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ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF THE A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	DOCKET NO. 37-03-11-1 **POCATELLO'S RESPONSE TO A&B IRRIGATION DISTRICT'S PETITION FOR RECONSIDERATION**

A&B Irrigation District ("A&B") moved to reconsider the Hearing Officer's March 27, 2009 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations ("Recommendations"). Pocatello timely submits its response pursuant to the April 21, 2009 "Order Granting Motion to Reconsider for the Sole Purpose to Allow Additional Time for Responses", and respectfully requests that the Hearing Officer deny A&B's Petition to Reconsider ("Petition" or "A&B Pet."). Pocatello's arguments within address all the arguments raised by Petitioners except for the last one, regarding the establishment of a Ground Water

Management Area. On that, Pocatello adopts the arguments of the Idaho Ground Water Appropriators, Inc. in their contemporaneously filed brief.

I. THE INJURY STANDARD IN THE RECOMMENDED ORDER IS CONSISTENT WITH IDAHO LAW.

A. There is no "new standard" for injury in the Recommendations: A&B misperceives the intent of the information it references on pages 18, 20 and 26.

In support of its arguments in Section II (pages 2-7 of the Petition), A&B suggests that findings on pages 18, 20 and 26 of the Recommendations create a new "failure of the project" or "catastrophic loss" injury standard. This is incorrect. As a threshold matter, the Recommendation's conclusion that A&B's water right no. 36-2080 is not suffering material injury is primarily supported by the findings in Sections XVI and XVII. By contrast, the findings in Section IX, pages 18 and 20, involve the predicate discussion: should injury be analyzed by reference to the terms and conditions of the water right no. 36-2080 decree? Or should injury be analyzed on a well system-by-well system basis—i.e., without relying on the appurtenance provisions of the decree to interconnect or drill supplemental wells in water short areas of the B unit? Section IX of the Recommendations properly adopts the same approach as the Director in his January 29, 2008 Order, and analyzes the question of injury to water right no. 36-2080 on a "project-wide" basis rather than a well-by-well basis *because* of the terms of A&B's decree.

Petitioners also misperceive the nature of the findings contained in Section XIV, at page 26. The discussion in paragraph 5 on page 26 arises in the context of A&B's claims of injury from declines in water levels. As the Recommendations point out, at Section XVIII.5 (page 36), A&B has no legal entitlement to any water level—except reasonable pumping levels which are to be established after it shows injury to its water rights. Nonetheless, A&B has persisted in

alleging injury on the basis of reductions in water levels. Section XIV discusses the evidence that was intended to relate to injury from declines in water levels—and properly concludes that A&B has not been injured from changes in water levels.

B. Under Idaho law, injury to water rights is a question of fact, and the Recommendations reflect that standard.

These misperceptions about the nature of the findings contains in Sections IX and XIV serve to anchor A&B's assertions that the Recommendations established a "new" injury standard and—more importantly—that the Director is "*required* to distribute water to A&B's *decreed* water right #36-2080." A&B Pet. at 3 (emphasis in original). A&B suggests that if depletions reduce the volume of water available to seniors, they are per se injurious and curtailment must follow. *Id.* at 3–4. This is simply incorrect. Under Idaho law, injury to water rights is a question of fact, and depletion to the stream does not equal injury to senior surface rights. As the Idaho Supreme Court held, (upholding the Gooding County District Court):

> [c]ontrary to the assertion of [American Falls], depletion does not equate to material injury. **Material injury is a highly fact specific inquiry** that must be determined in accordance with IDAPA conjunctive management rule 42.

American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources ("*AFRD #2*"), 143 Idaho 862, 868, 154 P.3d 433, 439 (Idaho 2007) (emphasis added). Further, the amount of water on the face of the decree is a maximum, not an amount to which the senior is necessarily entitled in a delivery call:

> The district judge acknowledged that even with decreed water rights, the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development.

AFRD #2, 154 P.3d at 447.

Under Idaho law, A&B is not entitled to curtailment of juniors to ensure delivery of the amounts on the face of its decree without a factual showing that it requires the full decreed amount of water.

The facts in evidence do not support that A&B farmers have *ever received* 1,100 cfs on a sustained basis; nor do the facts indicate a need for 1,100 cfs (or 0.88 miner's inches/acre at each well).

- Well capacities are equivalent to the available water supply. Koreny, Vol. XI, 2169:20-25. A&B has never had an available water supply equivalent to 1,100 cfs during the peak of the season. Koreny, Vol. XI, 2196:14-2197:3 (Table 3-7), 2201:14-2203:18 (referring to Figure 3-20). If A&B has never delivered the decreed amount—even in the 1960s before significant ground water development on the ESPA, how can it be the junior ground water users' obligation to improve their facilities so that they can deliver 1,100 cfs today?
- The Director's January 29, 2008 Order determined that A&B required, on average, 2.89 af/acre of water. FOF 52.
- A&B's experts determined that A&B required 2.77 af/acre of water. Table 4-8 of A&B's July expert report.
- As Mr. Koreny testified, in 1970, average annual deliveries to the headgates of the 62,604 acres associated with water right no. 36-2080 were 0.69 miner's inches/acre. Incorporating the water spread acres, that value is 0.65 miner's inches/acre. Exhibit 366. These values are far less than the 1,100 cfs for water right no. 36-2080.
- Further, as the Director concluded, diversions have declined over time due to increases in efficiency. FOF 58; Luke, Vol. VI, 1200:24-1202:25.

Based on this evidence, the Recommendations properly found that A&B is not suffering material injury, and properly denied A&B's claim that it is entitled to curtailment based simply on the flow rate in its decree (1,100 cfs for use on 62,604 acres).

C. The Recommendations are supported by substantial evidence and do not create a "minimum need" standard.

Although A&B does not like the Hearing Officer's reliance on evidence of the water demands of other farmers (including A&B district members), this is precisely the type of evidence that is useful to support a finding of no injury in the Recommendations. Under Idaho law, evidence is "substantial" and sufficient to support factual determinations made by the agency if it is "relevant evidence which a reasonable mind might accept to support a conclusion." *Lamar Corp. v. City of Twin Falls,* 133 Idaho 36, 43, 981 P.2d 1146, 1152–53 (1999)). The water demands of other similarly situated ground water users in the same vicinity as the B unit are consistent with this standard. Under Idaho law, such evidence "need not be uncontradicted, nor must it necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder." *Spencer v. Kootenai County*, 145 Idaho 448, 456, 180 P.3d 487, 495 (Idaho. 2008).

The Hearing Officer properly evaluated the amount of water required for B unit farmers to make beneficial use of water right no. 36-2080 in evaluating the injury claims of A&B. Recommendation, at p. 31. This beneficial use evaluation, which A&B characterizes as a "crop maturity" standard, is consistent with Idaho law. *See, e.g.,* I.C. § 42-226. Like A&B's so-called "catastrophic loss" and "failure of the project" standards, this alleged standard provides another basis for A&B to argue that it should be entitled to divert its entire decreed water right on demand. However, the legal authorities cited by A&B do not support this proposition.

For example, A&B is incorrect that *Caldwell v. Twin Falls Salmon River Land & Water Co.* sets a standard for Idaho water rights administration requiring delivery of the decreed amount of the water right. *See* A&B Pet. at 12. First, *Caldwell* was a dispute about the terms of water contracts, not water administration. *See Caldwell v. Twin Falls Salmon River Land & Water Co.*, 225 F. 584, 588–89 (D. Id. 1915) ("[Plaintiffs] contend, the [Defendant] Company has failed to comply with the terms of its agreements..."). Second, *Caldwell* concluded that *actual use* of a water right is limited by "reasonable need." *See id.* at 595 ("the waters of the state belong to the public, and...the private right which the individual acquires by appropriation or purchase is usufructuary only, and further[,] at any given time the extent of his reasonable need is the measure of the maximum amount he is entitled for the time being to divert from the stream or to receive and use"). Finally, A&B's reliance on a quote from Caldwell about *appropriation* is irrelevant in this case about *administration*. It is undisputed that A&B may divert its entire decreed amount when available; but it is also the law that A&B may not demand curtailment for its entire decreed amount unless it can show it requires that amount for beneficial use.

Interestingly, in citing *Caldwell*, A&B is pressing the same issue that it already lost before the Idaho Supreme Court. A&B, as an appellee in *AFRD #2*, cited *Caldwell* for the proposition that reasonable use is determined by a decreed water right and cannot be considered in an administrative call. *See* Plaintiffs Brief in Response to Defendant's and IGWA's Opening Briefs, at 24, *AFRD #2 v. IDWR*, Case Nos. 33249, 33311, 33399 (Nov. 10, 2006) (excerpt attached). The Supreme Court soundly rejected A&B's argument. "[R]easonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication." *AFRD #2*, 143 Idaho at 877,

154 P.3d at 448 (Idaho 2007). The Hearing Officer properly considered whether A&B's exercise of its water rights is reasonable. Recommendations at 31.

A&B goes on to misstate the holding from *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (Idaho 1929). A&B Pet. at 12. In that case, Arkoosh and Big Wood Canal Company disagreed whether Arkoosh could unilaterally determine the beginning and end of the irrigation season. After noting, as quoted by A&B, that a water user is best positioned to know when to ask for water for beneficial use under a water right, the Idaho Supreme Court reversed the lower court's injunction requiring Big Wood to bypass water to Arkoosh upon any demand. Instead, the Court held:

> Our present statutes give the commissioner of reclamation the "immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom." C. S. § 5606. We are of the opinion that the matter should be determined by that department.

Arkoosh, 283 P. 525–26 (emphasis added). Thus, *Arkoosh* does not stand for the proposition that A&B is entitled to curtailment of juniors to produce its decreed flow rate any time A&B demands water. *Cf.* A&B Pet. at 12. Instead, curtailment is a function of water administration vested in the Idaho Department of Water Resources. Here, the Recommendations properly concluded that A&B could not reasonably require higher water levels in the ESPA because its beneficial uses are adequately supplied under existing conditions. This is not micro-management of A&B's operations, *cf.* A&B Pet. at 10; it is a determination that A&B is not suffering material injury because it has enough water to accomplish its purposes.

II. GIVEN THE TERMS OF THE A&B PARTIAL DECREE, INTERCONNECTION IS AN APPROPRIATE CONSIDERATION IN THE CONTEXT OF THE A&B CALL.

A&B's discussion of interconnection is at odds with the facts. The Bureau of Reclamation sought and obtained a license for the B unit that allowed the use of water pumped

from any well to be used on any acre of the 62,604 acre place of use. Exhibit 157D, Exhibit 157 at page 4398. The Department resisted issuing such a license with such generous and flexible terms but eventually relented. Exhibit 157D. Having bargained for and obtained a license that provides maximum flexibility in water delivery, taken advantage of this flexibility to interconnect several well systems (including drilling supplemental wells to serve unreliable systems), A&B now wants to ignore the terms of its water right and ask for administration of water right no. 36-2080 as if it had separate and distinct water rights for each of its approximately 135 well systems.

Further, IDAPA Rule 37.03.11.40.03 of the Conjunctive Management Rules ("CMR") requires the Director to examine the operations of the petitioner to see whether the petitioner is "diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42." This standard is based on the constitutional and statutory provisions requiring administration for the "public interest" and "reasonable use". Idaho Const., Art. XV, § 5; I.C. §§ 42-101, 42-226. The Recommendations properly find that no curtailment can be had when A&B has the ability under its partial decree to interconnect and otherwise obtain water (through supplemental wells) for areas of the project that it considers water short.

Based on the terms of the partial decree and the applicable legal analysis, it was not error to find that the appurtenance terms of the 36-2080 decree obligate A&B to take reasonable steps to interconnect its system.

III. THE PETITION'S REQUEST FOR RECONSIDERATION OF THE BASES OF THE JANUARY 29, 2008 ORDER APPEARS TO REQUEST RELIEF THAT CANNOT BE GRANTED.

The Petition, at pages 17-18, requests that the Hearing Officer recommend that the Director re-evaluate the January 29, 2008 Order because the Recommendations found different

facts on three points: a) that 0.75 miner's inches/acre is a "maximum rate of delivery"; b) that A&B operates an "inefficient well and delivery system"; and c) that A&B was not injured because it failed to use, *inter alia*, "reasonable drilling standards". A&B's request is premature at best.

The Recommendations state:

> **3. The parties may rely on facts developed by the Director, and in the absence of more persuasive contradictory evidence the Director's findings are accepted**....The Director's findings are accepted as part of this recommendation unless the recommendation explicitly finds differently or the Director's findings are inconsistent with the findings in this recommendation.

Recommendations at Section III.3 page 8. This provision of the Recommendations seems to be in line with what the Petition requests.

In any event, the Petition is being reviewed by the Hearing Officer. It isn't clear how the Director can offer any relief at this point in the proceedings. To the extent these are offered as pre-emptive exceptions, they should be styled as such by the Hearing Officer and found to be premature; A&B can raise them again, if necessary, when exceptions to the final order are due.

IV. THE WELL PRODUCTION PROBLEMS IN THE SOUTHWEST AREA PROVIDE NO BASIS FOR IDWR TO CURTAIL JUNIOR GROUND WATER RIGHTS.

The Petition suggests erroneously that Section XVIII of the Recommendations is "inconsistent" with other portions of the Recommendations. *See* A&B Pet. at 19. Section XVIII provides the factual and legal basis for rejecting A&B's assertion that is entitled to curtailment of junior ground water users on the ESPA because, *inter alia*, of water production problems in the southwest area. In the context of the constitutional and statutory concepts of "reasonable use" and the "public interest", the analysis in Section XVIII concludes that A&B is in the position of the owner of the water wheel in *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107

(1912). Under Idaho law, which incorporates the concepts of public interest and "reasonable use", A&B has an obligation to go after available ground water rather than demand curtailment.

This conclusion is not "inconsistent" with the findings on pages 15-19 of the Recommendations. Indeed, the conclusion of the discussion on those pages is that A&B has a partial decree that includes generous terms and decrees allowing flexibility in the operation of its well system and, further, that analysis of injury to A&B should proceed on a system-wide basis rather than a well system-by-well system basis. On the issue of interconnections, the Recommendations conclude:

> ***According to Mr. Temple there was a $360 million estimate prepared by an engineering firm for IDWR to convert Unit B from a ground water irrigation system to a surface water system—a cost he believed would be similar to interconnect all of the pumping systems...**[t]hose costs are not reflected in this record and must be considered speculative. Nonetheless, the feasibility of a complete interconnection of the system in Unit B has not been shown.**
>
> Section IX, paragraph 7, at page 19 (emphasis added).
>
> **9. A&B's duty to interconnect the system before calling for curtailment.** It appears that interconnection of the entire pumping system is not simple or inexpensive either legally or practically. Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury. However, **it is equally clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from junior users**.
>
> Section IX, paragraph 9, at page 19 (emphasis added). These conclusions support the Recommendations' application of the *Schodde* water wheel doctrine to A&B.

Schodde held that a single water right may not command the entire natural body of water to effect a diversion of a water right. *Schodde*, 224 U.S. at 125. Like A&B, Schodde owned irrigation water rights. *See id.* at 117 (*Schodde* trial court "recognized fully the right of [Schodde] to the volume of water actually appropriated for a beneficial purpose"); *cf.* A&B Pet.

at 22 (arguing Schodde lacked a decreed water right). A&B is also like Schodde in seeking to curtail other uses of the natural water body in order to make use of its existing diversion facilities. The Hearing Officer correctly concluded that the *Schodde* case forecloses this result. Recommendations at 34.

The *Arkoosh* case, relied on by A&B, is inapposite. *Cf.* A&B Pet. at 23. In Arkoosh, water was lost from the stream, and no change in Arkoosh's means of diversion would allow him to divert his water. *Arkoosh*, 48 Idaho at 397, 283 P. at 526. Unlike *Arkoosh*, water is available under A&B's water right, although it may not be equally available at every A&B well.[1] Thus, A&B's call presents a *Schodde* means of diversion issue, not an *Arkoosh* unavailability of water issue. The Director properly concluded that A&B should either look deeper within the aquifer or investigate surface interconnections to allow it to withdraw from more productive portions of the aquifer. Recommendations at 36.

V. THE RECOMMENDATIONS PROPERLY FIND THAT THERE IS NO FACTUAL BASIS FOR ESTABLISHING REASONABLE PUMPING LEVELS BASED ON THE EVIDENCE IN THE A&B MATTER.

A&B's Petition suggests that the evidence received in this matter "demonstrate[s] that A&B has exceeded a reasonable ground water pumping level..." A&B Pet. at 25. No evidence is cited. Nor is there any discussion of the factual basis necessary to trigger the Director's determination of "reasonable pumping levels".

A&B's evidence of ground water declines (Exhibit 225) by itself is inadequate to establish injury to its water rights. Under Idaho law, A&B's delivery call triggers the Director's authority to determine A&B's entitlement to a particular quantity of water. Idaho law does not

[1] However, as discussed elsewhere, the Bureau, on behalf of A&B, sought and obtained a license (and decree) that allow the District to move use water from any well on any acre in the 62,604 acre place of use. Exhibit 157, Exhibit 157D.

support a delivery call to obtain particular water levels. *AFRD #2*, 143 Idaho at 880, 154 P.3d at 451; *Schodde*, 224 U.S. at 120. Further, even at common law, prior to adoption of the Ground Water Act, A&B could not have demanded particular water levels in the absence of injury, *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho 45, 223 P. 531, 532 (1923), although upon a showing of shortage, A&B may have been entitled to request historic water levels as a means of relief from injury. *Compare Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1915), with *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933).

The legislature refined the nature of prior appropriative ground water rights when it adopted the Ground Water Act, I.C. § 42-226 *et seq.* Under *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973), the Supreme Court interpreted the Ground Water Act to have codified the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. The practical effect of this decision on appropriative ground water rights was to eliminate restoration of historic water levels as a form of relief from material injury to a water right. *Id.* at 634-36 ("[a]pparently our Ground Water Act was intended to eliminate the harsh doctrine of *Noh*.... We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest ... [and] inconsistent with the Ground Water Act.").

The Recommendations properly conclude that the Director need not determine reasonable pumping levels based solely upon water production problems of a minority of the wells in the B unit. The aquifer is not being mined and A&B has not been required to exceed reasonable pumping levels. Under Idaho law, having failed to satisfy that threshold factual showing, the Director's duty to establish reasonable pumping levels has not been triggered and, accordingly, A&B is not entitled to any relief in the form of reasonable pumping levels or costs.

CONCLUSION

For the reasons described herein, Pocatello respectfully requests that the Petition for Reconsideration be denied.

DATED this 1st day of May, 2009.

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CERTIFICATE OF SERVICE VIA E-MAILING / MAILING

I hereby certify that on this 1st day of May, 2009, a copy of **Pocatello's Response to A&B Irrigation District's Petition for Reconsideration** in the case Docket No. 37-03-11-1 for the **Petition for Reconsideration of Hearing Officer's March 27, 2009 Opinion filed by petitioner A&B Irrigation District** was served by email and/or by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:

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Nos. 33249, 33311, 33399

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

v.

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

IDAHO GROUND WATER APPROPRIATORS, INC.,
Intervenor-Appellant.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions & Statutes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Following that decision and during the course of the proceedings before the special master, the IDWR stated that the Director's recommendation was based on current non-application to "reasonable beneficial use." ***The IDWR stated that the concept of beneficial use allows for constant re-evaluation of whether the water is being used beneficially.*** ...
>
> ***The special master determined*** that absent a claim of forfeiture, abandonment, adverse possession, or estoppel, ***a reduction in beneficial use after a water right vests is not a basis upon which a water right may be reduced.*** ...
>
> Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, ***the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights.***

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

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

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

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

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

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

R. Vol. IX, p. 2322.

[53] The district court rightly followed this Court's precedent which has repeatedly held that a watermaster does not have the ability to "second-guess" court decrees in administration: "[i]t is contrary to law that the Director, or any party to the SRBA could, in effect stipulate to the elements of a water right in one proceeding and then collaterally attack the same elements when the right is later sought to be enforced." Order at 93; *see State v. Nelson*, 131 Idaho 12, 16 (1998) ("the watermaster is to distribute water according to the adjudication or decree."); *Stethem v. Skinner*, 11 Idaho 374, 379 (1905) ("We think the position is correct . . . where the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.").

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

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

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

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

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

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

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

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

Under Idaho law, a reduction in the water supply available for diversion and use by a senior results in an "injury" to that senior's water right.[58] The inquiry is objective and is based upon a review of the junior's diversion and impact on the water source. However, the Rules define "material injury" as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person ***as determined in accordance with Idaho law, as set forth in***

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

[57] At the hearing on the Defendants' motion to stay the judgment, the district court explained:

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

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

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

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

Rule 42." Rule 10.14 (emphasis added). The definition tiers to Rule 42 and its eight factors for further explanation.[59] These Rule 42 factors conflict with Idaho's water code and what constitutes "injury" to a water right in a curtailment context.

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

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[59] The district court rightly acknowledged how the Rules undermine the certainty of adjudications by replacing water distribution according to decrees with subjective determinations by the Director: "In the Director's effort to satisfy all water users on a given source, seniors are put in the position of re-defending the elements of their adjudicated water right every time a call is made for water . . . the Director is put in the expanded role of re-defining elements of water rights in order to strategize how to satisfy all water users as opposed to objectively administering water rights in accordance with the decrees." Order at 97.

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

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

[61] In the Clear Springs case, the Director ***refused to honor*** the decreed elements of Clear Springs' water rights, and instead determined the quantities only signified a "maximum" authorized rate of diversion subject to re-

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

> The way the CMR's are now structured, the Director becomes the final arbiter regarding what is "reasonable" without the application or governance of any express objective standards or evidentiary burdens. The determination essentially

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determination based upon conditions presumed to have existed when Clear Springs made its original appropriations. R. Vol. V, p. 1139 (July 8, 2005 Order at 12-13, ¶¶ 55-56; relying upon Rule 42.01.a "The amount of water available in the source from which the water right is diverted."). Further, the quantity element was unlawfully re-conditioned to merely representing an entitlement at a spring flow "seasonal high", instead of the year-round diversion rate that was decreed by the SRBA Court. R. Vol. V, p. 1140 (July 8, 2005 Order. at 14, ¶ 61). As such, such, the Director administratively reduced Clear Springs' decreed water rights. Such a determination, provided by the Rules, contradicts the unambiguous quantity terms of Clear Springs' decrees and plainly violates the watermaster's "clear legal duty" to distribute water according to those decrees.

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

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

> becomes one of discretion, which is inconsistent the constitutional protections specifically afforded water rights. The absence of any standards or burdens also eliminates the possibility of any meaningful judicial review of the Director's action as under applicable standards of review, as any reviewing court would always be bound by the Director's recommendation as to what constitutes reasonableness.

Order at 96.

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

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

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

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

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

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

Dated this 10th day of November, 2006.

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