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IN THE SUPREME COURT OF THE STATE OF IDAHO

SOUTH VALLEY GROUND WATER DISTRICT and GALENA GROUND WATER DISTRICT, Petitioners-Respondents-Cross Appellants, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources, Respondents-Appellants-Cross Respondents, and SUN VALLEY COMPANY, CITY OF BELLEVUE, BIG WOOD CANAL	**Supreme Court Docket No. 49632-2022** **RESPONDENTS' AND CROSS-APPELLANTS' MOTION TO AUGMENT THE RECORD**

COMPANY, BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, CITY OF POCATELLO, CITY OF KETCHUM, and CITY OF HAILEY,

Intervenors-Respondents.

COME NOW the Petitioners/Respondents/Cross Appellants, SOUTH VALLEY GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, BARKER ROSHOLT & SIMPSON LLP and GALENA GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, LAWSON LASKI CLARK, PLLC (collectively "Districts"), pursuant to Idaho Appellate Rule 30, and move the Court for an order augmenting the record in the above-captioned matter with the documents attached to this motion.

I. Introduction.

In its *Appellants' Combined Reply & Cross-Response Brief* ("*IDWR Resp. Br.*"), the Idaho Department of Water Resources ("IDWR" or the "Department") asks the Court to disregard six addenda attached to the Districts' opening brief, characterizing those documents as an impermissible attempt to augment the record. *IDWR Resp. Br.* at 56. The Districts' six addenda are excerpts of prior agency orders, unpublished district court decisions, and prior legal briefing of the Department to Idaho's judiciary, including this Court. These addenda provide helpful background on legal issues pertinent to this matter, particularly the Department's position on conjunctive administration.

This motion asks the Court to augment the record to include those documents, as well as to include a proposed agreement between the junior and senior users in Basin 37 created during the advisory committee meetings in late 2020 that was presented to the Department, but never included in the agency records.

"At any time before the issuance of an opinion, any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record." I.A.R. 30(a). "Matters to be judicially noticed by the Supreme Court must be augmented in the settled record by motion under I.A.R. 30(a), with a motion and all relevant documents attached." *Ellis v. Ellis*, 167 Idaho 1, 5, 467 P.3d 365, 369 (2020). This is true even for documents the court can take judicial notice of under Idaho Rule of Evidence 201 because "the record on appeal must be settled in the district court, I.A.R. 29(b), and then filed with the Supreme Court." *Id.*

IDWR argues that the addenda cannot be considered because they have not been the subject of an Idaho Appellate Rule 30 motion to augment the record on appeal, and that such a motion would be futile because the addenda were not presented during the administrative process, nor to the district court. *IDWR Resp. Br.* at 56. The Districts' motion however, is not futile. Nothing in the appellate rules, and nothing cited by the Department, limit the Districts from augmenting the record at this stage in the proceedings. As such, and for reasons discussed below, the Court should grant this motion to augment the record and take judicial notice of the following documents. *See* I.R.E. 201(b)(2) (allowing judicial notice of documents that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

II. Documents to augment the record.

- Addendum A, *Amended Order, SWC Delivery Call* (IDWR May 2, 2005).

Addendum A provided relevant excerpts from the Department's order in the agency proceeding preceding *A&B v. Spackman* (Nos. 38191, 38192, 38193). Addendum A is relevant to the issues on appeal in this matter and shows the Department's position that a senior water right holder can receive less than their decreed amount and still not suffer material injury under

the CM Rules. It is publicly available on the Department's website[1] and attached in its entirety to this motion as Aug. pp. 1-66.

- Addendum B, *Defendants' Memo in Response to Motion for Summ. Judg.*, *AFRD#2*, No. CV-2005-600 (Gooding Cnty. Dist. Ct. Dec. 6, 2005).

Addendum B provided relevant excerpts of the Department's response memorandum to motions for summary judgment in the district court case preceding *AFRD#2 v. Spackman* (Nos. 33249, 33311, 33399). Addendum B is relevant to the issues on appeal in this matter and illustrates the Department's prior position that the CM Rule's "material injury" requirement is consistent with the Ground Water Act. The Department has published only a few select documents from the *AFRD#2* district court case, including the order on summary judgment,[2] but the Department has omitted Addendum B from its publicly available documents. However, as authors of this document, the Department is aware of and in possession of this document. Addendum B is attached in its entirety to this motion as Aug. pp. 67-135.

- Addendum C, *Statement of Purpose*, H.B. 986, 52nd Legis., 2nd Reg. Sess. (1994).

Addendum C is the full text of the 1994 statement of purpose for House Bill 986 to amend Idaho Code §§ 42-602 and 42-237a. This document is relevant to the issues on appeal in this matter, and supports the District's argument that section 42-237a.g's "discretionary" language was added by the legislature to free the Director from being forced to act under a writ mandate to administer water outside an established water district, rather than the broad-sweeping discretion to administer water whenever and however he chooses. Addendum C is publicly available from the Idaho Legislative Research Library and is attached in its entirety to this

[1] *See* https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2005/2005-orders-archive.zip.

[2] Available publicly at, https://idwr.idaho.gov/legal-actions/district-court-actions/AFRD-v-IDWR/.

motion, Aug. p. 156, along with the complete legislative history for the 1994 amendments, Aug. pp. 136-84.

- Addendum D, *Def.-App. Opening Br. on Appeal*, *AFRD#2*, No. 33249, 33311, 33399 (Idaho Sup. Ct. Oct. 27, 2006).

Addendum D provided relevant excerpts of the Department's opening brief to the Supreme Court in *AFRD#2 v. Spackman*. Addendum D is relevant to the issues on appeal in this matter and shows the Department's prior position that a senior water right holder's decreed quantity is not conclusive for a beneficial use analysis. The Department has omitted Addendum D from its publicly available documents related to the Supreme Court matter in *AFRD#2 v. Spackman*. However, as authors of this document, the Department is aware of and in possession of this document. Addendum D is attached in its entirety to this motion as Aug. pp. 185-233.

- Addendum E, *Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction, IGWA v. IDWR*, No. 2007-526 (Jerome Cnty. Dist. Ct. June 12, 2007).

Addendum E provided relevant excerpts of the district court's order dismissing an application for temporary restraining order. This unpublished court decision is relevant to the issues on appeal in this matter and supports the Districts' argument that the timing of the administrative process, after plantings had already occurred, was not in accord with due process. The Department has omitted Addendum E from its publicly available documents related to this matter. However, as a party to this lawsuit, the Department is aware of and in possession of this document. Addendum E is attached in its entirety to this motion as Aug. pp. 234-41.

- Addendum F, *Order on Petition for Judicial Review*, *A&B v. IDWR*, No. 2008-551 (Gooding Cnty. Dist. Ct. July 28, 2009).

Addendum F provided relevant excerpts of the district court's order affirming the Director's actions related to mitigation plans and is relevant to the Districts' cross-appeal issues.

This is an unpublished district court order. The Department has omitted Addendum F from its publicly available documents related to this matter. However, as a party to this lawsuit, the Department is aware of and in possession of this document. Addendum F is attached in its entirety to this motion as Aug. pp. 242-75.

- October 2020 draft agreement between Basin 37 seniors and juniors.

The October 2020 draft agreement between Basin 37 seniors and juniors ("2020 Agreement") was created in the context of the BWRGWMA advisory committee meetings. It was presented at the November 4, 2020 meeting. AR. 5962. And was later reviewed by the Department at the March 3, 2021 meeting. AR. 6418 (Mr. Luke reviewed "the draft proposed agreement submitted by the surface water users"). The 2020 Agreement is relevant to the Districts' cross-appeal issue that a delivery call was made by senior users. This document was not included in the agency record.[3] A true and correct copy of that agreement is attached in its entirety to this motion as Aug. pp. 276-80.

- *Second Declaration of Michael A. Short*, *SVGWD v. IDWR*, No. CV-21-00243 (Blaine Cty. Dist. Ct. June 29, 2021).

The Second Declaration of Michael A. Short was filed in support of the Districts' first amended petition to the court below. The declaration provided the district court pertinent information regarding the Districts' first amended petition related to the Director's failure to provide a hearing on its proposed mitigation plan. It is publicly available.[4] This document is

[3] A February 2021 submission to the advisory committee by the seniors is also absent from the agency record, though there are numerous references to it. AR. 6279, 6413, 6418. That document provided the demands of the seniors as: "The seniority of surface water rights is currently not being honored. i.e., groundwater rights that are junior to surface rights should be curtailed accordingly." AR. 6413 (emphasis added). The Districts' would move to augment the record to include this submission, but the Department never provided a copy to the Districts during the committee meetings or subsequently.

[4] At https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV07-21-00243/Second-Declaration-of-Michael-A-Short..pdf.

cited in the Districts' first amended petition, and is listed in the district court record's table of contents, though the document itself does not appear to have been included in the record. R. 5. Furthermore, the declaration was also cited by the Department. R. 193 at fn. 7. This document should be included in the record. A true and correct copy of the declaration is attached in its entirety to this motion as Aug. pp. 281-85.

III. Good cause to augment the record.

IDWR argues that the Districts' addenda cannot be admitted under Idaho Appellate Rule 30 nor do they fit the categories set out in Appellate Rule 35(f). *IDWR Resp. Br.* at 57. The documents discussed herein however, should be included in the record. The Districts' addenda E and F are unpublished court decisions and are therefore appropriate addenda under Idaho Appellate Rule 35(f), "recent court decisions not yet published, or relevant parts thereof, [] may be reproduced in the brief or in an addendum at the end of the brief." The Districts' addendum A is a publicly available order from the Department. The Districts' addenda B and D are briefings authored by the Department and relevant to the present case. The Districts' addendum C is a copy of the publicly available statement of purpose discussing amendments to Idaho Code § 42-237a.g, the statute centrally at issue in this case. These documents are either appropriate addenda under Idaho Appellate Rule 35(f), or relevant legal evidence related to salient issues in this matter and therefore, appropriate subjects of a motion to augment as documents to be judicially noticed. "Matters to be judicially noticed by the Supreme Court must be augmented in the settled record by motion under I.A.R. 30(a), with a motion and all relevant documents attached." *Ellis v. Ellis*, 167 Idaho at 5, 467 P.3d at 369.

The Department also argues that the Districts' addenda were not the subject of a timely motion under Idaho Code § 67-5376. *IDWR Resp. Br.* at 56. "Judicial review of disputed issues

of fact must be confined to the agency record," unless supplemented by Idaho Code § 67-5276. I.C. § 67-5277 (emphasis added). The Districts' addenda do not provide additional evidence of disputed fact. As shown above, those addenda address the Department's legal reasoning and conclusions on a variety of issues pertinent to this case, or concern the legislative intent behind amending the most prominent statute in this matter. Nothing in Idaho Code § 67-5276 requires that such additional legal support be presented at the proceedings before the agency, nor that good cause be shown why it was not. Nonetheless, the legal issues in this case have developed considerably in complexity and scope since the agency proceeding. The Districts' failure to present publicly available legal citations at the proceedings, most of which were authored by the Department, should be excused. The Districts' addenda provide important context for the issues here on appeal and their inclusion in the record has merit.

Unlike the Districts' addenda, the October 2020 draft Agreement does seek to provide evidence related to disputed issues of fact—namely, whether the seniors made a delivery call. The Department insists that the administrative proceeding in this case was initiated under the Director's discretionary authority provided by Idaho Code § 42-237a.g. That is, the proceedings were triggered by the Director, regardless of a delivery call. The import of that distinction was not immediately clear during the administrative proceedings, but has become significant as the legal issues have developed through this matter.

Additionally, the October 2020 Agreement was provided in the context of the advisory committee meetings and its omission from the record was unexpected by the Districts. Nonetheless, the agency record references the 2020 Agreement and the Districts have provided argument based on that agreement in prior briefings. The Districts' failure to present this

agreement, possessed by the Department, into the agency record should be excused, and good cause shown for that failure.

IV. Conclusion.

The Districts' addenda attached to its *Combined Response and Opening Brief* should be judicially noticed by the Court and included in the record by virtue of this timely motion to augment the record. *See* I.A.R. 30(a) ("At any time before the issuance of an opinion, any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record"). Additionally, the October 2020 draft Agreement and the Short declaration should be included in the agency record and good cause exists for the Districts' failure to include it in the agency record. As such, the Districts' request that the present motion to augment the record be GRANTED. Consistent with Idaho Appellate Rule 30, the filing of this motion "shall not suspend or stay the appellate process or the briefing schedule."

RESPECTFULLY SUBMITTED this 21st day of November, 2021.

BARKER ROSHOLT & SIMPSON LLP

/s/ Michael A. Short
Michael A. Short
Attorneys for Respondent-Cross Appellant South Valley Ground Water District

LAWSON LASKI CLARK PLLC

/s/ Heather E. O'Leary
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November 2022, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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BEFORE THE DEPARTMENT OF WATER RESOURCES

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	)	**AMENDED ORDER**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of a letter ("Letter") and petition ("Petition"), both filed with the Director on January 14, 2005, from 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 referred to as the "Surface Water Coalition" or "Coalition"). The Letter and Petition seek the administration and curtailment of ground water rights within Water District No. 120, the American Falls Ground Water Management Area, and areas of the Eastern Snake Plain Aquifer not within an organized water district or ground water management area, that are junior in priority to water rights held by or for the benefit of members of the Surface Water Coalition. The Petition also seeks designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

On February 14, 2005, the Director issued an Order in this matter, which provided an initial response to the Letter and Petition filed by the Coalition. Based upon the Director's initial and further consideration of the Letter and Petition, the Director issued an Order on April 19, 2005, superceding the interlocutory portions of the Order of February 14, 2005. Following a status conference conducted by the Director on April 27, 2005, the Director determined that Finding No. 127 should be clarified. The Director now enters the following Findings of Fact, Conclusions of Law, and Amended Order with revisions to Findings No. 124 through No. 127 and No. 129, three additional findings (Findings No. 128, No. 129, and No. 131), corrected numbering of Conclusions of Law No. 47 through No. 53, and revisions to paragraph no. 9 in the Amended Order.

FINDINGS OF FACT

Procedural History

1. On January 14, 2005, the Surface Water Coalition hand delivered to the Director its Letter regarding *Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) / Request for Delivery of Water to Senior Surface Water Rights.*

2. On January 14, 2005, the Surface Water Coalition also filed its Petition captioned *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.* The Petition was filed "pursuant to Rules 30 and 41 of the conjunctive management rules (IDAPA 37.03.11) and Rule 230 of the Department's rules of procedure (IDAPA 37.01.01) . . . ." *Petition* at p. 1.

3. Footnote 5 on page 4 of the Letter filed by the Surface Water Coalition on January 14, 2005, seeking the administration of ground water rights in Water District No. 120, contained the following statement: "In the event any entity administering water rights perceives the need for further information concerning 'material injury' other than is supplied either on the face of the Surface Water User's water rights or herein, the undersigned request notification of the same, and a timely and meaningful opportunity to provide such information."

4. On February 3, 2004, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed two petitions to intervene. The first was filed to intervene in the request for administration and curtailment of ground water rights within Water District No. 120, and the second was filed to intervene in the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area and designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

5. On February 11, 2005, Idaho Power Company filed a letter in which Idaho Power requests that the letter be treated as a motion to intervene should a contested case be initiated in response to the Letter and Petition filed by the Coalition.

6. On February 14, 2005, the Director issued his initial Order in this matter responding to the Letter and Petition filed by the Coalition, designating the requested water right administration in Water District No. 120 and the American Falls Ground Water Management Area as contested cases, and granting the two petitions to intervene filed by IGWA. Pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, the Order of February 14, 2005, was an interlocutory order and was not subject to review by reconsideration or appeal, with the exception of the portions of the Order (1) determining certain water rights to be junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights and (2) denying the portion of the Petition seeking designation of the Eastern Snake Plain Aquifer as a ground water management area. Those two portions of the February 14 Order were final on March 7, 2005, and the Coalition filed a petition seeking a hearing on the denial of designation of the Eastern Snake Plain Aquifer as a ground water management area.

7. To provide for the Director making a determination of the likely extent of injury to the water rights held by or for the benefit of the members of the Surface Water Coalition, the Order of February 14, 2005, included a provision (Conclusion of Law 38) for each member of the Coalition to submit the following information for the past fifteen (15) irrigation seasons, 1990 through 2004:

a. Total diversions of natural flow in acre feet by month;

b. Total diversions of water released from reservoir storage in acre feet by month;

c. Total diversions of ground water by the member entity in acre feet by month;

d. Number of the entity's members or shareholders holding individual ground water rights;

e. Average monthly headgate deliveries to the entity's members or shareholders (e.g., 5/8 inch);

f. Total amount of reservoir storage in acre feet carried over to the subsequent year;

g. Quantity of water in acre feet the member entity leased to other users through the water supply bank and the Water District 01 Rental Pool;

h. Quantity of water in acre feet the member entity made available to other users through means other than the water supply bank or the Water District 01 Rental Pool;

i. Total number of acres irrigated by flood irrigation and total number of acres irrigated by sprinkler irrigation; and

j. Specific types of crops planted on irrigated acres served by the member entity.

8. On March 15, 2005, members of the Surface Water Coalition jointly filed information in response to the Order of February 14, 2005, but objected to the "scope of the information request." An amendment to Exhibit A of the submittal (total monthly diversions of natural flow and total monthly diversions of water released from reservoir storage) was filed on March 18, 2004.

9. The response filed by the Surface Water Coalition relied heavily on data obtained from the Department (total monthly diversions of natural flow and total monthly diversions of water released from reservoir storage), failed to identify members or shareholders holding individual ground water rights (alleging that such information is "irrelevant for purposes of the request for water right administration of Petitioners' surface water rights"), referred the Director to his own staff or the watermaster for Water District 01 (total amount of reservoir storage carried over to the subsequent year, quantity of water leased to other users through the water supply bank and the Water District 01 Rental Pool, and quantity of water made available to other

users through means other than the water supply bank or the Water District 01 Rental Pool), provided data or estimates for the total number of acres irrigated by flood irrigation and the total number of acres irrigated by sprinkler irrigation for one year only (Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company), and a single list of crops for each member of the coalition (no acreage numbers and no history of crop rotation). The joint response submitted by the Coalition was subsequently supplemented as described in Finding 18.

10. On February 17 and March 7, 2005, respectively, the Idaho Dairymen's Association, and the U. S. Bureau of Reclamation each filed petitions to intervene in the request for administration and curtailment of ground water rights within Water District No. 120.

11. On February 18, 2005, IGWA filed *Idaho Ground Water Appropriators, Inc.'s Motion for Order Authorizing Discovery.*

12. On March 7, 2005, the Surface Water Coalition filed a letter requesting the Department's assistance in completing the identification of ground water rights from the Eastern Snake Plain Aquifer that are junior in priority to surface water rights held by members of the Coalition and that are not in an organized water district or ground water management area, together with the names and addresses for the holders of such rights. The letter of March 7, 2005, also requested a two-week extension from the date set in the Order of February 14, 2005, or until March 31, 2005, to serve the holders of such junior priority water rights with the *Petition for Water Right Administration* originally filed by the Coalition on January 14, 2005.

13. On March 9, 2005, the Director issued an Order denying IGWA's *Motion For Order Authorizing Discovery* without prejudice and granting the request of the Surface Water Coalition for a two-week extension, or until March 31, 2005, to serve the holders of junior priority water rights with the Coalition's *Petition for Water Right Administration.*

14. On March 15, 2004, the Surface Water Coalition filed *Petitioners' Joint Response to Director's February 14, 2005 Request for Information.*

15. On March 23, 2005, IGWA filed *Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support.*

16. On April 6, 2005, the Director issued an Order denying the February 11, 2005, motion of Idaho Power Company to intervene, granting the petitions to intervene filed by the Idaho Dairymen's Association and the U. S. Bureau of Reclamation and renewing the Director's request of the members of the Surface Water Coalition for submission of all information (see Finding 7) called for in the Order of February 14, 2005, and requesting simultaneous briefing on whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the holders of ground water rights were not parties.

17. On April 15, 2005, members of the Surface Water Coalition filed *Memorandum in Support of Surface Water Coalition's Request for Water Right Administration (Water District 120)*. The Director treated this filing the same as *Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support* and accompanying *Affidavit of Dr. Charles M. Brendecke* filed on March 23, 2005, and did not rely on either filing in preparing the present Order.

18. On April 18, 2005, the Director received a joint supplemental response to the renewed request for submission of information. The Director has not had sufficient time to evaluate the supplemental submittal.

Eastern Snake River Plain Aquifer and the Department's Ground Water Model

19. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," U. S. Geological Survey ("USGS") Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. *See* IDAPA 37.03.11.050.

20. The ESPA is predominately in fractured Quaternary basalt having an aggregate thickness that may, at some locations, exceed several thousand feet, decreasing to shallow depths in the Thousand Springs area. The ESPA fractured basalt is characterized by high hydraulic conductivities, typically 1,000 feet/day but ranging from 0.1 feet/day to 100,000 feet/day.

21. Based on averages for the time period from May of 1980 through April of 2002, the ESPA receives approximately 7.5 million acre-feet of recharge on an average annual basis from the following: incidental recharge associated with surface water irrigation on the plain (3.4 million acre-feet); precipitation (2.2 million acre-feet); underflow from tributary drainage basins (1.0 million acre-feet); and losses from the Snake River and tributaries (0.9 million acre-feet).

22. Based on averages for the time period from May of 1980 through April of 2002, the ESPA also discharges approximately 7.5 million acre-feet on an average annual basis through sources including the complex of springs in the Thousand Springs area, springs in and near American Falls Reservoir, and the discharge of nearly 2.0 million acre-feet annually in the form of depletions from ground water withdrawals.

23. The ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and the Snake River and its tributaries is in the American Falls area.

24. Hydraulically-connected ground water sources and surface water sources are sources that within which, ground water can become surface water, or surface water can become ground water, and the amount that becomes one or the other is largely dependent on ground water elevations.

25. When water is pumped from a well in the ESPA, a conically-shaped zone that is drained of ground water, termed a cone of depression, is formed around the well. This causes surrounding ground water in the ESPA to flow to the cone of depression from all sides. These depletionary effects propagate away from the well, eventually reaching one or more hydraulically-connected reaches of the Snake River and its tributaries. When the depletionary effects reach a hydraulically-connected reach of the Snake River, reductions in river flow begin to occur in the form of losses from the river or reductions in reach gains to the river. The depletions to the Snake River and its tributaries increase over time, with seasonal variations corresponding to seasonal variations in ground water pumping, and then either recede over time, if ground water pumping from the well ceases, or reach a maximum over time beyond which no further significant depletions occur, if ground water pumping from the well continues from year to year. This latter condition is termed a steady-state condition.

26. Various factors determine the specific hydraulically-connected reach of the Snake River affected by the pumping of ground water from a well in the ESPA; the magnitude of the depletionary effects to a hydraulically-connected reach; the time required for those depletionary effects to first be expressed as reductions in river flow; the time required for those depletionary effects to reach maximum amounts; and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions, if ground water pumping continues. Those factors include the proximity of the well to the various hydraulically-connected reaches, the transmissivity of the aquifer (hydraulic conductivity multiplied by saturated thickness) between the well and the hydraulically-connected reach of the Snake River, the riverbed hydraulic conductivity, the specific yield of the aquifer (ratio of the volume of water yielded from a portion of the aquifer to the volume of that portion of the aquifer), the period of time over which ground water is pumped from the well, and the amount of ground water pumped that is consumptively used.

27. The time required for depletionary effects in a hydraulically-connected reach of the Snake River to first be expressed, the time required for those depletionary effects to reach maximum amounts, and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions, if ground water pumping continues, can range from days to years or even decades, depending on the factors described in Finding No. 26. Generally, the closer a well in the ESPA is located to a hydraulically-connected reach of the Snake River, the larger will be the portion of ground water depletions to the hydraulically-connected reach and the shorter will be the time periods for depletionary effects to first be expressed, for those depletionary effects to reach maximum amounts, and for those depletionary effects to either recede or reach steady-state conditions. However, essentially all depletions of ground water from the ESPA cause reductions in flows in the Snake River equal in quantity to the depletions over time.

28. The Department uses a calibrated ground water model to determine the effects on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries from pumping a single well in the ESPA, from pumping selected groups of wells, and from surface water uses on lands above the ESPA.

29. In 2004, in collaboration with the Idaho Water Resources Research Institute, University of Idaho, U. S. Bureau of Reclamation ("USBR"), USGS, Idaho Power Company, and consultants representing various entities, including certain members of the Surface Water Coalition and IGWA, the Department completed reformulation of the ground water model used by the Department to simulate effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. This effort was funded in part by the Idaho Legislature and included significant data collection and model calibration intended to reduce uncertainty in the results from model simulations.

30. The reformulated ground water model for the ESPA was calibrated to recorded ground water levels in the ESPA and reach gains or losses to Snake River flows, determined from stream gages together with other stream flow measurements, for the period May 1, 1980 to April 30, 2002. The calibration targets, consisting of measured ground water levels and reach gains/losses, including discharges from springs, have inherent uncertainty resulting from limitations on the accuracy of the measurements. The uncertainty in results predicted by the ESPA ground water model equals the maximum uncertainty of the calibration targets. The calibration targets having the maximum uncertainty are the reach gains or losses determined from stream gages, which although rated "good" by the USGS, have uncertainties of up to 10 percent.

31. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause depletions to the flow of the Snake River in the form of reduced reach gains or increased reach losses in various reaches of the Snake River including the reach extending from Shelley, Idaho to Minidoka Dam, which includes the American Falls Reservoir.

32. The Department is implementing full conjunctive administration of rights to the use of hydraulically-connected surface and ground waters within the Eastern Snake River Plain consistent with Idaho law and available information. The results of simulations from the Department's ground water model are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and ground water rights diverted from the ESPA.

33. The Department's ground water model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There currently is no other technical basis as reliable as the simulations from the Department's ground water model for the ESPA that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically connected reaches of the Snake River and its tributaries.

Creation and Operation of Water Districts No. 120 and No. 130, and Status of the American Falls Ground Water Management Area

34. On November 19, 2001, the State of Idaho sought authorization from the Snake River Basin Adjudication ("SRBA") District Court for the interim administration of water rights by the Director in all or parts of the Department's Administrative Basins 35 and 41 overlying the ESPA in the American Falls area and all or parts of Basins 36 and 43 overlying the ESPA in the Thousand Springs area. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued two orders on February 19, 2002, creating Water District No. 120 and Water District No. 130, pursuant to the provisions of Idaho Code § 42-604.

35. On August 30, 2002, the State of Idaho filed a second motion with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 37 overlying the ESPA in the Thousand Springs area. On November 19, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 8, 2003, revising the boundaries of Water District No. 130 to include the portion of Administrative Basin 37 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

36. On July 10, 2003, the State of Idaho filed a third motion with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 29 overlying the ESPA in the American Falls area. On October 29, 2003, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 22, 2004, revising the boundaries of Water District No. 120 to include the portion of Administrative Basin 29 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

37. Water Districts No. 120 and No. 130 were created, and the respective boundaries revised, to provide for the administration of water rights, pursuant to chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. As a result, the watermasters for Water Districts No. 120 and No. 130 were given the following duties to be performed in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of any stipulated agreement; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

38. On August 29, 2003, the Director issued a final order reducing the area of the American Falls Ground Water Management Area. Even though reach gains to the Snake River between the USGS stream gage located about 10 miles southwest of Blackfoot, Idaho ("Near Blackfoot Gage") and the USGS stream gage located about 1 mile downstream of American Falls Dam ("Neeley Gage") have generally continued to decline since 2001 when the American Falls Ground Water Management Area was designated, the Director determined that preserving the original area of the American Falls Ground Water Management Area was no longer necessary to administer water rights for the protection of senior surface and ground water rights because administration of such rights is now accomplished through the operation of Water Districts No. 120 and No. 130.

39. On April 15, 2005, the State of Idaho filed three motions with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the Department's Administrative Basin 25; Basins 31, 32, and 33; and Basin 45. If the SRBA District Court authorizes interim administration in these administrative basins, nearly all ground water rights authorizing diversion of ground water from the ESPA will be subject to administration through water districts, when combined with the ground water rights already in Water Districts No. 120 and No. 130. At the time of filing Director's Reports in the SRBA later this year for the relatively few remaining ground water rights authorizing diversions from the ESPA, additional motions will be filed by the State of Idaho seeking authorization for interim administration of those remaining rights. While authorization for interim administration of the remaining ground water rights is subject to determinations to be made by the SRBA District Court, the Director anticipates that water districts covering all of the ESPA will be in place for the irrigation season of 2006, and all ground water rights authorizing diversions from the ESPA will be subject to administration through water districts established pursuant Idaho Code, Chapter 6, Title 42.

40. The general location and existing boundaries for Water Districts No. 120 and No. 130 as well as the location and existing boundaries for the remaining American Falls Ground Water Management Area are shown on Attachment A. Boundaries for a proposed addition to Water District No. 120 as well as areas for potential future water districts (Water Districts No. 110 and No. 140) are also shown on Attachment A.

Conjunctive Management Rules

41. Idaho Code § 42-603 authorizes the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." Promulgation of such rules and regulations must be in accordance with the procedures of chapter 52, title 67, Idaho Code.

42. On October 7, 1994, the Director issued *Order Adopting Final Rules*; the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Conjunctive Management Rules"), promulgated pursuant to chapter 52, title 67, Idaho Code, and Idaho Code § 42-603.

43. Pursuant to Idaho Code § 67-5291, the Conjunctive Management Rules were submitted to the 1st Regular Session of the 53rd Idaho Legislature (1995 session). During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature. Therefore, the Conjunctive Management Rules are final and effective.

44. The Conjunctive Management Rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

45. The Conjunctive Management Rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02.

Letter Filed by the Surface Water Coalition

46. On January 14, 2005, the Surface Water Coalition hand delivered to the Director its Letter regarding *Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) / Request for Delivery of Water to Senior Surface Water Rights.*

47. The Letter states that: "Data collected by the United States Bureau of Reclamation (USBR) over the past six years indicates about a 30% reduction in reach gains to the Snake River between Blackfoot and Neeley, a loss of about 600,000 acre feet. The recently recalibrated ESPA ground water model identifies ground water pumping as a major contributor to declines in the source of water fulfilling senior surface water rights. The ground water model demonstrates that pumping under junior groundwater rights results in an approximate steady state annual depletion of 1.1 million acre-feet to the Snake River in the American Falls reach." *Letter* at p. 2.

48. The Letter claims that water diverted by junior ground water users can be put to beneficial use by the Surface Water Coalition: "The water that will accrue to these reaches (Neeley to Minidoka, near Blackfoot to Neeley, and Shelley to Blackfoot) is needed and can be put to beneficial use under the Coalition's senior surface water rights. Whenever natural flow rights are on, the Coalition can use that water under their natural flow rights, and whenever that water would accrue to fill storage rights, the water is likewise needed to satisfy those storage rights." *Id.* at p. 3.

49. The Letter states that reduced availability of water as a result of ground water diversions under junior priority rights has materially injured the Surface Water Coalition's senior rights. "The extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water which is the result of groundwater depletions." *Id.* Moreover, the letter asserts that: "Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as

demonstrated by the model, results in a 'material injury' to the Surface Water Coalition's senior surface water rights." *Id.*

50. The Letter requests "administration of water rights in Water District No. 120 and delivery of water to their respective Snake River natural flow water rights and to the storage water rights held by the USBR in trust for these entities, pursuant to Idaho Code Chapter 6 Title 42 and the Rules for Conjunctive Management of Surface and Ground Water Resources (Idaho Administrative Code Section 37.01.01.)." *Id.* at p. 2.

Petition Filed by the Surface Water Coalition

51. On January 14, 2005, the Surface Water Coalition also filed its Petition captioned *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.* The Petition was filed "pursuant to Rules 30 and 41 of the conjunctive management rules (IDAPA 37.03.11) and Rule 230 of the Department's rules of procedure (IDAPA 37.01.01) . . . ." *Petition* at p. 1.

52. In addition to the information presented in the Letter regarding reduction in reach gains, annual depletions to the Snake River, and material injury claimed to the natural flow and storage water rights of the members of the Surface Water Coalition based upon the diversions of ground water under junior rights, the Petition seeks designation of the Eastern Snake Plain as a Ground Water Management Area.

53. The Surface Water Coalition states in paragraph 24 of its Petition that: "Petitioners reserve the right to supplement this petition with additional information as necessary."

Water Rights Held by or for the Benefit of Members of the Surface Water Coalition

54. The disposition of all of the water rights listed in the Letter and Petition filed by the Surface Water Coalition is pending in the SRBA. Many of the water rights listed in the Letter and Petition are overlapping or redundant. The Department has completed its preliminary examination of the rights claimed by members of the Coalition, other than rights also claimed by the USBR, pursuant to Idaho Code § 42-1410 and has prepared preliminary recommendations for reporting these rights in the SRBA. The preliminary recommendations were mailed to the members of the Coalition on April 15, 2004. Over the coming weeks, the Department will consider any additional information provided by the members of the Coalition concerning the members' water rights and will prepare its final reporting of these rights for filing with the SRBA District Court. Upon filing of the Director's Report for water rights in Basin 01, including the rights held by members of the Coalition, the State of Idaho will file a motion with the SRBA District Court seeking authorization for the interim administration of rights in Basin 01 by the Director based on the Director's Report.

55. The A&B Irrigation District holds the following surface water right as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00014
Basis for Right:	Decree
Priority Date:	April 1, 1939
Diversion Rate:	267 cfs
Beneficial Use:	Irrigation
Place of Use:	See Attachment B

56. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-02060A, 01-02064F, and 01-02068F claimed by the A&B Irrigation District in the SRBA. The current holder of record for these rights is the United States through the USBR. Determination of the interest held by the A&B Irrigation District in each of these rights is pending in the SRBA.

57. The American Falls Reservoir District #2 holds the following surface water right as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00006
Basis for Right:	Decree
Priority Date:	March 20, 1921
Diversion Rate:	1,700 cfs
Beneficial Use:	Irrigation
Place of Use:	See Attachment C

58. The Burley Irrigation District holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00007	01-00211B	01-00214B
Basis for Right:	Decree	Decree	Decree
Priority Date:	April 1, 1939	March 26, 1903	August 6, 1908
Diversion Rate:	163.4 cfs	655.88 cfs	380 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation
Place of Use:	See Attachment D		

59. The Milner Irrigation District holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00009	01-00017	01-02050
Basis for Right:	Decree	Decree	License
Priority Date:	April 1, 1939	April 30, 1931	October 25, 1939
Diversion Rate:	121 cfs	135 cfs	37 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation
Place of Use:	See Attachment E		

60. The Letter and Petition filed by the Surface Water Coalition referred to water right no. 01-02064B claimed by the Milner Irrigation District in the SRBA. The current holder of record for this right is the United States through the USBR. Determination of the interest held by the Milner Irrigation District in this right is pending in the SRBA.

61. The Minidoka Irrigation District holds the following surface water right as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00008
Basis for Right:	Decree
Priority Date:	April 1, 1939
Diversion Rate:	266.6 cfs
Beneficial Use:	Irrigation
Place of Use:	See Attachment F

62. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-04045, 01-10187, 01-10188, 01-10189, 01-10190, 01-10191, 01-10192, 1-10193, 01-10194, 01-10195, and 01-10196 claimed by the Minidoka Irrigation District in the SRBA. The basis for water right no. 01-04045 is a beneficial use claim filed pursuant to Idaho Code § 42-243 for which the current holder of record is the Amalgamated Sugar Company. The remaining water rights are based on claims filed in the SRBA under Idaho Code § 42-1409 for which the current holder of record, except for 01-10192 and 01-10193, is the United States through the USBR. Determination of the interest held by the Minidoka Irrigation District in each of these rights is pending in the SRBA.

63. The North Side Canal Company holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00005	01-00016	01-00210A
Basis for Right:	Decree	Decree	Decree
Priority Date:	December 23, 1915	August 6,1920	October 11, 1900
Diversion Rate:	300 cfs	1,260 cfs	54 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation

Water Right No.:	01-00210B	01-00212	01-00213
Basis for Right:	Decree	Decree	Decree
Priority Date:	October 11, 1900	October 7, 1905	June 16, 1908
Diversion Rate:	346 cfs	2,250 cfs	890 cfs
Beneficial Use:	Irrigation	Irrig., Irrig. from Storage, Irrig. storage	Irrigation

Water Right No.:	01-00215	01-00220
Basis for Right:	Decree	Decree

Priority Date:	June 2, 1909	June 29, 1910
Diversion Rate:	500 cfs	3,000 cfs
Beneficial Use:	Irrigation	Irrigation
Place of Use:	See Attachment G	

64. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-02064C, 01-10042B, 01-10043A, 01-10045B, and 01-10053A claimed by the North Side Canal Company in the SRBA. The current holder of record for water right no. 01-02064C is the United States through the USBR. The remaining water rights are based on claims filed in the SRBA under Idaho Code § 42-1409 for which the current holder of record is also the United States through the USBR. Determination of the interest held by the North Side Canal Company in each of these rights is pending in the SRBA.

65. The Twin Falls Canal Company holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00004	01-00010	01-00209
Basis for Right:	Decree	Decree	Decree
Priority Date:	December 22, 1915	April 1, 1939	October 11, 1900
Diversion Rate:	600 cfs	180 cfs	3,000 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation
Place of Use:	See Attachment H		

66. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-02064A, 01-10042A, 01-10043, and 01-10045A claimed by the Twin Falls Canal Company in the SRBA. The current holder of record for water right no. 01-02064A is the United States through the USBR. The remaining water rights are based on claims filed in the SRBA under Idaho Code § 42-1409 for which the current holder of record is also the United States through the USBR. Determination of the interest held by the Twin Falls Canal Company in each of these rights is pending in the SRBA.

67. Because sufficient water could not be obtained from the natural and unregulated flow of the Snake River for the full irrigation of lands authorized under the surface water rights held by the members of the Surface Water Coalition as well as surface water rights held by other entities in the Upper Snake River Basin of Idaho with points of diversion at and upstream of Milner Dam, the USBR constructed dams to provide reservoirs to capture and store water from the Snake River when water surplus to irrigation demands was available, generally during the non-irrigation season, for subsequent release to supplement existing water rights for natural flow to help meet irrigation shortages. Additionally, these reservoirs are used to generate power incidental to reservoir releases for irrigation and flood control. Storage reservoirs developed by the USBR include Jackson Lake, Ririe Reservoir, Lake Walcott, American Falls Reservoir, and Palisades Reservoir.

68. The USBR holds the following surface water rights as claimed in the SRBA for diversion of water from the Snake River for irrigation, reservoir storage for irrigation, and reservoir releases for irrigation and incidental power generation under some rights:

Water Right No.:	01-00284	01-02064	01-02068
Basis for Right:	Decree	License	License
Priority Date:	March 30, 1921	March 30, 1921	June 28, 1939
Reservoir:	American Falls	American Falls	Palisades
Storage Volume:	1.7 million acre-feet	1.8 million acre-feet	1.4 million acre-feet

69. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-04052, 01-04055, 01-04056, 01-04057, 01-10042, 01-10043, 01-10044, 01-10045, and 01-10053 claimed by the USBR in the SRBA. The basis for water rights nos. 01-04052, 01-04055, 01-04056, 01-04057, 01-10042, 01-10043, 01-10044, 01-10045, and 01-10053 are beneficial use claims filed pursuant to Idaho Code § 42-243 or claims filed pursuant to Idaho Code § 42-1409. Determination of each of these rights is pending in the SRBA.

70. The members of the Surface Water Coalition entered into contracts with the USBR for the use of water yielded from storage space in the reservoirs described in Finding No. 67 under the water rights described in Findings Nos. 68 and 69 as follows:

a. A&B Irrigation District –
46,826 acre-feet of storage space in American Falls Reservoir
90,800 acre-feet of storage space in Palisades Reservoir
Total: 137,626 acre-feet of storage space

b. American Falls Reservoir District #2 –
393,550 acre-feet of storage space in American Falls Reservoir

c. Burley Irrigation District –
31,892 acre-feet of storage space in Lake Walcott
155,395 acre-feet of storage space in American Falls Reservoir
39,200 acre-feet of storage space in Palisades Reservoir
Total: 226,487 acre-feet of storage space

d. Milner Irrigation District –
44,951 acre-feet of storage space in American Falls Reservoir
45,640 acre-feet of storage space in Palisades Reservoir
Total: 90,591 acre-feet of storage space

e. Minidoka Irrigation District –
186,030 acre-feet of storage space in Jackson Lake
63,308 acre-feet of storage space in Lake Walcott
82,216 acre-feet of storage space in American Falls Reservoir
35,000 acre-feet of storage space in Palisades Reservoir
Total: 366,554 acre-feet of storage space

f. North Side Canal Company –
312,007 acre-feet of storage space in Jackson Lake
431,291 acre-feet of storage space in American Falls Reservoir
116,600 acre-feet of storage space in Palisades Reservoir
Total: 859,898 acre-feet of storage space

g. Twin Falls Canal Company –
97,183 acre-feet of storage space in Jackson Lake
148,747 acre-feet of storage space in American Falls Reservoir
Total: 245,930 acre-feet of storage space

71. Legal title to the water rights described in Findings Nos. 68and 69 is held by the USBR. The beneficial use of the water provided under the storage water contracts described in Finding No. 70 is made by the landowners within the respective service areas of the members of the Surface Water Coalition.

72. Water that is supplied through the storage contracts described in Finding No. 70 is supplemental to the water rights held by the members of the Surface Water Coalition authorizing the diversion and beneficial use of the natural flow of the Snake River. Members of the Surface Water Coalition rely on their natural flow water rights together with the supplemental water supply resulting from their rights under storage contracts with the USBR, and in some instances supplemental ground water rights, to provide a full water supply for their respective irrigation needs. The actual amount of storage used for irrigation during any given irrigation season varies based upon climatic conditions.

General Findings in Response to Letter and Petition Filed by the Surface Water Coalition

73. The Petition filed by the Surface Water Coalition did not include the names, addresses, and description of the water rights outside of water districts held by ground water users who are alleged by the Coalition to be causing material injury to the surface water rights held by or for the benefit of members of the Coalition, in so far as such information is known by the members of the Coalition or can be reasonably determined by a search of public records, as required by Rule 30.01.b. of the Conjunctive Management Rules.

74. The Surface Water Coalition has since preliminarily identified the names and addresses of approximately 3,000 persons and other entities holding ground water rights that the Coalition allege to be causing material injury to the surface water rights held by or for the benefit of members of the Coalition. On or about April 1, 2005, the Coalition began serving the holders of such ground water rights with its *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area* as required by Rule 30.02 of the Conjunctive Management Rules (IDAPA 37.03.11.030.02) and Rule 230 of the Department's rules of procedure (IDAPA 37.01.01.230).

75. Resolution of the Petition and the associated contested case pursuant to Rule 30 of the Conjunctive Management Rules (IDAPA 37.03.11.030) are pending. Resolution of the Petition as it regards the administration of water rights in the American Falls Ground Water Management Area pursuant to Rule 41 of the Conjunctive Management Rules (IDAPA 37.03.11.041) is also pending.

76. The Letter filed by the Surface Water Coalition limited the administration and curtailment of junior priority ground water rights sought by the Coalition to Water District No. 120. The Letter did not seek the administration and curtailment of junior priority ground water rights in Water District No. 130, which includes ground water rights held by members of the North Snake Ground Water District (including some also holding shares in the North Side Canal Company), members of the Magic Valley Ground Water District, and the United States for the benefit of members of the A&B Irrigation District.

77. Using the Department's ground water model for the ESPA, Department staff simulated the curtailment of all ground water rights in Water District No. 120 separately and in Water District No. 130 separately using the average annual consumptive use for irrigation beginning in 1980 through 2001. The results of these simulations showed that at steady-state conditions, the reach gain to the Snake River between the Near Blackfoot Gage and the USGS stream gage located 1 mile downstream from Minidoka Dam ("Minidoka Gage") would be greater by 429,300 acre-feet annually, an amount equal to 66 percent of the total average annual ground water depletions in Water District No. 120, from curtailment of all ground water rights in Water District No. 120. For curtailment of all ground water rights in Water District No. 130, the reach gain between the Near Blackfoot Gage and the Minidoka Gage would be greater by 195,500 acre-feet annually, an amount equal to 35 percent of the total average annual ground water depletions in Water District No. 130.

78. Based on the 2-year, 3-year, 4-year, and 5-year moving averages of unregulated (corrected for reservoir storage) natural flow in the Snake River at the USGS stream gage located 2.4 miles upstream of Heise, Idaho ("Heise Gage"), since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record.

79. The Department has records of reach gains to the Snake River between the Near Blackfoot Gage and the Neeley Gage for every year since and including 1928. The total reach gains for each of these years are shown on Attachment I. Based on these records, there is no significant trend, up or down, for the 72 years of record from 1928 through 1999. Since 1999, there has been a significant decrease in the reach gains, reaching record lows in 2003, which correspond to the consecutive years of drought in the Upper Snake River Basin since 2000.

80. Using the Department's ground water model and under contract with the Department, the Idaho Water Resources Research Institute ("IWRRI") simulated the effects of continuing ground water diversions, with no other changes, (the "Base Case Scenario") by repeatedly using the input for the time period used to calibrate the ground water model (May 1, 1980 through April 30, 2002). The results from this simulation, as well as from a companion water budget analysis, indicate that "... as of May 2002, the Snake River Plain aquifer [sic] is close to dynamic equilibrium." IWRRI Technical Report 04-001. Based on these results,

reductions of flows in hydraulically-connected reaches of the Snake River and its tributaries resulting from ground water depletions were essentially the same in 2004 as in 1999. Therefore, ground water depletions are not the cause of the declines in measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999.

81. Using the Department's ground water model, IWRRI also simulated the effects of curtailing ground water diversion and use across the ESPA under ground water rights junior to January 1, 1870; January 1, 1949; January 1, 1961; January 1, 1973; and January 1, 1985; with no other changes using separate model simulations (the "Curtailment Scenario"). IWRRI Technical Report 04-023. The simulated reach gain accruals from the Near Blackfoot Gage and the Neeley Gage and from the Neeley Gage to the Minidoka Gage represent the additional flows that would be present in the Snake River in those river reaches if ground water diversion and use junior to one of the selected priority dates were curtailed and no other changes occurred.

82. The effect of ground water depletions described in Findings 25, 26, 27, and 81 reduces the amount of natural flow, over time. As a result, members of the Coalition may use more storage in some years than would otherwise be used but for ground water depletions, which in those years reduces the amount of carry-over storage at the end of the irrigation season for a particular year that would otherwise be available for the following year. At steady-state conditions, this has essentially the same effect as if the holders of ground water rights replaced the diversion and use of ground water instead with diversion and use of storage releases.

83. If American Falls Reservoir does not fill in a particular year, the effect of ground water depletions described in Findings 25, 26, 27, and 81 can also reduce the amount of water in the Snake River that would otherwise be available for diversion to storage in American Falls Reservoir under the rights held by the United States through the USBR, described in Finding 68, for the benefit of the members of the Coalition.

84. Another significant action affecting the amount of storage available for release and diversion by some members of the Surface Water Coalition, most notably the A&B Irrigation District, the North Side Canal Company, and the Twin Falls Canal Company, is the use of the Water District 01 Rental Pool, which is operated pursuant to Idaho Code § 42-1765 and the "Water Supply Bank Rules" of the Idaho Water Resource Board (IDAPA 37.02.03).

85. The A&B Irrigation District supplied some of its storage water to the rental pool, 20,000 acre-feet in 2000 and 3,000 acre-feet in 2002, for rental and use by others at the beginning of and prior to the current sequence of drought years, thereby reducing the subsequent carryover storage available to the A&B Irrigation District. The A&B Irrigation District has also entered into exchange agreements that have reduced the storage supplies available to the District.

86. The Minidoka Irrigation District has also supplied some of its storage water to the rental pool, 10,000 acre-feet in 2000 and 23,800 acre-feet in 2003, for rental and use by others. Under the ongoing drought conditions persisting since 2000, water from the relatively senior priority bottom storage space in Jackson Lake under the contract held by the Minidoka Irrigation District has been heavily drafted. Although the bottom storage space in Jackson Lake has refilled every year during the ongoing drought conditions persisting since 2000, the relatively junior

priority top storage space in Jackson Lake under the contracts held by the North Side Canal Company and the Twin Falls Canal Company has not filled. Under these conditions, because the bottom space in Jackson Lake refills, the effects of the water supplied to the rental pool by the Minidoka Irrigation District, and subsequently used by others, reduced the fill of the top storage space in Jackson Lake in an amount equal to the water supplied to the rental pool by the Minidoka Irrigation District, thereby reducing the subsequent carryover storage available to the North Side and Twin Falls Canal Companies. The current Rental Pool Procedures for the Water District 01 Rental Pool have been revised to address these effects in 2005 and future years.

87. To the extent entities holding contracts to use water from relatively senior priority storage space in USBR reservoirs use more storage, as described in Finding 82, and that storage space refills, under the drought conditions persisting since 2000 the increased use of storage further reduces the fill of junior priority storage space, thereby further reducing the subsequent carryover storage available to the North Side and Twin Falls Canal Companies.

Water Supply Historically Available and Predicted to be Available in 2005

88. Whether effects of ground water depletions result in material injury to the senior priority surface water rights held by the members of the Surface Water Coalition in a particular year depends in large part on the total water supply, under natural flow water rights and from reservoir storage, and in some instances supplemental ground water rights, otherwise available to each member of the Coalition in that year. For example, for the irrigation year beginning November 1, 1996, and ending October 31, 1997, the total unregulated natural flow in the Snake River at the Heise Gage was 8.4 million acre-feet, which was the maximum total unregulated flow of record. In 1997, the water supply available to each member of the Surface Water Coalition under each member's natural flow water rights (described in Findings Nos. 55, 57, 58, 59, 61, 63, and 65) supplemented by stored water (described in Findings No. 67 and 68) constituted a full supply of water for the beneficial uses authorized under each member's water rights. On October 31, 1997, the amount of carry-over storage in the Upper Snake River Basin reservoirs was nearly 3 million acre-feet, or about 140 percent of the 30-year average (1970 through 2000) for carry-over storage. In 1997, ground water depletions caused reductions of flows from what would otherwise be available in the Snake River between the Near Blackfoot Gage and the Neeley Gage. Because each member of the Surface Water Coalition had a full supply of water for the beneficial uses authorized under each member's rights, ground water depletions did not cause material injury to the members of the Surface Water Coalition in 1997.

89. Based on the information submitted by the Surface Water Coalition in response to the Order of February 14, 2004, the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, were each able to divert sufficient supplies of water, under each entity's natural flow water rights and storage releases combined, to make "full" deliveries of water to the headgates of their shareholders in the irrigation years 1990-1991 and 1995-2000. Based on the information submitted for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, full headgate deliveries are defined by these members of the Coalition as average rates of diversion at the shareholder-

headgates during each month of the irrigation season of 5/8-inch, 5/8-inch, and 3/4-inch, respectively. The Twin Falls Canal Company was able to divert a sufficient supply of natural flow and storage releases to make full headgate deliveries in 1993 as well.

90. Beginning in about the 1960 to 1970 time period through the most recent years, the total combined diversions of natural flow and storage releases above Milner Dam for irrigation using surface water supplies have declined from an average of nearly 9 million acre-feet annually to less than 8 million acre-feet annually, notwithstanding years of drought, because of conversions from gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities such as the members of the Surface Water Coalition. The measured decrease in cumulative surface water diversions above Milner for irrigation reflects the fact that less water is generally needed in the present time to fully irrigate lands authorized for irrigation with a certain crop mix under certain climatic growing conditions than was needed in the 1960 to 1970 time frame for the same lands, crop mix, and climatic growing conditions.

91. A full supply of water for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company is not the maximum amount of combined natural flow and storage releases diverted that yielded full headgate deliveries, based on those entities' definition of full supply, but the minimum amount of combined natural flow and storage releases diverted recently that provided for full headgate deliveries, recognizing that climatic growing conditions do affect the minimum amount of water needed and such effects can be significant.

92. For the American Falls Reservoir District #2 and the North Side Canal Company, the total diversions of natural flow and storage releases were the lowest while maintaining full headgate deliveries most recently in 1995. The total quantity of water diverted during the irrigation year ending October 31, 1995, by the American Falls Reservoir District #2 was 405,600 acre-feet and by the North Side Canal Company was 988,200 acre-feet.

93. For the Twin Falls Canal Company, the total diversions of natural flow and storage releases were the lowest while maintaining full headgate deliveries in 1993, although the 1993 diversions were only 19,300 acre-feet less than the total diversions of 1,075,900 acre-feet diverted by the Twin Falls Canal Company during the irrigation year ending October 31, 1995.

94. What might constitute a full supply of water for the A&B, Burley, and Milner irrigation districts, can not be determined from the headgate delivery information submitted by these entities in response to the Order of February 14, 2005. That response also states that the "Minidoka Irrigation District does not deliver by measurement to the headgate."

95. For the irrigation year ending on October 31, 1995, the A&B, Burley, Milner, and Minidoka irrigation districts diverted the following amounts of water under their respective natural flow water rights and entitlements to storage water releases and had the following amounts of storage carried over for 1996:

	1995 Diversions (acre-feet)	1995 Carryover (acre-feet)	Average Carryover 1990-2004 (acre-feet)
A&B Irrigation District:	50,000	103,300	64,900
Burley Irrigation District:	254,300	159,200	95,900
Milner Irrigation District:	50,800	75,500	44,000
Minidoka Irrigation District:	280,200	258,000	150,300

96. For the irrigation year ending on October 31, 1995, the amount of carryover storage for the A&B, Burley, Milner, and Minidoka irrigation districts was substantially above the 1990-2004 average by 59 percent, 66 percent, 72 percent, and 72 percent, respectively. The A&B, Burley, Milner, and Minidoka irrigation districts each had ample storage remaining after the 1995 irrigation season, which could have been released and diverted during the 1995 irrigation season had it been needed. Therefore, it is reasonable to conclude that as for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, the A&B, Burley, Milner, and Minidoka irrigation districts each had a full supply of water in 1995 considering both natural flow and storage releases.

97. The USBR and the U. S. Army Corps of Engineers ("USACE") jointly prepare operating forecasts for unregulated inflow from the Upper Snake River Basin projected for the Heise Gage beginning soon after January 1 of each year. The Heise Gage location is the most representative location for overall surface water supply conditions in the Upper Snake River Basin.

98. The USBR and USACE jointly issue forecasts each year for unregulated inflow at the Heise Gage after February 1, for the period February 1 through July 31; after March 1, for the period March 1 through July 31; after April 1, for the period April 1 through July 31; and after May 1, for the period May 1 through July 31. Because the snowpack in the Upper Snake River Basin generally peaks in April, with most of the melting of the snowpack and resulting inflow occurring thereafter, the later forecasts are generally more accurate than the earlier forecasts, based on comparisons of predicted inflow versus observed inflow, although at times the later forecasts are less accurate. The forecast issued soon after April 1 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.

99. The U. S. Natural Resources and Conservation Service ("NRCS") operates and maintains Snotel sites that measure and record snowpack conditions throughout the western United States that are used to develop forecasts for inflow to various river systems and for other purposes. The USBR and USACE use the NRCS Snotel sites in the Upper Snake River Basin to develop the inflow forecasts described in Findings Nos. 97 and 98.

100. The joint operating forecast prepared by the USBR and the USACE for unregulated inflow from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31 became available on April 7, 2005, and predicts an unregulated inflow of 2,340,000 acre-feet. While the actual, measured inflow from April 1, 2005, through July 31, 2005, will undoubtedly be different than the predicted inflow of 2,340,000 acre-feet, the predicted inflow is similar to the measured, unregulated inflows at the Heise Gage for two recent

years in the present sequence of drought years, 2002 and 2004. In 2002, the unregulated inflow for the period April 1 through July 31 was 2,362,600 acre-feet, and in 2004 the unregulated inflow for the same period was 2,386,800 acre-feet.

101. The amount of unregulated inflow that may be divertible under the water rights held by members of the Surface Water Coalition and the amount of water that may be divertible to storage in the reservoirs operated by the USBR for the benefit of the members of the Coalition can be highly variable and depends on climatic conditions and when water rights authorizing diversions from the Snake River are in priority. For example, even though the unregulated inflow at the Heise Gage from April 1 though July 31 was 24,200 acre-feet greater in 2004, than for the comparable period in 2002, the amount of water diverted into storage in the reservoirs operated by the USBR was greater in 2002 than in 2004 by 381,300 acre-feet. And in 2004, the amount of natural flow diverted under the rights held by the Twin Falls Canal Company was 28,400 acre-feet greater than the amount it diverted in 2002, while the amount of natural flow diverted under the rights held by the American Falls Reservoir District #2 in 2004 was 17,700 acre-feet less than in 2002.

102. Attachments J through P show correlations between measured, unregulated inflows at the Heise Gage for the period April 1 through July 31 and the amounts of natural flow historically diverted by each of the members of the Surface Water Coalition for the years 1990 through 2004.

103. Predicting the amount of unregulated inflow that may be divertible in 2005 under the water rights held by individual members of the Surface Water Coalition based on what was historically divertible in a specific year is uncertain because it is unlikely that the climatic conditions and the resulting portion of the inflow divertible by individual members of the Coalition will be exactly the same in 2005 as in any prior particular year. While acknowledging the uncertainty in predicting the amount of unregulated inflow that may be divertible in 2005 under the water rights held by individual members of the Coalition, the average of the inflow diverted in 2002 and 2004 for each member of the Coalition provides a reasonable lower-bound estimate of the natural flow that may be divertible in 2005 by each member of the Coalition.

104. For each member of the Surface Water Coalition, the average of the inflow diverted in 2002 and 2004 is near or less than, in varying amounts, the divertible natural flow derived from the correlations in Attachments J through P for an inflow at Heise of 2,340,000 acre-feet, less one standard error of estimate. The average of the inflow diverted in 2002 and 2004 for each member of the Coalition is considered to be a reasonably likely projection of the total amount of water that may be available to each member of the Coalition in 2005 under their respective rights, subject to variations caused by climatic conditions. The average of the inflow diverted in 2002 and 2004 for each member of the Coalition is as follows:

	2002 Diversion (acre-feet)	2004 Diversion (acre-feet)	Average Diversion (acre-feet)
A&B Irrigation District:	900	0	500
American Falls Res. Dist. #2:	17,800	100	9,000
Burley Irrigation District:	129,900	139,000	134,500
Milner Irrigation District:	5,100	3,600	4,400
Minidoka Irrigation District:	107,600	104,700	106,200
North Side Canal Company:	357,000	309,500	333,300
Twin Falls Canal Company:	855,100	883,500	869,300

105. Similar to predicting the amount of natural flow that may be divertible in 2005, predicting the volume of water that may be storable in the reservoirs operated by the USBR for the benefit of the members of the Surface Water Coalition based on what was historically storable in a specific year is uncertain because as for divertible natural flow, it is unlikely that the climatic conditions and the resulting portion of the inflow divertible to storage will be the same in 2005 as in any prior particular year. While acknowledging the uncertainty in predicting the amount of unregulated inflow that may be storable in 2005 under the water rights held by the USBR, averaging (1) the actual storage as of April 1, 2005, added to the inflow stored after April 1 in 2002 and (2) the actual storage as of April 1, 2005, added to the inflow stored after April 1 in 2004, and reducing the average by the estimated evaporation in 2005, provides a reasonable estimate of the storage that may be available in 2005 for the benefit of each member of the Coalition. This results in the following maximum storage predicted for 2005, adjusted for estimated evaporation:

	2005 Max. Storage (acre-feet)	2005 Evap. (acre-feet)	2005 Net Storage (acre-feet)
Jackson Lake:	718,800	20,800	698,000
Palisades Winter Water Savings:	259,600	7,500	252,100
Other Palisades Reservoir:	76,700	2,200	74,500
Henrys Lake:	24,900	700	24,200
Island Park Reservoir:	63,500	1,800	61,700
Grassy Lake:	0	0	0
Ririe Reservoir:	0	0	0
Amer. Falls Winter Water Sav.:	156,800	4,500	152,300
Other American Falls:	1,472,500	42,600	1,429,900
Lake Walcott:	95,200	2,800	92,400
Totals:	2,868,000	82,900	2,785,100

106. Using the Department's accounting program for storage, the maximum predicted storage less evaporation for 2005 was allocated among all reservoir storage spaceholders in the Upper Snake River Basin, which resulted in the following predicted storage allocations for the Surface Water Coalition. When added to the amount of natural flow predicted to be available in 2005, as set forth in Finding 104, the predicted total supply for each member of the Coalition is

considered to be a reasonably likely projection of the total amount of water that may be available to each member of the Coalition in 2005, subject to variations caused by climatic conditions, for the limited purpose of assessing reasonably likely material injury caused by the diversion and use of ground water under junior priority rights. The reasonably likely predicted total supply for the purpose of predicting material injury for each member of the Coalition is as follows:

	2005 Natural Flow (acre-feet)	2005 Storage (acre-feet)	Total 2005 Supply (acre-feet)
A&B Irrigation District:	500	44,600	45,100
American Falls Res. Dist. #2:	9,000	379,100	388,100
Burley Irrigation District:	134,500	217,300	351,800
Milner Irrigation District:	4,400	50,500	54,900
Minidoka Irrigation District:	106,200	323,300	429,500
North Side Canal Company:	333,300	733,700	1,067,000
Twin Falls Canal Company:	869,300	201,300	1,070,600

107. In addition to the water rights authorizing the diversion and use of water from the Snake River held by the Surface Water Coalition and the contract entitlements to divert storage releases as supplemental supplies to the Coalition member's rights, an unknown number of landowners in the member irrigation districts and shareholders in the member canal companies hold supplemental ground water rights. Because the members of the Coalition did not identify landowners and shareholders, or the places of use within their boundaries, that receive water from the Coalition members and that also can be supplied ground water under supplemental rights in a timely manner, prior to the submittal of April 18, 2005, the use of supplemental ground water rights can not be presently assessed. The Director will review and consider all of the additional information submitted on April 18, 2005, and if warranted, issue an amended order in this matter.

Material Injury Predicted in 2005

108. In its Letter, the Surface Water Coalition states that: "Impacts have been occurring as a result of ground water depletions and reduced reach accruals for several years, resulting in material injury to the water rights of the Surface Water Coalition. ... Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as demonstrated by the Model, results in a 'material injury' to the Surface Water Coalition's senior surface water rights."

109. None of the members of the Surface Water Coalition have identified lands that are entitled to receive surface water but have not been irrigated or where crops could not be harvested because of shortages in the surface water supplies available to members of the Coalition under the members' various rights. The Coalition simply alleges that material injury is occurring because in recent years members of the Coalition have been unable to divert natural flow at the diversion rates authorized under the members' rights for as long a period of time as the members otherwise could, and that members have been unable to accrue as much storage in

USBR reservoirs as the members otherwise could, but for depletions caused by diversions of ground water under junior priority water rights.

110. The members of the Surface Water Coalition supply water to lands located in the counties of Lincoln, Gooding, Jerome, Twin Falls, and several other counties. Department staff contacted individuals employed by the University of Idaho as Agricultural Extension Agents and by the U. S. Department of Agriculture Farm Service Agency as County Directors (each referred to as "FSA Director") in these four counties to glean information about shortages in the amounts of water available for irrigation in recent years.

111. Among the counties of Lincoln, Gooding, Jerome, and Twin Falls, shortages in the surface water supplies for irrigation in Lincoln County have been the most problematic where the FSA Director estimates losses in crop production to be 35 percent because of shortages in surface water supplies, although the losses were not primarily the result of shortages in supplies from the Snake River.

112. In Gooding County, the FSA Director reported that the North Side Canal Company has carefully managed water diverted to minimize waste, shareholders have reduced nozzle sizes on sprinkler systems, and that estimated losses in crop production because of shortages in surface water supplies were about 5 percent in 2004. For lands served by the American Falls Reservoir District #2, the FSA Director reported that the 10-day shut off at the end of May in 2004 significantly impacted some growers, corn crops were stressed but overall yields were near normal, the fourth cutting of hay was foregone in 2004 so that available water could be used to finish corn crops, and overall losses in crop production were estimated to be 15 percent in 2004.

113. In Jerome County, the FSA Director reported that shortages in surface water supplies have caused only slight declines in crop production.

114. In Twin Falls County, the FSA Director and University of Idaho Extension Agent reported that shortages in surface water supplies in 2004 caused significant impacts on lands served by the Salmon Falls Canal Company, but impacts were not as significant on lands served by the Twin Falls Canal Company. In 2004, lands served by the Twin Falls Canal Company experienced some loss in crop production, the last cutting of hay was reduced, and yields from corn crops were reduced largely because of delayed harvest, not shortages of water.

115. To predict the shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005, the amounts of water diverted in 1995 are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders. If crop evapotranspiration is greater in 2005 than in 1995, the amounts of water diverted in 1995 may be less than what is needed for a full supply in 2005. If crop evapotranspiration is less in 2005 than in 1995, the amounts of water diverted in 1995 may be more than what is needed for a full supply in 2005.

116. The shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005 are estimated by subtracting the reasonably likely total

supplies of natural flow and storage set forth in Finding 106 from the minimum amounts needed for full deliveries based on 1995 diversions as follows:

	Minimum Full Supply Needed (acre-feet)	Predicted 2005 Supply (acre-feet)	Predicted Shortages in 2005 (- is surplus) (acre-feet)
A&B Irrigation District:	50,000	45,100	4,900
American Falls Res. Dist. #2:	405,600	388,100	17,500
Burley Irrigation District:	254,300	351,800	-97,500
Milner Irrigation District:	50,800	54,900	-4,100
Minidoka Irrigation District:	280,200	429,500	-149,300
North Side Canal Company:	988,200	1,067,000	-78,800
Twin Falls Canal Company:	1,075,900	1,070,600	5,300

117. The reasonably likely shortages set forth in Finding 116 total 27,700 acre-feet and assume that the members of the Surface Water Coalition that are expected to have shortages (A&B Irrigation District, American Falls Reservoir District #2, and Twin Falls Canal Company) use all of their carryover storage from 2004. The predicted surpluses (Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, and North Side Canal Company) are the amounts of estimated carryover storage at the end of the 2005 irrigation season.

118. Members of the Surface Water Coalition are entitled to maintain a reasonable amount of carryover storage to minimize shortages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rules (IDAPA 37.03.11.042.01.g).

119. The reasonable amount of carryover storage to which members of the Surface Water Coalition are entitled is determined by averaging (1) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2002 and (2) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2004. This results in the following amounts of reasonable carryover storage for Coalition members:

	2005 Carryover Based on 2002 (acre-feet)	2005 Carryover Based on 2004 (acre-feet)	Reasonable Carryover Based on Average (acre-feet)
A&B Irrigation District:	3,500	13,500	8,500
American Falls Res. Dist. #2:	6,300	96,100	51,200
Burley Irrigation District:	-50,000	-36,200	0
Milner Irrigation District:	2,300	12,100	7,200
Minidoka Irrigation District:	-83,800	-52,900	0
North Side Canal Company:	-36,600	203,100	83,300
Twin Falls Canal Company:	34,600	42,200	38,400

120. The reasonably likely material injury predicted for 2005 is the sum of the shortages set forth in Finding 116, if any, and the shortfalls in predicted carryover as compared to the reasonable amounts of carryover storage set forth in Finding 119, if any. If the material injury predicted for 2005 is mitigated with replacement water, the following are the predicted amounts of injury and ending carryover storage for 2005 for the members of the Surface Water Coalition:

	Predicted 2005 Material Injury Shortages + Carryover Shortfalls (acre-feet)	Predicted 2005 Carryover (acre-feet)
A&B Irrigation District:	13,400	8,500
American Falls Res. Dist. #2:	68,700	51,200
Burley Irrigation District:	0	97,500
Milner Irrigation District:	3,100	7,200
Minidoka Irrigation District:	0	149,300
North Side Canal Company:	4,500	83,300
Twin Falls Canal Company:	43,700	38,400
Totals:	133,400	435,400

If the material injury predicted for 2005 is resolved through curtailment, the predicted amounts of carryover storage for 2005 for the Coalition members can not presently be determined, but will be less than shown above, except for the Burley and Minidoka Irrigation Districts.

121. The material injury predicted for 2005 is reasonably likely. However, climatic conditions for the remainder of 2005 can not be precisely predicted, meaning that the predicted material injury and the carryover storage, assuming the predicted material injury is mitigated with replacement water, are both likely to be greater or smaller.

122. A mechanism can be devised whereby additional mitigation will be required if the predicted material injury is less than what is later determined to be the actual material injury, and credits against future mitigation requirements can be recognized if the predicted material injury is more than what is later determined to be the actual material injury.

Simulated Curtailment of Junior Priority Ground Water Rights

123. Nearly all ground water rights authorizing the diversion and use of ground water from the ESPA are junior in priority to the surface water rights held by or for the benefit of the Surface Water Coalition described in Findings 55, 57, 58, 59, 61, 63, 65, and 68. Based on simulations using the Department's ground water model for the ESPA described in Findings 29 and 30, using the average annual consumptive use for irrigation beginning in 1980 through 2001, curtailing all ground water diversions in Water District No. 120 would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total

amount of 429,300 acre-feet, which equals 66 percent of the total average annual ground water depletions in Water District No. 120, for each year of curtailment. Curtailing all ground water rights in Water District No. 130 would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 195,500 acre-feet, which equals 35 percent of the total average annual ground water depletions in Water District No. 130, for each year of curtailment. Curtailing all ground water diversions in Water Districts No. 120 and No. 130 for one year would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 624,800 acre-feet, which is nearly five times the amount of the reasonably likely material injury predicted to occur in 2005 to the water rights held by or for the benefit of the Surface Water Coalition members.

124. Based on the Department's water rights data base and ground water model for the ESPA, curtailing all ground water diversions, which at steady-state conditions reduce reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, see Finding 30), within the modeled area for one year under water rights having priority dates of February 27, 1979, and later will increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 133,900 acre-feet, over time.

125. Based on the Department's water rights data base and ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 124 within the area defined as the area of common ground water supply for the ESPA in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 125,600 acre-feet, over time.

126. Based on the Department's water rights data base and ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 124 within Water Districts No. 120 and No. 130, which are wholly within the area of common ground water supply for the ESPA defined in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would result in the curtailment of irrigation of 22,660 acres and 58,150 acres, respectively, and would increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by 79,800 acre-feet and 21,200 acre-feet, respectively, over time. The number of acres on which irrigation would be curtailed in Water Districts No. 120 and No. 130 total 80,810 acres, and the total amount of the simulated increase in reach gains over time between the Near Blackfoot Gage and the Minidoka Gage from curtailment in Water Districts No. 120 and No. 130 is 101,000 acre-feet.

127. Based on the Department's water rights data base and ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 124 within the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, using the most recent boundaries of the districts provided to the Department, within the area of common ground water supply for the ESPA defined in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would result in the curtailment of irrigation on the following acreages and increase reach gains in the Snake

River between the Near Blackfoot Gage and the Minidoka Gage over time by the following amounts:

	Acres Curtailed	Total Accruals (acre-feet)	1st 6-month Accruals (acre-feet)	2nd 6-month Accruals (acre-feet)	3rd 6-month Accruals (acre-feet)
North Snake District:	4,230	2,400	0	0	10
Magic Valley District:	17,200	17,800	10	110	280
Aberdeen-Amer. Falls District:	34,590	52,000	6,850	9,790	6,120
Bingham District:	11,460	14,900	1,760	2,830	1,790
Bonneville-Jefferson District:	8,280	7,200	100	510	660
Totals:	75,760	94,300	8,720	13,240	8,860

	4th 6-month Accruals (acre-feet)	5th 6-month Accruals (acre-feet)	6th 6-month Accruals (acre-feet)	7th 6-month Accruals (acre-feet)	8th 6-month Accruals (acre-feet)
North Snake District:	20	30	40	50	60
Magic Valley District:	440	530	590	600	610
Aberdeen-Amer. Falls District:	4,280	3,180	2,510	2,030	1,700
Bingham District:	1,260	940	750	610	510
Bonneville-Jefferson District:	640	560	490	430	370
Totals:	6,640	5,240	4,380	3,720	3,250

128. The total reach gain accruals set forth in Finding 127 are the total accruals that are simulated to occur over a time period of about 20 years or more from the curtailment of the diversion and use of ground water under the water rights and for the irrigation of the lands described in Finding 127 for a single year. The 6-month accruals set forth in Finding 127 are the simulated incremental additions to the reach gains for the first 4 years following curtailment for a single year. By the end of the fourth year, approximately 60 percent of the total reach gain accruals will have occurred. Additional reach gains would continue to accrue until the effects of the single year of curtailment have been fully realized.

129. If curtailment of the diversion and use of ground water under these same rights occurred within the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts during each and every year of a four-year period, the following 6-month accruals to the reach gains are simulated to occur using the Department's ground water model:

	Acres Curtailed	Total Accruals (acre-feet)	1st 6-month Accruals (acre-feet)	2nd 6-month Accruals (acre-feet)	3rd 6-month Accruals (acre-feet)
North Snake District:	4,230	9,600	0	0	10
Magic Valley District:	17,200	71,200	10	110	290
Aberdeen-Amer. Falls District:	34,590	208,000	6,850	9,790	12,970
Bingham District:	11,460	59,600	1,760	2,830	3,550
Bonneville-Jefferson District:	8,280	28,800	100	510	760
Totals:	75,760	377,200	8,720	13,240	17,580

	4th 6-month Accruals (acre-feet)	5th 6-month Accruals (acre-feet)	6th 6-month Accruals (acre-feet)	7th 6-month Accruals (acre-feet)	8th 6-month Accruals (acre-feet)
North Snake District:	20	40	70	90	120
Magic Valley District:	540	830	1,130	1,430	1,740
Aberdeen-Amer. Falls District:	14,080	16,150	16,580	18,170	18,280
Bingham District:	4,080	4,490	4,830	5,090	5,340
Bonneville-Jefferson District:	1,150	1,320	1,640	1,750	2,010
Totals:	19,870	22,830	24,250	26,530	27,490

130. The total increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage from curtailment for a single year within ground water districts is less than the total increase in reach gains from curtailment within Water Districts No. 120 and No. 130 by 6,700 acre-feet because not all ground water rights having priority dates of February 27, 1979, and later that are within Water Districts No. 120 and No. 130 are also within ground water districts. Nearly all such rights are located east of American Falls Reservoir in an area adjacent to the Aberdeen-American Falls Ground Water District. The amount 6,700 acre-feet is 12.9 percent of the 52,000 acre-feet increase in reach gains that would occur over time from curtailment for a single year in the Aberdeen-American Falls Ground Water District.

131. The predicted reach gains from curtailment of the diversion and use of ground water for irrigation described in Findings 123 through 129 is limited to the reach of the Snake River between the Near Blackfoot Gage and the Minidoka Gage. In its Letter the Surface Water Coalition alleges that water that would also accrue from curtailment of the diversion and use of ground water to the reach of the Snake River between the USGS stream gage located 2.5 miles north of Shelley, Idaho ("Shelley Gage"), and the Near Blackfoot Gage "... is needed and can be put to beneficial use under the Coalition's senior surface water rights." *Letter* at p. 3. Accruals to the reach of the Snake River between the Shelley Gage and the Near Blackfoot Gage that would occur from curtailment of the diversion and use of ground water are not considered because such accruals would be divertible by members of the Surface Water Coalition on a limited basis, particularly during years of low natural flow, since there are other surface water

rights under which diversions from that reach are made that are senior in priority to the rights held by members of the Coalition.

CONCLUSIONS OF LAW

1. The Director issues this Order subsequent to his Order of February 14, 2005, which provided that: "The Director will make a determination of the extent of likely injury after April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 1, 2005." This Order is issued by the Director prior to an opportunity for a hearing being provided to the parties. Any person aggrieved by the Order shall be entitled to a hearing before the Director to contest the action pursuant to Idaho Code § 42-1701A(3). Judicial review of any final order of the Director issued following the hearing shall be had pursuant to Idaho Code § 42-1701A(4).

2. On April 6, 2005, the Director requested the parties to brief the issue of whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party. The Director requested that the parties review the cases of *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921); *Scott v. Nampa Meridian Irr. Dist.*, 55 Idaho 672, 45 P.2d 1062 (1934); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997); and any other Idaho Supreme Court decisions that may be relevant to the issue raised.

3. IGWA, on behalf of the holders of potentially affected ground water rights answered the question in the negative. *Idaho Ground Water Appropriators' Brief in Response to Director's April 6, 2005 Order* ("IGWA Br."). Based upon its analysis of the cases for which the Director sought review, IGWA asserted: "Idaho courts have precluded administration as between water rights whose elements are established in separate, unrelated decrees, even where the respective rights have been incorporated within their own water districts under their separate decrees." IGWA Br. at 2.

4. IGWA relies principally upon language in the Idaho Supreme Court's decision in *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921) that a water rights decree "is not, and cannot be made, conclusive, as to parties who are strangers to it," and it would be "repugnant to a fundamental principle of our jurisprudence" to conclude that "one's rights can be affected by a decree to which he was a stranger." IGWA Br. at 3. IGWA notes that the Idaho Supreme Court recently restated this principle in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997) holding that "[a] decree entered in a private water adjudication binds only those parties to the decree." IGWA Br. at 3-4.

5. IGWA points out that the Idaho Supreme Court reversed the efforts of the Department to combine the operation of two water districts on Upper and Lower Reynolds Creek without first conducting a hearing to determine whether there are sufficient uncontested rights to develop a workable plan for water distribution. *Id.* at 4. "If not, then the [Department] should

proceed with an adjudication pursuant to I.C. § 42-1406 before combining these two districts into one." *Nettleton v. Higginson*, 98 Idaho 87, 94, 558 P.2d 1048, 1055 (1977). Finally, IGWA cites to an Idaho Supreme Court holding that where rights were decreed in separate adjudications, their relationships need to be determined in a single adjudication such as the SRBA before the rights can be administered together because, depending on the facts of the case, "priority-in-time might not necessarily result in priority of right." *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994).

6. The Surface Water Coalition and the Bureau of Reclamation answered the question of whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party in the positive. *Surface Water Coalition's Joint Memorandum in Response to Director's April 6, 2005 Legal Question* ("Coalition Br.") and *Reclamation's Brief in Response to Director's April 6, 2005 Request* ("USBR Br.").

7. The Surface Water Coalition argues that the Director's February 18, 2002, *Final Order Creating Water District 120* requires the Department and the watermaster of Water District 120 to administer by priority the rights of the surface water rights of the Coalition members and the ground water right holders represented by IGWA. Coalition Br. at 2-8. The Coalition also argues that Idaho law requires watermasters to administer all water rights within an organized water district by priority, regardless of the status of a general stream adjudication. Coalition Br. at 8-20. In support of this argument, the Coalition relies principally upon the decision of the Idaho Supreme Court in *Nettleton v. Higginson*. The Coalition summarizes the status of Idaho law on the issue raised as follows:

> [W]ater users not party to a former decree are subject to administrative enforcement of the decree by the Director, whether such administration arises from a call or from the Director's initiative; but, water users not party to a decree are not bound by the decree as *res judicata* in a subsequent adjudication by a court of competent jurisdiction.

Coalition Br. at 9.

8. The USBR argues that the rights of the ground water users represented by IGWA are presently subject to curtailment in favor of the senior surface water rights of the Surface Water Coalition members because of the provisions of the 1968 *Eagle Decree* (*Burley Irrigation Dist. v. Eagle*, No. 21406 (5th Jud. Dist. Twin Falls Cty., Idaho July 10, 1968)) which confirmed the water rights and contracts of the Coalition members and ordered that together they "constitute a scheme or plan for the administration of the Snake River and as such, are binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam." USBR Br. at 11. The USBR argues that this result is consistent with the holdings of the Idaho Supreme Court in *Higginson*, 98 Idaho at 94, 558 P.2d at 1055.

9. Following review of the briefs of the parties on the issue of whether Idaho law permits the members of the Surface Water Coalition to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party, the Director remains troubled by the conflicting court decisions and recognizes that the issue is not free from doubt. The Director is persuaded, however, that under the circumstances of the

present case it is appropriate to recognize the right of the Coalition members to pursue their delivery call against the holders of junior priority ground water rights within established water districts who were not parties to nor bound by the prior decrees that adjudicated the surface water rights of the Coalition members.

10. The Director reaches this conclusion to recognize the Surface Water Coalition delivery call based upon the holding of the majority of the Idaho Supreme Court in *Higginson*, 98 Idaho at 94, 558 P.2d at 1055, that the Department may rely upon a decree for the orderly distribution of water rights among the right holders within adjoining water districts on connected sources until such time as a court action is brought to challenge the rights established in the decree. In this instance, while water rights of the members of the Coalition have not been adjudicated in the SRBA simply because of the timing of the Director's Report for Basin 01, they possess rights that have long been administered by the watermaster of Water District 01.

11. The Director also reaches this conclusion based upon the fact that a junior water right is established subject to all existing water rights. If a junior water right holder has concerns regarding the validity of the senior water right making the delivery call, the junior right holder has the opportunity and right to challenge the senior water right in an adjudication proceeding. Thus, there is an avenue for addressing any due process concerns.

12. Finally, a contrary holding would de-stabilize the priority system and frustrate the conjunctive administration of water rights diverting from a common water supply. The Director must be cognizant of the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source. Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42-237a(g), and 42-607. Under the circumstances of the present case, the Director concludes that recognizing the pending deliver call of the members of the Surface Water Coalition is the proper result.

13. Idaho Code § 42-607 provides that the following shall apply during times of scarcity of water when it is necessary to distribute water between water rights in a water district created and operating pursuant to chapter 6, title 42, Idaho Code, in accordance with the priority of those rights:

> [A]ny person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply . . . .

14. Water rights nos. 01-04045, 01-04052, 01-04055, 01-04056, and 01-04057 listed in the Letter as being held by or for the benefit of members of the Surface Water Coalition are beneficial use rights claimed pursuant to Idaho Code § 42-243 and shall be treated as junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights. Only those water rights held by or for the benefit of the members of the Surface Water Coalition that are decreed, licensed, or permitted, taking into account overlapping and redundant rights,

shall have their priorities recognized in determining the extent of injury from the exercise of other decreed, licensed, or permitted water rights.

15. According to the Letter, members of the Surface Water Coalition hold entitlements to water in storage projects owned and operated by the United States through the USBR. While legal title to the water in those projects is held by the United States through the USBR, the SRBA District Court has recognized that delivery organizations, such as the members of the Surface Water Coalition, have beneficial or equitable title to storage water described in their contracts with the USBR. *Final Order on Cross-Motions for Summary Judgment*, Consolidated Subcase 91-63 (SRBA Dist. Ct., Idaho, January 7, 2005) (*appeal filed*). Therefore, the Surface Water Coalition has standing to assert rights to storage water in USBR reservoirs on the Snake River upstream of Milner Dam. Moreover, any concern regarding the standing of the members of the Coalition are resolved by the intervention of the USBR in this proceeding.

16. Surface water rights held by the United States through the USBR for the benefit of members of the Surface Water Coalition to divert water from the Snake River to storage for subsequent release for irrigation uses are supplemental to the natural flow water rights held by the members of the Surface Water Coalition. *See* Michael W. Straus, Commissioner, *Substantiating Report: Water Supply for Palisades Reservoir Project, Idaho*, 1946 U.S. Bur. Rec. 162; *see, e.g., Burley Irrigation Dist. v. Eagle*, No. 21406, Findings of Fact ¶ VIII (5th Jud. Dist. Twin Falls Cty., Idaho July 10, 1968), supplemented by *Aberdeen-Springfield Canal Co. v. Eagle*, No. 6117. Supplemental Decree (7th Jud. Dist., Fremont Cty., Idaho Mar. 12, 1969).

17. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

18. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

19. The issue of how to integrate the administration of surface and ground water rights diverting from a common water source in the Eastern Snake Plain area has been a continuing point of debate for more than two decades. To date, no court has directly and fully addressed the issue of how to integrate the administration of the surface and ground water rights that were historically administered as separate sources. The progress made in adjudicating the ground water rights in the Snake River Basin Adjudication and the development of the reformulated ground water model for the ESPA used by the Department to simulate the effects of ground water depletions on hydraulically-connected tributaries and reaches of the Snake River now allow for the State to address this issue during this period of unprecedented drought.

20. Resolution of the conjunctive administration issue lies in the application of two well established principles of the prior appropriation doctrine: (1) the principle of "first in time is first in right" and (2) the principle of optimum use of Idaho's water. Both of these principles are subject to the requirement of reasonable use.

21. "Priority of appropriations shall give the better right as between those using the water" of the state. Art. XV, § 3, Idaho Const. "As between appropriators, the first in time is first in right." Idaho Code § 42-106.

22. "[W]hile the doctrine of 'first in time is first in right' [applies to ground water rights] a reasonable exercise of this right shall not block full economic development of underground water resources." Idaho Code § 42-226.

23. It is the policy of this state to integrate the appropriation, use, and administration of ground water tributary to a stream with the use of surface water from the stream in such a way as to optimize the beneficial use of all of the water of this state. "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water . . .." IDAPA 37.03.11.020.03; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 119 (1912).

24. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the prior appropriation doctrine as implemented in Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. *See* Idaho Code § 42-607.

25. Water Districts No. 120 and No. 130 were created to provide for the administration of ground water rights in areas overlying the ESPA in the American Falls area and other areas, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

26. Additionally, watermasters for Water Districts No. 120 and No. 130 were appointed by the Director to perform the statutory duties of a watermaster in accordance with guidelines, direction, and supervision provided by the Director. The Director has given specific directions to the watermasters for Water Districts No. 120 and No. 130 to curtail illegal

diversions, measure and report diversions, and curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

27. In seeking the administration and curtailment of junior priority ground water rights in Water District No. 120, the Surface Water Coalition cannot preclude the administration and curtailment of junior priority ground water rights in Water District No. 130 that are determined to be causing injury to senior priority water rights held by members of the Surface Water Coalition.

28. In accordance with chapter 52, title 65, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

29. Rule 10 of the Conjunctive Management Rules, IDAPA 37.03.11.010, contains the following pertinent definitions:

> **01. Area Having A Common Ground Water Supply**. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.
>
> **03. Conjunctive Management**. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply.
>
> **04. Delivery Call**. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.
>
> **07. Full Economic Development Of Underground Water Resources**. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.
>
> **08. Futile Call**. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.
>
> **14. Material Injury**. 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 Rule 42.

16. Person. Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character.

17. Petitioner. Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule.

19. Reasonably Anticipated Average Rate Of Future Natural Recharge. The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change.

20. Respondent. Persons against whom complaints or petitions are filed or about whom investigations are initiated.

30. As used herein, the term "injury" means "material injury" as defined by Rule 10.14 of the Conjunctive Management Rules.

31. The diversion and use of ground water under existing rights results in an average annual depletion of ground water from the ESPA of nearly 2.0 million acre-feet and does not exceed the "Reasonably Anticipated Average Rate of Future Natural Recharge," consistent with Rule 10.07 of the Conjunctive Management Rules.

32. Rule 20 of the Conjunctive Management Rules, IDAPA 37.03.11.020, contains the following pertinent statements of purpose and policies for conjunctive management of surface and ground water resources:

01. Distribution Of Water Among The Holders Of Senior And Junior-Priority Rights. The rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.

03. Reasonable Use Of Surface And Ground Water. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

05. Exercise Of Water Rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made.

33. Rule 40 of the Conjunctive Management Rules, IDAPA 37.03.11.040, sets forth the following procedures to be followed for responses to calls for water delivery made by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district:

01. Responding To A Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, 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-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.

02. Regulation Of Uses Of Water By Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in section 42-604, Idaho Code, and under the following procedures:

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by section 42-606, Idaho Code.

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

03. Reasonable Exercise Of Rights. In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and 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. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

04. Actions Of The Watermaster Under A Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

34. The Letter filed on January 14, 2005, with the Director by the Surface Water Coalition will be treated pursuant to Conjunctive Management Rule, 40. Rule 40 applies only to areas within Water Districts No. 120 and No. 130.

35. In accordance with Rule 40 of the Conjunctive Management Rules, curtailment of junior priority ground water rights may only occur if the use of water under senior priority rights is consistent with Rule 20.03 of the Conjunctive Management Rules and injury is determined to be caused by the exercise of the junior priority rights. Factors that will be considered in determining whether junior priority ground water rights are causing injury to the senior priority water rights held by or for the benefit of the members of the Surface Water Coalition are set forth in Rule 42 of the Conjunctive Management Rules as follows:

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

a. The amount of water available in the source from which the water right is diverted.

b. The effort or expense of the holder of the water right to divert water from the source.

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

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The 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; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

02. Delivery Call For Curtailment Of Pumping. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

36. There currently is no approved and effectively operating mitigation in place to mitigate for injury, if any, to the water rights held by or for the benefit of the members of the Surface Water Coalition.

37. In Idaho, water rights are real property, Idaho Code § 55-101(1). However, water rights are unique because they are usufructuary, *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935). "[T]he right of property in water is usufructuary, and

consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself." SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 18 (1911). Being usufructuary, water rights do not stand on their own. Instead, water rights "are the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . . ." Idaho Code § 42-101. The usufructuary nature of a water right is found in Article XV, § 1 of the Idaho Constitution, which states in full:

> The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, *is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.*

Emphasis added.

38. In addition, Article XV, § 3 of the Idaho Constitution provides that "[t]he right to divert and appropriate the unappropriated waters of any natural stream *to beneficial uses*, shall never be denied. . . ." Emphasis added. According to the Idaho Supreme Court, "it is against the public policy of the state, as well as against express enactments, for a water user to take from an irrigation canal more water, of that to which he is entitled, than is necessary for the irrigation of his land and for domestic purposes. *The waters of this state belong to the state, and the right to the beneficial use thereof is all that can be acquired.*" *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-324, 227 P. 29, 30 (1924) (emphasis added).

39. Even if an appropriator possesses a right to use up to a certain quantity of water, that right is tempered by the concept of beneficial use. *Schodde*, 224 U.S. 107; *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912).

40. "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 v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915).

41. Again, the Idaho Supreme Court "has declared that 'it is against the public policy of the state . . . for a water user to take from an irrigation canal more water, of that to which he is entitled, than is necessary for the irrigation of his land. . . . That policy logically applies also to a stream supplying several farms, and prohibits appellant from diverting more water than necessary for the beneficial purpose regardless of alleged seniority in right through priority in time." *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972).

42. Even when an appropriator has control of public water, the appropriator cannot prevent the state from regulating its use. Idaho Const. Art. XV, § 1; Idaho Code § 42-101. For

example, appropriators are prohibited from committing waste or applying water in a non-beneficial manner:

> It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources. *Reynolds Irrigation District v. Sproat*, 69 Idaho 315, 206 P.2d 774; Constitution, Art. 15; §§ 42-104, 42-222 I.C. To effectuate this policy, the legislature has made it a misdemeanor to waste water from a stream, the waters of which are used for irrigation. § 18-4302 I.C. Under this section and the constitutional policy cited, it is the duty of a 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.

Mountain Home Irrigation Dist. v. Duffy, 79 Idaho 435, 442, 319 P.2d 965, 968 (1957). *See Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900) ("It is the policy of the law to prevent wasting of water.").

43. In Idaho, ground water is treated similarly to surface water in terms of appropriation, priority, and the requirement that the water be put to a beneficial use:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

Idaho Code § 42-226.

Because Idaho Code § 42-226 seeks to promote "*optimum development* of water resources . . . [,]" it is consistent with the Idaho Constitution. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (emphasis added).

44. In *Fellhauer v. People*, the Colorado Supreme Court, in interpreting a portion of Colorado's constitution, which the drafters of the Idaho Constitution considered in crafting Article XV, § 3, reached the same conclusions regarding full or optimal economic development of underground water resources:

> It is implicit in these constitutional provisions that, along with Vested rights, there shall be Maximum utilization of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of Maximum utilization and how constitutionally that doctrine can be integrated into the law of Vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968).

45. Based upon the Idaho Constitution, Idaho Code, the Conjunctive Management Rules, and decisions by Idaho courts, in conjunction with the reasoning established by the

Colorado Supreme Court in *Fellhauer*, it is clear that injury to senior priority surface water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use. Because 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. Thus, 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.

46. In its Letter, the Surface Water Coalition asserts that:

> The extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water which is the result of groundwater depletions. Impacts have been occurring as a result of ground water depletions and reduced reach accruals for several years, resulting in material injury to the water rights of the Surface Water Coalition.
>
> Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as demonstrated by the model, results in a 'material injury' to the Surface Water Coalition's senior surface water rights.

Letter at p. 3.

47. Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42. The Surface Water Coalition has no legal basis to seek the future curtailment of junior priority ground water rights based on injury alleged by the Coalition to have occurred in prior years.

48. Whether the senior priority water rights held by or for the benefit of members of the Surface Water Coalition are injured depends in large part on the total supply of water needed for the beneficial uses authorized under the water rights held by members of the Surface Water Coalition and available from both natural flow and reservoir storage combined. To administer junior priority ground water rights while treating the natural flow rights and storage rights of the members of the Surface Water Coalition separately would either: (1) lead to the curtailment of junior priority ground water rights, absent mitigation, when there is insufficient natural flow for the senior water rights held by the members of the Surface Water Coalition even though the reservoir space allocated to members of the Surface Water Coalition is full; or (2) lead to the curtailment of junior priority ground water rights, absent mitigation, anytime when the reservoir space allocated to the members of the Surface Water Coalition is not full even though the natural flow water rights held by members of the Surface Water Coalition were completely satisfied. Either outcome is wholly inconsistent with the provision for "full economic development of underground water resources" in Idaho Code § 42-226 articulated as "optim[al] development" in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513, P.2d 627, 636 (1973).

49. The Director has determined that the average of the inflow diverted in 2002 and 2004 for each member of the Coalition provides a reasonable lower-bound estimate of the natural flow that may be divertible in 2005 by each member of the Coalition. *See* Findings 103 and 104.

50. The amounts of water diverted in 1995 are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders served by the members of the Surface Water Coalition. The Director has used the 1995 diversions to predict the shortages in surface water supplies that are reasonably likely for Coalition members in 2005. *See* Findings of Fact 115 and 116.

51. The members of the Surface Water Coalition should not be required to exhaust their available storage water prior to being able to make a delivery call against the holders of junior priority ground water rights. The members of the Coalition are entitled to maintain a reasonable amount of carryover storage water to minimize shortages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rules (IDAPA 37.03.11.042.01.g). *See* Findings 118 and 119.

52. The reasonably likely material injury predicted for 2005 is the sum of the shortages set forth in Finding 116, if any, and the shortfalls in predicted carryover as compared to the reasonable amounts of carryover storage set forth in Finding 119, if any. The material injury predicted for 2005 to the members of the Surface Water Coalition is 133,400 acre-feet of water. *See* Finding of Fact 120.

53. Based upon the foregoing Findings of Fact and Conclusions of Law, the Director concludes that members of the Surface Water Coalition will be materially injured in 2005 by ground water depletions in Water Districts No. 120 and No. 130. Holders of certain ground water rights having priorities of February 27, 1979, and later within Water Districts No. 120 and No. 130 are required to either curtail the diversion and use of ground water for the remainder of 2005, provide replacement water to the members of the Surface Water Coalition as mitigation, or a combination of both. The required curtailment or mitigation shall be governed by the following order.

ORDER

The Director enters the following Order in response to the Letter for the reasons stated in the foregoing Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED as follows:

1. The watermasters for Water Districts No. 120 and No. 130 are directed to issue written notices by April 22, 2005, or as soon thereafter as practicable, to the holders of consumptive ground water rights in Water Districts No. 120 and No. 130 having priority dates of February 27, 1979, and later and identified to the watermasters by the Department, including consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding in-house culinary uses. The written notices are to advise the holders of such consumptive ground water rights of this Order and to instruct the holders of such rights that they are required to provide replacement water to the members of the Surface Water Coalition as mitigation for out-of-priority depletions, as provided herein, in amounts equal to the annual depletions to the reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage under their rights as determined using the Department's ground water model for the ESPA. The notices are to also advise such right holders that failure to provide sufficient replacement water will result in their diversions being curtailed for the remainder of 2005 or in future years, as provided herein, in accordance with the provisions of Idaho Code §§ 42-602 and 42-607 and the directions and orders of the Director.

2. Holders of ground water rights affected by this Order where the purpose of use is irrigation shall provide the required replacement water through the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts. Holders of ground water rights for irrigation that are not members of one of these ground water districts shall be deemed a nonmember participant for mitigation purposes pursuant to H.B. No. 848 (Act *Relating to the Administration of Ground Water Rights within the Eastern Snake River Plain*, ch. 352, 2004 *Idaho Sess. Laws 1052*) and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for replacement water as mitigation pursuant to Idaho Code § 42-5259.

3. Holders of ground water rights affected by this Order where the purpose of use is commercial, industrial, or municipal may provide the required replacement water through a ground water district as a nonmember participant for mitigation or may separately or jointly provide the required replacement water.

4. The Department shall allocate the amounts of replacement water required as mitigation to members of the Surface Water Coalition. The amount of replacement water required to mitigate diversions of ground water for irrigation shall be provided by the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts as follows:

North Snake Ground Water District:	2,400 acre-feet
Magic Valley Ground Water District:	17,800 acre-feet
Aberdeen-American Falls Ground Water District:	58,700 acre-feet
Bingham Ground Water District:	14,900 acre-feet
Bonneville-Jefferson Ground Water District:	7,200 acre-feet

These amounts equal the increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage that would occur over time based on the ground water model simulations described in Finding 127, except for the Aberdeen-American Falls Ground Water District. The required amount of replacement water for the Aberdeen-American Falls Ground Water District is 12.9 percent more than described in Finding 127 to provide replacement water as mitigation for ground water rights for irrigation that are within Water Districts No. 120 and No. 130 but that are not within any of the ground water districts. Nearly all such rights are located east of American Falls Reservoir in an area adjacent to the Aberdeen-American Falls Ground Water District. *See* Finding 130.

5. The required replacement water can be provided over time on an annual basis in amounts at least equal to the increase in reach gains in the Snake River between the Near Black Foot Gage and Minidoka Gage that would result from curtailment of the affected ground water rights based on simulations using the Department's ground water model for the ESPA. The simulated increase in reach gains in the Snake River from curtailment of affected ground water rights for irrigation in 2005 for the first four years is set forth in Finding 127. The total amount of replacement water provided for mitigation in 2005 shall not be less than 27,700 acre-feet, which equals the amount of the predicted shortage in 2005 set forth in Findings 115 and 116.

6. If all of the replacement water required for mitigation is not provided in 2005, the amount remaining to be provided shall be an obligation for future years and additive to future mitigation requirements, if any, should material injury continue. The amount remaining as a future obligation shall not be cancelled unless the storage space held by the members of the Surface Water Coalition under contract with the USBR fills.

7. The amount of replacement water required, both for 2005 and in future years, can be reduced by foregoing (curtailing) consumptive uses authorized under the affected water rights or other water rights so long as full beneficial use was made under the forgone rights in the prior year.

8. If at any time the mitigation for out-of-priority depletions is not provided as required herein, the associated water rights are subject to immediate curtailment, based on the priorities of the rights, to the extent mitigation has not been provided.

9. As required herein, the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices no later than 5:00 pm on April 29, 2005. Requests for extensions to file a plan for good cause will be considered on a case-by-case basis and granted or denied based on the merits of any such individual request for extension.

The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension. A plan that is approved or approved with conditions will be enforced by the Department and the watermasters for Water Districts No. 120 and No. 130 through curtailment of the associated rights in the event the plan is not fully implemented.

10. The Director will monitor water supply requirements and the water supplies available throughout the irrigation season and may issue additional orders or instructions to the watermasters as conditions warrant.

11. 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. To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2006 and be added to any new mitigation determined to be required for 2006. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2006 and be subtracted from any new mitigation determined to be required for 2006.

12. The Director will make a determination of the extent of injury reasonably likely to occur to members of the Surface Water Coalition from out-of-priority ground water depletions under water rights within water districts annually after April 1, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 31, and require mitigation or curtailment as warranted without further demand by members of the Coalition until such time that a permanent mitigation plan may be approved.

13. Mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with the USBR fills. At that time, any remaining debits and credits will cancel.

14. Mitigation requirements resulting from orders of the Director in response to other pending requests for water rights administration of junior priority ground water rights may be in addition to the mitigation requirements set forth herein.

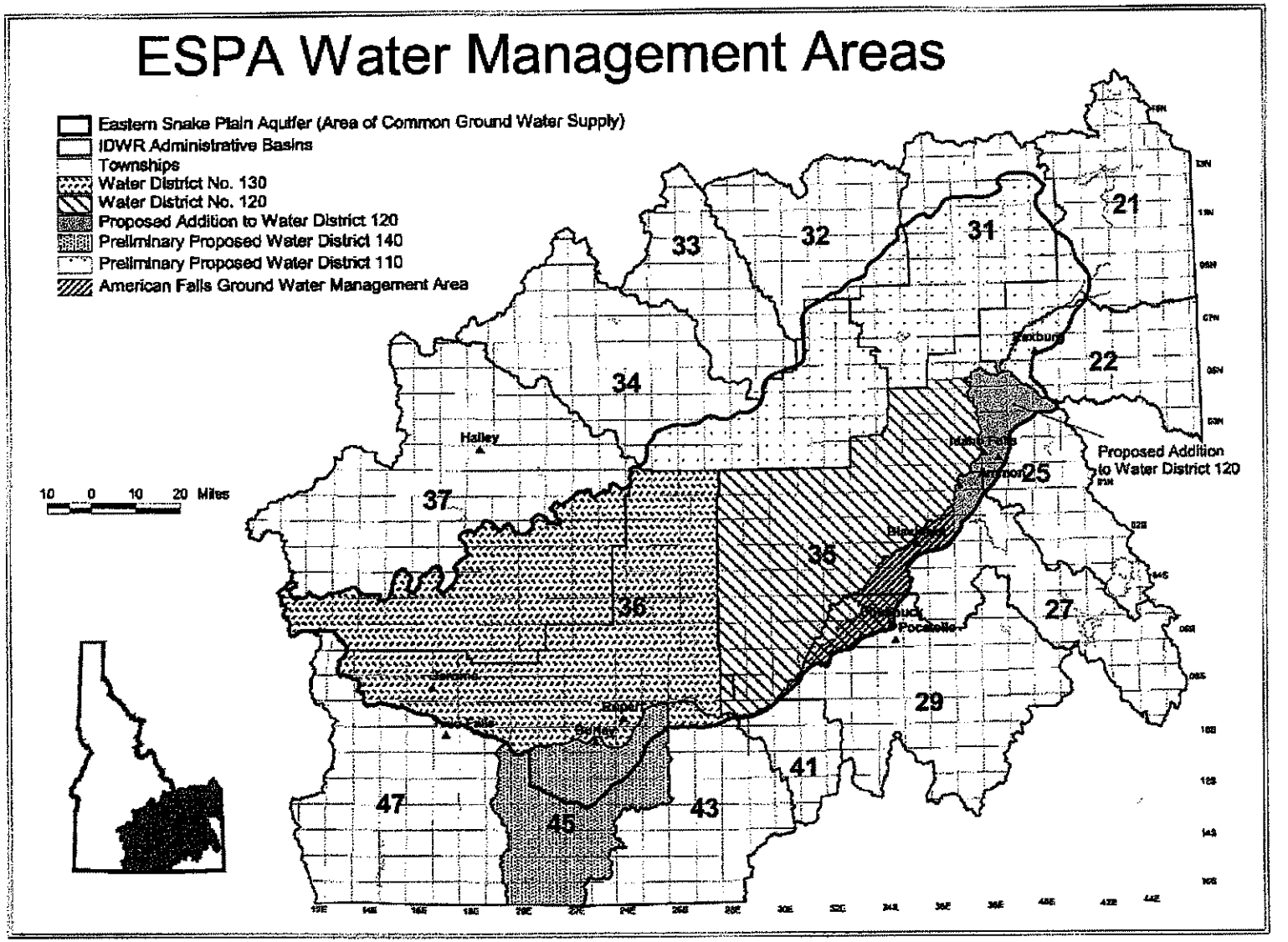
IT IS FURTHER ORDERED that pursuant to Idaho Code § 67-5247 this Order is made effective upon issuance due to the immediate danger to the public welfare posed by the lack of certainty existing among holders of water rights for the diversion and use of ground water for irrigation from the Eastern Snake Plain Aquifer as to whether water will be available under the priorities of their respective rights during the 2005 irrigation season.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

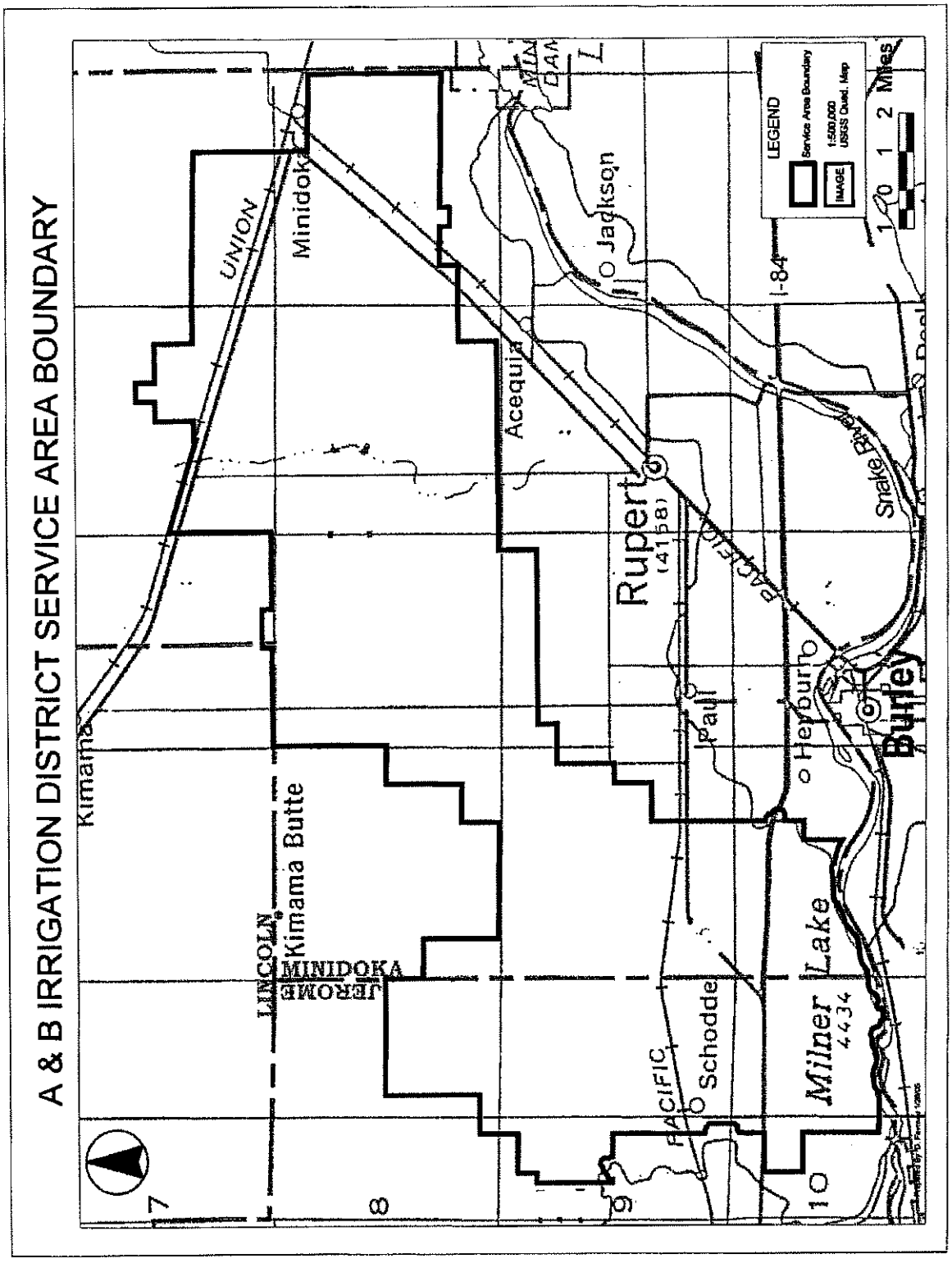
IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

DATED this 2nd day of May 2005.

KARL J. DREHER
Director


ESPA Water Management Areas
Eastern Snake Plain Aquifer (Area of Common Ground Water Supply)
IDWR Administrative Basins
Townships
Water District No. 130
Water District No. 120
Proposed Addition to Water District 120
Preliminary Proposed Water District 140
Preliminary Proposed Water District 110
American Falls Ground Water Management Area
10 0 10 20 Miles
Proposed Addition to Water District 120
Hailey
Rexburg
Pocatello
21
22
25
27
29
31
32
33
34
35
36
37
41
43
45
47

ATTACHMENT B



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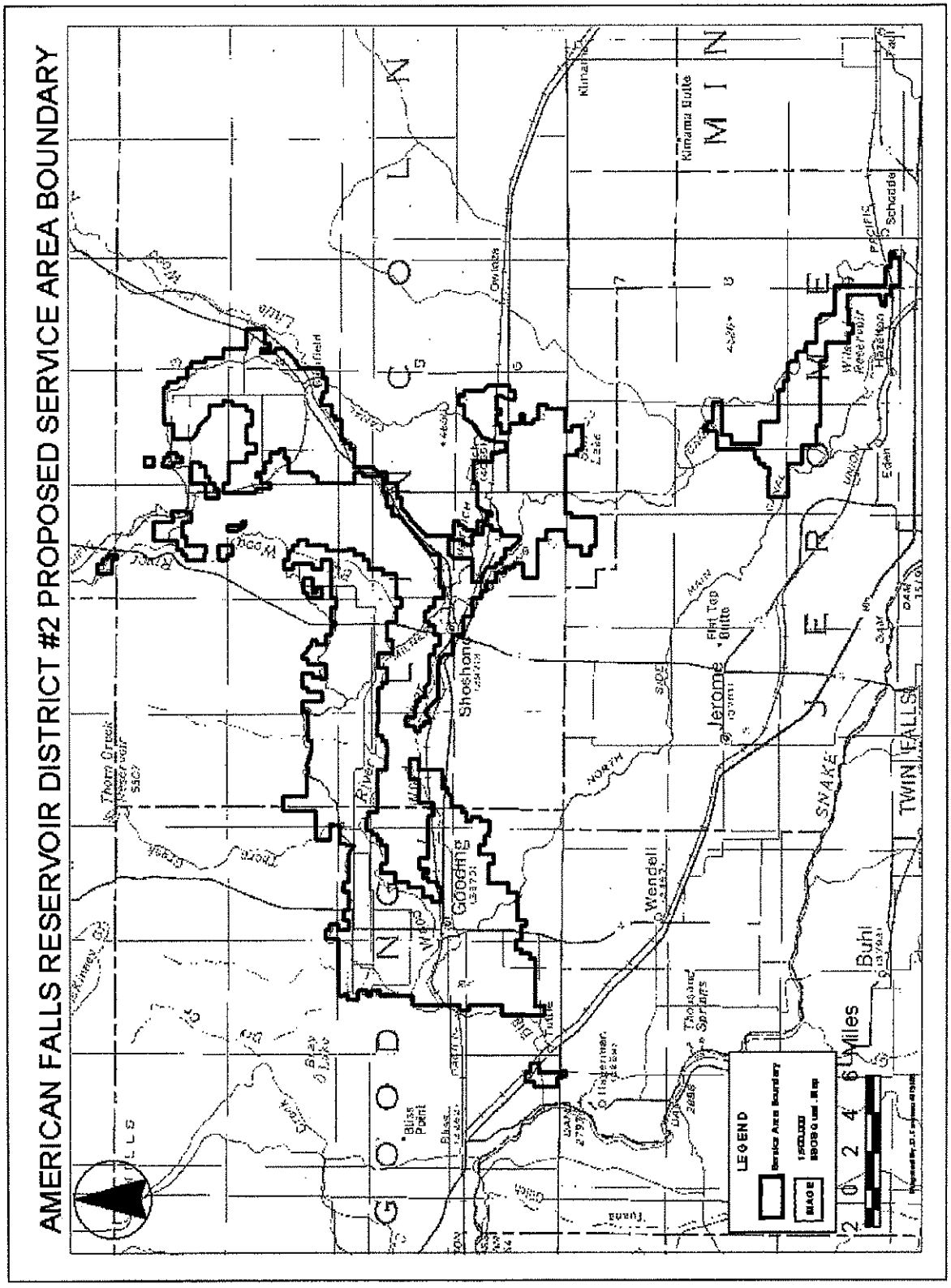

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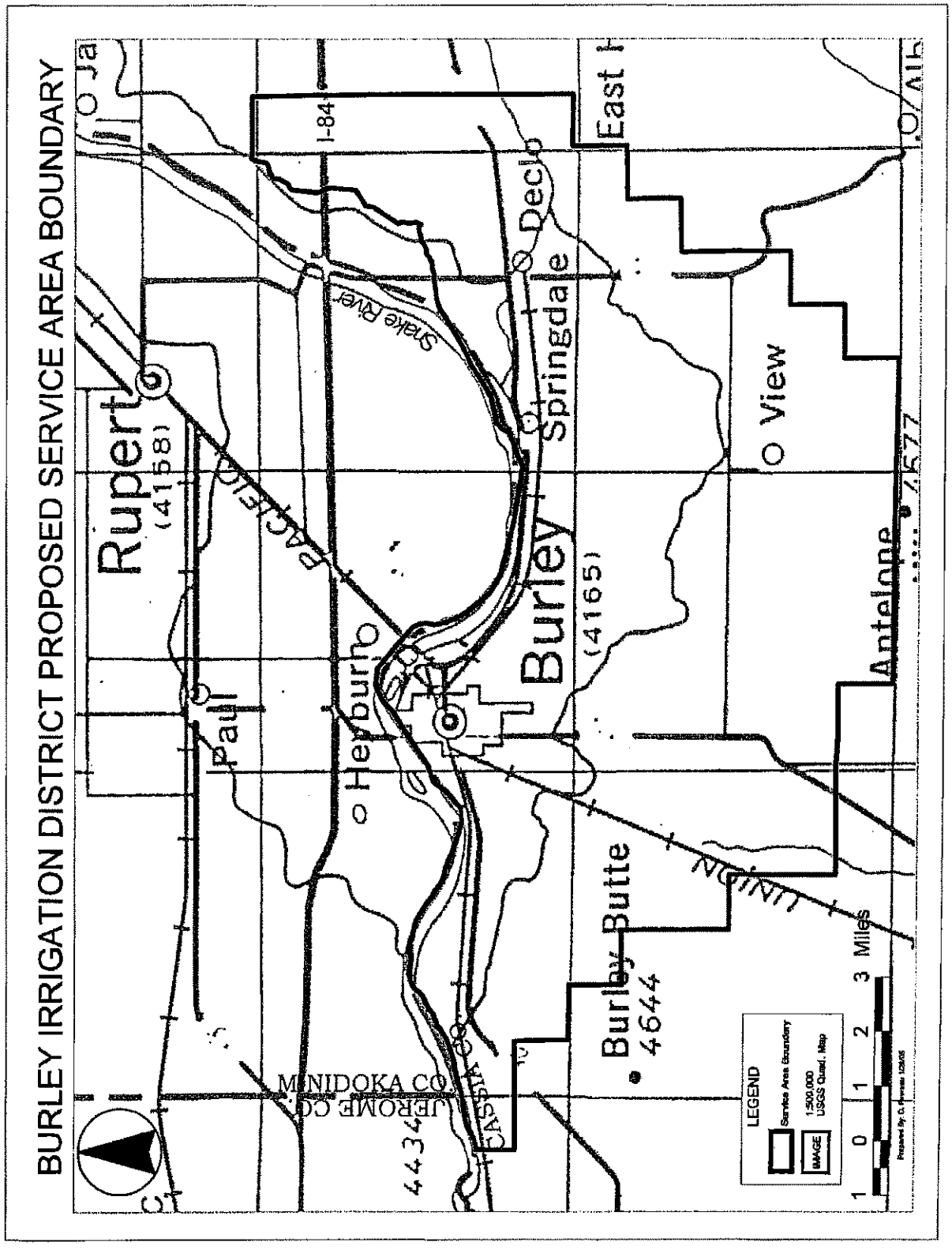

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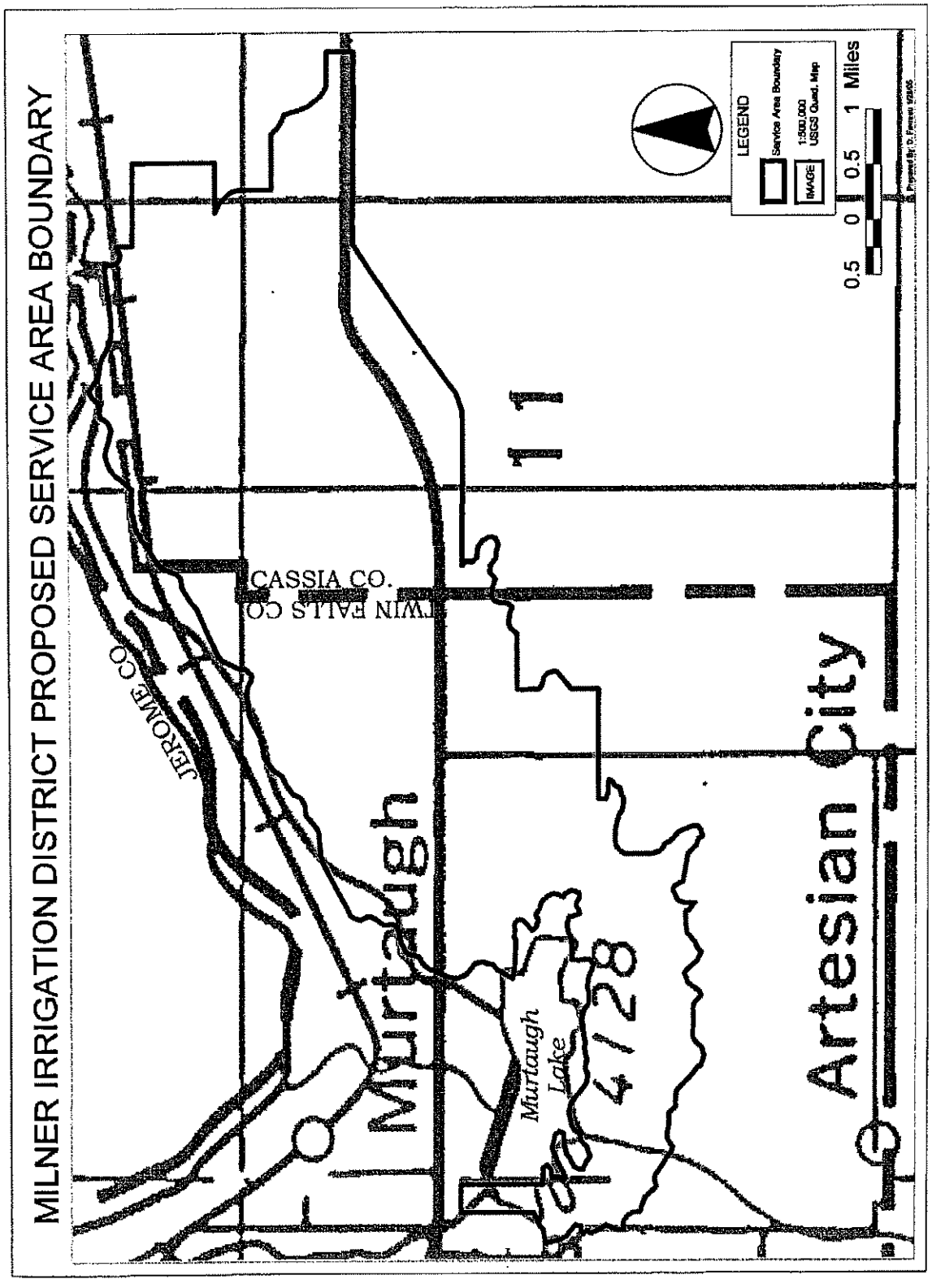

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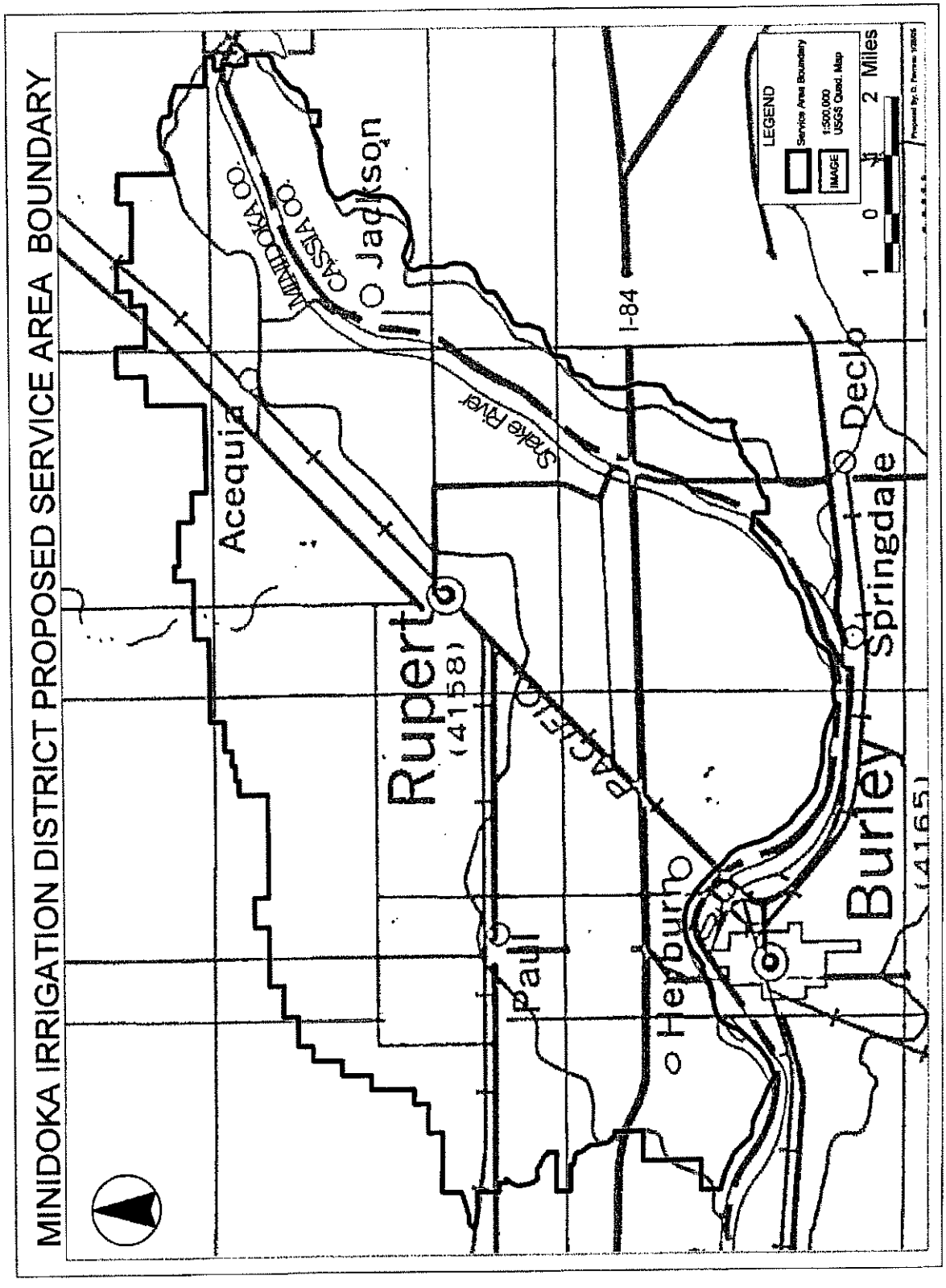

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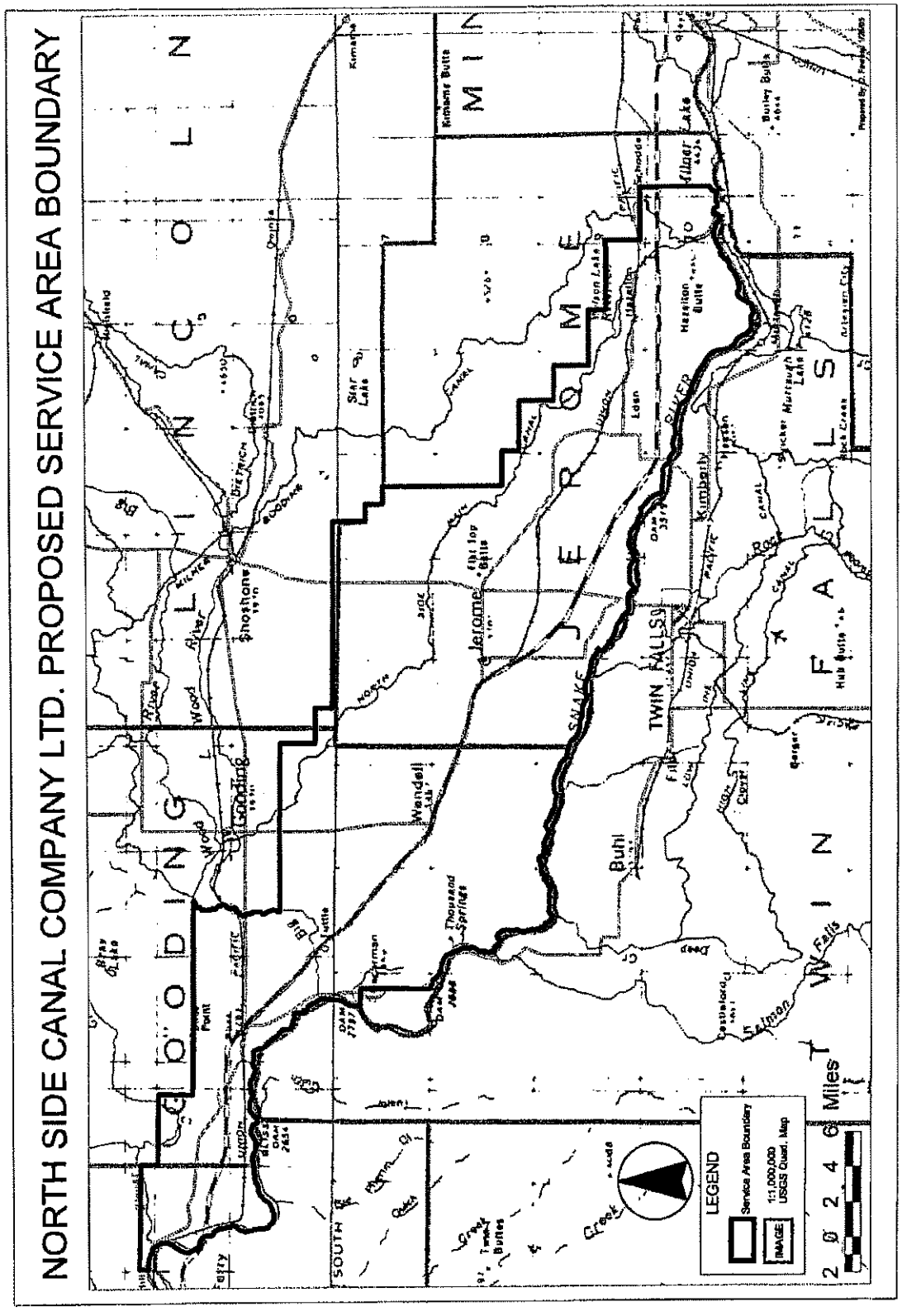

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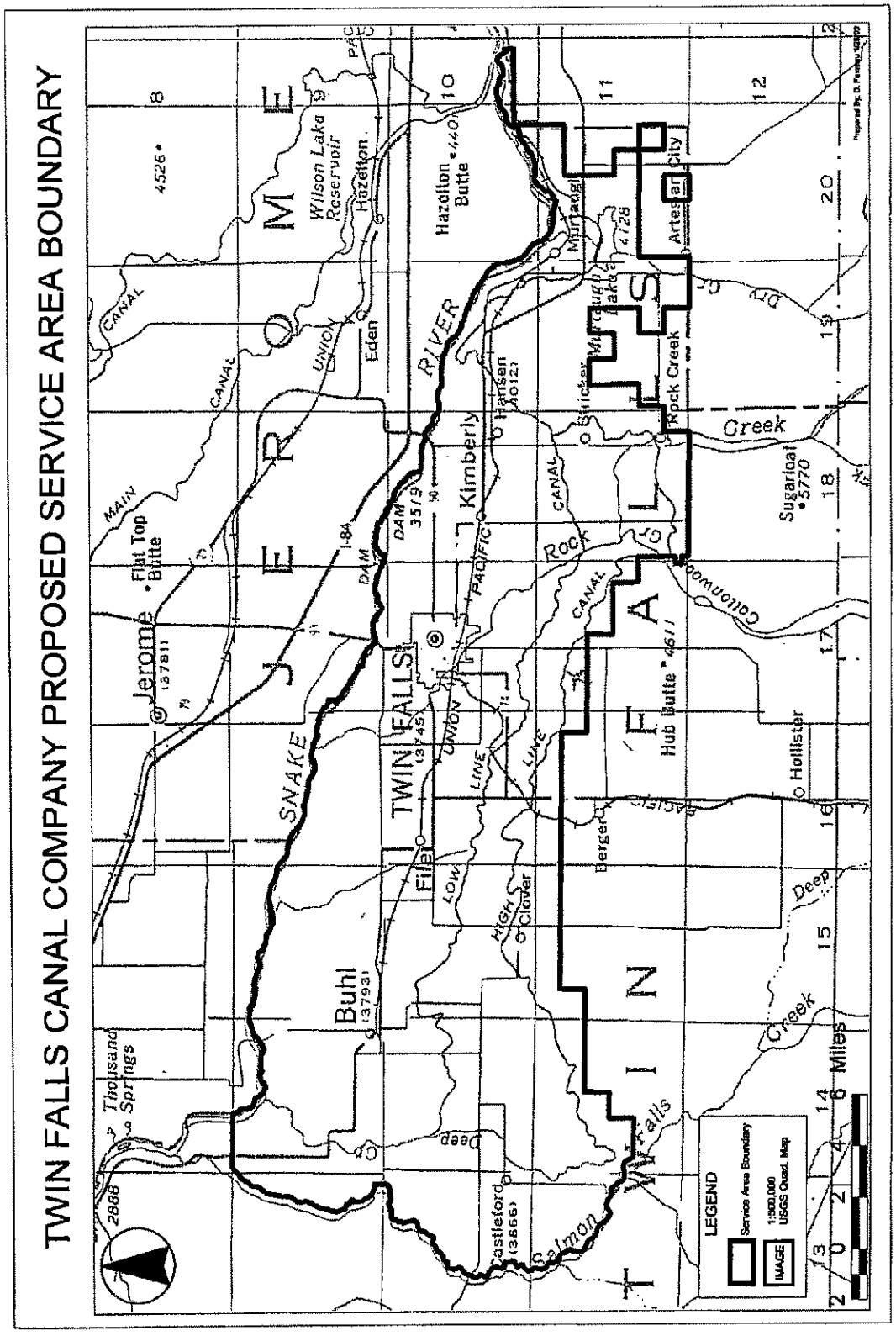
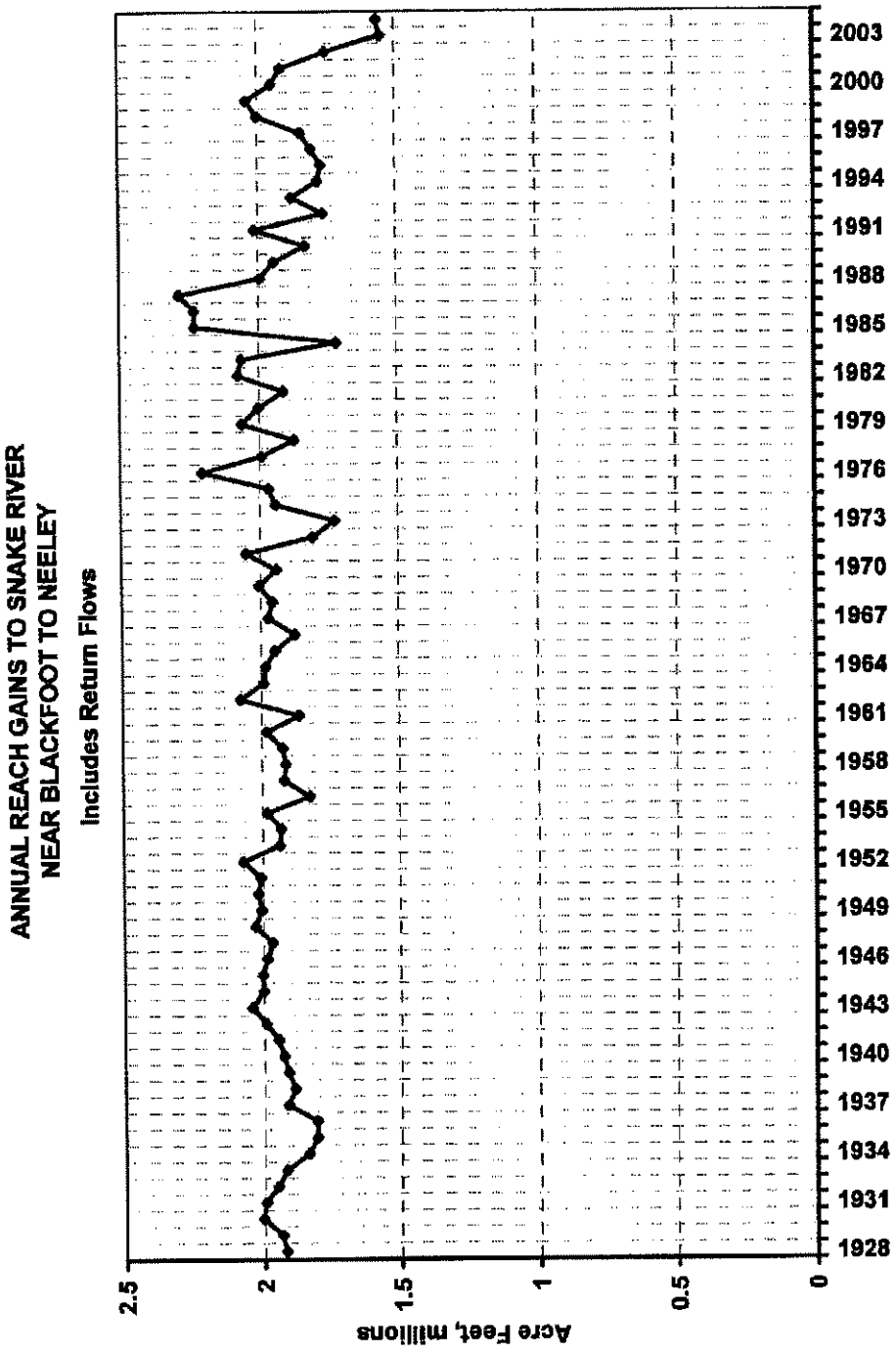
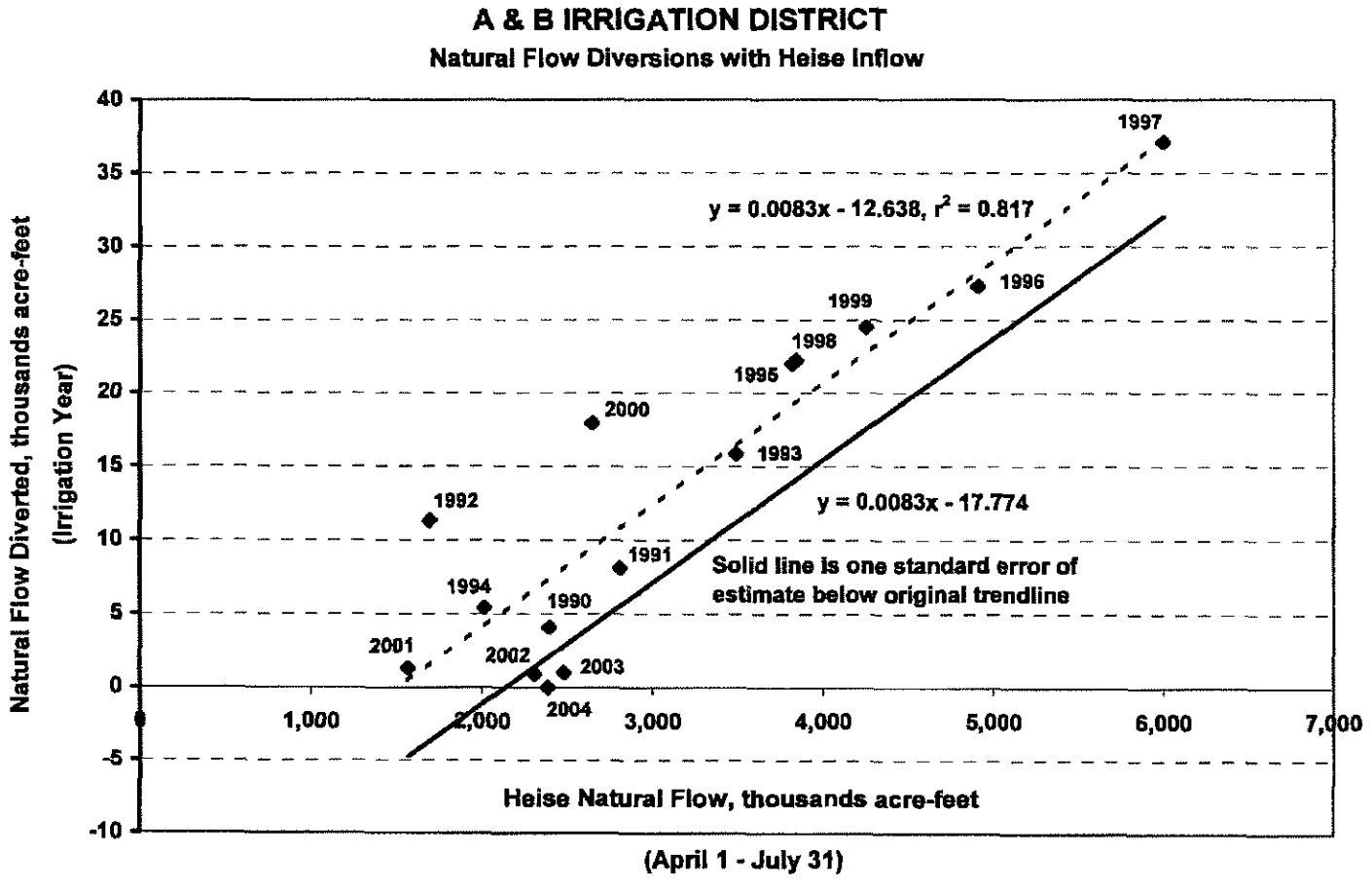
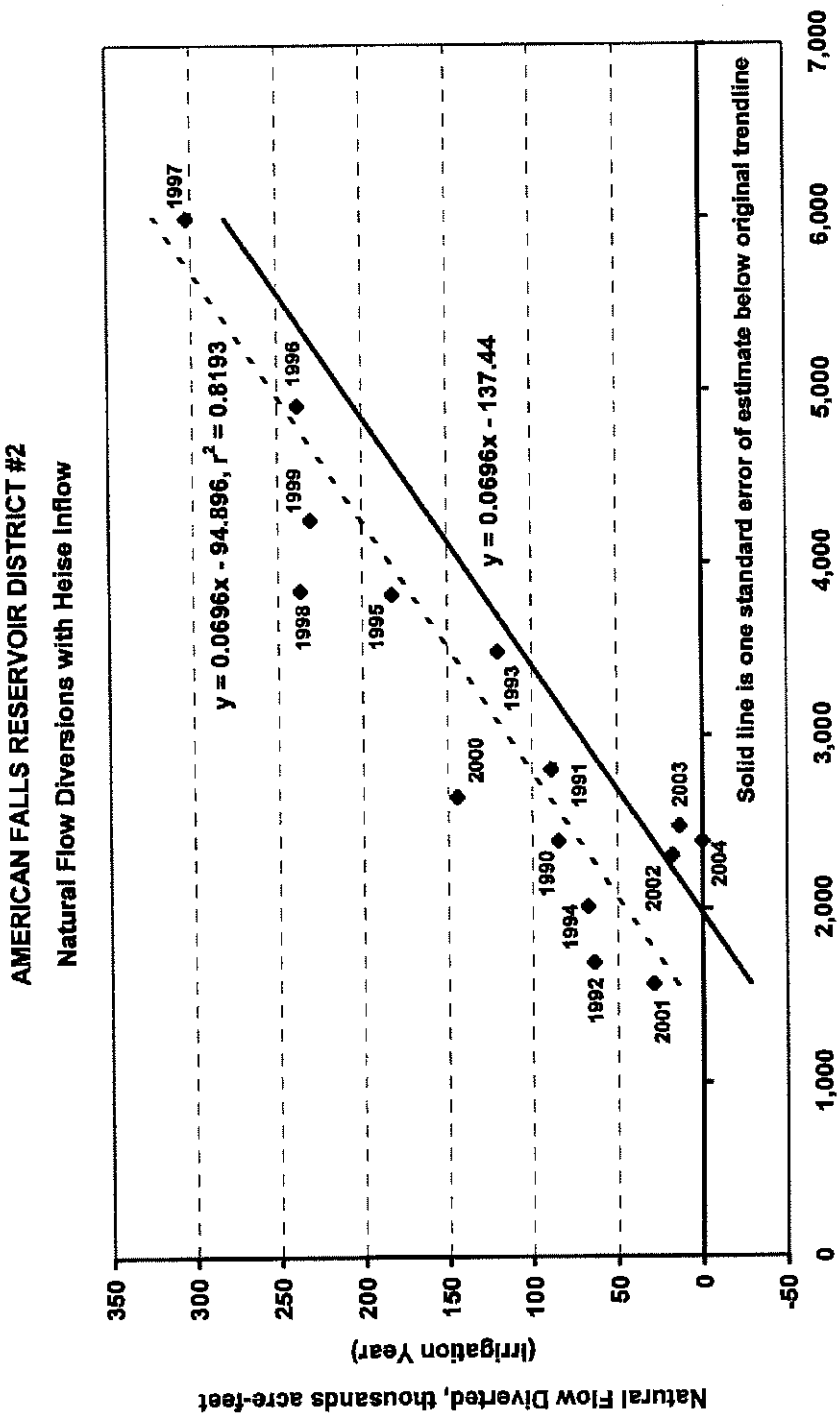


ATTACHMENT I




A & B IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow
Natural Flow Diverted, thousands acre-feet
(Irrigation Year)
y = 0.0083x - 12.638, r² = 0.817
y = 0.0083x - 17.774
Solid line is one standard error of estimate below original trendline
1997
1996
1999
1998
1995
2000
1993
1992
1991
1994
1990
2001
2002
2003
2004
40
35
30
25
20
15
10
5
0
-5
-10
1,000
2,000
3,000
4,000
5,000
6,000
7,000
Heise Natural Flow, thousands acre-feet
(April 1 - July 31)

ATTACHMENT K



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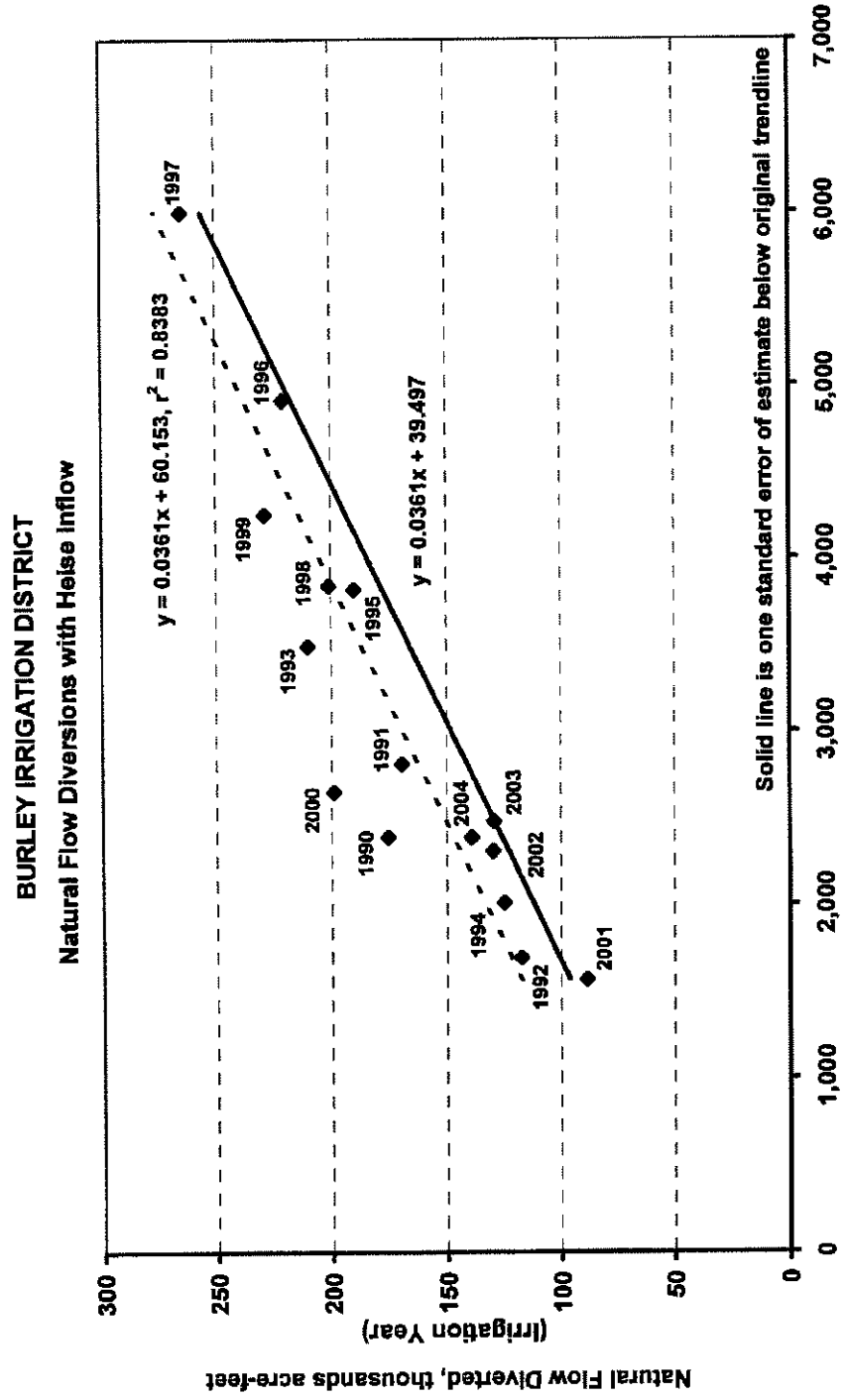

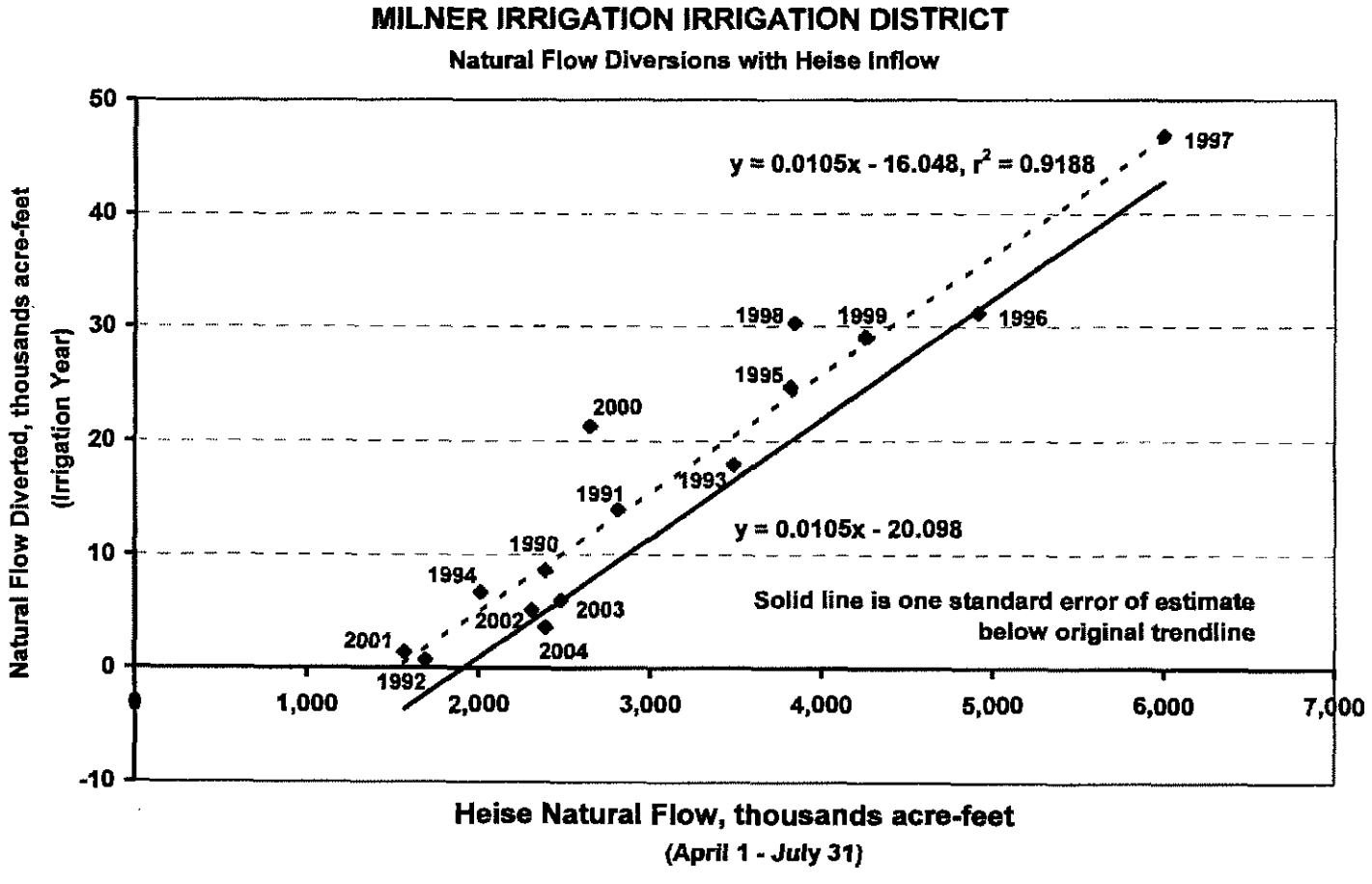
MILNER IRRIGATION IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow
Natural Flow Diverted, thousands acre-feet
(Irrigation Year)
Heise Natural Flow, thousands acre-feet
(April 1 - July 31)
y = 0.0105x - 16.048, r2 = 0.9188
y = 0.0105x - 20.098
Solid line is one standard error of estimate
below original trendline
50
40
30
20
10
0
-10
1,000
2,000
3,000
4,000
5,000
6,000
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1997
1998
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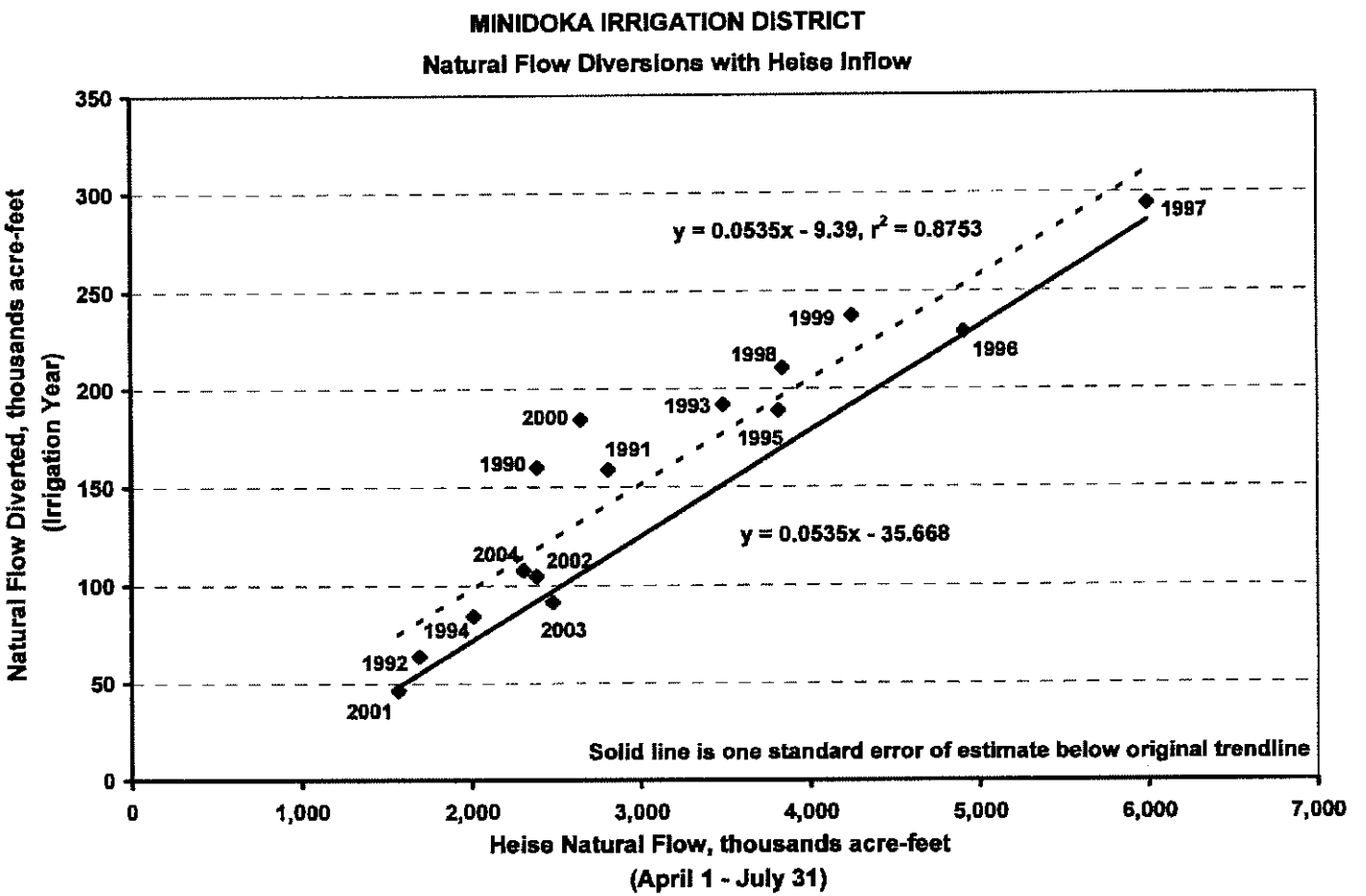
2004
1992


MINIDOKA IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow
Natural Flow Diverted, thousands acre-feet (Irrigation Year)
Heise Natural Flow, thousands acre-feet (April 1 - July 31)
y = 0.0535x - 9.39, r2 = 0.8753
y = 0.0535x - 35.668
Solid line is one standard error of estimate below original trendline
1997
1999
1998
1996
1993
2000
1995
1991
1990
2004
2002
1994
2003
1992
2001
0
50
100
150
200
250
300
350
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4,000
5,000
6,000
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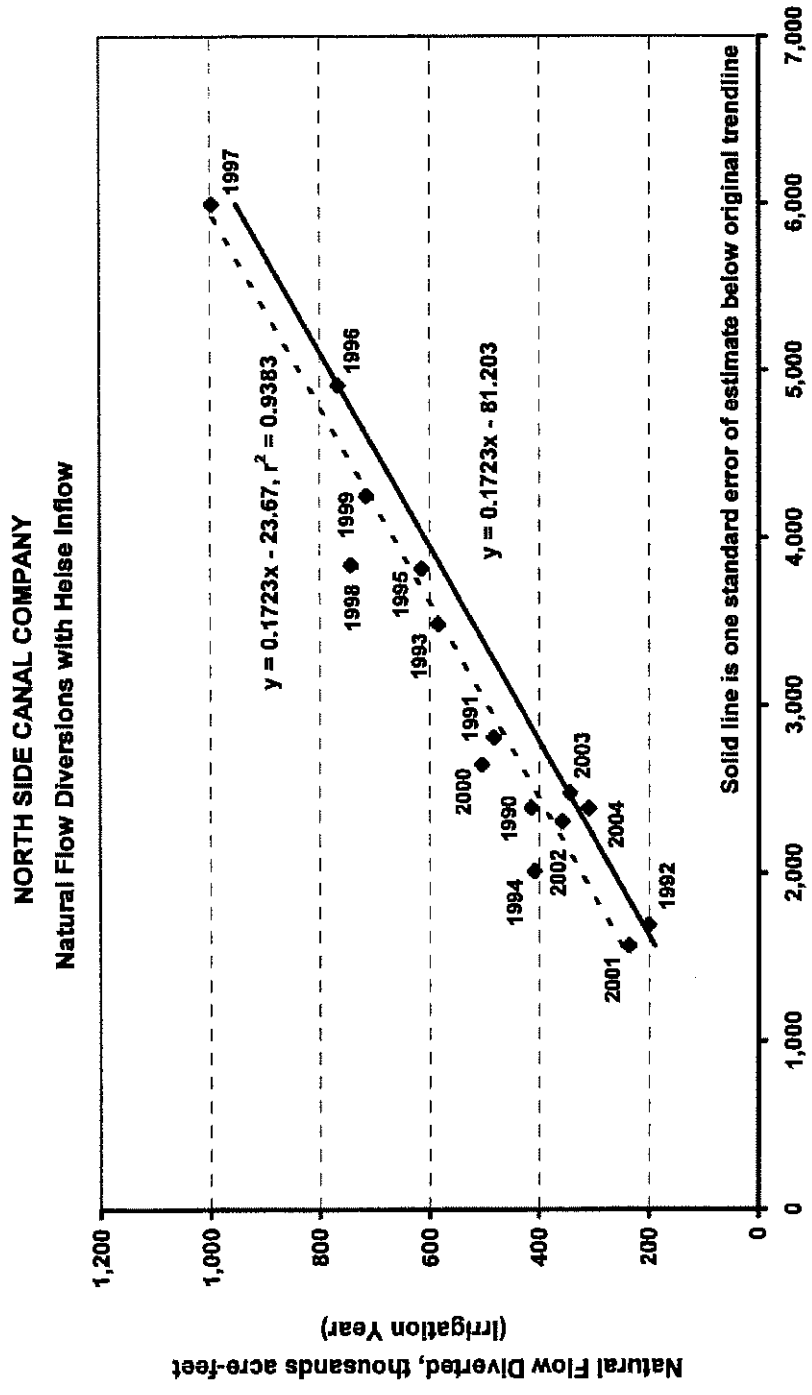
ATTACHMENT O



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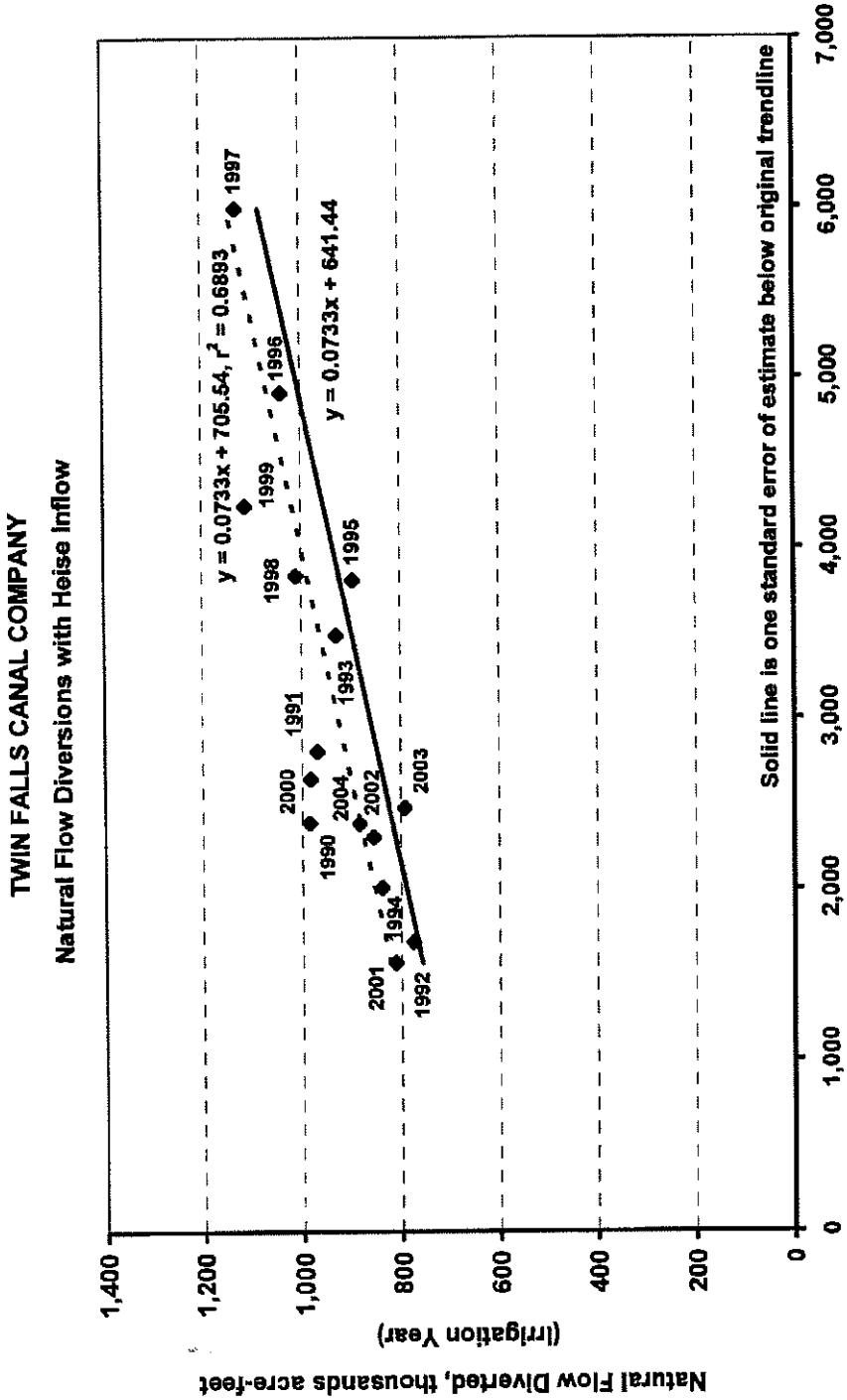

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2005, the above and foregoing was served by the method indicated below and addressed to the following:

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs, and RANGEN, INC., CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY, Intervenors, v. THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL DREHER, its Director, Defendants, and IDAHO GROUND WATER APPROPRIATORS, INC., Intervenors.	**Case No. CV-2005-600** **DEFENDANTS' MEMORANDUM IN RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT**

COME NOW DEFENDANTS, the IDAHO DEPARTMENT OF WATER RESOURCES ("IDWR" or "the Department") and KARL DREHER, in his capacity as Director of IDWR ("the Director") and hereby submit this memorandum in response to the motions for summary judgment filed in the above-captioned matter by the Plaintiffs and intervenors Rangen, Inc., Thousand Spring Water Users' Association, and Clear Springs Foods, Inc. ("Intervenors"). This memorandum responds to all four pending motions for summary judgment. Hereinafter, the term "Plaintiffs" refers collectively to the named Plaintiffs and the Intervenors.

STATEMENT OF FACTS

The Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources ("the Rules")[1] in October 1994 and submitted them to the Idaho Legislature. The Legislature did not reject or modify the Rules and has taken no subsequent action with respect to the Rules. Thus, the Rules are final and have been in effect since late 1994.

The Plaintiffs and the intervenors in this action who are aligned with the Plaintiffs—Rangen, Inc., Clear Springs Foods, Inc., and certain members of the Thousand Springs Water Users Association ("Intervenors")—made written requests to the Department for delivery of water and the administration of junior ground water rights. The Director interpreted the requests as delivery calls under the Rules and initiated contested cases in which he applied the Rules and issued a number of orders. The Plaintiffs and the Intervenors requested hearings on the orders, as was their right, and the Director set hearing dates and pre-hearing schedules and deadlines for preliminary matters and filings. Before the dates set for the hearings, the original Plaintiffs filed this

action, alleging that the Rules are unconstitutional and invalid both facially and as-applied. Shortly thereafter, the Intervenors intervened into this case, and also alleged a combination of facial and as-applied challenges to the Rules.

The Department filed a motion to dismiss on grounds of primary jurisdiction and failure to exhaust administrative remedies. Shortly before the hearing on the motion to dismiss, the Plaintiffs filed a Motion for Summary Judgment as to all their claims, both facial and as-applied, supported by an affidavit containing copies of several orders the Director had issued in the Plaintiffs' contested case, as well as other documents relevant to the Plaintiffs' as-applied claims. After the hearing but before the Court entered its Order on IDWR's Motion to Dismiss, the Intervenors also filed motions for summary judgment as to all of their facial and as-applied claims, each of which was also supported by an affidavit containing copies of orders the Director has issued in their respective contested cases, and other documents relevant to the as-applied claims. In all, the Plaintiffs and the Intervenors filed approximately 100 pages of briefing and approximately 750 pages of affidavits and exhibits.

The Court entered its Order on the Motion to Dismiss on November 4, 2005, denying the motion as to the facial challenges and stating that a ruling on the as-applied challenges was avoided as unnecessary. Order on IDWR's Motion to Dismiss at 8. The Defendants thereafter filed a Motion For Order Denying Summary Judgment Without Prejudice And Establishing Schedule For Summary Judgment Pursuant To Order On IDWR's Motion To Dismiss ("Motion to Re-Brief"), requesting that the pending motions for summary judgment be dismissed without prejudice and that the briefing schedule be re-set with instructions to confine the arguments to the facial challenges only. The Court

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[1] Codified under IDAPA 37, Title 03, Chapter 11.

denied the Motion to Re-Brief in a hearing held on November 29, 2005, but expressly stated that the Order on the Motion to Dismiss had eliminated the as-applied challenges from consideration as part of Plaintiffs' and Intervenors' motions for summary judgment. *See* Affidavit of Phillip J. Rassier in Support of Defendants' Memorandum in Response to Motions for Summary Judgment ("Rassier Affidavit") at Exhibit A, pp. 64-69, in large part because the contested cases on the Plaintiffs' and Intervenors' delivery calls remain pending before the Department. The Court limited the motions for summary judgment pending in this action to the facial challenges only. *See id.*

OBJECTION TO AFFIDAVITS AND AS-APPLIED ARGUMENTS

Because a facial challenge to the Conjunctive Management Rules is a pure question of law, the affidavits previously filed in support of the motions for summary judgment are irrelevant to the Plaintiffs' and Intervenors' facial challenges. The affidavits are only relevant to the fact-based, as-applied claims and arguments, which are not before the Court. However, the affidavits remain in the record, therefore, the Defendants formally object to the affidavits and the attached exhibits as being irrelevant to the issues remaining before the Court in this action.

Similarly, the Defendants object to the parts and portions of the Plaintiffs' briefs that explicitly or implicitly cite or rely on the affidavits and exhibits, and to any as-applied arguments in said briefs.

The Defendants also hereby assert they have attempted to address and rebut each and every facial challenge argument contained in the summary judgment motions and briefs. However, due to the nature of the Plaintiffs' briefs, it is possible that the Defendants inadvertently failed to address an argument that the Court may subsequently

determine was a facial challenge argument. The Plaintiffs' briefs did not explicitly segregate or label their facial and as-applied arguments, and these different arguments are often intermixed, sometimes even in the same paragraphs of the various briefs. Thus, should the Court determine that the Defendants have failed to address any of the facial challenge arguments in the summary judgment briefs, the Defendants request the Court for leave to file supplemental briefing to address such argument(s).

ARGUMENT

I. INTRODUCTION

Plaintiffs in this case challenge the facial validity of the Rules of the Department that provide for the combined administration of interconnected surface and ground water rights. Plaintiffs argue that whenever their decreed senior priority surface water rights are not being filled to the maximum amount reflected in their decree, the Department has an affirmative duty to automatically curtail the diversion of water under all junior priority ground water rights from interconnected ground water sources in the Snake River basin that could affect their source of supply.

Plaintiffs argue that the Department has this duty of automatic curtailment regardless of whether they have made a call for the delivery of water and regardless of whether they have a need for the water to satisfy the beneficial uses authorized under their water rights.

The Plaintiffs' approach to water law focuses on the priority date and quantity elements of their water rights to the apparent exclusion of all other principles of the prior appropriation doctrine as established by Idaho law. Absent from the Plaintiffs' modified version of the prior appropriation doctrine is any consideration of the essential principles

relating to the reasonable and efficient diversion and use of water in an arid state. Absent also is any notion of the futile call and the important principle that junior right holders are only to be curtailed when their diversions cause material injury to the holders of more senior rights.

Plaintiffs' approach to water law would have the Department abandon oversight of the state's water resources to ensure that water diverted is applied to the beneficial use for which it was appropriated without an unreasonable amount of waste. The Rules incorporate these time-tested principles and provide a systematic method to administer ground water rights in conjunction with senior surface rights and other ground water rights. The Plaintiffs' lawsuit challenges not only the Rules but also strikes at the very heart of the prior appropriation doctrine as established by Idaho law and relied upon by Idaho water users for more than a century.

Plaintiffs' facial challenge rightly comes with a heavy burden to prove that the Rules are incapable of any valid application. As demonstrated in the argument below, Plaintiffs cannot meet this burden. The Rules can be validly applied and in fact provide the tools necessary for the Director to properly distribute water to senior priority users in accordance with Idaho law without improperly diminishing valid junior priority rights.

The Rules recognize well-respected principles of water law developed in the arid West and adopted in Idaho by the Legislature and the Idaho Supreme Court over the past one hundred years plus to secure the maximum benefit from the state's scarce water resources. Contrary to the arguments of the Plaintiffs, the law in Idaho is well established that a water right is not an entitlement to divert the maximum amount of water authorized under the right regardless of need or circumstances.

II. STANDARDS OF REVIEW

A. SUMMARY JUDGMENT STANDARDS

"Summary judgment is appropriate 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving part is entitled to a judgment as a matter of law.'" *Foster v. Traul*, 141 Idaho 890, ___, 120 P.3d 278, 280 (2005) (quoting Idaho Rule of Civil Procedure 56(c)). "If the evidence shows no disputed issues of material fact, what remains is a question of law." *Spur Products Corp. v. Stoel Rives LLP*, ___ Idaho ___, ___, 122 P.3d 300, 303 (2005). In this action, there is no factual evidence to consider because the only question is whether the Rules are valid on their face.

B. FACIAL CHALLENGE STANDARDS

A party asserting regulations are unconstitutional on their face carries "a heavy burden." *Matter of Wilson*, 128 Idaho 161, 167, 911 P.2d 754, 760 (1996). Regulations are presumed valid and the Plaintiffs must establish that no set of circumstances exist under which the Rules would be valid. *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 540, 545, 96 P.3d 637, 641, 646 (2004), *cert. denied*, 125 S.Ct. 1299 (2005); *Rhodes v. Indus. Comm'n*, 125 Idaho 139, 142, 868 P.2d 467, 470 (1993); *Lindstrom v. District Bd. of Health Panhandle Dist. I*, 109 Idaho 956, 959-60, 712 P.2d 657, 660-61 (Ct. App. 1985).[2] "A facial challenge means that the law is invalid *in toto* and therefore incapable of any valid application." *State v. Newman*, 108 Idaho 5, 11, 696 P.2d 856, 862 (1985) (internal quotation marks and citations omitted).

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[2] "Administrative regulations are subject to the same principles of construction as are statutes." *Rhodes*, 125 Idaho at 142, 868 P.2d at 470.

It is not enough for the Plaintiffs to show that an unconstitutional application of the Rules is merely possible—they must show that such is inevitable. Anecdotal evidence of an instance of allegedly unconstitutional or invalid application of the Rules is insufficient to prevail on a facial challenge. Thus, for purposes of this case, the Rules are presumed constitutional and Plaintiffs' facial challenges fail unless they demonstrate that the Rules cannot be valid or constitutional under any circumstances.[3]

III. LEGAL OVERVIEW

The Plaintiffs emphasize that under Idaho water law, "first in time is first in right." Plainly, this rule is a fundamental principle of the prior appropriation doctrine as established by Idaho water law. *See* Idaho Const. art. XV § 3 ("Priority of appropriations shall give the better right as between those using the water"). It is not the only fundamental or important principle, however, as a brief review of Idaho water law demonstrates.[4] Equally fundamental are the principles that a water right consists of a right of use only—the State owns the water before, during and after the appropriator uses it—and a water right is limited to the reasonable and efficient diversion and use of water for beneficial purposes, without waste. Further, it is well established that the policy of

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[3] The Plaintiffs incorrectly argue that the Rules must be presumed invalid under *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 28 P.3d 1006 (2001), *cert. denied*, 534 U.S. 1115 (2002). Under *Bradbury*, a presumption of invalidity arises and the burden of proof shifts only when a "fundamental right" is at stake, and the exhaustive list of "fundamental rights" in *Bradbury* does not include water rights or real property interests of any kind. *See id.* at 68, 69 n.2, 28 P.3d at 1011, 1012 n.2 (listing "fundamental rights" as follows: (1) the right to travel interstate; (2) the freedom of association; (3) the right to participate in the electoral process; (4) the right to privacy; and (5) access to courts).

[4] Indeed, the reclamation of arid lands was uppermost in the minds of the framers of Article XV of the Idaho Constitution: "Gentlemen of this convention, we are more interested today in the reclamation of these sagebrush lands than any other problem that has been brought before this body." II PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 at 1341 (quoting Mr. McConnell).

Idaho water law is to promote and secure the maximum use and benefit, and the least waste, of the State's water resources.

A. IN IDAHO, A WATER RIGHT IS A RIGHT OF USE FOR BENEFICIAL PURPOSES.

Under the Idaho Constitution, the water is owned by the State in its sovereign capacity and a water right only entitles the holder to use water for beneficial purposes. *See* Idaho Const. art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied") (emphasis added). "A water right differs from other species of property, in that the owner does not own the water itself or have any property right in the corpus of the water; all the right which he has is to use the same." *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59, 231 P. 418, 421 (1924); *see also Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 650, 150 P. 336, 338-39 (1915) ("Under the Constitution and laws of the state, the ownership of the corpus of the water is in the state").

The policy of the prior appropriation doctrine as established by Idaho law "is to secure the maximum use and benefit, and least wasteful use, of [the state's] water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). Securing the maximum beneficial use of the state's water means "that it should always be so used as to benefit the greatest number of inhabitants of the state . . . keeping in view the rule existing all over the arid region, 'First in time first in right.'" *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 594, 76 P. 331, 332 (1904). These principles have been the "guiding star" of Idaho water law since its inception, *id.*, and have been formally recognized in the Idaho Code:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

Idaho Code § 42-226.[5]

For these reasons, the prior appropriation doctrine as established by Idaho law requires a water right holder to use water economically, efficiently and reasonably. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used." *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915). "Economy must be required and demanded in the use and application of water." *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909).[6]

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[5] These longstanding principles were formally incorporated into section 7 of Article XV of the Idaho Constitution by virtue of that provision's reference to the "optimum development of water resources in the public interest." *See Baker*, 95 Idaho at 584, 513 P.2d at 636 (referring to the "constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7"). These policies also are recognized as foundational principles in prior appropriation law across the western states. *See, e.g., Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 54 (Colo. 1999) (referring to "fundamental principles of Colorado and western water law that favor optimum use, efficient water management, and priority administration, and disfavor speculation and waste") (footnote omitted). Indeed, the New Mexico Supreme Court has stated that the utilization of water for maximum benefits "is a requirement second to none," and a "principal reason" for adoption of the prior appropriation doctrine:

> Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival. Recognition of these facts, as well as a conviction that the doctrine of prior appropriation was better suited to accomplishing the desired ends than was the common law riparian doctrine must have been the principal reason for the adoption in this state of the prior appropriation doctrine as the law applicable to water.

State ex rel. Martinez v. City of Las Vegas, 89 P.3d 47, 59 (N.M. 2004) (quoting *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986, 989 (N.M. 1970)).

[6] *See also* Idaho Code § 42-101 (stating that the state's industrial prosperity and agricultural development depend largely on the "just apportionment [of water] to, and its economical use by, those making a beneficial application of the same") (emphasis added).

Similarly, an appropriator's means of diversion and conveyance may not unreasonably impede maximum beneficial use of the state's water resources or allow an unreasonable waste of water. *See Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (holding that a senior was not entitled to continue to dam a stream to subirrigate his meadows when such means of diversion caused a loss of enough water to irrigate ten times as much land); *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 117 (1912) (holding that a senior was not entitled to continue using his existing water wheels as a means of diversion when such could prevent use of a great surplus of unappropriated water in the river).

Thus, contrary to the Plaintiffs' characterization, the prior appropriation doctrine as established by Idaho law is not simply a matter of "first in time is first in right." The prior appropriation doctrine is more than just a set of rules for defining and enforcing private property rights—it is also a system of water allocation intended to promote the public interest by making the most of the state's water. Further, and as discussed in a subsequent section of this memorandum, these principles apply not just in licensing and adjudications, but also in the ongoing administration of water rights. "[Beneficial use] is a continuing obligation." *Hagerman Water Right Owners, Inc.*, 130 Idaho at 735, 947 P.2d at 408. "Administering a water right is not a static business." *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 414, 958 P.2d 568, 571 (1997).

B. OVERVIEW OF THE CONJUNCTIVE MANAGEMENT RULES

The Conjunctive Management Rules "govern the distribution of water from ground water sources and areas having a common ground water supply." Rule 20.01.[7]

[7] Rule 20.01 means IDAPA 37.03.11.020.01. This convention for citation to particular provisions of the Conjunctive Management Rules will be maintained throughout this memorandum.

The Rules "prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." Rule 01.

The Rules expressly acknowledge "all elements of the prior appropriation doctrine as established by Idaho law." Rule 20.02. Thus, the Rules require administration in accordance with priority of right, and numerous provisions of the Rules reiterate the rule of priority.[8] The Rules also incorporate the well-established concepts of reasonable and efficient use and diversion, and the policies of full and optimum development of the state's water resources. Rules 20.03, 42.01, 43.03. In general, the Rules provide that a senior seeking administration of a junior ground water right must make a "delivery call" to initiate the administrative procedure. Rules 30.01, 40.01, 41.01.

The Director had authority to promulgate the Rules under several provisions of the Idaho Code. Sections 42-602 and 42-607 give the Director direction and control over the distribution of water in water districts. Section 42-603 authorizes the Director to

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[8] The Rules' plain language demonstrates clearly embodies the presumption that administration will follow the principle that first in time is first in right:

- Rule 30.07(g) authorizes the Director to issue summary orders to prohibit or limit withdrawals from a well if its use "would affect the present or future use of any prior surface or ground water right";
- Rule 30.09 provides that when a common ground water area is incorporated into a new or existing water district, "the use of water shall be administered in accordance with the priorities of the various rights as provided in Rule 40";
- Rule 30.10 provides that upon designation of a ground water management area, "the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41";
- Rule 40.01(a) provides that on a finding by the Director that a senior water right holder is suffering material injury due to junior ground water diversions, the watermaster shall "[r]egulate the diversion and use of water in accordance with the priorities of rights of the various surface and ground water users whose rights are included within the district";
- Rule 40.02(a) provides that the Director, through the watermaster, shall regulate the use of water within the water district pursuant to Idaho law and the priorities of water rights";

This listing is illustrative, not exhaustive—other provisions of the Rules also expressly incorporate or reference the rule that first in time is first in right. *See, e.g.,* Rules 00, 01, 10.07, 10.18, 20.03, 40.02, 40.05.

promulgate rules and regulations for distributions of both surface waters and ground waters. The Ground Water Act, Idaho Code §§ 42-226 *et seq.* ("GWA" or "the Act"), authorizes the Director to supervise and control the administration of all rights to the use of ground water. Idaho Code §§ 42-229, 42-237a(g). The GWA also authorizes the Director to prescribe "reasonable rules and regulations of procedure" for conducting hearings on claims by seniors claiming to have been adversely affected by junior ground water users. Idaho Code § 42-237c. In addition, section 42-1805 contains a broad grant of general rulemaking authority, empowering the Director to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department." Idaho Code § 42-1805(8).[9]

IV. THE PLAINTIFFS' FACIAL CHALLENGE ARGUMENTS ARE DEFICIENT AS A MATTER OF LAW.

A. THE RULES CANNOT BE FACIALLY INVALID SIMPLY BECAUSE THEY INCORPORATE OTHER WELL-ESTABLISHED PRINCPLES OF THE DOCTRINE OF PRIOR APPROPRIATION AS ESTABLISHED BY IDAHO LAW IN ADDITION TO THE PRINCIPLE THAT FIRST IN TIME IS FIRST IN RIGHT.

The Plaintiffs concede that the Rules expressly incorporate the rule that first in time is first in right, but argue that this is "merely lip service"[10] and the Rules are facially invalid because they impose conditions of reasonable and efficient use on senior rights,

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[9] The nature and breadth of the rulemaking authority strongly suggests that the Legislature did not view the distribution and administration statutes as self-executing and affirmatively intended that the Director promulgate the rules and regulations for the administration of water rights and the distribution of water.

[10] Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memorandum") at 14 n.6; Thousand Springs Water Users Association's Memorandum in Support of Motion for Summary Judgment ("TSWUA Memorandum").

and incorporate the policies of promoting the optimum and full economic development of the state's water resources in the public interest.[11]

This argument amounts to a contention that considerations of reasonableness, efficiency and maximizing the development of Idaho's water are repugnant to the prior appropriation doctrine, and that merely mentioning such terms irretrievably infects the Rules with an unconstitutional taint. Such a position is plainly untenable because, as previously discussed, it is well established that the requirements of reasonable and efficient diversion and use of water are fundamental components of the prior appropriation doctrine as established by Idaho law. The Rules did not create these principles and cannot be facially invalid or unconstitutional simply for including them.

The same is true of the Rules' references to "optimum development of water resources in the public interest" and "full economic development" of the state's water resources. These phrases are verbatim quotations of provisions of the Idaho Constitution and the Idaho Code, s*ee* Idaho Const. art. XV § 7; Idaho Code § 42-226, and have deep roots in the prior appropriation doctrine as established by Idaho law. They reflect "the well recognized policies in this state of maximum economic utility of water resources and the development and reclamation of arid lands." *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 612, 619 P.2d 122, 130 (1980), *cert. denied*, 451 U.S.912 (1981); *see also Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982) (stating that the policy of putting water to its maximum use and benefit "has long been recognized in this state and was reinforced in 1964 by the adoption of article XV,

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[11] The Defendants do not concede or waive any argument on the issue of whether the Rules entirely fail, on their face, to incorporate the rules that "first in time is first in right." Further, any such contention is demonstrably incorrect because the Rules expressly acknowledge the rule of priority, and it pervades the plain language of the Rules, as previously discussed.

section 7 of the Idaho Constitution") (citing *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 913 P.2d 627 (1973)).

Plaintiffs' attempt to analogize the Rules' administrative framework to the "common property" doctrine rejected by the Idaho Supreme Court in *Kirk v. Bartholomew*, 3 Idaho 367, 29 P. 40 (1892), fails under the plain language of the Rules. In that case the problem was that the district court entirely ignored the prior appropriation doctrine and explicitly adopted the "common right" or "common property" theory:

> The court failed to find the amount of water actually appropriated, for a useful or beneficial purpose, by each of the parties or their grantors, (in case a party claimed by purchase,) and also failed to determine the priority of right of each appropriation over each subsequent appropriation. . . . The court then proceeded to distribute the water thus held to be common property, or the right to the use thereof a common right, regardless of priority of appropriation. . . . The court failed to determine the priority of right of any of the parties litigant, but, on the unstatutory theory of the use of water being a common right, decrees, by a sliding scale, the amount of water which each shall be entitled to at specified periods of the irrigating season.

Kirk, 3 Idaho at 369, 371, 29 P. at 40-41.

As previously discussed, the Rules expressly incorporate the doctrine of prior appropriation and explicitly recognize the priority of senior rights. Further, the Rules do not incorporate, mention or refer to the "common right" or "common property" theory, or any other foreign theory or doctrine of water allocation. It follows that the Rules are not facially invalid under *Kirk.*

Plaintiffs argue "the Rules allow the Director to formulate a system of water distribution based upon 'conditions' on senior rights and 'reasonableness' determinations, like the district court in *Kirk.*"[12] Quite the opposite is true. Under the rules, the Director

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12 Plaintiffs' Memorandum at 25 (emphasis added).

starts his analysis with the presumption that the senior water right holder has a need for the full amount of his right at the time the call is made. Only if his investigation determines that the present beneficial uses of the senior can be satisfied with less than the full quantity of water under the water right does he propose to administer under the present circumstances for less than the full quantity. Even then, the senior is afforded a right to show that the full entitlement is needed and the burden in on the Director to show to the contrary. Thus, Plaintiffs at most allege the mere possibility of an unconstitutional outcome, which is not sufficient to carry the facial challenge burden of proving that under no circumstances could the Rules be valid. *Moon*, 140 Idaho at 540, 545, 96 P.3d at 641, 646; *Rhodes*, 125 Idaho at 142, 868 P.2d at 470; *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003).

The Rules cannot be invalid for simply incorporating the concepts of reasonableness, efficiency and the policy of promoting the maximum development of Idaho's water resources. Presumably, this fact is the reason that the Plaintiffs' arguments focus on their belief that the Rules can be applied in an unconstitutional manner.

B. THE PLAIN LANGUAGE OF THE RULES PRESUMES THAT ADMINISTRATION WILL BE IN ACCORDANCE WITH PRIORTY OF RIGHT AND THE PRINCIPLE THAT AN APPROPRIATOR MAY NOT RECEIVE MORE WATER THAN REASONABLY NECESSARY FOR BENEFICIAL USE UNDER THE CIRCUMSTANCES AT THE TIME OF THE CALL.

Contrary to Plaintiffs' suggestion, the Rules are not in conflict with the SRBA partial decrees but rather complimentary to them. The partial decrees form the foundation for administration of water rights. They reflect the maximum amount of water a senior water right holder is authorized to divert for beneficial use. The senior

water right holder is authorized to divert this amount when needed to achieve the beneficial use for which the right was established. The senior water right holder, however, is not entitled to divert the full amount of the right if that amount is not needed to achieve the beneficial use. *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P. 865, 867 (1926) (holding that a water right allows an appropriator "only the amount actually necessary for the useful or beneficial purpose to which he applies it"); *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n.5, 546 P.2d 390 n.5 (stating that appropriators have no right to more water than is necessary for beneficial use "regardless of the amount of their decreed right").

For example, a senior water right holder is not entitled to demand his right during times that rainfall is sufficient to meet the needs of his crops, but once the rain becomes insufficient to meet the needs of the crop, the senior may demand such amount of his right up to the maximum quantity authorized, if necessary, to grow his crops. Thus, while the senior has a right to the full amount of his decree if needed for the beneficial use for which the water right is established, he may demand through administration only that portion of the right necessary at the time of the call to achieve his beneficial use. This aspect of the process of administration protects the senior water holder while at the same time ensuring the limited water supplies are available to junior water right holders when not needed by the senior water right holder. This fundamental aspect of the prior appropriation doctrine ensures that the limited water supplies are available to achieve the optimum benefit from the resource. Thus, valid applications of the Rules are not only possible, but are in fact the expected outcome.

The Plaintiffs' belief that the Rules may not even mention any principles or policies of the prior appropriation doctrine other than "first in time is first in right" finds no support in Idaho law. Moreover, taken as a whole, the Rules emphasize the importance of priority more than any other principle or policy. In addition, the Rules respect and allow for the consideration of important, relevant factors in conjunction with priority date of the subject water rights in distributing waters during times of shortage. The Rules allow for a systematic, scientific method of water rights administration that provides due process to both *senior and junior* water right holders.

Further, the provisions of the Rules that deal with reasonableness, efficiency and the policy of full and optimum development are limited and the burden falls on the Director to establish the facts for their application. The plain language of the Rules demonstrates that constitutional application is not only easily possible, but probable.

For instance, Rule 20.03 ("Reasonable Use of Surface and Ground Water") is a "General Statement of Purpose and Policy" that recites policy language from the Idaho Constitution and the Idaho Code regarding reasonable use and full and optimum development of the state's water, but imposes no such standards or requirements of its own. The Rule does not require, instruct or authorize the Director to apply the stated policies in any particular way, or to reach any particular outcome. Rule 20.03 is, in name and substance, a "merely hortatory" statement of general policy and purpose. *Bonner General Hosp. v. Bonner County*, 133 Idaho 7, 10, 981 P.2d 242, 245 (1999) (holding that a codified statement of legislative purpose that did not purport to impose requirements was "merely hortatory"). Further, Rule 20.03 explicitly recognizes the rule that first in time is first in right. Rule 20.03 ("reasonable use includes the concepts of

priority in time and superiority in right"). Thus, the plain language of Rule 20.03 simply cannot support the argument that Rule 20.03 renders the Rules incapable of valid application under any circumstances. Rather, the Rule reflects the presumption of priority administration.

Rule 42 ("Determining Material Injury and Reasonableness of Water Diversions") provides a list of factors that the Director "may" consider in determining whether a senior is "using water efficiently and without waste." Rule 42.01. Thus, on its face, Rule 42 also respects senior rights and presumes entitlement to the full amount of water absent any proven facts that would require a contrary results under applicable principles of the prior appropriation doctrine as established by Idaho law. The plain terms of Rule 42.01 demonstrate that a valid and constitutional application of the Rules is at least as likely, if not more so, than any invalid application.[13]

The same analysis applies to Rule 40.03 ("Reasonable Exercise of Rights"). Rule 40.03 incorporates the permissive language and factors of Rule 42 expressly and because "reasonable exercise" under Rule 40.03 requires consideration of whether there has been "material injury" and whether a senior is "diverting and using water efficiently and without waste." Rule 40.03. Thus, Rule 40.03 is identical to Rule 42 for purposes of determining what constitutes a "reasonable exercise of rights." Accordingly, under Rule 40.03, there is a presumption the senior has a right to receive the full amount set forth in the partial decree. It follows that a valid application of Rule 40.03 clearly is possible, and the Rule cannot be facially invalid.

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[13] This argument is not meant to, and in fact does not, concede or waive any assertion by the Plaintiffs that the Rule 42 factors are facially invalid or inconsistent with the prior appropriation doctrine as established by Idaho law. As discussed in a subsequent section, each of the factors is fully consistent with and supported by Idaho law.

Thus, the Rules are best and most accurately viewed as presuming that the rule of "first in time is first in right" controls absent facts to the contrary. The Plaintiffs' argument essentially assumes that the Rules will be used to subject senior rights to some form of strict scrutiny and/or micromanage the senior's use of water. To the contrary, the permissive and hortatory nature of the language for considering reasonableness, efficiency, and the policies of optimum and full development of the state's water lends itself to just the opposite: administration in accordance with priority is presumed and required, and the Rules impose a burden on the Director, when responding to a delivery call, to determine a factual basis for distributing less than the full quantity of water stated in the decree. *See also Roper v. Elkhorn at Sun Valley*, 100 Idaho 790, 793, 605 P.2d 968, 971(1980) (stating that there is "a presumption of regularity in the performance of official duties by public officers"). In light of the fact that Idaho law inherently limits a water right to the amount of water needed for beneficial use, this administrative determination is entirely proper—indeed, it is necessary from both a practical and a legal perspective.

C. THE PLAINTIFFS ONLY ARGUE THAT AN INVALID APPLICATION OF THE RULES IS POSSIBLE, NOT THAT THE RULES CANNOT BE VALIDLY APPLIED UNDER ANY CIRCUMSTANCES.

The Plaintiffs' pleadings and arguments are primarily, and usually expressly, focused on the mere possibility that application of the principles of reasonable and efficient diversion and use and the policies of optimum and full economic development of the state's water resources could result in an invalid or unconstitutional outcome.[14] In

[14] The Plaintiffs' facial challenge arguments and allegations generally emphasize that the Rules simply "allow," "permit," or "authorize" the Director to ignore priorities or otherwise reach an unconstitutional result, or, similarly, the Rules merely "create a number of avenues" or "open the door" for the Director to do so. *See, e.g.,* Plaintiffs' Memorandum at 25, 33, 35, 36, 39, 40, 42, 43, 44, 47; Complaint

effect, Plaintiffs' argument assumes that the Rules must be crafted so as to eliminate any possibility of an unconstitutional application. Such an assumption turns the facial challenge standard on its head and would make it virtually impossible for the Department to promulgate facially valid administrative rules—or, for that matter, for the legislature to enact facially valid statutes.

The argument that the Rules open the door to an unconstitutional application is simply not enough to carry the facial challenge burden of showing that the Rules cannot be validly or constitutionally applied under any circumstances.[15] The Plaintiffs' facial challenges to the Rules thus are deficient as a matter of law.

D. THE RULES ARE CLEARLY VALID AND CONSTITUTIONAL WHEN APPLIED TO A DELIVERY CALL BY THE HOLDER OF A SENIOR GROUND WATER RIGHT AGAINST A JUNIOR GROUND WATER RIGHT.

The legal deficiency of the Plaintiffs' facial challenges becomes even more apparent in light of the fact that there is at least one set of circumstances in which the Rules plainly can be validly and constitutionally applied: a delivery call by the holder of a senior ground water right.

The Plaintiffs' arguments never address the possibility of a delivery call by a senior ground water user, but by their plain terms the Rules apply to such delivery calls.

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at 7-9; Memorandum in Support of Clear Springs Foods, Inc.'s, Motion for Summary Judgment at 2, 3, 7, 10, 11, 19, 23, 24, 25; Clear Springs' Foods, Inc.'s, Memorandum in Support of Motion to Intervene at 6-7 (implicitly adopting the allegations of the Complaint); TSWUA Memorandum at 19; Thousands Springs Water Users Association's Petition for Intervention at 3 (incorporating certain allegations of the Complaint); Memorandum in Support of Rangen, Inc.'s Motion for Summary Judgment at 3-6; Rangen, Inc.'s Petition to Intervene at 4-7.

[15] Any argument that the Rules have been unconstitutionally applied to the Plaintiffs is insufficient to meet this burden. Further, as previously discussed, any application of the Rules to the Plaintiffs and the Director's orders in the Plaintiffs' contested cases are not before the Court in this facial challenge. The Defendants object to any argument based on those orders or any application of the Rules to the Plaintiffs as being outside the scope of the matters before the Court.

See Rule 01 ("These rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right"). In such a scenario it is clear that the Rules are valid and supported by the GWA.

The GWA provides for the filing of a claim and the holding of a hearing, and that a finding be made that "the use of the junior right affects, contrary to the declared policy of this act, the use of the senior right." Idaho Code §§ 42-237b, 42-237c. The Rules' requirements of a delivery call and material injury determinations are entirely consistent with this procedure, and the definition of material injury as a "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person," Rule 10.14, is similarly consistent with the GWA requirement of a finding that use under the junior right "affects" use under the senior right." Idaho Code § 42-237c.

Moreover, the GWA expressly provides that the state's water resources are to be "devoted to beneficial use in reasonable amounts," and that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." Idaho Code § 42-226. This language supports the Rules' provisions regarding material injury, reasonable exercise of rights, and reasonable and efficient use of water. Rules 10.14, 40.03, 42.01.

The GWA also provides that if a junior right is determined to be injuring a senior right, the relief may take the form of an order to cease use under the junior right, either in whole or in part, or "under such conditions for the repayment of water to senior right holders as the board may determine." Idaho Code § 42-237c. This relief provision is

consistent with and supports the Rules' provisions authorizing partial or phased curtailment and/or mitigation as relief for an injured senior. Rules 20.04, 43.

Plainly, the Rules are entirely valid and consistent with Idaho law when the holder of a senior ground water right seeks curtailment of junior ground water rights. It follows that the Plaintiffs have not and cannot carry their burden of showing that the Rules are incapable of valid application under any circumstances. *Moon*, 140 Idaho at 540, 545, 96 P.3d at 641, *Rhodes*, 125 Idaho at 142, 868 P.2d at 470; *Korsen*, 138 Idaho at 711, 69 P.3d at 131.[16]

V. THE PLAINTIFFS ARE NOT ENTITLED TO SUMMARY CURTAILMENT OF JUNIOR WATER RIGHTS.

The Plaintiffs argue they are entitled to have all junior ground water rights—whether they are located in a water district, a ground water management area, or elsewhere—immediately and completely curtailed whenever the Plaintiffs have not received the maximum quantity of water stated in their decrees, without any request or action by the Plaintiffs, without any individualized determination as to the nature or extent of the hydraulic connection to the junior rights in question, and without any determination that use under the junior rights actually injured the Plaintiffs. For purposes of this memorandum, such a system of administration will be termed "summary curtailment."

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[16] Defendants by making this argument do not concede that the prior appropriation doctrine of Idaho, independent of the Ground Water Act, does not impose upon water rights established prior to 1951 the requirements of reasonable use and full economic development. These requirements and policies have been integral to Idaho prior appropriation doctrine since its inception. *See, e.g., Hard*, 9 Idaho at 594, 76 P. at 332 (explaining the policy of maximizing beneficial use of the state's water resources); *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, ___, 258 P. 532, 533 (1927) (referring to "the reasonable use of water contemplated by our law of appropriation").

The Plaintiffs have not cited any provision of the Idaho Constitution that entitles a water right holder to summary curtailment, or any Idaho case holding that summary curtailment is an inherent entitlement under an Idaho water right. The Plaintiffs' summary curtailment argument relies exclusively on a water distribution statute—Idaho Code § 42-607—and cases construing it. These authorities do not support or authorize summary curtailment. In addition, summary curtailment is wholly contrary to the spirit of the Ground Water Act's formal claim-and-hearing requirements for administration of junior ground water rights pursuant to a call by a senior surface water user.

A. IDAHO CODE § 42-607, *ALMO WATER COMPANY* AND *R.T. NAHAS* DO NOT REQUIRE SUMMARY CURTAILMENT OF JUNIORS.

The Plaintiffs argue that Idaho Code § 42-607 requires summary curtailment because it provides that the watermaster must "shut and fasten" headgates or other diversion facilities "when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others." Idaho Code § 42-607. This language does not equate to a requirement of summary curtailment, however. The statute plainly contemplates, at a minimum, preliminary determinations of the existence of "necessity" and of which particular junior-priority water users "supply the prior rights"—including whether shutting down an upstream junior would be futile because it would not "supply" water to the senior.

Further, the statute does not set forth any administrative procedures to be followed and does not address applicable principles of the prior appropriation doctrine such as beneficial use or the futile call doctrine. Moreover, section 42-607 affirmatively requires the watermaster to distribute water "under the direction of the department of water resources," and the Director is required to ensure that water is distributed in

accordance with the prior appropriation doctrine as a whole—not simply on the basis of priority alone—and to promulgate the appropriate administrative rules and regulations. Idaho Code §§ 42-602, 42-603. It thus follows from the plain language of section 42-607 and chapter 6 generally that section 42-607 is not self-executing and does not require summary curtailment.

The same is true of *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700, (1972), and *R.T. Nahas Co. v. Hulet,* 106 Idaho 37, 674 P.2d 1036 (Ct.App. 1983). These cases dealt only with a watermaster's duty to distribute water under section 42-607 between recorded (licensed or decreed) and unrecorded (beneficial use) water rights. *See R.T. Nahas Co.*, 114 Idaho at 27, 752 P.2d at 629; *Almo Water Co.*, 95 Idaho at 21 & n.18, 501 P.2d at 705 & n.18. There was no suggestion in either case that a watermaster was required to summarily shut off junior water right holders without any action or request by a senior, or without determinations of whether the junior's use was injuring the senior or whether curtailment would be futile.

Plaintiffs' approach would require curtailment even when no demonstrated need for the water existed. This approach would result in an onerous and unworkable administrative burden because the Director would be required to constantly monitor every use under every right to determine whether the full amount of the decreed quantity of water was being delivered. It would also lead to absurd and wasteful results, such as full deliveries even when ground was fallowed, or when the full decreed quantity of water is greater than the amount of water needed to irrigate the crop being grown.

Plaintiffs argue that the Rules have relegated their water rights to nothing more than "the mere right to a lawsuit." As the *Almo* opinion makes clear, it is only the

statutory authority of the watermaster—not the water right itself—that gives a senior something more than a right to a lawsuit:

> Watermasters in properly constituted water districts exercise exclusive power under I.C. § 42-601 et seq., to distribute water among appropriators. The State has persuasively argued in its brief that the purpose of this broad grant of authority has been to insure that a water right consists of more than the mere right to a lawsuit against an interfering water user.

Almo Water Co., 95 Idaho at 21, 501 P.2d at 705 (emphasis added). The Rules simply provide the framework for such administration by the Director.

This passage from *Almo* also shows that a water right does not include any entitlement to have a vested or licensed junior summarily shut down without any administrative or legal proceedings or showing of actual injury. Thus, section 42-607, *Almo* and *R.T. Nahas* do not stand for the rule that summary curtailment is one of the sticks in the water rights bundle or is otherwise required under Idaho law.

B. IDAHO CODE § 42-607, *ALMO WATER COMPANY* AND *R.T. NAHAS* APPLY ONLY IN WATER DISTRICTS.

Regardless of whether section 42-607, *Almo* and *R.T. Nahas* require summary curtailment, they cannot support a facial challenge because they apply only among the water rights within a given water district. Section 42-607 provides that "[i]t shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district." Idaho Code § 42-607 (emphases added). A watermaster has no statutory authority to distribute water outside his or her water district, *see generally* Idaho Code §§ 42-604 – 42-619,[17] and in any event section 42-607

[17] As a creation of statute, the office of watermaster has no authority beyond that conferred by statute. *See Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 434, 437, 18 P.3d 956, 959 (2000) ("As a creature of statute, SIF is limited to the power and authority granted to it by the legislature"); *see also DeRousse v. Higginson*, 95 Idaho 173, 180, 505 P.2d 321, 328 (1973) ("It is to be kept in mind that the authority of the watermaster in his district is to control the delivery of the water from the source of supply,

expressly limits its duty of distribution to waters "comprising a water district." Thus, by its plain terms, section 42-607 applies only within a given water district—not across water district boundaries or otherwise outside a water district.

The same is true with respect to *Almo* and *R.T. Nahas,* because they dealt with the duty of a watermaster to distribute water under section 42-607. *See R.T. Nahas Co.*, 114 Idaho at 27, 752 P.2d at 629; *Almo Water Co.*, 95 Idaho at 21 & n.18, 501 P.2d at 705 & n.18. There was no suggestion in either opinion that a watermaster had any authority to apply section 42-607 or distribute water outside of his or her water district. Because section 42-607, *Almo* and *R.T. Nahas* have no application outside a given water district, they cannot, as matter of law, suffice to show that the Rules are invalid under all circumstances.

C. SUMMARY CURTAILMENT IS INCONSISTENT WITH THE CLAIM-AND-HEARING PROCEDURES REQUIRED BY THE GROUND WATER ACT.

The Ground Water Act's requirements of a written claim, a hearing and a finding of injury prior to regulation or curtailment of junior ground water rights also demonstrates that a water right does not entitle a senior to summary curtailment of juniors, and that for purposes of conjunctive administration, there is no statutory right to summary curtailment. Further, the plain language of the GWA and the statute on which the Plaintiffs rely, section 42-607, shows that there is no statutory right to summary curtailment of junior ground water users.

Section 42-607 does not contain the terms "ground water," "aquifer" or "well," or any other substantially similar term specifically related to ground water diversion or use.

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i.e. 'the public stream, streams or water supply, comprising his water district,' into the respective ditches or canals leading from the main stream") (quoting section 42-607).

The closest the statute comes to addressing these subjects is in its generic references to "water supply" and "other facilities for diversion of water." Idaho Code § 42-607. In contrast, the GWA specifically sets forth procedures for the administration of ground water rights, and contemplates the conjunctive administration of surface water rights and ground water rights. *See* Idaho Code § 42-237b (setting forth administrative procedures for cases in which "any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority"). Thus, the GWA is the more appropriate legislative enactment for purposes of evaluating the facial validity of the Rules. *See Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 115, 73 P.3d 721, 729 (2003) ("Where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute").[18]

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[18] This conclusion also applies to water rights acquired prior to 1951, despite the fact that section 42-226 provides that the GWA does not "affect" rights acquired before its 1951 enactment and the Idaho Supreme Court's related holding in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). The relevant statement in section 42-226 occurs at the end of a lengthy paragraph setting forth the general policies of the Act and nothing in the statute specifically addresses water rights administration. It is properly understood as simply recognizing the existence of rights established prior to 1951, not as forbidding administration of existing rights under the GWA's provisions. This understanding is supported by the original language of the statute, which provided that "[a]ll rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed." The language was amended in a 1987 bill primarily addressing geothermal water resources. *See* Idaho Session Laws 1987, ch. 347 § 1, p. 741 (S.B. 1133).

This understanding of section 42-226 is also supported by the plain language of section 42-229, which explicitly draws a distinction between the acquisition of rights to use ground water rights and the administration of such rights. *See* Idaho Code § 42-229 (addressing how such rights may be "acquired" and "the administration" of such rights). Further, section 42-229 specifically provides that administration of all ground water rights, "whenever or however acquired," will be governed by the GWA's administration provisions. Idaho Code § 42-229 (emphasis added).

The specific language of section 42-229 controls over the general statement in section 42-226 for purposes of the administration of ground water rights. *See Westway Const., Inc.*, 139 Idaho at 115, 73 P.3d at 729. Moreover, any other interpretation would impermissibly render the express "whenever acquired" language of section 42-229 a nullity, defeating the unambiguous legislative intent. *See Hecla Min. Co. v. Idaho State Tax Comm'n*, 108 Idaho 147, 151, 697 P.2d 1161, 1165 (1985) ("it is incumbent upon a court to give a statute an interpretation that will not render it a nullity"); *State v. Yager*, 139 Idaho 680, 689-90, 85 P.3d 656, 665-66 (2004) ("It is a fundamental law of statutory construction that statutes that are in *pari materia* are to be construed together, to the end that the legislative intent will be given effect").

Summary curtailment of junior ground water rights is clearly contrary to the GWA's claim-and-hearing procedure. Thus, to construe section 42-607 as requiring summary curtailment would result in a conflict between two statutes providing for the administration of ground water rights. A fundamental rule of statutory construction requires a court to construe statutes in harmony where possible. *See Cox v. Mueller*, 125 Idaho 734, 736, 874 P.2d 545, 547 (1994) ("statutes relating to the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible"). As previously discussed, it is clearly reasonable to construe section 42-607 as contemplating preliminary determinations with regard to necessity, injury and futility before curtailment takes place, and such an interpretation is in harmony with the spirit of the GWA's administrative procedures. This construction avoids a statutory conflict between the GWA and section 42-607 and provides an interpretation of the Rules that upholds their constitutionality and validity. *See Korsen*, 138 Idaho at 711, 69 P.3d at 131 ("Appellate courts are obligated to seek an interpretation of a statute that upholds its constitutionality").[19]

VI. THE RULES DO NOT IMPERMISSIBLY BURDEN SENIORS BUT RATHER PROVIDE FOR EFFICIENT CONJUNCTIVE ADMINISTRATION OF INTERCONNECTED SURFACE WATER RIGHTS AND GROUND WATER RIGHTS.

It should be noted that section 42-229 was not before the Idaho Supreme Court in *Musser v. Higginson*, 125 Idaho 392, 394, 871 P.2d 809, 811 (1994), and was not mentioned in that opinion. Thus, *Musser* cannot be understood as overruling the express and unambiguous language the legislature used in section 42-229. *See Union Pacific Corp. v. Idaho State Tax Comm'n*, 139 Idaho 572, 578, 83 P.3d 116, 122 (2004) ("When the meaning of a statute is clear, the statute is to be read literally, neither adding nor taking away anything by judicial construction"); *Willows v. City of Lewiston*, 93 Idaho 337, 341, 461 P.2d 120, 124 (1969) ("It is the primary canon of statutory construction that where the language of a statute is unambiguous, the clear expressed intent must be given effect and there is no occasion for construction").

[19] "Administrative regulations are subject to the same principles of construction as are statutes." *Rhodes*, 125 Idaho at 142, 868 P.2d at 470.

A. THE REQUIRMENTS OF A DELIVERY CALL BY THE SENIOR AND A MATERIAL INJURY DETERMINATION BY THE DIRECTOR DO NOT IMPERMISSIBLY BURDEN SENIORS.

The Rules require that the senior make a delivery call, a nominal requirement that even the SRBA District Court contemplated would be a necessary component of conjunctive administration. *See* Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits, *In re SRBA, Subcase 91-00005 (Basin-Wide Issue 5)* ("Order re: Basin-Wide Issue 5") at 19 (discussing curtailing junior rights "in the event of a delivery call").[20] Such a requirement is also a common sense necessity for efficient administration as it notifies the Director that the senior water right holder is not receiving sufficient water under his right to achieve the beneficial use for which the right was established.

Under the plain language of the Rules, it is the Director, not the senior, who has the burden of making an initial material injury determination. In areas where a common ground water supply has already been established for purposes of administration, such as ground management areas and certain water districts, nothing in the Rules requires the senior to do anything more than allege material injury caused by a junior ground water right holder.[21] It is also implicit in the conjunctive administration process that in determining hydraulic interconnections and material injury, the Director will primarily

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[20] Attached to the Affidavit of Travis L. Thompson in Support of Plaintiffs' Motion for Summary Judgment ("Thompson Affidavit") as Exhibit B.

[21] In other areas, where the existence of a common ground water supply has not been established, the senior is required to provide "information, measurements data or study results available to the petitioner" that support the claim of material injury. Rule 30.01(c). This reflects the fact that in such areas there has been no final determination that includes ground water rights, and therefore the foundation for administration that exists in water districts and ground water management area is absent.

rely on data and information that the Department collects and develops, as the SRBA District Court has observed:

> IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree. . . . The partial decree need not contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call. Rather, IDWR makes this determination based on its knowledge and data regarding how the water rights are physically interrelated.

Order re: Basin-Wide Issue 5 at 19.

Thus, the delivery call requirement imposes no significant burden on a senior but rather promotes efficiency by alerting the Director to the need for the administration of water rights. The Director must make a material injury determination regardless of whether the senior supplies any such proof. It follows that the Rules do not impermissibly burden seniors and are not facially invalid simply because they require a delivery call by the senior and a material injury determination by the Director prior to potentially curtailing junior rights.

B. CONJUNCTIVE ADMINISTRATION OF INDIVIDUAL WATER RIGHTS REQUIRES FACTUAL DETERMINATION OF HYDRAULIC INTERCONNECTION AND THE EFFECTS OF DIVERSIONS AND WITHDRAWALS ON A CASE BY CASE BASIS, AND THE RULES PROVIDE AN EFFICIENT ADMINISTRATIVE FRAMEWORK FOR MEETING THESE REQUIREMENTS.

The Plaintiffs argue that there is no need for any factual inquiry into the hydraulic interconnections during conjunctive administration because the Idaho Supreme Court stated, "all water under the jurisdiction of the SRBA Court is interconnected." *A& B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 421, 958 P.2d 568, 578 (1997). As the rest of the *A&B* opinion makes clear, however, this statement of general hydraulic

interconnection across the Snake River system at large does not mean that no further factual inquiries are necessary for the conjunctive administration of individual water rights:

> Conjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and from ground water sources. Proper management in this system requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.

A & B Irr. Dist., 131 Idaho at 422, 958 P.2d at 579.

The SRBA District Court also recognized the need to determine the precise nature and extent of hydraulic interconnection between or among individual surface water and ground water sources before rights in such interconnected sources can be conjunctively administered:

> The scope of these proceedings should not include a factual determination of the specific interrelationships of the degree of connectivity between specific water rights (i.e., which particular junior water rights will be curtailed in the event of a delivery call by a senior). Factually, the Court could not make findings as to exact relationships. As indicated by IDWR, the technology and the data do not presently exist for making such determinations. Even if the technology and the data did exist the task of making such factual determinations would be monumental in terms of scope. Lastly, the specific interrelationships are dynamic as opposed to static. Therefore, any factual determinations made by the Court would be subject to change depending on climatic conditions and future geological activity.
>
> Legally, the Court also does not need to adjudicate specific interrelationships between water rights. IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree. For example, as between surface rights, the partial decree identifies the source of the rights in general terms. The partial decree identifies the particular stream source from which the water rights are diverted. The partial decree need not

> contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call. Rather, IDWR makes this determination based on its knowledge and data regarding how the water rights are physically interrelated. Mechanisms are available for water right holders in disagreement with IDWR's administrative actions to challenge and seek review of the same. This same legal reasoning should apply as between ground and surface sources, and therefore, a determination of the specific physical interrelationships between all water rights need not be made in the SRBA.

Order re: Basin-Wide Issue 5 at 19.

The Idaho Legislature has also implicitly recognized the special difficulties inherent in conjunctive administration by expressly requiring all ground water rights be administered under detailed claim-notice-hearing procedures. *See* Idaho Code §§ 42-229, 42-237a, 42-237b, 42-237c.

Clearly, the presumption of a general, overall interconnection in the Snake River system at large cannot replace specific factual determinations as to hydraulic interconnections between surface water sources and ground water sources or the effects of diversions or withdrawals from those sources for purposes of conjunctive administration. Indeed, the Idaho Supreme Court and the SRBA District Court have implicitly recognized that, in practical terms, such specific factual determinations can only be made on a case-by-case basis. The GWA's administration provisions also reflect this necessity.

The point is that the factual determinations of to what degree the use of a junior well interferes with a senior surface water right, and the appropriate regulatory response, are not trivial matters that can simply be brushed aside by asserting that the only difference between surface water sources and ground water is that ground water is invisible. Making specific factual determinations sufficient to support the administration

of individual water rights—including the possible curtailment of licensed or vested rights—takes time. The Plaintiffs' argument simply ignores this reality.

Given the practical and legal necessity of making specific factual determinations regarding the nature and degree of hydraulic interconnections between surface water and ground water sources, the Rules provide an efficient administrative framework. As previously discussed, the delivery call requirements impose no real burden on the senior right holders. The requirement of a delivery call operates to increase efficiency, because it alerts IDWR to the need for administration.

This process is at least as efficient as the statutory administrative procedures set forth in the GWA, if not more so, and plainly is quicker and less expensive than a lawsuit. Further, once the Director has entered an order as to a call in a water district, subsequent administration is performed by the watermaster in accordance with the order and Idaho law. *See* Rule 40.02. Thus, the Rules provide an efficient administrative system, especially in light of the legal and factual issues that must be resolved on a case-by-case basis in conjunctively administering interconnected surface water rights and ground water rights.

VII. THE RULES DO NOT AUTHORIZE THE RE-ADJUDICATION OF A WATER RIGHT.

The Plaintiffs also allege that the Rules are facially invalid because they "allow"[22] the Director to look beyond the face of a decree and essentially re-adjudicate a senior's water right by making it subject to conditions of reasonable and efficient use and diversion and the policies of optimum and full economic development of the state's water

[22] As previously discussed, the Plaintiffs primarily and repeatedly argue only that it is possible to re-adjudicate a water right under the Rules, not that such is required or inevitable.

resources. These arguments mischaracterize what the Rules require the Director to do. The Rules do not permit the Director to look behind the decree, they simply require as part of the administration of the rights to determine whether the water being called for is presently needed to achieve the beneficial uses for which the senior water right was established. If so, the full right is delivered. If not, then only that amount of water presently needed under the senior water right is delivered. This is not a diminishment of priority or re-adjudication of the water right. Thus, the Rules lend themselves to valid and constitutional application of the prior appropriation doctrine as established by Idaho law.

The Plaintiffs' arguments are based on the premise that strict priority administration based exclusively on the face of the partial decree is absolutely required as a matter of law. Under the prior appropriation doctrine as established by Idaho law, however, it is clear that reasonable and efficient beneficial use of water are inherent limitations in a water rights decree and continuing obligations after the decree is entered. It is also settled that the Department is authorized to apply these obligations in administering water rights in times of shortage if there is no actual need for the decreed quantity of water—such as when land has been fallowed, the crop mix does not require the full entitlement, or sufficient water is available under supplementary storage rights.

A. DECREE DOES NOT CREATE AN ABSOLUTE ENTITLEMENT TO RECEIVE THE FULL QUANTITY OF WATER UNDER THE RIGHTS AT ALL TIMES BECAUSE BENEFICIAL USE IS THE MEASURE AND LIMIT OF THE RIGHT TO DIVERT WATER IN IDAHO.

The Plaintiffs argue that the Director may not look beyond the face of the decree, relying principally on *Almo Water Company, R.T. Nahas, Stethem v. Skinner*, 11 Idaho 374, 82 P. 451 (1905), and *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 507

(1944). In terms of their relevance to the matter currently before this Court, these cases stand only for the general proposition that a watermaster must distribute water in a water district in accordance with the applicable decrees and the water distribution statutes. None of them address the central issues raised by the Plaintiffs' argument: the question of the quantity of water to which a decree entitles the holder, and the question of whether the obligation of reasonable and efficient beneficial use of water applies after the decree is entered.

The contention that a decree entitles a water right holder to receive the stated quantity of water set forth therein, regardless of the factual realities of use, is clearly wrong under well-established Idaho law. Although a license or decree may provide the maximum amount of water that a water right holder is authorized to use, it does not reflect the amount of water that a right holder is authorized to divert under all circumstances. "The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it." *Munn*, 43 Idaho at 207, 252 P. at 867. The Idaho Supreme Court has expressly made it clear that under Idaho law this limitation applies regardless of the quantity of water set forth in the decree:

> [Idaho Code §] 42-220 prohibits the senior appropriators, regardless of the amount of their decreed right, from "the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed"

Briggs, 97 Idaho at 435 n.5, 546 P.2d at 390 n.5.[23]

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[23] Idaho Code § 42-20 provides, in pertinent part:

> [A]nd 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.

Briggs did not break new ground in this regard. It has long been the law in Idaho that actual beneficial use—not the decree—is the measure of the quantity of water that may be used under a water right:

> 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.

Glavin v. Salmon River Canal Co., 44 Idaho 583, 589, 258 P. 532, 534 (1927); *see also Conant v. Jones,* 3 Idaho 606, 613, 32 P. 250, 251 (1893) ("he is only entitled to such water, from year to year, as he puts to a beneficial use"); *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 442, 319 P.2d 965, 968 (1957) (stating that when an appropriator has no actual need of water, "it is the duty of a prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators"); *Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho 216, 223, 240 P. 443, 445 (1925) ("The right of appellant to the waters of the Portneuf river for mill purposes was limited to the quantity of water reasonably necessary to operate the mill"); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. at 22 ("An appropriator is entitled only to the amount of water he needs, economically and reasonably used").

In other words, "the extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate." *Schodde*, 224 U.S. at 120; *see also Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 59 F.2d 19, 23 (9th Cir. 1932), *cert. denied*, 7 U.S. 638 (1932) ("The extent of beneficial use is an inherent and necessary limitation upon the right"); *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 535 (D.C.Cir. 1940), *cert. denied*, 312 U.S. 687 (1941) ("His right is qualified by the limitation, made in favor

of subsequent appropriators and the widest possible use of water on arid lands, that all of the water he uses must be beneficially applied and with reasonable economy in view of the conditions under which the application must be made");[24]

Thus, the contention that the Plaintiffs are absolutely entitled to the quantity of water set forth in their decrees is flatly contrary to the prior appropriation doctrine as established by Idaho law. The Plaintiffs and other water right holders are only authorized to divert or receive the quantity of water necessary for beneficial use, regardless of the quantity recited in the decree. In effect, the decreed quantity only operates as an upper limit, but admittedly one the user is presumptively authorized to divert. These principles reflect the fact that a water right confers no entitlement to waste water and is a right of use only—the State, not the appropriator, owns the water. They also give effect to the "the well recognized policies in this state of maximum economic utility of water resources and the development and reclamation of arid lands." *Canyon View Irrigation Co.*, 101 Idaho at 612, 619 P.2d at 130.

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[24] The principle that a water right entitles the holder to the quantity of water necessary for beneficial use regardless of the quantity recited in the decree is a fundamental tenet of prior appropriation law in the western states:

> To provide protection to the rights of other appropriators, limitations are read into every decree for a water right. One limitation is that diversions are limited to an amount sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion. The holder of a water right decree cannot divert more water than can be used beneficially.

Matter of Board of County Comm'rs of County of Arapahoe, 891 P.2d 952, 969 (Colo. 1995); *see also Basin Elec. Power Co-op. v. State Bd. of Control*, 578 P.2d 557, 563 (Wyo. 1978) ("the water right of an appropriator is limited to beneficial use, even though a larger amount has been adjudicated"); *Whitcomb v. Helena Water Works Co.*, 444 P.2d 301, 304 (Mont. 1968) ("So long as a party has all the water his necessity requires or that his ditches will carry, it is immaterial that he has a right, under decree or otherwise, to a greater flow from the creek"); *In re Water Rights of Deschutes River and Its Tributaries*, 36 P.2d 585, 587 (Or. 1934) ("The rights to the use of the waters of the Deschutes river and its tributaries, as determined by the decree in the present proceedings, entitled and limited the owners of a water right to the use of the quantity of water which may be applied to a beneficial use. If the amount specified in the decree is not beneficially used and it so appears to the water master, the error should be corrected").

B. THE REQUIREMENT THAT WATER BE USED REASONABLY AND EFFICIENTLY FOR BENEFICIAL PURPOSES IS A CONTINUING OBLIGATION THAT THE DEPARTMENT IS AUTHORIZED TO APPLY IN ADMINISTERING WATER RIGHTS PURSUANT TO A CALL DURING TIMES OF SHORTAGE.

It follows that the requirement of beneficial use is not simply a hurdle the appropriator must surmount to obtain a decree. The Idaho Supreme Court has held that the requirement is "a continuing obligation" that is "integral" to the policy of maximum use:

> Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. This is a continuing obligation.

Hagerman Water Right Owners, Inc., 130 Idaho at 735, 947 P.2d at 408.[25]

Giving meaning to these ongoing obligations, and the underlying policy of securing the maximum use and benefit and least waste of the state's water, requires administration that is more than a purely ministerial exercise of delivering the quantity of water recited in the decree without regard to actual use or any other principles of the prior appropriation doctrine as established by Idaho law, as the Plaintiffs would have it. Accordingly, the Idaho Supreme Court has recognized that "[a]dministering a water right is not a static business." *A & B Irr. Dist.*, 131 Idaho at 414, 958 P.2d at 571.

The Idaho Supreme Court has made it clear that under Idaho statutes, water rights administration is intended to give effect to the continuing obligation of beneficial use and

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[25] The principle that beneficial use is a continuing obligation is also fundamental to the prior appropriation doctrine throughout the western states. *See, e.g., Basin Elec. Power Co-op. v. State Bd. of Control*, 578 P.2d 557, 563 (Wyo.1978) ("Beneficial use is not a concept which is considered only at the time an appropriation is obtained. The concept represents a continuing obligation which must be satisfied in order for the appropriation to remain viable"); *Mitchell Irr. Dist. v. Sharp*, 121 F.2d 964, 967 (C.A.10 1941), *cert. denied,* 314 U.S. 667 (1941) ("the right of the appropriator attaches not to the water while running in the natural channel but to the use of a limited quantity thereof for beneficial use, in pursuance of an appropriation perfected and continued in compliance with the requirements of law") (emphasis added).

the underlying policies of maximizing the use of the state's water resources. "The statutory scheme set forth in Title 42 of the Idaho Code is the vehicle by which the Legislature set out to effectuate this [concept of beneficial use] and other constitutional principles regarding the use and administration of water in the state. *Hagerman Water Right Owners, Inc.*, 130 Idaho at 743, 947 P.2d at 416.

> "The governmental function in enacting ... the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources."

Hagerman Water Right Owners, Inc., 130 Idaho at 735, 947 P.2d at 408 (quoting *Nettleton v. Higginson,* 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977)) (ellipsis in *Hagerman*).

In *A&B*, the Idaho Supreme Court left no doubt that when a delivery call is made the Director has ongoing authority to ensure that the amount of water being diverted is necessary for the beneficial use for which the right was established and that the water is not being wasted:

> No irrigator has the right to waste water. The Director has the administrative duty and authority to annually determine the beginning and ending of an irrigation season and to prevent wasteful use of water by irrigators. The period of the year when water is used for irrigation purposes shall be determined annually by irrigators subject to the authority of the Director and any reasonable rules and regulations the Director may adopt.

Id. at 415, 958 P.2d at 572.

This holding implicitly recognized that "[t]he legislature intended to place upon the shoulders of the [Director] the primary responsibility for a proper distribution of the waters of the state," *Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725,

732 (1968). Further, it is "well settled" in Idaho that the state has the right to "control the use" of water through administrative rules:

> The water belongs to the state of Idaho. And the right of the state to regulate and control the use, by appropriate procedural and administrative rules and regulations, is equally well settled.

Board of Directors of Wilder Irr. Dist. v. Jorgensen, 64 Idaho 538, 551,136 P.2d 461, 466 -67 (1943) (Ailshie, J., concurring). "Hence a use which is wasteful may be restricted in the interest of subsequent appropriators and thus of the conservation of water." *Burley Irr. Dist.*, 116 F.2d at 535.

It is therefore clear that the Department is authorized to actively administer water rights so as to promote the maximum beneficial use and least waste of Idaho's water resources.[26] Because these continuing obligations are inherent in an Idaho water right, applying them while administering water rights is entirely consistent with the prior

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[26] To be sure, such administration must be consistent with the rule of priority. It is clear, however, that "[t]he prior appropriation doctrine is not a legal barrier to the concurrent consideration by the state engineer of the various methods of implementing the state policy of maximum utilization. *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973)." *Matter of Rules and Regulations Governing Use, Control, and Protection of Water Rights for both Surface and Underground Water Located in Rio Grande and Conejos River Basins and their Tributaries*, 674 P.2d 914, 934 (Colo. 1983).

Indeed, the general presumption is that actively administering water rights to promote beneficial use and reduce waste is fully consistent with the prior appropriation doctrine. *See Basin Elec. Power Co-op. v. State Bd. of Control*, 578 P.2d 557, 564 (Wyo. 1978) (referring to the presumption "that diligent water administration would prevent unneeded excess water from being diverted in the first place"); *Squaw Creek Irr. Dist. v. Mamero*, 214 P. 889, 893 (Or. 1923) (referring to "the duty of the water master to regulate the headgates of ditches so as to prevent the waste of water, or its use in excess of the volume to which the owner of any water right is lawfully entitled"); *In re Water Rights of Deschutes River and Its Tributaries*, 36 P.2d 585, 587 (Or. 1934) ("if, for any reason the water is not needed by a water user for a beneficial purpose, although the same may be awarded to him, the water master should regulate the same so that there should be no waste of water. Beneficial use is the limit of the right to the use of water in this state"); *Parshall v. Cowper*, 143 P. 302, 304 (Wyo. 1914) ("The volume of water to which an appropriator is entitled at any particular time is that quantity, within the limits of the appropriation, which he can and does apply to the beneficial uses stated in his certificate of appropriation. It may be more at one time than at another; and, as we understand the statute, it is for the purpose of regulating the quantity from time to time to which an appropriator is so entitled that the water commissioner is given authority to close or partially close a headgate, so as to prevent waste of water, and to secure to prior appropriators the quantity of water to which they are entitled"); *Humboldt Lovelock Irr. Light & Power Co. v. Smith*, 25 F.Supp. 571, 573 74 (D.Nev 1938) ("It has long been the settled law in the arid and semi-arid states that a state, in the exercise of its police power, may regulate the manner of appropriation and distribution of water from natural streams for purposes of irrigation").

appropriation doctrine as established by Idaho law and does not constitute a re-adjudication.[27]

The Idaho Supreme Court's decision in *McGinness v. Stansfield*, 6 Idaho 372, 55 P. 1020 (1898) does not alter this conclusion. To the extent that decision implies that the state may not regulate use under a water right, it is no longer good law in light of *Hagerman Water Right Owners*, *A&B*, *Keller* and *Board of Directors of Wilder Irr. Dist.* In addition, *McGinness* was decided under different statutes and is no longer controlling with regard to the Department's administrative authority, if indeed it ever was.

Further, the notion that the Department is limited to delivering the quantity of water recited in the decree in the course of administering water rights makes little sense in the larger framework of Idaho water law. The continuing obligations to reasonably and efficiently divert and use water for beneficial purposes would be largely meaningless if the Department was barred from giving them effect in a system of ongoing water rights administration. Limiting any inquiry into the extent of beneficial use or waste to the time of the adjudication while requiring deliveries of decreed amounts regardless of whether they were needed or could even be used, would render the obligation of continuing beneficial use and minimizing waste a hollow one.

Such a limited system of administration would in many cases essentially immunize a water right from the obligation of maximizing beneficial use and minimizing

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[27] Courts in other states have reached the same conclusion. *See Laramie Irrigation & Power Co. v. Grant*, 13 P.2d 235, 239 (Wyo. 1932) ("the water commissioner acts only in an administrative capacity, since his function is merely to preserve the peace and see to it that water is, at a particular time, distributed and divided in a peaceful, orderly manner for the common good of all . . . his decision is temporary only and determines the property rights of none"); *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1297-98 (Cal. 1975), *disapproved of on other grounds by City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 858-59 (Cal. 2000) (distinguishing between "the principle of continuing administration of competing rights" to water from "the rules by which the limited supply of water is apportioned among the parties").

waste. This is not what the Idaho Supreme Court had in mind when it said that "[f]inality in water rights is essential." *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998).

Similarly, viewing water rights administration as merely the ministerial delivery of the quantity of water set forth in the decree is contrary to the very nature of an Idaho water right, which only allows the holder to use water—the water itself remains the property of the State in its sovereign capacity. Thus, water rights administration logically and necessarily encompasses the use of water, not just its delivery. The State and the right holder both have property interests in a water right, and the prior appropriation doctrine as established by Idaho law requires administration of water rights to "balance the competing interests of the parties involved and the public and serve to effectuate the policy of maximum development of the water resources of this state." *Parker*, 103 Idaho at 514, 650 P.2d at 656. The Colorado Supreme Court similarly recognized almost forty years ago in the seminal *Fellhauer* case that the administration of water rights must integrate the principles of maximizing use and protecting of vested rights:

> As administration of water approaches its second century the curtain is opening upon the new drama of Maximum utilization and how constitutionally that doctrine can be integrated into the law of Vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer v. People, 447 P.2d 986, 994 (1968).

A water right decree does not, as Plaintiffs appear to believe, amount to fee ownership of a certain quantity of water that the holder can demand and use free of any obligations or duties, and without any regulation or oversight. The appropriator and the State—and by extension the public at large—both have vital property interests at stake. The Plaintiffs' argument ignores this fact and essentially views a decree as excusing the

appropriator from any further compliance with the continuing obligation of beneficial use. The effect of embracing such an argument would be to transform a qualified right of use into a right of absolute ownership of the water itself. This result would be contrary to Idaho water law and policy, would eliminate incentives for maximizing use and reducing waste, and would ultimately impede the development of the state's water resources and the state's economy at large.

Under the prior appropriation doctrine as established by Idaho law, it is clear that the State has legal authority to administer water rights to give effect to the continuing obligations of reasonable and efficient beneficial use of water and the reduction of waste. It is just as clear that doing so does not amount to a re-adjudication of water rights or otherwise violate any property interest in water rights. The Plaintiffs' argument that the Rules are facially invalid and authorize a re-adjudication of vested rights simply because they incorporate the principles of reasonable and efficient beneficial use and diversion of water, and the policies of maximizing the beneficial use and economic development of the state's water resources in the public interest, must be rejected as a matter of law and policy.

For the same reasons, the contention that the Rules are facially invalid for violating the principle of separation of powers is groundless. As the foregoing discussion demonstrates, administering water rights pursuant to a delivery call in time of shortage to give effect to the continuing obligations of reasonable and efficient beneficial use is an administrative and executive process of applying inherent limitations and requirements in every Idaho water right decree. Such is not a violation of separation of powers.

VIII. THE PLAINTIFFS HAVE FAILED TO SHOW THAT THE SPECIFIC PROVISIONS OF THE RULES TO WHICH THEY OBJECT ARE FACIALLY INVALID.

A. THE INCORPORATION INTO RULE 20.03 OF PORTIONS OF SECTIONS 5 AND 7 OF ARTICLE XV OF THE IDAHO CONSTITUTION AND THE GROUND WATER ACT DO NOT RENDER THE RULE FACIALLY INVALID.

The Plaintiffs contend that Rule 20.03 is facially invalid because it incorporates portions of sections 5 and 7 of the Idaho Constitution and a policy statement from the Idaho Ground Water Act. Nothing in Rule 20.03 amounts to blanket negation or nullification of the rule of priority—the Rule explicitly recognizes that "reasonable use" incorporates the concepts of "priority in time and superiority in right." Rule 20.03. Thus, it cannot be said that Rule 20.03 makes it impossible, in all cases, to protect a senior's water right or administer water rights on a priority basis.

Moreover, Rule 20.03 only incorporates sections 5 and 7 by reference, and simply incorporating provisions of the Idaho Constitution by reference cannot render the Rule facially invalid. This is especially true in light of the fact that the section 5 reference only incorporates reasonable use conditions that "the legislature may by law prescribe." Rule 20.03. It must be presumed that any such conditions the legislature enacts—and that therefore are incorporated into the Rules by the pass-through provision—will be in accordance with section 5 and all other relevant Idaho law. *See First American Title Co. of Idaho, Inc. v. Clark*, 99 Idaho 10, 13, 576 P.2d 581, 584 (1978) (stating that the legislature must be presumed to know existing law). The argument that Rule 20.03

"stretch[es] the application of Article XV, Section 5 outside the boundaries of water delivery entities' projects"[28] is plainly incorrect.

Nor is the Rule defective simply because it provides that "[t]he policy of reasonable use includes the concepts of priority in time and superiority in right being subject to . . . optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution." Rule 20.03. The "optimum development" language is a direct quote of part of section 7 that the Idaho Supreme Court has interpreted as setting forth a "constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). The Rule cannot be facially invalid for simply incorporating a constitutional water development policy that the Idaho Supreme Court has expressly recognized, and that is substantially the same policy that has always been part of the prior appropriation doctrine as established by Idaho law. *See, e.g., Poole*, 82 Idaho at 502, 356 P.2d at 65 (stating the policy of "secure[ing] the maximum use and benefit, and least wasteful use, of [the state's] water resources").

Further, the "optimum development" language from section 7 does not impermissibly subordinate priorities, because the Rule also incorporates the "first in time is first in right" rule, which is rooted in section 3 of Article XV. *See* Idaho Const. art. XV § 3 ("Priority of appropriations shall give the better right as between those using the water"). These two provisions must be construed as being consistent and in harmony with each other. *See State v. Edmonson*, 113 Idaho 230, 234, 743 P.2d 459, 463 (1987)

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28 Plaintiffs' Memorandum at 26.

("When construing separate constitutional provisions, the general principles of statutory construction apply. Statutes must be construed, if at all possible, consistently and harmoniously") (citation omitted).

The Plaintiffs also argue that Rule 20.03 is facially void because it provides that the policy of reasonable use and rule of priority are subject to the goal of "full economic development as defined by Idaho law," which is similar to certain language in the Ground Water Act. *See* Idaho Code § 42-226 ("while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources"). The Plaintiffs argue this language makes the Rule facially invalid because the GWA does not apply to pre-1951 water rights.

As an initial matter, the goal of full economic development of Idaho water resources has always been a policy of Idaho water law—the policy did not originate with the Ground Water Act. *See generally Hard*, 9 Idaho at 594, 76 P. at 332; *see also Canyon View Irrigation Co.*, 101 Idaho at 612, 619 P.2d at 130 (referring to "the well recognized policies in this state of maximum economic utility of water resources and the development and reclamation of arid lands").

Further even assuming for purposes of argument only that the policy of "full economic development" originated with the Act and the Act does not apply to pre-1951 water rights,[29] the "full economic development" policy clearly applies to post-1951

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[29] As previously discussed, the Act has some application to pre-1951 water rights because section 42-229 expressly provides that the Act governs the administration of "all rights to the use of ground water, whenever or however acquired." Idaho Code § 42-229.

ground water rights.[30] It follows that, even under the Plaintiffs' arguments, Rule 20.03 has an entirely valid application, and therefore cannot be facially invalid.

B. RULE 20.03'S INCORPORATION OF A PRINCIPLE FROM THE *SCHODDE* CASE DOES NOT RENDER THE RULES FACIALLY INVALID.

The Plaintiffs' next objection to Rule 20.03 is that it misinterprets *Schodde v. Twin Falls Land & Water Co.,* 224 U.S. 107 (1912) and therefore impermissibly imposes conditions of reasonable use on a senior water right. The Plaintiffs are simply wrong that Rule 20.03 misinterprets *Schodde*. *Schodde* is routinely interpreted as standing for, among other things, the rule that an appropriator has no right to command a large body of water to support or facilitate the appropriator's diversion or use of a portion of that water. *See, e.g., Fellhauer v. People*, 447 P.2d 986, 994 (Colo. 1968); *Wayman v. Murray City Corp.*, 458 P.2d 861, 865 (Utah 1969). This is precisely what is stated in the relevant portion of Rule 20.03. *See* Rule 20.03 ("An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule").

Further, *Schodde* is entirely consistent with the prior appropriation doctrine as established by Idaho law. The United States Supreme Court made it clear in *Schodde* that the "precise question" presented in that case had already been addressed and foreclosed by the Idaho Supreme Court in *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907). *Schodde,* 224 U.S. at 123-24. The Idaho Supreme Court did not, as the Plaintiffs suggest, reject *Schodde* in *Arkoosh v. Big Wood Canal Co.,* 48 Idaho 383, 283 P.2d 522 (1929), or

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30 *See supra* note 18.

otherwise suggest *Schodde* might be incompatible with Idaho law. In *Arkoosh*, the Court only held that *Schodde* did not support a dam operator's decision to reduce releases on the ground that excessive, artificially-caused seepage losses in the river bed[31] should be charged against the downstream seniors rather than the dam operator. *Arkoosh,* 48 Idaho at396, 283 P.2d at 523-24. The case did not involve an attempt to command the entire river to support a single appropriation. The fact that the Court distinguished *Schodde* on the ground that it involved unappropriated water while all the water in *Arkoosh* was subject to appropriation has no legal or logical bearing on the facial validity of Rule 20.03, and plainly does not render the Rule incapable of valid application under any circumstances.

C. THE MITIGATION PLAN PROVISIONS DO NOT RENDER THE RULES FACIALLY INVALID.

The Plaintiffs argue that Rules 40 and 43 are facially invalid because they provide for mitigation in lieu of curtailment without a senior's consent and allegedly allow juniors to buy their way out of curtailment by paying money to the senior. This facial challenge argument fails because the mitigation provisions have valid applications that are entirely consistent with Idaho law.

Under Idaho law, water exchanges "are invalid only if they clearly infringe upon the rights of other water users." *Almo Water Co.*, 95 Idaho at 20, 501 P.2d at 704; *Board of Directors of Wilder Irr. Dist.*, 64 Idaho at 546-47, 136 P.2d at 464-65 (similar). In his concurrence in *Board of Directors,* Justice Ailshie characterized the substitution of water

[31] The natural seepage losses in the river bed had been greatly increased by (1) the construction of the dam, which blocked silt that would have otherwise acted as a natural sealant in the fractured basalt of the river bed, and (2) large and abrupt releases from the dam that scoured the existing silt and debris out of the cracks in the river bed. *Arkoosh*, 48 Idaho at 389-90, 283 P. at 523-24.

as merely an "administrative regulation" that can make no difference to the appropriator as long as water is delivered at the time and under the priorities provided in the decree:

> the right to substitute the waters of one stream for those of another, when that can be done without impairment of the rights of prior appropriators along these streams, is merely an administrative regulation calculated to be beneficial rather than detrimental to the proprietary rights of the water user. It can make no difference to the appropriator of water, whether he gets the water from one stream or another, or from the pooled waters of a lake or reservoir, so long as it is delivered to him at his headgate at the times and under the priorities to which his location and appropriation entitle him.

Board of Directors of Wilder Irr. Dist., 64 Idaho at 551, 136 P.2d at 467 (Ailshie, J., concurring).

Under Rule 43, a mitigation plan is a means for replacing the water a senior has not received due to junior diversions. S*ee generally* Rule 43.02 (multiple provision referring to replacement water). Further, Rule 43.03 contains a detailed list of factors for determining whether a proposed mitigation plan will injure seniors, including "[w]hether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source." Rule 43.03(b). The mitigation provisions thus are wholly consistent with Idaho law.

The Plaintiffs' assertion that IDWR admits it cannot compel a senior to accept such mitigation water mischaracterizes the "Facility Volume" order. By its terms, the relevant portion of that order concerns "mitigation in the form of money," not water supplied to a senior to offset the depletive effects of junior well withdrawals. *See* Exhibit

I to Thompson Affidavit at 14. The plain language of the Rules contemplates that mitigation in the form of water supplied to a senior is the primary and preferred type of mitigation. The mitigation provisions are almost entirely concerned with issues relating to supplying such water.

In addition, to the extent that the relevant portion of the "Facility Volume" order is a judicial interpretation of testimony given by Dave Tuthill of IDWR in that proceeding, IDWR was not and is not a party. Plaintiffs' reliance on Mr. Tuthill's opinions regarding the scope of the Department's legal authority is misplaced because his opinions do not define that authority. IDWR and the office of the Director are creations of statute and their duties and authorities are defined by Idaho law, *see Selkirk Seed Co.*, 135 Idaho at 437, 18 P.3d at 959, not by the opinions of the Department's staff. Further, the Plaintiffs have not argued or contended that Mr. Tuthill—or any of the Department's personnel—are empowered to limit or expand the Department's authority under Idaho law. It follows that Mr. Tuthill's stated opinions cannot strip the Department of its lawful authority to approve and apply mitigation plans in conjunctive administration proceedings.

The argument that Rule 43 is facially invalid because it allows junior to "buy" their way out of curtailment is also insufficient to prove facial invalidity. Rule 43 allows the Director to consider whether a mitigation proposal "provides replacement water supplies or other appropriate compensation." Rule 43.03(c). The Plaintiffs have explicitly argued only that the "other compensation" language creates the possibility of an invalid application of the Rules—not that the language renders the Rules incapable of valid application under all circumstances:

> Clearly, Rules 40 and 43 allow the Director to ignore priority and even permit junior ground water right holders to 'buy' their way out of curtailment and proper administration. Under the Rules as written, presumably the Director could approve a mitigation plan wholly based upon monetary payments to seniors instead of a plan that actually provides water to supply the prior rights.

Plaintiffs' Memorandum at 34 (emphasis added). This is all that Plaintiffs could argue, because the Rule does not require the payment of "other compensation"—it only provides that the Director may "consider" whether a proposal includes "other compensation," and there is no requirement that the Director accept such a proposal, even if it has been approved by the affected senior right holders.

Further, the "other compensation" provision clearly has at least one valid application under Idaho law—payments to a senior ground water user as compensation for expenses incurred in changing a method or means of diversion necessitated by a junior ground water use:

> [The plaintiff's vested domestic well right] includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and [the senior] is required to change his method or means of diversion in order to maintain his right to use the water.

Parker, 103 Idaho at 512, 650 P.2d at 654 (emphasis added).

The Plaintiffs' arguments fail to show that the mitigation provisions are incapable of valid application and it is clear that the provisions do have valid applications under Idaho law. Thus, the Plaintiffs' facial challenge to the mitigation provisions must be rejected.

D. THE DEFINITION OF "MATERIAL INJURY" AND THE RULE 42 FACTORS DO NOT RENDER THE RULES FACIALLY INVALID.

The Plaintiffs contend that the definition of "material injury" in Rule 10.14 is invalid because it incorporates the factors listed in Rule 42. The Rule defines "material injury" as "[h]indrance 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 Rule 42."

As an initial matter, the fact that the Rules require a "material injury," rather than simply an "injury," is consistent with the established rule that an existing junior ground water right may not be curtailed unless the senior has suffered an injury that is "material and actual, and not fanciful, theoretical or merely possible." *Bower v. Moorman*, 27 Idaho 162, 182, 147 P. 496, 503 (1915); *Noh v. Stoner*, 53 Idaho 651, 655, 26 P.2d 1112, 1113 (1933); *see also Jones v. Vanausdeln,* 28 Idaho 743, 749, 156 P. 615, 617 (1916); *Bailey v. Idaho Irr. Co.*, 39 Idaho 354, 358, 227 P. 1055, 1056 (1924). Further, the phrase "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person" obviously includes the definition the Plaintiffs urge: "a reduction in the quantity of water available under existing water rights." *See* Plaintiffs' Memorandum at 37 (quoting Idaho Code §§ 42-203A(5), 42-1763).

Turning to the Rule 42 factors, it is clear that the Plaintiffs' facial invalidity argument is deficient as a matter of law because the Plaintiffs only argue that the factors "create a number of avenues" for the Director to reach an invalid or unconstitutional result[32]—the Plaintiffs entirely fail to argue that the Rule 42 factors compel such an outcome or make the definition of "material injury" incapable of valid application.

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[32] Plaintiffs Memorandum at 37.

The Plaintiffs also argue that Rule 42 factors have the effect of placing the burden of proof on the senior.[33] This is incorrect under the plain language of the Rule, which requires no proof by the senior and simply authorizes the Director to consider a senior's diversion, conveyance and use of water in determining material injury. This fact does not create any burden that the seniors demonstrate reasonable or efficient diversion or use of water. Rule 42 merely authorizes the Director to determine whether the senior is complying with the prior appropriation doctrine as established by Idaho law. Further, it is the Director who has the burden of making the inquiries and locating and reviewing the information and data required to make a material injury determination. Rule 42 does not have the effect of placing any burden on the senior.

The Plaintiffs' real objection to the Rule 42 factors is that they allow the Director to consider the efficiency and reasonableness of the senior's diversion, conveyance and use of water. As previously discussed, it is clear that such efficiency and reasonableness of diversion and use, and the minimization of waste, are necessary elements of and limitations on the exercise of every appropriative right under the prior appropriation doctrine as established by Idaho law, and that these continuing requirements are proper subjects for inquiry in the process of administering a water right pursuant to a call during times of shortage. Thus, the fact that the Rule 42 factors allow the Director to consider reasonableness and efficiency of diversion and use does not render the Rule facially invalid.

A review of the individual factors in Rule 42 entirely supports this conclusion. The factors that the Director may consider under Rule 42 are set forth below:

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[33] Nothing in Rules 42 explicitly shifts or refers to any burden of proof.

a. The amount of water available in the source from which the water right is diverted. (10-7-94)
b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)
c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (10-7-94)
d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. (10-7- 94)
e. The amount of water being diverted and used compared to the water rights. (10-7-94)
f. The existence of water measuring and recording devices. (10-7-94)
g. The 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; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10- 7-94)
h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority. (10-7-94)

Rule 42.01.

Clearly, factors (a) and (f) present no issues because the Director may consider the amount of water available in a source and whether the senior has water measuring and recording devices in the course of administration. Similarly, factor (c) passes muster because the Director must be authorized to consider the individual and/or collective effects of use under junior ground rights on the availability of water for a senior right.

Indeed, the Plaintiffs would certainly object if Rule 42 did not authorize the Director to do so as part of his "material injury" determination.

Factor (e) is valid and consistent with Idaho law because, as previously discussed, a water right is inherently limited to the amount of water that is beneficially used, regardless of the decreed quantity or flow, and beneficial use is a continuing obligation and a proper subject for inquiry when a senior requests administration of existing junior rights. Factors (g)[34] and (h) are valid for similar reasons—reasonable and efficient diversion and use of water are ongoing obligations and proper subjects for inquiry in administering water rights, and a water right does not include the right to waste water. Further, as also previously discussed, Idaho law also requires that a water right be exercised reasonably in light of other water rights and the underlying policies of the prior appropriation doctrine as established by Idaho law.

Factor (b) authorizes the Director to consider the effort and expense associated with the seniors' diversion from his or her water source. This factor thus authorizes consideration of one aspect of the "efficiency" of the senior's diversion. *See* WEBSTER'S II NEW COLLEGE DICTIONARY at 367 (defining "efficiency" as "The ratio of the effective or useful output to the total input in a system"). As discussed above, there is nothing objectionable in considering a senior's diversion efficiency in the process of administering vested junior rights. Further, the factor is facially neutral—it obviously allows the Director to conclude that a diversion is "efficient" if there is an unusually large effort or expense associated with the diversion.

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[34] Factor (g) also allows the Director to determine what constitutes a reasonable amount of carry-over storage water. This provision is discussed in a subsequent section of this memorandum, as the Plaintiffs specifically argue that the "reasonable carryover" language renders the Rules facially invalid.

Accordingly, the Rule 42 factors are facially and substantively consistent with the prior appropriation doctrine as established by Idaho law. The Plaintiffs have failed to carry their burden of showing Rule 42 facially invalid.

E. THE PROVISION FOR "REASONABLE CARRYOVER" IN RESERVOIR STORAGE DOES NOT RENDER THE RULES FACIALLY INVALID.

The Plaintiffs further argue that Rule 42's factor (g) is facially invalid because it allows the Director to determine the amount of reservoir storage that constitutes "reasonable carryover." The Plaintiffs argue that this Rule authorizes an unconstitutional "taking" of private property. This argument fails both under the plain language of the Rules and because the question of whether requiring reservoir storage to be used as a condition of curtailing juniors amounts to a taking is an inherently factual inquiry and there are clearly circumstances in which such a requirement would not be a taking.

The plain language of Rule 42.01(g) demonstrates that the "reasonable carryover" provision operates, in context, as a qualifier to and limitation on the extent to which the hypothetical use of additional "reasonable diversion and conveyance efficiency and conversation practices" may enter into the determination of whether a senior has a sufficient water supply. The provision authorizes the Director to consider:

> The 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; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

Rule 43.01(g) (emphasis added).

Thus, the "reasonable carryover" allowance can operate to prevent a senior from being compelled to use storage water just as readily as it could be applied to require a senior to use stored water before there can be a finding of material injury. This fact alone renders the Rule facially valid because it means that even under the Plaintiffs' arguments, the Rule is susceptible of a valid and constitutional interpretation. *See Moon*, 140 Idaho at 540, 545, 96 P.3d at 641, 646; *Rhodes*, 125 Idaho at 142, 868 P.2d at 470; *Korsen*, 138 Idaho at 711, 69 P.3d at 131.

Furthermore, the question of whether requiring a reasonable use of reservoir storage water as a condition of curtailment is a "taking" depends on the facts of the case. Such a requirement would clearly be valid and constitutional when the storage rights are decreed or licensed as being supplemental to an irrigation entity's primary right to divert and use water from the natural stream or river. Under such circumstances, such a requirement would also be consistent with the policy of securing maximum beneficial use and minimum waste.

Thus, the "reasonable carryover" provision of Rule 42 is entirely consistent with substantive Idaho water law in at least one conceivable set of circumstances: when an entity such as an irrigation district or canal company stores water from a natural stream in a reservoir under a license or decree for supplementary storage rights. It follows that factor (g) of Rule 42 cannot be invalid under a facial challenge.

F. THE RULES DO NOT IMPERMISSIBLY DISCRIMATE AGAINST SURFACE WATER USERS OR VIOLATE EQUAL PROTECTION.

The Plaintiffs argue that the Rules unfairly discriminate against surface water users because watermasters must immediately "shut or fasten" surface water users' headgates, while ground water users may be curtailed only if the Director makes a

material injury determination and enters a curtailment order. This argument must be rejected because the Rules' procedures are consistent with the GWA, surface water users and ground water users are not similarly situated, and the difference in administrative procedures is rationally related to a legitimate state interest.

As previously discussed, the Rules' requirement of a delivery call and a material injury determination is consistent with and supported by the GWA. *See* Idaho Code §§ 42-229, 42-237a, 42-237b, 42-237c. Different statutes apply to the administration of surface water rights alone. *See, e.g.,* Idaho Code §§ 42-602, 42-607, and the Rules procedures for the administration of surface water rights alone are consistent with these statutes. *See* Rules 40.01, 40.02. Thus, the procedural differences in the Rules are simply a reflection of a legislative decision to provide different statutory administrative procedures. The Plaintiffs have not challenged the constitutionality or the validity of those statutes.

Further, and as previously discussed, Idaho courts and the Idaho legislature have recognized that the factual and legal issues inherent in the administration of ground water rights—especially the conjunctive administration of ground water rights with interconnected surface water rights—are different from, and considerably more complex than, those associated with the administration of surface water rights alone. Thus, by no means can ground water users and surface water users be deemed similarly situated for purposes of water rights administration.

The state interest in the administration of water rights "is to secure the maximum use and benefit, and least wasteful use, of [the state's] water resources." *Poole*, 82 Idaho at 502, 356 P.2d at 65. Given the significant difference between the factual and legal

issues that arise in ground water rights administration as opposed to those in the relatively straightforward administration of surface water rights, the difference in administrative procedures is rationally related to a legitimate state interest. *See Anderson v. Spalding,* 137 Idaho 509, 514, 50 P.3d 1004, 1009 (2002) (stating that equal protection depends on a showing that similarly situated persons were treated differently and that the distinction was not rationally related to a legitimate state interest).

Thousand Springs argues that the Rules violate equal protection because they do not require the Director to inquire into the reasonableness and efficiency of use under a junior ground water right. This assertion is demonstrably incorrect under the plain language of the Rules. Rule 40.03, which is entitled "Reasonable Exercise of Rights," specifically provides that "[t]he Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste." Rule 40.03. Further, the broad language of Rules 10.07 and 20.03 plainly encompasses junior ground water rights:

> Full Economic Development Of Underground Water Resources. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.

Rule 10.07.

> Reasonable Use Of Surface And Ground Water. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution,

> and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

Rule 20.03.

In any event, as discussed above, users of ground water and users of surface water are not similarly situated for purposes of an equal protection analysis, and even if they were, the differential treatment is rationally related to a legitimate state interest. Thus, the Rules are not facially invalid for violating equal protection principles or impermissibly discriminating against surface water users.

G. THE DEFINITION OF "FUTILE CALL" DOES NOT RENDER THE RULES FACIALLY INVALID.

Rangen argues that the Rules' definition of "futile call" is facially invalid because the definition "permits" the Director to allow out-of-priority diversions when a call is wasteful but not futile. Rangen Brief at 5. This contention is itself facially deficient because it fails to argue or show that there is no set of circumstances under which the definition of "futile call" can be validly applied. Further, the plain language of the definition demonstrates that a delivery call can be determined to be futile without any finding that such a call would be wasteful, because the phrase to which Rangen objects is an alternative—not necessary—basis for a futility determination:

> 08. Futile Call. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.

Rule 10.08 (emphasis added).

The Rules also do not, as the Plaintiffs contend, impermissibly shift the burden of proof under the futile call doctrine. As previously discussed, the Rules only require the seniors to make a delivery call. The Director has the burden of determining whether the senior has been materially injured, and can make such a determination even if the senior submits no supporting information or documentation.

H. THE PHASED CURTAILMENT PROVISIONS DO NOT RENDER THE RULES FACIALLY INVALID.

Clear Springs argues that Rule 40.01(a) is facially invalid because it allows curtailments to be "phased-in" over a period of five years. This argument fails under the plain text of the Rule, which provides that such a "phased-in" curtailment is only a possibility, not a certainty: the Director "may" order phased curtailment, and even then only if there has been a determination that material injury due to junior ground water use is "delayed or long range." Rule 40.01(a).

In addition, nothing in the Rules prohibits or precludes that phased curtailment be ordered in conjunction with other relief, such as mitigation, the combined effect of which can be designed to provide full relief for the injury a senior has suffered as a result of junior diversions. By allowing for such combinations, the Rules provide the flexibility necessary to provide adequate and effective relief for seniors while still promoting the policy of securing the maximum use and benefit of the state's water. It is thus clear that the phased curtailment provisions can be applied validly and constitutionally, and Clear Springs' facial challenge fails as a matter of law.

I. RULE 20.08 IS NOT FACIALLY INVALID.

Clear Springs further argues that Idaho Code § 42-237a(g) "plainly forbids"[35] ground water withdrawals at a rate exceeding the reasonably anticipated rate of future natural recharge, and therefore Rule 20.08 is facially invalid because it only refers to the "goal" that "withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge." Rule 20.08.

This argument lacks any merit. Idaho Code § 42-237a(g) expressly refers to the "policy" that withdrawals not exceed recharge, which is entirely consistent with Rule 20.08's characterization of such as a "goal." *See* BLACK'S LAW DICTIONARY 1196 (8th ed/ 2004) (defining "policy" as "the general principles by which a government is guided in the management of public affairs"). Indeed, Clear Springs even concedes that Rule 20.08 makes a "policy statement" in this regard.[36] It follows that Rule 20.08 is not facially invalid simply because it uses the term "goal."

J. THE DOMESTIC AND STOCKWATER EXEMPTIONS DO NOT RENDER THE RULES FACIALLY INVALID.

The Plaintiffs assert that the Rules are facially invalid because they exempt junior domestic and stockwater rights from delivery calls under Rule 20.11. Under Idaho Code § 42-111, such uses are limited to 13,000 gallons per day, and the Rule 20.11 exemption expressly applies only if the domestic or livestock use is within the limits of section 42-111. Thus, the exemption is available only for certain statutorily designated uses that are clearly *de minimis* in nature. Further, this exemption is also consistent with and supported by the legislature's decision to exempt domestic and stockwater rights from the

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35 Clear Springs Brief at 29.
36 Clear Springs Brief at 29.

requirement of filing a notice of claim in a general adjudication—such rights are not lost even if no claim is filed. Idaho Code § 42-1420(1)(a). Section 42-1420 plainly reflects a legislative determination that allowing *de minimis* domestic and stockwater uses to continue is consistent with the prior appropriation doctrine as established by Idaho law. Likewise, section 42-227 exempts *de minimis* ground water rights from the permitting statutes.

Administering the large number of *de minimis* domestic and stockwater uses under the Rules would significantly complicate the administrative process, inevitably postponing relief for an injured senior without any measurable benefit to the senior. Thus, the Rules' exemption for domestic and stockwater uses is consistent with Idaho statutes and promotes more timely and efficient administration—one of the very things that the Plaintiffs seek. Accordingly, the exemptions are not facially invalid.

K. THE PLAINTIFFS' OBJECTION TO THE REPLACEMENT WATER PLAN IS NOT PROPERLY BEFORE THE COURT BECAUSE THE CLAIM RELIES ON AS-APPLIED ARGUMENTS AND WAS NOT PLEADED.

The Plaintiffs' claim that the "replacement water plan" the Director authorized in their contested case amounts to an administrative "rule" that was enacted without adherence to the requirements of the Idaho Administrative Procedure Act ("IAPA"). This argument relies entirely on orders entered in the Plaintiffs' contested case and as such is an as-applied argument that is not before the Court in the Plaintiffs' facial challenge to the Rules.[37]

Further, this claim does not appear in the Complaint, and nothing in the Complaint can fairly be deemed to have given notice of such a claim. The Complaint

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[37] *See supra* "Objection to Affidavits and As-Applied Arguments."

confines itself to allegations and claims that the Rules violate Article XV of the Idaho Constitution and/or various provisions of Title 42 of the Idaho Code, that is, the water code. There is no allegation, statement, claim or prayer in the Complaint that even remotely suggests that the Plaintiffs were making or might make a claim that the Director's approval of IGWA's water replacement plan constituted unlawful rulemaking under the IAPA. The only reference to "replacement water" anywhere in the Complaint is in Count II, which alleges that the replacement water plan has allowed the Defendants to avoid curtailment of juniors, not that the plan amounted to an impermissible "rule" under the IAPA or *Asarco:*

> The Director, pursuant to his purported authority, which is unknown and undisclosed to the plaintiffs, and in his application of the Rules has allowed avoidance of curtailment by junior appropriators through the issuance of what the Director has conceived, adopted, ordered and styled as a "replacement water plan," which allows diversions under junior ground water rights which affect hydrologically connected senior surface water rights by providing "replacement water" in amounts and at times which conflict with plaintiffs' rights, which "replacement water plans" are issued without notice or hearing, upon the instigation of the Director, upon terms and conditions subjectively set by Director, and such application of the Rules interferes with and impairs the legal rights and privileges of the plaintiffs represented by their water rights.

Complaint at 10.

The plain language of this claim primarily takes issue with the substantive effect of the replacement water plan. There is no reference to the IAPA, *Asarco*, or any other suggestion that what the Plaintiffs really meant was that the replacement water plan was, in effect, an administrative rule that had been promulgated outside of the mandatory procedures of the IAPA.[38]

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[38] Similarly, the Complaint contains no prayer for a declaration or order to the effect that the replacement water plan is invalid for failing to conform to the rulemaking requirements of the IAPA. The request for relief sought only orders declaring that the Rules substantively impair or interfere with the

Thus, it is clear that the Plaintiffs did not intend to, and in fact did not, allege an IAPA or *Asarco* claim of any kind. Even under notice pleading standards, the Complaint was deficient in this respect. Thus, the Plaintiffs' IAPA claim should be rejected.

CONCLUSION

The Plaintiffs and the Intervenors have failed to carry their burden of showing the Rules facially invalid. The Rules are entirely supported by the doctrine of prior appropriation as established by Idaho law and provide for efficient water rights administration based on the rule of priority and in accordance with other well-established principles and policies of Idaho law. The four summary judgment motions filed by the Plaintiffs and the Intervenors should be denied for the reasons set forth herein.

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Plaintiffs rights, and that the Rules are invalid and unconstitutional, both facially and as applied, without any mention of any procedural rulemaking issues in the prayer for relief. *See* Complaint at 11.

To the extent that Plaintiffs might argue that the Complaint implicitly encompassed an IAPA/*Asarco* claim because of the reference to the Director's "purported authority, which is unknown and undisclosed to the plaintiffs," or the allegation that the replacement water plan was "issued without notice or hearing," any such contention simply reaches too far. It would have been easy enough to specifically refer to the IAPA, or *Asarco*, or simply allege that the replacement water plan constituted an improperly promulgated administrative rule, but the Plaintiffs did no such thing.

DATED this _____ day of December 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6TH day of December 2005, I caused to be served a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT** to the following parties by the indicated methods:

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Michael C Orr

MICHAEL C. ORR
Deputy Attorney General

1994

GENCY AND PROVIDING A SUNSET CLAUSE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 18, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-1806, Idaho Code, and to read as follows:

42-1806. MORATORIUM ON APPROVAL OF APPLICATIONS TO APPROPRIATE WATER. (1) Findings. On April 30, 1993, the director of the Idaho department of water resources adopted an amended moratorium order "In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water within the Eastern Snake River Plain Area and the Boise River Drainage Area." This moratorium was adopted because of the continuing effect of a long-term drought. The effects of this drought continue to exist. In addition, changed irrigation practices have resulted in a reduction in the recharge of the aquifer. These factors have caused concerns regarding the water supply for water rights in some areas of the Snake Plain aquifer. In order to address the long-term management of the Snake Plain aquifer, the legislature has authorized a study to examine the implications of these changes. This study is expected to last two (2) years. Continuation of the current moratorium for the Eastern Snake Plain area is appropriate while these studies are undertaken.

(2) The portion of the director's moratorium entitled "In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water within the Eastern Snake River Plain Area and the Boise River Drainage Area," dated April 30, 1993, relating to the Eastern Snake River Plain area is hereby approved and confirmed and shall continue in effect until December 31, 1997.

(3) Except as provided in subsection (2) of this section, nothing in this act shall preclude the director from maintaining or modifying the requirements of any existing moratoriums or initiating any new, more restrictive moratoriums relating to water resource administration of the state.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after passage and approval, and shall be null, void and of no force and effect on and after December 31, 1997.

Approved April 11, 1994.

CHAPTER 450

(H.B. No. 986, As Amended)

AN ACT

RELATING TO WATER DISTRIBUTION; AMENDING SECTION 42-602, IDAHO CODE, TO CLARIFY THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES IS AUTHORIZED TO DISTRIBUTE WATER PURSUANT TO THE PROVISIONS OF

CHAPTER 6, TITLE 42, IDAHO CODE, ONLY WITHIN ORGANIZED WATER DISTRICTS; AMENDING SECTION 42-1701A, IDAHO CODE, TO CLARIFY THAT SUBSECTION (3) APPLIES TO DECISIONS, DETERMINATIONS, ORDERS OR ACTIONS OF THE DIRECTOR; AMENDING SECTION 42-237a, IDAHO CODE, TO REVISE POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-237g, IDAHO CODE, TO PROVIDE FOR THE USE OF ADMINISTRATIVE ENFORCEMENT ACTIONS; AMENDING SECTION 42-351, IDAHO CODE, TO PROVIDE A PROCEDURE FOR ADMINISTRATIVE ENFORCEMENT ACTIONS AGAINST PERSONS ALLEGED TO BE DIVERTING WATER OR TO HAVE DIVERTED WATER WITHOUT A WATER RIGHT OR NOT IN CONFORMANCE WITH THE CONDITIONS OF A VALID WATER RIGHT; DECLARING AN EMERGENCY AND PROVIDING APPLICATION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-602, Idaho Code, be, and the same is hereby amended to read as follows:

42-602. DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO SUPERVISE WATER DISTRIBUTION WITHIN WATER DISTRICTS. ~~It shall be the duty of t~~The director of the department of water resources ~~to~~ shall have ~~immediate~~ direction and control of the distribution of water from all ~~of the streams, rivers, lakes, ground water and other natural water sources in this state~~ natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished ~~either (1)~~ by watermasters ~~appointed~~ as provided in this chapter and supervised by the director~~; or (2) directly by employees of the department of water resources under authority of the director in those areas of the state not constituted into water districts as provided in this chapter. The director must execute the laws relative to the distribution of water in accordance with rights of prior appropriation as provided in section 42-106, Idaho Code.~~

The director of the department of water resources shall~~, in the distribution of~~ distribute water ~~from the streams, rivers, lakes, ground water and other natural water sources, be governed by this title~~ in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

SECTION 2. That Section 42-1701A, Idaho Code, be, and the same is hereby amended to read as follows:

42-1701A. HEARINGS BEFORE DIRECTOR -- APPEALS. (1) All hearings required by law to be held before the director shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(2) The director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director. In such event, the hearing officer shall have the duty to make a complete record of the evidence presented and duly received at the hearing and to prepare a proposal for decision in accordance with chapter 52,

title 67, Idaho Code, and rules of procedure promulgated by the director.

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any decision, determination, order or action of the director of the department of water resources or any applicant for any permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by a denial or conditional approval ordered by the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the denial or conditional approval upon filing with the director, within fifteen (15) days after receipt of the denial or conditional approval, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing may be had pursuant to subsection (4) of this section.

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

SECTION 3. That Section 42-237a, Idaho Code, be, and the same is hereby amended to read as follows:

42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

a. To require all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.

b. To require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or below the land surface.

c. To prescribe uniform scientific methods to determine water levels in and calculate waters withdrawn from wells.

d. To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, and fittings, including wells used or claimed to be used for domestic purposes.

e. To order the cessation of use of a well pending the correction of any defect that the director of the department of water resources has ordered corrected.

f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the director of the department of water resources that the determination of such action or proceeding might result in depletion of the ground water resources of such

state contrary to the public policy expressed in this act.

g. To supervise and control the exercise and administration of all rights ~~hereafter acquired~~ to the use of ground waters and in the exercise of this discretionary power he may ~~by summary order,~~ initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.

2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section 42-604 of title 42, Idaho Code. The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

SECTION 4. That Section 42-237g, Idaho Code, be, and the same is hereby amended to read as follows:

42-237g. PENALTIES. Any person violating any provision of this chapter, or any decision of the director of the department of water resources, or order of a local ground water board, shall be guilty of a misdemeanor and any continuing violation shall constitute a separate offense for each day during which such violation occurs, but nothing in this section or in the pendency or completion of any criminal action for enforcement hereof shall be construed to prevent the institution of any administrative enforcement action or civil action for injunctive or other relief for the enforcement of this chapter or the protection of rights to the lawful use of water.

SECTION 5. That Section 42-351, Idaho Code, be, and the same is hereby amended to read as follows:

42-351. ILLEGAL DIVERSION OR USE OF WATER -- INJUNCTIVE RELIEF -- ~~CEASE--AND-DESIST-ORDERS~~ ADMINISTRATIVE ENFORCEMENT ACTION. (1) If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a valid water right to do so or is applying water or has applied water not in conformance with ~~the conditions of~~ a valid water right, then the director of the department of water resources shall have the discretion to take action against such person. The director may file an action seeking injunctive relief or may ~~issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's action into compliance with applicable law and with any existing water right~~ commence an administrative enforcement action by issuing the person a written notice of violation directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right. The notice of violation shall be served upon the alleged violator in person or by certified mail. The notice of violation shall identify the alleged violation and specify whether that person is diverting water or has diverted water without a water right or is applying water or has applied water not in conformance with a valid water right. The notice of violation shall state the remedy, including any restoration and mitigation measures, and the civil penalty the director seeks for redress of the violation and contain a statement of findings of fact and conclusions of law that provide a factual and legal basis for the initiation of the administrative enforcement action.

(2) ~~Any order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.~~

~~(3) The director of the department of water resources shall serve a copy of any such order on the person who is the subject of the cease~~

~~and-desist-order-by-personal-service-or-by-certified-mail.-Service--by certified--mail--shall-be-complete-upon-receipt-of-the-certified-mail. Personal-service-may-be-completed-by-department-personnel-or-a--person authorized-to-serve-process-under-the-Idaho-rules-of-civil-procedure.~~

~~(4)--The--person--who-is-the-subject-of-the-cease-and-desist-order shall-have-a-right-to-an-administrative-hearing-before-the-department, if-requested-in-writing-within-fourteen-(14)-days--from--the--date--of service--of--the--cease--and--desist--order,-and-the-right-to-judicial review,-all-as-provided-in-section-42-1701A,-Idaho-Code.~~

~~(5)--If-the-person-who-is-the-subject--of--the--cease--and--desist order--fails-to-comply-with-the-order-within-the-time-limit-set-in-the order-the-director-may-seek,-by--and--through--the--attorney--general, injunctive--relief--in--the--district-court-pending-the-outcome-of-the department-proceeding.-In-such-action,-brought-against--a--person--for diverting--water-without-having-obtained-a-valid-water-right-to-do-so, the-director-need-not-allege-or-prove-that-irreparable-injury--to--the state--or--to--other--water--users--will--occur-should-the-preliminary injunction-or-permanent-injunction-not-be-issued,-or-that--the--remedy at--law--is--inadequate,--and-the-preliminary-injunction,-or-permanent injunction-shall-issue--without--such--allegations--and--without--such proof.~~ The notice of violation shall inform the person to whom it is directed of an opportunity to confer with the director or the director's designee in a compliance conference concerning the alleged violation. A written response may be required within fifteen (15) days of a receipt of the notice of violation by the person to whom it is directed. If a recipient of a notice of violation contacts the department within fifteen (15) days of the receipt of the notice, the recipient shall be entitled to a compliance conference. The conference shall be held within twenty (20) days of the receipt of the notice unless a later date is agreed upon between the parties. If a compliance conference is not requested, the director may proceed with a civil enforcement action as provided in subsection (4) of this section.

(3) The compliance conference shall provide an opportunity for the recipient of a notice of violation to explain the circumstances of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance. If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude any civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and such other relief as authorized by law. If the parties cannot reach agreement of a consent order within sixty (60) days after the receipt of the notice of violation, or if the recipient does not request a compliance conference, the director may commence and prosecute a civil enforcement action in district court in accordance with subsection (4) of this section.

(4) The director may initiate a civil enforcement action through

the attorney general as provided in subsection (6) of this section. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred, and may be brought against any person who is alleged to be diverting water or has diverted water without a water right or applying water or has applied water not in conformance with the conditions of a valid water right. The director shall not be required to bring an administrative enforcement action before initiating a civil enforcement action. If the person who is the subject of the notice of violation fails to cease and desist the activity or activities constituting the alleged violation within the time limits set in the notice of violation, the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the administrative enforcement action. In such action, brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction not be issued, or that the remedy at law is inadequate, and the preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.

(5) Any person determined in a civil enforcement action to have willfully and knowingly or after notice diverted water without a water right or applied water not in conformance with a valid water right shall be liable for a civil penalty as provided in section 42-352, Idaho Code. No action taken pursuant to this section shall relieve any person from any civil action and damages that may exist for injury or damages resulting from diverting water without a water right or applying water not in conformance with the conditions of a valid water right.

SECTION 6. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and shall apply to all calls for distribution of water pending at the time of passage and approval.

Approved April 11, 1994.

CHAPTER 451
(H.B. No. 988)

AN ACT

APPROPRIATING GENERAL FUND MONEYS TO THE WATER MANAGEMENT FUND; EXPRESSING LEGISLATIVE INTENT WITH RESPECT TO UTILIZATION OF THE MONEYS FOR AQUIFER RECHARGE; EXPRESSING LEGISLATIVE INTENT WITH RESPECT TO UTILIZATION OF THE MONEYS TO INVESTIGATE PUMPING ALTERNATIVES; EXPRESSING LEGISLATIVE INTENT WITH RESPECT TO REPORTING REQUIREMENTS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. There is hereby appropriated from the General Fund,

LEGISLATURE OF THE STATE OF IDAHO
Fifty-second Legislature Second Regular Session - 1994

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 986, As Amended

BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO WATER DISTRIBUTION; AMENDING SECTION 42-602, IDAHO CODE, TO CLARIFY THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES IS AUTHORIZED TO DISTRIBUTE WATER PURSUANT TO THE PROVISIONS OF CHAPTER 6, TITLE 42, IDAHO CODE, ONLY WITHIN ORGANIZED WATER DISTRICTS; AMENDING SECTION 42-1701A, IDAHO CODE, TO CLARIFY THAT SUBSECTION (3) APPLIES TO DECISIONS, DETERMINATIONS, ORDERS OR ACTIONS OF THE DIRECTOR; AMENDING SECTION 42-237a, IDAHO CODE, TO REVISE POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-237g, IDAHO CODE, TO PROVIDE FOR THE USE OF ADMINISTRATIVE ENFORCEMENT ACTIONS; AMENDING SECTION 42-351, IDAHO CODE, TO PROVIDE A PROCEDURE FOR ADMINISTRATIVE ENFORCEMENT ACTIONS AGAINST PERSONS ALLEGED TO BE DIVERTING WATER OR TO HAVE DIVERTED WATER WITHOUT A WATER RIGHT OR NOT IN CONFORMANCE WITH THE CONDITIONS OF A VALID WATER RIGHT; DECLARING AN EMERGENCY AND PROVIDING APPLICATION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-602, Idaho Code, be, and the same is hereby amended to read as follows:

42-602. DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO SUPERVISE WATER DISTRIBUTION WITHIN WATER DISTRICTS. ~~It shall be the duty of t~~The director of the department of water resources ~~to~~ shall have ~~immediate~~ direction and control of the distribution of water from all ~~of the streams, rivers, lakes, ground water and other natural water sources in this state~~ natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished ~~either (1)~~ by watermasters ~~appointed~~ as provided in this chapter and supervised by the director~~; or (2) directly by employees of the department of water resources under authority of the director in those areas of the state not constituted into water districts as provided in this chapter. The director must execute the laws relative to the distribution of water in accordance with rights of prior appropriation as provided in section 42-106, Idaho Code.~~

The director of the department of water resources shall~~, in the distribution of~~ distribute water ~~from the streams, rivers, lakes, ground water and other natural water sources, be governed by this title~~ in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

SECTION 2. That Section 42-1701A, Idaho Code, be, and the same is hereby amended to read as follows:

42-1701A. HEARINGS BEFORE DIRECTOR -- APPEALS. (1) All hearings required by law to be held before the director shall be conducted in accordance with

the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(2) The director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director. In such event, the hearing officer shall have the duty to make a complete record of the evidence presented and duly received at the hearing and to prepare a proposal for decision in accordance with chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any decision, determination, order or action of the director of the department of water resources or any applicant for any permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by a denial or conditional approval ordered by the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the denial or conditional approval upon filing with the director, within fifteen (15) days after receipt of the denial or conditional approval, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing may be had pursuant to subsection (4) of this section.

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

SECTION 3. That Section 42-237a, Idaho Code, be, and the same is hereby amended to read as follows:

42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

a. To require all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.

b. To require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or below the land surface.

c. To prescribe uniform scientific methods to determine water levels in and calculate waters withdrawn from wells.

d. To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, and fittings, including wells used or claimed to be used for domestic purposes.

e. To order the cessation of use of a well pending the correction of any defect that the director of the department of water resources has ordered corrected.

f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the director of the department of water resources that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in

this act.

g. To supervise and control the exercise and administration of all rights ~~hereafter--acquired~~ to the use of ground waters and in the exercise of this discretionary power he may ~~by-summary-order,~~ initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.

2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section 42-604 of title 42, Idaho Code. The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

SECTION 4. That Section 42-237g, Idaho Code, be, and the same is hereby amended to read as follows:

42-237g. PENALTIES. Any person violating any provision of this chapter, or any decision of the director of the department of water resources, or order of a local ground water board, shall be guilty of a misdemeanor and any con-

tinuing violation shall constitute a separate offense for each day during which such violation occurs, but nothing in this section or in the pendency or completion of any criminal action for enforcement hereof shall be construed to prevent the institution of any administrative enforcement action or civil action for injunctive or other relief for the enforcement of this chapter or the protection of rights to the lawful use of water.

SECTION 5. That Section 42-351, Idaho Code, be, and the same is hereby amended to read as follows:

42-351. ILLEGAL DIVERSION OR USE OF WATER -- INJUNCTIVE RELIEF -- ~~CEASE AND--DESIST--ORDERS~~ ADMINISTRATIVE ENFORCEMENT ACTION. (1) If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a valid water right to do so or is applying water or has applied water not in conformance with ~~the conditions of~~ a valid water right, then the director of the department of water resources shall have the discretion to take action against such person. The director may file an action seeking injunctive relief or may ~~issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's action into compliance with applicable law and with any existing water right~~ commence an administrative enforcement action by issuing the person a written notice of violation directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right. The notice of violation shall be served upon the alleged violator in person or by certified mail. The notice of violation shall identify the alleged violation and specify whether that person is diverting water or has diverted water without a water right or is applying water or has applied water not in conformance with a valid water right. The notice of violation shall state the remedy, including any restoration and mitigation measures, and the civil penalty the director seeks for redress of the violation and contain a statement of findings of fact and conclusions of law that provide a factual and legal basis for the initiation of the administrative enforcement action.

~~(2) Any order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.~~

~~(3) The director of the department of water resources shall serve a copy of any such order on the person who is the subject of the cease and desist order by personal service or by certified mail. Service by certified mail shall be complete upon receipt of the certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure.~~

~~(4) The person who is the subject of the cease and desist order shall have a right to an administrative hearing before the department, if requested in writing within fourteen (14) days from the date of service of the cease and desist order, and the right to judicial review, all as provided in section 42-1701A, Idaho Code.~~

~~(5) If the person who is the subject of the cease and desist order fails to comply with the order within the time limit set in the order the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the department proceeding. In such action,~~

~~brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction or permanent injunction not be issued, or that the remedy at law is inadequate, and the preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.~~ The notice of violation shall inform the person to whom it is directed of an opportunity to confer with the director or the director's designee in a compliance conference concerning the alleged violation. A written response may be required within fifteen (15) days of a receipt of the notice of violation by the person to whom it is directed. If a recipient of a notice of violation contacts the department within fifteen (15) days of the receipt of the notice, the recipient shall be entitled to a compliance conference. The conference shall be held within twenty (20) days of the receipt of the notice unless a later date is agreed upon between the parties. If a compliance conference is not requested, the director may proceed with a civil enforcement action as provided in subsection (4) of this section.

(3) The compliance conference shall provide an opportunity for the recipient of a notice of violation to explain the circumstances of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance. If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude any civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and such other relief as authorized by law. If the parties cannot reach agreement of a consent order within sixty (60) days after the receipt of the notice of violation, or if the recipient does not request a compliance conference, the director may commence and prosecute a civil enforcement action in district court in accordance with subsection (4) of this section.

(4) The director may initiate a civil enforcement action through the attorney general as provided in subsection (6) of this section. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred, and may be brought against any person who is alleged to be diverting water or has diverted water without a water right or applying water or has applied water not in conformance with the conditions of a valid water right. The director shall not be required to bring an administrative enforcement action before initiating a civil enforcement action. If the person who is the subject of the notice of violation fails to cease and desist the activity or activities constituting the alleged violation within the time limits set in the notice of violation, the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the administrative enforcement action. In such action, brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction not be issued, or that the remedy at law is inadequate, and the preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.

(5) Any person determined in a civil enforcement action to have willfully and knowingly or after notice diverted water without a water right or applied

water not in conformance with a valid water right shall be liable for a civil penalty as provided in section 42-352, Idaho Code. No action taken pursuant to this section shall relieve any person from any civil action and damages that may exist for injury or damages resulting from diverting water without a water right or applying water not in conformance with the conditions of a valid water right.

SECTION 6. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and shall apply to all calls for distribution of water pending at the time of passage and approval.

LEGISLATURE OF THE STATE OF IDAHO

Fifty-second Legislature — Second Regular Session — 1994

Moved by Newcomb

Seconded by Linford

IN THE HOUSE OF REPRESENTATIVES
HOUSE AMENDMENT TO H.B. NO. 986

AMENDMENT TO SECTION 1

On page 1 of the printed bill, delete lines 34 through 36 and insert: "~~other--natural-water-sources,-be-governed-by-this-title~~ in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code,".

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 986

BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO WATER DISTRIBUTION; AMENDING SECTION 42-602, IDAHO CODE, TO CLARIFY THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES IS AUTHORIZED TO DISTRIBUTE WATER PURSUANT TO THE PROVISIONS OF CHAPTER 6, TITLE 42, IDAHO CODE, ONLY WITHIN ORGANIZED WATER DISTRICTS; AMENDING SECTION 42-1701A, IDAHO CODE, TO CLARIFY THAT SUBSECTION (3) APPLIES TO DECISIONS, DETERMINATIONS, ORDERS OR ACTIONS OF THE DIRECTOR; AMENDING SECTION 42-237a, IDAHO CODE, TO REVISE POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-237g, IDAHO CODE, TO PROVIDE FOR THE USE OF ADMINISTRATIVE ENFORCEMENT ACTIONS; AMENDING SECTION 42-351, IDAHO CODE, TO PROVIDE A PROCEDURE FOR ADMINISTRATIVE ENFORCEMENT ACTIONS AGAINST PERSONS ALLEGED TO BE DIVERTING WATER OR TO HAVE DIVERTED WATER WITHOUT A WATER RIGHT OR NOT IN CONFORMANCE WITH THE CONDITIONS OF A VALID WATER RIGHT; DECLARING AN EMERGENCY AND PROVIDING APPLICATION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-602, Idaho Code, be, and the same is hereby amended to read as follows:

42-602. DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO SUPERVISE WATER DISTRIBUTION WITHIN WATER DISTRICTS. ~~It shall be the duty of t~~The director of the department of water resources ~~to~~ shall have ~~immediate~~ direction and control of the distribution of water from all ~~of the streams, rivers, lakes, ground water and other natural water sources in this state~~ natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished ~~either (1)~~ by watermasters ~~appointed~~ as provided in this chapter and supervised by the director~~; or (2) directly by employees of the department of water resources under authority of the director in those areas of the state not constituted into water districts as provided in this chapter. The director must execute the laws relative to the distribution of water in accordance with rights of prior appropriation as provided in section 42-106, Idaho Code~~.

The director of the department of water resources shall~~, in the distribution of~~ distribute water ~~from the streams, rivers, lakes, ground water and other natural water sources, be~~ in water districts in accordance with the prior appropriation doctrine as governed by this title, the constitution and common law of this state. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

SECTION 2. That Section 42-1701A, Idaho Code, be, and the same is hereby amended to read as follows:

42-1701A. HEARINGS BEFORE DIRECTOR -- APPEALS. (1) All hearings required by law to be held before the director shall be conducted in accordance with

the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(2) The director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director. In such event, the hearing officer shall have the duty to make a complete record of the evidence presented and duly received at the hearing and to prepare a proposal for decision in accordance with chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any decision, determination, order or action of the director of the department of water resources or any applicant for any permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by a denial or conditional approval ordered by the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the denial or conditional approval upon filing with the director, within fifteen (15) days after receipt of the denial or conditional approval, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing may be had pursuant to subsection (4) of this section.

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

SECTION 3. That Section 42-237a, Idaho Code, be, and the same is hereby amended to read as follows:

42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

a. To require all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.

b. To require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or below the land surface.

c. To prescribe uniform scientific methods to determine water levels in and calculate waters withdrawn from wells.

d. To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, and fittings, including wells used or claimed to be used for domestic purposes.

e. To order the cessation of use of a well pending the correction of any defect that the director of the department of water resources has ordered corrected.

f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the director of the department of water resources that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in

this act.

g. To supervise and control the exercise and administration of all rights ~~hereafter--acquired~~ to the use of ground waters and in the exercise of this discretionary power he may ~~by summary order,~~ initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.

2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section 42-604 of title 42, Idaho Code. The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

SECTION 4. That Section 42-237g, Idaho Code, be, and the same is hereby amended to read as follows:

42-237g. PENALTIES. Any person violating any provision of this chapter, or any decision of the director of the department of water resources, or order of a local ground water board, shall be guilty of a misdemeanor and any con-

tinuing violation shall constitute a separate offense for each day during which such violation occurs, but nothing in this section or in the pendency or completion of any criminal action for enforcement hereof shall be construed to prevent the institution of any administrative enforcement action or civil action for injunctive or other relief for the enforcement of this chapter or the protection of rights to the lawful use of water.

SECTION 5. That Section 42-351, Idaho Code, be, and the same is hereby amended to read as follows:

42-351. ILLEGAL DIVERSION OR USE OF WATER -- INJUNCTIVE RELIEF -- ~~CEASE AND--DESIST--ORDERS~~ ADMINISTRATIVE ENFORCEMENT ACTION. (1) If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a valid water right to do so or is applying water or has applied water not in conformance with ~~the conditions of~~ a valid water right, then the director of the department of water resources shall have the discretion to take action against such person. The director may file an action seeking injunctive relief or may ~~issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's action into compliance with applicable law and with any existing water right~~ commence an administrative enforcement action by issuing the person a written notice of violation directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right. The notice of violation shall be served upon the alleged violator in person or by certified mail. The notice of violation shall identify the alleged violation and specify whether that person is diverting water or has diverted water without a water right or is applying water or has applied water not in conformance with a valid water right. The notice of violation shall state the remedy, including any restoration and mitigation measures, and the civil penalty the director seeks for redress of the violation and contain a statement of findings of fact and conclusions of law that provide a factual and legal basis for the initiation of the administrative enforcement action.

~~(2) Any order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.~~

~~(3) The director of the department of water resources shall serve a copy of any such order on the person who is the subject of the cease and desist order by personal service or by certified mail. Service by certified mail shall be complete upon receipt of the certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure.~~

~~(4) The person who is the subject of the cease and desist order shall have a right to an administrative hearing before the department, if requested in writing within fourteen (14) days from the date of service of the cease and desist order, and the right to judicial review, all as provided in section 42-1701A, Idaho Code.~~

~~(5) If the person who is the subject of the cease and desist order fails to comply with the order within the time limit set in the order the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the department proceeding. In such action,~~

~~brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction or permanent injunction not be issued, or that the remedy at law is inadequate, and the preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.~~ The notice of violation shall inform the person to whom it is directed of an opportunity to confer with the director or the director's designee in a compliance conference concerning the alleged violation. A written response may be required within fifteen (15) days of a receipt of the notice of violation by the person to whom it is directed. If a recipient of a notice of violation contacts the department within fifteen (15) days of the receipt of the notice, the recipient shall be entitled to a compliance conference. The conference shall be held within twenty (20) days of the receipt of the notice unless a later date is agreed upon between the parties. If a compliance conference is not requested, the director may proceed with a civil enforcement action as provided in subsection (4) of this section.

(3) The compliance conference shall provide an opportunity for the recipient of a notice of violation to explain the circumstances of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance. If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude any civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and such other relief as authorized by law. If the parties cannot reach agreement of a consent order within sixty (60) days after the receipt of the notice of violation, or if the recipient does not request a compliance conference, the director may commence and prosecute a civil enforcement action in district court in accordance with subsection (4) of this section.

(4) The director may initiate a civil enforcement action through the attorney general as provided in subsection (6) of this section. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred, and may be brought against any person who is alleged to be diverting water or has diverted water without a water right or applying water or has applied water not in conformance with the conditions of a valid water right. The director shall not be required to bring an administrative enforcement action before initiating a civil enforcement action. If the person who is the subject of the notice of violation fails to cease and desist the activity or activities constituting the alleged violation within the time limits set in the notice of violation, the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the administrative enforcement action. In such action, brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction not be issued, or that the remedy at law is inadequate, and the preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.

(5) Any person determined in a civil enforcement action to have willfully and knowingly or after notice diverted water without a water right or applied

water not in conformance with a valid water right shall be liable for a civil penalty as provided in section 42-352, Idaho Code. No action taken pursuant to this section shall relieve any person from any civil action and damages that may exist for injury or damages resulting from diverting water without a water right or applying water not in conformance with the conditions of a valid water right.

SECTION 6. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and shall apply to all calls for distribution of water pending at the time of passage and approval.

STATEMENT OF PURPOSE 1994

RS04039C3

In 1992, the Idaho Legislature enacted changes to Idaho Code § 42-602. Those changes have been interpreted by the Idaho Supreme Court as imposing a duty upon the Director to supervise and control the distribution of water outside the boundaries of an organized water district even though the rights to that water have not been adjudicated and there are unresolved legal questions regarding the relationship of the water rights sought to be distributed. This was not the intent of the 1992 Amendments.

Prior to the Court's decision, the burden was on the water user making a call for distribution outside a water district to identify the person causing the injury and to make a prima facie showing of injury. The effect of the Court's decision is to shift a private water user's legal burden and expenses to the state. Unlike the distribution of water within a water district, there is no mechanism for the state to fully recover its costs for distributing water outside a water district.

The purpose of this Act is to restore the law relative to distribution of water back to what it was prior to the 1992 amendments to Idaho Code § 42-602 and to make clear that the Director shall not be subject to a writ of mandate when called upon to distribute water. Specifically, the Act clarifies that Chapter 6 of Title 42, Idaho Code is only applicable to distribution of water within a duly formed water district. Water users seeking to make a call for distribution outside a water district may elect to proceed directly against the owner of the water right claimed to be causing injury or may request the director to exercise authority under other chapters of title 42, Idaho Code. This Act, however, makes clear that the Director's authority to distribute water outside a water district is a discretionary function. The director shall have discretion to not shut or fastened any headgate or other facility for the diversion of water pursuant to a water right outside a water district if the director determines that the legal status of the water right or the legal or hydrologic relationship of the water right to one or more other water rights must first be adjudicated by a court.

This Act is also intended to nullify the effect of the recent Supreme Court decision, which held that review of a Director's decision under Idaho Code § 42-237a is not subject to appeal under the Administrative Procedures Act. The Act clarifies that such orders or decisions are subject to review under the APA.

FISCAL NOTE

This bill will result in a significant savings to the State of Idaho by not allowing private parties seeking distribution of water outside a water district to shift their legal burdens and costs to the Department of Water Resources.

Session Law Chapter 388
Effective: 04/07/94

H0981.....By REVENUE AND TAXATION
RURAL DEVELOPMENT IMPACT FEES - Adds to existing law to impose rural development impact fees for governmental entities in certain counties.

03/30 House intro - 1st rdg - to printing
03/31 Rpt prt - to 2nd rdg
03/31 2nd rdg - to 3rd rdg
04/01 3rd rdg - PASSED - 37-29-4
NAYS -- Barraclough, Barrett, Black(15), Crane, Cuddy, Deal, Field, Geddes, Johnson(27), Jones(22), Judd, Keeton, King, Larsen, Loertscher, Mader, McKeeth, Mortensen, Newcomb, Reynolds, Sali, Schaefer, Stennett, Stoicheff, Stubbs, Taylor, Tilman, Tippets, White.
Absent and excused -- Crow, Hawkley, Loosli, Wood.
Title apvd - to Senate
Senate intro - 1st rdg - to Loc Gov

H0982.....By WAYS AND MEANS
SNAKE RIVER BASIN - Adds to existing law to provide a moratorium on approval of applications to appropriate water for certain water rights in the Snake River Basin.

03/30 House intro - 1st rdg - to printing
03/31 Rpt prt - to Res/Con
03/31 Rpt out - rec d/p - to 2nd rdg
03/31 Rls susp - PASSED - 69-0-1
NAYS -- None.
Absent and excused -- Loosli.
Title apvd - to Senate
04/01 Senate intro - 1st rdg - to Res/Env
Rpt out - rec d/p - to 2nd rdg
04/01 Rls susp - PASSED - 32-0-3
NAYS -- None.
Absent and excused -- Chamberlain, Lloyd, McLaughlin.
Title apvd - to House
04/01 To enrol
04/05 Rpt enrol - Sp signed
Pres signed - to Governor
04/11 Governor signed
Session Law Chapter 449
Effective: 04/11/94
12/31/97 Sunset Clause

H0983.....By WAYS AND MEANS
WATER - Adds to and amends existing law to authorize the Director of the Department of Water Resources to distribute water within a water district and to provide a procedure for administrative enforcement actions against persons alleged to be diverting or to have diverted water without a water right.

03/30 House intro - 1st rdg - to printing
03/31 Rpt prt - to Res/Con

H0984.....By REVENUE AND TAXATION
COUNTIES - Adds to existing law to provide that counties do not have to provide any program, fund or account exceeding the state's budget limitation law.

03/30 House intro - 1st rdg - to printing
03/31 Rpt prt - to Rev/Tax

H0985.....By REVENUE AND TAXATION
TAXING DISTRICTS - Adds to and amends existing law to provide a budget limitation for local units of government with exceptions.

03/30 House intro - 1st rdg - to printing
03/31 Rpt prt - to Rev/Tax

H0986aa.....By COMMITTEE
WATER - Adds to and amends existing law to authorize the Director of the Department of Water Resources to distribute water within a water district and to provide a procedure for administrative enforcement actions against persons alleged to be diverting or to have diverted water without a water right.

03/30 House intro - 1st rdg - to printing
Rpt prt - to Res/Con
03/31 Rpt out - to Gen Ord
Rpt out amen - to engros
Rpt engros - to 1st rdg as amen
1st rdg - to 2nd rdg as amen
03/31 Rls susp - PASSED as amen - 57-11-2
NAYS -- Barrett, Black(34), Danielson, Gould, Hansen, Jones(22), Nafziger, Sali, Stennett, Stevens, Wilde.
Absent and excused -- Loosli, Wood.
Title apvd - to Senate
Senate intro - 1st rdg as amen - to Res/Env
04/01 Rpt out - rec d/p - to 2nd rdg as amen
04/01 Rls susp - PASSED as amen - 30-2-3
NAYS -- Haun, McRoberts.
Absent and excused -- Chamberlain, Lloyd, McLaughlin.
Title apvd - to House
04/04 To enrol - rpt enrol - Sp signed
Pres signed - to Governor
04/11 Governor signed
Session Law Chapter 450
Effective: 04/11/94

H0987.....By APPROPRIATIONS
CATASTROPHIC HEALTH CARE - Adds to existing law to provide that the Department of Health and Welfare shall be responsible for purchasing health insurance for certain children and appropriating moneys to the Catastrophic Health Care Cost fund.

03/31 House intro - 1st rdg - to printing
03/31 Rpt prt - rec d/p - to 2nd rdg
03/31 Rls susp - PASSED - 65-3-2
NAYS -- Alexander, Hansen, Stevens.
Absent and excused -- Loosli, McKeeth.
Title apvd - to Senate
03/31 Senate intro - 1st rdg - to Fin
Rpt out - rec d/p - to 2nd rdg
04/01 2nd rdg - to 3rd rdg
04/01 Rls susp - PASSED - 31-0-4
NAYS -- None.
Absent and excused -- Chamberlain, Ingram, Lloyd, McLaughlin.
Title apvd - to House
04/04 To enrol
04/05 Rpt enrol - Sp signed
Pres signed - to Governor
04/07 Governor VETOED

H0988.....By APPROPRIATIONS
APPROPRIATIONS - Apppropriating moneys to the Water Management Fund and expressing Legislative intent regarding aquifer recharge, pumping alternatives and reporting requirements.

03/31 House intro - 1st rdg - to printing
Rpt prt - to 2nd rdg

--Continued--

HOUSE WAYS AND MEANS COMMITTEE

DATE: March 30, 1994

TIME: 9:10 a.m.

PLACE: HOUSE MAJORITY CAUCUS ROOM

PRESENT: All members

ABSENT/ EXCUSED:

MINUTES: Rep. Lance moved and Rep. Loertscher seconded that the Minutes of the previous meeting be approved. MOTION CARRIED.

RS04035 Rep. Newcomb presented this legislation. The purpose of this bill is to extend the Department of Water Resources current moratorium on permits for diversion and use of surface and ground water within the Eastern Snake Plain area. There is a need to temporarily stop further water development while the effects of the continuing drought and concerns regarding conjunctive management of the upper Snake River surface and ground water are evaluated and to extend to December 31, 1997.

Rep. Lance moved and Rep. Black seconded that RS 04035 be introduced for printing and referred to the Resources and Conservation committee. MOTION CARRIED

RS 04057 Rep. Newcomb explained this resolution authorizing the Legislative Council to appoint a committee to study the Snake River Basin adjudication. Rep. Newcomb said this would extend the moratorium in response to the Musser case and would invoke an emergency clause.

Rep. Loertscher moved and Rep. Stoicheff seconded that RS 04057 be introduced for printing and referred to the Resources and Conservation committee. MOTION CARRIED.

RS 04039C3 Rep. Linford explained this bill relating to water distribution defines how the director defines water distribution in a district and said this is the first in a series of companion bills.

Rep. Newcomb moved and Rep. Lance seconded that RS 04039C3 be introduced for printing and referred to the Resources and Conservation committee. MOTION CARRIED.

RS 04056 Recognizing and commending the contributions of Governor Cecil D. Andrus to the State of Idaho and the United States of America.

Rep. Lance moved and Rep. Flandro seconded that RS 04056 be referred to the second reading calendar. MOTION CARRIED.

The meeting recessed 9:20 a.m. subject to call of the Chair.

The committee returned at 5:35 to act on RS 04066.

RS 04066 Ken McClure addressed the committee, explaining a change was necesarry to correct the language relating to the legislation on water distribution. The specific change is on page one, line 35 - "the constitution and common law of the state."

Rep. Stoicheff moved and Rep. Loertscher seconded that RS 04066 be introduced for printing and referred to the Resources and Conservation committee. MOTION CARRIED.

The meeting adjourned at 5:40 p.m.

Respectfully submitted,

Rep. Donna M. Jones, Chair

Linda Magstadt, Secretary

AGENDA

HOUSE RESOURCES AND CONSERVATION COMMITTEE

8:00 A.M.
ROOM 412
THURSDAY, MARCH 31, 1994 A

BILL NO.	*DESCRIPTION*	*SPONSOR*
HCR 70	Provides for a committee to study the Snake River Basin Adjudication	Rep. Newcomb\ Linford
HB 982	Provides for a moratorium on approval of applications for diversions	Rep. Newcomb\ Linford
→ HB 986	Defines power of Director in distribution of water within a water district	Rep. Newcomb\ Linford

COMMITTEE MEMBERS

Linford, Chairman
Steele, Vice Chairman
Wood
Lucas
Field
Jones (22)
Newcomb
Mahoney
Bell
Loosli
Sutton
Barraclough
Mader
Stoicheff
Johnson (35)
Robison
White
Cuddy

HOUSE RESOURCES AND CONSERVATION COMMITTEE

DATE: MARCH 31, 1994 - A

TIME: 8:00 A.M.

PLACE: ROOM 412

PRESENT: ALL MEMBERS OF THIS COMMITTEE

GUESTS: Keith Higginson, Jim Yost, Dell Raybould, Claude Storer, Sherl Chapman, Jeff Fereday, Dale Rockwood, Ray Rigby, Robert Bakes, John Hepworth, Pat Brow, Rep. Christiansen

MINUTES: The meeting was called to order at 8:20 a.m.

MOTION: Rep. Johnson made the motion to approve the minutes from the previous meeting as written Rep. Stoicheff seconded the motion and it was carried.

HCR 70 Keith Higginson, Director of the Department of Water Resources, explained this resolution to the committee. Questions and discussion followed in regard to the committee that this resolution refers to and on the definition of conjunctive management.

Rep. Christiansen spoke against this bill saying that he thought the committee was acting out of hysteria. Chairman Linford told those in attendance that these bills were drafted out of urgency not out of hysteria and the process of looking at the water concerns will be ongoing.

MOTION: Rep. Newcomb made the motion to send HCR 70 to the floor with a do pass recommendation. Rep. Mahoney seconded the motion and it carried.

HB 982 Director Higginson spoke to this bill giving a brief history of the current moratorium in the Eastern Snake Plain and explained that this would extend this until 1997. Questions and discussion followed on the status of pending applications.

Pat Brow, an attorney representing the Clear Spring Trout Company and companies who depend on spring flows, said he could support this if it were a moratorium on water. Sherl Chapman, representing the Idaho Water Users Association, spoke in support of this bill saying that this is a good interim measure. Jim Yost, representing the Farm Bureau, spoke in support of this bill.

MOTION: Rep. Mahoney made the motion to send HB 982 the 2nd reading calendar. Rep. Field seconded the motion and it was carried.

MOTION: Rep. Wood made the motion to bring HCR 70 back to the table. Rep. Stoicheff seconded the motion and it was carried.

MOTION: Rep. Stoicheff made the motion to rescind the motion on HCR 70. Rep. Wood seconded the motion and it was carried.

MOTION: Rep. Stoicheff made the motion to send HCR 70 to the 2nd reading calendar. Rep. Wood seconded the motion and it was carried.

HB 986 Director Higginson, spoke to the changes that HB 986 would provide for. Questions and discussion followed his presentation. Sherl Chapman, Idaho Water Users Association, spoke to the "public trust doctrine" and suggested removing "common law" from page one line 35. Jim Yost, Idaho Farm Bureau, also expressed his concern with the "common law" and supported the need to delete this. He told the committee that his organization supported this bill. Dell Raybould spoke in support of this legislation. Dale Rockwood, a farmer and a member of the Committee of Nine spoke in support of this legislation. John Hepworth an attorney for the Mussers, spoke to the areas that he did not like in this legislation and urged the committee to table this legislation. Questions and discussion followed on the possibility of a call for water, the course of action if a call is made, and to the similarity of HB 800 and HB 986. Pat Brow, an attorney, spoke against this bill and suggested that his bill is bad public policy. Robert Bakes, an attorney, spoke to eliminating common law and suggested a period on page one line 35 after the word "doctrine" and to eliminate the rest of the sentence. Then speaking in support, he addressed individual sections of this bill. Questions and discussion were held on who would and how the Mussers will be compensated. There was also discussion on the recourse "the little guy", who could not afford an attorney has and the priority appropriation doctrine. Jeff Fereday, who represents the Idaho Ground Water Association, spoke in support of HB 986. Ray Rigby, an attorney who represents several water users, told the committee that the bill is good and the correction suggested is also good. He also explained that this would give the little guy his day in court and assured the committee that the Mussers were not the only injured permits.

MOTION: Rep. Newcomb made the motion to send HB 986 to General Orders with the change being to put a period on page one line 35 after the word "doctrine" and to eliminate the rest of the sentence. Rep. Steele seconded the motion. Discussion was held on the motion. A vote was taken on the motion to send HB 986 to General Orders and it was carried. Rep. Jones voted no.

The meeting was adjourned at 11:15 p.m.

Golden C. Linford

Golden C. Linford, Chairman

Susan Hansen

Susan Hansen, Secretary

HOUSE
RESOURCES AND CONSERVATION
COMMITTEE

Testimony Sign-up Sheet

Date: 3-31

PRINT NAME	TESTIFY	PRO	CON	RS/BILL	TITLE/OCCUPATION	REPRESENTING	ADDRESS/CITY/ZIP/PHONE
Jim Yost	/	/				Farm Bureau	Boise
Dell Raybould		/					
Clark Stover							
* Shul Chapman	✓				Executive Director	Idaho Water Users Assn	
Jeff Fereday	✓	✓			atty Idaho Ground water Assn	IGWA	Boise
Dale Rockwood	✓						
Jay W. Fogby	✓				atty CWP9		
Robert E. Bakes	✓						
John C. Hegsworth				all			
Pat Brown				all			
X Rep. Christiansen							

AMENDED AGENDA

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

8:00 a.m. - 12:00 p.m.
Gold Room
FRIDAY, APRIL 1, 1994
PLEASE NOTE TIME AND PLACE

BILL NO.	*DESCRIPTION*	*SPONSOR*
H 969	Modifies procedures for the Snake River Basin Adjudication and clarifies two "presumption" statutes declared unconstitutionally vague by the adjudication court.	Representative Linford and Senator Noh
H 986	Modifies and clarifies procedures for the administration of water rights outside of a water district.	Representative Linford and Senator Noh
H 982	Extends the moratorium on new agricultural groundwater withdrawals from the Snake Plains aquifer.	Representative Linford and Senator Noh
HCR 70	Establishes a legislative interim committee to monitor implementation of the water agreement and the adjudication processes and to study ways to compensate water right holders who incur large costs from litigating their rights as "basin wide issues."	Representative Linford and Senator Noh

Legislation listed above is contingent upon passage by the House Thursday.

The following legislation is to be introduced in the House Thursday and pending approval by the House is scheduled for hearing before the Committee.

H 990	A trailer bill making necessary changes to H 969.	Representative Linford and Senator Noh
H 989	Legislation extending for one year the authority of the Director of the Department of Water Resources to allow water for salmon movement purposes to be moved down the Snake River system upon certain findings.	Representative Linford and Senator Noh

MINUTES

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

DATE: April 1, 1994

TIME: 8:00 a.m..

PLACE: Gold Room

PRESENT: Chairman Laird Noh, Senators Schroeder, Cameron, Frasure, Furness, Hansen, Hawkins, McLaughlin, Peavey, Reed and Richardson.

ABSENT/ EXCUSED: Senator Lloyd.

MINUTES: The meeting was called to order by Chairman Noh at 8:14 a.m.

Chairman Noh explained all the legislation scheduled could be presented and then considered by the Committee. The legislation is as a result of the Supreme Court decision in Musser v. Higginson which has resulted in problems for the agriculture and financial community. The state water user community and their legal representatives have reached a complex and comprehensive general agreement which moves the state towards responsible water management. He called the Committee's attention to a letter from Terry Uhling, legal counsel for J.R. Simplot Co., (incorporated into the minutes as through set forth in full herein) detailing the agreement of the various interest groups in support of the interim conjunctive management rules. Additionally, representatives from the Committee of 9, representing users upstream from Milner Dam and responsible for the operation of the water bank, meet with various water interest groups and agreed to allow the Bureau of Reclamation to pay the lease cost for City of Pocatello water to be used as replacement water for the aquifer project this spring in the Hagerman. The recharge is in place and the appropriation legislation is proceeding toward approval.

H 990 **Clive Strong, Attorney General's office**, explained H 990, a trailer bill making necessary changes to H 969. H 990 addresses the use of the director's report, how federal water right claims notices will be transmitted to the claimants and how H 969 will be applied to the ongoing adjudication. Strong explained section 2 which provides that the director's report will be part of the record and how the legislation attempts to preserve the status quo in regard to the burden of proof. If a claimant agrees with the director's report the burden of proof then rests with the objector. If the claimant does not agree with the director's report, the claimant could present his proof to establish his claim to the court.

Section 5 addresses how to file notices of federal water right claims. He noted that over 7,000 federal instream flow claims were filed with the court. This legislation will not affect those notices, but could require the United States to assume the responsibility for service of process of approximately 11,000 federal claims. This section addresses the recent federal court decision determining that the federal government was immune from payment. The court ruled that each party has the burden to bear their own respective costs in connection with the litigation. This legislation could shift back to the federal government to pay for the notice of their claims and could remove the state subsidy of that process. Section 34 could remove the remand requirement in relation to Basin 34, Big Lost River drainage basin, and substitute a supplemental director's report which requires the director to review all the existing director's report and to conform the claims that have been reported as a result of this legislation. Strong explained to the Committee the legislation defines explanatory materials as being information material only cannot be used to support a claim.

H 969 Strong explained **H 969** which modifies procedures for the Snake River Basin Adjudication clarifies two "presumption" statutes declared unconstitutionally vague by the adjudication court. He stated the purpose of H 969 is to define the role of the state in the Snake River Basin Adjudication. This legislation reduces the role of the director so that the director is not a party to the adjudication process. The state could continue to be a party in the adjudication, but the director and department could not. The director will continue to prepare the director's report in connection with claims based upon state law and to assure that claims are accurately reported to the court. He noted there are 150,000 claims in the adjudication which includes over 100,000 are state claims. So the purpose of the director's report will be to highlight areas where claimants might want to determine if they have objections to the claims being reported. Section 18 provides changes to the description of a water right to make clear the elements of a water right that are necessary for the administration and the director could use those provisions that are necessary. Additionally, the director may include conditions which have been imposed on water rights when the license was issued. This legislation, along with H 990, will make clear that once the director's report has been filed it will be prima facie evidence of a claim and will facilitate claims that agree with the director's recommendation.

Upon inquiry from the Committee, Strong noted there are two constraints upon the director. The first is the statutory provision set forth in the Act and the second is that the director's report becomes prima facie evidence as the director is not a party to the litigation. The court makes the necessary determinations and evaluates the director's report.

In explaining the state's role in the adjudication process, Strong said if the state has a claim to a water right the state may assert the claim as any other claimant could. Additionally the state would have the right to participate in any decisions regarding federal water right claims filed. Upon inquiry, Strong explained the intent of changing to the terminology "water rights based upon federal law" is to clarify the intent to adjudicate all types of federal claims. Dworshak Reservoir, for example, would be included.

Section 11 is the historical footnote and the provisions of this section have

been implemented through the commencement of the adjudication. The terminology "and administered" conforms the legislation with the federal McCarran Amendments which provides that a state may adjudicate and administer federal water rights in state court proceedings.

Upon inquiry from the Committee, Strong noted changes which could provide for settlement conferences prior to litigation. He said that settlement conferences have been quite successful and facilitates resolvement of the majority of cases. The intent is to foster some alternative dispute resolution proceedings. Strong noted that once the final decree is entered, water districts could be established and administered pursuant to Chapter 6 and that the U.S. could be subject to those same procedures as any other claimant. In further explanation, Strong explained section 30 could address the private attorney general doctrine which could open the state treasury to unlimited access to funding the adjudication.

In relation to the presumption statutes, despite the pending rehearing in the Musser case, Strong noted this legislation attempts to clarify language because of the affect any further delay could have on thousands of water rights.

Senator Bilyeu inquired whether claims have been filed for the Fort Hall project. Strong said the Shoshone Bannock Water Rights Agreement was filed with the district court and will be subject to an objection-response period.

Pat Brown, attorney, Twin Falls, represents water users in all three test basin, opposes H 969 and H 990. He said he felt there was some fundamental constitutional problems in attempting to dismiss the director as a party to a lawsuit. He recommended changes to H 969, section 17, which states an examination shall be in a manner as the director determines, which gives the director the power to determine what a reasonable examination is. Brown suggests the language is intended to avoid having the court tell the director to make a reasonable examination. Additionally in section 18, the director is given the power to file director's reports as he sees fit which takes away the power of the court to administer the case. The report is allowed to be filed to contain things the director deems appropriate and proper, not what the law requires, not what the court requires to decree a right, but what the director determines is proper. He noted the legislation provides that the director can put any "general provisions" into the report as the director deems proper. He noted that the director, in the Hagerman area, has given claimants the same irrigation periods regardless of whether they have used the water before that or not and regardless of whether or not that is a correct period for the area. Brown noted there were numerous provisions that give the director the power to determine what is appropriate which is designed to make the director the final judge of his own actions. He said water rights have always been prima facie evidence, an assurance that they could not have to litigate unless challenged. He said the legislation could allow the director to recommend a right different than the license or decree and then puts the burden on the claimant to disprove the director's recommendation. Brown suggested new language to section 18, line 10, "when filed with the court the director's report shall constitute evidence of the nature and extent of a water right claimed under state law. The unobjected to portions of the director's report may be decreed as reported." Additionally, "if the claim is to a right under state law which is evidenced by a

permit, a license or a decree, the permit, license or decree is prima facie evidence of the right. Any party asserting through their objection or response, if their right should be decreed differently than previously decreed, licensed or permitted shall have the burden of producing evidence and ultimately proving that the recommendation should be changed from the previous court decree." Brown said it was his belief that the adjudication could go back and catalog who owned water rights, not go back and have the director decide how to reallocate water. He recommended following prior decrees, instead of giving the director carte blanc to put in general provisions in the report as prima face evidence and make someone prove their water right again.

Upon inquiry from the Committee, Brown stated prima facie evidence is evidence which is presumptively correct. He said that Idaho Rules of Evidence provide that any statute which speaks to the evidentiary affect is of no force and affect is inconsistent with the court rules. This legislation tells the court what constitutes prima facie evidence. A license has been prima facie evidence, but this legislation states that the director's report is prima facie evidence.

Further inquiry from the Committee, section 30 dealing with attorney fees, Brown stated the legislation provides that the director does what the director determines is appropriate and submits a report which contains what the director wants in it becomes evidence and then claim sovereign immunity from costs and attorney fees. This makes the director unaccountable for his actions because the legislation removes the director from being a party to the action. Previous litigation resulted in I.C. 12-117 allows for the court to award costs and attorney fees against state agencies when they act unreasonably without any factual or legal basis. This statute applies to every state agency, but this legislation could exempt the Department of Water Resources. He said that in the attempt to limit and define the role of the director, the legislation expands the power of the director and immunizes him from accountability and takes away the ability of the citizen to recover costs and attorney fees for any unreasonable action of the director.

Roger Ling, Rupert attorney with thirty years experience in water law, represents both senior surface and groundwater users and junior pumpers, said his comments are consistent with what he perceives his clients' views to be. He noted there is a need to streamline the adjudication process, the role of the director and who he was going to protect and represent if he is a party to the proceedings. Ling supports the legislation as an attempt to correct and define the director's role. This procedure allows the director to determine the accuracy which becomes a statement to the court so the court may adopt it as prima facie evidence. The license is prima facie evidence and the director's report is prima face evidence and if they are in conflict then the court adjudicates the proceedings. He approves the legislation as to the director's role and the changes in the adjudication statutes. He noted that the changes in the presumption statutes could address the concerns of the court and the changes as necessary. He noted that public interest was not an issue until 1978 when the Legislature incorporated public interest into law. Additionally, he noted conservation groups have objected to water spreading with a 1948 water right which has resulted in an expansion of use from the original acreage. The local public interest concern affects the aesthetic rights

in the middle Snake, but the aquifer in this case does not go to the middle Snake. It is also contended that local public interest is affected because of the right to fish in the river and other recreation activities. He noted that local public interest is not a criteria the court legally needs to address.

Upon inquiry from the Committee, Ling expressed it was the Legislature's right to determine the role of the director. He noted the changes in reducing the role of the director to a friend of the court is proper because there is still an avenue for objection to the director's report. Ling said he did not find a constitutional issue with the legislation. It is easy to say it is unconstitutional, but the determination is not that easy. He noted the legislation changes the role of the director, but has a mandatory provision as to what the director must do to evaluate the extent and nature of the water right. The court has the right to evaluate that report and remand for further findings by the director. Ling said that the provision has not been changed that allows the director to make an investigation and examination to determine the extent and nature of each water right. He noted that there are avenues to address an abuse of discretion if necessary. Ling said there is always the ability to raise an issue in court if it has not been determined by the director.

Laird Lucas, attorney, Land and Water Fund, representing Idaho Conservation League, Idaho Rivers United, Idaho Wildlife Federal and Northwest Resource Information Center, stated these groups are attempting intervention in the SRBA because the citizens of Idaho have an interest in how these waters are going to be used. The result of the adjudication will be a decree guaranteeing a water right which will affect everyone using those waters. They have been granted intervention to challenge particular changes in water rights which may conflict with the local public interest. Since 1978 any change in a water right has to have a local public interest determination. Lucas noted objection to sections 31 and 32 which eliminate local public interest because any changes which should have been examined by the director can only be denied if another water right is injured or if there is an increase of water being used. Lucas requested the addition of language providing that if you substantially impair the local public interest the change cannot be approved. He noted that substantially impairment of the local public interest is a higher threshold than exists under current law. He noted the additional language could not stop the SRBA court from approving the vast majority of water rights that have been changed as the vast majority are in the public interest. Lucas said the value of public interest will change from time to time and place to place.

Norm Samenko, attorney, Twin Falls, representing the Twin Falls Canal Company and the North Side Canal Company, addressed three issues. The first one is the director's report being prima facie evidence in the SRBA. He stated that prima facie is the minimum amount of evidence that is required to establish every element of whatever you are working for, in this case, a water right. The minimum amount of evidence gets you into court to establish some kind of water right. The director's report should not be conclusive evidence, the decree or license is stronger evidence than a director's report. He noted that there was no statement in the legislation to determine the director's report is conclusive or presumptive. He supports the legislation permitting the director's report to be considered as

prima facie evidence.

Samenko noted in relation to the private attorney general doctrine, the issue is whether or not the state should be accountable for attorney fees. He supports the interim committee studying this issue for one year because the issue is bigger than the SRBA because it addresses a policy pertaining to all state agencies and whether SRBA should be exempted.

Additionally, by making it clear that it is not a remand, but a supplemental director's report is a issue that is resolved by the legislation. He supports the legislation because it is critical to fulfilling the purposes of SRBA and clarifies that all possible claims could be filed and adjudicated in the SRBA. He noted that it may expand the scope of SRBA, but this could be best rather than having the federal government filing claims later on. He urged passage of this legislation to adjust to the ongoing changes in the SRBA.

Dale Rockwood, eastern Idaho farmer, member of the Committee of 9, chairman of the rental pool, chairman of Mitigation, Inc., and member of the Progressive Irrigation Board. He explained the origination of the Committee of 9 approximately seventy years ago when the pioneers started diverting the water. He noted that the reservoirs were established for the benefit of agriculture, but are operated for the benefit of the public. He said that we are extremely lucky to have the water in Idaho to be able to go through an adjudication. It was noted that the Committee of 9 has signed an agreement with the City of Pocatello for 45,000 acre feet of water for recharge.

Sherl Chapman, director of the Idaho Water Users Association, commended the Committee for protecting the resource and the water right holders. He said their organization supports the legislation as many of their members have been involved in the formulation of the proposed legislation because of the complexity of the issues.

Dell Raybould, member of Committee of 9, noted the necessity of the legislation and that the presumptive statutes were a necessary part of the original adjudication. He said that there has not been an expanded use of water under the presumptive statutes because of expansion of existing water rights. He indicated that water has been placed on land that was already being irrigated and has actually diminished water use by the extension, leveling and bringing in other acres of irrigated crop land. He noted that the Committee should consider that the presumption statutes were not to increase a water right through consumptive use. He urged the passage of the legislation to take care of the ambiguities. He noted that when the adjudication started it was to be a clarification of existing water rights and the legislation is needed for that process.

Susan Walmsley, Hagerman Water Right Owners, said this was an opportunity for her to express her first amendment rights. She noted the adjudication was designed for the water users. She said the process has cost the water users a great deal of time and money. She said the legislation could change the rules and place additional burdens on the water right holders in their attempt to reach accord with the department in administrative or nonjudicial proceedings. She noted that water right holders had to compel the department by law to provide discovery information as to the department's recommendations to the court. She said removing the department from attorney fees through immunity by giving prima facie evidence to the department's finding could be an injustice.

By giving immunity from attorney fees and costs is unfair to those who have played by the rules of the adjudication. She urged the Committee to think of all the water right holders and not adopt the legislation. She noted that the legislation should not be confused with the call on water addressed by the recent Supreme Court decision. She noted that the legislation could unfairly weigh evidence in favor of the department, place unfair financial burdens on water right holders, promote unnecessary litigation and leaves no recourse for water users because it makes the department immune. She said this did not make sense to erase seven years of work on the adjudication by the passage of the legislation. Upon inquiry from the Committee, she said that through the adjudication process they could loose seventy-five percent of their water through the department's recommendation. She said she thought the department should be working for them not against them.

Chairman Noh noted that he is in contact with the Agriculture Extension Office, have reviewed their report on water requirements and there will be additional evaluations of the appropriate duty of water in the Hagerman area this summer.

Bob Muffley, Middle Snake Regional Water Resource Commission, supports the legislation generally, but also supports amending the legislation to eliminate sovereign immunity.

Cooper Brassy agrees what has been said and also with what Mr. Brown said, but expressed concern that the legislation was panic driven and might create more controversy than the legislation attempts to resolve. He said full economic development of Idaho's water has been surpassed and we cannot continue to consume more water.

Bill Ringert, attorney, Boise, dealing with water matters for over thirty years, represents several clients in the SRBA, including a major trout producer urges a limited role for the department. He noted that when the adjudication was authorized the director was assigned to make a report to the court and was not intended to serve the role of advocate, but that the interpretation has changed and created issues wasting time and money in the adjudication. Ringert said that H 969 restores the process to what was intended when SRBA was initiated in 1986. The court should not have to be continually monitoring the director's investigation activities to determine if the director is doing a reasonable job. The adjudication was designed to determine the parameters of existing water rights. He said that the adjudication should not be a vehicle to establish new water law policy. It is the Legislature's responsibility to make policy, not the director and not the court. Ringert noted that H 969 and H 990 streamlines the process. If the director is a party he is before the court at all times and is in a position to advocate his policy. Ringert said that water users should not have to compete with the director on those issues. The water users are there to get their water rights confirmed and determined by the court. He said that local public interest is supposed to take care of the concerns of the people directly affected by the proposed change, but public interest has been expanded over time by the courts. He said that local public interest should not be used to complicate SRBA because it could touch almost every water right. He noted that local public interest did not become involved in the adjudication process until the 1989 amendment which was for the limited purpose of the accomplish transfer statute. He said that there were some constitutional issues which should

not be part of the adjudication process and H 969 eliminates those issues. He said that we have an adjudication that forces every holder of a water right into the adjudication, required to pay a filing fee at the threat of loosing a vested water right, and those asserting local public interest now have a captive target that cannot escape that will be subjected to diminution of water rights.

Lawrence Babcock, chairman of Big Lost River Water Users Association, noted that they have been in the adjudication fight for in excess of eight years. He said that they have a problem with the department because the recommendations were not in accordance with their historic use of their decree. He noted that he has surface and ground water rights. He said they object to the general provisions in the director's report, cannot continue to irrigate with the limited amount of daily water and without flood irrigation the Big Lost River could have very little recharge. Since 1988 400 wells in a seven mile area have been deepened or redrilled because of declining water tables. He noted that it was difficult to retain flows that they were licensed to retain. He said if the general provision of the director's report are not contestable they take part of the water away. The settlement conference is unnecessary Babcock stated. Upon inquiry, it was noted that the settlement conference is under the jurisdiction of the court not the department. Babcock said the legislation was not necessary because SRBA has ruled that the director is directed to do all things necessary to protect the people of the state from depletion of resources. Babcock said he strongly supports comments by Pat Brown and Susan Walmsley and urged the Committee to amend the legislation or defeat the legislation.

Upon inquiry from the Committee in relation to mitigation, Babcock said that in order to mitigate you have to have unappropriated water and a place to storage that water for use when it needs to be used. He said that they have been threatened by the department that no ground water pumps could be turned on unless they came up with a mitigation plan. He said that nothing in the mitigation area will work for them in the Big Lost River. He said that mitigation needs to be eliminated or clearly defined.

Ray Rigby, attorney, Rexburg, represents several clients and the Committee of 9, agrees with the remarks of Roger Ling, Norm Samenko and Bill Ringert. He said this legislation is needed to explain and correct the problems addressed by the concerns of the water users. He noted that in an adjudication the court calls upon the director to make the investigation and present his findings, but now the role of the director is challenged and now the legislation is contested because it removes the director. He noted that the judge is still in command of this law suit for all purposes and the legislation allows the evidence to be presented to the judge in the best way possible for the judge to decide. Prima facie evidence is evidence that standing by itself is sufficient upon which to base a decree. Rigby spoke about his "Rexburg decree" book relating to water rights 100 years ago. The court approved, the Legislature did not change it, and the water master has been delivering the water for all those years until there evolved more elements of a water right. Now it is necessary to have a decree with all seven elements. This legislation could help establish those seven elements and say that it is a public policy of this state on the basis of what has transpired over the past hundred years. There is no intent in the legislation to eliminate

people; they are already involved. He said the private attorney general doctrine has worked for basin wide interests, but eliminates that doctrine only in the adjudication. The legislation sets up an interim committee to study that issue for next year. He urged support of the legislation which has been studied carefully.

MOTION by Senator Hansen, seconded by Senator Cameron, that H 969 and H 990 be sent to the floor with a do pass recommendation.

SUBSTITUTE MOTION by Senator Reed, seconded by Senator Peavey, that H 969 be sent to the fourteenth order for amendment.

Roll call vote on substitute motion:

Ayes: Peavey and Reed

Nays: Cameron, Frasure, Furness, Hansen, Hawkins, McLaughlin, Richardson, Schroeder and Noh

Absent: Lloyd.

Substitute motion failed.

Motion that H 969 and H 990 be sent to the floor with a do pass recommendation passed on voice vote. Senator Reed voting nay.

Committee recessed at 12:15 p.m. to reconvene at 12:45 p.m.

Chairman reconvened the meeting at 1:01 p.m.

APPROVAL OF MINUTES:

Motion by Senator Hansen, seconded by Senator McLaughlin, that the minutes of March 14, 1994, be approved. Motion carried.

Motion by Senator Richardson, seconded by Senator Hansen, that the minutes of March 16, 1994, be approved. Motion carried.

Motion by Senator McLaughlin, seconded by Senator Reed, that the minutes of March 18, 1994, be approved with grammatical corrections. Motion carried.

Motion by Senator Reed, seconded by Senator McLaughlin, that the minutes of March 25, 1994, be approved. Motion carried.

HCR 70 **Lynn Tominaga, Idaho Water Users Association,** explained HCR 70, which establishes a legislative interim committee to monitor implementation of the water agreement and the adjudication processes and to study ways to compensate water right holders who incur costs from litigating their rights as "basin wide issues." He stated that originally the adjudication raised over $20,000,000 plus interest and $14,000,000 has been expended as of a month ago. It is projected that within eighteen months the adjudication will be out of funds. The federal government was to come up with approximately $8,000,000 to $11,000,000 dependent upon federal filings. He noted that it has been projected by the director that the adjudication will probably last another seven to eight years at a cost of approximately $3,000,000 to $4,000,000 per year dependent upon the litigation.

Motion by Senator Cameron, seconded by Senator Frasure, that HCR 70 be

sent to the floor with a do pass recommendation. Motion carried.

Upon inquiry from the Committee, R. Keith Higginson, director, Department of Water Resources, stated in relation HCR 70 that there could need to be a substitute source of money for that account. He estimated the department and court costs were approximately $4,000,000 a year. He noted that some litigants are being required to bear an unusable amount of the costs on the basin wide issues which needs to be investigated and determined how to compensate them for those costs. He said that it could take a lot of effort to put a package together for funding other than general fund monies. He noted that it has been suggested that a water use fee should be implemented to pay some of the costs. The legislation provides for a broad latitude for the makeup of the interim committee.

H 989a **R. Keith Higginson**, Director, Department of Water Resources, explained H 989 which extends for one year the authority of the Director of the Department of Water Resources to allow water for salmon movement down the Snake River system upon certain findings. He said the department has allowed use of water from the water banks for flow augmentation for salmon. Last year the amount was 427,000 acre feet; this year the Bureau of Reclamation needs 527,000 acre feet, which is water from storage reservoirs in southern Idaho. He said this legislation could extend the time to January 1, 1996, and could continue to allow the uses of the water on a willing buyer/willing seller basis through this year and next year.

Upon inquiry from the Committee, it was noted that the amendment becomes effective upon the Governor making a proclamation that the Bureau of Reclamation has agreed to withdraw or hold in abeyance for a period of one year, the bureau's applications for transfer of water rights in the Payette River basin. Higginson noted that he has two applications awaiting response from the bureau as to their intent to amend the purpose and place of use of 95,000 acre feet of Cascade and Deadwood water. This amendment could provide that the bureau withdraw those applications. It was noted that the bureau could be agreeable to that approach. Higginson noted that the bureau needs to file applications on the Boise River and the Upper Snake River reservoirs.

Concern was expressed from by Senator McLaughlin as to some state control at Dworshak Dam. Higginson explained that H 969 by changing "Federal Reserved Water Right" to a broader definition will include the water of Dworshak Dam under the adjudication. Higginson said he thought what is transpiring at Dworshak is contrary to federal law because the dam was not authorized for those purposes. He said the state should challenge the operation of Dworshak. The department is not pursuing any action; the state through the attorney general's office, is pursuing action in connection with the biological no jeopardy opinion. He said the department does not have a water right issue pending, but through the adjudication and the proposed changes through the proposed legislation, the federal government will be required to file whatever claim they have to Dworshak which will permit objections and responses.

Motion by Senator Furness, seconded by Senator Frasure, that H 989 be sent to the floor with a do pass recommendation. Motion carried.

H 986 **Jo Beeman,** attorney, Boise, representing water users, explained H 986 which modifies and clarifies procedures for the administration of water rights outside of a water district. She noted that generally the legislation addresses the Musser situation. She noted that the changes made in 1992 have been interpreted by the Idaho Supreme Court in the Musser decision as imposing a duty on the director to supervise and control the distribution of water outside of water districts. She said that rights outside a water district have not been adjudicated and there are unresolved legal issues. Section 1 of this legislation restores the law to the intent of the Legislature in 1992 that the director's duty to distribute water relates to water districts. As a result of the Musser decision, the department has sent out notices to ground water users giving them notice that the decision could affect them this irrigation season. There are some 9,500 ground water users that are not in a water district. The legislation clarifies the law and the procedures for a hearing before the director before an order could be issued affecting water rights outside a water district. The legislation also addresses due process guarantees that a hearing could precede an action by the director or the court.

The legislation makes it very clear that the water user has the opportunity for a hearing. If the department proceeds through the Administrative Enforcement Act the notice of violation will allow the water user an opportunity for a compliance conference to negotiate a remedy. This also allows the water user the choice not to respond to that process and then the matter could proceed in court.

She noted that with the adjudication and the number of ground water rights that are potentially affected by the Musser decision, to have the director be in a position of being told to determine what to do with those ground water rights more or less leaps past the process that was put in place with the adjudication to determine the nature of the rights within the aquifer so that there can be an understandable method to administer the ground water rights with the surface water rights.

Upon inquiry from the Committee, Beeman noted the legislation could affect the Musser case if there was a rehearing and the Supreme Court looked at the status of the legislation at the time of rehearing. She noted that the legislation is to clarify the intent of the Legislature in 1992 and she does not see a constitutional problem.

Upon inquiry, Chairman Noh noted that the legislation in 1992 had to do with internal disagreements within a water district and the way funds were managed.

Beeman noted that the purpose of the 1992 legislation was not related to water distribution. Upon further inquiry, she explained the legislation provides for options to make a call to the director. Another option has always been available and that is to go to court and prove your case. She noted another option is through the conjunctive management rules when adopted as interim rules. Additionally, there is another option because of the SRBA. Once a director's report is filed a water user can ask the court to administer the water right pursuant to the director's report. She noted there is a statutory procedure which was not used by the Mussers but was available to them.

Robert Bakes, Boise attorney whose firm represents pumpers, municipal and agricultural business which use well waters. He expressed concern with the Musser decision,

which the legislation attempts to rectify, is the requirement that the director distribute water outside of an organized water district under a writ of mandate, which compels the director to act without being able to commence a hearing and give anyone an opportunity to be heard before their water is shut off. Bakes said that raises an extreme concern in the agricultural and financial community because the director, being under a writ of mandate to deliver water when a call is made, would have no other choice but to shut off someone's water. The constitution of the United States and the state of Idaho require that before any one's property is taken that they be given notice and opportunity for a hearing. Bakes expressed concern with the Musser decision is the preemptory nature of the writ of mandate. Additionally, he supports the legislation because it eliminates the mandatory administerial duty of the director in water rights outside a water district and provides that in the event the director determines an action was necessary there could be a notice and an opportunity for a hearing before the issuance of an order. The legislation shifts the burden to the director for an administrative hearing at his discretion and provides for notice to anyone affected. He noted that the Mussers' still have a remedy through the SRBA by petitioning the court for a hearing. He said that the effect of the writ of mandate shifts the burden from the Mussers to the director and has adverse impacts because the public is required to finance the litigation. Upon inquiry, Bakes said that the claimant must show an interconnection which will ultimately be resolved in the adjudication.

Motion by Senator Hansen, seconded by Senator Cameron, that H 986 be sent to the floor with a do pass recommendation. Motion carried.

H 982 **Sherl Chapman**, Idaho Water Users Association, explained H 982 as extending the moratorium on new agricultural groundwater withdrawals from the Snake Plains aquifer. The nature of the moratorium is a legislative confirmation and extension of the moratorium already in place. Chapman said one of the concerns is that the aquifer is either over subscribed, or over subscribed in some areas or there is a lack of knowledge of the aquifer. This legislation creates a moratorium on the approval of new applications for consumptive uses with the exception of those that are exempted in the current moratorium with a sunset provision of December, 1997. Under this moratorium the Department of Water Resources can continue to accept applications which could receive a priority date, but could not be processed. If there is a decision that there is water that can be appropriated then those filed could receive equitable consideration.

Motion by Senator Peavey, seconded by Senator Richardson, that H 982 be sent to the floor with a do pass recommendation. Motion carried.

ADJOURN: There being no further business to come before the Committee, the meeting was adjourned at 2:00 p.m.

Respectfully submitted,

Laird Noh, Chairman

Darby Harris, Committee Secretary

Date 4/1/94

RESOURCES AND ENVIRONMENT COMMITTEE

VISITOR RECORD

Name	Association	Bills Interested In	Testify Yes/No
JON MEHLED	SELF		
Senator Hardy Barrett	State Representative		NO Yes
BRUCE SMITH	Rosho H. Robbins	all	NO
Jim TUCKER	IDAHO POWER	969 (ALL)	YES
LAURA LUCAS	LAW FUND	969	YES
John Hepworth	HWRC	969	Maybe
Wayne Lenicka	IFCC	969	maybe
Norm Young	IDWR	969	NO
David Shaw	IDWR	969	No
David Mabe	Givens Pursley	969	NO
LARRY TAYLOR	IDAHO POWER	969	NO
Pat Brown	HWRC	969	YES
Rima Robinson	USFS	969	no
Jo Beeman	Moffatt Thomas	986	Yes if no
Robert BAKES	Moffatt-Thomas	986	yes
Cindy Brossy	Citizen-Watcher	969	NO
Cooper Brossy	" "	969	no
NORM SBRANKO	Rosho Robbins Tucker	ALL	Yes
JAMIE GOUGH	ACUMENICS	ALL	NO

VISITORS' RECORD

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

Date of Meeting: April 1, 1994

Name and Title	Representing	Bills of Interest	Wish to Testify	Support or Opposition
Robert Brailsford Water Right Owner.	Hagerman Water Right LLC. Self		No	Opposition
Dannie McFadden Rancher	Self		?	Opposition
Shirl Chapman	Idaho Water Users Assn.	ALL	Yes	Support
Kayla Jacobsen	Id Farm Bureau	all	no	Support
Tom Geary	Idaho Farm Bureau	all	no	support
Roger Ling	Ling, Nielson, Robinson	ALL	Yes	Support
Lynn Tominaga	Idaho Water Users Assn	All	?	Support
Lorna Jorgensen	Self	All	No	Uncertain
Fred Brossy	Self	969	yes	opp.
Jeff Peavey	IGWA	all	?	support
Ronald Stewart	self			
W. E. Ringert	Wid & others	ALL	SOME	support

VISITORS' RECORD

SENATE RESOURCES AND ENVIRONMENT COMMITTEE

Date of Meeting: april 1, 1994

Name and Title	Representing	Bills of Interest	Wish to Testify	Support or Opposition
Shannon Bennett				
L.D. ANDERSEN	SELF.			
Lawrence Babcock		969	?	opp.
Dan McFadden	HWRO Inc.	969	?	opp.
Claude Stoen	Com 9	969	?	s
Susan Walmsley	HWRO, Inc	969	✓	OPPOSED
Dale Rockwood	Comm of Nez	969	✓	support
Dee Raymond	Co of 9.	969	✓	Support
Ray Rigby	Co of 9.	all	✓	Support
Bob Muffley	Middle SNAKE Regional water Resource Commission	969	yes	opposed
Suzanne Johnsen	HWRO Inc	969	yes	opposed
Johnnie Mayne	LSRARD	969	NO	opposed

Senator Laird Noh

Elements of 1994 Water Agreements and Legislative Action

Aquifer Recharge - 45,000 acre feet minimum - 1994

Requested recharge legislation.
Legislative waiver of filing fee for recharge district.
General fund appropriation for conveyance costs of water.
Bureau of Reclamation pays for lease costs for City of Pocatello water to replace recharge waters from Idaho Power.
In exchange for payment by Bureau of Reclamation, legislative extension for one year of Director's release of salmon augmentation water.
General fund appropriation for local recharge studies in Hagerman area.

Legislation creating methods to measure groundwater withdrawals.

Legislative moratorium on new groundwater withdrawals.

Additional studies will be done in the Hagerman area on the duty of water.

Consensus agreement has been reached upon interim rules for conjunctive management which the Director will implement. The deadline for completion of permanent rules will be extended.

Legislative establishment of interim committee to work with implementation of the agreement and consider means of compensating claimants who have incurred significant legal costs as a result of their claims being involved in a state-wide issue in the adjudication.

Legislative consideration of the expansion statutes which were declared unconstitutional by the adjudication court, as part of modification of adjudication procedures, and the establishment of provisions for settlement conferences.

Legislative modification of I.C. 42-602, changing the methods whereby the Director distributed groundwater outside of a water district.

4/1/94

J.R. SIMPLOT COMPANY ONE CAPITAL CENTER 999 MAIN STREET SUITE 1300
P.O. BOX 27 BOISE, IDAHO 83707-0027 (208) 336-2110 FAX (208) 389-7515

CORPORATE HEADQUARTERS

March 31, 1994

Golden C. Linford
Idaho State Legislature
State Capitol Building
Boise, Idaho 83720

Bruce Newcomb
Idaho State Legislature
State Capitol Building
Boise, Idaho 83720

Laird Noh
Idaho State Legislature
State Capitol Building
Boise, Idaho 83720

RE: Interim Conjunctive Management Rules

Dear Senator Noh:

We have prepared proposed interim conjunctive management rules in response to your charge on March 17, 1994 to work with water users to develop a consensus of support for interim conjunctive management rules affecting ground and surface water users in Idaho. Your request was in response to the likelihood of litigation if the conjunctive management rules presently published in the March Administrative Rules Bulletin were adopted by the Idaho Department of Water Resources.

Certain interests were almost uniformly shared among water users even before your request of March 17, 1994. First, the Idaho Department of Water Resources would be best served if it did not have to adopt final conjunctive management rules this April. In other words, more time would benefit the process. Second, ground water users almost without exception believe that some form of rules are necessary for this irrigation season.

My first step in fulfilling your assignment, was to meet with the Idaho Department of Water Resources to discuss means of adopting "interim" rules, allowed by the Administrative Procedures Act, which would provide more time for comments to the formal rulemaking, but also allow interim rules to be adopted to meet the interests of water users in Idaho.

The initial meeting with Idaho Department of Water Resources was followed by intense drafting sessions where I tried to obtain as much input from as many

4/1/94

parties as possible to suggest how the current proposed rules could be amended and adopted as interim rules. We used personal meetings, phone calls, and written facsimiles to accomplish these purposes.

We believe many of the water users are resolved to the interim rules concept as an attempt to avoid litigation. These interim rules have been redrafted to focus on existing Idaho law to allow ground water and surface water users to argue on a case-by-case basis their viewpoint on applicable Idaho law. The litigation would focus on what law applies, not whether the rules themselves are legal.

Conjunctive management rules are necessary because the water users are as varied in their inter-relationships as the water uses of our ground water and surface water systems in Idaho. From this diversity arises a common interest which almost without exception supports (1) additional time to comment and work on formulation of final conjunctive management rules; and (2) adoption of interim rules to provide a learning opportunity to strengthen the final product.

Please let me know if I may provide any further assistance prior to the adoption of the final conjunctive management rules. Thank you for the opportunity to lend my assistance to this important process.

Sincerely,

TERRY T. UHLING
Assistant General Counsel
Environmental & Regulatory Affairs

TTU:hp
5496v

Nez Perce

TRIBAL EXECUTIVE COMMITTEE
Office of Legal Counsel
P.O. BOX 305 • LAPWAI, IDAHO 83540-0305 • (208) 843-7355
Fax (208) 843-7377

TELEFAX COVER LETTER

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Senator Laird Noh

FAX NUMBER: (208) 334-2320

TOTAL NUMBER OF PAGES INCLUDING COVER LETTER: 3

FROM: Rebecca Craven, Deputy Counsel

ADDITIONAL MESSAGE:

DATE TRANSMITTED: 03/31/94

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Nos. 33249/33311/33399

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiffs-Respondents-Cross-Appellants, and

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

Interveners-Respondents-Cross-Appellants,

v.

IDAHO DEPARTMENT OF WATER RESOURCES and KARL DREHER, its Director,

Defendants-Appellants-Cross-Respondents, and

IDAHO GROUND WATER APPROPRIATIORS, INC.,

Intervener-Appellant-Cross-Respondents.

DEFENDANTS-APPELLANTS' OPENING BRIEF ON APPEAL

On appeal from the District Court of the 5th Judicial District of the State of Idaho, in and for the County of Gooding
Honorable Barry Wood, District Judge

Counsels for Defendants-Appellants, State of Idaho **LAWRENCE G. WASDEN**, Attorney General **CLIVE J. STRONG**, ISB #2207 Deputy Attorney General Chief, Natural Resources Division **PHILLIP J. RASSIER,** ISB #1750 Deputy Attorney General Idaho Department of Water Resources	**MICHAEL C. ORR**, ISB #6720 Deputy Attorney General Natural Resources Division P.O. Box 83720 Boise, ID 83720-0010 Telephone: (208) 334-4154 *(See Service Page for Remaining Counsel)*

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STATEMENT OF THE CASE

I. THE NATURE OF THE CASE.

This case presents a facial constitutional challenge to the Rules for Conjunctive Management of Surface and Ground Water Resources (the "CM Rules" or "Rules").[1] Appellant Idaho Department of Water Resources ("IDWR" or "the Department") promulgated the Rules to integrate the administration of surface water rights and ground water rights under the prior appropriation doctrine as established by Idaho law. IDWR takes this appeal from a summary judgment ruling declaring the Rules facially unconstitutional based on the perceived absence of certain "procedural components" of the prior appropriation doctrine from the Rules.

The question of such an absence was not raised, briefed or argued in the district court. Rather, the district court proceedings focused on the Plaintiffs-Respondents' ("Plaintffs") theory

[1] IDAPA 37.03.11.000 – 37.03.11.050.

that Idaho law requires "strict priority" administration of water rights. The Plaintiffs argued 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 principle of the prior appropriation doctrine as established by Idaho law. The Plaintiffs argued that the Rules permit a "re-adjudication" of decreed rights because they recognize such substantive tenets of the prior appropriation doctrine rather than requiring administration based solely on priority date and decreed quantity.

The district court correctly rejected these arguments and held that the substantive factors and policies recognized in the Rules are consistent with the prior appropriation doctrine and can be applied constitutionally. The district court went on, however, to hold the Rules facially unconstitutional on an entirely different basis—the perceived absence of "procedural components" of the prior appropriation doctrine the district court viewed as constitutionally mandated. The questions presented by this appeal therefore differ in significant respects from the questions actually litigated in the district court.

This is particularly true in that the district court focused on the application of the Rules to the Plaintiffs rather than the Rules' facial validity, even though the administrative record was incomplete and a factual record was never properly developed in court. The district court interpreted Idaho Code § 67-5278 as making the Director's actual and "threatened" application of the Rules to the Plaintiffs the controlling inquiry, and as authorizing judicial review of an

ongoing administrative proceeding in a "facial" challenge. Likewise, the district court's holding that the "reasonable carryover" provision is facially unconstitutional was based on premature judicial review, and on the district court's unprecedented ruling that storage rights in Idaho include an entitlement to retain a full storage allotment through the end of an irrigation season, *while calling for the curtailment of junior rights, regardless of whether a full storage allotment is* necessary for the authorized beneficial use in either the current season or the next season.

This case presents questions that strike at the core of the Idaho Administrative Procedure Act and the prior appropriation doctrine, and poses significant constitutional law questions. As discussed herein, the district court erred in several respects that warrant reversal.

II. THE PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT.

The Plaintiffs filed a declaratory judgment complaint under Idaho Code §§ 67-5278 and 10-1201—10-1217 on August 15, 2005, seeking declarations that the CM Rules are being unconstitutionally applied to the Plaintiffs' request for administration of junior ground water rights ("delivery call"), and are void on their face.[2] Rangen, Inc., Clear Springs Foods, Inc., the Thousand Springs Water Users Association, and Idaho Power Company intervened on the Plaintiffs' side of the case, and the City of Pocatello and the Idaho Ground Water Appropriators, Inc., intervened on the Appellants-Defendants' ("Defendants") side.

The Defendants moved to dismiss the Complaint under the doctrines of primary jurisdiction and failure to exhaust administrative remedies,[3] but the Plaintiffs and the like-aligned Interveners (collectively, "Plaintiffs") moved for summary judgment before the district court

2 R. Vol. 1, pp.1, 11.
3 R. Vol. 1, pp.150-51.

ruled on the motion to dismiss.[4] The district court denied the motion to dismiss but limited summary judgment to the facial challenge alone.[5] After the Defendants filed a brief opposing summary judgment, the district court ordered that the facial challenge would be decided on the basis of the "threatened application" of the Rules to the Plaintiffs' delivery call.[6]

The district court allowed the parties to file supplemental briefing under the "threatened application" standard,[7] and heard summary judgment arguments on April 11, 2006.[8] The district court entered a 126-page Order on Plaintiffs' Motion for Summary Judgment ("Order") on June 2, 2006,[9] holding that the substantive factors and policies of the Rules can be applied constitutionally and are consistent with the prior appropriation doctrine,[10] but that the Rules are facially unconstitutional as a whole due to the perceived absence of certain "procedural components" of the prior appropriation doctrine.[11] The district court also held that the "reasonable carryover" provision regarding year-end carryover in reservoir storage was facially unconstitutional on grounds of its "threatened application" to the Plaintiffs, and under this Court's decision in *Washington County Irrigation District v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935).[12] The district court entered a corresponding Judgment Granting Partial Summary

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4 R. Vol. IV, pp. 736-37; R. Vol. V, pp. 1095-96, 1229-30; R. Vol. VI, pp. 1266-67.
5 R. Vol. VI, pp. 1312, 1314; Tr. Vol. I, p. 132-33, 135; R. Vol. VIII, p. 1813.
6 R. Vol. VIII, pp. 1814-15.
7 R. Vol. VIII, pp. 2059-86; R. Vol. IX, pp. 2173-2223; R. Vol . IX, pp. 2248-2277.
8 T. Vol. I, p. 182.
9 The Order is located at R. Vol. X, pp. 2337-2477. Subsequent citations to the Order will consist of the word "Order" and the corresponding page number(s) rather than a record citation.
10 Order at 3, 83-90.
11 Order at 3, 83-83, 90-98.
12 Order at 109-17.

Judgment ("Judgment") on June 30, 2006,[13] and certified the Judgment under Rule 54(b) on July 11, 2006.[14] The Defendants filed a Notice of Appeal on the same day.[15]

III. STATEMENT OF FACTS.

A. The Conjunctive Management Rules.

IDWR promulgated the CM Rules in 1994 for use in responding to delivery calls by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights diverting from interconnected sources.[16] Prior to the 1992 amendments to Idaho Code §§ 42-602 and 42-603 that provided for the inclusion of ground water rights in water districts,[17] ground water rights and surface water rights had been administered as separate water sources in Idaho. The CM Rules are the first formal rulemaking attempt to establish a comprehensive framework for joint administration of rights in interconnected surface water and ground water sources. The Rules provide procedures tailored to water districts, ground water management areas, and areas outside of such administrative structures.[18]

B. The Plaintiffs' Water Delivery Call.[19]

The Plaintiffs hold surface water rights in the Snake River or springs in the Snake River

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13 R. Vol. X., pp. 2502-05.

14 Tr. Vol. I, pp. 359, 371-72.

15 R. Vol. X, p. 2516.

16 IDAPA 37.03.11.001. Subsequent citations to provisions of the CM Rules will consist of the term "CM Rule" or "Rule" and the corresponding rule number rather than an IDAPA citation. For instance, IDAPA 37.03.11.20.02 will be cited as "CM Rule 20.02" or "Rule 20.02."

17 1992 Idaho Session Laws ch. 339 §§ 2, 4, p. 1015-16.

18 CM Rules 30, 40, 41.

19 The Defendants discuss the Plaintiffs' delivery call and the Director's response thereto solely for purposes of supporting Defendants' assignments of error in this appeal. The Defendants reserve all objections to the district court's review of the Plaintiffs' delivery call proceedings and its consideration and resolution of disputed factual issues in this case.

canyon, and several also hold storage contracts with the United States Bureau of Reclamation ("USBR") for space in the Upper Snake River reservoirs.[20] In January 2005, the five named Plaintiffs and two other entities[21] submitted a delivery call to the Director seeking preemptory curtailment of junior ground water rights during the 2005 irrigation season.[22] The Director responded with an order on February 14, 2005, that, among other things, concluded that the Plaintiffs' water supplies likely would be injured by junior ground water diversions during the 2005 season.[23] The Director ordered that he would determine the reasonably likely extent of the projected injury after the USBR and the United States Army Corps of Engineers released their joint forecast for inflow to the Upper Snake River Basin for April 1 through July 1, 2005.[24]

The Department received the joint inflow forecast on April 7, 2005, and the Director issued an order for relief ("Relief Order") less than two weeks later, on April 19, 2005.[25] The Relief Order determined the water shortages and shortfalls the Plaintiffs were reasonably likely to suffer in 2005, and the amount of additional water that would accrue to the Plaintiffs' supplies under various scenarios for the curtailment of junior ground water rights.[26] The Relief Order identified the junior ground water rights subject to administration pursuant to the Plaintiffs' delivery call, and ordered these juniors to provide "replacement" water in sufficient quantities to

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20 R. Vol. I, pp. 168-73. The underlying storage rights for these reservoirs are claimed by United States Bureau of Reclamation and have not yet been adjudicated in the SRBA.

21 The two other entities were Milner Irrigation District and North Side Canal Company. Collectively, the seven entities are known as the "Surface Water Coalition" or, in some portions of the record, "SWC."

22 R. Vol. III, pp. 599-650.

23 R. Vol. IX, p. 2244, ¶ 5; R. Vol. X, p. 2550, L. 5.

24 The February 14 order also granted IGWA's request to intervene in the administrative matter.

25 Appendix A is copy of the Relief Order. Subsequent citations to the Relief Order will consist of the term "Relief Order" and the corresponding page and/or paragraphs numbers. The Director issued an amended Relief Order on May 2, 2005. The amendments were limited and are not germane to the issues presented in this appeal

26 Relief Order at 24-29.

offset the depletions in the Plaintiffs' water supplies caused by the junior diversions, at the time and in the place required under the Plaintiffs' water rights, or face immediate curtailment.[27]

The Director expedited the Relief Order by making it effective immediately as an emergency order under Idaho Code § 67-5247,[28] and by issuing it before a hearing. Pursuant to Idaho Code § 42-1701A(3), the Relief Order provided that aggrieved parties were entitled to an administrative hearing on the order if requested within fifteen days, but otherwise the order would become final.[29] The Plaintiffs and IGWA requested an administrative hearing, but the Plaintiffs filed this action before the date set for the hearing and subsequently requested stays or continuances in the hearing schedule, either on their own behalf or jointly with other parties.[30] This administrative challenge to the Relief Order remains pending.

C. The Declaratory Judgment Action.

The Complaint focused primarily on the allegedly unconstitutional application of the Rules to the Plaintiffs' delivery call and sought corresponding declaratory relief.[31] The Complaint also sought a declaration that the Rules are "void on their face."[32] The Plaintiffs' summary judgment motion relied on extensive affidavits pertaining to the Plaintiffs' delivery call,[33] and briefing that conflated the as-applied and facial claims and arguments.[34] The

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27 *Id.* at 43-46.

28 *Id.* at 46 ¶ 14.

29 *Id.* at 46 ¶ 14.

30 R. Vol. IX, p. 2244, ¶ 3 ("Illustrative Timeline" at 2-3); R. Vol. X, p. 2550, L. 5. Appendix B is a copy of the "Illustrative Timeline" for the administrative proceedings on the delivery call.

31 *See generally* R. Vol. I, pp. 5-10 ¶¶ 13, 14(A)-(B), 15, 17, 18 (Count I); *id.* at 10 ¶¶ 1-2 (Count II); *id.*, p. 11 (prayer for relief). The petitions to intervene made similar allegations and requests for relief. R. Vol. I, pp. 85-92; R. Vol. II, pp. 292-96.

32 R. Vol. I, pp. 11, 91; R. Vol. II, pp. 296.

33 R. Vol. IV, pp. 744-983; R. Vol. V, pp. 1100-1189; R. Vol. V, pp. 1257-65; R. Vol. X, p. 2550, L. 1; R.

Defendants argued that the case should be dismissed as an improper attempt to bypass the administrative hearing.[35] The district court found that the Plaintiffs had failed to exhaust their administrative remedies, but nonetheless declined to dismiss any claims.[36]

The Defendants sought clarification that summary judgment would be limited to the facial claim and requested that the Plaintiffs re-brief summary judgment on the facial claim alone.[37] While the district court affirmed that the summary judgment hearing was confined to the facial challenge,[38] it declined to exclude the factual materials or order re-briefing.[39]

In their brief in opposition to summary judgment, the Defendants argued that the Plaintiffs had to show the Rules incapable of constitutional application under any circumstances for purposes of a facial challenge, and could not rely on allegations regarding the application of the Rules to the delivery call.[40] Shortly thereafter, the district court *sua sponte* ordered that under Idaho Code § 67-5278, the actual and "threatened application" of the CM Rules to the Plaintiffs' delivery call was "part and parcel" of the facial challenge.[41] The district court explained that under this standard, "the director's threatened application of the rule, or his application to date, as applied to the rules, is subject to review."[42]

Based on the district court's "threatened application" ruling, the Plaintiffs pressed their

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Vol. VI, pp. 1271-75; *see also* R. Vol. III, pp. 591-725.

34 *See, e.g.*, R. Vol. V., pp. 988-89, 999-1002, 1024-30, 1032-35, 1191-92, 1194-95, 1198, 1201-08, 1234-35, 1238, 1244-51; R. Vol. V, pp. 1277, 1280-81.

35 R. Vol. II., p. 260.

36 R. Vol. VI, pp. 132, 1314.

37 R. Vol. VI, 1340-45.

38 Tr. Vol. I, p. 132-33, 135; R. Vol. VIII, p. 1813; Order at 23.

39 Tr. Vol. I, pp. 135.

40 R. Vol. VII, pp. 1582, 1534-39.

41 R. Vol. VIII, pp. 1814-15; R. Vol. X, pp. 2337, 2360.

42 Tr. Vol. I, p. 316.

as-applied claims and sought judicial review under the guise of a facial challenge.[43] The district court reviewed the Director's orders on the delivery call, drew factual inferences and conclusions on disputed issues of material fact regarding the application of the Rules to the Plaintiffs, including sharply disputed issues that remained pending before the Director, and relied on these conclusions and inferences in holding the CM Rules facially invalid.[44]

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in holding that the CM Rules are facially unconstitutional due to the perceived absence of certain "procedural components";

2. Whether the Rules' application of well-established prior appropriation principles to conjunctive administration of water rights constitutes a facial "re-adjudication" or "taking" of decreed rights;

3. Whether the district court erred in finding the "reasonable carryover" provision of the Rules facially unconstitutional;

4. Whether the district court erred in ruling that the Director acted outside his statutory authority in promulgating the CM Rules; and

5. Whether the district court improperly circumvented the exhaustion requirement of the Idaho Administrative Procedure Act.

ARGUMENT

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[43] *See, e.g.*, R. Vol. V. p. 1192 (arguing that because the Rules "allow the Department to diminish and limit Clear Springs' vested property rights, its decreed water rights, the Rules are unconstitutional on their face"); Tr. Vol. I, p. 324 ("I'm showing that's how he applied the rules, and that is not a proper application. He believes the rules allow him to do that. And therefore, they're unconstitutional"); *see also* R. Vol. V, pp. 999-1000, 1001-02, 1023-30, 1032, 1034-35, 1194-95, 1201-08, 1210-11, 1215, 1217-18, 1245, 1248; R. Vol. VI, pp. 1280-81; R. Vol. VIII, pp. 1898-99, 1905-06, 1909, 1912 n.16, 1913-15, 1917, 1938, 1947, 1969-72, 1974, 1984; R. Vol. IX, pp. 2252-53 n.4, 2262, 2265 n.18, 2269-70, 2281, 2285; Tr. Vol. I, pp. 165, 175, 186, 194-95, 203-07, 210-11, 218-19, 222-23, 232, 304, 307, 323-24, 331-32.

[44] *See, e.g.*, Order at 25 ("this Court will also utilize the underlying facts in this case to determine whether the CMR's are invalid, and illustrate how the CMR's are being applied"); *id.* at n.5 ("In order to help determine whether the CMR's attempt to give the Director this authority [to re-adjudicate water rights], this Court will look at the facts of this case to determine if the Director did or threaten[ed] to do this"); *see also id.* at 90-97, 109-17.

I. SUMMARY OF ARGUMENT

The district court correctly rejected the Plaintiffs' theory of strict priority administration and determined that the substantive elements of the Rules can be applied constitutionally and are consistent with the prior appropriation doctrine under the familiar standards that govern facial challenges in Idaho. The district court erred by going further and declaring the Rules unconstitutional due to the perceived absence of certain "procedural components," a claim that had not been raised, briefed or argued.

This holding was flawed as a matter of law because it erroneously read into the Idaho Constitution and this Court's cases a new requirement that delivery calls must be administratively litigated as mini-lawsuits with the Director acting as a referee or special master rather than as an executive officer. This holding ignored the framework for water rights administration and judicial review established by the Legislature, usurped the Director's statutory authority, and would return Idaho to the system of administration-by-lawsuit the Legislature has rejected. Further, there is no requirement that the Rules expressly recite "procedural components," because they are provided by existing law and are explicitly incorporated into the Rules by reference.

The district court relied on improper presumptions and speculation rather than the plain language of the Rules in holding that they permit the administrative "re-adjudication" or "takings" of decreed rights. Moreover, while the district court recognized the inherent factual and legal complexity of conjunctively administering surface and ground water rights under the prior appropriation doctrine as established by Idaho law, it failed to recognize that IDWR is

required to consider more than just decreed quantity and priority date in such administration.

The rule that "first in time is first in right" is central to the administration of water rights in hydraulically connected sources, as the Rules explicitly recognize. This tenet is not self-executing, however, and before it can be applied there must first be a determination of under what facts or circumstances priority controls. This is no simple task, as Douglas L. Grant, former professor of law at the University of Idaho, discusses in a 1987 law review article. "The immediate cause of the complexity [of managing hydrologically connected surface and ground water] is that surface water and groundwater differ physically. Groundwater moves slower and more diffusely, and its movement is less readily ascertainable." Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63, 63 (1987).[45] This character of ground water means that curtailment may or may not benefit the senior, depending on the circumstances. The Rules provide the necessary administrative framework for integrating the rule that "first in time is first in right" with the other legal tenets of the prior appropriation doctrine that seek to promote optimum utilization of the resource.

Factual determinations made under the Rules do not constitute a "re-adjudication" because the SRBA district court's decrees do not adjudicate many of the complex factual issues necessary for the conjunctive administration of individual surface and ground water rights in accordance with Idaho law. Rather, IDWR is charged with making the factual determinations necessary to support conjunctive administration of individual water rights. In addition, the

[45] Appendix D is a copy of this article.

Director is statutorily obligated to give effect to all relevant principles of the prior appropriation doctrine in responding to a delivery call, and doing so does not amount to a re-adjudication or taking, but rather is consistent with the inherent nature and scope of an Idaho water right.

In holding the "reasonable carryover" provision unconstitutional, the district court created a new, bright line rule that a storage right includes an entitlement to retain a full reservoir storage allotment through the end of the irrigation season regardless of whether the full amount will be necessary to satisfy the beneficial use for which the water is stored—and to call for curtailment of any vested junior rights if their exercise would affect the ability to maintain a full storage allotment. This holding is contrary to this Court's cases and the historic exercise of storage rights in Idaho. It would also allow water to be wasted while junior rights are curtailed, and would surrender public control of Idaho's public water resources.

The district court circumvented the exhaustion requirement by misinterpreting Idaho Code § 67-5278 as authorizing judicial review of an ongoing administrative proceeding for purposes of a facial challenge. This allowed the Plaintiffs to use this case as a vehicle to pursue their as-applied claims while simultaneously seeking delay of those proceedings. The district court resolved disputed issues of material fact regarding those claims at summary judgment in a declaratory judgment action—including factual issues that are statutorily entrusted to the Director in the first instance, and that remain pending before him. If not reversed, the district court's decision will provide a basis and incentive for opting out of an ongoing administrative proceeding at any time by filing a lawsuit alleging the applicable administrative rules are invalid.

II. STANDARD OF REVIEW.

The facial constitutionality of a statute or an administrative rule is a question of law over which this Court exercises free review. *Moon v. North Idaho Farmers Ass'n,* 140 Idaho 536, 540, 96 P.3d 637, 641 (2004), *cert. denied*, 543 U.S. 1146 (2005); *Rhodes v. Indus. Comm'n*, 125 Idaho 139, 142, 868 P.2d 467, 470 (1993). There is a strong presumption of validity, and the challenger must carry the heavy burden of showing that there is no set of circumstances under which the statute or rule is valid. *Moon*, 140 Idaho at 540, 545, 96 P.3d at 641, 646. The Court is obligated to seek a constitutional interpretation of the challenged statute or rule. *Moon*, 140 Idaho at 540, 96 P.3d at 641.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE RULES ARE FACIALLY UNCONSTITUTIONAL DUE TO THE PERCEIVED ABSENCE OF PROCEDURAL COMPONENTS OF THE PRIOR APPRORPRIATION DOCTRINE.

A. The District Court Correctly Held That The Rules Can Be Applied Constitutionally And Are Consistent With The Prior Appropriation Doctrine As Established By Idaho Law.

The Plaintiffs claimed in the district court that the CM Rules are facially unconstitutional because the substantive factors and policies recognized in the Rules are repugnant to the prior appropriation doctrine and are an attempt to create "new law." *See, e.g.*, R. Vol. V, pp. 996-1008, 1010-12, 1016-22. The Plaintiffs asserted that Idaho water distribution statutes are "self-executing" and require the Director to constantly monitor all water supplies and automatically curtail junior water rights holders whenever any senior water right holder's supply dips below the decreed maximum quantity. *See e.g.*, R. Vol. VIII, pp. 1891-92, 1938-39. In short, the Plaintiffs argued that Idaho law requires rote and mechanical "strict priority" administration solely on the basis of priority date and decreed quantity.

The district court correctly rejected this challenge. It held that Idaho's water distribution statutes are not self-executing, Order at 98, and applied "a presumption of constitutionality" and the facial challenge standard that "if the provision can be construed in a manner which is constitutional, the provision will withstand the challenge." Order at 83. The district court held that the "Plaintiffs did not meet this standard" and that the challenged portions of the Rules "can be construed consistent with the prior appropriation doctrine." Order at 84. The district court held that the substantive factors and policies of the Rules "survive a facial challenge." *Id.* at 90.

This conclusion was well grounded in Idaho law, because Idaho water rights are "administered according to the prior appropriation doctrine as opposed to strict priority." *In re SRBA, Subcase No. 92-00021-37 SW (Surface Water)*, Order Granting Motion for Interim Administration for Basin 37 Part 1 Surface Water (5th Jud. Dist., Dec. 13, 2005) at 6; *see also In re SRBA, Subcase 91-00005 (Basin-Wide Issue 5)* Order on Cross-Motions for Summary Judgment; Order on Motion to Strike Affidavits (5th Jud. Dist., July 2, 2001) ("Order on Basin-Wide Issue 5") at 30 ("The prior appropriation doctrine as developed in Idaho does not require that water rights sharing a given source be administered according to strict priority. The prior appropriation doctrine also recognizes various principles that protect junior water rights which should be incorporated into the administration of water rights").[46] Indeed, the SRBA district court has recognized that its decrees do not make all factual determinations necessary for conjunctive administration of surface and ground water rights:

IDWR is charged with the duty of administering water rights in accordance with

[46] Copies of these two SRBA district court orders are included herein at Appendices E and F.

> the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree. . . . The partial decree need not contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call. Rather, IDWR makes this determination based on its knowledge and data regarding how the water rights are physically interrelated.

Order on Basin-Wide Issue 5 at 19.

Moreover, Idaho water rights are limited to the amount necessary to fulfill the authorized beneficial use, "regardless of the amount of [the] decreed right." *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n.5, 546 P.2d 382, 390 n.5 (1976) Water rights must also be exercised "within reasonable limits" and "with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual." *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120-21 (1912) (internal quotation marks and citation omitted).

While the Plaintiffs relied on the remark in *A & B Irrigation District v. Idaho Conservation League* that the Rules "do not appear to deal with the rights on the basis of 'prior appropriation,'" 131 Idaho 411, 422, 958 P.2d 568, 579 (1997), in arguing that the substantive factors and policies of the Rules are contrary to Idaho law, the district court rejected this argument without mentioning *A & B*. This was appropriate because *A & B* is not controlling, or even helpful, in evaluating the Rules' constitutionality under the applicable legal standards.[47]

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[47] The qualified remark in *A & B* was not based on a constitutional analysis of the Rules and was peripheral to the issue before the Court, which was whether a general provision regarding conjunctive management should be included in the partial decrees for Basins 34, 36 and 57. *Id.* at 421, 958 P.2d at 578. It should also be noted that, contrary to what the *A & B* remark appears to suggest, the Rules expressly recite, recognize or implement the rule of senior priority in multiple provisions. *See, e.g.,* Rules 000, 001, 10.07, 10.15, 10.18, 20.02, 20.04, 30.07(f)-(g), 30.09, 30.10, 40.01(a), 40.02, 40.02(a), 40.02(e), 40.05, 41.01, 41.02(c), 41.04, 43.03, 43.03(k).

Rather, the district court correctly looked to the plain language of the Rules and methodically rejected each of the Plaintiffs' challenges to the substantive factors and policies of the Rules, concluding that concepts such as ongoing beneficial use, "material injury," the need for a delivery call, reasonableness of diversion and use, and allowing for the provision of replacement or mitigation water in lieu of curtailment in appropriate circumstances, are constitutional and consistent with the prior appropriation doctrine as established by Idaho law. *See* Order at 83-89 ("The Court disagrees that each of the above stated concepts or factors considered when responding to a delivery call are on their face contrary to the prior appropriation doctrine and therefore unconstitutional on their face"); *id.* at 86 ("Accordingly, at least on its face, the integration of this policy [as set out in Rule 20.03] is not necessarily inconsistent with Idaho's version of the prior appropriation doctrine"); *id.* at 88 ("On this basis the Court does not find the concept of '*material injury*' to be facially inconsistent with the prior appropriation doctrine. The concept of 'reasonableness of diversion is also a tenet of the prior appropriation doctrine. . . . There is a 'reasonableness' limitation imposed on the appropriation") (italics in original); *id.* at 89 ("The concept of being able to compel a senior to modify or change his point of diversion under appropriate circumstances is also consistent with the prior appropriation doctrine"); *id.* at 90 ("the principles are generally consistent with the prior appropriation doctrine. This same reasoning applies to the ability of the Director through the CMR's to require replacement water in lieu of hydraulically connected surface water diverted under the senior right, so long as no injury occurs to the senior . . . this replacement reasoning is

also consistent with the nature of a water right").

These holdings reflect the fact that the only "new law" in this case was that advocated by the Plaintiffs – strict priority administration, an extreme and simplistic policy that is foreign to the prior appropriation doctrine as established by Idaho law. The Rules' substantive elements, on the other hand, are well established in Idaho law. This should have been the end of the district court's inquiry under the controlling legal standards. The district court erred, however, by going further and finding the Rules facially defective on grounds that had not been raised: the perceived absence of "procedural components" of the prior appropriation doctrine.

B. The District Court Erred In Holding That Seniors Are Entitled To A Specific Administrative Procedure In Response To A Delivery Call.

The district court held that the Rules are facially unconstitutional because of the perceived absence of certain "procedural components" of the prior appropriation doctrine: a presumption of injury to a senior, an allocation of the burdens of proof, appropriate evidentiary standards, "objective standards" for applying the substantive factors and policies of the Rules, a workable procedural framework for processing a delivery call within a growing season, and the giving of proper legal effect to a partial decree. Order at 3, 84, 90-91, 94-98.

The significance of this perceived absence lay in the district court's view that there is a specific, constitutionally mandated procedure the Director must follow in responding to a delivery call. The district court held that the "procedural components" are "incorporeal property rights," Order at 76, that require the Director to follow a lawsuit-like procedure in responding to a delivery call. *See* Order at 98-103 (describing the delivery call response procedure).

These holdings were incorrect as a matter of law because "no one has a vested right in any given mode of procedure." *State v. Griffith*, 97 Idaho 52, 58, 539 P.2d 604, 610 (1975) (internal quotation marks and citation omitted). Nothing in the Idaho Constitution or the Idaho Code requires the Director to use the specific process or procedure the district court outlined in responding to delivery calls. Even the cases from which the district court drew the "procedural components" were not "delivery call" cases in the administrative sense, but rather private lawsuits between individual appropriators that had nothing to do with administrative procedures. *See* Order at 77-78 (discussing *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908)). These cases did not hold that the Director must follow a specific procedure when responding to a delivery call, and this Court has not so extended them.

The district court erroneously assumed that delivery calls must be handled as mini-lawsuits with the Director acting as a referee or special master presiding over the litigation, *see generally* Order at 98-103, rather than as an officer of the executive branch charged with implementing and administering substantive Idaho law. This reasoning subverts the water rights administration scheme devised by the Legislature, which replaced the practice of administration-by-lawsuit, and usurps the authority of Director, who is a water resources management professional and statutorily authorized to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law. *See, e.g.*, Idaho Code §§ 42-1701(1)-(2), 42-602, 42-603, 42-606, 42-607, 42-237a.

The Director is "the expert on the spot [with] the primary responsibility for a proper distribution of the waters of the state," not a special master or referee who resolves delivery calls

under judicial procedures developed for private water rights litigation. *Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725, 732 (1968) (internal quotation marks and citations omitted).[48] Rather, an appropriator dissatisfied with the Director's decision—senior or junior—is entitled to judicial review of that decision under the standards and procedures established by the applicable provisions of the Idaho Administrative Procedure Act ("IDAPA"). Idaho Code § 67-5270. This is the framework the Legislature has provided for water rights administration and it protects the constitutional rights of water right holders.

C. The CM Rules Incorporate The "Procedural Components" By Reference.

The district court was also simply incorrect in holding that the "procedural components" are absent from the Rules. CM Rule 20.02 provides that the Rules acknowledge "all elements of the prior appropriation doctrine as established by Idaho law." The term "Idaho law" means "[t]he constitution, statutes administrative rules and case law of Idaho"—the same sources from which the district court drew the "procedural components." CM Rule 10.12. Thus, the "procedural components" are explicitly incorporated into the Rules by reference. Administrative rules need not recite legal principles precisely as formulated by a reviewing court to be constitutional. Such a standard would impose a hyper-technical and essentially unattainable drafting requirement and put a broad range of administrative rules that can be constitutionally applied at risk of being stricken.

D. The Rules Would Be Constitutional Even If The "Procedural Components" Were Not Incorporated Into The Rules

[48] "[T]he [Director] is 'the expert on the spot,' and we are constrained to realize the converse, that 'judges are not super engineers.' The legislature intended to place upon the shoulders of the [Director] the primary responsibility for a proper distribution of the waters of the state." *Id.* (citations omitted).

Even assuming for purposes of argument that the "procedural components" are not incorporated into the Rules, such an absence would not render the Rules facially invalid unless they are incapable of constitutional application under any set of circumstances. *Moon*, 140 Idaho at 545, 96 P.3d at 646. The district court made no such determination in this case. Even if such an absence made an unconstitutional application of the Rules hypothetically possible, "the mere possibility of a constitutional violation is insufficient to sustain a facial challenge." *West Virginia v. U.S. Dept. of Health & Human Servs.*, 289 F.3d 281, 292-93 (4th Cir. 2002) (citing *United States v. Salerno,* 481 U.S. 739, 745 (1987)). Even the perceived likelihood or threat of an unconstitutional application in certain circumstances will not support a facial challenge. *Greenville Women's Clinic v. Bryant,* 222 F.3d 157, 164 (4th Cir. 2000) ("'[i]t has not been the Court's practice' to strike down a statute on a facial challenge 'in anticipation' of particular circumstances, even if the circumstances would amount to a 'likelihood'") (quoting *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988)).

Moreover, there is no blanket requirement that administrative rules recite selected elements of the applicable law to survive a facial challenge—the test is whether the rules can be lawfully applied as written. For instance, in *Pitts v. Perluss*, 377 P.2d 83 (Cal. 1962), insurance companies challenged an administrative regulation for, among other things, the lack of a weighting formula applying cost factors that had been expressly enumerated in the underlying statute. *Pitts*, 377 P.2d at 95-96. The California Supreme Court rejected the challenge and made it clear that if an administrative rule can be lawfully applied, a court should not rely on its view

of how the rule should have been drafted as a basis for invalidating it. *Pitts*, 377 P.2d at 96.[49] Similarly, in *Louisiana Chemical Association v. Bingham*, 550 F. Supp. 1136 (W.D. La. 1982), *aff'd*, 731 F.2d 280 (5th Cir. 1984), the court rejected the argument that an OSHA records-access rule was facially defective "simply because the rule contains no express provision reiterating the *Barlow's* warrant requirement,"[50] holding that "[t]he omission of a warrant clause, however, will not invalidate the rule." *Louisiana Chemical Ass'n*, 550 F.Supp. at 1140.

Further, challenged rules can rely on "existing law" to fill any perceived gaps. *Id.* (rejecting the argument that the challenged regulation did not recite the "exact means" of access allowed under *Barlow's* because "existing law" provided the means of access). Existing Idaho law provides the "procedural components" the district court identified, and the Rules incorporate "all elements of the prior appropriation doctrine as established by Idaho law." CM Rule 20.02.

E. The District Court Erred In Holding That The Rules Do Not Provide For Timely Administration In Response To A Delivery Call.

The district court further erred in holding that the Rules do not provide for timely administration in response to a delivery call, as demonstrated by the straightforward procedure applicable in water districts having a common ground water supply.

The senior submits a call, the Director determines whether junior ground water uses are materially injuring the senior, and if so the juniors are regulated in accordance with priorities.

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[49] *See* also *id.* at 89 "this court does not inquire whether, if it had the power to draft the regulation, it would have adopted some method or formula other than that promulgated by the director. The court does not substitute its judgment for that of the administrative body").

[50] The "*Barlow's* warrant requirement" was a Supreme Court ruling that a contested search under the Occupational Safety and Health Act requires a warrant or subpoena. *Id.* (discussing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)). Thus, the *Barlow's* requirement is a constitutionally-mandated procedural protection, but its omission from the rule did not render it incapable of lawful application. The same logic applies to the "procedural components" in this case.

CM Rule 40.01-.02. Outside water districts or ground water management areas, the Rules provide for expedited, informal resolution of delivery calls if doing so will not prejudice interested parties. Rule 30.03.

Further, IDWR's general rules of procedure, which apply to contested cases arising under the CM Rules, are to be "liberally construed to secure just, speedy and economical determination of all issues presented to the agency." IDAPA 37.01.01.052. Similarly, the Idaho Administrative Procedure Act authorizes emergency orders that are effective on issuance, such as the Relief Order issued in response to the Plaintiffs' delivery call. Idaho Code § 67-5247.

The Director's prompt response to the Plaintiffs' delivery call further demonstrates that the Rules provide for timely administration. The Director issued the Relief Order on the Plaintiffs' delivery call just a few weeks after the March 15 start of the 2005 irrigation season, and just twelve days after receiving the joint inflow forecasts for April through July. Appendix B at 1; Appendix C at 1-2. The Director expedited the Relief Order by issuing it prior to a hearing under Idaho Code § 42-1701A(3), and by making it an emergency order that was effective immediately under Idaho Code § 67-5247. Relief Order at 46. Watermasters served the junior ground water right holders subject to the Relief Order with notice by letters dated April 22, 2005. R. Vol. IX, p. 2245 ¶ 7; R. Vol. X, p. 2550, L. 5. Ground water right holders subject to the Relief Order began submitting replacement water plans to the Director for approval within two weeks, and most were approved or slightly modified by the Director within eight days of being submitted. *See* Appendix B at 1; Appendix C at 2-3.

In spite of this, the district court held that the Rules prevent timely administration

because the administrative hearing on the Relief Order had not taken place. Order at 13 n.2. This reasoning failed to recognize the distinction between an emergency order for relief and a subsequent administrative challenge to such an order, which are legally distinct stages of the proceedings.[51] *Compare* chapter 6, Title 42, Idaho Code ("Distribution of Water Among Appropriators") *with* chapter 52, Title 67, Idaho Code (the Idaho Administrative Procedure Act). There is no requirement in Idaho law that an administrative challenge to an emergency relief order on a delivery call be completed before the end of the season.

Moreover, a blanket requirement that administrative challenges be completed before the end of season—even when an emergency relief order is already in effect—could prevent adequate development of the factual record and otherwise raise significant due process concerns. It would also open the door for abuse, because an interested party could unilaterally transform an expedited order for emergency relief into a claim for an unconstitutional failure to respond to a delivery call, simply by challenging the order after it was issued.[52]

The district court also erred in assuming that the Director must convene an administrative hearing on a delivery call before issuing a final order for relief. *See* Order at 101-02 (describing an administrative procedure that requires a "hearing" prior to a "final decision"). Idaho law establishes no such requirement, and in fact explicitly authorizes the Director to expedite his

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[51] This analysis was also flawed as a matter of law because it was based on the application of the Rules to the Plaintiffs' delivery call, which cannot support a determination that the Rules are facially invalid. *See State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003) (facial and as-applied analyses are "mutually exclusive").

[52] For instance, the Relief Order would have been final by its own terms but for requests for an administrative hearing by Plaintiffs and IGWA. Relief Order at 46. The Plaintiffs proposed that the hearing take place in January 2006, well after the irrigation season, and then sought stays and continuances in the hearing schedule—once for a period of two years. *See* Appendix B at 2-3. In the district court, the Plaintiffs characterized these self-inflicted "delays" as an "administrative quagmire" created by the CM Rules. R. Vol. VIII, p. 9.

response to a delivery call by issuing an order for relief prior to a hearing or other proceedings. *See* Idaho Code § 42-1701A(3) (providing for post-order hearings); *id.* § 67-5247 (authorizing issuance of emergency orders). The district court's reasoning ignores these statutes and would have the perverse effect of transforming a statutorily-authorized attempt to provide expedited relief into a failure to respond to a delivery call.

F. The Rules Give Proper Effect To Decrees And "Objective Standards."

Contrary to the district court's suggestion, the Rules give proper legal effect to water right decrees. *See, e.g.,* CM Rule 41.04 (preparation of a water right priority schedule); CM Rule 30.01(a) (providing that the senior's water right decree is part of the information necessary for the Director to respond to a delivery call); CM Rule 10.25 (defining a water right as being "evidenced by a decree, a permit or license"); *see also* CM Rules 000, 001, 10.07, 10.15, 10.18, 20.02, 20.04, 30.07(f)-(g), 30.09, 30.10, 40.01(a), 40.02, 40.02(a), 40.02(e), 40.05, 41.01, 41.02(c), 41.04, 43.03, 43.03(k) (recognizing or implementing the rule of senior priority).

The district court was also incorrect in holding that the Rules do not include "objective standards" to guide the application of the substantive factors and policies in the Rules. For instance, Rule 42 sets out a number of objectively measurable or verifiable factors that the Director takes into account in responding to delivery calls. *See generally* CM Rule 42.01. The standards set forth in this Court's decisions also guide the application of the substantive factors and policies of the Rules. *See* CM Rule 20.02 (incorporating by reference all elements of the prior appropriation doctrine as established by Idaho law).

IV. THE RULES PROVIDE FOR ADMINISTRATION OF WATER RIGHTS IN

ACCORDANCE WITH PRIOR APPROPRIATION DOCTRINE.

A. The District Court's "Re-Adjudication" Holding Ignored The Plain Language Of The Rules And Relied On Improper Presumptions.

The district court erred in concluding that the Rules authorize *de facto* administrative "re-adjudications" because the Rules incorporate all elements of the prior appropriation doctrine as established by Idaho law, which prohibits such "re-adjudications." Moreover, the district court's discussion of administrative "re-adjudications" and "takings" was based on improper presumptions rather than the language of the Rules.

The district court essentially assumed the worst, discussing at some length its suspicions that the Director would use the Rules to undermine decreed rights or otherwise act unlawfully. *See generally* Order at 94-97, 116-17, 121-24 (discussing the possibility of administrative "re-adjudications" or "takings"). Such adverse presumptions have no place in a facial challenge. *See Rhodes*, 125 Idaho at 142, 868 P.2d at 470 ("this Court makes every presumption in favor of the constitutionality of the challenged regulation"). Similarly, a court may not make factual presumptions against the non-moving party at summary judgment. *Concerning Application for Water Rights of Midway Ranches Property Owners' Ass'n, Inc. in El Paso and Pueblo Counties*, 938 P.2d 515, 526 (Colo. 1997) ("We cannot presume that the water officials will fail to discharge their duties in distributing the available water supply according to applicable decrees and priorities").

B. The SRBA Does Not Adjudicate All Issues That Must Be Resolved For Conjunctive Administration Of Water Rights.

The district court also incorrectly assumed that the Rules re-visit matters that have been

adjudicated, when in fact water right adjudications do not decide all the factual questions relevant to administration, but rather leave many to the administration process. *See, e.g., Tudor v. Jaca*, 164 P.2d 680, 686 (Or. 1946) ("The court, having established the priorities, should not attempt to anticipate exigencies which may arise in administration of the decree, but should leave such matters to the water master, whose duty it is to preserve the priorities and the quantities consistently with the highest duty of water, as applied to all concerned") (internal quotation marks and citation omitted).

This is particularly true as to conjunctive administration, which "requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources." *A & B Irr. Dist.*, 131 Idaho at 422, 958 P.2d at 579. These matters are left to IDWR because the SRBA cannot and does not make all these technical determinations, as the SRBA district court has observed:

> the scope of these proceedings should not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights (i.e. which particular junior water rights will be curtailed in the event of a delivery call by a senior). Factually, the Court could not make findings as to exact relationships. As indicated by IDWR, the technology and the data do not presently exist for making such determinations. Even if the technology and data did exist the task of making such factual determinations would be monumental in terms of scope. Lastly, the specific interrelationships are dynamic as opposed to static. Therefore, any factual determinations made by the Court would be subject to change depending on climatic conditions and future geological activity.

Order on Basin-Wide Issue 5 at 19.

The factual determinations necessary for the conjunctive administration of individual water rights are not "re-adjudications" because such determinations are not made in the SRBA, but rather are made in the first instance by IDWR, "based on its knowledge and data regarding how the water rights are physically interrelated. Mechanisms are available for water right holders in disagreement with IDWR's administrative actions to challenge and seek review of the same." *Id.* This is entirely consistent with the different statutory functions of the SRBA and IDWR. "Legally, the Court also does not need to adjudicate the specific interrelationships between water rights. IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree." *Id.*

The decreed quantity for a water right is not necessarily conclusive for purposes of conjunctive administration because water rights are limited by actual beneficial use, regardless of decreed quantity. *Briggs*, 97 Idaho at 435 n.5, 546 p.2d at 390 n.5; Idaho Code § 42-220. While a senior has a right to use up to the full amount of his decreed right when necessary to achieve the authorized beneficial use, beneficial use is a "fluctuating limit" that depends on the circumstances, as the district court recognized. Order at 87. It is also "a continuing obligation," *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997), and properly taken into account in the administration of water rights under chapter 6, Title 42 of the Idaho Code. Indeed, "[t]he governmental function in enacting ... the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Id.* (quoting *Nettleton v. Higginson*, 98 Idaho 87, 91, 558

P.2d 1048, 1052 (1977)) (ellipsis in *Hagerman*). Thus, an administrative inquiry into actual beneficial use and needs in responding to a delivery call does not amount to a "re-adjudication." The entry of a partial decree does not terminate the Director's statutory duty and authority to make appropriate factual determinations and apply the substantive factors and policies of the Rules in responding to delivery calls and administering water rights.

C. The Director's Reasonable Exercise Of His Statutory Authority To Administer Water Rights Does Not Threaten A "Re-Adjudication."

Similarly, the Director's reasonable exercise of his statutory authority in applying these principles in water rights administration does not constitute a "re-adjudication" or uncompensated taking. "[The State Engineer is] called upon at times to exercise judgment and decide questions, but, when the judgment is exercised as a means of administering the law, the act is administrative rather than judicial." *Speer v. Stephenson*, 16 Idaho 707, 718, 102 P. 365, 369 (1909); *see also Arkoosh v. Big Wood Canal Co.* 48 Idaho 383, 395-96, 283 P. 522, 525-26 (1929) (holding that the commissioner of reclamation determines when an appropriator is able to beneficially use water and may either deliver or refuse to deliver water, even though the decree made the appropriator the judge of when water could be so used); *A & B Irr. Dist.*, 131 Idaho at 415, 958 P.2d at 572 ("The Director has the administrative duty and authority . . . to prevent wasteful use of water by irrigators").

The district court also erred in concluding that the Director "becomes the final arbiter regarding what is 'reasonable'" under the Rules. Order at 96. As previously discussed, the Rules include a number of objective standards to guide the Director's application of the

substantive policies in the Rules. Further, the concepts of reasonable diversion and use of water are well established and defined in this Court's cases,[53] and these standards are incorporated into the Rules. CM Rule 20.02. Moreover, the Director's orders and determinations under the Rules are subject to judicial review under IDAPA and the applicable substantive law.

D. The Substantive Factors And Policies Of The CM Rules Are Inherent Limitations On A Water Right, Not A "Re-Adjudication" Or "Taking."

Idaho water rights are inherently subject to prior appropriation principles such as beneficial use, waste, and futile call. *See, e.g., Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 59 F.2d 19, 23 (9th Cir. 1932) ("The extent of beneficial use is an inherent and necessary limitation upon the right"); *Schodde*, 224 U.S. at 120 (similar). Because these principles "inhere in the title" to a water right under Idaho law, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), the Rules do not impose any new limitations on water rights. These factors and policies are as much a part of an Idaho water right as the priority date, and the Rules' recitation of them in no way re-adjudicates, diminishes or takes a water right.

Further, it is well established in Idaho that property rights are "subject to reasonable limitation and regulation by the state in the interests of the common welfare." *Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953). This principle has particular force with regard to water rights, which entitle the holder only to a right to use a publicly owned resource:

The water belongs to the state of Idaho. And the right of the state to regulate and

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[53] *See, e.g.,Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207-08, 252 P. 865, 867 (1926); *see also Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120-21 (1912); Idaho Code § 42-226.

> control the use, by appropriate procedural and administrative rules and regulations, is equally well settled. An appropriation or rental use gives the appropriator or user no title to the water; his right thus acquired is to the *use* only.

Board of Directors of Wilder Irr. Dist. v. Jorgensen, 64 Idaho 538, 551,136 P.2d 461, 466 - 67 (1943) (internal citations omitted; emphasis in original) (Ailshie, J., concurring).

It is widely recognized that the police power of the state includes the authority to regulate use under decreed water rights. *See, e.g., State ex rel. Cary v. Cochran*, 292 N.W. 239, 244 (Neb. 1940); *Humboldt Lovelock Irrigation Light & Power Co. v. Smith*, 25 F.Supp. 571, 574 (D.Nev. 1938); *Hamp v. State*, 118 P. 653, 661-62 (Wyo. 1911). The prior appropriation doctrine is not simply a means of creating and enforcing private property rights. It is also a system that regulates the ongoing use of a publicly owned resource, and promotes the maximum beneficial use and development of the state's water. The Rules' inclusion of such principles is not a "taking," but rather reflects the inherent nature and scope of an Idaho water right.

V. THE DISTRICT COURT ERRED IN FINDING THE "REASONABLE CARRYOVER" PROVISION FACIALLY UNCONSTITUTIONAL.

A. The Plain Language Of The "Reasonable Carryover" Provision Demonstrates That It Can Be Constitutionally Applied.

The "reasonable carryover" rule provides that in responding to a delivery call, the Director may consider:

> The 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; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and

> the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

Rule 42.01(g) (emphasis added).

Contrary to the district court's view, nothing in this provision purports to or has the effect of authorizing the Director to re-determine the quantity element of a storage right—much less re-determine it annually—or determine the amount of water that may legally be carried over year to year. Order at 110. Rather, the "reasonable carryover" provision ensures that junior rights are not curtailed unless the senior is likely to need additional water to fulfill the beneficial use for which the storage was authorized during the current and next irrigation seasons. This is consistent with—indeed, it is required by—the fundamental principle that a water right entitles the holder only to the quantity of water actually required for the beneficial use, regardless of the decreed or licensed quantity. *Briggs*, 97 Idaho at 435 n.5, 546 P.2d at 390 n.5; Idaho Code § 42-220. The prior appropriation doctrine as established by Idaho law does not allow curtailment of vested junior rights when the senior does not need additional water to achieve the authorized beneficial use. As stated in the Ninth Circuit's decision in the *Schodde* case, "[w]hile any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public." *Schodde v. Twin Falls Land & Water Co.*, 161 F. 43, 47 (9th Cir. 1908), *aff'd* 224 U.S. 107 (1912) (internal quotation marks and citation omitted).

This principle is particularly applicable to storage carryover, because in many cases it is not necessary to carry a full reservoir allotment over from year to year to fully achieve the authorized beneficial use, and in such cases curtailment would not be justified. Moreover,

curtailing juniors in order to fill reservoirs with water that is not needed to achieve the beneficial use would concentrate control of vast quantities of water in a relatively few storage right holders, which is contrary to the prior appropriation doctrine:

> It is easy to see that, if persons appropriating the waters of the streams of the state became the absolute owners of the waters without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state.

Id. at 47-48 (internal quotation marks and citation omitted).

Further, storage rights are often expressly "supplemental" to primary natural surface flow rights. *See, e.g., Nampa & Meridian Irr. Dist. v. Petrie*, 28 Idaho 227, 231, 153 P. 425, 426 (1915), *error dismissed*, 248 U.S. 194 (1918) (referring to "supplemental storage water" under a contract with the federal government).[54] Requiring the application of supplemental storage water for the beneficial use authorized by the primary right before curtailing juniors is consistent with the nature of supplemental storage rights, and promotes maximum beneficial use of the state's water.

In addition, many reservoirs are operated not just for irrigation but also for flood control, and must have sufficient space available after the irrigation season to hold runoff. Administering to ensure maximum carryover regardless of actual beneficial use or needs would often leave water in the reservoir that would have to be released for flood control purposes, resulting in an unreasonable waste of water and the unnecessary curtailment of juniors, contrary to Idaho law.

B. *Talboy* Did Not Establish Or Recognize That A Storage Right Includes A Vested

[54] The Plaintiffs admitted that they "acquired storage water rights to supplement their natural flow diversions." R. Vol. V, p. 1024. The underlying storage rights are held in the name of the USBR , which viewed the storage supply as "almost wholly supplemental to other, older rights." Appendix G.

Entitlement To Unrestricted Carryover.

The district court read too much into *Washington County Irrigation District v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935), in holding that a storage right includes a "vested property right" to carry the full storage allotment in the reservoir without any limitation as a matter of Idaho law. Order at 115. The property interest in storage water recognized in *Talboy* is a qualified one "impressed with the public trust to apply [the water] to a beneficial use." *Talboy*, 55 Idaho at 389, 43 P.2d at 945. Moreover, *Talboy* did not raise or discuss the question of carryover.

Carryover was addressed in *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 258 P. 532 (1927), a case in which this Court recognized that public policy imposes a reasonableness limitation on carryover. *Glavin* involved a challenge to a canal company rule authorizing nearly unlimited storage carryover by individual users and this Court affirmed an injunction against the rule. This Court looked unfavorably on the rule's potential to allow individual users to "hoard [water] against other users who could and would have made beneficial use," and to "speculate with it, rather than making a beneficial use of it." *Id.* at 587-88, 258 P. at 533. Relying on the "the public policy of this state," the Court held that "whatever may be the exact nature of the ownership by an appropriator of water thus stored by him, any property rights in it must be considered and construed with reference to the reasonableness of the use to which the water stored is applied or to be applied." *Id.* at 588-89, 258 P. at 534.

Glavin involved different users in a single project, but was decided on global principles of Idaho water law that apply with equal force between different appropriators and water rights. The case demonstrates that the determination of the amount of carryover depends on the facts of

the case, not a blanket rule of law. *See also Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 216, 157 P.2d 76, 81, 83 (1945) (upholding a revised and more limited carryover rule for the same project on the basis that the new rule "differ[ed] radically and remedially from the one voided in *Glavin*" by limiting carryover to one-third of the face amount of the user's right and making deductions for evaporation and seepage losses).

C. The District Court Improperly Relied On A "Hybrid Analysis" In Finding The "Reasonable Carryover" Provision Facially Defective.

The district court also erred in finding the "reasonable carryover" provision unconstitutional based on its "threatened application" to the Plaintiffs' delivery call. Order at 111-12, 115-17. The district court based its "threatened application" conclusion on a review of selected portions of the Relief Order the Director issued in response to the Plaintiffs' delivery call. *Id.* at 111-12. This inquiry "erroneously combined the facial and 'as applied' standards" in an impermissible "hybrid analysis." *Korsen*, 138 Idaho at 715, 69 P.3d at 135; *see also Greenville Women's Clinic*, 222 F.3d at 164 ("'[i]t has not been the Court's practice' to strike down a statute on a facial challenge 'in anticipation' of particular circumstances, even if the circumstances would amount to a 'likelihood'") (quoting *Bowen*, 487 U.S. at 612-13).

D. The District Court's "Takings" Analysis Was Incorrect As A Matter Of Law And Relied On An Incomplete Factual Record.

The district court erroneously held that the Rules physically "take" private water rights. Order at 122-24. Takings cases are generally placed into two categories: "physical" takings and "regulatory" takings. *Moon*, 140 Idaho at 540-41, 96 P.3d at 642-43. The Rules do not affect either type of taking on their face because they do not authorize or amount to an "actual physical

taking of the [water rights]," nor do they deprive water right holder owners of "all economically beneficial uses" of such rights. *Id.* at 541-42, 96 P.3d at 642-43 (internal quotation marks and citation omitted)

Further, takings cases require a threshold determination of the nature of the property right in question. *See Lucas,* 505 U.S. at 1022-24; *Moon*, 140 Idaho at 542, 96 P.3d at 643. Such a determination was not possible in this case because the underlying storage rights have not yet been adjudicated in the SRBA, and the question of the nature and scope of a storage spaceholder's interest in the underlying storage rights is currently pending before this Court in *United States v. Pioneer Irrigation District.*[55] Moreover, the Plaintiffs did not properly plead a "takings" cause of action.[56]

Moreover, as the district court found, the Plaintiffs' storage contracts "are not in the record in this case." Order at 109. The district court went to considerable lengths to fill in the omissions in the record, *see, e.g.,* Order at 110 (relying on a footnote to the Complaint and the Director's orders), but the incomplete record precluded a "takings" analysis.

VI. THE DISTRICT COURT ERRED IN RULING THAT THE DIRECTOR ACTED OUTSIDE HIS AUTHORITY IN PROMULGATING THE CM RULES.

The district court relied on its determination that the CM Rules are facially unconstitutional as the basis for holding that the Director acted outside his authority in promulgating the Rules. Order at 3, 125. As discussed above, the Rules are facially

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[55] Docket No. 31790, appeal filed April 14, 2005.

[56] There is only one "takings" allegation in the Complaint, and no request for "takings" relief. R. Vol. I, p. 8 ¶ 17; *id.*, p. 11. Even under notice pleading standards, this single allegation without any corresponding request for relief fails to state a "takings" claim.

constitutional, and thus the Director acted within his statutory authority. Idaho Code § 42-603.

VII. THE DISTRICT COURT IMPROPERLY CIRCUMVENTED THE EXHAUSTION REQUIREMENT OF THE IDAHO ADMINISTRATIVE PROCEDURE ACT.

A. The District Court Allowed The Facial Challenge To Become A Vehicle For Litigating As-Applied Claims and Disputed Facts On An Incomplete Record.

The district court correctly found as a factual matter that the Plaintiffs had not exhausted administrative remedies on their as-applied claims, and thus limited summary judgment to the facial challenge alone. R. Vol. VI, pp. 1312, 1314; Tr. Vol. I, pp. 130, 132-33, 135; R. Vol. VIII, p. 1813. A facial challenge to the Rules is "purely a question of law," *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998), and is limited to an analysis of their language "on a cold page and without reference to the defendant's conduct." *People v. Stuart*, 100 N.Y.2d 412, 421 (N.Y. 2003); *see also Korsen*, 138 Idaho at 712, 69 P.3d at 132 (holding that facial and as-applied analyses are "mutually exclusive"). The district court avoided these well-established standards under a misinterpretation of Idaho Code § 67-5278 that circumvented the exhaustion requirement, and 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.

The district court held that Idaho Code § 67-5278 established a "threatened application" standard under which the Director's actual and threatened application of the CM Rules to the Plaintiffs' delivery call was "part and parcel" of the facial challenge, and that there was no better "evidence" of the facial constitutionality of the CM Rules than "the actual conduct of IDWR and the Director to date" in the delivery call proceedings. R. Vol. VIII, pp. 1814-15. Under this standard, "the director's threatened application of the rule, or his application to date, as applied

to the rules, is subject to review." Tr. Vol. I, p. 316. The district court held that § 67-5278 authorizes "the use of a factual history of a case when determining a rule's validity" and stated that "this Court will utilize the underlying facts in this case to determine whether the CMR's are invalid." Order at 25.

The Plaintiffs used the "threatened application" standard to pursue their as-applied claims under the rubric of a facial challenge. *See, e.g.*, R. Vol. IX, pp. 2252-53 n.4 ("Here, the examples provided by Plaintiffs demonstrate legal defects of the Rules on their face as well as the underlying facts in how the Director unconstitutionally applied the Rules to their requests for water right administration"); Tr. Vol. I, p. 175 (referring to the Defendants' supplemental briefing under the "threatened application" standard as addressing "the as-applied portion of our claims"). Indeed, the Plaintiffs' principal argument throughout the case was that the application of the Rules to their delivery call proved that the Rules themselves were facially invalid. *See, e.g.*, R. Vol. V, p. 1192 (arguing that because the Rules "allow the Department to diminish and limit Clear Springs' vested property rights, its decreed water rights, the Rules are unconstitutional on their face"); Tr. Vol. I, p. 324 ("I'm showing that's how he applied the rules, and that is not a proper application. He believes the rules allow him to do that. And therefore, they're unconstitutional").[57]

The district court similarly intertwined the mutually exclusive issues of facial and as-applied constitutionality. For example, the district court's holding that the CM Rules are facially

[57] *See also* R. Vol. V, pp. 999-1000, 1001-02, 1023-30, 1032, 1034-35, 1194-95, 1201-08, 1210-11, 1215, 1217-18, 1245, 1248; R. Vol. VI, pp. 1280-81; R. Vol. VIII, pp. 1898-99, 1905-06, 1909, 1912 n.16, 1913-15, 1917, 1938, 1947, 1969-72, 1974, 1984; R. Vol. IX, pp. 2252-53 n.4, 2262, 2265 n.18, 2269-70, 2281, 2285; Tr. Vol. I, pp. 165, 175, 186, 194-95, 203-07, 210-11, 218-19, 222-23, 232, 304, 307, 323-24, 331-32.

unconstitutional "to the extent that the Director's application of the CMR's diminish proper administration of the senior's water right," Order at 97, is essentially indistinguishable from the flawed "hybrid" holding in *Korsen* that a statute was facially unconstitutional "insofar as it applies to public property." 138 Idaho at 710, 69 P.3d at 130.

Over the Defendants' repeated objections, the district court considered and resolved disputed factual matters by concluding, on the basis of allegations and argument rather than a properly developed record, (1) that the Director's orders amounted to "threatened applications" of the Rules that were contrary to the prior appropriation doctrine, Order at 111-15; (2) that in responding to the Plaintiffs' delivery call the Director "promptly engaged on a course under the CMR's inconsistent with his own words [in his May 2, 2005 order]," Order at 125; (3) that the Director's administration of the Plaintiffs' water rights had not been completed, Order at 13 n.2, 91; (4) that the Director's reliance on historic water supply and use data in attempting to predict future supplies and uses had no rational basis in fact, Order at 116; and (5) that the Director had refused to administer junior priority ground water rights in a timely fashion. Order at 117.

The district court also apparently concluded that the Director was using the Plaintiffs' reservoir storage water as a "slush fund" to spread water and avoid administering junior ground water rights in priority, Order at 114; that the Director was attempting "to satisfy all water users on a given source" rather than "objectively administering water rights in accordance with the decrees," Order at 97; and that the Director was trying to "'shoe-horn' in a complete re-evaluation analysis of the scope and efficiencies of a decreed water right in conjunction with an administrative delivery call." Order at 92. Even the hearing on the motion for Rule 54(b)

certification of the Judgment became a vehicle for the Plaintiffs to attempt to control the delivery call proceedings and the district court to inquire into the Director's intentions in that proceeding. Tr. Vol. I, pp. 343, 349, 351, 356, 358.

Thus, despite the Defendants' repeated objections, this case was litigated and decided under a forbidden "hybrid analysis." *Korsen*, 138 Idaho at 715, 69 P.3d at 135. It was an improper use of a declaratory judgment action to "bypass the administrative process" and obtain premature judicial review of an ongoing administrative proceeding. *Regan v. Kootenai County*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004), and "to try [disputed issues of fact] as a determinative issue." *Ennis v. Casey*, 72 Idaho 181, 185, 238 P.2d 435, 438 (1951).

B. Idaho Code § 67-5278 Does Not Provide That A Rule May Be Declared Facially Invalid On The Basis Of A "Threatened Application."

The judicial review and factual inquiry undertaken in this facial challenge was based on district court's view that under Idaho Code § 67-5278, the validity of a challenged rule is determined on the basis of its "threatened application." This reading of the statute was incorrect because the language merely authorizes a declaratory judgment challenge to the legal validity of a rule "if it is alleged that the rule, or its threatened application" may adversely affect legal rights. Idaho Code § 67-5278(1). The statute does not provide the substantive standard for determining the validity of a challenged rule. *See Richards v. Select Ins. Co., Inc.*, 40 F.Supp.2d 163, 169 (S.D.N.Y. 1999) ("A declaratory judgment is a remedy. Its availability does not create an additional cause of action or expand the range of factual disputes that may be decided by a district court sitting in diversity").

Rather, the statutory term "threatened application" is properly understood as establishing a standing or ripeness threshold. *See Rawson v. Idaho State Board of Cosmetology*, 107 Idaho 1037, 695 P.2d 422 (1985) (analyzing § 67-5278, then codified as § 67-5207, in terms of standing), *rejected in part on other grounds by Golay v. Loomis*, 118 Idaho 387, 392 n.3, 79 P.2d 95, 99 n.3 (1990). "[A] declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists . . . justiciability questions [include] standing [and] ripeness." *Schneider v. Howe*, 142 Idaho 767, ___, 133 P.3d 1232, 1237 (2006) (internal quotation marks and citation omitted).

Moreover, the Idaho Administrative Procedure Act provides that "disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter." Idaho Code § 67-5277 (emphases added). Section 67-5277 makes it clear that factual litigation regarding an agency action must proceed via "judicial review," not a declaratory judgment action under § 67-5278, and must be based on a complete "agency record," including a final order. *See* Idaho Code §§ 67-5270, 67-5271 , 67-5275 . The district court's view of § 67-5278 as "contemplating" the use of the factual history of an ongoing administrative case in determining the validity of a rule cannot be squared with § 67-5277's express prohibition against litigating disputed facts on an incomplete record in a declaratory judgment action. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002) ("a basic tenet of statutory construction is that the more specific statute or section addressing an issue controls over a statute that is more general").

No reported Idaho case has interpreted § 67-5278 as authorizing judicial review of an agency proceeding or the litigation of disputed issues of fact. To the contrary, in *Rawson* the

Court of Appeals held that the district court had acted "prematurely" in reaching a factual question the agency had not yet decided and "in essence took the issue from the Board and decided it de novo." *Rawson*, 107 Idaho at 1041, 695 P.2d at 426. Similarly, there was no litigation of disputed factual issues in *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003). Even in *Lindstrom v. Dist. Bd. of Health*, 109 Idaho 956, 712 P.2d 657 (Ct. App. 1985), which involved both facial and as-applied challenges, no disputed issues of fact remained when the case came to the Court of Appeals. *Lindstrom*, 109 Idaho at 959, 712 P.2d at 660.

These cases are consistent with the principle that while a court may pass on a constitutional challenge to a statute administered by an agency in a declaratory judgment action, "it ha[s] no jurisdiction to investigate the facts, to make findings thereon or to determine the credibility of witnesses" when "[t]hese were questions to be determined by [the agency] in the first instance reviewable on appeal." *Idaho Mut. Ben. Ass'n, Inc. v. Robison*, 65 Idaho 793, 803, 154 P.2d 156, 161 (1944); *see also Regan*, 140 Idaho at 725-26, 100 P.3d at 619-20 (declaratory judgment action that "exalts form over substance" may not be used to bypass administrative remedies); *Ennis*, 72 Idaho at 185, 238 P.2d at 438 (declaratory judgment action "cannot be used where the object of the proceedings is to try [a disputed issue of fact] as a determinative issue").

Under the district court's reasoning, "a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue." *Foremost Ins. Co. v. Public Serv. Comm'n*, 985 S.W.2d 793, 795 (Mo. Ct. App. 1998). If the district court's interpretation of Idaho Code § 67-5278 is not reversed, the Idaho courts will replace the

Department as the primary venue for administering water rights. District courts will become *de facto* water courts, and the exhaustion requirement will largely be read out of the Idaho Administrative Procedure Act.

C. The District Court Erred By Declining To Dismiss The As-Applied Claims For Failure To Exhaust Administrative Remedies.

The Plaintiffs requested an administrative hearing on the Relief Order, but filed this action before the hearing had taken place. Thus, the district court correctly found that "[a]s to the 'as applied challenge' . . . the plaintiffs have not yet exhausted those [administrative] remedies." R. Vol. VI, pp. 1312; *see also* Tr. Vol. I, p. 130, LL. 13-14 ("that decision [on the Plaintiffs' delivery call] has not been made by the director, there's no final determination there"). The district court declined to dismiss the as-applied claims, however. *See* R. Vol. VI, pp. 1312, 1314 (declining to rule on exhaustion and avoiding a ruling on the as-applied claims).

Under the Idaho Administrative Procedure Act, "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." Idaho Code § 67-5271(1). IDWR rules incorporate this statutory exhaustion requirement. IDAPA 37.01.01.790. Even when an agency action is challenged on constitutional grounds, "exhaustion of administrative remedies is generally required before constitutional claims are raised." *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005); *see also Theodoropoulos v. I.N.S.*, 358 F.3d 162, 172 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 823 (2004) ("a constitutional attack upon an agency's interpretation of a statute is subject to the exhaustion requirement"). When a claimant has not exhausted administrative remedies,

"dismissal of the claim is warranted." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003). The district court thus erred in failing to dismiss the as-applied claims.

CONCLUSION

For the reasons discussed herein, the Defendants request that this Court affirm the district court's holding that the Rules can be constitutionally applied and are consistent with the prior appropriation doctrine as established by Idaho law, and reverse the district court's holdings (1) that the Rules are unconstitutional due to the perceived absence of the "procedural components," and (2) that the "reasonable carryover" provision is unconstitutional. The Defendants also request that this Court remand this case to the district court with instructions to dismiss the as-applied claims without prejudice for failure to exhaust administrative remedies.

RESPECTFULLY SUBMITTED this 27th day of October 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of October 2006, I caused to be served a true and correct copy of the foregoing DEFENDANTS-APPELLANTS' OPENING BRIEF ON APPEAL to the following parties by the indicated methods: U.S. Mail, postage prepaid and E-mail

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Michael C. Orr

MICHAEL C. ORR

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IDAHO GROUND WATER APPROPRIATORS, INC. MAGIC VALLEY GROUNDWATER DISTRICT and NORTH SNAKE GROUND WATER DISTRICT, Plaintiffs vs. IDAHO DEPARTMENT OF WATER RESOURCES and DAVID TUTHILL, JR, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES, Defendants, and BLUE LAKES TROUT FARMS, INC.; CLEAR LAKES TROUT CO., INC.; ANITA K. HARDY; RIM VIEW TROUT COMPANY, INC.; JOHN W. "BILL" JONES, JR. and DELORES JONES; CLEAR SPRINGS FOODS, INC.; RANGEN INC.; AMERICAN FALLS RESERVOIR DISTRICT NO. 2; A&B IRRIGATION DISTRICT; BURLEY IRRIGATION DISTRICT; MILNER IRRIGATION DISTRICT; NORTH SIDE CANAL CO.; and TWIN FALLS CANAL CO., Intervenors.	Case No. CV 2007-526 ORDER DISMISSING APPLICATION FOR TEMPORARY RESTRAINING ORDER, COMPLAINT FOR DECLARATORY RELIEF, WRIT OF PROHIBITION AND PRELIMARY INJUNCTION

I.

PROCEDURE

1. This matter came before the Court pursuant to an *Application for Temporary Restraining Order and Order to Show Cause and Complaint for Declaratory Relief, Writ of Prohibition, Temporary Restraining Order and Preliminary Injunction* filed May 7, 2007, through counsel, by the Idaho Ground Water Appropriators, *et al.* On May 31, 2007, the case was assigned to this Court based on the disqualification of the Honorable John Butler.

2. Motions to intervene were filed by Clear Springs Foods, Inc., Blue Lakes Trout Farm, Inc., *et al.*, Rangen Inc., John W. "Bill" Jones, Jr. and Delores Jones and American Falls Reservoir District #2, *et al.* ("Surface Water Coalition"). The motions to intervene were granted via a separate order issued June 1, 2007.

3. Motions to dismiss were filed by the Idaho Department of Water Resources and the various intervenors, alleging *inter alia*: the Court's lack of jurisdiction for failure to exhaust administrative remedies.

4. A hearing was held on the matter on June 6, 2007, wherein the Court granted the motions to dismiss and dismissed the action without prejudice, and to avoid further delay, stated the basis for its decision on the record in open court.

II.

ORDER

THEREFORE, for the reasons stated on the record in open court, a copy of the transcript of the Court's oral ruling is attached hereto, the *Motion to Dismiss* is **granted** and the *Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction* is **dismissed without prejudice**.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

Dated June 12, 2007.

HONORABLE JOHN M. MELANSON
District Judge

THE COURT: We're on record in Case Number CV 2007-526, Idaho Ground Appropriators and others, versus Idaho Department of Water Resources. The parties are present with counsel -- or I should say that counsel for the parties are present, as are counsel for the intervenors. I am prepared to rule from the bench in this matter and I will do so at this time.

The doctrine of prior appropriation has been the law in Idaho for over 100 years. It is set forth in our State Constitution at Article 15 and in our statutes at Idaho Code Section 42-106, which was enacted in 1899. Prior appropriation is a just, although sometimes harsh, method of administering water rights here in the desert, where the demand for water often exceeds water available for supply. The doctrine is just because it acknowledges the reality that in times of scarcity, if everyone were allowed to share in the resource, no one would have enough for their needs, and so first in time - first in right is the rule. The doctrine is harsh, because when it is applied, junior appropriators may face economic hardship or even ruin.

I say these things in an introductory way so the parties and other people who may be interested will know that I know the possible consequences of my ruling today, and I do not take this decision or its consequence lightly,

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but it is a decision that I believe to be mandated by law. My decision today is based simply and solely upon the fact that the plaintiffs have not exhausted their administrative remedies.

I do agree that there may be some colorable defenses, such as reasonable pumping levels, futile call and reasonableness of diversion. This, however, is not the proceeding in which those issues should be raised. In American Falls Reservoir District Number Two versus Idaho Department of Water Resources, 143 Idaho 862, in a case decided in March of this year, cited by the parties, the court dealt with strikingly similar circumstances: A declaratory judgment action brought while an administrative proceeding was pending. In American Falls No. 2 it was surface water users challenging the manner and process by which the Director responded to a delivery call against ground water pumpers. The surface water users contended that the Director's response was contrary to law and ultimately unconstitutional. Although both the surface water users and the ground water pumpers, including Idaho Ground Water Users Association, requested a hearing before the Director, prior to the hearing being conducted the surface water users filed an action for declaratory relief challenging, among other things, the constitutionally of the rules of conjunctive management: The very same rules

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which govern the Director's response to this call.

In American Falls No. 2 the court reaffirmed the long-standing-general requirement that a party not seek declaratory relief until administrative remedies have been exhausted unless that party is challenging the rule's facial constitutionality. The court relied on Idaho Code Section 67-5271 and the Regan versus Kootenai County Case, 140 Idaho 721, a 2004 case.

In the case now before this court, IGWA, I'll refer to it as both parties have referred to it -- Idaho Ground Water Appropriators Association by its acronym -- initially requested a hearing before the director. The hearing was placed on hold when the constitutional challenges to the rules of conjunctive management was raised in American Falls No. 2. Finally, because both cases involved application of the same rules, after the Supreme Court issued its ruling in American Falls No. 2, the Director issued a notice of potential curtailment on May 10, 2007, almost a month ago. Instead of re-noticing or requesting immediate hearing before the Director and arguing its claims and defenses, IGWA filed the instant action. As such, the Director has not developed a full-administrative record and ruling on the claims and defenses raised.

Ironically, in American Falls No. 2, IGWA and the

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ground water pumpers appeared in defense of the Director's application of the rules, including an argument that the surface water users must first exhaust their administrative remedies before seeking judicial review. In its opening brief on appeal IGWA argued: Moreover, the legislature already has specified the process for resolving challenges to such unlawful agency action. The proper procedure is through judicial review, pursuant to the Administrative Procedures Act, Idaho Code Section 67-5270; not a collateral attack as the plaintiffs have undertaken here.

The APA also contains entire sections on agency hearing procedures, evidence, and other related matters, e.g. Idaho Code Sections 67-5242, hearing procedure; and 67-5271, evidence. The Department applies these as part of its rules. The district court's approach tosses out administrative law, end quote.

That's from the affidavit of Mr. Arrington, Exhibit I to the IGWA opening brief, page six.

Apparently the Supreme Court agreed with IGWA, holding that administrative remedies must be exhausted before even constitutional issues can be raised before the District Court, unless there is a facial challenge. The Supreme Court held, quote: Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating

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or curing errors without judicial intervention, deferring to the administrative processes established by the legislature and the administrative body and the sense of comity for the quasi-judicial functions of the administrative body. That's from American Falls No. 2, quoting White versus Bannock County Commissioners, 139 Idaho 396, at 401 - 402.

Frankly, this Court, despite the differences pointed out by the plaintiffs, has difficulty in meaningfully distinguishing American Falls No. 2 and the instant case. Although American Falls No. 2 dealt with a constitutional challenge, the underlying principles are the same, and the Supreme Court defined the scope of the exceptions to the exhaustion of administrative remedies requirement. The essence of what was at issue in American Falls No. 2 was the manner in which the Director responded to the delivery call. Although the action was argued and analyzed as a facial challenge, the Supreme Court held it was an as-applied challenge, and it held that an as-applied challenge did not provide an exception to the exhaustion of the administrative remedies requirement.

The court reasoned, quote: To hold otherwise would mean that a party whose grievance presents issues of fact or misapplications of rules or policies could nonetheless bypass his administrative remedies and go

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straight to the courthouse by the simple expedient of raising a constitutional issue. Again, from American Falls No. 2, citing Foremost Insurance versus Public Service Commission 985, S.W. 2d 793.

Although IGWA has not framed the issues in terms of a constitutional challenge, it is nonetheless raising issues pertaining to the perceived misapplication of rules, and raising issues of fact and law, which according to the holding in American Falls No. 2, must first be ruled on by the administrative agency prior to seeking judicial review.

The surface water users in American Falls No. 2 raised issues pertaining to the lawfulness of the Director's response to a delivery call. They simply asserted that the infirmaties rose to the level of constitutional proportions because of the property rights at stake. Ultimately, the district court in that case applied a facial challenge analysis because the Director's actions, although alleged to be contrary to law, were consistent with the conjunctive management rules.

Nonetheless, the Supreme Court rejected the so-called hybrid approach that is as applied in the facial challenge and held that administrative remedies must first be exhausted. The result of the holding is that whether a party raises legal or factual issues, or alleges that such issues rise to the level of an as-applied constitutional

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challenge, administrative remedies must first be exhausted.

IGWA has raised two exceptions to the exhaustion of administrative remedies doctrine that were mentioned, but not discussed by the Supreme Court in American Falls No. 2. The first being: When the interest of justice so require; and the second being: When the agency is acting outside the scope of its authority. As I mentioned a moment ago, IGWA was a participant in the American Falls No. 2 case and even advocated dismissal of the case because surface water users had failed to exhaust administrative remedies. The Supreme Court affirmed IGWA's position.

The court has difficulty finding the justice required for that exception to exhaustion of administrative remedies doctrine when IGWA has taken one position in one proceeding and then adopted the exact opposite position in a similar proceeding, involving similar issues.

The court has considered the justice of the plaintiff's cause. The timing of the proposed curtailment should not have come as a surprise. This case has been going on since 2005, the curtailment was part of a five-year-phased-in curtailment, and it had only been put on hold as a result of the American Falls No. 2 case. Here, the plaintiff's assertion that the interests of justice require the court to exercise authority over the Department before exhaustion administrative remedies, is

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not persuasive.

As noted at the beginning of my comments, the prior appropriation doctrine sometimes leads to a harsh result, but it is just. If the court were to block this action now, every proposal curtailment would first be decided in the courts instead of where the legislature intended: At the Idaho Department of Water Resources. We would have judicial administration of water rights.

Perhaps if the American Falls Case No. 2 had not taken place and there was not a five-year curtailment plan already in place; and IGWA was being notified of the curtailment for the first time after the planting season had already commenced; and if the right to a pre-curtailment hearing were plainly established; and if IGWA did not have the remedy of mandamus; or perhaps other remedies such as the judicial review mentioned, perhaps then their argument that justice requires an exception to exhaustion of administrative remedies would have more merit.

The plaintiff's claim that the Director has exceeded his authority is also without merit. The fact is that we do not yet know what the Director will do. The question of the Director's authority must first be raised in the administrative proceeding.. Idaho Code Section 42-602 vests the Director with the authority to distribute

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water from all natural sources within a water district in accordance with the prior appropriation doctrine. All the rights at issue have been reported or adjudicated and have been included within a water district.

As far as the operation of the ground water management act, Idaho Code Section 42-237 (a), et seq., and Idaho Code Section 42-602 and 607, the court will direct IGWA's attention to its analysis in its own appellate brief in the American Falls No. 2 case, wherein IGWA asserted that the two processes were independent of each other. Specifically, quote: The rules embody the broad concepts of the act within the context of the department's traditional contested case process; rather than the ground water board proceeding. The board process remains independently available under the act. It's in the affidavit of Mr. Arrington, Exhibit I, the IGWA opening brief, page 11.

If the plaintiffs desire a hearing and if the Director fails to conduct that hearing, their remedies may include mandamus, possibly judicial review: Not a request that this court decide the issues that they believe should have been decided in the administrative proceeding.

In summary, this action provides a text book case in support of the need for exhaustion of administrative remedies. To date the Director has not ruled on the

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underlying claims and defenses. But despite the fact that the same claims, issues and defenses are raised in at least three different jurisdictions, the exhaustion requirement avoids forum shopping, avoids deciding cases on a piecemeal basis, and avoids inconsistent rulings on the same issues; and, frankly, it avoids inconsistent arguments made by the same parties in different forums.

The court finds American Falls No. 2 to be directly on point in this matter. Accordingly, it is the decision of this court, and it is hereby ordered, that the defendant's motion to dismiss is granted without prejudice as to refiling after completion of the administrative proceedings, as required by Idaho Code Section 67-5271 in the American Falls Reservoir District case.

Because the underlying complaint has been dismissed, the plaintiffs cannot show that they are entitled to a temporary restraining order or a preliminary injunction in this case. The TRO is therefore dissolved and the court shall not issue a preliminary injunction in this matter.

That concludes the court's order in this case.

The court, of course, doesn't have any jurisdiction at this point to tell the Director what to do, but Mr. Rassier, I'm just going to suggest that the hearings on these matters of law should be conducted with

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dispatch. These folks have a right to a hearing, and unless that's done, we're just going to be back here. And if it happens that it really can't be done until later in the summer or in the fall, then certainly the Director would see to it that the matters are concluded expeditiously so we're not back here next spring, perhaps after the crops are planted again. As I said, I don't have jurisdiction to order that. I wouldn't presume to do so. I'm hoping that what I've said will be enough. The court will enter a written order in this matter and judgment will be certified as a final judgment so that appeal may proceed.

Is there anything further from the plaintiffs in this matter?

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 13 day of June, 2007 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

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By Judy Owens
Judy Owens, Deputy Clerk

CERTIFICATE OF MAILING/DELIVERY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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,

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,[1] and THE DEPARTMENT OF WATER RESOURCES,

Filed pursuant to I.R.C.P 5(e)(1) on July 24, 2009 at 3:05 P.M.
John Melanson, Dist. Judge

Case No. 2008-0000551

ORDER ON PETITION FOR JUDICIAL REVIEW

[1] Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

Respondents.	)
	)
	)
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	)

Ruling:

1) Director did not exceed authority by waiting until following season to adjust material injury to carry-over storage but exceeded his authority by not making process contingent on guarantee of replacement water in event of shortfall; 2) Director exceeded authority by categorically denying reasonable carry-over for multiple-years; 3) Director did not exceed authority or abuse discretion by combining natural flow and storage rights in making a material injury analysis or by using a "baseline" different from the decreed or licensed quantity, subject to certain conditions; 4) Director did not err or abuse discretion by using 10% trim-line in applying ground water model; 5) Director exceeded authority and abused discretion by not following procedural steps for mitigation plans as set forth in the Rules for Conjunctive Management; 6) Director exceeded his authority by determining that full headgate delivery for Twin Falls Canal Company as issue is currently pending in the SRBA; 7) Director exceeded authority by issuing separate "Final Orders"; 8) Based on foregoing actions, Director's actions did not constitute timely administration of junior rights to protect senior rights.

Appearances:

C. Thomas Arkoosh, of Capitol Law Group, PLLC, Gooding, Idaho, attorney for American Falls Reservoir District #2.

W. Kent Fletcher, of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

John A. Rosholt, John K. Simpson, and Travis L. Thompson, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation

District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

John C. Cruden, Acting Assistant Attorney General, and David Gehlert, of the United States Department of Justice, Denver, Colorado, attorneys for the United States Bureau of Reclamation.

Randall C. Budge, Candice M. McHugh, and Scott J. Smith, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators.

A. Dean Tranmer, of the City of Pocatello Attorney's Office, Pocatello, Idaho, attorney for the City of Pocatello.

Sarah A. Klahn of White and Jankowski, LLP, Denver, Colorado, attorney for the City of Pocatello.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

I.
STATEMENT OF THE CASE

A. Nature of the case

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR" or "Department") issued in response to a delivery call filed by Petitioner Surface Water Coalition ("SWC") on January 14, 2005. The delivery call was filed as a result of a reduction in reach gains and spring flows discharging from the Eastern Snake Plan Aquifer ("ESPA"). The SWC is made up of seven irrigation districts and canal companies below American Falls Reservoir that divert natural flow water from the Snake River and who hold storage water rights in various Bureau of Reclamation ("BOR") reservoirs. The members of SWC are: A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD #2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka

Irrigation District ("MID"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC"). The September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call ("Final Order")*, from which judicial review is sought, ordered curtailment of junior ground water rights or alternatively a replacement water plan in lieu of curtailment. Petitioners contend the Department erred in response to the delivery call and seek judicial review pursuant to the Idaho Administrative Procedures Act, Title 57, Chapter 52, Idaho Code.

B. Course of Proceedings

1. The Delivery Call

SWC delivered a letter to the Director of IDWR on January 14, 2005, requesting the Director to commence conjunctive administration of their water rights. Hearing Record (R.) Volume (Vol.) 1 at 1. SWC asserts in the letter that their senior water rights were being materially injured "[b]y reason of the diversion of junior ground water rights located within Water District No. 120 and elsewhere throughout the ESPA," including the American Falls Ground Water Management Area, and areas of the ESPA not within an organized water district or ground water management area. *Id.* at 4. Also on January 14, 2005, SWC filed a *Petition for Water Rights Administration and Designation of the Eastern Snake River Plain Aquifer as a Ground Water Management Area.* R. Vol. 1 at 53.

On February 14, 2005, Director Dreher issued an order ("*February 14, 2005 Order*") in response to SWC's requests. The Director found that because water districts were expected to be created in the ESPA by the irrigation season of 2006, there was no need for the creation of a ground water management area encompassing the entire ESPA. R. Vol. 2 at 214. The Director was unable to determine injury to the senior priority rights held by SWC until the commencement of the 2005 irrigation season and until the BOR and the United States Army Corps of Engineers released inflow forecasts. *Id.* at 226. The Director requested more information from SWC in order to make a determination of injury "as soon after April 1 [the start of the irrigation season] as practicable." *Id.* at 227, 230.

On May 2, 2005, Director Dreher issued an *Amended Order* ("*May 2, 2005 Amended Order*"). The Director found that junior ground water diversions from the ESPA were materially injuring senior SWC natural flow and storage rights. Vol. 8 at 1384-85, 1402. The amount of material injury to the seniors was determined to be 27,700 acre feet of water. *Id.* at 1402. Applying the amount of water used by SWC water users in 1995, the Director determined the "minimum full supply" needed for full deliveries, and then subtracted the predicted 2005 supply, in order to calculate a total shortage of 133,400 acre feet. *Id.* at 1384. Built into this calculation was the assumption that SWC members use all of their carryover storage from 2004. Further, the Director found that "[m]embers of the Surface Water Coalition are entitled to maintain a reasonable amount of carryover storage to minimize storages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rule (IDAPA 37.03.11.042.g)." *Id.* at 1385. The Director determined the amount of reasonable carryover due to SWC by averaging the amounts of carryover storage based on flow and storage accruals from 2002 and 2004. *Id.* Finally, the Director ordered that replacement water be provided over time to SWC and that the amount of replacement water for 2005 not be less than 27,700 acre feet. *Id.* at 1404. The Director determined that if all of the replacement water is not provided to the senior users as required, the amount remaining would be added to the ground water users' obligations for future years. However, the Director also ordered that the ground water users may be curtailed if at any time mitigation is not provided. *Id.*

Thereafter, the Director issued a series of supplemental orders, which reviewed IDWR action, made additional findings, and modified or revised previous findings. R. Vol. 37 at 7067-7071. For instance, on June 29, 2006, the Director entered his *Third Supplemental Order* ("*June 29, 2006 Supplemental Order*"), determining that the remainder of the replacement water that IGWA was to supply in 2005 was to be supplied at the beginning of the 2006 irrigation season, and not as 2005 carryover storage. R. Vol. 20 at 3756. Subsequent supplemental orders amended or approved replacement water plans for 2006, 2007, and 2008. R. Vol. 37 at 7068-7071, Vol. 38 at 7198.

2. IGWA

On February 3, 2004, IGWA filed two petitions to intervene in the request for administration in Water District 120 and the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area, and designation of the ESPA as a Ground Water Management Area. R. Vol. 2 at 197, 204. IGWA is a non-profit corporation that represents ground water users who pump water from the ESPA and irrigate over 700,000 acres of land from the aquifer. R. Vol. 37 at 7058. IGWA represents water users with ground water rights junior to SWC's rights, which are subject to curtailment under the Director's *Final Order*.

In a February 14, 2005 *Order*, the Director granted IGWA's petition to intervene in the matter of water right administration in Water District 120 and in the American Falls Ground Water Management Area.[2] *Id.* at 228.

IGWA has filed petitions for reconsideration of each of the *Director's Orders* and is a respondent in the petition for judicial review currently before this Court. ("IGWA or Ground Water Users").

3. The City of Pocatello

On April 26, 2005, the City of Pocatello filed a petition to intervene in the SWC delivery call. R. Vol. 7 at 1254. The City of Pocatello holds a ground water right that is junior to rights held by SWC and is subject to curtailment under the Director's *Final Order*. R. Vol. 37 at 7060.

On May 16, 2005, the City of Pocatello filed a petition for reconsideration of the Director's *May 2, 2005 Order*, and also filed petitions for reconsideration for later *Supplemental Orders*. R. Vol. 9 at 1669, Vol. 23 at 4376, Vol. 25 at 4745. The City of Pocatello is a respondent in the petition for judicial review currently before this Court.

[2] The Idaho Dairymen's Association, the City of Pocatello, the United States Bureau of Reclamation, and the State Agency Ground Water Users were also granted intervention in the proceedings before Director Dreher. *See* R. Vol. 39 at 7381.

4. Hearing on the SWC Delivery Call, Hearing Officer Schroeder's Recommended Order and the Director's Final Order

On August 1, 2007, Director David Tuthill issued an *Order Approving Stipulation and Rescheduled Hearing*, and an *Order Appointing Hearing Officer*, setting a hearing on the SWC delivery call and appointing Hon. Gerald F. Schroeder ("Hearing Officer") to preside over the hearing. R. Vol. 25 at 4770, 4775. The hearing began on January 18, 2008, and concluded on February 5, 2008. R. Vol. 37 at 7048. On April 29, 2008, the Hearing Officer entered his *Opinion Constituting Findings of fact, Conclusions of Law and Recommendation* ("*Recommended Order*"). *Id.*

In sum, the Hearing Officer concluded that: 1) the Director's assignment of a 10% uncertainty to the ESPA model and the use of a "trim-line" was reasonable, *Id.* at 7080; 2) the Director's consideration of the public interest criteria was proper, *Id.* at 7086; 3) the Director's application of a "minimum full supply" was reasonable when subject to adjustment as conditions change, but was unacceptable as a fixed amount, *Id.* at 7091, 7095, 7098-7099; 4) the existing facilities utilized by SWC were reasonable, *Id.* at 7101-7102; 5) the members of SWC were employing reasonable conservation practices, *Id.* at 7103-7104; 6) the Director's determination to provide carryover storage for one year (not multiple years) was reasonable, *Id.* at 7109; 7) the process utilized by the Director to determine a reasonable amount of carryover storage due to SWC was proper; 8) the Director's order of replacement water plans as a form of mitigation was proper, *Id.* at 7112-7113; and 9) replacement water must be approved in accordance with the procedures of the Conjunctive Management Rules, and provided at the time of material injury, *Id.* at 7112.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call*. R. Vol. 39 at 7381. The *Final Order* adopted the findings of fact and conclusions of law of the previous Director's orders issued in the delivery call, and the recommended orders of the Hearing Officer except as specifically modified. *Id.* at 7387. In particular, the Director held that 1) the Director properly exercised his discretion in authorizing replacement water as an interim measure for mitigation to senior water users before conducting a hearing to determine material injury, *Id.* at 7383, 7388; 2) it was appropriate to find that replacement water for predicted

shortages to reasonable carryover be provided in the season in which water can be put to beneficial use, not the season before, *Id.* at 7386, 7391; and 3) the term "reasonable in-season demand" will replace the use of the term "minimum full supply", *Id.* at 7386.

5. Petitions for Judicial Review

Petition for judicial review of the *Final Order* was timely filed by the SWC on September 11, 2008. On September 25, 2008, the United States Bureau of Reclamation filed a *Petition for Reconsideration* of the Director's *Final Order*. Thereafter, the Director issued an *Order Denying USBR Petition for Reconsideration and Pocatello's Response*. BOR then timely filed a petition for judicial review on November 7, 2008. This case was assigned to this Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication, on September 12, 2008.

C. Relevant Facts

1. The Water Rights at Issue

a) The A&B Irrigation District

A & B holds natural flow right number 01-00014 for 267 cfs with a priority date of April 1, 1939, and storage water rights in American Falls Reservoir for 46,826 acre feet with a priority date of March 30, 1921, and 90,800 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 137,626 acre feet. R. Vol. 37 at 7055.

b) The American Falls Reservoir District #2

AFRD #2 holds natural flow right number 01-006 for 1,700 cfs with a priority date of March 30, 1921, and storage water rights in American Falls Reservoir for 393,550 acre feet with a priority date of March 30, 1921. R. Vol. 37 at 7055.

c) The Burley Irrigation District

BID holds natural flow right number 01-00211B for 655.88 cfs with a priority date of March 26, 1903, and natural flow right number 01-00214B for 380 cfs with a priority date of August 6, 1908, and natural flow right number 01-00008 for 163.4 cfs with a priority date of April 1, 1939. BID also has a storage rights in Lake Walcott for 31,892 acre feet with a priority date of December 14, 1909; 2,672 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 155,395 acre feet in American Falls Reservoir with a priority date of March 30, 1921; 36,528 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 226,487 acre feet. R. Vol. 37 at 7055.

d) The Milner Irrigation District

Milner holds natural flow right number 01-00017 for 135 cfs with a priority date of November 14, 1916, and natural flow right 01-00009 for 121 cfs with a priority date of April 1, 1939, and natural flow right number 01-02050 for 37 cfs with a priority date of July 11, 1968. Milner has storage rights of 44,951 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 45,640 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 90,591 acre feet. R. Vol. 37 at 7055.

e) The Minidoka Irrigation District

MID holds natural flow rights number 01-00211A for 1,070 cfs with a priority date of March 26, 1903, right number 01-00214A for 620 cfs with a priority date of August 6, 1908, and right number 01-00008 for 266.6 acre feet with a priority date of April 1, 1939. MID has storage rights of 127,040 acre feet in Jackson Lake with a priority date of August 23, 1906; 58,990 acre feet in Jackson Lake with a priority date of August 18, 1910, 63,308 acre feet in Lake Walcott with a priority date of December 14, 1909; 5,328 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 82,216 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 29,672, acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 336,554 acre feet. R. Vol. 37 at 7056.

f) The North Side Canal Company

NSCC holds natural flow rights 01-00210 for 400 cfs with a priority date of October 11, 1900, right number 01-00212 for 2,250 cfs with a priority date of October 7, 1905; right number 01-00213 for 890 cfs with a priority date of June 16, 1908; right number 01-00005 for 300 cfs with a priority date of December 23, 1915; and right number 01-00016 for 1,260 cfs with a priority date of August 6, 1920. NSCC has storage rights for 312,007 acre feet in Jackson Lake with a priority date of May 24, 1913; 9,248 acre feet in American Falls Reservoir with a priority date of March 29, 1921; 116,600 acre feet in Palisades Reservoir with a priority date of March 29, 1921; and 422,043 acre feet in American Falls Reservoir with a priority date of March 30, 1921. R. Vol. 37 at 7056.

g) The Twin Falls Canal Company

TFCC holds natural flow rights 01-00209 for 3,000 cfs with a priority date of October 11, 1900, right number 01-00004 for 600 cfs with a priority date of December 22, 1915, and right 01-00010 for 180 cfs with a priority date of April 1, 1939. TFCC has storage rights of 97,183 acre feet in Jackson Lake with a priority date of May 24, 1913, and 147,582 acre feet in American Falls Reservoir with a priority date of March 29, 1921, for combined storage rights of 244,765 acre feet. Twin Falls Canal Company has claimed in the SRBA and the Director has recommended irrigation rights totaling 196,162 acres. TFCC delivers water to 202,690 shares. R. Vol. 37 at 7056.

2. Eastern Snake Plain Aquifer (ESPA)

The ESPA is an unconfined aquifer underlying a geographic area of approximately 10,800 square miles of southern and southeast Idaho. R. Vol. 37 at 7050. The ESPA connects with the Snake River and its tributaries along a number of reaches resulting in either gains or losses to the River depending on the level of the aquifer in relation to the River. *Id.* The ESPA consists primarily of fractured basalt ranging in a saturated thickness of several thousand feet in the central part of the Eastern Snake River

Plain, to a few hundred feet in the Thousand Springs area where the water is discharged through a complex of springs. Water flow through the ESPA is not uniform. Water travels through the system at rates ranging from 0.1 feet per day to 100,000 feet per day depending on subterranean geology, elevation and pressure differentials. *Id.* The ESPA receives approximately 7.5 million acre-feet per year from the following sources: irrigation related incidental recharge (3.4 million acre-feet), precipitation (2.2 million acre-feet) flow from tributary basins (0.9 million acre-feet) and losses from the Snake River and its tributaries (1.0 million acre-feet). R. Vol 2 at 198. On average between May 1980 and April 2002, the ESPA discharged approximately 7.5 million acre-feet on an annual basis through spring complexes located in the Thousand Springs area and near the American Falls Reservoir and through the discharge of approximately 2.0 million acre-feet per year through depletions from ground water withdrawals. *Id.* The ESPA is estimated to contain as much as one billion acre-feet of water. R. Vol. 37 at 7050.

The early 1950's marked the beginning of the use of deep well pumps on the ESPA. Spring flows then began to decline as a result of conversion from flood irrigation to sprinkler irrigation as well as depletions caused by ground water pumping. R. Vol. 37 at 7052. As a result, spring discharges and ESPA ground water levels have been declining in the last 50 years. A moratorium on new ground water permits was issued in 1992. R. Vol. 37 at 7058.

3. ESPA Model

A calibrated ground water model was used by the Director to predict the effects of curtailment of junior ground water rights. R. Vol. 2 at 199. The model has strengths and weaknesses. The model was designed to simulate gains and losses in various reaches of the Snake River including the reach from Shelley, Idaho to Minidoka Dam, which includes the American Falls Reservoir. *Id.* at 200. The model divides the ESPA into individual one mile by one mile cells. R. Vol. 37 at 7079. Despite the lack of homogeneity in the ESPA the model treats all cells as homogenous. The model was developed with input from a number of stakeholders with competing interests. *Id.*

4. The Bureau of Reclamation

The United States Bureau of Reclamation operates four main reservoir facilities on the Snake River: Jackson Lake Reservoir ("Jackson"), American Falls Reservoir ("American Falls"), Lake Walcott or Minidoka Dam ("Minidoka"), and Palisades Reservoir ("Palisades"). R. Vol. 37 at 7060-7061. This reservoir system was originally constructed with the intent to provide storage water to irrigators to insure against water shortages in times of drought. *Id.* More recently, the system also allows for flood control and hydropower production, while continuing to provide irrigation districts with the certainty that water will be available in future years. R. Vol. 37 at 7060-7061, 7107-7108. The BOR has contracts with members of SWC and the City of Pocatello for water held in storage in this reservoir system, including contracts for carryover water for irrigation. *Id.* at 7060-7061. *See also* United States' *Opening Brief*, at 3-4. As a result, the BOR has an interest in how the water rights at issue in this delivery call are administered. *See also U.S. V. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (holding legal title is held by the BOR with equitable title being held by landowners within the service area of SWC).

5. Interim Administration and Formation of Water District

On January 8, 2002, pursuant to I.C. § 42-1417, the SRBA District Court ordered Interim Administration of water rights located in all or portions of Basins 35, 36, 41 and 43, which included the water rights at issue in this matter. R. Vol. 2 at 200. On February 19, 2002, the Director of IDWR issued orders creating Water District Nos. 120 and 130. On November 19, 2002, the SRBA District Court ordered interim administration of a portion of Basin 37, which includes water rights at issue in this matter. *Id.* Thereafter, the Director issued an order revising the boundaries of Water District 130 to include this portion of Basin 37. *Id.* On October 29, 2003, the SRBA District Court issued an order authorizing Interim Administration of water rights located in portions of Basin 29, which includes water rights at issue here. *Id.* Again, the Director thereafter issued an order revising the boundary of Water District No. 120 to include this portion of Basin 29. *Id.* at

201. The water rights at issue in this case are included in Water District nos. 120 and 130, and such water districts have been created in order to provide for administration of water rights to protect prior surface and ground water rights. R. Vol. 37 at 7064. As a precondition for interim administration Idaho Code § 42-1417 requires that water rights either be reported in a director's report or partially decreed. I.C. § 42-1417 (a) and (b).

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held May 26, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or May 27, 2009.

III.
APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code §67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4); *Barron v. IDWR,* 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[3] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of*

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[3] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934,939 (1993).

Utah Hosp. v. Board of Comm'rs of Ada Co., 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

IV.
ISSUES PRESENTED FOR JUDICIAL REVIEW

A. Issues Raised by SWC

In its brief, SWC raised a number of issues. The Court has summarized these issues as follows:

1. Whether the Director failed to provide timely and lawful conjunctive administration of junior ground water rights?

2. Whether the Director gave proper weight and deference to the SWC's decreed senior water rights?

3. Whether the Director exceeded his statutory authority through the implementation of replacement water plans?

4. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary, capricious, and contrary to law?

5. Whether the Director's application of the Conjunctive Management Rules is consistent with Idaho law?

6. Whether the Director's use of a 10% "trim-line" resulting in the exclusion of certain junior priority ground water rights from administration was arbitrary, capricious, and contrary to law?

7. Whether the Director's determinations regarding carryover storage is arbitrary, capricious, and contrary to law?

B. Issues Raised by the Bureau of Reclamation

1. Whether the Director abused his discretion by failing to allow reasonable carryover storage for use in multiple years?

2. Whether the Director abused his discretion by failing to require mitigation of the material injury to reasonable carryover storage in the season the injury occurs?

V.
ANALYSIS AND DISCUSSION

A. The Director abused discretion by failing to require mitigation of material injury to reasonable carry-over storage in the season in which the injury occurs.

The SWC and BOR argue that Director Tuthill acted outside the scope of his authority and abused discretion by waiting until the following irrigation season before making a final determination of material injury to carry-over storage. Instead of making a final determination of injury, the Director adopted at "wait and see" approach to see if the storage reservoirs were predicted to fill the following year. The Director would not make a final determination until after the issuance of the "joint forecast" for the inflow for the Upper Snake River Basin which is issued annually after April 1st by the BOR and the United States Army Corps of Engineers. The Director reasoned as follows:

> The former Director [Dreher] found that shortfalls to reasonable carryover should be provided the season before the water can be put to beneficial use. as evidenced in 2006 and 2008, if the reservoir system mostly fills and had IGWA been required to provide reasonable carryover shortfalls to injured members of the SWC, the secured water would have been in excess of the amount needed for beneficial use by members of the SWC in the season of need.
>
> As found by the Hearing Officer, the reservoir system fills two-thirds of the time, and storage water has been historically available for rental or lease even during times of drought. *Recommended Order* at 6, 15. To order reasonable carryover the year prior to the season of need would result in waste of the State's water resources. *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 422, 319 P.2d 995, 968 (1957); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900). It is appropriate to notify the parties in the fall prior to the upcoming irrigation season of predicted carryover shortfalls for planning purposes. *But it is not appropriate to require junior ground water users to provide predicted shortfalls until the spring when the water can be put to beneficial use*

> *during the season of need*: 'As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards applied in *AFRD#2*.'

Final Order, R. Vol. 39 at 7391 (emphasis added). The Director concluded that if the reservoirs filled in the following year any shortfall to carry-over storage from the preceding year would be cancelled. This Court concludes that this issue is addressed by the express language and framework of the CMR.

1. Surface Storage Rights Include Reasonable Carry-Over Storage.

The storage rights held by the BOR and SWC include the right to reasonable carry-over. CMR 042 expressly acknowledges material injury to carry-over storage.

> **Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:
>
> . . .
>
> g. The 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; provided, however, the holder of a surface storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

CMR 042.01.g. In *American Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD #2*"), the Idaho Supreme Court upheld the constitutionality of the reasonable carry-over provisions of the CMR.

> Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out. *For*

> *purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task.* ***This Court upholds the reasonable carryover provisions in the CM Rules.***

AFRD #2 at 880, 154 P.3d at 451 (emphasis added). Clearly, based on the foregoing, absent conditions or other limitations included in the partial decree, a surface storage right includes with it the right to reasonable carry-over.

2. The Director's "wait and see" determination of material injury to carry-over storage is only authorized pursuant to a mitigation plan.

The CMR state that in determining a reasonable amount of carry-over storage "the Director shall consider the average annual rate of fill of storage reservoirs and the average carry-over for prior comparable water conditions and the projected water supply for the system." CMR 042.01.g. Of significance is that the "material injury" provisions of the CMR with respect to the reasonable carry-over provisions of storage water do not authorize a "wait and see" approach for purposes of determining material injury to carry-over storage. *See generally* CMR 042 ("Determining Material Injury and Reasonableness of Water Diversions"). Rather, a "wait and see" type approach is expressly authorized under the mitigation provisions of the CMR. CMR 043 provides:

> 03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan *will prevent injury to senior rights* include, but are not limited to, the following:
>
> c. ... A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply.

CMR 043.03.c. (emphasis added). However, the provision goes on to provide: "***The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable.***" *Id.* (emphasis added). This language is unambiguous.

A court must construe a statute as a whole and consider all of its sections together. *Davaz v. Priest River Glass Co., Inc.* 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). As such, the court must adopt a construction that will harmonize and reconcile all of the provisions of a statute. *State v. Horejs*, 143 Idaho 260, 266, 141 P.3d 1129, 1135 (Ct. App. 2006).

In this regard, although the Director adopted a "wait and see" approach, the Director did not require any protection to assure senior right holders that junior ground water users could secure replacement water. The Hearing Officer found that to date during extended drought periods there has always been water available somewhere at a price. Although the water may be expensive and/or difficult to obtain. R. Vol. 37 at 7053. While water may be available somewhere, the failure to require any protections for seniors is contrary to the express provisions and framework of the CMR. This does not mean that juniors must transfer replacement water in the season of injury, however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example.[4] Seniors can therefore plan for the future the same as if they have the water in their respective accounts and juniors may avoid the threat of curtailment. The BOR and SWC argue that in the event the reservoirs do not fill in times of shortage, the risk of junior ground pumpers not being able to obtain replacement water to mitigate for injury to carry-over storage is unconstitutionally borne by the senior. This Court agrees.

Under the CMR the ordering of replacement water or other mitigation is in lieu of curtailment. CMR 040.01 provides in relevant part that "upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director through the water master, shall: a. regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included in the district . . . 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." CMR 040.01.a. and b. The Hearing Officer also acknowledged: "The theory underlying predicting material injury and allowing replacement water as mitigation instead of

[4] An option for water or some other mechanism for securing water pursuant to a long term mitigation plan where the cost would be less than actually transferring or leasing water.

requiring curtailment is that replacement water will be provided in time and in place in stages comparable to what would occur if curtailment were ordered." R. Vol. 37 at 7113. In the event replacement water could not be obtained in the following irrigation season or was determined too costly to obtain, ordering curtailment after the irrigation season has already begun or is about to begin presents new issues and problems. Both senior and juniors will have already planted crops. At that point curtailment may not timely remediate for the carry-over shortfall. The seniors are therefore forced to assume losses and adjust their cropping plans based on not having the anticipated quantity of carry-over storage. The Director is also faced with the issue as to whether or not to curtail junior ground water users based either on futile call as to the instant irrigation season or considerations regarding lessening the impact of economic injury. The Hearing Officer aptly pointed to this dilemma: "Curtailment of the ground water users may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous economy." R. Vol. 37 at 7090. Ultimately, the prior appropriation doctrine is turned upside down. Therefore, unless assurances are in place that carry-over shortfalls will be replaced if the reservoirs do not fill, the risk of shortage ultimately falls on the senior. As such, the very purpose of the carry-over component of the storage right -- insurance against risk of future shortage -- is effectively defeated.

Accordingly, the Court concludes that the Director abused discretion in failing either to order curtailment in the season of injury or alternatively require a contingency provision to assure protection of senior right in the event the reservoirs do not fill.

3. The Director abused discretion by categorically denying reasonable carry-over for storage for more than one year.

The BOR and SWC argue that the Director acted outside of his authority and/or abused discretion by failing to require juniors to provide carry-over water for use beyond the one irrigation season. The Hearing Officer essentially recommended a categorical

rule with respect to carry-over storage beyond one irrigation season (as opposed to a case-by-case determination):

> The multiple functions of BOR and the desire of SWC for long term insurance against adverse weather conditions are legitimate and consistent with the language of CM Rule 42.01.g which refers to dry years. Nonetheless, attempting to curtail or to require replacement water sufficient to insure storage for periods of years rather than the forthcoming year presents too many problems and too great likelihood for the waste of water to be acceptable. Curtailing to hold water for longer than a year runs a serious risk of being classified as hoarding, warned against by the Supreme Court in AFRD #2. . . Ordering curtailment to meet storage needs beyond the next year is almost certain to require ground water pumpers to give up valuable property rights or incur substantial financial obligations when no need would develop enough times to warrant such action.

R. Vol. 37 at 7109. The Director adopted this reasoning in the *Final Order*. R. Vol. 39 at 7385. The problem with such a determination is that it is inconsistent with the plain language and framework of the CMR as well as the Idaho Supreme Court's ruling in AFRD #2. There is not a statute that specifically authorizes, defines or limits carry-over storage. However, carry-over storage is specifically included in the "**Determining Material Injury and Reasonableness of Water Diversions**" section of the CMR.[5] CMR 042.01.g provides "the holder of a surface storage right *shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years*. (emphasis added). IDWR argues in its brief that "[t]here appears to be a misconception in the opening briefs filed by the SWC and USBR that the Director has limited those entities' ability to hold carryover storage. Nothing in the Final Order limits the right to hold carryover storage. Rather, the issue is whether junior ground water users are subject to curtailment for the purpose of providing water to enhance carryover storage beyond one year." *Respondent's Brief* at 14. The problem with IDWR's argument is that the carry-over storage provisions are specifically included in the material injury section of the CMR as opposed to being just a provision that authorizes carry-over storage. Once material injury is established (absent defenses raised by juniors), then the Director must

either regulate the diversion and use of rights in accordance with priority or allow out-of –priority diversion pursuant to an approved mitigation plan. CMR 040. 01. a. and b. Accordingly, the CMR clearly contemplate that juniors can be curtailed to enhance carry-over storage beyond one year.

This exact provision withstood a facial constitutional challenge in *AFRD#2*. The Idaho Supreme Court rejected the argument that storage rights holders should be permitted to fill their entire storage right regardless of whether there was any indication that it was necessary to fulfill current or future needs. *Id.* at 880,154 P.3d at 451 (2007). The Supreme Court also rejected the argument of ground water users that the purpose of the reasonable carry-over provision is to meet actual needs as opposed to "routinely permitting water to be wasted through storage and non-use." The Court acknowledged that it is "permissible . . . to hold water over from one year to the next absent abuse." *Id.* at 880, 154 P.3d at 451 (citing *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945)). But "[t]o permit excessive carryover of stored water without regard to the need for it would in itself be unconstitutional." *Id.* Ultimately, the Court concluded that the CMR were facially constitutional in permitting some discretion in the Director to determine whether carryover water is reasonably necessary for future needs." *Id.*

Based upon this holding, this Court concludes that the Director exceeded his authority by concluding that permitting carry-over for more than just the next season is categorically unreasonable and results in the unconstitutional hording of water. Such a determination contravenes the express language and framework of the CMR. The Director, however, in the exercise of discretion, can significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances of a particular delivery call. Ultimately, the end result may well be the same. Finally, as discussed above, the securing of water through an option or similar method pursuant to or in conjunction with a long term mitigation plan would eliminate any concerns regarding hoarding water or other abuses.

[5] In referring to 'framework" the Court means that the reasonable carry-over provision is specifically located in the material injury and reasonableness of diversion section of the CMR.

B. The Director did not err in combining the natural flow rights and storage rights for purposes of determining material injury.

The SWC argues that the Director abused discretion and/or exceeded his authority by combining the supply of natural flow rights and storage rights for purposes of making a material injury determination. This Court disagrees. The irrigation water requirements of the members of the SWC are satisfied through a combination of decreed natural flow and storage rights. Storage is supplemental to natural flow to meet water requirements. However, the extent to which individual members of the SWC rely on storage to supplement natural flow in order to satisfy irrigation season demands varies. As a result of differing priority dates, some SWC members do not have sufficient natural flow rights to irrigate through an entire season and must rely heavily on storage rights to meet irrigation season demands. For others with earlier natural flow priority dates, less reliance on storage rights to meet seasonal demands is required. However, because one of the purposes of a storage right includes carry-over for future use, the combined full decreed quantities of natural flow and storage rights can exceed the quantity necessary to satisfy the water requirements for a single irrigation season. In the context of a material injury analysis, the issue is then at what point does material injury occur to a senior storage right such that curtailment of junior ground pumpers or mitigation in lieu of curtailment is required? Former Director Dreher discussed this issue in his testimony:

> Do you curtail junior priority ground water use to provide full reservoirs? Half-full reservoirs? At what point do you curtail junior-priority ground water use because of storage, the reduced storage supplies that are available to the senior right holders?

Tr. at 42-43.

Although the storage rights are decreed separately from the natural flow rights, the purpose of use of the storage rights is that the stored water will be released and used to supplement the natural flow rights for irrigating the same lands.[6] Therefore, it would be error for the Director not to consider natural flow and storage rights in conjunction with each other. This was confirmed by the Idaho Supreme Court in *AFRD#2,* where the

[6] The storage use is not an *in situ* use such as recreation, aesthetic etc.

Idaho Supreme Court specifically rejected the argument that senior surface storage right holders were entitled to seek curtailment up to the decreed quantity of the storage right regardless of whether there was any indication that it was necessary to fulfill current or future irrigation needs. The Court held that storage right holders were entitled to protection for reasonable carry-over:

> Clearly American Falls has decreed storage rights. Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute right without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or lost. Somewhere between the absolute right to use a decreed water right and the obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out. For purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task. This Court upholds the reasonable carry-over provisions.

AFRD#2 at 880, 154 P.2d at 451. The Director's actions must be evaluated against the back drop of this holding. Additionally, one of the factors the Director is to consider in determining material injury under CMR 042 is "the extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing water supplies . . . ." CMR 042.01.g. Accordingly, because:

1) a combination of both natural flow and storage rights are used for the purpose of meeting the same irrigation purpose of use; and

2) the decreed quantity of natural flow rights and the decreed quantity of storage rights can exceed irrigation demands for a single irrigation season; and

3) regulation of juniors for carry-over storage is limited to reasonable carry-over as opposed to the full quantity of the storage right; and

4) a material injury analysis requires that the Director consider the extent to which the requirements of a senior water right holder can be met with existing water supplies;

the Director's material injury determination necessarily requires evaluating natural flow and storage rights in conjunction with each other, as opposed to independently from each other. Accordingly, the Director did not abuse discretion or act outside his authority in considering natural flow rights and storage rights together for purposes of making a material injury determination.

1. The Director did not abuse discretion or act outside his authority in utilizing a "minimum full supply" or "reasonable in-season demand" baseline for determining material injury.

In determining material injury to senior rights the Director considered a "baseline" quantity independent of the decreed or licensed quantity. The baseline quantity represented the amount of water predicted from natural flow and storage needed to meet in-season irrigation requirements and reasonable-carryover. The Director then determined material injury based on shortfalls to the predicted baseline as opposed to the decreed or licensed quantities. Former Director Dreher labeled the baseline "minimum full supply." Director Tuthill in the *Final Order* replaced "minimum full supply" with the term "reasonable in-season demand." R. Vol. 39 at 7386. The SWC argues that the Director abused discretion and acted contrary to law by using a baseline quantity, as opposed to the decreed or licensed quantity. This Court disagrees.

On first impression it would appear that the use of such a baseline constitutes a re-adjudication of a decreed or licensed water right. As stated by the Hearing Officer "[t]he

logic of SWC in objecting to the Director's use of a minimum full supply is difficult to avoid." R. Vol.37 at 7090. However, on closer examination the use of baseline is a necessary result of the Director implementing the conditions imposed by the CMR with respect to regulating junior rights to protect senior storage rights. Put differently, senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR 042. Rule 042 of the CMR lists a number of factors the Director is to consider in determining material injury to senior rights. CMR 042.01 a-h. As this Court concluded previously, the total combined decreed quantity of the natural flow and storage rights can exceed the amount of water necessary to satisfy in-season demands plus reasonable carry-over. Simply put, pursuant to these factors a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right. Although the CMR do not expressly provide for the use of a "baseline" or other methodology, the Hearing Officer concluded that: "Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at base and works up according to need, the end result should be the same." R. Vol 37 at 7091. Ultimately the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable provided the baseline was adjustable to account for weather variations and that the process satisfied certain other enumerated conditions. R. Vol. 37 at 7086- 7100. This Court affirms the reasoning of the Hearing Officer on this issue.

C. The Director did not err in using the 10 % margin of error for the ESPA Model or in using as a "trim-line" for juniors located with the margin of error.

The Court addressed this issue at length in the *Order on Petition for Judicial Review* recently issued in Gooding County Case No. 2008-000444, which involves many of the same parties to this action. *See* Gooding County Case No. 2008-000444 ***Order on***

Petition for Judicial Review (June 19, 2009) at 25-28. The Court's analysis and holding in that decision is incorporated herein by reference.

D. The Director Abused Discretion by ordering a "replacement water plan" in lieu of following the procedures set forth in the CMR.

In response to the January 2005, request for administration filed by the SWC, the Ground Water Users filed an *Application for Approval of Mitigation Plan* pursuant to CMR 043. R. Vol. 1 at 126. A hearing was originally scheduled on the *Application* but was ultimately continued. R. Vol. 1 at 186; R. Vol. 2 at 454. On May 2, 2005, the Director issued an *Amended Order*, which made findings of fact and conclusions of law relative to material injury predictions and ultimately ordered replacement water as "mitigation" in lieu of curtailment. *See e.g. Amended Order*, R. Vol. 8 at 1403-1405 ¶¶ 1-14. The *Amended Order* also provided:

> As required herein, the North Snake, Magic valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices no later than 5:00 pm on April 29, 2005. Requests for extensions to file a plan for good cause will be considered on a case-by-case basis and granted or denied based on the merits of any such individual request for extension. The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension. A plan that is approved with conditions will be enforced by the Department and the water masters for Water Districts No. 120 and No. 130 through curtailment of the associated rights in the event the plan is not fully implemented.

Amended Order, R. Vol. 8 at 1405-05, ¶ 9. In response, the SWC filed a *Protest, Objection, and Motion to Dismiss 'Replacement Water Plans,'* on the grounds that the Director failed to follow the procedures set forth in the CMR. R. Vol. 8 at 1507.

> Conjunctive Management Rule 43 clearly sets forth the method for submitting mitigation plans, requires notice and hearing, requires that the

> plan be considered under the procedural provisions of Idaho Code § 42-222 in the same manner as applications to transfer water rights, and sets forth specific factors that may be considered by the Director of the Department in determining whether a proposed mitigation plan will prevent injury to senior rights.
>
> The department has no legal right or ability to unilaterally create new conjunctive management rules nor do those proposing mitigation have any legal authority to proceed other than set forth in the Conjunctive Management Rules. Should the Director or the Department desire to create new rules, the provisions of the Idaho Administrative procedure Act must be followed. See Idaho Code § 67-5201 *et seq.*

R. Vol. 8 at 1511. On May 6, 2005, without conducting a hearing, the Director issued an *Order Approving IGWA's Replacement Water Plan for 2005.* R. Vol. 12 at 2174. Thereafter the Director issued a series of supplemental orders amending the replacement water requirements.[7] A limited hearing was granted on IGWA's 2007 Replacement Plan. R. Vol. 23 at 4396. The hearing was limited as follows:

> The hearing on the 2007 Replacement Plan is limited in scope to presentation of information regarding the implementation of the Plan by IGWA to demonstrate that timely, in-season replacement water and reasonable carryover water can be provided to members of the Surface water Coalition.
>
> The hearing on IGWA's 2007 Replacement Plan will not include argument or presentation of evidence on any other orders issued by the Director, or the Director's method and computation of material injury.

Id. at 4397. Ultimately, a hearing was held before the Hearing Officer on January 16, 2008. The Hearing Officer determined that: "[t]he replacement water plan approved by

---

[7] *Supplemental Order Amending Replacement Water Requirements* (July 22, 2005), R. Vol. 13 at 2424; *Second Supplemental Order Amending Replacement Water Requirements* (Dec. 27, 2005), R. Vol. 16 at 2994; *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* (June 29, 2006), R. Vol. 20 at 3735; *Fourth Supplemental Order Amending Replacement Water Requirements* (July 17, 2006), R. Vol. 21 at 3944; *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* (May 23, 2007), R. Vol. 23 at 4286; *Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan* (July 11, 2007), R. Vol. 25 at 4714; *Seventh Supplemental Order Amending Replacement Water Requirements* (December 20, 2007), Ex. 4600; *Eighth Supplemental Order Amending Replacement Water Requirements Final 2007 & Estimated 2008* (May 23, 2008), R. Vol. 38 at 7198.

the former Director in the May 2, 2005, Order and Supplemental Orders is in effect a mitigation plan. However, it does not appear that the procedural steps for approving a mitigation plan were followed." R. Vol. 37 at 7112.

This Court agrees. This is not a situation where the replacement water ordered is consistent with the timing and in the quantities authorized under the decreed or licensed rights, leaving no room for disagreement. Rather this is situation where the Director has extensively applied the provisions of the CMR for purposes of making a material injury analysis ultimately resulting in adjustments in the timing of delivery and in the quantities of water authorized under the decrees or licenses. The Court sees no distinction between the "replacement water plans" ordered in this case and a mitigation plan. Mitigation plans under the CMR are defined as:

> A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law.

CMR 010.15. governed by CMR 43:

> **043. MITIGATION PLANS (RULE 43).**
> **02.** Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222, which provides in relevant part:

> Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. *Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the*

> *receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.*

(emphasis added). The Director did not follow this process. IDWR argues that "[a]uthorizing replacement plans is akin to a court issuing a preliminary injunction in a civil matter to preserve the status quo, pending final judgment." While this may be true the Court is aware of no circumstance under the civil rules where a preliminary injunction is issued without the opportunity for a hearing. Next, the Director's preliminary relief extended over a period of multiple irrigation seasons in effect becoming an unauthorized substitute for a mitigation plan. Finally, Director concluded in his *Final Order*:

> Once a record is developed through the hearing process on the delivery call, a formal mitigation plan should be submitted by junior ground water users to mitigate material injury to the senior. Since a Rule 43 mitigation plan serves as a long term solution to material injury to senior water users, it is necessary for junior ground water users to have a proper record upon which to develop the plan because the amount of water sought by the senior in its delivery call may not be the amount attributable to junior ground water depletions.

R. Vol. 39 at 7384. However, the methodology employed by the Director in conjunction with the replacement plan can result in junior ground water users never being required to file a mitigation plan. For example, if and when the reservoirs ultimately fill and no future injury is predicted the filing of a mitigation plan is not required under the CMR. If the next time a shortfall occurs and the Director responds with the replacement plan process, the replacement plan has by default effectively circumvented and replaced the mitigation plan requirement. Thus, the process may never reach the point where a mitigation plan is filed.

While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users.

E. The Director exceeded his authority in determining that full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 of an inch instead of 3/4 of an inch per acre.

In response to information requests to SWC members made by former Director Dreher, Twin Falls Canal Company responded that 3/4 of an inch per acre constituted full headgate delivery. The Hearing Officer concluded:

> The former Director [Dreher] accepted Twin Falls Canal Company's response that 3/4 inch constituted full headgate deliver [sic], and TFCC continued to assert that position at hearing. This is contradicted by the internal memoranda and information given to shareholders in the irrigation district. It is contrary to a prior judicial determination. It is inconsistent with some of the structural facilities and exceeds similar SWC members with no defined reason. Any conclusions based on full headgate delivery should utilize 5/8 inch.

R. Vol. 37 at 7100. Director Tuthill accepted the recommendation in his *Final Order*. R. Vol. 39 at 7392. TFCC's water right is still pending in the SRBA. The *Director's Report* recommended the water right at the delivery of 3/4 of an inch. Ex. 4001A. IGWA filed a SRBA *Standard Form 1 Objection* to the recommendation asserting *inter alia*, "The quantity should not exceed 5/8" per acre consistent with the rights of other surface water coalition rightholders." Ex. 9729. Proceedings on the *Objection* are currently pending in the SRBA. The Hearing Officer's recommendation appears to be based on a determination that TFCC's water right only entitles it to 5/8 of an inch per acre. The SRBA Court is vested with exclusive jurisdiction for determining the elements of a water right. Furthermore, the Director's determination is inconsistent with his recommendation for the claim in the SRBA. The SRBA Court ordered interim administration of the water rights at issue in this proceeding pursuant to Idaho Code § 42-1417. Idaho Code § 42-1417 provides: "The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code . . . in accordance with the director's report or as modified by the court's order . . . [or] . . . in accordance with applicable partial decree(s) for water rights acquired under state law. . . ." I.C. § 42-1417(1) (a) and (b). At this stage of the proceedings the *Director's Report* recommends 3/4 of an inch per acre. The Director can file an amended director's report in the SRBA, however, the

interim administration process is not a substitute for litigating the substantive elements of a water right. *See e.g. Walker v. Big Lost Irr. District*, 124 Idaho 78, 856 P.2d 868 (1993). The Director exceeded his authority in making this determination.

F. The Director abused his discretion by issuing two "*Final Orders*" in response to the Hearing Officer's *Recommended Order.*

In the September 5, 2008, *Final Order*, the Director stated his decision to issue an additional *Final Order* at a later date in response to the Hearing Officer's *Recommended Order*:

> 25. Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing on the order will be provided.

The SWC argues that the failure to address this issue in the *Final Order* was an abuse of discretion. This Court agrees.

In the *Recommended Order*, the Hearing Officer found that adjustments should be made to the methodologies for determining material injury and reasonable carryover for future years. R. Vol. 37 at 7090. The Director adopted this conclusion, but did not address a new method in his September 5, 2008 *Final Order*. R. Vol. 39 at 7382. The process for determining material injury and reasonable carryover is an integral part of the Hearing Officer's *Recommended Order*, and the issues raised in the delivery call. The Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*. Styling the *Final Order* as two orders issued months apart runs contrary to the Idaho Administrative Procedures Act and IDWR's Administrative Rules. *See* I.C. §§ 67-5244, 67-5246, 67-5248 and IDWR Administrative Rules 720 and 740. In addition, the issuance of separate "Final Orders" undermines the efficacy of the entire delivery call process, including the process of judicial review. Such a process requires certainty and definiteness as to the *Final Order* issued, so that any review of the *Final Order* can be complete and timely.[8]

[8] The Court notes that on June 30, 2009, the Director issued an *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover.* The *Order* is not part of the record in this matter.

G. Timeliness of the Director's Response to Delivery Calls.

The SWC also raises the issue that the Director failed to provide timely and lawful administration of junior priority rights to satisfy senior rights. This argument was addressed in the context of the Director's failure to provide mitigation in the season of injury and the Director's use of a replacement plan in lieu of following the procedural requirements for mitigation plans as set forth in the CMR.

VI.

CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the actions taken by the Director in this matter are affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision.

IT IS SO ORDERED.

Dated: July 24, 2009

JOHN M. MELANSON
District Judge

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 24 of July, 2009, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petition for Judicial Review to the parties listed below via the U.S. Postal Service, postage prepaid:

John Simpson
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Boise, ID 83701-2139

John Rosholt
Travis Thompson
BARKER ROSHOLT & SIMPSON
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Twin Falls, ID 83303-0485

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David Gehlert
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Boise, ID 83701-2720

Randy Budge
Candace McHugh
RACINE OLSON
P.O. Box 1391
Pocatello, ID 83204-1391

Dated: July 27, 2009

Cynthia R. Eagle-Ervin, Deputy Clerk

Notice of Orders
Certificate of Mailing
IRCP 77(d)

Agreement Between Participating Members of the Big and Little Wood Water User's Association and Big Wood Canal Company and Participating Members of Galena and South Valley Groundwater Districts

Primary Objectives

The Primary objectives of this agreement are:

- To identify and plan for "Groundwater Level Stabilization and Enhancement" actions and measures in the Wood River Valley aquifer to the extent practicable, to minimize present & future impacts to holders of both surface water and groundwater rights.

- To plan for and implement voluntary "Conjunctive Management" (as defined in IDAPA 37.03.11) of surface and groundwater sources within Idaho Water District #37 in substantial adherence to the Prior Appropriation Doctrine (i.e., "first in time is first in right"), to the degree to which such doctrine can be reasonably applied to groundwater diversions. Conjunctive management would begin no later than four (4) years from the effective date of this Agreement.

- To identify and plan for "Mitigation" (compliant with IDAPA 37.03.11.043) actions and measures to address injuries to holders of senior water rights from junior groundwater diversions. The degree to which any such planned "Mitigation" actions and measured are implemented will remain the responsibility of Junior groundwater diverters.

- To identify, plan for and implement, to the degree practicable, Irrigation Water Conservation practices to ensure the maximum reasonable beneficial use of groundwater and surface water within the district.

Implementing Terms & Conditions

Agreement on Common Groundwater Supply

Parties subject to this agreement voluntarily agree that, while this agreement is in force, all groundwater diversions within Water District #37 are within an "Area Having a Common Groundwater Supply" and therefore subject to voluntary "Conjunctive Management" within Water District #37.

Groundwater Level Stabilization & Enhancement

Finalize the development of the "Wood River Valley Ground Water Management Plan" with the objective of stabilizing and enhancing aquifer levels to a level substantially equal to those in 1978 as measured by the average of water levels between 1974- 1982.

Groundwater Recharge

Develop and support the use of temporary water rights (i.e., surplus recharge) pursuant to Idaho Code 42-202A (temporary water rights granted during periods of surplus/unappropriated water) and associated "surplus recharge" facilities.

Other recharge (i.e., non-surplus recharge) will only be accepted on a case-by-case basis if it can be clearly demonstrated that such recharge is feasible and sustainable, of sufficient magnitude to mitigate for surface water injuries in dry years, would provide net benefits to impoundments in Magic Reservoir, formalized in an IDAPA Rule 43 Compliant Mitigation Plan, and agreed to by all parties.

Mitigation Plan

Groundwater Districts agree to voluntarily develop a detailed Voluntary IDAPA 37.03.11.043 (Rule 43) Mitigation Plan which identifies specific & detailed actions and measures to prevent, or compensate holders of senior water rights for, material injury caused by the diversion and use of water by holders of junior water rights.

Establishment of a Conjunctive Management Planning Steering Committee (CMPSC)

The parties will agree to form a steering committee composed of representatives of surface and groundwater rights holders and representatives of IDWR, including Water District 37 employees. The CMPSC will advise and represent the interests of respective boards, review progress regarding the implementation of established benchmarks and goals, and develop implementation documents for the various monitoring, mitigation and management plans described herein. The ASC will be separate from the existing Water District 37 Advisory Board and will report to the parties subject to this agreement. Once an agreed upon "Conjunctive Management Plan" is developed and approved, the CMPSC will be dissolved and further oversight will be completed through the existing WD 37 Advisory Board. The CMPSC may also:

- Establish a forum for collecting/reviewing data
- Serve as a forum for mediating water related issues within the Water District
- Support and guide the development of a Ground Water Management Plan
- Develop and propose implementation of a ground water recharge program
- Serve as a forum for communication of water related issues

Establishment of a Technical Advisory Group (TAG)

The TAG will be created to support the Conjunctive Management Planning Steering Committee. The TAG will provide technical & hydrogeological analysis to the Advisory Steering Committee as needed to support agreement objectives.

Interim Mitigation Water Delivery

Prior to the implementation of a Water District wide "Conjunctive Management Plan" junior groundwater diverters will continue to divert without restriction while holders of senior water rights will continue to be subject to time priority water "cuts". In acknowledging this reality, junior groundwater diverters will provide senior water rights holders with the following volumes of irrigation water (or agreed upon equivalent):

Year 1: 10,000 ac-ft
Year 2: 10,000 ac-ft
Year 3: 10,000 ac-ft
Year 4: Conjunctive Management

Water Bank

Parties agree to support the development of a local water bank to allow existing surface water rights to be leased and rented for recharge use. Any committee overseeing the water bank shall accurately reflect the makeup of WD37 water users and be chaired by an IDWR employee such as the WD37 watermaster, since water bank actions will require approval by IDWR.

Consumptive Use Volume Restrictions

Groundwater diversions shall be voluntarily limited to a maximum annual volume of 40,000 ac-ft/per until conjunctive management is fully implemented no later than four (4) years from the effective date of this Agreement.

Mandatory Near-Real Time Measurement of Groundwater Diversions

All groundwater diversions in excess of 0.2 cfs and/or 200 ac-ft annually will be required to install near-real time measuring devices and ensure that such devices have the ability to transmit flow data at a frequency no longer than 24 hours.

Irrigation Water Conservation Plan

Parties will agree to develop a comprehensive Water District Irrigation Water Conservation Plan that will address, but not necessarily be limited to, the following:

- Increased reliability and enforcement of water use, measurement, and reporting.
- Increase compliance with all elements and conditions of all water rights and ensure enforcement in cases of non-compliance.
- Identify and seek remedy to system inefficiencies within the surface and groundwater delivery systems.

Conversions

The parties will support, plan for, and undertake targeted ground water to surface water conversions and/or fallow land as needed to meet existing water rights as part of Mitigation Plans described in this Agreement.

Trust Water Rights

Parties agree to support the Idaho Water Resource Board (IWRB) in making reasonable efforts to assert their Minimum Stream Flow rights on the Big Wood River and Silver Creek (e.g., WR# 37-7727).

Moratorium New Surface and Groundwater Diversions

Continue the existing moratorium on pending/future water rights applications. New water rights for domestic use only. The CMPSC shall be advised in writing of all new water rights applications, including transfers and conversions.

Implementing Documents

The following documents shall be developed and agreed upon no later than the associated time frame indicated as measured from the Effective Date of this agreement:

Groundwater & Surface Water Diversion Monitoring Plan – 6 months
Voluntary IDAPA 37.03.11.043 (Rule 43) Mitigation Plan – 12 months
Groundwater Stabilization/Enhancement Plan – 18 months
Irrigation Water Conservation Plan – 24 months
Comprehensive Conjunctive Management Plan – 36 months

Safe Harbor

No ground water divertor, party to this agreement, will be subject to a water delivery call by members of the Big and Little Wood Waters User's Association or members of Big Wood Canal Company, who are both party to this agreement, as long as the provision of this agreement are met.

General Terms & Conditions

Non-Participants

Any ground water user not participating in the Agreement or other have another approved Mitigation Plan will be subject to administration.

Term

This is a perpetual agreement until such time as an agreed upon Water District 37 Conjunctive Management Plan is approved and implemented.

Binding Effects

This Agreement shall bind and inure to the benefit of the respective successors of the parties.

Entire Agreement

This agreement sets forth all understandings between the parties with respect to the potential for a delivery call by either BW-LW Water User's Association or Big Wood Canal Company. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

Effect of Headings

Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretation of the text.

Effective Date of This Agreement

TBD

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Travis L. Thompson, #6168
Michael A. Short, #10554
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Attorneys for Petitioner South Valley Ground Water District and Galena Ground Water District

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SOUTH VALLEY GROUND WATER DISTRICT and GALENA GROUND WATER DISTRICT, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources,	CASE NO. CV07-21-00243 **SECOND DECLARATION OF MICHAEL A. SHORT**

Respondents.)
)
)
)
)

COME NOW,
I, Michael A. Short, hereby declare and state as follows:

1. I am over the age of 18 and state the following based upon my own personal knowledge.
2. I am one of the attorneys representing the South Valley Ground Water District ("SVGWD") in the above captioned matter.
3. On June 23, 2021, SVGWD and Galena Ground Water District ("GGWD") submitted its *Proposed Mitigation Plan* to the Director of Idaho Department of Water Resources in in the Basin 37 administrative proceeding (Docket No. AA-WRA-2021-001) ("Basin 37 Matter"). *See* Ex. T to *Declaration of Michael A. Short* (filed previously with the Court).
4. On June 29, 2021, at 2:39 p.m., without holding a hearing pursuant to the *Mitigation Plan*, the Director of Idaho Department of Water Resources filed a *Final Order Denying Mitigation Plan* in the Basin 37 Matter. A true and correct copy of that order is attached hereto as **Exhibit A**.
5. On June 28, 2021, SVGWD and GGWD submitted its *Petition to Stay Curtailment/Request for Expedited Decision/Request for Hearing on Proposed Mitigation Plan* in the Basin 37 Matter. *See* Ex. Y to *Declaration of Michael A. Short* (filed previously with the Court).
6. On June 29, 2021, at 2:39 p.m., the Director of Idaho Department of Water Resources emailed a *Final Order Denying Petition to Stay Curtailment/Granting Request for Expedited Decision/Granting Request for Hearing on Proposed Mitigation Plan* in the Basin 37 Matter. A true and correct copy of that order is attached hereto as **Exhibit B**.

7. The Director did not follow the required procedures for a mitigation plan set forth in Rule 43 of the Department's Conjunctive Management Rules, *see* IDAPA 37.03.11.43, in his consideration and denial of the Petitioners' *Proposed Mitigation Plan*.
8. The Director denied the Petitioners' *Proposed Mitigation Plan* without first holding a hearing on the plan.[1]
9. The Director denied the petition to stay the curtailment of Petitioners' water rights, which is set to begin at 12:01 a.m. on July 1, 2021.
10. There is no administrative remedy at this point to stop the curtailment of Petitioners' member's groundwater rights.
11. On June 29, 2021, I received communications indicating that the Idaho Department of Water Resources intends to send ten (10) people to the Bellevue Triangle area of Basin 37 on the morning of Thursday, July 1, 2021 to check that those water users curtailed by the Director have shut-off their pumps. The risk of harm to Petitioners' is immediate and manifest. The Directors' curtailment order will be enforced the morning of July 1, 2021, and Petitioners will be irreparably, and immediately harmed without action from this Court.

DATED this 29th day of June, 2021.

BARKER ROSHOLT & SIMPSON LLP

/S/ MICHAEL A. SHORT
Michael A. Short

Attorneys for South Valley Ground Water District

[1] The Director granted the request for a hearing on the mitigation plan pursuant to I.C. § 42-1701A(3) but has only indicated that the "Department will work with the parties in this administrative proceeding to expeditiously schedule a hearing." *See* Ex. B *(Order Denying Petition to Stay Curtailment*), at 2. Any hearing at this point would be futile since the mitigation plan has already been denied by a final order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2021, the foregoing was filed, served, and copied as shown below.

IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail iCourt
Gary L. Spackman IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098	☐ ☐ ☒	U. S. Mail Overnight Mail iCourt
James R. Laski Heather O'Leary LAWSON LASKI CLARK PLLC PO Box 3310 Ketchum, ID 83340	☐ ☐ ☒	U. S. Mail Overnight Mail iCourt
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Sarah A. Klahn SOMACH SIMMONS & DUNN 2033 11th St., #5 Boulder, CO 80302	☐ ☐ ☒	U. S. Mail Overnight Mail iCourt
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☐ U. S. Mail
☐ Overnight Mail
☒ iCourt

/s/ Albert P. Barker
Albert P. Barker