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IN THE SUPREME COURT FOR THE STATE OF IDAHO

CITY OF POCATELLO, Petitioner-Appellant on Appeal, and **IDAHO GROUND WATER APPOPRIATORS, INC.;** Petitioner-Appellant on Appeal, vs. **RANGEN, INC.,** Appellant-Respondent on Appeal, and **THE IDAHO DEPARTMENT OF WATER RESOURCES** and **GARY SPACKMAN**, in his capacity as Director of the Idaho Department of Water Resources, and, Respondents-Respondents on Appeal, and **FREMONT-MADISON IRRIGATION DISRICT, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION**	Docket Nos. 42775 / 42836 **SURFACE WATER COALITION'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**

DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and **TWIN FALLS CANAL COMPANY,**

Intervenors.

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 (collectively hereafter referred to as the "Surface Water Coalition" or "Coalition"), by and through their undersigned counsel, and pursuant to I.A.R. 42(b), hereby file this memorandum in support of their petition for rehearing.

INTRODUCTION

On March 23, 2016 this Court issued a decision that addressed the use of a "trim line" by the Director of the Idaho Department of Water Resources ("IDWR") when administering Rangen, Inc.'s water rights pursuant to the *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CMR" or "Rules"), IDAPA 37.03.11 *et seq*. *See Rangen, Inc. v. IDWR (In re Distrib. of Water to Water Right Nos. 36-02551 & 36-07694)*, __ Idaho __, 2016 Ida. LEXIS 85 (2016) (hereafter referred to as "*Rangen*" with * for page numbers). Chief Justice Jones, joined by Justice Burdick and Justice Pro Tem Walters, found that the Director had discretion to impose a trim line "based on the policy of beneficial use." *Id.* at *42. Justice Eismann, joined by Justice Horton, concurred in the result on the basis of model uncertainty, but found that the Director did not have discretion to implement a trim line and reduce a senior's decreed water right on the basis of a beneficial use policy. *See id.* at *67-68. The Coalition filed its petition for rehearing on April 13, 2016.

As explained in detail below, the majority opinion erroneously expands the "beneficial use" doctrine beyond what is provided by Idaho's constitution, statutes, conjunctive management rules, and prior case law. The majority's misapplication of the "beneficial use" doctrine threatens water right holders across this State, both senior and junior alike, and should be corrected on rehearing.

Further, although this Court has previously held that model uncertainty is a valid basis and exercise of the Director's discretion to impose a trim line, the administrative record in this case does not support such a finding.

STATEMENT OF ISSUES

The Surface Water Coalition respectfully requests the Court to rehear the matter on the following issues:

1. Does the majority opinion misapply the concept of beneficial use?

2. Does the majority opinion ignore the totality of the CMRs as adopted and approved by the Idaho Legislature?

3. Does the majority opinion result in the diminishment of private property rights?

4. Does the majority opinion fail to analyze the impact of weighing and comparing beneficial uses in water right administration?

5. Does the court's decision unlawfully shift the well-established burden of proof in water right administration?

6. Does the administrative record support a finding of model uncertainty?

ARGUMENT

I. The Majority Opinion Misapplies Idaho's Beneficial Use Doctrine.

Beneficial use is a straight forward concept embodied in the Idaho Constitution:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water. . .

IDAHO CONST. Art. XV, § 3.

The Legislature codified the principle of beneficial use in Idaho Code §§ 42-104 and 42-220.[1]

> The 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.

I.C. § 42-104.

> The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery of distribution of such water, . . . and 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 on the lands for the benefit of which such right may have been confirmed . . .

I.C. § 42-220.

The beneficial use inquiry is also codified in the CMR. *See* CMRs 40.03; 42.01.[2] Rule 40 provides that the Director shall consider whether the senior "is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42." CMR 40.03 (emphasis added). Rule 42

[1] An appropriator must put the water to beneficial use in order to obtain a water right. *See also*, I.C. §§ 42-217, 219; *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 110 (2007) ("Under the constitutional method of appropriation, appropriation is completed upon application of the water to the beneficial use for which the water is appropriated").

[2] The Conjunctive Management Rules were adopted on October 7, 1994. Thus, when analyzing the Director's application of the Conjunctive Management Rules, one must analyze the elements of the prior appropriation doctrine as established by Idaho law existing as of October 7, 1994.

lists several factors the Director may consider to determine whether a senior is suffering material injury and "using water efficiently and without waste." CMR 42.01. Importantly, neither rule authorizes the Director to compare the results of conjunctive administration to offset a perceived disparity of water provided to the senior as compared to the effects of curtailment on junior ground water users.

This Court has repeatedly confirmed the beneficial use doctrine in its decisions. *See Joyce Livestock Co. v. United States*, 144 Idaho 1 (2007); *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007); *Hidden Springs Trout Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677 (1980); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26 (1915).

Citing the above statute, noted water law scholar Wells A. Hutchins succinctly summarized the beneficial use requirement in his seminal treatise on Idaho water law:

> The intending appropriator may acquire a right to the use of as much water as is necessary to satisfy his lawful requirements; but no water user is permitted to take more of the water to which he is entitled under his appropriation than is necessary at the time for the beneficial use for which he has appropriated it. . . . No appropriator is entitled to make a wasteful use of water.
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> * * *
>
> It is provided by statute that no licensee nor any claimant of a decreed water right "shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right have been confirmed." The supreme court also has held that the appropriator is held to the quantity of water he is able to divert and apply to a beneficial use at a particular time, within the limit of his appropriation.

WELLS A. HUTCHINS, THE IDAHO LAW OF WATER RIGHTS 34-35 (1956).

Recently, the Idaho Supreme Court analyzed the prior appropriation doctrine and described the concept of beneficial use:

> The prior appropriation doctrine is comprised of two bedrock principles – that the first appropriator in time is the first in right and that water must be placed to a beneficial use. . . . These two doctrines encouraged settlers to divert surface water from its natural course and put it to beneficial use, thus leading to the

> development of Idaho's arid landscape. . . . The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.

A&B Irr. Dist. v. Spackman, 155 Idaho 640, 650 (2013). Further, the Court stated:

> While recognizing the Director's authority to evaluate the issue of beneficial use in the administration context we stated:
>
> > While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place . . . Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile, or to challenge, in some other constitutionally permissible way, the senior's call.

155 Idaho at 653 (citing *AFRD#2 v. IDWR*, 143 Idaho 862, 878 (2007)).

The Court in *AFRD#2* went on to state that "[c]oncurrent with the right to use water in Idaho 'first in time,' is the obligation to put that water to beneficial use." 143 Idaho at 880. As recognized by the constitution, statutes, rules, and the Court's recent *AFRD#2* and *A&B* decisions, Idaho's beneficial use doctrine analyzes ***the appropriator's use of water***.[3]

In short, the beneficial use doctrine simply asks whether the appropriator is putting the State's water resources to beneficial use. In the context of administration, the doctrine requires the senior to beneficially use the water authorized by the license or decree. That is the end of the

[3] *See also*, *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 524 (2012) (" . . . issues that are involved in administration such as whether the appropriator making the call is suffering material injury, the reasonableness of the appropriator's diversion, the appropriator's conveyance efficiency, whether the appropriator is putting the water to beneficial use, whether the appropriator is wasting water, and hydrology") (emphasis added). The majority opinion fails to explain how its present decision complies with the Court's prior statements in *A&B*, which all plainly state that the Director analyzes the appropriator's use of water, not a comparison of results of administration.

beneficial use inquiry. [4] The doctrine does not contemplate a subjective weighing of the beneficial uses among various water users for the purpose of administering rights in priority.

This Court has confirmed the limited role of the beneficial use doctrine in conjunctive administration. In *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011), the Court recognized:

> Based upon a field investigation of the Spring Users' facilities by a registered professional civil engineer, the Director found that they were employing reasonable diversions, conveyance efficiency, and conservation practices, with the exception of one pipeline at the Clear Springs's facility that was found to be in disrepair and leaking water. The Director also found that there were no alternate reasonable means of diversion or alternate points of diversion that the Spring Users should be required to implement.
>
> * * *
>
> ***The amounts of the Spring Users' water rights had already been decreed based upon the amounts of water that they had diverted and applied to the beneficial use of fish propagation. Subject to the rights of senior appropriators, they are entitled the full amount of water they have been decreed for that use.***

150 Idaho at 810-11 (emphasis added).

Further, in *A&B Irr. Dist. v. State of Idaho*, 157 Idaho 385 (2014) the Court stated:

> Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed . . . Here, ***the Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user***. However, it is within the Director's discretion to determine when that number has been met for each individual decree. In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user.

157 Idaho at 393-94 (emphasis added).

[4] The rules also allow the Director to evaluate whether the juniors are using water reasonably and without waste. CMR 20.05. In this case the Director found that junior ground water users, like Rangen, were "using water efficiently and without waste." Agency R. Vol. 21, p. 4228; R. 691. Citations to "Agency R." refer to the agency record and citations to "R." refer to the Clerk's Record on Appeal.

Accordingly, if a senior can beneficially use the water with reasonable and efficient diversion and conveyance facilities, he or she is entitled to use that decreed quantity in priority. This rule of law existed before statehood and was adopted by the framers of our constitution. *See Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 414 (1888) ("the law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld."); IDAHO CONST. Art. XV, § 3. The law has not changed.

Despite the well-settled doctrine and its application in the context of water right administration, the majority opinion expands the doctrine by creating a new standard not recognized under Idaho law. The majority opinion focuses solely on the disparity between curtailment of junior water rights east of the Great Rift with the water that would be delivered to Rangen. In support, the majority erroneously isolates language from Rule 20.03 and misinterprets two cases concerning an appropriator's means of diversion. *See Rangen*, at *32-42.

Rather than analyze Rangen's beneficial use of water, which the Director found to be reasonable and efficient,[5] the majority expands the beneficial use consideration to allow a weighing of uses between senior and junior appropriators:

> This policy limits the prior appropriation doctrine by excluding from its purview water that is not being put to beneficial use. . . . In light of this challenging balancing requirement, it is necessary that the Director have some discretion to determine in a delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller. . . . The prior appropriation doctrine sanctifies priority of right, but subject to the limitations imposed by beneficial use. . . . Rather, the trim line represents the Director's reasoned refusal to curtail irrigation to hundreds of thousands of acres so that Rangen might get another 1.5

[5] The Director specifically found that Rangen employs "reasonable diversion and conveyance efficiencies and conservation practices in diverting water from the Curren Tunnel" and that "Rangen is diverting and using water efficiently, without waste and in a manner consistent with the goal of reasonable use." Agency R. Vol. 21, pp. 4223 & 4228. The district court affirmed the Director's factual findings which were not appealed. R. 693-94.

> cfs of water. . . . Nonetheless, the Director may consider any such disparity when seeking to balance priority of right with beneficial use requirements.

Rangen, *35-38.[6]

The holding erroneously overlooks the actual beneficial use of water by Rangen and instead focuses on the result of administration on juniors. Even if Rangen can beneficially use 1.5 cfs with its reasonable and efficient aquaculture facilities, if administration of the senior right results in thousands of acres of junior water rights being curtailed, Rangen's vested right to receive water will not be protected and its decreed water right is therefore diminished. Nothing in Idaho's constitution, statutes, or rules authorizes such an analysis.[7]

The majority opinion relies heavily upon selected language in Rule 20.03. Yet, the term "beneficial use" is not referenced or defined in Rule 20.03.[8] Nothing in the rule changes the concept of beneficial use as defined by Idaho law.[9] *See supra*. The majority opinion fails to acknowledge that beneficial use evaluates the use of water by the appropriator, not a weighing of

[6] The majority opinion points to no constitutional or statutory provision to support its theory that "it is necessary that the Director have some discretion to determine in a delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller." *Rangen*, at *36. The Legislature has not stated that any such analysis is necessary.

[7] Justice Eismann correctly points this out in his concurring opinion: "The majority opinion in Part B abandons the constitutional requirement of first in time, first in right and states that the Director can apportion water in a manner 'to ensure maximum and beneficial use of the State's water resources.'" . . . "The Director does not have the discretion to ignore the Constitution, nor does the majority." *Rangen*, at *55 (Eismann, J., concurring).

[8] Notably, the majority opinion does not analyze whether or not its interpretation of Rule 20.03 is supported by any Idaho statutes. All statutes that reference "beneficial use" concern the appropriator's use of water, not whether the Director can weigh the consequences of administration between juniors and seniors. *See* I.C. §§ 42-101; 104; 217; 219; 220. To the extent the majority believes the rules create a standard not stated by the Legislature, it is well settled that the Court has no authority to enforce an administrative rule where it conflicts with a statute. *See Mason v. Donnelly Club*, 135 Idaho 581, 583 (2001); *Moses v. Idaho State Tax Com'n*, 118 Idaho 676, 680 (1990) . Reading the provisions of Rules 20.02 and 20.03 together, there is nothing that changes the statutory concept of beneficial use from that existing in 1994, when the rules were adopted. *See* I.C. §§ 42-104, 42-220. The Court cannot expand the Director's discretion in this regard. *See A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 515-16 (2012) ("The Director did not impose a new condition, but rather he used his discretion to analyze A&B's delivery call using his statutory authority in the manner governed by the CM Rules").

[9] The CMR incorporate Idaho law by reference. CMR 20.02; *AFRD#2*, 143 Idaho at 873. This means that the "beneficial use" doctrine as set forth by the constitution, statutes, and case law is incorporated and must be followed by this Court.

uses or the disparate impact between the senior and juniors. This Court has already rejected the notion that a water call should be denied based upon a comparison of competing water uses. *See Clear Springs Foods*, 150 Idaho at 811 ("If business profitability was the basis for appropriation, decreed water rights would become meaningless. The issue would be which appropriator at the time could make the greater profit by using the water").

Further, Professor Doug Grant, in his article cited by the majority opinion, referenced this rule of law as well:

> Even if the impact of a junior diversion on a senior right is not inconsequential, the difference between the amount of water the junior diverts and the amount the senior thereby loses still might incommensurate. The legal issue that arises is whether incommensurate impact justifies not invoking the priority principle against the junior appropriator. ***The prevailing rule is that notwithstanding incommensurate impact, a senior priority can be enforced against a junior appropriator if enforcement makes water available to the senior appropriator in useable quantities.***

Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 83 (1987) (emphasis added).

The majority disregards this rule of law and instead creates a new policy standard. The majority opinion relies upon the last sentence of Rule 20.03 which states "An appropriator is not entitled to command the entirety of large volumes of water in a surface water or ground water source <u>to support</u> his appropriation contrary to the public policy of reasonable use of water as described in this Rule."[10] CMR 20.03 (emphasis added). Yet, as this Court previously recognized, this provision speaks to the reasonableness of the appropriator's means of diversion, not the ultimate use of that water. *Clear Springs Foods*, 150 Idaho at 809. The Court should not conflate the concept of "beneficial use" with a "reasonable means of diversion." The two

[10] The terms "to support" the appropriation further bolsters the interpretation that the rule's language speaks to an appropriator's means of diversion. Further, the Court already extensively analyzed Rule 20.03 and what it means in administration of senior surface water rights. *See Clear Springs Foods*, 150 Idaho at 801-10.

concepts are distinct. As this Court recognized in *Clear Springs Foods*, this provision of Rule 20.03 is derived from *Van Camp v. Emery,* 13 Idaho 202 (1907) and *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912).

Those cases address the appropriator's means of diversion only, not the quantity or use of water compared to others.[11] Contrary to the conclusion drawn by the majority opinion, there is nothing in either case that could lead to the conclusion that the senior appropriator was entitled to less water than could be beneficially used by the senior appropriator, just because the result of administration would affect a large number of junior users. Moreover, this Court previously interpreted both cases and confirmed that they do not support the result of the majority opinion.

First, in *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1929), the Court limited the application of *Schodde*. In *Arkoosh*, downstream senior water users sued to enjoin the Big Wood Canal Company, the owner of Magic Dam, from "interfering with the natural flow of the Big Wood River." 48 Idaho at 388. The Supreme Court found that under a proper interpretation of the water right decree the storage rights could only be exercised when the downstream senior appropriators "have at their headgates the amount of water to which they are entitled under their appropriations as the same would have naturally flowed in the natural stream . . ." 48 Idaho at 396. With respect to the effect of *Schodde* on Idaho water right administration, the Court held:

> *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686, is clearly distinguishable because therein ***the interference was not with the water right but with the current. In other words, the same amount of water went to Schodde's place as before***.

[11] Notably a surface water user that has a spring water source cannot change his or her "manner of diversion." Drawing to the logical conclusion, the majority's decision amounts to a way around the source element of a surface water right. That is but for the fact that the source of Rangen's water is surface water, the appropriator would have to chase the supply, like groundwater. The logical result is that if this line of reasoning is allowed, collateral attacks on any element of a water right would be permissible within some undefined circle of agency discretion. This is not the result intended by lawful water right administration under the CMRs.

48 Idaho at 397 (emphasis added).[12]

> Addressing both *Van Camp* and *Schodde* in *Clear Springs Foods*, this Court held:
>
> The senior appropriator in *Van Camp* ***was entitled to his water right***; ***he simply had to change his unreasonable means of diversion***. . . . The issue in *Schodde* was whether the senior appropriator was ***protected in his means of diversion, not in his priority of water rights***.

150 Idaho at 809 (emphasis added).

The majority opinion erroneously expands the holdings of these cases and Rule 20.03 to create its "results disparity" criteria for conjunctive administration. Again, the opinion references how thousands of acres under junior rights would be curtailed to provide Rangen with another 1.5 cfs under its senior water right. *Rangen*, at *42. The district court acknowledged the disparity but correctly noted that the water owed to Rangen would be put to beneficial use, and that it represented a significant quantity of water to the calling senior:

> In this case, the Director did not abuse his discretion in determining that Rangen's water use and method of diversion are reasonable. . . . In this case the model predicts that curtailment of junior rights east of the Great Rift are causing material injury and curtailment of such rights would produce a quantity of water to the Martin-Curren Tunnel in the amount of 1.5 cfs. Indeed, while 1.5 cfs may not seem like a meaningful quantity of water, when compared to the average annual flow Rangen currently receives through the Martin-Curren Tunnel, the meaningfulness of the quantity becomes readily apparent. The Director found that the average annual flow available from the Martin-Curren tunnel was 3.1 cfs in 2005. *Id.* And that the average annual flow has not exceeded 7 cfs since 2002. From that perspective, the additional 1.5 cfs is neither insignificant nor *de minimus*.

R. at 695, 706-707.

Rather than accept that Rangen would put the additional 1.5 cfs to beneficial use under its senior water right, the majority opinion focuses on the consequences to juniors resulting from that administration. The majority opinion claims the trim line did not "reduce" Rangen's

[12] Unlike the facts in *Schodde*, here junior ground water users are interfering with Rangen's senior water right. Juniors east of the Great Rift are taking 1.5 cfs that would otherwise flow to and be available for Rangen's beneficial use under its senior right. R. 706-07 (20-50% of the water supply).

decreed quantities, but allowing junior water right holders who are taking 20-50% of Rangen's water supply, without mitigation, that Rangen could otherwise beneficially use, certainly reduces Rangen's water right. Idaho law forbids such a result. *See* IDAHO CONST. Art XV, § 3; I.C. §§ 42-602, 607; *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908).

The Court in *Clear Springs Foods* addressed the Director's discretion when implementing a trim line. In that unanimous decision the wording of Rule 20.03 stating "full economic development is defined by Idaho law" was specifically addressed. The Court held that this phrase only appears in Idaho Code § 42-226 and that the statute "has no application in this case. It only modifies the rights of ground water users with respect to being protected in their historical pumping levels." *Clear Springs Foods*, 150 Idaho at 808 (emphasis added). The Court further explained that the "district court did not affirm the final order based upon the above-quoted statements regarding Idaho Code § 42-226 and Conjunctive Management Rule 20.03." *Id.* at 816. Accordingly, the Court upheld the Director's use of a trim line based solely upon the model's quantified margin of error of 10%. *See id.* at 817.

Importantly, the majority opinion did not overrule the Court's prior holdings and decisions regarding the senior's "beneficial use" inquiry confirmed in *AFRD#2*, *Clear Springs Foods*, and *A&B*. As such under the rule of stare decisis the Court is bound to follow its own precedent. *See State v. Wulff*, 157 Idaho 416, 418 (2014) ("We must follow controlling precedent 'unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued'"). Had the majority opinion meant to overrule the Court's prior decisions it would have clearly stated the same. *See e.g.*,157 Idaho at 423 ("Thus, we overrule *Diaz* and *Woolery* to the extent that they applied Idaho's implied consent statute as an irrevocable per se rule that

constitutionally allowed forced warrantless blood draws"); *see also, Farber v. Idaho State Ins. Fund*, 152 Idaho 495, 501 (2012) ("The Court's statute of limitation holding in *Hayden Lake I* is manifestly wrong, particularly as it applies in this case, and we therefore overrule it. We hold that the five-year statute of limitation in I.C. § 5-216 applies to Farber's claim").

Finally, the Court has no authority to modify the constitution, statutes, or the conjunctive management rules. *See A&B Irr. Dist. v. IDWR*, 154 Idaho 652, 656 (2012) ("We must apply the statute as written. 'If the statute is unwise, the power to correct it resides with the legislature, not the judiciary.'"). If the Legislature wanted the Director to engage in a "balancing" of competing water uses in conjunctive administration it would have so stated in the water code or in its review and amendment of the Department's conjunctive management rules. The Legislature has taken neither action.

Consequently, existing law and the rule of stare decisis bar the majority opinion's misapplication of the "beneficial use" doctrine to support the Great Rift trim line that was struck down by the district court. The Coalition respectfully requests the Court to rehear this issue accordingly.

II. The Majority Opinion Ignores the Totality of the CMR.

As stated above, the Conjunctive Management Rules were adopted on October 7, 1994 and were approved by the Legislature in 1995. *AFRD#2*, 143 Idaho at 866-67. The Legislature has not rejected, amended or modified any part of the rules since that time. *See id.* at 867. Without constitutional or statutory support, the majority opinion focuses solely on limited language from Rule 20.03 for its new "beneficial use" standard. In doing so, however, the majority fails to analyze the entirety of the CMRs, including the specific actions required of the Director when responding to a delivery call. Further, the majority opinion ignores the reality of

how the rules are implemented and how junior ground water users can mitigate for the material injury they cause to senior rights.

The Conjunctive Management Rules set forth a detailed and mandatory process for the Director to respond to a delivery call. *See Rangen v. IDWR (In the Matter of the Fourth Mitigation Plan et al.)*, 2016 Opinion No. 44 at 5-6 (April 26, 2016) ("when it is found that junior-priority ground water pumping is causing a senior right holder material injury, the Director must either: (1) curtail junior-priority ground water pumping to satisfy the senior right, or (2) '[a]llow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan . . .'"). Importantly, the rules do not give the Director discretion to reduce delivery to a senior water right provided the senior is beneficially using the water. *See e.g. A&B v. Spackman*, 155 Idaho at 653. Instead, Rule 40 sets forth specific actions that must be taken if the Director determines that material injury is occurring. The rule states that the Director shall:

> a. Regulate the diversion and use of water in accordance with the priorities of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased in over not more than a five (5) year period to lessen the economic impact of immediate and complete curtailment; or
>
> b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

Rule 40.01.a and b.[13]

The obligations of the Director are clear. Rule 40 does not provide the Director with discretion to weigh the relative beneficial uses of the senior priority surface user and the junior ground water users. This Court cannot expand the Director's or the agency's authority in this regard. *See Henderson v. Eclipse Traffic Control & Flagging, Inc.*, 147 Idaho 628, 632 (2009)

[13] *See Rife v. Long*, 127 Idaho 841, 848 (1995) (distinguishing the meaning of permissive language as opposed to "imperative or mandatory meaning" of the term "shall"). Rule 40 uses the term "shall."

("Administrative agencies are 'creature[s] of statute' and, therefore, are 'limited to the power and authority granted [them] by the Legislature'"); *see also, Syringa Networks LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 61 (2013) ("A government agency may not do indirectly what it is prevented by law from doing directly").

Further, the Court cannot ignore the totality of the CMRs when analyzing the Director's use of a trim line in this case. The failure to give effect to all of the rules misapplies Idaho's rules of statutory or regulatory construction. *See State v. Besaw*, 155 Idaho 134, 142 (Ct. App. 2013) ("When interpreting a rule, we will construe it as a whole to give effect to the intent of the promulgating entity"); *see also, George W. Watkins Family v. Messenger*, 118 Idaho 537, 539 (1990) *abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889 (2011) ("In construing legislative acts it is not the business of the court to deal in any subtle refinements of the legislation, but our duty is to ascertain, if possible, from a reading of the whole act, and amendments thereto, the purpose and intent of the legislature and give force and effect thereto").

The Idaho Constitution, statutes, and CMRs all require the Director to administer water rights in priority. Provided the senior appropriator will put the water to beneficial use, and a junior proves no defenses, then the senior's water right must be delivered in administration. [14] Nothing in the law allows the Director to "weigh" the consequences of that administration on junior users and then allow those juniors to take water away from a senior on that basis. The majority opinion turns the very notion of "priority" on its head by allowing the Director to refuse delivery to the senior through an analysis of the consequences of administration on juniors.

[14] When the Director finds a senior right is injured, juniors carry the burden to prove, by clear and convincing evidence, any defenses to the senior's call. *See AFRD#2*, 143 Idaho at 878; *A&B*, 153 Idaho at 524.

In one of this state's very first cases on water rights the Supreme Court explicitly rejected this very theory for administration. *See Kirk v. Bartholomew*, 3 Idaho 367 (1892). In *Kirk*, the district court decreed the water of Raft River to the various appropriators according to a decreasing scale based upon the time of year, without regard to priority. 3 Idaho at 369. The district court was concerned about the limited supply of water and proposed to balance the various uses so that everyone could receive some water later in the irrigation season:

> I also find that said appropriations and use, as herein stated, were not only according to the custom of the place, but were each and all of them reasonable and just to the public, and to all claimants of water from Raft river, and that a greater claim by each would be unreasonable and unjust; also, that a claim of the same amount of water at all times of the year, or in years of extraordinary drought, would be unreasonable, not according to said customs or laws and unjust to other settlers on or claimants to use of the waters of said stream or streams. I further find that the volume of water which is the subject of these findings should be and is hereby held to be a common right in those so accustomed and entitled to their use, in proportions herein declared.

3 Idaho at 370-71.[15]

The Supreme Court soundly rejected the district court's decree:

> The statutes of this state in regard to water rights evidently did not meet with the approval of the learned judge who tried this case. He brushes them aside, and evidently undertakes to make the judgment herein conform to his ideas of what the law ought to be, and in some future time to make it conform to a constitution and laws thereafter to be adopted and enacted. ***"As between appropriators, the one first in time is the first in right." The law is thus written. The law-making power, only, has the power to repeal or amend it. It cannot be repealed or amended by the court, but must be enforced as long as it remains the law, even if harsh and unjust.***

Kirk, 3 Idaho at 372 (emphasis added).

Accordingly, even if the prior appropriation doctrine is "harsh and unjust" to junior appropriators, such a result follows from the written law. However, contrary to the majority's

[15] Notably, the district court concluded that administration by priority during times of shortage would be "unreasonable" and "unjust" to the other claimants. The court's analysis is strikingly similar to the majority opinion's reasoning in this case. *See Rangen*, at *42 ("Here, it will not do to say that access to an entire aquifer may be foreclosed so as to cause 1.5 cfs to accrue to a single tunnel at a loss of enough water to irrigate 322,000 acres").

implication, curtailment is not the only remedy for injury caused by a junior user. Instead, junior users can mitigate and, if proper facts are present, can even phase-in that mitigation over a five (5) year period.[16] CMR 40.01.a.

Phased-in mitigation recognizes the time delay identified and the potential economic hardship/disparity that the majority opinion found central for its variance from well settled case law regarding Idaho's prior appropriation doctrine. While a junior right causing injury must be administered, an approved and effectively operating mitigation plan provides the junior with an avenue to continue the out-of-priority diversion. *See* CMRs 40.01.b; 43; *A&B Irr. Dist. v. Spackman*, 155 Idaho at 654 ("the Director shall either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversions").

In several parts of the majority opinion reference is made to the fact that hundreds of thousands of acres would be curtailed to provide 1.5 cfs to Rangen, the senior appropriator. *Rangen*, at *12, 26-27, 29-30, 42, 46. However, the majority opinion fails to address the fact that the record in this case plainly shows that NO junior water user was ever curtailed. Furthermore, all juniors affected by the Rangen call, including those east of the Great Rift, stipulated to phased-in mitigation in early 2015. *See Coalition Resp.*, Addendum A (stipulation signed by Upper Valley Pumpers and City of Pocatello); Addendum B (identifying obligations of all junior groundwater users junior to July 13, 1962) (filed June 8, 2015).

In fact, the records in all of the water call cases that have been before this Court demonstrate that no curtailment has ever occurred. Rather, and despite great obstacles on occasion, the record shows that the junior groundwater users have always been able to propose and provide mitigation for their injury as allowed by the conjunctive management rules. *See* CMRs 40.01.b; 43.

[16] The Director authorized phased-in mitigation in this case, which was affirmed by the district court. R. 708.

One way to look at this issue is the way it was addressed by the majority opinion – it seems somehow unconscionable that hundreds of thousands of acres would be curtailed in order to supply a single water user 1.5 cfs of water. However, another way to look at the very same facts is that 1.5 cfs is not a large amount of water required for mitigation, and that when that cost of mitigation is shared over hundreds of thousands of acres, the economic impact of supplying mitigation is insignificant.[17]

In other words, the junior groundwater users have the ability to mitigate for their injury and spread those costs and obligations over hundreds of thousands of acres. *See* CMR 43. This is exactly what the rules provide, even though the injury may be occurring over a long period of time. *See* CMR 20.04 ("these rules may require mitigation or staged or phased curtailment . . . if diversion and use of water by the holder of the junior-priority water right caused material injury, even though not immediately measureable, to the holder of the senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued"). It is simply not justifiable to rewrite the rules and circumvent the remedies authorized and approved by the Legislature, particularly when the Court's decision invalidates well-established law concerning the prior appropriation doctrine.

Moreover, the Court does not need to sanction the diminishment of a vested property right in order to achieve an equitable result in this case. Instead, the Court can look to the reality of the Department's implementation of the Conjunctive Management Rules, and the fact that in over 11 years of active water calls on the ESPA, and multiple determinations of injury to senior appropriators, no actual curtailment has ever occurred. The Court should issue a decision that protects vested property rights while at the same time provides an adequate opportunity for those

[17] In this case such mitigation was achieved and stipulated to by Rangen. *See Coalition Resp.*, Addendum A.

causing injury to mitigate for that injury, as specifically provided for by the CMRs as approved by the Idaho Legislature.[18]

As the Idaho Supreme Court has recognized, application of the priority doctrine is difficult and can be harsh in the eyes of a junior appropriator. *See Kirk*, 3 Idaho at 372; *AFRD#2*, 143 Idaho at 869 ("These principles become even more difficult, and harsh, in their application in times of drought"). However, "first in time, first in right" has been the law in Idaho since and even before statehood. *See Malad Valley*, 2 Idaho at 414. The prior appropriation doctrine is well-settled and by necessity provides that not all water users receive water in times of shortage. *See Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9 (1944); I.C. §§ 42-602, 42-607. However, juniors have the ability to mitigate their injury and continue their out-of-priority diversions. *See* CMR 43. This alternative to curtailment protects the senior water right and greatly softens the impact of the prior appropriation doctrine on junior water users.

The Court should rehear and reevaluate the totality of the CMRs when reviewing the majority opinion's "beneficial use" policy. The Court should also consider the remedies that are already available to protect Rangen's vested senior water right while at the same time allowing juniors to mitigate and avoid curtailment.

III. The Majority Opinion Diminishes Private Property Rights.

Idaho's constitution, applicable statutes, and case law all support the position that a water right is a real property right that vests in the owner. *See* IDAHO CONST., Art. XV, § 3; I.C. § 55-101; *Olsen v. IDWR*, 105 Idaho 98, 101 (1983) ("In Idaho, water rights are real property");

[18] Again, this result is specifically addressed in Rule 20.04. That Rule, which initially recognizes the futile call doctrine applies to surface water, goes on to state "these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water user causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued." CMR 20.04.

Bennett v. Twin Falls North Side Land & Water Co., 27 Idaho 643, 651 (1915); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797 (2011).

Moreover, the Idaho Department of Water Resources recognizes this rule of law as well. For example, an agency pamphlet entitled "A Water Users Information Guide – Idaho Water Rights a Primer" states:

> The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state and ground waters of the state, to be public waters.
>
> The constitution and statutes of the State of Idaho guarantee the right to appropriate the public waters of the State of Idaho. When a private right to the use of public waters is established by appropriation, a water right is established that is a real property right much like property rights in land. The constitution and statutes of the State of Idaho protect private property rights, including water rights.
>
> A water right is the right to divert the public waters of the State of Idaho and put them to a beneficial use, in accordance with one's priority date.
>
> A priority date is date the water right was established. How this date is determined is described in the section below. The priority date is important because the priority date determines who gets water when there is a shortage. If there is not enough to satisfy all of the water rights, then the oldest (or senior) water rights are satisfied first and so on in order until there is no water left. It is the new (or junior) water rights that do not get water when there is not enough to satisfy all the water rights.
>
> Beneficial uses include such uses as domestic use, irrigation, stockwatering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others. The amount of the water right is the amount of water put to beneficial use. Due to the beneficial use requirement, a water right (or a portion of a water right) may be lost if it is not used for a continuous five-year period.
>
> * * *

> Water law in Idaho is based on the appropriation doctrine, because water rights in Idaho are based upon diversion and beneficial use of water. The appropriation doctrine has also been called "first in time is first in right", because the priority date determines who gets water when there is not enough to go around. The water right is said to have "appropriated" water.

See Addendum A.

The summary of a water right as described in the agency brochure is an accurate description of water rights in Idaho. Water rights are real property rights that must be protected based upon priority.

The majority opinion states "The trim line here does not reduce decreed quantities of Rangen's water rights. Rangen remains entitled to the full measure of its rights, subject to availability of water and beneficial use limitations." *Rangen*, at *38. This statement is not supported by the record. Instead, the record demonstrates that the total injury to Rangen's senior water rights was 10.6 cfs (including impacts caused by juniors pumping east of the Great Rift). Agency R. Vol. 21, p. 4228; R. 701. Notwithstanding this injury, the Director only required curtailment or mitigation of 9.1 cfs (limited to the amount of injury caused by juniors pumping west of the Great Rift). Agency R. Vol. 21, p. 4228. In other words, the Director administratively redistributed the water owed to Rangen's senior water right and gave it to the hydraulically-connected juniors east of the Great Rift. Contrary to the majority's analysis, Rangen's right is now diminished and Rangen <u>will not</u> receive water or mitigation for that injury. Instead, juniors east of the Great Rift are allowed to pump their full rights and take the 1.5 cfs that would otherwise flow to Rangen's water supply at the Curren Tunnel.[19]

[19] This quantity represents 20-50% of Rangen's water supply experienced since 2002. R. 706-07. Certainly, junior ground water irrigators would object to the Director taking 50% of their water and redistributing it to other water users. Yet, that is the logical result that may follow under the majority's new "beneficial use" standard.

The Director's decision diminishes the priority element of the property right contrary to existing law. *See Jenkins v. State, Dep't of Water Resources,* 103 Idaho 384, 388 (1982). The evidence in the record is undisputed that Rangen beneficially uses the water that it receives. Agency R. Vol. 21, pp. 4222-23, 4228. Further, it is also undisputed that the best available scientific evidence shows that water passing through the Great Rift will arrive at Rangen's facilities for its beneficial use. *See id.*, p. 4224-28.

However, by condoning the use of the Great Rift trim line, the majority found that despite the fact Rangen would receive water passing through the Great Rift and despite the fact that Rangen would beneficially use all of the water delivered to its facility, Rangen was not entitled to the additional 1.5 cfs. *Rangen,* at *38.

In essence, the majority opinion holds that Rangen's vested and decreed water right can be diminished, not because of anything Rangen was doing improperly, but rather because the Director, in his discretion, held that other uses were more beneficial than Rangen's. This is clearly a diminishment of Rangen's vested property right prohibited by Idaho law. *See Jenkins,* 108 Idaho at 388; *Lockwood,* 15 Idaho at 398. If the Court is unwilling to protect Rangen's senior water right, then no water right in Idaho is protected in future administration.[20]

If the Director will not enforce Rangen's vested water right, then the Director and the majority opinion are reducing the quantity that can be diverted and put to beneficial use pursuant to Rangen's water right by the amount being used by junior appropriators. Such a diminishment of Rangen's property right without compensation is prohibited by Idaho law. *See* IDAHO CONST. Art I, § 14. The Coalition respectfully requests the Court to rehear its decision accordingly.

[20] It is misleading to state that a senior water right holder is entitled to the "full measure of his rights, subject to availability of water and beneficial use limitations," when at the same time authorizing the Director to deny delivery to the senior user because junior users have a greater perceived beneficial use. *Rangen*, at *38.

IV. The Majority Opinion Fails to Analyze the Impact of Weighing Beneficial Uses.

The majority opinion changes Idaho's historical constitutional, statutory, and case law determinations concerning water rights administration and the definition of beneficial use. The majority decision bases this upon the rationale that "there is a point where curtailment is unjustified because vast amounts of lands would be curtailed to produce a very small amount of water to the caller." *Rangen,* at *36. The majority decision goes on to assert that this is the result of balancing the "bedrock principles" of priority of right and beneficial use. *Id*. Finally, the majority opinion acknowledges that the Director's discretion is limited. *Id.*, at *36-37, n. 2. The question then becomes, what are the limits to the Director's discretion based upon the rationale of the majority decision?[21]

The majority decision states that "The Director may consider <u>any such disparity</u> when seeking to balance priority of right with beneficial use requirements." *Rangen*, at *38. Such a holding sets a very dangerous precedent that threatens to undermine decades of adjudication of water rights on the Eastern Snake River Plain (ESPA) and leaves all water rights in jeopardy – regardless of priority.

The prior appropriation doctrine was adopted for a reason. Southern Idaho receives little rainfall each year. Water is a scarce resource, and in times of shortage not all water rights can be satisfied. For this reason, Idaho's forefathers implemented the prior appropriation doctrine to assure those who properly developed a water right that they would be entitled to the water that they put to a beneficial use prior to the next junior appropriator receiving any water. In this manner, Idaho's vast desert region was developed into a thriving agricultural community.

[21] Again Justice Eismann rightly identified the problem with the majority opinion's decision: "Indeed, the majority does not give any guidelines as to how the discretion it grants to the Director is to be exercised." *Rangen*, at *59 (J. Eismann, concurring).

If the Director is entitled to consider "any such disparity" when "seeking to balance priority of right with beneficial use requirements", no one's water right will be secure. For example, a junior industrial user with a 1990 water right that uses 2 cfs of water and employs hundreds of people could potentially always be entitled to water delivery ahead of all senior water rights since a Director could easily determine that the water used by the industrial user is much more beneficial than water used to irrigate, provide stockwater for cattle, or that is used to provide water to smaller businesses.

Extending the majority's new standard even further, does the Director now have discretion to weigh relative uses of water such as water used for pastures verses water used to irrigate and raise cash crops? If someone only grows grain and uses 1.5 acre-feet of water per acre per year is that a more beneficial use of water than someone growing sugar beets that uses 3 acre-feet of water per year? Such determinations may not be foreclosed under the majority's new "beneficial use" policy standard.

The danger in the majority opinion's new standard is obvious. The Director is a political appointee of the Governor. As such, the Director is subject to the political pressures that are encountered by all persons holding such offices. Those favoring development and who need water for that new development will always put political pressure on those in power to take water away from senior users in order to allow that development to occur.

Our forefathers understood this problem when they adopted the prior appropriation doctrine. It is true that the prior appropriation doctrine can lead to harsh results. However, as explained above, the harsh result of curtailment has not occurred in over 11 years of active delivery calls on the ESPA. Again, the Conjunctive Management Rules provide the ability for a

junior user who is injuring a senior to mitigate for that injury and in all circumstances to date, junior users have avoided curtailment.[22] *See* CMRs 40.01.b; 43.

As such, the Coalition respectfully requests the Court to rehear the issue in order to avoid the diminishment of private property rights in water right administration.

V. The Court's Opinion Unlawfully Shifts the Burden of Proof to Rangen.

Another signature error in the majority opinion's analysis of the Director's trim line is the failure to give effect to the well-established burden of proof in a delivery call proceeding. The majority opinion states:

> We find that the Director had discretion to implement the trim line based on the policy of beneficial use. Therefore, we need not address whether the trim line was also justified to account for model uncertainty and whether implementing a trim line on that basis impermissibly shifted the burden of proof on material injury.

Rangen, at *26.

The concurring opinion upholds the Director's discretion to establish the Great Rift trim line based upon model uncertainty, but also fails to analyze the burden of proof. The Director is not authorized to apply the rules in a manner that would violate the constitution and existing law. *See e.g.*, *AFRD#2*, 143 Idaho at 877-78. By creating the new "beneficial use" policy standard the majority opinion authorizes the Director to circumvent the well-established burden of proof that is incorporated into the Rules. *See* CMR 20.02; *A&B Irr. Dist. v. IDWR*, 153 Idaho at 524 ("It is Idaho's longstanding rule that proof of 'no injury' by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administrative agency or court, all changes to that decree, permanent or temporary, must be

[22] The Court does not need to undo over 100 years of water law development concerning the concept of beneficial use and prior appropriation in order to uphold the ability of junior users to avoid the harsh result of curtailment. The CMRs provide that opportunity and have been upheld as facially constitutional by this Court. *See AFRD#2*, 143 Idaho at 883.

supported by clear and convincing evidence"); *see also, AFRD#2*, 143 Idaho at 874 ("the Rules do not permit or direct the shifting of the burden of proof").

Despite governing precedent, the majority opinion authorizes the Director to discount Rangen's injury without requiring those juniors east of the Great Rift to prove any defenses to the call. In essence those juniors were allowed to take 1.5 cfs (i.e. 20-50% of Rangen's water supply) without any mitigation obligation and without proving any defenses by clear and convincing evidence.[23] The majority opinion effectively requires the senior user to prove that the senior's use of water is more beneficial than the juniors' use. By not addressing the burden of proof, the concurring opinion fails to address a key component of authorizing the Director to rely upon model uncertainty when he established the Great Rift trim line.

The district court recognized the obvious problem with the Director's analysis and the effect of the trim line and held:

> By its very nature uncertainty does not support a finding of clear and convincing evidence. To allow model uncertainty to operate in favor of junior ground water pumpers would shift the burden of proof to the senior to prove that junior ground water pumpers east of the Great Rift were causing injury. Therefore, the Director's application of the trim line in this matter is set aside and remanded for further proceedings as necessary.

R. 707.

The City of Pocatello and IGWA did not appeal this finding. Accordingly, if this Court is going to reverse the district court the Court must address the burden of proof. This Court previously did so when it addressed the issue of burden of proof and injury and held:

> It is Idaho's long standing rule that proof of "no injury" by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

A&B Irr. Dist. v. IDWR, 153 Idaho 500, 524 (2012) (emphasis added).

[23] R. 706 (e.g. 1.5 cfs equals 50% of Rangen's water supply that it received from the Curren Tunnel in 2005).

The Court has repeatedly confirmed that defenses such as "futile call" or "waste" must be proven by the junior appropriators by clear and convincing evidence. *See AFRD#2*, 143 Idaho at 878; *A&B v. Spackman*, 155 at 653; *A&B v. IDWR*, 153 Idaho at 524.

In this case, it is undisputed that junior ground water users east of the Great Rift injured Rangen's senior water right. Agency R. Vol. 21, pp. 4224-28. As found by the district court, to allow model uncertainty to operate in favor of junior ground water pumpers east of the Great Rift shifts the burden of proof, contrary to the holding of this Court in *A&B*. R. 707.

Further, allowing a junior user to injure a senior user based upon an analysis of competing beneficial uses, when the junior did not prove any defenses, shifts the burden to the senior to make the senior prove that his or her water user is more beneficial than the junior's. If the senior can beneficially use the water pursuant to its vested water right, nothing in Idaho law supports the notion that it is then the senior's burden to prove his or her water use is more beneficial than the junior's.

There is no dispute in the record that ground water users east of the Great Rift are contributing to the material injury to Rangen's senior surface water right. As such, the use of a trim line based upon model uncertainty is not sustainable based upon prior decisions of this Court and the record in this case. Further, Idaho law does not support the concept that it is the senior's burden to show that his or her water use is more beneficial than the junior's.

Neither the majority or concurring opinions discuss the shifting of the burden of proof that results from the Director's use of a trim line. The Coalition respectfully requests the Court to rehear this issue accordingly.

VI. The Administrative Record Does Not Support a Finding of Model Uncertainty.

As stated above, this Court has not overruled its prior decision in *Clear Springs Foods*. *See supra*, Part II at 13-14. *Clear Springs Foods* upheld the Director's use of a ten percent (10%) trim line when using ESPAM 1.1 and stated that the trim line was justified based upon "an uncertainty of up to ten percent (10%) due to the margin of error in stream gauges used in developing the model." 150 Idaho at 812. Nothing in the Court's decision authorized the use of a trim line based upon some "policy" or other basis.[24]

In this case there was very little conflict between any of the expert witnesses concerning model uncertainty when using ESPAM 2.1. As set forth in the Coalition's *Joint Response Brief*, all of the experts agreed that the model was the best available science. *Coalition Resp.* at 7-9. Further, the experts agreed and the Director concluded that "the margin of error associated with model predictions cannot be quantified." Agency R. Vol. 21, p. 4228; R. 705.

The concurring opinion appears to rely upon one sentence of the Director's order in upholding the Director's use of the Great Rift as a trim line. The Director stated "uncertainty in the model justifies use of a trim line" and the concurring opinion quotes the Director. *Rangen*, at *67-68. The question is does the record support a finding by clear and convincing evidence that there is uncertainty in the model that would justify the use of a trim line? *See Kaseburg v. State, Bd. of Land Com'rs*, 154 Idaho 570, 577 (2013).

It is the Coalition's position that there is no evidence to support the use of the Great Rift as a trim line based upon model uncertainty. The only facts in the record are that all of the experts, including those used by IDWR, agree that ESPAM 2.1 is the best science and that any model uncertainty cannot be quantified. R. 705 ("All experts involved in this case were in

[24] Moreover, the Court carefully explained that the 10% "trim line" was <u>not</u> affirmed on policy grounds. 150 Idaho at 816 ("The district court did not affirm the final order based upon the above-quoted statements regarding Idaho Code § 42-226 and Conjunctive Management Rule 20.03").

general agreement that the use of a trim line would be based more on a policy decision than on a quantifiable level of uncertainty"). The only evidence in the record shows that water passing through the Great Rift would be delivered to Rangen's senior water right.

As such, it the Coalition's position that the record does not support the use of a trim line based upon model uncertainty and that the district court properly set aside the Director's decision on this issue. R. 705-07. The Coalition respectfully requests the Court to rehear the issue accordingly.

CONCLUSION

> 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.

Lockwood v. Freeman, 15 Idaho at 398.

This Court rightly stated what is required by the prior appropriation doctrine over 100 years ago in *Lockwood.* The majority opinion's new weighing of beneficial uses standard is contrary to the constitution and long-standing Idaho law and subjects all vested water rights to great uncertainty. Further, in a water call, it is not the senior's burden to establish defenses or show that his or her water use is more beneficial than a junior's. Finally, the Director's findings must be supported by facts in the administrative record, and there are no facts to support a trim line based upon quantified model uncertainty.

For the benefit of all water users, and the protection of private property rights moving forward, the Coalition respectfully requests the Court to rehear these issues and accurately analyze Idaho water law as it applies in conjunctive administration.

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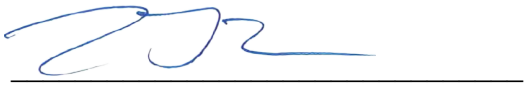
DATED this 27th day of April, 2016.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic memorandum, *Surface Water Coalition's Memorandum in Support of Petition for Rehearing*, submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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Dated and certified this 27th day of April, 2016.

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Addendum A

IDAHO DEPARTMENT OF WATER RESOURCES

A Water Users Information Guide

IDAHO

WATER RIGHTS A PRIMER

What is a water right?

The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state and ground waters of the state, to be public waters.

The constitution and statutes of the State of Idaho guarantee the right to appropriate the public waters of the State of Idaho. When a private right to the use of public waters is established by appropriation, a water right is established that is a real property right much like property rights in land. The constitution and statutes of the state of Idaho protect private property rights, including water rights.

A water right is the right to divert the public waters of the state of Idaho and put them to a beneficial use, in accordance with one's priority date.

A priority date is the date the water right was established. How this date is determined is described in the section below. The priority date is important because the priority date determines who gets water when there is a shortage. If there is not enough to satisfy all of the water rights, then the oldest (or senior) water rights are satisfied first and so on in order until there is no water left. It is the new (or junior) water rights that do not get water when there is not enough to satisfy all the water rights.

Beneficial uses include such uses as domestic use, irrigation, stockwatering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others. The amount of the water right is the amount of water put to beneficial use. Due to the beneficial use requirement, a water right (or a portion of a water right) may be lost if it is not used for a continuous five-year period.

A diversion is a structure used to divert the water from its natural source. Typical diversion structures include pumps, headgates, ditches, pipelines, and dams or some combination. A diversion is generally required to establish a water right. The Idaho Water Resource Board is authorized to acquire water rights without diversions. These water rights are called "instream flow" water rights, and are typically authorized for purposes of protecting some public interest in a natural stream or lake, such as recreation, wildlife, or natural beauty. A water right may also be acquired to water livestock directly from the stream, which is called an "instream livestock" water right.

Water law in Idaho is based on the appropriation doctrine, because water rights in Idaho are based upon diversion and beneficial use of water. The appropriation doctrine has also been called "first in time is first in right", because the priority date determines who gets water when there is not enough to go around. The water right is said to have "appropriated" water.

You may also have heard of something called "riparian rights". In some states, an owner of land has the right to make a "reasonable use" of ground water underneath her land, or water naturally flowing on, through, or along the borders of her land. A riparian right to make use of the water is not limited by priority date and it cannot be lost by non-use. Idaho law does not recognize a "riparian right" to divert and use water.

A water right under the law of the state of Idaho can be established only by appropriation, and once established, it can be lost if it is not used.

How is a water right established?

Surface Water

Prior to May 20, 1971, there were two ways in which a right to surface water could be established. The first was to simply divert water and apply it to beneficial use. These water rights are called "beneficial use", "historic use" or "constitutional" water rights. The priority date for a water right established by this method is the date water was first put to beneficial use.

The second way to establish a water right to surface water was to comply with the statutory method in effect at the time the water right was established. The current statutory method is an application/permit/license procedure that is described further below. The priority date for a water right established by this method is the date of filing the application with IDWR, and this priority date is shown on the license that is issued when the process is completed. Prior to 1903, Idaho had a "posted notice" statute, which provided for posting of a notice at the point of diversion and recording the notice at the county recorder's office, followed by actual diversion and beneficial use of water, among other things. If the statutory requirements were met then the priority date for a water right established under the posted notice statute was the date of posting the notice. Water rights established under the old statutory method are called "Posted Notice" water rights, but are considered beneficial use rights because they are not confirmed by a license or decree.

As of May 20, 1971, there is only one way to establish a right to surface water, and that is by following the application/permit/license procedure that is described further below. The one exception to this rule is for water rights used solely for instream watering of livestock.

Ground Water

Prior to March 25, 1963, there were two ways to establish rights to ground water, which are the same methods described above under Surface Water. As of March 25, 1963, there is only one way to establish a right to ground water, and that is by following the application/permit/license procedure that is described further below. There is one exception to this rule. A "beneficial use" right to ground water may still

be established for domestic purposes. "Domestic purposes" is defined by statute as "a) the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or (b) any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day." Domestic purposes does not include "water for multiple ownership subdivision, mobile home parks, commercial or business establishments" unless the use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

Can a water right be changed?

The point of diversion, place of use, period of use, or nature of use of a water right may be changed so long as the change meets certain conditions as described below.

After May 26, 1969, any person wishing to make a change in use of the water right must file an application for transfer with IDWR for approval of the change. IDWR may approve the proposed change if it a) will not injure other water rights, b) does not constitute an enlargement of the original water right, c) is a beneficial use, d) is consistent with the conservation of water resources within the state of Idaho, and e) is in the local public interest. IDWR may approve the change in whole, in part, or approve it subject to conditions where necessary to meet those five requirements. If the proposed change does not meet those five requirements, then the proposed change is not approved and the application for change is denied.

How do I get a water right?

If you are currently diverting the public waters of the state and putting the water to beneficial use, then you may already have a valid water right established either by the statutory method or by beneficial use.

If water was used on your property before you acquired it, and the person you acquired the property from did not "reserve" the water right in the deed conveying the property to you, and you continued the use of water, you may have acquired a valid water right along with your land. Also, some water rights (including both water rights established by the statutory method and water rights established by beneficial use) have been confirmed by a decree of a state or federal court.

IDWR keeps records of water right decrees and licenses, and these records are available for public inspection.

You may need a new water right for an existing use of water if a water right was not properly established for the existing use. (For example, if a use of surface water was initiated after 1971 without applying to IDWR for a permit.) A new water right is also needed for a new use of water. If you wish to establish a new water right, then there are certain procedures you will need to follow.

First, an application for a permit must be filed with IDWR. Application forms are available from IDWR. The information that must be included in the application is described by statute and in rules and regulations of IDWR.

IDWR is required to publish notice of the application, and other persons may file protests to the application with IDWR. If protests are filed, then IDWR must hold a hearing, if protests cannot be resolved.

IDWR must then review the application (including any hearing record), and if the application meets the requirements of the statute and the Rules and regulations, a permit is issued. The permit describes the appropriation to be made and the deadline within which the appropriation must be completed.

Prior to the end of the period in which the appropriation must be completed, IDWR sends the permit holder a notice that the deadline is approaching and that the permit holder must submit proof of beneficial use. "Proof of beneficial use" is a form sent to the permit holder by IDWR, that the permit holder fills out and returns to IDWR. In the proof form, the permit holder states that she has completed her appropriation.

After filing the proof form, a field examination must be made. The permit holder may request that the field examination be made by IDWR, in which case an examination fee is required to be paid to IDWR at the time proof is filed. The permit holder may instead have the field examination completed by a certified field examiner not associated with IDWR, in which case the field examiner submits a report to IDWR after the examination is completed and prior to the proof due date. The purpose of the field examination is to ensure that water is in fact being used as described in the permit. If so, the IDWR issues a license that describes the appropriation that has been completed.

What is a claim?

There are two different types of filings that are often called "claims". The first is a "statutory claim" that was filed with IDWR to make a record of an existing beneficial use right. In 1978, a statute was enacted requiring persons with beneficial use rights (other than water rights used solely for domestic purposes as defined above) to record their water rights with IDWR. The purpose of the statute was to provide some means to make records of water rights for which there were previously no records. However, these records are merely affidavits of the water users, and do not result in a license, decree, or other confirmation of the water right.

The other type of claim is a "notice of claim" to a water right that is filed with IDWR in water rights adjudications. An adjudication is a court action for the determination of existing water rights, which results in a decree that confirms and defines each water right. (The application/permit/and license procedure described above is for purposes of establishing new water rights.) When an adjudication of a particular source is commenced, IDWR is required to notify the water users of the commencement of the adjudication, and notify the water users that they are required to file notices of claims for the water rights with IDWR. IDWR then investigates the notices of claims and prepares a report that is filed with the court. Claimants of water rights are notified of the filing of the report, and objections to the report may be filed with the court by anyone who disagrees with the findings in the report. If no objection is filed to a water right described in the report, then the court determines the water right after a hearing and decrees the water right. A general adjudication of the Coeur d'Alene-Spokane River Basin in Idaho is currently ongoing. Information about the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA) is available on the IDWR website.

Other kinds of water "rights"

Some persons have a right to receive water that is not an "appropriation". For example, some persons have the right to receive water that is represented by shares in a ditch company. In such cases, the ditch company has the appropriation, and the water users have a right to receive water from the ditch company.

Other examples are persons who receive water from a city, an irrigation district, or a water utility company (such as United Water of Idaho). Again, the water user may have a right to receive water from the city, district, or utility, (usually contingent upon payment of a fee), but does not have an appropriation.

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Revised – July 2015