Supreme Court 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-Respondents-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.

IDAHO DEPARTMENT OF WATER RESOURCES
and GARY SPACKMAN, Interim Director,
Respondents/Respondents on Appeal/Cross-Respondents,

v.

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

IDWR RESPONDENTS/CROSS-RESPONDENTS' BRIEF

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

Honorable John M. Melanson, District Judge, Presiding.

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I. STATEMENT OF THE CASE

The Idaho Ground Water Appropriators, Inc. *et al.* ("Ground Water Users") appeal the Director of the Idaho Department of Water Resources' ("Director" or "Department") orders finding that Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively referred to herein as "Spring Users") are materially injured by junior ground water rights that divert from the Eastern Snake Plain Aquifer ("ESPA").

II. FACTUAL AND PROCEDURAL BACKGROUND

1. Blue Lakes and Clear Springs Delivery Calls

The Spring Users' delivery calls were initiated by letters requesting that then-Director Karl J. Dreher administer water rights. R. Vol. 1 at 1; R. Vol. 1. at 2.[1] The Director treated these letters as calls for delivery under the Department's Rules for Conjunctive Management of Ground and Surface Water Resources ("CM Rules"), IDAPA 37.03.11 *et seq.* R. Vol. 1 at 69; R. Vol. 3 at 517-518. In response to the letters, the Director applied the CM Rules and issued two orders finding that certain surface water rights held by the Spring Users were materially injured by junior ground water diversions. R. Vol. 1 at 45 ("May 2005 Blue Lakes Order"); R. Vol. 3 at 487 ("July 2005 Clear Springs Order") (collectively referred to herein as the "curtailment orders").

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[1] Consistent with the Ground Water Users' Opening Brief, citations to documents in the agency record are identified as "R. Vol. ___ at ___." Exhibits in the agency record are identified as "Ex." Citations to the transcript from the agency hearing are identified as "Tr. Vol. ___, p. ___, ln(s). ___." Citations to the district court record are identified as "Clerk's R. at ___."

For Blue Lakes, the Director found that junior ground water diversions were materially injuring water right no. 36-07427, with a priority date of December 28, 1973. R. Vol. 1 at 61. Based on the determined injury, the Director ordered curtailment of ground water rights junior to December 28, 1973. *Id.* Using the ESPA ground water model ("ESPA Model"), the Director determined that the curtailment would affect 57,220 acres and provide 51 cubic feet per second ("cfs") to the reach of the Snake River in which the Blue Lakes facility was located (Devil's Washbowl to Buhl). *Id.* Using a separate analytical method, the Director estimated that, of the 51 cfs that would accrue to the Devil's Washbowl to Buhl reach, 10 cfs would arrive directly at Blue Lakes' facility (20% of 51 cfs). *Id.* at 72.

For Clear Springs, the Director found that junior ground water diversions were materially injuring water right nos. 36-04013B and 36-07148, with a senior-priority date of February 4, 1964. R. Vol. 3 at 502. Based on the determined injury, the Director ordered curtailment of ground water rights junior to February 4, 1964. *Id.* Using the ESPA Model, the Director determined that the curtailment would affect 52,470 acres and provide 38 cfs to the reach of the Snake River in which the Clear Springs facility was located (Buhl to Thousand Springs). *Id.* at 502-503. Using a separate analytical method, the Director estimated that, of the 38 cfs that would accrue to the Buhl to Thousand Springs reach, 2.7 cfs would arrive directly at Clear Springs' facility (7% of 38 cfs). *Id* at 503.

The curtailment orders provided that curtailment could be avoided if junior ground water users submitted plans to provide a sufficient volume of water to offset the identified injury. R. Vol. 1 at 72; R. Vol. 3 at 524. The curtailment orders also stated that the requirement to provide

water could be phased-in over a period of five years to "lessen the economic impact of immediate and complete curtailment pursuant to IDAPA 37.03.11.040.01.a." R. Vol. 1 at 71; R. Vol. 3 at 520.

2. Ground Water Users' Response to Ordered Curtailment

After issuance of the curtailment orders, the Ground Water Users filed replacement water plans to mitigate for material injury caused by junior ground water diversions, electing to phase-in its substitute curtailments over the five-year period identified by the Director. R. Vol. 16 at 3715-3716. The Ground Water Users' replacement water plans generally sought to mitigate material injury by conveying leased surface water through the North Side Canal Company's delivery system to allow incidental recharge of the ESPA; conversion of irrigated acres from ground water to surface water; targeted recharge; and enrollment of some ground water irrigated acres in a federal land fallowing program known as the Conservation Reserve Enhancement Program. *Id.* The five-year, phased-in period of curtailment has ended and the Ground Water Users are diverting ground water under approved CM Rule 43 mitigation plans.

3. The Hearing Officer's Recommended Order

On August 1, 2007, Gerald F. Schroeder was appointed by then-Director David R. Tuthill, Jr. to preside as an independent hearing officer ("Hearing Officer") in the joint hearing on the Blue Lakes and Clear Springs delivery calls. R. Vol. 10 at 1979. "Because of requests by the parties for schedule changes, and matters wholly unrelated to the delivery call proceedings initiated by Blue Lakes and Clear Springs, *see American Falls Res. Dist. No. 2 v. Idaho Dept. of*

Water Resources, 143 Idaho 862 (2007), it was not until the summer of 2007 that the parties agreed to a joint hearing schedule and the appointment of an independent hearing officer." R. Vol. 16 at 3951.

On November 28, 2007, the hearing commenced and ran for approximately twelve days. On January 11, 2008, the Hearing Officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation* ("Recommended Order"). R. Vol. 16 at 3690. Pertinent to this appeal, the Recommended Order approved the curtailment orders on all major points, finding, among other things: (1) that the Director properly used the ESPA Model and that his assigned uncertainty of 10% was reasonable, *id.* at 3701-04; (2) that 20% and 6.9% (adjusted from 7%) of increased Snake River reach gains would directly benefit Blue Lakes and Clear Springs' facilities, respectively (referred to as "spring apportionment" or by the Ground Water Users in their Opening Brief as the "linear analysis"), *id.* at 3710; (3) that the Director's determination of the amount of water that would directly benefit the Blue Lakes and Clear Springs facilities if curtailment were ordered was supported by the record, *id.* at 3710; (4) that the Director properly ordered curtailment, *id.* at 3714-15; and (5) that the Director properly exercised his discretion in evaluating the delivery calls, *see generally* R. Vol. 16 at 3690.[2]

[2] On February 29, 2008, the Hearing Officer issued his *Responses to Petitions for Reconsideration and Clarification and Dairymen's Stipulated Agreement* to clarify some aspects of the Recommended Order, as well as to state that "The Findings of the Director were adopted by the Hearing Officer unless explicitly rejected by the Hearing Officer." R. Vol. 16 at 3839. On July 11, 2008, the Director issued his *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("Final Order"). R. Vol. 16 at 3950. The Final Order accepted the Hearing Officer's recommendations with a few minor modifications.

4. Judge Melanson's Orders on Petition for Judicial Review and Petitions for Rehearing

On June 19, 2009, Judge Melanson issued his *Order on Petition for Judicial Review.* Clerk's R. at 44. In his order on judicial review, Judge Melanson held that the Director acted properly and within his discretion in finding that Blue Lakes and Clear Springs were materially injured by junior ground water diversions. On December 4, 2009, Judge Melanson issued his *Order on Petitions for Rehearing.* Clerk's R. at 112. In his order on rehearing, Judge Melanson clarified that, in accordance with CM Rule 40, which is the procedural rule for administration of ground water rights located within an organized water district, the Director is not required to hold a hearing prior to curtailment. Clerk's R. at 54.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency

decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998).

IV. OVERVIEW OF THE ARGUMENT IN RESPONSE TO THE ISSUES RAISED BY THE GROUND WATER USERS AND SPRING USERS

The Court is called upon to review, for the first time, the Director's exercise of his authority to administer hydraulically connected surface and ground water rights in the Eastern Snake Plain. At the heart of this case is a dispute over whether the Director has properly applied the prior appropriation doctrine in the context of the delivery calls filed by Blue Lakes and Clear Springs. As former University of Idaho professor of law, Douglas L. Grant, noted in his seminal article on conjunctive administration, "The management of hydrologically connected surface water and groundwater under the appropriation doctrine is widely acknowledged to be complicated." Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 63 (1987).[3]

The prior appropriation doctrine as established by Idaho law serves two core objectives: to provide security of right and to ensure full utilization of the resource. Most of the time these objectives are compatible and the issue of administration is easily resolved based upon seniority

[3] A copy of Professor Grant's article is attached hereto as **Addendum 1.**

of right. Occasionally, however, these core objectives come into tension with one another, as shown in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911). In that case, the senior surface water user sought to preclude junior surface water users from damning the Snake River in order to protect the current of the river. Because enforcement of seniority would have resulted in the senior monopolizing the resource, the United States Supreme Court refused to enforce the senior priority. This principle, that priority of use will not be strictly enforced if such enforcement will allow the senior to monopolize the resource, is reflected in Idaho Code § 42-226, which provides that while the doctrine of "'first in time if first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." Likewise, courts and legislatures in other prior appropriation states have decided that priority does not insulate a senior appropriator from having to bear reasonable costs and risks to avoid monopolization of the resource. Grant *supra* at 70. In the facial challenge to the CM Rules, the Idaho Supreme Court recognized this tension and stated, "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007).

In surface water administration, the Director's exercise of his authority is less contentious due in large part to the fact that the impacts of administration are visible. In contrast, the movement of ground water in the unconfined and geologically heterogeneous ESPA is much more complex.

Because of the lack of homogeneity and the size of the ESPA, the impacts of ground water pumping on discrete surface water sources has to be estimated through the use of models and the best professional judgment of the Director. It is simply not possible to know with precision the effect of curtailment of any particular water right on an individual reach of the river, let alone the impact on a specific senior water right emanating from a canyon wall.

In recognition of this fact, the Department, with the involvement of the stakeholders, developed the ESPA Model to simulate the impact that ground water pumping has on reaches of the Snake River. The ESPA Model was used by the Director in these proceedings as a basis for curtailment of junior-priority ground water rights that have a greater than 10% depletionary impact on the reaches of the Snake River in which the Spring Users divert surface water for fish propagation.

As evidenced by the opening briefs filed by the Ground Water Users and Spring Users, they agree with the Department that the ESPA Model is the best science available for determining the effects of ground water diversions and surface water users on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. Disagreement, however, lies in inherent scientific uncertainties associated with the Model and thereby how to interpret and apply the Model's results in accordance with the prior appropriation doctrine, as established by Idaho law.

The Ground Water Users argue that because the Director failed to account for all uncertainty, the results from the ESPA Model should be thrown out and the curtailment orders set aside. The Spring Users argue, however, that there should be no uncertainty factored into

results associated with the ESPA Model. These arguments were raised below and rejected in the administrative proceeding and on judicial review.

In addition to the technical argument regarding the Model, the Ground Water Users argue that ground water rights are exempt from curtailment based upon their flawed understanding of the Swan Falls Agreement and the Ground Water Act, Idaho Code §§ 42-226 *et seq.* These arguments were raised by the Ground Water Users and rejected in the administrative proceeding and on judicial review below.

Ultimately, the resolution to this dispute requires the exercise of professional judgment by the Director. As required by Idaho Code § 42-226, the Director must administer the rights based upon the principles of "first in time is first in right," while assuring that a reasonable exercise of senior-priority rights do not block the full economic development of the ESPA. Given the specialized expertise and knowledge of the Director, his finding and conclusions on the appropriate balance between the core principles of the prior appropriation doctrine are entitled to deference. *American Falls* at 446, 154 P.3d at 875; *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991).

While the Ground Water Users and Spring Users disagree with certain aspects of the Final Order, the Director's actions were consistent with the governing constitutional and statutory provisions, were supported by the record, were made upon lawful procedure, and were within the Director's discretion. Thus, the Director respectfully requests that his Final Order be affirmed by this Court. Idaho Code § 67-5279(3).

V. RESPONSE TO ISSUES RAISED BY THE GROUND WATER USERS

1. The Swan Falls Agreement Does Not Circumvent Conjunctive Administration

The Ground Water Users argue that if the Murphy minimum flows of 3,900 cfs in the summer and 5,600 cfs in the winter established pursuant to the Swan Falls Agreement ("Agreement")[4] are met, the Director has no authority to administer hydraulically connected surface and ground water rights in accordance with the CM Rules. This argument was presented and summarily rejected by the Department and the district court. R. Vol. 14 at 3240-41; Clerk's R. at 82-84.

In simplest terms, the Agreement is a contract between the Idaho Power Company ("Idaho Power" or "the Company") and the state of Idaho ("State") providing for subordination of the hydropower water rights for certain Idaho Power facilities in the Snake River basin below Milner Dam and above the Murphy gage. The Spring Users were not signatories to the Agreement, and it does not purport to define the Spring Users' water rights or to impose upon them the subordination provisions that apply to Idaho Power's water rights. *See Miles v. Idaho Power Co.*, 116 Idaho 635, 636, 778 P.2d 757, 758 (1989) ("the agreement provided for the subordination of certain water rights claimed by Idaho Power to those of subsequent upstream users") (emphasis added).

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[4] Copies of the Swan Falls Agreement are located in R. Vol. 8 at 1529 and R. Supp. Vol. at 4595. Hereinafter, citations to the Agreement will simply cite "Agreement." "Summer" means April 1 through October 31, and "winter" means November 1 through March 31. Agreement at Exhibit 6.

Further, the Spring Users' water rights have been decreed in the Snake River Basin Adjudication ("SRBA") and are not defined, subordinated, or conditioned in terms of the Swan Falls Agreement or the Murphy minimum flows. Exhibit 31 (Blue Lakes SRBA decrees); Exhibits 301-06 (Clear Springs SRBA decrees). Thus, nothing in the Agreement or the applicable SRBA decrees supports the Ground Water Users' argument.

The CM Rules, in contrast, by their terms apply to delivery calls such as those of the Spring Users in this case. *See American Falls* at 866-67, 154 P.3d at 437-38 (discussing the CM Rules). They contain no exceptions based on the Swan Falls Agreement or the Murphy minimum flows. Thus, the conclusions of the Hearing Officer, the Director, and the district court that the CM Rules authorize the Director to administer junior-priority ground water rights causing material injury to the Spring Users' water rights without regard to the Swan Falls Agreement or the Murphy minimum flows should be affirmed. CM Rule 20.01.

A. The Swan Falls Agreement contemplated that state law would govern water rights administration in the Snake River Basin

The Ground Water Users argue that the Swan Falls Agreement creates a "comprehensive plan" for water rights administration. *Ground Water Users' Opening Brief* at 19-31. This argument not only misapprehends the nature of the Agreement, but also is contrary to its terms and overall structure.

i. The Swan Falls Settlement was given legal effect primarily through state law and the State Water Plan, not through the Agreement

While the Ground Water Users urge this Court to interpret and apply the Swan Falls Agreement, they ignore the fact that the SRBA district court has already done so. In Consolidated Subcase No. 00-92023 (923-23) the SRBA district court took up and resolved a number of questions regarding the "interpretation and/or application of the *Swan Falls Agreement*."[5]

As the SRBA district court observed, one of the most important aspects of the Swan Falls Agreement was that it "was not a self-executing instrument, but rather proposed a suite of legislative and administrative action that if implemented would resolve the [Swan Falls] controversy and the legal issues to the mutual satisfaction of the parties." Memorandum

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[5] Order Granting In Part, Denying In Part Motion To Dismiss; Consolidating Common Issues Into Consolidated Subcase; And Permitting Discovery Pending Objection Period In Basin 02; And Notice Of Scheduling Conference, *In re SRBA, Consolidated Subcase No. 92-23*, at 16 (Jul. 24, 2007) (italics in original). The SRBA district court issued a thorough and detailed summary judgment decision interpreting the Agreement in the same consolidated subcase, on April 18, 2008. In March of this year, the SRBA consolidated the sole issue remaining in the consolidated subcase with "Basin-Wide Issue No. 13" (Subcase No. 00-91013), and dismissed the consolidated subcase. Order On Motions For Reconsideration; Order Consolidating Issue With Basin-Wide Issue 13; Order Partially Decreeing Water Rights; Order Dismissing Complaint And Petition For Declaratory And Injunctive Relief, *In re SRBA, Consolidated Subcase No. 00-92023 (923-23)*, at 7-10 (Mar. 25, 2010) ("*Partial Decree And Consolidation Order*"); Order Dismissing Complaint And Petition For Declaratory And Injunctive Relief, *In re SRBA, Consolidated Subcase No. 00-92023 (923-23)*, at 1-6 (Mar. 30, 2010). (These orders are available on the SRBA's website, http://www.srba.state.id.us/.) The Ground Water Users were parties to Consolidated Subcase 00-92023 and did not appeal the dismissal. The issue that was consolidated into Basin-Wide Issue No. 13 involves the question of whether the subordination provisions of Paragraph 7D of the Agreement protect all water rights with priority dates prior to October 1, 1984. *See generally Partial Decree And Consolidation Order* at 5-7 (discussing Paragraph 7D and the "rebound call" issue). This issue remains pending in the SRBA, and hinges in large part on whether the Ground Water Users can make "a showing of unintended consequences arising from the literal application of the [Agreement's] provisions" that "establish a latent ambiguity" in the Agreement. *Id.* at 6. It appears that in this appeal the Ground Water Users may be attempting to avoid this requirement and obtain a substantive ruling on the issue without developing the record in the SRBA, because the Ground Water Users assert that the Agreement "protects all water rights with a priority date prior to October 1, 1984." *Ground Water Users' Opening Brief* at 22.

Decision And Order On Cross-Motions For Summary Judgment, *In re SRBA, Consolidated Subcase No. 00-92023 (92-23)*, at 26 (Apr. 18, 2008) ("*SRBA Memorandum Decision*").[6] Thus, the Agreement proposed and was contingent upon the enactment of certain legislation and the incorporation of certain policy positions into the State Water Plan. *Id.* at 13; Agreement ¶ 13.[7] The Legislature and the Idaho Water Resource Board ultimately enacted and approved the proposed legislation and State Water Plan amendments, 1985 Idaho Sess. Laws 20-32, 514,[8] but only after thoroughly scrutinizing the Agreement and its proposals.[9]

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[6] A copy of this decision is attached hereto as **Addendum 2.**

[7] The proposed legislation and State Water Plan policies were set forth in the exhibits to the Agreement. Exhibit 1 contained proposed legislation establishing "public interest" criteria for approving new uses of water that becomes available due to the subordination of a hydropower water right. Exhibit 2 contained proposed legislation authorizing a general Snake River adjudication. Exhibit 3 contained proposed legislation appropriating funds for hydrologic and economic studies. Exhibit 4 contained proposed legislation regarding the allocation of gain on the sale of a hydropower water right. Exhibit 5 contained proposed legislation for legislative approval of the Swan Falls Agreement and limiting the jurisdiction of the Idaho Public Utilities Commission. Exhibit 6 set forth certain policy positions to be incorporated into Policy 32 of the State Water Plan, such as the establishment of new seasonal minimum flows at the Murphy gage, and reaffirmation of the Milner minimum daily flow of zero cfs Exhibits 7A and 7B contained proposed legislation authorizing the subordination of hydropower water rights pursuant to the State's constitutional authority to "regulate and limit" hydropower water rights. Idaho Const. Art. XV, § 3. Exhibit 8 contained proposed legislation authorizing the Director to impose a moratorium on water filings and to promulgate administrative rules.

[8] The "public interest" criteria legislation was enacted as Idaho Code § 42-203C. 1985 Idaho Sess. Laws 26-27. The SRBA legislation was enacted as Idaho Code § 42-1406A (uncodified). 1985 Idaho Sess. Laws 28. The legislation regarding allocation of gain on the sale of a hydropower water right was enacted as Idaho Code § 61-502B. 1985 Idaho Sess. Laws 22. The legislation approving the Swan Falls Agreement and limiting Idaho Public Utilities Commission jurisdiction was enacted under chapter 14 of the 1985 Idaho Sessions Laws. The legislation authorizing subordination of hydropower water rights was enacted as Idaho Code § 42-203B. 1985 Idaho Sess. Laws 23-24. The legislation authorizing the Director authority to impose a moratorium on water filings and to promulgate administrative rules was added to Idaho Code § 42-1805. 1985 Idaho Sess. Laws 21-22. The Idaho Water Resource Board adopted, and the Legislature approved, amendments to Policy 32 of the State Water Plan implementing the policy positions proposed in Exhibit 6. 1985 Idaho Sess. Laws 514.

[9] There is an extensive legislative record on the Agreement and the implementing legislation and State Water Plan amendments. The negotiators of the Agreement explained it in detail, including the legislation and the State Water plan policies proposed to implement the Agreement, in a series of meetings and hearings before the Idaho Water Resource Board and the Senate and House resource committees. *SRBA Memorandum Decision* at 12-13, 33-37. This legislative history is essential to interpreting the Agreement and understanding the overall settlement it

In short, almost all of the substantive elements of the Swan Falls settlement were given legal effect through legislation, the State Water Plan, and court decrees, not through the Agreement itself. The Agreement was primarily a vessel the parties used to propose legislation and State Water Plan policies. *See* Agreement ¶ 4 ("When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action."); *id.* ¶ 6 ("The parties agree to propose and support the following legislation . . . ."); *id.* ¶ 13 ("Conditions on Effectiveness"); *id.* ¶ 17 ("This agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board").

For example, the Agreement did not establish the Murphy minimum flows, but simply proposed them. Agreement at Exhibit 6. The Murphy minimum flows were established, rather, by amendments to Policy 32 of the State Water Plan that were adopted by the Idaho Water Resource Board and approved by the Legislature. 1985 Sess. Laws 514; Minutes of Sen. Res. & Env't Comm., Mar. 4, 1985, at 1-2 & attachment; Minutes of House Res. & Cons. Comm., Mar. 7, 1985, at 4.[10] While Paragraph 7 recited the Murphy minimum flows, it did so only to quantify

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proposed, as demonstrated by the SRBA district court's summary judgment decision, which often refers to and quotes from the implementation record and legislative history (which the State provided to the SRBA district court). *Id.* Although the Ground Water Users were parties to the SRBA proceedings and seek a ruling on the Swan Falls Agreement in this appeal, they have not provided this Court with the SRBA district court's decision or the legislative and administrative record on which the SRBA district court relied. Therefore, included in the Addendum to this brief are copies of the SRBA district court's decision interpreting the Swan Falls Agreement and portions of the Agreement's legislative and administrative implementation record. The Department respectfully requests that this Court take judicial notice of these documents.

[10] Copies of excerpted pages of the Senate committee minutes of March 4, 1985 and copies of excerpted pages of the House committee minutes of March 7, 1985 are attached hereto as **Addendum 11** and **Addendum 15**, respectively. Complete copies of these minutes were provided to the SRBA district court in Consolidated Subcase

at the same levels as the Murphy minimum flows that portion of the Company's hydropower water right that would not be subordinated to future uses.

Thus, the Director's water rights administration duties and obligations are defined by state law, not by the Swan Falls Agreement. This is confirmed by Paragraph 14, which provides that the Agreement "shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce or administer." Agreement ¶ 14. In 2004, Idaho Power's former attorney and Swan Falls negotiator Tom Nelson confirmed this understanding in his statements to the Expanded Natural Resources Interim Committee:

> The Agreement itself did not attempt to manage the Snake River. . . . The state, in managing the river, has to decide if any junior water rights need to be curtailed, among other things. This sort of management consideration was not on the table during the discussions, it was left to the state.

R. Vol. 12 at 2829.

In sum, the Ground Water Users' arguments must be rejected because they rest on the erroneous assumption that the Swan Falls Agreement itself establishes the legal authorities and standards applicable to the Spring Users' delivery calls. These authorities and standards are established by SRBA decrees and state law, not by the Agreement.[11]

No. 00-92023 as Exhibit 15 and Exhibit 25 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment (Jan. 9, 2008) ("Orr Aff.").

[11] The subordination provisions of Paragraphs 7C and 7D of the Agreement do protect some of the Ground Water Users from delivery calls by Idaho Power, but this protection does not apply to delivery calls by the Spring Users.

ii. The Agreement did not create a comprehensive plan for water rights administration nor did it supplant state law on this subject

The Ground Water Users attempt to reshape the Agreement by arguing that under Paragraph 11, the Agreement itself constitutes a "comprehensive plan" for the management of the Snake River basin. *See Ground Water Users' Opening Brief* at 19-31. This argument misreads Paragraph 11, which does not state that the Agreement itself is a "comprehensive plan" but rather memorializes the parties' intent to seek FERC recognition of Agreement as a "comprehensive plan" for purposes of Section 10 of the Federal Water Power Act.[12] *See* Agreement ¶ 11 ("State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River watershed."). This interpretation is confirmed by the explanation of Paragraph 11 that Pat Kole, the attorney who negotiated the Agreement on behalf of the Attorney General, presented in an Idaho Water Resource Board public information meeting on the Agreement:

> But you know the real beauty of this agreement in my opinion is that what it does is that it requires both the state and the power company to go back to the Federal Energy Regulatory Commission and to say to them, "Here is a comprehensive state plan for management of this very vital natural resource." Now, to date FERC has never recognized the right of the state to do that kind of thing. And if we can get FERC to do that in this case, we're going to go a long ways towards protecting the other rivers in the state. . . . what I'm saying is that we're going back to them and asking them to approve our agreement. Okay? And as part of our agreement, we are saying, "We have got this plan for management of the river. Take a look at it. Don't you think it's a good plan? Won't you base your determinations upon what our plan is?

[12] Section 10 of the Federal Water Power Act requires FERC to consider the extent to which a hydropower project will be "consistent with a comprehensive plan . . . for improving, developing or conserving a waterway." 16 U.S.C. § 803(2). FERC approval of the Agreement was required under Paragraphs 12(B)(i) and 13(A)(iv).

Transcript of Proceedings, Public Information Meeting on the Swan Falls Agreement (Id. Water Res. Bd.), at 40-42 (Oct. 31, 1984).[13]

The FERC record confirms Pat Kole's interpretation of Paragraph 11. Because the U.S. Department of the Interior opposed FERC recognition of the Agreement as a comprehensive plan under Section 10(a) of the Federal Water Power Act, the State and the Company entered into an offer of settlement with Interior stipulating that the Agreement was no longer being presented to the Commission as a comprehensive plan for purposes of Section 10. 42 FERC P 61375, 1988 WL 244129, at *4. Thus, the "comprehensive plan" provision on which the Ground Water Users rely pertained to the parties' objective of obtaining federal regulatory approval of the Agreement. It was never intended to mean that the Agreement itself established a comprehensive plan for water rights administration or supplanted state law in such matters.

B. Neither the Agreement nor the State Water Plan subordinated the Spring Users' water rights or made them subject to the Murphy minimum flows

While the Ground Water Users argue that the Swan Falls Agreement created a "comprehensive plan" that protects them from the Spring Users' delivery calls, they fail to go beyond this general assertion and demonstrate how the "comprehensive plan" does so. To the extent the Agreement contemplates a "comprehensive plan," there are two components: the definition of the Company's hydropower water rights, and the State Water Plan. *See* Agreement ¶ 11 ("the resolution of Company's water rights . . . together with the Idaho State Water Plan

[13] Copies of excerpted pages of this transcript are attached hereto as **Addendum 6**. A copy of this transcript was provided to the SRBA district court in Consolidated Subcase No. 00-92023 (92-23) as Exhibit 45 to the Orr Aff. The transcripts the State provided to the SRBA district court in Consolidated Subcase No. 00-92023 were made from tape recordings of proceedings before the Idaho Water Resource Board and the Senate resources committee during late 1984 and early 1985.

provide a sound comprehensive plan for the management of the Snake River watershed."). As discussed below, neither of these components subordinates the Spring Users' water rights or makes them subject to the Murphy minimum flows.

i. The Settlement subordinated only hydropower water for certain Idaho Power facilities below Milner dam and above the Murphy gage

The Swan Falls Agreement was meant to resolve the Swan Falls controversy, which first and foremost was a dispute over whether Idaho Power's water rights at Swan Falls dam and a number of other hydropower facilities in the Snake River Basin below Milner Dam and above the Murphy gage were subordinate to other uses. *SRBA Memorandum Decision* at 6-7; *Miles* at 636, 778 P.2d at 758; *Idaho Power Co. v. State*, 104 Idaho 575, 582-83, 661 P.2d 741, 748-49 (1983). The Agreement contemplated two different types of subordination, depending on whether the subordination protected existing water rights or future water rights.

a. The Settlement's subordination of hydropower water rights to existing water rights did not subordinate the spring water rights

Paragraphs 7C and 7D of the Agreement directly subordinated the hydropower water rights for certain Idaho Power facilities below Milner Dam and above the Murphy gage to most water rights existing at the time of the Agreement.[14] The Ground Water Users nonetheless assert

[14] Paragraphs 7C and 7D directly subordinated the hydropower water rights through the Agreement itself rather than through legislation or State Water Plan amendments adopted to implement the Agreement. The partial decrees to be entered pursuant to the SRBA district court's orders in Consolidated Subcase No. 00-92023 will include subordination provisions corresponding to Paragraphs 7C and 7D of the Agreement. *See Partial Decree And Consolidation Order* at 9-10 & attachments. The SRBA district court has finalized and decreed all the elements of the hydropower water rights, with the exception of a single remark in each decree that will memorialize the

that the "comprehensive plan" of the Agreement "bears directly" on the Spring User's delivery calls because Paragraph 7D protects "all water rights with a priority date prior to October 1, 1984." *Ground Water Users' Opening Brief* at 22. This argument is contrary to the plain language of Paragraph 7D, which is expressly limited to the Company's hydropower water rights identified in Paragraphs 7A and 7B, and has no effect on the Spring Users' water rights. Agreement ¶ 7D.[15]

Idaho Power's attorney and Swan Falls negotiator Tom Nelson confirmed this interpretation in public hearings on the Agreement before the Senate Resources and Environment Committee and the Idaho Water Resource Board, emphasizing that the provisions for subordination to existing uses applied only to Idaho Power's water rights:

> SENATOR RICKS: So that means -- does that mean, then, that they could not be -- the courts could not -- or anybody could not sue them and challenge their water right in the future?
>
> MR. NELSON: Mr. Chairman, Senator Ricks, the only meaning that has in the context in which that dismissal took place is that the power company is barred from ever challenging their water right. Now, as I said before, if they have trouble with their neighbors, they have trouble with the state, whatever those other problems are, they will continue to have them. But the power company is barred from challenging their water right.

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subordination provisions of Paragraph 7D of the Agreement. *Partial Decree And Consolidation Order* at 9-10 & attachments.

[15] Paragraph 7D of the Agreement provides as follows: "The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985." The question of whether Paragraph 7D protects all water rights with a priority date prior to October 1, 1984 is currently pending before the SRBA district court in Basin-Wide Issue No. 13. *See supra* note 2.

Transcript of Proceedings, Sen. Res. & Env't Comm., at 39 (Feb. 1, 1985)[16]; *see also* Transcript of Proceedings, Water Res. Bd., at 57 (Nov. 1, 1984) ("MR. KOLE: . . . . Existing people will be protected. MR. NELSON: From the power company. MR. KOLE: From the power company. . . .").[17]

The express terms of the Agreement and its legislative history conclusively demonstrate that the Agreement did not subordinate the Spring Users' water rights to existing ground water rights.

b. The Settlement's subordination of hydropower water rights to future water rights did not subordinate the spring water rights

The subordination provisions relating to future water rights were also limited to the hydropower water rights for the same Idaho Power facilities below Milner Dam and above the Murphy gage. The Agreement quantified the portion of the hydropower water rights that were "unsubordinated" to future uses[18] at the same levels as the new Murphy minimum flows to be incorporated into the State Water Plan. *Compare* Agreement ¶ 7A *with id.* at Exhibit 6 ¶ 1. Pursuant to the hydropower subordination legislation enacted to implement the Agreement and the State's constitutional authority to "regulate and implement" hydropower water rights, Idaho

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[16] Copies of excerpted pages of this transcript are attached hereto in **Addendum 13**. A copy of this transcript was provided to the SRBA district court in Consolidated Subcase No. 00-92023 (92-23) as Exhibit 40 to the Orr Aff.

[17] Copies of excerpted pages of this transcript are attached hereto in **Addendum 7**. A copy of this transcript was provided to the SRBA district court in Consolidated Subcase No. 00-92023 (92023) as Exhibit 46 to the Orr Aff.

[18] Paragraph 7A provides that Idaho Power's hydropower water right to flows of 3,900 cfs and 5,600 cfs as measured at Murphy is "unsubordinated," but this term refers only to future water rights for other uses. The Agreement expressly provides that the hydropower water right is subordinate to certain water rights existing at the time of the Agreement, as defined in Paragraphs 7C and 7D of the Agreement. Agreement ¶¶ 7C, 7D; *see also Partial Decree And Consolidation Order* at 9-10 & attachments.

Code § 42-203B(1), Idaho Const. Art. XV, § 3, the State holds in trust the hydropower water rights for the flows in excess of the Murphy minimum flows. Idaho Code § 42-203B(2), (5); *SRBA Memorandum Decision* at 26-32, 42-43; *see also* Agreement at Exhibits 7A, 7B (proposing legislation that ultimately was enacted as Idaho Code § 42-203B).[19] Subordination of the hydropower water rights held in trust by the State is governed by state law. *Id.* Thus, the Agreement and its implementing legislation authorized the State to subordinate the hydropower water rights down to the level of the Murphy minimum flows.

This approach to future subordination allowed for some additional development of the ESPA, because the new summer minimum flow of 3,900 cfs was approximately 600 cfs less than the lowest measured flow of 4,520 cfs,[20] which was thought to fully reflect the depletive effects

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[19] The subordination and trust legislation was the result of a compromise that resolved the parties' dispute over "subordinated" versus "subordinatable" water rights, which had threatened to derail the settlement during the final stages of negotiations. The State insisted that the hydropower water rights in excess of the minimum flows be immediately subordinated to future uses upon execution of the Agreement, while Idaho Power insisted that the water rights remain unsubordinated and merely be "subordinatable" to new uses. This disagreement developed into a stalemate that was resolved by the subordination and trust legislation: "'And what we ended up agreeing to was, in essence, have the water right placed in trust in the ownership of the state in exchange for which we went with the concept of the subordinatable water right.'" *SRBA Memorandum Decision* at 34 (quoting attorney Pat Kole, who negotiated the Swan Falls Agreement on behalf of the Attorney General, in an Idaho Water Resource Board public information meeting on the Agreement.) Thus, under the trust arrangement, the hydropower water rights in excess of the minimum flows are "subordinatable," but the State holds legal title to them and their subordination is controlled by state law rather than contract. *Id.* at 29-32, 40-41; Idaho Code § 42-203B(2), (5).

[20] These figures are "average daily flows," which are calculated flows rather than instantaneous flow measurements. Further, while the Agreement and its implementing legislation contemplated that flows in excess of the Murphy minimum flows would be available for uses other than hydropower, nothing in the settlement assumed or required that the excess flows would amount to 600 cfs, or to any other particular quantity. *See SRBA Memorandum Decision* at 47 ("the Agreement was structured to specifically account for uncertainty in the availability of the excess flows. No guarantees or promises were made to Idaho Power with respect to the availability of the excess flows."). As Tom Nelson, Idaho Power's attorney, explained to the Senate resources committee in 1985: "And the agreement isn't written around 600 CFS being available for development. It's written around the minimum flow. So if there's more than 600 CFS available for development, it's available. And the contrary, likewise, is true." Transcript of Proceedings, Sen. Res. & Env't. Comm. (Jan. 25, 1985), at 31. Copies of excerpted pages of this transcript are attached hereto in **Addendum 12**. A complete copy of this transcript was

of all uses existing at the time. *See SRBA Memorandum Decision* at 7-8 (discussing flow figures). This approach also "enabled the State to impose the public interest criteria in conjunction with issuing new water rights." *Id.* at 40.

Contrary to the Ground Water Users' argument, the Agreement and the hydropower subordination legislation are clear that this subordination framework applies only to the water rights held in trust by the State, which by definition are hydropower water rights for certain Idaho Power facilities below Milner Dam and above the Murphy gage. Agreement ¶¶ 4, 7A, 7B & Exhibit 7B; Idaho Code § 42-203B(2), (5). There is no express or implied reference to any other water rights in the Agreement or the subordination legislation. Thus, the Ground Water Users are mistaken in arguing that the terms of the Swan Falls Agreement bar the Spring Users from making a delivery call so long as the minimum flows at the Murphy gage are maintained.

C. The State Water Plan amendments implementing the Swan Falls Settlement did not subordinate the spring water rights

The true basis of the Ground Water Users' "comprehensive plan" argument is that, in practical terms, the subordination issue was mainly a question of whether Idaho Power's hydropower water rights were subordinate to junior ground water uses diverting from the ESPA. The longstanding policy of "zero flow" at Milner and Idaho Power's equally longstanding recognition of it meant that hydropower facilities on the Snake River below Milner had no

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provided to the SRBA district court in Consolidated Subcase 00-92023 as Exhibit 39 to the Orr Aff. *See also* R Vol. 10 at 2815 ("the trust is thus keyed to the maintenance of the established minimum stream flows rather than any estimates of how much water may be available above such minimum flows") ("Statement of Legislative Intent" for Idaho Code § 42-203B).

entitlement to call for water to be spilled past Milner Dam.[21] Thus, any delivery call by Idaho Power would fall almost entirely on ground water users diverting from the ESPA, which is hydraulically connected to the Milner-Murphy reach by the springs discharging into the canyon downstream from Milner Dam.

While in many ways the Swan Falls controversy was largely a debate over ground water development of the ESPA, this fact was not explicitly recognized in the Agreement itself. It was plainly discussed, however, in the amendments to Policy 32 of the State Water Plan adopted to implement the settlement. The amendments contemplated that the Snake River and the ESPA would be managed together, and that management would be based on the Milner and Murphy minimum flows:

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[21] The Milner "zero flow" policy is an optimum use principle that has guided development of the water resources of the Snake River basin since at least 1920, when it was formally articulated in a report issued by a board of engineers representing the State, the United States, and private interests that proposed a plan for development of Snake River's agricultural and hydropower potential. The Milner "zero flow" policy is memorialized in the State Water Plan and the Idaho Code and, in brief, provides that all of the flows of the Snake River arising above Milner Dam may be developed for uses above Milner, and that uses of water below Milner Dam may not interfere with such development. *See* Idaho State Water Plan at 17 (Policy 5B) (Id. Water Res. Bd.) (1996) ("The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero."); Idaho Code § 42-203B(2) ("For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered."). The Milner "zero flow" provisions of the State Water Plan and Idaho Code § 42-203B(2) have been recommended for inclusion in the SRBA's final decree as a general provision. Order Granting Petition To Appear As Amicus Curiae, Order Setting Deadline For Comments, and Special Master Report And Recommendation, *In re SRBA, Subcase Nos. 02-0200, 02-0201, 02-0223, 02-0224 (State if Idaho) and Basin 02 GP #4 (00-92002GP)* at 3-5 (Nov. 20, 2009) (recommending a general provision reciting the Milner "zero flow" provisions of the State Water Plan and Idaho Code § 42-203B(2)). *See* **Addendum** 3. It should be noted that the Milner "zero flow" provision of Idaho Code § 42-203B(2) was added to the statute in 1986 specifically to clarify and confirm the intent of the Swan Falls settlement and the Milner "zero flow" policy of the State Water Plan. *See* 1986 Senate Bill 1358; Minutes of Sen. Res. & Env't. Comm., Feb. 5, 1986, at 2; Minutes of Sen. Env't. & Res. Comm., Feb. 19, 1986, at 1; Minutes of House Res. & Cons. Comm., Mar. 13, 1986, at 1. Copies of the legislation and its statement of purpose, and of excerpted pages of the minutes, are attached hereto in **Addendum 20**, **Addendum 21**, **Addendum 22** and **Addendum 23**, respectively. Copies of the legislation and the minutes were provided to the SRBA district court in Consolidated Subcase No. 00-92023 as Exhibits 60-63 to the Orr Aff.

> The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

Minutes of Sen. Res. & Env't Comm., Mar. 4, 1985, attachment at 2.[22]

In keeping with this policy, related amendments covered the question of how the springs fit into the overall settlement. One such amendment was the "Aquaculture" policy, which expressly contemplated that the new Murphy minimum flows would provide adequate spring flows for aquaculture uses. The Aquaculture policy also recognized, however, that existing water rights to the springs were to be "protected"—although the spring users might have to change their methods of diversion as a consequence of ground water development on the plain:[23]

> The minimum flows established for the Murphy gaging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist. . . . [F]uture management and development of the Snake River Plain aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

Minutes of Sen. Res. & Env't Comm., Mar. 4, 1985, attachment at 5.[24]

These points were made repeatedly in the Idaho Water Resources Board's public meetings on the proposed amendments, which were held in early 1985 in Pocatello, Burley,

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[22] A copy of these minutes and the Idaho Water Resource Board resolution attached thereto was provided to the SRBA district court in Consolidated Subcase No. 00-92023 as Exhibit 15 to the Orr Aff., and is also attached hereto in **Addendum 11**.

[23] The Director's findings that the Spring Users' means of diversion were reasonable was affirmed by the district court on review. Clerk's R. at 80-81.

[24] A copy of these minutes and the Idaho Water Resource Board resolution attached thereto was provided to the SRBA district court in Consolidated Subcase No. 00-92023 as Exhibit 15 to the Orr Aff., is attached hereto in **Addendum 11**.

Twin Falls, Boise, and Lewiston.[25] Even the Ground Water Users admit that the State Water Plan amendments were presented as recognizing the priority of existing spring water rights. *See Ground Water Users' Opening Brief* at 24 ("These water rights will still have its priority date . . .") (in block quote).

While the State Water Plan amendments expressed the expectation that the new Murphy minimum flows would be sufficient to satisfy the Spring Users' water rights, as a matter of law the amendments could not have subordinated these existing water rights or precluded the Spring Users from making a delivery call. The State Water Plan applies to "the conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest." Idaho Code § 42-1734A(1); *see also Idaho Power* at 571, 661 P.2d at 737 (stating that the Idaho Water Resource Board has power to "'*to formulate and implement a state water plan* for optimum development of water resources in the public interest'") (quoting Idaho Const. Art. XV, § 7) (emphasis in original). Under Idaho law, the State Water Plan could not (and cannot) impair existing water rights. *See* Idaho Code § 42-1734A(1)(a) ("Existing rights, established duties, and the relative priorities of water established

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[25] *See, e.g.*, Transcript of Public Hearing Before The Idaho Water Resource Board, Pocatello, Idaho, Jan. 29, 1985, 2:00 P.M., at 11-12, 18-19; Transcript of Public Hearing Before The Idaho Water Resource Board, Pocatello, Idaho, Jan. 29, 1985, 7:00 P.M., at 11-12, 17; Transcript of Audiotaped Proceedings, Hearing of the Idaho Water Resource Board on State Water Plan Policy 32 (Jan. 30, 1985, 2:00 P.M.) (Burley, Id.), at 12-13; Transcript of Audiotaped Proceedings, Hearing of the Idaho Water Resource Board on State Water Plan Policy 32 (Jan. 30, 1985, 7:00 P.M.), at 15-16; Transcript of Idaho Water Resource Board State Water Plan Hearing On Policy 32, Twin Falls, Idaho, Jan. 31, 1985 , 2:00 P.M. and 7:00 P.M., at 15, 70-71, 80-81; Transcript of Proceedings, Public Information Meeting Regarding Changes to the State Water Plan – Policy 32 (Id. Water Res. Bd.) (Feb. 6, 1985, 2:00 P.M. & 7:00 P.M.) (Lewiston, Id.), at 19-21, 31-32, 73. Copies of excerpted pages of these transcripts are attached hereto in **Addendum 16**, **Addendum 17**, **Addendum 18** and **Addendum 19**. These transcripts were provided to the SRBA district court in Consolidated Subcase No. 00-92023 as Exhibits 24, 25, 26 and 28 to the Third Affidavit of Michael C. Orr (Jul. 18, 2008) ("Third Orr Aff.").

in article XV, section 3 of the constitution of the state of Idaho, shall be protected and preserved").

Rather than purporting to subordinate the Spring Users' water rights or to prescribe how they would be administered, the State Water Plan recognized that administration of the Spring Users' water rights would be governed by applicable principles of the prior appropriation doctrine as established by Idaho law. Among these are the requirement of reasonable diversion and the defense of futile call, both of which were assumed to apply to administration of the Spring Users' water rights. Tom Nelson, for example, responded to a question in the first public information meeting on the Agreement regarding whether a well 80 miles from Thousand Springs would be shut off to support the new Murphy minimum flows in a dry year: "I think, Bruce, as we discussed yesterday, you can't in your postulate shut your well off 80 miles away and do any good in 1995 . . . ." Transcript of Proceedings, Public Information Meeting on the Swan Falls Agreement (Id. Water Res. Bd.), at 36 (Oct. 25, 1984).[26] Likewise, Idaho Water Resource Board representative Frank Sherman explained that one of the reasons for a proposed amendment regarding acquisition of storage water to support the Murphy minimum flows was that delivery calls against ground water users on the plain would not be effective in protecting the minimum flows:

> MR. SHERMAN: . . . . Certainly most of us know enough about (inaudible) to know that if you made a call (inaudible) on a pumper who is 50 miles from Thousand Springs, the effect of shutting him off might not show up for six months at which point, who cares.

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[26] Copies of excerpted pages of this transcript are attached hereto in **Addendum 5**. A complete copy of this transcript was provided to the SRBA district court in Consolidated Subcase No. 00-902023 as Exhibit 44 to the Orr Aff.

Transcript of Public Hearing Before The Idaho Water Resource Board, Pocatello, Idaho, January 29, 1985, 2: P.M., at 19.[27] *See also* Transcript of State Water Plan Hearing on Policy 32, Twin Falls, Idaho (Id. Water Res. Bd.) (7:00 P.M., Jan. 31, 1985), at 79 (MR. SHERMAN: . . . . Now, law provides that junior appropriators can be cut off, but cutting off a junior appropriator on the Snake Plain doesn't do any good in terms of days or months, even, perhaps for the flow at Murphy.")[28]

Thus, representatives of the parties and the Idaho Water Resource Board plainly understood that the State Water Plan did not subordinate the spring water rights. Rather, the administration of spring water rights and ground water rights would be governed by applicable Idaho law. Moreover, any contention by the Ground Water Users that under the State Water Plan amendments they obtained a vested right to be protected from the Spring Users' delivery calls whenever the Murphy minimum flows are met cannot be reconciled with Paragraph 17 of the Agreement ("Subsequent Changes In Law"). Paragraph 17 provided that the Legislature remained free to change any aspect of the settlement except the definition of Idaho Power's water right. As Tom Nelson, Idaho Power's attorney and Swan Falls negotiator, explained to the House resources committee, Paragraph 17 allows for the implementing legislation and State Water Plan provisions to be changed at any time:

> [T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing, next year, that is its prerogative. The only thing the legislature does not have the power to do, would be to change the contractual recognition of the company's water rights at the Murphy gage.

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[27] Copies of excerpted pages of this transcript are attached hereto in **Addendum 16**. A copy of this transcript was provided to the SRBA district court in Consolidated Subcase No. 00-92023 as Exhibit 24 to the Third Orr Aff.

[28] Copies of excerpted pages of this transcript are attached hereto in **Addendum 18**. A copy of this transcript was provided to the SRBA district court in Consolidated Subcase No. 00-92023 as Exhibit 26 to the Third Orr Aff.

Id. at 36-37 (quoting Minutes of House Res. & Cons. Comm, Feb. 11, 1985).[29]

In sum, the Ground Water Users are mistaken in arguing that the Swan Falls Agreement established a "comprehensive plan" for water rights administration that subordinated the Spring Users' water rights or that otherwise protects the Ground Water Users from the Spring Users' delivery calls. The Swan Falls settlement contemplated that water rights administration would be governed by Idaho law, including but not limited to Idaho Code § 42-226, which provides 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."

2. The Director Properly Applied The Ground Water Act In Responding To The Delivery Calls

The Ground Water Users next argue that the curtailment orders should be set aside because the Director failed to apply the reasonable pumping level and full economic development standards from Idaho Code § 42-226; thereby allowing the Spring Users to hold an unreasonable monopoly over the ESPA. The Ground Water Users' argument misconstrues Idaho law and should be rejected on appeal.

A. The Ground Water Act's reasonable pumping level standard does not apply to the holders of senior-priority surface water rights

At common law, holders of senior-priority ground water rights were protected in the maintenance of historic pumping levels. *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933).

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[29] Copies of excepted pages of these minutes are attached hereto in **Addendum 14**. A copy of these minutes was provided to the SRBA district court in Consolidated Subcase No. 00-92023 as Exhibit 20 to the Orr Aff.

Following World War II, improvements in pumping technology and rural electrification led to the rapid development of ground water in the state of Idaho, particularly the ESPA. Ex. 461 at 5, Fig. 1 (ground water priorities on the ESPA); Ex. 435 (Idaho Power literature promoting ground water pumping). In 1951, with a great deal of clairvoyance, the Legislature enacted the Ground Water Act (the "Act"), which provided a statutory scheme for the appropriation and administration of ground water rights. 1951 Idaho Sess. Laws 421-428 (codified at Idaho Code §§ 42-226 *et seq.*). *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 580, 513 P.2d 627, 632 (1973) ("Idaho was in the vanguard of this movement when we enacted our Ground Water Act in 1951.") (internal citation omitted).

In 1953, the Legislature amended the Act. Most notably, the Legislature amended Section 1 by adding the following language, which is substantially similar to today's Idaho Code § 42-226:

> 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, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.

1953 Idaho Sess. Laws 278 (approved March 12, 1953) (emphasis added).

The amendment recognized that ground water rights would be administered according to the prior appropriation doctrine, but that prior rights should not prevent the full economic development of the ground water resources of the State, and that ground water appropriators would be required to pump from a reasonable pumping level as may be established by the

Director. The amendment "was intended to eliminate the harsh [common law] doctrine of *Noh*." *Baker* at 582, 513 P.2d at 634.

In construing the Act between junior-priority and senior-priority ground water users, the Court stated that the Act protected holders of senior-priority ground water rights through the maintenance of reasonable pumping levels, not historic pumping levels: "In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. . . . Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels." *Id.* at 584, 513 P.2d at 636 (emphasis added).[30]

Relying on *Baker*, the Ground Water Users argue, without qualification, that "A water user is not entitled to curtail junior-priority groundwater rights simply because the water table has lowered." *Ground Water Users' Opening Brief* at 34 (emphasis added). "This is precisely why the Act provides that senior water users may have to accept 'some modification of their rights in order to achieve the goal of full economic development.' *Baker*, 95 Idaho at 584." *Id.* at 40 (emphasis added). Because the Ground Water Users believe spring rights are in fact ground water rights, they argue that the Director's orders must be set aside because the "orders do not address administration of the ESPA based on reasonable aquifer levels at all." *Id.* at 37 (emphasis added).

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[30] Two of the six senior-priority ground water rights at issue in *Baker* pre-dated the Act and were subject to the reasonable pumping level standard. *Baker* at 585, 513 P.2d at 637. However, because reasonable pumping levels were exceeded, which resulted in mining of the aquifer, the Court affirmed the district's ruling that enjoined junior ground water diversions.

The Ground Water Users' argument is critically flawed. The Act does not speak to "reasonable aquifer levels," *id.*, it speaks to "reasonable pumping levels," *Baker* at 584, 513 P.2d at 636. Use of the term "pumping" directly links application of the Act to senior-priority ground water diversions. Interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Harrison v. Binnion*, 147 Idaho 645, 649, 214 P.3d 631, 635 (2009) (internal citation and quotations omitted). Clearly, the Act's reasonable pumping level standard does not apply to the holders of senior-priority surface water rights.

B. As required by Idaho law, the Director's orders protect priority of right and ensure full economic development of the ESPA

A core issue in this dispute is the Director's obligation to protect priority of right, while at the same time ensuring full economic development of the ESPA. Idaho Code § 42-226. The Ground Water Users argue that if the Director had properly applied the principle of full economic development he would not have ordered curtailment. By failing to apply the principle of full economic development, the Ground Water Users allege that the Director has allowed the Spring Users' to monopolize the ESPA. In making this argument, the Ground Water Users focus solely on full economic development without consideration of other equally important objectives of the prior appropriation doctrine, namely priority of right.

The prior appropriation doctrine, as established by Idaho law, protects holders of senior-priority water rights. Idaho Const. Art. XV, § 3. This protection is not, however, absolute. A

senior's use must be reasonable and beneficial, Idaho Const. Art XV, §§ 3, 5; not result in monopolization or waste of the resource, *Schodde*, 224 U.S. 107; *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957); be in the public interest, Idaho Code § 42-101; and provide for full economic development and optimum development of the resource, Idaho Cost. Art. XV, § 7; Idaho Code § 42-226. In responding to delivery calls under the CM Rules, the Director is required to evaluate all principles of the prior appropriation doctrine. CM Rule 20.03.

Here, the Ground Water Users hold junior-priority rights that deplete the ESPA. While depletion does not automatically constitute material injury, *American Falls* at 868, 154 P.3d at 439, the Director found, consistent with CM Rule 10.14, that the Spring Users were materially injured by ground water pumping. As observed by the Hearing Officer: "The information available to the Director and presented at hearing in this matter justify curtailment of junior ground water users. [The Ground Water Users] object[] on various grounds to any curtailment. . . . It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. . . . Curtailment is proper." R. Vol. 16 at 3714.

As required by CM Rule 20.03, the Director did not, however, end his inquiry at priority of right. In order to provide for full economic development, the Director implemented what is referred to as the "trim line." *Id.* As will be discussed in more detail below, the predictive uncertainty associated with the ESPA Model is 10%. *See infra* Part V.5.A., pp. 42-43. The Director tied the trim line to the predictive uncertainty associated with results from the ESPA Model. Tr. Vol. 7 , p. 1226, lns. 6-10. By using the trim line, the Director removed from the

scope of curtailment junior-priority ground water rights that might provide no measurable benefit to the Spring Users if curtailed. Tr. Vol. 7, p. 1229, lns. 7-25; p. 1230, lns. 1-23. Junior ground water rights that would provide at least 10% of their depletions to the Spring Users were curtailed. Clerk's R. at 67.

With the trim line in place, the Director ordered curtailment of 57,220 acres in response to the Blue Lakes call (curtailment date of December 23, 1973), and 52,470 acres in response to the Clear Springs call (curtailment date of February 4, 1964). Clerk's R. at 78. Using the same priority dates, but without the trim line in place, the Director would have curtailed 300,000 acres in response to the Blue Lakes call and 600,000 acres in response to the Clear Springs call. *Id.*

Because the Ground Water Users ignore priority of right and focus solely on full economic development, they argue that the Director's limitation on curtailment violates *Schodde*, 224 U.S. 107. *Ground Water Users' Opening Brief* at 41-42. In *Schodde*, the United States Supreme Court refused to enforce the priority of a senior surface water user because his unreasonable means of diversion monopolized the current of the Snake River. Citing a hypothetical discussion by the Court, the Ground Water Users specifically argue that the Director's limited scope of curtailment violates *Schodde*'s "10 percent rate of return" on curtailment. *Ground Water Users' Opening Brief* at 42.

While the CM Rules do not set a rate of return on curtailment, the Director's use of the trim line effectively established a rate of return: whereby only those ground water rights that were reasonably certain to provide at least 10% of their depletions to the Spring Users would be curtailed. Use of the trim line therefore ensured full economic development of the resource by

not authorizing curtailment of junior ground water rights where the best available science failed to show any measureable benefit to the Spring Users, while at the same time recognizing the priority of the Spring Users' injured rights. Tr. Vol. 7, p. 1167, lns. 9-25; p. 1168, lns. 1-18; p. 1230, lns. 2-23. Reducing the scope of curtailment from 900,000 acres to 109,670 acres prevented monopolization. R. Vol. 16 at 3712; Clerk's R. at 78. The reduction established a ratio similar to what was discussed by the Court in *Schodde*. On review, the district court concluded that the Director "balanced the reasonable use of the senior surface rights against the State's policy of full economic development and the pubic interest as required by the CMR." Clerk's R. at 81.

As established by the record herein, the Director considered and weighed each of the principles that make up the prior appropriation doctrine in arriving at his finding of material injury. The Director specifically found that the Spring Users' use was beneficial, that the Spring Users' means of diversion were reasonable, and that alternative means of diversion were not required to enhance their water supply. Clerk's R. at 80-81. More particularly, the Director protected priority of right and also ensured full economic development of the ESPA.

3. The Director's Findings Of Material Injury Are Supported By Substantial Evidence

As their third issue on appeal, the Ground Water Users argue that the Director's orders should be set aside because the Director did not explicitly consider CM Rule 42.01.e, and his findings of material injury are not based on substantial evidence. The Ground Water Users'

argument ignores the plain language of CM Rule 42.01, as well as the great weight of the evidence in the record supporting the Director's findings of material injury.

A. The Director considered or applied each of the factors in CM Rule 42.01

CM Rule 42.01 contains eight non-exclusive, permissive factors for the Director to consider in determining material injury to a senior water right: "Factors the Director may consider in determining whether the holders of water rights are suffering material injury . . . are not limited to, the following . . . ." Emphasis added. "This Court has interpreted the meaning of the word 'may' appearing in legislation, as having the meaning or expressing the right to exercise discretion. When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall.'" *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) (internal citation omitted). Therefore, despite the Ground Water Users' argument to the contrary, the Director is not obligated to expressly apply each of the factors in CM Rule 42.01.

Former Director Dreher appeared at hearing and testified for two days regarding the findings made in the curtailment orders. Former Director Dreher was extensively cross-examined by counsel for the Ground Water Users and Spring Users. Pertinent to the Ground Water Users' argument regarding CM Rule 42.01.e, former Director Dreher specifically testified that he applied or considered each of the enumerated factors in CM Rule 42.01. Tr. Vol. 7, p. 1154, lns. 4-16. The former Director's testimony that he applied or considered each factor in CM Rule 42.01 is supported by the curtailment orders. R. Vol. 1 at 68-71; R. Vol. 3 at 516-22.

The former Director's testimony was evaluated by the Hearing Officer, and resulted in his recommendation that the Director's findings of material injury were proper. Former Director Tuthill accepted this recommendation in his Final Order, which was in turn affirmed by the district court on review.

B. The Director's material injury analysis is supported by the record

The Ground Water Users argue that because they were precluded from discovering "information concerning fish production," there is no evidence in the record to support a finding of material injury. *Ground Water Users' Opening Brief* at 48. The Ground Water Users state that the Director's findings of material injury are therefore inconsistent with this Court's ruling in *American Falls* that "depletion does not equate to material injury." *Id.* at 50.

As stated by the Court: "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls* at 875, 154 P.3d at 446. "Material injury is a highly fact specific inquiry . . . ." *Id.* at 868, 154 P.3d at 439. "This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. *Id.*; I.C. § 67-5279(1) (2001). Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous." *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003).

Here, the Spring Users filed letters with the Director which sought administration in accordance with the CM Rules. R. Vol. 1 at 1; R. Vol. 1 at 2. The letters stated that reduced spring flows impacted their production and that additional water would be put to beneficial use.

Id. Upon receipt of the letters, which the Director treated as calls for delivery under CM Rule 40, R. Vol. 1 at 69; R. Vol. 3 at 518, the Director began his initial investigation into the Spring Users' claims. *See* Tr. Vol. 7, p. 1136, lns. 18-25; p. 1137, lns. 1-13 (former Director Dreher reviewed the letters filed by the Spring Users and conducted an independent investigation). The curtailment orders contained extensive findings of fact regarding the ESPA, the ESPA Model, the creation of water districts that allowed the Director to conjunctively administer hydraulically connected surface and ground water rights, and the CM Rules. R. Vol. 1 at 45-53; R. Vol. 3 at 487-95. The orders also specifically examined the letters filed by the Spring Users, the water rights held by the Spring Users, the factors considered by the Director in determining material injury, the Director's assessment of the reasonableness of diversion associated with the Spring Users' water rights, and the effects of curtailment on junior ground water rights. R. Vol. 1 at 53-62; R. Vol. 3 at 495-511.

The Director's curtailment orders were subsequently probed at a twelve-day administrative hearing by the Ground Water Users and the Spring Users. Evidence and testimony supporting the curtailment orders was presented at hearing, as well as evidence and testimony developed by the Ground Water Users and Surface Water Users in support of their respective positions. R. Vol. 16 at 3690-91.

At hearing, former Director Dreher agreed with this Court's determination that depletion does not automatically constitute material injury. Tr. Vol. 7, p. 1248, lns. 7-22. On cross-examination by counsel for the Ground Water Users, former Director Dreher explained his

rationale for finding material injury relative to the issue currently posed by the Ground Water Users on appeal. Tr. Vol. 7, p. 1250, lns. 17-25; pp. 1251-1253; p. 1254, lns. 1-23.

In evaluating the evidence and testimony presented at hearing, the Hearing Officer agreed that the record supported the Director's findings of material injury:

> The information available to the Director and presented at hearing in this matter justify curtailment of junior ground water users. . . . The ground water pumpers are upstream from the springs that supply water to the Spring User facilities. The ground water users draw water from the body of water that ultimately spills water into the canyon reaches from a variety of springs. The ground water users that have been curtailed are junior to all Spring User adjudicate[d] rights. The Spring Users have been prevented from applying water that would otherwise be available to them for a beneficial use, causing them material injury. Curtailment is proper.

R. Vol. 16 at 3714.

While the Ground Water Users disagree with the findings and conclusions contained in the record, the Ground Water Users cannot establish that the Director was clearly erroneous in determining that the Spring Users were materially injured by junior ground water pumping. Because the Director acted within the scope of his discretion, his findings of fact concerning material injury should be upheld on appeal. *American Falls* at 875, 154 P.3d at 446; *Sagewillow* at 835, 70 P.3d at 673; *Tupper* at 727, 963 P.2d at 1164.

4. The Director Properly Found That The Spring Users' Delivery Calls Were Not Futile

In times of shortage, the prior appropriation doctrine requires curtailment of junior-priority diversions for the benefit of senior users. Idaho Const. Art. XV, § 3. A notable exception to priority administration is the futile call doctrine. Here, the Ground Water Users

argue that futile call applies, which should result in the setting aside of the Director's findings of material injury.

The futile call doctrine has its roots in surface water administration. As explained by this Court: "if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water." *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). *See also* IDAPA 37.03.12.20.04 (Department administrative rule regarding futile call in the Big Lost River Basin as between surface water users).

In surface water administration, the effects of curtailment can be seen and timed. "When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great." *American Falls* at 877, 154 P.3d at 448. Because of the hydrologic complexities associated with conjunctive administration, the CM Rules recognize that, although the benefits of curtailment may be delayed and disperse, the Director may still find that the holder of a senior-priority water right is materially injured. CM Rule 20.04. "When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower." *Id.* at 877, 154 P.3d at 448.

The Director is therefore tasked with determining "whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior . . . ." *Id.* at 875, 154 P.3d at 446. "Conjunctive administration requires knowledge by the

IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources." *Id.* at 877, 154 P.3d at 448 (internal citation and quotations omitted).

Here, the delivery calls were analyzed by the Director and a determination made, based on review of the information available to him, that the Spring Users were materially injured within the meaning of the CM Rules and that curtailment of junior ground water rights would result in usable quantities of water reaching the Spring Users' facilities. R. Vol. 1 at 70, ¶¶ 24-28; R. Vol. 3 at 518-520, ¶¶ 24-29.

In his review of the evidence and testimony presented at hearing, the Hearing Officer specifically found that "[t]he amount of water that would be delivered to the Spring Users' facilities is a usable quantity. Using the ESPAM establishes the increased amount of water that will go to the reaches. The percentage of that water that will go to the particular Spring Users is a usable quantity." R. Vol. 16 at 3710. The Hearing Officer's recommendation was accepted by the Director, and not disturbed by the district court on review.

Even if a usable quantity of water would reach Blue Lakes and Clear Springs' points of diversion, the Ground Water Users argue that the Director erred by not deeming the delivery calls futile because of the length of time in which the ESPA Model predicts curtailment of junior ground water rights would result in appreciable gains to the impacted reaches of the Snake River. At steady state, the ESPA Model shows that it will take more than 100 years for the full benefit of curtailment to accrue to the Spring Users' facilities; much of the benefit, however, will occur

within the first twenty years. Ex. 461, Figs. 12 (Blue Lakes) and 13 (Clear Springs); Tr. Vol. 5, p. 883, lns. 18-19.

The issue of timing is discussed in the CM Rules, was reviewed by the Court in *American Falls*, spoken to at hearing by former Director Dreher, examined by the Hearing Officer, and the district court on review. CM Rules 20.04, 40.01.a, 42.01.c., and 43.03.c discuss the delayed impacts of junior ground water pumping on senior water rights and the ability for the Director to order curtailment even when the call might be deemed futile in traditional surface water administration. "The Rules do give the Director the tools by which to determine how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversions and use of water from one source impacts others." *American Falls* at 878, 154 P.3d at 449.

During the hearing, former Director Dreher explained why administration of junior ground water rights was appropriate in light of CM Rule 20.04. *See* Tr. Vol. 8, p. 1368, lns. 5-25; p. 1369, lns. 1-21. The Hearing Officer understood the Ground Water Users' argument and nevertheless deemed that administration of junior ground water rights was proper. R. Vol. 16 at 3714-15. The Hearing Officer's recommendation was accepted by the Director and affirmed by the district court on review.

5. The Director Properly Accounted For Model Uncertainty And Spring Apportionment

The Ground Water Users argue that these proceedings should be remanded because the Director failed to account for uncertainty associated with the ESPA Model, as well as his determination of how much water would accrue to the Spring Users as a result of curtailment.

A. The predictive uncertainty associated with the ESPA Model is 10%

In his curtailment orders, the Director explained the present technical understanding of the ESPA and the need for modeling in order to better understand the relationship between hydraulically connected ground and spring water rights. R. Vol. 1 at 45-49; R. Vol. 3 at 487-492. The ESPA Model, which was collaboratively designed by the Department and the stakeholders, represents the best available science for simulating the regional effects of ground water diversions and surface water uses on the ESPA and hydraulically connected reaches of the Snake River and its tributaries, including springs in the Thousand Springs area. *Id.*; Tr. Vol. 4, p. 794, lns. 20-25; p. 795, lns. 1-25.

Acknowledging that "no model is perfect," former Director Dreher found it was scientifically necessary to quantity uncertainty associated with results from the ESPA Model. Tr. Vol. 7, p. 1133, ln. 9. The uncertainty assigned by the Director was 10%. R. Vol. 1 at 49, ¶ 16; R. Vol. 3 at 491, ¶ 17. In his testimony before the Hearing Officer, former Director Dreher explained his rationale, which he tied to the uncertainty associated with river gaging, "the highest degree of uncertainty in the model results . . . ." Tr. Vol. 7, p. 1166, lns. 7-25; p. 1167, lns. 1-8.

In weighing the evidence before him, the Hearing Officer approved the use of 10% uncertainty: "It was proper for the Director to determine a margin of error . . . the Director in his best judgment may use 10%." R. Vol. 16 at 3703. In his Final Order, the Director accepted the Hearing Officer's recommendation. R. Vol. 16 at 3958, ¶ 10. On judicial review, the district court stated as follows: "This Court agrees that the evidence, albeit conflicting, supports the use of the 10% margin of error as a minimum and is not arbitrary or capricious. That is all that is available. No evidence was presented that establishes a higher margin of error or to controvert that the margin of error is less than 10%." Clerk's R. at 68.

While the Ground Water Users argue that the 10% uncertainty assigned by the Director should be greater and that his reasoning is faulty because he failed to account for all known uncertainties associated with the ESPA Model, the assignment of 10% uncertainty is a finding of fact that falls squarely within the realm of the Director's discretion in conjunctive administration of surface and ground water rights. *American Falls* at 875, 154 P.3d at 446; *Sagewillow* at 835, 70 P.3d at 673; *Tupper* at 727, 963 P.2d at 1164.

B. The Director's findings of spring apportionment are supported by the record

Similar to the Director's finding of 10% uncertainty, the Ground Water Users disagree with the Director's method for apportioning the benefits of curtailment to the Spring Users' respective facilities, referred to as "spring apportionment" or by the Ground Water Users as the Director's "linear analysis." *Ground Water Users' Opening Brief* at 56.

The ESPA Model is a regional model that divides the Snake River into five reaches. Tr. Vol. 5, p. 801, lns. 13-18. Within the Thousand Springs, the Model divides the area into six adjacent groupings of spring complexes, or spring reaches, based on the relative magnitude of spring discharge. R. Vol. 1 at 48, ¶ 14; Tr. Vol. 5, p. 801, lns. 19-22. Blue Lakes is located in the 24-mile long Devil's Washbowl to Buhl reach. R. Vol. 1 at 48, ¶ 15; R. Vol. 9 at 1908, ¶ 15. Clear Springs is located in the 11-mile long Buhl to Thousand Springs reach. R. Vol. 3 at 491, ¶ 15; Ex. 262 at 6, ¶ 15. Blue Lakes and Clear Springs divert water for their fish propagation facilities from discrete springs located within their respective multi-mile spring reaches.

The Department agrees with the Ground Water Users that the ESPA Model "was not designed as a tool to predict the effect of curtailment on discrete spring flows." *Ground Water Users' Opening Brief* at 56. This concept was explained by former Director Dreher at hearing, Tr. Vol. 7, p. 1132, lns. 13-25; p. 1133, lns. 1-8, and has been agreed with by Clear Springs' modeling expert, Ex. 312 at 11.

In order to apply the results from the ESPA Model that simulated gains to the Spring Users' respective river reaches, the Director undertook an analysis to determine how much water would arrive at the Spring Users' discrete points of diversion as a result of curtailment. Using water measurements taken by the United States Geological Survey, the results of the Director's analysis were that 20% of flows in the 24-mile Devil's Washbowl to Buhl reach would accrue directly to the Blue Lakes facility. R. Vol. 1 at 48-49, ¶ 15. In the 11-mile Buhl to Thousand Springs reach, 7% of the flow would accrue directly to the Clear Springs facility. R. Vol. 3 at 491, ¶ 15.

During his direct examination, former Director Dreher explained these findings. Tr. Vol. 7, p. 1170, lns. 17-25; pp. 1171-72; p. 1173, lns. 1-7. Former Director Dreher was extensively cross-examined on his percentage assignment of direct benefit to the Blue Lakes and Clear Springs facilities. Tr. Vol. 7, pp. 1244-47; pp. 1276-89; Tr. Vol. 8, pp. 1416-20. On cross-examination, former Director Dreher agreed that his determination of direct benefit to the Spring Users was "the best analysis" that he could have performed. Tr. Vol. 8, p. 1420, lns. 3-6.

The development of information regarding direct benefit to the facilities was important in the Director's analysis of the delivery calls because it allowed him to determine if curtailment would result in a usable quantity of water arriving at the Spring Users' discrete points of diversion. The Hearing Officer found that the use of 20% for Blue Lakes "is supported by the evidence and was proper to be applied." R. Vol. 16 at 3710. As for the 7% figure for Clear Springs, the Hearing Officer found that the proper percentage to utilize, based on information in the record, was 6.9%. *Id.*

Other than disagreement with the Director's methodology, no alternative science was presented at the hearing to establish different percentages: "Criticism of the former Director's methodology and conclusions did not, however, provide any percentages that could be relied upon above those utilized by the former Director." R. Vol. 16 at 3845. In his Final Order, the Director accepted the Hearing Officer's recommendations on these points. R. Vol. 16 at 3957-58, ¶¶ 1, 5. On review, the district court stated that, "given the data and methodology available to the Director, in light of the limitations of the model, despite being subject to differences of opinion, the apportionment was not arbitrary or capricious." Clerk's R. at 71.

The Director's findings of fact regarding spring apportionment fall squarely within the realm of discretion that should be afforded to the Director in conjunctive administration and therefore should be upheld on appeal. *American Falls* at 875, 154 P.3d at 446; *Sagewillow* at 835, 70 P.3d at 673; *Tupper* at 727, 963 P.2d at 1164.

6. The Ground Water Users' Due Process Rights Were Not Violated By The Director's Curtailment Orders And CM Rule 40 Does Not Require Hearing Prior To Issuance And Enforcement Of A Curtailment Order In An Organized Water District

As their final issue on appeal, the Ground Water Users argue that the Director's failure to set a hearing until 2007 violated their due process rights and should result in the setting aside of the curtailment orders. Alternatively, the Ground Water Users urge this Court to hold that, under the CM Rules, a hearing in an organized water district must occur prior to curtailment.

A. The procedural background of this case supports the Director's actions

When the Department received the Spring Users' letters for conjunctive administration, along with a similar request from the Surface Water Coalition ("SWC"),[31] it resulted in the Department, for the first time, applying the CM Rules.[32] Being responsive to the delivery calls, the Director quickly issued orders, which resulted in findings of material injury to Blue Lakes, Clear Springs, and the SWC. In the summer of 2005, at the request of the Ground Water Users,

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[31] The Surface Water Coalition is made up of seven irrigation entities that divert water from the Snake River and apply it to lands overlaying the ESPA. The SWC filed its delivery call with the Department in January 2005.

[32] A similar delivery call was filed by Rangen, Inc. ("Rangen"). Rangen, a cross-respondent in this case, diverts surface water for fish propagation purposes in the Thousand Springs area. On May 19, 2005, former Director Dreher entered an order finding the call futile.

R. Vol. 3 at 607; R. Vol. 4 at 754, the Director stated his intention to hold a hearing by March 2006, R. Vol. 4 at 756.[33]

On June 6, 2007, following the Court's decision in *American Falls*, former Director Tuthill[34] notified the parties of his intention to schedule a hearing, R. Vol. 7 at 1411, thereafter ordering hearing to commence October 10, 2007. R. Vol. 9 at 1913. On July 27, 2007, counsel for the Ground Water Users and the Spring Users stipulated to begin hearing on November 28, 2007. R. Vol. 9 at 1963. The stipulation was accepted by the Director, R. Vol. 9 at 1974, and Gerald F. Schroeder was appointed to serve as independent hearing officer, R. Vol. 10 at 1979. On November 28, 2007, hearing in the first conjunctive administration delivery call proceeding in the state of Idaho began. R. Vol. 16 at 3690.

Consistent with the procedural history of the case described above, the Hearing Officer in his Recommended Order found as follows:

> The Director's Orders for curtailment were entered in the spring and summer of 2005. This hearing occurred in December, 2007. There are reasons. When the Conjunctive Management Rules were challenged, the authority of the Director and the policies of the State were in doubt. There is no remediation for

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[33] On August 15, 2005, shortly before issuance of the Director's scheduling order, a declaratory action was filed with the district court in Gooding County by certain members of the SWC alleging that the CM Rules were unconstitutional. *American Falls* at 868, 154 P.3d at 439. Litigation ensued. On June 2, 2006, the Honorable Barry Wood entered an order finding that the CM Rules were unconstitutional. R. Vol. 7 at 1288. With the CM Rules in question, on July 28, 2006, the Director requested briefing from the parties regarding the posture of the proceedings. R. Vol. 7 at 1287. This was the last order issued by former Director Dreher in this proceeding. In response, counsel for the Ground Water Users requested that a hearing "occur in February 2007." R. Vol. 7 at 1310. On March 5, 2007, this Court issued its decision in *American Falls*, upholding the facial constitutionality of the CM Rules. *American Falls* at 862, 154 P.3d at 43. Following the Court's decision, the administrative proceedings recommenced.

[34] In January 2007, David R. Tuthill, Jr. was appointed interim Director. On April 17, 2007, Mr. Tuthill was appointed Director. After thirty-three years of service to the state of Idaho, Director Tuthill retired on June 30, 2009. Gary Spackman was subsequently appointed interim Director.

> what has occurred. The Director's Orders are supportable and should be enforced. Actions that were taken pursuant to them have been actions that would have been necessary had there been a hearing in short time from their issuance.

R. Vol. 16 at 3716 (emphasis added).[35]

Assuming for purposes of argument only that the Ground Water Users were deprived of due process prior to the 2007 hearing, any error committed by the Department has since been cured with no harm to the Ground Water Users. As explained above, the findings in the curtailment orders are supported by the record.

While the Ground Water Users were under threat of curtailment, the Ground Water Users were not curtailed in the years at issue because the Director found they were able to provide sufficient mitigation to the Spring Users. The Ground Water Users received a full and fair hearing in 2007 and are presently diverting ground water under approved CM Rule 43 mitigation plans. With approved mitigation plans in place, the Ground Water Users are protected from delivery calls. CM Rule 42.02 ("The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping . . . where use of the water under the junior-priority right is covered by an approved and effectively operating mitigation plan.").

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[35] While the district court on review found that the Department violated the Ground Water Users' due process rights regarding hearing on their replacement/mitigation plans—for which there was no remedy—the court found that the curtailment orders were sound and did not violate the Ground Water Users' due process rights. Clerk's R. at 100, ¶¶ 2 and 3.

B. CM Rule 40 does not require a hearing in an organized water district prior to curtailment

Alternatively, the Ground Water Users argue that if the curtailment orders are not set aside because of due process concerns, this Court should definitively rule that "due process requires a hearing before curtailment is enforced in the context of conjunctive water administration." *Ground Water Users' Opening Brief* at 71 (emphasis in original) The Ground Water Users' argument, which was rejected by the district court, is not supported by the CM Rules.

In 2001, with the success of the SRBA in decreeing water rights across the Eastern Snake Plain, the Director created water districts in accordance with Idaho Code § 42-604, thereby establishing an administrative foundation upon which conjunctive management would be based. Tr. Vol. 7, p. 1122, lns. 4-25; pp. 1123-26; p. 1127, lns. 1-11. Specific to these proceedings, the Director created water districts 120 and 130, R. Vol. 1 at 50, and dissolved what were known as ground water management areas ("GWMAs"), Tr. Vol. 4, p. 655, lns. 12-25; p. 656, ln. 1. The water rights at issue in these proceedings are located in organized water districts. R. Vol. 1 50-51; R. Vol. 3 at 493-494. The SRBA district court has sanctioned administration of the water rights at issue in these proceedings. Clerk's R. at 54.

If the Director had never created GWMAs, kept the GWMAs in place, or dissolved the GWMAs without the subsequent creation of water districts, the Ground Water Users would be correct that the Director must hold a hearing prior to curtailment of junior-priority ground water rights. *See* CM Rule 30 (hearing required in areas not within GWMAs or organized water

districts); CM Rule 41 (hearing required in GWMAs). This argument is supported by the Ground Water Users' citation to *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969), wherein a hearing was held before a local ground water board prior to administration of non-adjudicated, junior-priority ground water rights. *Id.* at 5, 453 P.2d at 820 ("The local ground water board concluded that appellants' well rights were junior and subsequent to respondents' rights to the use of waters from Warm Springs."). Here, however, the water rights at issue have been decreed or recommended by the Director to the SRBA district court, are located in organized water districts, and are subject to administration in accordance with CM Rule 40. R. Vol. 1 50-51; R. Vol. 3 at 493-494; Clerk's R. at 54.

CM Rule 40.01.a. allows the Director to administer those rights without a hearing "in accordance with the priorities of rights . . . within the district . . . ." Therefore, for purposes of conjunctive administration within organized water districts, the Director is not required to hold a hearing prior to administration of junior-priority ground water rights. Clerk's R. at 123. The Director may, however, in the exercise of his discretion, provide for hearing and render a timely decision. Clerk's R. at 123; *American Falls* at 875, 154 P.3d at 446. Based upon the CM Rules, the Court should deny the Ground Water Users' argument that the Director must always hold a hearing prior to curtailment in an organized water district.

VI. RESPONSE TO ISSUES RAISED BY THE SPRING USERS

1. The Director's Use Of The Trim Line Is Consistent With The Prior Appropriation Doctrine, As Established By Idaho Law

In their Opening Brief, the Spring Users take exception with the Director's assignment of 10% uncertainty to results associated with the ESPA Model, as well as his application of that uncertainty to exclude ground water users from the scope of curtailment. As presented above, 10% is the degree of uncertainty associated with results from the ESPA Model.[36] *See supra* Part V.5.A., pp. 42-43. The Director applied that uncertainty through application of the trim line. *See supra* Part V.2.B., pp. 31-34.

While the Spring Users agree that water rights in Idaho are "administered pursuant to the prior appropriation doctrine[,]" *Spring Users' Opening Brief* at 12, the Spring Users focus solely on priority of right in support of their argument that the Director must ministerially curtail junior ground water rights without regard for the mandate that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources." Idaho Code § 42-226. Former Director Dreher specifically testified that the trim line was applied to promote full economic development of the

[36] The Spring Users state that the Department's modeling expert, Dr. Allan Wylie, testified that the results of the ESPA Model should not account for uncertainty. *Spring Users' Opening Brief* at 4, 9. The Spring Users do not accurately summarize Dr. Wylie's testimony. Dr. Wylie stated that ground water models are inherently inaccurate and that it would be indefensible not to account for uncertainty. Tr. Vol. 5, p. 820, lns. 10-24. Because of this inherent uncertainty, Dr. Wylie was asked to provide former Director Dreher with his "best judgment on model uncertainty." *Id.* at 816, lns. 5-7. The result of his analysis was that 10% was the degree of uncertainty to apply to results from the ESPA Model. *Id.* at 816, lns. 14-25. Uncertainty was important to account for because curtailment of ground water rights outside the 10% trim line could contribute no water to the Spring Users' respective river reaches. *Id.* at 888, lns. 16-24.

resource by preventing curtailment of ground water rights that, if curtailed, could provide zero benefit to the Spring Users' facilities. Tr. Vol. 7, pp. 1165-1168.

Without the trim line, the Director would have curtailed 900,000 acres. Because of the time period in which most ground water rights were developed (post-World War II), Ex. 461, p. 5, Fig. 1, and without the trim line in place, two fish propagation facilities would have controlled 82% of all acres irrigated by ground water from the ESPA, *id.* at 18, Tbl. B-1 (approximately 1,100,000 total ground water irrigated acres). The Director's use of the trim line promoted full economic development of the resource and prevented monopolization of the ESPA, while at the same time protecting the priority of the Spring Users' senior water rights.[37] The Spring Users' must exercise their water rights with "reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121.

The Spring Users incorrectly assert that the Director's use of the trim line relieved the Ground Water Users of a burden of proof by "creating a de-facto 'futile call' determination without any showing by the junior water user." *Spring Users' Opening Brief* at 14. As explained above, and despite argument from the Ground Water Users to the contrary, the Director found that the Spring Users' delivery calls were not futile. *See supra* Part V.4., pp. 38-41. The Director's application of the trim line was in furtherance of his duty under the CM Rule

[37] It should be noted that just as the trim line excluded certain ground water rights from curtailment, application of the trim line precluded the Ground Water Users from obtaining credit for any mitigation activity that was outside the trim line. Tr. p. 819, lns. 18-25; p. 820, lns. 1-9.

20.03 to apply all principles of the prior appropriation doctrine, not just those principles advanced by seniors or juniors.

2. If The Issue Has Been Preserved For Appeal, The Appropriate Burden Of Proof To Apply In This Delivery Call Is Preponderance Of The Evidence

The Spring Users assert that the burden of proof to apply in administration of hydrualically connected water rights is "clear and convincing evidence." *Id.* at 9. At the outset, the Spring Users have likely decided to raise this issue in this forum because of the recent *Memorandum Decision and Order on Petition for Judicial Review*, entered by the Honorable Eric J. Wildman in the A&B Irrigation District ("A&B") delivery call. Case No. CV 2009-647 (Fifth Judicial District in and for the County of Minidoka) (hereinafter referred to as the "A&B Decision").

In the A&B Decision, Judge Wildman upheld the Director's conclusions that: (1) Idaho's Ground Water Act applies retroactively to A&B's pre-1951 irrigation water right, 36-2080; (2) that A&B's reasonable pumping levels have not been exceeded; (3) that A&B's water right is properly analyzed as an integrated system; and (4) that it was not necessary to create a Ground Water Management Area where the Director had already created Water Districts. *A&B Decison* at 1-2. The Court, however, found that the Director "erred in failing to apply [a] proper evidentiary standard of clear and convincing evidence in [his] finding of no material injury to

A&B's right." *Id.* at 2. The Court remanded the Director's finding of no material injury for purposes of applying the clear and convincing evidentiary standard. *Id.*[38]

The issue of which standard of proof applies in the administration of hydrualically connected water rights (preponderance or clear and convincing) was not a focus of the administrative hearing, was not raised by the Spring Users before the district court on judicial review, and did not result in a ruling by Judge Melanson. Therefore, the Spring Users are foreclosed from raising it before this Court on appeal: "To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, (sic) an issue cannot be raised for the first time on appeal." *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008). If, however, the Court determines that the issue was preserved on appeal, the Director will address the question.

A. Adjudication and licensure of water rights have markedly different goals than conjunctive administration of decreed or licensed water rights

In the Snake River Basin Adjudication, the Director was tasked with determining a claimant's maximum extent of beneficial use. For the Spring Users, that determination of beneficial use was made by the Department with a moment-in-time measurement during the licensure proceedings for the water rights that supply their fish propagation facilities. For irrigators, the Director was tasked with determining a claimant's maximum extent of beneficial

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[38] Petitions for rehearing on the burden of proof issue set for remand were filed by the City of Pocatello ("Pocatello") and the Ground Water Users. Opening briefs were filed by Pocatello and the Ground Water Users on August 3, 2010. Response briefs are to be filed by August 25, 2010, with reply briefs due September 7, 2010. Oral argument is scheduled to occur on September 13, 2010.

use for the most water intensive crop (alfalfa) during the peak period of use (hottest period of the summer).

Beneficial use is the basis of a water right and may vary over time. In the context of a delivery call, the Director is obligated to consider all known facts to determine the senior's current beneficial needs. According to the Court in *American Falls*, the Director must begin with the presumption that the water right held by the calling senior is valid. 143 Idaho at 877-78, 154 P.3d at 448-49. Here, the Director began with the presumption that the Spring Users' water rights were valid. The Director further found that their rights had been injured by junior ground water diversions and were entitled to curtailment to prevent further injury.

The CM Rules allow the Director to not only review the information filed by the senior, but also develop a record upon which to base a decision. *Id.* at 446, 154 P.3d at 875. "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *Id.* If the Director's review leads to a finding of material injury, "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." *Id.* at 878, 154 P.3d at 449.

Regardless of whether the Director finds material injury, the CM Rules do not require the Director to forever alter the senior's water right—through a finding of abandonment, adverse possession, forfeiture, or waste—if the Director determines that the senior does not presently require the full extent of his or her water right to accomplish the same beneficial purpose. This is consistent with *American Falls*, where the Court stated that the Director may determine that

the senior does not need the "full quantity" of his or her decreed right and that such determination does not constitute a re-adjudication of the right. *Id.* at 876-77, 154 P.3d at 447-48. "If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *Id.* at 876, 154 P.3d at 447 (emphasis added). The adjudication and licensure proceedings established the historical maximum extent of beneficial use, which may be less than what the senior requires today for beneficial use.

While administration of water rights recognizes the historical maximum, it is only concerned with determining whether curtailment is necessary to provide for the senior's current beneficial use. Because beneficial use varies from year-to-year, administration of water rights does not re-establish the quantity element of the water right—absent a finding of abandonment, adverse possession, forfeiture, or waste. The senior's water right is protected up to the full entitlement of the right if the senior needs that amount to achieve the authorized beneficial use. The senior continues to possess the right as set forth in the decree or license and has the right to call out junior users up to the full quantity of the right, to the extent it is needed for current beneficial use.

In this proceeding, the Director found that the Spring Users were entitled to call for delivery of the full extent of their water rights because that amount of water was currently needed for beneficial use. While the Director used the trim line to remove certain junior-priority ground water rights from the scope of curtailment, the Director's findings in no way altered the

Spring Users' water rights through a finding of abandonment, adverse possession, forfeiture, or waste. The Spring Users maintain the ability to divert the full extent of their rights for beneficial use.

B. Because the Spring Users' water rights were not altered, the proper standard of review to apply is preponderance of the evidence

In *American Falls*, the Court reversed the district court and held that the CM Rules were not facially unconstitutional because they failed to set out the evidentiary standard to apply in a delivery call proceeding. *American Falls* at 873, 154 P.3d at 444. The Court stated that the applicable burdens of proof were incorporated into the CM Rules by reference. *Id.*

In their Opening Brief, the Spring Users state that the burden of proof to apply in a conjunctive administration delivery call is the "clear and convincing evidence" standard. *Spring Users' Opening Brief* at 9. In support of their position, the Spring Users cites three cases involving junior appropriators, without sanctioned water rights, to establish by clear and convincing evidence that their proposed diversions would not injure senior users. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904). These cases do not involve administration of established water rights.

The rationale of the Idaho Supreme Court in *Cantlin*, *Josslyn*, and *Moe* is in direct accord with the United States Supreme Court regarding proposed new diversions of interstate waters in prior appropriation states. *Colorado v. New Mexico*, 467 U.S. 310 (1984). There, the state of

Colorado petitioned the Court for an equitable apportionment of the Vermejo River. After reference to a special master, the Court stated as follows:

> Last Term, the Court made clear that Colorado's proof would be judged by a clear-and-convincing-evidence standard. *Colorado v. New Mexico*, 459 U.S., at 187188, and n. 13, 103 S.Ct., at 547548, and n. 13. In contrast to the ordinary civil case, which typically is judged by a "preponderance of the evidence" standard, we thought a [proposed] diversion of interstate water should be allowed only if Colorado could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are "highly probable."
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> . . . .
>
> Requiring Colorado to present clear and convincing evidence in support of its proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision: "The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote."

Id. at 316 (emphasis added).

Application of a clear and convincing standard of proof makes sense in cases regarding proposed new diversions because of the need to protect the rights of existing users. While clear and convincing is not an insurmountable hurdle, the risk of an erroneous decision is properly placed on the new user to establish that water is available for beneficial use. The paradigm changes, however, once junior rights have been sanctioned.

There is no case law or rule in the state of Idaho that establishes the standard of proof to apply in a delivery call proceeding between established water rights. Therefore, the standard of proof to apply is "preponderance of the evidence." *Northern Frontiers, Inc. v. State ex rel. Cade*,

129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). *See also Colorado* at 316 ("ordinary civil case is . . . judged by a preponderance of the evidence standard").

Application of a preponderance of the evidence standard is consistent with decisions from the United States Supreme Court regarding administration of established interstate water uses in prior appropriation states.[39] *Nebraska v. Wyoming*, 507 U.S. 584 (1993). There, the Court was asked by the state of Nebraska for enforcement of a 1945 decree against the state of Wyoming that established interstate priority to waters from the North Platte River. *Id.* at 587. A special master was assigned to the dispute.

Before the special master, Wyoming argued that Nebraska was required to prove its case by "the clear and convincing evidence standard."[40] "Nebraska, on the other hand, points out that while [the clear and convincing] standard is properly used in actions for equitable apportionment, it should not apply here because this proceeding entails enforcement of a prior equitable apportionment (the Decree), not whether there should be an apportionment." *See supra* fn. 3 at 12-13 (emphasis added). The special master concluded "the clear and convincing standard is inapplicable to the issues in these proceedings. The Court requires states to bear a heavier burden than the usual civil litigant [preponderance of the evidence standard] only where interference with another state's actions is requested in the first instance. *Colorado v. Kansas*, 320 U.S. 383, 399 (1943). Here, the interference has already occurred by entry of the Decree.

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[39] At least one state court has held that the appropriate standard of proof to apply in a delivery call proceeding between users with established water rights is "preponderance of the evidence." *Willadsen v. Christopulos*, 731 P.2d 1181, 1184 (Wyo. 1987).

[40] Page 12 at http://www.supremecourt.gov/SpecMastRpt/ORG%20108%20040992.pdf (last visited August 19, 2010).

Cf. Colorado v. New Mexico, 467 U.S. 310, 316 (1984)." *See supra* fn. 3 at 13 (emphasis added).

On review, the United States Supreme Court concurred with the special master's assessment: "we find merit in [the] contention that, to the extent Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies. The two types of proceeding are markedly different." *Nebraska* at 592 (emphasis added).

Following the Court's 1993 decision in *Nebraska*, the prior appropriation states of Colorado and Kansas brought an action in the United States Supreme Court for administration of an interstate compact to the waters of the Arkansas River. *Kansas v. Colorado*, 514 U.S. 673 (1995). Relying on *Nebraska*, the special master held that, because Kansas was seeking enforcement of an existing interstate compact against Colorado, it was required to prove its case by "the traditional [burden] of ordinary civil litigation, that is, preponderance of the evidence." *Kansas v. Colorado*, 1994 WL 16189353, 29 (U.S. 1994) (emphasis added). Because the special master found that under either burden of proof Kansas proved that Colorado breached the compact, the United States Supreme Court did not disturb the special master's findings on review. *Kansas*, 514 U.S. at 694.

Here, the Spring Users seek administration of their established senior-priority water rights. At the time of decree or licensure, new water users were required to prove to the court or the Director, by clear and convincing evidence, that their new diversions would not injure established water rights. *Colorado*; *Cantlin*; *Josslyn*; *Moe*. All of the water rights at issue in this proceeding have since been sanctioned in accordance with the heightened clear and convincing

evidence standard. The Director must now administer the established water rights in accordance with the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602.

The purpose of administration is not to ensure by clear and convincing evidence that there is no risk of injury to the senior. That was already asked and answered by the court and Director in the adjudication and licensure proceedings, respectively. This is precisely why the United States Supreme Court stated in *Nebraska* that administration of water rights is "markedly different" from creation or modification of water rights. 507 U.S. at 592. And furthermore, why the clear and convincing standard of proof does not apply in administration of established water rights. *Id.*

In administration, the Director is required to balance all principles of the prior appropriation doctrine, namely priority of right with full economic development of the resource. Idaho Const. Art. XV, §§ 3, 7; Idaho Code § 42-226; CM Rule 20.03. Preponderance of the evidence is the proper standard to apply in order to allow the Director to exercise his discretion in balancing these principles where the outcome does not modify the senior's right. *Kansas*; *Nebraska*; *Colorado*; *American Falls*; *Willadsen*; *Northern Frontiers*. If, however, the Director finds, or sustains a defense asserted by juniors, that abandonment, adverse possession, forfeiture, or waste apply, the standard of review should be clear and convincing evidence. The heightened standard of proof should only apply in those instances where the senior's water right is forever altered by the outcome of the administrative proceeding.

Because the Spring Users' rights were not altered by the outcome of this delivery call, the proper burden of proof to apply is preponderance of the evidence.

VII. CONCLUSION

In this case, the actions taken by the Director in responding to the conjunctive administration delivery calls filed by the Spring Users were consistent with constitutional and statutory provisions, were supported by the record, were made upon lawful procedure, and were within the Director's discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order. Idaho Code § 67-5279(3).

RESPECTFULLY SUBMITTED this 20th day of August, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 20th day of August, 2010.

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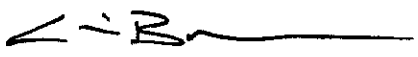

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ADDENDUM INDEX