> applied to the running of manufactories or anything else of that sort.
>
> Mr. Gray: Suppose he won't pay for it.
>
> Mr. Claggett: It is dedicated to the use, and when it has once been sold to any one particular party in one year, then he have the right to demand it annually thereafter upon paying for it...
>
> Mr. Claggett: Mr. Chairman, **both of these sections apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental or distribution.'** The first section protects the person who comes in, by making it 'an exclusive dedication' to agricultural uses after it has been so appropriated and so used.

> **These conditions necessarily result in an affirmance of the judgment as to those appellants who rely on contracts for water rights from the irrigation and canal company, and who do not connect themselves with an original appropriation of the water from the natural stream.**

Mellen, 21 Idaho at 359-61 (emphasis mine).

VII. Article XV, § 6.

Section 6 was adopted as follows:

> SECTION 6
>
> The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water, sold, rented, or distributed, for any useful or beneficial purpose.

Proceedings and Debates at 2080.

This section imposes a duty on the legislature to provide the method or means for fixing compensation for supplying water to any city or town, and until the legislature provides such a

method, the contract rates for such supply will be enforced. Section 6 is not at issue in the present case.

VIII. Article XV, § 7 -- Creation of a State Water Resources Conservation Agency.

The meaning of section 7 is at issue in this case because of CMR Rule 20.03. Then Governor Robert E. Smylie convened an extraordinary session of the Idaho Legislative during July of 1964 for six (6) purposes. One of those was:

> 1. To consider the passage of, and to enact, a resolution submitting a constitutional amendment to the people of Idaho providing for the creation of a water resources conservation agency;

See Proclamation, Session Laws of Idaho, 1965.

As originally proposed, and then adopted, § 7 read as follows:

> (S.J.R. No. 1)
>
> A JOINT RESOLUTION
>
> PROPOSING AN AMENDMENT ADDING A NEW SECTION, SECTION 7, TO ARTICLE 15 OF THE CONSTITUTION OF THE STATE OF IDAHO CREATING A WATER RESOURCE AGENCY COMPOSED AS THE LEGISLATURE MAY NOW OR HEREAFTER PRESCRIBE, WITH POWER TO FORMULATE AND IMPLEMENT A STATE WATER PLAN, CONSTRUCT AND OPERATE WATER PROJECTS, ISSUE REVENUE BONDS, GENERATE AND WHOLESALE HYDROELECTRIC POWER, APPROPRIATE PUBLIC WATER, TAKE TITLE TO STATE LANDS AND CONTROL STATE LANDS REQUIRED FOR WATER PROJECTS.
>
> *Be It Resolved by the Legislature of the State of Idaho:*
>
> SECTION 1. That the Constitution of the State of Idaho be amended by adding Section 7 to Article 15 to read as follows:
>
> SECTION 7. STATE WATER RESOURCE AGENCY.—There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and

> implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the legislature.
>
> SECTION 2. That the question to be submitted to the electors of the State of Idaho as the next general election shall be as follows:

Id. at 72.

The section was ratified by the people of Idaho voting in the general election of November 3, 1964. Section 7 has been amended once as proposed by S.J.R. No. 117 (S.L. 1984, p. 689) as follows:

> Be It Resolved by the Legislature of the State of Idaho:
>
> SECTION 7. STATE WATER RESOURCE AGENCY. There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to ~~formulate and implement a state water plan for optimum development of water resources in the public interest; to~~ construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature. Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Id. at 689-90. The amendment was ratified at the general election of November 6, 1984 to read as it now appears.

The question presented by the Plaintiffs in this case is whether Article XV, § 7 limits or conditions senior water rights.

According to Plaintiffs, § 7 was enacted to ward off the State of California's interest in diverting water from Southern Idaho in the early 1960's, and did so by enacting § 7 which

> Authorizes the Idaho Water Resource Board to 'formulate and implement a state water plan for optimum development of water resources in the public interest.' The State Water Plan does not call for senior water users to suffer water shortages at the hands of junior appropriators.

Pl.'s Memo. at 27; citing State Water Plan, ¶ 1 G (requiring conjunctive management).

More will be stated on this later. However, suffice it to say at this point, that section 3 was not altered or amended by section 7. The two must simply be read together -- that is "water resources board shall have the power to formulate and implement a state water plan for optimum development of water resource sin the public interest -- consistent with the established law of this state, including the prior appropriation doctrine."

X.

GENERAL ANALYSIS

1. As presently used in Idaho water law, what does the phrase "Conjunctive Management" really mean?

The Director defines conjunctive management in the IDAPA as:

> 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.

IDAPA 37.03.11.010.03.

In A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568 (Idaho 1998), the Idaho Supreme Court stated:

> **Conjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and ground water sources. Proper management in this system requires knowledge** by the IDWR **of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.**

A & B Irrigation, 131 Idaho at 422 (emphasis mine). The Supreme Court then commented on a 1994 Interim Legislative Committee, which committee had been charged with specific duties and, after its investigation, filed its report. The Idaho Supreme Court stated:

> In 1994, an interim legislative committee charged with reviewing the progress of the SRBA noted **the pendency of studies on conjunctive management investigating the effect of ground water pumping on natural springs that flowed directly into the Snake River.** The committee reported:
>
> > **Conjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication.** In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls dam.
> >
> > **Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River.** To conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface water is necessary.
> >
> > Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, **they generally relate to two classic elements of a water right – its source and priority. The SRBA should determine the ultimate source of the ground and surface water**

> **rights being adjudicated.** This legal determination must be made in the SRBA. The IDWR should provide recommendations to the SRBA District Court on how it should do so. Further, **the SRBA District Court must determine the relative priority between surface and ground water rights.**
>
> **If** the SRBA proceeds and **these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another generation of ground and surface water users will be uncertain regarding their relationship to each other.**

Id. (internal citations omitted) (emphasis mine); citing 1994 INTERIM LEGISLATIVE COMMITTEE REPORT ON THE SNAKE RIVER BASIN ADJUDICATION, p. 36-37.

To this Court (and despite the definition offered in IDAPA 37.03.11.010.03), the term "conjunctive management" as presently used in Idaho water law is a term of art with lots of "wiggle room" or discretion; it is not a well defined legal phrase which has a well settled meaning. To borrow from Mr. Ainslie (who was characterizing the language "or any other use necessary to complete development of the material resources of the State"), such a phrase "is **a regular rainbow-chasing expression**..." Proceedings and Debates at 1630 (emphasis mine). Or, as Mr. Reid in the same debate stated:

> As a lawyer, if I desired litigation to spring up, and **litigation which would be susceptible, from so many considerations**, to throw people into trouble and make business for lawyers, I should vote for this, but I am legislating for the good of the people, and I think the matter should be put certain and definite, and **you have made it so broad it is going to be inoperative and you destroy the very purpose you wish to achieve. Limit it to what you propose.** That is the reason I offer the amendment. I offer it in good faith. I do not want the law to be a nullity on our statute book.

Id. at 1628-29 (emphasis mine).

As will be discussed in greater detail later in this decision, in its present operative sense, the phrase "conjunctively managed" is, in some respects, an empty vessel to be filled later in the discretion of the Director. In the past, similar concerns with the phrase have not missed the attention of either the SRBA district court or the Idaho Supreme Court.

More particularly, this Court believes it is for this "term of art" or "Director's discretion" reason that the SRBA District Court, in ruling on Basin Wide Issue 5,[15] specifically rejected the language "to be conjunctively managed," but instead inserted the language "connected sources."

> The SRBA Court specifically warned of the dangers of allowing 'conjunctive administration' to redefine water rights decreed in the SRBA:
>
> > **Although IDWR is charged with the sole authority for administering water rights, such water rights cannot be 'administered' in a manner inconsistent with the prior appropriation doctrine**. The argument is that subjecting a water right to the undefined term 'conjunctively,' could be construed at some point in the future to supercede or modify the concept of prior appropriation. The other related concern is that IDWR has promulgated administrative rules for conjunctive management and that the proposed general provision as worded can be reasonably interpreted to incorporate by reference these administrative rules into the decree. ***Since administrative rules are subject to change, every time the rules change, the scope of the water rights affected by the general provision would also change. Also, to the extent the administrative rules, now or in the future, allow IDWR to administer water in a manner inconsistent with the prior appropriation doctrine, the incorporation of the administrative rules into a water right decree effectively diminishes the owner's property interest.***

Pl.'s Memo. in Support of S.J. at 47-48; Thompson Aff., Ex. K Order Setting Trial Date, etc. (Basin-Wide Issue 5) (Conjunctive Management General Provision) at 3-4 (May 26, 2000) (bold and italicized emphasis in original; bold only emphasis mine).

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[15] See Order on Cross Motions for Summary Judgment: Order on Motion to Strike Affidavits; dated July 2, 2001; see also Basin Wide Issue No. 5; Connected Sources General Provisions (Conjunctive Management) Memorandum Decision and Order of Partial Decree; dated February 27, 2002, in particular Exhibit A, attached thereto.

The Idaho Supreme Court has also honed in on the problem. In State v. Nelson, 131 Idaho 12, 951 P.2d 943 (Idaho 1998), in speaking to water administration and the CMR's the Idaho Supreme Court stated:

> **The IDWR has the power to issue 'rules** and regulations as may be necessary for the conduct of its business.' **These rules and regulations are subject to amendment or repeal** by the IDWR. Additionally, the **IDWR's Director is in charge of distributing water** from all natural water resources **or supervising the distribution. Including these General Provisions in a decree will provide finality to water rights, and avoid the possibility that the rules and regulations could be changed at the sole discretion of the Director** of the IDWR.
>
> **Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.'** An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. Additionally, pursuant 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. Further, these General Provisions describe common practices in the Big Lost which are unique and sometimes contrary to general water distribution rules.
>
> **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. **If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.**
>
> Additionally, we conclude that the General Provisions provided by I.C. § 42-1412(6) should be included in a decree if they are deemed necessary for the efficient administration or to define a water right. **Provisions necessary for the efficient administration of water rights should be preserved in the SRBA decree, not merely in the Administrative rules and regulations.**

Id. at 16 (internal citations omitted) (emphasis mine).

2. CMR's Generally

Generally speaking, what are the CMR's? IDAPA 37.03.11.001 provides:

> **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.

IDAPA 37.03.11.001 (emphasis mine).

At this juncture, several points are worth noting. First, in A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 428, 958 P.2d 568 (1998), on re-argument, the Idaho Supreme Court stated:

> While the district court noted the adoption by the IDWR of IDAPA 37.03.11 setting forth the department's "Rules for Conjunctive Management of Surface and Ground Water Resources," these rules do not necessarily overlap the SRBA proceedings. They do not provide for administration of interconnected surface and ground water rights in the SRBA, nor do they deal with the interrelationship of water rights within the various Basins defined by the Director and the SRBA district court, and they do not deal with the interrelationship of those Basins to each other and to the Snake River in the SRBA proceeding.[16] **The rules adopted by the IDWR are primarily directed toward an instance when a 'call' is made by a senior water right holder, and do not appear to deal with the rights on the basis of 'prior appropriation' in the event of a call as required.**

Id. at 422 (footnote and emphasis mine). Thus, Idaho Supreme Court has previously reviewed the CMR's, and on at least one occasion found that the rules do not even deal with the subject water rights on the basis of "prior appropriation" in the event of a call as required. Of course, this is very problematic given the legislative charge to the Director in I.C. §§ 42-602 and 42-603.

The second point this Court wishes to draw attention to is the language in IDAPA 37.03.11.001, "in an area having a common ground water supply." Despite the definition in

[16] This Court believes that since the qualifier in this sentence references "the SRBA" District Court, and since the SRBA District Court has now adopted the Basin Wide Issue 5 – "Connected Sources" general provision, this sentence of the Idaho Supreme Court made in 1998 would no longer be a correct statement. The Basin Wide Issue 5 general provisions was filed on February 27, 2002. However, the accuracy of the next (bolded) sentence remains.

IDAPA 37.03.11.010.01, and the Director's finding in IDAPA 37.03.11.050 (Rule 50), by virtue of the SRBA Court's Basin Wide 5 Order, all water – ground and surface – is deemed to be hydraulically connected unless it is specifically exempted.

The language of the Basin Wide Issue 5 "Connected Sources" Order now to be incorporated as a general provision in all SRBA partial decrees, is as follows:

> The following water rights from the following sources of water in Basin ___ shall be administered separately from all other water rights in Basin ___ in accordance with the prior appropriation doctrine as established by Idaho law:
>
> Water Right No. Source
>
> The following water rights from the following sources of water in Basin ___ shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.
>
> Water Right No. Source
>
> Except as otherwise specified above, all water rights within Basin ___ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

Memorandum Decision and Order of Partial Decree, Basin Wide Issue No. 5, Connected Sources General Provision (Conjunctive Management); Ex. A (Feb. 27, 2002).

3. The Statutory Authority for the CMR's

IDAPA 37.03.11.000 recites the legal authority for the adoption of the CMR's. The two statutes listed are I.C. § 42-603 and I.C. § 42-1805(8). I.C. § 42-603 provides:

> **42-603. Supervision of water distribution – Rules and regulations.— The director** of the department of water resources **is authorized to adopt rules** and regulations **for the distribution of water from** the streams, rivers, lakes, **ground water** and other natural water sources **as shall be necessary to carry out the laws in accordance with the priorities of the**

> **rights of the users thereof.** Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

I.C. § 42-603 (emphasis mine). A strong emphasis is placed by this Court upon the legislative authorization "as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof."

See also Idaho Code § 42-602, which states in part:

> **The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine.** The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-602 (WEST 1996) (emphasis mine).

4. The nature of a water right in Idaho.

A water right is a constitutionally recognized property right. Idaho Const., Art. XV, § 3. The Idaho Supreme Court stated in Nelson:

> Finality in water rights is essential. **'A water right is tantamount to a real property right, and is legally protected as such.'** An agreement to change any of the definitional factors of a water rights would be comparable to a change in the description of property. Additional, pursuant 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.**

Nelson, 131 Idaho at 16 (emphasis mine).

The nature of the right is called an usufructuary right. Mr. Poe, in the constitutional debate, stated the following:

> Now, the right to water; no man can acquire any right to water. There is no such thing as property in water. It is what is called a usufructuary right, or the right to the use.

Proceedings and Debates at 1128. See also, Mr. Heyburn's comments at id. at 1168.

Or, as Counsel for IGWA correctly writes in their book, Handbook on Idaho Water Law, January 1, 2003 at pages 2-3:

> A water right is a property right, but the water right owners do not "own" the water itself. This is because Idaho's rivers, streams, lakes and ground water all belong to the people of the state. **A water right is a legally protected right to *use* the public's water.** Water rights are often described by lawyers as "usufructuary," meaning a right to the use of a thing, not ownership of the thing itself. **Usufructuary rights are nevertheless property rights – real estate – fully protected against unconstitutional takings.**

Id. at 2-3 (italicized emphasis in original, bold emphasis mine).

A water right is described and defined by the stated elements of the right. The traditional elements of a water right are: source, priority date, amount, period of use, purpose of use, point of diversion, and place of use. See Olson v. Idaho Dep't of Water Resources, 105 Idaho 98, 666 P.2d 188 (1983). See also I.C.§ 42-1411(2)(h), (i), and (j), which statutorily adds to the traditional elements as follows:

> (2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:
>
> ***
>
> (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except that the place of use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the irrigation project would qualify to be so described under section 42-219, Idaho Code;
>
> (i) conditions over the exercise of any water right included in any decree, license, or approved transfer application; and
>
> (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

Idaho Code § 42-1411(2) (WEST 2006).

5. The Prior Appropriation Doctrine

Generally stated, there are two systems of water rights in the United States relating to the use of water. One is the riparian rights system and the other is the prior appropriation doctrine. The prior appropriation doctrine is firmly rooted in Idaho law. It was in effect in Idaho when Idaho was still a territory. Malad Valley Irrigation Co. v. Campbell, 2 Idaho 411, 411, 18 P. 52 (Idaho 1888). As discussed earlier in this decision, various parameters of the prior appropriation doctrine were discussed at length during the Constitutional Convention. There were also two distinct attempts to inject portions of the riparian doctrine in the Constitution, one for agricultural use and the other for mining.[17] The first was Mr. Vineyards' motion. See Proceedings and Debates at1131-38, 1159-60. The second was Mr. Heyburn's proposed amendment. See id. at 1166-76. Each was firmly rejected.

Following adoption of the Constitution, the Idaho Supreme Court and the United States Supreme Court also addressed and rejected riparian rights in at least the following cases: Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 493, 101 P. 1059 (Idaho 1909) (riparian rights are repugnant to the constitution and exist only to the extent they do not conflict with right acquired through prior appropriation); Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 121 (1912) (rejecting the riparian rights of appropriation); Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 584, 513 P.2d 627 (Idaho 1973) (rejecting "correlative rights" in ground water).

In rejecting the riparian rights doctrine and adopting the prior appropriation doctrine, the framers' intent was clear that an owner of land, simply as the owner, has no right to have a

[17] This Court clearly recognizes that waters within an organized mining district are not at issue in this case. The reason this mining matter is placed in this decision is to punctuate the intent of the framers in which they reject any notion of riparian or "equal rights" in water administration in this State.

stream of water flow to, by, through, over, or under his land. See Proceedings and Debate of the Constitutional Convention of Idaho at 1132.

The underlying theory or premise of the riparian rights doctrine is equality of rights and reasonable use. There is no priority of rights. The reasonable use by each is limited by a like reasonable use in every other riparian.

The underlying theory or premise of the prior appropriation doctrine is that he who first appropriates a supply of water to a beneficial use is first in right. There is no equality of rights. The prior appropriation doctrine, in its truest sense, makes no distinction between those beneficial uses for natural wants (domestic) and those for agricultural or manufacturing, etc. However, and as chronicled by this Court earlier in this decision, Idaho's version of the prior appropriation doctrine does have a preference system, as stated in Article XV, § 3 of the Idaho Constitution.

This "preference" system as stated in Section 3 was in part addressed by the Idaho Supreme Court in Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 P. 741 (Idaho 1911), as follows:

> From the language thus used in this section appellant argues that it was the intention of the framers of the constitution to make an appropriation of water for domestic uses a right superior to an appropriation made for manufacturing uses, without reference to the time or priority of such appropriations.
>
> ***
>
> We do not think the language thus used in the constitution was ever intended to have this effect, for it is clearly and explicitly provided in said section that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that priority of appropriation shall give the better right as between those using the water. This clearly declares that the appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the use, but recognizes the right of appropriations for

> domestic purposes as superior to appropriations for other purposes, when the waters of any natural stream are not sufficient for the service of all those desiring the same. **This section clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property** for public and private use as referred to in section 14, art. 1, of the Constitution.
>
> **It clearly was the intention of the framers of the constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrary and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section**, which declare that the right to divert and appropriate the unappropraited waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right.

Montpelier Milling, 19 Idaho at 218-19 (emphasis mine).

Another tenet of the prior appropriation doctrine of Section 3, Article XV, which cannot be overstated as it relates to the present case, is that by definition the rights of the various appropriators are never equal.[18]

The basis, measure and limit of the water right under the prior appropriation doctrine is the beneficial use to which he has put the water. See Wells A. Hutchins, Idaho Law of Water Rights, 5 Idaho L. Rev. 1, 39 (1968).

Because water must be put to a beneficial use, a water right holder cannot lawfully waste water. As Mr. Gray stated in the Constitutional debates:

> When I go there first I will take what I need; we cannot have any more than we need as a matter of course; the law will not permit us to do that.

Proceedings and Debates at1136.

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[18] This means appropriators diverting from the natural stream or the aquifer as opposed to those who procure a water right under a "sale, rental, or distribution." Idaho Const. Art. XV, § 4-5.

It is the policy of the law to prevent wasting of water. Stickney v. Hanrahan, 7 Idaho 424, 433, 63 P. 1891 (Idaho 1900); Twin Falls Land & Water Co. v. Twin Falls Canal Co., 7 Fed.Supp. 237, 251 (D. Idaho 1933).

The Idaho Supreme Court stated in Martiny v. Wells, 91 Idaho 215, 218-19, 419 P.2d 470 (Idaho 1966):

> **Wasting of irrigation water is disapproved by the constitution and laws of this state.** As we said in Mountain Home Irrigation District v. Duffy, supra, **it is the duty of a prior appropriator of water to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof.**
>
> ***
>
> Under the facts involved in this case, **the court's conclusion that the best use of the water was the use made of it by defendant, is immaterial** and lends no support to the judgment. **The policy of the law against the waste of irrigation water cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator.**

Martiny, 91 Idaho at 218-19 (emphasis mine).

The burden of proof to establish waste is allocated to the junior appropriator. Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220 (Idaho 1976).

And, as stated by Mr. Hutchins in his law review article:

> *Beneficial use.* – It is provided by statute that no licensee nor any claimant of a decreed water right 'shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed.' **The supreme court also has held that the appropriator is held to the quantity of water he is able to divert and apply to a beneficial use at a particular time, within the limit of his appropriation.**
>
> *Economical and reasonable use.* – In addition to beneficial use, the factors of economy and reasonableness of use of water have been imposed upon the appropriator; but in some of the decisions the courts have been careful not to push their interpretation of reasonableness to the point of imposing

unreasonableness upon the appropriator. In one decision the Idaho Supreme Court said that:

> It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the use of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration. *** A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.

A federal court agreed, in the same year, that conservation of water is a wise public policy, but added that so also is the conservation of the energy and well-being of the water user and that economy of use is not synonymous with minimum use. The Idaho court has recently held that the fact a junior appropriator could use water already decreed to a senior appropriator more efficiently was immaterial to a determination of who had the superior right.

Hutchins at 39-40; citing Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 44, 147 P. 1073 (Idaho 1915); Caldwell v. Twin Falls Salmon River Land & Water Co., 225 Fed. 584, 596 (D. Idaho 1915) Clark v. Hansen, 35 Idaho 449, 455-56, 206 P. 808 (Idaho 1922) (emphasis mine).

However, Idaho's version of the prior appropriation doctrine also includes other significant components or aspects, incorpreal property rights, if you will, which are very much a part and parcel of the doctrine which attaches to the water right; more particularly, the concomitant tenets and procedures related to a delivery call, which have historically been held necessary to give the constitutional protections pertaining to senior water rights. The battle cry of IDWR throughout their briefing in this case is that while "priority of appropriation shall give the better right as between those using the water," "it is not the only fundamental principle or important principle." See IDWR's Memo. in Opposition to S.J., at 8 (Dec. 6, 2005). In other

words, IDWR argues that there is a lot more to Idaho's version of the prior appropriation doctrine than just "first in time." This Court fully agrees. With that point in mind, however, the issues in this case deal with the administration of established/decreed rights and not with the process of adjudication of those rights.

As such, there are two additional primary and essential principles of Idaho's version of the prior appropriation doctrine which are at issue in the administration of established rights but which are absent from the CMR's. They are that in times of shortage there is the presumption of injury to a senior by the diversion of a junior, and the well engrained burdens of proof.

Injury in this context is universally understood to mean a decrease in the volume or supply of water to the detriment of the senior.

These concepts arise out of the Constitution and are stated in Moe v. Harger, 10 Idaho 302, 7 P. 645 (Idaho 1904), as follows:

> **This court has uniformly adhered to the principle *announced both in the constitution* and by the statute that the first appropriator has the first right; and it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable as its application and so generally and uniformly applied** by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.
>
> ***
>
> It is therefore clear that no water will be left for some of the subsequent appropriators. Where prior appropriators have diverted the amount of water to which they are entitled and, for example, say one hundred inches, to which the next appropriator is entitled, is left in the stream and a settler above diverts a part or all of the remaining water, **the presumption must at once arise that such diversion will be to the injury and damage of the appropriator entitled thereto. So soon as the prior appropriation**

> **and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right**, and an injunction against interference therewith is proper protective relief to be granted. **The subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence.**

Moe, 10 Idaho at 305-07 (emphasis mine).

And in Josslyn v. Daly, 15 Idaho 137, 96 P. 568 (Idaho 1908), the Idaho Supreme Court stated:

> **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, **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.** In this case there can be no reasonable doubt but that the **appellant is entitled to have at least the volume of water flow from these springs into Seaman's creek as great and to as full an extent as it was at the time the decree was entered** in Daly v. Josslyn, **provided these springs flow that much water at this time.**

Josslyn, 15 Idaho at 149 (internal citations omitted) (emphasis mine); see also Cantlin v. Carter, 88 Idaho 179, 186-87, 397 P.2d 761 (Idaho 1964).

In summary, at least three additional components or tenets of the prior appropriation doctrine relative to the administration/delivery/curtailment cases are:

1. in an appropriated water source, when a junior diverts or withdraws water in times of a water shortage, it is presumed that there is injury to a senior;
2. as soon as the senior establishes his prior appropriation and use, the burden then shifts to the junior who claims the diversion will not injure

the senior, to establish that fact first by clear and convincing evidence; and

3. that these two rules of law derive from the historical development of the prior appropriation doctrine, which carried over into the Constitution.

Moe, 10 Idaho at 305-07. Each has been reaffirmed by the Idaho Supreme Court, and each remains as part and parcel of Idaho's version of the prior appropriation doctrine, which is the law in this State today.

6. Futile Call

Futile call is defined by the CMR's as:

> 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.

IDAPA 37.03.11.010.08.

In Wells A. Hutchins's law review article, Hutchins describes the concept of futile call as follows:

> If neither the surface flow nor underflow of the stream, if undisturbed, would reach the point of diversion of a prior appropriator, such appropriator cannot complain of a diversion of water above him by a junior appropriator; **but the burden rests upon the latter** to show that neither the surface flow nor underflow if uninterrupted would reach the senior appropriator's diversion. **The same burden rests upon a junior appropriator of ground water, to show by direct and convincing testimony that his diversion will not injure or affect the diversion of a prior appropriator.**

Hutchins at 52 (emphasis mine).

7. Transfer of a Water Right v. Delivery Call to Fulfill a Water Right

While an in depth discussion regarding the concept and laws of a "transfer" versus a "delivery call" is not necessary, because the CMR's seem to "borrow" some transfer concepts and apply them to delivery or distribution calls, several points need to be addressed. Under Idaho law, a "transfer" of a water right refers to a change or alteration of one or more of the elements of the already established right. Idaho Code § 42-222 (WEST 2006); Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (Idaho 1993). On the other hand, a water delivery call is defined in the CMR's as: "a request from the holder of a water right for administration of water rights under the prior appropriation doctrine." IDAPA 37.03.11.010.04. Both a "transfer" request and a "delivery call/distribution demand," are addressed to the Director of IDWR.

The basic requirements for a transfer of a water right are codified in I.C. § 42-222, but the fundamental principles and overriding focus has been to scrutinize the proposal to prevent injury to one or more junior water rights, and/or secondly to prevent enlargement of the existing right. While I.C. § 42-222 statutorily protects all water rights from injury, the injury analysis focuses on the protection of junior water right holders who are entitled to those conditions in the source maintained as they found them when they first made their request for appropriation. Crockett v. Jones, 47 Idaho 497, 503-04, 227 P. 550 (Idaho 1929). Of primary import to the present case, when a transfer is proposed, the Director is allowed to re-examine and alter the elements of a right as a condition of granting the transfer. Hardy v. Higginson, 123 Idaho 485, 489, 849 P.2d 946 (Idaho 1993). In particular, one way to protect a junior water right from injury resulting from a transfer is to re-examine the quantity element of the right to be transferred and reduce the

quantity to the historical use (as opposed to the quantity stated in the decree or license). Thus, the three salient points of a transfer regarding the case at hand are:

1. The Director can "re-adjudicate" or adjust virtually any of the elements of the water right;
2. the focus is on the injury which might be caused to a junior; and
3. the burden of proof of no injury is on the senior seeking the transfer.

Water delivery calls or distribution demands, on the other hand, have an entirely different focus. According to Moe v. Harger, 10 Idaho 302, 307, 7 P. 645 (Idaho 1904), the mechanics of a water delivery call by a senior are:

1. When there is a water shortage;
2. the senior establishes his prior appropriation and right of use;[19]
3. injury to the senior is presumed by the diversion of the junior; and
4. the burden of proof is then on the junior to prove a lack of injury by an evidentiary standard of clear and convincing evidence.

Id. at 307.

In summary, suffice it to say, that in a transfer application, the burden is on the senior seeking the transfer to demonstrate no injury to the junior. In a water delivery call, just the opposite is true; the burden is on the junior to overcome the presumed injury to the senior by an evidentiary standard of clear and convincing evidence and the quantity element is not re-examined as a legally recognized condition of allowing the delivery call.

[19] This would be by a preponderance of the evidence standard, and in present day proceedings this would be established by the senior providing the Director a certified copy of his partial decree from the SRBA, together with the Basin Wide Issue 5 – Connected Sources language, showing the rights to be hydraulically connected, i.e., which, if any, were excepted.

8. Director's Duty to Administer/Distribute Water.

Because in the real world a water right is only as good as how it is administered, there have developed some rather well defined principles of administration. Those are:

1. The Idaho Legislature has adopted I.C. §§ 42-602, 42-603, and 42-607, which impose upon the Director and his watermasters the duty to administer water.

I.C. § 42-602 governs a watermaster's duties in "clear and unambiguous terms." R.T. Nahas Co. Hulet., 114 Idaho 23, 27 (Idaho 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 (Idaho 1994).

2. 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 (Idaho 1998); see also I.C. § 42-607; Stethern v. Skinner, 11 Idaho 374, 379 (Idaho 1905).
3. The priority system provides certainty to water right holders and "protects and implements established water rights." Almo Water Co. v. Darrington, 95 Idaho 16, 21 (Idaho 1972). Moreover, senior water right holders are "entitled to presume that the watermaster is delivering water to them in compliance with the priorities expressed in the governing decree." Id.
4. Of primary importance to the "takings issue" presented in this case is that individual water users or right holders have no authority to administer water on their own. Authorization to administer/distribute/curtail water is vested only in the Director and his watermasters and the Director has a clear legal duty to do so.

XI.

SPECIFIC ISSUES

1. Issue – Generally, whether the factors the Director takes into account in responding to a call are facially unconstitutional.

The Plaintiffs allege that CMR's are contrary to law and ultimately unconstitutional with respect to both (1) how the Director is to respond to a delivery call by a senior water right holder; and (2) the criteria or factors the Director must consider when responding to the call. The Plaintiffs identify numerous factors alleged to be contrary to law; factors such as: "material injury," "reasonableness of the senior water right diversion," "that the senior right could not be satisfied using alternate points and/or means of diversion," the concept of "full economic development," "compelling a surface user to convert his point of diversion to a ground water source," and "reasonableness of use." The Plaintiffs also allege that the consideration of these factors results in unreasonable burdens and delays ultimately impairing or interfering with the right of the senior making the call.

This Court agrees in part and disagrees in part with the foregoing assertions of the Plaintiffs. The Court disagrees that each of the above stated concepts or factors considered when responding to a delivery call are on their face contrary to the prior appropriation doctrine and therefore unconstitutional on their face. This determination must be evaluated in the context of the standard of review for a constitutional challenge to a statute or administrative rule. In particular, there is a presumption of constitutionality and if the provision can be construed in a manner which is constitutional, the provision will withstand the challenge. See State v. Prather,

135 Idaho 770, 772, 25 P.3d 83, 86 (Idaho 2001). In this respect, the Court finds that Plaintiffs did not meet this standard.

However, the Court finds the CMR's constitutionally deficient for failure to also integrate the concomitant tenets and procedures related to a delivery call, which have historically been held to be necessary to give effect to the constitutional protections pertaining to senior water rights. Specifically, the CMR's fail: 1) to establish a procedural framework properly allocating the well established burdens of proof; 2) to define the evidentiary standards that the Director is apply in responding to a call; 3) to give the proper legal effect to a partial decree; 4) to establish objective criteria necessary to evaluate the aforementioned factors; and 5) to establish a workable, procedural framework for processing a call in a time frame commensurate with the need for water – especially irrigation water.

2. Issue – Specifically, the factors to be considered by the Director can be construed consistently with the prior appropriation doctrine.

The factors and policies contained in the CMR's and alleged by the Plaintiffs to be contrary to law can be construed consistent with the prior appropriation doctrine. At first blush, many of the factors and policies set forth in the CMR's appear to be more akin to principles associated with the riparian doctrine, which as discussed earlier, has been specifically rejected in Idaho (riparian principles exist only to the extent they do not conflict with rights acquired through prior appropriation). Nonetheless, some of these factors and policies have also been considered in the context of the prior appropriation doctrine, although one must be careful to evaluate the context in which they were made. For example, the CMR's make a general statement of policy of reasonable use of surface and ground water.

> **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 by 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 public policy of reasonable use of water as described in this rule.**

IDAPA 37.03.11.020.03. (emphasis mine). The above quoted rule comes from at least three (3) distinct sources, namely: Article XV, § 5 (which deals chiefly with the subject of priorities as between water users in canal systems who expect to receive water under a "sale, rental, or distribution" from the canal, and not from the original diverter/water right holder); Article XV. § 7 (creating a State Water Resource Agency to formulate and implement a state water plan for optimum development of water resources in the public's interest; "optimal development" must be read together with section 3 to be "optimal development in accordance with the prior appropriation doctrine"); and the Rule announced in the Schodde case.[20] See Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1912). While the above rule is a "cut and paste" from these three distinct sources, none of which are "curtailment" sources, the Idaho Supreme Court did state in Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (Idaho 1915):

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[20] Schodde placed a waterwheel in the Snake River and sought to maintain a right to use the current of the river to operate the wheel which would be negatively affected by the construction of Milner Dam. The U.S. Supreme court stated:

> [T]he license given by the terms of § 3184 of the Revised Statutes of Idaho... does not confer upon such riparian owner the power to appropriate, without reference to beneficial use, the entire volume of a river or its current, to the destruction of rights of others, to make appropriations of unused water.

Schodde, 224 U.S. at 123. The Idaho Supreme Court in Arkoosh v. Big Wood Canal Co., stated:

> Schodde... is clearly distinguishable because therein the interference was not with a water right but with a current. In other words, the same amount of water went to Schodde's place as before ... this is an action for an injunction to restrain appellant from interfering with respondents' water rights.

Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 397 (Idaho 1929).

> A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the water of the state in the interest of agriculture and for useful and beneficial purposes.

Washington State Sugar Co., 27 Idaho at 44. In Farmer's Cooperative Ditch Co. v. Riverside Irrigation Dist., 16 Idaho 525, 102, P. 481 (Idaho 1909), the Idaho Supreme Court stated:

> Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water.

Farmer's Cooperative Ditch Co., 16 Idaho at 535-36. In Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61 (1960), the Supreme Court reiterated that the policy of the state is to secure the maximum use and benefit and least wasteful use of its resources. Poole, 82 Idaho at 502. Accordingly, at least on its face, the integration of this policy is not necessarily inconsistent with Idaho's version of the prior appropriation doctrine.

The CMR's define the factor of "material injury" as "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..." IDAPA 37.03.11.010.14. The result is that a senior user cannot call for water if the water is not, or will not, be put to a beneficial use, irrespective of whether the right is decreed. Idaho Code § 42-220 codifies that "neither such licensee nor anyone claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed." Idaho Code § 42-220 (WEST 2006). In addition, this concept was discussed in the constitutional debates. See Proceedings and Debates at 1136. Idaho case law is also replete with references to

the established principle that a water right holder is not entitled to divert more water under his right, albeit established, than he can put to a beneficial use. See Coulson v. Aberdeen – Springfield Canal Co., 39 Idaho 320 (Idaho 1924); Hutchins at 38-41 (numerous citations omitted). As a corollary, it therefore follows that a senior cannot make a call for water under his right if the water is not being put to a beneficial use consistent with his right or decree. No water user has a right to waste water. In an SRBA district court case deciding whether a remark should be included in the face of a partial decree to qualify that the amount of water that can be sought incident to a call was limited to its beneficial use, as opposed to the actual quantity stated in the decree, this Judge, then presiding in the SRBA, rejected the necessity of such a remark but held:

> Implicit in the quantity element in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: 'Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed'.' State v. Hagerman Water Right Owners, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997); quoting I.C. § 42-1402. However, **the quantity element in a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time** (i.e. there is no right to divert water that will be wasted). A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 415, 958 P.2d 568 (1997). **The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short result in a loss or reduction to the water right.** State v. Hagerman Water Right Owners, at 730, 947 P.2d at 403.
>
> Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In State v. Hagerman Water Rights

Owners, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:

> A water user is not entitled to waste water... It follows that a water right holder cannot avoid a partial forfeiture by wasting portion of his or her water right that cannot be put to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, a forfeiture has taken place.

Id. (citations omitted).

> NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

Memo. Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman (Nov. 23, 1999) (Barry Wood, SRBA Presiding Judge) (emphasis mine). On this basis the Court does not find the concept of "*material injury*" to be facially inconsistent with prior appropriation.

The concept of "reasonableness of diversion" is also a tenet of the prior appropriation doctrine. It is established with respect to both ground and surface water that a water user may not command the entirety of a volume of water of a ground or surface source to support his appropriation for a beneficial use involving less than the entire volume. Rather, there is a "reasonableness" limitation imposed on the appropriation. In Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1911), the U.S. Supreme Court upheld the determination that a water user could not appropriate the entire flow of the river to satisfy a limited beneficial use. Schodde, 224 U.S. at 107. As discussed earlier, however, Schodde dealt with the current of the

river, not the water right. The Court discussed a limitation based on the reasonableness of the diversion in contrast to the quantity actually being put to beneficial use. Id. As far as ground water is concerned, following the enactment of the Idaho Ground Water Act in 1951, I.C. § 42-226, *et seq.*, senior ground water pumpers were protected only to the extent of reasonable ground water pumping levels as established by the Director. Idaho Code § 42-226 (WEST 2006). Prior to its enactment and application, ground water pumpers were protected to historic pumping levels but subject to subsequent appropriators bearing the cost of changing the senior's method or means of diversion. Parker v. Wallentine, 103 Idaho 506, 512, 650 P.2d 648 (Idaho 1982); (citing Noh v. Stoner, 53 Idaho 651, 26 P.2d 1112 (Idaho 1933); Hutchins, Protection in Means of Diversion of Ground Water Supplies, 29 Cal L. Rev. 1, 15 (1941)). The overriding policy in support of this reasonableness limitation rests on the policy of the maximum use and benefit of the state's water resources. Parker 103 Idaho at 513; citing Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61, 65 (Idaho 1960).

The concept of being able to compel a senior to modify or change his point of diversion under appropriate circumstances is also consistent with the prior appropriation doctrine. As explained in Noh, the Idaho Supreme Court expressly held that although a senior was protected to historic pumping levels, to ensure full economic development of water resources, subsequent appropriators could nonetheless compel the senior to change his method or means of diversion, albeit at the expense of the subsequent appropriator. Noh, 53 Idaho at 657. How this principle would apply to hydraulically connected surface spring users has yet to be decided. In particular, whether the senior surface user is protected to historic levels but could be compelled to convert to ground water at the expense of subsequent appropriators, or whether the means and level of diversion prevents a Schodde type situation, in that a senior spring user cannot tie up the entire

volume of water of an aquifer in order to maintain the natural flow of a spring.[21] In all likelihood, this determination would have to be determined on a fact specific basis. Nevertheless, the principles are generally consistent with the prior appropriation doctrine.

This same reasoning relates to the ability of the Director through the CMR's to require replacement water in lieu of hydraulically connected surface water diverted under the senior right, so long as no injury inures to the senior. Provided, however, that the subsequent appropriator must bear the cost of supplying the replacement and the replacement must be timely. This replacement reasoning is also consistent with the nature of a water right. A water right is an usufructuary right. Proceedings and Debate at 1128. See also, Mr. Heyburn's comments at id. at 1168. The appropriator has the right to divert and put the water to beneficial use but does not own the corpus of the water. See id.

3. Issue - The CMR's fail to incorporate any of the necessary and historically established constitutional protections pertaining to water rights.

Although the factors enumerated above, which are listed in the CMR's, survive a facial challenge, the absence of any of the concomitant historically and constitutionally established procedural components, including: presumption of injury, burden of proof, objective standards for review, and failure to give due effect to the partial decree for a senior water right, do not withstand such a challenge. Such components are necessary to protect and prevent diminishment to vested senior property rights. Stated another way, it is these concomitant procedural components which give the primary effect and value to "first in time, first in right."

[21] This Court refers to this as the "bath tub" example; more specifically, with the aquifer being the bath tub and the spring being the overflow from the bathtub, and the result being that the only time the "over-flow" produces water is when the bath tub is full.

This Court acknowledges that most of the issues pertaining to the principles comprising the prior appropriation doctrine have developed in the context of surface water only. Applying these same principles to the integration of surface and ground water presents an entirely new set of complexities. Nonetheless, because the law requires administration in accordance with Idaho's version of the prior appropriation doctrine, these surface/ground water complexities cannot override the procedural mechanisms that have historically and constitutionally been in place to ensure that the administration of a water right does not undermine the decreed elements of such a water right. The lack of any meaningful timely process, objective standards or established burdens allows administration of the right under the CMR's to circumvent certain constitutional protections that have been historically accorded water rights. The result is a diminishment of the senior water rights which amounts to an unlawful taking.

A. CMR's improperly allow re-evaluation or de facto re-adjudication of a decreed right.

With the exception of the water rights from Basin 01 (the main stem of the Snake River upstream from Milner Dam), the water rights at issue are within one or more organized water districts in accordance with I.C. § 42-602, *et seq.* Significant to this analysis is that many of these rights have been adjudicated and decreed in the SRBA.[22] This means that the elements of the rights have already been judicially determined. Accordingly, most but not all issues pertaining to quantity, reasonable use, waste, beneficial use, reasonableness of diversion, etc. should have been previously identified in the Director's investigation and subsequent

[22] Some may still be in the process of being adjudicated in the SRBA but are being administered according to the Director's recommendation.

recommendation to the SRBA Court as part of the SRBA adjudication process.[23] These issues would then have been litigated and ultimately adjudged. This does not mean, as IGWA correctly points out, that a senior initiating a call is always using the right consistent with its decreed elements. For example, if a water user is not irrigating the full number of acres decreed under the right he would be precluded from making a call for the full decreed quantity. Clearly, the Director has the duty and authority to consider such circumstances when responding to a call.

In State v. Hagerman Water Rights Owners, 130 Idaho 736, 947 P.2d 409 (Idaho 1997), the Idaho Supreme Court discussed the effect of a decreed right in the SRBA pointing out that decreed rights are not insulated from being lost or reduced based on evidence that the right has been forfeited. Hagerman Water Rights Owners, 130 Idaho at 741. Consistent with this reasoning is the acknowledgment that a partial decree is not conclusive as to any post-adjudication circumstances or unauthorized changes in its elements. However, that same reasoning does not permit the Director the authority to "shoe-horn" in a complete re-evaluation analysis of the scope and efficiencies of a decreed water right in conjunction with an administrative delivery call. As this Court previously discussed in a prior section of this decision, a delivery call does not convert a water right to a transfer proceeding.

The consequence of a de-facto re-evaluation process is that the senior is put in the position of having to re-defend the elements of his adjudicated right every time he makes a delivery call for water. This creates several problems. First, it fails to give conclusive effect to the adjudicated right. To the extent the senior is using the right consistent with its decreed elements, it is *res judicata* as to the scope and efficiencies of the water right. It should be pointed out that in the course of the SRBA proceedings, a claimant either had to overcome the presumptive effect of the Director's recommendation by proving up the elements of his water

[23] Issues related to specific aquifer levels may not be identified and litigated as part of the adjudication process.

right; or had to have the Director's concurrence with any proposed settlement. It is contrary to law that the Director, or any party to the SRBA could, in effect stipulate to the elements of a water right in one proceeding and then collaterally attack the same elements when the right is later sought to be enforced. A decreed water right is far more than a right to have another lawsuit, only this time with the Director.

Second, in order to give any meaningful constitutional protections to a senior water right, a delivery call procedure must be completed consistent with the exigencies of a growing crop during an irrigation season. The SRBA adjudication process for a water right extends well beyond the time frame of an irrigation season. The same is also true in an administrative transfer proceeding in which the elements of the right are properly and legally subject to a complete re-evaluation. See I.C. § 42-222. Ultimately, putting the senior in the position of having to re-defend a decreed right in a delivery call undermines the water right, as the process cannot be completed consistent with the exigencies related to the irrigating of crops. Moreover, any delay occasioned by the process impermissibly shifts the burden to the senior right, thus diminishing the right. The concept of time being of the essence for a water supply for irrigation rights is one of the primary basis for the preference system in § 3 of Article XV of the Constitution.

> The CHAIR. ... I will say to the gentleman that I was on that committee, and the object of putting in that clause was, that where water had been used for the three purposes from one ditch, and the water ran short, the preference should be given first to domestic purposes, household use, and next to agricultural purposes, because **if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost. That is the reason the committee saw fit to state it in that manner.**

Proceedings and Debates at 1115 (emphasis mine); see also id. at 1122-23.

B. The CMR's omission of presumption of injury, burdens of proof, or evidentiary standards, which are part and parcel of Idaho's version of the prior appropriation doctrine, is unconstitutional on its face.

In a prior section of this decision, this Court discusses certain principles and tenets of Idaho's version of the prior appropriation doctrine. The CMR's list the factors the Director is to consider when responding to a delivery call. However, the CMR's exclude the procedures for responding to a call that are integral to the prior appropriation doctrine. It is well established in Idaho that incident to a call a senior must show by a preponderance of the evidence that his water right is hydraulically connected to juniors alleged to cause injury. Moe, 10 Idaho at 305-07. Upon such a showing, injury is then presumed. Id. Hydraulically connected juniors then have the burden of demonstrating by a standard of clear and convincing evidence that curtailing their rights would not result in a return to the senior making the call. Id. These respective burdens are integral to the constitutional protections accorded water rights. Id. The CMR's make absolutely no reference to these relative burdens of proof. Counsel for the IDWR acknowledged this at oral argument: "The [CMR's] do not as I recall, specifically mention burden of proof. The senior is required to make a call, and **the director evaluates the criteria.**"[24] Tr. page 72 (emphasis mine). Given the complexities and uncertainties associated with the integrated administration of ground and surface water, the application of the appropriate evidentiary standards and relative burdens are essential in order for the Director's findings to be in compliance with established constitutional procedures. Under these circumstances, no burden equates to impermissible burden shifting.

[24] To this Court, this statement speaks volumes as to the shortcomings of the CMR's as presently drafted. This approach significantly and immediately diminishes the senior right. This procedure also nearly instantaneously places the calling right and the Director in an adversarial position. This position is inconsistent with I.C. § 42-607 and with the burden being on the junior.

There is also a significant difference in standards of required proof based on clear and convincing evidence, a preponderance of evidence, and simply a discretionary standard of "reasonableness" in the eyes of the Director as used in the administrative process. The evidentiary standard of "preponderance of evidence" means "such evidence, as when weighed with that opposed to it, has more convincing force and from which it results, that the greater possibility of truth lies therein." Big Butte Ranch, Inc. v. Grasmick, 91 Idaho 6, 9, 415 P.2d 48, 51 (Idaho 1966). The evidentiary standard of "clear and convincing evidence is a heightened standard and means "a greater degree of proof than a mere preponderance." Idaho State Bar v. Topp, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (Idaho 1996). The CMR's need to define the appropriate standard the Director is to apply when responding to a call, and allocate the burdens according to established principles of the prior appropriation doctrine. As discussed in the next section, a discretionary standard of "reasonableness" in the eye of the Director does not comport with the Constitution.

C. The CMR's are also devoid of any objective standards against which the Director is to apply the various criteria.

The application of the CMR's is further problematic because of the absence of any objective standards from which to evaluate the criteria the Director is to consider when responding to a delivery call. The CMR's list the various criteria the Director is to consider when responding to a delivery call, and then evaluate these criteria in the context of a "reasonableness standard." However, there is nothing more concrete to establish what is or is not reasonable. For example, there is a significant difference between a finding of unreasonableness based on a water user's ability to employ new technology to conserve water,

such as converting from flood to sprinkler irrigating and a finding of unreasonableness based on waste.[25] See State v. Idaho Dept. of Water Administration, 96 Idaho 440, 448, 530 P.2d 934, 932 (Idaho 1974); see also Wells A. Hutchins, Idaho Law of Water Rights, 5 Idaho L. Rev. 1 (1968). Another problem is the absence of any standards governing when a call becomes futile taking into account the delayed impact associated with ground water movement and when pumping actually becomes adverse to a senior. Questions arise, such as how far into the future may a senior consider when making a call, when does pumping actually become adverse to a senior, and can a senior make an anticipatory call. The way the CMR's are now structured, the Director becomes the final arbiter regarding what is "reasonable" without the application or governance of any express objective standards or evidentiary burdens. The determination essentially becomes one of discretion, which is inconsistent with the constitutional protections specifically accorded water rights. The absence of any standards or burdens also eliminates the possibility for any meaningful judicial review of the Director's action as under applicable standards of review, as any reviewing court would always be bound by the Director's recommendation as to what constitutes reasonableness.

The Idaho Supreme Court acknowledged these procedural constitutional deficiencies in the CMR's in A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568 (Idaho 1997) in the context of determining the necessity for a general provision on conjunctive management in the SRBA, when it stated:

> The Rules [CMR's] adopted by the IDWR are primarily directed toward an instance when a 'call is made by a senior rights holder, and do not appear to deal with the rights on the basis of 'prior appropriation' in the event of a call as required.

[25] It would seem that every mandate requiring greater efficiencies through technology would have to come from the legislature, subject to constitutional review by the Idaho Supreme Court, as opposed to an ad hoc determination by the Director who is charged with the administration of a decreed right.

A&B Irrigation District, 131 Idaho at 422; (citing Musser v. Higginson, 125 Idaho 392, 871 P.2d 889 (Idaho 1994)).

In the final analysis, one only need to step back from the trees and look generally at the process currently in place. In the Director's effort to satisfy all water users on a given source, seniors are put in the position of re-defending the elements of their adjudicated water right every time a call is made for water. The call is the process and means by which effect is given to a water user's priority, which is the essence of the right under a prior appropriation system. The mechanism now in place also creates a process that cannot be completed within the attendant time frame exigencies associated with water usage for a crop in progress. In practice, an untimely decision effectively becomes the decision; i.e. "no decision is the decision." Finally, the Director is put in the expanded role of re-defining the elements of water rights in order to strategize how to satisfy all water users as opposed to objectively administering water rights in accordance with the decrees. While full economic development of the state's water resources may be consistent with prior appropriation, even to satisfy prior appropriation, it must be a policy that cuts both ways.

Additionally, the Director or his watermasters are the only ones who can administer these water rights. See Idaho Code 42-603. The individual owner cannot. Therefore, to the extent the Director's application of the CMR's diminish proper administration of the senior's water right, they are unconstitutional. In other words, and assuming the water would otherwise be available, inherent in the senior's water right is the right to use the water. While some minimal due process is required, setting up a procedural labyrinth of requiring a senior water right holder to initiate a contested case proceeding (CMR 30.02.) in accordance with the administrative proceedings which cannot be completed during the irrigation season prevents timely administration to a

growing crop, and is not what either the framers of the constitution had in mind or what the legislature had in mind in adopting I.C. § 42-607.

D. This Court's view on incorporating the procedural framework and the CMR's.

The CMR's attempt a basic framework for the integrated management of ground and surface sources. However, based on the foregoing discussion, and by way of illustrating the deficiencies and providing context, it is this Court's view that the CMR's need to also incorporate the following:

1. Showing by senior making the call:

The senior making a call would be required to file a call with the Director in writing. Previously, in a related case, this Court held that the provisions of Idaho Code § 42-406 should be "self-executing" in that the watermaster should simply engage in curtailment to satisfy rights in order of priority. This Court has since reversed itself on that point.[26] A call in writing is not only necessary to put the Director on notice that the senior is not receiving sufficient water on a given source, but also to initiate a process which incorporates the historically established constitutional burdens and procedures. These procedures and burdens not only protect seniors but also protect junior rights in the event a call is futile. Simply put, the CMR's as currently worded only give "lip service" to these burdens and procedures and do not give a water user the opportunity to exercise the process. In conjunction with making the call, the senior should also be required to produce his decree and could also be required to submit an affidavit attesting he is

[26] See Order Denying IDWR's I.R.C.P. 12(c) Motion for Judgment on the Pleadings and Motion to Dismiss, filed Nov. 1, 2005; See also Order on Motion for Reconsideration of Court's Order Denying IDWR's I.R.C.P. 12(c) Motion for Judgment on the Pleadings and Motion to Dismiss, filed Jan. 30, 2006; and Order on IDWR's Renewed Motion for Reconsideration of Court's Order Denying IDWR's I.R.C.P. 12(c) Motion for Judgment on the Pleadings and Motion to Dismiss, filed April 28, 2006 (Gooding County Case No. 2005-426).

beneficially using all water or all water being sought will be beneficially used consistent with the elements contained in the decree. For example, the senior should be required to at least attest as to the number of acres authorized under the right sought to be irrigated.

The senior must then also demonstrate hydraulic connectivity with juniors alleged to be causing injury. This can be demonstrated by producing the general provision on connected sources issued in every sub-basin within the SRBA. Memorandum Decision and Order of Partial Decree, Basin Wide Issue No. 5, Connected Sources General Provision (Conjunctive Management) (Feb. 27, 2002).

At this point, injury by hydraulically connected juniors is presumed. See Moe, 10 Idaho at 306-07.

2. Application of methodology to determine scope of juniors causing injury.

The determination of which specific juniors are causing injury with respect to ground water is infinitely more complex than making the same determination as between surface users, and the methodology and science is not exact. The methodology and science, and hence the result, has and will change as the accuracy of data and science improves. Nonetheless, and as suggested by at least one affidavit filed in this case, perhaps the state's collaborative ground water model (Enhanced Snake Plain Aquifer Ground Water Model, or "ESPAM") may in fact present the best evidence presently available.[27] The application of which, if based upon sound

[27] See Aff. Gregory K. Sullivan (December 6, 2005). The Director states he in fact used this computer model in fashioning his Order of May 6, 2005 (See ¶ 42, p. 10); Order of June 24, 2005 (See ¶ 13, p. 4); and Order July 22, 2005 (See p. 3). This Court expresses no opinion on whether this computer model is the best available science currently available.

admissible standards, could determine the relative effects of curtailment of certain wells as well as arguably satisfy the clear and convincing evidence standard.[28]

3. Application of criteria for determining futile call.

The CMR's do not specify criteria for determining when a call against ground water is futile, taking into account delays in impact of subterranean flows. For example, what period of time between curtailment and receipt by the calling senior of a beneficial quantity must pass before a call is considered futile? Also, when does pumping by the junior become adverse to the senior? Must the senior experience actual deprivation of water or can the call be made on an anticipated reduction? To this Court's knowledge, Idaho has yet to address this issue. Although the determination would be a mixed question of law and fact, some of the legal standards or criteria may have to come from the legislature, subject to constitutional review by the Idaho Supreme Court.

Following the application of any such criteria to the results of a reliable ground water model, or other suitable method of proof, the Director would have the best scientific evidence based on a clear and convincing standard regarding which juniors are causing injury and subject to curtailment. The Director could then promptly issue a preliminary recommendation in accordance therewith, and serve the affected parties.

4. Notice to juniors subject to curtailment and notice to seniors of futility of call as to certain connected juniors, and notice of hearing.

[28] This could result, of course, in curtailment of ground water diversions which have a more direct and immediate hydraulic connection to the calling right as opposed to curtailment based solely upon priority. See Director's Order Regarding IGWA Replacement Water Plan, ¶ 8, p. 3 (May 6, 2005).

The parties who may be curtailed are entitled to at least minimal due process of law, notice of the proposed action, and the opportunity to be heard.

5. Hearing.

The Director could then conduct a hearing whereby juniors and seniors would have the opportunity to put on evidence and try to rebut the preliminary findings of the Director based on the results of either the ground water model or other suitable method. Juniors would also have the opportunity to put on evidence to try and establish that the senior is wasting water contrary to the partial decree as well provide a mitigation plan for replacement water; or to try to establish a futile call. Obviously, if the senior is wasting water then there is no "material injury" to the extent of the quantity wasted.

6. Burdens of Proof.

The burden is also on the junior to show by clear and convincing evidence that uninterrupted flows would not result in a usable quantity to the senior. Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220 (Idaho 1976) (burden on junior to demonstrate uninterrupted flows would reach point of diversion of seniors); Martiny v. Wells, 91 Idaho 215, 219, 419 P.2d 470 (Idaho 1966) (burden on junior to show water not tributary); Jackson v. Cowan, 33 Idaho 525, 528, 196 P. 216 (Idaho 1921) (burden of proving stream would not reach reservoir on junior); Josslyn v. Daly, 15 Idaho 137, 149, 96 P. 568 (Idaho 1908) (junior must produce clear and convincing evidence showing prior appropriation not affected by diversion); Moe v. Harger, 10 Idaho 302, 306, 77 P. 645 (Idaho 1904) ("theories neither create nor produce water.")

7. Ruling on replacement water or changing means or method of diversion.

In ruling on replacement water, or requiring a senior to change his point of diversion, the Director could then make a ruling, taking into account whether the senior is protected to historical diversion levels or reasonable aquifer levels; depletionary effects by juniors on the aquifer and integrated rate of recharge for the aquifer; whether requiring replacement water or change in means or method of diversion would result in injury to senior, or other hydraulically connected water users.

8. Final Decision.

The Director would then issue a final decision, applying the relative evidentiary standards. Juniors seeking to prove waste must also satisfy the clear and convincing standard. Juniors seeking to supply replacement water must also demonstrate by clear and convincing evidence that no injury would result to the senior making the call.

9. Time is of the essence.

At least as to curtailment for irrigation water the CMR's must recognize that time is of the essence and set up procedural time frames commensurate with these constitutional principles. Anticipatory calls may well be necessary to accommodate the time constraints.

IGWA argues that no where does the Constitution speak of "immediate administration." IGWA's Memo. at 27 (Dec. 6, 2006). IGWA's statement is correct to the extent the words "immediate administration" are not used. However, as chronicled in the historical portion of this decision, a primary consideration of the preference system in Section 3 was to protect "crops in progress, being green..." Proceedings and Debates at 1115 and 1123. I.C. § 42-607 provides the

means for curtailment – the watermaster fastens the headgate or other diversion device. In fact, the constitution contemplates timely administration in two respects: priority in time and preference in use. That was the "real world" then and it is the real world today.

4. Issue -- CMR's Exemption of Domestic and Stock Watering Ground Water Rights from Administration

The Constitutional Provision. As stated earlier, Article XV, Section 3 provides, in part:

> ...Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law[29]) have the preference over those claiming for any other purpose... But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

The CMR Provisions: IDAPA 37.03.11.020.11. provides in part

> **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 is within the limits of the definition set forth in Section 42-1401A(11), 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.

IDAPA 37.03.11.020.11 (emphasis mine).

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[29] For the limitations prescribed by the legislature to domestic purposes, see Idaho Code § 42-111 (WEST 2006).

Limitations prescribed by law: I.C. § 42-111 provides in part:

> **42-111. Domestic purposes defined.** – (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic use" means:
>
> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
>
> (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five (2,500) gallons per day.
>
> (2) For purposes of sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

I.C. § 42-111.

I.C. § 42-1401A(11) provides:

> **42-1401A. Definitions.** – The following terms are defined for purposes of this chapter as follows:
>
> (11) "Stock watering use" means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

Idaho Code § 42-4201A(11) (WEST 2006).

Applicable provisions of I.C. § 42-602, *et seq*: I.C. § 42-602 provides:

This Court has already quoted I.C. §§ 42-602 and 603. These are incorporated herein by reference.

I.C. § 42-607 provides

> **42-607. Distribution of water. – It shall be the duty of said watermaster to distribute the waters of the** public stream, streams or

> **water supply, comprising a water district,** among the several ditches taking water therefrom **according to the prior rights of each respectively, in whole or in part,** and to shut and fasten, or cause to be shut and fastened, under the direction of the department of water resources, the headgates of the ditches or other 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; provided, that any person or corporation claiming the right to use the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply, and the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit or licensed right in such stream or water supply. So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.

Idaho Code § 42-607 (WEST 2006) (emphasis mine).

Summarily stated, the CMR's attempt to exclude administration of domestic water rights from ground water sources is both facially unconstitutional and is also otherwise unlawful as being in violation of I.C. §§ 42-602, 42-603, and 42-607.

As to being facially unconstitutional, Article XV, § 3 grants domestic use (subject to legislatively created restrictions), in times of scarcity, a preference for use over other uses. However, this preference is subject to the following: "But the usage by subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in Section 14 of Article I of this Constitution." Idaho Const. Art. XV, § 3.

Thus, the Constitution provides the method for dealing with domestic ground water uses in times of shortage and ignoring them to the detriment of seniors is not the method.[30] Such conduct, especially the cumulative effect, diminishes the value of senior rights, which is an unlawful taking.

> Mr. BEATTY. They ought to have no right, but you propose by this section [section 3] to give them that right because they are going to use the water for domestic purposes. These people that come and start the town propose to use it for domestic purposes, and that, you say, by this section, shall be a superior right to that of the farmer who took it up for agricultural purposes.
>
> Mr. HASBROUCK. That is only in time of scarcity.
>
> Mr. BEATTY. It matters not whether it is in time of scarcity or not. Why should you, because water is scarce, take it away from the man who was first entitled to it, in times of scarcity or any other time.

Proceedings and Debates at 1141. Thus, the framers of the Idaho constitution clearly understood the cumulative effect of domestic use. It must be remembered that the framers also considered a specific proposed Amendment to Section 3 which could have given domestic uses an absolute preference without the requirement of compensation. Had this amendment been adopted, it would support the CMR's exclusion of domestic rights. However, this amendment was specifically withdrawn.

I.C. § 42-602 requires the Director (in water districts) (and the Constitution makes the requirement apply everywhere in the State) to administer water in accordance with the prior appropriation doctrine; and this includes domestic uses. As such, the Director is without authority to "pick and choose" which parts or tenets of the doctrine he wants to utilize or follow. The Director's duty is to administer water in accordance with the prior appropriation doctrine; that is, all of the rights in accordance with all of the doctrine.

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[30] It should be noted that the CMR's are entirely silent on any of the preferences set forth in Article XV, § 3.

In addition to the Constitutional infirmity, through I.C. § 42-603 the legislature authorized the Director to adopt rules and regulations "for the distribution of water from ... ground water ... sources as shall be necessary to carry out the laws in accordance with the priority of the rights of the users thereof." The legislative intent here is clear and unambiguous.

The exclusion of junior ground water users for domestic purposes does not respond to this legislative charge. The Idaho Supreme Court in Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 41 P.3d 237, 241 (Idaho 2001) states the following legal principle:

> **When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.** However, regulations of administrative agencies are generally upheld if they are reasonably directed to the accomplishment of the purposes of the statutes under which they are established.
>
> A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statutes under which it is made just as though it were prescribed in terms therein. **To be valid, an administrative regulation must be adopted pursuant to authority granted to the adopting body of the legislature. A regulation that is not within the expression of the statute, however, is in excess of the authority of the agency to promulgate that regulation and must fail.**
>
> **In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative powers to modify, alter, enlarge or diminish provisions of a legislative act that is being administered.**
>
> The final responsibility for interpretation of the law rests with the courts. **A court must always make an independent determination whether the agency regulation is 'within the scope of the authority conferred' and that determination includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute.** The Yamaha court [see Yamaha Corp. of America .v State Board of Equalization, 19 Cal.4th 1, 78 Cal.Rptr.2d 1, 960 P.2d 1031, 1041 (Cal. 1998).] described the narrow standard under which quasi-legislative rules are reviewed as 'limited to a

> determination whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law' and distinct from the broader standard courts apply to interpret rules.

Roeder Holdings, 136 Idaho at 813 (internal citations omitted) (emphasis mine).

Moreover, I.C. § 42-111 recognizes a domestic use not to exceed thirteen thousand (13,000) gallons per day.[31] This Court would characterize that quantity as being fairly generous or "beefy." Taking into account the cumulative effects of such rights, particularly in a relatively confined geographical area, could easily exacerbate the effect of ground water withdrawal for domestic purposes. The CMR's recognize the concept of "ground water rights either individually or collectively causes material injury..." IDAPA 37.03.11.020.01.

For a case that judicially recognizes the obvious collective effect of multiple small ground water withdrawals for domestic purposes, see the Washington Supreme Court case of State of Washington v. Campbell & Gwinn, 146 Wash.2d 1, 43 P.3d 4 (Wash. 2002).

Going back in time to the constitutional debates and tracing the development of Section 3 through the Convention by the various proposed amendments, it is absolutely clear that while the framers recognized the importance of domestic rights, and ultimately granted these rights a preference over other uses in times of shortage, priority is still recognized and the junior domestic uses must pay. Therefore, the Director's wholesale exclusion of such domestic rights from administration is unequivocally unconstitutionally and can amount to an unlawful taking of prior vested water rights. The Legislature, by enacting I.C. §§ 42-1420 and 42-227, cannot change Article XV, § 3.

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[31] It should also be noted that the constitutional preference for domestic purposes would also likely include domestic uses of water under a municipal water right, yet municipal water rights are not exempted under the CMR's.

5. Issue – Whether the CMR's Concept of "Reasonable Carryover" Injures Vested Senior Storage Water Rights and Violates Idaho's Constitution and Water Distribution Statutes.

The issue regarding storage water arises from the CMR's Rule 42.01.g. and the Director's application/threatened application as stated in his orders relating to Plaintiffs' delivery call of January 14, 2005; specifically, the three attached to Plaintiffs' Complaint. See Pl.'s Compl., Ex. B, Order Regarding IGWA Replacement Water Plan; Ex. C, Order Approving IGWA's Replacement Plan for 2005; and Ex. D, Supplemental Order Amending Replacement Water Requirements (Aug. 15, 2005).

The applicable CMR provides:

> **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:
>
> ***
>
> **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 employment 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.

IDAPA 37.03.11.042.01.g. (emphasis mine).

This Court's review of the rather voluminous record has revealed that the actual storage rights at issue are not in the record in this case. However, footnote 1 to Plaintiffs' Complaint provides as follows:

> The United States Bureau of Reclamation holds various water rights for the diversion of water from the Snake River for irrigation, reservoir storage for irrigation, and reservoir releases for irrigation and incidental power generation under some rights. The nature and extent of the spaceholers' [sic] ownership interests in the storage water rights is currently at issue before the Idaho Supreme Court on appeal from the SRBA District Court (Case No. 39576, Consolidated Subcase No. 91-63). The plaintiffs own storage space in these reservoirs pursuant to contracts they entered into with Reclamation, and in some cases have filed their own storage water right claims. **For purposes of the priority dates attached to the storage space held by plaintiffs in various reservoirs**, a portion of Reclamation's water rights are described as follows: 1) Water Right No. 01-00285, 1.7 million acre-feet, decree, American Falls, **March 30, 1921**; 2) 01-02064, 1.8 million acre-feet, license, American Falls, **March 30, 1921**; and 3) 01-02068, 1.4 million acre-feet, Palisades, **June 28, 1939**.

Pl.'s Compl. n. 1 ¶ 10.B (emphasis mine).

Additionally, and for the purpose of this ruling, the Director in his Orders of May 6, 2005; June 24, 2005; and July 22, 2005 (see Pl.'s Compl. Ex. B, C, and D) acknowledges that Plaintiffs have storage rights (the exact amount may be at issue and obviously, the nature of the title – legal v. equitable – is presently before the Idaho Supreme Court).

The gist of the argument between the parties can basically be stated as follows: Is the vested property right of the Plaintiffs' storage right the face amount of the right (contract, license or partial decree) or is it some yearly variable amount expressed in terms of "reasonable carryover" as determined by the Director?[32]

Mr. Roger Ling of the Surface Water Coalition asserts that:

> The most flagrant abuse in the doctrine of the Conjunctive Management Rules and that [Sic] the provision in Rule 42 which provides that the Director has the authority to determine the extent to which water supplies

[32] In practice, this argument may be better illustrated by an example. Assume the senior has a natural flow right out of the main stem of the Snake River for diversion of 100 cfs and a storage right in an upper basin reservoir of 1000 AFA. Of this 1000, 900 AFA is actually in storage. Further assume that at the time of the delivery call by the senior, there is only 80 cfs available in the river. Assuming the storage right is senior to the junior diversion, can the senior curtail the junior to get the other 20 or must the senior go to his storage right?

> are available to it before it will determine whether or not there is material injury.

Transcript of Oral Arguments on Plaintiffs' Motion for Summary Judgment, April 11, 2006, pages 38-39.

Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, lodged October 14, 2005, states in part as follows:

> The 'material injury' factors in Rule 42 also contain a concept of 'reasonable carryover.' As written, the Rule allows the Director to avoid administration even though junior ground water rights interfere with storage water rights. In other words, the Rules allow the Director to refuse to order curtailment of junior ground water rights to satisfy senior storage water rights under the theory that a senior is only entitled to an amount of 'reasonable carryover' storage water, not the amounts listed on the relevant storage water rights and contracts seniors have with the United States Bureau of Reclamation. *See May 2, 2005 Amended Order* at 15-16 ¶ 70' Ex. A to *Rassier Aff.* (listing Plaintiffs' storage space and storage water right entitlements).

Pl.'s Memo. in Support of Pl.'s Mot. S.J. 40 (Oct. 14, 2005).

The Director's further threatened application of the CMR's is recited in Plaintiffs' Memorandum of October 14, 2005 at pages 41 and 44 as follows:

> By way of example of Plaintiffs' request for administration in 2005, the Director determined the following 'reasonable carryover' storage water amounts, contrary to the licensed and decreed water rights, and vastly less than what has historically been carried over by the respective entities (in acre-feet):

	Reasonable Carryover Determined by Director	Total Storage Rights Owned by Entity
A&B Irrigation District	8,500	137,626
American Falls Res. Dist. #2	51,200	393,550
Burley Irrigation District	0	226,847
Milner Irrigation District	7,200	90,591
Minidoka Irrigation District	0	366,554
North Side Canal Company	83,300	859,898
Twin falls Canal Company	38,400	245,930

> *May 2, 2005 Amended Order* at 15-16, ¶ 70 (storage rights) compared to 26, ¶ 119 (reasonable carryover determinations), Ex. A to *Rassier Aff.* Strikingly, although Burley and Minidoka irrigation districts have vested property rights in 226,487 acre-feet and 366,554 acre-feet of storage space in Reclamation reservoirs in Water District No. 1, the Director, under a Rule 42 'reasonable carryover' analysis, determined they have ***no right to carry over any water*** for any purposes of administration against junior priority ground water rights. Even though Burley and Minidoka had averaged approximately 95,900 acre-feet and 150,300 acre-feet of carryover storage between 1990 and 2004, the Director refused to acknowledge any amount of carryover storage under their senior rights. *See Order* at 20, 21. ¶ 95, Ex. A to *Rassier Aff.*

Pl.'s Memo. in Support of Pl.'s Mot. for S.J. at 40 (emphasis in original).

The threatened application of this rule by the Director is still further stated by the Plaintiffs in their Memorandum as follows:

> Just such a 'determination' was made in the Director's May 2, 2005 *Amended Order* in responding to Plaintiffs' request for water administration. For example, instead of honoring the decreed elements of Plaintiffs' senior water rights, the Director arbitrarily picked a single water year (1995) and 'determined' the total amount of water diverted by Plaintiffs that year was all the water they were entitled to demand for purposes of administration in 2005:
>
> > 91. ***A full supply of water*** for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company ***is not the maximum amount of combined natural flow and storage releases diverted that yielded full headgate deliveries***, based on these entities' definition of full supply, ***but the minimum amount of combined natural flow and storage releases diverted recently that provided for full headgate deliveries***, recognizing that climatic growing conditions do affect the minimum amount of water needed and such affects can be significant.
> >
> > ***
> >
> > 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***...

> [Citing to the Director's] May 2, 2005 *Amended Order* at 20, 25 (emphasis added). See Ex. A to *Rassier Aff.*
>
> Clearly, the Rules allow the Director to 'redefine' senior water rights for purposes of administration. Instead of looking at the face of the decrees or licenses to determine how Plaintiffs' water rights would be administered according to priority, the Director arbitrarily determined that 1995 would serve as the 'minimum supply' needed to make full water deliveries and that total amount would serve as the basis for the rights in administration. Moreover, the Rules permit the Director to determine a water user's 'need' based upon 'combined' diversions of natural flow and storage, even though those rights are separate water rights entitled to separate priority administration pursuant to Idaho's constitution and water distribution statutes. Such a process flies in the face of the prior appropriation doctrine and renders court adjudications, like the SRBA, which has been progressive for almost twenty-six years, meaningless.

Id. at 43-44.

In its Memorandum in Opposition of Summary Judgment, IDWR argues that because the "reasonable carryover" provision could be applied consistent with the constitution in the event an entity, such as an irrigation district or a canal company, stores water from a natural stream under a license or decree from supplemental storage rights, it withstands the constitutional scrutiny required in a facial challenge. IDWR Memo. at 58 (Dec. 6, 2005). As stated in this Court's Notice of Clarification of Oral Order of November 29, 2005, filed December 16, 2005, this Court's review is broader than the facial challenge alone.

In its Memorandum in Opposition of Summary Judgment, IGWA argues that various federal and Idaho Supreme Court cases support the argument that reasonable restrictions on use of carryover storage do not conflict with Idaho's version of the prior appropriation doctrine. IGWA Memo. at 50-52; citing Washington County Irrigation Dist. V. Talboy, 55 Idaho 382, 385, 43 P.2d 943, 945 (Idaho 1935); Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1133-34 (10th Cir. 1981); Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 85 (Idaho

1945); and Caldwell v. Twin Falls Salmon River Land and Water Co., 225 F. 584, 595 (D. Idaho 1915). IGWA further argues that it should not be the junior right holder's burden to ensure a senior's storage water reliability to a level beyond that existing when it was first appropriated. In other words, a junior's right should not be converted into a kind of insurance or guarantee that senior's full storage volume will be obtained under every set of climatic conditions or every circumstances of a senior's storage use. IGWA Memo. at 52 (Dec. 6, 2005).

Factually speaking, Plaintiffs assert that they acquired storage water rights to supplement their natural flow diversions and that all of the Plaintiffs' storage rights have priority dates earlier in time than 1951 (the date of the enactment of the Idaho Ground Water Act). As such, both categories of Plaintiffs' rights, that is their natural flow rights as well as their storage rights,[33] are senior to thousands of hydraulically connected junior ground water rights in Water Districts 120 and 130. Plaintiffs' purposes in securing the storage rights are obvious -- the storage water rights were acquired to both supplement their natural flow diversions in a current year necessary to cover shortages caused by naturally occurring conditions (e.g. a drought), and to ensure Plaintiffs would have a sufficient water supply in future years in times of shortage caused by naturally occurring conditions. The purposes of storage was never to serve as a slush fund in order to allow the Director to spread water and avoid administering junior ground water rights in priority; nor was it ever intended to cover shortages caused by junior diversions.

Simply put, whether it is this year, next year, or years from now, a senior cannot exercise his water right and "use" the water in storage if the water represented by the right is not present in storage. Absent a proper showing of waste, senior storage right holders are allowed to store up to the quantity stated in the storage right, free of diminishment by the Director. Otherwise,

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[33] In accord with Paragraph 10 of IDWR's Answer to the Plaintiffs' Complaint, this Court is aware that the exact ownership interest of the storage rights is currently before the Idaho Supreme Court in United States v. Pioneer Irr. Dist., Docket No. 31790, appeal filed April 14, 2005.

why would there even be a quantity element to a storage right? In Washington County Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943 (Idaho 1935), the Idaho Supreme Court characterized the vested property interest in the reservoir storage water as follows:

> **After the water was diverted from the natural stream and stored in the reservoir, it was no longer 'public water' subject to diversion and appropriation** under the provisions of the Constitution (article 15, § 3). It then **became water 'appropriated for sale, rental or distribution'** in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The **waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.** A subsequent appropriator claiming a part or all of such waters would be the only person who could question the lack, extent, or nature of its application to a beneficial use.
>
> ***
>
> **No one can make an appropriation from a reservoir or canal for the obvious reasons that the waters so stored or conveyed are already diverted and appropriated and are no longer public waters.** This does not mean, however, that the reservoir or canal may waste the water or withhold it from persons who make application to rent the same. If, on the other hand, the owner of the reservoir owns land subject to irrigation from such reservoir, he may apply it to his own land or sell it to others, or both, according to the priorities of their applications.

Id. at 389-90 (internal citations omitted).

Because the stored water is a vested property right, the Plaintiffs also have the right to (subject to the limitation on waste) supplement their natural flow right diversions, rent the water to others for lawful purposes, or carry it over to future years. Bennett v. Twin Falls Water Side Land and Water Co., 27 Idaho 643, 651, 150 P. 336 (Idaho 1935).

Several other points are also apparent from the Director's above threatened application of the CMR's to vested storage water rights.

First, the threatened application of diminishing the senior's storage is not in accord with the prior appropriation doctrine or established Idaho case law.

Second, the threatened application of diminishing the senior's storage is an unconstitutional taking. Storage water is a recognized beneficial use and it is a vested property right.

Third, an irrigation water year is from November 1 of a given year through October 31 of the following year. See Pl.'s Compl., Ex. B (Director's Order of May 6, 2005). With all due respect, unless the Director has newly acquired powers of accurate prediction of future weather, he cannot, during the current irrigation season, reliably determine next year's storage needs for irrigation because no one knows what an upcoming winter will bring in terms of water. In other words, and because one of the lawful purposes of storage is to carry water over to future years, under the water law doctrine of "waste," meaning the senior cannot divert more than he can apply to beneficial use, unless the Director can objectively establish that the senior's current actual storage, plus the upcoming winter's yield of water to storage will exceed the senior's vested storage right (thus amounting to "waste"), the Director has no lawful authority to presently diminish the senior' storage right.[34] More importantly, the burden would be on the junior to establish the waste. Absent such a showing, it is an unlawful taking no matter how one tries to rationalize the conduct.

Fourth, and probably the most obvious point, is that determining future irrigation needs based upon the theory of what happened in 1995 is without any rational basis in fact or law. As the Idaho Supreme Court has already expressed in Moe v. Harger, 10 Idaho 302, 77 P. 645 (Idaho 1904):

> This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right;

[34] Evidence that the Director recognizes the winter water issue can be found in ¶ 4. p. 4 of his July 22. 2005. Order. wherein he writes: "on June 30, 2005, maximum storage in the Upper Snake River Basin Reservoirs had accrued... winter-water savings accounts had filled to 100 percent." See Pl.'s Compl., Ex. D. In other words, the Director could not accurately determine the reservoir water storage picture until the end of June of that year.

> and **it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured if affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts.** ***Theories neither create nor produce water***, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.

Moe, 10 Idaho at 305-06 (emphasis mine).

The foregoing illustrates why allowing the Director to presently determine what is 'reasonable' carryover in his mind (which in some instances is zero, despite the established senior water right for that purpose), and thereby justify his refusal to administer junior priority ground water rights in a timely fashion, results in an unlawful taking. Absent a showing that present storage equates to waste, the Director has no lawful authority to diminish the respective storage rights. Again, the responsibility to "optimize the water resources of the State" has to include the remainder of the Constitution "in accordance with the prior appropriation doctrine."

In summation, the reasonable carryover provision of the CMR's is unconstitutional, both on its face, and as threatened to be applied to the Plaintiffs in this case.

6. Issue – Whether the CMR's violate the Equal Protection Clause.

The Plaintiffs also argue that the CMR's violate the Equal Protection clauses of the Idaho and federal constitutions. In so arguing, they maintain that the CMR's allow junior priority ground water right holders to divert water in the face of a potentially adverse delivery call, while junior surface water right holders are immediately curtailed without the benefit of similar rules.

The Defendants, on the other hand, argue that the CMR's do not violate Equal Protection. They first argue that ground water users and surface water users are not similarly situated.

because of the factual and legal issues inherent in administration of ground water, due to its increased complexities, that are not ordinary present in the administration of surface water. Given the unique complexities of administration of ground water, the Defendants assert that the CMR's differences in administrative procedures are rationally related to a legitimate state interest.

> Equal Protection Clause jurisprudence has been summarized as follows by the United States Supreme Court:
>
> > The Equal Protection Clause ... commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' **Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.**
> >
> > As a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.' Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
>
> Even though a statute or regulation is valid under this analysis, selective or discriminatory enforcement of that statute or regulation may amount to a violation under either the Idaho or United States Constitutions, but only if the challenger shows a deliberate plan or discrimination based upon some improper motive like race, sex, religion, or some other arbitrary classification.

Anderson v. Spalding, 137 Idaho 509, 514, 50 P.3d 1004, 1009 (Idaho 2002); quoting Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12 (1992) (internal citations omitted) (emphasis mine).

"The first step in an equal protection analysis is to identify the classification at issue." McLean v. Maverik Country Stores, Inc., --- P.3d ----, 2006 WL 1042332, *3 (Idaho 2006). In this water administration case, the classification is based upon the source of water in a water right, e.g., whether the water is from a ground water source, or whether the water is from a surface water source. The definitions of ground water and surface water are found in Rule 10 of the CMR's.

"The second step is identifying the standard by which the classification will be tested." Id. In doing so, it is helpful to look at case law in Idaho on the subject.

> The state has wide discretion to enact laws that affect some groups or citizens differently from others. It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional. **Under either the Fourteenth Amendment or the Idaho Constitution, a classification will survive rational basis analysis if the classification is rationally related to a legitimate governmental purpose.** On rational basis review, courts do not judge the wisdom or fairness of the legislation being challenged. **Under the 'rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it.**

Id. (internal citations omitted) (emphasis mine).

> Equal protection issues focus upon classifications within a statutory scheme that allocate benefits and burdens differently among categories of persons affected. The Equal Protection Clause ... is designed to ensure that those persons similarly situated with respect to a governmental action should be treated similarly. **When reviewing the constitutionality of statutes impacting on** social or **economic areas, the rational basis test is generally appropriate. Under the rational basis test, the equal protection clause is violated only if classification is based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be advanced to justify those goals.**

Madison v. Craven, 141 Idaho 45, 48, 105 P.3d 705, 709 (Idaho App. 2005) (internal citations omitted) (emphasis mine).

As stated above, the first step is to determine what the classification is; and in this case the classification is based upon the source of water in a water right, e.g., whether the water is from a ground water source, or whether the water is from a surface water source.

The next step then is to determine what sort of scrutiny would apply to this classification. It seems to this Court that a rational basis should be applied for several reasons. First, the two classifications (ground and surface) are not similarly situated in all relevant respects. The United States Supreme Court has stated that the Equal Protection Clause was written to prevent the government from treating people differently who are alike *in all relevant respects*. Nordlinger, 505 U.S. at 10. In this case, water users whose diversion is from a ground water source are not similarly situated to water users whose diversion is from a surface water source. There are well recognized complexities and difficulties inherent with ground water sources that are simply not present in many surface water sources (i.e. at a minimum, there is usually more difficulty determining the degree to which the use of ground water even affects other users, whereas this may be facially apparent with surface water). Therefore, the two classifications are not similarly situated in all respects.

Even if it is determined that they are similarly situated, i.e., from connected sources, it is still apparent that rational basis would apply, because the courts have held that when reviewing statutes that impact in the economic area, rational basis is the proper test to apply. See Madison, 141 Idaho at 48. It is clear that a water right is an economic right, not a suspect classification, such as race or gender, for which the strict scrutiny test would be applied.

Applying the rational basis test to this case, it is clear that the legislature had a legitimate state interest in authorizing the Director to promulgate the CMR's and establishing the classification at issue here: the administration of junior ground water and senior surface water

together. Further, the CMR's, as written (although otherwise defective) are rationally related to this interest, in that the distinction posed here is based on the different complications created through administration of ground water.

7. Issue – Whether administration, or lack thereof, pursuant to the CMR's constitutes an unlawful taking.

As stated many times in this decision, a water right is a vested property right. In State v. Nelson, 131 Idaho 12, 16, .P.2d 943, 947 (Idaho 1998), the Idaho Supreme Court stated:

> Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of the property.

Nelson, 131 Idaho at 16. However, as discussed earlier, a water right is not the right to own the physical characteristics of the water (i.e. its molecules), but a right to use the water. Therefore, a diminishment in the right to use the water defeats the very purpose of the right. Further, any action which undermines the priority of the water right undermines the core value of the right – the right to use the water before all those who acquired their rights subsequent to the senior user. Therefore, this case raises the question of whether the CMR's diminishment of a senior's water right, as discussed above, constitutes a taking.

The United States Supreme Court has recognized that any permanent, physical invasion of one's property constitutes a taking, no matter how minor or de minimus the invasion may be. Loretto v. Teleprompter CATV Corp., 458 US 419, 434-35, 102 S.Ct. 3164, 3175-76 (1982). In Loretto, the United States Supreme Court determined that a city ordinance requiring landlords to install small cable boxes on their property constituted an outright physical taking. Id.

Further the Idaho Supreme Court has stated:

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. **The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.**

Roark v. Caldwell, 87 Idaho 557, 566, 394 P.2d 641, 646 (Idaho 1964); quoting The Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513, 514 (Tex. 1921) (emphasis mine).

It has been determined that there are two types of takings: physical takings, where the government occupies a permanent, physical presence on the property (See Loretto); and regulatory takings. In discussing regulatory takings, the Idaho Supreme Court has stated:

> [I]n addition to an outright taking, governmental interference with an owner's use or enjoyment of his private property may also require compensation... '[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'

McCuskey v. Canyon County Commissioners, 128 Idaho 213, 215, 912 P.2d 100, 102 (Idaho 1996). This Court determines that diminishment of water rights, which occurs as a direct result of administration pursuant CMR's, constitutes a physical taking.

The Director and/or other IDWR employees [watermasters] are state of Idaho employees; i.e., "the government" for purposes of a takings analysis. Only the Director and/or his watermasters can administer water. I.C. § 42-602. A private person cannot administer water. In fact, it is a criminal act to do so. See I.C. § 18-4301, *et. seq.*, but in particular I.C. § 18-4304. Therefore, in order for a senior water user to obtain administration in times of scarcity to be able to exercise his vested property right, he must go through the government. As such, the government's conduct in failing to administer the water right in accordance with the prior appropriation doctrine could amount to a physical taking. See also Idaho Const. Art. XV, § 3.

The framers of the Idaho Constitution clearly understood the diminishment of the senior's water right to be a taking requiring compensation. They added a specific amendment to section 3 to cover this very issue.

Here, through the CMR's the Director is allowed to administratively re-adjudicate the water right decree, by determining how much water he believes the senior is *actually* entitled to. Further, the burden is placed on the senior user to essentially re-prove the beneficial use element of the decree, and that he will not waste it. As previously discussed, this approach is not the law in Idaho. Finally, in the area of storage rights, the Director has the authority to disregard the amount actually licensed to the storage right user, and determine instead a "reasonable" amount of carryover; and even could determine that no amount of carryover is appropriate, regardless of what storage rights have vested to the senior user.

The Plaintiffs' storage rights were developed and acquired years before many of the junior ground water rights were licensed and years before Idaho adopted the Ground Water Management Act. Reservoirs were constructed primarily for flood control and water storage. To now suggest that a purpose of the stored water is to avoid administration of junior ground water rights at the expense of the senior is simply without merit.

If the government attempted to change the physical description of real property to the point where a party was left with less property than originally deeded, the courts would have no trouble determining that a taking had taken place. See e.g. C&G, Inc. v. Canyon Highway District, 139 Idaho 140, 75 P.3d 194 (Idaho 2003). Here, because the Director, through the CMR's has the ability to decrease the amount of water a senior user is entitled without establishing waste, he is essentially given the power to alter the property right.

Additionally, the CMR's for the various reasons discussed above, diminish the senior water user's ability to use their water by not administering water in times of shortage in a timely manner, and by shifting the burden to the senior. This diminishment and the uncertainty created thereby de-values the right, and therefore, as for as this Court cam determine in accordance with the law stated above, constitutes an unconstitutional taking without just compensation.

XIII

CONCLUSION

In times of scarcity, administration of water under Idaho's version of the prior appropriation doctrine is not a user friendly business. To the contrary, it is harsh -- there are winners and there are losers. To the extent a person is applying water in accordance with his decreed water right and is not wasting water, he is, under the Idaho Constitution, allowed to be "the dog-in-the-manger."[35] Rules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, they are essential to proper administration and to protect vested property rights. With that said, rules for the administration of water must also be in accordance with the established law. This too was the charge by the legislature. See I.C. §§42- 602-603. The first Rule of "Conjunctive Management" is Idaho's version of the prior appropriation doctrine; and in particular, all of the prior appropriation doctrine -- that is to say, including those portions which are harsh and abrupt, and benefit some to the detriment of others.

Or as Mr. Heyburn in the constitutional debate phrased such a dilemma (in debating a proposed additional section to the constitution):

[35] See Proceedings and Debates at 1162.

> I am just as well aware of the possibility of working an injustice in this section, perhaps, as the gentlemen who have so plainly and specifically stated such possibilities. **A man might do a great many unjust things if he is clothed with this right, and if the right is absolutely taken away from him he might be deprived of a great many very plain and just rights.**

Proceedings and Debate from the Idaho Constitutional Convention, 1889, at 1171 (emphasis mine).

One final matter which is of great interest to this Court is the Director's own written words, wherein he concisely describes with clarity, how irrigation water is to be administered:

> 4. In water districts, watermasters must summarily determine: (1) whether a water right holder calling for delivery of water is receiving the water authorized by the water users water right; (2) if not, what junior water right diversions must be curtailed; and (3) whether there are alternative means to provide the water to senior water rights to reduce or eliminate injury to the senior water rights.

Pl.'s Compl., Ex. B, Director's Order entered May 6, 2005.

However, immediately following this recognition of the law, he promptly engaged on a course under the CMR's inconsistent with his own words.

Because (1) the Director has a clear legal duty to administer water in accordance with priority, (2) the CMR's do not contain reasonable and objective standards, omit significant concepts of the law; try to re-write others; and fail to establish a time frame for administration commensurate with the needs for irrigation; the result is a diminishment of vested rights. The diminishment results in an unconstitutional taking. The end result is this Court must declare the CMR's, as written, are both not in accord with the statute authorizing the Director to promulgate rules and the Rules are also otherwise unconstitutional and void in the respects noted herein.

For the foregoing reasons, the Plaintiffs' and related Intervenors' Motions for Summary Judgment are hereby GRANTED as stated herein. Counsel for the Plaintiffs is to prepare the appropriate judgment. Each party is to bear their own costs and attorneys' fees.

IT IS SO ORDERED.

Dated: June 2, 2006

Signed: B Wood
Barry Wood, District Judge