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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF 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 HEARING ON DIRECTOR'S MAY 2, 2005 AMENDED ORDER	**SURFACE WATER COALITION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING LEGAL POINTS AND AUTHORITIES**

COMES NOW, 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 (hereinafter collectively referred to as the "Surface Water Coalition" or "Coalition") and hereby files this *Motion for Partial Summary Judgment and Supporting Legal Points and Authorities* in the above captioned matter pursuant to the Director's scheduling orders, IDAPA 37.01.01.260, and I.R.C.P. 56(c). The bases for this *Motion* are set forth as follows:

FACTUAL BACKGROUND

On January 14, 2005, the Surface Water Coalition requested administration of junior priority ground water rights in Water District No. 120. Thereafter, the Director of the Idaho Department of Water Resources ("Department") issued various orders, including a May 2, 2005 *Amended Order* (hereinafter "May 2005 Order"), wherein the Director made several findings of fact and conclusions of law relative to the Coalition's request for water right administration in 2005. Pursuant to I.C. § 42-1701A and IDAPA 37.01.01.740, the Coalition requested a hearing on the Director's May 2005 Order on May 17, 2005.

The May 2005 Order recognizes the authority granted by the Snake River Basin Adjudication (SRBA) District Court to perform interim administration of water rights in administrative basins 29, 35, 36, 37, 41, and 43 while the SRBA is still proceeding. *See May Order* at 8. Pursuant to that authority granted by the SRBA Court, the Director created Water District Nos. 120 and 130 "to provide for the administration of water rights, pursuant to chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights." *Id.* The Director's May 2005 Order describes the Coalition members' water rights, including storage rights held at various reservoirs operated by the United States Bureau of Reclamation

("Reclamation"). *See May 2005 Order* at 12-16. Despite recognizing these prior decreed and licensed water rights, the Director proceeded to apply an unprecedented procedure for water right administration by "combining" the Coalition members' natural flow and storage rights and reducing those rights to a "minimum full supply" for purposes of determining "material injury" that would be suffered in 2005:

> 115. To predict the shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005, the amounts of water diverted in 1995 are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders. If crop evapotranspiration is greater in 2005 than in 1995, the amounts of water diverted in 1995 may be less than what is needed for a full supply in 2005. If crop evapotranspiration is less in 2005 than in 1995, the amounts of water diverted in 1995 may be more than what is needed for a full supply in 2005.

May 2005 Order at 25 (emphasis added).

In furtherance of the "minimum full supply" concept, the Director added a "land fallowing", "total crop loss", and "shortage" criteria for determining "material injury" to the Coalition members' water rights in 2005:

> 109. None of the members of the Surface Water Coalition have identified lands that are entitled to receive surface water but have not been irrigated or where crops could not be harvested because of shortages in the surface water supplies available to members of the Coalition under the members' various rights. The Coalition simply alleges that material injury is occurring because in recent years members of the Coalition have been unable to divert natural flow at the diversion rates authorized under the members' rights for as long a period of time as the members otherwise could, and that members have been unable to accrue as much storage in USBR reservoirs as the members otherwise could, but for depletions caused by the diversions of ground water under junior priority water rights.

May 2005 Order at 24-25 (emphasis added).

> 116. The shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005 are estimated by subtracting the reasonably likely total supplies of natural flow and storage set forth in Finding 106 from the minimum amounts needed for full deliveries based on 1995 diversions . . .

> 117. The reasonably likely shortages set forth in Finding 116 total 27,700 acre-feet and assume that the members of the Surface Water Coalition that are expected to have shortages (A&B Irrigation District, American Falls Reservoir District #2, and Twin Falls Canal Company) use all their carryover storage from 2004. The predicted surpluses (Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, and North Side Canal Company) are the amounts of estimated carryover storage at the end of the 2005 irrigation season.

May 2005 Order at 25-26 (emphasis added).

Finally, in the Director's conclusions of law, he further defined what constitutes "material injury" for purposes of the Coalition's request for water right administration in the following paragraphs:

> 45. Based upon the Idaho Constitution, Idaho Code, the Conjunctive Management Rules, and decisions by Idaho courts, in conjunction with the reasoning established by the Colorado Supreme Court in *Fellhauer*, it is clear that injury to senior priority surface water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use. Because the amount of water necessary for beneficial use can be less than decree or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. Thus, senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.
>
> * * *
>
> 47. Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42. . . .
>
> 48. Whether the senior priority water rights held by or for the benefit of members of the Surface Water Coalition are injured depends in large part on the total supply of water needed for the beneficial uses authorized under the water rights held by members of the Surface Water Coalition and available from both natural flow and reservoir storage combined. To administer junior priority ground water rights while treating the natural flow rights and storage rights of the members of the Surface Water Coalition separately would either: (1) lead to the

> curtailment of junior priority ground water rights, absent mitigation, when there is insufficient natural flow for the senior water rights held by the members of the Surface Water Coalition even though the reservoir space allocated to members of the Surface Water Coalition is full; or (2) lead to the curtailment of junior priority ground water rights, absent mitigation, anytime when the reservoir space allocated to the members of the Surface Water Coalition is not full even though the natural flow water rights held by members of the Surface Water Coalition were completely satisfied. . . .

Id. at 42-43 (emphasis added).

As a result of the Director's analysis, the predicted "material injury" to the Coalition members for 2005 was 133,400 acre-feet. *See May 2005 Order* at 44. This "injury" determination was subsequently amended by the Director through "supplemental orders amending replacement water requirements" issued on July 22, 2005 and December 27, 2005.[1]

ISSUES

1. Whether the Director's concept of "material injury" set forth in the May 2005 Order violates Idaho's water distribution statutes and results in an impermissible "re-determination" of previously decreed and licensed water rights?

2. Whether the Director's concept of "material injury" set forth in the May 2005 Order violates the SRBA District Court's order authorizing interim administration and the recent order on the motion to enforce that prior order in subcase no. 92-00021?

3. Whether the Director's concept of "material injury" set forth in the May 2005 Order is contrary to the definition of "material injury" and violates the conjunctive management rules?

STANDARD OF REVIEW

Pursuant to I.R.C.P. 56(c), summary judgment must be entered when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no

[1] The Director's July 22nd and December 27th orders substantively modified the May 2005 Order and are subject to petitions requesting hearings that were timely filed by the Coalition.

genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Steele v. Spokesman-Review*, 138 Idaho 249, 251 (2002). "Judgment shall be granted to the moving party if the nonmoving party fails to make a showing sufficient to establish an essential element to the party's case." *Foster v. Traul*, 141 Idaho 890, 120 P.3d 278, 280 (2005). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Id.*

However, when an action will be tried before the court (or in this case a hearing officer) without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from the uncontroverted evidence. *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785, 787 (2005). If there are no material facts in dispute, a court may enter a judgment in favor of the party entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 312 (Ct. App. 1982). For purposes of this motion, the Coalition has established the relevant facts above, i.e. the Director made certain findings in the May 2005 Order based upon various procedures and criteria for determining "material injury." As explained below, these "procedures and criteria" violate Idaho law and are even contrary to the Department's own conjunctive management rules, IDAPA 37.03.11 *et seq.* Accordingly, the Coalition is entitled to an order declaring the Director's procedures and criteria for determining "material injury" as set forth in the May 2005 Order, invalid as a matter of law.

ARGUMENT

I. Idaho Law Requires the Water District 120 and 130 Watermasters to Administer Rights on All Connected Surface and Ground Water Rights By Priority.

Idaho law requires the Water District 120 and 130 Watermasters to administer all connected surface and ground water resources according to priority. The Idaho Constitution and statutes governing water distribution plainly provide:

"Priority of appropriations shall give the better right as between those using the water;"

IDAHO CONST. art. XV, § 3.

"As between appropriators, the first in time is first in right."

Idaho Code § 42-106.

Although Idaho's water code has undergone many revisions and amendments since 1881, the bedrock principle of water right administration mandated by the constitution, "first in time, first in right", has not wavered. The Idaho Supreme Court has consistently reaffirmed this guiding principle in the State's water law. *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931)("a valid appropriation first made under either method will have priority over a subsequent valid appropriation"); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9 (1944)("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water."); *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977)("it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right."); *Jenkins*, 103 Idaho at 388 (1982)("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.").

In its most basic terms the prior appropriation doctrine requires senior water rights to be satisfied prior to junior water rights. The legislature expressly required the same of the Water District 120 and 130 Watermasters, in adopting the following law of water distribution:

> ***It shall be the duty of said watermaster to distribute the waters*** of the public stream, streams or water supply, . . . ***according to the prior rights of each respectively***, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do ***in order to supply the prior rights of others*** in such stream or water supply . . .

Idaho Code § 42-607 (emphasis added).

The above statute governs a watermaster's duties in "clear and unambiguous terms." *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). The Idaho Supreme Court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994). In times of shortage, watermasters must distribute water according to the elements and priority dates of an "adjudication or decree." *State v. Nelson*, 131 Idaho 12, 16 (1998); *see also Crow v. Carlson*, 107 Idaho 461, 465 (1984)("The [ ] decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use . . ."). A watermaster's duty to administer water rights according to the plain terms of a decree has been in place for over a century:

> We think the position is correct, and we are also satisfied that in a case like this where the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.

Stethem v. Skinner, 11 Idaho 374, 379 (1905).

The priority system provides certainty to water right holders and "protects and implements established rights." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972). Moreover, senior water right holders are "entitled to presume that the watermaster is delivering

water to them in compliance with the governing decree." *Id.* As demonstrated by the relevant constitutional and statutory provisions outlined above, the watermasters have a clear legal duty to curtail junior water rights to satisfy senior rights in times of shortage, i.e. when the water supply does not fill all the rights. The Director carried this mandate forward into the orders that formed Water Districts 120 and 130:

> 10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
>
> * * *
>
> d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.

Final Orders Creating Water District Nos. 120 and 130 at 5 (February 19, 2002).

Any "guidelines, direction, and supervision" or "injury determinations" provided by the Director for the purposes of instructing watermasters in carrying out their "clear legal duty" to administer water rights must honor senior rights in priority and prevent interference by junior water rights. Since the Director's May 2005 Order contains "guidelines, direction, supervision" as well as "injury determinations" that do not honor the constitution's and statute's directives to administer in accordance with the prior appropriation doctrine, those findings and procedures are invalid as a matter of law.

II. The Director Has No Authority to "Re-Adjudicate" Previously Decreed or Licensed Water Rights Through Conjunctive Administration.

The Director and the Water District 120 and 130 Watermasters must administer water rights according to the decrees and licenses, and they have no authority to "second-guess" those prior judicial and administrative findings and "re-adjudicate" a water right's decreed or licensed elements. Stated another way, the Director has no authority to modify the elements of a water

right through administration. In *State v. Nelson*, 131 Idaho 12, 16 (1998), the Court plainly held that a "watermaster is to distribute water according to the adjudication or decree." *See also, Stethem*, 11 Idaho at 379; *Crow*, 107 Idaho at 465.

Administration of water rights according to the prior decrees and licenses requires the Department to honor ***all elements*** of those water rights. Contrary to the Idaho Supreme Court's mandate and the SRBA Court's *Order* authorizing interim administration, the Director's May 2005 Order effectively precludes the watermasters from performing their lawful duties to administer water rights according to "the adjudication or decree."

Idaho's water distribution statute, I.C. § 42-607, requires the Water District 120 and 130 Watermasters to review the list of decrees and licenses and deliver water to those rights on the basis of priority. Neither the watermaster nor the Director has any authority to "re-condition" or conduct new "fact-finding" hearings for purposes of reducing a water right through administration. Indeed, when the Department issues a license, it does so only after the water user has supplied evidence of "beneficial use." I.C. § 42-217. By law, the license cannot reflect "an amount in excess of the amount that has been beneficially applied." I.C. § 42-219. Thereafter the license is "binding upon" the Department for purposes of administration. I.C. § 42-220. Further, when a court, such as the SRBA, decrees a water right, the Department is similarly bound to accept the court's findings as to the quantity element that a right holder is entitled to divert and beneficially use. I.C. §§ 42-1401A(5); 1420(1). Inherent in the decreed quantity amounts is the fact that the water right holder has a need for and has actually used that amount of water. The Idaho Supreme Court has recognized the same:

> Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to

> the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.

Head v. Merrick, 69 Idaho 106, 108 (1949).

The Director's May 2005 Order unlawfully ignores the "conclusive" nature of the Coalition members' previously decreed and licensed water rights. Instead, the Director arbitrarily determined that their "total" diversions of natural flow and storage water in 1995 represented their "minimum full supply" entitled to protection in administration against junior priority ground water rights. *See May 2005 Order* at 25, 42-43. In other words, the decreed and licensed quantity amounts of the Coalition's water rights were completely disregarded under the Director's "material injury" analysis.

The Director attempted to justify the "minimum full supply" benchmark for purposes of water right administration by explaining that the Coalition members' water rights are not "entitlements", but only represent "authorized maximum diversion rates" that can be reduced under a "beneficial use" analysis:

> 45. Based upon the Idaho Constitution, Idaho Code, the Conjunctive Management Rules, and decisions by Idaho courts, in conjunction with the reasoning established by the Colorado Supreme Court in *Fellhauer*, it is clear that injury to senior priority surface water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use. <u>Because the amount of water necessary for beneficial use can be less than decree or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury</u>.

May 2005 Order at 42 (emphasis added)..

Contrary to the Director's conclusion of law set forth above, Idaho courts have repeatedly rejected administrative attempts to "limit" or "reduce" decreed and licensed water rights after

those rights have vested. For example, the Idaho Supreme Court held the following in *State v. Hagerman Water Right Owners, Inc.*:

> Following that decision and during the course of the proceedings before the special master, the IDWR stated that the Director's recommendation was based on current non-application to "reasonable beneficial use." ***The IDWR stated that the concept of beneficial use allows for constant re-evaluation of whether the water is being used beneficially.***
>
> ...
>
> ***The special master determined*** that absent a claim of forfeiture, abandonment, adverse possession, or estoppel, ***a reduction in beneficial use after a water right vests is not a basis upon which a water right may be reduced.***
>
> ...
>
> Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, ***the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights***.

130 Idaho 736, 738-39 (1997) (emphasis added).

The SRBA Court invalidated a similar attempt by IDWR in denying the inclusion of a "facility volume" remark that would limit existing water right licenses:

> Like a prior decree, any attempt to redefine a license would be 'tantamount' to altering a real property right. In this case IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding effect of licenses as set forth in I.C. § 42-220.

Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue at 14 (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 36-02708 et al., December 29, 1999).

The SRBA Court, in its *Facility Volume* decision, further explained that IDWR "cannot limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced from the use of that right . . ." *Id.* at 17. By reducing the Coalition members' water rights to a "total fixed volume" for administration, the Director has "limited the

extent of beneficial use" of their water rights. For example, if ground water pumpers can reduce the available water supply every year to a point where Milner Irrigation District only receives 50,800 acre-feet in total diversions (natural flow and storage), essentially completely eliminating one of Milner's storage rights[2], and crop water requirements on the project exceed that amount for the year, the Director's finding clearly limits the types of crops and the number of acres that can be planted that year. Such a determination flies in the face of the Idaho Constitution and is directly at odds with the decisions set forth above. Moreover, watermasters distribute water to "water rights", not according to particular crops a water right holder may decide to plant or the weather on a particular day.

Indeed, Idaho courts have rejected administrative attempts to "limit" or "reduce" decreed and licensed water rights due to the property interest at stake and the fact that a watermaster is bound to follow a court's decree when administering water rights on a common source. The Idaho Supreme Court succinctly announced this rule of law in *State v. Nelson*:

> Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' . . . [P]ursuant to *Idaho Code section 42-220*, all rights that are decreed pass with conveyance of the land and therefore the land could be sold with the certainty that the water would be distributed as decreed. . . .
>
> A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. *Stethem v. Skinner*, 11 Idaho 374, 379, 82 P. 451, 452 (1905). If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute was according to the adjudication or decree. I.C. § 42-607 (1997).

131 Idaho at 16.

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[2] Milner Irrigation District holds rights to 44,951 acre-feet in American Falls Reservoir and 45,640 acre-feet in Palisades Reservoir, for a total of 90,591 acre-feet. The Director's "minimum full supply" for Milner is just over 50% of that total. *See May 2005 Order* at 15.

The State's watermasters have a duty to distribute water by the decrees and licenses, the Director's May 2005 Order interferes with that duty by providing "guidelines" or "injury determinations" that conflict with Idaho law. Accordingly, the Director's "minimum full supply" criteria, which purports to establish the amount of water that the Coalition members are entitled to have distributed to them by the watermaster in 2005, does not reflect the stated quantities of their decreed and licensed water rights, and as such is invalid as a matter of law.

III. The Director Has No Authority to Unilaterally "Combine" Natural Flow and Storage Water Rights for Purposes of Administration.

The Director's May 2005 Order impermissibly "combines" the Coalition members' natural flow and storage water rights for purposes of administration against junior ground water rights:

> 48. Whether the senior priority water rights held by or for the benefit of members of the Surface Water Coalition are injured depends in large part on the total supply of water needed for the beneficial uses authorized under the water rights held by members of the Surface Water Coalition and available from both natural flow and reservoir storage combined.

May 2005 Order at 43 (emphasis added).

Nothing in Idaho law permits this new scheme of water distribution whereby a water right holder's separate rights are melded into one for purposes administration against other rights. As set forth above, the watermasters are required to distribute water according to the list of water rights set forth by the "adjudication or decree." I.C. § 42-607, *State v. Nelson*, 131 Idaho at 16. If a storage water right is entitled to fill, i.e. as a senior priority date, prior to diversions by a hydraulically-connected junior ground water right then there is no question the junior ground water user cannot intercept water that would otherwise reach the reservoir storage. The Director's finding in the May 2005 Order precludes priority distribution to the Coalition members' senior storage water rights by reducing their total storage space and making it simply a

component of the "minimum full supply". Nowhere in history have Idaho watermasters been permitted to take two water rights with differing priority dates and combine them into one for purposes of administration. Such a system of administration is contrary to the Idaho Constitution (art. XV, § 3) and Idaho's water distribution statutes (I.C. § 42-602, 607). The Director's May 2005 Order further results in senior water right holders being forced to exhaust nearly all of their storage water supplies in order for the Director to find "material injury" to their "combined" supply under their water rights. Although the Director's order includes a "reasonable carryover" amount for each Coalition member, this amount does not represent the vested storage water rights held by the Coalition members, nor does it account for the rights each member have to carryover all of that water, or use it for any other lawful purpose.

Since the Director's May 2005 Order creates a scheme of administration that unlawfully "combines" vested water rights for administration it must be set aside as a matter of law.

IV. The Director's "Material Injury" Analysis Violates the SRBA Court's Interim Administration Orders

The Director's May 2005 Order was issued pursuant to his authority granted by the SRBA Court to perform interim administration in Water Districts 120 and 130. The State of Idaho previously requested authority to perform interim administration on the basis that administration was necessary to protect senior water rights. The SRBA Court's interim administration *Order* requires the Department to administer water rights in such a manner:

> The State of Idaho's *Motion for Interim Administration* is hereby GRANTED. Pursuant to Idaho Code § 42-1417, the Court authorizes distribution of water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director's Reports and the partial decrees that have superseded the Director's Reports, in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1.

Order Granting State of Idaho's Motion for Order of Interim Administration at 2 (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 92-00021, January 8, 2002).

After the Director's May 2005 Order was issued, the SRBA Court issued another order that governs the Director's authority to distribute water and perform interim administration until the SRBA Court issues the final decree. *See Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 92-00021, November 17, 2005). In this most recent order, the SRBA Court held:

> Collateral attack of the elements of a partial decree cannot be made in an administrative forum. As such, the Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a re-examination of prior existing conditions in the context of applying a "material injury" analysis through the application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11 *et seq.* IDWR's Rules for Conjunctive Management are not elements of a water right nor have they been incorporated into the general provision on connected sources.

November 17, 2005 Order at 8 (emphasis in original).

The SRBA Court plainly held that the Director cannot "collaterally attack" or "re-examine the basis" for a water right as a condition of administration. Since the Director is precluded, by the Court's order and existing Idaho law, from "looking behind" decreed water rights through an administrative "material injury" analysis, there is no legal basis for the Director's "minimum full supply" criteria which disregards the Coalition members' previously decreed and licensed water rights. The SRBA Court's order reaffirms the legal principle that "holders of water rights are entitled to presume that the watermaster is delivering water to them in compliance with the governing decree." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972). The Director's May 2005 Order precludes the watermasters from relying upon the "governing decree" in administering the connected sources by reducing the Coalition members'

vested water rights to a finite amount that is considerably less than the stated elements of their prior decrees and licenses. Instead, the watermasters are subject to the Director's new procedure which dictates "minimum full supplies" that are significantly less and different from prior court decrees and even prior licenses issued by the Department. The resulting administrative "re-adjudication" conflicts with the SRBA Court's interim administration orders and leaves senior water right holders guessing, from year to year, as to the amount of water they are entitled to for purposes of administration. Accordingly, the "minimum full supply" procedure and criteria plainly violates the terms of the SRBA Court's interim administration orders and must be set aside as a matter of law.

V. The Director's "Minimum Full Supply", "Total Crop Loss", "Land Fallowing", and "Shortage" Criteria for Determining "Material Injury" Violate the Plain Terms of the Conjunctive Management Rules.

Finally, the Director's May 2005 Order contains various procedures and criteria for determining "material injury" that even violate IDWR's own conjunctive management rules. The Rules define "material injury" as follows:

> 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.

IDAPA 37.03.11.010.14.

Rule 42 sets forth a number of "factors" for the Director to consider in determining "material injury" and reasonableness of water diversions. By definition, the term "material injury" means "hindrance to or impact upon the exercise of a water right." Rule 10.14. Webster's defines the term "hindrance" as the "1. the state of being hindered", and "hinder" means "to interfere with the activity or progress of." Webster's Ninth New Collegiate Dictionary (1987). Webster's further defines "impact" as "to have an impact on: impinge on"

with "impinge" carrying the meaning "to have an effect" or "encroach, infringe on other people's rights." *Id.* Accordingly, any diversions by a junior water right holder that "interfere with" or "have an effect" on a senior's water right equates to a "hindrance to or impact upon" the exercise of that right.

Idaho law places the burden upon the junior to prove "non-interference" or "non-injury" to a senior's water right:

> It seems self evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and *where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator*, he should, as we observed in *Moe v. Harger*, 10 Idaho 305, 77 Pac. 645, produce "clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion." *The burden is on him to show such facts.*

Josslyn v. Daly, 15 Idaho 137, 149 (1908)(emphasis added).

This rule requiring a junior to prove water is available for his use as against a senior has been reaffirmed by the Idaho Supreme Court on several occasions. *Jackson v. Cowan*, 33 Idaho 525, 528 (1921)("The burden of proving that [the water] did not reach the reservoir was upon the appellants . . . and this they fail to do."); *Cantlin v. Carter*, 88 Idaho 179, 186 (1964)("A subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations); *Silkey v. Tiegs*, 54 Idaho 126, 129 (1934)("adherence to rule requiring protection of the prior appropriator, precludes relief to [the junior ground water user]").

The Director's May 2005 Order disregards the well-established law in Idaho and plainly states that "interference" with senior water rights by junior ground water diversions does not constitute "material injury":

> 47. Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury. Material injury is a highly fact specific inquiry

> that must be determined in accordance with IDAPA conjunctive management rule 42.

May 2005 Order at 43.

Only by refusing to recognize the stated elements of the Coalition members' decreed and licensed water rights, as well as the definition of "material injury" set forth in the Rules, can the Director allege that "depletion" to the water supply, or "interference" with the exercise of a senior's water right, does not constitute "material injury".

Since the Rules do not support the May 2005 Order's concept of "material injury", the Director impermissibly creates new criteria and procedures that violate the plain terms of the rules themselves. First, as referenced above, the Director disregards the list of water rights, and their stated elements, held by the Coalition members, and instead purports to distribute water to their "minimum full supply". Nothing in IDWR's conjunctive management rules defines a water right for purposes of administration as only representing a "minimum full supply". Although the Rule 42 factors state that the Director may consider "the annual volume of water diverted" and the "amount of water being diverted and used compared to the water rights", nothing suggests that the Director is authorized to distribute water to a senior water right holder according to any basis other than that quantity stated on the water rights. Moreover, Rule 40 specifically requires the watermasters to "[r]egulate the diversion and use of water in <u>accordance with the priorities of rights of the various surface or ground water users</u> who are included within the water district . . ." and "regulate the diversion and use of ground water <u>in accordance with the rights thereto</u>." Rule 40.01.a and 02.b (emphasis added). In other words, the watermasters must distribute water to the respective <u>water rights</u>, not to some "minimum full supply" as determined by the Director. Again, the rules expressly reference "water rights", not some "minimum full supply" concept. Apparently the Director applied the "water rights" concept for ground water users since the May

2005 Order does not examine each and every ground water right in Water Districts 120 and 130 and delineate a "minimum full supply" for those class of water rights. By arbitrarily creating a "minimum full supply" basis for the Coalition members and applying that standard for administration, the Director violated the plain terms of the conjunctive management rules.

Next, the Director creates a "total crop loss" and "land fallowing" criteria for the "material injury" determination that similarly finds no support in the Rules. As explained in the Director's May 2005 Order:

> 109. None of the members of the Surface Water Coalition have identified lands that are entitled to receive surface water <u>but have not been irrigated or where crops could not be harvested because of shortages</u> in the surface water supplies available to members of the Coalition under the members' various rights.

May 2005 Order at 24.

Similar to the "minimum full supply" criteria, the "total crop loss" and "land fallowing" criteria are nowhere to be found in IDWR's conjunctive management rules. Although the Rule 42 factors allow the Director to consider "the rate of diversion compared to the acreage of land served", this factor does not suggest that "material injury" is based upon "total crop loss" or "land fallowing". Indeed, since watermasters regulate water rights, not the number of acres that may be planted or what particular crop may be grown in any given year, it follows that "total crop loss" and "land fallowing" are not a part of water right administration. Moreover, "material injury" is defined as "hindrance to or impact upon the exercise of a water right", and is not based upon a review of total crop loss or whether certain acres were not planted in a particular year. The Director's new criteria suggest that watermasters must distribute water not by lists of water rights, but instead by lists of who plants what and whether that crop is harvested. Again, this scheme finds no support in Idaho law or even the Rules themselves. Accordingly, since these

new criteria are not included in the Rules, the Director's finding regarding the same, and however they may have been used to determine "material injury" in the May 2005 Order, should be set aside as a matter of law.

Finally, the Director's May 2005 Order applies a total supply "shortage" criteria for determining "material injury". The "shortage" criteria is inextricably linked to the "minimum full supply" concept and limits the Coalition members' to that amount:

> 115. To predict the shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005, the amounts of water diverted in 1995 are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders. . . .

May 2005 Order at 25.

As referenced above, the "minimum full supply" has no relation to the stated quantities of the Coalition members' water rights. Consequently, neither does the Director's "shortage" criteria.

Idaho Code § 42-607 requires a watermaster to monitor the water supply along with the list of water rights that are diverting from that supply and curtail rights in priority when the supply is insufficient to fill all rights. *See Jones v. Big Lost Irr. Dist.*, 93 Idaho 227, 229 (1969) ("The duties of a water master are to determine decrees, regulate flow of streams and to transfer the water of decreed rights to the appropriate diversion points, I.C. § 42-607."); *see also Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935) ("The defendant water master is only an administrative officer and has no interest in the subject of the litigation - his only duty is to distribute the waters of his district in accordance with the respective rights of appropriators"). The relevant "shortage" inquiry under the law centers upon the water supply and comparing that supply to the list of water rights. When the water supply is insufficient to fill all rights, the watermaster curtails junior priorities first.

The Director's "shortage" criteria prevents a watermaster from performing her legal duty to monitor the supply and regulate rights accordingly. Instead, she must wait until the irrigation season is over, determine if any crops were lost and evaluate crop "evapotranspiration" to determine if a water right holder received too little or too much water that year. *See May 2005 Order* at 25. Again, this new scheme of water right administration is contrary to Idaho law and does not find any support in the Rules' themselves. Similar to the "minimum full supply" concept, the Director does not apply the "shortage" criteria to an evaluation of junior priority ground water rights.[3] Even the Rules contemplate that a watermaster will regulate water rights, not particular crops and an after-the-fact accounting of "crop evapotranspiration." *See* Rule 40. Since the Director's "shortage" criteria is not part of the Rules' procedures for regulating junior priority ground water rights, it must be set aside as a matter of law.

CONCLUSION

The Director's May 2005 Order contains a number of analyses and criteria for purposes of determining "material injury" that violate Idaho law. The Director's "minimum full supply" concept precludes administration by water rights and instead creates a different standard that diminishes the Coalition members' vested property rights. In addition, the Director unlawfully combined the Coalition members' natural flow and storage water rights in predicting "material injury" in 2005.

By reducing the Coalition members' storage water rights to simply a component of "minimum full supply" and "reasonable carryover", the Director diminished those entitlements for the benefit of junior priority ground water rights. Idaho law strictly forbids this type of "administration." *See Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has

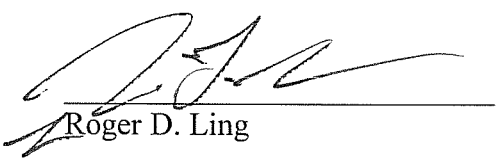
[3] Presumably junior priority ground water rights do not suffer "shortages" because those uses have never been involuntarily curtailed to satisfy prior rights, nor has the Director created a "minimum full supply" basis upon which to administer ground water rights.

no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away."). Moreover, the Director's "minimum full supply" concept violates the SRBA Court's interim administration orders which preclude administration that disregards the stated elements of previously decreed and licensed water rights.

Finally, the Director created new criteria related to "total crop loss", "land fallowing", and "shortage" that are similarly unsupported by Idaho law and are foreign concepts to the conjunctive management rules. Accordingly, the Director's "material injury" concept and its related criteria and procedures, as set forth and applied in the May 2005 Order, should be set aside as a matter of law. The Coalition respectfully requests an order granting partial summary judgment on these issues.

DATED this 23rd day of January, 2006.

LING ROBINSON & WALKER



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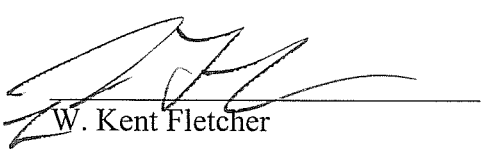

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I hereby certify that on this 23rd day of January, 2006, I served a true and correct copy of the foregoing *Surface Water Coalition's Motion for Partial Summary Judgment and Supporting Legal Points and Authorities* on the following by the method indicated:

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