

Docket No. 37308-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT
NOS. 36-2356A, 36-7210 & 36-7427 (Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT
NOS. 36-4013A, 36-4013B & 36-7148 (Clear Springs Delivery Call)

BLUE LAKES TROUT FARM, INC. and CLEAR SPRINGS FOODS, INC.,
Cross-Appellants/Respondents,

v.

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

v.

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

v.

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

SPRING USERS JOINT REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Gooding County
Honorable John M. Melanson, District Judge, Presiding

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INTRODUCTION

On appeal to this Court, the Spring Users (Clear Springs Foods, Inc. and Blue Lakes Trout Farm, Inc.) raise two narrow issues arising from the rationale given by the Director for excluding the majority of junior ground water rights that deplete the Spring Users' water supplies from conjunctive administration. That rationale is what the Director calls "model uncertainty."

The Snake River Basin Adjudication ("SRBA") District Court established that all water rights decreed in the Snake River Basin are considered interconnected unless proven otherwise. [R. Vol. 13 at 3057-61](#). As such, all rights are subject to conjunctive administration. In 2002, the SRBA Court authorized IDWR to form water districts and administer all surface and ground water rights pursuant to chapter 6 of Title 42. [R. Vol. 13 at 3079, 3083](#). The SRBA Court further recognized the immediate need for interim administration to protect senior surface water rights from injury. *See id.* at 3080.

After the SRBA proceedings, the Spring Users submitted the water delivery calls that are the subject of this appeal. In his 2005 orders, the Director determined that all ground water rights cause depletions to the Snake River and its tributary spring flows equal to their withdrawals from the ESPA, and that some of the Spring Users' senior rights are being injured by junior ground water diversions. The Director used a computer model called the Eastern Snake Plain Aquifer Model ("ESPAM" or "Model") to quantify the impact of junior ground water rights on the Spring Users' water rights to establish a collective mitigation obligation as an

alternative to curtailment. The Model is calibrated to water flows in several reaches of the Snake River.¹

The Director determined that there is uncertainty in the Model's outputs, and that the greatest source of uncertainty comes from the Snake River measurements used to calibrate the Model. The Director used the "good" rating of Snake River gages as accurate to plus or minus (+/-) 10 % to represent this uncertainty. This rating means that the actual flow associated with a 100 cfs gage measurement could be as high as 110 cfs or as low as 90 cfs. [Tr. at 1562-63](#). The Director applied this plus or minus 10% uncertainty factor to his administration of junior ground water rights to create what has been called the "trim-line."² Using this "trim-line," the Director excluded from administration all junior ground water rights which, according to the Model, deplete spring flows by 10% or less than the quantity of their depletions from the ESPA. The ground water rights excluded by the trim-line account for over 40% of the depletions to the Spring Users' water supplies caused by junior ground water rights in the ESPA.³ The Director's

¹ Simplistically, calibration is a process of verifying Model outputs or results against actual water measurements. The Director found that the model is well calibrated.

² Hearing Officer Gerald Schroeder and the district court recognized that the Director's model uncertainty and trim-line determinations were not supported by sound science. They concluded that, although these determinations are flawed, the Director did not abuse his discretion in adopting them until better methods are developed to determine the impact of ground water diversions on spring flows and to deal with model uncertainty in administration. [Clerk's Rec. at 67-71](#). The Director adopted, and the district court, affirmed the Hearing Officer's finding that: "Continuing efforts should be made to improve the accuracy of all scientific conclusions." "If that produces more reliable results, those results should be used in the future." [R. Vol. 16 at 3845-46](#).

³ The results for IDWR's model runs for curtailments at various priority dates without a trim-line for Blue Lakes are shown in [Ex. 462](#), and for Snake River Farm are shown in [Ex. 463](#). For Blue Lakes' 1973 right, [Ex. 462](#) shows that the impact of all junior ground water to the Devil's Washbowl to Buhl Gage spring reach is 88 cfs. With the trim-line, per the 2005 order, the impact to the reach is an average of 51 cfs ([R. Vol. 1 at 61, ¶ 77](#)). Thus, the trim-line reduced 42% (37/88) of the cumulative impact of junior ground water pumping to the Devil's Washbowl to Buhl Gage reach, and 44% (8/18) of the cumulative impact of junior ground water pumping to Blue Lakes springs.

rationale for this determination is the mistaken assumption that, due to the plus or minus 10% error factor, ground water depletions beyond the trim-line could have no impact on spring flows.

The most scientifically defensible interpretation of the Model is that junior ground water diversions will cause the depletions predicted by the Model. In other words, it is most likely that the Model's outputs show actual spring depletions caused by junior ground water rights.

On appeal, the Spring Users challenge the use of a plus or minus uncertainty factor to skew administration in favor of either senior or junior water right holders. A plus or minus uncertainty factor is a nullity for purposes of administration because there is an equal probability that junior ground water depletions cause 10% more injury to senior spring rights or 10% less injury to senior spring rights. Accordingly, gage measurement or model uncertainty should not be used to exclude from administration hydraulically connected junior ground water rights shown by the Model to injure the Spring Users' water rights.

IDWR's and IGWA's responses to the Spring Users' appeal wholly miss the point. IDWR spends much of its response addressing one phrase from the introduction of the Spring Users' *Joint Opening Brief* regarding the burden of proof – an issue that is not even presented on appeal. IGWA spends most of its response arguing that the Director has an “independent duty” to assert the futile call doctrine – even though this Court specifically held that the obligation to

Exhibit 463 does not show results for a 1964 curtailment date. It shows that that the impact of post 1961 ground water rights on the Buhl Gage to Thousand Springs reach is 81 cfs. Presumably, post 1964 ground water rights would have a somewhat lower impact on the reach. The Director's 2005 Order concluded that the impact of post 1964 ground water pumping within the trim-line on the reach is an average of 38 cfs, ranging as high as 62 cfs (R. Vol. 3 at 502-503, ¶ 71), which is 47% of 81 cfs. So the magnitude of the cumulative impact of junior ground water rights that the trim-line excluded from administration for the Clear Springs and Blue Lakes water delivery calls is similar, over 40%.

assert this defense is on the holder of the junior water right(s), *American Falls Reservoir Dist. No. 2, et al. v. Idaho Dept. of Water Resources, et al.*, 143 Idaho 862, 878 (2007) (“AFRD#2”), and even though the district court held that futile call cannot be “cloaked in part of the material injury determination,” [Clerk’s Rec. at 65](#).⁴

The law in Idaho is clear: All water rights in the Snake River Basin and ESPA, unless otherwise identified on their individual decrees, are deemed hydraulically connected for purposes of conjunctive administration. [R. Vol. 13 at 3057](#); *A&B Irr. Dist. v. Idaho Cons. League*, 131 Idaho 411, 421-22 (1998).⁵ As such, Rule 40 requires that all hydraulically connected ground water rights contributing to the material injury of senior water rights must be administered either by curtailment or approval of a plan that mitigates the injury. There is no exception in the CM Rules or in Idaho’s water distribution statutes. *See* I.C. § 42-607; CM Rule 40.

The Director’s decision to exclude from administration hydraulically connected junior ground water rights causing material injury to the Spring Users’ water rights impermissibly shifted the burden to the Spring Users to re-prove the hydrologic connection established through the SRBA and demonstrate why those rights should be administered. This is contrary to the SRBA Court’s “Connected Sources General Provision” established in its Basin-Wide 5 decision and the respective burdens placed upon juniors in conjunctive administration once the hydrologic

⁴ Importantly, IGWA did not appeal this determination by the district court.

⁵ Pursuant to the SRBA Court’s order on Basin-Wide Issue No. 5, all water rights decreed in the Snake River Basin are considered interconnected unless proven otherwise. [R. Vol. 13 at 3057](#). Unless a partial decree issued by the SRBA Court indicates the water derives from a “separate source,” the presumption of hydrologic interconnection 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.

connection is established. A leading commentator on the subject has summarized the application of the respective burdens as follows:

[W]hen a senior appropriator seeks to enjoin a junior diversion, the senior – the person seeking judicial intervention to change an existing situation – must prove the water sources for the two diversions are connected. But once hydrologic connection is shown, it becomes probable that the junior diversion interferes with the senior right, if the senior’s source is fully appropriated by rights prior to the junior diversion. Then the junior appropriator – the person arguing against probabilities – must show his particular water use somehow does not cause interference.

Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L.Rev. 63, 92-93 (1987).⁶

The Director had no authority to force the Spring Users to re-prove hydrologic connection with junior ground water rights in the ESPA, a decision already made by the SRBA Court. The Director’s decision to exclude junior ground water rights causing injury to the Spring Users’ senior rights based on model uncertainty is without support in the law, and therefore should be reversed.

ARGUMENT

I. The Director Wrongly Excluded Junior Ground Water Rights Causing Injury from Administration Based on a Plus or Minus Model Uncertainty Factor.

IDWR and IGWA provide no meritorious reasons to support the Director’s use of “model uncertainty” to exclude junior ground water rights from administration. Instead, both parties suggest excluding ground water rights from administration is acceptable if there is a chance that those diversions might not impact the Spring Users’ water supplies. According to IDWR’s own

⁶ See also, *Memorandum Decision and Order on Petitions for Rehearing* at 11-12 (Nov. 2, 2010) (*A&B Irr. Dist. v. IDWR et al.*, Minidoka County Dist. Court, Fifth Jud. Dist., Case No. 2009-647).

expert, the most scientifically defensible, highest probability interpretation of Model results is that they accurately predict the impacts of ground water withdrawals on spring flows. [Tr. at 818](#). Although there is a possibility that actual impacts from ground water diversions outside the “trim-line” may be less than predicted, it is equally likely that the impacts are greater than predicted. Accordingly, IDWR’s presumption of zero impact is no better than the presumption that the impact is double. Consequently, the uncertainty is a nullity for purposes of administration and the best estimate is the modeled result. Since the Director is required to utilize the best available science to administer all hydraulically connected junior ground water rights that cause injury to the Spring Users’ senior surface water rights, the use of a “trim-line” to exclude certain juniors on the basis of model uncertainty is arbitrary and capricious and not supported by Idaho law.

No statute or rule authorizes the Director to use a plus or minus 10% model uncertainty as a basis to exclude hydraulically connected ground water rights from administration within an organized water district. Just the opposite, Idaho law requires all juniors that cause injury to a senior on a connected water source to be subject to water right administration. Article XV, § 3 of the Idaho Constitution and I.C. § 42-607 require the Director and watermasters to distribute water within organized water districts in times of shortage to supply prior water rights. The Conjunctive Management Rules (“CM Rules”) implement these constitutional and statutory provisions. In response to a senior water delivery call, the CM Rules first require the Director to determine whether junior ground water rights are causing material injury to the senior. CM Rule 40. Upon a finding of material injury, the CM Rules require the Director, acting through the

watermaster to: “Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district.”

CM Rule 40.01.a.

The CM Rules do not exempt junior ground water rights from priority administration based on model or measurement uncertainty. The CM Rules explicitly anticipate the use of computer modeling to simulate the impacts of junior ground water diversions on senior surface water rights. CM Rules 31.02, 43.03.e, 50.01. Nothing in the CM Rules suggests that model or measurement uncertainty is a basis for excluding junior ground water rights that are demonstrated by model simulations to injure senior surface water rights from administration.

Nor do the CM Rules quantify a minimum impact standard for priority administration. The cumulative impacts of junior ground water diversions are among the factors the Director is to consider in making the material injury determination:

Whether the exercise of junior-priority ground water rights individually or *collectively* affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the *multi-year and cumulative impacts of all ground water withdrawals* from the area having a common ground water supply.

CM Rule 42.01.c (emphasis added).

Accordingly, the CM Rules require administration of all junior rights by curtailment or mitigation, whether the impact from a well is direct and immediate, or is cumulative with other wells over time. The Director’s use of alleged model uncertainty to exclude certain juniors directly contradicts the CM Rules.

Notwithstanding the lack of legal support for its theory, IDWR also alleges that without the “trim-line” administration would have resulted in too much curtailment. *IDWR Br.* at 52. IDWR juxtaposes the concept of “too much curtailment” with the general policy of “full economic development.” *See* I.C. § 42-226; CM Rule 20. However, the plus or minus 10% “trim-line” has nothing to do with full economic development of the ESPA. Indeed, if “too much curtailment” is a substantive standard for water right administration, then what would stop the Director from refusing to administer any junior priority water rights?

In arguing in favor of the CM Rules’ constitutionality to the district court in the *AFRD #2* litigation, IDWR represented that Rule 20 was merely a general “hortatory” policy statement, not a substantive standard to apply:

For instance, Rule 20.03 (‘Reasonable Use of Surface and Ground Water’) is a ‘General Statement of Purpose and Policy’ that recites policy language from the Idaho Constitution and the Idaho Code regarding reasonable use, and full and optimum development of the state’s water, but imposes no such standards or requirements of its own. The Rule does not require, instruct or authorize the Director to apply the stated policies in any particular way, or to reach any particular outcome. Rule 20.03 is, in name and substance, a ‘merely hortatory’ statement of general policy and purpose.

[R. Vol. 12 at 2731.](#)

Now IDWR takes the opposite position and argues that the Director’s application of the “trim-line” was in “furtherance of his duty under the CM Rule 20.03 to apply all principles of the prior appropriation doctrine.” *IDWR Br.* at 52-53. IDWR cannot have it both ways and attempt to transform the general policy statements in Rule 20 into a substantive standard to preclude administration of junior rights causing injury.

Moreover, contrary to IDWR's theory, neither model uncertainty nor a reference to "full economic development" allows junior rights to injure senior rights. If a junior ground water right injures a senior surface water right in an organized water district, the junior right is subject to administration under the law. *See* IDAHO CONST. art. XV, § 3; I.C. § 42-607; CM Rule 40.01. The Director and watermasters must administer all water rights known to contribute to material injury to a senior right. CM Rule 40. Full economic development does not mean that only some juniors are administered while others are free take water from a senior. Indeed, the Director is prohibited from allowing any juniors to take water away from the Spring Users' senior rights. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) ("to diminish one's priority works an undeniable injury to that water right holder."); *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away.").

Despite IDWR's insinuation, curtailment is not the sole option for conjunctive administration. *IDWR Br.* at 52. Any junior right causing injury has the option to provide mitigation in order to continue to divert out-of-priority.⁷ *See* CM Rule 40.02.c; 43. The Rules implement "full economic development" of the water resource by allowing for mitigation and phased-in curtailment obligations which lessen the "economic impact of immediate and complete curtailment." CM Rule 40.01.a; 43. Accordingly, IDWR's argument that "too much

⁷ Indeed, since 2005, IGWA has filed multiple replacement water plans and mitigation plans and has avoided any curtailment. *IGWA Open. Br.* at 12.

curtailment” required a 10% “trim-line” is not supported by Idaho law and directly contradicts the plain language of the CM Rules.

Similar to IDWR’s response, IGWA provides no lawful support for the Director’s use of a 10% “trim-line” to exclude certain ground water rights from administration. Instead, IGWA misrepresents the record by asserting that the trim-line “exclude[s] from curtailment those ground water rights located so far from the target spring outlets that [the] ESPA Model predicted their curtailment would have no measureable impact on spring flows.” *IGWA Br.* at 22, 45.⁸ In reality, the use of a “trim-line” wrongly exempted 90% of the acres irrigated by rights junior to Clear Springs’ injured senior right and 80% of the acres irrigated by rights junior to Blue Lakes’ injured senior right from any administration. [R. Vol. 16 at 3711](#).

IGWA cannot dispute that the uncertainty in the modeled results is equally likely to understate the impact of junior ground water diversions on a particular river reach. Moreover, the model shows that junior rights outside the trim-line cumulatively contribute to the injury suffered by the Spring Users. *See supra*, n. 3.

In sum, any model uncertainty cannot be applied one way to make the definitive claim that IDWR and IGWA advance. Although modeled results may overstate a ground water diversion’s impact on a spring resource, they are just as likely to understate that impact. Any

⁸ The arguments by the Director and IGWA are contrary to the order on Basin-Wide Issue No. 5, which determined that, absent a specific finding to the contrary, all waters in the Snake River Basin are hydraulically connected. [R. Vol. 13 at 3057](#). The Director’s assertion that administration of water users outside the trim-line “*could* provide zero benefit” or “*could* contribute no water” is legally and factually wrong. *IDWR Br.* at 51. Likewise, IGWA’s assertion that administration is inappropriate because there would be “no measurable impact on spring flows” contradicts with the interconnected nature of all of the water rights in question. *IGWA Br.* at 22 & 45. There is no evidence in the record that the decrees for the water rights identify a separate source. As such, they are interconnected and must be administered when they are found to be contributing to the material injury.

uncertainty is a nullity. The modeled results represent the best prediction of the juniors' injury to the Spring Users' water rights using the best available science. Therefore, the Director wrongly applied a 10% model uncertainty to exclude from administration junior ground water rights causing injury to the Spring Users' senior surface water rights. The Director's decision was arbitrary and capricious and contrary to Idaho law. This Court should reverse the Director accordingly.

II. The Director Unconstitutionally Shifted the Burden of Proof to the Spring Users.

The Director does not even respond to the Spring Users' argument that application of the trim-line unconstitutionally shifted the burden to the Spring Users. IGWA's only response is that the Director should unilaterally apply the futile call doctrine. This argument, however, is without merit and, if accepted, would require the Court to rewrite Idaho water law – including the recent *AFRD#2* decision.

This Court, in *AFRD#2*, confirmed the burdens of proof and evidentiary standards that must be applied in conjunctive administration:

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.

131 Idaho at 878 (emphasis added).

The Director must first make a material injury determination. The CM Rules provide a list of elements for the Director to consider. CM Rule 42. These factors do not include a "futile call" determination. *Id.* Indeed, whether the call is futile is not a consideration in the material

injury determination phase. Rather, “once the initial determination is made ... *the junior then bears the burden*” to assert a defense – which can include that the call is futile. *AFRD#2, supra* (emphasis added).⁹ Importantly, however, even if a call is deemed futile, the CM Rules do not exempt junior ground water rights from administration because their impact on a senior right may be attenuated. To the contrary, the CM Rules provide that:

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, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

CM Rule 20.04.

Former Director Dreher further explained that the application of “futile call” in surface water administration does not apply to conjunctive administration, where the injury from ground water diversions can take several years to show up at the spring source. [Tr. at 1368-69](#).

Notwithstanding the law, IGWA asserts that nothing prevents the Director from considering futile call during the material injury analysis. IGWA claims that a contrary result – one consistent with the requirements of *AFRD#2* – would “treat the Director as nothing more than a judge of claims and counterclaims to water, rather than an agent of the State with an affirmative duty to administer water resources in accordance with Idaho law.” *IGWA Br.* at 45-46. This argument is at odds with this Court’s precedent and well established water law. *See AFRD#2,*

⁹ Whereas a material injury determination considers whether the junior priority diversion are hindering or impact the exercise of a senior water right, CM Rule 10.14, a futile call determination considers whether curtailment will satisfy the senior water right “within a reasonable time of the call,” *id.* at 10.08. The questions are different.

supra (holding that the Director makes a material injury determination *then* the *junior* asserts defenses, including futile call).

The district court warned that conflating “aspects of futile call” with “the material injury determination” would “effectively circumvent[]” the burdens of proof identified by *AFRD#2*. [Clerk’s Rec. at 65](#). IGWA did not challenge this holding and cannot attempt to raise it as an issue at this late stage of the appeal.

Contrary to IGWA’s assertions, there is a clear demarcation of evidentiary standards and burdens in the administrative process. Once the Director determined that the Spring Users’ senior surface water rights were being materially injured by hydraulically connected junior ground water 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*.

Here, the Director did not shift the burden and, instead, unilaterally exempted a majority of the junior ground water rights contributing to material injury from administration. *Supra*. Such actions have resulted in a de facto futile call determination – effectively shifting the burden onto the Spring Users to prove that hydraulically connected water rights known to be contributing to the material injury should be subject to administration.¹⁰ The Director’s decision conflicts with Idaho and unlawfully shifted the burden to Spring Users to prove why juniors outside the trim-line should be administered in the first place. This Court should reverse the Director accordingly.

¹⁰ The decision effectively reverses the SRBA Court’s decision in Basin-Wide 5 and the “connected sources” general provision applicable to all junior ground water rights in the ESPA. Since the issue of interconnection has been legally established, the Spring Users do not carry the burden to re-prove that junior ground water rights are subject to conjunctive administration.

III. The Spring Users Have Not Appealed the Burden of Proof.

IDWR and IGWA disregard much of the Spring Users' arguments and instead respond to an issue that is not even before the Court. Selecting one phrase from the Spring Users' *Joint Opening Brief* (p. 9), IDWR argues that the appropriate burden of proof is a preponderance of the evidence. *See IDWR Br.* at 53-61; *see also IGWA Br.* at 44 (joining the argument). Neither IDWR nor IGWA appealed the burden of proof applied by the district court and cannot now appeal the issue. *See* I.A.R. 35(a)(4); *Kugler v. Drown*, 809 P.2d 1166, 1170 (Idaho Ct. App. 1991) ("Failure of the appellant to include an issue in the statement of issues . . . will eliminate consideration of that issue on appeal."). Moreover, IDWR's argument that the Spring Users are improperly appealing the issue is nonsensical. The claim is nothing more than an attempt to have this Court address an issue that IDWR itself recently raised in an appeal of a separate case. *See A&B Irr. Dist. et al. v. IDWR et al.* (Appeal No. 38193-2010).

The burden of proof issue is not pending before the Court in this case – a fact that was made clear in the Spring Users' August 27, 2010 *Motion to Deny City of Pocatello's Petition to Appear as Amicus Curiae*. The Spring Users responded to the City of Pocatello's assertion – identical to IDWR's and IGWA's present arguments – that the Spring Users were attempting to make the burden of proof an issue on appeal in this case. "Contrary to Pocatello's second bullet item describing the Spring Users' arguments, *Pet.* at 4-5, the Spring Users have not questioned the standards to apply in conjunctive administration." *Motion to Deny* at 6. Nothing has

changed since the Spring Users filed their motion. The issue is not before the Court in this case.¹¹

IV. The Issue of Conservation Efficiencies and Alternate Means of Diversion Is Not Before the Court on Appeal.

For the first time in their reply brief, IGWA asserts error in the Director's alleged refusal "to consider efficiencies or alternate means of diversion." *IGWA Br.* at 42-44. This issue, however, has never been identified as an issue on appeal. *See Clerk's Rec. at 128.* The matter was not discussed in IGWA's opening brief. As such, IGWA is foreclosed from raising the issue in its reply brief. *See Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 211 (2007); *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508 (2004) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. I.A.R. 35. A reviewing court looks to the initial brief on appeal for the issues presented on appeal.").

That notwithstanding, the Director did consider the Spring Users' diversion efficiencies and concluded their operations are reasonable and that no alternate means of diversion are necessary. In the original Blue Lakes Order, the Director specifically held that "Based on the results from the field inspection on April 11, 2005, described in Finding 66, Blue Lakes Trout is employing reasonable diversion, conveyance efficiency, and conservation practices." *R. Vol. 1*

¹¹ In addition, the Honorable Eric J. Wildman recently issued an order denying IDWR's and IGWA's petitions for rehearing on the issue concerning the proper burden of proof and evidentiary standards to apply in conjunctive administration in the context of a separate delivery call case. In his November 2, 2010 *Memorandum Decision & Order on Petitions for Rehearing*, Judge Wildman, like Judge Melanson, rejected IDWR's arguments, which were identical to the arguments offered in its response brief in this case. *See A&B Irr. Dist. v. IDWR et al.* (Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2009-647).

at 59. Indeed, the Director identified possible alternate diversion efficiencies but concluded that “it is not reasonable to require Blue Lakes Trout to incur the costs for such a system.” *Id.*

Finally,

Based on the results from the field inspection on April 11, 2005, described in Finding 66, there are no alternate reasonable means of diversion or alternate points of diversion that Blue Lakes Trout should be required to implement.

Id.

The Director made similar findings with respect to Clear Springs. *R. Vol. 3 at 501-02.*

With the exception of a leaking “spring collection box,” which was subsequently repaired, the Director concluded that Clear Springs’ diversions were reasonable.

Based on the results from the field inspection on May 5, 2005, described in Finding 64, other than the collection box that is in disrepair Clear Springs is employing reasonable diversion, conveyance efficiency, and conservation practices at the Snake River Farm. Other than repairing the collection box, no other means for using the existing facilities and water supplies at the Snake River Farm were identified. ...

Based on the results from the field inspection on May 5, 2005, described in Finding 64, there are no alternate reasonable means of diversion or alternate points of diversion that Clear Springs should be required to implement at the Snake River Farm.

R. Vol. 3 at 502.

The Hearing Officer specifically rejected IGWA’s argument that the Spring Users should be required to employ alternate means of diversion – namely, drilling ground water wells:

IGWA has asserted deficient means of diversion by the Spring Users. However, there is no evidence that the diversion works are out of date or function inefficiently as they exist, following correction of a defect observed by the Director. IGWA's position in this regard is premised on the claim that the Spring Users should be required to pursue additional water by drilling. ...

There is conjecture that the Spring Users could drill, but there are no facts establishing that they could fulfill their water rights in this manner without interfering with other rights. *There is no genuine issue of material fact to dispute the Director's finding that the Spring Users' means of diversion are reasonable.*

R. Vol. 14 at 3237 (emphasis added).

During the hearing, Former Director Dreher explained that it “was not reasonable” to require the Spring Users to “drill horizontal wells in order to obtain water.” [Tr. at 1359-60](#). He explained:

Q. [MR. STEENSON]: Okay. Can you explain why?

A. [MR. DREHER]: Well, in my view it wasn't reasonable because those horizontal wells would simply capture water that otherwise would have been discharged through other spring complexes. And so it would have, assuming that other water right holders where the source of supply was the spring also drilled horizontal wells, essentially it would result in, you know, a number of entities constructing and further constructing horizontal wells, essentially competing with each other for the same source of supply. It wasn't going to increase the supply overall and therefore was not reasonable.

Q. Were there any other reasons that you determined that requiring spring users to drill horizontal wells was not a reasonable requirement?

A. Well, if – if there was a need to construct a horizontal well, and if the horizontal well would have enhanced the supply – which I already said it wouldn't have. But let's assume for the purposes of discussion it would have – I determined that it wasn't – that was not a reasonable expense that should be born by the senior if the need for the horizontal well was caused by injury from junior priority rights.

Q. Okay. And was the – this determination that you made based on your discussions with other IDWR employees who had hydrologic expertise related to the interaction – related to the concern about horizontal wells?

A. Yes.

Tr. at 1359-61.

In other words, requiring the Spring Users to drill for ground water to replace spring flows would have resulted in a race to the bottom of the aquifer – an unreasonable result. IGWA cannot now, at this late stage of the proceedings, assert a new issue for appeal. As such, their challenge to the Director’s findings regarding reasonable efficiencies and alternate means of diversion should not be considered. However, regardless of IGWA’s argument, the record contains substantial evidence to support the Director’s decision that the Spring Users are employing a reasonable and efficient means of diversion. Pursuant to the applicable standard of review, this Court should affirm the Director’s decision on that issue. *See Mercy Medical Center v. Ada Cty.*, 192 P.3d 1050, 1053 (Idaho 2008).

CONCLUSION

Idaho law requires the Director to administer all water rights on connected sources in the ESPA. If a junior water right causes or contributes to the injury suffered by a senior, administration is required. The water distribution statutes and CM Rules provide no exception to administration on the basis of a plus or minus uncertainty in water measurements or model calibration. At most, any uncertainty in this case is a nullity, with the modeled result representing the best estimate of a junior’s impact on the Spring Users’ senior water rights.

In sum, the Director had no basis to exclude from administration junior ground water rights causing injury to the Spring Users’ senior surface water rights. The Director’s use of a 10% trim-line is arbitrary and capricious, an abuse of discretion, and contrary to the law.

Therefore, the Spring Users respectfully request the Court to reverse the Director's determination accordingly.

RESPECTFULLY submitted, this 17th day of November, 2010.

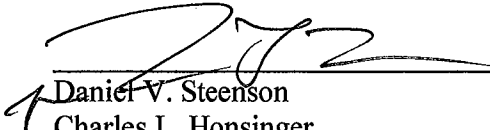
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of November, 2010, I served true and correct copies of the **SPRING USERS' JOINT REPLY BRIEF** upon the following by the method indicated:

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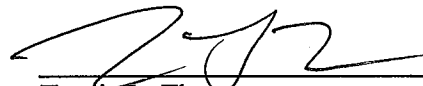
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