

**Docket No. 37308-2010**

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT  
NOS. 36-04013A, 36-04013B, AND 36-07148 (Clear Springs Delivery Call)

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IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT  
NOS. 36-02356A, 36-07210, AND 36-07427 (Blue Lakes Delivery Call)

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CLEAR SPRINGS FOODS, INC.,  
Petitioner/Respondent/Cross-Appellant,

v.

BLUE LAKES TROUT FARM, INC.,  
Cross-Petitioner/Respondent/Cross-Appellant,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND  
WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,  
Cross-Petitioners/Appellants/Cross-Respondents,

v.

GARY SPACKMAN., in his capacity as Director of the Idaho Department of Water Resources;  
and the IDAHO DEPARTMENT OF WATER RESOURCES,  
Respondents/Respondents on Appeal/Cross-Respondents,

v.

IDAHO DAIRYMEN'S ASSOCIATION, INC., and RANGEN, INC.,  
Intervenors/Respondents/Cross-Respondents.

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**GROUNDWATER USERS' REPLY BRIEF**

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On Appeal from the District Court of the Fifth Judicial District  
of the State of Idaho, in and for the County of Gooding.

Honorable John M. Melanson, District Judge, Presiding.

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## ARGUMENT

### **1. THIS COURT ALREADY REJECTED THE SPRING USERS' POSITION THAT GROUNDWATER SHOULD BE ADMINISTERED STRICTLY ON A PRIORITY IN TIME BASIS.**

The Spring Users present a myopic view of Idaho water law whereby the Director is to do nothing more than compare priority dates when administering groundwater. They claim that principles of reasonable use and full economic development are “new theories for Idaho water law which would preclude administration of [] junior ground water rights.” (Spring Users’ Resp. Br. 22.) In fact, the section of their brief entitled “Legal Basis for Conjunctive Administration” fails to cite any of the cases, statutes, and constitutional provisions addressing reasonable use and full economic development. In their view, consideration of these policies automatically results in “reverse-priority” administration. *Id.* at 25.

This is not the first time the Spring Users have argued for groundwater administration by priority alone. In *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* (“AFRD2”), Clear Springs and other surface water users argued that the CM Rules “flip the law of prior appropriation on its head” and result in “reverse ‘first in time, first in right.’” (Pls’ Br. in Resp. to Defs’ and IGWA’s Open. Brs., AFRD2, Idaho S. Ct. Docket Nos. 33249, 33311, 33399 (Nov. 10, 2006), attached hereto as Addendum A at 14, 16.) They asserted that “the Director has no authority to reduce a senior’s right based upon a subjective determination in order to promote ‘the maximum beneficial use and development of this state’s water.’” *Id.* at 24. Their position was, in sum, that “water rights in Idaho should be administered strictly on a priority in time basis.” AFRD2, 143 Idaho 862, 870 (2007).

This Court rejected that argument, confirming instead that “there is a lot more to Idaho’s version of the prior appropriation doctrine than just ‘first in time.’” *Id.* at 872. The Court held that when responding to calls for the delivery of groundwater, the Director must also “make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development.” *Id.* at 876.

Principles of reasonable use and full economic development are embodied in the Ground Water Act (the “Act”), Swan Falls Agreement (the “Agreement”), and Rules for Conjunctive Management of Surface and Ground Water Source<sup>1</sup> (“CM Rules”) which define meaningful criteria for groundwater administration. Unfortunately, the curtailment orders<sup>2</sup> fail to meet those criteria, as explained below.

**2. THE CURTAILMENT ORDERS VIOLATE THE GROUND WATER ACT BY FAILING TO ADMINISTER THE ESPA BASED ON REASONABLE GROUNDWATER LEVELS.**

The Spring Users and the Idaho Department of Water Resources (“IDWR”) criticize the Groundwater Users for focusing on the Act and its assurance that groundwater users “shall be protected in the maintenance of reasonable pumping levels ....” I.C. 42-226. The Spring Users say this demonstrates a “repeated failure to accept reality that junior ground water rights are subject to administration pursuant to Idaho’s prior appropriation doctrine.” (Spring Users’ Resp. Br. 22.) The IDWR similarly argues that “the Ground Water Users focus solely on full economic development without consideration of other equally important objectives of the Prior Appropriation Doctrine, namely priority of right.” (IDWR Br. 31.)

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<sup>1</sup> The CM Rules are found at IDAPA 37.03.11.

<sup>2</sup> The Blue Lakes Order (R. Vol. 1 p. 45), the Clear Springs Order (R. Vol. 3 p. 487), and the Final Order (R. Vol. 16 p. 3950) are referred to collectively in this brief as the “curtailment orders.”

The Groundwater Users' attention to the Act is deliberate. This is the first time the Director has been called upon to apply the Act in response to a call for the delivery of groundwater by the holder of a surface water right. It is also the first time the Director has been called upon to apply the Act to the massive ESPA—the aquifer for which the Act was chiefly enacted.

This Court has already declared that the prior appropriation doctrine “was modified in certain respects by the enactment of the Ground Water Act ....” *Parker v. Wallentine*, 103 Idaho 506, 512 (1982). How the Act operates is at the heart of this case. Yet neither the Spring Users nor the IDWR present a cogent explanation of the Act that honors its terms. The Spring Users argue that the Act has no effect at all. (Spring Users' Resp. Br. 43.) The IDWR recognizes that the Act does contain substantive requirements for groundwater administration, but mistakenly claims that the “trim line” meets those requirements. (IDWR Br. 32.)

As explained below, the Act enables full economic development of Idaho's groundwater resources by requiring that Idaho's aquifers be administered based on reasonable groundwater levels. I.C. 42-226. It applies to all calls for the delivery of groundwater, whether made by surface or ground water users. I.C. 42-237b. The curtailment orders violate the Act by failing to administer the ESPA accordingly.

**a. The Act protects junior groundwater rights from curtailment so long as a reasonable groundwater level is maintained.**

The goal of the Act is “full economic development of underground water resources.” I.C. 42-226. The Act assures this will be achieved by providing that groundwater users “shall be protected in the maintenance of reasonable pumping levels ....” *Id.* (emphasis added).

The term “pumping levels” refers to the level of the groundwater table. The withdrawal of groundwater naturally lowers the water table whereas water entering the aquifer through precipitation, surface water irrigation, etc. (“recharge”) naturally raises the water table.

The Act defines what constitutes a “reasonable” groundwater level by instructing the Director to curtail groundwater use if it will “result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.” I.C. 42-237A(g). As an exception, the Act allows withdrawals to exceed recharge if “[a] program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.” *Id.* These provisions make clear that a reasonable groundwater level exists if the amount of recharge to the aquifer is capable of sustaining the amount of water withdrawn from the aquifer.

This balance between aquifer recharge and withdrawals is key to the Act’s goal of full economic development. To curtail sustainable groundwater use would obviously result in underutilization of the aquifer, thereby blocking full economic development. By protecting sustainable groundwater use, the State is able to “best [] utilize the annual supply without overdrafting the stock which maintains the aquifer’s water level.” *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 580 (1973).

The Spring Users claim that administration of the ESPA based on reasonable groundwater levels Act will result in unlimited groundwater pumping “until the point everyone will be out of water.” (Spring Users’ Resp. Br. 44.) In other words, they argue that the Act condones groundwater “mining” which is caused by “perennially withdrawing ground water at rates

beyond the rate of recharge.” *Baker*, 95 Idaho at 577. This argument ignores the plain language of the Act. Because mining results in underutilization of an aquifer, thereby blocking full economic development, the Act prohibits “withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.” I.C. 42-237A(g); see also *Baker*, 195 Idaho at 583.

The Spring Users also claim that administration based on reasonable groundwater levels “does not address a core issue—the effect of the doctrine of ‘first in time is first in right’ in water rights.” (Spring Users’ Resp. Br. 21; quoting R. Vol. 16, p. 3844.) The IDWR likewise claims that the protection of sustainable groundwater use does not give “consideration of other equally important objectives of the Prior Appropriation Doctrine, namely priority of right.” (IDWR Br. 31). These assertions ignore the terms of the Act.

The Act states that “[w]ater in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right ...” I.C. 42-237a(g). In other words, the Act protects the right of senior water users to curtail junior rights so long as it does not block full economic development of the resource. *Id.* The Act is in essence a legislative declaration that the exercise of priority is reasonable to protect an aquifer from being mined; it is not reasonable if it curtails sustainable groundwater use. The Act honors principles of reasonable use and full economic development by precluding seniors from curtailing junior water use if the aquifer is capable of sustaining such use without being mined. The Act simultaneously honors priority by allowing seniors to curtail junior rights as necessary

to maintain a reasonable groundwater level. This is precisely the “reasonable exercise of the doctrine of ‘first in time is first in right’” called for by the Act. I.C. 42-226.

The Spring Users malign the Act by claiming that it “attempts to elevate ground water rights to a preferred status over the Spring Users surface water rights.” (Spring Users’ Resp. Br. 26.) That statement mischaracterizes the Act. The Act is not concerned with giving preference to any type of water user; it is concerned with “the policy of the law of this state [] to secure the maximum use and benefit of its water resources. *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 442 (1957).

The Spring Users further challenge the Act by claiming it “prevents administration based purely on economics.” (Spring Users’ Resp. Br. 27.) This argument too is mistaken. Nowhere does the Act provide for administration based purely on economics. Rather, as noted by the District Court, “full economic development denotes expansive utilization of the aquifer, and does not necessarily dictate a preference of a more profitable or popular water use over another.” (Clerk’s R. at 120; emphasis added.)

Finally, the Spring Users’ claim that the Groundwater Users have argued for the first time on appeal that the Director misapplied the Act. (Spring Users’ Resp. Br. 46.) That argument could not be further from the truth. The Director’s application of the Act has been at the center of this dispute from the beginning and the focal point of the Groundwater Users’ arguments to the Director and to the district court. (*See, e.g.*, R. Vol. 15, p. 3662 (C12-13), 3663 (C18), 3675-76 (C44), 3676 (C48-49); Clerk’s R. p. 10, 128; Groundwater Users’ Open. Br. 19, 32-34, 43-46 (Jan. 9, 2009) and Reply Br. 1-2, 21-23 (March 9, 2009), Gooding Co. Case No. CV-2008-444.)

**b. The Act applies to all calls for the delivery of groundwater, whether made by surface or ground water users.**

Given the Director's failure to administer the ESPA based on reasonable groundwater levels, the IDWR takes the position that the Act "does not apply to the holders of senior-priority surface water rights." (IDWR Br. 28-31.) It claims surface water rights are exempt because the Act refers to "reasonable pumping levels" as opposed to "reasonable aquifer levels." *Id.* at 31. However, by its own terms, the Act applies when "any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority ...." I.C. 42-237B (emphasis added). The distinction between "pumping levels" and "aquifer levels" exists in word only. Both terms refer to the elevation of the groundwater table. As this Court recognized in *Baker*, the Act is concerned with "the maintenance of water tables." 95 Idaho at 581 (emphasis added). Thus, the District Court properly held that "any surface water appropriation fed from a hydraulically connected ground water source regulated by the Act is effected by the Act." (Clerk's R. p. 77.)

**c. The CM Rules expressly incorporate the Act.**

The Spring Users frame the Groundwater Users' position as a "theory that 'full economic development' creates a substantive condition or limit for conjunctive administration." (Spring Users' Resp. Br. 43). Their juxtaposition of full economic development against conjunctive management is misleading. Full economic development is not opposed to, but in fact part of, conjunctive management, as explained in CM Rule 20.03:

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 ... full economic development as defined by Idaho law.

The CM Rules further incorporate the Act and its program of administering Idaho's aquifers based on reasonable groundwater levels by defining full economic development in terms of groundwater use "in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use ...." CM Rule 10.07. Indeed, were it not for the principles of reasonable use and full economic development embodied in the Act, groundwater would be administered strictly by priority and there would be no need for the CM Rules.

**d. Courts have long recognized reasonable use and full economic development as substantive limitations on a water user's right to exercise priority.**

The Spring Users assert that "IGWA fails to cite any cases supporting their theory that 'full economic development' creates a substantive condition or limit for conjunctive administration." (Spring Users' Resp. Br. 43). They even say that Idaho law does not contain "any cases where administration to protect the senior water right has been denied in the name of economic development of junior water rights." *Id.* This allegation ignores a host of cases upholding principles of full economic development and reasonable use, four of which are cited in the Groundwater Users' Opening Brief.

In *Schodde v. Twin Falls Land & Water Co.*, the senior water user (Schodde) diverted his water right from the Snake River. 224 U.S. 107, 114 (1910). A dam and a large canal (the Twin

Falls Canal) were subsequently constructed to provide irrigation water to 300,000 acres of land under junior-priority rights. *Id.* at 115. The dam made it impossible for Schodde “to irrigate [his] lands or any part thereof or to raise profitable crops thereon or to use the same as pasture lands.” *Id.* at 116.

The Court recognized that to give Schodde an absolute right to exercise his priority would substantially limit beneficial use of the Snake River:

without the dam the Twin Falls scheme with all its present great promise fails. Not only this, but the Government is now constructing a dam across the river some distance above plaintiff for another extensive irrigating scheme, known as the Minidoka Project, which will take a large amount of the water and so much that probably there will not be enough left, especially at low stages of the river, for the full operation of the plaintiff’s wheels.

*Id.* at 118-19. Though senior in priority, the Court denied Schodde’s delivery call because it would block maximizing beneficial use of the Snake River. The Court reasoned that

the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right. ... It must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.

*Id.* at 120-21. *Schodde* is clearly a case where administration to protect a senior water right was denied in the name of economic development of junior water rights.

While *Schodde* is a decision from the United States Supreme Court, it relied on this Court’s earlier decision in *Van Camp v. Emery* which explained that

In this arid country where the largest duty and the greatest use must be had of every inch of water in the interest of agriculture and home-building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper irrigation.

*Id.* at 124-25 (quoting *Van Camp*, 13 Idaho 202, 208 (1907)). *Schodde* has since been cited favorably by this Court. *AFRD2*, 143 Idaho at 876.

The Spring Users try to distinguish *Schodde* by claiming that “Schodde was not deprived of the quantity of water he diverted through his water wheel.” (Spring Users’ Resp. Br. 47.) This argument ignores the fact that Schodde was left without any water. The decision explains that Schodde “will not in the future be able to irrigate said lands or to raise profitable crops or any crops thereon, as long as defendant’s dam is maintained.” 224 U.S. at 441. While some water still flowed in the Snake River, Schodde had no way of diverting it.

*Schodde* stands for two key propositions: 1) that an appropriator is not entitled to a certain elevation of a stream or waterway, and 2) “that the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right.” *Id.* 120.

This Court’s decision in *Baker* also confirms that a delivery call may be denied in the interest of full economic development of a groundwater resource. 95 Idaho 575. In *Baker*, the Court was “called upon to construe our Ground Water Act’s policies of promoting ‘full economic development’ of ground water resources and maintaining ‘reasonable pumping levels.’” *Id.* at 576. The Court had previously taken a strict priority approach to groundwater administration, holding that “the only way that a junior can draw upon the same aquifer is to hold the senior harmless for any loss incurred as a result of the junior’s pumping.” *Baker*, 95 Idaho at 581 (citing *Noh v. Stoner*, 53 Idaho 651 (1933)). The *Baker* decision reversed *Noh*, reasoning that “[i]f the costs of reimbursing the senior became excessive, junior appropriators could not

afford to pump from the aquifer.” 95 Idaho at 581. The Court held that *Noh* was “inconsistent with full economic development of our ground water resources.” *Id.* at 581-82.

The *Baker* decision confirms that “the phrase ‘reasonable pumping levels’ means that senior appropriators are not necessarily entitled to maintenance of historic pumping levels.” *Id.* at 584. The Court explained that

[a] senior appropriator is only entitled to be protected to the extent of the “reasonable pumping levels” as established by the IDWA. A senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.

In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote the full economic development of the resources. The legislature has said that when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare of all our citizens.

*Id.* (internal cites omitted).

Later, in *Parker v. Wallentine*, this Court again affirmed that the prior appropriation doctrine “was modified in certain respects by the enactment of the Ground Water Act ....” 103 Idaho 506, 512 (1982). More recently, in *AFRD2*, the Court held that “[w]hile the prior appropriation doctrine certainly gives pre-eminent right to those who put water to beneficial use first in time, this is not an absolute rule without exception.” 143 Idaho at 880. In responding to calls for the delivery of groundwater rights, the Court confirmed that the Director must also consider “the reasonableness of a diversion, the reasonableness of use and full economic

development.” *Id.* at 876. These are not “new theories for Idaho water law” as the Spring Users suggest. (*Cf.* Spring Users’ Resp. Br. 22.)

**e. The curtailment orders violate the Act by failing to administer the ESPA based on reasonable groundwater levels.**

The original curtailment orders issued in 2005 both recite the central premise of the Act that “[w]hile the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.” (R. Vol. 1, p. 63, ¶ 6; R. Vol. 3, p. 512, ¶ 6.) However, while the orders acknowledge the mandate for full economic development, they are devoid of any application of the Act. Absent from the orders are any findings of fact or conclusions of law addressing reasonable groundwater levels. (R. Vol. 1, p. 45; R. Vol. 3, p. 487.) In fact, the orders do not even refer to the Act’s promise that groundwater users “shall be protected in the maintenance of reasonable ground water pumping levels.” I.C. 42-226. Instead, the orders curtail all groundwater rights that have a measurable impact on spring flows. (R. Vol. 1, p. 70-71, ¶ 28-31; R. Vol. 3, p. 520, ¶ 30-33.)

By holding groundwater users liable for all impacts in spring flows, the curtailment orders effectively administer the ESPA based on peak groundwater levels rather than reasonable groundwater levels, in violation of the Act. Further, the record shows that the ESPA can sustain existing groundwater use without being mined.

Despite a reduction in recharge due to more efficient irrigation practices, annual recharge to the ESPA still remains far greater than annual withdrawals. Of the 7.5 million acre-feet of recharge to the ESPA each year, only 2 million acre-feet are used by groundwater pumpers. (R.

Vol. 1, p. 46, ¶ 4; R. Vol. 3, p. 488, ¶ 4.) The remaining 5.5 million acre-feet overflows from the ESPA and via spring outlets. *Id.* at ¶5.

Accordingly, while spring flows have declined from record highs, they are still 1,200 cubic feet per second (cfs) higher than they were at the turn of the twentieth century. (Ex. 407; R. Supp. Vol. 3, p. 4431-32.) Moreover, the effects of groundwater pumping have been substantially realized and the ESPA is now at or near equilibrium (*i.e.* stabilized). (*See* Groundwater Users' Open. Br. 15.) In fact, there is evidence that spring flows are increasing as the ESPA recovers from the worst drought on record which occurred in the early to mid 2000s (a drought with a probably of occurrence in excess of 500 years). (Dreher, Tr. 1134.) Dr. MacMillan testified that five of Clear Springs' raceways that were taken out of production in 2004 were put back into production in 2006. (Tr. 225.) The graph attached to the curtailment orders showing average annual ESPA discharges in the Thousand Springs area also shows spring flows increasing. (R. Vol. 1, p. 76; R. Vol. 3, p. 526; copies of this document are attached hereto as Addendum B.)

The curtailment orders block full economic development of the ESPA and violate the Act by curtailing irrigation to more than 70,000 acres *even though* the ESPA can sustain such use without being mined.

The Director upheld the curtailment orders by reasoning that groundwater pumpers must be held responsible for any lowering of the water table:

It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. The ground water pumpers are upstream from the springs that supply water to the Spring Users

facilities. The ground water users draw water from the body of water that ultimately spills water into the canyon reaches from a variety of springs. The ground water users that have been curtailed are all junior to all Spring Users adjudicated rights. The Spring Users have been prevented from applying water that would otherwise be available to them for a beneficial use, causing them material injury. Curtailment is proper.

(R. Vol. 16, p. 3714.) Not surprisingly, the Spring Users support the Director's departure from the Act, arguing that "the prior appropriation doctrine is harsh—but it is fair. It provides certainty to water right holders and has been the law in Idaho before statehood. There is no legal or factual reason to change course now for the sole benefit of junior priority ground water rights." (Spring Users' Resp. Br. 48.)

The idea that to apply the Act is to "change course" is remarkable. While priority of right provides a degree of certainty to appropriators, it has never provided absolute certainty. *See Schodde, Baker, Parker, and AFRD2, supra.* Moreover, none of the Spring Users' water rights in this case were appropriated until after the Act was amended to provide for full economic development. (1953 Idaho Sess. Laws, ch. 182, p. 278; R. Vol. 1, p. 52, ¶ 34; R. Vol. 3, p. 495, ¶36.) The certainties (and uncertainties) upon which the Spring Users made their appropriations *include* administration of the ESPA based on reasonable groundwater levels pursuant to the Act. By failing to apply the Act, it is the orders that "change course."

The Spring Users further defend the curtailment orders by arguing that "severe economic impacts and the blocking of full economic development are wholly unfounded and do not provide a sustained reason to preclude conjunctive administration to protect the Spring Users' water rights," and that "[i]f mitigating senior right is more economical than facing curtailment,

the market and the CM Rules provide the junior user with that option.” (Spring Users’ Resp. Br. 49; internal quotes omitted). These statements underscore the fact that the curtailment orders adhere to the defunct doctrine of *Noh* instead of the Act.

*Noh* provided that “the only way that a junior can draw on the same aquifer is to hold the senior harmless from any loss incurred as a result of the junior’s pumping.” *Baker*, 95 Idaho at 576 (citing *Noh*, 53 Idaho 651). *Noh* was reversed because “[i]f the costs of reimbursing the senior became excessive, junior appropriators could not afford to pump from the aquifer,” which this Court found to be “inconsistent with the full economic development of our groundwater resources.” *Id.* at 581.

The curtailment orders reach the same result as *Noh* by requiring the Groundwater Users to hold the Spring Users harmless for any loss incurred as a result of declines in the groundwater table. (R. Vol. 1, p. 72, ¶ 1-2; R. Vol. 3, p. 524, ¶ 5.) While the orders pay lip-service to the Act, they administer the ESPA no differently than if the Act did not exist. They violate the Act by 1) exempting surface water rights from complying with the Act when making a call for the delivery of groundwater, and 2) failing to protect groundwater users “in the maintenance of reasonable pumping levels.” I.C. 42-226. The orders must therefore be set aside.

**f. The “trim line,” while justified by the futile call doctrine, does not meet the requirements of the Act.**

The IDWR attempts to remodel the orders by claiming that the “trim line” is a product of the Act as opposed to ESPA Model uncertainty. (IDWR Br. 32.) It argues that “[t]he Director’s use of the trim-line promoted full economic development of the resource and prevented

monopolization of the ESPA, while at the same time protecting the priority of the Spring Users' senior water rights.” *Id.* at 52. This new argument does not comport with the record in this case.

Nowhere do the original curtailment orders mention the Act, full economic development, or reasonable pumping levels in conjunction with the trim line. The orders clearly explain that the trim line was derived from the Director's calculation of ESPA Model uncertainty. (R. Vol. 1, p. 59, ¶ 67; R. Vol. 3, p. 502, ¶ 71.) The Director implemented the trim line to exclude from curtailment those groundwater rights located so far from the target spring outlets that ESPA Model predicted their curtailment would have no measureable impact on spring flows. (Tr. Vol. 7, p. 1229-30.)

Not until the hearing, when the trim line was challenged, was the Act cited in conjunction with the trim line. Even then, however, the Director unequivocally confirmed that the trim line was solely a product of ESPA Model uncertainty. (Tr. 1168: 19-21.) The hearing officer also acknowledged that the basis for the trim line was Model uncertainty. (R. Vol. 16, p. 3703-04.)

Despite the after-the-fact citation to the Act in support of the trim line, the trim line does not meet the requirements of the Act. The trim line says nothing of reasonable groundwater levels. Rather, the trim line is justified by the futile call doctrine which is markedly different from the Act.

A “futile call” is “[a] delivery call made by the holder of a senior-priority surface or ground water right that, for physical or hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority water rights or that would result in waste of the water resource.” CM Rule 10.08. In other words, if

curtailment will not provide a usable quantity to the senior within a reasonable time, the call is futile. This is exactly what the trim line does: “remove[s] from the scope of curtailment junior-priority groundwater rights that might provide no measureable benefit to the Spring Users if curtailed.” (IDWR Br. 33.)

The Act goes beyond futile call doctrine. Even though curtailment of a given water right may not be futile (i.e. water will reach the senior), the Act precludes curtailment if it will block full economic development of the resource. The curtailment orders, on the other hand, curtail all groundwater rights that have a measureable impact on spring flows, regardless of whether curtailment blocks full economic development.

Despite IDWR’s contention, the trim line does not address reasonable groundwater levels and therefore does not meet the requirements of the Act. If the trim line is allowed to pass for a proper application of the Act, then the Act is nothing more than the futile call doctrine and may as well not exist.

**3. THE CURTAILMENT ORDERS VIOLATE THE COMPREHENSIVE PLAN ESTABLISHED BY THE SWAN FALLS AGREEMENT.**

The Spring Users argue that “IGWA wrongly claims that the Swan Falls Agreement created a ‘comprehensive plan for the management of the water shed.’” (Spring Users’ Resp. Br. 35-35.) The IDWR similarly argues that “the Ground Water Users are mistaken in arguing that the Swan Falls Agreement established a ‘comprehensive plan’ for water rights administration ....” (IDWR Br. 28.)

Paragraph 11 of the Agreement speaks for itself:

State and Company agree that the resolution of Company's water rights and recognition of the State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to refer as a comprehensive plan for management of the Snake River watershed.

(Ex. 437 at 5, ¶ 11; emphasis added.)

The issue is not whether or not the Agreement defines a comprehensive plan for management of the Snake River watershed—it clearly does. The issue is what that plan is and what it means for administration of the ESPA.

**a. The comprehensive plan provides for administration of the ESPA based on reasonable groundwater levels, in accordance with the Act.**

The Spring Users offer no explanation of the meaning and effect of the comprehensive plan established by the Agreement. They simply ask the Court to ignore the Agreement. The IDWR recognizes that the Agreement does define a comprehensive plan for the Snake River watershed, but claims it has no bearing on the Spring Users' water rights. (IDWR Br. 17-18.)

The comprehensive plan has two stated components: a) resolution of Idaho Power's water rights, and b) incorporation of the State Water Plan. (Ex. 437 at 5, ¶11.) The second component is relevant to this case.

The Agreement incorporates the State Water Plan because the Swan Falls controversy arose in large measure as a result of the first State Water Plan implemented in 1976. Consistent with the Act, the State Water Plan provided for administration of the ESPA based on reasonable groundwater levels, measured by Snake River flows at the Murphy Gauge. (Addendum C at

115-16.) Snake River flows at the Murphy Gauge reflect the groundwater level of the ESPA because such flows derive principally from groundwater discharged from the ESPA in the Thousand Springs area. (*See* Groundwater Users’ Open. Br. 23.) Higher groundwater levels produce higher spring flows (and higher Snake River flows at Murphy); lower groundwater levels produce lower spring flows (and lower Snake River flows at Murphy Gauge).

The State Water Plan established a minimum flow at Murphy Gauge of 3,300 cfs, which required that the ESPA be administered to provide sufficient overflow to ensure that 3,300 cfs would always pass the Murphy Gauge. (Addendum C at 116.) This administrative paradigm was explained in the 1986 State Water Plan: “river flows downstream from [Milner] to Swan Falls dam may consist almost entirely of groundwater discharge ... The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.” (Ex. 440 at 35.)

The purpose of administering ESPA discharges based on minimum flows at the Murphy Gauge is to maximize beneficial use of the aquifer. At the time of the 1976 State Water Plan, actual flows at the Murphy Gauge exceeded 6,000 cfs. (Addendum C at 22.) The minimum flow of 3,300 cfs allowed for additional groundwater development while protecting an adequate water supply for hydropower, aquaculture, and other uses below Milner. *Id.* at 116. The Plan projected that an additional 498,000 acres could be brought under irrigation in the upper Snake River basin while maintaining the minimum flow, with groundwater pumping expected to be the primary source for such development. *Id.* at 117.

The State Water Plan was a policy determination that the water table of the ESPA will be maintained at a reasonable level so long as a minimum flow of 3,300 cfs at the Murphy Gauge is maintained. The Plan recognized that “[m]ore efficient upstream water use and system management plus additional groundwater pumping will have an effect on the Snake Plain aquifer, the source of most springs along the Snake River.” *Id.* at 129. Therefore, the Plan specifically warned the Spring Users that their historic peak spring flows would not be absolutely protected and that they would need to adapt to spring flow declines:

Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist.

*Id.* at 118. This is entirely consistent with the Act.

The Idaho Power lawsuit that precipitated the Agreement challenged the State’s authority to administer the ESPA based on a minimum flow of 3,300 cfs, claiming that it resulted in a taking of Idaho Power’s water rights. *Idaho Power v. State*, 104 Idaho 575, 582 (1983). Idaho Power’s hydropower water rights at Swan Falls Dam (near the Murphy Gage downstream from Thousand Springs) authorized the diversion of up to 8,400 cfs—5,100 cfs more than was protected under the 1976 State Water Plan. *Id.* at 578.

Idaho Power took the position that it had an absolute right to curtail junior rights any time it received less than the maximum rate of diversion authorized under its water rights, regardless of whether that blocked full economic development of the ESPA. Conversely, the State and the defendant water users (mainly groundwater users) relied on *Schodde*, the Act, and various

equitable doctrines to defend the State's authority to administer the ESPA for full economic development based on reasonable groundwater levels measured by flows at the Murphy gauge.

This contest was never decided by the courts, because the State and Idaho Power entered into the Agreement to settle the dispute. What is significant is that the Agreement did not stop at resolving Idaho Power's water rights; it also confirmed the State's authority to manage the ESPA based on reasonable groundwater levels in pursuant to the Act and in accordance with the State Water Plan. Paragraph 11 of the Agreement specifically addresses the "Status of State Water Plan" and provides that "the resolution of Company's water rights and recognition thereof by the State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed." (Ex. 437 at 5, ¶ 11; emphasis added.) The Framework for Final Resolution of Snake Water River Water Rights Controversy (the "Framework") confirms that "[t]he State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as part of the settlement." (Addendum D at 7.)

In addition to reinforcing the State's right to administer the ESPA based on flows at the Murphy Gauge, the Agreement required that the minimum flows be increased to 3,900 cfs during the irrigation season and 5,400 cfs during the non-irrigation season. (Ex. 437 at 7, ¶ 13.A.i.) This compromise was at the heart of the Agreement. (*See* Groundwater Users' Open. Br. 23-24.) The Framework confirms that the Agreement was intended to allow groundwater use to expand until the minimums are met: "by setting the irrigation season minimum flow at 600 c.f.s. below

the current actual minimum, the state can allow a significant amount of further development of water uses without violating the minimum.” (Addendum D at 2.)

The IDWR attempts to diminish the role of the minimum flows by stating that “the Agreement did not establish the Murphy minimum flows, but simply proposed them.” (IDWR Br. 14.) That argument does not square with paragraphs 16 and 17 of the Agreement. Paragraph 16 provides for termination of the Agreement if the State Water Plan was not amended to increase the minimum flows. (Ex. 437 at 8, ¶ 16.) Paragraph 17 states that once implemented, the amendments became permanent. (Ex. 437 at 8, ¶17.) Administration of the ESPA based on the minimum flows was the very centerpiece of the settlement, not an ancillary suggestion.

Despite the monumental nature of the Agreement, the Spring Users argue that “[n]othing in the Swan Falls legislation changed the existing law as to the Spring Users’ ability to protect their senior water rights against interference or injury caused by junior water users.” (Spring Users’ Resp. Br. 34.) The IDWR argues similarly that “the State Water Plan recognized that administration of the Spring Users’ water rights would be governed by applicable principles of the prior appropriation doctrine as established by Idaho law.” (IDWR Br. 26)

The Groundwater Users’ agree that neither the Agreement nor the Plan changed Idaho water law. The Act was in place long before both the Agreement and the State Water Plan. The Agreement’s provision for administration of ESPA discharges based on minimum flows at the Murphy Gauge is a legislative application of the Act. It did not *change* Idaho law, but *applied* it.

The Spring Users argue that even if the Agreement was a valid application of the Act, the Groundwater Users have waived the protections it affords them. They say that “[s]ince the Swan

Falls Agreement was executed in 1984, IGWA and its members have had multiple opportunities to assert these arguments.” (Spring Users’ Resp. Br. 27.) Yet, there has been no need to invoke the Agreement, because the minimum flows have been maintained since it was signed. It was not until the Spring Users sought to curtail ground water rights *even though the minimum flows are maintained* that the effect of the comprehensive plan established by the Agreement was thrown into question.

The IDWR claims that the SRBA District Court “has already interpreted and applied the Swan Falls Agreement in 92-23.” (IDWR Br. at 12). SRBA subcase 92-23, however, only addressed the affect of the Agreement on Idaho Power’s water rights (the first component of the Agreement). SRBA subcase 91-13 (a/k/a Basin-Wide Issue 13) addresses the more global effect of the Agreement on other water users. The latest scheduling order in that proceeding identifies the issues still outstanding in that proceeding, two of which deal directly with the effect of the Agreement on other water users:

**Issue No. 2:** Identifying and preserving protections for third-party beneficiaries to the Swan Falls Agreement.

**Issue No. 4:** General provision in IDWR Basin 2 regarding the comprehensive management plan for administration of water rights above Murphy Gage and below Milner Dam as reflected in the State Water Plan.

(*Initial Scheduling Order*, SRBA Subcase No: 00-91013 (Basin-Wide Issue 13), May 26, 2010, attached as Addendum E.)

**b. The Agreement and the State Water Plan are binding upon the Director.**

The IDWR argues that even if the Swan Falls Agreement defined a comprehensive plan for administration of the Snake River watershed, it is not binding on the Director because “the

Director's water rights administration duties and obligations are defined by state law, not by the Swan Falls Agreement." (IDWR Br. 15.) However, as the IDWR itself acknowledges, the settlement "was given effect primarily through state law and the State Water Plan, not through the Agreement." (IDWR Br. 12.) And the Director has a statutory duty to "exercise [his] duties in a manner consistent with the comprehensive state water plan." I.C. 42-1734B(4).

Further, the Agreement explicitly provides that "[t]he State shall enforce the State Water Plan ... [and] shall not take any position before the legislature or any court, board or agency which is inconsistent with this agreement." (Ex. 437 at 1, ¶ 4.) The Agreement also specifically obligates the Director, as an executive officer, to adhere to its terms: "[w]hen the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions." *Id.* at 1, ¶ 2.

**c. The comprehensive plan applies to all water rights supplied by groundwater discharged from the ESPA, not just Idaho Power's water rights.**

The IDWR argues that the Swan Falls Agreement has no bearing on the Spring Users' water rights because they "were not signatories to the Agreement," and because "[t]here is no express or implied reference to any other water rights in the Agreement or the subordination legislation." (IDWR Br. 10, 22.) The Spring Users take the same position, arguing that the Agreement is merely "a private agreement between the State of Idaho and Idaho Power Company" that has no effect on other water rights. (Spring Users' Resp. Br. 30.) They say that "[s]ince the Agreement does not identify or subordinate the Spring Users' senior surface water

rights, that ends any inquiry and defeats IGWA’s claim on appeal.” *Id.* at 32. These arguments disregard the history and the terms of the Agreement.

Resolution of Idaho Power’s water rights is only one component of the Agreement. The second component affects the rest of the water rights that depend upon ESPA discharges in the Thousand Springs area. This is explained in the Framework:

The focus of discussion of settlement of the “Swan Falls Controversy” has necessarily been on the claims of right and authority at [the Swan Falls Dam] site. However, the settlement of those issues necessarily involves [sic] putting in place legislation and policies which will govern the rest of the Snake River and other watersheds also.

(Addendum D at 8.) The Swan Falls controversy forced the State and water users in the upper Snake River basin to face the challenge of “[a]chieving a proper balance among competing demands for a limited resource.” (Addendum D at 1.) The Agreement met this challenge by fortifying the State Water Plan approach of administering the ESPA based on minimum flows at Murphy Gauge. The Framework explains that “[b]y raising the irrigation season minimum streamflow, the state will be able to assure an adequate hydropower resource base and better protect other values recognized by the State Water Plan such as fish propagation, recreational and aesthetic interests ....” *Id.* at 2.

The Framework explains that the State entered into the Agreement instead of continuing with litigation because “adversary proceedings may not necessarily yield solutions which reflect the broad public interest.” *Id.* at 1. Like the State Water Plan it reinforced, the Agreement reflects a policy determination that ESPA discharges will be maintained at a reasonable level so long as the minimum flows of 3,900 cfs and 5,400 cfs are maintained. The Agreement

conditions its effectiveness upon the implementation of these minimum flows (Ex. 437 at 7, ¶13.A.i.) and then makes them irreversible (*Id.* at 8, ¶ 16-17). This component of the Agreement was designed to avoid a repeat of Swan Falls controversy—to avoid this case.

The IDWR and the Spring Users nevertheless argue that the Agreement and its changes to the State Water Plan are meaningless. They say that administration based on minimum stream flows is impermissible because it will “impair existing water rights.” (IDWR Br. 25; *see also* Spring Users’ Resp. Br. 39-40.) They rely on Idaho Code 42-1734A(1) which states that the State Water Plan applies to “unappropriated water resources.” (IDWR Br. 25; Spring Users’ Resp. Br. 39.) However, that statute was not enacted until 1988—two years after the Agreement was implemented via the 1986 State Water Plan. 1988 Idaho Sess. Laws, ch. 370, § 5, p. 1090.

At the time of the Agreement, the State Water Plan was governed solely by the Idaho Constitution which does not restrict the Plan to unappropriated waters. It reads simply that “the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest.” Idaho Const., Art. 15, § 7. At the time of the Agreement the State Water Plan governed all water rights. The Agreement does likewise.

The Spring Users also cite to the 1986 State Water Plan which states that “existing water rights are protected.” (Spring Users’ Resp. Br. 39.) When read in context, however, this phrase does not protect peak spring flows, as the Spring Users suggest. The 1986 Plan states that

[t]he minimum flows established for the Murphy Gauging Station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different

diversion facilities than presently exist. ... future management and development of the Snake River Plain aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

(Ex. 440 at 38.)

The statements that a) existing rights are protected and b) spring users will have to adapt to declining flows may appear contradictory, but they are not. When one considers the proverbial “bundle of sticks” held by the Spring Users at the time of the Agreement, it is clear that the anticipated reduction in spring flows did not impair their existing rights. Under the Act, the Spring Users were entitled to exercise priority to maintain *reasonable* groundwater levels, but not *historic* levels. Neither the Agreement nor the State Water Plan changed this. They protect “adequate” (i.e. reasonable) ESPA discharges rather than historic ESPA discharges.

To accept the argument that the Agreement affects only Idaho Power and has no bearing on the other water users in the Thousand Springs area defeats the major goal of the Agreement to “allow a significant amount of further development of water users without violating the minimum [flows].” (Addendum D at 2). If the Spring Users are permitted to shut down vast amounts of groundwater pumping even though the minimum flows are met, then the additional groundwater development that the Agreement intended to secure can never be realized.

The Agreement was not a futile exercise. It incorporated the State Water Plan program of administering ESPA discharges based on minimum flows with the expectation that it be “the cornerstone of the effective management of the Snake River.” (Addendum D at 7; *see also* Ex. 437 at 1, ¶ 4.) It was anticipated that “[t]he definition and implementation of a known and

enforceable state policy will make the Swan Falls controversy an asset in the history of this state.” (Addendum D at 8.)

The curtailment orders violate the Agreement by curtailing more than 70,000 irrigated acres in an effort to increase ESPA discharges even though the minimum flows are met. (*See* Groundwater Users’ Open. Br. 26-27.) As a result, the orders undermine the monumental effort undertaken in the 1980s to avoid the very dispute presented in this case.

**4. THE ACT IS NOT SUPERSEDED BY THE DEVELOPMENT OF CM RULES, FORMATION OF WATER DISTRICTS, OR ENTRY OF SRBA DECREES.**

The Spring Users’ argue that even if the Act defines meaningful criteria for groundwater administration, it does not apply within water districts. (Spring Users’ Resp. Br. 26-29, 61.) They assert that the Groundwater Users have waived their protections under the Act by not raising the Act as a defense to the formation of Water District 130, the development of the CM Rules, and the adjudication of their water rights in the SRBA. *Id.* These actions, however, are all *precursors* to groundwater administration. The Spring Users even acknowledge that “[a]ll of these actions set the framework for conjunctive administration.” *Id.* at 27. Since none of these actions involved actual delivery calls, and none challenged the Act, the Ground-water users had no reason to raise the Act as a defense to any of those actions.

**a. The formation of a water district does not insulate the Spring Users from the requirements of the Act.**

The Spring Users suggest that the Act does not apply to administration within water districts because Idaho Code § 42-602 states that water shall be distributed “in accordance with the prior appropriation doctrine.” (Spring Users’ Resp. Br. 14.) There is nothing in the water

district statutes (I.C. 42-602 et seq.), however, that excuses the Director from complying with the Act. The statutes simply instruct the Director to follow the “laws of the State of Idaho.” I.C. 42-604 (Emphasis added.) The statement that administration shall be according to the “prior appropriation doctrine” naturally means *all* aspects of the doctrine.

Moreover, it would have been futile for the Groundwater Users to contest the formation of Water District 130 because the Director is obligated to organize the State into water districts: “The director of the department of water resources shall divide the state into water districts ....” I.C. 42-604 (emphasis added). Since the Director has a duty to form water districts, and since he must administer water within water districts according to all aspects of Idaho’s version of the prior appropriation, there was no need for the Groundwater Users to challenge the formation of Water District 130.

**b. The CM Rules do not supersede the requirements of the Act.**

The Spring Users also claim that the Groundwater Users should have raised the Act as a defense to the development of the CM Rules. (Spring Users’ Resp. Br. 48-49.) This argument also fails. First, as agency rules, the CM Rules are inherently subject to statutory law. Second, the CM Rules incorporate the Act by “acknowledg[ing] all elements of the prior appropriation doctrine” including “full economic development as defined by Idaho law.” CM Rule 20.02-03. Third, the CM Rules “provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge.” CM Rule 20.08. Fourth, the CM Rules also provide that “[n]othing in

these rules shall affect or in any way limit a person's entitlement to assert any defense or claim based upon fact of law in any contested case or other proceeding." CM Rule 20.09.

**c. SRBA decrees are inherently subject to Idaho law, including the Act.**

The Spring Users argue that their water rights should not be subject to the Act because their SRBA decrees do not cite the Act as an administrative condition of their rights. (Spring Users' Resp. Br. 28.) They say that "[h]ad the Swan Falls Agreement or Ground Water Act actually limited the Spring Users' water rights in [sic] administration, IGWA is required to raise those objections during the SRBA litigation." *Id.* The IDWR similarly argues that the "Spring Users' water rights have not been decreed or defined in the SRBA as subordinated or conditioned in terms of the Swan Falls Agreement or the minimum flows at Murphy." (IDWR Br. 11.) In their view, water rights are subject only to the laws expressly recited in the decree.

The purpose of the SRBA is not to recite the canons of Idaho water law, but to define specific elements of individual water rights. While the SRBA court does have authority to decree unusual administration practices that may affect a given water right, that authority by no means obligates the SRBA court to recite in each decree the full body of law governing water administration generally. The Spring Users' water rights are inherently subject to all elements of Idaho's version of the prior appropriation doctrine, including those set forth in the Act.

Moreover, the Spring Users' decrees include the following language which makes them subject to general provisions entered after their partial decrees: "This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time

no later than the entry of a final unified decree.” (Ex. 31, 301-306.) Thus, their water rights are subject to the outcome of SRBA subcase no. 91-13 mentioned above.

#### **5. DEPLETION DOES NOT EQUAL MATERIAL INJURY.**

The Spring Users argue that the “injury addressed in conjunctive administration is to the water right.” (Spring Users’ Resp. Br. 25; emphasis in original.) They say that “[t]o the extent that Junior Ground Water Rights are taking water that would otherwise flow to and be used to fill senior water rights—thereby causing material injury—conjunctive administration is required.” *Id.* at 23. In other words, their position is that depletion to the water supply automatically equals material injury to the water user.

The distinction between injury to a water *right* versus injury to the *use* of water is significant. If injury is measured by impact to the *right* to divert water, then the senior is automatically injured any time he receives less than the maximum rate of diversion authorized under his right, regardless of whether he needs additional water to accomplish the designated beneficial use. On the other hand, if injury is measured by the impact to the *use* of water, then the senior suffers injury only if he is unable to meet his actual need for water.

This issue has already been decided. More than a century ago this Court held “the law only allows the appropriator the amount *actually* necessary for the useful or beneficial purpose to which he applies it.” *Abbott v. Reedy*, 9 Idaho 577, 581 (1904) (emphasis in original). Later the Court explained that administration requires evidence of “not merely a fanciful injury but a real and actual injury.” *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7 (1944). Further, this Court explained in *Mountain Home Irr. Dist. v. Duffy* that since

the policy of the law of this state is to secure the maximum use and benefit of its water resources ... it is the duty of the prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators at times when he has no immediate need for the use thereof.

79 Idaho 435, 442 (1957) (emphasis added).

The CM Rules define material injury accordingly as “hindrance to or impact upon the exercise of a water right.” (CM Rule 10.14.) The term “exercise” denotes impact to the use of water, not merely impact to the amount of water available for diversion.

When the CM Rules were challenged in *AFRD2*, the district court relied upon a surface water case (*Moe v. Harger*) to hold that “when a junior diverts or withdraws water in times of water shortage, it is presumed that there is injury to a senior.” 143 Idaho at 877 (citing *Moe*, 10 Idaho 302 (1904)). This Court reversed the district court, reasoning that *Moe* “was a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights. The issues presented are simply not the same.” *Id.*

This Court instead upheld the Director’s conclusions that “depletion does not equate to material injury,” that “[b]ecause the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury,” and that “senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.” *AFRD2*, 143 Idaho at 868.

These conclusions reflect the material injury factors listed in CM Rule 42 which relate to three assumptions that must be met to support a finding of material injury: 1) junior diversions reduce the amount of water available to the senior, 2) the senior needs additional water to accomplish his or her designated beneficial use, and 3) the senior's needs cannot be met by employing conservation efficiencies or alternate means of diversion. If these assumptions are met, the Director must then determine whether curtailment is in accordance with the Act. In this case, the Director's analysis went no further than the first assumption.

**a. There is no substantial evidence that the Spring Users need additional water to accomplish their designated beneficial use.**

CM Rule 42.01.e instructs the Director to consider “[t]he amount of water being diverted and used compared to the water rights.” (Emphasis added). This mirrors the Act which requires that any call for the delivery of groundwater include “[a] detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected.” I.C. 42-237B. If the senior does not need additional water, there is no injury.

The original curtailment orders contain no findings or conclusions addressing the Spring Users' use of and need for water. They find that material exists for the sole reason that groundwater pumping has “reduced the quantity of water available to [the Spring Users' water rights], thereby causing material injury.” (R. Vol. 1, p. 70, ¶ 28; R. Vol. 3, p. 520, ¶30.) There is no analysis of whether additional water is actually needed by the Spring Users.

The Groundwater Users have criticized the curtailment orders for finding material injury without any evidence that the Spring Users need additional water. Spring Users defend the

orders by arguing that “[t]he law does not require a showing that more, large or healthier fish can be raised with the water to be distributed any more than it requires a showing that a farmer can raise more, large or healthier crops with additional water.” (Spring Users’ Resp. Br. 25-26.) But the law *does* require the Director to consider production when responding to a delivery call. This Court held in *AFRD2* that

the director has the duty and the authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

143 Idaho 862, 876 (emphasis added). If additional water will not increase production, then the Spring Users do not need additional water and curtailment is improper.

The Spring Users claim that the testimony of Larry Cope and Gregory Kaslo proves they do need additional water. (Spring Users’ Resp. Br. 52.) That testimony, however, was admitted over the Groundwater Users’ objection and in violation of the Order re Discovery which barred the Spring Users from offering testimony that is based upon production records, facility design, etc. (Supp. R. p. 4402; *see* Groundwater Users’ Open. Br. 48-49.)

The hearing officer barred discovery of production records and facility information and improvements on the basis that “[p]rior authority from the SRBA District Court indicates that such information is not discoverable.” (Supp. R. Vol. 3, p. 4402.) This ruling was in error. SRBA decrees define the maximum amount of water that may be used by an appropriator at any one time. They do not define how often the water user needs the maximum rate of diversion or

whether such needs can be met by employing conservation efficiencies or alternate means of diversion. As this Court held in *AFRD2*, “water rights adjudications neither address, nor answer, the questions presented in delivery calls.” 143 Idaho at 876.

When Larry Cope was questioned about Clear Springs’ need for additional water, counsel for the Groundwater Users objected. (Tr. 87-90.) Mr. Cope admitted that his knowledge of Clear Springs’ need for water and ability to produce more, larger, or healthier fish was based on his regular review of fish production records which the Groundwater Users were denied discovery of. The hearing officer allowed the answer to stand, subject to “whatever weight is given.” (Tr. 91-92.)

Blue Lakes strained to admit testimony of Gregory Kaslo concerning water needs, but he was permitted to speak only to the water measurements that affect stocking decisions. (Tr. 275.) He could not attest to fish production and water needs, ability to meet production through conservation efficiency, or otherwise.

The Spring Users also claim that the watermaster for Water District 130 confirmed that they need additional water to accomplish their beneficial use. (Spring Users’ Resp. Br. 56.) Her testimony clearly did not go so far. She testified that she inspects the Spring Users’ fish facilities about once per year (Tr. 489), and that the Spring Users have the *capacity* to divert the maximum rates of diversion under their water rights. (Tr. 487-88, 493-94.) The ability to divert water, however, does not mean water is needed. When asked about actual *use* of water, the watermaster confirmed that she could not attest to the Spring Users use of water or need for additional water because that is not part of her investigation. (Tr. 492.)

Without substantial evidence that the Spring Users actually need additional water, the orders have been upheld based on an assumption that more water automatically equals more fish. (R. Vol. 16, p. 3840.) That assumption contradicts evidence that the Clear Springs has voluntarily scaled back production at times (Tr. 96-97.) and that Blue Lakes' facility capacity is 210 cfs (35 raceways designed for 6 cfs each) even its water rights authorize the use of only 197 cfs (Tr. 268). Thus, the testimony that people have seen empty raceways at Blue Lakes and Clear Springs does not necessarily evidence an inability to meet water needs. Perhaps most significantly, the lack of evidence that the Spring Users actually need additional water is because of their own efforts to avoid discovery of such evidence.

The Director's failure to examine the amount of water needed by the Spring Users in this case is inconsistent with his decisions in major delivery call cases that followed where he thoroughly considered the amount of water needed by the senior in making his material injury determination. (*See, e.g.*, excerpts from *IDWR Respondents' Brief*, Minidoka County Case No. CV-2009-647 ("A&B Delivery Call") January 28, 2010, attached hereto as Addendum F.)

The orders must be set aside because their finding of material injury is not supported by substantial evidence in the record and/or because the Director's decision to order curtailment in without considering whether the Spring Users legitimately need additional to accomplish their beneficial use is an abuse of discretion.

- b. The curtailment orders do not consider whether the Spring Users' needs can be met via conservation efficiencies or alternate means of diversion.**

If a senior legitimately needs additional water to accomplish his beneficial use, the CM Rules instruct the Director to determine whether the senior's needs can be met "by employing reasonable diversion and conveyance efficiency and conservation practices" (CM Rule 42.01.g) or "by using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells ..." (CM Rule 42.01.h). These considerations reflect the reality that curtailment groundwater pumping is a terribly inefficient means of increasing discrete spring flows. (*See* Groundwater Users' Open. Br. 16-17.)

There is evidence in the record to indicate that conservation efficiencies are a legitimate option for satisfying the Spring Users' water needs (if any). Dr. MacMillan testified that water is currently reused between 5 and 6 times between the race ways. (Tr. 105.) Greg Kaslo testified that "[i]f the raceway has to be dried up the fish can be moved to another raceway or they can be harvested and sent someplace else." (Tr. 274.)

Nevertheless, the hearing officer declined to consider conservation efficiencies options or alternate means of diversion on the basis that the Spring Users partial decrees in the SRBA "did not condition the rights to water upon pursuing it in a different manner, and there is no basis in the record to add this condition to the partial decrees." (R. Vol. 14, p. 3237.) This ruling is contrary to the reality that these are administration issues that arise in response to a delivery call and are not normally litigated in the context of the ESPA.

The Director's refusal to consider alternate ways to meet water needs is presumably due to the lack of evidence that the Spring Users actually need additional water in the first place. Regardless, the curtailment orders should be set aside because there is no substantial evidence

that the Spring Users' water needs cannot be met by conservation efficiencies or alternate means of diversion, and/or because the Director's failure to consider these material injury factors is an abuse of discretion.

**6. THE STANDARD OF PROOF ISSUE HAS NOT BEEN PRESERVED FOR APPEAL.**

For the first time on appeal, the Spring Users argue that groundwater administration decisions are subject to a "clear and convincing" standard of proof. (Spring Users' Open. Br. 9.) As pointed out by the IDWR, the Spring Users are presumably raising this issue in an attempt to preempt proceedings in the A&B delivery call case (Minidoka Case No. CV-2009-647) where the standard of proof is directly in dispute and is presently awaiting a decision. Regardless, the Groundwater Users are unable to locate any document where the Spring Users made this argument at the agency level or to the district court. While their Notice of Cross Appeal raises the issue of burden shifting, it does not raise the distinctly different issue of standard of proof. (Notice of Cross Appeal 3.) Since this issue was not raised below, it has been waived and cannot be raised for the first time on appeal. However, if the Court decides to rule on this issue, it should confirm that groundwater administration decisions must be based on the preponderance of the evidence as argued by the IDWR.

**7. THE DIRECTOR HAS AN INDEPENDENT DUTY TO APPLY THE FUTILE CALL DOCTRINE WHETHER OR NOT JUNIOR USERS RAISE FUTILE CALL AS A DEFENSE TO CURTAILMENT.**

The Spring Users argue that the Director erred by excluding from curtailment those water rights for which ESPA Model predicts curtailment will provide no measureable benefit to the Spring Users. (Spring Users' Resp. Br. 12-17.) They say this impermissibly shifts the burden of proof in water administration.

The Spring Users' argument is based on the assertion that ESPA Model uncertainty creates an "equal probability of increased injury to spring water rights." *Id.* This argument is factually incorrect. The Director was specifically asked: "So that 10 percent uncertainty level, it may be less than that or maybe greater than that?" to which he responded "No. It could only be equal to or greater than that. Because the gauge readings were determined to be the most inaccurate -- I'm not sure how I want to say that. But the gauge readings were determined to be the highest -- the source of the highest inaccuracy." (Tr. 1227-28.) Thus, the trim line does not exclude groundwater users with a 9% depletive effect while including rights with an 11% depletive effect, as the Spring Users suggest. (*See* Spring Users' Open. Br. 15.) It excludes groundwater rights for which curtailment will have no measurable benefit while including rights that will have some measurable benefit. (Tr. 1166-68.)

The Spring Users eventually recognize the trim line is a matter of futile call, but argue that the Director has no authority to apply the futile call doctrine on his own. (Spring Users' Open. Br. 14.) They say the Director "effectively nullifies the burden of proof required under Idaho law" if he applies the futile call doctrine without being compelled to by junior water users. *Id.* They claim that even if curtailment will be futile, the Director must curtail anyway until juniors come forward and present their own evidence of futile call. *Id.* at 15.

The Spring Users would have this Court treat the Director as nothing more than a judge of claims and counterclaims to water, rather than an agent of the State with an affirmative duty to administer water resources in accordance with Idaho law. Their argument contradicts the history and practicalities of water administration as well as the Director's legal duties to "distribute

water in water districts in accordance with the prior appropriation doctrine” (I.C. 42-602), “equally guard the various interests” of water users (I.C. 42-101), supervise the “appropriation and allotment [of groundwater] to those diverting the same for beneficial use” (I.C. 42-226), and extend priority “only to those using water” (*AFRD2*, 143 Idaho at 876).

While junior water users have the right to assert that a delivery call is futile, nothing precludes the Director from administering water in accordance with the futile call doctrine based on the evidence before him. Moreover, although the Groundwater Users were limited by the Order re Discovery, they did put on evidence of futile call. (Ex. 462-463)

### **CONCLUSION**

The Spring Users ask this Court to reverse *Schodde, Baker, Parker* and *AFRD2*, defeat the Act and the CM Rules, and reduce Idaho water law to a single, absolute rule that first in time is first in right. This Court rejected this proposal before, and should do it again.

The Court should set aside the curtailment orders because they violate the Act by failing to protect groundwater users in the maintenance of reasonable groundwater levels. The orders block full economic development of the ESPA by curtailing more than 70,000 irrigated acres even though the ESPA can sustain irrigation of those acres without being mined. Further, the orders violate the Swan Falls Agreement—a legislative application of the Act—by curtailment groundwater use in order to increase ESPA overflow even though the minimum Snake River flows at the Murphy Gauge are met.

If the Court refuses to set aside the curtailment orders for violating the Act and the Agreement, the orders should be set aside because there is no substantial evidence that the Spring

Users need additional water to accomplish their beneficial use, and no substantial evidence that their needs (if any) cannot be met by employing conservation efficiencies or alternate means of diversion. Finally, the curtailment orders should be set aside for failing to account for known uncertainties in the ESPA Model and for violating due process and the Idaho Administrative Procedures Act, as explained in the Groundwater Users' Opening Brief.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of October, 2010.

RACINE OLSON NYE BUDGE &  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of October, 2010, the above and foregoing document was served in the following manner:

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THOMAS J. BUDGE

# **ADDENDUM A**

## **Plaintiffs' Brief in Response to Defendants' and IGWA's Opening Briefs**

*American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*  
Supreme Court Docket Nos. 33249, 33311, 33399  
November 10, 2006

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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AMERICAN FALLS RESERVOIR DISTRICT #2, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY,

Plaintiff-Respondents, and

RANGEN, INC., CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY,

Intervenor-Respondents,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL J. DREHER, its director, Defendant-Appellants, and

IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor-Appellant.

---

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' AND  
IGWA'S OPENING BRIEFS

---

On Appeal from the District Court of the Fifth Judicial District  
Of the State of Idaho, in and for the County of Gooding,  
The Honorable R. Barry Wood  
District Judge, Presiding

---

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## STATEMENT OF THE CASE

### I. Nature of the Case

The Eastern Snake Plain Aquifer ("ESPA") is hydraulically connected to the Snake River and its tributary surface water sources (springs, streams) at various places and to varying degrees.<sup>1</sup> All water sources in the Snake River Basin, including the ESPA, are deemed connected and must be administered as connected sources.<sup>2</sup> The Idaho Constitution and water distribution statutes require that "[p]riority of appropriations shall give the better right as between those using the water". IDAHO CONST., art. XV, § 3; I.C. §§ 42-106, 602, 607. Water rights to the Snake River and its tributary springs are therefore entitled to constitutional protection against out-of-priority ground water diversions from the ESPA.

How is it then that junior priority ground water rights are permitted to intercept and take water away from connected senior surface water rights? The answer: under the cloak of the Department's *Rules for Conjunctive Management of Connected Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*) ("Rules"). Recognizing this threat to Idaho's law of water distribution, as established well over a century ago, the district court declared the Department's Rules facially unconstitutional.

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<sup>1</sup> R Vol. IV, p. 754 (Water District 120 Order at p. 4, ¶ 19); p. 762 (Water District 130 Order at p. 4, ¶ 19). The Director of the Idaho Department of Water Resources ("Department") previously found that ground water diversions in certain areas of the ESPA reduce flows in connected springs and the Snake River by an amount equal to 50% of those diversions within six months. R Ex. 1; *Steenon Aff.*, Ex. Y (Thousand Springs GWMA Order at p. 2, ¶ 4 of; see also, Ex. H to *Affidavit of Travis L. Thompson in Support of Opposition to Motion for Stay Pending Appeal Under Idaho Appellate Rule 13(g)* (American Falls GWMA Order at p. 2, ¶ 4) (filed with this Court in this appeal on August 31, 2006).

<sup>2</sup> R Vol. IV, p. 806 ("the form of the conjunctive management general provision is hereby decreed as set forth in the attached 'Exhibit A'."); pp. 807-808 (Exhibit A stating "Except as otherwise specified above, all other 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.").

Before this Court is an appeal of the district court's decision granting Plaintiffs' motion for summary judgment. The district court found that the Rules fail to include necessary constitutional components and protections for senior water rights which results in an unlawful diminishment and "taking" of those property rights.<sup>3</sup> These issues were directly raised by the Plaintiffs and argued before the district court.<sup>4</sup> The constitutional protections afforded senior water rights in Idaho's prior appropriation system are much more than mere "procedures" to be altered at the whim of an administrative officer. The constitutional protections afforded seniors, including honoring a water right's priority date and other decreed elements, are subverted through administration under the Rules. Accordingly, the district court rightly declared the Rules unconstitutional and in conflict with Idaho's water distribution statutes. This Court should affirm.

#### ADDITIONAL ISSUES ON APPEAL<sup>5</sup>

1. Whether the district court erred in finding that the Rules disparate treatment of ground water rights and surface water rights does not violate equal protection?
2. Whether Plaintiffs are entitled to attorneys fees and costs on appeal pursuant to Appellate Rule 40 and 41, and I.C. §§ 12-117?

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<sup>3</sup> The Rules are found in the record at R. Vol. 1, pp. 15-28. All future cites to the Rules will consist of the word "Rule" and the respective rule number rather than a reference to the record. The district court's June 2, 2006 *Order on Plaintiffs' Motion for Summary Judgment* is found at R. Vol. X, pp. 2337-2477. All future cites to this decision will consist of the word "Order" and the respective page number rather than a reference to the record.

<sup>4</sup> Contrary to the Defendants' representations (*Defs. Br.* At 5, 14), the issue of the Rules' failure to include the constitutional protections afforded senior rights was directly briefed and argued by the Plaintiffs to the district court. R. Vol. IX, pp. 2267-68; T. Vol. 1. pp. 189-191, 252-53, 264, 319-320.

<sup>5</sup> Plaintiffs join in the arguments in the TSWUA / Rangen response brief, including the equal protection arguments, as well as the response brief of the Idaho Power Company. Clear Springs joins in those briefs and this one as well.

## STANDARD OF REVIEW<sup>6</sup>

### I. Summary Judgment & Constitutional Issues

On review of summary judgment orders, this Court employs the same standard of review as the district court. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272 (1994). This Court reviews the record before the district court, to determine *de novo* whether, after construing the facts in the light most favorable to the nonmoving party, there exists any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Armand v. Opportunity Management Co., Inc.*, 141 Idaho 709, 713 (2005); *McColm-Traska v. Valley View, Inc.*, 138 Idaho 497, 500 (2003). Likewise, constitutional issues are pure questions of law over which this Court exercises free review. *Meisner v. Potlatch Corp.*, 131 Idaho 258, 260 (1998).

### II. Facial Constitutional Challenges & Declaratory Judgment Actions

Defendants and IGWA take issue with district court's consideration of facts, including the Director's use of the Rules to avoid regulating any connected junior priority ground water rights in 2005. As described below, the district court properly considered these facts, since:

- 1) Idaho Code § 67-5278(1) and this Court's decision in *Asarco, Inc. v. State of Idaho*, 138 Idaho 719 (2003) provide an exception from the "exhaustion rule" and allows a court to review an agency's "threatened application" of unconstitutional rules; and
- 2) A factual foundation is necessary for a court to review a facial constitutional challenge to administrative rules.

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<sup>6</sup> The standard of review for discretionary actions made by the district court is briefed in the *Plaintiffs' Brief in Response to the City of Pocatello's Opening Brief* and is adopted for this response as well. The "Course of Proceedings / Statement of Facts" is also included Plaintiffs' response to Pocatello's brief and is adopted herein.

Laws and regulations which are "clearly in violation of [a] constitutional principle" are not valid. *Moon v. Investment Bd.*, 96 Idaho 140, 143 (1974); *Bradshaw v. Milner Low Lift Irr. Dist.*, *infra*; *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325 (1956) ("That which the constitution directly prohibits may not be done by indirection through a plan ... to evade the constitutional prohibition."). Generally speaking, constitutional challenges are either "facial" challenges or "as applied" challenges. *State v. Korsen*, 138 Idaho 706, 712 (2003).<sup>7</sup> For facial challenges to a statute, a party must typically show "that no set of circumstances exist under which the [Rules] would be valid." *Moon v. North Idaho Farmers Association*, 140 Idaho 536, 545 (2004).<sup>8</sup> This rule, however, does not preempt consideration of some facts, including an agency's "threatened application" of unlawful rules. Reviewing the fact the Director failed to distribute water in a timely and lawful manner was relevant to demonstrate the "threatened application" of the Department's unconstitutional Rules. Moreover, no after-the-fact administrative review of the Director's actions would ever cure the lack of timely water distribution in 2005.

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<sup>7</sup> In an "as applied" challenge, the Plaintiff must show that the statutory or regulatory provisions were applied to a specific complainant in an unconstitutional manner. *Korsen*, 138 Idaho at 712. Since the underlying administrative action is still ongoing, nearly two years after the Plaintiffs first requested administration, the district court determined that it would not address any "as applied" challenge at this time. R. Vol. VIII, p. 1813. The Plaintiffs presented evidence of another situation wherein a senior water right holder was unlawfully prejudiced by an application of the Rules. See R. Vol. IX, pp. 226-27, 2305-2313. Specifically, the Plaintiffs addressed the Department's response to an administrative call, made on August 6, 2003, by Warren Lloyd, a senior ground water user. This example did not involve the Plaintiffs' water rights.

<sup>8</sup> This rule necessarily requires the introduction of certain hypothetical evidence of circumstances wherein the challenged provision can/cannot be applied constitutionally. This is the case, no matter how absurd the hypothetical circumstances may be. Yet, this is where the flaws in the Defendants' and IGWA's arguments are exposed. According to the Defendants and IGWA, Plaintiff could argue that, *hypothetically speaking*, the Director could use the Rules to justify the implementation of an administrative process which precludes water delivery for years without end. However, at the same time, the *fact* that the Department has done that very thing is somehow inadmissible. The Defendants arguments are nothing more than an attempt to hide their unconstitutional actions from the Court.

A. The Declaratory Judgment Statute Allows the Court to Review Some Facts Relative to its Analysis of the Validity of a Statute

This Court has recognized that “some factual foundation of record” must be present in a facial challenge. *Moon*, 140 Idaho at 545 (“Plaintiffs challenging the constitutionality of a statute *are required to provide* ‘some factual foundation of record’ that contravenes the legislative findings”) (emphasis added). Section 67-5278(1) allows a court to consider the “threatened application” of a rule, which necessarily includes a review of the actions taken by the agency to that point in time. This statute further provides an exception to the general rule that a party must first “exhaust” administrative remedies with the agency.<sup>9</sup>

In a declaratory judgment action, a plaintiff must only show that the statute or rule requires, *or allows*, an agency to consider factors and employ procedures that are inconsistent with the Idaho Constitution. *See Idaho Watersheds Project v. State Board of Land Commissioners*, 133 Idaho 64 (1999) (“*IWP*”). In *IWP*, the plaintiffs challenged the constitutionality of Idaho Code § 58-310B, both facially and as applied, through a declaratory

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<sup>9</sup> The exception was upheld by this Court in *Asarco*. 128 Idaho at 725 (“While the general rule is that a contestant must first exhaust administrative remedies before filing a complaint in district court, *there is an exception for declaratory judgments regarding agency rules.*”) (emphasis added). The Defendants fail to acknowledge this Court’s holding in *Asarco*, a case where similar arguments were advanced by a state agency in an attempt to dismiss a case on jurisdictional grounds. In *Asarco*, the Department of Environmental Quality (DEQ) moved to dismiss the case on exhaustion grounds claiming the plaintiffs were required to take their challenge to the agency first. 138 Idaho at 722. This Court rejected that argument.

judgment action.<sup>10</sup> *Id.* at 65. In that case, the Court examined the express language of the Idaho Constitution and compared it to the criteria found in the challenged statute.<sup>11</sup> *Id.* at 66-68.

*IWP* and section 67-5278 make clear that (1) a constitutional challenge may be brought in the form of a declaratory judgment action, and (2) where the challenged statute or rule contains "permissive" language, the "no set of circumstances" standard will not operate to save the rule from being declared facially unconstitutional. In other words, the standard is not applied in the traditional sense.<sup>12</sup> Indeed, the district court correctly recognized there is no better evidence of the "threatened application" of a rule than the actions already taken by the agency. R. Vol. VIII, pp. 1814-15.

This notwithstanding, the Defendants and IGWA allege that the district court "invented a hybrid analysis for evaluating Plaintiffs' claims." *Def's. Br.* at 40-42, *IGWA Br.* at 2.<sup>13</sup> In addition to ignoring I.C. § 67-5278, the Defendants misinterpret *Korsen*. In *Korsen*, the lower courts did not examine the challenged statute "as it applied to *Korsen's* specific conduct." 138 Idaho at 712 (emphasis added). In fact, the "hybridized" analysis that this Court disapproved of

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<sup>10</sup> Although the statute's constitutionality was challenged "as applied," no facts were presented to indicate that anything other than a purely facial challenge was considered. This is particularly evident by the fact that the Court struck down the section as "unconstitutional" without any limitation as to any particular application of the statute. *IWP*, 133 Idaho at 68.

<sup>11</sup> The constitutional provision reviewed in *IWP*, Article IX, § 8, requires that "monies received from the sale or lease of school endowment lands 'shall be reserved for school purposes only.'" While the Constitution requires the State to consider only the financial return to the schools of the sale or lease of school endowment lands, the Court found that the challenged statute unconstitutionally allowed for consideration of broader financial impacts to the State. *Id.* at 67-68.

<sup>12</sup> For example, given the use of such phrases as "may be considered" and "include, but are not limited to," found in section 58-310B, it would have been impossible for the *IWP* plaintiffs to have succeeded in any facial challenge under the "no set of circumstances" standard. Yet, this Court found section 58-310B to be facially unconstitutional.

<sup>13</sup> Defendants wrongly claim that the district court transformed the purely legal question of the facial validity of the Rules into a vehicle for litigating the Plaintiffs' "as-applied claims and resolving disputed issues of fact". Since the case was decided on summary judgment, there were no "disputed issues of fact" to be resolved.

was a limited review of facial validity.<sup>14</sup> Accordingly, the Defendants' "hybrid analysis" arguments are fundamentally flawed.<sup>15</sup>

Defendants further argue that section 67-5278 is nothing more than a "standing" and "ripeness" statute. *Def. Br.* at 44. This argument is also without merit. First, any party that is harmed by facially unconstitutional agency rules has standing. Likewise, since the statute allows parties to challenge a regulation *regardless of whether or not the agency has had such an opportunity*, any ripeness argument is defeated. I.C. § 67-5278(3).<sup>16</sup>

As demonstrated by this Court's holding in *IWP*, and, as properly recognized by the district court, a section 67-5278 declaratory judgment action is not a traditional "facial" constitutional challenge and allows a district court to consider some factual evidence. Accordingly, the district court correctly considered the "threatened application" of the Rules, i.e.

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<sup>14</sup> 138 Idaho at 712 ("By finding the statute vague, *not as applied to Korsen's conduct*, but as to all applications on public property alone, the magistrate and the district court used an improper standard for determining whether the statute was facially vague. It was improper to conclude that the statute is invalid on its face as applied to public property, because the standard to sustain a facial challenge requires that a statute be held impermissibly vague in *all of its applications*." (emphasis added).

<sup>15</sup> That notwithstanding, this case is not like *Korsen*. The district court here reviewed the Rules, as a whole. The district court's review involved a thorough review of the constitutional convention and other foundations for Idaho's water law, an in depth review of case law on the subject of prior appropriation and actual application of the Rules in other cases. There was no *Korsen* hybrid analysis. Furthermore, the examples presented by the Plaintiffs demonstrate the legal defects of the Rules on their face. The Defendants' misinterpretation of *Korsen* is no justification for their objection to the district court considering the facts of the unconstitutional water right administration scenarios that are possible, and that have actually occurred, under the Rules.

<sup>16</sup> Finally, such an argument is nonsensical as it would require the court to entertain factual evidence relative to standing and ripeness and then ignore that same evidence in order to review hypothetical circumstances intended to support and/or defeat the regulations. This is the case even if, as here, the factual evidence provides glaring examples of the constitutional deficiencies of the regulations.

the actions of the Director already taken in responding to the Plaintiffs' request for administration, as well as other proceedings, in reviewing the Rules' constitutionality.<sup>17</sup>

**B. Plaintiffs' Challenge to the Rules Still Meets the "No Set of Circumstances" Standard.**

Assuming that the aforementioned standard applies, the Plaintiffs meet the "no set of circumstances" rule for a typical facial constitutional challenge. As the district court recognized, the Constitution affords senior water rights certain constitutional protections.<sup>18</sup> The Rules usurp those protections and unlawfully require the senior appropriator to run an administrative gauntlet, the end result of which is, that the senior must continue to go without needed water until all contested cases (including appeals) have been resolved.<sup>19</sup> Since the Rules flip the prior appropriation doctrine on its head, they are unconstitutional *in every possible situation*, regardless of whether the senior appropriator uses surface water or groundwater.<sup>20</sup>

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<sup>17</sup> The Defendants wrongly claim the district court erred in failing to dismiss the "as applied" claims. *Def's. Br.* at 46-47. Section 67-5278(1) and *Asarco* provide an express exception to the general "exhaustion rule" when a party challenges the validity of an agency rule. The Defendants' reliance upon *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129 (200), is inapposite since that case did not involve a challenge to an agency's rules but involved the Industrial Commission's denial of injured workers' settlements. 141 Idaho at 132. Even so, the *Owsley* Court acknowledged there are exceptions to the "exhaustion rule". *See id.*

Here, Plaintiffs' challenge falls within the exception set forth in I.C. § 67-5278. Moreover, since the Department had no jurisdiction to determine constitutional questions, Plaintiffs did exhaust their administrative remedies. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 908 (1999).

Finally, this Court should take note of the Defendants' statements to the district court on the "as applied" claims. In seeking certification of the judgment for appeal, the Defendants represented that the "as applied" claims were moot. *Tr. Vol. 1*, p. 340, L. 12-16, p. 350, L. 14-18, p. 351, L. 23-25. In a turnabout with this Court, the Defendants now assert Plaintiffs' "as applied" claims are not "moot" and that this Court should remand the case with instructions to dismiss those claims. *Def's. Br.* 46-47. The Defendants cannot represent that part of a case is "moot" in order to receive a speedy appeal of a decision they don't like and then at the same time seek to have that part of the case dismissed through the appeal. Such tactics are the type of "piecemeal" appeals that Rule 54(b) prohibits. If the claims are not "moot" as argued by the Defendants in this appeal, and the district court's decision is reversed, then they remain before the district court.

<sup>18</sup> Order at 90, 94, 117, 124.

<sup>19</sup> The Rules also result in an unlawful diminishment and taking of a senior's prior decreed right.

<sup>20</sup> The Rules are also unconstitutional in administration between ground water rights. *See* p. 4, n. 7, *supra*.

### III. Notwithstanding the Standard of Review Applied by the District Court, this Court can Affirm on Alternate Grounds.

Even if, *arguendo*, this Court finds that the standard of review applied by the district court was improper, this Court should still affirm. Decisions regarding motions for summary judgment and constitutional challenges are reviewed *de novo*. See *Armand*, 141 Idaho at 713; *Meisner*, 131 Idaho at 260. Furthermore, “[w]hen a judgment on appeal reaches the correct conclusion, but employs reasoning contrary to that of this Court, we may affirm the judgment on alternate grounds.” *Martel v. Bulotti*, 138 Idaho 451, 454-55 (2003). Accordingly, since, the Rules are facially unconstitutional, this Court should affirm – regardless of the required standard of review.<sup>21</sup>

## ARGUMENT

### I. Introduction

The Defendants’ Rules unlawfully diminish a water right’s priority and create a system that ensures water is distributed to juniors, not seniors, first.<sup>22</sup> In the face of a water shortage, senior appropriators cannot rely upon a watermaster to protect and distribute water under their

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<sup>21</sup> This is not to state that the standard of review is not important. However, given the extremely time sensitive nature of these proceedings as illustrated by this Court’s order placing the matter on the expedited calendar and the fact the Rules have been repeatedly challenged in various district courts affirmation is appropriate regardless of this Court’s ruling on the standard of review. See *Martel*, 138 Idaho at 454-55.

Furthermore, to use a “standard of review” theory to defer a ruling on the merits of the case is not in the interests of the parties and does not further the policy of judicial economy. Since all parties admit this case presents a question of great importance for purposes of water right administration in this State, this Court should render a final decision. See *e.g. Bogert v. Kinzer*, 93 Idaho 515, 518 (1970) (“In a case of such wide and extreme public and governmental importance, questions of technicality and methodology should, if possible, be laid aside and the decision of this Court be dispositive of the ultimate issue.”).

<sup>22</sup> Although the Director is authorized to promulgate rules and regulations, such rules must be “in accordance with the priorities of the rights of the users thereof.” I.C. § 42-603. Since the Rules, as explained throughout this brief, violate the Idaho Constitution and water distribution statutes, the district court correctly found that the Director acted outside his statutory authority in promulgating the Rules. Order at 125.

rights. Instead, they must initiate administrative "contested cases", demonstrate why administration is necessary, and repeatedly justify their diversion and use under a previously decreed right. The resulting system of administration does not, as recognized by this Court in *A&B Irr. Dist. v. Idaho Conservation League*, "deal with the rights on the basis of 'prior appropriation' in the event of a call as required." 131 Idaho 411, 422 (1998).

After a careful review of the constitution and its history, the relevant statutes, and this Court's precedent defining the protections afforded a senior water right, the district court rightly declared the Defendants' Rules unconstitutional. This Court should affirm.

## II. Summary of the Plaintiffs' Case Before the District Court

As the Defendants and IGWA continue to mischaracterize the Plaintiffs' position, a brief summary is necessary. A water right is a property right that the Defendants are constitutionally required to administer in accordance with the doctrine of "first in time, first in right." Such administration forbids treating every water right as a creature of equal status, but instead, in times of scarcity, demands timely delivery of water to an older, senior right to the detriment of a newer, junior right "even if harsh and unjust." *Kirk v. Bartholomew*, 3 Idaho 367 (1892). The timely delivery sought by Plaintiffs to service their senior water rights must occur, as succinctly set out by the district court, when the fields are "green," that is, "consistent with the exigencies of a growing crop during an irrigation season."<sup>23</sup> Order at 93. Moreover, administration that is

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<sup>23</sup> Any arguments to the contrary fail to comprehend the realities of irrigation in an arid state like Idaho. The Defendants misinterpret *Arkoosh* in this regard. See R. Vol. IX, p. 2256 for further discussion.

not timely effects a taking of the property right.<sup>24</sup> Such a deprivation is not redressable through further "after-the-fact" administrative review. Finally, a water right decree or license defines the amount of water right to be protected and is not subject to re-interpretation by the Department or its Director.

Plaintiffs *did not* argue, as incorrectly represented by the Defendants:

that Idaho law requires immediate and automatic curtailment of junior ground water rights any time a senior surface water right holder's water supply dips below the decreed quantity, without regard to the extent of hydraulic interconnection between the surface and ground water supplies, the effect of junior ground water diversions on the senior right, the extent of the senior's current needs, or any other relevant principal of the prior appropriation doctrine as established by Idaho law.

*Defs. Br.* at 6. Plaintiffs are not seeking to "shut down" all groundwater use on the ESPA. Rather, Plaintiffs seek proper administration to protect their water rights from unlawful interference by out-of-priority diversions.<sup>25</sup>

Instead of addressing the true arguments in their briefs, the Defendants and IGWA waste most of their briefing ineffectively shadow boxing a phantom argument of their own creation. As a result, they fail to address the Plaintiffs' real contention – that senior water rights be given the protections afforded by Idaho's constitution and water distribution statutes and administered accordingly. The Rules seek to unlawfully change these rights.

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<sup>24</sup> This Court has recognized that to diminish a senior's priority by taking water that would otherwise be available for his diversion and use, results in an "injury" to the senior's water right. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1984); *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908).

<sup>25</sup> If a junior water right holder contends that his right does not injure the senior water right, that there is waste or that curtailing the junior will not supply water to the senior (i.e. a futile call), then the junior must prove such by clear and convincing evidence.

### III. The District Court Correctly Found That Idaho's Constitution and Water Distribution Statutes Require Juniors, Not Seniors, to Prove They May Divert Water in Times of Shortage.

"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." Order at 73. The district court's statement is well grounded in Idaho law and the Director must administer the State's water resources, *including ground water*, according to priority. The bedrock principle of Idaho water law that guarantees senior appropriators have the "better right" against juniors has not wavered since 1881. This Court has consistently reaffirmed this guiding principle that has protected property rights and provided certainty and stability to the regulation of Idaho's water resources.<sup>26</sup> In its most basic terms *the prior appropriation doctrine requires senior water rights to be satisfied prior to junior water rights*, hence, as noted by the district court "[t]here is no equality of rights." Order at 73.

The constitutional and statutory mandate is implemented by the state's watermasters who, in "clear and unambiguous terms" are required to protect senior rights in times of shortage.<sup>27</sup>

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<sup>26</sup> See *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931) ("a valid appropriation first made under either method will have priority over a subsequent valid appropriation"); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9 (1944) ("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water."); *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977) ("it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right.").

<sup>27</sup> Idaho's water distribution statutes (I.C. §§ 42-602, 607) do not require a senior to make a "delivery call" in order to receive the benefit of lawful water administration. The SRBA Court recognized the same in its *Basin Wide 5 Order*:

Implicit in the efficient administration of water rights is the recognition that a senior should not be required to resort to making a delivery call against competing junior rights in times of shortage in order to have the senior right satisfied. The Idaho Supreme Court made this pointedly clear in the *Musser* case.

R. Vol. IV, p. 798. This duty of the Director and its watermasters is further heightened when they have knowledge of a depleted water supply and the fact seniors' water rights are unfulfilled. See p. 1, n. 1, *supra*.

I.C. § 42-607; see *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). This Court has similarly held that the Director's affirmative obligation to administer water rights within a water district by priority is a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994).<sup>28</sup>

Given the constitutional preference for senior water rights, junior water rights must therefore be curtailed in times of shortage unless the junior can prove, by "clear and convincing evidence", that his diversion and use of water does not injure a senior appropriator. *Moe v. Harger*, 10 Idaho 302, 305 (1904).<sup>29</sup> This Court has reaffirmed constitutional protection afforded seniors on several occasions.<sup>30</sup>

These standards apply equally to water rights diverting from connected tributary sources.<sup>31</sup> Accordingly, since all water in the Snake River Basin is deemed hydraulically

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<sup>28</sup> Idaho's prior appropriation system provides certainty to a senior water right holder who is "entitled to presume that the watermaster is delivering water ... in compliance with this governing decree" and that his water right "consists of more than the mere right to a lawsuit against an interfering water user." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972) (emphasis added).

<sup>29</sup> Contrary to IGWA's interpretation (*IGWA Br. At 19*), the trial court in *Moe* entered a decree determining the water rights to the Big Lost River along with an injunction to prevent the junior appropriators from diverting water that eventually flowed underground and reappeared for diversion and use by senior appropriators downstream. 10 Idaho at 305-307. The incorporation of the injunction into the decree was affirmed. *See id.* at 306. There was no "jury trial" before administration, and the decree was found to be the "final word" for water distribution on the river.

<sup>30</sup> *See Cantlin v. Carter*, 88 Idaho 179, 186 (1964) ("A subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations"); *Silkey v. Tiegs*, 54 Idaho 126, 129 (1934) ("adherence to rule requiring protection of the prior appropriator, precludes relief to [the junior ground water user]"); *Jackson v. Cowan*, 33 Idaho 525, 528 (1921) ("The burden of proving that [the water] did not reach the reservoir was upon the appellants ... and this they fail to do").

<sup>31</sup> In *Josslyn v. Daly*, the Court held:

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

15 Idaho 137, 149 (1908)

connected,<sup>32</sup> administration of junior priority ground water rights in the ESPA is necessary to prevent interference with senior surface water rights to the Snake River and its tributary springs.

In short, a senior appropriator is *entitled* to have his water right *protected from interference by junior appropriators*, and the Department has a "clear legal duty" to distribute water on that basis.<sup>33</sup> The district court rightly found that these "concepts arise out of the Constitution" and constitute "incorporeal property rights," vested in the senior appropriator, that must be respected and upheld. Order p. 76, 77.<sup>34</sup> The protection is required whether it is against a surface water user attempting to divert water out-of-priority up river or a well owner that accomplishes the same effect by pumping tributary groundwater.

The district court correctly determined that the Department's Rules flip the law of prior appropriation on its head by failing to incorporate constitutional tenets requiring: (1) a presumption of injury in times of shortage; (2) the burden on the junior to claim lack of injury by clear and convincing evidence; (3) objective standards for review; and 4) the Director to honor prior decreed and licensed water rights. Order at 79, 81, 90-91. The above principles are

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<sup>32</sup> The exception to this presumption is limited to circumstances where an individual claimant proves to the SRBA Court that the source of his water right is "separate" from the rest of the Basin. The general provision from the *Basin-Wide 5* case provides the pertinent language. Order at 69. Unless a water right is deemed to derive from a "separate source", it must be administered together with all other rights in the basin under the "connected sources" general provision.

<sup>33</sup> IDAHO CONST. art. XV, § 3; I.C. §§ 42-602, 607; *Musser*, 125 Idaho at 395.

<sup>34</sup> These constitutional rights and protections afforded senior appropriators are far more than simply "procedures," as characterized by the Defendants. See *Defs. Br.* at 22. Moreover, Defendants' reliance upon *State v. Griffith*, 97 Idaho 52 (1975) is misplaced. *Griffith* concerned a defendant's appeal of a district court's decision to reject his request for another "trial *de novo*" of his conviction. 97 Idaho at 54. The defendant received one jury trial before the magistrate and was not entitled to another one before the district court. *Id.* at 57-58. No constitutional rights were denied. See *id.* Here, on the other hand, the Defendants' Rules directly conflict with the constitution's "first in time, first in right" mandate and fail to give effect to the necessary protections afforded senior rights.

"integral to the constitutional protections accorded water rights" and "give the primary effect and value to 'first in time, first in right.'" Order at 90, 94.<sup>35</sup>

**IV. The District Court Properly Determined That the Rules Violate the Constitution and Water Distribution Statutes By Failing to Incorporate Necessary Components of Idaho's Prior Appropriation Doctrine.**

The Defendants oversimplify the district court's decision as simply finding the Rules void due to missing "procedural components." *Def's. Br.* at 6, 23-25. The Defendants even attempt to justify the Rules by arguing that these tenets and procedures are "incorporated by reference" or that the Director could "fill in the gaps" with "existing law." *Id.* On the contrary, these components, including the required burdens of juniors, objective standards for administration, and the need to complete administration during an irrigation season, are not simply "procedures" to be left to the whim of administrative officials and their subjective interpretations of agency rules. Rather, they are crucial for constitutional water distribution. As correctly found by the district court, the Rules' failure to expressly identify these components is fatal.<sup>36</sup>

**A. Rules 30, 40, and 41 Unlawfully Force Seniors ("Petitioners") to Initiate and Prove Why Administration is Necessary During Times of Shortage.**

<sup>35</sup> The Defendants shrug off these constitutional shortcomings; instead claiming that judicial review of the Director's "decision" in water right administration is sufficient to protect water right holders. *Def's. Br.* at 23. Defendants fail to understand that initiating and completing a "judicial review" proceeding (months or years later) of a Director's unconstitutional scheme of water right administration fails to provide the necessary remedy, water, particularly when that water is necessary for irrigation purposes to satisfy a growing crop.

<sup>36</sup> The district court's decision regarding the unlawful exemption of "domestic" and "stockwater" water rights was correct as well. Order at 103-108. Neither the Defendants nor IGWA take issue with this part of the court's decision. *See Def's. Br.* at 13; *IGWA Br.* at 1. Accordingly, the Defendants' failure to raise the issue in their opening brief, without any argument, is dispositive and the district court's decision must be affirmed. *Myers v. Workman's Auto Ins. Co.*, 140 Idaho 495, 508 (2004) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. I.A.R. 35. . . . Consequently, 'this Court will not consider arguments raised for the first time in the appellant's reply brief . . .'").

The Rules reverse “first in time, first in right” by forcing seniors to make a “delivery call” and proceed through administrative “contested cases” before any administration occurs. This “last in time until determined otherwise” doctrine permeates the Rules and inherently protects junior priority ground water rights. The three different regulatory scenarios in Rules 30, 40, and 41 all place the same burdens on seniors. Then, while a senior suffers through the administrative gauntlet at great expense and delay, junior priority ground water users are free to deplete the senior’s water supply without consequence.

Rule 30, dealing with hydraulically connected junior ground water rights located outside the boundaries of a water district, forces a senior to begin a “contested case” by filing a “petition.”<sup>37</sup> Rule 30. Furthermore, according to Rule 30, the *senior*, or “petitioner,” carries the burden of proving “material injury.” Remarkably, no action is taken against junior ground water users until the Director issues an order “following consideration of the contested case.”<sup>38</sup> Rule 30.07. In the meantime, juniors are permitted to continue diverting a senior’s water.<sup>39</sup> In the example of a Rule 30 call made by a senior groundwater user in August 2003, the Department denied the request for administration (two years later in January 2005) on the basis the senior “did not prove, by preponderance of the evidence that pumping by junior water right holders

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<sup>37</sup> Under the Department’s procedural rules, a petitioner must: 1) fully state the facts upon which the petition is based, 2) refer to statutes, rules, or other law upon which the petition is based, 3) state the relief desired, and 4) state the name of the person petitioned against. R. Vol. IV, p. 848 (IDAPA 37.01.01.230).

<sup>38</sup> Although the Defendants allege that Idaho’s legislative scheme for water right administration replaced the “practice of administration-by-lawsuit”, they fail to explain how Rule 30’s “contested case” process is any different or why “administrative lawsuits” are acceptable. *Def’s. Br.* at 22. Moreover, being forced to file a petition and serve approximately 3,000 junior priority ground water rights, as was the case with Plaintiffs, can hardly be characterized as a “mini-lawsuit”. R. Ex. 4, *Creamer Aff.*, Ex. D (Order at 33).

<sup>39</sup> Whereas Idaho’s prior appropriation doctrine requires a junior to justify his use before being allowed to take water from a source, Rule 30 turns that constitutional protection upside down.

caused injury to his water right” and “did not prove that his diversion and use of water is reasonable”. R. Vol. IX, p. 2313. Clearly, the process violates Idaho’s law of prior appropriation.<sup>40</sup> See *Cantlin*, 88 Idaho at 186 (a junior “has the burden of proving” lack of injury).

Similarly, Rule 40 precludes administration within organized water districts until a senior files a “delivery call” “alleging” he is suffering “material injury.” Rule 40. Furthermore, like Rule 30, administration only occurs “upon a finding by the Director as provided in Rule 42 that material injury is occurring.” See Rule 40.01. Contrary to the constitutional presumption of injury to a senior in times of shortage, the rule places the burden on the senior to demonstrate he is suffering “material injury” *before any administration occurs*.<sup>41</sup> On its face, Rule 40, like Rule 30, contradicts priority administration by forcing seniors to initiate administration and carry the burden of demonstrating “material injury” while juniors are left to divert.

Rule 41 creates yet another process for a senior to follow when requesting administration of junior ground water rights located within a ground water management area. Under this rule, the senior, or “petitioner”, is required to “submit all information . . . on which the claim is based that the water supply is insufficient.” Rule 41.01.a. The rule then requires the Director to hold a “fact-finding hearing” at some point in time where the senior and any “respondents” can present evidence on the water supply and the diversions of ground water. Rule 41.01.b. The Director then “may” deny the petition, grant the petition, or find the water supply is insufficient to meet

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<sup>40</sup> In addition, “contested cases” under the Department’s procedural rules provide for discovery, motion practice, and post-hearing appeal processes. R. Vol. IV, p. 837-871. Clearly, proceeding through a formal “contested case”, like a lawsuit, takes time and is certain to extend beyond an irrigation season when administration is required.

<sup>41</sup> R. Ex. 4, *Creamer Aff.*, Ex. D (February 14, 2005 Order at 31, ¶ 38, and at 34).

the demands of water rights within all or a portion of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water. Rule 41.02.c. Once again, seniors, as the “petitioners”, carry the burden.<sup>42</sup>

The Rules unlawfully shift the burden of proving injury and the need for administration onto the senior appropriator. As such, seniors are left to initiate a series of “contested cases” and prove they are suffering “material injury” before the Director and the watermasters will take any action. The result is a lack of water to seniors, while juniors continue to divert unabated. Such a system does not provide efficient and immediate administration as required by the Idaho Constitution and water distribution statutes, I.C. §§ 42-602, 607. Moreover, the Rules’ “after-the-fact” administrative scheme forces seniors to endure extraordinary costs and burdens in order to receive proper water right administration.<sup>43</sup>

The Rules’ water distribution scheme violates the constitution and “injures” a senior water right holders by denying them use of their vested property rights without due process. See

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<sup>42</sup> Although a ground water management area designation signals that the water supply is “approaching the conditions of a critical ground water area”, the rule still places the burden on the senior to initiate and prove why administration is necessary. I.C. § 42-233b. The rule plainly contradicts what is happening in the subject aquifer since the ground water supply is not secure and the basin is deemed to be approaching a state of “not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated fields . . .” I.C. § 42-233a. Despite the statutory precautions, Rule 41 allows the Director to deny a senior water right holder’s request for priority administration and permit juniors to continue to divert unabated while a senior suffers the shortage. The law does not give the Director “discretion” to deny water distribution to senior water right holders when connected junior water right holders are diverting and taking water that would otherwise be available for the senior’s use. Finally, Rule 41 purports to allow the Director, when ordering right holders on a time priority basis, “to consider the expected benefits of an approved mitigation plan in making such finding.” *Id.* Nothing in Idaho’s ground water management area statute, I.C. § 42-233b, gives the Director any authority to consider “expected benefits” of a “mitigation plan” if there is insufficient water to meet the demands of all water rights within the management area. On its face, Rule 41 does not comport with I.C. § 42-607, or the ground water management area statute, I.C. § 42-233b, and therefore must be declared void as a matter of law and set aside. See *Roeder Holdings, LLC v. Board of Equalization of Ada County*, 136 Idaho 809, 813 (2001).

<sup>43</sup> See Appendix B to *Defs. Br.* (example of Plaintiffs’ administrative case identified at that point in time as proceeding for 16 months).

*Jenkins*, 103 Idaho at 388; *Lockwood*, 15 Idaho at 398. Accordingly, the district court correctly declared the Rules invalid as a matter of law for violating the plain terms of Idaho's constitution and water distribution statutes.<sup>44</sup> This Court should affirm.

**B. The Rules Fail to Establish a Workable Procedural Framework for Timely Water Right Administration.**

Water distribution must be "timely" in order to have a meaningful and practical effect for those that use the water, particularly those entities and individuals that rely upon water for irrigation. The district court correctly recognized the "timeliness" factor and its constitutional history:

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 ... [t]he 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 [the] Constitution."

Order at 93. See *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930).

IGWA would have this Court ignore the timeliness requirement. IGWA wrongly claims that resolution of a delivery call need only "be completed within a reasonable time consistent with due process and the complexity of the issues at hand" and that the "water administration statutes also are silent about timing." *IGWA Br.* at 16. Of course the longer the delay, the more water a junior can divert out-of-priority under the Rules.<sup>45</sup> Contrary to IGWA and the Rules,

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<sup>44</sup> See *Evans v. Andrus*, 124 Idaho 6, 10 (1993) ("Our duty is to follow and give effect to the plain and unambiguous language of the Constitution."); *Roeder*, 136 Idaho at 813 ("When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.").

<sup>45</sup> Similar to the flaws in the Rules, IGWA's "reasonable" time standard is not objective and provides no certainty that a senior will receive water during the irrigation season. Obviously this would benefit junior priority ground water rights.

however, Idaho law requires distribution to occur “in times of scarcity of water . . . so to do in order to supply the prior rights.” I.C. § 42-607.

“Times of scarcity” denotes any time during the irrigation season when the water supply is not sufficient to supply all the rights on a source or during the non-irrigation season when sufficient water does not accrue to fill senior rights. Delaying a decision on water right administration indefinitely or to whatever time is deemed “reasonable” to the Director plainly contradicts the law.<sup>46</sup> When a senior irrigator needs the water, and the vehicle of “contested cases” delays administration beyond the time when the water would have been diverted and used, it is obvious the process will not comport with Idaho’s prior appropriation doctrine.

The Defendants assert that the “informal resolution” process under Rules 30 and 41 and the Director’s May 2005 “emergency relief” order under Rule 40 comply with the law’s “timely administration” requirement. *Def’s. Br.* at 26. Yet, what if the Director rejects a senior’s request for “informal resolution”, as was the response the Plaintiffs received in early 2005?<sup>47</sup> When the Director refuses to “informally” resolve a request for administration, a senior has no choice but to proceed through the formal “contested cases” *before* administration occurs. The delays in such cases are well documented and inevitable given their “litigation” nature. The process

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<sup>46</sup> In addition, the “phased-in” curtailment provision in Rule 40.01.a further unlawfully delays administration by allowing juniors to curtail over a period of up to five years, while the senior must continue to suffer the shortage in the interim. The “phased-in” curtailment provision is another example of how the Rules violate the constitution. This issue was addressed in the briefing before the district court. R. Vol. V, pp. 1213-1215; Vol. VII, pp. 1903-906.

<sup>47</sup> R. Ex. 4, *Creamer Aff.*, Ex. D (February 14, 2005 Order at 33). Plaintiffs are unaware of any conjunctive administration case that has ever been decided under “informal resolution” procedures. The Defendants’ claim that “informal procedures” are available under the Rules is a hollow promise since in reality such a process is never used.

provided by the Rules does not accord with ensuring timely water right administration.<sup>48</sup> The district court correctly determined such a failure was constitutionally deficient. This Court should affirm.

V. The District Court Correctly Found That the Rules Effect an Unlawful “Re-Adjudication” of Senior Water Rights.

Court decrees are *conclusive* and are not subject to re-examination under the guise of administration.<sup>49</sup> Since the Rules permit the Director to ignore elements of decreed and licensed water rights and force a senior to re-prove and justify his use through various “determinations” under Rules 20, 40, and 42, they plainly violate Idaho law.

A. A Water Right Decree is “Conclusive” to the “Nature and Extent” of That Right and the Director is Bound to Honor the Decree in Administration.

The Defendants and IGWA misconstrue the effect and purpose of adjudications. The SRBA is not simply an exercise to catalog and list water rights in the Snake River Basin. The code specifically charges the Director to “commence an examination of the water system, *the canals and ditches and other works, and the uses being made of water diverted* from the water system for water rights acquired under state law.” I.C. § 42-1410(1) (emphasis added). The

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<sup>48</sup> As for the Director’s May 2005 “emergency order”, the Defendants fail to mention that no “relief” was ever actually provided during the 2005 irrigation season (except for 435 acre-feet of reach gain, R. Vol. I, p. 51). Indeed, the order purposely delayed a “final” decision until some undefined later date: “The Director will make a final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2005 is complete.” R. Vol. I, p. 204 (May 2, 2005 Order at 47, ¶ 11). This so-called “final” determination did not occur until well after the 2005 irrigation season and was even at that point subject to further revision by the Director. R. Ex. 5, *Third Rassier Aff.*, Ex. H. Although the Director determined injury occurred in 2005, no water was provided to mitigate that injury during 2005. The resulting “contested case” and so-called “emergency relief” provided by the Director was meaningless.

<sup>49</sup> The same rule applies to licenses issued by the Department since by law the license cannot reflect “an amount in excess of the amount that has been beneficially applied.” I.C. § 42-219. Like a decree, after a license is issued it is “binding upon” the Department and Director for purposes of administration. I.C. § 42-220.

Director must "evaluate *the extent and nature* of each water right", which includes the "authority to go upon all lands, both public and private" and inspect buildings or other structures that may house a "well or diversion works." I.C. § 42-1410(2) (emphasis added). The Director then recommends the water right to the court based upon his investigation. I.C. § 42-1411.

Accordingly, a court decree of the "the nature and extent of the water right" is considered "conclusive." I.C. §§ 42-1412(6), 1420(1); *see also, Crow v. Carlson*, 107 Idaho 461, 465 (1984) ("decree is conclusive proof of diversion of the water, and of application of the water to beneficial use"). Moreover, in applying for a water right, a water user must prove he has not taken more water than needed for the intended beneficial purpose. *Drake v. Earhart*, 2 Idaho 750 (1890).<sup>50</sup> Furthermore, he cannot waste or misuse the water so as to deprive others of the quantity for which he does not have actual use. *Id.*

This Court recognized that beneficial and reasonable use is determined when a water right is decreed in *Head v. Merrick*:

Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and *certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.*

69 Idaho 106, 108 (1949) (emphasis added).

Accordingly, in Idaho, as in other prior appropriation states, beneficial use is the measure of a water right and is a settled term of the decreed right. The reasonableness of diversion and

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<sup>50</sup> *See also, Farmers' Co-op Ditch Co. v. Riverside Irrigation Dist.*, 16 Idaho 525, 535-36 (1909) (Economy must be required and demanded in the use and application of water.); *Abbott v. Reedy*, 9 Idaho 577, 581 (1904) (the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it).

use is proved when the water right is adjudicated and it becomes *res judicata* upon entry of the decree. If a decree's terms may be disregarded in administration, then the purpose of an adjudication, like the 20-year Snake River Basin Adjudication, is rendered meaningless.

Since a decree is "conclusive" as to the "extent and nature" of a water right, the Director has no authority to refuse to distribute water in priority under the theory the senior may not "need" the water on a particular day when it happens to rain or in a year where the senior happens to grow a less consumptive crop.<sup>51</sup> Although a water right is still subject to "forfeiture" or "abandonment" after it is decreed, a right cannot be reduced under a subjective "reasonable beneficial use" finding in administration.

This Court firmly rejected such "micromanagement" of water rights in *State v. Hagerman Water Right Owners, Inc.*:

Following that decision and during the course of the proceedings before the special master, the IDWR stated that the Director's recommendation was based on current non-application to "reasonable beneficial use." *The IDWR stated that the concept of beneficial use allows for constant re-evaluation of whether the water is being used beneficially. ...*

*The special master determined that absent a claim of forfeiture, abandonment, adverse possession, or estoppel, a reduction in beneficial use after a water right vests is not a basis upon which a water right may be reduced. ...*

Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, *the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights.*

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

<sup>51</sup> Such analyses are prohibited under Idaho law for the Department "cannot limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced from the use of that right." R. Vol. IV, p. 933.

Accordingly, contrary to the Defendants' claims, the Director has no authority to reduce a senior's water right based upon a subjective determination in order to promote "the maximum beneficial use and development of the state's water." *Def's. Br.* At 34. The district court rightly rejected the Defendants' theory and clarified that the Defendants' "responsibility to optimize the water resources has to include the remainder of the Constitution 'in accordance with the prior appropriation doctrine.'" Order at 117. As stated in *Caldwell v. Twin Falls Salmon River Land & Water Co.*, 225 F. 584 (D.C. Idaho 1915), "Economy of use is not synonymous with minimum use."

Finally, honoring a court water right adjudication forbids the Director from re-conditioning a decreed water right on the basis of "historic conditions" when the appropriation was first made. Once a decree has been entered, the Department is bound to accept the court's findings.<sup>52</sup> See *Beecher*, 66 Idaho at 10 ("When water has once been decreed and becomes a fixed right, the water *must be distributed as in the decree* provided.") (emphasis added).<sup>53</sup> As

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<sup>52</sup> The SRBA Court explained the same in the context of the Department's conjunctive management rules and partial decrees issued by that court:

Collateral attack of the elements of a partial decree cannot be made in an administrative forum. As such, the Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a re-examination of prior existing conditions in the context of applying a "material injury" analysis through application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11 *et seq.*

R. Vol. IX, p. 2322.

<sup>53</sup> The district court rightly followed this Court's precedent which has repeatedly held that a watermaster does not have the ability to "second-guess" court decrees in administration: "[i]t 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." Order at 93; see *State v. Nelson*, 131 Idaho 12, 16 (1998) ("the watermaster is to distribute water according to the adjudication or decree."); *Siethem v. Skinner*, 11 Idaho 374, 379 (1905) ("We think the position is correct . . . where the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.").

set forth below, the Rules violate the law's requirements and effect a "re-adjudication" of senior water rights.

**B. The Rules Unlawfully Force Seniors to Re-Prove a Water Right Under the Guise of "Reasonableness" and "Material Injury" Determinations.**

The Defendants and IGWA downplay the significance of adjudications and the binding effect of a decree in administration.<sup>54</sup> IGWA similarly argues that only in administration, not adjudications, is a water right holder's "diversion" and potential "waste" of water determined. *IGWA Br.* at 32-34. Such arguments do not justify how the Rules unlawfully force seniors to re-defend the elements of a decreed water right every time administration occurs.

The Rules strip a decree's "conclusive" effect and replace it with whatever the Director determines is "reasonable."<sup>55</sup> The Rule 40 and 42 "material injury" determinations, which are further conditioned by a "reasonableness" opinion, effectively preclude administration according to a court's decree.<sup>56</sup> *See Nelson*, 131 Idaho at 16; *Stethem*, 11 Idaho at 379.

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<sup>54</sup> The Defendants continue to advance the same arguments they offered in *Hagerman Water Right Owners, Inc.* -- even citing a footnote from *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 (1976) to argue that a senior is not entitled to divert the quantity set forth on his decree. *Defs. Br.* at 31. Yet, *Briggs* does not support the Defendants' contention and is foreclosed by this Court's decision in *Hagerman Water Right Owners, Inc.* While, in *Briggs*, the Director had reduced prior licensed water rights pursuant to a prior district court order, the question before the Court concerned the perfection of the appeal and whether or not the district court had authority to restrain the Director from allowing junior ground water right holders to pump water that had not been used by the seniors. 97 Idaho at 435. In reviewing the Ground Water Act and section 42-220, the Court concluded the Director had authority to allow junior ground water right holders to divert from the aquifer based upon the finding that water was available without "mining" the aquifer. *Id.* Contrary to the Department's claim, the case does not stand for the proposition that the Director is free to disregard a senior's decreed water right for purposes of administration. *S*

<sup>55</sup> In the face of nearly one hundred years of *stare decisis* on this subject, Rule 20.05 boldly states that "[T]hese rules provide the basis for determining the reasonableness of the diversion and use of water by [] the holder of a senior-priority water right who requests priority delivery."

<sup>56</sup> The district court acknowledged that certain "factor and policies" in the Rules "can be construed consistent with the prior appropriation doctrine", so long as one is "careful to evaluate the context in which they are made." *Order* at 84. The Defendants Rules' are not so "careful", and the context in which these various "factors and policies" are

Notably, the “reasonableness” condition, in conjunction with the various Rule 42 “material injury” factors, impermissibly shifts an objective “injury” inquiry away from the state of the water supply and the impact of the junior’s diversion on the supply to the senior and whether or not he can prove a “reasonable” and “efficient” diversion and use to the satisfaction of the Director. Accordingly, the context of “material injury” in the Rules is strikingly different than what constitutes “injury” under Idaho law, or what is required of a junior to prove a senior is “wasting” water or that a call would be “futile”.<sup>57</sup>

Under Idaho law, a reduction in the water supply available for diversion and use by a senior results in an “injury” to that senior’s water right.<sup>58</sup> The inquiry is objective and is based upon a review of the junior’s diversion and impact on the water source. However, the Rules define “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, as set forth in*

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placed impermissibly undercuts prior decrees, thereby effecting a “re-adjudication” of decreed water rights contrary to Idaho law.

<sup>57</sup> At the hearing on the Defendants’ motion to stay the judgment, the district court explained:

THE COURT: ... And so what I see under the conjunctive management with this new body of law that the director wants to evolve is that there is no presumption of injury. There’s a different definition of injury in curtailment that he tries to develop with this material injury and the factors that he has enunciated; as opposed to what injury mean, historically, in curtailment cases.

Tr. Vol. II, p. 80, L. 10-17.

<sup>58</sup> See R. Vol. V, pp. 1020-22. The district court, following this Court’s definition of “injury” from *Beecher* correctly noted that “injury” in the administration context “is universally understood to mean a decrease in the volume or supply of water to the detriment of the senior.” Order at 77. See *Beecher*, 10 Idaho at 8. Diverting water from a supply that would otherwise be available to fill a senior right obviously “decreases the volume of water in a stream” and constitutes a “real and actual injury” to the senior. See *id.* at 7, 8.

The “injury” question, as expressed in the statutes concerning new water right appropriations and transfers, centers on the proposed action’s impact, not the “reasonableness” or “efficiency” of uses under existing water rights. The same is true for water distribution under I.C. § 42-607. The watermaster monitors the supply and curtails junior rights as necessary to protect senior rights from receiving less water than they otherwise would by reason of those junior diversions. See *Jones v. Big Lost Irr. Dist.*, 93 Idaho 227, 229 (1969) (“The duties of a water master are to determine decrees, regulate flow of streams and to transfer the water of decreed rights to the appropriate diversion points, I.C. § 42-607.”).

*Rule 42.*” Rule 10.14 (emphasis added). The definition tiers to Rule 42 and its eight factors for further explanation.<sup>59</sup> These Rule 42 factors conflict with Idaho’s water code and what constitutes “injury” to a water right in a curtailment context.

Indeed, the example of how the Rule 42 factors play out in administration is telling as to how “injury” is not tied to a senior’s water right, but instead is determined in the context of what the Director believes is a “reasonable” use. In the Plaintiffs’ case the Director disregarded “injury” that was occurring to their water rights and instead created a “minimum full supply”, or what he believed was “reasonable”, for administration.<sup>60</sup> In the case of Plaintiff-Intervenor, Clear Springs Foods, the Director unlawfully re-conditioned Clear Springs’ decreed water rights by limiting the decreed quantity as a “seasonal high” based upon what the Director believed to be “historic conditions.”<sup>61</sup>

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<sup>59</sup> The district court rightly acknowledged how the Rules undermine the certainty of adjudications by replacing water distribution according to decrees with subjective determinations by the Director: “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 Director is put in the expanded role of re-defining 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.” Order at 97.

<sup>60</sup> In the Plaintiffs’ case the Director failed to administer any junior ground water rights during the 2005 irrigation season. Instead, hydraulically connected junior ground water rights in Water Districts 120 and 130 were allowed to divert unabated throughout the 2005 irrigation season and deplete the water sources that supply the Plaintiffs’ senior surface water rights. Whereas the natural stream and spring flows hit all-time recorded lows in 2005, junior priority ground water users were permitted to freely intercept tributary spring flows and reach gains that would have otherwise been available to satisfy Plaintiffs’ senior surface water rights.

In examining whether or not the Plaintiffs would be “materially injured”, the Director ignored their previously decreed water rights, including the stated quantity elements, by arbitrarily determining that their “total” diversions of natural flow and storage water in 1995 represented their “minimum full supply” entitled to protection in administration. R. Vol. 1, p. 177, 182 (May 2, 2005 Order at 20, 25). This “minimum full supply” determination was the basis for the Director’s “material injury” determination. *Id.* at 182 (May 2, 2005 Order at 25, ¶ 115). Since the Rules provide for unlawful “re-adjudications” of vested senior water rights they create a system of water right administration that violates Idaho’s constitutional mandate of “first in time, first in right.”

<sup>61</sup> In the Clear Springs case, the Director *refused to honor* the decreed elements of Clear Springs’ water rights, and instead determined the quantities only signified a “maximum” authorized rate of diversion subject to re-

The lack of “objective standards” further undermines decreed water rights and gives the Director unlimited discretion for his “factual determinations” under the Rules. Section 42-607, the statute that governs water distribution, “is intended to make the authority of a watermaster more certain, his duties less difficult and his decisions less controversial.” *R.T. Nahas Co.*, 114 Idaho at 27 (Ct. App. 1988).<sup>62</sup> The Rules defeat the statute’s purpose by replacing objective water right administration pursuant to decrees with uncertain “reasonableness” decisions that are committed to the opinion of the Director. As explained above, the “material injury” determination under Rules 40 and 42 is dependant upon what the Director determines is “reasonable”, not objective criteria or the stated terms of a decreed water right. Without objective standards, there is nothing “to establish what is or is not reasonable.” Order at 95. The district court correctly identified the dangers with such a system of water right administration:

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

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determination based upon conditions presumed to have existed when Clear Springs made its original appropriations. R. Vol. V, p. 1139 (July 8, 2005 Order at 12-13, ¶¶ 55-56; relying upon Rule 42.0).a “The amount of water available in the source from which the water right is diverted.”). Further, the quantity element was unlawfully re-conditioned to merely representing an entitlement at a spring flow “seasonal high”, instead of the year-round diversion rate that was decreed by the SRBA Court. R. Vol. V, p. 1140 (July 8, 2005 Order. at 14, ¶ 61). As such, such, the Director administratively reduced Clear Springs’ decreed water rights. Such a determination, provided by the Rules, contradicts the unambiguous quantity terms of Clear Springs’ decrees and plainly violates the watermaster’s “clear legal duty” to distribute water according to those decrees.

Furthermore, the Director’s “material injury” analysis shows how the burden under the Rules inevitably falls on a senior right holder. In fact, the Director even refused to curtail any interfering junior ground water rights “*unless Clear Springs extends or improves the collection canal . . . or unless Clear Springs demonstrates to the satisfaction of the Director that extending and improving the collection canal for the Crystal Springs Farm is infeasible.*” R. Vol. V, pp. 1161, 1164-65 (July 8, 2005 Order at 35, ¶ 35 and at 38-39) (emphasis added). Accordingly, the context of “material injury” in the Rules plainly conflicts with the “injury” definition provided by Idaho law and is the vehicle for a “re-adjudication” of a senior’s decreed water right.

<sup>62</sup> See also, *Jones*, 93 Idaho at 229; *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935) (“The defendant water master is only an administrative officer and has no interest in the subject of the litigation - his only duty is to distribute the waters of his district in accordance with the respective rights of appropriators”).

becomes one of discretion, which is inconsistent the constitutional protections specifically afforded water rights. The absence of any standards or burdens also eliminates the possibility of 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.

Order at 96.

The end result is that the Rules' "reasonableness" standard leaves adjudications, like the SRBA, as simply water right cataloging exercises. If a water user cannot rely upon his decree for administration, and is instead left with whatever is "reasonable" in the eyes of the Director, there is no "finality" in the water right. Such a quandary leaves a senior guessing as to how much water will delivered from year to year. The district court properly recognized the lack of "objective standards" in the Rules and how the unbounded "reasonableness" standard conflicts with the protections afforded senior rights under the constitution and water distribution statutes. The court's determination that the Rules effect an unlawful "re-adjudication" of a senior's water right was proper. This Court should affirm.

#### **VI. Administration Under the Rules Constitutes an Unconstitutional "Taking" of a Senior's Property Right.**

The right to use the waters of Idaho is a constitutional right. IDAHO CONST., art XV §§ 1, 3, and 4, *see Wilterding v. Green*, 4 Idaho 773, 779-80 (1896). A water right also represents a real property right. I.C. § 55-101; *see Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Priority, a property right interest, gives a water right its value.<sup>63</sup> By requiring water to be distributed to

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<sup>63</sup> The Colorado Supreme Court described the property aspect of a water right's priority in *Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893) ("priorities of right to the use of water are property rights ... Property rights in water consist not alone in the amount of the appropriation, but also in the priority of the appropriation. It often happens

seniors first, the constitution and water distribution statutes protect a water right's priority. This is especially true on water sources that are fully or over-appropriated.<sup>64</sup> This Court has recognized that to diminish a senior's priority by taking water that would otherwise be available for his diversion and use, results in an "injury" to the senior's water right. *See Jenkins*, 103 Idaho at 388. The Defendants' Rules unlawfully diminish a water right's priority and create a system that ensures water is supplied to junior ground water rights, not seniors, first. The Director has no authority to take water from a senior and give it to a junior, thereby physically diminishing the senior's right to use the water. *See Lockwood*, 15 Idaho at 398 ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away.").

The district court recognized these fundamental problems with the Rules and rightly held that "the diminishment of water rights, which occurs as a direct result of administration pursuant CMR's, constitutes a physical taking." Order at 122. Moreover, the district court further acknowledged that "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." Order at 123.

The United States Constitution, through the Takings Clause of the Fifth Amendment (applicable to the states through the Fourteenth Amendment), and the Idaho Constitution, expressly through Article I § 14 and Article XV § 3, forbid a government agency from "taking" a

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that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right."

<sup>64</sup> *See Sanderson v. Salmon River Canal Co.*, 34 Idaho 303, 309 (1921) ("The question of priorities becomes of practical importance only where the water supply turns out to be permanently inadequate.").

person's water right without "just compensation."<sup>65</sup> *Roark v. City of Caldwell*, 87 Idaho 557, 561 (1964) ("It is fundamental that these constitutional provisions prohibit the taking of private property for public use without just compensation."); *Crow*, 107 Idaho at 465.

The Defendants argue that because the concepts of "beneficial use", "waste", and "futile call" are limits of a water right, "state regulation" of a right pursuant to those factors does not constitute a "taking". *Def's. Br.* at 33. The Defendants miss the point and fail to recognize that as a "legally protected" property right interest, a water right is not subject to arbitrary changes by a state agency "in the interests of the common welfare." Moreover, the claim that "water belongs to the state" does not vest the Defendants with authority to "take" water that would otherwise be diverted and used by a senior and distribute it to a junior right instead.<sup>66</sup> Yet this is exactly what happens under the Rules. Instead of receiving water they are lawfully entitled to divert and use, seniors must suffer shortages while juniors receive the benefit of countless "contested cases" and "reasonableness" determinations that preclude priority water distribution. Such a "common property" scheme for water distribution that results under the Rules was firmly rejected in *Kirk v. Bartholomew, supra*, 3 Idaho at 372.<sup>67</sup> Since the Plaintiffs must go through the state (i.e. the watermaster) to receive water pursuant to their rights, the district court correctly found that a failure to properly distribute water to a senior effects a "physical taking" that injures the senior. Order at 122. This Court should affirm.

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<sup>65</sup> The importance of a private property interest in Idaho has been recognized by this Court. See *L. U. Ranching Co. v. United States*, 138 Idaho 606, 608 (2003) ("The private interest at stake is great. The right to water is a permanent concern to farmers, ranchers, and other users.").

<sup>66</sup> *But see*; I.C. § 42-110 ("Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.").

<sup>67</sup> See also, R. Vol. IV, pp. 1007-08.

## VII. Storage Water Rights, Storage Water and Reasonable Carryover.

A storage water right, like any other water right in Idaho, is entitled to the same constitutional protections afforded real property rights. I.C. § 55-101; *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651 (1915); *Murray v. Public Utilities Commission*, 27 Idaho 603, 620 (1915) (if one appropriates water for a beneficial use, and then sells, rents or distributes it to others, he has a valuable right entitled to protection as a property right). Pursuant to the constitution and water distribution statutes, junior ground water rights cannot interfere with or take water that would otherwise be available to fill a senior priority storage water right or “take” the water stored under said right or rights.

Under the provisions of Rule 42, the Director is empowered to require the use of the storage water of each Plaintiff to mitigate the diversions by junior priority ground water rights, subject to “reasonable carryover” established by the Director, which could be *zero*, before diversions and withdrawals under junior priority ground water rights may be reduced or curtailed. *See* Order at 111 (“reasonable carryover” for Burley and Minidoka Irrigation Districts determined to be zero acre-feet in 2005). The district court rightly rejected this Rule. The district court, in its extensive review of Rule 42.01., properly concluded that: “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.”; and that “The reasonable carry-over provision of the CMR’s is unconstitutional, both on its face, and as threatened to be applied to the plaintiffs in this case.” Order at 109-117.

Two observations and findings by the district court provide significant insight into this issue. The court stated:

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.

Order at 114.

The Defendants argue that somehow the holding in *Schodde v. Twin Falls Land & Water Co.*, 161 F.43, 47 (9<sup>th</sup> Cir. 1908), aff'd 224 U.S. 107 (1912), allows the state to consider the "rights of the public." The *Schodde* case does not stand for the principle that the use and carryover of storage water may be controlled by the state in contravention of the storage water right. The issue in *Schodde* was the use of water for the diversion of water under an irrigation right, not the use of the water diverted for irrigation. *Defs. Br.* at 35. The Defendants further argue that as storage rights are sometimes expressed as "supplemental rights" to primary natural surface flow rights, somehow the water stored may be directed by the Director to be used to mitigate wrongful diversions by junior appropriators from a senior's natural surface water flow supply before administration will occur. IGWA argues that under Idaho's Constitution, carryover storage has no status in priority administration. These arguments seem to adopt the reasoning of the trial court in *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382 (1935), which held:

The court is of the opinion that public waters of the state, impounded in a reservoir, do not become either the personal property or private property of the owners of the reservoir. Further that while there is a distinction between storage water and water flowing in the stream, the distinction as contended for by plaintiff does not exist. The court is of the opinion further that such waters when impounded in a reservoir remain the public waters of the state; that the rights to the use of the same are usufructuary, that the ownership of public waters by the state constitutes a trust to be administered so as to accomplish the greatest benefit to the people of the state; . . .

55 Idaho at 388. This holding by the trial court was firmly rejected and the decision overturned by the Idaho Supreme Court. The Supreme Court held:

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 water so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply to a beneficial use.

*Id.* at 389.

The Court further stated:

No one can make an appropriation from a reservoir or a canal for the obvious reason that the waters so stored or conveyed are already diverted and appropriated and are no longer "public waters". *Rabido v. Furey*, 33 Idaho, 56, 190 P. 73. This does not mean, however, that the reservoir or canal owner may waste the water or withhold it from persons who make application to rent the same. (Cases cited) 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 389-390

Finally, the Court found that the spaceholders in the reservoir were tenants in common, but one co-tenant may not draw off, use, and enjoy the full number of acre-feet to which it is

entitled and then because it is a co-tenant, either use or sell the share of its co-tenant without in any sense being responsible therefor.

The significance and nature of water rights held by an irrigation district are again clearly demonstrated in *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528 (1963). In that case, Milner Irrigation District ("Milner") annexed additional lands in 1952, on the condition that the lands included in the district prior to the 1952 annexation would have the first priority to water under the water rights acquired prior to the annexation, including storage water in American Falls Reservoir, and that the annexed lands would share equally with the other lands in the district in the new storage rights to be obtained by Milner in Palisades Reservoir on the Snake River. After the 1952 annexation, the landowners whose lands were annexed in 1952 filed legal action in which they sought the right to share equally with all other lands in the irrigation district in all water rights held by the district under the provisions of I.C. § 43-1010. The Idaho Supreme Court noted that an irrigation district holds title to its water rights in trust for the landowners, and that the district stands in the position of appropriator for distribution to the landowners within the district, within the meaning of Const., Art. 15, §1. The landowners, to whose land the water has become dedicated by application thereon to a beneficial use, have acquired the status and rights of distributees under Const., Art. 15, §§4 and 5. 85 Idaho at 545.

The Supreme Court in *Bradshaw* then confirmed the holding of the trial court which found that the owners of the old lands, through and by means of the irrigation district, acquired, and for many years applied to the irrigation of their lands, valuable water rights, which had become appurtenant and dedicated to their lands, and which were held in trust by the district for

their use. They could not thereafter, without their consent, be deprived of use of that water when needed.

The Court found that I.C. § 43-1010 should be interpreted only so far as may be consistent with the priority of water rights as recognized and protected by the provisions of the constitution. The Court noted that the owners of the new lands were entitled to the use of any water owned by the district, when the use thereof is not required for the proper irrigation of the old lands, and when such use is not in conflict with the rights previously acquired by the owners of the old lands, or when such use is not in derogation or impairment of such prior rights. The Court, after noting that its conclusions were in keeping with the express conditions of the annexation, further stated: "Moreover, enforcement of the claimed right to compel delivery of water to such lands, would effect an invasion of the constitutionally protected priority rights, and property rights, of the owners of the old lands, hereinbefore cited. (Cases cited.)" 85 Idaho at 548. Certainly the Defendants cannot do by rule what the legislature could not do by statute. Water that is stored by entities such as the Plaintiffs can be used to supplement their natural flow irrigation rights, be used as the primary source of its water, rented to others for lawful purposes, or carried over for use in subsequent years. Order at 115.

The Defendants and IGWA rely upon *Glavin v. Salmon River Canal Co.*, 44 Idaho 583 (1927), and in so doing misrepresent the facts and holding in that case. As pointed out by the court in *Talboy, supra*, 55 Idaho at 393, the specific question in *Glavin* was the validity of a rule adopted by the canal company which allowed an individual shareholder of the company to hold over his allotted share of stored water stored by the company, without limitation, thereby having

the effect of reducing the allocated share of stored water of other shareholders in future years. The court held the rule to be invalid. The limited decision in that case does not apply as a general rule between appropriators, and was later clarified by the Court's decision in *Rayl v. Salmon River Canal Co.*, 66 Idaho 199 (1945).

The Defendants and IGWA also cite *Rayl* to support their position that the Director has the right to determine the use and carry-over of storage, while ignoring the facts and ultimate holding of the Court. In *Rayl*, the Court was again requested to consider holdover by individual shareholders in the storage space of the Carey Act corporation. The rule was being challenged, in reliance upon *Glavin v. Salmon River Canal Co.*, *supra*. In response to this claim, the court stated:

*Quite obviously the above opinion did not hold and was not intended to hold that irrigation organizations and/or individual appropriators of water could not accumulate within their appropriations and hold storage over from one season to the next, both to encourage and practice economic use of water and to guard against a short run-off in succeeding seasons, because such custom has become too well entrenched in the concept of our water law both by practice and prior and subsequent precept to be thus denounced and forbidden. The court merely held the particular rule offended in certain particulars.*

66 Idaho at 201 (emphasis added).

The Court in *Rayl* then proceeded to review, with approval, numerous practices illustrating the approval of carry-over water in a reservoir storing water for irrigation. The *Rayl* Court noted that it had on an earlier occasion in *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105 (1924), approved a contract which provided, in part, that:

Should there ever, in any year, be such a shortage in the flow of Snake River available for storage in American Falls reservoir, that such flow available for

storage, together with any surplus held over in said reservoir from previous years, is insufficient to fill the reservoir to full capacity. then in such year any party entitled to water from said reservoir, who shall have conserved and held over in said reservoir from the previous year any part of the water which said party was entitled to have received during such previous year, shall be entitled to the use and benefit of the water so held over by such party to the extent that such hold-over water may be necessary to complete the filling of such party's pro rata share of the reservoir capacity.

66 Idaho 204-205.

The Court further noted that the contract considered and approved in *Board of Directors v. Jorgensen*, 64 Idaho 538 (1943), recognized the rights of carry or hold-over storage while recognizing that when the reservoir was filled to capacity, hold-over rights are wiped out, because those who had not contributed to the hold-over water and therefore may and should not participate in its distribution, may nevertheless not be deprived of their rights to new storage the succeeding year. The Court in *Rayl, supra*, then stated: "Because even if the law compelled every reservoir to be drained dry at the end of every irrigation season, the user who needed more than his allotted share could not take from the economical user, because the latter could himself use and exhaust his water or sell or lease part of all of it." 66 Idaho at 206.

The Court also noted:

There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

*Id.* at 208:

Finally, the Court stated:

If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average, or when, through accidents to the system, there is partial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. Ordinarily for the farmer not to make provision against such contingencies would be counted against him for carelessness. So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. *Economy of use is not synonymous with minimum use. Caldwell v. Twin Falls Salmon River Land & Water Co., D.C.Idaho, 225 F. 584, at pages 595, 596.*

66 Idaho 210-11 (emphasis added).

Another significant benefit derived from carry-over of stored water that has not been mentioned by the courts is the significant improvement in the capacity of reservoirs with the most junior water right to refill each year. To the extent there is hold-over in any reservoir, there is less water required from the river system to fill all available capacity in all reservoirs. Neither the Department's Rules nor any other rule of law should allow the Director to determine the extent to which stored water must be used and carry-over reduced before administration will be allowed against a junior ground water appropriator, as it injures the rights of all entities that have contracted for and obtained a right to store water to insure an adequate water supply for the lands served by that entity.

A senior's stored water does not, as argued by the IGWA and the Defendants, have to be applied to the senior's land to be put to beneficial use.<sup>68</sup> It is undisputed that stored water in Idaho is routinely rented through the Idaho State Water Supply Bank and its local rental pools, including the Water District 01 rental pool. I.C. §§ 42-1761 through 1765 ("board may appoint local committees . . . to facilitate the rental of stored water.").<sup>69</sup> A senior's ability to rent his storage water to others, including to the United States Bureau of Reclamation for salmon migration purposes, has been expressly approved by the Idaho Legislature, and does not constitute "waste" or "non-use".<sup>70</sup> I.C. §§ 42-1763B, 1764. Since the State of Idaho does not own storage water, senior water right holders like Plaintiffs are the ones left to rent water to the U.S. Bureau of Reclamation to fulfill the SRBA Nez Perce Water Rights Agreement.<sup>71</sup>

Once decreed or licensed, the Director has no authority to alter or change a storage water right through administration. *See Nelson*, 131 Idaho at 16 ("Finality in water rights is essential. .

<sup>68</sup> The Defendants recognized the same at the hearing on the Plaintiffs' motion for summary judgment:

THE COURT: Is the storage itself, the water while it's in the storage, to be used for irrigation? Is that a beneficial use? The storage of water itself.

MR. RASSIER: I think it's generally viewed as a beneficial use. If you need to have a beneficial use in order to divert the water from the - from the natural source, that is the beneficial use. Storage for some subsequent use - Or I guess in some instances, there may be storage for aesthetic use, in-place use, yes.

Tr. Vol. I, p. 267 L. 20-25; p. 268, L. 1-5.

<sup>69</sup> IGWA has participated in "renting" stored water through the Water District 01 local rental pool. R Vol. I, p. 46 ("IGWA has submitted executed lease agreements with Peoples Irrigation Company, the Idaho Irrigation District, and the New Sweden Irrigation District that lease a total of 20,000 acre-feet of storage water."). Although IGWA argues that such water has "no status in priority administration" because it was not used by the lessors, it at the same time has no problem using the rental bank system and the priority afforded that storage water to try and avoid administration of the junior priority ground water rights held by its members. The hypocrisy of IGWA's arguments and actions is evident. Apparently only the Plaintiffs, who seek to prevent unlawful interference by junior priority ground water rights, have no right to rent their storage water to others.

<sup>70</sup> Pocatello, a spaceholder with storage water in Palisades reservoir, but without any diversion works to take that water from the Snake River, would presumably agree that a "rental" of storage water constitutes a beneficial use since it has never diverted its storage water and used it for irrigation purposes. Pocatello fails to explain how non-use and rental of its stored water is beneficial but if Plaintiffs carryover and rent their storage water it is "waste".

<sup>71</sup> See discussion at R. Vol. IX, p. 2272-73.

.. 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.”); *Crow*, 107 Idaho at 465. Moreover, the Director cannot take water that would have been stored under a senior right and give it to a junior instead. *Lockwood*, 15 Idaho at 398. Despite this rule, the “reasonable carryover” provision takes the use of a senior’s storage right in violation of Idaho’s constitution and water distribution statutes.

First, the Rule impermissibly allows the Director to disregard the stated amounts of a senior’s storage water right. Rule 42.01.g. provides, in essence, that notwithstanding the fact that the water supply available under a senior-priority water right has been substantially affected by diversions under a junior-priority water right, the Director may refuse to regulate the diversion and use of water in accordance with the priorities of the rights so long as the senior has enough storage water to mitigate the decreased water supply caused by a junior ground water diverter, over and above a reasonable amount of carry-over storage as determined by the Director. The Rule allows the Director to avoid administering junior ground water rights in priority if a senior is able to carryover an amount of water that the Director deems to be “reasonable”, regardless of the amounts the senior is *entitled* to carryover pursuant to his storage water right.

If these rules were deemed to be valid on their face, one must accept the premise that the Director could impose the same standards and could consider the same factors in determining material injury to a senior-priority surface water right by the diversion under a junior-priority surface water right. The junior right holder could argue, under his equal protection rights, that his diversion from the stream in times of shortage should not be curtailed so long as the holder of the senior right has sufficient stored water to meet its required water supply.

It is clear that Rules 40 and 42 provide for the destruction, interruption or deprivation of the common, usual and ordinary use of stored water. That the stored water and the water rights providing for such diversion of water for storage are property rights held by Plaintiffs, and such rules are unlawful and unconstitutional and provide for the taking of one's property without just compensation, in contravention of Article 1, §§ 13 and 14 of the Idaho Constitution. The district court rightly declared the Rules unconstitutional. This Court should affirm.

#### ATTORNEYS' FEES

If the Plaintiffs prevail on appeal they request costs and attorneys' fees as provided by Appellate Rules 40 and 41 and Idaho Code sections 12-117. Plaintiffs, as senior water right holders, have "borne unfair and unjustified financial burden attempting to correct mistakes" Defendants should never have made. *Fischer v. City of Ketchum*, 141 Idaho 349, 356 (2005). The Defendants have no reasonable basis in fact or law to appeal a decision striking rules that were promulgated in excess of statutory authority and that plainly contradict Idaho's Constitution and water distribution statutes.

#### CONCLUSION

The Idaho Constitution and state's water distribution statutes afford senior water rights protection against interfering junior rights. In times of shortage a senior is entitled to water against a junior. If a junior disagrees with administration, he carries the burden to show the senior's diversion and use is "waste", not "beneficial", or that the regulation of the junior would be "futile". The Department's Rules extinguish the constitutional protections for seniors, result in a taking of private property rights, and replace timely water distribution with endless

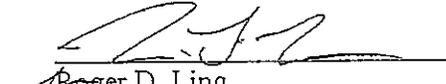
administrative "contested cases". The Rules further render decreed water rights, including storage rights, obsolete by leaving the determination of how much water a right holder is entitled to the "reasonable" opinion of the Director.

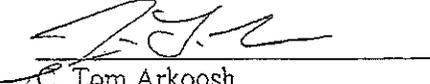
The district court properly declared the Rules unconstitutional. This Court should affirm.

Dated this 10<sup>th</sup> day of November, 2006.

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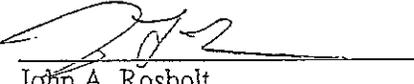
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---

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10<sup>th</sup> Day of November, 2006, I served the foregoing RESPONDENTS' BRIEF IN RESPONSE TO POCA TELLO'S OPENING BRIEF upon the following via email (copies by mail to be sent on 11/13/06):

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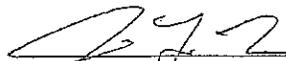
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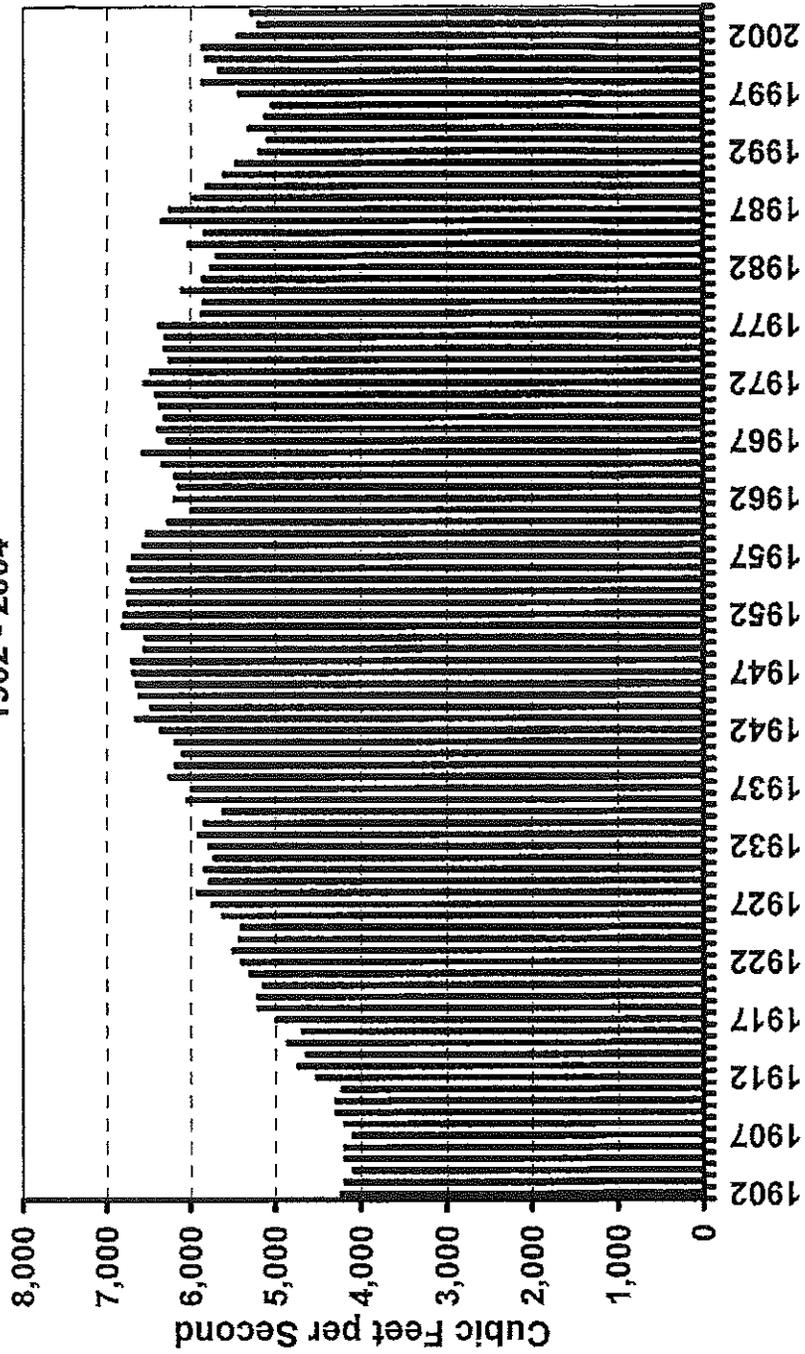
  
Travis L. Thompson

# **ADDENDUM B**

**Average Annual Spring Discharge to Snake River  
in the Thousand Springs Area  
(1902-2004)**

ATTACHMENT A

AVERAGE ANNUAL SPRING DISCHARGE TO SNAKE RIVER  
IN THOUSAND SPRINGS AREA  
1902 - 2004



# **ADDENDUM C**

**Excerpts from 1976 Idaho State Water Plan**

State of Idaho

## The State Water Plan — Part Two

Idaho Water Resource Board:

John F. Streiff  
*Chairman*

George L. Yost  
*Vice-Chairman*

Donald R. Kramer  
*Secretary*

Joseph H. Nettleton

Franklin Jones

Scott W. Reed

Edwin C. Schlender

M. Reed Hansen

December 1976

Idaho Water Resource Board, Statehouse, Boise, Idaho 83720

# STATE OF IDAHO

JOHN V. EVANS

Governor

*"There shall be constituted a State Water Resource Agency composed as the Legislature may now or hereafter prescribe which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest . . ."*

**Constitutional Amendment**

First printing December 1976  
1,000 Copies

Second Printing February 1977  
500 Copies

Third Printing July 1977  
500 Copies

Fourth Printing January 1978  
500 Copies

Fifth Printing February 1978  
500 Copies

Sixth Printing June 1980  
500 Copies



# STATE OF IDAHO

## IDAHO WATER RESOURCE BOARD

STATEHOUSE  
BOISE, IDAHO 83720

December 29, 1976

To the Citizens of Idaho:

It is our pleasure to present to you *The State Water Plan - Part Two*. Valuable time and effort has been expended by many citizens around the state in helping us develop this plan, and we gratefully acknowledge this assistance. We realize that the contents of this document will not meet the desires and expectations of every citizen, but we feel that *Part II* represents the best approach for the greatest number of Idahoans.

The success of this plan depends on how actively we all work toward its implementation. The Board looks forward to working closely with individual citizens, the legislature, and local, state and federal government to make our recommendations in this report a reality.

The State Water Plan will serve Idaho only as long as it continues to reflect the needs of Idaho. We urge every citizen to monitor the plan as it is put to practical use and to suggest changes to the Board when necessary. The plan will be subject to public and formal review at least once every five years.

We seek the assistance and support of the people of Idaho so that together we may work towards providing for the future economic growth and protection of our natural resources that are so important to Idaho.

Sincerely,

A handwritten signature in cursive script that reads "John F. Streiff".

JOHN STREIFF, Chairman  
Idaho Water Resource Board

RESOLUTION TO ADOPT

December 29, 1976

WHEREAS, the Idaho Water Resource Board is charged with the task of formulating a coordinated, integrated, multiple-use water resource policy, and

WHEREAS, draft documents for the State Water Plan - Part Two have been published and distributed to the public for the Panhandle, the Snake River, and the Bear River Basins, and

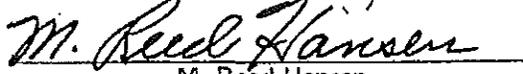
WHEREAS, public meetings and hearings have been held throughout Idaho to gain input as to the content of those draft plans, and such input has been taken into full consideration by this Board,

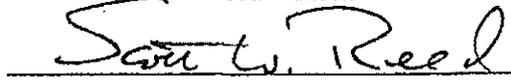
NOW THEREFORE, BE IT RESOLVED, that pursuant to Article XV, Section 7 of the Constitution of the State of Idaho, and pursuant to the powers granted to us by statute, we hereby adopt the attached document as Part Two of the State Water Plan to guide the future use and conservation of Idaho's water resources.

BE IT FURTHER RESOLVED, that the Board, in recognition of constantly changing economic and environmental conditions which must be considered in establishing a state water resource plan will formally review this document and provide opportunity for public input annually upon request, but at least once every five years from the date of adoption of this order.

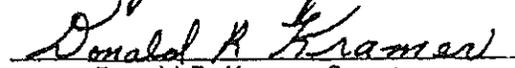
  
\_\_\_\_\_  
John F. Streiff, Chairman

  
\_\_\_\_\_  
Franklin Jones

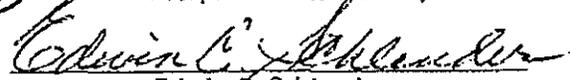
  
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Scott W. Reed

  
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George L. Yost, Vice-Chairman

  
\_\_\_\_\_  
Donald R. Kramer, Secretary

  
\_\_\_\_\_  
Joseph H. Nettleton

  
\_\_\_\_\_  
Edwin C. Schlender

## FOREWORD

*The State Water Plan - Part Two* is the result of ten years of thought, study and research by the Idaho Water Resource Board to fulfill its constitutional mandate "to formulate and implement a State Water Plan. . ." Many studies and reports were published during that time, numerous public meetings and hearings have been held and thousands of pages of testimony and public comment have gone into making up the policies contained herein.

Prior to creation of the Idaho Water Resource Board in 1965, water use had developed through custom and legislation since Lewis and Clark traveled through the northwest from 1804 to 1806. On June 27, 1855, settlers in Lemhi County first put water to use by irrigating land to raise the family garden and feed for their livestock. By 1896, the Office of the State Engineer had been established to oversee the development of new land and the construction of water works. The State Engineer in 1896 reported to the Governor that 315,000 acres had been cultivated, the majority of which required irrigation. Since that time, approximately six million more new acres have been put under cultivation (four million are irrigated), technology has enabled Idaho farmers to participate in a worldwide marketplace, and the state's once seemingly plentiful supply of a valuable natural resource — water — now has more demands on it than it is capable of satisfying.

*The State Water Plan - Part Two*, a guide to future water resource management in Idaho, is the most recent in a series of documents that comprise the State Water Plan. In July 1972, the *Interim State Water Plan* was published which catalogued the resources of the state and presented the various alternatives for future water policy to the public. *The State Water Plan - Part One, The Objectives*, was published in June 1974 to guide the direction of later efforts to formulate the final water plan. Finally in March, 1976, a draft version of *The State Water Plan - Part Two* was distributed to the public and various private and governmental agencies for review and comment. These previous efforts are now culminated in this document.

Water policy for the three planning basins — the Snake River, Panhandle and Bear River basins — is set forth within this document. Chapter 4 contains the goals and recommendations of the Board to be used in guiding future water resource management in Idaho. Some of the policy statements pertain only to a single basin or vary in their application to each basin, and these are discussed separately.

Implementation of the policies contained in Chapter 4 will require several changes in Idaho law and public attitudes. The Board will work closely with the legislature to secure changes in the law where necessary.

Public understanding and compromise will be required by those with special interests to assure the plan's full implementation. Unless the plan is implemented quickly, there may not be sufficient water supplies left in many areas to maintain Idaho's quality of life. The Idaho Water Resource Board has found great support among the citizens of Idaho for a state water plan and feels confident that this document will be accepted as a beginning process for continuing Idaho's economic growth while protecting a quality environment.

Because public priorities and economic and social conditions change, the Board has provided a procedure whereby the plan will be updated at least once every five years to insure that the State Water Plan continues to be dynamic, responsive plan for developing, protecting and preserving Idaho's water resources for generations to come.

## ACKNOWLEDGEMENTS

Formulation of *The State Water Plan - Part Two* has involved a great number of Idahoans from all walks of life. Their involvement may have been at information meetings, public hearings or merely taking the time to let the Idaho Water Resource Board know their views and opinions on the water resource issues confronting Idaho. Without this citizen response and testimony the State Water Plan would not have been possible.

The Board gratefully acknowledges the efforts and contributions of state, federal and local agencies who have cooperated in this endeavor. Their assistance insures a broad view of public interest to be considered in future water resource decisions.

The private sector, from small businesses to large corporations to special interest associations and organizations, are an equal voice in Idaho and many have contributed to this State Water Plan. Their response and reaction brings new dimensions to the decision making process.

The Board sincerely appreciates the assistance given by the staff of the Department of Water Resources. Many, many times they have given extra time to accomodate various Board actions. The staff of the Department of Water Resources has demonstrated the highest standards of professionalism in the gathering of basic resource data, conducting extensive evaluations and assembling that data into an orderly form. Their efforts will stand as a bench mark in water resources planning regionally and nationwide.

The largest man-made reservoir is behind Dworshak Dam. This lake is 53 miles long, has a surface area of 26.7 square miles and contains 3.468 million acre-feet of water when full.

A number of natural lakes are regulated within prescribed limits by outlet dams, and thus provide storage water that can be released as desired. Included in this category are Payette, Bear, Coeur d'Alene, Priest and Pend Oreille lakes. A Wyoming lake, Jackson Lake, was enlarged primarily to provide water for irrigation in Idaho.

Many large reservoirs were built as multi-purpose, having allotted spaces of storage amounts for power production, irrigation supply, fish and wildlife, flood control and other purposes. The operation criteria established for each reservoir is dependent upon the purposes authorized for the project and the relative priorities assigned.

The groundwater resources of Idaho have barely been tapped although over-development has occurred in some parts of the state. The principal aquifers occur beneath the Snake River Plain, Rathdrum Prairie, and the western Snake River Valley. Over-development of the groundwater resource has occurred in the Raft River Valley, the Blue Gulch area west of Twin Falls, a portion of the Goose Creek-Cottonwood drainage south of Burley and in Curlew Valley in southeast Idaho.

Groundwater provides for the flows of springs — Thousand Springs, for example — and to lakes, reservoirs and streams. Projects and uses which influence groundwater often affect the surface systems also. Changes in surface systems likewise affect associated groundwater systems.

Over one million acres of land are irrigated with groundwater in the state. In addition, nearly all water requirements for municipal, industrial, domestic and livestock uses are met from groundwater. Many uses have nearly constant demands; but the largest use, irrigation, has primarily a seasonal demand.

A continuing planning effort is underway by various state and federal agencies to explore the possibility of developing the Snake Plain aquifer to supply pumped irrigation water and to store excess winter surface water flows as recharge. The quality of groundwater is generally excellent. However, the chemical compatibility of recharge water with that already in the aquifer requires study, as does the problem of how the recharge water moves from the original site, the possible water-logging of adjacent lands, biological and mechanical plugging of recharge facilities, impact on Thousand Springs and other operational problems.

There are at least 380 hot springs and wells which have been identified in the central and southern parts of Idaho. A 1973 study of the Idaho Department of Water Administration in cooperation with the U.S. Geological Survey inventoried 124 of these hot water sources as possible geothermal resource sites. That study identified 25 areas as having potential geothermal possibilities based upon geochemical investigations.

There are five major river systems in Idaho. They are: Bear, Snake, Coeur d'Alene-Spokane, Clark Fork-Pend Oreille and Kootenai rivers. In the course of water planning studies, the Coeur d'Alene-Spokane, Kootenai, and Clark Fork-Pend Oreille rivers were combined as the Panhandle River Basins.

### Snake River Basin

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The Snake River is the largest river system in Idaho with a drainage area of approximately 87 percent of the state. The Snake River headwaters are in Wyoming on the western slope of the Continental Divide. Crossing Idaho's eastern border, it flows northwestward 59 miles through a canyon to Heise where it opens onto the Snake River Plain. From Heise to Milner, a distance of 219-river miles, the river is not deeply entrenched. It is in this reach that numerous diversions for irrigation are made.

At Milner, the river enters a deep canyon cut through lava and sedimentary beds and continues for 216 miles in a west and northwesterly direction. Near the Oregon border, the river emerges from the canyon and flows through a broad valley to Weiser, a distance of about 75 miles. Downstream from Weiser the river enters Hells Canyon and flows a distance of about 190 miles to Lewiston. It leaves Idaho at Lewiston, turning westward for 139 miles to its junction with the Columbia River near Pasco, Washington.

The largest tributaries of the Snake are the Salmon and the Clearwater rivers. Other important tributaries are the Henrys Fork, Wood, Boise, and Payette rivers. Basin areas outside of Idaho which contribute substantially to the river's flow include the upper basin in Wyoming, the Owyhee, Malheur, Burnt, Powder and Imnaha rivers in Oregon and the Grande Ronde River in Washington. Small portions of the Snake River Basin also lie in Utah and Nevada.

The principal characteristics of the Snake River Basin climate include a wide range of temperature, relatively low precipitation, wide variation in snow depth, abundance of sunshine, low humidity, high evaporation, and an almost complete absence of severe storms.

Climate

Over the Snake River Plain, the mean annual temperature is high, but in the timbered mountain areas, temperatures are low and the precipitation is much greater than on the plain. Snow rarely remains long on the ground over most of the areas of the Snake River Plain. In the mountains large accumulations of snowmelt in the spring and early summer furnish practically all of the summertime natural streamflows.

Average annual precipitation in the Snake River Basin ranges from about 7 inches per year to near 70 inches per year. Large areas in southern portions of the basin receive less than 10 inches annually, while higher elevations in the Clearwater, Payette, and Boise basins receive an average of 40 to 50 inches per year. Seasonal distribution of precipitation shows a marked pattern of winter maximum and midsummer minimum amounts in the northern and western portions of the basin.

Average annual temperatures in the basin indicate the pronounced effect of altitude. The highest annual average temperatures are found in the lower elevations of the Clearwater and Salmon river basins and along the Snake River Valley in southwestern Idaho, including portions of the lower Boise, Payette, and Weiser valleys. The growing season, like the average temperature, varies throughout the basin due to differences in elevation. The valleys in the immediate vicinity of Lewiston have the longest growing season with about 200 days. This is followed by sizeable areas along the Snake, lower Boise, Payette, and Weiser valleys in Southwestern Idaho with 150-day growing seasons. The growing season shortens to 120 days in the Pocatello-Idaho Falls area. Above Idaho Falls, the season diminishes to 90 days or less.

#### Surface Water

Most of the streamflows of the Snake River Basin are derived from snowmelt in the mountainous areas. The average runoff in the Snake River below the Clearwater River where it leaves Idaho is about 35.5-million acre-feet per year. Before the Snake River leaves the state, an additional 45-million acre-feet of its flow are either consumptively used by man or lost through evaporation. Approximately one-third of the flow leaving Idaho is derived from the basin above Weiser. Another third comes from the Clearwater River Basin. The Salmon River produces about one-fourth, with the remaining amount of approximately 10 percent coming from tributaries in Oregon and Washington and small streams in Idaho below Weiser. Average annual runoff under present conditions at principal gaging stations in the Snake River Basin is shown in Table 1. Location of these gages is shown on

Figure 2. Losses from river flow between pairs of gages (Snake River, Neeley to Milner, and the Boise and Payette River gages) are due to major irrigation diversion. The dramatic gain in Snake River flow between Milner and King Hill is largely the result of discharge from the Snake Plain aquifer in the Thousand Springs area. Seasonal variations in Snake River flow are shown in Figure 3. The flows at Heise as indicated in Figure 3 result from natural snowmelt modified by reservoir storage operations for summertime irrigation. At King Hill, the seasonal hydrograph is principally affected by the near-constant discharge of groundwater from the Snake Plain aquifer. It is also affected by the flows which pass Milner Dam in high runoff years. Flows at Weiser reflect the affects of the storage, diversion, and groundwater management in virtually all the irrigated area of the Snake River Basin. At Clarkston, the hydrograph is dominated by runoff from the vast unregulated areas of the Salmon and Clearwater basins.

The Snake River Basin is subject to wetter-than-normal and drier-than-normal periods of runoff. High and low runoff years in the Snake River Basin are illustrated in Figure 4. The hydrographs illustrate the general sequence of wet and dry periods in the eastern portion of the basin at Heise, in the southwestern portion at Twin Springs in the Boise River system, and in the northern portion of the basin at Whitebird on the Salmon River. These locations were chosen because of their relatively long period of available records. In each hydrograph the sequence of years of lowest runoff generally occurred between 1929 and 1942. This sequence was the most severe water-short period in the basin during the twentieth century. Using the record of the Columbia River at The Dalles, Oregon, the longest record of streamflow data in the Columbia Basin, it appears probable that the period in the 1930's was the driest in the past 100 years.

A period of above normal runoff began in 1965 and continued through water-year 1976, although 1968 and 1973 were drier than normal. The period 1950 to 1957 was also one of very high runoff.

The longest streamflow records in the basin are similar to those shown in Figure 4 and have data generally for less than 60 years. During this period, major changes have occurred in water use and control. Irrigated agriculture has increased by some 3 million acres. Nearly all of the major irrigation, power, and flood control reservoirs have been constructed during this time period. Groundwater recharge and discharge from the Snake Plain aquifer has been significantly changed, thereby modifying the flow pattern of the river. Because of these changes, historic records in themselves are often not useful to describe the water supply of a river because they do not reflect current development.

Therefore, hydrologic data reported in this and following sections of the report generally refer to the base period of 1928 to 1972 adjusted to 1974 levels of development.

The Snake River is intensively managed. Controls on the flow are imposed by a system of reservoirs and diversions. Table 2 contains a list of reservoirs in the basin having an active capacity greater than 10,000 acre-feet. The reservoirs were constructed for one or more purposes, but irrigation use is involved in most of the Snake River system reservoirs. Some idea of the operation of each reservoir can be gained from its purposes listed in Table 2.

Irrigation is the principal use for the waters of the Snake River system. It accounts for an estimated 99 percent of the consumptive use. Municipal and industrial uses account for most of the remainder. Snake River flows are also used for power generation, fish production, recreation, and navigation.

Records of diversions are available for only a fraction of the irrigation, canals, and other uses of the Snake River Basin. Groundwater withdrawal and consumption generally is not measured. Because of this, total water use can only be estimated by indirect methods.

The 3.6 million acres of irrigated land in the Snake River Basin deplete the river flow by about 6 million acre-feet per year. Approximately 25 percent of this is withdrawn as groundwater. Irrigation diversions have their primary effect on the river during the summer months.

Table 3 contains a list of hydroelectric power plants on the Snake River and its tributaries. Most of these are run-of-river plants which generate power with available flow but without the benefit of storage operations to control it for maximum generation. There are two major reservoirs which are operated primarily for power. Brownlee regulates the Snake River flows for generation at Idaho Power Company power plants at Brownlee, Oxbow, and Hells Canyon dams. Dworshak Dam regulates the North Fork of the Clearwater for power at the dam and for downstream plants on the Lower Snake and Columbia rivers.

Approximately 2 million acre-feet of groundwater are consumptively used in the Snake River Basin each year to irrigate about 1 million acres. In addition, nearly all municipal, industrial, domestic, and over half of livestock water requirements use a groundwater source. Small quantities of groundwater can be obtained from wells and springs throughout the Snake River Basin in nearly all years. However, only in specific areas, can large quantities of water be obtained within present economical limits. These areas are mainly in the southern portions of the basin.

Most areas where large quantities of groundwater are available have been extensively developed. A long growing season, large tracts of arable land, and the need for supplemental water supplies have caused the majority of irrigation wells to be drilled in the southern and southwestern part of the basin. Throughout the Snake River Plain and in many areas southeast, south and southwest of the Snake River, the majority of wells obtain their

principal supply of water from consolidated formations — principally basalt interbedded with sediments and fractured zones. The principal supplies of groundwater to be obtained from unconsolidated formations occur in the geologically young alluvial fans and valley-fill deposits or along the major stream channels.

The Snake Plain aquifer is the largest and most important aquifer in the state. The Snake Plain aquifer extends eastward and northeastward roughly 200 miles from Bliss to St. Anthony. It is a broad undulating surface of about 8,500 square miles bounded on the north, east, and south by mountain ranges and broad, alluvial-filled Intermontane valleys, and on the west by a broad, lava-capped plateau.

In the Snake Plain aquifer, some groundwater occurs in sand and gravel alluvial deposits. However, the most important occurrence of groundwater is in the porous basalt and sedimentary interbeds underlying nearly the entire plain. These are a series of successive basaltic lava flows which include interflow beds of sedimentary materials.

The Snake River contributes water to and receives water from the Snake Plain aquifer. Springs discharge water to the river in stretches from the mouth of the Blackfoot River to below American Falls Reservoir and from below Milner through Hagerman Valley to Bliss. Elsewhere, the river channel is above the regional water table and river flow recharges the groundwater system.

A major source of water to the aquifer is precipitation on the mountains surrounding the Snake River Plain. All streams on the northern side of the Snake River Plain except the Big and Little Wood rivers terminate on the plain and percolate into the aquifer, however they also lose some water from their streambeds to the aquifer.

The sources of recharge in order of importance are: (1) percolation from irrigation, (2) seepage from streams entering or crossing the plain, (3) underflow from tributary basins, and (4) precipitation on the plain. Direct precipitation on the plain probably accounts for less than ten percent of the total recharge to the aquifer. Total recharge from all sources amount to approximately 6.5 to 7 million acre-feet annually.

Water in the main aquifer occurs mostly under water-table (unconfined) conditions. Some flowing wells occur locally where artesian conditions exist. Generally groundwater movement is west and southwestward from sites of recharge to sites of discharge. Discharge from the aquifer averages about 8,000 cfs, 80 percent of which occurs in the Thousand Springs area.

Secondary water bodies (perched water tables) have formed at places where beds of low permeability underlie areas of heavy irrigation. Egin Bench, the Rupert and Mud Lake areas overlie perched water bodies.

Mountain ranges along the north side and east end of the upper basin are high rainfall areas and precipitation at the higher elevations generally is 40 to 60 inches. Precipitation on the south and southeast flanks of the basin is less, but many mountains receive 25 to 40 inches at higher elevations. Streams receive groundwater effluent throughout the year nearly everywhere in the foothills and mountains. Because of the limited storage capacity and the steep hydraulic gradients underlying the tributary basins, base flow of the aquifers decreases greatly during prolonged dry periods. Streams in the northern and eastern part of the basin lose part or all of their discharge on reaching the part of the basin underlain by the deep alluvial and deep younger basalt materials. No stream draining the north side of the basin between the mouth of Henrys Fork and the Big Wood River, a distance of 160 miles, reaches the Snake River.

The Snake River is the trunk drain and all outflow from the region is through it. However, through the Snake River Plain, the Snake River alternately gains and loses in several areas before finally collecting all known surface and groundwater discharge near the western end of the subregion.

In summary, the Snake River loses flow in its alluvial fan below Heise to the regional and perched aquifers. The Teton River in its lower reaches and Henrys Fork below St. Anthony are above the regional water table and lose water to it but receive inflow from perched aquifers. The Snake River for several miles downstream from its junction with Henrys Fork near Menan Buttes is at about the same level as the regional water table. The river may alternately gain or lose in this reach depending on river stage and other factors. There are no perched aquifers on the north side of the river in this upper river area, but there may be some on the south side. From near Roberts to a point a few miles downstream from Blackfoot, the Snake River is above the regional water table and loses water to it. However, the river may receive inflow from local perched aquifers at some places. A few miles downstream from Blackfoot to the upper end of Lake Walcott, the Snake River receives large quantities of inflow from both regional and perched aquifers. From Lake Walcott to Twin Falls, the river is above the regional water table and loses water to it but receives inflow from perched aquifers in the vicinity of Rupert and Burley. From Twin Falls to Bliss, the river is below the regional and perched aquifers and receives large quantities of groundwater.

The headwaters of the Boise and Payette rivers have moderately good base flow which is maintained by groundwater inflow into hundreds of small tributaries. The lower reaches of these rivers receive large quantities of groundwater return flow from irrigation. Dry season flows in these reaches are greater now than they were before the lands were irrigated.

South of the Snake River and the Owyhee Mountains in Idaho, the mountains in Nevada are underlain by rocks of relatively low permeability. These mountains receive 20 to 30 inches of precipitation annually. There are

## Basin Policies

---

*The available and unappropriated waters of the Snake River Basin are allocated to satisfy existing uses, meet needs for future growth and development, and protect the environment. The allocations recognize and protect existing water uses and rights. The water allocations are made by large regions to allow the widest possible discretion in application.*

Policy 32  
Snake River Basin

The greatest competition for water in the Snake River Basin exists along the main stem of the Snake River. Existing and potential uses include hydropower generation, irrigation, fish and wildlife, recreation and protection of water quality. The amount of water required for the potential uses exceeds the remaining available supply.

*Water Allocation  
Criteria*

The river flow is regulated by numerous dams, reservoirs, direct diversions and return flows as it crosses the southern half of the state. Existing water rights are principally for irrigation and hydropower generation. Irrigation needs are normally met except during extreme low runoff years. Hydropower generation utilizes water remaining after irrigation diversions even though there are licensed water rights for hydro-generation at several points on the Snake River. Some of these rights are subordinated to upstream diversion and depletions and others are not. The largest unsubordinated right is at Swan Falls Dam (near the Murphy gage) with a flow right of 9,450 cfs (includes 3,300 cfs in claims). Substantial development has occurred above this point, thus reducing flows below the claimed right. Pending applications to divert water could reduce the flows to essentially zero during July, August and September of each year. The resulting impact would substantially reduce electrical energy generation at Swan Falls and at all other points downstream on the main stem Snake River. In the absence of protests from the public and water right holders, the Department of Water Resources has continued to issue permits to develop new water supplies for irrigation from Snake River.

Permits previously issued by the department, if fully developed, would reduce summertime flows in dry years to about 3,300 cfs near Murphy. Sequences of consecutive years of flows of this magnitude would have occurred in the early 1930's and again in the late 1950's and early 1960's if present developments, plus the already issued permits, had been fully developed at that time. These flows were computed in a study of major outstanding permits from the Snake River in southwestern Idaho (Technical Studies Report No. 3) and a preliminary estimate of effects of full development of outstanding groundwater permits in the Upper Snake.

A flow of 3,300 cfs at Swan Falls is about one-third of the flow necessary to meet the entitlement of hydro-generation at that power plant if the recorded water filings are valid. It is also less than the amount identified as needed for fish, wildlife and recreation purposes at Swan Falls or downstream. The potential uses of water in the main stem Snake River have been identified in sufficient detail to determine that remaining water supplies cannot fulfill all identified needs.

The Idaho Water Resource Board concluded, after considering all current and potential uses of water on the main stem Snake River, that depletion of flows below that currently available in the low flow months to maintain water for production of hydropower and other main stem water uses is not in the public interest.

*Therefore, main stem Snake River flows will be protected against further appropriations and preserved to provide the following average daily flows at the following U.S. Geological Survey stream gaging stations:*

| Gaging Station | Protected Flow<br>(Average Daily) |
|----------------|-----------------------------------|
| Milner         | 0 cfs                             |
| Murphy         | 3,300 cfs                         |
| Weiser         | 4,750 cfs                         |

Studies indicate that sufficient water exists in excess of these flows to provide for additional uses if water conserving and storage facilities are constructed.

Water available in excess of the designated flows for development above an average annual flow basis are:

| Gaging Station | Water Presently Available<br>for Appropriation<br>(Average Year) |
|----------------|--|
| Milner         | 1,437,000 acre-feet  |
| Murphy         | 4,218,700 acre-feet  |
| Weiser         | 7,821,000 acre-feet  |

The above average daily flows will allow the flow requirements contained in the Federal Power Commission License issued for the Hells Canyon hydropower complex to be met without significantly affecting hydropower production. Article 43 of the license provides the management criteria,

“The project shall be operated in the interest of navigation to maintain 13,000 cfs flow into the Snake River at Lime Point (river mile 172) a minimum of 95 percent of the time, when determined by the Chief of Engineers to be

necessary for navigation. Regulated flows of less than 13,000 cfs will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the License and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 cfs at Johnson's Bar, at which point the maximum variation in river stage will not exceed one foot per hour. These conditions will be subject to review from time to time as requested by either party."

The Board further finds that this requirement is still in the public interest and should be maintained without change.

Within the above management framework, each future use of water can be considered individually. Water allocations for forestry, flood damage reduction, environmental quality, urban lands, land measures, mining and lake and reservoir management are included as components of other allocations.

*Water is allocated for additional new and supplemental irrigation development. A minimum level of irrigation development of 850,000 acres by the year 2020 over that which existed in August 1975 is endorsed. The location of future development is expected to be: Upper Snake - 498,000 acres; Southwest Idaho - 292,000 acres, and Lower Snake - 60,000 acres. In addition, 255,000 acres are expected to receive supplemental irrigation water. At least 1.7 million acre-feet of water will be consumptively used to meet the minimum level of irrigation development. A maximum level of irrigation development is not identified but will be determined as water supplies, economic conditions, environmental standards and protected instream water rights allow. The Water Resource Project Feasibility Planning Program is directed to assist in appropriate studies to help accomplish the identified agricultural development.*

*Agriculture*

*Water is allocated for municipal and industrial purposes. It is projected that the basin population will more than double by year 2020 and additional industrialization will occur. Water necessary to process agricultural, forest, minerals, aquaculture and other products are included in this allocation. The plan provides for 830,000 acre-feet of diversion beyond August 1975 levels to meet this growth. The diversion is distributed as follows: Upper Snake - 420,000 acre-feet; Southwest Idaho - 275,000 acre-feet; and Lower Snake - 135,000 acre-feet. The net depletion will be about 105,000 acre-feet.*

*Municipal and Industrial*

### *Electric Energy*

*Water is allocated for electric energy. Future electric energy requirements will be largely supplied from thermal plants. The plan provides for 170,000 acre-feet beyond August 1975 levels for consumptive use in cooling thermal power plants. The depletion is distributed as follows: Upper Snake - 75,000 acre-feet; Southwest Idaho - 30,000 acre-feet. In addition, flows in the Snake River will be stabilized for the hydropower generating capability of the river.*

### *Navigation*

No specific allocation of water is made for commercial or recreational navigation. Commercial navigation enroute to Lewiston on the Columbia River and Lower Snake River can be accommodated with the flows leaving Idaho in Snake River at Lewiston. Above Lewiston, commercial and recreational navigation should be accommodated within the protected flows on Snake River and the instream flows on tributary streams, however, both commercial and recreational navigation are included as components of the multi-lake and reservoir management program.

### *Aquaculture*

No specific allocation of water is made for aquaculture uses. Water necessary to process aquaculture products is included as a component of the municipal and industrial water allocation. Aquaculture is encouraged to continue to expand when and where water supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist.

### *Recreation*

No specific allocation of water is made for recreation. The instream flow program for fish and wildlife will provide water for recreation on tributary streams. Main stem Snake River recreation may be affected because of lower flows than presently exist particularly during summer months. Some existing reservoirs may experience greater seasonal fluctuations from increased use of stored water. The State Natural and Recreational River System and Greenway-Greenbelt System will aid and promote water-oriented recreation in the basin. Recreation is also a component of the multi-use lake and reservoir management program.

### *Indian Resource Use*

No separate allocation of water is made for Indian resource use on the Indian reservations. Indian water needs are included as components of other water uses. Irrigation, municipal, industrial, electric energy and the instream flow program include water for Indian uses. Identification of specific needs is required before water allocations can be made specifically to Indian water uses. Several policies in the plan are designed to assist the Indian tribes in obtaining necessary information and incorporating their needs into the State Water Plan.

### *Fish and Wildlife*

No specific allocation of water on the main stem Snake River is made for fish and wildlife, however, the plan does provide for maintaining flows on selected tributary streams to the Snake River for fish and wildlife.

snow packs and increasing infiltration of rain snowmelt. Those considerations will require careful planning and construction of access roads, and proper location and extent of harvest areas.

Forest recreation generally involves both the environmental quality of the forest setting and some recreational use or uses of water. Maintenance of environmental quality includes protection of specific areas and road building and harvesting practices, regulation of grazing for retention of ground cover, rotation of use as harvest regrowth occur, and provision of appropriate facilities and regulation of levels of recreation use. Selection and development of areas and facilities for recreation use should take into consideration the location and conditions of access from major population centers and transportation routes used by tourists. Provision should be made, on forest lands, to cover a wide range of uses and use intensities. Facilities should include those appropriate for heavy, concentrated day use near population centers, for overnight camping in more remote and less developed areas, and for trail access and limited to day use development in wilderness and primitive areas.

Both livestock and wildlife depend, in part, or in season, on forest lands and cover for food and shelter. The management practices discussed for timber production generally tend to maintain both habitat aspects, and to provide for access to wildlife populations for consumptive (hunting) and non-consumptive (viewing and photograph) uses. Irrigation of forest lands to increase vegetative and timber growth is a potential, but not considered as a general practice. Instead in those cases where past overgrazing or other uses have damaged or destroyed vegetative cover, ongoing programs of land management and land treatment should be continued and in some cases accelerated.

Fish production needs in forested areas generally respond to measures which are beneficial to water yield and water quality. Additional measures include preservation of a shelter corridor, or forest canopy, along streams and minor tributaries which maintain proper water temperatures, removal of log jams and other barriers to fish passage. Other items are discussed under fish and wildlife.

#### Aquaculture

Aquaculture is the practice of raising fish and shell fish in closely managed habitats. As considered in this report, aquaculture includes both the raising of fish for commercial purposes and conservation purposes, that is, hatcheries for stream and lake stocking. In 1974 there were 28 commercial fish farms, 1 commercial pond, 3 federal and 17 state hatcheries operating in the Snake River Basin. Most of the commercial operations are located near the Snake River in the Twin Falls-Hagerman area and in the American Falls-Pocatello area. Two of the federal hatcheries are located in the Clearwater River drainage and one in the Hagerman area. The 17 state hatcheries are scattered throughout the Snake River Basin with three in the Twin Falls-Hagerman area and one in the American Falls area. Three additional state hatcheries are located in portions of the state outside of the Snake River Basin.

1973 records indicate that an estimated 19 million pounds of rainbow trout were produced by commercial fish farms in Idaho. This was about 90 percent of the U.S. production of processed rainbow trout. In 1973 over 37 million live fish were distributed to streams and lakes by federal and state hatcheries most of which are located in the Snake River Basin. Projections of future aquaculture production have not been made, but it is assumed that demand will grow at least at the national population growth rate and that Idaho will maintain its present share of the national commercial production while meeting conservation requirements.

The primary considerations for the location of an aquaculture facility appears to be the availability of a large water supply which has the quality and temperature suitable to the desired specie of fish. The availability of such water in the vicinity of the Snake River from Pocatello to Hagerman is the principal reason for the concentration of aquaculture facilities in that area. Because of these requirements, the water conditions in Idaho have categorically met the needs for high quality trout production. The three major sources from present fish farms come from:

1. The Hagerman Aquifer - 1,662 cfs
2. Aquifer located south and west of the Snake River - 113.8 cfs
3. Other sources - 409.1 cfs

Within the "other sources" category is the water that supplies the Caribou Trout Ranch located near Soda Springs. The source of the water is Big Springs Creek, its water temperature is 47 to 57 degrees Fahrenheit and its flow is between 22.7 and 30.0 cfs. The water temperature is slightly cooler than the Hagerman area flows making it an ideal habitat for fish egg production rather than fish production.

Based on commercial fish farm data and present practices of single-pass flows, one cfs can support an annual fish production of approximately 10,000 pounds. Aquaculture is a non-consumptive water use in that nearly all of the water used is passed back into streams or is available for other uses.

Factors affecting future aquaculture growth, particularly the commercial industry are:

1. Water resource development. More efficient upstream water use and system management plus additional groundwater pumping will have an effect on the Snake Plain aquifer, the source of most springs along the Snake River. Full impact cannot be projected until development is located on specific sites. Annual reports of the impact of new development will reveal trends on water levels and flows, thereby allowing future decision makers the option of changing development policies.
2. Federal limitations on effluent quality. Improvement in pond design and construction and implementation of new practices will be necessary to offset the costs of effluent treatment facilities.

3. Management practices. Except for the more recently constructed fish farms, the industry in Idaho is operating in much the same way as 20 years ago. Changes to effect more modern practices would result in a better product at less cost of production.

As the aquaculture industry expands, it probably will be necessary to locate in areas not served by existing suitable spring flows. Water for such expansion would probably be obtained from groundwater sources. This presents several problems: added facility and operations cost, treatment of effluent prior to discharge back to a stream or the aquifer, and necessity for standby pumping equipment to provide water in the event of power failures. With proper location and with adequate soils and terrain, an aquaculture facility may be combined with an agricultural development to the benefit of both. Fish water effluent would be stored or effluent treatment provided during nonirrigation seasons.

Aquaculture is important to Idaho. Water supply problems will increase in future years as the Snake Plain aquifer is developed for other purposes. State sponsored aquacultural research programs would be of benefit and would assist in alleviating some of the design, management, sales promotion and other problems that now occur. Research programs would also be beneficial in formulation and implementation of multi-purpose aquaculture-agriculture projects.

#### Fish and Wildlife

The state contains large mountainous areas that are generally forested, large expanses of irrigated and dry-farmed agriculture lands and considerable areas of rangeland. Streams, rivers, lakes and reservoirs are scattered throughout the basins. Under these conditions, even though development for other uses has resulted in loss and deterioration of habitat, significant fishery, upland game, big game and waterfowl resources are available. In 1974, about 850,000 fishing and hunting licenses were sold in Idaho, many to out-of-state residents. Also, in 1975 it is estimated that people participated in approximately 10,400,000 activity days fishing and hunting within the state. That level is projected to increase approximately 50 percent by the year 2020.

A principal problem so far as protection and preservation of water resources for fish and wildlife is the lack of authority to do so. The recent Malad Canyon decision of the Idaho Supreme Court in December, 1974, answered three important questions regarding instream flows. Among other findings the court held that: (1) there could be beneficial uses other than those listed in the Constitution; (2) that in the specific case before them, the Idaho legislature had considered scenic and recreational uses to be beneficial uses of water; and (3) the actual diversion of water is not required in establishing a beneficial use of water when so provided by the legislature. Since this decision of the Idaho Supreme Court no additional legislation has been enacted.

severely damaged by drawdowns to a nearly empty condition. This recommendation proposes agreements be made with reservoir owners to provide minimum pool levels which will permit survival of the fish population. Compensation of one type or another would probably be required in most cases to accomplish this.

4. Greater public access. Throughout the basins there are many areas that could provide excellent fishing and hunting except that public access is limited. The recommendation is made that greater public access be provided in such areas, either through acquisition of lands, easements, or establishment of greenways or greenbelts.
5. Fish screens at diversion structures. Many irrigation diversions from streams and rivers do not have screens to prevent entry of fish into waterways that become dry after the irrigation season ends. Although actions are now being taken to prevent fish losses by installation of screens, the recommendation is made that this program be accelerated.

#### Agriculture

Irrigated agriculture uses 7 percent of the state's land and produces 85 percent of the total agricultural returns. One-third of the irrigated land is sprinkled and one-fourth of the land is irrigated from groundwater. Conversions to more efficient systems are also occurring in the older irrigated areas which make water available for other uses.

There are approximately 8 million acres of land within the state presently without a water supply which have been classified as having a potential for irrigation. Figure 7 shows the general location of existing and potentially irrigable lands.

The projected need for agricultural land to fill the national demands for additional food production have been made. The national projections were then disaggregated to states based on historical shares of the market and available land and water resources. These projections are based on (1) the current U.S. population birth rate which will result in zero population growth between the year 2030 and 2040, and (2) an increasing export demand. Also included in the projection is a 40 percent increase in per acre crop yield for rangeland, dry-farm land and irrigated land. A part of the projection assumptions is the maintenance of current diet level and per capita consumption.

The projected new irrigated land area demands within Idaho are 987,000 acres between 1974 and 2020. Farm building areas, roads, ditches and waste areas that receive some water will reduce cropped acreage to about 860,000 acres. The proposed plan also includes furnishing water to 379,000 acres of the 656,000 acres needing supplemental water. The distribution of these lands by basin is estimated in acres:

The subareas are shown on Figure 8. Groundwater will be the primary source for the development of one-half of the projected lands. Large government-sponsored project developments are anticipated to be used only in the period 2000 to 2020, except for major projects to provide supplemental water to the Salmon Falls and Oakley Fan areas near Twin Falls plus development on the Fort Hall Indian Reservation of 15,000 acres.

New water right permits diverting in the Murphy reach would be limited in the low flow months of July and August so as not to cause reduction in flows at the Murphy gage to be below those which would result from the plan in order to protect hydropower water rights. Because this flow is only about 40 percent of identified fish and wildlife flow needs, no instream flow designation for fish and wildlife is proposed.

The limiting of future appropriations from this reach during the lowest flow months, however, will still allow the level of development described in the State Water Plan. Studies indicate that sufficient water can be obtained from existing water supplies made available through the Water Bank, from off-stream storage, upstream water conservation, and from groundwater pumping to support the additional consumptive water uses. To allow development to deplete the river at Murphy would decrease electrical energy production from the Snake River hydropower facilities beyond that reduction identified in the plan. The proposed limit in new diversion during low flow months is designed to encourage the development and/or use of other available water supplies first.

There is concern in the Kootenai River Basin regarding possible problems in adapting to the changed flows caused by the Libby Project in Montana. Agricultural drainage systems within diked areas in Kootenai Valley may need modification to handle local runoff and river seepage when river flows are high because of power and flood control releases. Portions of the valley may lose some of the sub-irrigation which now results from high river stages during the spring and early summer. New or additional water supplies may be needed. This problem should be given further study in light of other proposed dam and reservoir facilities on the Kootenai system.

The water supply of the Bear River Basin for agricultural use is limited. Additional storage is possible, but it would be costly. The U.S. Bureau of Reclamation has studied several sites throughout the entire length of the Bear River and its tributaries. Most projects would require interstate cooperation and support before construction could begin. Negotiations between the three states should be completed before a final plan can be determined. It is presently estimated that 67,000 acres of new land and 123,000 acres of supplemental land should be developed.

Agricultural expansion problems are numerous and all must be solved before effective and efficient development can occur. The principal problems are:

# **ADDENDUM D**

**Framework for Final Resolution of  
Snake River Water Rights Controversy**

This foregoing is a true and certified copy of  
the document on file at the department of  
Water Resources

Given this 4th day of January 2008

*Carly Spackman*

**SCANNED**

JAN 29 2007

FRAMEWORK FOR FINAL RESOLUTION  
OF SNAKE RIVER WATER RIGHTS CONTROVERSY

INTRODUCTION

The litigation concerning water rights on the Snake River and its tributaries has focused public attention on the relationship between hydro-power generation at facilities such as Swan Falls dam, and upstream water use and development which impacts the availability of water for power generation. While the litigation has been costly to the Idaho Power Company, other water users, and the State of Idaho and has resulted in uncertainty over future availability of water, it has served to stimulate much-needed dialogue and study concerning prudent management of this vital natural resource.

However, Governor John Evans, Attorney General Jim Jones and Idaho Power Chief Executive Officer James Bruce believe we have reached the point of diminishing returns in pursuing further judicial resolution of this water rights controversy. Achieving a proper balance among competing demands for a limited resource such as water in the Snake River system is a fundamental public policy question. Litigation is not the most efficient method to resolve complex public policy questions. Moreover, adversary proceedings may not necessarily yield solutions which reflect the broad public interest as well as the

In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative and administrative actions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction.

1. THE MINIMUM STREAMFLOW IN THE STATE WATER PLAN SHOULD BE ADJUSTED TO 3,900 CUBIC FEET PER SECOND AT MURPHY GAGE DURING THE IRRIGATION SEASON AND TO 5,600 CUBIC FEET PER SECOND DURING THE NON-IRRIGATION SEASON.

The State Water Plan currently provides for a minimum streamflow of 3,300 c.f.s. on an average daily basis at Murphy Gage (below Swan Falls Dam). The Plan itself acknowledges that 3,300 c.f.s. is "less than the amount identified as needed for fish, wildlife and recreational purposes at Swan Falls or downstream." The best available hydrologic data indicate that existing uses result in a potential irrigation season low flow of approximately 4,500 c.f.s. at Murphy Gage on an average daily basis. By raising the irrigation season minimum streamflow, the state will be able to assure an adequate hydropower resource base and better protect other values recognized by the State Water Plan such as fish propagation, recreational and aesthetic interests, all of which would be adversely impacted by an inadequate streamflow. Conversely, by setting the irrigation season minimum flow at 600 c.f.s. below the current actual minimum, the state can allow a significant amount of further development of water uses without violating the minimum

Non-irrigation season flows are of critical importance to the preservation of a low-cost hydro base, and to the ability of the Idaho Power Company to meet the needs of its customers. Therefore, the State Water Plan should be amended to recognize a seasonal differential in flows.

Implementation of an irrigation season (April through October) minimum flow of 3,900 cfs at the Murphy gage would result, under similar assumptions, in a low flow of 5,600 cfs in the non-irrigation season (November through March). The non-irrigation season minimum flow should be set at that level. While new storage projects which use non-irrigation season flows may serve to make more water available during the summer irrigation season, they may adversely impact generation capacity during winter months. Therefore, the state water plan should be amended to require that before new storage projects are approved by the state, we should require that existing storage facilities be fully utilized. After such time, new non-irrigation season storage in the reach below Milner dam and above Murphy Gage should only be authorized if it can be coupled with provisions which mitigate depletions such storage would cause in hydro-power generation.

The actual amount of development that can take place without violation of these minimum streamflows will depend on the nature and location of each new development, as well as the implementation of new practices to augment the streamflow.

Development of new domestic, commercial, municipal and industrial (DCMI) uses should proceed without further impediment because of their minimal effect on total water supply. Availability of an assured water supply for those purposes is essential for the orderly development of all the State's resources. Therefore, the State Water Plan should be amended to reserve a block of water for future consumptive DCMI development. This will both assure its availability and avoid the necessity of numerous eminent domain cases to acquire water for such uses.

2. BECAUSE ADDITIONAL WATER USE DEVELOPMENT POTENTIAL IS LIMITED, EACH NEW DEVELOPMENT SHOULD BE CAREFULLY SCRUTINIZED AGAINST EXPRESS PUBLIC INTEREST CRITERIA.

The right to develop the remaining water resources on the Snake River system should be allocated in a manner which will maximize long-term economic benefit to all sectors of society. Priority should be given to projects which promote Idaho's family farming tradition and which will create jobs. Because maintenance of inexpensive hydropower resources contributes to a positive economic climate for the creation of new jobs for Idahoans, future water rights allocation decisions should weigh the benefits to be obtained from each development against the probable impact it will have on the Company's hydropower resources.

To this end, the settlement of the pending Swan Falls litigation should be structured in a way which will allow the State to utilize Idaho Power Company's asserted water right to augment the State's existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest. This authority should extend to pending undeveloped permits as well as new applications.

In addition, legislation should be adopted which will enunciate state policy regarding the types of water resource development which are deemed to be beneficial, and which expressly recognizes hydropower generation benefits as an element of such public interest determination. The public interest criteria should also address the timing of new development.

The legislation should also clarify the authority of the Department of Water Resources to impose and lift moratoriums on the granting of new water rights permits. The parties envision that the Department can resume processing of pending water rights filings upon adoption of regulations implementing such legislation.

3. THE STATE SHOULD COMMENCE A GENERAL ADJUDICATION OF THE ENTIRE SNAKE RIVER BASIN IN IDAHO.

The key to effective management of the Snake River lies in a comprehensive determination of the nature, extent and priority of all of the outstanding claims to water rights.

Only through a general adjudication will the state be in a position to effectively enforce its minimum streamflow rights, protect other valid water rights, and determine how much water is available for further appropriation. A general adjudication will also result in quantification of federal and Indian water rights which until now have been unresolved. A further benefit of adjudication is that it will enable the establishment of an efficient water market system, which will encourage the highest and best use of our water resources.

Because a general adjudication will take many years to complete, it is essential to initiate the process as soon as possible so that it will be completed before an even more severe water rights crisis is upon us. The costs of the adjudication will be substantial, and legislation should be passed which equitably distributes those costs among water users, ratepayers and other taxpayers. The parties consulted with representatives of affected interests, and will recommend an equitable cost-sharing formula as part of a joint legislative package.

#### 4. THE STATE SHOULD ENCOURAGE THE ESTABLISHMENT OF AN EFFECTIVE WATER MARKETING SYSTEM.

If the actions outlined in this document are taken there should be a significant amount of water available for appropriation in the Snake River Basin. However, such appropriations should be on the terms and conditions referred to in #2 above. The day is also approaching when there will be no further water

available for traditional appropriation. Therefore some provision must be made to enable people to acquire water rights outside of the appropriation process, over and above the amount reserved for DCMI. Private condemnation proceedings generally involve transaction costs which make it an unattractive alternative. The State should make it easier to get willing sellers together with willing buyers, and to facilitate approval of changes in the place of use. Conjunctive use and management of ground and surface water should also be explored.

5. THE STATE SHOULD FUND HYDROLOGIC AND ECONOMIC STUDIES TO DETERMINE THE MOST COST-EFFECTIVE AND ENVIRONMENTALLY SOUND MEANS TO IMPLEMENT THE STATE WATER PLAN AND TO AUGMENT FLOWS IN THE SNAKE RIVER.

The State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as a part of the settlement. Much additional information is needed to permit informed management and planning decisions.

A number of methods have been suggested to enhance streamflows in the Snake River, which would benefit both agricultural development and hydro-power generation. Among them are new in-stream storage and aquifer recharge projects. These and other methods deserve study to determine their economic potential, their impact on the environment, and their impact on hydro-power generation.

6. LEGISLATION SHOULD BE ENACTED TO CLARIFY THAT PROCEEDS FROM UTILITY SALES OF HYDROPOWER WATER RIGHTS WILL BENEFIT RATE-PAYERS.

Concern has been expressed that current law could permit a utility to sell its water rights to others. An additional concern is that the proceeds of such a sale would go to stockholders. The parties will propose legislation to address these concerns. Legislation in a draft form has already been discussed at a staff level and should be ready for inclusion in the joint legislative package.

#### CONCLUSION

The focus of discussion of settlement of the "Swan Falls Controversy" has necessarily been on the claims of right and authority at that site. However, the settlement of those issues necessarily involve putting in place legislation and policies which will govern the rest of the Snake River and other watersheds also.

The ultimate-benefit will be to allow informed state policy decisions on future growth and protection of hydropower generation. The definition and implementation of a known and enforceable state policy will make the Swan Falls controversy an asset in the history of the state.

### IMPLEMENTATION TIMETABLE

The nature of the controversy surrounding this issue is of such dimensions and affects the actions of so many citizens that the parties have agreed to an implementation timetable to assist the public in understanding when actions may be expected. However, it must be emphasized that the nature of the issues raised in this matter are complex and changes should be expected. Every effort will be made to keep the public informed concerning actions of the parties that could affect their interests.

October 1...Release Framework and Public Interest Criterion.

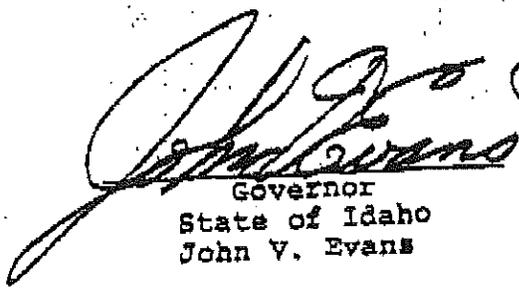
October 15...Execute Settlement Agreement, S.B. 1180 Contract and Stipulation.

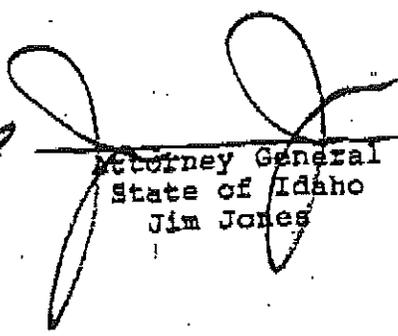
November 1...Proposed amendments to the State Water Plan, and proposed legislation providing public interest criteria, authority of the Department of Water Resources to impose moratoriums on new permits, funding for adjudication of the Snake River, establishment of an effective water market system, funding for hydrologic and economic studies to augment Snake River flows and clarifying allocation of proceeds on sales for hydropower water rights released for comment.

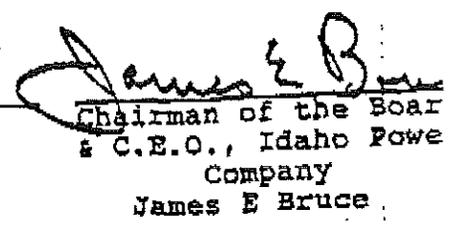
November-December...Meetings with legislative committees for briefing and comments on proposed legislation.

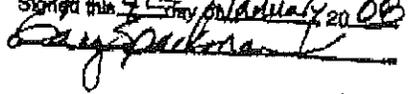
January 15, 1985...Presentation of legislative package to State Legislature.

DATED this 1<sup>st</sup> day of October, 1984.

  
Governor  
State of Idaho  
John V. Evans

  
Attorney General  
State of Idaho  
Jim Jones

  
Chairman of the Board  
& C.E.O., Idaho Power  
Company  
James E. Bruce

The foregoing is a true and certified copy of  
the document on file at the department of  
Water Resources.  
Signed this 4<sup>th</sup> day of January, 20 08  


# **ADDENDUM E**

*Initial Scheduling Order*

**SRBA Subcase No: 00-91013 (Basin-Wide Issue 13)**

**May 26, 2010**

|   |              |
|---|--------------|
| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |              |
| MAY 26 2010   |              |
| By _____  | Clerk        |
| _____   | Deputy Clerk |

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

|                |   |                                 |
|----------------|---|---------------------------------|
| In Re SRBA     | ) | Subcase No: 00-91013            |
|                | ) | (Basin-Wide Issue 13)           |
| Case No. 39576 | ) |                                 |
|                | ) |                                 |
|                | ) | <b>INITIAL SCHEDULING ORDER</b> |
|                | ) |                                 |
|                | ) |                                 |

This matter came before the Court pursuant to a status conference held on May 25, 2010. Prior to the status conference, the parties identified the following unresolved issues pending in Basin-Wide Issue 13 via their submission of written *Statements of Issues*:

- Issue No. 1:** The rebound call issue.
- Issue No. 2:** Identifying and preserving protections for third-party beneficiaries to the Swan Falls Agreement.
- Issue No. 3:** Identifying water rights that benefit from Paragraphs 7C and 7D of the Swan Falls Agreement.
- Issue No. 4:** Subordination consistency between the minimum flow rights and the Idaho Power rights under the Swan Falls Agreement.
- Issue No. 5:** General provision in IDWR Basin 2 regarding the comprehensive management plan for administration of water rights above Murphy Gage and below Milner Dam as reflected in the State Water Plan.

At the status conference all of the parties agreed to the following deadlines in the above-captioned matter:

With respect to Issue Nos. 1, 2 and 3, the parties agreed to the following deadlines:

**August 2, 2010:**                      **Deadline for submitting Standard Form 5's.**

**November 1, 2010:**                **Deadline for filing summary judgment motions.**

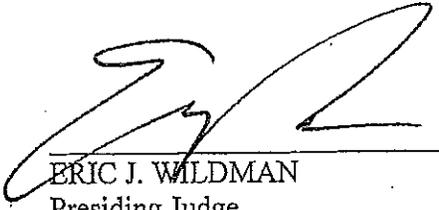
In regards to any proposed settlement regarding the memorialization and tracking of those rights identified as protected by the subordination provision of the Swan Falls Agreement for purposes of future administration, the parties are encouraged to confer with IDWR regarding a workable solution. In the event Issue Nos. 1, 2 or 3 are unresolved by the August 1, 2010 deadline, this Court will, upon receipt of a summary judgment motion from any of the parties on or before November 1, 2010, issue a briefing schedule and set the motion for oral argument.

With respect to Issue No. 4, the parties agreed to holding this issue in abeyance until Issue No. 1 is resolved.

With respect to Issue No. 5, the parties agreed to holding this issue in abeyance pending the Idaho Supreme Court's issuance of its decision in Gooding County Case No. CV 2008-444, which is presently on appeal before the Idaho Supreme Court.<sup>1</sup>

IT IS SO ORDERED.

Dated May 26, 2010

  
ERIC J. WILDMAN  
Presiding Judge  
Snake River Basin Adjudication

<sup>1</sup> This issue has not yet been consolidated into the above-captioned matter and is still pending before the Special Master. Upon filing of a stipulation of all parties and motion, the Court is not opposed to consolidation.

# **ADDENDUM F**

**Excerpts from *IDWR Respondents' Brief*  
Minidoka County Case No. CV-2009-647 (“A&B Delivery Call”)  
January 28, 2010**



**IDWR RESPONDENTS' BRIEF**

Judicial Review from the Idaho Department of Water Resources  
Gary Spackman, Interim Director

Honorable Eric J. Wildman, Presiding

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with the Act's stated purpose of furthering full economic development of the State's ground water resources.

**2. The Director Applied The Appropriate Burdens Of Proof And Deference To A&B's Water Right**

**A. Appropriate Deference was Afforded to A&B's Partial Decree**

According to A&B, the Director and his watermasters are obligated to deliver water to water rights, in order of priority, without engaging in any analysis. *Id.* This is simply incorrect. In *American Falls*, the Supreme Court stated "the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development." *American Falls* at 876, 154 P.3d at 447. Other factors that the Director may consider are expressly listed in the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). *See* CM Rule 10.07 (full economic development); 20.03 (reasonable use); and CM Rule 42.01 (material injury factors). In performing his analysis, the Director may determine that the senior does not need the "full quantity" of his or her decreed right. *American Falls* at 876, 154 P.3d at 447. This evaluation does not constitute a "re-adjudication" of the right. *Id.* at 877, 154 P.3d at 448. By requiring the Director to conduct his own investigation prior to his initial order, the Court recognized that the Director is not obligated to find material injury based simply upon the filing of a delivery call.

Here, A&B filed its Motion to Proceed on March 16, 2007. R. at 830. A&B subsequently sought a writ of mandamus from the Minidoka County District Court for the Director to respond. The Director was ordered by that court "to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules . . . ." R. at 1106, ¶ 6. Consistent with *American Falls*, the Director subsequently requested that A&B provide the Department with information in support of its delivery call. R. at 1107. Following

the submittal of information, the Director issued his January 2008 Order. R. at 1105. In his initial order, the Director stated, "Material injury is a highly fact specific inquiry that must be determined in accordance with CM Rule 42; therefore, the establishment of injury is a threshold determination that must be established by prima facie evidence." R. at 1147.

A&B points to this statement in support of its position that the Director flipped the burden of proof, thereby requiring A&B to prove material injury and re-prove its water right. *Opening Brief* at 12. The statement, however, was not directed at A&B; A&B met its obligation by providing the Director with the information required by *American Falls*. R. at 1146; *see American Falls* at 877, 154 P.3d at 448. Instead, the statement was made by the Director in regard to his duty to evaluate the information prior to issuance of his initial order. The Minidoka County District Court understood this when it ordered the Director "to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules . . . ." R. at 1106, ¶ 6 (emphasis added). If a "threshold determination" for material injury does not exist, the CM Rules would not have been promulgated and the Court in *American Falls* would have simply required the Director to enter a finding of material injury based solely upon the filing of a delivery call. Instead, the Director is duty-bound to review the information and exercise his discretion and professional judgment to determine whether junior ground water rights are causing material injury to A&B.<sup>9</sup>

As explained above, ground water appropriators that divert water for irrigation purposes are protected in the maintenance of reasonable pumping levels. Idaho Code § 42-226, -229. If reasonable pumping levels are not exceeded, the senior is not entitled to have the junior rights

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<sup>9</sup> As stated in the Recommended Order: "The allegation of material injury under oath invoked the Director's authority and responsibility to develop facts upon which a well-informed decision could be made as to the existence of material injury and the consequences if there were material injury." R. at 3085. *See American Falls* at 878-879, 154 P.3d at 448-49.

curtailed. Rather, it is the senior appropriator's duty to extend his or her diversion works to satisfy his or her prior right. *Baker* at 584, 513 P.2d at 636. In this sense, ground water to ground water administration is decidedly different than surface water to ground water administration. To the extent material injury is found in a surface-to-ground water call, the senior must rely upon the watermaster to curtail junior pumping in order to supply more surface water to the senior's point of diversion, in the absence of mitigation.

As will be explained in detail below, the Director found that A&B's reasonable pumping levels have not been exceeded. A&B maintains the ability to exercise the full extent of its right, but is obligated, to the extent it chooses, to drill its wells deeper to fully satisfy its right. While the Director did engage in an analysis regarding A&B's reasonable irrigation needs (0.75 miner's inches per acre, R. at 3110), at no time in these proceedings was A&B informed, or should it infer, that it was not authorized to exercise the full extent of its right: "A&B is entitled to the higher rate of delivery if its delivery system can produce the higher rate and that amount can be applied to a beneficial use." R. at 3102; *American Falls* at 878-79, 154 P.3d at 449-50 ("The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has.") Proper deference was therefore afforded to A&B's partial decree.

**B. Because Material Injury was not Found, it is Incorrect for A&B to Assert that Junior Ground Water Users Carried a Burden of Proof**

A&B asserts that junior ground water users failed to carry their burden of proof by proving through a showing of "waste, forfeiture, abandonment, etc." that A&B did not need the full extent of its water right. *Opening Brief* at 28 citing *American Falls* at 878-79, 154 P.3d 449-50. As explained in *American Falls*, this argument is incorrect.