

Docket No. 37308-2010

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

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

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

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

v.

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

v.

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

v.

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

v.

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

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**SPRING USERS' JOINT OPENING BRIEF**

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

Honorable John M. Melanson, District Judge, Presiding.

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## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

This is a cross-appeal from the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls*, issued by the Director of the Idaho Department of Water Resources (“IDWR”), on July 11, 2008. This cross-appeal was filed jointly by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (collectively “Spring Users”).

### II. COURSE OF PROCEEDINGS

The description of the course of proceedings in the *Spring Users’ Joint Response Brief*, filed concurrently herewith, is incorporated by this reference.

Additionally, with respect to the issues raised by this cross-appeal, the District Court held that the Director acted within his discretion when he used a plus or minus 10% margin of error “trim line” to exclude hydraulically-connected junior ground water rights causing injury to the Spring Users’ water rights from priority administration. This conclusion was “simply based on the function and application of the model.” Clerk’s Rec. at 72.

### III. STATEMENT OF THE FACTS

The statement of facts in the *Spring Users’ Joint Response Brief*, filed concurrently herewith, is incorporated by this reference. The following additional facts pertain to the issues raised by this cross-appeal regarding the Director’s use of model uncertainty to exclude hydraulically-connected junior ground water rights causing injury to the Spring Users’ water rights from priority administration.

The direct hydraulic connection between the Eastern Snake Plain Aquifer (“ESPA”) and the Spring Users’ spring water supplies is thoroughly documented in prior legislative, judicial and administrative findings and proceedings. *See Spring Users’ Joint Response Brief* Part III.C (Statement of Facts). The ESPA is a defined “area of common ground water supply” that both supplies water to and receives water from the Snake River. CM Rule 50. Throughout the Thousand Springs area, ESPA water discharges through the walls of the Snake River Canyon to form natural springs.

Equally well documented is the fact that ground water diversions deplete the ESPA and consequently reduce hydraulically connected spring discharges. As ESPA levels decline, spring discharges decline as well. R. Supp. Vol. 3 at 4443, lns. 20-21. A model is not required to know these facts. Tr. at 1489, ln. 20 – 1490, ln. 12. Wells located in closer proximity to the Spring Users’ water supplies have the greatest and most immediate impacts on spring flows. R. Vol. 1 at 47, ¶11. Over time, all groundwater depletions from the ESPA cause reductions in flows in the Snake River and spring discharges equal in quantity to the ground water depletions. R. Vol. 1, p. 47 ¶ 11; Ex. 400A at 8; Tr. at 818, lns. 21-23.

In the 2005 Orders, the Director found that junior ESPA ground water rights in Water District No. 130 cause material injury to the Spring Users’ senior surface water rights. R. Vol. 1 at 58-59, ¶¶65, 67; R. Vol. 3 at 500-501, ¶¶ 62, 66. The Director’s finding of material injury was based, in part, on his use of a hydrologic model, called the Enhanced Snake Plain Aquifer Model (“ESPAM”), to determine the impacts of junior diversions on the designated spring reaches in

which the Spring Users' water supplies are located. *Id.* The Director ordered curtailment, but, through an unprecedented "10% trim line" determination, exempted a significant number of junior ground water rights shown by the model to deplete the Spring Users' water supplies from administration. R. Vol. 1 at 61, ¶76; R. Vol. 3 at 502-503, ¶ 71.

The basis for the trim line is the former Director's assumption that the ESPAM's predictions of the impacts of ground water diversions on spring flows is subject to a plus or minus 10% margin of error. The ESPAM is designed to predict the impacts of ground water pumping on designated Snake River or spring subreaches in the Thousand Springs area. R. Vol. 1 at 49, ¶ 20. Blue Lakes' water source is located in the Devil's Washbowl to Buhl Gage spring reach and Clear Springs' spring source is located in the Buhl Gage to Thousand Springs reach. R. Vol. 1 at 58-59, ¶ 67; R. Vol. 3 at 501, ¶ 66.

The ESPAM is "calibrated" to measured ground water levels, Snake River reach gains and losses, and spring discharges in the Thousand Springs area. Tr. at 1131, lns. 13-25.<sup>1</sup> The former Director placed a "significant emphasis on model calibration," using 120 different model configurations until arriving at the final model. Tr. at 1131, lns. 13-25. The former Director testified that he "had never seen or used a ground water model that was calibrated so closely to actual measured ground water levels, measured reach gains, measured spring discharge." *Id.*

Although the ESPAM is the "best one [he] had ever seen," Tr. at 1132, lns. 6-7, the former Director acknowledged that it is not perfect, Tr. at 1133, lns. 9-13. Despite his confidence

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<sup>1</sup> Calibration means that the model's parameters are adjusted so that its outputs or predictions match field observations. Tr. at 808, ln. 25 -- 809, ln. 2.

in the model, the Director felt compelled to assign an uncertainty factor or margin of error to the model's outputs before using it in administration. Tr. at 1133, lns. 13-15. Since no analysis of model uncertainty had been performed, Tr. at 811, lns. 1-11, the Director assumed that the model's predictions could be no more accurate than the water measurements to which it was calibrated.<sup>2</sup> He identified stream gauge measurements as the largest potential source of uncertainty because stream gauges, although rated "good" by the USGS, have uncertainties of up to plus or minus 10%. R. Vol. 1 at 49, ¶ 16; R. Vol. 1 at 49, ¶ 16; Tr. at 1166, lns. 7-18; 1168, ln. 22 – 1169, ln. 6.

According to the Director's reasoning, because of the this uncertainty in the reach gain calibration targets, there is a possibility that the model's predictions may be up to 10% too high or 10% too low. The model predicts, for example, that curtailing all rights junior to 1973 would deliver 88 cfs to the Devil's Washbowl to Buhl spring reach. Ex. 462. The Director's assignment of 10% plus or minus margin of error to the model means that such curtailment may actually deliver as much as 97 cfs or as little as 79 cfs. However, Dr. Allan Wylie, the Department's modeling expert, testified that the most likely outcome is that ground water withdrawals will have the impact predicted by the model. Tr at 818, ln. 24 – 819, ln. 2.

The former Director translated his estimate of plus or minus 10% model uncertainty into a "trim line" to exclude all junior ground water rights whose impact on the springs is 10% or less than their depletions to the ESPA (e.g. 0.1 cfs impact from a 1.0 cfs depletion of the aquifer) from

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<sup>2</sup> Importantly, this trim line was *not* based on science. Clerks' R. at 68 ("The margin of error used by the Director was not established in conjunction with the development of the model *nor was it developed pursuant to any*

administration. R. Vol. 1 at 61-62, ¶¶ 76-82; R. Vol. 3 at 502-04, ¶¶ 71-77. This exclusionary determination is called a “trim line” because it draws a virtual line upon the Eastern Snake Plain. On one side of the line are ground water rights that the model shows have a greater than 10% impact on the Spring Users’ water supplies. Ground water rights diverting on this side of the line are subject to conjunctive administration. Junior ground water rights on the other side of the line (a much greater number of rights and irrigated acres), however, are exempt from administration. At hearing, the Director explained this new concept as follows:

Q. And can you just explain how that worked? How did you translate the 10 percent uncertainty to where the trim line ends up on the map?

A. Well, looking at the -- what we did is we looked at the source of water for the calling senior water rights. So in the case of Blue Lakes Trout that was one particular subreach of the spring discharge. So then we -- *we did a simulation of curtailing water rights that were junior to the right held by Blue Lakes that we had determined was causing injury*. And we looked at the depletion to the aquifer associated with those junior rights. And if -- *if the accretion or the increase from curtailment to that reach, to that particular reach that contained the source for the senior water right, if the increase was less than 10 percent of the depletion to the aquifer, that right was trimmed out as contributing to depletions*. Because within that 10 percent we're not certain whether that right is or is not causing depletions.

Tr. at 1229, lns. 7-25 (emphasis added).

According to the Director, “If you didn’t apply the trim line, there is some probability that you would curtail junior priority rights that are not causing injury.”<sup>3</sup> Tr. at 1230, lns. 20-22.

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*scientific methodology* or peer review process”) (emphasis added).

<sup>3</sup> As the District Court recognized:

In conjunction with running the model simulations in response to both delivery calls, the Director assigned a 10% margin of error factor, excluding from administration those *junior rights identified by the model to be causing injury* but within the 10% margin of error or

Importantly, however, the Director fails to acknowledge the equal probability that ground water rights located beyond the trim line cause 10% more injury to the Spring Users' water right than the model predicts. Nor does the trim line acknowledge the cumulative impacts of ground water diversions located beyond the trim line. The vast majority of ground water depletions causing injury to the Spring Users water rights occur beyond the trim lines. Exs. 461, 462, 463.

### ISSUES PRESENTED

The Spring Users present the following issues on appeal:

1. Whether, as a matter of law, a "plus or minus" uncertainty factor in determining the impact of junior ground water diversions on senior water rights is a nullity for purposes of conjunctive administration, or may instead be applied by the Director to exclude certain junior ground water rights from administration.
2. Whether the Director unconstitutionally applied the Conjunctive Management Rules by shifting the burden of proof to injured senior surface water right holders through exclusion of certain junior ground water rights from administration based upon model uncertainty.

### STANDARD OF REVIEW

Generally, a Court is charged with deferring to an agency's decision. *See St. Joseph Reg. Med. Ctr. v. Nez Perce Cty.*, 134 Idaho 486, 488 (2000) ("The reviewing court may not substitute

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*"trim-line." The Director concluded that rights outside of the trim-line were not subject to administration because of the uncertainty that they would contribute water to the particular sub-reach.*

Clerks R. at 67 (emphasis added).

its judgment for that of the decision make on questions of fact”). The Court should not substitute its judgment for that of the agency as to questions of fact so long as the decision is “supported by substantial and competent evidence.” *Mercy Medical Center v. Ada Cty.*, 146 Idaho 226, 192 P.3d 1050, 1053 (2008).

An agency, however, is not granted free reign. Rather, the Court is “free to correct errors of law.” *Mercy Medical Center, supra*. An agency’s decision must be overturned if (a) violates “constitutional or statutory provisions,” (b) “exceeds the agency’s statutory authority,” (c) “was made upon unlawful procedure,” (d) “is not supported by substantial evidence in the record as a whole” or (e) “arbitrary, capricious or an abuse of discretion.” *Chisholm v. IDWR*, 142 Idaho 159 (2005) (citing I.C. § 67-5279(3)). An agency action is “capricious” if it “was done without a rational basis.” *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is “arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *Id.* In addition, the petition must show that “a substantial right has been violated” as a result of the agency action. *Chisholm, supra*.

An agency’s decision must be supported by “substantial evidence”. *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 260 (1985); *see also Chisolm, supra* at 164 (“Substantial evidence ... need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder”). The “reviewing courts should evaluate whether ‘the evidence supporting [the agency’s] decision is substantial.’” *Hunnicutt, supra*. at 261. The Director cannot use discretion as a shield to justify a decision that is not supported by substantial evidence. Such decisions are “clearly erroneous” and should be reversed. *Galli v.*

*Idaho County*, 146 Idaho 155, 159 (2008) (“A decision is clearly erroneous when it is not supported by substantial and competent evidence”). A court is not required to defer to an agency’s decision that is not supported by the record. *See Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

### SUMMARY OF ARGUMENT

Under Idaho law, junior ground water rights that cause material injury to senior water rights are subject to administration. This is the case, regardless of whether the right is located inside or outside of the Director’s virtual “trim line.” The use of uncertainty to disregard actual model results, exempt junior ground water rights from administration, and allow continued injury to the Spring Users’ senior water rights is arbitrary and capricious, an abuse of discretion, and contrary to law. In truth, any plus or minus uncertainty (i.e. margin of error) in measuring water or using the ESPAM to determine the impact of junior ground water diversions on the Spring Users’ senior water rights should be a nullity for purposes of water right administration. At the least, any plus or minus uncertainty cannot be applied against the senior right in favor of junior water users. Such an application clearly diminishes the senior right contrary to Idaho’s prior appropriation doctrine.

The Director’s exclusion of junior ground water rights from administration based on model uncertainty alleviates the junior water users from meeting their burden to show that they are not subject to administration, and impermissibly shifts the burden to the Spring Users to rebut the exclusion. The Director’s exclusion of ground water users amounts to a futile call defense, which, according to this Court’s decision in *American Falls Reservoir Dist. #2 v. Idaho Dept. of*

*Water Resources*, 143 Idaho 862 (2007) (“*AFRD#2*”), is a burden to be borne by the junior right holder causing injury. Idaho law requires junior appropriators to prove any valid defenses by “clear and convincing evidence”.<sup>4</sup> See *AFRD #2*, 143 Idaho at 874 (“the Rules do not permit or direct the shifting of the burden of proof . . . [r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules.”). The Director’s decision impermissibly shifts the burden to the Spring Users to rebut a defense that was never presented by the ground water users.

## ARGUMENT

### **I. The Director’s Exclusion of Junior Ground Water Rights From Administration based on a Plus or Minus Uncertainty is Arbitrary and Capricious, an Abuse of Discretion, and Contrary to Law.**

The trim line excludes from administration ground water rights identified by the ESPAM to cause material injury to the Spring Users’ senior surface water rights. Model uncertainty does not provide a rational basis for this exclusion. The ESPAM is a well-calibrated model, the best one the former Director has ever seen. Tr. at 1132, Ins. 6-7. Although imperfect, the possibility of error does not establish that it is erroneous, or that any errors should be held against senior water users. As Dr. Wylie testified, the most reasonable interpretation of ESPAM results is that they accurately reflect the effect of ground water depletions on spring flows. Tr. at 818-19.

Since it is equally likely that the ESPAM either understates or overstates the impact of junior ground water diversions on spring flows, the plus or minus 10% margin of error identified

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<sup>4</sup> Junior water users carry the burden to establish by “clear and convincing evidence” that their diversions will not injure senior water rights on the same source. *Cantlin v. Carter*, 88 Idaho 179 (1964); *Josslyn v. Daly*, 15 Idaho 137

by the Director is a nullity for administration. With the equal probability of increased injury to senior water rights, there is no rational basis for the Director to apply model uncertainty exclusively for the benefit of junior ground water right holders. Applying model uncertainty only for the benefit of junior ground water users is contrary to the Director's constitutional, statutory, and regulatory duty to administer junior water rights that cause material injury to seniors. *See* IDAHO CONST. art XV, § 3; Idaho Code § 42-607; CM Rules 20, 40.

Furthermore, there is no rational basis to infer from a margin of error that a well shown by the model to deplete spring flows may have no impact. Ground water pumping will have the predicted effect, with the possibility that that effect will be somewhat greater or somewhat less (by 10 %) than the prediction.

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 common measuring device or a complex computer model such as the ESPAM. The Snake River stream gauges that have the 10% margin of error identified by the Director are rated "good" by the USGS and are regularly used in water rights monitoring and administration. 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.*

There is no statute, rule or case law requiring 100% accuracy in measuring devices (or any other means of determining material injury) as a prerequisite to administering water rights.

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(1908); *Moe v. Harger*, 10 Idaho 302 (1904).

Neither the Spring Users' decrees nor any general provision or order of the SRBA Court requires such accuracy in measurement as a precondition to priority administration of water rights.

Chapter 7, Title 42 of the Idaho Code addressing headgates and water measurement does not impose a standard of accuracy for measuring devices. Chapter 6 of Title 42, governing water distribution, does not require or authorize watermasters to perform an uncertainty analysis as a precondition to distribution of water in organized water districts. Finally, the Department's Rules for the Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11, *et seq.*) ("CM Rules") impose no such standard, and only require that the Director consider the existence of measuring and recording devices as part of the analysis of the reasonableness of the senior's water diversions. CM Rule 42.01.g. In short, there is no legal authority authorizing the Director to exclude junior water rights from administration based on a margin of error in water flow measurements.

Furthermore, no evidence was presented in the administrative proceedings in this case to show that technology exists to measure and determine injury with 100% accuracy. Absent a method that is completely accurate, the Director is bound to use the best information available for administration, in this case the predictions of the ESPAM. Any uncertainty in those predictions is a nullity and cannot be used against the Spring Users for the sole benefit of junior ground water rights. Such action diminishes the senior rights contrary to Idaho's prior appropriation doctrine.

Therefore, the Director's use of model uncertainty to create a trim line that excludes from administration junior ground water rights that cause injury to the Spring Users' senior water rights

is arbitrary and capricious, an abuse of discretion, and contrary to law, and should be reversed by this Court.

**II. Exclusion of Junior Ground Water Rights from Administration Based on Model Uncertainty Unconstitutionally Shifted the Burden of Proof to the Spring Users.**

Idaho law requires water rights to be administered pursuant to the prior appropriation doctrine, which prohibits junior water rights from taking water that would otherwise flow to senior water rights. *See* IDAHO CONST. art XV, § 3; Idaho Code §§ 42-602;607.<sup>5</sup> The CM Rules define material injury as the “hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law.” CM Rule 10.14. Diverting ground water that would otherwise flow to a connected senior surface water right constitutes a “hindrance to or impact upon the exercise” of that senior right and therefore requires administration.

In organized water districts in the ESPA – such as Water Districts 120 and 130 – the CM Rules require curtailment or an approved mitigation plan to prevent material injury to a senior water right. CM Rules 40.01; 50. There is no “threshold” that must be met before these obligations are imposed. If a junior ground water right takes water that would otherwise flow to a senior surface water right, the right is subject to conjunctive administration.

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<sup>5</sup> The CM Rules follow the prior appropriation doctrine. CM Rule 20.02.

In 2002, the SRBA Court held that all water rights in the ESPA are legally connected for purposes of water right administration – the “connected sources” determination.<sup>6</sup> R. Vol. 13 at 3057; *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 421-22 (1998); see also CM Rule 50 (the ESPA “is found to be an area having a common ground water supply” and “supplies water to and receives water from the Snake River”). As such, “the prior appropriation doctrine applies as between all hydraulically connected ground and surface water right sources” in the ESPA and “a junior groundwater user is not per se insulated from a senior surface call simply because the junior right is diverting from a well.” R. Vol. 13 at 3046.

Although the impacts from a ground water diversion may take several years to be fully realized – i.e. that “no direct immediate relief would be achieved if the junior-priority water use was discontinued” – administration is still required. 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 right causes material injury”).

In *AFRD#2, supra*, this Court described the burdens and evidentiary standards that must be applied in conjunctive administration:

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 rights. ... The Rules may not be applied in such a way as to force the

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<sup>6</sup> Individual claimants in the SRBA have the opportunity to prove they divert from a “separate source,” so as not to fall under the “connected sources” general provision. No ground water right holders in Water Districts 120 or 130 sought or obtained a “separate sources” provision on their water rights, thus they are deemed legally connected for purposes of conjunctive administration.

senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine “how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].” *Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call.*

143 Idaho at 877-78 (internal citations omitted) (emphasis added).

The CM Rules do not authorize the Director to exclude hydraulically connected junior ground water rights that have been found to contribute to the material injury suffered by a senior water right. To the contrary, the CM Rules demand their inclusion in administration. *See* CM Rule 40.01.

Once the Director determined that the Spring Users’ senior water rights were being materially injured by hydraulically connected junior groundwater rights, the law required the Director to shift the burden to the holders of the junior water right to prove a valid defense to the call. *AFRD#2, supra.*

Contrary to this Court’s clear guidance in *AFRD#2*, however, the Director did not shift the burden to the junior ground water users after finding material injury. Rather, he unilaterally exempted a majority of the junior ground water rights contributing to the material injury – essentially creating a de-facto “futile call” determination without any showing by the junior water user. Such an action effectively nullifies the burden of proof required under Idaho law. Clerk’s R. at 65 (“The problem is that if aspects of futile call are cloaked in part of the material

injury determination and no subject to the applicable burdens of proof, *then the burdens of proof are effectively circumvented*") (emphasis added).

Instead of requiring the legally mandated burden of proof, the Director chose not to require the juniors to submit any evidence as to futile call and unilaterally "trimmed" ground water rights found to be causing material injury. Using the trim line the Director eliminated any administrative obligations from those rights whose impacts to the spring sources was estimated to be 10% or less than their total diversions from the ESPA. R. Vol. 1 at 61-62, ¶¶ 76-82; R. Vol. 3 at 502-04, ¶¶ 71-77. Of the 300,000 acres covered by ground water rights junior to Blue Lakes' injured senior water rights, the Director exempted approximately 243,000 acres (80%) from any administration. R. Vol. 16 at 3711. For Clear Springs, the Director exempted 547,000 of the 600,000 acres (90%) from administration. *Id.*

The end result of this type of administrative scheme violates Idaho's prior appropriation doctrine. For example, a ground water user with a 1965 priority right with an 11% depletive effect on the spring reach is subject to administration, while a ground water user with a 1990 priority right and a 9% depletive effect on the spring reach is excluded.<sup>7</sup> In some cases the amount of water taken out-of-priority by the 1990 ground water right with a 9% depletion

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<sup>7</sup> Importantly, the fact that the diversions may be a longer distance from the spring source than others does not prevent administration.

What these facts establish is that in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time from the results of the curtailment to be fully realized may require years, not days or weeks. This is the reverse process of depletion of the water flowing to the springs from the aquifer over a substantial number of years.

Clerk's R. at 99 (citing R. Vol. 16 at 3709). Additionally, the "CMR acknowledge that relief from curtailment will not be immediate." *Id.* (citing CM Rule 20.04).

rate could be greater than the amount of water diverted by the 1965 ground water right with the 11% depletion rate.<sup>8</sup> Yet, under the Director's action the 1990 priority ground water right would be allowed to avoid administration altogether, while the 1965 priority ground water right would be subject to curtailment.

The Director has no authority to ignore priority in conjunctive administration. The law is clear that all junior ground water rights causing injury to senior surface water rights are subject to administration. Under the SRBA Court's "connected sources" determination, all water rights in the ESPA are hydraulically connected. *See supra.*; *see also*, CM Rule 50. As such, the Director and watermasters have a "clear legal duty" to regulate the use of water under every junior groundwater right contributing to a senior water right's material injury – regardless of total impact on the water supply used by the senior water right. *Musser v. Higginson*, 125 Idaho 392, 395 (1994); *see also State v. Nelson*, 131 Idaho 12, 16 (1997) ("the watermaster is to distribute water according to the adjudication or decree"); Idaho Code § 42-607; IDAHO CONST. art. XV, § 3; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) (to "diminish one's priority works an undeniable injury to the water right holder").

Once the Director determines that a senior water right is materially injured, it is the holder of the junior water right that must present and prove a defense to the call. *AFRD#2, supra*. Here, however, the Director flipped the burden back to the Spring Users to prove that those junior groundwater rights outside the 10% "trim line" should be subject to conjunctive

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<sup>8</sup> For example, assume the 1990 priority right authorizes a diversion rate of 10 cfs – or 0.9 cfs (9%) depletion to the spring source. If the 1965 priority right authorizes a diversion rate of 5 cfs, its depletion would be 0.55 cfs (11%).

administration. Since the Director (i) recognized that the waters of the ESPA are hydraulically connected, (ii) found that the Spring Users' senior water rights were being materially injured by out of priority ground water diversions and (iii) allowed certain groundwater rights to avoid administration even though they are hydraulically connected and contributing to the material injury, the Director abused his discretion and violated long-standing Idaho law. The District Court's failure to correct this error should be reversed.

### CONCLUSION

Plus or minus uncertainty in water measurements or model calibration should be a nullity for purposes of water rights administration. The Director's use of a trim line to exclude junior ground water rights shown by the model to injure the Spring Users' water rights is arbitrary and capricious, an abuse of discretion, and contrary to the law for the reasons discussed herein. By imposing the trim line to exclude junior rights from administration the Director has impermissibly shifted the burden to the Spring Users' to demonstrate injury, when the law demanded that the burden should be on the juniors to prove a defense to administration. For these reasons, the Spring Users respectfully request that the Court reverse the Director's 10% trim line determination.

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RESPECTFULLY submitted, this 23<sup>rd</sup> day of July, 2010.

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CERTIFICATE OF SERVICE

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

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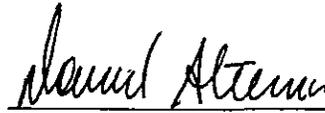
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