Docket No. 37308-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

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.

SPRING USERS' JOINT RESPONSE BRIEF

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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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("*Final Order*") issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department"), on July 11, 2008.

II. Course of Proceedings

In 2005, Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively "Spring Users") filed water delivery calls with the Director of IDWR, seeking administration of junior priority ground water rights in the Eastern Snake Plain Aquifer ("ESPA"). R. Vol. 1 at 1, 2 & 4.[1] The Director issued final orders ("*Orders*") that determined junior ground water rights materially injured the Spring Users' senior surface water rights. The Director ordered the junior ground water rights curtailed unless they could mitigate the injury to the Spring Users' senior rights. R. Vol. 1 at 45; R. Vol. 3 at 487. The *Orders* identified specific mitigation requirements, phased-in over a five year period. *Id.*

The Department's Rules for the Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.01.11, *et seq.*) ("CM Rules") set forth the procedures for filing and responding to water delivery calls within organized water districts. In order to avoid curtailment, a junior water user must file a formal mitigation plan, which is subject to protest and an administrative hearing. *See* CM Rule 43. Notwithstanding the CM Rules, the Director

[1] Citations to the agency record are identified as "R. Vol. __ at ___." Citations to the transcript from the agency hearing are identified as "Tr. ___." Citations to the district court record are identified as "Clerk's R. ___."

authorized the ground water users to continue to divert out-of-priority, and injure the Spring Users' senior water rights, without an approved Rule 43 mitigation plan.[2]

The Spring Users' delivery calls were consolidated and the Director appointed former Chief Justice Gerald F. Schroeder as the Hearing Officer. R. Vol. 10 at 1979. An administrative hearing was then held from November 28 through December 13, 2007, after which the Hearing Officer issued his recommended order on January 11, 2008.[3] R. Vol. 16 at 3690. The parties filed exceptions to the Hearing Officer's recommendations and the Director issued his *Final Oder* on July 11, 2008. R. Vol. 16 at 3950. In the *Final Order*, the Director adopted the findings of the prior orders and the Hearing Officer's recommendations, with some modifications. *Id.* at 3951.

The Spring Users and Idaho Ground Water Appropriators, Inc., North Snake Ground Water District and Magic Valley Ground Water District (collectively referred to as "IGWA") filed petitions for judicial review with the Gooding County District Court. Clerk's R. at 1, 8 & 14. The Honorable John M. Melanson issued an *Order on Petitions for Judicial Review* on June 19, 2009. *Id.* at 44. The District Court affirmed the Director's material injury determinations and further held that the Director "exceeded his authority" by implementing a newly created

[2] The Director created a "replacement water plan" scheme, not provided for by the CM Rules, to justify this decision. R. Vol. 3 at 523-24. In 2005, 2006 and 2007, junior groundwater users, represented by the Idaho Ground Water Appropriators, Inc. ("IGWA"), filed "replacement water plans" as a means to avoid administration pursuant to the CM Rules. R. Vol. 1 at 111; R. Vol. 5 at 881; R. Vol. 7 at 1375; R. Vol. 9 at 1853. These plans were approved by the Director without any hearings and despite the Spring Users' protests. Although the plans did not fully mitigate the injury suffered by the Spring Users, not a single ground water right was ever curtailed during this time.

[3] The Hearing Officer issued a *Response to Petitions for Reconsideration and Clarification and Dairymen's Stipulated Agreement* on February 29, 2008. R. Vol. 16 at 3839.

"replacement water plan" scheme. *Id.* at 89. In addition, the District Court confirmed that the Swan Falls Agreement and Ground Water Act do not preclude conjunctive administration of junior groundwater rights that injure the Spring Users' senior surface water rights. *Id.* at 78-83.

Both IGWA and the Spring Users appealed the District Court's decision. Clerk's R. at 126 & 131(a).

III. Statement of Facts

A. The Eastern Snake Plain Aquifer

The Eastern Snake Plain Aquifer ("ESPA") in southern Idaho provides a source of water for thousands of water users. R. Vol. 3 at 487-88. The ESPA is not an unlimited supply of water. Each year, the average withdrawals and outflow from the ESPA at least equal or exceed the inflow to the aquifer. *Id.*

The ESPA is hydraulically connected to the Snake River and its tributaries at "various places and to varying degrees." R. Vol. 3 at 488.[4] One location where "a direct hydraulic connection exists between the ESPA" and surface water is the Thousand Springs area. There, ground water flows to springs emanating from the canyon walls and floor. *Id.* The majestic beauty of cool, pristine spring water discharging from the Snake River Canyon is an Idaho landmark. This spring water, a defined surface water source in Idaho, is used for irrigation, generation of hydropower, municipal and domestic purposes, and for year-round aquaculture use. *See* I.C. § 42-101; IDAPA 37.03.01.60.02.c.i ("For surface water sources, the source of water

[4] "Hydraulically-connected ground water sources and surface water sources are sources that within which, ground water can become surface water, or surface water can become ground water, and the amount that becomes one or the other is largely dependent on ground water elevations." R. Vol. 3 at 488-89.

shall be identified by the official name listed on the U.S. Geological Survey Quadrangle Map. ... If there is no official or common name, the source should be described as 'unnamed stream' or 'spring'").

The direct hydraulic connectivity of the aquifer to the springs in the Thousand Springs area creates a situation where any depletion to the aquifer, such as those that result from diversions under junior priority ground water rights, impacts the ability of the Spring Users to divert and use water pursuant to their decreed senior surface water rights.[5]

B. The Spring Users Water Rights & Facilities.

1. Blue Lakes' Facilities and Water Rights

The *Blue Lakes Order* provides a general overview of Blue Lakes' water rights and facilities. R. Vol. I at 56 ¶¶ 52-55. Blue Lakes raises rainbow trout for commercial production, using the entire flow of Alpheus Creek, near Twin Falls, Idaho. Water is diverted through concrete headworks into a pipeline and then conveyed to Blue Lakes' facilities where trout at various life stages are reared.[6] Gregory Kaslo, Blue Lakes' vice president of operations and oversight, provided a detailed description of Blue Lakes' facilities and trout rearing operations, including water usage, at the administrative hearing. Tr. at 250-81.

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[5] IGWA asserts that the ESPA is like "an underground bathtub" that is regulated by the springs in the Thousand Springs area – deemed, by IGWA, to be "overflow valve[s] for the ESPA." *IGWA Br.* at 10-11. They liken springs to "shallow wells" and claim that the springs spill "water when the aquifer is full." *Id.* This characterization of the aquifer and springs is misleading and incorrect. Contrary to IGWA's assertion, natural springs are not similar to shallow man-made wells. Springs are natural surface water sources as defined by state law and water right decrees issued by the SRBA District Court. *See* I.C. § 42-101; Exs. 31 & 301-06. Furthermore, spring flows are not only limited to times "when the aquifer is full." However, depletions to the aquifer, such as those caused by IGWA's out of priority diversions, impact spring flows and have caused material injury to the Spring Users senior surface water rights.

[6] A portion of the diverted water (25.3 cfs) is conveyed directly to Pristine Springs, Inc. to fill its prior water right. *See* Ex. 201 & 202.

Blue Lakes owns three surface water rights – that authorize an aggregate year-round diversion of 197.06 cfs from Alpheus Creek. Ex. 31.[7] The decrees identify the following elements:

Water Right No.	36-2356A	36-7210	36-7427
Priority Date	May 29, 1958	November 17, 1971	December 28, 1973
Quantity	99.83 cfs	45 cfs	52.23 cfs
Purpose of Use	Fish Propagation	Fish Propagation	Fish Propagation
Period of Use	01-01 to 12-31	01-01 to 12-31	01-01 to 12-31
Source	Alpheus Creek	Alpheus Creek	Alpheus Creek
Partial Decree Date	April 10, 2000	April 10, 2000	April 10, 2000

As decreed, these water rights authorize the diversion of water at the specified rate, 365 days per year. Tr. at 2107, lns. 14-25. There are no conditions or limitations on any of the decreed elements of Blue Lakes' water rights.

The *Blue Lakes Order* contains a table showing daily maximum, average, and minimum flows available to Blue Lakes on a monthly basis during the years 1994/1995 and 2004 – the year before Blue Lakes submitted its water delivery call. R. Vol. 1 at 57-58. The data shows that the 2004 Alpheus Creek water flows were never adequate to fill Blue Lakes' 1973 priority water right (36-7427), and were only able to fill Blue Lakes' 1971 priority right (36-7210) ten of twelve months. *See* Tr. at 679, lns. 1-8.[8]

In addition, Exhibit 204 contains Blue Lakes' daily water flow measurements showing water shortages in 2005, 2006 and 2007. The exhibit shows shortfalls of 82.06 cfs (2004), 78.06 cfs (2005), 86.06 cfs (2006) and 81.60 cfs (2007).

[7] The water right decrees issued by the Snake River Basin Adjudication (SRBA) District Court describe each element of the water rights (i.e. source, quantity, priority date, point of diversion, purpose of use, period of use, and place of use) as required by I.C. §§ 42-1411 & -1412.
[8] For illustrative purposes, this data is depicted on a line graph admitted as Exhibit 205.

Blue Lakes' facilities have sufficient capacity to utilize the entire flow of its water rights for commercial fish production. Tr. at 269, lns. 7-12. However, Alpheus Creek water flows remain insufficient to supply Blue Lakes' water rights and to operate the Blue Lakes' facility to full capacity. Blue Lakes has the ability to put the additional water to beneficial use. Tr. at 272-81.

2. Clear Springs' Facilities and Water Rights

Clear Springs, an Idaho general business corporation, is an employee-owned food company headquartered in Buhl, Idaho. Tr. at 92, lns. 12-20. Founded in 1966, Clear Springs prepares a variety of fresh and frozen seafood, for sale in fine restaurants and in seafood sections of major supermarkets throughout the United States and Canada. Tr. at 64, lns. 8-24; R. Vol. 14 at 3310-15. Clear Springs is the world's largest producer of aquaculture rainbow trout but also manufactures salmon, mahi mahi, and other premier value added seafood products. *Id.* at 3316-18.

Clear Springs is vertically integrated[9] with its own rainbow trout brood stock and egg production, feed manufacturing, farm operations, processing and value adding plants, and distribution system, including a fleet of refrigerated tractor/trailer combinations. Tr. at 68-69. Clear Springs also operates a leading edge research facility whose mission is to develop tools that enhance fish production at Clear Springs' facilities.

Clear Springs diverts surface water for its Snake River Farm at a collection system

[9] Vertical integration begins with Clear Springs' own pedigreed rainbow trout brood stock – selectively bred for over 20 years with a 50% increase in growth rate. R. Vol. 14 at 3271, ¶ 2. This provides Clear Springs' market with a continuous supply of product at stable prices and consistent quality. *See also Id.* at ¶ 3 (discussing breeding and harvesting process), Tr. at 67-69.

("spring pool") that receives spring flow emanating from approximately a 300 ft length of the canyon wall. Tr. at 208, lns. 6-13. Water is collected into a central conveyance for distribution. Clear Springs measures water flow weekly using a flow-meter at two delivery pipes to the farm. Tr. at 85, lns. 7-11.

Snake River Farm owns surface water rights totaling 117.67 cfs for fish propagation, each partially decreed by the SRBA Court in April 2000. Exs. 301-306.

Water Right No.	36-02703	36-02048	36-04013C
Priority Date	November 23, 1933	April 11, 1938	November 20, 1940
Quantity	40 cfs	20 cfs	14 cfs
Purpose of Use	Fish Propagation	Fish Propagation	Fish Propagation
Period of Use	01-01 to 12-31	01-01 to 12-31	01-01 to 12-31
Source	Springs	Springs	Springs

Water Right No.	36-4013A	36-4013B	36-7148
Priority Date	September 15, 1955	February 4, 1964	January 31, 1971
Quantity	15 cfs	27 cfs	1.67 cfs
Purpose of Use	Fish Propagation	Fish Propagation	Fish Propagation
Period of Use	01-01 to 12-31	01-01 to 12-31	01-01 to 12-31
Source	Springs	Springs	Springs

As decreed, these water rights authorize the diversion of water at the specified rate, 365 days per year. *Id.* Clear Springs' diversion, conveyance, and trout rearing facilities have sufficient capacity to divert and use the full aggregate quantity of the decreed water rights. Tr. at 218, lns. 1-10.

Spring discharges supplying water to Clear Springs' Snake River Farm water rights have declined by as much as *21 percent* since 1972. R. Vol. 3 at 500, ¶¶ 58-60. Current flows remain insufficient to fill water rights 36-4013A, 36-4013B and 36-7148, *id.*, forcing Clear Springs to dry up raceways at its farm, Tr. at 216, lns. 10-25 & 217, lns. 1-5. The reduction in water supply

has prevented Clear Springs from using water under its senior rights.

C. Ground Water Depletions to the ESPA and the State's Effort to Implement Conjunctive Administration.

Extraordinary efforts have been undertaken by the Legislature, the SRBA Court, IDWR, and water users during the last three decades to facilitate conjunctive administration of ESPA water rights. Beginning in the 1950s, consumptive ground water development increased dramatically on the ESPA. Today, ground water pumping depletes the aquifer and its hydraulically-connected surface water sources by approximately 2.0 million acre-feet per year. R. Vol. 3 at 488. Corresponding with the dramatic increase in ground water development, aquifer levels and hydraulically-connected spring discharges began to decline.[10] R. Vol. 3 at 488. As a result, the Spring Users' and other senior surface water rights experienced prolonged shortages while pumping under junior priority ground water rights continued unabated. R. 2nd Supp. Vol. 1 at 5688.

1. Legislation Provides Framework for Regulation of Ground Water Rights.

Recognizing the lack of a statutory framework for regulating ground water use, the State began to take actions to protect its water resources in the early 1950's. *See* I.C. §§ 42-226 *et seq.* (Idaho Ground Water Act); *Id.* § 42-237a(g) (the Director has authority to "supervise and control the exercise and administration of all rights to the use of ground waters"). In 1978, the Legislature authorized recharge districts to "further water conservation and increase the water available for beneficial use." I.C. §§ 42-4201 *et seq.* In 1993, IDWR issued an amended

[10] The fact that spring flows may have increased during the early 1900's due to "incidental recharge," *IGWA Br.* at 13-14, does not excuse injury by junior ground water users, R. Vol. 14 at 3238-39.

moratorium on new consumptive surface and ground water rights in the ESPA. Tr. at 1149; Ex. 212.

In addition to new regulations, the State commenced the Snake River Basin Adjudication ("SRBA") in 1987. Conjunctive administration was identified as a primary goal of the adjudication:

> Conjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication. In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its *Swan Falls Dam. Idaho Power Co. v. State,* 104 Idaho 575, 588, (1983); *In re Snake River Basin Water System,* 115 Idaho 1, 2-3 (1988). Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River. To conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface water rights is necessary.
>
> Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, they generally relate to two classic elements of a water right – its source and priority. The SRBA should determine the ultimate source of the ground and surface water rights being adjudicated. This legal determination must be made in the SRBA. The IDWR should provide recommendations to the SRBA District Court on how it should do so. Further, the SRBA District Court must determine the relative priority between surface and ground water rights.
>
> If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another generation of ground and surface water users will be uncertain regarding their relationship to each other.

A&B Irr. Dist. v. Idaho Cons. League, 131 Idaho 411, 422 (1998); *see also* R. Vol. 13 at 3021.

2. The *Musser* Decision & the Promulgation of the Conjunctive Management Rules.

Shortly after the SRBA started, surface water irrigators in the Hagerman area requested administration of hydraulically connected junior ground water rights in the ESPA. *See Musser v. Higginson*, 125 Idaho 392 (1994). The Director refused to act and alleged he did not have authority to regulate hydraulically connected ground water sources. The district court rejected the Director's arguments and issued a writ of mandate. On appeal, this Court upheld the mandate and confirmed the Director's "clear legal duty" to administer all water rights pursuant to Idaho law. *Id.* at 395.

Following *Musser*, the Director promulgated the CM Rules, which "apply to ***all situations*** in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights." CM Rule 20.01 (emphasis added). "The rules govern the distribution of water from ground water sources and areas having a common ground water supply," *id.*, and "provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right," *id.* at 20.04. The rules specifically recognize that the ESPA is "an area having a common ground water supply" that "supplies water to and receives water from the Snake River." CM Rule 50. The CM Rules give the Director the authority to "regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users" through curtailment or the use of an approved mitigation plan. CM Rules 40.01 & 43. This Court found

the CM Rules to be facially constitutional in *American Falls Reservoir Dist. #2 v. Idaho Dept. of Water Resources*, 143 Idaho 862 (2007).

3. The SRBA District Court's Decision in Basin-Wide 5 Confirms that All Sources of Water in the ESPA are Hydraulically Connected.

The Director's authority to administer ground water rights in the ESPA took another step forward in 2002, when the SRBA issued an order on Basin-Wide Issue No. 5. R. Vol. 13 at 3057. Pursuant to the SRBA Court's order, all water rights decreed in the Snake River Basin are considered interconnected unless proven otherwise. *Id.*; *see also A & B Irr. Dist.*, 131 Idaho at 421-22. Unless a partial decree issued by the SRBA Court indicates the water derives from a "separate source," the presumption of interconnectedness applies and the water right, regardless if it is to a surface or ground water source, is deemed legally and hydrologically connected for purposes of water right administration.

The SRBA recognized that this presumption is conclusive for purposes of water right administration of hydraulically connected junior ground water rights:

> The starting point for this Court's reasoning is the recognition in Idaho that ***the prior appropriation doctrine applies as between hydraulically connected ground and surface water right sources.*** To the extent ground and surface sources are hydraulically connected, the water rights are treated legally as if from the same source irrespective of the fact that one water right is a surface diversion and the other diversion is from a well. ***A junior Ground water user is not per se insulated from a senior surface call simply because the junior right is diverting from a well.*** As a result of this recognized legal relationship, ground and surface rights must be regulated and administered by IDWR in conjunction with one another so as to give proper effect to vested priorities.

R. Vol. 13 at 3046 (emphasis added).[11]

4. Designation of the Thousand Springs Ground Water Management Area.

In 2001, IDWR finally recognized that senior surface water rights in the Thousand Springs reach were not being satisfied – requiring administration of hydraulically connected ground water rights. The Director issued an order designating the "Thousand Springs Ground Water Management Area" pursuant to I.C. § 42-233b. Ex. 220. In that order, the Director recognized that "the ***depletionary effects of ground water withdrawals*** on the flow of water from springs tributary to the Snake River in the Thousand Springs area" prevented senior water rights from being filled. Ex. 220 at 2-3 (emphasis added). Further, the Director found:

> 3. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from the ESPA for irrigation and other consumptive purposes, which occur in relatively close proximity to the Thousand Springs area, cause significant reductions in spring flows tributary to the Kimberly to King Hill, or Thousand Springs, reach of the Snake River within ***six (6) months or less from the time the withdrawals occur.***

[11] Accordingly, "all other water rights" in each basin adjudicated in the SRBA "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." R. Vol. 13 at 3063.

> 4. Although all consumptive ground water diversion from the ESPA eventually affect surface water flows to varying degrees, the Department's model simulations demonstrate that ground water diversion occurring within a five (5) to ten (10) kilometer band from the canyon wall along the north side of the Snake River in the Thousand Springs reach result in seasonal spring flow reductions equal to fifty percent (50 percent) or more of the amount of water diverted and consumptively used, and such reductions occur within six (6) months of the diversions.
>
> ...
>
> 7. The water supply available for use under senior surface water rights from spring sources in the Thousand Springs area is expected to be further diminished because of the drought and inadequate to fully satisfy all senior surface water rights during the next irrigation season. ***This water supply is also expected to be reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes that are diverted in close proximity to the area of the springs without mitigating the effects of the associated ground water depletions.***

Ex. 220 at 1-2 (emphasis added).

5. In Order to Avoid Curtailment in 2002, The Ground Water Users Stipulate to the Creation of Water Districts for the Administration of Ground Water and Surface Water Rights.

The Director proposed curtailment of ground water rights for the 2002 irrigation season under the Ground Water Management Area orders. R. Vol. 13 at 3071. The senior surface water right holders and junior ground water right holders executed an Interim Stipulated Agreement ("ISA") to temporarily resolve the pending curtailment. *Id.*; *see also Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117 (2005) (case concerning interpretation of the Interim Stipulated Agreement). Under the ISA, senior surface water right holders agreed not to seek curtailment and junior ground water users agreed to provide mitigation for two years. *Id.* In

addition, all parties agreed not to oppose the State of Idaho's motion for interim administration in the SRBA Court. The motion was filed to allow the Director to create water districts to administer all surface and ground water rights:

> While the stipulated agreements are for a two-year period, the parties understand that ***the water districts to be formed are being established on a permanent basis and will be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by state law.***

Id. at 3071, n.2 (emphasis added).

6. The State Seeks Authority for Interim Administration in Order to "Permit Immediate Administration of Water Rights."

As anticipated by the ISA, the State requested authority from the SRBA Court for IDWR to perform interim administration of surface and ground water rights in Basins 35, 36, 41 and 43. R. Vol. 13 at 3065-77. The State's motion was based on the Director's prior determination that "the available water supply is currently not adequate to satisfy some senior prior water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights." *Id.* at 3076. The State acknowledged that "the need for interim administration of the water rights ***is pressing and immediate***." *Id.* at 3068 (emphasis added). In support of its motion, the State explained:

> "[T]he Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of ground water pumpers on the Snake River Plain and the rights of Idaho Power and its Swan Falls Dam." 1994 *Interim Legislative Committee on the Snake River Basin Adjudication* at 36. Upon completion of the SRBA, water districts will be created pursuant to chapter 6, title 42, Idaho Code, to, among other functions, protect senior water rights from injury caused by junior water rights diverting from hydraulically connected sources within the Snake River Basin in Idaho. The legislature recognized, however, that there might be a need for

> earlier interim administration of water rights during the pendency of the general adjudication ...
>
> Recent events demonstrate the immediate need for water districts within portions of the ESPA to protect senior water rights. ... [T]he water supplies available for use under senior priority surface water rights relying on spring sources in the American Falls and Thousand Springs areas have diminished and are expected to continue to diminish in the coming year. ...
>
> Thus, interim administration of water rights in all or portions of Basins 35, 36, 41 and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights. ...
>
> The creation of water districts is an important step in the administration of water rights. ***Water districts provide mechanisms for administration, regulation, and enforcement of water rights. ... In addition, water districts provide for local and timely response to general calls for water distribution*** and provide a system whereby a local watermaster can provide timely assistance and expertise to water users and respond to their complaints. ... The watermaster duties in the new water districts will be to . . . (4) curtail out-of-priority diversions determined by the Director to be causing injury to senior water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

Id. at 3072-75 (emphasis added).

On January 8, 2002, the SRBA Court granted the State's motion, finding that "[t]he available water supply in all or portions of Administrative Basins 35, 36, 41, and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights." R. Vol. 13 at 3080. The court concluded that

interim administration was "reasonably necessary to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law." *Id.*

7. Water District 130 is Created to Provide for the "Immediate Administration of Water Rights" including Ground Water Rights.

Following the SRBA Court's order authorizing interim administration, the Director issued a *Final Order Creating Water District No. 130*, on February 19, 2002. R. Vol. 13 at 3083. The Order summarizes the Director's findings and actions with respect to the prior ground water management area designation, the terms of the Interim Stipulated Agreement, and the SRBA Court's order authorizing interim administration of water rights. *Id.* The Director again found that the water supply was inadequate to satisfy senior priority water rights. *Id.* at 3085. As such, the Director concluded the "administration of ground water rights within the portion of Administrative Basins 36 and 43 overlying the ESPA is necessary for the protection of prior surface and ground water rights." *Id.* The Director further advised all water users that their rights would be subject to administration by a watermaster in compliance with Idaho law:

> 8. The Director concludes that ***immediate administration*** of water rights, other than domestic and stockwater rights as defined under I.C. §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, ***is necessary for the protection of prior surface and ground water rights.***
>
> ...
>
> 10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
>
> ...

d. ***Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights*** if not covered by a stipulated agreement or a mitigation plan approved by the Director.

Id. at 3086 (emphasis added).

The Director's *Order* creating Water District 130 was not challenged by IGWA or its members. Accordingly, as of February, 2002, IGWA agreed to the foundation that was set for conjunctive administration of ground water rights in the ESPA.

D. The Spring Users' Calls, the Administrative Proceedings and Judicial Appeal.

Despite the actions described above, spring flows continued their downward trend from 2000 through 2005. *See* Exs. 155 & 156.[12] Since IDWR failed to take the necessary action to prevent injury to senior water rights, the Spring Users filed water right delivery calls requesting administration of hydraulically connected junior priority ground water rights within the ESPA. R. Vol. 1 at 1, 2 & 4; *see also* R. Vol. 3 at 487. The Director determined that junior ground water diversions were materially injuring, and would continue to injure, the Spring Users' senior water rights.[13] R. Vol. 1 at 72-74; R. Vol. 3 at 523-24; *see also* R. Vol. 16 at 3695-96, ¶ 2.

In the 2005 Orders, the Director required the holders of junior ground water rights to mitigate the material injury they caused either through curtailment or by providing replacement

[12] The continued decline of the aquifer, is evidence that the ESPA is not "at or near equilibrium" as alleged by IGWA. *IGWA Br.* at 15. In fact, since at least 1988, spring discharges have been on a downward trend. Exs. 155 & 156. Spring flows are still experiencing declines from historical pumping and the effects have not been fully realized on the hydraulically connected surface water sources.

[13] The question of material injury to Blue Lakes' 1971 water right and Clear Springs' 1955 water right was remanded to IDWR. No party appealed Judge Melanson's decision remanding that matter back to IDWR. Nor did any party appeal the associated burdens described in the Remand. On July 19, 2010, the Director issued an order on remand that found material injury to Blue Lakes' 1971 and Clear Springs' 1955 water rights.

water. R. Vol. 1 at 72-74; R. Vol. 3 at 523-24. The Director phased-in the ground water users' obligations over a five-year period.[14] *See* CM Rule 40.01; R. Vol. 1 at 72-74; R. Vol. 3 at 523-24. Using the ESPAM ground water model, IDWR recognized that approximately 60% of the water resulting from curtailment was predicted to arrive in the spring reaches within the first four years. Ex. 461 at Figs. 12 & 13. For ground water rights pumping closer to the springs, IDWR also found that 50% of the water resulting from curtailment would arrive at the springs within the first 6 months following curtailment. *See* Ex. 220 at 2.[15]

The Director's injury determination was affirmed by the Hearing Officer, the Honorable Gerald F. Schroeder, R. Vol. 16 at 3690, the Director in the *Final Order*, R. Vol. 16 at 3950, and finally by the Honorable John M. Melanson on judicial review, Clerks R. at 44.

LEGAL STANDARDS

I. Standard of Review

The Standard of Review is provided in the *Cross-Appellants' Joint Opening Brief*, filed concurrently herewith and is incorporated by reference.

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[14] During the administrative proceedings, from 2005 through 2008, the Director allowed IGWA's members to continue diverting under their junior priority rights – even though the Spring Users continued to suffer material injury – pursuant to a "replacement water plan" concept. Contrary to the procedures required by the CM Rules for a "mitigation plan," the Director did not accept protests and prohibited any hearings on the "replacement water plans" prior to their approval. The District Court found the Director's "replacement water plan" scheme unlawful. Clerks R. at 89-91.

[15] IGWA wrongly assert that most of the "water curtailed will either be lost downriver or used by other water users who are not entitled to additional flows." *IGWA Br.* at 17. Notable, the Spring users' call is just one of several water delivery calls filed with the Department in recent years. Ex. 338. There are numerous senior surface water users whose water rights are unfulfilled. *Id.* It is incorrect, therefore, to assert, without any factual basis, that the curtailed water will "be lost" or used by those "not entitled to additional flows."

II. Legal Basis for Conjunctive Administration

Idaho law requires the Director to administer the State's water resources, including ground water, according to the prior appropriation doctrine:

> Priority of appropriations shall give the better right as between those using the water.

IDAHO CONST. art. XV, § 3.

> As between appropriators, the first in time is first in right.

I.C. § 42-106.

Although Idaho's water code has undergone many revisions and amendments since 1881, the bedrock principle "first in time, first in right," has not wavered. *Silkey v. Tiegs*, 54 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."); *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder."); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 8 (2007) ("The rule in this state, both before and since the adoption of our constitution is … that he who is first in time is first in right").

In its most basic terms, the prior appropriation doctrine requires senior water rights to be satisfied prior to junior water rights. The Idaho Legislature expressly charged the State's watermasters to carry out this duty:

> ***It shall be the duty of said watermaster to distribute the waters*** of the public stream, streams or water supply, . . . ***according to the prior rights of each respectively***, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do ***in order to supply the prior rights of others*** in such stream or water supply . . .

I.C. § 42-607 (emphasis added). The above statute governs a watermaster's duties in "clear and unambiguous terms," and crates a "clear legal duty" to follow the law of prior appropriation. *See R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988); *Musser, supra* at 395. A watermaster is further required to administer water rights according to the plain terms of a decree:

> We think the position is correct, and we are also satisfied that in a case like this 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.

Stethem v. Skinner, 11 Idaho 374, 379 (1905).

The priority system provides certainty to water right holders and "protects and implements established rights." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972). Moreover, senior water right holders are "entitled to presume that the watermaster is delivering water to them in compliance with the governing decree." *Id.*

In 1994, following this Court's decision in *Musser, supra*, the Department promulgated the CM Rules. That same year, the Interim Legislative Committee issued a report confirming

that "[c]onjunctive management of ground water and surface water rights is one of the main reasons for the commencement" of the SRBA." R. Vol. 13 at 3020-21; *A&B*, 131 Idaho at 422.

As discussed above, over the next decade following the issuance of the CM Rules, the State took additional steps to implement conjunctive administration. These actions, including the SRBA Court's Basin-Wide 5 proceedings and the "connected sources" general provision, the Thousand Springs Ground Water Management Area designation, the ISA, and the interim administration motion were each taken with the purpose to administer hydraulically connected ground water rights. *See* R. Vol. 13 at 3072.

SUMMARY OF ARGUMENT

> A difficulty in this case is that **IGWA** ***does not address a core issue – the effect of the doctrine of 'first in time, first in right' in water rights***. The end result of the arguments is that even though junior aquifer depletions have encroached upon senior rights over the years, there is no remediation for the harm because the result is harsh. The Spring Users have rights senior to the ground water users. ***Those senior rights have been damaged by depletions to the aquifer, reducing the flows from the springs***. . . . The reduction of the aquifer by junior ground water users, is however, subject to remediation. . . . In the early stages of development of water law in Idaho the Idaho Supreme Court rejected the concept of a "common right" to water whereby priority would be ignored and water apportioned among users as a common property, balancing one need with another. *Kirk v. Bartholomew*, 3 Idaho 367, 29 Pac. 40 (1892). "As between appropriators, the first in time is first in right." Idaho Code section 42-106. The principle has limits, but it is a starting point that must be addressed.

R. Vol. 16 at 3844-45 (emphasis added).

The above language from Honorable Gerald F. Schroeder's recommended order plainly summarizes this case and IGWA's repeated failure to accept the reality that junior ground water rights are subject to administration pursuant to Idaho's prior appropriation doctrine.

IGWA ignores the declining water supply and the need for conjunctive administration to protect senior water rights, and instead argues that this Court should accept new theories for Idaho water law which would preclude any administration of their junior ground water rights. For example, IGWA claims that the Swan Falls Agreement between the State of Idaho and Idaho Power Company somehow subordinated non-parties' water rights to all junior ground water use. IGWA alleges that the general concept of "full economic development" in the Ground Water Act allows junior ground water users to forever injure senior surface water rights. In short, IGWA asks this Court to turn Idaho's prior appropriation doctrine upside down in favor of junior ground water rights.[16] Long ago, this Court rejected the "riparian" notion of water law, and there is no reason to change course now, some 120-years later. *See Drake v. Earhart*, 2 Idaho 750 (1890).

This case is not unique. In a nutshell, it is about the various steps taken over several years leading up to conjunctive administration of ground water rights in the ESPA and how Idaho law protects senior surface water rights from injury caused by hydraulically connected junior ground water rights. Under the well-established law, junior ground water rights causing material injury must be curtailed unless they mitigate that injury through an approved mitigation plan. *E.g.* CM Rule 40.01.

[16] Under this scheme, having a 1990 ground water right would have greater value and constitutional and statutory protections, than a 1938 or 1955 surface water right.

Importantly, as soon as water reaches the aquifer – regardless of the originating source – it is subject to appropriation and administration by IDWR. *See* I.C. § 42-230 (defining "ground water" as "***all water*** under the surface of the ground") (emphasis added); CM Rule 50 (ESPA has a "common ground water supply" and is, therefore, subject to conjunctive administration); *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680 (1980) ("'seepage water may be appropriated'").[17] To 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. Indeed, there would have been no reason for the CM Rules, or any of the other actions taken by the State (and, in some cases, agreed to by IGWA) had there been no basis for administration of ground water.[18]

IGWA alleges that ground water users "are devastated and face financial ruin by the curtailment orders." *IGWA Br.* at 19. Yet, they admit *IDWR has never actually curtailed any junior ground water rights* and that they have avoided curtailment for actions taken at a fraction of the alleged total cost that would result from curtailment. *Id.* at 16-17. Moreover, IGWA ignores the fact that the Spring Users' senior water rights have continued to be injured and unfulfilled throughout this 5-year process and before.

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[17] While it is true that the original appropriator has the right to recapture and reuse seepage water originating from the original use of the water, *Hidden Springs Trout Ranch, Inc., supra* at 680 ("[I]t has long been settled law in Idaho that a senior appropriator of water ***retains his right*** to surface waste and seepage water, and may reclaim it, even though such water has been used by a junior appropriator"), this does not affect the right to appropriate any of that seepage water that may reach the aquifer. Once in the aquifer, it becomes subject to appropriation and priorities just as any other water in the aquifer.

[18] By signing the ISA, IGWA's members agreed that the State could seek authority for interim administration of ground water rights in the ESPA. R. Vol. 13 at 3071, n. 2.

It is well understood that the prior appropriation doctrine can be harsh, but it is the law. *E.g. Drake, supra*. The Honorable John M. Melanson best described the reality of the prior appropriation doctrine when he found the following:

> The doctrine of prior appropriation has been the law in Idaho for over 100 years. It is set forth in our State Constitution at Article 15 and in our statutes at Idaho Code Section 42-106, which was enacted in 1899. ***Prior appropriation is a just, although sometimes harsh, method of administering water rights here in the desert, where the demand for water often exceeds water available for supply. The doctrine is just because it acknowledges the reality that in times of scarcity, if everyone were allowed to share in the resource, no one would have enough for their needs, and so first in time – first in right is the rule. The doctrine is harsh, because when it is applied, junior appropriators may face economic hardship or even ruin***.[19]

Order Dismissing Application for TRO, Complaint for Declaratory Relief, Writ of Prohibition & Preliminary Injunction, IGWA v. IDWR, Jerome County Case No. CV-2007-526 (June 12, 2007) (emphasis added).

All of IGWA's issues on appeal are disconnected from the applicable law and facts. The Swan Falls Agreement does not prevent administration of non-parties' senior surface water rights such as the Spring Users' rights. The Swan Falls Agreement is unambiguous, as recognized by Hearing Officer Schroeder, and only subordinates Idaho Power Company's hydropower water rights. The Agreement does not impair – either expressly or implicitly – the Spring Users' ability to seek administration of junior ground water rights that injure their senior surface water rights.

[19] Even though the law has been in place for over 100 years, IGWA attempt to characterize this case as one of first impression – asserting that the Court has never been called upon to address administration like it is being asked to address in this case. *IGWA Br.* at 6. Yet, in reality, Idaho's water law is well settled – established through more than a century of water use, and statutory and case law establishing the rights and burdens of the water users in an administrative context. Furthermore, water rights administration in State created Water Districts has been on-going for decades where rights are diverting out of the same source.

Second, IGWA's newly created standard of "the law of full economic development" cannot be used as a shield to prohibit conjunctive administration. The general concept identified in the Ground Water Act, addressing "reasonable ground water pumping levels" for ground water users, does not justify a new form of water right administration wherein a junior ground water user is allowed to take water that would otherwise be used under a senior surface water right. The fact that the water supplies are diminishing is undeniable[20] and a "reverse-priority" scheme would threaten to undermine lawful administration of water rights across the State of Idaho.

Next, IGWA claims there is no "substantial evidence" in the record to support a material injury determination. Yet, they ignore the evidence in the record – including a determination by the Water District 130 Watermaster – confirming that the Spring Users can beneficially use more water (up to their diversion limits on their decreed water rights). The record supports the Director's decision and pursuant to the standard set forth in Idaho's APA, IGWA cannot show any error. *See Mercy Medical Center v. Ada Cty.*, 146 Idaho 226 (2008) (court cannot substitute its judgment for that of the agency the decision is supported by substantial evidence).

IGWA's "futile" call argument demands information that is not required in any water right administration context. The Spring Users testified that they could use more water under their decreed rights and the watermaster confirmed this fact. The injury addressed in conjunctive administration is to *the water right*. The law does not require a showing that more, larger or healthier fish can be raised with the water to be distributed any more than it requires a showing

[20] All spring and surface water supplies connected to the ESPA have declined and, as of March, 2007, there had been eighteen water delivery calls by senior water users. Ex. 338.

that a farmer could raise more, larger or healthier crops with additional water. Tr. at 1250-54. Furthermore, the CM Rules specifically allow the Director to administer water rights even if a call may be futile. CM Rule 20.04 ("Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water rights causes material injury"). The doctrine has no application in the ESPA, where all water rights are administered together from a common source. *Supra.*

Finally, IGWA's claim that they were not provided due process flies in the face of the long-history of litigation and negotiations confirming the depletions caused by out-of-priority ground water diversions and the need for immediate action by the Director.

In the end, IGWA attempts to elevate ground water rights to a preferred status over the Spring Users' surface water rights. Contrary to these arguments, Idaho law regarding conjunctive administration is clear: "first in time is first in right." *See* IDAHO CONST. art. XV, § 3; I.C. §§ 42-106, -602, -607; CM Rules 20.02 & 40.01. IGWA's inequitable administration scheme plainly flies in the face of Idaho water law and should be rejected.

ARGUMENT

I. IGWA's Claims that Conjunctive Administration is Precluded by the Swan Falls Agreement and/or Ground Water Act are Barred.

IGWA advances several new theories in an effort to override the administration required under the Constitution, Title 42 of the Idaho Code and the CM Rules. For example, IGWA claims that the Swan Falls Agreement established a safe harbor that protected ground water users

from *any* administration – regardless of impacts to other ground or surface water rights – so long as a certain minimum flow in the Snake River is met at the Murphy Gauge. *IGWA Br.* at 20-31. Likewise, they claim that the Ground Water Act creates a broad "law of full economic development" that prevents administration based purely on economics. *IGWA Br.* at 31-45. These arguments, however, are barred and should be denied.

As discussed above, conjunctive administration is founded in the Constitution, water distribution statutes the CM Rules and numerous actions taken over the last two decades. *See supra*. Following *Musser*, the Department promulgated the CM Rules to administer hydraulically connected water resources. The SRBA Court's Basin-Wide 5 proceedings and the "connected sources" general provision established, as a matter of law, that all water rights in the Snake River Basin would be administered as if they diverted water from the same source.[21] The designation of the Thousand Springs Ground Water Management Area and the establishment of Water District 130 further confirmed the Director's authority to administer hydraulically connected ground water rights. The creation of water districts was specifically intended to "***permit immediate administration*** of" hydraulically connected ground water and surface water rights. R. Vol. 13 at 3072 (emphasis added). All of these actions set the framework for conjunctive administration in the ESPA. IGWA now asserts it was all for nothing and that no administration should be allows.

Since the Swan Falls Agreement was executed in 1984, IGWA and its members have had multiple opportunities to assert these arguments. Yet, they failed to assert them at any time

[21] In 2000, the Spring Users' water rights were partially decreed by the SRBA Court without a "separate sources" provision. Exs. 31 & 301-06

during the judicial and administrative proceedings which provided the foundation for conjunctive administration of their water rights. In fact, in the Interim Stipulated Agreement, junior ground water users agreed to the State's request for interim administration to allow for the "immediate administration" of water rights with no mention of any limitation imposed by the Swan Falls Agreement or the Ground Water Act.

When the SRBA Court reviewed and partially decreed the Spring Users' water rights in 2000, again IGWA failed to raise a Swan Falls or Ground Water Act arguments in their objections. Idaho's adjudication code requires that a decree include "such remarks and other matters as are necessary for definition of the rights, for clarification of any element of a right, or for administration of the rights by the director." I.C. § 42-1411(2)(j). IGWA never alleged that the Spring Users' water rights needed to be clarified or further defined for administration by the defenses they raise now.

IGWA attempts to justify their failure to raise these arguments in the SRBA by asserting that the Spring Users' partial decrees may be amended such that the Swan Falls Agreement may still be included as a limiting remark due to "Basin-Wide Issue No. 13." *IGWA Br.* at 28. This argument is a red herring. Importantly, Basin-Wide Issue No. 13 was not designated as a basin-wide issue until 2004 – *four years after the Spring Users' rights were decreed.* Had the Swan Falls Agreement or Ground Water Act actually limited the Spring Users' water rights is administration, IGWA was required to raise those objections during the SRBA litigation. They failed to take such an action. Consequently, Basin-Wide Issue No.13 cannot be used as a

justification for failing to raise these arguments at the time the Spring Users' rights were partially decreed.

Apart from failing to raise the arguments in other forums, IGWA did not even assert the Swan Falls defense until over two years after these proceedings had started. R. Vol. 9 at 1786. Importantly, IGWA failed to identify the Swan Falls Agreement as a defense in their original petitions for hearing in 2005. R. Vol. 1 at 161. If the 1984 Swan Falls Agreement was always a "trump card" to conjunctive administration, it is questionable why IGWA did not even allege the defense until after the CM Rules were promulgated, the Springs Users' rights were decreed, and Water District 130 was created. By failing to raise these issues at any previous opportunity, IGWA is now barred from asserting these defenses. *Kootenai Elec. Co-op, Inc. v. Lamar Corp.*, 148 Idaho 116 (2009) ("Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action ... which might have been made'").

II. The State of Idaho, Including the Director and the Department, has Consistently Acknowledged its Obligation to Administer Hydraulically Connected Water Rights Without the Limitations Asserted by IGWA.

Contrary to IGWA's appeal, the State has repeatedly acknowledged a duty to administer hydraulically connected surface and ground water rights in the ESPA. Notably, the State (i) defended its statutory right to administer Idaho's water resources, (ii) promulgated the CM Rules, (iii) designated the Thousand Springs Ground Water Management Area, (iv) sought interim authority to administer water rights in the SRBA, (v) created water districts and (vi) administered (and continues to administer) hydraulically connected water rights in Water District

130. Although the State negotiated, and was a party to, the Swan Falls Agreement, it ***never*** asserted that the Agreement affected IDWR's statutory authority to administer water rights. Moreover, the State has never alleged that the Ground Water Act prohibits conjunctive administration.

In the SRBA, the Department recommended the Spring Users' water rights *without any limitation* derived from the Swan Falls Agreement or Ground Water Act. This is important because the Director is statutorily charged with issuing recommendations for water rights that include "such remarks and other matters as are necessary for ... administration of the right by the director." I.C. § 42-1411(2)(j). None of the limitations advanced by IGWA were ever alleged to be necessary for administration of the Spring Users' water rights.

III. The Swan Falls Agreement does Not Prevent Blue Lakes and Clear Springs From Seeking Conjunctive Administration to Protect Their Senior Surface Water Rights.

IGWA claims that the Spring Users should have no legal right to seek priority administration because the Swan Falls Agreement "render[s] any delivery call by spring users invalid so long as the minimum flows at the Murphy Gauge are maintained." *IGWA Br.* at 31. The argument wrongly suggests that the State has prioritized junior priority ground water development above all senior surface water rights. Idaho's constitution defeats IGWA's claim since the right to appropriate water can "never be denied." IDAHO CONST. art. XV, § 3. Moreover, a private agreement between the State of Idaho and Idaho Power Company does not trump the constitution nor limit the Spring Users' private property rights. Finally, the argument

finds no support in the plain terms of the Swan Falls Agreement and was properly rejected by the Hearing Officer, Director and District Court.

A. The Swan Falls Agreement is Plain on it Face and Does Not Impair the Spring Users' Ability to Seek Priority Administration.

> Regardless of historical belief and understanding of many concerned interests, the Spring Users were not parties to the Swan Falls Agreement, and nothing in this record indicates that they agreed to the understanding [that the Swan Falls Agreement precludes a delivery call by the Spring Users]. The Agreement does not explicitly address the issue. Further, of significance, the partial decrees entered in this case do not reflect any conditions or limitations attributable to the Swan Falls Agreement.

R. Vol. 14 at 3240.

IGWA's Swan Falls argument lacks any discussion of the specific provisions of the Agreement itself. *IGWA Br.* at 20-31. Although providing a few selected quotes, IGWA does not identify or discuss the Agreement's operative provisions – in particular, those provisions that specifically deal with the subordination of water rights. Rather, IGWA focuses on materials outside the Agreement, including the personal opinions of a former Director and the statements of former members of the Idaho Water Resource Board ("IWRB") in a strained effort to make the Agreement stand for something that it does not state.

Contrary to IGWA's extraneous information, the Agreement is clear and unambiguous. Consequently, Idaho law precludes review of any outside materials, documents, or statements for purposes of interpreting the contract. *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405 (2009) ("When the language in a contract is clear and unambiguous, its interpretation is a question of law and the language will be given its plain meaning"); *Swanson v. Beco Const. Co.,*

Inc., 145 Idaho 59, 64 (2007) ("The intent of the parties is determined from the plain meaning of the words"); *Dunlap v. State*, 141 Idaho 50, 63 (2004) ("The meaning of an unambiguous contract must be determined from the plain meaning of the contract's own words").[22]

The Swan Falls Agreement states that only *Idaho Power Company's* water rights were subordinated based on Snake River flows at Murphy Gauge. Ex. 437 at 3, ¶ 7(A); I.C. § 42-203C. It was *Idaho Power Company* that subordinated its hydropower water rights to other existing water rights and claims. Ex. 437 at 4, ¶ 7(C), (D).[23] These provisions are clear and unambiguous. Indeed, IGWA's own witness, former Director Dunn, admitted at hearing that "the Agreement does not specifically discuss spring users' water rights at Thousand Springs." R. Vol. 13 at 2879.

In his April 18, 2008 *Memorandum Decision & Order on Cross-Motions for Summary Judgment*, Consolidated Subcase No. 00-92023, at 27-32 (Apr. 8, 2008), Judge Melanson held that Paragraph 7 of the Swan Falls Agreement – the provision specifically identifying the water rights being subordinated by the Agreement – is unambiguous. Since 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.

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[22] Only if the contract is deemed ambiguous may the Court look outside the four corners of that contract for evidence as to the intent of the parties. *Dunlap* at 63. Importantly, however, a "contract is not rendered ambiguous on its face because one of the parties thought that the words used had some meaning that differed from the ordinary meaning of those words." *Swanson* at 64.

[23] IGWA claims that paragraph 7(d) of the Agreement indicates intent to protect all pre-October 1, 1984 water rights from administration based on flows at the Murphy Gauge. *IGWA Br.* at 22-23. Yet, the provision plainly provides that it was "the Company's rights" that were subordinated. Ex. 437, ¶ 7(D).

Furthermore, the Agreement's other provisions refute IGWA's argument and confirm the Director's obligations to administer water rights pursuant to the state law:

> This Agreement ***shall not be construed to limit or interfere with the authority and duty*** of the Idaho Department of Water Resources or the Idaho Water Resource Board ["Board"] to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

Ex. 437 at 8, ¶ 14 (emphasis added). This includes the Director's "clear legal duty" to enforce and administer water rights in accordance with the prior appropriation doctrine, *Musser, supra v.* at 395, as well as the Board's duty to "protect[] and preserve[]" "existing rights," when formulating the State Water Plan, I.C. §§ 42-1734A(1)(a) & 42-1738 (the Board "shall have no power or authority" to "modify, set aside or alter any existing right or rights to the use of or the priority of such use as established under existing laws").

Finally, the Agreement specifically "sets forth ***all the covenants, promises, provisions, agreements, conditions, and understandings between the parties***." Ex. 437 at 9, ¶ 19 (emphasis added). Indeed, "there are no covenants, provisions, promises, agreements, conditions or understandings, either oral or written between them other than are herein set forth." *Id.* Former Director Dunn confirmed the Agreement's plain language and testified at hearing that its terms and the implementing legislation[24] *only applied to the hydropower water rights listed in the Agreement*:

[24] IGWA's argument regarding the impact of the Swan Falls Agreement is also incompatible with that legislation that implemented the Swan Falls Agreement. *See* I.C. §§ 42-203B, C & D. Pursuant to this legislation, in order for IDWR to grant to a ground water user, or any other party, a water right to trust water made available by the Swan Falls Agreement subordination, IDWR must first determine whether the proposed use would significantly reduce the amount of trust water available to Idaho Power, and if so, then apply public interest criteria which include assessing economic impacts on electric utility rates in Idaho. I.C. § 42-203C. This legally mandated process under the

> Q. Okay. So the only – the only water rights subordinated, if you will, under the Swan Falls agreement were the hydropower rights; correct?
>
> A. That's correct.
>
> Q. Okay. So with respect to the administration of ground water and surface water rights upstream from Swan Falls, was that administration of those rights in any way addressed specifically in the Swan Falls agreement?
>
> A. No. ***They were never changed.***

Tr. at 1026, lns. 9-17 (emphasis added).

Nothing 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. Idaho's water distribution statutes and case law concerning water right interference were not altered by the legislation implementing the Agreement. *See* I. C. §§ 42-602,-607; *Martiny v. Wells*, 91 Idaho 215 (1966).

That notwithstanding, IGWA wrongly claims that the Swan Falls Agreement created a "comprehensive plan for the management of the Snake River watershed." *IGWA Br.* at 12 & 22. Again, the plain language of the Agreement states otherwise. The Agreement resolved a legal dispute between the State of Idaho and Idaho Power Company. Ex. 437 at 1.[25] Nowhere does the Agreement establish some new "comprehensive plan" that would "bear directly on the

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Agreement and legislation, under which subordination of Idaho Power Company's water rights cannot occur until IDWR makes such determinations regarding impact of proposed water uses on water supply or rates for power, does not square with IGWA's theory that the Agreement subordinated not only Idaho Power's rights, but also the Spring Users' rights, which have nothing to do with power supply or electric utility rates.

[25] IGWA provides no legal basis for the subordination of the Spring Users' water rights through the execution of an agreement to which they were not a party.

delivery calls made by Blue Lakes and Clear Springs," or any other senior water user. *IGWA Br.* at 22.

Without any legal or factual support IGWA resorts to speculation and theory by arguing that increasing the Murphy gauge minimum flow to 3,900 cfs would "secure a greater water supply for Idaho Power as well as spring users in the Thousand Springs area" and that spring users would make a call for Idaho Power's benefit. *IGWA Br.* at 23. The record plainly shows a decrease in spring flows since the 1980's. Exs. 155 & 156. IGWA asserts that the Agreement "settled all water disputes upstream of Murphy Gauge." *IGWA Br.* at 24. Yet, the Spring Users' calls were not filed with the Director until 2005, over twenty years after the Swan Falls Agreement was signed – at time when spring flows continued to be depleted by out of priority ground water diversions. Exs. 155 & 156.

Citing only Director Dunn's testimony, IGWA claims there was a general "understanding" that spring rights were going to be impacted – and lose their right to priority administration – as a result of the Swan Falls Agreement. *IGWA Br.* at 25. This argument has no merit, particularly since (i) the Department has ***never*** interpreted the Agreement in such a restrictive manner and (ii) IGWA failed to assert this so-called "understanding" at any time when IDWR exercised its authority to conjunctively administer Idaho's hydraulically connected water resources. *See, supra.* Indeed, in *Musser, supra*, this Court affirmed the Director's obligations to take action to administer senior surface water rights as against hydraulically connected junior ground water rights in the ESPA.

Finally, IGWA claims that the alleged subordination of spring water rights in the Swan Falls Agreement is simply the State exercising its "constitutional authority to control and administer water resources." *IGWA Br.* at 26. This claim misreads the Agreement and existing Idaho law, and ignores the fact that water rights are property rights. *See* I.C. § 55-101; *State v. Nelson* 131 Idaho 12, 16 (1997) ("A water right is tantamount to a real property right"). The State cannot simply "take" a person's water rights without just compensation. *Nettleton v. Higginson*, 98 Idaho 87 (1977). Moreover, there is no constitutional provision that authorizes the State to subordinate water rights appropriated for agricultural purposes (i.e. aquaculture).[26]

To the contrary, Art. XV, § 3 of the constitution clearly states that the right to appropriate water "shall never be denied." IGWA would have the Court bless an unconstitutional denial of the Spring Users' appropriations by prohibiting any administration of interfering junior ground water rights. Nothing in Idaho law supports IGWA's theory. Since the plain language of the Swan Falls Agreement subordinates only Idaho Power's water rights, IGWA's appeal should be denied.

B. The Limited Information in the Record Does Not Support IGWA's Arguments.

Notwithstanding the fact that the Agreement is clear on its face, the limited evidence and testimony in the record demonstrates that the Agreement did not impair the Spring Users' ability to seek priority administration.

[26] Only water rights for hydropower purposes may be limited. *See* IDAHO CONST. art. XV, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream ... shall never be denied, except that the state may regulate and limit the use thereof for power purposes").

First, none of the decrees for the Spring Users' water rights include a limitation derived from the Swan Falls Agreement. Exs. 31, 301-06. Any such limitation, if it existed, would be necessary for the future administration of those water rights. *See* I.C. §§ 42-1411(2)(j); -1412(6) (One purpose of the SRBA is to provide all conditions necessary for the administration of water rights).

Second, there is no statute, administrative rule or formal IDWR policy that would subordinate the Spring Users' property rights. *See* Tr. at 1031, lns. 21-24 (Director Dunn testifying that the "policy wasn't written"). The testimony cited by IGWA only reflects the personal opinion of a former Director and is not binding on the Department or any Court. In fact, subsequent Director Karl Dreher *rejected* the view "that the Swan Falls Agreement also subordinated all uses from the springs in the Thousand Springs Area." R. Vol. 13 at 3124-27. According to Mr. Dreher, the "prior appropriation doctrine as established by Idaho law governs the administration of both the surface water rights from sources in the Thousand Springs Area and ground water rights," *id.* at 3126, The "Agreement ***only defined the relationship between surface and ground water rights and nonconsumptive hydropower rights held by Idaho Power.***" *Id.* at 3127 (emphasis added). Mr. Dreher's successor David Tuthill affirmed this position as well. R. Vol. 16 at 3951 (adopting the Hearing Officer recommendations – including the conclusion that the Swan Falls Agreement does not prohibit administration of the Spring Users' senior surface water rights).

Third, former Director Dunn confirmed that the Department *cannot* "regulate the use of water under a water right by preventing that water right holder from protecting their right against

junior water right holders." Tr. at 1027, lns. 4-10; *see also* R. Supp. Vol. 7 at 4795 ("spring water rights ***would have the same right to make a call against ground water pumping as other ground water pumpers***") (emphasis added). In fact, the "State had the responsibility to protect the senior water right holder." Tr. at 1027, lns. 11-24. Otherwise, the senior water users would be "deprived of their property interests." *Id.* Execution of the Swan Falls Agreement did not "change that position." R. Supp. Vol. 7 at 4795. As stated above, the State has administered water rights consistent with this understanding since the Agreement was signed in 1984.

Finally, in 2004, Hon. Judge Thomas Nelson, counsel for the Idaho Power Company during the Swan Falls Agreement negotiations, testified that the intent of the Agreement was never to impact water rights to the springs and that there were "a number of problems" with the notion that "the Swan Falls Agreement subordinated the rights of spring flow users below Milner particularly in the Thousand Springs Reach." R. Vol. 12 at 2830. According to Judge Nelson, this is clear because: (1) the terms of the Agreement, including the subordination provision in Section 7, ***only*** define Idaho Power's water rights; (2) Section 17 of the Agreement provides that the Agreement is the entire Agreement between the parties, and there are no other promises, covenants, or understandings outside of it; (3) the parties to the Agreement were the State and Idaho Power, which had no authority to act for anyone else; and (4) the State had no authority to unilaterally subordinate existing uses of non-parties, which would have raised substantial constitutional problems. *Id.* Again, the State had no constitutional authority to "take" a third party's water rights without compensation through the execution of an agreement with Idaho

Power. IDAHO CONST. art. I, § 14 (State may not take private property without "just compensation").

C. The State Water Plans Do Not, and Cannot, Limit the Spring Users' Rights in Conjunctive Administration.

IGWA further asserts that the State Water Plans, adopted prior to and after the Swan Falls Agreement, reflect the intent of the State to limit the Spring Users' rights in conjunctive administration. *IGWA Br.* at 11 & 26-27. By law, however, the State Water Plans cannot limit the Spring Users water rights in the method claimed by IGWA. Stated simply, the plans do not override Idaho's prior appropriation doctrine. I.C. § 42-1734A(1)(a).

First, the 1986 plan, which was adopted after the Agreement was executed, specifically recognized that "***existing water rights are protected***." Ex. 440 at 38 (emphasis added). Both the 1977 and 1982 plans recognize that, while "development of the Snake Plan aquifer may reduce the present flow of springs tributary to the Snake River," "adequate water for aquaculture ***will be protected***." Ex. 438 at 118 & Ex. 439 at 44 (emphasis added).[27]

Furthermore, in formulating the State Water Plans, the Board is statutorily required to "protect[] and preserve[]" "[e]xisting rights, established duties, and the relative priorities of water established in article XV, section 3, of the constitution of the state of Idaho." I.C. § 42-1734A(1)(a). The Board has no statutory "power or authority" to do anything which would "modify, set aside or alter ***any existing right or rights*** to the use of or the priority of such use as

[27] In light of these statements, the provision that "different water diversion facilities" may need to be constructed clearly does not prevent priority distribution of water between junior and senior water rights. Nothing in the State Water Plans prevents senior surface water right holders from seeking the administration of junior priority ground water rights, especially when these out-of-priority ground water diversions continue to deplete a senior's water supply.

established under existing laws except pursuant to the owner's consent or eminent domain." I.C. § 42-1738 (emphasis added). Finally, the statutory authority for the planning process acknowledges that the scope of the plans shall be limited to "unappropriated" water – that is water which has not already been appropriated through the statutory water right licensing process.

Therefore, IGWA's claim that the Department, through the Water Board's State Water Plans, stripped the Spring Users of their legal right to conjunctive administration ignores the law and should be rejected.

IV. The Policy of Full Economic Development Does Not Authorize the Director to Limit Priority Administration of Junior Ground Water Rights

Citing what it coins the "overarching policy of the Ground Water Act," IGWA argues that the administration of ground water rights in this case violated the "law of full economic development of ground water resources." *IGWA Br.* at 31. They argue that the right of the Director to administer ground water rights is strictly conditioned upon a finding that the "hydraulic conditions" cannot "sustain the existing diversions from the aquifer" – i.e. administration can only occur if the aquifer is being "mined" by their use. *Id.* at 32.

Relying on a strained reading of the Ground Water Act, IGWA seeks to rewrite Idaho's water administration history by claiming that "prior to 1953, holders of surface water rights had neither a recognized right nor an administrative mechanism to seek priority administration against ground water rights." *IGWA Br.* at 31-32. They wrongly claim that ground water rights represent a class of *super* water rights that can only be administered by priority "to the extent

necessary to prevent over-drafting of the aquifer," *id.* at 35, with no mention or consideration of the material injury that may be suffered by senior water rights as a result of their ground water depletions or the injury to others they cause. There is no support in the law for these novel theories.

First, the Constitution establishes the prior appropriation doctrine and was in place long before 1953. IDAHO CONST. art. XV § 3. Nothing in the Ground Water Act trumps the Constitution's provisions of "first in time, first in right" or the "right to appropriate ... shall never be denied." *Id.* Furthermore, contrary to IGWA's claim, this Court has addressed the administration of junior ground water rights prior to 1953. *E.g. Bower v. Moorman*, 27 Idaho 162 (1915); *Hinton v. Little*, 50 Idaho 371 (1931); *Noh v. Stoner*, 53 Idaho 651 (1933); *Silkey v. Tiegs*, 54 Idaho 126 (1934). This Court previously held that "***any interference*** with a vested right to the use of water, whether from open streams, lakes, ponds, ***percolating or subterranean water***, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference." *Bower, supra.* There is no support for IGWA's theory that under the common law only senior ground water rights were protected from out-of-priority diversions but that senior surface water rights were not.

IGWA's argument is based on the faulty premise that the Director must deny any conjunctive administration so long as aquifer levels are above a "reasonable pumping level." *See e.g. IGWA Br.* at 38. They claim that the <u>*only consideration*</u> priority is given in the administration of ground water rights is "to prevent over-drafting of the aquifer" and to "maintain a stable water table." *IGWA Br.* at 35. IGWA goes so far to misquote the District

Court's Order and decisions from this Court dealing with water rights administration to support their conclusion.

In the Snake River Basin, the SRBA Court's "connected sources" general provision confirms that all water rights, regardless of source, must be administered together as if they divert from the same source. R. Vol. 13 at 3063. In addition, the CM Rules provide the framework for conjunctive administration intended to address both ground and surface water rights. This Court determined that the rules are facially constitutional. *AFRD#2, supra*. The ESPA is an "area of common water supply" where surface and ground water rights are administered together. CM Rule 50. The CM Rules require administration anytime diversions under junior ground water rights injure senior surface water rights. CM Rule 40.01. The law does not allow the Director to make his administrative decisions solely on the overall "hydraulic conditions" of the aquifer and to exclude consideration of the impacts of ground water diversions on surface water rights. The entire process set up in CM Rule 40 requires the Director and watermasters to protect senior surface water rights from injury within organized water districts.

Rather than discuss the long history of applicable case law, IGWA misreads *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho 45 (1923),. Their reliance upon *Petrie* is misplaced. For example, absent from IGWA's brief is any reference to the Court's finding that there was "no proof that he [the water user] secured water from a natural subterranean stream." 37 Idaho at 51. *Petrie* involved the senior surface water irrigation district and the drainage of lands that were saturated by seepage and percolation from the district's canals. The Court refused to award damages to the appellant and his "waste water" right due to the interference caused by the

drainage operations of the irrigation district. The appellant did not have a "valid water right" recognized by the Court. Here, unlike the facts in *Petrie*, the Spring Users have water rights to natural surface water sources (springs) that have been decreed in the SRBA. Exs. 31 & 301-06. The entire quote from the *Petrie* Court, with the portions deleted by IGWA underlined, reads as follows:

> We conclude, however, that he [the water user] had no right to insist that the water table be kept at the existing level in order to permit him to use the underground waters. There is no proof that he secured water from a natural subterranean stream. The evidence tends to show that he secured it from water collected beneath the surface of the ground due to seepage and percolation. To hold that any landowner has a legal right to have such a water table remain at a given height would absolutely defeat drainage in any case, and is not required by either the letter or spirit of our constitutional and statutory provisions in regard to water rights.

Petrie at 51 (underline added). When read in context, it is clear that the *Petrie* decision cannot be read to support the conclusion that administration of ground water rights is conditioned on an analysis that ignores impacts to a surface water supply and valid decreed senior surface water rights. The Spring Users are seeking conjunctive administration to protect their senior rights, the facts have nothing to do with the drainage operations of an irrigation district or wastewater rights. Accordingly, *Petrie* is inapplicable and does not support IGWA's theory.

IGWA fails to cite any cases supporting their theory that "full economic development" creates a substantive condition or limit for conjunctive administration. They cannot cite any cases wherein administration to protect a senior water right has been denied in the name of economic development of junior water rights. Such an interpretation of the Ground Water Act would render the "clear legal duties" contained in section 42-607 and the CM Rules meaningless.

Obendorf v. Terra Hug Spray Co., Inc., 145 Idaho 892, 901 (2008) (statutory interpretation should give "meaning to every word, clause and sentence"). Furthermore, if the Director denied administration until such a time that the "hydraulic conditions can" no longer "sustain the existing diversions from the aquifer," *IGWA Br.* at 32, then administration is defeated until the point everyone will be out of water.[28]

The irony of the IGWA's argument is that they are insisting on the very thing that they chastise the Spring Users for allegedly demanding. While accusing the Spring Users of seeking to maintain a certain water level in the aquifer – the so-called "peak" water levels – they demand that the Director establish a certain water level in the aquifer – the so-called "reasonable" water levels – above which all administration must be denied. The end result of their theory is to create a loop-hole for administration that is not recognized in the law. The District Court properly rejected this argument by concluding "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.

A. To the Extent that Junior Ground Water Rights Materially Injure Senior Surface Water Rights, they are Subject to Conjunctive Administration.

Without any legal support or facts in the administrative record, IGWA repeatedly argues that the Director's orders require the aquifer to remain at "peak" levels. *IGWA Br.* at 36-40. IGWA further asserts that the Spring Users "insist that the water table be kept at the existing level" and demand a "guarantee[d]" water level. *Id.* at 39-40. Responding to this fabricated

[28] Nor does Idaho law condition administration on simply preventing "over-drafting of the aquifer." *IGWA Br.* at 35. This new standard is not contained in the Constitution, any statutes or the CM Rules.

demand, IGWA then claims that such demands would require "a total reversion to inefficient flood irrigation and a reversal of a half century's worth of ground water development." *Id.* at 40. IGWA even alleges that conjunctive administration would require "retiring Palisades Reservoir in favor of winter canal flows." *Id.* The repetition of exaggerated claims, however, does not make these claims true.

There is no dispute that ground water pumping impacts aquifer levels and hydraulically connected surface water sources. *See supra* (discussing Basin-Wide 5, interim administration, and the creation of Water Districts 120 and 130). Even IGWA admits this fact. *IGWA Br.* at 15. Yet, IGWA argues that conjunctive administration somehow "violates the Ground Water Act" because (i) annual recharge is greater than discharges, (ii) spring discharges are above "natural levels" and (iii) the aquifer is "at or near equilibrium." *IGWA Br.* at 40.

Resorting to a general "mass balance" view of the ESPA, IGWA consciously avoids the impacts to individual senior surface water rights caused by out-of-priority ground water diversions. IGWA further ignores the law that requires water rights to be administered by priority in organized water districts. I.C. §§ 47-602;-607; R. Vol. 13 at 3083. To the extent a junior ground water diversion injures a senior surface water right, conjunctive administration is required. *See supra*. All the Spring Users request in this case is proper water right administration to protect their senior rights.

In responding to the Spring Users' request for administration, the Director reviewed the law and facts and concluded that ground water diversions were depleting the aquifer and causing material injury to the Spring Users' senior surface water rights. R. Vol. 1 at 72-74; R. Vol. 3 at

523-24. Hearing Officer Schroeder considered this evidence and concurred. R. Vol. 16 at 3690. The Director adopted these conclusions in his final order, R. Vol. 16 at 3950, and the District Court confirmed the Director's findings, Clerk's R. 72-82 & 119-21.

IGWA faults these conclusions, however, arguing (for the first time on appeal) that the Director failed to "administer the ESPA based on a reasonable aquifer level." *IGWA Br.* at 38. The "reasonable pumping level" provisions of the Ground Water Act do not create a standard for water right administration that allows a junior to take water and injure a senior's right. Rather, the law provides that ground water users may have to deepen wells or pump from greater depth pursuant to a reasonable pumping level set by the Director. I.C. § 42-226. Since the Spring Users do not "pump" their water out of the ground this argument is not applicable here.

Furthermore, the "reasonable pumping level" provision is not a substantive standard for conjunctive administration. *See generally*, CM Rules. Had IGWA truly believed that the "reasonable pumping level" provisions applied in the context of administering hydraulically connected water resources, they should have challenged the orders establishing Water Districts 120 and 130 which, along with Idaho's water distribution statutes, govern the administration of ground and surface water rights in those districts.

IGWA attempts to create new standards for administration – standards that have never been applied in Idaho water law. They claim that the Director must provide "meaningful analysis of the recharge/withdrawal balance and reasonable ground water levels." *IGWA Br.* at 39. Noticeably, they cannot cite any legal support for this argument. Indeed, there is no basis in any statute, case or rule for IGWA's attempt to apply a "reasonable ground water level" to

conjunctive administration of senior water rights that divert from hydraulically connected surface water sources. As such, the Court should deny IGWA's appeal on this issue.

B. Administration of Junior Priority Ground Water Rights to Cure Material Injury to Senior Surface Water Rights Does Not Create an Unreasonable Monopoly.

The Director's actions in this case have not created a monopoly over the ESPA. *IGWA Br.* at 40-44. The Watermaster and Director reviewed the Spring Users' diversion structures and water use and found them to be reasonable and in compliance with the elements of their decreed water rights. *See* R. Vol. 14 at 3236-37. This is all that is required for water right administration under Idaho law and IGWA does not challenge these findings of fact. As such, this case is not analogous to *Schodde v. Twin Falls Land & Cattle Co.*, 224 U.S. 107 (1912). In that case, the holder of the senior water right received his water – he was not deprived of his water. There, the Court held that Schodde's *diversion structure* was unreasonable because it demanded the entire current of the river, which would have prevented the construction of Milner Dam. *Id.* That is not the case here. There is no challenge to the Director's findings that the Spring Users' diversions and water use are reasonable.[29] In addition, Schodde was not deprived of the quantity of water that he diverted through his water wheel.[30] Here, the Spring Users are being deprived of water that they are entitled to beneficially use under their decreed senior water rights, hence the Director's injury findings. Under Idaho law the Director was required to administer the out-of-priority ground water diversions. CM Rule 40.01.

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[29] Likewise, the *Schodde* court did not create a "return on curtailment" standard to guide administration. *IGWA Br.* at 42. There is no such scheme in the law.

[30] *See Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930) (distinguishing *Schodde* because it did not involve interference with the water right – "in other words, the same amount of water went to Schodde's place as before").

In addition to mischaracterizing the result of conjunctive administration, IGWA provides no support in the record that curtailment will result in "unusable 'dead' storage' that serves the sole purpose of propping up an inflated water table and spring discharges." *IGWA Br.* at 43. To the contrary, the ESPA Model shows that water not pumped will eventually flow to the springs for beneficial use by senior surface water users. Ex. 461 at Figs. 12 & 13. This is the very essence of hydraulic connectivity and conjunctive administration.

C. The CM Rules Adequately Consider the Economic Impacts of Administration.

The framers of Idaho's constitution understood the essential role of "first in time, first in right" to encourage and protect property ownership, namely water rights. In Idaho there is an economic benefit to being first and a consequence to later in time appropriations.

IGWA claims that administration of their junior priority rights will have an economic impact on their farming and other operations. *IGWA Br.* at 44-46. Importantly, they wholly ignore the economic impacts that their depletions have caused and continue to cause the Spring Users and other senior water users who have suffered material injury throughout the ESPA. Ex. 315; *see also* Ex. 338. As stated above, the prior appropriation doctrine is harsh – but it is fair. *See supra*. 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.

Importantly, however, the CM Rules do consider the economic impacts of administration and allow the Director to take certain actions that will buffer those impacts on junior users. For

example, the CM Rules allow the Director to phase-in curtailment over five years – thus minimizing the sudden impact of wholesale curtailment. CM Rule 40.01. In addition, the CM Rules allow the Director to forego curtailment so long as there is an approved mitigation plan in place that is operating effectively. CM Rules 40.01 & 43. In other words, a junior ground water user is always provided with an opportunity to mitigate his or her out-of-priority diversion by filing and obtaining approval of a Rule 43 Mitigation Plan. If mitigating the senior right is more economical than facing curtailment, the market and the CM Rules provide the junior user with that option. In the end, IGWA's assertions of "severe economic impacts" and the blocking of full economic development are wholly unfounded and do not provide a substantive reason to preclude conjunctive administration to protect the Spring Users' senior water rights.

V. The Evidence Shows that the Spring Users are Suffering Material Injury Due to Out-of-Priority Ground Water Diversions.

The Director found that diversions under junior priority ground water rights are materially injuring the Spring Users' senior surface water rights. R. Vol. 1 at 72-74; R. Vol. 3 at 523-24. This conclusion was confirmed by the Hearing Officer, R. Vol. 16 at 3690, verified by the Director in his *Final Order*, R. Vol. 16 at 3950, and affirmed by the District Court, Clerk's R. at 44. Given the Director's findings of fact on this issue, coupled with the standard provided by Idaho's APA, IGWA's appeal fails as a matter of law.

This Court cannot substitute its judgment for that of the Director as to questions of fact so long as the Director's decision is "supported by substantial and competent evidence." *Mercy Medical Center v. Ada Cty.*, 146 Idaho 226, 192 P.3d 1050, 1053 (2008). As discussed below,

there is substantial evidence in the record that supports the Director's material injury finding. Importantly, *IGWA did not even try to rebut any of the testimony presented at hearing*. Rather, they waited until the hearing was over to protest that the testimony and evidence did not meet their own newly created evidentiary standards for water right administration. As such, their appeal must fail.

Idaho law defines injury to a water right as an action that "diminishes" a water right's priority or reduces the quantity of water available for use under the right. *See Jenkins*, 103 Idaho at 388 (to "diminish one's priority works an undeniable injury to that water right holder"); *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 8 (1944) (defining injury to a water right for purposes of a transfer as an enlarged use that "increases the burden on the stream, or decreases the volume of water in the stream"); *see also*, I.C. § 42-203A(5) (defining injury in context of application for permit when a new use will "reduce the quantity of water under existing rights").

CM Rule 10.14 defines material injury as the "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." Noticeably, there is no burden placed upon a senior water user to demonstrate that he or she can raise better or more fish or grow better or more crops in order to suffer material injury to a senior water right. *See IGWA Br.* 52. Indeed, the watermaster cannot tell water users what crops to grow or how many fish to raise:

> The court 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, so long as there is not an enlargement of use of the water right.

Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue at 17 (In Re SRBA Case No. 39576, Subcase Nos. 36-02708 et al., Twin Falls County Dist. Ct., Fifth Jud. Dist.) ("*Facility Volume Order*").[31]

If a senior water right holder can put the water to beneficial use under a decreed right and a junior's diversion interferes with that use, the result is material injury to the senior right. Here, the undisputed testimony is that the Spring Users could and would beneficially use all the water under their senior water rights if it was available. This testimony was based on the decreed water rights, testimony from the Director and watermaster, and firsthand knowledge of the Spring Users' witnesses.

Cindy Yenter, Watermaster for Water District 130, conducted a site visit at each of the Spring Users' facilities and confirmed that additional water could be put to beneficial use. Tr. at 494, lns. 1-4; 501, lns. 12-18; 502, lns. 5-19. Former Director Dreher also testified that he analyzed the "history of development and use" of water at the facilities and "found that they had beneficially used the entire amount of the water and could, if the water was delivered to the spring, make beneficial use." *Id.* at 1395, lns. 16-23. In other words, both the Director and watermaster reviewed the Spring Users' water right decrees and facilities and confirmed that they were suffering water shortages and could beneficially use all of their decreed water if available. The conclusion here is straightforward and obvious, "more water allows the production of more fish." R. Vol. 16 at 3695. To the extend that IGWA's members divert water

[31] This decision was included in the administrative record as Exhibit H to the *Affidavit of Daniel V. Steenson in Support of Joint Motion for Partial Summary Judgment*, R. Vol. 15 at 2518, but was not copied in the Administrative Record on appeal.

that would otherwise flow to and be put to beneficial use under the Spring Users' decrees, there is material injury and either curtailment or mitigation is required. *See* CM Rule 40.01.

In addition to this testimony provided by IDWR's witnesses, the Spring Users also provided evidence and testimony about the injury to their senior water rights. Mr. Larry Cope testified that Clear Springs' Snake River Farm facility was built and operated to beneficially use the extent of the decreed water rights and that additional water would be beneficially used for fish propagation. Tr. at 85-90.[32] Dr. John R. MacMillan testified that spring flows supplying Clear Springs' water rights were so low in 2005 that two sets of raceways had to be shut down and dried up. Tr. at 216, lns. 10-25 & 217, lns. 1-5; *see also* Exs. 204-05 & 308 at 2. He further testified that in 2006 Clear Springs was able to turn water back into one of the dry raceway sets and that the water was beneficially used for fish production. *Id.* at 217, lns. 21-24. Likewise, he confirmed that additional water could be put to beneficial use by Clear Springs pursuant to its decreed water rights. *Id.* at 218, lns. 1-5.

For Blue Lakes, Mr. Gregory Kaslo gave a detailed description of the company's diversion and trout rearing facilities and how it uses water to raise trout. Tr. at 250-281, 291; Ex. 201. The Blue Lakes facility is designed to use over 197 cfs, all the water it is authorized to divert under its water rights. Trout are reared in raceways, each of which has a capacity of 6 cfs. Water is reused within the facility three to four times. *Id.* at 292, lns. 19-24, 268, lns. 8-13 & 269, lns. 7-12. Water is also used in a hatch house, where eggs are raised. *Id.* at 264-65.

[32] On pages 50-51 of IGWA *Brief*, IGWA quotes from the transcript of proceedings and wrongly attribute the testimony to be that of Gregory Kaslo of Blue Lakes. However, the testimony was actually provided by Larry Cope of Clear Springs.

Maintenance of a constant flow through the hatchery building is particularly important to maintain the eggs.

Mr. Kaslo also explained how diminished water flows have impacted Blue Lakes' ability to rear fish. *Id.* at 273-76 & 310-12. He explained that Blue Lakes usually begins to experience low flows in April, shortly after ground water pumping begins. During the two to three years prior to the hearing, when the low flows began to occur, Blue Lakes had to dry up several raceways for two to three months each year. *Id.* at 273-74. This condition forces the removal of the fish in those raceways. *Id.* at 274, ln. 4-8. Mr. Kaslo explained that "when I'm there and there's a dry raceway it hurts, and we're not raising the product." *Id.* at 275, lns. 7-9. The reoccurrence of the low flows affects Blue Lakes' stocking decisions throughout the year. *Id.* at 275-76. Mr. Kaslo testified that if and when Blue Lakes receives additional water, it will "absolutely" be able to beneficial use the water to raise more fish. *Id.* at 279-81.

Furthermore, Spring Users use water under their decreed rights for more than just raising fish for market. For example, water is used for research and brood facilities in the aquaculture operations at Clear Springs' Snake River Farm facility. *See* Tr. at 199-200; 203-04 & 208-09.

The fact that fish need water goes without saying. IGWA's attempt to downplay this elemental fact by demanding that the Spring Users demonstrate the exact number and weight of fish that can be raised with each incremental increase of water defies over a century of water right administration in this state. *See e.g., Facility Volume Order* at 9 ("This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to

regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water"). In essence, if accepted, IGWA's theory would require every farmer to show that additional water would result in larger, healthier, and more potatoes in order to justify the administration of junior priority ground water rights. Nothing in the law places such a demand on a senior user. If a senior can beneficially use water under a decreed right, the inquiry is over, and the Director and watermaster are obligated to distribute water to the senior first.

The Spring Users' water rights were partially decreed by the SRBA Court in 2000. *See* Exs. 31 & 301-06. The Department recommended the water right claims, and the SRBA Court adjudicated the extent of beneficial use for the Spring Users' rights. I. C. §§ 42-1412(6), 42-1420(1) (decree determines "the nature and extent of the water right"); *Head v. Merrick*, 69 Idaho 106, 109 (1949) ("claimant seeking a decree ... must present to the court sufficient evidence ... 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."). If IGWA believed the Spring Users could not beneficially use the amount of water recommended by IDWR, they were provided with the opportunity to file and prove their objections to the Springs Users' rights in the SRBA. None of the ground water right holders contested the Spring Users' diversion rates or the year-round period of use for their water rights. Consequently, the diversion rates – representing the quantity of water that the Spring Users' are entitled to beneficially use under their respective rights – were recommended and decreed.

During the administrative proceedings, IGWA sought to discover, and use against the Spring Users, evidence that pre-dated the SRBA partial decrees. R. Supp. Vol. 2 at 4192-94. IGWA claimed there, as it does now, that this information was necessary to prove that the Spring Users could not beneficially use the water in their decrees. The law, however, does not allow the Director or IGWA to go behind the SRBA Court's judgments and, in essence, force the holder of the senior water right to re-prove the elements of a decree as a pre-condition to administration or to prove material injury.

> Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules.
>
> . . .
>
> 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 . . . The presumption under Idaho law is that the senior is entitled to his decreed water right.

AFRD#2, 143 Idaho at 873 & 877-78.

In *AFRD#2*, this Court did find that "certain post-adjudication factors" may weigh on the Director's administration decisions. *Id.* However, IGWA did not present any such "post decree" information and there was no evidence that water would be wasted rather than beneficially used by the Spring Users. Rather, IGWA sought to discover pre-decree beneficial use information – an action expressly prohibited by this Court.

Consistent with this Court's *AFRD #2* decision, Hearing Officer Schroeder properly rejected IGWA's attempt to discover "pre-decree" beneficial use information. R. Supp. Vol. 3 at 4401-06. The Hearing Officer correctly recognized that such information would be of minimal relevance – at best. *Id.* at 4403. This is not a matter of the Spring Users having "something to hide" as IGWA asserts. *IGWA Br.* at 48. Indeed, the Spring Users, the Watermaster, and Director all confirmed that additional water could be put to beneficial use under the decreed water rights. That is all that is required under the law and that procedure was properly followed in this case.

In addition, the Hearing Officer and Director applied the proper burdens of proof and evidentiary standards on this issue– as confirmed by this Court. *AFRD#2, supra*; *see also* R. Vol. 16 at 3698-3700. Importantly, there is a "***presumption*** that a senior water user is entitled to the amount of water set forth in the partial decree." *Id.* at 3698 (emphasis added). Following allegations of material injury made under oath, the Director makes a material injury determination and the burden then shifts to the junior water users to "show a defense to a call for the amount of water in the partial decree." *Id.* at 3698-99. The Court cannot overlook the long-standing presumptions associated with the administration of water rights. *AFRD#2, supra* at 878 ("The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of the petition containing information about the decreed right"). The Spring Users are not required to produce "pre-decree" information and reprove their decreed water rights in conjunctive administration.

Moreover, the law does not require a showing that more, larger or healthier fish will be produced through administration any more than it requires that a farmer demonstrate he can raise more, larger or healthier potatoes with more water. Rather, the law requires a showing that but for the interfering diversions under junior water rights, water under a senior water right will be put to beneficial use. As discussed above, this showing has been made in this case. That is the extent of the inquiry made by the Watermaster and Director in administration. The inquiry was made, and the Spring Users showed that additional water could be put to beneficial use under their decreed senior water rights.

VI. Model Uncertainty is Not a Rational Basis to Exclude Junior Ground Water Rights From Administration

IGWA argues that the Director should increase the uncertainty, or margin of error, applied in the ground water model and that he should further reduce the number of ground water rights subject to administration based on that recalculation. *IGWA Br.* at 55-59. What IGWA fails to understand, however, is that, regardless of the uncertainty applied, the Director has no legal basis to unilaterally exclude junior ground water rights from administration where those rights are hydraulically connected and are found to contribute to the material injury. *See Spring Users' Joint Opening Brief*, filed contemporaneously herewith and incorporated herein by reference.

Under Idaho law, junior ground water rights that cause injury to the Spring Users' senior water rights are subject to administration. CM Rule 40.01. Any uncertainty inherent in the use of the model is not a rational basis for the Director to unilaterally exclude junior ground water

rights from administration. Such uncertainty, or margin of error, is a nullity because it is equally likely that the ESPAM either understates or overstates the impact of junior ground water diversions on spring flows.

Notwithstanding such uncertainty, the most scientifically supportable interpretation of ESPAM results is that they correctly predict the effect of ground water depletions on spring flows. Ground water pumping will have the predicted effect, with the possibility that that effect will be somewhat greater or somewhat less than the prediction.

The Spring Users know of no precedent in which water rights have been excluded from administration based on a "margin of error" in water measurement or in approved methods to make injury determinations. Uncertainties are inherent in the use of technology to measure and determine the impact of a junior water diversion on a senior water right. This is true, whether the technology is a standard weir or a complex computer model such as the ESPAM. The Snake River stream gages that have the 10% margin of error identified by the Director are rated "good" by the USGS and are used on a daily basis in water rights monitoring and administration across the state. R. Vol. 1 at 49. The Director has described the ESPAM as the "best available" technology for determining the impact of junior ground water diversions on spring supplies. *Id.* Therefore, the Director had no legal basis to limit or condition the results of the ESPAM's predictions and use that in favor of certain junior ground water rights.

As such, the Director's use of a margin of error to exclude junior water rights from administration violates the constitutional mandate for priority administration of water rights as well as the Springs Users' constitutional right to equal protection of the laws of this State that are

designed to protect their senior rights during times of shortage. A margin of error should not be applied to benefit either the junior right holder causing injury to the senior or the senior who is short of water.

VII. The Director Did Not Deprive IGWA of Due Process by issuing the 2005 Orders Without a Prior Hearing

IGWA asserts that the Director deprived them of due process by curtailing their water rights without a hearing. The Director made the 2005 orders effective upon issuance pursuant to I.C. § 67-5247, and provided aggrieved parties with an opportunity for hearing. The CM Rules require the Director to regulate junior ground water diversions upon a finding of material injury to a senior that has filed a water delivery call. CM Rule 40.01. There is no requirement for a hearing prior to an order of curtailment. *Id.*; Clerk's R. at 85-87. Likewise, Idaho's water distribution statutes do not require a hearing prior to curtailment either. Clerk's R. at 85-87; I.C. § 42-607; *Nettleton, supra* at 91-92. Moreover, this Court recognized the importance of a timely response to a water delivery call:

> We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right. Clearly, ***a timely response is required when a delivery call is made and water is necessary to respond to that call.***

143 Idaho at 874 (emphasis added). Based on this clear precedent, there was no due process violation in this case.

When an irrigation water right is not delivered, crops cannot be planted or dry up in the field. The consequences of water shortage to the Spring Users are no less real. Raceways, like

fields, dry up and become unproductive. Fish die more quickly without water than terrestrial plants. The need for timely administration is just as urgent. Any delay in administration favors junior water rights to the detriment of a senior. No action by the Watermaster or Director effectively becomes a decision in itself, again to the senior's detriment.

Once a water right is decreed, it provides the basis for administration. I. C. §§ 42-607;1420. A watermaster is required "to distribute water according to the adjudication or decree." *Nelson,* 131 Idaho at 13. Adjudications establish the elements of a water right and identify the rights that take water from common and connected sources. *See supra.* After the decree is issued, no additional hearing is necessary for administration to proceed within water districts. I.C. §§ 42-602; -607. In surface water districts, watermasters respond immediately to water delivery calls and adjust headgates in accordance with priority. Tr. 646-47.

The need for conjunctive administration of the ESPA has been recognized for decades. It was one of the main reasons for commencement of the SRBA in 1987. *See A&B Irr. Dist.*, 131 Idaho at 422. As discussed in detail above, the State has taken extraordinary steps through judicial and administrative proceedings to establish the basis for conjunction administration. These steps were taken to "***permit immediate administration*** of" hydraulically connected ground water and surface water rights. R. Vol. 13 at 3072.

These proceedings were not conducted behind closed doors. Indeed, IGWA and its members had multiple opportunities to participate and contest findings that their rights are hydraulically connected to the Thousand Springs reach, that ground water diversions were depleting the springs and that immediate administration of ground water rights is necessary to

protect senior surface water users from injury caused by their depletions. Yet, they failed to take any steps to challenge these decisions and did not contest the State's efforts to ensure "immediate administration" of hydraulically connected water sources.

Now, *after* the CM Rules have been promulgated, *after* the Thousand Springs Ground Water Management Area was created, *after* Basin-Wide 5 legally determined that all water in the Snake River Basin is hydraulically connected, *after* entering into the Interim Stipulated Agreement, *after* agreeing to the State's request for Interim Administration and *after* the creation of Water Districts 120 and 130 – all of which recognized that ground water diversions are injuring spring flows and that "immediate administration" was necessary – IGWA complains that it has not had an opportunity to be heard. Given the multiple opportunities that IGWA has had to be heard, this argument is without merit.

CONCLUSION

Extraordinary efforts have been undertaken by the Legislature, the SRBA District Court, IDWR, and water users during the last three decades to facilitate conjunctive administration. Now that conjunctive administration is finally occurring, IGWA argues that it is trumped by the Swan Falls Agreement, the State Water Plan, and the Ground Water Act's concept of the "law of full economic development." These arguments come far too late – long after the issuance of orders and decrees and the decades leading up to implementation of conjunctive administration on the ESPA. Accordingly, as previously recognized by this Court, there is no basis to "set back" conjunctive administration so that "another generation of ground and surface water users will be uncertain regarding their relationship to each other." *A&B*, 131 Idaho at 422.

Finally, the "substantial evidence" in the record supports the Director's material injury determination. The law does not require, as IGWA demands, that the Spring Users show they can raise more or larger or healthier fish. The law simply requires a showing that, but for the out of priority diversions under junior ground water rights, the Spring Users would be able to beneficially use their senior surface water rights. That showing has been made in this case.

For the reasons stated above, the District Court's order should be affirmed.

RESPECTFULLY submitted, this 23rd day of July, 2010.

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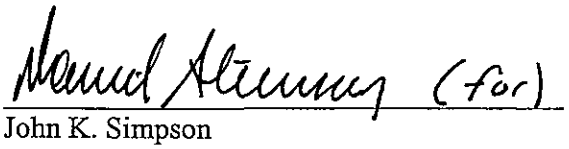

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of July, 2010, I served true and correct copies of the **SPRING USERS' JOINT RESPONSE BRIEF** upon the following by the method indicated:

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