

Docket Nos. 38191-2010 / 38192-2010 / 38193-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN
FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH
SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2,
BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL
COMPANY, UNITED STATES OF AMERICA BUREAU OF RECLAMATION,
Petitioners-Appellants, and

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,
Petitioners-Respondents on Appeal, and

IDAHO DAIRYMEN'S ASSOCIATION, INC.,
District Court Cross Petitioner,

v.

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

IDAHO GROUND WATER APPROPRIATORS, INC.
Intervenor-Respondent-Cross Appellant, and

THE CITY OF POCA TELLO, IDAHO
Intervenor-Respondent-Cross Appellant.

GROUNDWATER USERS' OPENING BRIEF

Appeal from Gooding County District Court Case No. 2008-551.
Honorable John M. Melanson, District Judge, Presiding.

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STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal from a water right curtailment order issued by the Director of the Idaho Department of Water Resources (“IDWR”). The order stops farmers, cities, and businesses from pumping groundwater from the Eastern Snake Plain Aquifer (“ESPA”) so that more groundwater will overflow from the ESPA into the Snake River. The beneficiaries of the order are seven irrigation entities known collectively as the Surface Water Coalition (“SWC”) who divert water out of the Snake River at various points between American Falls Reservoir and Milner Dam (near Burley).

The district court reversed the Director’s order concerning “material injury” to Twin Falls Canal Company (“TFCC”) on the basis that the Director utilized a “preponderance of the evidence” standard of proof instead of a “clear and convincing” standard. Idaho Ground Water Appropriators, Inc. (“IGWA”) asks this Court to sustain the Director’s decision because material injury should be determined based on the preponderance of the evidence standard that normally applies to agency decisions.

IGWA also asks this Court to reject the SWC appeal concerning the “minimum full supply” methodology because the issue is moot. Even if this Court considers the issue, the SWC argument should be rejected because it is predicated on the false premise that depletion to the water supply automatically equates to material injury.

2. Procedural History.

On January 14, 2005, the SWC petitioned the Director to curtail groundwater diversions from the ESPA. (R. Vol. 1, p. 1.)¹ The Director responded with an *Order* dated February 15, 2005 (“*February 2005 Order*”) that initiated a contested case. (R. Vol. 2, p. 197.) The Director then issued an *Order* dated April 19, 2005 (“*April 2005 Order*”) concluding that the SWC had suffered “material injury” due to groundwater pumping, and requiring groundwater users to provide 27,700 acre-feet of replacement water to the SWC to mitigate the injury, or suffer curtailment. (R. Vol. 7, pp. 1157-1219.) On May 2, 2005, the Director issued an *Amended Order* (“*May 2005 Order*”) that revised certain findings in the *April 2005 Order* but still required groundwater users to provide 27,700 acre-feet of mitigation water to the SWC. (R. Vol. 8, pp. 1359-1424.) These orders are referred to collectively herein as the “*2005 Curtailment Order*.”

Several parties objected to the *2005 Curtailment Order* and requested a hearing, including IGWA, Idaho Dairymen’s Association (“Dairymen”), City of Pocatello (“Pocatello”), Bureau of Reclamation (“Bureau”), State Agency Ground Water Users (“State Users”), and SWC. However, the SWC preempted the hearing by filing suit in district court to have the IDWR’s *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”), IDAPA 37.03.11, declared facially unconstitutional. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862 (2007) (“*AFRD2*”). After that proved unsuccessful, the Director appointed former Chief Justice Gerald F. Schroeder to preside as hearing officer, and a hearing was held over three weeks in January and February of 2008.

¹ Citations to the agency record are identified by “R. Vol.” Citations to the clerk’s record on appeal are identified by “Clerk’s R. Vol.”

The hearing officer issued an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (“*Recommended Order*”) on April 29, 2008. (R. Vol. 37, p. 7048.) The Director subsequently issued a *Final Order Regarding the Surface Water Coalition Delivery Call* (“*Final Order*”) on September 5, 2008. (R. Vol. 39, p. 7381.) The *Final Order* adopts the findings and conclusions contained in the *Recommended Order* and the prior orders of the Director except as specifically modified by the *Final Order*. *Id.* at 7382.

The SWC and the Bureau filed petitions for judicial review of the *Final Order*, and the Dairymen filed a cross-petition for judicial review. (R. Vol. 39, pp. 7450 and 7406.) The petitions were assigned to the Honorable John M. Melanson, District Judge of the Fifth Judicial District. (Clerk’s R. Vol. 1, p. 19.) Judge Melanson issued an *Order on Petition for Judicial Review* on July 24, 2009 (Clerk’s R. Vol. 3, p.511) and an *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition’s Motion for Clarification* on September 9, 2009 (Clerk’s R. Vol. 7, p. 1240.) The district court orders have been appealed to this Court by IGWA, the SWC, and Pocatello.

The Director stated in the *Final Order* that he was in the process of developing an improved methodology for determining material injury. (R. Vol. 39, p. 7386.) He subsequently issued a series of orders, beginning with the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”) on April 7, 2010 (Clerk’s R. Vol. 7, p. 1354(s)) and culminating, after a hearing, with the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Amended Methodology Order*”) on

June 23, 2010. The *Methodology Order* is included in this record; the *Amended Methodology Order* is not. The *Amended Methodology Order* is currently on appeal to the Twin Falls County District Court, case no. CV-2010-5520 (consolidated with Gooding County Case No. CV-2010-382).

3. Standard of Review.

This appeal is taken from the district court, but the subject of review is the *Final Order* issued by the Director. When reviewing agency decisions, this Court generally reviews the agency record independent of the district court decision. *First Interstate Bank, N.A. v. West*, 107 Idaho 851, 852-53 (1984). The *Final Order* is to be reviewed under the Idaho Administrative Procedures Act. Idaho Code § 42-1701A(4). It must be affirmed unless the Court finds that the findings, inferences, conclusions, or decisions of the Director 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). Even if the Director erred in one of the foregoing manners, the *Final Order* should be affirmed if no substantial rights of the SWC were prejudiced. *Id.*

The Court's review of issues of disputed fact must be confined to the record, and the Court should not substitute its judgment for that of the Director as to the weight of the evidence on issues of fact. Idaho Code §§ 67-5277 and 67-5279(1). If the evidence in the record is conflicting, the Court must sustain the *Final Order* so long as it is based on substantial evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417 (2001).

With respect to discretionary matters, courts defer to the agency decision unless the agency “acted without a reasonable basis in fact or law.” *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 88 (2007). The agency decision should be affirmed if the agency “perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason.” *Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 54 (2006).

If the *Final Order* is not affirmed, it should be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

4. Statement of Facts.

A. SWC water rights.

The SWC entities all operate canal systems that divert water from the Snake River near Burley, Idaho. Their water rights have priority dates ranging from 1900 to 1939. (R. Vol. 1 p. 8; Exs. 4001A and 4001.) They also have contracts with the Bureau to use water that is stored in Jackson Lake, Palisades Reservoir, American Falls Reservoir, and Lake Walcott. (R. Vol. 37, pp. 7055, 7060-61; Ex. 9704.) These reservoirs capture water during the winter and spring that can then released during the summer for irrigation. (R. Vol. 8, p. 1372.) Water is stored in the reservoirs under water rights owned by the Bureau with priority dates ranging from 1906 to 1957. (Exs. 4001A and 4000.) Neither the SWC’s nor the Bureau’s water rights have been decreed in the Snake River Basin Adjudication (“SRBA”) because they are subject to unresolved objections. (R. Exs. 4615, 9723-9729.)

Like all water rights, the SWC water rights define the maximum amount of water that may be diverted under the right. (R. Vol. 37, pp. 7073-75.) The amount actually needed for irrigation can be substantially less. (R. Vol. 8, p. 1378.) One reason is because farmland is often paved over, turned into a residential or commercial development, or otherwise removed from irrigation. (Exs. 4300, 4310, 4339-4352, 4353-4357.) At least 6,600 acres claimed by TFCC are not irrigated due to development (Ex. 8190 at 14; Tr. Vol. 11, p. 2247), 2,907 are non-irrigated in Burley Irrigation District (Ex. 4300 at 3, 10; Ex. 4301), and 5,008 are non-irrigated in Minidoka Irrigation District (Ex. 4302.) Another reason is that essentially all irrigation in southern Idaho is now done by sprinkler, which requires less water per acre than the flood irrigation practices used historically. (R. Vol. 4, pp. 621-22; R. Vol. 8, p. 1378; R. Vol. 12, p. 2149; R. Vol. 28, p. 5305.)

The disparity between the maximum authorized rate of diversion shown on the face of a water right and the amount of water actually needed for beneficial use is illustrated by comparing the amount of water authorized for diversion under the SWC's water rights with the amount of water it actually diverts when there was no scarcity of water. The SWC's natural flow rights collectively authorize the diversion of 13,756 cfs, or 6.7 million acre-feet, each irrigation season. (R. Vol. 8, pp. 1370-72.)² Their storage water rights collectively authorize the diversion of up to 2.3 million acre-feet, for a combined total of 9 million acre-feet. (R. Vol. 8, pp. 1373-74.) Yet, the maximum amount of water the SWC has ever actually diverted is just over 4 million acre-feet. (Ex. 8000 at Vol. 4, p. AS-8.)

² The irrigation season for the SWC water rights is March 15 to November 15 (246 days). (Ex. 4001A at 2-23.) The diversion of one cfs equals 1.9835 acre-feet per day. Over a 246-day irrigation season, the SWC's natural flow rights allow the diversion of up to 6,712,116 acre-feet (1.9835 x 13,756 cfs x 246 days).

The SWC's storage water rights are intended to provide a measure of insurance against drought. (Ex. 1023 at 6-8; Ex. 3048 at 21; R. Vol. 2, p. 207.) It was never expected, however, that storage water would insulate the SWC from the effects of drought. Even with the construction of Palisades Reservoir (the last storage facility to be constructed, primarily for drought relief) the Bureau anticipated that the SWC and other spaceholders would occasionally suffer water shortages. (Ex. 7001 at 11-16.)

B. The Snake River and the ESPA.

The ESPA and the Snake River are hydraulically connected at various locations and in varying degrees. (R. Vol. 8, pp. 1363-64; Ex. 4100 at 5-6.) In some places groundwater flows from the ESPA into the Snake River; in other places the opposite occurs. *Id.*

The key connection in this case is in the Blackfoot to Neeley reach of the Snake River, which runs from Blackfoot to just south of Massacre Rocks near American Falls, Idaho. (R. Vol. 3, p. 542.) In this reach there are numerous springs that discharge groundwater from the ESPA into the River. (Ex. 8013.) Since the SWC canals are all located downstream from this reach, they filed their delivery call with the Director in 2005 asking him to shut down groundwater pumping so that more water will overflow from the ESPA into this reach of the Snake River. (R. Vol. 1, pp. 2-4.)

The impact of groundwater pumping on the Blackfoot to Neeley reach was vigorously contested at the hearing. Exhibits 4113 shows no statistically significant trend in reach gains over the 93 year period of measurement for this reach. Significantly, the large expansion of ground-

water pumping in the 1960s and 1970s does not correlate with any decline in reach gains, indicating that groundwater pumping has little impact on this reach of the River. (Ex. 4100 at 7.)

It is also significant that groundwater, unlike surface water, cannot be directed through physical channels from a junior user's point of diversion to a senior's point of diversion. (R. Vol. 37, p. 7050.) Given the varying degrees of connectivity between the ESPA and the Snake River, shutting off a well does not always mean that a usable quantity of water will accrue to the senior. (R. Vol. 3, p. 556.) Even when curtailment will increase surface water flows, typically only a portion of the curtailed water will accrue to the target reach of the River. This is because when groundwater is pumped from an aquifer there results a "cone of depression" in the groundwater table that has a radial impact on the aquifer (*i.e.* the impact emanates 360 degrees). (R. Vol. 8, p. 1364.) When pumping ceases, the recovery to the aquifer is likewise radial. *Id.* When a well is shut off, the impact is dissipated across the aquifer, with only a portion accruing to the target reach of the River. (R. Vol. 2, p. 199.) The rest is effectively lost from beneficial use. The degree of loss is exacerbated by distance—the further away a well is from the Snake River, the less impact it has on River flows, and the greater the loss of beneficial use. (R. Vol. 8, p. 1364.) In addition, the effects of groundwater curtailment are spread throughout the year, which means that the effects of curtailment may be largely realized during the non-irrigation season when the SWC cannot use the water anyway.

C. Drought.

The worst drought on record in Idaho occurred from 2000 to 2005. (Tr. Vol.3, p. 625.) It was so severe that it is expected to be repeated no more than once every 500 years. (*Id.*; Exs.

4105 and 4106.) It caused a reduction in “reach gains” to the Snake River between Blackfoot and Neeley (downstream from American Falls). Before this drought, there had been no statistically significant change in reach gains for this reach. (Ex. 4113; R. Vol. Vol. 3, pp. 546, 553; R Vol. 27, p. 5090; Exs. 4145-49.)

D. The curtailment order.

In response to the SWC delivery call, the Director ordered groundwater users to provide the SWC with enough water to meet their irrigation needs, or suffer curtailment. (R. Vol. 9, pp. 1559-1560 and 1569.) The Director determined what their irrigation needs would be by developing what he termed their “minimum full supply.” (R. Vol. 8, pp. 1383-84.) The Director subsequently adopted a more sophisticated methodology for determining irrigation needs, termed “reasonable in-season demand.” (Clerk’s R. Vol. 7, pp. 1354(s)-1354(iii).) Under both methodologies, the extent of curtailment and mitigation is recalculated annually and adjusted throughout the year to account for water conditions.

E. Mitigation.

The *SWC Opening Brief* states that “a lack of mitigation water provided no relief to the injured Coalition members while junior groundwater users continued to pump without constraint.” (*SWC Open. Br.* 12.) The implication is that groundwater users provided no mitigation, and the SWC was left without water to meet its irrigation needs. This is simply untrue.

Groundwater users have not actually been curtailed because they have at great effort and expense delivered to the SWC the full amount of mitigation water required by every order of the Director, fully offsetting any material injury. In 2005, 2007, 2009 and 2010, IGWA rented sto-

rage water from other spaceholders in the upper Snake River reservoir system to fully mitigate TFCC's predicted material injury (Exs. 4501, 4502A at 10, 4603; R. Vol. 34, p. 6431.) (No mitigation was required in 2006, 2008, or 2011 due to adequate water supplies.)

The SWC also gives the misimpression that IGWA failed to provide storage water mitigation in a timely manner, claiming that "the Director's administration produced no mitigation water for the Coalition during the irrigation season *even though the Director found material injury.*" (SWC Open. Br. 11, emphasis in original.) This allegation simply ignores how the Water District 01 accounts for the use of storage water. Because Water District 01 completes its accounting for the use of storage water following the irrigation season, water leased by IGWA for mitigation has at times been transferred into the SWC's storage water accounts after the irrigation season. (Tr. Vol. 4, p. 826; R. Vol. 38, p. 7208.)

F. Impact to the SWC.

The SWC often claims dire harm as a result of groundwater pumping, yet it has failed to present any competent evidence that a single acre of farmland had gone without water. The SWC put on a number of lay witnesses who offered their personal opinion that they experienced reduced crop yields, but none could provide substantiating evidence (it should not have been difficult to provide documentation comparing crop yields between wet and dry years, if a disparity legitimately existed). (R. Vol. 34, pp. 6361-66; R. Vol. 33, pp. 6269-72; R. Vol. 33, pp. 6333-39; R. Vol. 40, pp. 7546-48; R. Vol. 33, pp. 6286-88; R. Vol. 33, pp. 6279-80; R. Vol. 33, pp. 6260-62; R. Vol. 33, pp. 6342-44.) The manager of the largest SWC entity testified that he had no evidence of crop loss either:

Q. There's no examples of fallowing based on water shortage?

A. No.

Q. And no examples of fallowing you can point to based on -- I'm sorry -- crop loss that you can point to based on water shortage; correct?

A. No.

(Tr. Vol. 8, p. 1788.) Some of the SWC's lay witnesses testified that they had changed their cropping patterns, but they admitted that this was not necessarily a result of reduced water supplies. North Side Canal Company's long-time manager testified that, if anything, more water-consumptive crops like corn and hay had been planted in recent years due to the growth of the dairy industry in the area. (Tr. Vol. 9, pp. 1873-74, 1889-90.)

In addition, the evidence showed that the SWC entities never had their storage water deliveries restricted despite record drought. (Tr. Vol. 4, p. 713; Tr. Vol. 5, pp. 977-78.) Even in 2004, the driest year of the drought, the SWC had 288,300 acre-feet of storage left at the end of the irrigation season. (Ex. 4100 at 14.) The Director predicted that TFCC and AFRD2 would suffer material injury in both 2005 and 2007, yet still the SWC was able to meet its irrigation needs, with carryover remaining at the end of the irrigation season (R. Vol. 23, p. 4298). The SWC's contention that it was without water, or even without sufficient water to meet its irrigation needs, remains unsubstantiated. (R. Vol. 8, pp. 1377-78.)

ISSUE ON APPEAL

1. Did the Director act within his authority and discretion in determining that Twin Falls Canal Company can meet its irrigation needs based on the “preponderance of the evidence” standard of proof?

SUMMARY OF THE ARGUMENT

Conjunctive administration of surface and ground water requires the Director to make complex and difficult decisions concerning whether senior-priority water users are “suffering material injury and using water efficiently and without waste.” CM Rule 42.01. As this Court explained in *AFRD2*, these decisions “require some determination of ‘reasonableness’” and “some exercise of discretion by the Director.” 143 Idaho at 880.

In applying the CM Rules in this case, the Director determined that Twin Falls Canal Company (“TFCC”) could meet its irrigation needs with 5/8 inch of water per acre. The district court reversed that decision on the basis that the Director must use a heightened “clear and convincing” standard of proof as opposed to the “preponderance of the evidence” standard that typically applies to agency decisions.

This Court should reverse the district court decision and uphold the preponderance of the evidence standard because (a) most civil suit decisions, like agency administrative decisions, are governed by a preponderance of the evidence standard, (b) the heightened clear and convincing standard applies in the water law arena only where water rights are permanently fixed or altered, which does not happen as a result of a material injury determination, (c) courts in other jurisdic-

tions distinguish between the adjudication of water rights and the distribution of water between established rights, and apply a preponderance of the evidence standard to administrative decisions involving water distribution, (d) this Court's decision in *AFRD2* supports using a preponderance of the evidence standard of proof, (e) the preponderance of the evidence standard affords presumptive weight to water right decrees, and (f) the cases relied on by the district court do not define the standard of proof that should apply to the conjunctive administration of surface and ground water rights under the CM Rules.

The SWC argument that the "minimum full supply" methodology is improper is moot because the Director has abandoned that methodology in favor of a new, more sophisticated methodology called "reasonable in-season demand." Even if this Court considers the SWC's argument, it should be rejected because it is predicated on the false premise that depletion to the water supply automatically equates to material injury.

ARGUMENT

When responding to a delivery call under the CM Rules, the Director has an obligation to determine whether the senior water user is "suffering material injury and using water efficiently and without waste." CM Rule 42.01. In this case, the Director determined that TFCC can meet its current irrigation needs with a "full headgate delivery" of 5/8 inch of water per acre (i.e. the SWC does not suffer material injury). (R. Vol. 8, p. 1378.) However, since the Director had recommended to the SRBA court that TFCC's water right have a maximum permissible rate of diversion of 3/4 inch per acre, the district court ruled that the Director has no authority to find that

TFCC's current irrigation needs can be met with less than 3/4 inch. (Clerk's R. Vol. 3, p. 541.) On rehearing, the district court added that the Director erred by "failing to apply the correct presumptions and burden of proof in making the determination under the CM [Rules] that TFCC was entitled to less than the recommended quantity." (Clerk's R. Vol. 7, pp. 1247, 1249.)

As set forth below, this Court should reverse the district court and uphold the Director's determination because he has clear authority under the CM Rules to determine whether TFCC can meet its irrigation needs with less than its maximum authorized rate of diversion, and the appropriate standard of proof for making that determination is "preponderance of the evidence."

1. The Director has clear authority to determine whether TFCC can meet its irrigation needs with less than its maximum authorized rate of diversion.

The first sentence of Idaho's water code proclaims that water is "essential to the industrial prosperity of this state, and all agricultural development throughout the greater portion of the state depend[s] upon its just apportionment to, and economical use by, those making a beneficial application of the same." Idaho Code § 42-101. Accordingly, this Court has for more than a century held that "[e]conomy must be required and demanded in the use and application of water." *Clear Springs v. Spackman*, 252 P.3d 71, 89 (2011) (quoting *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist., Ltd.*, 16 Idaho 525, 535 (1909)). The "settled law of this state" is that

no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration. A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.

Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 44 (1915) (internal cite omitted); *see also*, *Clear Springs*, 252 P.3d at 89 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502 (1960)) (“The policy of the law of this state is to secure the maximum use and benefit, and least wasteful use, of its water resources.”)

These rulings reflect the universal principle of western water law that beneficial use is the basis, measure, and limit of any water right. As stated in Idaho Code § 42-104, the appropriation of water “must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.” *See also*, *Lee v. Hanford*, 21 Idaho 327, 330-31 (1912) (holding that an appropriator is limited to the quantity of water he is able to apply to beneficial use at a particular time, within the limit of his appropriation.) This Court confirmed this principle in its *AFRD2* decision, explaining that the Director:

has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. 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.

143 Idaho at 876.

The foregoing principles are captured in CM Rule 42, which instructs the Director, when responding to a water delivery call, to determine whether the senior water user is “suffering material injury and using water efficiently and without waste.” CM Rule 42.01. The rule contains various factors the Director should consider when making this determination, including “[t]he amount of water being diverted and used compared to the water rights,” CM Rule 42.01.e, and “[t]he extent to which the requirements of the holder of a senior-priority water right could be met

with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices ...,” CM Rule 42.01.g. These factors recognize that a water user may not always need the maximum amount of water under his water right to accomplish his beneficial use. The example cited in *AFRD2* of a farmer not irrigating the full number of acres is one such instance. Similarly, if a farmer converts from flood irrigation to a much more efficient means of irrigation such as sprinkler or drip irrigation, he should be able to meet his irrigation needs with something less than the maximum rate of diversion.

These material injury factors clearly authorize the Director to determine whether TFCC can meet its irrigation needs with less than the maximum authorized rate of diversion under its water right, and they were declared facially constitutional in *AFRD2*. 143 Idaho at 876-77.

2. The “preponderance of the evidence” standard should apply to the Director’s determination of material injury under CM Rule 42.

Despite the Director’s clear authority to determine material injury under CM Rule 42, and the substantial evidence supporting his 5/8 inch determination, the district court reversed the Director on the basis that “[t]he Hearing Officer’s recommendation appears to be based on a determination that TFCC’s water right only entitles it to 5/8 inch per acre.” (Clerk’s R. Vol. 1, p. 541.) The district court concluded that this determination infringed on the authority of the SRBA court which is “vested with exclusive jurisdiction for determining the elements of a water right.” *Id.* In other words, the district court ruled that the 5/8 inch determination was a re-adjudication of TFCC’s water right.

On rehearing, the district court elaborated on its decision, explaining that “[n]o reference was made [] to the evidentiary standard applied. Therefore, the Director erred by failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the recommended quantity.” (Clerk’s R. Vol. 7, p. 1249.) The district court acknowledged that the Director had authority to determine material injury under CM Rule 42, but concluded that such a determination must be based on the same “clear and convincing evidence” standard that applies to water right adjudications. *Id.* at 1248-49. The district court erroneously treated the Director’s application of CM Rule 42 as an adjudicative act.

The district court did not explain in detail the basis for its decision, but instead incorporated by reference a contemporary decision issued by Judge Wildman in a Minidoka County case that concludes that clear and convincing evidence is required to prove that material injury does not exist. *Id.* at 1247. Following the district court’s ruling, Judge Wildman granted rehearing in the Minidoka County case and issued a subsequent order further explaining his decision. That rehearing decision, which is not a part of the record in this case, is attached hereto as Appendix A. These decisions are referred to collectively in this brief as the “*A&B Decision*.”

This Court should reverse the district court decision and hold that administrative determinations regarding material injury should be based on the preponderance of the evidence. There are several reasons why a preponderance of the evidence standard should be used. First, most civil suit decisions, like agency administrative decisions, are governed by a preponderance of the evidence standard. Second, the adjudication of water rights is different from the distribution of water among established rights. Third, courts in other jurisdictions distinguish between adjudica-

tions and administration, and apply a preponderance of the evidence standard to administration. Fourth, this Court’s decision in *AFRD2* supports using a preponderance of the evidence standard of proof. Fifth, the preponderance of the evidence standard affords presumptive weight to water right decrees. Finally, the cases relied on by the district court do not define the standard of proof that should apply to administrative decisions involving the distribution of water under the CM Rules. Each argument will be addressed in turn.

A. The preponderance of the evidence standard generally applies in civil and administrative hearings.

In most civil actions, “the burden of proof is by a preponderance of the evidence, which means more probable than not.” *Bourgeois v. Murphy*, 119 Idaho 611, 622 (1991). “[T]he preponderance of the evidence standard [is] generally applied in administrative hearings.” *N. Frontiers v. State ex re. Cade*, 129 Idaho 437, 439 (Ct. App. 1996) (citing 2 Am. Jur. 2d Administrative Law § 363 (1994)).

In contrast, the “clear and convincing” standard is a heightened evidentiary standard that typically applies only to cases that involve permanent deprivations of rights such as the involuntary termination of parental rights (Idaho Code § 16-2009); involuntary institutional commitment (Idaho Code § 66-329(11)); claims of professional misconduct of a lawyer (*Idaho State Bar v. Top*, 129 Idaho 414, 415 (1996)), or the permanent deprivation of real property (*Cardenas v. Kurpjuweit*, 116 Idaho 739, 742-43 (1989)).

B. The adjudication of a water right is different from the distribution of water among established rights.

In the water law arena, clear and convincing evidence is required when someone is seeking to eliminate or permanently alter the defined elements of a water right: “One who seeks to alter decreed water priorities has the burden to demonstrate the elements of abandonment by clear and convincing evidence.” *Gilbert v. Smith*, 97 Idaho 735, 738 (1976). Clear and convincing evidence is required if a water user tries to acquire another’s water right through adverse possession. *Id.* at 740. It is required to declare that a water right has been forfeited or abandoned. *Jenkins v. State*, 103 Idaho 384, 388-89 (1982). It is also required in water adjudication or quiet title cases where a court is asked to allow new appropriations or to permanently fix title to water rights and establish priority dates and quantities. *Crow v. Carlson*, 107 Idaho 461, 467 (1984); *Silkey v. Tiegs*, 51 Idaho 344 (1931) (“*Silkey I*”); *Silkey v. Tiegs*, 54 Idaho 126 (1934) (“*Silkey II*”). These actions are all adjudicative in nature because they permanently redefine, eliminate, or fix title to water rights.

In contrast, the allocation of water between existing water rights is an administrative function that does not alter the defined elements of water rights. The determination of material injury under the CM Rules does not alter the elements of the senior’s water right, but evaluates the senior’s current need for water and ensures that water is not wasted or hoarded contrary to the public policy of reasonable use of water. CM Rules 42.01 and 20.03. This Court confirmed in *AFRD2* that “evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication,” and that “determining whether waste is taking place is not a

re-adjudication because clearly that too, is not a decreed element of the right.” 143 Idaho at 877. This Court recognized that “water rights adjudications neither address, nor answer, the questions presented in delivery calls.” *Id.* at 876.

The material injury factors in CM Rule 42 illustrate that the analysis is not concerned with defining the maximum parameters of authorized water use, but of meeting the senior’s current water needs. The factors instruct the Director to consider such things as the effort and expense to divert from the source (42.01.b); rate of diversion, acres, efficiencies, and irrigation method (42.01.d); amount of water used compared to the water right (42.01.e); whether the senior can meet his or her needs with existing facilities, reasonable diversion and conveyance efficiencies, or conservation practices (42.01.g); and alternate reasonable means of diversion (42.01.h).

None of these factors are concerned with defining maximum parameters of authorized water use, and they do not permanently alter or fix the elements of the senior’s water right. They are concerned with present water needs, and they are subject to change. If the Director determines that a senior can meet its current irrigation needs with less than the maximum authorized rate of diversion, that does not preclude the Director from later revisiting the issue and finding that the senior needs additional water. For instance, if a senior must convert its delivery system to a less efficient means of irrigation, the Director has authority under the CM Rules to reevaluate circumstances and make corresponding redetermination of material injury. In neither case are the elements of the water right altered; in neither case should clear and convincing evidence be required.

C. Courts in other jurisdictions distinguish between the distribution of water and the adjudication of water rights, and apply different standards of proof.

The distinction between the distribution of water and the adjudication of water rights—and the need for different standards of proof—has been recognized by the U.S. Supreme Court. In *Nebraska v. Wyoming*, the U.S. Supreme Court considered a water right decree for the North Platte River, and held that decisions involving the enforcement of priorities under the decree (*i.e.* the distribution of water) should be based on the preponderance of the evidence, whereas modifications of the decree (*i.e.* adjudicative decisions) require a higher standard of clear and convincing proof. 507 U.S. 584, 590-92 (1993). The Court recognized that the “two types of proceeding are markedly different.” *Id.* at 592.

The Wyoming Supreme Court has specifically considered the appropriate standard of proof to be applied in the conjunctive management context. In *Willadsen v. Christopoulos*, the court considered a delivery call by the holder of a surface water right against a junior-priority groundwater right that was allegedly depleting the senior’s stream flow. *Willadsen*, 731 P.2d 1181, 1182 (Wyo. 1987). The State Engineer (equivalent to the Director in Idaho) found insufficient evidence of interference, and therefore refused to curtail the junior right. *Id.* On appeal, the senior challenged the State Engineer’s conclusion on the basis that he applied the wrong standard of proof. The Wyoming Supreme Court upheld the State Engineer’s decision, ruling that the decision of whether to curtail the junior groundwater user was properly based on “the preponderance of the evidence standard customarily used in civil cases.” *Id.* at 1184.

Like the U.S. Supreme Court in the *Nebraska* case, and the Wyoming Supreme Court in the *Willadsen* case, this Court should recognize the distinction between adjudication of water rights and the distribution of water among established rights and hold that the preponderance of the evidence standard applies to water administration decisions.

D. Key holdings and rationale in *AFRD2* support the application of the preponderance of the evidence standard in the conjunctive management context.

In *AFRD2*, this Court did not enunciate the evidentiary standard that applies in the conjunctive management context, but did explain that “to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules.” *AFRD2*, 143 Idaho at 873. No Idaho case directly addresses what standard of proof applies to conjunctive administration, but the Legislature has instructed the Director, when allocating water between existing rights, to “equally guard all the various interests involved.” Idaho Code § 42-101. This suggests that when it comes to water distribution, the Director should not presume that material injury does or does not exist, but should instead make that determination based on the preponderance of the evidence before him. Director Dreher believed this to be the right to approach to conjunctive management, explaining that

under this whole conflict that had developed, my view was that it was the State’s responsibility – the department’s responsibility to initially take the burden of determining the extent of injury and the appropriate recourse. Some might say, well, that burden should be put on the juniors. They ought to have to prove the negative. They ought to come in and prove that they’re not causing injury.

Well, the reason I disagree with that is because it’s the State that authorized those junior-priority diversions. It’s the State that issued those licenses. And the junior

rightholders, even though they're junior and even though they are subject to all prior rights, their rights are real too. They had just been decreed in the SRBA, and I didn't think it was appropriate to say, okay, prove that you're not causing injury; we – the State has issued these water rights, we issued these decrees, now prove that you're not causing injury. I didn't think that was the appropriate way to do this.

Similarly, it certainly was inappropriate to, at least in my view, put the burden on the seniors. Okay. You allege you're being injured. Now, prove it. I didn't think that was appropriate.

And so in developing this May 2nd Order, I tried to develop a process under which the State would take the initial burden of making these determinations, and then there would be a hearing ... under which the factual issues and the legal issues were resolved.

(Tr. Vol. 1, pp. 50-52.)

This Court's rationale and holdings in *AFRD2* lead to the same conclusion. In *AFRD2* the SWC argued that the factors set forth in CM Rule 42 are unconstitutional because they authorize the Director to effectively re-adjudicate the elements of the senior's water right. This Court rejected that argument, recognizing that "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." 143 Idaho at 876-77. The Court understood, like the U.S. Supreme Court in *Nebraska* and the Wyoming Supreme Court in *Willadsen*, that the decisions that must be made in the distribution of water are markedly different than those that must be made in a water right adjudication. Since *AFRD2* confirms that a delivery call proceeding is administrative in nature (as opposed to adjudicative), it supports application of the preponderance of the evidence standard.

Other holdings in *AFRD2* further support the preponderance of the evidence standard for water administration decisions under the CM Rules. Although the senior is presumed to be entitled to its full decreed water right, this Court held that the senior is *not* presumed to suffer material injury. *Id.* at 876-77. The district court had relied on an old surface water administration case, *Moe v. Harger*, 10 Idaho 302 (1904), to hold that “when a junior diverts or withdraws water in times of water shortage, it is presumed there is injury to the senior.” *AFRD2*, 143 Idaho at 877. This Court rejected that ruling, and pointed out that *Moe* “was a case dealing with competing surface water rights, and this is a case involving interconnected ground and surface water rights. The issues presented are simply not the same.” *Id.*

The preponderance of the evidence standard is further warranted by the fact that the material injury determination requires the Director to “evaluate whether the senior is putting the water to beneficial use,” *Id.* at 876, “whether the holders of water rights are using water efficiently and without waste,” *Id.* at 875, and “the reasonableness of a diversion, the reasonableness of use and full economic development,” *Id.* at 876, all of which necessitate “some exercise of discretion by the Director.” *Id.* at 875. These decisions naturally require the exercise of technical judgment and discretion, which is why the Director is required by law to be a licensed engineer, Idaho Code §4 2-1701(2), and instructed to utilize his “experience, technical competence, and specialized knowledge” when administering water. Idaho Code § 67-5251(5); *see also* IDAPA 37.01.01.600. Such decisions should be made in the Director’s best judgment, based on the preponderance of the evidence.

E. The preponderance of the evidence standard affords presumptive weight to the decree.

The *A&B Decision* was concerned with the statement in *AFRD2* that a senior is presumed to be entitled to their decreed amount of water. (Sup. Ct. Order Augmenting Record, Aug. 3, 2011, pp. 34-35.) The *A&B Decision* concludes that, given this presumption, a “clear and convincing proof” standard must apply, reasoning that “[t]o conclude otherwise accords no presumptive weight to the decree.” *Id.* at 34, n. 12. This conclusion mistakenly presumes that a decree’s presumptive weight in and of itself defies a preponderance of the evidence standard for determining material injury.

The presumption is simply the starting point against which the burden of proof (clear and convincing or preponderance) is measured. The presumption that a senior is entitled to their decreed amount exists whether the standard to prove otherwise is “clear and convincing” or “preponderance.” Even under a preponderance of the evidence standard, the senior still benefits from the presumption by receiving his full decreed amount unless and until the preponderance of the evidence shows that the senior’s irrigation needs can be met with something less than the full decreed amount. For example, the SWC’s water rights presumptively entitle it to divert 9 million acre-feet of water. For the Director to deliver less, the preponderance of the evidence must show that the SWC can meet its irrigation needs with less than 9 million acre-feet. The preponderance of the evidence standard still affords the presumption of entitlement to the full decreed amount.

F. The cases cited by the district court do not define the standard of proof applicable to water administration decisions under the CM Rules.

The *A&B Decision* and the *A&B Rehearing Decision* rely on a number of surface water cases to conclude that in the conjunctive management context the Director must presume that material injury exists until proven otherwise by clear and convincing evidence. *Id.* at 34-35 (citing *Cantlin v. Carter*, 88 Idaho 179 (1964), *Crow v. Carlson*, 107 Idaho 461 (1984), *Jenkins v. IDWR*, 103 Idaho 384 (1982), and *Gilbert v. Smith*, 97 Idaho 735 (1976)); Appx. A at 9-10 (citing *Moe v. Harger*, 10 Idaho 302 (1904), *Josslyn v. Daly*, 15 Idaho 137 (1908), *Neil v. Hyde*, 32 Idaho 576 (1919), and *Jackson v. Cowan*, 33 Idaho 525 (1921)). These cases are all distinguishable because they all deal with competing surface water rights and therefore do not address the unique issues involved in conjunctive administration. *See, AFRD2*, 143 Idaho at 877. These cases are distinguishable for additional reasons as well, as set forth below.

Cantlin, *Josslyn*, and *Moe* are distinguishable because they involve the granting of new appropriations which is an adjudicative act. The U.S. Supreme Court explained in *Colorado v. New Mexico* why the granting of a new appropriation warrants a heightened standard of proof:

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.

467 U.S. 310, 316 (1984) (internal quotations omitted). While that case involved an appropriation of interstate water, the court's reasoning applies equally to new appropriations of intrastate

water. In both instances, granting a new water right whose benefit may be speculative and remote is much different than allocating water between proven beneficial uses under established water rights.

Crow, *Jenkins*, and *Gilbert* are distinguishable because they involve claims of abandonment, forfeiture, and adverse possession which are also adjudicative in nature because they permanently extinguish the right to divert water.

Neil and *Jackson* involve claims that the use of junior rights will not affect the senior due to a lack of hydraulic connectivity, but in neither case does the Court enunciate a heightened standard of proof. *Neil*, 32 Idaho at 587; *Jackson*, 33 Idaho at 528. This Court held in both cases that the burden is on the junior to prove the lack of connection, but did not state that clear and convincing evidence is required. *Id.*

The *A&B Rehearing Decision* cites two additional cases involving groundwater rights, but they are also adjudicative in nature. *Silkey v. Tiegs*, 51 Idaho 344 (1931) (“*Silkey I*”); *Silkey v. Tiegs*, 54 Idaho 126 (1934) (“*Silkey II*”). *Silkey I* involves a water right adjudication and entry of decree that permanently defined the elements of various water rights. *Silkey II* involves a motion to modify the decree to allow a junior user to divert more water. Since both cases involve the permanent definition of the elements of water rights, they are not conclusive as to the standard of proof that should apply to the Director’s determination of material injury when responding to a delivery call under the CM Rules.

Finally, the *A&B Rehearing Decision* addresses the sole case involving the administration of groundwater: *Jones v. Vanausdeln*, 28 Idaho 743 (1916). In *Jones*, a senior groundwater user

sought an injunction against the operation of a junior-priority well. *Id.* at 746. This Court had previously held in *Moe* and *Josslyn* that a “subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence.” *Moe*, 10 Idaho at 307; *Josslyn* 15 Idaho at 149. Yet, this Court did not require the same showing in *Jones*. Instead, this Court required the *senior* to provide “very convincing proof of the interference of one well with the flow of another ... before a court of equity would be justified in restraining its proprietors from operating it on that ground.” *Id.* at 749. This Court recognized that a dispute over the administration of groundwater “differs somewhat from the ordinary action for the adjudication of conflicting water rights on the same stream.” *Id.* at 752.

The *A&B Rehearing* decision attempts to reconcile *Jones* with the surface water cases by ruling that:

Jones instructs that the initial burden rests upon the senior appropriator to establish that he and the junior appropriator receive water from the same hydraulically connected source. Once it is determined that the senior and junior derive water from a common source, as was the case in the above-mentioned cases except for *Jones*, the burden rests on the junior appropriator to prove by clear and convincing evidence that his use will not injure the senior’s right to use.

(Appx. B at 11.) The problem with this conclusion is two-fold. First, the other cases involve surface water administration, and the issues in determining material injury in the conjunctive management context “are simply not the same.” *AFRD2*, 143 Idaho at 877. Second, the SRBA court has eliminated the senior’s burden to prove hydraulic connectivity, by entering an order that creates a presumption *in favor of the senior* that all water sources are hydraulically connected

unless proven otherwise. (Appx. A at 12.) The effect of the order is that the junior now bears the burden to disprove connectively, effectively reversing the burden set forth in *Jones*.

The district court's attempt to amalgamate *Jones* with the surface water cases is not in harmony with this Court's holding in *AFRD2*, and unnecessarily forces the Director's determination of material injury into the familiar constructs of surface water administration and water rights adjudications.

Given the significant differences between the issues that must be addressed in the adjudication of water rights as compared to the distribution of water among established rights, the recognition by courts in other jurisdictions that these differences warrant different standards of proof, and the key holding in *AFRD2* that the Director is not to presume that material injury exists, this Court should hold that the administrative decisions required of the Director when responding to a delivery call under the CM Rules should be based on the preponderance of the evidence standard.

RESPONSE TO SWC'S OPENING BRIEF

The *SWC Opening Brief* is principally dedicated to the argument that the Director's use of a "minimum full supply" to determine material injury violates Idaho law. (*SWC Open. Br.* 15-30.) As set forth below, the entire argument is moot because the Director no longer utilizes the "minimum full supply" methodology. Even if this Court decides to consider SWC's "minimum full supply" argument, it should be rejected because it is predicated on the false premise that depletion to the water supply automatically equals material injury, regardless of the senior's actual beneficial use of water.

1. The SWC argument concerning “minimum full supply” is moot.

“A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.” *Schools for Equal Education Opportunity v. Idaho State Board of Education*, 128 Idaho 276 (1996); *See also, Bradshaw v. State*, 120 Idaho 429, 432 (1991).

The Director utilized the concept of “minimum full supply” in the original 2005 *Curtailment Order* as part of his determination of material injury under CM Rule 42. (R. Vol. 8, pp. 1377-80.) He calculated the “minimum full supply” as the amount of water “necessary to meet water needs independent of the licensed, decreed or contracted rights.” (R. Vol. 37, p. 7087.) It was “an attempt to predict the minimum amount of water the surface water users need to meet their crop requirements, below which curtailment is necessary if the minimum is not met as a consequence of junior ground water depletions.” *Id.*

In response to criticisms by the Hearing Officer concerning the Director’s methodology for calculating “minimum full supply,” the Director developed a new methodology for determining material injury, termed “reasonable in-season demand.” (Cl. R. Vol. 7, p. 1354(s).) The question of whether the new “reasonable in-season demand” methodology comports with Idaho law is currently on appeal in Minidoka County consolidated case no. CV-2010-382.

Since the Director has abandoned the “minimum full supply” methodology, there is no need for this Court to determine whether or not it is legally justifiable. Such a determination will have no practical effect on the outcome of this case. The issue is moot.

2. Depletion does not automatically equal material injury.

If the Court does consider the SWC's "minimum full supply" argument, it should be rejected because it is predicated on the false premise that depletion to the water supply automatically equals material injury, regardless of the senior's actual beneficial use of water.

The SWC argues that "the Director and watermasters must regulate and distribute water to water rights." (*SWC Open. Br.* 21, emphasis in original) They say that "any hindrance to either a natural flow or a storage water right (including the right to carryover storage) constitutes 'material injury' that must be mitigated either through curtailment or an approved CM Rule 43 mitigation plan." *Id.* at 16. They go so far as to argue that anytime a senior merely claims to be suffering material injury, then "material injury is presumed." *Id.* In other words, their position is that depletion to the water supply automatically equals material injury, regardless of whether the senior needs and will beneficially use additional water. The SWC argument is inconsistent with the definition of "material injury" given in the CM Rules, and it has already been rejected by this Court.

The distinction between injury to the water *supply* versus injury to the *use* of water is significant. If injury is measured merely by an impact to the supply of water, then the senior is automatically injured any time the water supply provides less than the maximum rate of diversion authorized under his water right, regardless of whether he actually needs additional water to accomplish his beneficial use. On the other hand, if injury is measured by the impact to the senior's beneficial use of water, then the senior suffers injury only if he is unable to meet his irrigation needs.

The CM Rules, Idaho Code, and prior decisions from this Court uniformly confirm that injury is measured by the impact on the use of water.

CM Rule 42 defines “material injury” as “hindrance to or impact upon the exercise of a water right.” CM Rule 10.14 (emphasis added). The term “exercise” is significant. It means “[a]n act of employing or putting to use.” *The American Heritage Dictionary of the English Language*, New Dell Ed., 1981, p. 251. By including the word “exercise,” the term “material injury” denotes impact to the use of water, not merely impact to the amount of water available for diversion.

This is consistent with the Idaho Code, which provides that an “appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.” Idaho Code § 42-104; *see also*, § 42-220 (“neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied”)

Precedent from this Court confirms that injury is measured by beneficial use of water. More than a century ago, this Court held “the law only allows the appropriator the amount *actually necessary* for the useful or beneficial purpose to which he applies it.” *Abbott v. Reedy*, 9 Idaho 577, 581 (1904) (emphasis in original); *see also*, *Cotant v. Jones*, 3 Idaho 606, 613 (1893) (a water user is “only entitled to such water, from year to year, as he puts to a beneficial use.”) In *Glavin v. Salmon River Canal Co.*, this Court explained that

[i]t is against the public policy of this state, as well as against express enactments, for a water user to take more of the water to which he is entitled than is necessary for the beneficial use for which he has appropriated it . . . Public policy demands

that, whatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them.

44 Idaho 583, 589 (1927); *see also*, *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 442 (1957) (“... it is the duty of the prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators at times when he has no immediate need for the use thereof.”) This Court has further held that injury requires evidence of “not merely a fanciful injury but a real and actual injury.” *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7 (1944).

This is not the first time that the SWC has argued that depletion to the water supply automatically equals material injury. The SWC made the same argument in *AFRD2*, claiming that by allowing the Director to consider the senior's actual beneficial use of water the CM Rules “flip the law of prior appropriation on its head” and result in “reverse ‘first in time, first in right.’” (*Pls’ Br. in Resp. to Defs’ and IGWA’s Open. Brs.*, Idaho S. Ct. Docket Nos. 33249, 33311, 33399 (Nov. 10, 2006), attached hereto as Appendix B at 14, 16.) The SWC’s position was that “water rights in Idaho should be administered strictly on a priority in time basis.” *AFRD2*, 143 Idaho at 870.

The district court decision in *AFRD2* accepted the SWC’s argument, relying on *Moe* to conclude that “when a junior diverts or withdraws water in times of water shortage, it is presumed that there is injury to a senior.” *AFRD2*, 143 Idaho at 877 (citing *Moe*, 10 Idaho 302 (1904)). This Court reversed the district court on this point, ruling instead that “depletion does not equate to material injury,” that “[b]ecause the amount of water necessary for beneficial use

can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury,” and that “senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.” *Id.* at 868. This Court reasoned that “[i]f 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. Accordingly, the Court held that while the Director must presume that the senior is entitled to his full decreed quantity, the Director’s evaluation of material injury when “responding to delivery calls, as conducted pursuant to the [CM Rules], does [sic] not constitute a re-adjudication.” *Id.* at 876-77.

The importance of evaluating beneficial use is illustrated by the difference between the maximum amounts of water authorized for diversion under the SWC’s natural flow and storage water rights (9 million acre-feet) and the amounts of water it actually diverts (no more than 4 million acre-feet). (Ex. 3007A, Table 7, Ex. 8000 at Vol. 4 p. AS-8.) Director Dreher explained what the result would be in this case if the Director had no discretion to examine SWC’s beneficial of water, but instead had to administer strictly based on the maximums:

If administration of these junior-priority rights is going to be based upon the maximum quantity authorized under these surface water rights, there will be no ground water irrigation in Idaho. It’s not possible. ... there will be a whole lot of water that goes down the Snake River in flood control releases and out of the state without being beneficially used ... look at the flood control releases that occur with ground water depletions.

(Tr. Vol. 1, pp. 170-171.) Accordingly, both Hearing Officer Schroeder and Director Tuthill concluded that “depletion does not equate to material injury,” but that the determination of whether a senior is materially injured is instead a “highly fact specific inquiry.” (R. Vol. 39, p. 7388.)

For these reasons, this Court should reject SWC’s proposition that depletion to the water supply automatically equals material injury.

CONCLUSION

This Court should reverse the district court and uphold the preponderance of the evidence standard of proof for determining material injury under the CM Rules because (a) most agency administrative decisions are governed by a preponderance of the evidence standard, (b) the heightened clear and convincing standard that applies to adjudicative actions should not apply to the administrative act of distributing water among established rights, (iii) courts in other jurisdictions apply a preponderance of the evidence standard to water distribution decisions, (iv) this Court’s decision in *AFRD2* supports using a preponderance of the evidence standard of proof, (v) the preponderance of the evidence standard affords presumptive weight to the decree, and (vi) the cases relied on by the district court are not definitive with respect to the standard of proof that applies to the decisions that must be made by the Director when responding to a delivery call under the CM Rules.

This Court should not consider the SWC’s arguments concerning the “minimum full supply” methodology because it has been superseded by the “reasonable in-season demand” methodology which is on a separate appeal. The issue of “minimum full supply” is moot because a

decision on the issue will have no practical outcome on this case. Even if this Court considers the SWC's argument concerning the "minimum full supply" methodology, it should be rejected because it is predicated on the false premise that depletion to the water supply does automatically equate to material injury.

RESPECTFULLY SUBMITTED this 31st day of August, 2011.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 2011, the above and foregoing document was served in the following manner:

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THOMAS J. BUDGE

APPENDIX A

Memorandum Decision and Order on Petitions for Rehearing

Minidoka County Case No. 2009-647 (Nov. 2, 2010)

DEPARTMENT OF
WATER RESOURCES

FILED-DISTRICT COURT
CASE # _____

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DUANE SMITH, CLERK
Sp, DEPUTY

Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources, (“Director,” “IDWR” or “Department”);

Randall C. Budge, Candice M. McHugh, Scott J. Smith, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, on behalf of Respondent Idaho Ground Water Appropriators, Inc. (“IGWA”);

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, A. Dean Tramner, Pocatello, Idaho, on behalf of Respondent City of Pocatello (“City of Pocatello”);

Jerry R. Rigby, Rigby, Andrus & Rigby, Chartered, Rexburg, Idaho, on behalf of Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, and Stan D. Neville, (“Fremont-Madison *et. al.*”).

I. PROCEDURE

A. Issue on rehearing.

On rehearing this Court is asked by the Department, IGWA and the City of Pocatello (collectively as “Ground Water Users”) to reconsider its ruling in the *Memorandum Decision and Order on Petition for Judicial Review* (May 4, 2010) (“*Order*”) regarding the appropriate burden of proof and evidentiary standards applied in a delivery call made pursuant to the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11. (“CMR”). In particular, the issue pertains to the standard of proof and burdens necessary to support a determination of no material injury when the determination relies on a finding by the Director that the water requirements of the senior right holder initiating the call can be satisfied with less than the decreed quantity. This Court held that such a finding must be supported by clear and convincing evidence. The issue on rehearing therefore involves the significance of a partial decree in a delivery call proceeding made pursuant to the CMR, and the standard of proof required to support a determination by the Director that the senior user initiating the call requires less water than previously decreed.

B. The purpose of the remand.

The *Order* remanded the case to the Director for application of the standard of proof to his determination that A & B could get by with less water than decreed to it in the SRBA. In the June 30, 2009, Final Order, the Director did not state the evidentiary standard applied. In *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 843, 70 P.3d 669, 681 (2003) the Idaho Supreme Court held that where the Department failed to state whether or not its findings were based on clear and convincing evidence it was outside the role of the reviewing court to review the evidence and decide whether there was clear and convincing evidence supporting the Department's findings. Following *Sagewillow*, this Court did not review the evidence to determine whether the above-mentioned finding was supported by clear and convincing evidence, but rather remanded the case to the Director to make such a determination.

C. The reasoning supporting the *Order*.

This Court reasoned that a decreed quantity in a SRBA decree is a judicial determination of the quantity of water put to beneficial use consistent with the purpose of use for which the right was decreed. Therefore, any determination that a senior right holder can accomplish the purpose of use for the water right on a quantity less than decreed would be akin to a finding of waste because the senior would not be making beneficial use of the entire decreed quantity. No material injury to the senior water right would inure and junior rights could not be regulated to satisfy the senior's decreed quantity. In the *Order*, the Court held that a finding of waste requires the higher standard of clear and convincing evidence.

The holding reconciled the objectives of giving proper effect and certainty to the adjudicated elements of a water right while at the same time also giving effect to the CMR by acknowledging that a quantity less than decreed may be all that is necessary to satisfy a senior right at the time a delivery call is made. The reasoning, however, placed any risk of uncertainty in the Director's determination resulting in the senior having an insufficient water supply on junior water rights. Absent a higher standard, the senior making the call can be put in the position of re-proving or re-litigating quantity

requirements for a particular water right. Simply put, if the Director is going to administer to provide the senior with less than the decreed quantity, taking into account the implementation of any reasonable measures imposed on the senior, the Director should be convinced to a high degree of certainty that his determination will provide the senior with sufficient water to accomplish the purpose of use. The high degree of certainty is necessary because a water right is a valuable property right. If the Director is turns out to be incorrect in his determination that senior can get by with less than the decreed quantity of water, the senior will receive less water than he would otherwise be entitled under the decree. Under those circumstances the senior is in effect deprived a portion of his property right. Such diminishment of the senior's right should only be made through the evidentiary standard of clear and convincing evidence.

II. CLARIFICATION, RESPONSES TO ISSUES RAISED AND DISCUSSION

A. The clear and convincing standard does not guarantee the senior the decreed quantity nor does it require that the Director administer according to strict priority.

The Ground Water Users argue the Court's *Order* results in requiring that the Director administer strictly to the decree unless juniors intervene and demonstrate by clear and convincing evidence less water is necessary. This argument misunderstands the Court's *Order*.

1. The presumptions and burdens of proof were not clearly addressed in the administrative proceedings as required by AFRD #2.

This Court previously discussed the significance of the Idaho Supreme Court's decision in *American Falls Reservoir District No. 2. v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD #2*). *Order*, 27-28. The Supreme Court held that the CMR survived a facial challenge despite the lack of stated burdens of proof and evidentiary standards applicable to a delivery call. Nevertheless, the Court recognized that the Department is

still required to apply the proper evidentiary standards and burdens of proof in order to apply the CMR in a constitutional or “as applied” manner. In the instant case, the evidentiary standards and burdens of proof were not clearly articulated by the Director.

i. Administration of rights in an organized water district does not avoid the application of the established burdens of proof.

The CMR distinguish between whether or not administration is sought in an organized water district. (*Compare* CMR Rule 40 and Rule 30). The initiation of a contested case is not required in an organized water district. This is significant because in an organized water district, water rights must first be adjudicated. *See* I.C. § 42-604 (requirements for water district). In responding to a delivery call in an organized water district, the Director is required to make findings and to administer rights through a water master if material injury is found. This is accomplished without the initiation of a contested case process. In *AFRD #2* the Idaho Supreme Court held that “[r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules. There is simply no basis from which to conclude the Director can never apply the proper evidentiary standard in responding to a delivery call.” *Id.* at 874, 154 P.3d at 445. Therefore, whether or not a junior intervenes in the proceedings, the Director must give effect to established evidentiary burdens and presumptions.

ii. The CMR do not modify the burdens or presumptions applied in a delivery call.

The Ground Water Users argue that the burden of proof is a preponderance of the evidence as it is the appropriate evidentiary standard in most administrative proceedings. The Ground Water Users additionally assert that the evidentiary standards that apply to the administration of ground water rights are different from those involving solely surface water administration. The Ground Water Users also argue the cases relied on by the Court in the *Order* only address surface to surface administration and that different

burdens and evidentiary standards apply in cases involving ground water administration. This Court disagrees that different burdens and evidentiary standards apply.

Again, in *AFRD #2* the Supreme Court did not hold that a different set of evidentiary standards and burdens apply to the administration of ground water. The Supreme Court held that the CMR were not unconstitutional for failing to articulate the appropriate standards and burdens. The Court added that “[r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules.” *Id.* at 874, 154 P.3d at 445. This statement is unequivocal. The argument that the CMR modify historically developed burdens and presumptions is inconsistent with that holding.

The City of Pocatello argues that the burden is on the senior to prove material injury. *Pocatello Opening Brief* at 10-11. In *AFRD #2* American Falls argued that specific provisions of the CMR squarely contradict Idaho law by placing the burden of proving material injury on the senior making the call. The Supreme Court held “[n]owhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02. . . . [O]ur analysis is limited to the rules as written, or ‘on their face,’ and the rules do not permit or direct the shifting of the burden of proof.” *Id.* at 873-74, 154 P.3d at 444-45. Accordingly, the express provisions of the CMR do not operate to modify the historically recognized burdens and presumptions.

Finally, the issue before this Court does not deal with the complexities and uncertainties posed by the hydraulic interrelation of ground and surface water. On rehearing, the issue focuses solely on the presumptive weight accorded a partial decree and the standard of proof required to support a determination that the senior initiating the call requires less water than previously decreed. At issue is the quantity of water necessary to accomplish the senior’s purpose of use.

- iii. **The Court’s *Order* does not result in the Director administering rights strictly in accordance with the decreed quantity.**

The Court's **Order** does not conclude that a senior right holder is guaranteed the maximum quantity decreed or that the Director is required to administer strictly according to the decree. Rather, the **Order** concludes that the decreed quantity includes a quantitative determination of beneficial use resulting in a presumption that the senior is entitled to that decreed quantity. The **Order** contemplates that there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity. The **Order** holds, however, that any determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by a high degree of certainty.

The clear and convincing evidentiary standard is not an insurmountable standard. The Department is not new to the administration of water and should be able to determine present water requirements taking into account multiple factors including the existing conveyance system. If the senior right holder has made efficiencies or changes to a delivery system resulting in the conservation of water, such should be no more difficult to establish at the higher evidentiary standard. Therefore the senior is not guaranteed the decreed quantity nor is the Director required to administer strictly in accordance with the decreed quantity. While a senior may not be guaranteed the decreed quantity in a delivery call, he should have assurances that any reduced quantity determined to be sufficient to satisfy current needs is indeed sufficient. Otherwise what occurs is a redistribution of the senior right to be apportioned among junior rights. The apportionment of water among users as common property was rejected by the Idaho Supreme Court in the early stages of water development. *Kirk v. Bartholomew*, 3 Idaho 367, 29 P. 40 (1892).

iv. The application of a clear and convincing standard does not turn a delivery call proceeding into a hearing on forfeiture.

The Ground Water Users argue that the Court's ruling essentially turns a delivery call into a proceeding on forfeiture. The Ground Water Users argue that that the Court's reliance on waste is in error because in a delivery call the senior's water right is not permanently reduced. This argument misses the point of the ruling. The Court simply

held that the quantity element represents a quantitative determination of beneficial use. In the delivery call, the senior's present water requirements are at issue. If it is determined that the senior's present use does not require the full decreed quantity, then the quantity called for in excess of the senior's present needs would not be put to beneficial use or put differently would be wasted. One leading commentator in analyzing the development of the use of the concepts of reasonable use and economical use in association with beneficial use among various western states, including Idaho, states:

As considered and applied in these decisions, economical use is an antonym of waste. If an appropriator wastes, he necessarily is not using it economically. As he has no right to waste water unreasonably or unnecessarily, then of necessity he must make economical as well as reasonable and beneficial use. . . . The limitation of the appropriative right to economical and reasonable use thus precludes any waste of water that can reasonably be avoided. The use of water is so necessary as to preclude its being allowed to run to waste. Its 'full beneficial and economical use requires' that when the wants of one appropriator are supplied, another may be permitted to use the flow.

Wells A. Hutchins, *Water Rights in the Western Nineteen States*, Vol I, 502 (1971). The holdings of the SRBA District Court have historically viewed waste and beneficial use in this manner. For example, the SRBA Court rejected the inclusion of a remark in partial decrees which specified that the quantity sought in a delivery call is limited to that which the senior right holder put to beneficial use. The SRBA Court reasoned that the remark was not necessary because it was a restatement of the law and held "that a senior has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water." **Order** at 32 (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)).

It is apparent that water quantity can be reduced based on a waste analysis without resulting in a permanent reduction of the water right through partial forfeiture. Only if the waste occurs for the statutory period can forfeiture be asserted. However, whether the senior's right is permanently reduced through partial forfeiture or is only temporarily reduced through administration in times of shortage and the reduction leaves the senior

with an insufficient water supply to satisfy present needs, the property right is nonetheless diminished.

B. The historically developed burdens and presumptions.

On rehearing, the parties identify those cases that address the burdens of proof and evidentiary standards applicable to disputes between competing water users under Idaho law. A review of these cases is worthwhile.

The early case of *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904) addressed a dispute between surface water users on a common source, the Big Lost River. The case was commenced by certain senior water appropriators to enjoin certain junior water appropriators from diverting water to the alleged injury of the seniors' rights of use. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed that once the senior appropriators' rights of use are established, the burden shifts to the junior to prove by clear and convincing evidence that his use will not injure the seniors' rights of use:

So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator, who claims that such diversion will not injure the prior appropriator below him, **should be required to establish that fact by clear and convincing evidence.**

Id. at 307, 77 P. at 647 (emphasis added).

In *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908) the Idaho Supreme Court again addressed a dispute between surface water users. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed, consistent with *Moe*, that the burden is on the party alleging that his appropriation will not injure a prior appropriator's right of use to prove the same by clear and convincing evidence:

It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or

prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho, 305, 77 Pac. 645, **produce ‘clear and convincing evidence’** showing that the prior appropriator would not be injured or affected by the diversion.’ The burden is on him to show such facts.

Id. at 149, 96 P. at 571–72 (emphasis added).

Neil v. Hyde, 32 Idaho 576, 186 P. 710 (1920) and *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921) likewise involved disputes between surface water users on common sources. The junior appropriators in those cases argued that their use did not injure the senior users. The Idaho Supreme Court directed in both cases that the burden of proof rested on the junior appropriators to show that their use did not injure the seniors, and held that the juniors in both cases failed to carry their burden.¹ *Neil*, 32 Idaho at 587, 186 P. at 713; *Jackson*, 33 Idaho at 528, 196 at 217.

A different issue than those addressed by the Court in the above-mentioned cases arose in the context of a dispute between two groups of artesian groundwater users in *Jones v. Vanausdeln*, 28 Idaho 743, 156 P. 615 (1916). In that case, the ultimate issue was one of hydrologic connectivity; that is, whether the respective artesian basins from which plaintiffs and defendants received their water were hydraulically connected:

The ultimate fact in issue was whether the [defendants’] wells drew their supply from the same underground flow as [plaintiffs’] wells, thereby causing a diminution in the flow of the [plaintiffs’] wells.

Id. at 751, 156 P. at 618. The district court denied plaintiffs’ request that the defendants’ use be enjoined on the grounds that no subterranean connection existed between the respective artesian basins and that, as a result, the two groups received their water from separate and unconnected sources. *Id.* at 747–48, 156 at 616. The Idaho Supreme Court confirmed, providing that when the issue is whether two sources are hydraulically connected, the burden of proof is on the senior appropriator to establish that such a connection exists before a junior’s use will be enjoined. *Id.* at 749, 156 at 617.

The Idaho Supreme Court again took up a dispute between various artesian groundwater users in *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931) (“*Silkey I*”) and *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934) (“*Silkey II*”). In that case, the district

¹ Although the Court directed that the burden of proof rested with the junior appropriators, in neither case did the Court specify the applicable evidentiary standard the juniors had to meet.

court adjudicated the rights of the parties, entered a decree curtailing the rights of several of the junior appropriators at the request of the senior appropriator and retained jurisdiction over the case to adjust the allowance of water permitted each user if necessary. *Silkey I*, 51 Idaho at 348–49, 5 P.2d at 1051. Unlike *Jones*, connectivity of source was not the ultimate issue in *Silkey*. Indeed, the district court found, and the Idaho Supreme Court affirmed, that “the waters flowing from the artesian well of each party is derived from the same source, and the supply of said wells constitutes one interdependent and connected source of supply.” *Id.* at 348, 5 P.2d at 1051.

The appeal in *Silkey II* arose when the junior appropriators curtailed in *Silkey I* moved the district court under its retained jurisdiction to modify its earlier decree to permit them to use more water. *Silkey II*, 54 Idaho at 127, 28 P.2d at 1037. The junior appropriators argued that such additional use would not deplete the amount of water available to the senior appropriator. *Id.* The Idaho Supreme Court affirmed the district court’s denial of the junior appropriators’ motion, holding that the juniors failed to sustain their burden of proving that their use would not injure the senior’s use:

The burden was on appellants herein to sustain their motion by direct and convincing testimony, this language in *Moe v. Harger*, 10 Idaho, 302, 77 P. 645, 646, being particularly apt: “This court has uniformly adhered to the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts.

Id. at 128–29, 28 P.2d at 1038. Consistent with *Moe*, the Court again made clear that the standard of proof was clear and convincing evidence if the juniors wished to prove that their use would not injure the senior appropriator.

The case history can be reconciled. *Jones* instructs that the initial burden rests upon the senior appropriator to establish that he and the junior appropriator receive water from the same hydraulically connected source. Once it is determined that the senior and junior derive water from a common source, as was the case in all of the above-mentioned cases except for *Jones*, the burden rests on the junior appropriator to prove by clear and convincing evidence that his use will not injure the senior’s right of use. One leading

commentator on the subject has summarized the application of the burdens of proof as follows:

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

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

It is significant that this Court established the hydrologic connection in *Memorandum Decision and Order of Partial Decree* in Basin Wide Issue No. 5 “Connected Sources General Provision” for the Snake River Basin. Among other things, the general provision identifies hydraulically connected ground and surface sources in the Snake River Basin for the purposes of administration and defining the legal relationship between connected sources. In pertinent part, the general provision provides as follows:

Except as otherwise specified above, all other water rights within Basin ____ will be administered **as connected sources** of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

(emphasis added). A *Partial Decree for Connected Sources* is issued for each basin within the Snake River Basin. Thus, unless water rights are listed as “otherwise specified” in the *Partial Decree for Connected Sources* for a given basin that the source from which a junior appropriator receives his water shall be administered separately from all other water rights in the Snake River Basin, the issue of whether or not the senior and junior divert water from a common source has already been answered in the positive. This is also consistent with the provisions of the Ground Water Act, IC. § 42-237a.g. which requires the Director to determine areas of the state having a common ground water supply. When it is determined that the area having a common ground water supply affects the flow of water in any stream in an organized water district, then the Director includes the stream in the water district. Conversely, when it is determined that the area having a common ground water supply does not affect the flow of a stream in an

organized water district, then the Director incorporates the area in a separate district. Under such circumstances, the senior appropriator's burden of proof to establish a common source is satisfied.

The burden is then on the junior right holder to show by clear and convincing evidence that his use will not injure the senior's right. One way in which this may be demonstrated is by showing that the senior's present water use does not require the full decreed quantity. A clear and convincing standard is consistent with the historically recognized burdens of proof and also insures that any amount determined to be sufficient to accomplish the present use is in fact sufficient.

C. The significance of the decree issued in a general adjudication in a delivery call.

The Ground Water Users argue the purpose and significance of a partial decree issued in a general adjudication differs substantially from its purpose and significance in delivery call proceedings. Specifically, the Ground Water Users assert the adjudication only establishes the historical maximum quantity that can be put to beneficial use. They argue that a delivery call proceeding, in contrast, requires that the Director examine the senior's current beneficial use requirements which may vary from the decreed quantity. The argument is that the decree is only conclusive as to historical maximum beneficial use for the water right and has little or no relevance as to present beneficial use requirements for the same right. This Court agrees that an appropriator's present water requirements can vary from the quantity reflected in the decree after taking into account such considerations such as post decree factors. However, the Ground Water User's characterization of decrees minimizes their intended purpose, undermines the certainty of the decrees and disregards that the issues that can be raised in a general adjudication pertaining to the quantity element extend beyond the maximum quantity that was historically put to beneficial use.

- 1. Idaho law contemplates certainty and finality so that water rights can be administered according to the decrees.**

Idaho Code § 42-1420 provides: “[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system. . . .” In *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998), the Idaho Supreme Court pronounced that “[f]inality in water rights is essential.” Further, “[a] decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for the source of the water. . . . If the provisions define a water right, it is essential that the provisions are in the decree, *since the water master is to distribute water according to the adjudication decree.*” *Id.* (citations omitted) (emphasis added). Clearly Idaho law contemplates certainty and finality of water right decrees for effective administration. Absent a higher evidentiary standard, any certainty and finality in the decree is undermined.

The position advocated by the Ground Water Users would significantly minimize the purpose and utility of the decree in times of shortage and any reliance on the decree for effective administration, particularly in a water district, is undermined. If the sole purpose of the decreed quantity is to identify the maximum quantity when sufficient water is available, the result is that the decreed quantity has little probative or presumptive weight and litigation over the senior’s present needs would be a virtual necessity in every delivery call. This is contrary to the holding in *AFRD #2*, which provides that: “The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has The presumption under Idaho law is that the senior is entitled to his decreed water right, but there may be some post-adjudication factors which are relevant to how much water is actually needed.” *Id.* at 877-78, 154 P.3d at 448-49

2. The quantity element is a quantitative determination of beneficial use.

The argument against applying the clear and convincing standard erroneously assumes that the decreed quantity element is not a quantitative determination of beneficial use. The argument assumes that the Department’s role in the SRBA is to recommend water rights based on established historical maximum beneficial use rather than present beneficial use requirements. For example, the Ground Water Users assert

that recommendations for previously decreed and licensed rights were recommended based on the previously decreed or licensed quantity. As such, the last field examination for the right could have taken place as long ago when the right was previously decreed or licensed. Since that time, the right holder could have made efficiencies to the conveyance system thereby requiring less water than was decreed or licensed. An example is converting from gravity irrigation to sprinkler irrigation or a tiled ditch system. As a result, the Ground Water Users argue that the decreed quantity in the SRBA may not reflect the quantity of water that is actually put to beneficial use. The Ground Water Users also argue that the quantity element is a maximum which provides for the highest degree of flexibility to provide for the most water intensive use within the scope of the purpose of use. For example, a quantity sufficient to allow an irrigator to rotate crops allows for growing the most water intensive crop in the hottest part of the irrigation season.

The argument ignores both the purpose of the decree as well as the scope of the issues raised in a general adjudication. This Court previously discussed the Department's statutory directive in issuing licenses and recommendations which limit the quantity to the amount of water beneficially used. *Order* at 28-30. Idaho Code § 42-220 provides:

[W]hen water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to use more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the [Department] in granting such license *and to the court in making such decree*, that a greater amount is necessary. . . .

I.C. § 42-220 (emphasis added). Idaho Code § 42-1420 provides “the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system.” As such, the appropriate time for contesting the Department's recommendation as to quantity was in the adjudication. I.C. § 42-1420.

Case law also supports the proposition that the quantity element in a decree represents a quantitative determination of beneficial use. Issues over excess quantity arise in proceedings relating to the adjudication of rights. In *Abbott v. Reedy*, 9 Idaho 577, 75 P. 764 (1904), in an adjudication to determine the respective rights on Soldier Creek in Blaine County, the Idaho Supreme Court held:

It is true that he said he had been using about two inches per acre, but the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used, but how much was actually necessary. There was a clear and substantial conflict in the evidence as to the quantity of water per acre necessary for the successful irrigation of appellant's lands.

Id. at 578, 75 P. at 765. The issue arose in the context of an adjudication as opposed to a delivery call proceeding.

The case of *Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 P. 481 (1909), involved the adjudication of water rights on the Boise River. At issue was whether the quantity decreed for certain classes of rights exceeded the duty of water for the purpose of use of the rights. In deciding whether or not to grant a new trial on the issue, the Court relied on the following:

In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use of application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water.

Farmers at 535-36, 102 P. 483-89. Again, the issue arose in the context of an adjudication as opposed to a delivery call proceeding. *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 F. 30 (D. Idaho 1917), involved an action to quiet title of water rights held on Goose Creek in Idaho and Nevada. In applying Idaho law, the Court held:

Much is said about the duty of water. . . .The Land and Stock Company insists that the duty of water should still be measured by the old method of irrigation of pasture and the native grasses for the production of hay, which was by the flooding system, that allowed the water to cover the surface of the soil, and actually to remain thereon for considerable periods of time. This method is being disapproved of in more recent years as wasteful and not an economical use. No person is entitled to more water

than he is able to apply to a reasonable and economical use. True, it may be that good results are obtainable from the former method, but that does not augur that just as good results may not be secured by a much more moderate use, which would leave a large quantity of water for others, who need it as much as the Land & Stock Company.

Id. at 33-34.

In *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918), one of the issues before the Idaho Supreme Court was the sufficiency of the evidence supporting the adjudicated quantity of a beneficial use claim, the Court reasoned:

‘The quantity of water decreed to an appropriator, in an action wherein priority of appropriation is the issue, should be upon the basis of cubic feet per second of time of the water actually applied to a beneficial use, and should be definite and certain as to the quantity appropriated and necessarily used by the appropriator.’

Id. at 15, 178 P. at 86. (quoting *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912)).

Further:

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

Id. at 15. Kinney on Irrigation provides with respect to economic use and the suppression of waste:

[T]he Courts have been and are now being called upon to fix by decrees the duty of water for certain tracts of land. . . . In fixing the duty of water for a certain tract of land, such an amount per acre should be awarded, within the lawful claim of the prior appropriator, as is essential or necessary for the proper irrigation of the land on which the water is used, and upon which the duty is being fixed; which water, when economically applied without waste, will result in the successful growing of crops on the land. Further than this, as far as the rights of the prior appropriator are concerned, the courts should not and can not lawfully go, where the result would be in cutting down the quantity of water to which the prior appropriator is entitled and reasonably needs for his purpose and the awarding of a certain amount of his water to subsequent appropriators.

2 Kinney on Irrigation and Water Rights § 905 at 1595-96 (2nd ed. 1912).

The Ground Water Users assume that the quantity element of decreed water rights is not reflective of present needs, or is “bloated” (i.e. in excess of the quantity needed) or at a minimum always represents a quantity which provides for the highest degree of flexibility in order to allow for the most water intensive use within the scope of the purpose of use. The argument oversimplifies what takes place in the SRBA. Water rights are claimed based on permits and licenses, prior decrees in both private and general adjudications), beneficial use, posted notice, and adverse possession, mesne deed conveyances, splits of property and appurtenant rights etc. As a result, the quantity claimed for one water right may include excessive water for a particular purpose while for another water right the quantity may provide for little or no flexibility. Therefore the amount of excess water, if any, or the degree of flexibility built into the quantity element of partial decree issued in the SRBA could be in actuality “all over the map.”

The Director’s recommendation as to quantity, whether or not an in-depth field investigation was conducted in preparing the recommendation, is by no means the final word on the matter. The quantity recommendation is subject to objections by the claimant and any other party to the adjudication. If such an objection is made it may be litigated and determined by the Court. Issues such as waste (i.e. reasonableness of conveyance works), duty of water, partial forfeiture, and excessive conveyance loss can and have been litigated in the SRBA whether or not they were considered in the Director’s recommendation. If the Director makes a recommendation based on a prior license where the delivery system that has since changed (i.e. gravity to sprinkler), third parties can object and assert partial forfeiture of any quantity no longer put to beneficial use. Accordingly, the degree to which the quantity element is scrutinized varies among the decrees issued in the SRBA. Nonetheless, parties were provided the opportunity to raise and litigate issues affecting quantity. Consequently, the partial decree issued in the SRBA is consistent with Idaho law and represents a quantitative determination of beneficial use.

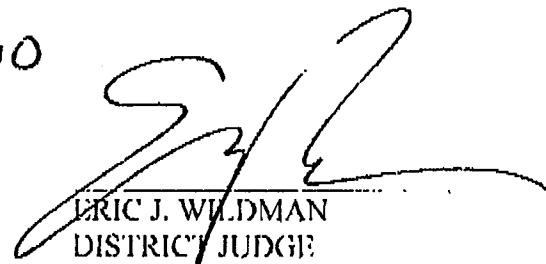
The result is that the issues litigated and evidence presented in support of the quantity element in the adjudication can be exactly the same as the issues presented and the evidence relied upon in conjunction with the delivery call. As such, depending on the

particular case, the argument that the issues are distinguishable because the issue in the adjudication is historical maximum beneficial use and in a delivery call only present need is at issue may be a difference in label only.

III. CONCLUSION

In sum, the application of a clear and convincing standard to the determination that a senior can get by with less water than decreed is consistent with the established presumptions and standards of proof. The standard reconciles giving the proper presumptive weight to the quantity decreed while at the same time allowing the Director to take into account such considerations as post-decree factors and in particular waste under the CMR. The standard avoids putting the senior right holder in the position of re-defending or re-litigating that which was already established in the adjudication. It avoids the risk that an erroneous determination will leave the senior short of water to which he was otherwise entitled, thereby promoting certainty and stability of water rights. The standard provides for effective timely administration by reducing contests to the sufficiency of the Director's findings. The Director's determination in an organized water district will be difficult to challenge by either the senior or junior sought to be enjoined. The alternative is a system which lacks certainty in water rights. For these reasons the Court affirms its prior decision on this issue and **denies** the *Petitions for Rehearing*.

DATED: November 2, 2010



ERIC J. WILDMAN
DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of November, 2010, she caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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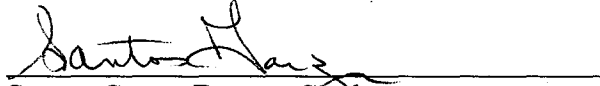
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APPENDIX B

Plaintiffs' Brief in Response to Defendants' and IGWA's Opening Briefs

Idaho S. Ct. Docket Nos. 33249, 33311, 33399 (Nov. 10, 2006)

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Givens Pursley, LLP

Nos. 33249, 33311, 33399

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiff-Respondents, and

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

Intervenor-Respondents,

v.

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

IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor-Appellant.

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

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

The Honorable R. Barry Wood

District Judge, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

The Eastern Snake Plain Aquifer ("ESPA") is hydraulically connected to the Snake River and its tributary surface water sources (springs, streams) at various places and to varying degrees.¹ All water sources in the Snake River Basin, including the ESPA, are deemed connected and must be administered as connected sources.² The Idaho Constitution and water distribution statutes require that "[p]riority of appropriations shall give the better right as between those using the water". IDAHO CONST., art. XV, § 3; I.C. §§ 42-106, 602, 607. Water rights to the Snake River and its tributary springs are therefore entitled to constitutional protection against out-of-priority ground water diversions from the ESPA.

How is it then that junior priority ground water rights are permitted to intercept and take water away from connected senior surface water rights? The answer: under the cloak of the Department's *Rules for Conjunctive Management of Connected Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*) ("Rules"). Recognizing this threat to Idaho's law of water distribution, as established well over a century ago, the district court declared the Department's Rules facially unconstitutional.

¹ R Vol. IV, p. 754 (Water District 120 Order at p. 4, ¶ 19); p. 762 (Water District 130 Order at p. 4, ¶ 19). The Director of the Idaho Department of Water Resources ("Department") previously found that ground water diversions in certain areas of the ESPA reduce flows in connected springs and the Snake River by an amount equal to 50% of those diversions within six months. R Ex. 1; *Steenson Aff.*, Ex. Y (Thousand Springs GWMA Order at p. 2, ¶ 4 of; see also, Ex. H to *Affidavit of Travis L. Thompson in Support of Opposition to Motion for Stay Pending Appeal Under Idaho Appellate Rule 13(g)* (American Falls GWMA Order at p. 2, ¶ 4)(filed with this Court in this appeal on August 31, 2006).

² R Vol. IV, p. 806 ("the form of the conjunctive management general provision is hereby decreed as set forth in the attached 'Exhibit A'"); pp. 807-808 (Exhibit A stating "Except as otherwise specified above, all other water rights within Basin ___ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.").

Before this Court is an appeal of the district court's decision granting Plaintiffs' motion for summary judgment. The district court found that the Rules fail to include necessary constitutional components and protections for senior water rights which results in an unlawful diminishment and "taking" of those property rights.³ These issues were directly raised by the Plaintiffs and argued before the district court.⁴ The constitutional protections afforded senior water rights in Idaho's prior appropriation system are much more than mere "procedures" to be altered at the whim of an administrative officer. The constitutional protections afforded seniors, including honoring a water right's priority date and other decreed elements, are subverted through administration under the Rules. Accordingly, the district court rightly declared the Rules unconstitutional and in conflict with Idaho's water distribution statutes. This Court should affirm.

ADDITIONAL ISSUES ON APPEAL⁵

1. Whether the district court erred in finding that the Rules disparate treatment of ground water rights and surface water rights does not violate equal protection?
2. Whether Plaintiffs are entitled to attorneys fees and costs on appeal pursuant to Appellate Rule 40 and 41, and I.C. §§ 12-117?

³ The Rules are found in the record at R. Vol. I, pp. 15-28. All future cites to the Rules will consist of the word "Rule" and the respective rule number rather than a reference to the record. The district court's June 2, 2006 *Order on Plaintiffs' Motion for Summary Judgment* is found at R. Vol. X, pp. 2337-2477. All future cites to this decision will consist of the word "Order" and the respective page number rather than a reference to the record.

⁴ Contrary to the Defendants' representations (*Defs. Br.* At 5, 14), the issue of the Rules' failure to include the constitutional protections afforded senior rights was directly briefed and argued by the Plaintiffs to the district court. R. Vol. IX, pp. 2267-68; T. Vol. I, pp. 189-191, 252-53, 264, 319-320.

⁵ Plaintiffs join in the arguments in the TSWUA / Rangen response brief, including the equal protection arguments, as well as the response brief of the Idaho Power Company. Clear Springs joins in those briefs and this one as well.

STANDARD OF REVIEW⁶

I. Summary Judgment & Constitutional Issues

On review of summary judgment orders, this Court employs the same standard of review as the district court. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272 (1994). This Court reviews the record before the district court, to determine *de novo* whether, after construing the facts in the light most favorable to the nonmoving party, there exists any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Armand v. Opportunity Management Co., Inc.*, 141 Idaho 709, 713 (2005); *McColm-Traska v. Valley View, Inc.*, 138 Idaho 497, 500 (2003). Likewise, constitutional issues are pure questions of law over which this Court exercises free review. *Meisner v. Potlatch Corp.*, 131 Idaho 258, 260 (1998).

II. Facial Constitutional Challenges & Declaratory Judgment Actions

Defendants and IGWA take issue with district court's consideration of facts, including the Director's use of the Rules to avoid regulating any connected junior priority ground water rights in 2005. As described below, the district court properly considered these facts, since:

- 1) Idaho Code § 67-5278(1) and this Court's decision in *Asarco, Inc. v. State of Idaho*, 138 Idaho 719 (2003) provide an exception from the "exhaustion rule" and allows a court to review an agency's "threatened application" of unconstitutional rules; and
- 2) A factual foundation is necessary for a court to review a facial constitutional challenge to administrative rules.

⁶ The standard of review for discretionary actions made by the district court is briefed in the *Plaintiffs' Brief in Response to the City of Pocatello's Opening Brief* and is adopted for this response as well. The "Course of Proceedings / Statement of Facts" is also included Plaintiffs' response to Pocatello's brief and is adopted herein.

Laws and regulations which are "clearly in violation of [a] constitutional principle" are not valid. *Moon v. Investment Bd.*, 96 Idaho 140, 143 (1974); *Bradshaw v. Milner Low Lift Irr. Dist.*, *infra*; *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325 (1956) ("That which the constitution directly prohibits may not be done by indirection through a plan ... to evade the constitutional prohibition."). Generally speaking, constitutional challenges are either "facial" challenges or "as applied" challenges. *State v. Korsen*, 138 Idaho 706, 712 (2003).⁷ For facial challenges to a statute, a party must typically show "that no set of circumstances exist under which the [Rules] would be valid." *Moon v. North Idaho Farmers Association*, 140 Idaho 536, 545 (2004).⁸ This rule, however, does not preempt consideration of some facts, including an agency's "threatened application" of unlawful rules. Reviewing the fact the Director failed to distribute water in a timely and lawful manner was relevant to demonstrate the "threatened application" of the Department's unconstitutional Rules. Moreover, no after-the-fact administrative review of the Director's actions would ever cure the lack of timely water distribution in 2005.

⁷ In an "as applied" challenge, the Plaintiff must show that the statutory or regulatory provisions were applied to a specific complainant in an unconstitutional manner. *Korsen*, 138 Idaho at 712. Since the underlying administrative action is still ongoing, nearly two years after the Plaintiffs first requested administration, the district court determined that it would not address any "as applied" challenge at this time. R. Vol. VIII, p. 1813. The Plaintiffs presented evidence of another situation wherein a senior water right holder was unlawfully prejudiced by an application of the Rules. See R. Vol. IX, pp. 226-27, 2305-2313. Specifically, the Plaintiffs addressed the Department's response to an administrative call, made on August 6, 2003, by Warren Lloyd, a senior ground water user. This example did not involve the Plaintiffs' water rights.

⁸ This rule necessarily requires the introduction of certain hypothetical evidence of circumstances wherein the challenged provision can/cannot be applied constitutionally. This is the case, no matter how absurd the hypothetical circumstances may be. Yet, this is where the flaws in the Defendants' and IGWA's arguments are exposed. According to the Defendants and IGWA, Plaintiff could argue that, *hypothetically speaking*, the Director could use the Rules to justify the implementation of an administrative process which precludes water delivery for years without end. However, at the same time, the *fact* that the Department has done that very thing is somehow inadmissible. The Defendants arguments are nothing more than an attempt to hide their unconstitutional actions from the Court.

A. The Declaratory Judgment Statute Allows the Court to Review Some Facts Relative to its Analysis of the Validity of a Statute

This Court has recognized that “some factual foundation of record” must be present in a facial challenge. *Moon*, 140 Idaho at 545 (“Plaintiffs challenging the constitutionality of a statute *are required to provide* ‘some factual foundation of record’ that contravenes the legislative findings”) (emphasis added). Section 67-5278(1) allows a court to consider the “threatened application” of a rule, which necessarily includes a review of the actions taken by the agency to that point in time. This statute further provides an exception to the general rule that a party must first “exhaust” administrative remedies with the agency.⁹

In a declaratory judgment action, a plaintiff must only show that the statute or rule requires, *or allows*, an agency to consider factors and employ procedures that are inconsistent with the Idaho Constitution. See *Idaho Watersheds Project v. State Board of Land Commissioners*, 133 Idaho 64 (1999) (“IWP”). In *IWP*, the plaintiffs challenged the constitutionality of Idaho Code § 58-310B, both facially and as applied, through a declaratory

⁹ The exception was upheld by this Court in *Asarco*. 128 Idaho at 725 (“While the general rule is that a contestant must first exhaust administrative remedies before filing a complaint in district court, *there is an exception for declaratory judgments regarding agency rules.*”) (emphasis added). The Defendants fail to acknowledge this Court’s holding in *Asarco*, a case where similar arguments were advanced by a state agency in an attempt to dismiss a case on jurisdictional grounds. In *Asarco*, the Department of Environmental Quality (DEQ) moved to dismiss the case on exhaustion grounds claiming the plaintiffs were required to take their challenge to the agency first. 138 Idaho at 722. This Court rejected that argument.

judgment action.¹⁰ *Id.* at 65. In that case, the Court examined the express language of the Idaho Constitution and compared it to the criteria found in the challenged statute.¹¹ *Id.* at 66-68.

IWP and section 67-5278 make clear that (1) a constitutional challenge may be brought in the form of a declaratory judgment action, and (2) where the challenged statute or rule contains "permissive" language, the "no set of circumstances" standard will not operate to save the rule from being declared facially unconstitutional. In other words, the standard is not applied in the traditional sense.¹² Indeed, the district court correctly recognized there is no better evidence of the "threatened application" of a rule than the actions already taken by the agency. *R.* Vol. VIII, pp. 1814-15.

This notwithstanding, the Defendants and IGWA allege that the district court "invented a hybrid analysis for evaluating Plaintiffs' claims." *Def's. Br.* at 40-42, *IGWA Br.* at 2.¹³ In addition to ignoring I.C. § 67-5278, the Defendants misinterpret *Korsen*. In *Korsen*, the lower courts did not examine the challenged statute "as it applied to *Korsen's* specific conduct." 138 Idaho at 712 (emphasis added). In fact, the "hybridized" analysis that this Court disapproved of

¹⁰ Although the statute's constitutionality was challenged "as applied," no facts were presented to indicate that anything other than a purely facial challenge was considered. This is particularly evident by the fact that the Court struck down the section as "unconstitutional" without any limitation as to any particular application of the statute. *IWP*, 133 Idaho at 68.

¹¹ The constitutional provision reviewed in *IWP*, Article IX, § 8, requires that "monies received from the sale or lease of school endowment lands 'shall be reserved for school purposes only.'" While the Constitution requires the State to consider only the financial return to the schools of the sale or lease of school endowment lands, the Court found that the challenged statute unconstitutionally allowed for consideration of broader financial impacts to the State. *Id.* at 67-68.

¹² For example, given the use of such phrases as "may be considered" and "include, but are not limited to," found in section 58-310B, it would have been impossible for the *IWP* plaintiffs to have succeeded in any facial challenge under the "no set of circumstances" standard. Yet, this Court found section 58-310B to be facially unconstitutional.

¹³ Defendants wrongly claim that the district court transformed the purely legal question of the facial validity of the Rules into a vehicle for litigating the Plaintiffs' as-applied claims and resolving disputed issues of fact". Since the case was decided on summary judgment, there were no "disputed issues of fact" to be resolved.

was a limited review of facial validity.¹⁴ Accordingly, the Defendants' "hybrid analysis" arguments are fundamentally flawed.¹⁵

Defendants further argue that section 67-5278 is nothing more than a "standing" and "ripeness" statute. *Def's. Br.* at 44. This argument is also without merit. First, any party that is harmed by facially unconstitutional agency rules has standing. Likewise, since the statute allows parties to challenge a regulation *regardless of whether or not the agency has had such an opportunity*, any ripeness argument is defeated. I.C. § 67-5278(3).¹⁶

As demonstrated by this Court's holding in *IWP*, and, as properly recognized by the district court, a section 67-5278 declaratory judgment action is not a traditional "facial" constitutional challenge and allows a district court to consider some factual evidence. Accordingly, the district court correctly considered the "threatened application" of the Rules, i.e.

¹⁴ 138 Idaho at 712 ("By finding the statute vague, *not as applied to Korsen's conduct*, but as to all applications on public property alone, the magistrate and the district court used an improper standard for determining whether the statute was facially vague. It was improper to conclude that the statute is invalid on its face as applied to public property, because the standard to sustain a facial challenge requires that a statute be held impermissibly vague in *all of its applications*.") (emphasis added).

¹⁵ That notwithstanding, this case is not like *Korsen*. The district court here reviewed the Rules, as a whole. The district court's review involved a thorough review of the constitutional convention and other foundations for Idaho's water law, an in depth review of case law on the subject of prior appropriation and actual application of the Rules in other cases. There was no *Korsen* hybrid analysis. Furthermore, the examples presented by the Plaintiffs demonstrate the legal defects of the Rules on their face. The Defendants' misinterpretation of *Korsen* is no justification for their objection to the district court considering the facts of the unconstitutional water right administration scenarios that are possible, and that have actually occurred, under the Rules.

¹⁶ Finally, such an argument is nonsensical as it would require the court to entertain factual evidence relative to standing and ripeness and then ignore that same evidence in order to review hypothetical circumstances intended to support and/or defeat the regulations. This is the case even if, as here, the factual evidence provides glaring examples of the constitutional deficiencies of the regulations.

the actions of the Director already taken in responding to the Plaintiffs' request for administration, as well as other proceedings, in reviewing the Rules' constitutionality.¹⁷

B. Plaintiffs' Challenge to the Rules Still Meets the "No Set of Circumstances" Standard.

Assuming that the aforementioned standard applies, the Plaintiffs meet the "no set of circumstances" rule for a typical facial constitutional challenge. As the district court recognized, the Constitution affords senior water rights certain constitutional protections.¹⁸ The Rules usurp those protections and unlawfully require the senior appropriator to run an administrative gauntlet, the end result of which is, that the senior must continue to go without needed water until all contested cases (including appeals) have been resolved.¹⁹ Since the Rules flip the prior appropriation doctrine on its head, they are unconstitutional *in every possible situation*, regardless of whether the senior appropriator uses surface water or groundwater.²⁰

¹⁷ The Defendants wrongly claim the district court erred in failing to dismiss the "as applied" claims. *Def's. Br.* at 46-47. Section 67-5278(1) and *Asarco* provide an express exception to the general "exhaustion rule" when a party challenges the validity of an agency rule. The Defendants' reliance upon *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129 (200), is inapposite since that case did not involve a challenge to an agency's rules but involved the Industrial Commission's denial of injured workers' settlements. 141 Idaho at 132. Even so, the *Owsley* Court acknowledged there are exceptions to the "exhaustion rule". *See id.*

Here, Plaintiffs' challenge falls within the exception set forth in I.C. § 67-5278. Moreover, since the Department had no jurisdiction to determine constitutional questions, Plaintiffs did exhaust their administrative remedies. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 908 (1999).

Finally, this Court should take note of the Defendants' statements to the district court on the "as applied" claims. In seeking certification of the judgment for appeal, the Defendants represented that the "as applied" claims were moot. *Tr. Vol. I*, p. 340, L. 12-16, p. 350, L. 14-18, p. 351, L. 23-25. In a turnabout with this Court, the Defendants now assert Plaintiffs' "as applied" claims are not "moot" and that this Court should remand the case with instructions to dismiss those claims. *Def's. Br.* 46-47. The Defendants cannot represent that part of a case is "moot" in order to receive a speedy appeal of a decision they don't like and then at the same time seek to have that part of the case dismissed through the appeal. Such tactics are the type of "piecemeal" appeals that Rule 54(b) prohibits. If the claims are not "moot" as argued by the Defendants in this appeal, and the district court's decision is reversed, then they remain before the district court.

¹⁸ Order at 90, 94, 117, 124.

¹⁹ The Rules also result in an unlawful diminishment and taking of a senior's prior decreed right.

²⁰ The Rules are also unconstitutional in administration between ground water rights. *See* p. 4, n. 7, *supra*.

III. Notwithstanding the Standard of Review Applied by the District Court, this Court can Affirm on Alternate Grounds.

Even if, *arguendo*, this Court finds that the standard of review applied by the district court was improper, this Court should still affirm. Decisions regarding motions for summary judgment and constitutional challenges are reviewed *de novo*. See *Armand*, 141 Idaho at 713; *Meisner*, 131 Idaho at 260. Furthermore, “[w]hen a judgment on appeal reaches the correct conclusion, but employs reasoning contrary to that of this Court, we may affirm the judgment on alternate grounds.” *Martel v. Bulotti*, 138 Idaho 451, 454-55 (2003). Accordingly, since, the Rules are facially unconstitutional, this Court should affirm – regardless of the required standard of review.²¹

ARGUMENT

I. Introduction

The Defendants’ Rules unlawfully diminish a water right’s priority and create a system that ensures water is distributed to juniors, not seniors, first.²² In the face of a water shortage, senior appropriators cannot rely upon a watermaster to protect and distribute water under their

²¹ This is not to state that the standard of review is not important. However, given the extremely time sensitive nature of these proceedings as illustrated by this Court’s order placing the matter on the expedited calendar and the fact the Rules have been repeatedly challenged in various district courts affirmation is appropriate regardless of this Court’s ruling on the standard of review. See *Martel*, 138 Idaho at 454-55.

Furthermore, to use a “standard of review” theory to defer a ruling on the merits of the case is not in the interests of the parties and does not further the policy of judicial economy. Since all parties admit this case presents a question of great importance for purposes of water right administration in this State, this Court should render a final decision. See *e.g. Bogert v. Kinzer*, 93 Idaho 515, 518 (1970) (“In a case of such wide and-extreme public and governmental importance, questions of technicality and methodology should, if possible, be laid aside and the decision of this Court be dispositive of the ultimate issue.”).

²² Although the Director is authorized to promulgate rules and regulations, such rules must be “in accordance with the priorities of the rights of the users thereof.” I.C. § 42-603. Since the Rules, as explained throughout this brief, violate the Idaho Constitution and water distribution statutes, the district court correctly found that the Director acted outside his statutory authority in promulgating the Rules. Order at 125.

rights. Instead, they must initiate administrative "contested cases", demonstrate why administration is necessary, and repeatedly justify their diversion and use under a previously decreed right. The resulting system of administration does not, as recognized by this Court in *A&B Irr. Dist. v. Idaho Conservation League*, "deal with the rights on the basis of 'prior appropriation' in the event of a call as required." 131 Idaho 411, 422 (1998).

After a careful review of the constitution and its history, the relevant statutes, and this Court's precedent defining the protections afforded a senior water right, the district court rightly declared the Defendants' Rules unconstitutional. This Court should affirm.

II. Summary of the Plaintiffs' Case Before the District Court

As the Defendants and IGWA continue to mischaracterize the Plaintiffs' position, a brief summary is necessary. A water right is a property right that the Defendants are constitutionally required to administer in accordance with the doctrine of "first in time, first in right." Such administration forbids treating every water right as a creature of equal status, but instead, in times of scarcity, demands timely delivery of water to an older, senior right to the detriment of a newer, junior right "even if harsh and unjust." *Kirk v. Bartholomew*, 3 Idaho 367 (1892). The timely delivery sought by Plaintiffs to service their senior water rights must occur, as succinctly set out by the district court, when the fields are "green," that is, "consistent with the exigencies of a growing crop during an irrigation season."²³ Order at 93. Moreover, administration that is

²³ Any arguments to the contrary fail to comprehend the realities of irrigation in an arid state like Idaho. The Defendants misinterpret *Arkoosh* in this regard. See R. Vol. IX, p. 2256 for further discussion.

not timely effects a taking of the property right.²⁴ Such a deprivation is not redressable through further "after-the-fact" administrative review. Finally, a water right decree or license defines the amount of water right to be protected and is not subject to re-interpretation by the Department or its Director.

Plaintiffs *did not* argue, as incorrectly represented by the Defendants:

that Idaho law requires immediate and automatic curtailment of junior ground water rights any time a senior surface water right holder's water supply dips below the decreed quantity, without regard to the extent of hydraulic interconnection between the surface and ground water supplies, the effect of junior ground water diversions on the senior right, the extent of the senior's current needs, or any other relevant principal of the prior appropriation doctrine as established by Idaho law.

Def's. Br. at 6. Plaintiffs are not seeking to "shut down" all groundwater use on the ESPA. Rather, Plaintiffs seek proper administration to protect their water rights from unlawful interference by out-of-priority diversions.²⁵

Instead of addressing the true arguments in their briefs, the Defendants and IGWA waste most of their briefing ineffectively shadow boxing a phantom argument of their own creation. As a result, they fail to address the Plaintiffs' real contention – that senior water rights be given the protections afforded by Idaho's constitution and water distribution statutes and administered accordingly. The Rules seek to unlawfully change these rights.

²⁴ This Court has recognized that to diminish a senior's priority by taking water that would otherwise be available for his diversion and use, results in an "injury" to the senior's water right. See *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1984); *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908).

²⁵ If a junior water right holder contends that his right does not injure the senior water right, that there is waste or that curtailing the junior will not supply water to the senior (i.e. a futile call), then the junior must prove such by clear and convincing evidence.

III. The District Court Correctly Found That Idaho's Constitution and Water Distribution Statutes Require Juniors, Not Seniors, to Prove They May Divert Water in Times of Shortage.

"The underlying theory or premise of the prior appropriation doctrine is that he who first appropriates a supply of water to a beneficial use is first in right." Order at 73. The district court's statement is well grounded in Idaho law and the Director must administer the State's water resources, *including ground water*, according to priority. The bedrock principle of Idaho water law that guarantees senior appropriators have the "better right" against juniors has not wavered since 1881. This Court has consistently reaffirmed this guiding principle that has protected property rights and provided certainty and stability to the regulation of Idaho's water resources.²⁶ In its most basic terms *the prior appropriation doctrine requires senior water rights to be satisfied prior to junior water rights*, hence, as noted by the district court "[t]here is no equality of rights." Order at 73.

The constitutional and statutory mandate is implemented by the state's watermasters who, in "clear and unambiguous terms" are required to protect senior rights in times of shortage.²⁷

²⁶ See *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931) ("a valid appropriation first made under either method will have priority over a subsequent valid appropriation"); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9 (1944) ("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water."); *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977) ("it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right.").

²⁷ Idaho's water distribution statutes (I.C. §§ 42-602, 607) do not require a senior to make a "delivery call" in order to receive the benefit of lawful water administration. The SRBA Court recognized the same in its *Basin Wide 5 Order*:

Implicit in the efficient administration of water rights is the recognition that a senior should not be required to resort to making a delivery call against competing junior rights in times of shortage in order to have the senior right satisfied. The Idaho Supreme Court made this pointedly clear in the *Musser* case.

R. Vol. IV, p. 798. This duty of the Director and its watermasters is further heightened when they have knowledge of a depleted water supply and the fact seniors' water rights are unfulfilled. See p. 1, n. 1, *supra*.

I.C. § 42-607; see *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). This Court has similarly held that the Director's affirmative obligation to administer water rights within a water district by priority is a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994).²⁸

Given the constitutional preference for senior water rights, junior water rights must therefore be curtailed in times of shortage unless the junior can prove, by "clear and convincing evidence", that his diversion and use of water does not injure a senior appropriator. *Moe v. Harger*, 10 Idaho 302, 305 (1904).²⁹ This Court has reaffirmed constitutional protection afforded seniors on several occasions.³⁰

These standards apply equally to water rights diverting from connected tributary sources.³¹ Accordingly, since all water in the Snake River Basin is deemed hydraulically

²⁸ Idaho's prior appropriation system provides certainty to a senior water right holder who is "entitled to presume that the watermaster is delivering water ... in compliance with this governing decree" and that his water right "consists of more than the mere right to a lawsuit against an interfering water user." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972) (emphasis added).

²⁹ Contrary to IGWA's interpretation (*IGWA Br.* At 19), the trial court in *Moe* entered a decree determining the water rights to the Big Lost River along with an injunction to prevent the junior appropriators from diverting water that eventually flowed underground and reappeared for diversion and use by senior appropriators downstream. 10 Idaho at 305-307. The incorporation of the injunction into the decree was affirmed. See *id.* at 306. There was no "jury trial" before administration, and the decree was found to be the "final word" for water distribution on the river.

³⁰ See *Cantlin v. Carter*, 88 Idaho 179, 186 (1964) ("A subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations"); *Silkey v. Tiegs*, 54 Idaho 126, 129 (1934) ("adherence to rule requiring protection of the prior appropriator, precludes relief to [the junior ground water user]"); *Jackson v. Cowan*, 33 Idaho 525, 528 (1921) ("The burden of proving that [the water] did not reach the reservoir was upon the appellants ... and this they fail to do").

³¹ In *Josshyn v. Daly*, the Court held:

It seems self evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho 305, 77 Pac. 645, produce "clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion." The burden is on him to show such facts.

15 Idaho 137, 149 (1908)

connected,³² administration of junior priority ground water rights in the ESPA is necessary to prevent interference with senior surface water rights to the Snake River and its tributary springs.

In short, a senior appropriator is *entitled* to have his water right *protected from interference by junior appropriators*, and the Department has a "clear legal duty" to distribute water on that basis.³³ The district court rightly found that these "concepts arise out of the Constitution" and constitute "incorporeal property rights," vested in the senior appropriator, that must be respected and upheld. Order p. 76, 77.³⁴ The protection is required whether it is against a surface water user attempting to divert water out-of-priority up river or a well owner that accomplishes the same effect by pumping tributary groundwater.

The district court correctly determined that the Department's Rules flip the law of prior appropriation on its head by failing to incorporate constitutional tenets requiring: (1) a presumption of injury in times of shortage; (2) the burden on the junior to claim lack of injury by clear and convincing evidence; (3) objective standards for review; and 4) the Director to honor prior decreed and licensed water rights. Order at 79, 81, 90-91. The above principles are

³² The exception to this presumption is limited to circumstances where an individual claimant proves to the SRBA Court that the source of his water right is "separate" from the rest of the Basin. The general provision from the *Basin-Wide 5* case provides the pertinent language. Order at 69. Unless a water right is deemed to derive from a "separate source", it must be administered together with all other rights in the basin under the "connected sources" general provision.

³³ IDAHO CONST. art. XV, § 3; I.C. §§ 42-602, 607; *Musser*, 125 Idaho at 395.

³⁴ These constitutional rights and protections afforded senior appropriators are far more than simply "procedures," as characterized by the Defendants. See *Defs. Br.* at 22. Moreover, Defendants' reliance upon *State v. Griffith*, 97 Idaho 52 (1975) is misplaced. *Griffith* concerned a defendant's appeal of a district court's decision to reject his request for another "trial *de novo*" of his conviction. 97 Idaho at 54. The defendant received one jury trial before the magistrate and was not entitled to another one before the district court. *Id.* at 57-58. No constitutional rights were denied. See *id.* Here, on the other hand, the Defendants' Rules directly conflict with the constitution's "first in time, first in right" mandate and fail to give effect to the necessary protections afforded senior rights.

"integral to the constitutional protections accorded water rights" and "give the primary effect and value to 'first in time, first in right.'" Order at 90, 94.³⁵

IV. The District Court Properly Determined That the Rules Violate the Constitution and Water Distribution Statutes By Failing to Incorporate Necessary Components of Idaho's Prior Appropriation Doctrine.

The Defendants oversimplify the district court's decision as simply finding the Rules void due to missing "procedural components." *Def's. Br.* at 6, 23-25. The Defendants even attempt to justify the Rules by arguing that these tenets and procedures are "incorporated by reference" or that the Director could "fill in the gaps" with "existing law." *Id.* On the contrary, these components, including the required burdens of juniors, objective standards for administration, and the need to complete administration during an irrigation season, are not simply "procedures" to be left to the whim of administrative officials and their subjective interpretations of agency rules. Rather, they are crucial for constitutional water distribution. As correctly found by the district court, the Rules' failure to expressly identify these components is fatal.³⁶

A. Rules 30, 40, and 41 Unlawfully Force Seniors ("Petitioners") to Initiate and Prove Why Administration is Necessary During Times of Shortage.

³⁵ The Defendants shrug off these constitutional shortcomings; instead claiming that judicial review of the Director's "decision" in water right administration is sufficient to protect water right holders. *Def's. Br.* at 23. Defendants fail to understand that initiating and completing a "judicial review" proceeding (months or years later) of a Director's unconstitutional scheme of water right administration fails to provide the necessary remedy, water, particularly when that water is necessary for irrigation purposes to satisfy a growing crop.

³⁶ The district court's decision regarding the unlawful exemption of "domestic" and "stockwater" water rights was correct as well. Order at 103-108. Neither the Defendants nor IGWA take issue with this part of the court's decision. See *Def's. Br.* at 13; *IGWA Br.* at 1. Accordingly, the Defendants' failure to raise the issue in their opening brief, without any argument, is dispositive and the district court's decision must be affirmed. *Myers v. Workman's Auto Ins. Co.*, 140 Idaho 495, 508 (2004) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. I.A.R. 35. . . . Consequently, 'this Court will not consider arguments raised for the first time in the appellant's reply brief . . .'").

The Rules reverse "first in time, first in right" by forcing seniors to make a "delivery call" and proceed through administrative "contested cases" before any administration occurs. This "last in time until determined otherwise" doctrine permeates the Rules and inherently protects junior priority ground water rights. The three different regulatory scenarios in Rules 30, 40, and 41 all place the same burdens on seniors. Then, while a senior suffers through the administrative gauntlet at great expense and delay, junior priority ground water users are free to deplete the senior's water supply without consequence.

Rule 30, dealing with hydraulically connected junior ground water rights located outside the boundaries of a water district, forces a senior to begin a "contested case" by filing a "petition."³⁷ Rule 30. Furthermore, according to Rule 30, the *senior*, or "petitioner," carries the burden of proving "material injury." Remarkably, no action is taken against junior ground water users until the Director issues an order "following consideration of the contested case."³⁸ Rule 30.07. In the meantime, juniors are permitted to continue diverting a senior's water.³⁹ In the example of a Rule 30 call made by a senior groundwater user in August 2003, the Department denied the request for administration (two years later in January 2005) on the basis the senior "did not prove, by preponderance of the evidence that pumping by junior water right holders

³⁷ Under the Department's procedural rules, a petitioner must: 1) fully state the facts upon which the petition is based, 2) refer to statutes, rules, or other law upon which the petition is based, 3) state the relief desired, and 4) state the name of the person petitioned against. R. Vol. IV, p. 848 (IDAPA 37.01.01.230).

³⁸ Although the Defendants allege that Idaho's legislative scheme for water right administration replaced the "practice of administration-by-lawsuit", they fail to explain how Rule 30's "contested case" process is any different or why "administrative lawsuits" are acceptable. *Defs. Br.* at 22. Moreover, being forced to file a petition and serve approximately 3,000 junior priority ground water rights, as was the case with Plaintiffs, can hardly be characterized as a "mini-lawsuit". R. Ex. 4, *Creamer Aff.*, Ex. D (Order at 33).

³⁹ Whereas Idaho's prior appropriation doctrine requires a junior to justify his use before being allowed to take water from a source, Rule 30 turns that constitutional protection upside down.

caused injury to his water right" and "did not prove that his diversion and use of water is reasonable". R. Vol. IX, p. 2313. Clearly, the process violates Idaho's law of prior appropriation.⁴⁰ See *Cantlin*, 88 Idaho at 186 (a junior "has the burden of proving" lack of injury).

Similarly, Rule 40 precludes administration within organized water districts until a senior files a "delivery call" "alleging" he is suffering "material injury." Rule 40. Furthermore, like Rule 30, administration only occurs "upon a finding by the Director as provided in Rule 42 that material injury is occurring." See Rule 40.01. Contrary to the constitutional presumption of injury to a senior in times of shortage, the rule places the burden on the senior to demonstrate he is suffering "material injury" *before any administration occurs*.⁴¹ On its face, Rule 40, like Rule 30, contradicts priority administration by forcing seniors to initiate administration and carry the burden of demonstrating "material injury" while juniors are left to divert.

Rule 41 creates yet another process for a senior to follow when requesting administration of junior ground water rights located within a ground water management area. Under this rule, the senior, or "petitioner", is required to "submit all information . . . on which the claim is based that the water supply is insufficient." Rule 41.01.a. The rule then requires the Director to hold a "fact-finding hearing" at some point in time where the senior and any "respondents" can present evidence on the water supply and the diversions of ground water. Rule 41.01.b. The Director then "may" deny the petition, grant the petition, or find the water supply is insufficient to meet

⁴⁰ In addition, "contested cases" under the Department's procedural rules provide for discovery, motion practice, and post-hearing appeal processes. R. Vol. IV, p. 837-871. Clearly, proceeding through a formal "contested case", like a lawsuit, takes time and is certain to extend beyond an irrigation season when administration is required.

⁴¹ R. Ex. 4, *Creamer Aff.*, Ex. D (February 14, 2005 Order at 31, ¶ 38, and at 34).

the demands of water rights within all or a portion of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water. Rule 41.02.c. Once again, seniors, as the "petitioners", carry the burden.⁴²

The Rules unlawfully shift the burden of proving injury and the need for administration onto the senior appropriator. As such, seniors are left to initiate a series of "contested cases" and prove they are suffering "material injury" before the Director and the watermasters will take any action. The result is a lack of water to seniors, while juniors continue to divert unabated. Such a system does not provide efficient and immediate administration as required by the Idaho Constitution and water distribution statutes, I.C. §§ 42-602, 607. Moreover, the Rules' "after-the-fact" administrative scheme forces seniors to endure extraordinary costs and burdens in order to receive proper water right administration.⁴³

The Rules' water distribution scheme violates the constitution and "injures" a senior water right holders by denying them use of their vested property rights without due process. *See*

⁴² Although a ground water management area designation signals that the water supply is "approaching the conditions of a critical ground water area", the rule still places the burden on the senior to initiate and prove why administration is necessary. I.C. § 42-233b. The rule plainly contradicts what is happening in the subject aquifer since the ground water supply is not secure and the basin is deemed to be approaching a state of "not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated fields . . ." I.C. § 42-233a. Despite the statutory precautions, Rule 41 allows the Director to deny a senior water right holder's request for priority administration and permit juniors to continue to divert unabated while a senior suffers the shortage. The law does not give the Director "discretion" to deny water distribution to senior water right holders when connected junior water right holders are diverting and taking water that would otherwise be available for the senior's use. Finally, Rule 41 purports to allow the Director, when ordering right holders on a time priority basis, "to consider the expected benefits of an approved mitigation plan in making such finding." *Id.* Nothing in Idaho's ground water management area statute, I.C. § 42-233b, gives the Director any authority to consider "expected benefits" of a "mitigation plan" if there is insufficient water to meet the demands of all water rights within the management area. On its face, Rule 41 does not comport with I.C. § 42-607, or the ground water management area statute, I.C. § 42-233b, and therefore must be declared void as a matter of law and set aside. *See Roeder Holdings, LLC v. Board of Equalization of Ada County*, 136 Idaho 809, 813 (2001).

⁴³ *See* Appendix B to *Defs. Br.* (example of Plaintiffs' administrative case identified at that point in time as proceeding for 16 months).

Jenkins, 103 Idaho at 388; *Lockwood*, 15 Idaho at 398. Accordingly, the district court correctly declared the Rules invalid as a matter of law for violating the plain terms of Idaho's constitution and water distribution statutes.⁴⁴ This Court should affirm.

B. The Rules Fail to Establish a Workable Procedural Framework for Timely Water Right Administration.

Water distribution must be "timely" in order to have a meaningful and practical effect for those that use the water, particularly those entities and individuals that rely upon water for irrigation. The district court correctly recognized the "timeliness" factor and its constitutional history:

in order to give any meaningful constitutional protections to a senior water right, a delivery call procedure must be completed consistent with the exigencies of a growing crop during an irrigation season ... [t]he concept of time being of the essence for a water supply for irrigation rights is one of the primary basis for the preference system in [the] Constitution."

Order at 93. See *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930).

IGWA would have this Court ignore the timeliness requirement. IGWA wrongly claims that resolution of a delivery call need only "be completed within a reasonable time consistent with due process and the complexity of the issues at hand" and that the "water administration statutes also are silent about timing." *IGWA Br.* at 16. Of course the longer the delay, the more water a junior can divert out-of-priority under the Rules.⁴⁵ Contrary to IGWA and the Rules,

⁴⁴ See *Evans v. Andrus*, 124 Idaho 6, 10 (1993) ("Our duty is to follow and give effect to the plain and unambiguous language of the Constitution."); *Roeder*, 136 Idaho at 813 ("When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.").

⁴⁵ Similar to the flaws in the Rules, IGWA's "reasonable" time standard is not objective and provides no certainty that a senior will receive water during the irrigation season. Obviously this would benefit junior priority ground water rights.

however, Idaho law requires distribution to occur "in times of scarcity of water . . . so to do in order to supply the prior rights." I.C. § 42-607.

"Times of scarcity" denotes any time during the irrigation season when the water supply is not sufficient to supply all the rights on a source or during the non-irrigation season when sufficient water does not accrue to fill senior rights. Delaying a decision on water right administration indefinitely or to whatever time is deemed "reasonable" to the Director plainly contradicts the law.⁴⁶ When a senior irrigator needs the water, and the vehicle of "contested cases" delays administration beyond the time when the water would have been diverted and used, it is obvious the process will not comport with Idaho's prior appropriation doctrine.

The Defendants assert that the "informal resolution" process under Rules 30 and 41 and the Director's May 2005 "emergency relief" order under Rule 40 comply with the law's "timely administration" requirement. *Def's. Br.* at 26. Yet, what if the Director rejects a senior's request for "informal resolution", as was the response the Plaintiffs received in early 2005?⁴⁷ When the Director refuses to "informally" resolve a request for administration, a senior has no choice but to proceed through the formal "contested cases" *before* administration occurs. The delays in such cases are well documented and inevitable given their "litigation" nature. The process

⁴⁶ In addition, the "phased-in" curtailment provision in Rule 40.01.a further unlawfully delays administration by allowing juniors to curtail over a period of up to five years, while the senior must continue to suffer the shortage in the interim. The "phased-in" curtailment provision is another example of how the Rules violate the constitution. This issue was addressed in the briefing before the district court. *R.* Vol. V, pp. 1213-1215; Vol. VII, pp. 1903-906.

⁴⁷ *R. Ex. 4, Creamer Aff.*, Ex. D (February 14, 2005 Order at 33). Plaintiffs are unaware of any conjunctive administration case that has ever been decided under "informal resolution" procedures. The Defendants' claim that "informal procedures" are available under the Rules is a hollow promise since in reality such a process is never used.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Following that decision and during the course of the proceedings before the special master, the IDWR stated that the Director's recommendation was based on current non-application to "reasonable beneficial use." *The IDWR stated that the concept of beneficial use allows for constant re-evaluation of whether the water is being used beneficially. ...*

The special master determined that absent a claim of forfeiture, abandonment, adverse possession, or estoppel, a reduction in beneficial use after a water right vests is not a basis upon which a water right may be reduced. ...

Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, *the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights.*

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

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

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

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

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

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

R. Vol. IX, p. 2322.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

determination based upon conditions presumed to have existed when Clear Springs made its original appropriations. R. Vol. V, p. 1139 (July 8, 2005 Order at 12-13, ¶¶ 55-56; relying upon Rule 42.0). a "The amount of water available in the source from which the water right is diverted."). Further, the quantity element was unlawfully re-conditioned to merely representing an entitlement at a spring flow "seasonal high", instead of the year-round diversion rate that was decreed by the SRBA Court. R. Vol. V, p. 1140 (July 8, 2005 Order at 14, ¶ 61). As such, such, the Director administratively reduced Clear Springs' decreed water rights. Such a determination, provided by the Rules, contradicts the unambiguous quantity terms of Clear Springs' decrees and plainly violates the watermaster's "clear legal duty" to distribute water according to those decrees.

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

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

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

Order at 96.

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

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

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

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

seniors first, the constitution and water distribution statutes protect a water right's priority. This is especially true on water sources that are fully or over-appropriated.⁶⁴ This Court has recognized that to diminish a senior's priority by taking water that would otherwise be available for his diversion and use, results in an "injury" to the senior's water right. *See Jenkins*, 103 Idaho at 388. The Defendants' Rules unlawfully diminish a water right's priority and create a system that ensures water is supplied to junior ground water rights, not seniors, first. The Director has no authority to take water from a senior and give it to a junior, thereby physically diminishing the senior's right to use the water. *See Lockwood*, 15 Idaho at 398 ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away.").

The district court recognized these fundamental problems with the Rules and rightly held that "the diminishment of water rights, which occurs as a direct result of administration pursuant CMR's, constitutes a physical taking." Order at 122. Moreover, the district court further acknowledged that "because the Director, through the CMR's has the ability to decrease the amount of water a senior user is entitled without establishing waste, he is essentially given the power to alter the property right." Order at 123.

The United States Constitution, through the Takings Clause of the Fifth Amendment (applicable to the states through the Fourteenth Amendment), and the Idaho Constitution, expressly through Article I § 14 and Article XV § 3, forbid a government agency from "taking" a

that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right."

⁶⁴ *See Sanderson v. Salmon River Canal Co.*, 34 Idaho 303, 309 (1921) ("The question of priorities becomes of practical importance only where the water supply turns out to be permanently inadequate.").

person's water right without "just compensation."⁶⁵ *Roark v. City of Caldwell*, 87 Idaho 557, 561 (1964) ("It is fundamental that these constitutional provisions prohibit the taking of private property for public use without just compensation."); *Crow*, 107 Idaho at 465.

The Defendants argue that because the concepts of "beneficial use", "waste", and "futile call" are limits of a water right, "state regulation" of a right pursuant to those factors does not constitute a "taking". *Def's. Br.* at 33. The Defendants miss the point and fail to recognize that as a "legally protected" property right interest, a water right is not subject to arbitrary changes by a state agency "in the interests of the common welfare." Moreover, the claim that "water belongs to the state" does not vest the Defendants with authority to "take" water that would otherwise be diverted and used by a senior and distribute it to a junior right instead.⁶⁶ Yet this is exactly what happens under the Rules. Instead of receiving water they are lawfully entitled to divert and use, seniors must suffer shortages while juniors receive the benefit of countless "contested cases" and "reasonableness" determinations that preclude priority water distribution. Such a "common property" scheme for water distribution that results under the Rules was firmly rejected in *Kirk v. Bartholomew, supra*, 3 Idaho at 372.⁶⁷ Since the Plaintiffs must go through the state (i.e. the watermaster) to receive water pursuant to their rights, the district court correctly found that a failure to properly distribute water to a senior effects a "physical taking" that injures the senior. Order at 122. This Court should affirm.

⁶⁵ The importance of a private property interest in Idaho has been recognized by this Court. See *L. U. Ranching Co. v. United States*, 138 Idaho 606, 608 (2003) ("The private interest at stake is great. The right to water is a permanent concern to farmers, ranchers, and other users.").

⁶⁶ *But see*; I.C. § 42-110 ("Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.").

⁶⁷ See also, R. Vol. IV, pp. 1007-08.

VII. Storage Water Rights, Storage Water and Reasonable Carryover.

A storage water right, like any other water right in Idaho, is entitled to the same constitutional protections afforded real property rights. I.C. § 55-101; *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651 (1915); *Murray v. Public Utilities Commission*, 27 Idaho 603, 620 (1915) (if one appropriates water for a beneficial use, and then sells, rents or distributes it to others, he has a valuable right entitled to protection as a property right). Pursuant to the constitution and water distribution statutes, junior ground water rights cannot interfere with or take water that would otherwise be available to fill a senior priority storage water right or "take" the water stored under said right or rights.

Under the provisions of Rule 42, the Director is empowered to require the use of the storage water of each Plaintiff to mitigate the diversions by junior priority ground water rights, subject to "reasonable carryover" established by the Director, which could be *zero*, before diversions and withdrawals under junior priority ground water rights may be reduced or curtailed. See Order at 111 ("reasonable carryover" for Burley and Minidoka Irrigation Districts determined to be zero acre-feet in 2005). The district court rightly rejected this Rule. The district court, in its extensive review of Rule 42.01., properly concluded that: "Absent a proper showing of waste, senior storage right holders are allowed to store up to the quantity stated in the storage right, free of diminishment by the Director."; and that "The reasonable carry-over provision of the CMR's is unconstitutional, both on its face, and as threatened to be applied to the plaintiffs in this case." Order at 109-117.

Two observations and findings by the district court provide significant insight into this issue. The court stated:

Plaintiffs' purposes in securing the storage rights are obvious--the storage water rights were acquired to both supplement their natural flow diversions in a current year necessary to cover shortages caused by naturally occurring conditions (e.g. a drought), and to ensure plaintiffs would have a sufficient water supply in future years in times of shortage caused by naturally occurring conditions. The purposes of storage was never to serve as a slush fund in order to allow the Director to spread water and avoid administering junior ground water rights in priority; nor was it ever intended to cover shortages caused by junior diversions.

Order at 114.

The Defendants argue that somehow the holding in *Schodde v. Twin Falls Land & Water Co.*, 161 F.43, 47 (9th Cir. 1908), aff'd 224 U.S. 107 (1912), allows the state to consider the "rights of the public." The *Schodde* case does not stand for the principle that the use and carryover of storage water may be controlled by the state in contravention of the storage water right. The issue in *Schodde* was the use of water for the diversion of water under an irrigation right, not the use of the water diverted for irrigation. *Def's. Br.* at 35. The Defendants further argue that as storage rights are sometimes expressed as "supplemental rights" to primary natural surface flow rights, somehow the water stored may be directed by the Director to be used to mitigate wrongful diversions by junior appropriators from a senior's natural surface water flow supply before administration will occur. IGWA argues that under Idaho's Constitution, carryover storage has no status in priority administration. These arguments seem to adopt the reasoning of the trial court in *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382 (1935), which held:

The court is of the opinion that public waters of the state, impounded in a reservoir, do not become either the personal property or private property of the owners of the reservoir. Further that while there is a distinction between storage water and water flowing in the stream, the distinction as contended for by plaintiff does not exist. The court is of the opinion further that such waters when impounded in a reservoir remain the public waters of the state; that the rights to the use of the same are usufructuary, that the ownership of public waters by the state constitutes a trust to be administered so as to accomplish the greatest benefit to the people of the state; . . .

55 Idaho at 388. This holding by the trial court was firmly rejected and the decision overturned by the Idaho Supreme Court. The Supreme Court held:

After the water was diverted from the natural stream and stored in the reservoir, it was no longer "public water" subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3). It then became water "appropriated for sale, rental or distribution" in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The water so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply to a beneficial use.

Id. at 389.

The Court further stated:

No one can make an appropriation from a reservoir or a canal for the obvious reason that the waters so stored or conveyed are already diverted and appropriated and are no longer "public waters". *Rabido v. Furey*, 33 Idaho, 56, 190 P. 73. This does not mean, however, that the reservoir or canal owner may waste the water or withhold it from persons who make application to rent the same. (Cases cited) If, on the other hand, the owner of the reservoir owns land subject to irrigation from such reservoir, he may apply it to his own land or sell it to others, or both, according to the priorities of their applications.

Id. at 389-390

Finally, the Court found that the spaceholders in the reservoir were tenants in common, but one co-tenant may not draw off, use, and enjoy the full number of acre-feet to which it is

entitled and then because it is a co-tenant, either use or sell the share of its co-tenant without in any sense being responsible therefor.

The significance and nature of water rights held by an irrigation district are again clearly demonstrated in *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528 (1963). In that case, Milner Irrigation District ("Milner") annexed additional lands in 1952, on the condition that the lands included in the district prior to the 1952 annexation would have the first priority to water under the water rights acquired prior to the annexation, including storage water in American Falls Reservoir, and that the annexed lands would share equally with the other lands in the district in the new storage rights to be obtained by Milner in Palisades Reservoir on the Snake River. After the 1952 annexation, the landowners whose lands were annexed in 1952 filed legal action in which they sought the right to share equally with all other lands in the irrigation district in all water rights held by the district under the provisions of I.C. § 43-1010. The Idaho Supreme Court noted that an irrigation district holds title to its water rights in trust for the landowners, and that the district stands in the position of appropriator for distribution to the landowners within the district, within the meaning of Const., Art. 15, §1. The landowners, to whose land the water has become dedicated by application thereon to a beneficial use, have acquired the status and rights of distributees under Const., Art. 15, §§4 and 5. 85 Idaho at 545.

The Supreme Court in *Bradshaw* then confirmed the holding of the trial court which found that the owners of the old lands, through and by means of the irrigation district, acquired, and for many years applied to the irrigation of their lands, valuable water rights, which had become appurtenant and dedicated to their lands, and which were held in trust by the district for

their use. They could not thereafter, without their consent, be deprived of use of that water when needed.

The Court found that I.C. § 43-1010 should be interpreted only so far as may be consistent with the priority of water rights as recognized and protected by the provisions of the constitution. The Court noted that the owners of the new lands were entitled to the use of any water owned by the district, when the use thereof is not required for the proper irrigation of the old lands, and when such use is not in conflict with the rights previously acquired by the owners of the old lands, or when such use is not in derogation or impairment of such prior rights. The Court, after noting that its conclusions were in keeping with the express conditions of the annexation, further stated: "Moreover, enforcement of the claimed right to compel delivery of water to such lands, would effect an invasion of the constitutionally protected priority rights, and property rights, of the owners of the old lands, hereinbefore cited. (Cases cited.)" 85 Idaho at 548. Certainly the Defendants cannot do by rule what the legislature could not do by statute. Water that is stored by entities such as the Plaintiffs can be used to supplement their natural flow irrigation rights, be used as the primary source of its water, rented to others for lawful purposes, or carried over for use in subsequent years. Order at 115.

The Defendants and IGWA rely upon *Glavin v. Salmon River Canal Co.*, 44 Idaho 583 (1927), and in so doing misrepresent the facts and holding in that case. As pointed out by the court in *Talboy, supra*, 55 Idaho at 393, the specific question in *Glavin* was the validity of a rule adopted by the canal company which allowed an individual shareholder of the company to hold over his allotted share of stored water stored by the company, without limitation, thereby having

the effect of reducing the allocated share of stored water of other shareholders in future years. The court held the rule to be invalid. The limited decision in that case does not apply as a general rule between appropriators, and was later clarified by the Court's decision in *Rayl v. Salmon River Canal Co.*, 66 Idaho 199 (1945).

The Defendants and IGWA also cite *Rayl* to support their position that the Director has the right to determine the use and carry-over of storage, while ignoring the facts and ultimate holding of the Court. In *Rayl*, the Court was again requested to consider holdover by individual shareholders in the storage space of the Carey Act corporation. The rule was being challenged, in reliance upon *Glavin v. Salmon River Canal Co.*, *supra*. In response to this claim, the court stated:

Quite obviously the above opinion did not hold and was not intended to hold that irrigation organizations and/or individual appropriators of water could not accumulate within their appropriations and hold storage over from one season to the next, both to encourage and practice economic use of water and to guard against a short run-off in succeeding seasons, because such custom has become too well entrenched in the concept of our water law both by practice and prior and subsequent precept to be thus denounced and forbidden. The court merely held the particular rule offended in certain particulars.

66 Idaho at 201 (emphasis added).

The Court in *Rayl* then proceeded to review, with approval, numerous practices illustrating the approval of carry-over water in a reservoir storing water for irrigation. The *Rayl* Court noted that it had on an earlier occasion in *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105 (1924), approved a contract which provided, in part, that:

Should there ever, in any year, be such a shortage in the flow of Snake River available for storage in American Falls reservoir, that such flow available for

storage, together with any surplus held over in said reservoir from previous years, is insufficient to fill the reservoir to full capacity, then in such year any party entitled to water from said reservoir, who shall have conserved and held over in said reservoir from the previous year any part of the water which said party was entitled to have received during such previous year, shall be entitled to the use and benefit of the water so held over by such party to the extent that such hold-over water may be necessary to complete the filling of such party's pro rata share of the reservoir capacity.

66 Idaho 204-205.

The Court further noted that the contract considered and approved in *Board of Directors v. Jorgensen*, 64 Idaho 538 (1943), recognized the rights of carry or hold-over storage while recognizing that when the reservoir was filled to capacity, hold-over rights are wiped out, because those who had not contributed to the hold-over water and therefore may and should not participate in its distribution, may nevertheless not be deprived of their rights to new storage the succeeding year. The Court in *Rayl, supra*, then stated: "Because even if the law compelled every reservoir to be drained dry at the end of every irrigation season, the user who needed more than his allotted share could not take from the economical user, because the latter could himself use and exhaust his water or sell or lease part of all of it." 66 Idaho at 206.

The Court also noted:

There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Id. at 208:

Finally, the Court stated:

If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average, or when, through accidents to the system, there is partial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. Ordinarily for the farmer not to make provision against such contingencies would be counted against him for carelessness. So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. *Economy of use is not synonymous with minimum use. Caldwell v. Twin Falls Salmon River Land & Water Co., D.C.Idaho, 225 F. 584, at pages 595, 596.*

66 Idaho 210-11 (emphasis added).

Another significant benefit derived from carry-over of stored water that has not been mentioned by the courts is the significant improvement in the capacity of reservoirs with the most junior water right to refill each year. To the extent there is hold-over in any reservoir, there is less water required from the river system to fill all available capacity in all reservoirs. Neither the Department's Rules nor any other rule of law should allow the Director to determine the extent to which stored water must be used and carry-over reduced before administration will be allowed against a junior ground water appropriator, as it injures the rights of all entities that have contracted for and obtained a right to store water to insure an adequate water supply for the lands served by that entity.

A senior's stored water does not, as argued by the IGWA and the Defendants, have to be applied to the senior's land to be put to beneficial use.⁶⁸ It is undisputed that stored water in Idaho is routinely rented through the Idaho State Water Supply Bank and its local rental pools, including the Water District 01 rental pool. I.C. §§ 42-1761 through 1765 ("board may appoint local committees . . . to facilitate the rental of stored water.").⁶⁹ A senior's ability to rent his storage water to others, including to the United States Bureau of Reclamation for salmon migration purposes, has been expressly approved by the Idaho Legislature, and does not constitute "waste" or "non-use".⁷⁰ I.C. §§ 42-1763B, 1764. Since the State of Idaho does not own storage water, senior water right holders like Plaintiffs are the ones left to rent water to the U.S. Bureau of Reclamation to fulfill the SRBA Nez Perce Water Rights Agreement.⁷¹

Once decreed or licensed, the Director has no authority to alter or change a storage water right through administration. See *Nelson*, 131 Idaho at 16 ("Finality in water rights is essential. .

⁶⁸ The Defendants recognized the same at the hearing on the Plaintiffs' motion for summary judgment:

THE COURT: Is the storage itself, the water while it's in the storage, to be used for irrigation? Is that a beneficial use? The storage of water itself.

MR. RASSIER: I think it's generally viewed as a beneficial use. If you need to have a beneficial use in order to divert the water from the – from the natural source, that is the beneficial use. Storage for some subsequent use – Or I guess in some instances, there may be storage for aesthetic use, in-place use, yes.

Tr. Vol. I, p. 267 L. 20-25; p. 268, L. 1-5.

⁶⁹ IGWA has participated in "renting" stored water through the Water District 01 local rental pool. R Vol. I, p. 46 ("IGWA has submitted executed lease agreements with Peoples Irrigation Company, the Idaho Irrigation District, and the New Sweden Irrigation District that lease a total of 20,000 acre-feet of storage water."). Although IGWA argues that such water has "no status in priority administration" because it was not used by the lessors, it at the same time has no problem using the rental bank system and the priority afforded that storage water to try and avoid administration of the junior priority ground water rights held by its members. The hypocrisy of IGWA's arguments and actions is evident. Apparently only the Plaintiffs, who seek to prevent unlawful interference by junior priority ground water rights, have no right to rent their storage water to others.

⁷⁰ Pocatello, a spaceholder with storage water in Palisades reservoir, but without any diversion works to take that water from the Snake River, would presumably agree that a "rental" of storage water constitutes a beneficial use since it has never diverted its storage water and used it for irrigation purposes. Pocatello fails to explain how non-use and rental of its stored water is beneficial but if Plaintiffs carryover and rent their storage water it is "waste".

⁷¹ See discussion at R. Vol. IX, p. 2272-73.

... An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of the property.”); *Crow*, 107 Idaho at 465. Moreover, the Director cannot take water that would have been stored under a senior right and give it to a junior instead. *Lockwood*, 15 Idaho at 398. Despite this rule, the “reasonable carryover” provision takes the use of a senior’s storage right in violation of Idaho’s constitution and water distribution statutes.

First, the Rule impermissibly allows the Director to disregard the stated amounts of a senior’s storage water right. Rule 42.01.g. provides, in essence, that notwithstanding the fact that the water supply available under a senior-priority water right has been substantially affected by diversions under a junior-priority water right, the Director may refuse to regulate the diversion and use of water in accordance with the priorities of the rights so long as the senior has enough storage water to mitigate the decreased water supply caused by a junior ground water diverter, over and above a reasonable amount of carry-over storage as determined by the Director. The Rule allows the Director to avoid administering junior ground water rights in priority if a senior is able to carryover an amount of water that the Director deems to be “reasonable”, regardless of the amounts the senior is *entitled* to carryover pursuant to his storage water right.

If these rules were deemed to be valid on their face, one must accept the premise that the Director could impose the same standards and could consider the same factors in determining material injury to a senior-priority surface water right by the diversion under a junior-priority surface water right. The junior right holder could argue, under his equal protection rights, that his diversion from the stream in times of shortage should not be curtailed so long as the holder of the senior right has sufficient stored water to meet its required water supply.

It is clear that Rules 40 and 42 provide for the destruction, interruption or deprivation of the common, usual and ordinary use of stored water. That the stored water and the water rights providing for such diversion of water for storage are property rights held by Plaintiffs, and such rules are unlawful and unconstitutional and provide for the taking of one's property without just compensation, in contravention of Article 1, §§ 13 and 14 of the Idaho Constitution. The district court rightly declared the Rules unconstitutional. This Court should affirm.

ATTORNEYS' FEES

If the Plaintiffs prevail on appeal they request costs and attorneys' fees as provided by Appellate Rules 40 and 41 and Idaho Code sections 12-117. Plaintiffs, as senior water right holders, have "borne unfair and unjustified financial burden attempting to correct mistakes" Defendants should never have made. *Fischer v. City of Ketchum*, 141 Idaho 349, 356 (2005). The Defendants have no reasonable basis in fact or law to appeal a decision striking rules that were promulgated in excess of statutory authority and that plainly contradict Idaho's Constitution and water distribution statutes.

CONCLUSION

The Idaho Constitution and state's water distribution statutes afford senior water rights protection against interfering junior rights. In times of shortage a senior is entitled to water against a junior. If a junior disagrees with administration, he carries the burden to show the senior's diversion and use is "waste", not "beneficial", or that the regulation of the junior would be "futile". The Department's Rules extinguish the constitutional protections for seniors, result in a taking of private property rights, and replace timely water distribution with endless

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

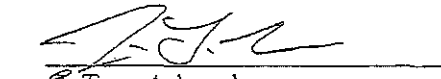
The district court properly declared the Rules unconstitutional. This Court should affirm.

Dated this 10th day of November, 2006.

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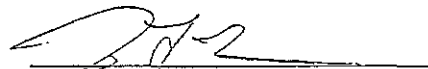
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th Day of November, 2006, I served the foregoing RESPONDENTS' BRIEF IN RESPONSE TO POCA TELLO'S OPENING BRIEF upon the following via email (copies by mail to be sent on 11/13/06):

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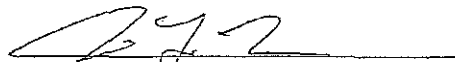
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