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GOODING COUNTY CLERK
BY: DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT # 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs, v. THE IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, and KARL J. DREHER, in his official capacity as Director of the Idaho Department of Water Resources, Defendants.	Case No. CV-2005-0000600

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COPY

I.

ORIENTATION

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James C. Tucker, IDAHO POWER COMPANY, Boise, ID 83702, James S. Lochhead and Adam T. Devoe, BROWNSTEIN HEYATT & FARBER, P.C., Denver, CO 80202, Attorneys for Idaho Power Company.

Daniel V. Steenson, Charles L. Honsinger, S. Bryce Farris, and Jon C. Gould, RINGERT CLARK CHARTERED, Boise, ID 83702, Attorneys for Thousand Springs Water Users Association.

J. Justin May, MAY, SUDWEEKS, & BROWNING, LLP, Boise, ID 83707, Attorneys for Rangen, Inc.

Lawrence G. Wasden, Attorney General of Idaho and Clive J. Strong, Phillip J. Rassier, Candice M. McHugh, and Michael C. Orr, Deputy Attorneys General for the State of Idaho, Boise, ID 83720, Attorneys for the Defendants the Idaho Department of Water Resources, an agency of the State of Idaho and Karl J. Dreher, in his official capacity as Director of the Idaho Department of Water Resources.

Jeffrey C. Fereday, Michael C. Creamer, John M. Marshall, Christopher H. Meyer, and Brad V. Sneed, GIVENS PURSLEY LLP, Boise, ID 83701, Attorneys for Idaho Ground Water Appropriators, Inc.

Court: Barry Wood, District Judge, presiding.

Holdings:

1. The Rules of Conjunctive Management of Surface and Ground Water Resources (hereinafter "CMR's") are constitutionally deficient for failure to

integrate the required legal tenets and procedures regarding burdens of proof and evidentiary standards.

2. The Director acted outside his legal authority in adopting CMR's which are not in accord with Idaho's version of the prior appropriation doctrine.

3. The factors and policies contained in the CMR's and to be applied by the Director can be construed consistent with the prior appropriation doctrine.

4. The CMR's are facially unconstitutional due to the omission of necessary components of the prior appropriation doctrine, 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.

5. The CMR's exclusion of domestic water rights from ground water sources is both facially unconstitutional and is in violation of Idaho Code §§ 42-602, 42-603, and 42-607.

6. The "reasonable carryover" provision of the CMR's is unconstitutional, both facially and as threatened to be applied.

7. The CMR's disparate treatment of the holders of junior ground water rights and junior surface water does not violate Equal Protection; serves a legitimate state interest; and is rationally related to that interest.

8. Under the CMR's, the untimely administration of water rights, and in particular irrigation rights, constitutes an unconstitutional taking without just compensation.

II.

BRIEF FACTUAL BACKGROUND

This lawsuit was filed August 15, 2005, by the American Falls Reservoir District #2 and four other irrigation districts and canal company entities (hereinafter "Plaintiffs") petitioning the Court for declaratory judgment pursuant to I.C. § 67-5278 and § 10-1201 *et. seq.* regarding the validity and constitutionality of the Rules of Conjunctive Management of Surface and Ground

Water Resources (hereinafter "the CMR's") of the Idaho Department of Water Resources (hereinafter "IDWR"). The CMR's were promulgated in 1994 and appear as IDAPA 37.03.11.

Plaintiffs are holders of various natural flow and storage water rights dating from the early 1900's. These rights allow the plaintiffs to divert water from the Snake River in Idaho. By way of paragraph 10 the Complaint, the Plaintiffs allege ownership of and assert the following rights are relevant to this suit:

A. American Falls Reservoir District #2 Water Right No. 01-00006 in the amount of 1,700 cfs [cubic feet per second], with a priority date of March 20, 1921.
B. American Falls Reservoir District #2 holds a contractual right in the amount of 393,550 acre-feet of storage space in American Falls Reservoir.
C. The A&B Irrigation District Water Right No. 01-00014 in the amount of 269 cfs, with a priority date of April 1, 1939.
D. A&B Irrigation District holds contractual rights in the amounts of 46,826 acre-feet of storage space in American Falls reservoir and 90,800 acre-feet of storage space in Palisades Reservoir, for a total of 137,626 acre-feet of storage space.
E. The Burley Irrigation District holds the following surface water rights:
   (1) Water Right No. 01-00007 in the amount of 163.4 cfs, with a priority date of April 1, 1939;
   (2) Water Right No. 01-00211B in the amount of 655.88 cfs, with a priority date of March 26, 1903;
   (3) Water Right No. 01-00214B in the amount of 380 cfs, with a priority date of August 6, 1908.
F. The Burley Irrigation District holds contractual rights in the amounts of 31,892 acre-feet of storage space in Lake Walcott, 155,395 acre-feet of storage space in American Falls Reservoir, and 39,200 acre-feet of storage space in Palisades Reservoir, for a total of 226,487 acre-feet of storage space.
G. The Minidoka Irrigation District, or Reclamation on Minidoka's behalf, holds the following natural flow water rights:
   (1) Water Right No. 01-00008 in the amount of 266.6 cfs, with a priority date of April 1, 1939.
   (2) Water Right No. 01-10187 in the amount of 1,070.12 cfs with a priority date of March 26, 1926.
   (3) Water Right No. 01-10188 in the amount of 620 cfs with a priority date of August 6, 1908.

(4) Water Right No. 01-10192 in the amount of 1,550 cfs with a priority date of August 23, 1906.
(5) Water Right No. 01-10193 in the amount of 1,550 cfs with a priority date of August 23, 1906.
(6) Water Right No. 01-10194 in the amount of 550.56 cfs with a priority date of December 28, 1909.

H. The Minidoka Irrigation District holds contractual rights in the amounts of 186,030 acre-feet of storage space in Jackson Lake, 63,308 acre-feet of storage space in Lake Walcott, 82,216 acre-feet of storage space in American Falls Reservoir, and 35,000 acre-feet of storage space in Palisades Reservoir, for a total of 366,554 acre-feet of storage space.

I. The Twin Falls Canal Company holds the following surface water rights;
(1) Water Right No. 01-00004 in the amount of 600 cfs, with a priority date of December 22, 1915;
(2) Water Right No. 01-00010 in the amount of 180 cfs, with a priority date of April 1, 1939;
(3) Water Right No. 01-00209 in the amount of 3,000 cfs with a priority date of October 11, 1900.

J. The Twin Falls Canal Company holds contractual rights in the amounts of 97,183 acre-feet of storage space in Jackson Lake and 148,747 acre-feet of storage space in American Falls Reservoir, for a total of 245,930 acre-feet of storage space.

Pl.'s Compl. ¶ 10 (Aug. 15, 2005) (footnote omitted). In response to this allegation, IDWR responds:

> State Defendants admit the allegations in Paragraph 10 subparts A through J to Plaintiffs' Complaint in so far as the Plaintiffs have claims pending in the Snake River Basin Adjudication for the elements as stated and the contractual rights described but assert that the claims and contracts speak for themselves and therefore deny any allegations inconsistent with the claims or contracts. However, recommendations and determination of specific elements for each of these water rights are pending in the Snake River Basin Adjudication so no final determination of the Parties' interests thereto have been made. Regarding footnote to Paragraph 10 of Plaintiffs' Complaint, State Defendants admit the allegations therein but state that the ownership interest held by Plaintiffs in the storage water held in the reservoirs is pending before the Idaho Supreme Court in United States v. Pioneer Irr. Dist., Docket No. 31790, appeal filed April 14, 2005.

Def.'s Ans. ¶ 10 (Sept. 7, 2005).

In the non-irrigation season and during the irrigation season when spring flood runoff exceeds diversions, the surface water flows of the upper Snake River are stored in various reservoirs. Part of these flows are diverted to storage space in United States Bureau of Reclamation reservoirs to which the Plaintiffs have a right due to spaceholder contracts with the United States. This stored water is claimed to be owned and controlled by each Plaintiff for its use and for the use of its landowners or shareholders.

Depending upon the given location, the ground water in the Eastern Snake River Plain Aquifer (ESPA) is hydraulically connected in varying degrees to the Snake River and tributary surface water sources. One of the locations where a direct hydraulic connection exists is in the American Falls area. Also, according to IDAPA 37.03.11.050.01a., this hydraulic connection goes both ways -- "the Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River," i.e., the aquifer feeds the river and the river feeds the aquifer.

Following a short water year in 2004, and on January 14, 2005, Plaintiffs initiated a delivery call which requested administration of junior ground water rights in Water District No. 120 to allow water to be delivered to them pursuant to their senior water rights. This delivery call was made pursuant to the CMR's, and in particular Rules 30 and 40. In response to this request, the Director claims to have applied the CMR's.

On August 15, 2005, and after having not received a satisfactory response to the requested administration, this current case was filed. The prayer in Plaintiffs' complaint seeks the following:

> WHEREFORE, plaintiffs pray for relief as follows:
>
> 1. For an Order of this Court finding that application of the Rules, as adopted, does impair, or threatens to interfere with or impair, the rights of plaintiffs.

2. For an Order of this Court declaring that the procedures and requirements of the conjunctive management rules are void on their face because they are unconstitutional, contrary to law, and violate plaintiffs' water rights and constitutional rights and defendants' duties.

3. For an Order of this Court declaring that defendants' application of the conjunctive management rules to plaintiffs' requests for delivery of water is unconstitutional, contrary to law, and violates plaintiffs' water rights and constitutional rights and defendants' duties.

4. For an Order awarding costs and attorney fees to the plaintiffs.

5. For such other and further relief as this Court deems just and equitable.

Pl.'s Compl. p. 11 (Aug. 15, 2005).

As of this writing in May of 2006, the Director has not yet entered a "final order," and Plaintiffs claim the process provided by the CMR's has not allowed for either correct or timely administration of their water rights for irrigation. This Court understands IDWR disputes that it has not administered some water pursuant to the call. 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).

There have also been numerous parties who have intervened in this lawsuit. The Thousand Springs Water Users Association (hereinafter "TSWUA") is a non-profit corporation that represents its members in restoring water supplies in the Thousand Springs and hydraulically connected ESPA. TSWUA's members are organizations and individuals that own water rights that emanate from the northern rim of the Snake River Canyon down river from Milner Dam. Collectively, its members own over 3,900 cfs of water rights. Several of TSWUA's members have sought administration of their water rights. In these cases, the Director applied the CMR's.

Rangen, Inc. (hereinafter "Rangen") holds water rights, whose source is in the Curran Tunnel, a spring that is part of the Thousand Springs complex. One of the locations that has a

direct hydraulic connection between the ESPA and the Snake River and its tributaries is in the Thousand Springs complex. Rangen holds three water rights which are relevant to this matter: 36-1501, 36-2551, and 36-7694. On September 23, 2003 and on October 6, 2003, Rangen requested the Director to administer water rights in accordance with priority.

Idaho Power Company (hereinafter "Idaho Power") alleges that it holds various water rights including:

A. Water Right No. 36-2704 in the amount of 120 cfs, with a priority date of 01/31/1966;

B. Water Right No. 36-2082 in the amount of 5 cfs, with a priority date of 12/10/1948;

C. Water Right No. 36-2710 in the amount of 0.1 cfs, with a priority date of 07/24/1940;

D. Water Right No. 36-2037 in the amount of 0.3 cfs, with a priority date of 10/29/1921;

E. Water Right No. 36-15221 in the amount of 0.04 cfs, with a priority date of 03/03/1982;

F. Water Right No. 36-15357 in the amount of 0.11 cfs, with a priority date of 09/30/1936;

G. Water Right No. 36-15358 in the amount of 0.03 cfs, with a priority date of 06/20/1924;

H. Water Right No. 36-7104 in the amount of 0.3 cfs, with a priority date of 12/10/1969;

I. Water Right No. 36-7831 in the amount of 25 cfs, with a priority date of 11/24/1978;

J. Water Right No. 36-7066 in the amount of 10 cfs, with a priority date of 01/05/1970;

K. Water Right No. 36-2478 in the amount of 14.2 cfs, with a priority date of 10/18/2001;

L. Water Right No. 36-2478 in the amount of 3.21 cfs, with a priority date of 10/21/1939;

M. Water Right No. 36-15388 in the amount of 0.15 cfs, with a priority date of 12/10/1949; and

N. Water Right No. 36-7162 in the amount of 8.62 cfs, with a priority date of 03/04/1971.

Idaho Power Mot. to Intervene, at ¶ 2 (Oct. 7, 2005).

Clear Springs Foods, Inc. (hereinafter "Clear Springs") holds several water rights located within Water District No. 130, all of which have been decreed by the SRBA Court. On May 2, 2005, Clear Springs requested the Director to administer and deliver their water rights. The Director deemed this request to be a delivery call, and two months later issued an order, pursuant to the CMR's.

The Idaho Ground Water Appropriators, Inc. (hereinafter "IGWA") have also intervened in this action, but have done so as Defendants to this action, seeking to defend the constitutionality of the CMR's. IGWA is a non-profit corporation in Idaho that is organized to promote and represent the interests of Idaho ground water users. Its members include six ground water districts, one irrigation district, cities, industries, and municipal water providers whose members rely on ground water. Its members hold water rights authorizing diversion from wells within the ESPA. Many of these ground water rights are junior to the Plaintiffs' surface water rights discussed above.

III.

BRIEF PROCEDURAL HISTORY

On August 15, 2005, the Plaintiffs in this case filed their Complaint. On September 7, 2005, the Defendants filed their Answer. On September 7, 2005, the Defendants filed a Motion to Dismiss, and lodged a Memorandum in Support of the Motion to Dismiss. On October 11, 2005, the Plaintiffs lodged a Memorandum in Opposition to Defendant's Motion to Dismiss. On October 17, 2005, the Defendants lodged a Reply Memorandum in Support of their Motion to Dismiss. On October 18, 2005, this Court held a hearing on Defendant's Motion to Dismiss. On November 4, 2005, this Court filed an Order denying the Defendant's Motion to Dismiss.

On October 14, 2005, the Plaintiffs filed a Motion for Summary Judgment, and lodged a Memorandum in Support of their Motion for Summary Judgment. On November 1, 2005, TSWUA lodged a Memorandum in Support of Plaintiffs' Motion for Summary Judgment. On November 1, 2005, Clear Springs filed a Motion for Summary Judgment, and lodged a Memorandum in Support of their Motion for Summary Judgment. On November 2, 2005, Rangen lodged a Memorandum in Support of their own Motion for Summary Judgment, which was filed November 3, 2005.

On December 12, 2005, IDWR lodged a Memorandum in Response to Plaintiffs' Motions for Summary Judgment. On that same day, the City of Pocatello lodged a Consolidated Response to the Summary Judgment Motions, and the IGWA lodged a Memorandum in Response to Plaintiffs' Motions for Summary Judgment.

On December 16, 2005, this Court filed its Notice of Clarification of Oral Order of November 29, 2005, clarifying its position regarding facial versus as applied analysis and use of underlying facts in the case.

On December 21, 2005, Plaintiffs lodged their Consolidated Reply Memorandum in Support of Summary Judgment. That same day, TSWUA lodged its own Reply Brief in Support of Motion for Summary Judgment, and Idaho Power lodged its Consolidated Reply Brief. On December 22, 2005, Rangen lodged its Consolidated Reply to Responses to Motions for Summary Judgment.

On March 13, 2006, IGWA lodged a Sur-Reply on Summary Judgment. On March 14, 2006, the City of Pocatello lodged a Consolidated Supplemental Response to Summary Judgment, and IDWR lodged its Sur-Reply in Opposition to Motions for Summary Judgment. On March 28, 2006, the Plaintiffs lodged their Joint Final Reply in Support of Motions for Summary Judgment.

On April 11, 2006, a hearing was held on the Motions for Summary Judgment.

IV.

MATTER DEEMED FULLY SUBMITTED FOR FINAL DECISION

Oral arguments on the Plaintiffs' Motion for Summary Judgment were heard April 11, 2006. At the conclusion of the hearing no party requested additional briefing and the Court requested none. The Court therefore deemed this matter fully submitted for decision on the next business day, or April 12, 2006.

On Friday, May 19, 2006, this Court received information of an indirect potential conflict of interest in the nature of an "appearance of impropriety." As soon as the Court received this information, the Court contacted Mr. Bob Hamlin of the Idaho Judicial Council, and then wrote a letter to each of the parties advising them of the issue, and asking for direction as to how to best proceed. The Court also informed each party that the Court would not work on the case further

and that the matter will not be deemed fully submitted for decision until the resolution of this "appearance" matter.

On May 26, 2006, the Court scheduled a telephonic conference hearing for June 1, 2006, to resolve the above issues. A hearing was held on June 1. Following the hearing, the Court declined to find an appearance of impropriety which would warrant a disqualification or recusal. This Court then advised the parties that the Court would again consider the matter fully submitted for decision. The Court therefore deemed this matter fully submitted for decision on the next business day, or June 2, 2006.

V.

THIS COURT'S JURISDICTION IS PROPER

1. Declaratory Judgment Action.

This Court has jurisdiction to presently hear this case. Idaho Code § 67-5278 provides:

> **Declaratory judgment on validity or applicability of rules –**
>
> (1) The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, **if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.**[1]
>
> (2) The agency shall be made a party to the action.
>
> (3) **A declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass upon the validity or applicability of the rule in question.**

Idaho Code § 67-5278 (WEST 2006) (emphasis mine).

[1] While the administrative action remains incomplete, the "threatened application" is well established by the various orders issued by the Director in response to Plaintiffs' call of January 14, 2005. See Pl.'s Compl. Ex. B, C, and D.

2. **Idaho Code §§ 10-1201, *et. seq.***

These code sections also grant this Court jurisdiction to hear the issues presented.

3. **Exhaustion of Administrative Remedies.**

The Idaho Supreme Court recently stated in Regan v. Kootenai County, 140 Idaho 721, 100 P.3d 615 (Idaho 2004):

> In Idaho, as a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. This Court has recognized exceptions to that rule in two instances: (a) when the interests of justice so require; and (b) when the agency has acted outside its authority...

Regan, 140 Idaho at 725 (internal citations omitted).

As to the first exception, the Plaintiffs submitted their delivery call to the Director in January of 2005, well before the 2005 irrigation season. It is now May of 2006, the start of the second irrigation season since the delivery call was made, and the administrative action as to Plaintiffs' water rights is incomplete.[2] According to the Director, the irrigation season is November 1 of a given year through October 31 of the next.

As to the second exception, whether the agency acted outside its authority, this Court finds that it has. In particular, the legislature authorized the Director to adopt Rules in accordance with the prior appropriation doctrine. Idaho Code § 42-603 (WEST 2006). To the extent the CMR's do not follow Idaho's version of the prior appropriation doctrine, the Director has acted outside his authority and the CMR's are invalid. This is a basis independent of any

[2] The Court has been led to believe that the parties have recently agreed by stipulation to delay the administrative resolution of Plaintiffs' water rights, pending this Court's decision in this matter. However, this stipulation was not entered into or agreed to until the Spring of 2006, well after a year had gone by without the administration being completed. The Court is unaware of the specifics of this agreement.

constitutional challenge, facial or as applied. This will be discussed in far greater detail later in this decision.

4. Facial Challenge.

This Court re-iterates portions of its ruling of November 4, 2005, on IDWR's Motion to Dismiss. This Court stated:

> 13. With respect to facial challenges, IDWR concedes that this Court presently has subject matter jurisdiction but in the exercise of discretion, this Court should defer a determination on that matter until IDWR has completed the ongoing contested case.
>
> 14. The senior surface entities assert that in response to their January 2005 delivery call, the Director adopted a novel, but unconstitutional, theory of water administration: namely a *de facto* re-adjudication of certain elements of the water rights to include the use of an injury analysis and a public interest component of economic optimization -- coupled with -- methods of conventional water delivery administration. The senior surface entities have dubbed this process 'Economic Administrative Adjudication' under/pursuant to the CM Rules.[3]
>
> 15. Simply stated, the surface entities assert that certain of the CM Rules are unconstitutional on their face.
>
> ***
>
> As to the facial Constitutional challenges, IDWR recognizes and concedes this Court has jurisdiction, rather it is urged that this Court exercise its discretion and defer a determination under the doctrine of primary jurisdiction.
>
> ***
>
> With respect to the 'facial Constitutional challenges' the doctrine of Primary Jurisdiction simply is not applicable to this case. It is freely admitted that IDWR does not have jurisdiction over these questions and will never decide these questions.

[3] Of course, at the time this Court wrote this in November of 2005, the Director had scheduled a trial for March 6, 2006. As of this writing, the trial has not occurred.

> To the contrary, and in the exercise of discretion, this Court finds little reason to delay an inevitable Constitutional challenge to the Conjunctive Management Rules. The logic and rationale for delay, under the circumstances presented, make little sense to this Court for several reasons. One, this is not the only case pending before this Court where the CM Rules are implicated and their application contested. Now that the constitutionality of the rules has been raised, it makes judicial sense to resolve the issue forthwith. Second, given the time sensitive nature pertaining to administration of water rights, it makes little sense to further delay resolution of the issue.

Order on IDWR's Mot. Dis., at 5-8 (Nov. 4, 2005) (original footnotes omitted, footnote added).

5. As Applied Challenge

In its initial ruling of November 4, 2005, this Court stated in part:

> 12. With respect to as applied challenges, IDWR's position is that IDWR has not completed the contested case proceedings and as such, there has been a failure to exhaust the administrative remedies which IDWR argues is a subject matter jurisdiction requirement for this Court to proceed.
>
> ***
>
> As to the 'as applied challenge,' and the assertion that this Court lacks subject matter jurisdiction based upon the general rules of Exhaustion of Administrative Remedies, it is a correct factual statement that the plaintiffs have not yet exhausted those remedies.
>
> The Idaho Supreme court in Regan v. Kootenai County, 140 Idaho (2004) [sic] recognizes two exceptions to the general exhaustion requirement. Those are: (1) when the interests of justice so and, (2) when the agency acted outside its authority. [Sic].
>
> As to the 'as applied' question, the Court decides the Motion to Dismiss presently before it without resort to and in fact declines to rule upon the exhaustion question. The parties are free to take whatever actions they deem necessary in the pending administrative proceeding. It simply is not necessary to a resolution of the primary issue before this Court. As such, the Court simply declines to decide this issue.

Order on IDWR's Mot Dis. at 5-6 (Nov. 4, 2005).

This Court then issued a Notice of Clarification to clarify its intent on what would be heard on the "as applied" matter. This Court incorporates that Order herein by reference. This Order specifically provided that this Court would consider the Director's threatened application of the CMR's. See Notice of Order of Clarification of Oral Order of November 29, 2005, (Dec. 16, 2005).

Suffice it to say, this Court has jurisdiction to hear the issues raised by the Plaintiffs' Complaint.

VI.

OVERVIEW OF THE CHALLENGED RULES

A true and complete copy of the CMR's is attached to this Order as Exhibit 1, and are, by this reference, incorporated herein. According to Plaintiffs' Memorandum lodged in support of Summary Judgment on October 14, 2005, there are various CMR's that are being challenged in this lawsuit. The specifically enumerated CMR's which are listed in the Plaintiff's brief are:

Rule 10.07: Full Economic Development of Underground Water Resources.

Rule 10.14: Material Injury.

Rule 10.15: Mitigation Plan.

Rule 20.01: Distribution of Water Among the Holders of Senior and Junior-Priority Rights.

Rule 20.03: Reasonable Use of Surface and Ground Water.

Rule 20.04: Delivery Calls.

Rule 20.05: Exercise of Water Rights.

Rule 20.07: Sequence of Actions for Responding to Delivery Calls.

Rule 20.11: Domestic and Stock Watering Ground Water Rights Exempt.

Rule 30: Procedure Responding to Calls Outside Water Districts

Rule 40: Procedure Responding to Calls Inside Water Districts

Rule 41: Procedure Responding to Calls Inside Ground Water Management Area

Rule 42: Material Injury/Reasonableness of Water Diversions

Rule 43: Mitigation Plans

Pl.'s Memo. in Support of S.J. 2 (Oct. 14, 2005).

VII.

ISSUES AS STATED BY THE PLAINTIFFS

For the sake of clarity, the Plaintiffs' briefing essentially states and organizes the issues in this fashion:

Issue #1: Whether the Department's Conjunctive Management Rules violate Idaho's Constitution and Water Distribution Statutes.

A. Does administration pursuant to Department's Rules only occur when a senior water right holder files a "delivery call" and the Director determines the senior is suffering "material injury" by reason of junior water right(s)?

B. Do the Rules misapply other constitutional provisions and unrelated statutes to limit senior water rights and prevent priority administration?

1. Does Idaho Constitution, Article XV, § 5 only apply within an irrigation entity's project, and not between different water right holders?
2. Does Article XV, § 7 limit or condition senior water rights?
3. Do the Rules attempt to incorporate aspects of Idaho's Ground Water Act to limit senior water rights contrary to Idaho's Constitution, Statutes, and prior case law?
4. Do the Rules misapply Schodde v. Twin Falls Land & Water Co. in an effort to limit senior water rights?

C. Do the Rules impermissibly exempt categories of junior ground water rights from administration?

D. Do the Rules allow the Director to force seniors to accept "mitigation" in lieu of required administration of junior ground water rights?

Issue # 2: Whether the definition and overall concept of "material injury" violates Idaho's Constitution and Statutory provisions.

Issue #3: Whether the Rules' concept of "reasonable carryover" injures vested senior storage water rights and violates Idaho's Constitution and water distribution statutes.

Issue # 4: Whether the Rules permit the Director to ignore the elements of decreed and licensed water rights and "re-adjudicate" those rights for purposes of administration.

Issue # 5: Whether the Rules discriminate against junior surface water users in favor of junior ground water users.

Issue # 6: Whether the replacement water plan constitutes unlawful rulemaking in violation of Idaho's APA.

VIII.

APPLICABLE STANDARDS OF REVIEW

1. Summary Judgment

Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Read v. Harvey, 141 Idaho 497, 499, 112 P.3d 785, 787 (Idaho 2005); citing Idaho R. Civ. P. 56(c). However, when an action is to be tried before the court without a jury, as in this case, "the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from *uncontroverted* evidentiary fact." Read, 141 Idaho at 499 (emphasis in original); citing Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (Idaho 1991). Any disputed facts must be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Read, 141 Idaho at 499.

Generally, a motion for summary judgment requires a court to hold that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Barlow's Inc. v. Bannock Cleaning Corp., 103 Idaho 310, 647 P.2d 766, (Idaho App. 1982).

> However, if the court determines, after a hearing, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. Thus, in appropriate circumstances, the court is authorized to enter summary judgment in favor of non-moving parties.

Barlow's Inc., 103 Idaho at 312. If the evidence shows no issue of material fact, what remains is a pure question of law. Spur Products Corp. v. Stoel Rives L.L.P., 142 Idaho 41, 122 P.3d 300, 303 (Idaho 2005).

Summary judgment should be granted if the non-moving party fails to make a showing sufficient to establish an essential element to the party's case. Foster v. Traul, 141 Idaho 890, 892, 120 P.3d 278, 280 (Idaho 2005); citing McColm-Traska v. Baker, 139 Idaho 948, 950-51, 88 P.3d 767, 769-70 (Idaho 2004).

2. Constitutionality of Agency Rules – Facial v. As Applied Challenges

Both parties have made much of the legal standards surrounding this Court's ability to interpret the constitutionality of the CMR's. The Plaintiffs argue that an "as applied" standard is the proper standard in this case, and the Court should consider all the facts leading up to this suit, including past decrees and orders issued by the Director and IDWR. The Plaintiffs further argue that a water right is a fundamental right, and as such, any regulation which seeks to limit the right, is subject to the standard of review of "strict scrutiny."

Conversely, the Defendants argue that all factual evidence must be excluded from this decision, and the Court should only look to the face of the CMR's, the Constitution and the statutes. The Defendants further argue that this is a strict facial challenge to the CMR's, and as such, if they can point to any set of circumstances where the CMR's could be construed as constitutional, this Court must deny the Plaintiffs' request to declare the CMR's unconstitutional. In support of this argument, the Defendants cite to numerous Idaho cases which state that a constitutional challenge to a statute or a rule must be determined on either a facial or as applied basis, but cannot be based on a hybrid between the two. See State v. Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (Idaho 2003). Finally, the Defendants argue that a water right is not a fundamental right, and therefore, the strict scrutiny standard would not apply. The Court will take each of these arguments in turn.

Courts have the responsibility to construe legislative language in order to determine the law. Mason v. Donnelly Club, 135 Idaho 581, 583, 21 P.3d 903, 905 (Idaho 2001). This responsibility extends to review of administrative rules, and it is the court's responsibility to determine the validity of a rule. Id.

Challenged regulations are presumptively constitutional, and the heavy burden of establishing their unconstitutionality rests upon the party challenging the regulation. Matter of Wilson, 128 Idaho 161, 167, 911 P.2d 754, 760 (Idaho 1996); citing Rhodes v. Industrial Comm., 125 Idaho 139, 142, 868 P.2d 467, 470 (Idaho 1993).

A statute or regulation may be challenged as being unconstitutional on its face or as applied to the challengers. Korsen, 138 Idaho at 712. A facial challenge requires the challenger

to establish that no set of circumstances exist under which the rule would be valid.[4] Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 545, 96 P.3d 637, 646 (Idaho 2004); citing United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987). However, to succeed on an "as applied" challenge, the complainant must show that the rule, as applied to the specific complainant, fails to meet constitutional scrutiny (in other words, that it is unconstitutional in this instance, but not necessarily in all instances). Korsen, 138 Idaho at 712. Generally, a facial challenge is mutually exclusive from an as applied challenge. Id.

In Korsen, the Idaho Supreme Court held that it was improper for the district court to conclude that a statute was invalid on its face, *only* as it applied to public property, because a facial challenge requires the statute to be impermissible in *all* of its applications. Id. However, I.C. § 67-5258 provides a standard of "application or threatened application" when determining if a declaratory judgment is an available remedy.

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.

I.C. § 67-5258. This statute clearly contemplates the use of a factual history of a case when determining a rule's validity. In this case, this would include the Director's Orders entered in the Spring of 2005 pursuant to the Plaintiffs' delivery call. See Pl.'s Compl. Ex. B, C, and D.

In Moon, the Idaho Supreme Court applied the test for facial constitutionality, because there were no facts presented, and therefore, an "as applied" challenge was not available to the plaintiffs. Moon, 140 Idaho at 545. However, the Court did state that "Plaintiffs challenging the constitutionality of a statute are required to provide 'some factual foundation of record' that

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[4] The Plaintiffs assert that this standard only applies to "void for vagueness" challenges. While it is true that the vast majority of decisions that have cited this test were void for vagueness challenges, Moon and others were not such challenges. Therefore, this argument warrants little discussion.

contravenes the legislative findings." Id.; citing O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 258, 51 S.Ct. 130, 132, 75 L.Ed.324, 328 (1931).

While this Court recognizes that generally parties must choose to attack a rule's constitutionality either as a facial challenge, or as an "as applied" challenge, this case simply is not conducive to such a rigid application. In one respect of this case, the Plaintiffs have technically exhausted all possible administrative remedies available, because the Director has stated he has no intention of ruling on the constitutionality of the CMR's, nor does he have the jurisdiction to do so. Therefore, the remedy sought by the Plaintiffs cannot be achieved through administrative avenues. However, the administrative proceedings have not been fully completed – specifically, the trial scheduled for March of 2006 was continued and the Director has not finally determined if the Plaintiffs are entitled to administration of their water rights, and if so, to what degree or extent. Therefore, a strict "as applied" analysis is not technically proper. However, the procedures that are being challenged have been used against the Plaintiffs, so, unlike in Moon, there is a factual basis to determine how the Director employs the CMR's, and how they operate, and therefore being restricted to a strict "facial" analysis is also not proper. There are, however, certain aspects of this case which do fit neatly into a facial challenge analysis and those will be decided on that basis.

In light of the confusion surrounding this case, its unique circumstances, and the aforementioned case law, this Court issued a Notice of Clarification of Oral Order of November 29, 2005, filed December 16, 2005.

> 2. Suffice it to say, with brevity, this Court ruled it would hear the Plaintiff's constitutional 'facial challenges' to the Conjunctive Management Rules.
>
> As to the 'applied challenges' this Court ruled that the Administrative proceeding instituted January 14, 2005, has not yet been concluded; that

there were two recognized exceptions to the general exhaustion requirement; and the Court at that time declined to rule on the exhaustion question or either of the stated exceptions to the exhaustion requirement. The parties are free to pursue the pending administration as they see fit.

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2. As stated in its November 4, 2005, written decision, this Court declining to presently address the 'as applied' challenge is primarily premised on the fact that the ultimate resolution of that contested case has not yet occurred. In fact, the written decision noted that the hearing (trial) was now scheduled for March 6, 2006. Since the ultimate result is unknown, this 'as applied' challenge is not presently subject to review.

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3. However, even though the ultimate result of the Administrative proceeding is presently unknown, what has occurred to date within the Administrative proceedings are not in the hypothetical, rather are factual, and are subject to being placed in the record before this Court. See I.C. 67-5278(1).

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6. So as to try to avoid any further confusion, the 'as applied' matter means the ultimate future result following the March 6, 2006 hearing, i.e., the end result of the pending Administrative proceeding.

7. The 'as applied' ruling does not mean that a party in the present proceedings is precluded from referring to the actual procedural history of the contested administrative case to date or other records and files and orders of IDWR (in this case or any other) to try to demonstrate why a particular rule or part of a rule is Constitutionally flawed.

8. As such, other rules, orders, proceedings, cases, et cetera, within/involving IDWR may be applicable as well. The Court declines IDWR's request in its *Memorandum* lodged December 6, 2005 to strike entire affidavits, etc. If IDWR or anyone else has a particularized objection to some item, such a motion can be made.

9. A good deal of Plaintiffs' facial constitutional challenges are premised upon <u>procedures</u> employed, or to be employed, by the Director and the Department via the Conjunctive Management Rules. There is no better evidence of such procedures than the actual conduct of IDWR and the Director to date, i.e., an analysis based upon fact versus hypothetical is usually better in making a constitutional evaluation.

Notice of Clarification of Oral Order of Nov. 29, 2005, 2-4 (Dec. 16, 2005).

Ultimately, the Court's resolution to the discussion of whether a facial analysis is to be used or whether an "as applied" analysis is to be used is as stated in the December 16, 2005, Order, quoted above. Consistent with that Order, this Court will apply both. This Court looks at the CMR's and determines whether the actions taken by the Director and the IDWR, pursuant to the CMR's is unconstitutional in every application, but this Court will also utilize the underlying facts in this case to determine whether the CMR's are invalid, and to illustrate how the CMR's were actually being applied.[5] Of course, the final result of the administrative proceeding is not known and therefore cannot be addressed.

The Plaintiffs have also alleged that because a water right is a fundamental right, strict scrutiny should be applied to this case. In support of this proposition, Plaintiff's cite to Bradbury v. Idaho Judicial Council, 136 Idaho 63, 28 P.3d 1006 (Idaho 2001), which states:

> [I]t is a general rule that 'a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case.' However, the general presumption is not always applicable.

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[5] In the analysis section of this Order, this Court will discuss whether the CMR's operate as an unconstitutional taking. However, as an example as to how this facial versus as applied analysis will apply, the following law is relevant:

> In the context of a takings claim, a facial challenge involves a claim that the mere enactment of a statute constitutes a taking and is to be distinguished from an 'as applied' challenge, which involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation. Plaintiffs pursuing a facial challenge must show that the provision is unconstitutional in all its applications, while plaintiffs pursuing an as-applied challenge must show that the provision was applied to them in such a way that deprived them of their property. In the context of facial challenges, the mere enactment of legislation may be sufficient to constitute a taking claim.

26 Am.Jur.2d Eminent Domain, § 11. In this case, the Plaintiffs argue that the CMR's allow the Director to re-adjudicate the previously decreed water rights. If this Court determines that the CMR's do allow such a re-adjudication, this would be constitutionally deficient in any application, regardless of the facts of this case. See State v. Nelson, 131 Idaho 12, 951 P.2d 943 (Idaho 1998). In order to help determine whether the CMR's attempt to give the Director this authority, this Court will look at the facts of this case to determine if the Director did or threaten to do this.

> It has been held in some jurisdictions that when it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, the presumption in favor of the constitutionality of statutes no longer applies, but a contrary presumption arises against the validity of such statute. Similarly, it has been said that the presumption of constitutionality is inapplicable in civil rights cases involving fundamental constitutional rights.

When a statute infringes on a fundamental right or a suspect class, the presumption is that the statute is invalid unless the state can demonstrate the statute is necessary to serve a compelling state interest.

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Where no fundamental right or suspect classification is involved or **when dealing with legislation involving** social or **economic interests**, courts apply the rational basis test's deferential standard of review. In this context, this Court has stated that:

> 'Substantive due process' means 'that state action which deprives [a person] of life, liberty, **or property** must have a rational basis -- that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.'

***

When a state law is challenged on constitutional grounds it is necessary to determine the nature of the right claimed to be infringed. If it is a fundamental right, strict scrutiny applies -- that is, the presumption in favor of constitutionality is not applicable. The state must show a compelling interest to vindicate the law. If, however, the law does not infringe a fundamental constitutional right, the rational basis test is applicable -- the presumption is then in favor of the state.

Bradbury, 136 Idaho at 68-69 (internal citations omitted) (brackets in original, emphasis mine).

The Idaho Supreme Court went on to discuss what constitutes a suspect classification or a fundamental right. A suspect classification is created in the following circumstances: racial

classifications; national origin classifications; alienage classifications; legitimacy classifications; and gender classifications. Id. at 68.

> In the absence of indivious [sic] discrimination, however, a court is not free... to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures... The threshold question, therefore, is whether the ... statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity...

Id.; quoting Parham v. Hughes, 441 U.S. 347, 351-52, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269, 274-75 (1979). A classification based on property rights is not a suspect classification. The Idaho Supreme Court also listed various rights which the Idaho Supreme Court has recognized as being fundamental rights. These rights include: the right to travel interstate; the freedom of association; the right to participate in the electoral process; the right to privacy; and access to courts. Bradbury, 136 Idaho at 69, n. 2. Property rights are not included in this list. Further, the Court states that legislation implicating economic interests, as a water right surely is, is not subject to strict scrutiny. Therefore, but with some reservation, this Court determines that a water right is not a fundamental right,[6] therefore strict scrutiny would not apply in this case, and the usual presumption in favor of the constitutionality of regulations will be applied.

3. Agency Rules Which Exceed statutory Authority

The legal basis for this review is independent and in addition to the constitutional challenge.

The CMR's are agency rules and generally, a party challenging the validity of an agency rule must first exhaust all administrative remedies before filing a complaint in district court. See Asarco, Inc. v. State of Idaho, 138 Idaho 719, 722, 69 P.3d 139, 142 (Idaho 2003). However,

[6] Even though a water right is a "property right," whether a water right is a "fundamental right" is not so easily answered and is fairly debatable, the reason being water that water rights occupy their own Article in the Idaho Constitution.

under the circumstances presented here, it is unnecessary for the Plaintiffs to exhaust all their administrative remedies prior to seeking a declaratory judgment in district court.

As discussed earlier, there are several reasons for this. The first is that the Director does not decide the constitutionality of his own rules.[7]

Secondly, there is an exception for declaratory judgments regarding the validity of agency rules. Id. Idaho Code § 67-5278 states:

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights of the petitioner.
>
> ***
>
> A declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass on the validity or applicability of the rule in question.

I.C. § 67-5278.

The third is that although an agency action will generally have the force and effect of law, in order for the agency action to have the effect and force of law, it must be promulgated according to statutory directives for rulemaking. Asarco, 138 Idaho at 723.

If there is a conflict between a statute and a regulation or rule, the regulation must be set aside to the extent of the conflict. Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 813, 41 P.3d 237, 241 (Idaho 2002). A regulation or rule of an administrative agency will generally be upheld if it is reasonably directed to the accomplishment of the purposes of the statutes under which it is established. Id. A rule or regulation that is not

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[7] Even if the Plaintiffs were required to exhaust all their administrative remedies before seeking such a declaratory judgment, the remedy they are seeking, to-wit: a declaration as to the constitutionality of the CMR's, is not available to them through administrative action. This is because the Director has conceded that he has no intention of ever resolving the question of the CMR's constitutionality. Therefore, there is no administrative remedy available that would meet this remedy sought by the Plaintiffs.

within the expression of the statute is in excess of the authority of the agency to promulgate that regulation and must fail. Id.

> 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.

Id.; citing 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) (internal citations omitted) (emphasis mine). See also Holly Care Center v. State of Idaho, 110 Idaho 76, 78, 714 P.2d 45, 47 (Idaho 1986) ("[A]dministrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation."); Idaho County Nursing Home v. Idaho Department of Health and Welfare, 120 Idaho 933, 937, 821 P.2d 988 (Idaho 1991).

IX.

CONSTITUTIONAL FRAMEWORK

I. The Framers understood the importance of putting something in the Constitution.

First, it is worth noting that at the time of the Constitutional Convention in Boise, the area was experiencing a drought. Proceedings and Debates of the Constitutional Convention of Idaho 1889 1122-23, 1349 (I.W. Hart ed., Caxton Printers, Ltd. 1912) (hereinafter Proceedings and Debates) (Mr. Coston's remarks).

Second, at the time of the Convention, part of the waters diverted from the Boise River into a large irrigation canal were then used for "manufacturing purposes, in generating electricity, to light this town." Id. at 1125.

Third, various members of the Convention clearly understood the significance of something being placed in the Constitution. This is in part illustrated by the following remarks:

> Mr. BEATTY. Mr. Chairman, **one of my chief objections to incorporating this as a part of the fundamental law is that we do not know just what we want.** I do know that this is a very important question. **I know that the question of appropriation of water is yet in its infancy in Idaho**, and I, for one, scarcely know what we want. **But we are undertaking in the doctrines here incorporated to establish as it were something that will result in a great deal of damage.**

Id. at 1138 (emphasis mine).

> Mr. AINSLIE. But **this is an article of the organic law.**

Id. at 1146 (emphasis mine).

> Mr. AINSLIE. **That would secure all their constitutional rights**; and I move the adoption of it.

Id. at 1161 (emphasis mine).

> Mr. GRAY. **I will ask the gentleman if that is not the law anywhere as it stands?**
>
> Mr. HEYBURN. **It will be the law unless we enact something to change it; it is the law now and I want it to remain the law in the organic law of this territory.**
>
> Mr. GRAY. **Why put it in here then?**
>
> Mr. HEYBURN. The fact that it is the law now does not promise it will be the law after this constitutional convention gets through with its work. **If we say without any qualification that prior appropriation or diversion of water, etc., I presume we will mean just that thing, and we don't want to leave that a thing of construction for the courts. The object of our action here is to establish these fundamental principles of law, and in this bill already we say that prior appropriation shall give a prior right**, and that has been the battle cry of the gentleman from

Ada throughout the consideration of this section. I simply want this convention to say that the location of a mining claim or of a piece of property, which from the very nature of it contemplates the use of this water, shall be a prior appropriation. That is the object of the section.

Mr. GRAY. **I don't see how we are defending the law.**

Mr. HEYBURN. **It is a declaration of a right.**

Mr. GRAY. **As I said before, we will have this constitution bigger than the Bible before we get through.** It is just and clear, and a principle that has been decided before you and I were born, I expect – not before I was, but before you were – that a man cannot take and hold water without he does it for a useful purpose. He cannot hold it just because he has taken it; that does not give him a right; it does not give the factory a right, and if he is not using it, it must go below to the neighbor. It is not a *property*, it is only a *use*, that we have in this water, and **I do not think we are lumbering up what we call a constitution with all these proceedings over a matter connected with it which should be for the statutes if we desire it at all.**

Id. at 1167-68 (italicized emphasis original, bold emphasis mine).

And lastly,

Mr. HEYBURN. **I am willing to leave it to the legislature if we do not lock the door against the legislature, because I am satisfied that the legislature would deal with this matter better than this convention could. Its powers are of a rather different character, more in detail. But I do not want to see the door shut, and my object in introducing this section was that the convention's attention should be called to that effect, and the door not entirely shut against the legislature providing for those matters.** 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…

Id. at 1171 (emphasis mine).

Fourth, certainty of interests was on the minds of the members. Examples are:

[Mr. BEATTY]…

> But the main objection is this; it makes all interests uncertain. I put the question to any of you, who of you would invest your money in establishing any large manufacturing establishment **when you know that the water that you desire to use** in running that establishment **may at any time be taken away from you by either of these two other interests, that is, the agriculturalists, or for domestic use**? For that is what this section means, if it means anything, or else I do not properly construe it...

Proceedings and Debates at 1118 (emphasis mine).

> Mr. McCONNELL. Well, I am opposed to this amendment then, because it strikes out what we have been working to secure. **We have been working to secure a permanent investment to those people who have seen fit to go out on the plains and improve farms. If they have no priority of right after they have gone there and done that work over a manufacturing interest, then there is no security in their going there.** That is the way I would understand it...

Id. at 1332 (emphasis mine).

II. Idaho Constitution: Article XV, § 3.

A principal constitutional provision at issue in the present case is Article XV, § 3. As originally adopted at the time of statehood in 1890, this section provided as follows:

> ARTICLE XV
>
> WATER RIGHTS
>
> SEC. 3: The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. 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) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of