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

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

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

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

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

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

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

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

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

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

1. Showing by senior making the call:

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

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

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

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

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

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

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

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

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

3. Application of criteria for determining futile call.

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

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

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

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

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

5. Hearing.

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

6. Burdens of Proof.

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

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

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

8. Final Decision.

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

9. Time is of the essence.

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

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

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

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

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

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

The CMR Provisions: IDAPA 37.03.11.020.11. provides in part

> **11. Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition** set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering is within the limits of the definition set forth in Section 42-1401A(11), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

IDAPA 37.03.11.020.11 (emphasis mine).

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

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

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

I.C. § 42-111.

I.C. § 42-1401A(11) provides:

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

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

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

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

I.C. § 42-607 provides

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The applicable CMR provides:

> **042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).**
>
> **01. Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:
>
> ***
>
> **g.** The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employment reasonable diversion and conveyance efficiency and conservation practices; provided, however, **the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.** In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

IDAPA 37.03.11.042.01.g. (emphasis mine).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Just such a 'determination' was made in the Director's May 2, 2005 *Amended Order* in responding to Plaintiffs' request for water administration. For example, instead of honoring the decreed elements of Plaintiffs' senior water rights, the Director arbitrarily picked a single water year (1995) and 'determined' the total amount of water diverted by Plaintiffs that year was all the water they were entitled to demand for purposes of administration in 2005:
>
> > 91. ***A full supply of water*** for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company ***is not the maximum amount of combined natural flow and storage releases diverted that yielded full headgate deliveries***, based on these entities' definition of full supply, ***but the minimum amount of combined natural flow and storage releases diverted recently that provided for full headgate deliveries***, recognizing that climatic growing conditions do affect the minimum amount of water needed and such affects can be significant.
> >
> > ***
> >
> > 115. To predict the shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005, ***the amounts of water diverted in 1995 are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders***...

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

Id. at 43-44.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Further the Idaho Supreme Court has stated:

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

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

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

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

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

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

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

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

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

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

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

XIII

CONCLUSION

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

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

[35] See Proceedings and Debates at 1162.

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

Dated: June 2, 2006

Signed: B Wood
Barry Wood, District Judge