

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.

**GROUNDWATER USERS' BRIEF IN SUPPORT
OF PETITION FOR REHEARING**

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.

ATTORNEYS FOR APPELLANTS/CROSS-RESPONDENTS

Randall C. Budge, Candice M. McHugh, and Thomas J. Budge, RACINE OLSON NYE BUDGE & BAILEY, CHARTERED, Pocatello, Idaho.

Representing Idaho Ground Water Appropriators, Inc. , North Snake Ground Water District, Magic Valley Ground Water District (collectively, the “Groundwater Users”)

ATTORNEYS FOR RESPONDENTS/CROSS-APPELLANTS

Daniel V. Steenson, Charles L. Honsinger, and S. Bryce Ferris, RINGERT LAW, CHARTERED, Twin Falls, Idaho.

Representing Blue Lakes Trout Farm, Inc.

John K. Simpson and Travis L. Thompson, BARKER ROSHOLT & SIMPSON, LLP, Twin Falls, Idaho.

Representing Clear Springs Foods, Inc.

ATTORNEYS FOR RESPONDENTS/CROSS-RESPONDENTS

Chris M. Bromley, IDAHO DEPUTY ATTORNEY GENERAL, Boise, Idaho.

Representing the Idaho Department of Water Resources (“IDWR” or “Department”) and the Director of the IDWR

Justin May, MAY SUDWEEKS & BROWNING, LLP, Boise, Idaho.

Representing Rangen, Inc.

Michael C. Creamer and Jeffrey C. Fereday, GIVENS PURSLEY, LLP, Boise, Idaho.

Representing Idaho Dairymen’s Association, Inc. (“Dairymen”)

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INTRODUCTION

Idaho Groundwater Appropriator's, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively, the "Groundwater Users") submit this brief in support of their petition for rehearing filed April 7, 2011. Rehearing is necessary because the *Opinion* fails to address two key sections of the Ground Water Act (the "Act") that contradict the Court's ruling that the Act does not apply to delivery calls made by surface water rights. Rehearing is also necessary to address the issue appealed by the Groundwater Users concerning material injury, and to reconsider whether the futile call doctrine was properly raised on appeal.

Upon rehearing, the *Opinion* should be modified to provide that 1) the Act applies to all calls for the delivery of groundwater, including the calls made by Blue Lakes and Clear Springs (the "Spring Users"); 2) there is not substantial evidence in the record to support the Director's finding of material injury; and 3) the Director's failure to apply the futile call doctrine is arbitrary, capricious, an abuse of discretion and/or is not supported by substantial evidence in the record. The curtailment orders should be set aside and remanded to the Director with instructions to take evidence of the Spring Users' actual use of water, re-determine whether material injury exists and whether their delivery calls are futile, and apply the Act to the facts of this case.

ARGUMENT

- 1. The *Opinion* contradicts Idaho Code sections 42-237b and 42-231 by ruling that the Act does not apply to delivery calls made by surface water rights.**

The *Opinion* concludes that the Act has no affect on the delivery calls made by the Spring Users because they own surface water rights and, it reasons, the Act applies only to delivery calls

made by groundwater rights. (*Opinion* 18-19; see also *Id.* at 25.) To support this ruling, the *Opinion* cites Idaho Code section 42-237a and points out that “[t]here is nothing in the statute regarding the administration of surface water rights.” *Id.* Section 42-237a, however, does not address delivery calls, and therefore does not answer the question of whether the Act applies to delivery calls by surface water rights. That question is answered by the next section of the Act (Idaho Code section 42-237b) which the *Opinion* does not discuss or cite.

a. The Act applies to delivery calls made by senior surface water rights per the plain language of Idaho Code sections 42-237b and 42-231.

Idaho Code section 42-237b defines protocol that senior water users must follow when making a delivery call against junior-priority groundwater rights. It reads:

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority, ... such claimant may make a written statement under oath of such claim to the director of the department of water resources.

(Emphasis added.) By its plain meaning, this statute requires *all* calls for the administration of groundwater to be made pursuant to the Act, regardless of whether the call is made by the holder of a senior surface or groundwater right. The *Opinion*’s ruling that the Act does not govern calls made by surface water rights contradicts the plain meaning of section 42-237b.

In construing the Act, the Court must “give effect to every word, clause and sentence” and adopt a construction that “does not deprive provisions of the statute of their meaning.” *Watkins Family v. Messenger*, 118 Idaho 537, 540 (1990). Had the Legislature intended the Act to govern only delivery calls made by senior groundwater rights, it could have easily stated that

in the Act. Instead, section 42-237b states the opposite. The *Opinion* violates established rules of statutory construction by construing the Act in a manner that deprives section 42-237b of its meaning.

The ruling also contradicts the plain meaning of Idaho Code section 42-231. That section makes it “the duty of the director of the department of water resources to control the appropriation and use of ground water of this state *as in this act provided.*” (Emphasis added.) Under a plain reading of this statute, the Director only has authority to control the use of groundwater in a manner that is consistent with the Act. The *Opinion* effectively instructs the Director to ignore the Act when administering groundwater in response to delivery calls made by surface water rights, contrary to section 42-231.

In construing Idaho Code sections 42-226 and 42-237a, the Court must consider the Act “as a whole without separating one provision from another.” *Watkins*, 118 Idaho at 539. Since Idaho Code section 42-237b brings delivery calls by senior surface water rights under the purview of the Act, and since section 42-231 requires all groundwater administration to comply with the Act, delivery calls by senior surface rights are necessarily subject to all of the provisions of the Act, including the full economic development provision set forth in section 42-226 and the curtailment criteria set forth in section 42-237a.

This is why the district court held that “the rights of the Spring Users are subject to the full economic development provisions of the Ground Water Act and CMR.” (Clerk’s R. p. 82.) Citing Idaho Code section 42-237b, the court reasoned that “under this Court’s plain reading of the language of the Act, any surface water appropriation fed from a hydraulically connected

ground water source regulated by the Act is affected by the Act.” (Clerk’s R. p. 77.) The Groundwater Users cited section 42-237b and the district court decision in their briefing to this Court, making the point that the Act “applies to all calls for the delivery of groundwater, whether made by senior surface or groundwater users.” (*Groundwater Users’ Reply Br.* 9; see also *Groundwater Users’ Open. Br.* 33.)

The *Opinion* critically reverses the district court on this important issue, yet does not address Idaho Code sections 42-237b or 42-231. While the lack of discussion of these key statutes was presumably inadvertent, it nonetheless leaves water users with a decision from this Court that directly conflicts with the plain language of sections 42-237b and 42-231, yet with no explanation of why the plain meaning of those statutes does not prevail.

The plain meaning of Idaho Code sections 42-237b and 42-231 must be given effect “unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results.” *Watkins*, 118 Idaho at 540. If the Court believes that the plain meaning of these statutes contradicts the intent of the Act or leads to absurd results, water users and the Legislature need to understand why. On the other hand, the Groundwater Users believe that further consideration of sections 42-237b and 42-231 in light of the intent of the Act will persuade the Court to honor the plain meaning of these statutes and modify the *Opinion* accordingly.

b. Application of the Act to delivery calls made by surface water rights is consistent with the intent of the Act.

“The primary function of the court in construing a statute is to determine legislative intent and give effect thereto.” *Watkins*, 118 Idaho at 539. The intent of the Act is undisputed. The in-

troductory section of the Act states that its purpose is to achieve “full economic development of underground water resources.” Idaho Code § 42-226. The *Opinion* rightly explains that “[f]ull economic development is the result of optimum development of water resources,” and that optimum development means “maximum use and benefit, and least wasteful use, of this State’s water resource.” (*Opinion* 26.) Thus, the intent of the Act is to obtain the maximum use and benefit of Idaho’s groundwater resources, and Idaho Code sections 42-237b and 42-231 must be construed according to their plain meaning unless it contravenes that intent or leads to absurd results.

The *Opinion* acknowledges that “[t]he policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters,” and that the Act “was the vehicle chosen by the legislature to implement the policy of optimum development of water resources.” (*Opinion* 26, citing *Parker v. Wallentine*, 103 Idaho 506, 513 (1982).) These statements directly contradict the ruling that the Act does not apply to delivery call by surface water rights, creating confusion for both water users and for the Director in making future water administration decisions. (*Opinion* 18-19.) This contradiction must be resolved on rehearing in a manner that gives effect to the intent of the Act.

The intent of the Act is utterly frustrated unless it applies to all calls for the administration of groundwater. The Act enables the goal of maximum beneficial use of groundwater to be achieved by placing reasonable restrictions on the exercise of priority by senior rights: “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of water resources.” Idaho Code § 42-226. Idaho Code section 42-237a defines what constitutes a reasonable exercise of priority by restricting curtailment

to two circumstances (discussed below). The practical effect of the restriction is that senior users are “not absolutely protected in either [their] historic water level or [their] historic means of diversion.” (*Opinion 17*, quoting *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 (1973)). “Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.” *Id.*

By making all senior water users comply with the Act, neither senior surface water nor senior groundwater users can exercise priority in a manner that blocks maximum beneficial use of the ESPA or any other aquifer. In contrast, by excusing surface water rights from complying with the Act when they call for the delivery of groundwater, the *Opinion* enables them to exercise priority in a manner that *does* block maximum beneficial use of Idaho’s groundwater resources, contrary the intent of the Act. It is absurd for one class of senior water users to be precluded from blocking maximum beneficial use of Idaho’s aquifers while allowing another class of seniors to exercise priority in a manner that does block maximum beneficial use. This is especially true in this case where the Spring Users’ water rights, while technically identified as surface water rights, are supplied entirely by groundwater from the ESPA. (R. Supp. Vol. 3, p. 4420, L. 16-26.)

Since construing the Act according to the plain meaning of Idaho Code sections 42-237b and 42-231 is consistent with the intent of the Act and does not produce absurd results, Idaho law requires that the plain meaning be honored. Therefore, the Groundwater Users ask the Court to modify the *Opinion* to confirm that the Act applies to all calls for the administration of groundwater, including the Spring Users’ delivery calls.

c. The curtailment orders should be set aside and remanded to the Director.

The Director failed to directly apply the Act to the facts of this case. (See *Groundwater Users' Open. Br.* 31-40; see also *Groundwater Users' Reply Br.* 8-21.) Therefore, the curtailment orders should be set aside and this case should be remanded to the Director with instructions to apply the curtailment criteria set forth in Idaho Code section 42-237a to the facts of this case. Toward that end, the Groundwater Users must address two interpretations of the Act given in the *Opinion*.

i. Idaho Code section 42-237a defines two circumstances that warrant curtailment of groundwater pumping.

The *Opinion* resists application of the Act on the basis that it “would, in essence, preclude conjunctive management of the Aquifer. Conflicts between senior surface water users and junior ground water users would be ignored as long as withdrawals from the Aquifer and recharge were in balance.” (*Opinion* 25.) This statement misapprehends the purpose of the Act. The Act does not *preclude* conjunctive management; it informs how conjunctive management is to work. It does not instruct the Director to *ignore* conflicts between senior surface water rights and junior groundwater rights, but to resolve those conflicts by administering groundwater based on the criteria set forth in Idaho Code section 42-237a.

Idaho Code section 42-237a is a key component of the Act because it implements the policy that “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.” Idaho

Code § 42-226. Section 42-237a defines what constitutes a reasonable exercise of priority by limiting the curtailment of groundwater pumping to two circumstances:

Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

Idaho Code § 42-237a(g) (emphasis added). By limiting curtailment to these two circumstances, the Act ensures that priority will not be exercised in a manner that blocks maximum beneficial use of Idaho's groundwater resources.

The Director found that groundwater pumping does not exceed the rate of recharge, with groundwater pumping consuming only 2.1 of the 7.5 million acre-feet of annual recharge to the ESPA. (R. Vol. 3, p. 488 ¶ 4.) Consequently, the curtailment orders are justified only if junior-priority groundwater pumping affects the Spring Users in a manner that is *contrary to the declared policy of the Act* (i.e. in a manner that blocks maximum beneficial use of the resource). This curtailment criterion is the keystone of this case, yet the Director made no findings of fact or conclusions of law that directly address this most pivotal issue. (See *Groundwater Users' Open. Br.* 38-40; see also *Groundwater Users' Reply Br.* 18-23.)

The *Baker* decision holds that junior groundwater pumping affects a senior water user in a manner that is contrary to the declared policy of the Act "to the extent that pumping by the juniors may force seniors to go below the 'reasonable pumping levels' set by the IDWA." *Baker*, 95 Idaho at 585. Since the term "pumping level" refers to the elevation of the groundwater table, the Groundwater Users argue that the Act authorizes the exercise of priority by the Spring Users

in order to secure the amount of groundwater overflow that results from maintenance of reasonable groundwater levels, but not to secure the amount of overflow that results from peak groundwater levels because that would block maximum beneficial use of the ESPA. (*Groundwater Users' Open. Br.* 31-36; *Groundwater Users' Reply Br.* 9-12.)

Even if implementation of the provision that a reasonable exercise of priority shall not block full economic development means something other than administration based on reasonable groundwater levels, the provision must be implemented in some fashion. The problem is that the Director did not apply Idaho Code section 42-237a to the facts of this case in any fashion. He simply ordered the curtailment of any groundwater rights that has a measurable impact on spring flows, without making any finding or conclusion that such massive curtailment is consistent with the policy of the Act. (R. Vol. 1, p. 70-71, ¶ 28-31; R. Vol. 3, p. 520, ¶ 30-33.) We are left with nothing more than an inference that the Director must have believed that curtailment meets the requirements of the Act, despite overwhelming evidence suggesting otherwise.

Inferences are not enough to sustain the curtailment orders. The Director has a statutory obligation to provide “a concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248. Nowhere is this more important than in the Director’s application of the Act—the centerpiece of this case.

Since curtailment is justified only if allowing junior groundwater pumping to continue is contrary to the policy of full economic development of the ESPA, Idaho Code section 67-5248 requires the Director to directly make that finding and explicitly identify the facts of record sup-

porting that finding. This is the most important finding of this case and must be taken head-on by the Director whose duty it is to administer groundwater according to the Act.

The most troubling and compelling fact in this regard is the permanent curtailment of 1,049 cfs (enough water to irrigate 52,470 acres) to provide a mere 2.67 cfs to Clear Springs (one quarter of one percent of the water curtailed), and the curtailment of 1,144 cfs (enough water to irrigate 57,220 acres) in order to provide only 10 cfs to Blue Lakes (less than one percent of the water curtailed). If the Director does not believe this to be contrary to full economic development of the ESPA, he must make and support that finding. Groundwater users deserve nothing less.

Because the Director failed to administer the ESPA based on the criteria set forth in the Act, the curtailment orders should be set aside and this case should be remanded to the Director with instructions to make specific findings and conclusions concerning his application of Idaho Code sections 42-237a and 42-226 to the facts of this case.

ii. The Act provides a measure of protection to junior rights.

The *Opinion* suggests that even if the Act applies to delivery calls made by senior surface water rights, it does nothing to protect junior groundwater rights from curtailment. (*Opinion* 18-19.) This ruling misapprehends the relationship between senior and junior rights, and should not be used as a basis to refuse remanding this case to the Director.

Senior and junior water rights are connected by their reliance upon a shared source of water and by their priorities to use that water. Consequently, the exercise of priority by seniors cannot be restricted without also affecting the junior rights that are subject to that exercise of priority. While Idaho Code sections 42-237a and 42-226 restrict the exercise of priority by seniors, the

effect of the restriction is to provide a measure of protection of junior rights. As explained in *Baker*, “[a] necessary concomitant of this statutory matrix is that the senior appropriators are *not entitled to relief* if the junior appropriators, by pumping their wells, force seniors to lower their pumps from historic levels to reasonable levels.” *Baker*, 95 Idaho at 585 (emphasis added). “Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.” *Id.* at 584.

The Act is meaningless if restricting the exercise of priority by seniors does nothing to enable the continued use of groundwater by juniors. Therefore, it would be wrong for the Court to deny remand on the basis that the Act offers no protection to junior rights.

2. The *Opinion* does not address the issue appealed by the Groundwater Users concerning material injury.

Rehearing is also necessary to enable the Court to determine whether there is substantial evidence in the record to support the Director’s finding of material injury to the Spring Users. The Groundwater Users argued that there is no material injury without evidence that the senior would in fact beneficially use additional water. (*Groundwater Users’ Opening Brief* 46-52.) This argument is predicated upon “the constitutional requirement that priority over water be extended only to those using the water.” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* (“*AFRD2*”), 143 Idaho 862, 876 (2007).

The *Opinion* drastically mischaracterizes the Groundwater Users’ argument, asserting instead that “they argue that there must be evidence showing that with more water the Spring Users

could produce fish *and profitably sell them.*” (*Opinion* 29; emphasis added.) The Groundwater Users never argued—either in their briefs or at oral argument—that there is no material injury without evidence of an impact on the *profitability* of the senior’s use of water. This is significant because the *Opinion* upholds the decision of the district court on the basis that CM Rule 42 “does not require showing an impact on the profitability of the senior appropriator’s business.” *Id.* at 30. The *Opinion* does not evaluate whether there is substantial evidence of the Spring Users’ actual use of water and purported need for additional water.

The *Opinion* seems to infer that since the Groundwater Users’ discovery requests asked for fish production records, the Groundwater Users must be arguing that material injury requires evidence of impact to profitability. That is not the case. The discovery requests aimed to discover how the Spring Users use water, whether their claimed need for additional water is justified, whether any additional water needs can be met through conservation efficiencies, and whether curtailment would provide a usable quantity of water. Unlike irrigation needs of farmers, which can be evaluated relatively easily by identifying the number of acres irrigated and the crops grown, determining aquaculture water needs is quite complex. It requires such information as how the facility is designed, how fish are reared, produced, and cycled, how much water is needed to operate a raceway, and how water needs change throughout the year. This information is necessary to determine whether material injury exists and whether curtailment will be futile.

Because the Spring Users refused to produce any information concerning their *use* of water, there is no admissible evidence of material injury. (*Groundwater Users’ Open. Br.* 46-52.) Therefore, the curtailment orders should be set aside for lack of substantial evidence to support

the Director's finding of material injury, and remanded to the Director with instructions to take evidence of the Spring Users' use of water and re-determine whether material injury exists.

3. The same futile call arguments made to this Court were made to the district court.

The *Opinion* acknowledges that the futile call doctrine was appealed to the district court, but declines to address the doctrine on appeal on the basis that the arguments made to the district court were different than the arguments made to this Court. (*Opinion* 32.) This ruling does not reflect reality, as the Groundwater Users made nearly identical arguments to both courts.

The general rule is that “when a party appeals the decision of an intermediate appellate court, the appellant may not raise issues that are different from those presented to the intermediate court.” *State v. Williamson*, 144 Idaho 597, 599 (Ct. App. 2007). This does not mean, however, that the arguments presented to both courts must be identical. In *Centers v. Yehezkely*, the Idaho Court of Appeals decided issues that were not distinctly identified below but that shared a “common nexus” with an issue that was appealed below. 109 Idaho 216, 217 (Ct. App. 1985). The court acknowledged that “it is readily apparent that some deviation exists between the issues advanced in the district court and those now presented to us,” but nevertheless considered them because “[t]he remaining issues, although stated differently from the questions presented to the district court, appear to share a common nexus of subject matter with issue (2) -- whether the broker failed to present a timely and valid full-price offer.” *Id.*

A futile call is defined as “[a] delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water

rights **or** that would result in waste of the water resource.” IDAPA 37.03.11.010.08. Thus, the futile call doctrine takes into account both the amount of time required for the effects of the curtailment to be realized and the likelihood of water being wasted unreasonably as a result of curtailment. The Groundwater Users made both arguments to the district court at to this Court.

To this Court the Groundwater Users argued:

- Since Blue Lakes and Clear Springs chose to conceal their fish production records, there is no evidence in the record that curtailment will enable them to produce more, larger, or healthier fish. This makes their delivery calls “futile” as a matter of law. (*Groundwater Users’ Open. Br.* 53.)
- The futile call doctrine does not simply ask whether a usable quantity of water will reach the calling senior. It asks whether in fact the senior will use the water that shows up. Just because curtailment will at some future date provide water to the senior does not mean the water will arrive at a time and in a quantity that it will in fact be put to beneficial use. A major problem with the curtailment orders is that there is no evidence that Blue Lakes or Clear Springs can or will beneficially use the water that eventually may accrue to them from curtailment. *Id.* at 53-54.
- Since Blue Lakes and Clear Springs decided to conceal fish production information, there is no evidence that these relatively small amounts of water will enable them to actually produce more fish. Even if they can produce more fish, it is important to know how many more fish can be produced, since the futile call doctrine takes into consideration waste of the resource. *Id.* at 54.
- Compounding the lack of evidence that the curtailed water will in fact be put to beneficial use is the amount of time it will take for that water to be realized. CM Rule 10.08. Whereas the drying up of more than 70,000 acres is immediate, the expected to benefit Blue Lakes and Clear Springs will take years to accrue. This time delay is important due to the likelihood that intervening events such as above average precipitation, managed aquifer recharge, or decreased water demand could nullify Blue Lakes’ or Clear Springs’ need or ability to use the water that results from curtailment. *Id.* at 54-55 (internal cites omitted).

- The curtailment orders should be set aside as “futile calls” because there is no substantial evidence in the record that the additional 10 cfs that is expected to accrue to Blue Lakes over time, and the additional 2.67 cfs that is expected to accrue to Clear Springs over time, will enable either of them to produce more, larger, and healthier fish.” *Id.* at 55.

The Groundwater Users made nearly identical arguments to the district court:

- ... the Groundwater Users were prohibited from discovering important information relative to the issues of material injury and futile call, such as the amount of water that Blue Lakes can put to beneficial use, patterns of beneficial water use, the amount of water needed for aquaculture production at different times of the year, whether the amount of water put to use has changed over time, and whether there are feasible alternatives to curtailment. It is very possible that Blue Lakes and Clear Springs cannot produce more or larger or healthier fish with the small amount of water that will result from curtailment, but the record is devoid of such information. *Id.* at 53.
- In light of the fact that it will take more than 100 years for the effects of curtailment to be fully realized by Blue Lakes and Clear Springs, the statement that “delayed response does not make the calls futile” indicates that no amount of delay would be sufficient to render a call futile in the conjunctive management context, and that staged-in curtailment is the only tool available to the Director to minimize the harsh effect of a curtailment that will not increase flows to the calling senior for years.

As explained *supra*, even though aquaculture is a year-round water use, the amount of time required for a senior spring user to see the effects of curtailment is still relevant to the futile call determination. While more than months may be required to render a delivery call futile in the conjunctive management context, it is not reasonable to curtail water rights when the anticipated benefit will take decades to accrue, since a myriad of intervening events such as above-average precipitation, managed recharge, decreased water demand, and market and economic factors could nullify the senior’s water need or ability to use increased spring flows that may eventually arise. *Id.* at 62.

- Notwithstanding the CM Rules’ proscription of wasteful water use, the scope of curtailment is so broad that it encompasses water rights for which only onto the three percent of the quantity curtailed is expected to discharge from the springs that supply Blue Lakes’ and Clear Springs’ water

right, and then only when steady state conditions are reached in 50-100 years. If it is not unreasonably wasteful to sacrifice beneficial water use, hoping that a mere one to three percent of the water can be used by another appropriators, then arguably nothing is. (*Groundwater Users' Open. Br.* 41, filed with the district court, excerpt attached hereto as Appendix A.)¹

- Without evidence that the Spring Users will be able to produce more, larger or healthier fish with the amount of water that will result from curtailment, the Director's determination that their delivery calls are not futile is not supported by substantial evidence in the record.” (*Groundwater Users' Rehr. Br.* 24, filed with the district court, excerpt attached hereto as Appendix B.)

Since the Groundwater Users not only raised the futile call doctrine on appeal to the district court and to this Court, but also made nearly identical arguments to both courts, the issue has been properly preserved and should be decided by this Court. The Groundwater Users therefore ask the Court to address the futile doctrine on rehearing, and to set aside the curtailment orders as futile calls because there is no substantial evidence that curtailment will enable the Spring Users to produce more, larger, or healthier fish. (See *Groundwater Users' Open. Br.* 52-55.)

CONCLUSION

This landmark case is fundamentally about how the Act operates in the context of a call for the delivery of groundwater by the holder of a senior surface water right. Based on the holding of the *Opinion*, the Act has no effect at all. That holding must be modified because the Act expressly applies to delivery calls for groundwater made by senior surface water rights, and because it is consistent with the intent of the Act to apply to delivery calls made by surface water

¹ While this argument is made under the full economic development section of the brief, it is incorporated in the futile call section of the brief: “The futile call doctrine is discussed *supra* relative to the Curtailment Orders’ interference with full economic development of the ESPA.” *Id.* at 61.

rights. Therefore, the Groundwater Users ask the Court to modify the *Opinion* to confirm that the Act applies to the Spring Users' delivery calls. And since the Director failed to make specific findings concerning the application of the Act to the facts of this case, as required by Idaho Code section 67-5248, the curtailment orders should be set aside and this case should be remanded to the Director with instructions to make specific findings concerning his application of the curtailment criteria set forth in Idaho Code sections 42-237a and 42-226.

The *Opinion* should also be modified to confirm that there is not substantial evidence in the record to support the Director's finding of material injury, and that the Director's failure to apply the futile call doctrine is arbitrary, capricious, an abuse of discretion and/or not supported by substantial evidence in the record. The remand order should therefore include instructions to the Director to take evidence of the Spring Users' actual use of water and re-determine whether material injury exists and whether their delivery calls are futile.

RESPECTFULLY SUBMITTED this _____ day of April, 2011.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED



Randall C. Budge
Candice M. McHugh
Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of April, 2011, the foregoing document was served on the persons below in the manner(s) indicated:

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Daniel V. Steenson Charles L. Honsinger S. Bryce Farris RINGERT LAW, CHARTERED P.O. Box 2773 Boise, Idaho 83701-2773 dvs@ringertclark.com clh@ringertclark.com sbf@ringertclark.com	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, Idaho 83701-2139 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Garrick Baxter Chris Bromley IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098 garrisck.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail

Jeff Fereday Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY, LLP P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Michael S. Gilmore IDAHO ATTORNEY GENERAL'S OFFICE P.O. Box 83720 Boise, Idaho 83720-0010 mike.gilmore@ag.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
J. Justin May MAY SUDWEEKS & BROWNING, LLP P.O. Box 6091 Boise, Idaho 83707 jmay@may-law.com	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Robert E. Williams FREDRICKSEN WILLIAMS MESERVY P.O. Box 168 153 E. Main Street Jerome, Idaho 83338-0168 rewilliams@cableone.net	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Josephine P. Beeman BEEMAN & ASSOCIATES 409 W. Jefferson Boise, Idaho 83702 jo.beeman@beemanlaw.com	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail



THOMAS J. BUDGE

Appendix A

Excerpts from the *Groundwater Users' Opening Brief* filed with the district court on January 9, 2009, Gooding County Case No. CV-2008-444.

If it is not unreasonably wasteful to sacrifice a beneficial water use, hoping that a mere one to three percent of that water can be used by another appropriator, then arguably nothing is. The amount of water that effectively wasted further demonstrates that the scope of curtailment is overbroad and unreasonably interferes with full economic development of the ESPA.

- C. It will take decades for increased spring discharges to be fully realized, and it is not clear that Blue Lakes and Clear Springs will be able to grow more or larger or healthier fish with the small amount of additional water.**

The gross disparity between the amount of water use that is being curtailed and the fractional return to Blue Lakes' and Clear Springs' water rights is compounded by the amount of time required for that return to be realized. It will take close to 100 years for the effect of curtailment to be fully realized by Blue Lakes and Clear Springs. (Ex. 462, 463; Wylie, Tr. p. 874, L. 20-p. 878, L. 17.)

In responding to a water delivery call, if it will take an unreasonable amount of time for the effects of curtailment to reach the calling senior water user, then the Director has a duty to declare the call futile. IDAPA 37.03.11.010.08; *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P2d 1220, 1223 (1976). Until now, Idaho appellate courts have not considered what constitutes a reasonable amount of time for the effects of curtailment to be realized in the conjunctive management context. The determination turns primarily on whether the water will show up in time for the senior appropriator to make beneficial use of it. For example, a delivery call for irrigation water will be deemed futile if the water cannot be delivered by the end of the irrigation season since the senior appropriator would not then be able to put the water to beneficial use.

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Department historically licensed aquaculture facilities based on maximum facility volume and not based on whether the maximum authorized amount was ever put to beneficial use. (Luke, Tr. p. 649, L. 13-20; Dreher, Tr. p. 1141, L. 6-p. 1147, L.4; p. 1348, L.9-p. 1350, L. 22.) It appears that the Department has not—either in these proceedings, in licensing Blue Lakes' and Clear Springs' water rights, or in the Snake River Basin Adjudication—evaluated the extent of beneficial use of Blue Lakes' or Clear Springs' water rights. Consequently, it was improper for the Hearing Officer to assume that Blue Lakes and Clear Springs need to divert at their maximum authorized rates of diversion in order to accomplish the beneficial use for which their water rights were issued.

In any case, the Ground water Users were prohibited from discovering important information relative to the issues of material injury and futile call, such as the amount of water that Blue Lakes and Clear Springs can put to beneficial use, patterns of beneficial water use, the amount of water needed for aquaculture production at different times of the year, whether the amount of water put to use has changed over time, and whether there are feasible alternatives to curtailment. It is very possible that Blue Lakes and Clear Springs cannot produce more or larger or healthier fish with the small amount of water that will result from curtailment, but the record is devoid of such information. Blue Lakes and Clear Springs were excused from substantiating their allegations of material injury, and the Ground water Users have been deprived of a meaningful opportunity to defend against the allegations.

Since Blue Lakes and Clear Springs chose to hide the information necessary to challenge their allegations of material injury, they likewise were precluded from presenting any

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reasonably improve their means of diversion just as a shallow well is required to drill deeper before being authorized to call out junior-priority ground water users. The Ground Water Users therefore ask this Court to declare that Blue Lakes and Clear Springs are not absolutely protected and that "some modification of their rights [is necessary] in order to achieve the goal of full economic development." *Baker*, 95 Idaho at 584.

V. THE DIRECTOR ERRED BY RULING THAT THE TIME REQUIRED FOR CURTAILED WATER USE TO REACH THE SPRINGS THAT SUPPLY BLUE LAKES' AND CLEAR SPRINGS' WATER RIGHTS HAS NO BEARING ON WHETHER THEIR DELIVERY CALLS ARE DEEMED FUTILE.

The futile call doctrine is a well-established principle of water administration under Idaho law, and applies in the administration of both surface and ground water resources, and in fact was the basis of the Director's denial of the Rangen, Inc., delivery call. (*In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-2551, and 36-7694*, Second Amended Order, IDWR, May 19, 2005.) As defined in CM Rule 10.08, a futile call is "[a] delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource." IDAPA 37.03.11.010.08. The futile call doctrine is discussed *supra* relative to the Curtailment Orders' interference with full economic development of the ESPA. Additional consideration of the futile call doctrine is necessary here because the Final Order appears to eliminate considerations of the timing element of the doctrine in the conjunctive management of ground water resources.

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The Hearing Officer initially acknowledged that the amount of time required for Blue Lakes' and Clear Springs' to receive additional water from curtailment bears on whether their delivery calls are deemed futile, stating that "the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks."

(Recommended Order, R. Vol. 16, p. 3709.) However, the Hearing Officer subsequently appears to have changed course and disregarded the timing aspect of the futile call doctrine by ruling that no amount of delay can render a delivery call futile in the conjunctive management context: "The amounts of water set forth in the targeted goals are usable by the Spring Users. If these targets are met the injuries that have developed over a period of years as the consequence of ground water pumping will be ameliorated. The delayed response time does not make the calls futile."

(Response Order, R. Vol. 16, p. 3843.) (emphasis added). In light of the fact that it will take more than 100 years for the effects of curtailment to be fully realized by Blue Lakes and Clear Springs, the statement that "delayed response does not make the calls futile" indicates that no amount of delay would be sufficient to render a delivery call futile in the conjunctive management context, and that staged-in curtailment is the only tool available to the Director to minimize the harsh effect of a curtailment that will not increase flows to the calling senior for years.

As explained *supra*, even though aquaculture is a year-round water use, the amount of time required for a senior spring user to see the effects of curtailment is still relevant to the futile call determination. While more than months may be required to render a delivery call futile in

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the conjunctive management context, it is not reasonable to curtail water rights when the anticipated benefit will take decades to accrue, since a myriad of intervening events such as above-average precipitation, managed recharge, decreased water demand, and market and economic factors could nullify the senior water user's need or ability to use increased spring flows that may eventually arise.

The Curtailment Orders improperly apply the CM Rules by requiring a curtailment response that is not reasonable in time or quantity, thus violating the principles of beneficial use and futile call, and are therefore arbitrary, capricious, and/or constitute an abuse of the Director's discretion. The Ground Water Users ask this Court to affirm that the futile call doctrine, as defined in CM Rule 10.08, applies to the conjunctive administration of Idaho ground water resources, and rule that the Director must make a specific determination of a "reasonable time" period within which water generated from a curtailment must be realized and be able to be put to beneficial use by a senior water user to avoid the denial of the call based upon the futile call doctrine. Based on the foregoing and for the additional reasons explained in section I.C above, the Ground Water Users ask that Blue Lakes' and Clear Springs' delivery calls be denied as futile calls. Alternatively, that the scope of curtailment be narrowed to assure that a significant portion of the water curtailed will accrue to Blue Lakes and Clear Springs within a reasonable time of curtailment.

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Appendix B

Excerpts from the *Groundwater Users' Rehearing Brief* filed with the district court on August 21, 2009, Gooding County Case No. CV-2008-444.

Spring Users had the option to supply that information but chose not to, the Spring Users must suffer the consequence. It would be an impossible burden to require the Ground Water Users to prove that curtailment would be futile while allowing the Spring Users to conceal the information needed to make that showing.

Without evidence that the Spring Users will be able to produce more, larger or healthier fish with the amount of water that will result from curtailment, the Director's determination that their delivery calls are not futile is not supported by substantial evidence in the record.

VI. The Director cannot adequately apply the law of full economic development without understanding whether, or the extent to which, curtailment will enable the Spring Users to produce more, larger or healthier fish.

The extent to which curtailment will enable the Spring Users to produce more, larger or healthier fish is equally relevant to the law of full economic development. Even if curtailment will enable the Spring Users to produce a few more fish, if curtailment unreasonably interferes with full economic development of the ESPA then the Spring Users' delivery calls must be denied nonetheless. As applied to the facts of this case, the law of full economic development cannot tolerate the permanent curtailment of more than 70,000 irrigated acres if it will not enable Blue Lakes and Clear Springs to produce more fish. Further, even if the Spring Users could produce some additional fish from curtailment, the economic benefit must be factually determined and compared with the economic injury that will result from the curtailment of 70,000 plus acres. Yet, there is still no evidence in the record that curtailment will enable Blue Lakes or Clear Springs to produce any more, larger or healthier fish. Thus, if the Director is deemed to have adequately applied Idaho Code § 42-226, his decision is arbitrary and capricious and not supported by evidence in the record. Additionally, if the Director is deemed to have