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,