ORIGINAL

Jeffrey C. Fereday (Idaho State Bar # 2719)
Michael C. Creamer (Idaho State Bar # 4030)
Deborah E. Nelson (Idaho State Bar #5711)
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

*Attorneys for Idaho Ground Water Appropriators, Inc.*

RECEIVED
MAR 2 3 2005
DEPARTMENT OF
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

| | |
|---|---|
| IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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 | **IDAHO GROUND WATER APPROPRIATORS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** |

Petitioners Surface Water Coalition ("Coalition") instituted this action with their January 14, 2005 letter to the Director of the Idaho Department of Water Resources ("Department") requesting water right administration in Water District 120 (the "Delivery Call"). Pursuant to Department Rule of Procedure 260 and Idaho Rule of Civil Procedure 56, Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, American Falls-Aberdeen Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, North Snake Ground Water District,

Bonneville-Jefferson Ground Water District, Southwest Irrigation District, and Madison Ground Water District ("Ground Water Users"), hereby moves the Director for an order granting summary judgment against the Coalition on their Delivery Call. The grounds for this motion are set forth in the following memorandum.

## THE FACTS, IN BRIEF

Most of the facts underlying this case are well known to the Director, and many are set forth in the Director's February 14, 2005 Order in this matter ("Director's Order") or in other portions of the record (including, for example, admissions in the Delivery Call itself and in the Coalition's submission of information in response to Director's Order). Additional facts are set forth in the attached Affidavits of Dr. Charles M. Brendecke ("Brendecke Affidavit") and Mr. John Church ("Church Affidavit"), together with their respective exhibits. But the central, animating facts in this case are simple, and are the focus of this Memorandum: The Delivery Call seeks to dry up several hundred thousand acres of irrigated crop land in southern Idaho. Shutting off wells to do this would not likely produce meaningful supplies of water to the Coalition or significantly increase their irrigated acreage, would be devastating to Idaho's economy, and would not make full economic use of our ground water resources. In Dr. Brendecke's words:

> Because curtailing ground water use on the ESPA will have delayed effects on AFR reach gains, and because Coalition members historically have experienced water shortages only rarely and as a result of intermittent drought events, curtailing ground water diversions on a large or small-scale is not likely to produce meaningful supplies of water during the short-term period when it might be diverted to beneficial use by surface water users. During the long-term, most of the predicted increases in reach gains will be expressed during periods when Coalition members already will have a full supply and/or when the reservoir system will not be able to hold the additional water and it consequently will be spilled and provide no benefit to Coalition members.

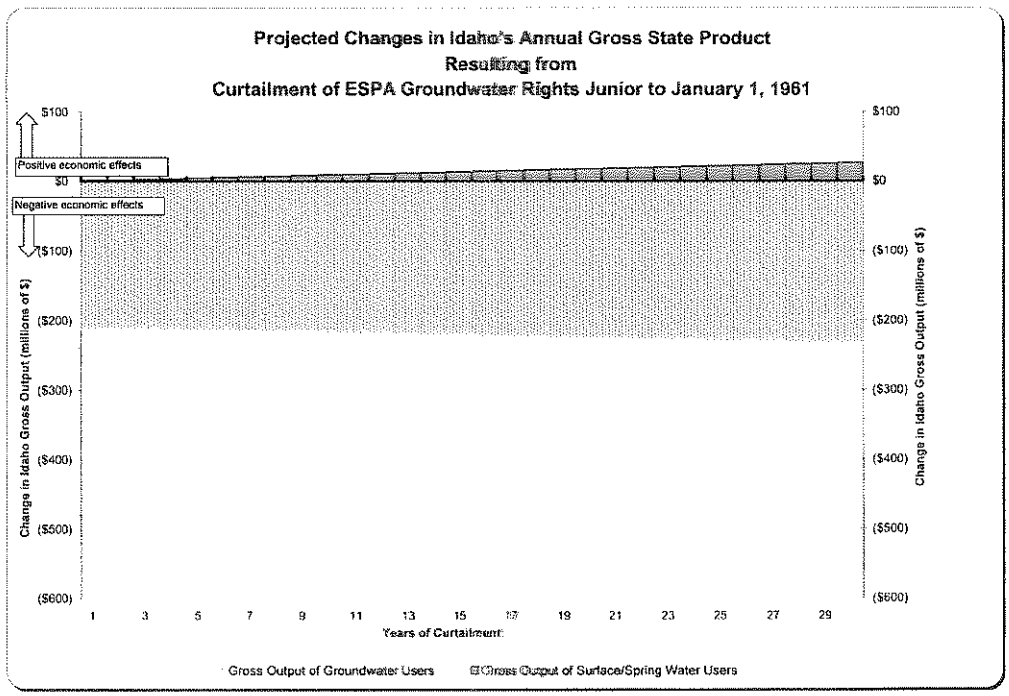
Brendecke Affidavit at 20. Dr. Brendecke also explains that "[a]ssuming the typical diversion by [Coalition] members of 6 acre-feet per acre, the dry-up of 1.1 million acres of ground water irrigated land would generate enough water to supply approximately 10,000 acres of [Coalition] land." *Id.* In other words, a curtailment along these lines would achieve an administration efficiency of 0.1%.

With regard to the proposal's effects on Idaho's economy and its relation to the "full economic development of underground water resources," Mr. Church says:

> [T]he concept of pursuing full economic development of Idaho's groundwater resources is wholly inconsistent with any alternative that regulates the use of the state's water resources to cause the state's economy to lose a present value of close to $8.1 billion in gross output during the next thirty years to gain a present value of $423.5 million. Whether or not, in the near-term, a curtailment of ESPA groundwater users would be considered a "futile call," it is quite evident that, in both the near and long terms, it would cause substantial, and likely permanent, harm to Idaho's economy that, in its first year alone, would overwhelm any possible long-term gain.

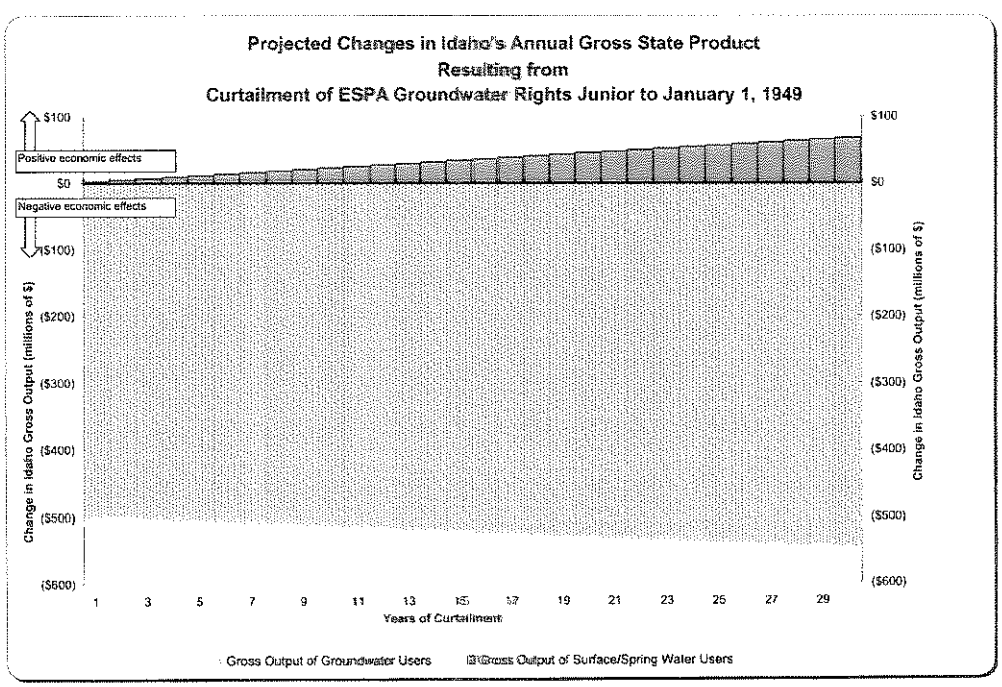
Church Affidavit at 14 (emphasis in original). The following are graphs, which Mr. Church adapted from a study recently commissioned by the Idaho Legislature, depicting the grossly disproportionate economic impacts—enormous, even devastating, costs to the state in return for paltry benefits—predicted to occur from the curtailment of ground water rights junior to 1961 and 1949, respectively.[1]

[1] These are discussed in detail in the Church Affidavit at 14, and shown in Appendix B to the affidavit.




Based on Snyder Report graphs, "Comparison of Gain and Loss Flows Over 10 Years," Snyder Report at 53.

John Church Affidavit Appendix B




Based on Snyder Report graphs, "Comparison of Gain and Loss Flows Over 10 Years," Snyder Report at 53.

John Church Affidavit Appendix B

## ARGUMENT

### I. Introduction.

This case presents Idaho with unprecedented questions of water law and economic policy that are vital to Idaho's future. And it is not a theoretical or distant future. The focal point for these critical questions is coming up immediately, this irrigation season, in a few weeks. A decision granting the Coalition's Delivery Call seeking to curtail all junior ground water rights in Water District 120 (or beyond)[2] would immediately idle, and probably permanently put out of business, several thousand farms in southern Idaho, beginning immediately. It would instantly change the face of our state and deal an almost unimaginable blow to Idaho's irrigated agriculture and the interconnected economies dependent upon it. In such a scenario, it is difficult to fathom when our state's agricultural economy would recover, if at all.

In policy terms, the answer to this question is self-evident: Idaho should not, with the stroke of a pen, shut off ground water deliveries to literally hundreds of thousands of acres of irrigated land, thus destroying the economic viability of thousands of farms depending on ground water and undercutting the economies of communities across the Snake Plain. Even more obvious, it would seem, is that Idaho should not implement such a shut-off because it would provide only a limited amount of water of questionable benefit this year—or next year, or the next—to surface water irrigators who have asserted pumping injures their water rights.

Fortunately, Idaho's water law does not look favorably on economic self-destruction. In resolving questions with such enormous economic and social dimensions, Idaho's foundational

[2] The Delivery Call seeks curtailment of all junior ground water diversions within Water District 120,which contains the Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and portions of the Magic Valley Ground Water District. However, the Director has made it clear that if there is to be a delivery call honored, he will decide where it will extend. See Director's Order at 19-20. Accordingly, as vast as Water District 120 is (over 370,000 acres of ground water irrigated land), Water District 130 and other areas of the ESPA also are implicated.

laws have never separated rights and responsibilities under the state's water law from considerations of economic development, maximum use of water resources in the public interest, or the necessities of other water users. This may come as a surprise to some, who may believe that priority and a claimed diversion amount are all that is needed to curtail any junior they believe is causing impacts to a common water source.[3]

This memorandum explains how Idaho's Constitution, statutes, case law, and administrative rules all require consideration of these important factors. Idaho water law is not a cold, one-sided assessment of priority and injury as the Coalition would have it. At least during monumental conflicts like these, Idaho water law has imposed a balancing. And as a matter of law and the undisputed facts of this case, that balancing must result in a denial of the Delivery Call.

## II. Summary judgment standards.

Under Idaho Rule of Civil Procedure 56(c), the Department must grant a summary judgment motion "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). As the party moving for summary judgment, IGWA, "initially carries the burden to establish there is no 'genuine issue of material fact' and that he or she is entitled to judgment as a matter of law.'" *Dunnick v. Elder,* 126 Idaho 308, 311, 882 P.2d 475, 478 (1994). However, because IGWA will not carry the burden of production or proof at trial, IGWA can meet this burden by establishing that the Coalition lacks evidence on an essential element of its case. *See id.* "Such an absence of

[3] We use "claimed diversion amount" here advisedly. Those Coalition members located in Water District 1 have not yet had their surface water rights reported or adjudicated in the Snake River Basin Adjudication. Therefore, no ESPA ground water user has yet had an opportunity to scrutinize these surface rights as to their quantity, place of use, or other elements which, once finally determined, would be relevant in any proceeding to determine the appropriateness or scope of any such Delivery Call.

evidence may be established either (1) by an affirmative showing with the moving party's own evidence or (2) by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Id.*

Once IGWA meets this burden, the burden shifts to the Coalition to respond with sufficient opposing evidence to show there is indeed a genuine issue for trial. *Id. See also Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001). If the Coalition does not come forward with admissible evidence sufficient to establish the existence of every single element of its case, then the Department must grant IGWA's summary judgment motion. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Sparks v. St. Luke's Regional Med. Center*, 115 Idaho 505, 509, 768 P.2d 768, 772 (1988) (citing *Celotex, v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986)).

## III. The Coalition's Delivery Call, if granted, would violate the longstanding requirement of Idaho law to maximize the use of Idaho's water resources.

Idaho law requires the Department to evaluate a Delivery Call by balancing the "first in time" principle of prior appropriation against other longstanding principles of the prior appropriation doctrine. These include the full economic development of ground water resources, preservation of the state's agricultural base, the necessities of other water users, and the public interest, all in light of hydrological realities. The Idaho Constitution is the original source of this balancing requirement. Over the years, the Idaho Legislature, the Idaho Supreme Court and the Department all have secured its place in Idaho law.

### A. Idaho's Constitution prescribes maximizing use of the resource by balancing public cost and benefit during times of water shortage.

The Delivery Call asks the Department to do nothing more than note that the Coalition's priorities are senior, take the Coalition's word that they are about to be injured by ground water

pumping, and then simply shut off the Ground Water Users' wells across a wide expanse. In lodging a Delivery Call premised on the fact of priority and the allegation of injury, the Coalition is asking the Department to ignore not only its own rules and Idaho statutes, but the Idaho Constitution itself.

Never in the many years of the surface water users' saber-rattling about the alleged effects of irrigation diversions from the Eastern Snake Plain Aquifer ("ESPA") have they ever attempted to explain how their desire for a "toggle-switch" shut-down of hundreds of thousands of acres of irrigated agriculture to deliver a paltry amount of water to the river squares with the Idaho Constitution. What the Constitution provides is a far cry from the concept of "priority, period," that the Coalition asks the Department to employ.

At least where irrigation entities are involved, in times of shortage the Idaho Constitution contemplates that the State will balance interests, give due regard to the "necessities" of junior-priority water users, and place "reasonable limitations" on senior-priority users, all to promote the greater economic interests of the State.

Our founding document states:

> The use of all waters now appropriated, or that may hereafter be appropriated for . . . distribution . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

Idaho Const. Art. XV, sec. 1 (emphasis added). The Coalition members are using the public's water, and the public, through the Legislature and the Department, has abiding interests, including economic interests, that must be considered.

To be sure, the Constitution sets up the familiar "first in time is first in right" principle. Idaho Const. Art. XV, sec. 3. However, as among those receiving the public's water for agricultural purposes under a distribution program—such as that occurring on the lands served

by every Coalition member—the Constitution qualifies this principle with the obligation that prior appropriators accept "reasonable limitations" in times of shortage.

> [P]riority in time shall give superiority of right to the use of such water . . .; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Idaho Const. Art. XV, sec. 5 (emphasis added). The Constitution also mandates that those using water in irrigation projects must comply "with such equitable terms and conditions as to the quantity used and time of use, as may be prescribed by law." Idaho Const. Art. XV, sec. 4 (emphasis added). The Idaho Constitution also establishes the Idaho Water Resource Board and empowers it to "formulate and implement a state water plan for optimum development of water resources in the public interest." Idaho Const. Art. XV, sec. 7 (emphasis added).[4] In contrast to all these directives, what the Coalition seeks with its Delivery Call is simple: impose no limitations on them at all, give no consideration to the necessities of anyone but them, and dismantle a large percentage of the water development in the state. It will not do for any water user to say that the rules of reasonable use, optimum development and reasonable limitations on the use of the public water resource apply to everyone's use but theirs.

While priority of right undeniably is a central factor in the allocation and administration of Idaho's water, it is not the only factor. Another requirement of equal importance—a

---

[4] It is worth noting that nearby western states' constitutions do not contain these unique and detailed provisions and instead are silent on the matter or simply emphasize priority as the operative principle in water allocation. *See, e.g.,* Colorado Const. Art. XVI, Sec. 6; Wyoming Const. 97-8-003; Montana Const. Art. IX; and Utah Const., Art. XVII, sec. 1. The Idaho Constitution—with its provisions expressly authorizing the Legislature to subject one's priority to "reasonable limitations" so as to extend "due regard to . . . the necessities" of junior priority rights, with its language enunciating the need to provide for "optimum development" of our water resources, and with its declaration that water used under a distribution scheme is a "public use"—stands in stark contrast to the charters of these other western prior appropriation doctrine states. These provisions are in our Constitution for a reason, and this case presents the exact situation where they, and the statutes and rules enacted to implement them, should not be ignored.

requirement whose relevance is squarely apparent in this case—is the constitutional stipulation that "reasonable limitations" shall be placed on prior rights to accommodate the "necessities" of junior appropriators. Idaho Const. Art. XV, sec. 5.

While the goal of avoiding injury to senior rights is important, it is not spelled out in the Constitution; instead there is the concept of "optimum use," and the constitutional requirement that water rights used "for agricultural purposes" can be subjected to those "equitable terms and conditions as to the quantity used and time of use" that the Legislature finds appropriate from time to time.

In the simple case, on a stream or river where shutting a junior's headgate will deliver water to the senior immediately and in amounts equal (or nearly so) to the shut-off, the priority system typically can proceed without significant constraint from any constitutional principle other than priority. The action is neutral in terms of economic impact: either the junior gets a certain amount of water for beneficial use or the senior gets the same amount. In such a situation, it is proper that the senior should have it, and maximum use of the resource is preserved. This is one reason the state has supported the construction of large surface storage reservoirs—so that there is a supplemental supply to ease the impact of the "instant on/off" system of priorities that works on surface streams.

However, it is a far different story with regard to the vast ESPA and its complex relationship to the river. Here, a call seeking to improve river flows by enough to irrigate 1000 acres may require drying up 100,000 acres of land served by ground water. Here, little of the water use curtailed will be delivered to the seniors in the year the call is made. The balance will not be fully "delivered" for decades, during which the climatic conditions and water supply situation will have changed several times. Here the effect of curtailment very likely will put

many, or most, ground water users out of business, perhaps permanently. Such a proposal surely triggers the balancing factors set forth in our Constitution.

**B. The Idaho Legislature has codified these Constitutional principles.**

Idaho's Legislature has implemented the principles the constitution set forth. "It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state." Idaho Code § 42-234. The Legislature has been particularly explicit on this subject with regard to ground water rights, such as those the Coalition seeks to curtail. In Idaho's Ground Water Act, the Legislature confirmed that a weighing of the constitutionally-recognized factors in times of shortage, not rote priority, is the law in Idaho. The stated policy of this statute is that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources." Idaho Code § 42-226 (emphasis added.) The Idaho Supreme Court has noted that this statute is "consistent with the Idaho Constitution" because it seeks to promote "optimum development of water resources." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 (1973).

Brought down to the terms of this case, the statute means, as its constitutional heritage means, that the Coalition's priorities must be held in check so that they may be "reasonably" exercised, and so that the Department may assure that they do not block "full" economic development of the ground water resource. It would hardly serve either the Constitution or the Ground Water Act for the Department simply to eliminate the economic development that has occurred with ESPA ground water.

The Ground Water Act is not the only place that the Legislature has implemented Idaho's constitutional goals of optimum use and reasonable limitations on priority. The lawmakers have

enacted several other provisions mandating that considerations other than priority and injury be considered when it comes to the use of the public waters of the state.

For example, in evaluating water right transfers, the Legislature requires the Department to determine that the change will be "consistent with the conservation of water resources within the state of Idaho and is in the local public interest," and that "the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates." Idaho Code § 42-222(1).

This same statute expressly prohibits the director from approving "a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area." *Id.* (emphasis added). Where large acreages are implicated by the proposed transfer (i.e., more than 5,000), the Legislature has declared that both that body and the Department have a role in approving it, and that "[e]ach shall give due consideration to the local economic and ecological impact of the project or development so proposed." *Id.* (Emphasis added.)

The Legislature also has mandated specific adjudicatory procedures to apply when surface water users, like the Coalition here, make injury claims against ground water users. Idaho's Ground Water Act provides that if the holder of a surface water right asserts that his or her right "is being adversely affected by one or more user[s] of ground water rights of later priority" the surface water right holder may initiate an action at the Department seeking curtailment or other administration of the ground water rights. Idaho Code § 42-237b. Once the Director has received from the surface user written grounds the Director deems "sufficient" for initiating a proceeding to consider such administration, the statute requires the Director to set the matter "for hearing before a local ground water board." *Id.* The board may recognize the senior

surface water users call and curtail the junior ground water right only "if the use of the junior rights affects, contrary to the declared policy of this act, the use of the senior right." Idaho Code § 42-237c. The "declared policy" of the act is "full economic development of underground water resources," a goal that shall not be blocked by "reasonable exercise" of a prior right.

The State's policy, when it comes to using the public water resource, is not simply to tally relative priorities in a surface water-ground water dispute, accept the senior's allegation of injury, and then switch off ground water pumps.[5] The statute contemplates a process where local considerations, the hydrological and economic effects of curtailment, the legislative mandate of full economic development of ground water, and the principles enunciated by the Framers, all are taken fully into account.

IGWA contends that the Coalition's Delivery Call must be referred to a local ground water board, that the Coalition's statements in support of the call are insufficient under section 42-237b, and that this is an independent ground for summarily rejecting the Delivery Call.

### C. Idaho's Supreme Court has ruled repeatedly that priority of right is not the only element to be considered during times of shortage and that maximum use and related concepts are critical elements.

In harmony with these constitutional and statutory mandates, Idaho's Supreme Court has confirmed that "maximum use" of the public's water, and its "optimum use," are overarching goals of state regulation. "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). *See also Reynolds Irr.Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880 (1950).

[5] Chapter 6, Idaho Code, is designed to allow administration on surface streams, where instant curtailment leading to instant relief is possible. Idaho Code § 42-237b sets up a different, more appropriate procedure where ground water rights are concerned.

> In this arid country, where the largest duty and the greatest use must be had from every inch of water, in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres, at a loss of enough water to surface irrigate ten times as much by proper application.

*Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907). One might also say that it will not do to demand that the ESPA be kept at an artificially high level—higher than when the Coalition's members obtained their surface water rights—so that the Coalition members may have their water rights improved beyond what they were when first appropriated.

In *State v. Hagerman Water Right Owners,* 130 Idaho 727, 735, (1997), quoting *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904 (1990),[6] the Idaho Court stated:

> The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it. Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of the limited resource. The policy of the law of the [s]tate is to secure the maximum use and benefit, and the least wasteful use, of its water resources.

Using language that was later to be echoed in Idaho's own constitution, the U.S. Supreme Court in *Basey v. Gallagher*, 87 U.S. 670, 683 (1874), ruled that the "right of the first appropriator" is to be "exercised within reasonable limits," and with reference to "the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

The Director's initial ruling in this very case recognizes these principles. Director's Order at 27-29. Here, the proposal is to curtail many times more acre-feet of ground water than could be delivered to or used by the Coalition's members, causing direct economic impact to the ground water-dependent economies while providing only transitory, eventual, and partial benefit

---

[6] *Kunz* cites nine additional Idaho cases for this proposition. *Kunz v. Utah Power & Light Co.*, 117 Idaho at 904.

to the surface water users. The Coalition has not attempted to show how its Delivery Call can be sustained in light of this fact, or in light of the principles of law mandated by our court.

### D. The Department's Conjunctive Management Rules require any Delivery Call to be considered in light of these same principles.

The Department's Conjunctive Management Rules embody the same principles—maximum use, balancing of priority against other factors—as articulated by the Framers, the Legislature, and the Idaho Supreme Court. The Department has expressly declared that:

> 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.

IDAPA 37.03.11.020.03. Similar standards are set forth in other portions of the rules. *Id.* at 37.03.11.020.04 (futile calls will not be honored, or may be honored with conditions); 37.03.11.020.05 ("reasonableness of diversion and use of water" is a factor to be considered). These principles are not idle comments in the Rules; it is not by accident that the Department specifically refers to these same provisions of the Idaho Constitution. They are central to the consideration of the Coalition's Delivery Call.

The Rules also authorize the Director to consider, in evaluating whether "material injury" has occurred, the extent to which a senior's water requirements could be met by employing "reasonable diversion and conveyance efficiency and conservation practices" or "alternate reasonable means of diversion," including wells. IDAPA 37.03.11.042.01g and h. Again, the burden is on the Coalition to answer these concerns, and to come forward with a proof that they meet these standards.

These principles should require heightened scrutiny of any request, such as the Coalition's request here, to shut off over a million acre-feet of ground water pumping to deliver perhaps 5% of that amount to the seniors this irrigation season.[7]

The Department's Rules also recite a principle basic to authorities such as the United States Supreme Court's opinion, upholding the position of the predecessor to Coalition member Twin Falls Canal Company in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912): "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 37.03.01.020.04. The Coalition's Delivery Call fails to address this factor. If granted, the Delivery Call also would violate it.

In sum, the wholesale shut-down of thousands of wells sought by the Coalition does not comport with the economic development, maximum use, and balancing principles contemplated by Idaho law.

The Coalition has made no attempt whatsoever to evaluate these hydrologic or economic factors, or to provide the Director with any facts that could support the radical and economically destructive ground water curtailment its members seek in this case.

## IV. The Coalition has failed to meet its obligation to provide evidence of beneficial use and material injury.

As stated above, summary judgment is appropriate if the Coalition has failed to present evidence on at least one essential element of its case. *Dunnick v. Elder,* 126 Idaho 308, 311, 882 P.2d 475, 478 (1994). A review of the Coalition's evidence demonstrates that the Coalition has failed to present sufficient evidence on both beneficial use and material injury to prove those elements of its case.

---

[7] See Brendecke Affidavit, attached.

The Department's Conjunctive Management Rules require that, before a delivery call will be honored, the Director first must "determin[e] 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." IDAPA 37.03.11.020.05. To allow the Director to make this determination here, the Rules require the Coalition to provide the following information, among other required information, to support a call for water delivery: (1) "... the water diversion and delivery system being used by petitioner and the beneficial use being made of the water" and (2) "[a]ll information, measurements, data or study results available to the petitioner to support the claim of material injury." IDAPA 37.03.11.030.01 (a, c).

In addition to the Rules' requirements, the Director's February 14 Order in this case specifically directed the Coalition to supply certain information. Director's Order at 31. Although the Coalition was granted an extension to obtain and submit some of this information (the names, addresses and description of the water rights of the ground water users who are alleged to be causing material injury), the deadline has passed for the Coalition to make their record on the required items quoted above—namely, (1) documentation of their delivery system and beneficial use and (2) evidence showing material injury. March 7, 2005 letter from Travis Thompson to Director Dreher; *Order Denying Motion to Authorize Discovery; and Granting Additional Time to Serve Respondents* (March 9, 2005).

The limited information the Coalition has provided fails to satisfy both the minimum requirements of IDAPA 37.03.11.030.01 and the Director's Order. *Petitioners' Joint Response to Director's February 14, 2005 Request for Information* (March 15, 2005), as amended by March 18, 2005 letter from Travis Thompson to Director Dreher. First, the Coalition has not

provided sufficient information about its beneficial use of water. As explained in more detail below, with regard to the Coalition's lack of responsiveness to the Director's Order, the Coalition has not provided sufficient evidence showing the actual amounts of water beneficially used by each of its members' landowners and shareholders. Without this, how can the Director make a determination about material injury?

Second, and even more significantly, the Coalition has provided no information—beyond pointing out that river flows, and perhaps their diversions, have decreased in recent years (during a once-in-500-years drought)—to demonstrate how its members' landowners and shareholders are suffering material injury from ground water pumping. They have provided no evidence showing the extent of any shortage, how they have been affected by any such shortage, or what adjustments they have made to accommodate it. In this case, the Coalition has made sweeping allegations and called for thousands of acres of irrigated crop land to be dried up immediately, yet they have not made any effort to prove this central element of their case—material injury.

In addition, the Coalition provided either no information, or incomplete information, in response to the following specific requests in the Director's Order: (1) total diversions of ground water in acre feet per month by the Coalition members' landowners or shareholders, as to A&B Irrigation District, Minidoka Irrigation District, Burley Irrigation District, and Milner Irrigation District; (2) number of the Coalition members' landowners or shareholders holding individual ground water rights; (3) average monthly headgate deliveries in inches per acre to Coalition members' landowners or shareholders, as to A&B Irrigation District, Minidoka Irrigation District and Burley Irrigation District; (4) the total amount of reservoir storage in acre feet carried over to the subsequent year; (5) the quantity of water in acre feet the Coalition members' landowners or shareholders leased to other users through the water supply bank and the Water District 01

Rental Pool; (6) the quantity of water in acre feet the Coalition members' landowners or shareholders made available to other users through means other than the water supply bank and the Water District 01 Rental Pool; (7) the total number of acres irrigated by flood irrigation and the total number of acres irrigated by sprinkler irrigation, as to A&B Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company; and (8) the specific types of crops planted on irrigated acres served by the Coalition members' landowners or shareholders (without some indication of the number of acres on which each crop is grown, for each year for the last fifteen years, the meager information as provided is meaningless to support the Coalition's Delivery Call).[8]

The Coalition seems to be waiting for someone else to make their case, but that burden falls squarely on them. The Coalition's failure to provide evidence proving essential elements of their case warrants dismissal on summary judgment. The Ground Water Users and the State of Idaho should not be forced into the expense of full litigation when the Coalition has not brought forth evidence to support their claim.

## V. The Surface Water Coalition's Delivery Call should not be granted because it would be futile.

The Department's Conjunctive Management Rules specify that a delivery call will be deemed "futile" and therefore denied if the call, "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." IDAPA 37.03.11.010.08. The Department already has refused, in response to delivery calls or proposed

[8] The Coalition itself agreed to provide any "further information concerning 'material injury'," beyond the wholly unsupported allegations in their Delivery Call. However, when requested (by the Director's Order) the Coalition again failed to provide the necessary information.

administration in water districts, to curtail juniors where it would be futile, including those situations where water could be delivered but to do so would be unreasonably wasteful.

In a 2004 case involving competing surface water rights on the Big Lost River, the Director concluded that a proposed delivery was futile and would not be attempted where channel and ditch losses between the junior diversions and the downstream seniors ranged from 75 percent to 90.2 percent. *In the Matter of Determining a Futile Call for the Delivery of Surface Water in Water District No. 34, Big Lost River* (July 30, 2004) (construing IDAPA 37.03.12.020.04, which prohibits "unreasonable waste").

In the present case, the Delivery Call asks the Department to curtail ground water use across a broad—and, as the Director's Order notes, as yet unspecified—expanse of the ESPA. The numbers implied in the Delivery Call certainly could involve drying up as many as 1.1 million acres of ground water irrigated land to "deliver" enough water to irrigate perhaps 10,000 acres of land. The Delivery Call requests an unreasonable waste of water and the antithesis of full economic development.

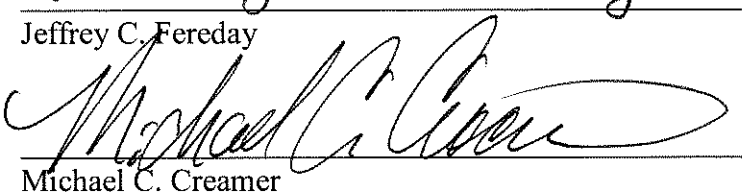
The Department's Rules indicate that, based on a finding that a call would be futile, the Department can either deny a curtailment or mitigation obligation outright or—provided the facts support it in light of the "full economic development" standard—require juniors to implement "mitigation" or "staged or phased curtailment." IDAPA 37.03.11.020.04 (emphasis added). The Director certainly has discretion in this regard. However, IGWA submits that, given the extreme imbalances involved and the certain harm to Idaho's economy that would result, it would be an abuse of discretion to require curtailment of any kind in this case.

Based on any one of the arguments raised in this memorandum and the facts set forth in the attached affidavits of H. J. Church and Charles M. Brendecke, the Coalition's Delivery Call should be dismissed on summary judgment.

RESPECTFULLY SUBMITTED this 23d day of March 2005.

GIVENS PURSLEY LLP

Jeffrey C. Fereday



Michael C. Creamer

*Attorneys for Idaho Ground Water Appropriators, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

| | |
|---|---|
| Mr. Karl J. Dreher<br>Director<br>Idaho Department of Water Resources<br>322 East Front Street<br>P.O. Box 83720<br>Boise, ID 83720-0098 | _____ U.S. Mail<br>_____ Facsimile<br>_____ Overnight Mail<br>✓ Hand Delivery |
| C. Tom Arkoosh, Esq.<br>Arkoosh Law Offices, Chtd.<br>301 Main Street<br>P.O Box 32<br>Gooding, ID 83330 | ✓ U.S. Mail<br>_____ Facsimile<br>_____ Overnight Mail<br>_____ Hand Delivery |
| W. Kent Fletcher, Esq.<br>Fletcher Law Office<br>P.O. Box 248<br>Burley, ID 83318-0248 | ✓ U.S. Mail<br>_____ Facsimile<br>_____ Overnight Mail<br>_____ Hand Delivery |
| Roger D. Ling, Esq.<br>Ling, Robinson & Walker<br>615 H St.<br>P.O. Box 396<br>Rupert, ID 83350-0396 | ✓ U.S. Mail<br>_____ Facsimile<br>_____ Overnight Mail<br>_____ Hand Delivery |
| John A. Rosholt, Esq.<br>John K. Simpson, Esq.<br>Travis L. Thompson, Esq.<br>Barker, Rosholt & Simpson<br>113 Main Avenue West, Ste. 303<br>Twin Falls, ID 83301-6167 | ✓ U.S. Mail<br>_____ Facsimile<br>_____ Overnight Mail<br>_____ Hand Delivery |
| James C. Tucker, Esq.<br>Idaho Power Company<br>1221 West Idaho P.O. Box 70<br>Boise, ID 83707 | ✓ U.S. Mail<br>_____ Facsimile<br>_____ Overnight Mail<br>_____ Hand Delivery |

| | |
|---|---|
| James S. Lochhead<br>Adam T. Devoe<br>Brownstein, Hyatt & Farber P.C.<br>410 17th St., 22nd Floor<br>Denver, CO 80202 | ✓ U.S. Mail<br>____ Facsimile<br>____ Overnight Mail<br>____ Hand Delivery |
| Kathleen Marion Carr, Esq.<br>Office of the Field Solicitor<br>U.S. Department of the Interior<br>550 West Fort Street, MSC 020<br>Boise, ID 83724-0020 | ✓ U.S. Mail<br>____ Facsimile<br>____ Overnight Mail<br>____ Hand Delivery |
| E. Gail McGarry, P.E.<br>Program Manager<br>Water Rights & Acquisitions<br>PN-3100<br>U.S. Bureau of Reclamation<br>Pacific Northwest Region<br>1150 N. Curtis Road<br>Boise, ID 83706-1234 | ✓ U.S. Mail<br>____ Facsimile<br>____ Overnight Mail<br>____ Hand Delivery |
| Scott L. Campbell, Esq.<br>Moffatt Thomas Barrett Rock & Fields, Chtd.<br>101 S. Capitol Blvd., 10th Floor<br>P.O. Box 829<br>Boise, ID 83701-0829 | ✓ U.S. Mail<br>____ Facsimile<br>____ Overnight Mail<br>____ Hand Delivery |
| Idaho Department of Water Resources<br>Eastern Regional Office<br>900 North Skyline Dr.<br>Idaho Falls, ID 83402-6105 | ✓ U.S. Mail<br>____ Facsimile<br>____ Overnight Mail<br>____ Hand Delivery |
| Idaho Department of Water Resources<br>Southern Regional Office<br>1341 Fillmore St., Ste. 200<br>Twin Falls, ID 83301-3033 | ✓ U.S. Mail<br>____ Facsimile<br>____ Overnight Mail<br>____ Hand Delivery |

Michael C. Creamer