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, v. THE IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, and KARL J. DREHER, in his official capacity as Director of the Idaho Department of Water Resources, Defendants.	Case No. CV-2005-0000600

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I.

ORIENTATION

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James C. Tucker, IDAHO POWER COMPANY, Boise, ID 83702, James S. Lochhead and Adam T. Devoe, BROWNSTEIN HEYATT & FARBER, P.C., Denver, CO 80202, Attorneys for Idaho Power Company.

Daniel V. Steenson, Charles L. Honsinger, S. Bryce Farris, and Jon C. Gould, RINGERT CLARK CHARTERED, Boise, ID 83702, Attorneys for Thousand Springs Water Users Association.

J. Justin May, MAY, SUDWEEKS, & BROWNING, LLP, Boise, ID 83707, Attorneys for Rangen, Inc.

Lawrence G. Wasden, Attorney General of Idaho and Clive J. Strong, Phillip J. Rassier, Candice M. McHugh, and Michael C. Orr, Deputy Attorneys General for the State of Idaho, Boise, ID 83720, Attorneys for the Defendants the Idaho Department of Water Resources, an agency of the State of Idaho and Karl J. Dreher, in his official capacity as Director of the Idaho Department of Water Resources.

Jeffrey C. Fereday, Michael C. Creamer, John M. Marshall, Christopher H. Meyer, and Brad V. Sneed, GIVENS PURSLEY LLP, Boise, ID 83701, Attorneys for Idaho Ground Water Appropriators, Inc.

Court: Barry Wood, District Judge, presiding.

Holdings: 1. The Rules of Conjunctive Management of Surface and Ground Water Resources (hereinafter "CMR's") are constitutionally deficient for failure to

integrate the required legal tenets and procedures regarding burdens of proof and evidentiary standards.

2. The Director acted outside his legal authority in adopting CMR's which are not in accord with Idaho's version of the prior appropriation doctrine.

3. The factors and policies contained in the CMR's and to be applied by the Director can be construed consistent with the prior appropriation doctrine.

4. The CMR's are facially unconstitutional due to the omission of necessary components of the prior appropriation doctrine, including: presumption of injury, burden of proof, objective standards for review, and failure to give due effect to the partial decree for a senior water right.

5. The CMR's exclusion of domestic water rights from ground water sources is both facially unconstitutional and is in violation of Idaho Code §§ 42-602, 42-603, and 42-607.

6. The "reasonable carryover" provision of the CMR's is unconstitutional, both facially and as threatened to be applied.

7. The CMR's disparate treatment of the holders of junior ground water rights and junior surface water does not violate Equal Protection; serves a legitimate state interest; and is rationally related to that interest.

8. Under the CMR's, the untimely administration of water rights, and in particular irrigation rights, constitutes an unconstitutional taking without just compensation.

II.

BRIEF FACTUAL BACKGROUND

This lawsuit was filed August 15, 2005, by the American Falls Reservoir District #2 and four other irrigation districts and canal company entities (hereinafter "Plaintiffs") petitioning the Court for declaratory judgment pursuant to I.C. § 67-5278 and § 10-1201 *et. seq.* regarding the validity and constitutionality of the Rules of Conjunctive Management of Surface and Ground

Water Resources (hereinafter "the CMR's") of the Idaho Department of Water Resources (hereinafter "IDWR"). The CMR's were promulgated in 1994 and appear as IDAPA 37.03.11.

Plaintiffs are holders of various natural flow and storage water rights dating from the early 1900's. These rights allow the plaintiffs to divert water from the Snake River in Idaho. By way of paragraph 10 the Complaint, the Plaintiffs allege ownership of and assert the following rights are relevant to this suit:

A. American Falls Reservoir District #2 Water Right No. 01-00006 in the amount of 1,700 cfs [cubic feet per second], with a priority date of March 20, 1921.
B. American Falls Reservoir District #2 holds a contractual right in the amount of 393,550 acre-feet of storage space in American Falls Reservoir.
C. The A&B Irrigation District Water Right No. 01-00014 in the amount of 269 cfs, with a priority date of April 1, 1939.
D. A&B Irrigation District holds contractual rights in the amounts of 46,826 acre-feet of storage space in American Falls reservoir and 90,800 acre-feet of storage space in Palisades Reservoir, for a total of 137,626 acre-feet of storage space.
E. The Burley Irrigation District holds the following surface water rights:
    (1) Water Right No. 01-00007 in the amount of 163.4 cfs, with a priority date of April 1, 1939;
    (2) Water Right No. 01-00211B in the amount of 655.88 cfs, with a priority date of March 26, 1903;
    (3) Water Right No. 01-00214B in the amount of 380 cfs, with a priority date of August 6, 1908.
F. The Burley Irrigation District holds contractual rights in the amounts of 31,892 acre-feet of storage space in Lake Walcott, 155,395 acre-feet of storage space in American Falls Reservoir, and 39,200 acre-feet of storage space in Palisades Reservoir, for a total of 226,487 acre-feet of storage space.
G. The Minidoka Irrigation District, or Reclamation on Minidoka's behalf, holds the following natural flow water rights:
    (1) Water Right No. 01-00008 in the amount of 266.6 cfs, with a priority date of April 1, 1939.
    (2) Water Right No. 01-10187 in the amount of 1,070.12 cfs with a priority date of March 26, 1926.
    (3) Water Right No. 01-10188 in the amount of 620 cfs with a priority date of August 6, 1908.

(4) Water Right No. 01-10192 in the amount of 1,550 cfs with a priority date of August 23, 1906.
(5) Water Right No. 01-10193 in the amount of 1,550 cfs with a priority date of August 23, 1906.
(6) Water Right No. 01-10194 in the amount of 550.56 cfs with a priority date of December 28, 1909.

H. The Minidoka Irrigation District holds contractual rights in the amounts of 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, and 35,000 acre-feet of storage space in Palisades Reservoir, for a total of 366,554 acre-feet of storage space.

I. The Twin Falls Canal Company holds the following surface water rights;
(1) Water Right No. 01-00004 in the amount of 600 cfs, with a priority date of December 22, 1915;
(2) Water Right No. 01-00010 in the amount of 180 cfs, with a priority date of April 1, 1939;
(3) Water Right No. 01-00209 in the amount of 3,000 cfs with a priority date of October 11, 1900.

J. The Twin Falls Canal Company holds contractual rights in the amounts of 97,183 acre-feet of storage space in Jackson Lake and 148,747 acre-feet of storage space in American Falls Reservoir, for a total of 245,930 acre-feet of storage space.

Pl.'s Compl. ¶ 10 (Aug. 15, 2005) (footnote omitted). In response to this allegation, IDWR responds:

> State Defendants admit the allegations in Paragraph 10 subparts A through J to Plaintiffs' Complaint in so far as the Plaintiffs have claims pending in the Snake River Basin Adjudication for the elements as stated and the contractual rights described but assert that the claims and contracts speak for themselves and therefore deny any allegations inconsistent with the claims or contracts. However, recommendations and determination of specific elements for each of these water rights are pending in the Snake River Basin Adjudication so no final determination of the Parties' interests thereto have been made. Regarding footnote to Paragraph 10 of Plaintiffs' Complaint, State Defendants admit the allegations therein but state that the ownership interest held by Plaintiffs in the storage water held in the reservoirs is pending before the Idaho Supreme Court in United States v. Pioneer Irr. Dist., Docket No. 31790, appeal filed April 14, 2005.

Def.'s Ans. ¶ 10 (Sept. 7, 2005).

In the non-irrigation season and during the irrigation season when spring flood runoff exceeds diversions, the surface water flows of the upper Snake River are stored in various reservoirs. Part of these flows are diverted to storage space in United States Bureau of Reclamation reservoirs to which the Plaintiffs have a right due to spaceholder contracts with the United States. This stored water is claimed to be owned and controlled by each Plaintiff for its use and for the use of its landowners or shareholders.

Depending upon the given location, the ground water in the Eastern Snake River Plain Aquifer (ESPA) is hydraulically connected in varying degrees to the Snake River and tributary surface water sources. One of the locations where a direct hydraulic connection exists is in the American Falls area. Also, according to IDAPA 37.03.11.050.01a., this hydraulic connection goes both ways -- "the Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River," i.e., the aquifer feeds the river and the river feeds the aquifer.

Following a short water year in 2004, and on January 14, 2005, Plaintiffs initiated a delivery call which requested administration of junior ground water rights in Water District No. 120 to allow water to be delivered to them pursuant to their senior water rights. This delivery call was made pursuant to the CMR's, and in particular Rules 30 and 40. In response to this request, the Director claims to have applied the CMR's.

On August 15, 2005, and after having not received a satisfactory response to the requested administration, this current case was filed. The prayer in Plaintiffs' complaint seeks the following:

> WHEREFORE, plaintiffs pray for relief as follows:
>
> 1. For an Order of this Court finding that application of the Rules, as adopted, does impair, or threatens to interfere with or impair, the rights of plaintiffs.

2. For an Order of this Court declaring that the procedures and requirements of the conjunctive management rules are void on their face because they are unconstitutional, contrary to law, and violate plaintiffs' water rights and constitutional rights and defendants' duties.

3. For an Order of this Court declaring that defendants' application of the conjunctive management rules to plaintiffs' requests for delivery of water is unconstitutional, contrary to law, and violates plaintiffs' water rights and constitutional rights and defendants' duties.

4. For an Order awarding costs and attorney fees to the plaintiffs.

5. For such other and further relief as this Court deems just and equitable.

Pl.'s Compl. p. 11 (Aug. 15, 2005).

As of this writing in May of 2006, the Director has not yet entered a "final order," and Plaintiffs claim the process provided by the CMR's has not allowed for either correct or timely administration of their water rights for irrigation. This Court understands IDWR disputes that it has not administered some water pursuant to the call. See Pl.'s Compl., Ex. B, Order Regarding IGWA Replacement Water Plan; Ex. C, Order Approving IGWA's Replacement Plan for 2005; and Ex. D, Supplemental Order Amending Replacement Water Requirements (Aug. 15, 2005).

There have also been numerous parties who have intervened in this lawsuit. The Thousand Springs Water Users Association (hereinafter "TSWUA") is a non-profit corporation that represents its members in restoring water supplies in the Thousand Springs and hydraulically connected ESPA. TSWUA's members are organizations and individuals that own water rights that emanate from the northern rim of the Snake River Canyon down river from Milner Dam. Collectively, its members own over 3,900 cfs of water rights. Several of TSWUA's members have sought administration of their water rights. In these cases, the Director applied the CMR's.

Rangen, Inc. (hereinafter "Rangen") holds water rights, whose source is in the Curran Tunnel, a spring that is part of the Thousand Springs complex. One of the locations that has a

direct hydraulic connection between the ESPA and the Snake River and its tributaries is in the Thousand Springs complex. Rangen holds three water rights which are relevant to this matter: 36-1501, 36-2551, and 36-7694. On September 23, 2003 and on October 6, 2003, Rangen requested the Director to administer water rights in accordance with priority.

Idaho Power Company (hereinafter "Idaho Power") alleges that it holds various water rights including:

A. Water Right No. 36-2704 in the amount of 120 cfs, with a priority date of 01/31/1966;

B. Water Right No. 36-2082 in the amount of 5 cfs, with a priority date of 12/10/1948;

C. Water Right No. 36-2710 in the amount of 0.1 cfs, with a priority date of 07/24/1940;

D. Water Right No. 36-2037 in the amount of 0.3 cfs, with a priority date of 10/29/1921;

E. Water Right No. 36-15221 in the amount of 0.04 cfs, with a priority date of 03/03/1982;

F. Water Right No. 36-15357 in the amount of 0.11 cfs, with a priority date of 09/30/1936;

G. Water Right No. 36-15358 in the amount of 0.03 cfs, with a priority date of 06/20/1924;

H. Water Right No. 36-7104 in the amount of 0.3 cfs, with a priority date of 12/10/1969;

I. Water Right No. 36-7831 in the amount of 25 cfs, with a priority date of 11/24/1978;

J. Water Right No. 36-7066 in the amount of 10 cfs, with a priority date of 01/05/1970;

K. Water Right No. 36-2478 in the amount of 14.2 cfs, with a priority date of 10/18/2001;

L. Water Right No. 36-2478 in the amount of 3.21 cfs, with a priority date of 10/21/1939;

M. Water Right No. 36-15388 in the amount of 0.15 cfs, with a priority date of 12/10/1949; and

N. Water Right No. 36-7162 in the amount of 8.62 cfs, with a priority date of 03/04/1971.

Idaho Power Mot. to Intervene, at ¶ 2 (Oct. 7, 2005).

Clear Springs Foods, Inc. (hereinafter "Clear Springs") holds several water rights located within Water District No. 130, all of which have been decreed by the SRBA Court. On May 2, 2005, Clear Springs requested the Director to administer and deliver their water rights. The Director deemed this request to be a delivery call, and two months later issued an order, pursuant to the CMR's.

The Idaho Ground Water Appropriators, Inc. (hereinafter "IGWA") have also intervened in this action, but have done so as Defendants to this action, seeking to defend the constitutionality of the CMR's. IGWA is a non-profit corporation in Idaho that is organized to promote and represent the interests of Idaho ground water users. Its members include six ground water districts, one irrigation district, cities, industries, and municipal water providers whose members rely on ground water. Its members hold water rights authorizing diversion from wells within the ESPA. Many of these ground water rights are junior to the Plaintiffs' surface water rights discussed above.

III.

BRIEF PROCEDURAL HISTORY

On August 15, 2005, the Plaintiffs in this case filed their Complaint. On September 7, 2005, the Defendants filed their Answer. On September 7, 2005, the Defendants filed a Motion to Dismiss, and lodged a Memorandum in Support of the Motion to Dismiss. On October 11, 2005, the Plaintiffs lodged a Memorandum in Opposition to Defendant's Motion to Dismiss. On October 17, 2005, the Defendants lodged a Reply Memorandum in Support of their Motion to Dismiss. On October 18, 2005, this Court held a hearing on Defendant's Motion to Dismiss. On November 4, 2005, this Court filed an Order denying the Defendant's Motion to Dismiss.

On October 14, 2005, the Plaintiffs filed a Motion for Summary Judgment, and lodged a Memorandum in Support of their Motion for Summary Judgment. On November 1, 2005, TSWUA lodged a Memorandum in Support of Plaintiffs' Motion for Summary Judgment. On November 1, 2005, Clear Springs filed a Motion for Summary Judgment, and lodged a Memorandum in Support of their Motion for Summary Judgment. On November 2, 2005, Rangen lodged a Memorandum in Support of their own Motion for Summary Judgment, which was filed November 3, 2005.

On December 12, 2005, IDWR lodged a Memorandum in Response to Plaintiffs' Motions for Summary Judgment. On that same day, the City of Pocatello lodged a Consolidated Response to the Summary Judgment Motions, and the IGWA lodged a Memorandum in Response to Plaintiffs' Motions for Summary Judgment.

On December 16, 2005, this Court filed its Notice of Clarification of Oral Order of November 29, 2005, clarifying its position regarding facial versus as applied analysis and use of underlying facts in the case.

On December 21, 2005, Plaintiffs lodged their Consolidated Reply Memorandum in Support of Summary Judgment. That same day, TSWUA lodged its own Reply Brief in Support of Motion for Summary Judgment, and Idaho Power lodged its Consolidated Reply Brief. On December 22, 2005, Rangen lodged its Consolidated Reply to Responses to Motions for Summary Judgment.

On March 13, 2006, IGWA lodged a Sur-Reply on Summary Judgment. On March 14, 2006, the City of Pocatello lodged a Consolidated Supplemental Response to Summary Judgment, and IDWR lodged its Sur-Reply in Opposition to Motions for Summary Judgment. On March 28, 2006, the Plaintiffs lodged their Joint Final Reply in Support of Motions for Summary Judgment.

On April 11, 2006, a hearing was held on the Motions for Summary Judgment.

IV.

MATTER DEEMED FULLY SUBMITTED FOR FINAL DECISION

Oral arguments on the Plaintiffs' Motion for Summary Judgment were heard April 11, 2006. At the conclusion of the hearing no party requested additional briefing and the Court requested none. The Court therefore deemed this matter fully submitted for decision on the next business day, or April 12, 2006.

On Friday, May 19, 2006, this Court received information of an indirect potential conflict of interest in the nature of an "appearance of impropriety." As soon as the Court received this information, the Court contacted Mr. Bob Hamlin of the Idaho Judicial Council, and then wrote a letter to each of the parties advising them of the issue, and asking for direction as to how to best proceed. The Court also informed each party that the Court would not work on the case further

and that the matter will not be deemed fully submitted for decision until the resolution of this "appearance" matter.

On May 26, 2006, the Court scheduled a telephonic conference hearing for June 1, 2006, to resolve the above issues. A hearing was held on June 1. Following the hearing, the Court declined to find an appearance of impropriety which would warrant a disqualification or recusal. This Court then advised the parties that the Court would again consider the matter fully submitted for decision. The Court therefore deemed this matter fully submitted for decision on the next business day, or June 2, 2006.

V.

THIS COURT'S JURISDICTION IS PROPER

1. Declaratory Judgment Action.

This Court has jurisdiction to presently hear this case. Idaho Code § 67-5278 provides:

> **Declaratory judgment on validity or applicability of rules –**
>
> (1) The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, **if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.**[1]
>
> (2) The agency shall be made a party to the action.
>
> (3) **A declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass upon the validity or applicability of the rule in question.**

Idaho Code § 67-5278 (WEST 2006) (emphasis mine).

[1] While the administrative action remains incomplete, the "threatened application" is well established by the various orders issued by the Director in response to Plaintiffs' call of January 14, 2005. See Pl.'s Compl. Ex. B, C, and D.

2. Idaho Code §§ 10-1201, *et. seq.*

These code sections also grant this Court jurisdiction to hear the issues presented.

3. Exhaustion of Administrative Remedies.

The Idaho Supreme Court recently stated in Regan v. Kootenai County, 140 Idaho 721, 100 P.3d 615 (Idaho 2004):

> In Idaho, as a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. This Court has recognized exceptions to that rule in two instances: (a) when the interests of justice so require; and (b) when the agency has acted outside its authority...

Regan, 140 Idaho at 725 (internal citations omitted).

As to the first exception, the Plaintiffs submitted their delivery call to the Director in January of 2005, well before the 2005 irrigation season. It is now May of 2006, the start of the second irrigation season since the delivery call was made, and the administrative action as to Plaintiffs' water rights is incomplete.[2] According to the Director, the irrigation season is November 1 of a given year through October 31 of the next.

As to the second exception, whether the agency acted outside its authority, this Court finds that it has. In particular, the legislature authorized the Director to adopt Rules in accordance with the prior appropriation doctrine. Idaho Code § 42-603 (WEST 2006). To the extent the CMR's do not follow Idaho's version of the prior appropriation doctrine, the Director has acted outside his authority and the CMR's are invalid. This is a basis independent of any

[2] The Court has been led to believe that the parties have recently agreed by stipulation to delay the administrative resolution of Plaintiffs' water rights, pending this Court's decision in this matter. However, this stipulation was not entered into or agreed to until the Spring of 2006, well after a year had gone by without the administration being completed. The Court is unaware of the specifics of this agreement.

constitutional challenge, facial or as applied. This will be discussed in far greater detail later in this decision.

4. Facial Challenge.

This Court re-iterates portions of its ruling of November 4, 2005, on IDWR's Motion to Dismiss. This Court stated:

> 13. With respect to facial challenges, IDWR concedes that this Court presently has subject matter jurisdiction but in the exercise of discretion, this Court should defer a determination on that matter until IDWR has completed the ongoing contested case.
>
> 14. The senior surface entities assert that in response to their January 2005 delivery call, the Director adopted a novel, but unconstitutional, theory of water administration: namely a *de facto* re-adjudication of certain elements of the water rights to include the use of an injury analysis and a public interest component of economic optimization -- coupled with -- methods of conventional water delivery administration. The senior surface entities have dubbed this process 'Economic Administrative Adjudication' under/pursuant to the CM Rules.[3]
>
> 15. Simply stated, the surface entities assert that certain of the CM Rules are unconstitutional on their face.
>
> ***
>
> As to the facial Constitutional challenges, IDWR recognizes and concedes this Court has jurisdiction, rather it is urged that this Court exercise its discretion and defer a determination under the doctrine of primary jurisdiction.
>
> ***
>
> With respect to the 'facial Constitutional challenges' the doctrine of Primary Jurisdiction simply is not applicable to this case. It is freely admitted that IDWR does not have jurisdiction over these questions and will never decide these questions.

[3] Of course, at the time this Court wrote this in November of 2005, the Director had scheduled a trial for March 6, 2006. As of this writing, the trial has not occurred.

> To the contrary, and in the exercise of discretion, this Court finds little reason to delay an inevitable Constitutional challenge to the Conjunctive Management Rules. The logic and rationale for delay, under the circumstances presented, make little sense to this Court for several reasons. One, this is not the only case pending before this Court where the CM Rules are implicated and their application contested. Now that the constitutionality of the rules has been raised, it makes judicial sense to resolve the issue forthwith. Second, given the time sensitive nature pertaining to administration of water rights, it makes little sense to further delay resolution of the issue.

Order on IDWR's Mot. Dis., at 5-8 (Nov. 4, 2005) (original footnotes omitted, footnote added).

5. As Applied Challenge

In its initial ruling of November 4, 2005, this Court stated in part:

> 12. With respect to as applied challenges, IDWR's position is that IDWR has not completed the contested case proceedings and as such, there has been a failure to exhaust the administrative remedies which IDWR argues is a subject matter jurisdiction requirement for this Court to proceed.
>
> ***
>
> As to the 'as applied challenge,' and the assertion that this Court lacks subject matter jurisdiction based upon the general rules of Exhaustion of Administrative Remedies, it is a correct factual statement that the plaintiffs have not yet exhausted those remedies.
>
> The Idaho Supreme court in Regan v. Kootenai County, 140 Idaho (2004) [sic] recognizes two exceptions to the general exhaustion requirement. Those are: (1) when the interests of justice so and, (2) when the agency acted outside its authority. [Sic].
>
> As to the 'as applied' question, the Court decides the Motion to Dismiss presently before it without resort to and in fact declines to rule upon the exhaustion question. The parties are free to take whatever actions they deem necessary in the pending administrative proceeding. It simply is not necessary to a resolution of the primary issue before this Court. As such, the Court simply declines to decide this issue.

Order on IDWR's Mot Dis. at 5-6 (Nov. 4, 2005).

This Court then issued a Notice of Clarification to clarify its intent on what would be heard on the "as applied" matter. This Court incorporates that Order herein by reference. This Order specifically provided that this Court would consider the Director's threatened application of the CMR's. See Notice of Order of Clarification of Oral Order of November 29, 2005, (Dec. 16, 2005).

Suffice it to say, this Court has jurisdiction to hear the issues raised by the Plaintiffs' Complaint.

VI.

OVERVIEW OF THE CHALLENGED RULES

A true and complete copy of the CMR's is attached to this Order as Exhibit 1, and are, by this reference, incorporated herein. According to Plaintiffs' Memorandum lodged in support of Summary Judgment on October 14, 2005, there are various CMR's that are being challenged in this lawsuit. The specifically enumerated CMR's which are listed in the Plaintiff's brief are:

Rule 10.07: Full Economic Development of Underground Water Resources.

Rule 10.14: Material Injury.

Rule 10.15: Mitigation Plan.

Rule 20.01: Distribution of Water Among the Holders of Senior and Junior-Priority Rights.

Rule 20.03: Reasonable Use of Surface and Ground Water.

Rule 20.04: Delivery Calls.

Rule 20.05: Exercise of Water Rights.

Rule 20.07: Sequence of Actions for Responding to Delivery Calls.

Rule 20.11: Domestic and Stock Watering Ground Water Rights Exempt.

Rule 30: Procedure Responding to Calls Outside Water Districts

Rule 40: Procedure Responding to Calls Inside Water Districts

Rule 41: Procedure Responding to Calls Inside Ground Water Management Area

Rule 42: Material Injury/Reasonableness of Water Diversions

Rule 43: Mitigation Plans

Pl.'s Memo. in Support of S.J. 2 (Oct. 14, 2005).

VII.

ISSUES AS STATED BY THE PLAINTIFFS

For the sake of clarity, the Plaintiffs' briefing essentially states and organizes the issues in this fashion:

Issue #1: Whether the Department's Conjunctive Management Rules violate Idaho's Constitution and Water Distribution Statutes.

A. **Does administration pursuant to Department's Rules only occur when a senior water right holder files a "delivery call" and the Director determines the senior is suffering "material injury" by reason of junior water right(s)?**

B. **Do the Rules misapply other constitutional provisions and unrelated statutes to limit senior water rights and prevent priority administration?**

1. Does Idaho Constitution, Article XV, § 5 only apply within an irrigation entity's project, and not between different water right holders?
2. Does Article XV, § 7 limit or condition senior water rights?
3. Do the Rules attempt to incorporate aspects of Idaho's Ground Water Act to limit senior water rights contrary to Idaho's Constitution, Statutes, and prior case law?
4. Do the Rules misapply Schodde v. Twin Falls Land & Water Co. in an effort to limit senior water rights?

C. Do the Rules impermissibly exempt categories of junior ground water rights from administration?

D. Do the Rules allow the Director to force seniors to accept "mitigation" in lieu of required administration of junior ground water rights?

Issue # 2: Whether the definition and overall concept of "material injury" violates Idaho's Constitution and Statutory provisions.

Issue #3: Whether the Rules' concept of "reasonable carryover" injures vested senior storage water rights and violates Idaho's Constitution and water distribution statutes.

Issue # 4: Whether the Rules permit the Director to ignore the elements of decreed and licensed water rights and "re-adjudicate" those rights for purposes of administration.

Issue # 5: Whether the Rules discriminate against junior surface water users in favor of junior ground water users.

Issue # 6: Whether the replacement water plan constitutes unlawful rulemaking in violation of Idaho's APA.

VIII.

APPLICABLE STANDARDS OF REVIEW

1. Summary Judgment

Summary judgment is proper 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 party is entitled to a judgment as a matter of law." Read v. Harvey, 141 Idaho 497, 499, 112 P.3d 785, 787 (Idaho 2005); citing Idaho R. Civ. P. 56(c). However, when an action is to be tried before the court without a jury, as in this case, "the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from *uncontroverted* evidentiary fact." Read, 141 Idaho at 499 (emphasis in original); citing Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (Idaho 1991). Any disputed facts must be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Read, 141 Idaho at 499.

Generally, a motion for summary judgment requires a court to hold that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Barlow's Inc. v. Bannock Cleaning Corp., 103 Idaho 310, 647 P.2d 766, (Idaho App. 1982).

> However, if the court determines, after a hearing, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. Thus, in appropriate circumstances, the court is authorized to enter summary judgment in favor of non-moving parties.

Barlow's Inc., 103 Idaho at 312. If the evidence shows no issue of material fact, what remains is a pure question of law. Spur Products Corp. v. Stoel Rives L.L.P., 142 Idaho 41, 122 P.3d 300, 303 (Idaho 2005).

Summary judgment should be granted if the non-moving party fails to make a showing sufficient to establish an essential element to the party's case. Foster v. Traul, 141 Idaho 890, 892, 120 P.3d 278, 280 (Idaho 2005); citing McColm-Traska v. Baker, 139 Idaho 948, 950-51, 88 P.3d 767, 769-70 (Idaho 2004).

2. Constitutionality of Agency Rules – Facial v. As Applied Challenges

Both parties have made much of the legal standards surrounding this Court's ability to interpret the constitutionality of the CMR's. The Plaintiffs argue that an "as applied" standard is the proper standard in this case, and the Court should consider all the facts leading up to this suit, including past decrees and orders issued by the Director and IDWR. The Plaintiffs further argue that a water right is a fundamental right, and as such, any regulation which seeks to limit the right, is subject to the standard of review of "strict scrutiny."

Conversely, the Defendants argue that all factual evidence must be excluded from this decision, and the Court should only look to the face of the CMR's, the Constitution and the statutes. The Defendants further argue that this is a strict facial challenge to the CMR's, and as such, if they can point to any set of circumstances where the CMR's could be construed as constitutional, this Court must deny the Plaintiffs' request to declare the CMR's unconstitutional. In support of this argument, the Defendants cite to numerous Idaho cases which state that a constitutional challenge to a statute or a rule must be determined on either a facial or as applied basis, but cannot be based on a hybrid between the two. See State v. Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (Idaho 2003). Finally, the Defendants argue that a water right is not a fundamental right, and therefore, the strict scrutiny standard would not apply. The Court will take each of these arguments in turn.

Courts have the responsibility to construe legislative language in order to determine the law. Mason v. Donnelly Club, 135 Idaho 581, 583, 21 P.3d 903, 905 (Idaho 2001). This responsibility extends to review of administrative rules, and it is the court's responsibility to determine the validity of a rule. Id.

Challenged regulations are presumptively constitutional, and the heavy burden of establishing their unconstitutionality rests upon the party challenging the regulation. Matter of Wilson, 128 Idaho 161, 167, 911 P.2d 754, 760 (Idaho 1996); citing Rhodes v. Industrial Comm., 125 Idaho 139, 142, 868 P.2d 467, 470 (Idaho 1993).

A statute or regulation may be challenged as being unconstitutional on its face or as applied to the challengers. Korsen, 138 Idaho at 712. A facial challenge requires the challenger

to establish that no set of circumstances exist under which the rule would be valid.[4] Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 545, 96 P.3d 637, 646 (Idaho 2004); citing United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987). However, to succeed on an "as applied" challenge, the complainant must show that the rule, as applied to the specific complainant, fails to meet constitutional scrutiny (in other words, that it is unconstitutional in this instance, but not necessarily in all instances). Korsen, 138 Idaho at 712. Generally, a facial challenge is mutually exclusive from an as applied challenge. Id.

In Korsen, the Idaho Supreme Court held that it was improper for the district court to conclude that a statute was invalid on its face, *only* as it applied to public property, because a facial challenge requires the statute to be impermissible in *all* of its applications. Id. However, I.C. § 67-5258 provides a standard of "application or threatened application" when determining if a declaratory judgment is an available remedy.

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.

I.C. § 67-5258. This statute clearly contemplates the use of a factual history of a case when determining a rule's validity. In this case, this would include the Director's Orders entered in the Spring of 2005 pursuant to the Plaintiffs' delivery call. See Pl.'s Compl. Ex. B, C, and D.

In Moon, the Idaho Supreme Court applied the test for facial constitutionality, because there were no facts presented, and therefore, an "as applied" challenge was not available to the plaintiffs. Moon, 140 Idaho at 545. However, the Court did state that "Plaintiffs challenging the constitutionality of a statute are required to provide 'some factual foundation of record' that

[4] The Plaintiffs assert that this standard only applies to "void for vagueness" challenges. While it is true that the vast majority of decisions that have cited this test were void for vagueness challenges, Moon and others were not such challenges. Therefore, this argument warrants little discussion.

contravenes the legislative findings." Id.; citing O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 258, 51 S.Ct. 130, 132, 75 L.Ed.324, 328 (1931).

While this Court recognizes that generally parties must choose to attack a rule's constitutionality either as a facial challenge, or as an "as applied" challenge, this case simply is not conducive to such a rigid application. In one respect of this case, the Plaintiffs have technically exhausted all possible administrative remedies available, because the Director has stated he has no intention of ruling on the constitutionality of the CMR's, nor does he have the jurisdiction to do so. Therefore, the remedy sought by the Plaintiffs cannot be achieved through administrative avenues. However, the administrative proceedings have not been fully completed – specifically, the trial scheduled for March of 2006 was continued and the Director has not finally determined if the Plaintiffs are entitled to administration of their water rights, and if so, to what degree or extent. Therefore, a strict "as applied" analysis is not technically proper. However, the procedures that are being challenged have been used against the Plaintiffs, so, unlike in Moon, there is a factual basis to determine how the Director employs the CMR's, and how they operate, and therefore being restricted to a strict "facial" analysis is also not proper. There are, however, certain aspects of this case which do fit neatly into a facial challenge analysis and those will be decided on that basis.

In light of the confusion surrounding this case, its unique circumstances, and the aforementioned case law, this Court issued a Notice of Clarification of Oral Order of November 29, 2005, filed December 16, 2005.

> 2. Suffice it to say, with brevity, this Court ruled it would hear the Plaintiff's constitutional 'facial challenges' to the Conjunctive Management Rules.
>
> As to the 'applied challenges' this Court ruled that the Administrative proceeding instituted January 14, 2005, has not yet been concluded; that

there were two recognized exceptions to the general exhaustion requirement; and the Court at that time declined to rule on the exhaustion question or either of the stated exceptions to the exhaustion requirement. The parties are free to pursue the pending administration as they see fit.

***

2. As stated in its November 4, 2005, written decision, this Court declining to presently address the 'as applied' challenge is primarily premised on the fact that the ultimate resolution of that contested case has not yet occurred. In fact, the written decision noted that the hearing (trial) was now scheduled for March 6, 2006. Since the ultimate result is unknown, this 'as applied' challenge is not presently subject to review.

***

3. However, even though the ultimate result of the Administrative proceeding is presently unknown, what has occurred to date within the Administrative proceedings are not in the hypothetical, rather are factual, and are subject to being placed in the record before this Court. See I.C. 67-5278(1).

***

6. So as to try to avoid any further confusion, the 'as applied' matter means the ultimate future result following the March 6, 2006 hearing, i.e., the end result of the pending Administrative proceeding.

7. The 'as applied' ruling does not mean that a party in the present proceedings is precluded from referring to the actual procedural history of the contested administrative case to date or other records and files and orders of IDWR (in this case or any other) to try to demonstrate why a particular rule or part of a rule is Constitutionally flawed.

8. As such, other rules, orders, proceedings, cases, et cetera, within/involving IDWR may be applicable as well. The Court declines IDWR's request in its *Memorandum* lodged December 6, 2005 to strike entire affidavits, etc. If IDWR or anyone else has a particularized objection to some item, such a motion can be made.

9. A good deal of Plaintiffs' facial constitutional challenges are premised upon procedures employed, or to be employed, by the Director and the Department via the Conjunctive Management Rules. There is no better evidence of such procedures than the actual conduct of IDWR and the Director to date, i.e., an analysis based upon fact versus hypothetical is usually better in making a constitutional evaluation.

Notice of Clarification of Oral Order of Nov. 29, 2005, 2-4 (Dec. 16, 2005).

Ultimately, the Court's resolution to the discussion of whether a facial analysis is to be used or whether an "as applied" analysis is to be used is as stated in the December 16, 2005, Order, quoted above. Consistent with that Order, this Court will apply both. This Court looks at the CMR's and determines whether the actions taken by the Director and the IDWR, pursuant to the CMR's is unconstitutional in every application, but this Court will also utilize the underlying facts in this case to determine whether the CMR's are invalid, and to illustrate how the CMR's were actually being applied.[5] Of course, the final result of the administrative proceeding is not known and therefore cannot be addressed.

The Plaintiffs have also alleged that because a water right is a fundamental right, strict scrutiny should be applied to this case. In support of this proposition, Plaintiff's cite to Bradbury v. Idaho Judicial Council, 136 Idaho 63, 28 P.3d 1006 (Idaho 2001), which states:

> [I]t is a general rule that 'a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case.' However, the general presumption is not always applicable.

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[5] In the analysis section of this Order, this Court will discuss whether the CMR's operate as an unconstitutional taking. However, as an example as to how this facial versus as applied analysis will apply, the following law is relevant:

> In the context of a takings claim, a facial challenge involves a claim that the mere enactment of a statute constitutes a taking and is to be distinguished from an 'as applied' challenge, which involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation. Plaintiffs pursuing a facial challenge must show that the provision is unconstitutional in all its applications, while plaintiffs pursuing an as-applied challenge must show that the provision was applied to them in such a way that deprived them of their property. In the context of facial challenges, the mere enactment of legislation may be sufficient to constitute a taking claim.

26 Am.Jur.2d Eminent Domain, § 11. In this case, the Plaintiffs argue that the CMR's allow the Director to re-adjudicate the previously decreed water rights. If this Court determines that the CMR's do allow such a re-adjudication, this would be constitutionally deficient in any application, regardless of the facts of this case. See State v. Nelson, 131 Idaho 12, 951 P.2d 943 (Idaho 1998). In order to help determine whether the CMR's attempt to give the Director this authority, this Court will look at the facts of this case to determine if the Director did or threaten to do this.

> It has been held in some jurisdictions that when it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, the presumption in favor of the constitutionality of statutes no longer applies, but a contrary presumption arises against the validity of such statute. Similarly, it has been said that the presumption of constitutionality is inapplicable in civil rights cases involving fundamental constitutional rights.

When a statute infringes on a fundamental right or a suspect class, the presumption is that the statute is invalid unless the state can demonstrate the statute is necessary to serve a compelling state interest.

***

Where no fundamental right or suspect classification is involved or **when dealing with legislation involving** social or **economic interests**, courts apply the rational basis test's deferential standard of review. In this context, this Court has stated that:

> 'Substantive due process' means 'that state action which deprives [a person] of life, liberty, **or property** must have a rational basis -- that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.'

***

When a state law is challenged on constitutional grounds it is necessary to determine the nature of the right claimed to be infringed. If it is a fundamental right, strict scrutiny applies -- that is, the presumption in favor of constitutionality is not applicable. The state must show a compelling interest to vindicate the law. If, however, the law does not infringe a fundamental constitutional right, the rational basis test is applicable -- the presumption is then in favor of the state.

Bradbury, 136 Idaho at 68-69 (internal citations omitted) (brackets in original, emphasis mine). The Idaho Supreme Court went on to discuss what constitutes a suspect classification or a fundamental right. A suspect classification is created in the following circumstances: racial

classifications; national origin classifications; alienage classifications; legitimacy classifications; and gender classifications. Id. at 68.

> In the absence of indivious [sic] discrimination, however, a court is not free... to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures... The threshold question, therefore, is whether the ... statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity...

Id.; quoting Parham v. Hughes, 441 U.S. 347, 351-52, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269, 274-75 (1979). A classification based on property rights is not a suspect classification. The Idaho Supreme Court also listed various rights which the Idaho Supreme Court has recognized as being fundamental rights. These rights include: the right to travel interstate; the freedom of association; the right to participate in the electoral process; the right to privacy; and access to courts. Bradbury, 136 Idaho at 69, n. 2. Property rights are not included in this list. Further, the Court states that legislation implicating economic interests, as a water right surely is, is not subject to strict scrutiny. Therefore, but with some reservation, this Court determines that a water right is not a fundamental right,[6] therefore strict scrutiny would not apply in this case, and the usual presumption in favor of the constitutionality of regulations will be applied.

3. Agency Rules Which Exceed statutory Authority

The legal basis for this review is independent and in addition to the constitutional challenge.

The CMR's are agency rules and generally, a party challenging the validity of an agency rule must first exhaust all administrative remedies before filing a complaint in district court. See Asarco, Inc. v. State of Idaho, 138 Idaho 719, 722, 69 P.3d 139, 142 (Idaho 2003). However,

[6] Even though a water right is a "property right," whether a water right is a "fundamental right" is not so easily answered and is fairly debatable, the reason being water that water rights occupy their own Article in the Idaho Constitution.

under the circumstances presented here, it is unnecessary for the Plaintiffs to exhaust all their administrative remedies prior to seeking a declaratory judgment in district court.

As discussed earlier, there are several reasons for this. The first is that the Director does not decide the constitutionality of his own rules.[7]

Secondly, there is an exception for declaratory judgments regarding the validity of agency rules. Id. Idaho Code § 67-5278 states:

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights of the petitioner.
>
> ***
>
> A declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass on the validity or applicability of the rule in question.

I.C. § 67-5278.

The third is that although an agency action will generally have the force and effect of law, in order for the agency action to have the effect and force of law, it must be promulgated according to statutory directives for rulemaking. Asarco, 138 Idaho at 723.

If there is a conflict between a statute and a regulation or rule, the regulation must be set aside to the extent of the conflict. Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 813, 41 P.3d 237, 241 (Idaho 2002). A regulation or rule of an administrative agency will generally be upheld if it is reasonably directed to the accomplishment of the purposes of the statutes under which it is established. Id. A rule or regulation that is not

[7] Even if the Plaintiffs were required to exhaust all their administrative remedies before seeking such a declaratory judgment, the remedy they are seeking, to-wit: a declaration as to the constitutionality of the CMR's, is not available to them through administrative action. This is because the Director has conceded that he has no intention of ever resolving the question of the CMR's constitutionality. Therefore, there is no administrative remedy available that would meet this remedy sought by the Plaintiffs.

within the expression of the statute is in excess of the authority of the agency to promulgate that regulation and must fail. Id.

> In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative powers to modify, alter, enlarge or diminish provisions of a legislative act that is being administered.
>
> The final responsibility for interpretation of the law rests with the courts. **A court must always make an independent determination whether the agency regulation is 'within the scope of the authority conferred,'** and that determination includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute.

Id.; citing Yamaha Corp. of America v. State Board of Equalization, 19 Cal.4th 1, 78 Cal. Rptr.2d 1, 960 P.2d 1031, 1041 (Cal. 1998) (internal citations omitted) (emphasis mine). See also Holly Care Center v. State of Idaho, 110 Idaho 76, 78, 714 P.2d 45, 47 (Idaho 1986) ("[A]dministrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation."); Idaho County Nursing Home v. Idaho Department of Health and Welfare, 120 Idaho 933, 937, 821 P.2d 988 (Idaho 1991).

IX.

CONSTITUTIONAL FRAMEWORK

I. The Framers understood the importance of putting something in the Constitution.

First, it is worth noting that at the time of the Constitutional Convention in Boise, the area was experiencing a drought. Proceedings and Debates of the Constitutional Convention of Idaho 1889 1122-23, 1349 (I.W. Hart ed., Caxton Printers, Ltd. 1912) (hereinafter Proceedings and Debates) (Mr. Coston's remarks).

Second, at the time of the Convention, part of the waters diverted from the Boise River into a large irrigation canal were then used for "manufacturing purposes, in generating electricity, to light this town." Id. at 1125.

Third, various members of the Convention clearly understood the significance of something being placed in the Constitution. This is in part illustrated by the following remarks:

> Mr. BEATTY. Mr. Chairman, **one of my chief objections to incorporating this as a part of the fundamental law is that we do not know just what we want.** I do know that this is a very important question. **I know that the question of appropriation of water is yet in its infancy in Idaho**, and I, for one, scarcely know what we want. **But we are undertaking in the doctrines here incorporated to establish as it were something that will result in a great deal of damage.**

Id. at 1138 (emphasis mine).

> Mr. AINSLIE. But **this is an article of the organic law**.

Id. at 1146 (emphasis mine).

> Mr. AINSLIE. **That would secure all their constitutional rights**; and I move the adoption of it.

Id. at 1161 (emphasis mine).

> Mr. GRAY. **I will ask the gentleman if that is not the law anywhere as it stands**?
>
> Mr. HEYBURN. **It will be the law unless we enact something to change it; it is the law now and I want it to remain the law in the organic law of this territory.**
>
> Mr. GRAY. **Why put it in here then**?
>
> Mr. HEYBURN. The fact that it is the law now does not promise it will be the law after this constitutional convention gets through with its work. **If we say without any qualification that prior appropriation or diversion of water, etc., I presume we will mean just that thing, and we don't want to leave that a thing of construction for the courts. The object of our action here is to establish these fundamental principles of law, and in this bill already we say that prior appropriation shall give a prior right**, and that has been the battle cry of the gentleman from

> Ada throughout the consideration of this section. I simply want this convention to say that the location of a mining claim or of a piece of property, which from the very nature of it contemplates the use of this water, shall be a prior appropriation. That is the object of the section.
>
> Mr. GRAY. **I don't see how we are defending the law.**
>
> Mr. HEYBURN. **It is a declaration of a right.**
>
> Mr. GRAY. **As I said before, we will have this constitution bigger than the Bible before we get through.** It is just and clear, and a principle that has been decided before you and I were born, I expect – not before I was, but before you were – that a man cannot take and hold water without he does it for a useful purpose. He cannot hold it just because he has taken it; that does not give him a right; it does not give the factory a right, and if he is not using it, it must go below to the neighbor. It is not a *property*, it is only a *use*, that we have in this water, and **I do not think we are lumbering up what we call a constitution with all these proceedings over a matter connected with it which should be for the statutes if we desire it at all.**

Id. at 1167-68 (italicized emphasis original, bold emphasis mine).

And lastly,

> Mr. HEYBURN. **I am willing to leave it to the legislature if we do not lock the door against the legislature, because I am satisfied that the legislature would deal with this matter better than this convention could. Its powers are of a rather different character, more in detail. But I do not want to see the door shut, and my object in introducing this section was that the convention's attention should be called to that effect, and the door not entirely shut against the legislature providing for those matters.** I am just as well aware of the possibility of working an injustice in this section, perhaps, as the gentlemen who have so plainly and specifically stated such possibilities. A man might do a great many unjust things if he is clothed with this right, and if the right is absolutely taken away from him he might be deprived of a great many very plain and just rights...

Id. at 1171 (emphasis mine).

Fourth, certainty of interests was on the minds of the members. Examples are:

> [Mr. BEATTY]...

> But the main objection is this; it makes all interests uncertain. I put the question to any of you, who of you would invest your money in establishing any large manufacturing establishment **when you know that the water that you desire to use** in running that establishment **may at any time be taken away from you by either of these two other interests, that is, the agriculturalists, or for domestic use**? For that is what this section means, if it means anything, or else I do not properly construe it...

Proceedings and Debates at 1118 (emphasis mine).

> Mr. McCONNELL. Well, I am opposed to this amendment then, because it strikes out what we have been working to secure. **We have been working to secure a permanent investment to those people who have seen fit to go out on the plains and improve farms. If they have no priority of right after they have gone there and done that work over a manufacturing interest, then there is no security in their going there.** That is the way I would understand it...

Id. at 1332 (emphasis mine).

II. Idaho Constitution: Article XV, § 3.

A principal constitutional provision at issue in the present case is Article XV, § 3. As originally adopted at the time of statehood in 1890, this section provided as follows:

> ARTICLE XV
>
> WATER RIGHTS
>
> SEC. 3: The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same,, those using the water for domestic purposes shall, (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of

> law regulating the taking of private property for public and private use, as referred to in Section 14 of Article I of this constitution.

Id. at 2079-80.

Article XV, § 3 has been amended once, which was in 1927, as proposed by S.L. 1927, p. 591, H.J.R. No. 13, which resolution provided in pertinent part:

> Be It Resolved by the Legislature of the State of Idaho:
>
> Section 1. That the first sentence of Section 3 of Article XV of the Constitution of the State of Idaho be amended to read as follows:
>
> 'Article XV, Section 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the State may regulate and limit the use thereof for power purposes*.'
>
> Sec. 2. The question to be submitted to the electors of the State of Idaho at the next general election in order to determine whether they approve or reject the amendment proposed in Section 1, shall be as follows:
>
> 'Shall Section 3 of Article XV of the State Constitution be so amended as to provide that the State may regulate and limit the use of the unappropriated waters of any natural stream for power purposes?'

1927 Idaho Laws 591-92 (emphasis in original).

The proposed amendment was ratified at the general election in November, 1928, and Article XV, § 3 was so amended to allow the State to regulate and limit the use of the unappropriated waters of any natural stream for power purposes.

III. Principles of Constitutional Interpretation

One issue to address for purposes of examining the prior appropriation doctrine is the proper method of interpreting the Idaho Constitution.

What is the Idaho Constitution? The first step in this analysis is to address the question of "what is the Idaho Constitution?" The Idaho Supreme Court has previously answered that inquiry. In Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 155 P. 680 (Idaho 1916), the Idaho Supreme Court stated:

> What is the Constitution of Idaho, anyway? It is the supreme law of the state formed by the mighty hand of the people themselves, in which certain fixed principles of fundamental law are established. It contains the will of the people, and is the supreme law of the state.

Blackwell Lumber Co., 28 Idaho at 580. The Constitution is the supreme law of the state.[8]

The meaning of the Idaho Constitution does not change over time. A recognition that the Idaho Constitution establishes "certain fixed principles of fundamental law" and is "the supreme law of the state" has a necessary implication. For the Constitution to establish *fixed* principles and for it to be the *supreme law* of the state, its meaning cannot change over time. If courts [or an administrative agency] can re-interpret it to mean something other than originally intended, then its principles are no longer fixed and it is no longer the supreme law of this state. Rather, the courts would become the supreme law of this state. The Idaho Supreme Court acknowledged this principle in Girard v. Diefendorf, 54 Idaho 467, 34 P.2d 48 (Idaho 1934):

> A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. ... The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

Girard, 54 Idaho at 474-75 (internal citations omitted).

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[8] This statement is obviously subject to the provisos of Article I, § 3, that the "Constitution of the United States is the supreme law of the land" and in Article 6, § 2 of the United States Constitution that it, federal laws, and treaties are the supreme law of the land. This case, however, does not concern any conflict between federal law or treaties and state law.

Construing the Idaho Constitution contrary to its meaning when adopted would be **usurping the authority of the people**. The Idaho Constitution provides, "All political power is inherent in the people." Idaho Const. Art. I, § 2. The people of Idaho adopted the Constitution, and it "can be revoked, nullified, or altered only by the authority that made it." Blackwell Lumber Co., 28 Idaho at 580. The people have reserved unto themselves the sole power to amend the Constitution. Idaho Const. Art. XX §§ 1-4. "The court has no more power to amend the Constitution than has the Legislature, and *vice versa*." Straughan v. City of Coeur d'Alene, 53 Idaho 494, 501, 24 P.2d 321, 323 (Idaho 1932) (emphasis in original). A court that "giv[es] to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty..." Girard, 54 Idaho at 474. "If [the Constitution] is to be amended, the amendment should come from the people in the constitutional manner and not by way of judicial construction." Feil v. City of Coeur d'Alene, 23 Idaho 32, 58, 129 P. 643, 652 (Idaho 1912).

Based upon the forgoing the Idaho Constitution must be construed according to the intent of the framers. "In construing the constitution, the primary object is to determine the intent of the framers." Williams v. State Legislature, 111 Idaho 156, 158-59, 722 P.2d 465, 467-68 (Idaho 1986). That principle of construction simply flows from the fact that the Constitution had a fixed meaning when it was drafted by the delegates to the constitutional convention and then adopted by the people. The delegates did not simply choose nice-sounding words and phrases that had no meaning to them. It is obvious from reading the proceedings of their debates that they took their task seriously. The intentions of many of the delegates were expressly stated. In the end, they understood the meaning of the provisions that they drafted, debated, amended,

and ultimately approved. When construing the Constitution, therefore, a court's task is simply to determine what the delegates understood the constitutional provision at issue to mean; i.e. determine the intent of the framers.

The Idaho Supreme Court is the final authority in construing the Idaho Constitution.

IV. Idaho Code § 42-602 and 603 as it relates to the Constitutional interpretation of Article XV, § 3.

Idaho Code § 42-602 reads:

> 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.

Idaho Code § 42-602 (WEST 2006) (emphasis mine).

Idaho Code § 42-603 reads:

> **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.

Idaho Code § 42-603 (WEST 2006) (emphasis mine).

Because this Court is charged with determining the intent of the framers, and because the Director is only authorized to adopt rules for administration which are in accordance with the prior appropriation doctrine, an examination of the adoption of Idaho's version of that doctrine is

necessary. More particularly, a tracing of the events actually serves two (2) primary purposes: the tracing reveals what ended up in the Constitution, and why; the tracing also reveals what did not end up in the Constitution, and why.

V. The Idaho Constitutional Convention and Article XV.

In addition to the above, and because questions of constitutional interpretation are presented, this Court includes certain portions of the proceedings of the Constitutional Convention of Idaho to trace the crafting of section 3; the section in which Idaho's version of the doctrine of prior appropriation became firmly rooted in Idaho's Constitution.

According to I.W. Hart, the Editor and Annotator of the publication of the Proceedings and Debates of the Constitutional Convention of 1889, all of the proceedings of the Convention were reported stenographically, at the time, by a very competent reporter, whose notes were filed with the Secretary of the Territory of Idaho. Proceedings and Debates, Preface at iii.[9]

However, certain records of the Convention were not preserved, namely the works of the respective standing committees which drafted, and then in due course, reported the various constitutional articles out to the whole Convention. According to I.W. Hart, these reports of the various article committees were in printed form with numbered lines, which numbers are frequently referred to in the reported proceedings of the whole Convention. None of these printed forms were preserved, thus in a few instances causing some difficulty in determining the exact places where amendments were offered within the various sections as discussed in the final publication of the proceedings. Id., preface at iv-v.

The actual publications of the Proceedings and Debates of the Constitutional Convention of Idaho, 1889 were ultimately made under authority of the Act of March 10, 1911, enacted to

[9] For purposes of clarity, it is helpful to note that Volume I ends at page 1024, and Volume II begins at 1025.

complete the transcripts of the stenographer's notes. Id., preface at iii; see also, 1911 Idaho Session Laws 686.

The completed publication consists of two volumes edited in 1912 by I.W. Hart, Clerk of the Supreme Court of Idaho, and is entitled Proceedings and Debates of the Constitutional Convention of Idaho, 1889. Proceedings and Debates at title page.

The Convention to draft the Constitution for the State of Idaho was convened July 4, 1889, (day one) in Boise City, Idaho. Id. at 1.

The drafting of the constitutional article on water rights was first assigned to the standing committee on Manufactures, Agriculture and Irrigation, which standing committee submitted its work in the form of a report to the Committee of the Whole Convention, on July 18, 1889, the twelfth day of the Convention. Id. at 52, 68, 182, 201. The Committee relied heavily on the experiences and history of the surrounding states of Utah, Colorado, and California. Id. at 1120-21.

The Committee of the Whole (Convention) first took up Article XV – Water Rights – on July 26, 1889, the nineteenth day of the convention. Id. at 1058, 1115.

Of interest to this Court is the fact that Section 1 and Section 2 of Article XV were read, voted upon and initially adopted with no discussion from the Committee of the Whole. Id. at 1115.[10] Section 1 and 2 of Article XV read as follows:

SECTION 1

> 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.

[10] However, Section 1 and its purpose were subsequently discussed as to whether "vested rights" could be taken. Id. at 1343-48.

Id. at 2079.

SECTION 2

> The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of, and in the manner prescribed by law.

Id.

The section originally numbered Section 4, as reported out from the standing committee, was stricken/deleted in its entirety, and the remainder of the sections (then re-numbered, i.e. 5 became 4, 6 became 5, and 7 became 6) commanded relatively little discussion.[11] See id. at 1176-85.

However, Article XV, Section 3, which contains the prior appropriation doctrine and its parameters, was discussed and debated at length, over several different days[12], and is reported in at least the following locations in Volume II of the Proceedings and Debate of the Constitutional Convention of Idaho, 1889, pages:

1114-1148

1154-1176

1183

1185

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[11] The purpose of sections 1, 5, and 6 was debated and expressed several days later. Id. at 1352.

[12] 1. July 25, 1989, Thursday, was the eighteenth day of the convention and is reported at Volume I, pages 901 through 1024 and Volume II, pages 1025-1058.

2. July 26, 1889, Friday (an apparent typographical error lists this as Saturday on page 1088) was the nineteenth day, and is reported at Volume II, pages 1058-1188.
3. July 27, 1889, Saturday, was the twentieth day, reported at Volume II, pages 1188-1276.
4. July 29, 1889, Monday, was the twenty-first day, reported at Volume II, pages 1276-1407.
5. July 30, 1889, Tuesday, was the twenty-second day, reported at Volume II, beginning on page 1407.
6. August 6, 1889, the twenty-eighth day, was reported at Volume II, beginning on page 2029; the Constitution was signed, page 2041; and the Convention adjourned, *sine die*, at page 2046.

1237-1239

1331-1333

1340-1365

1407.

As noted earlier, the records and papers of the standing committees were not preserved. Id., preface at iv-v. However, by reading the debate as reported in the pages referenced immediately above, this Court has been able to reconstruct Section 3 of Article XV as it was initially reported out from the Standing Committee on Manufactures, Agriculture and Irrigation. When first presented to the Committee of the Whole, Section 3 read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Id. at 1117, 1140, 1141, and 1143.

On July 26, 1889, the first day Article XV was considered by the whole convention, an argument immediately ensued over the preferences contained in the proposed Section 3. It started like this:

> SECTION 3
>
> Section 3 was read, and it is moved and seconded that section 3 be adopted.
>
> Mr. SHOUP. Mr. Chairman, I don't exactly understand that section, and if the chairman of the committee is present I would like to have him explain it. **I understand by the reading of it that agriculture has the preference over mining.**

> Mr. CHANEY. Over manufacturing.
>
> Mr. SHOUP. If any person or company has been using this water for mining, and any person desires to use it for agriculture, they shall have the preference over those using it for mining?
>
> The CHAIR. I don't know that the chairman of the committee is present. **I will say to the gentleman that I was on the committee, and the object of putting in that clause was, that where** water had been used for the three purposes from one ditch, and the **water ran short, the preference should be given first to domestic purposes**, household use, **and next to agricultural purposes, because if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost**. That is the reason why the committee saw fit to state it in that manner.

Id. at 1115 (emphasis mine).

Various amendments to the original version of section 3 were proposed and considered by the Committee of the Whole Convention.[13] These included a motion to strike the entire section, two proposed additions to the section which were ultimately approved, several proposed amendments that were ultimately rejected, plus an additional section was proposed but also rejected. However, and distilled to their essence, they were (again, not in the exact order proposed):

1. **Motion to strike all of Section 3 as originally drafted.**

This motion was offered by Mr. Beatty. Proceedings and Debates at 1116. This motion was withdrawn a short time later. Id. at 1122.

2. **Motion to strike "for the same purpose."**[14]

[13] The amendments, and more particularly the debate and discussion thereon, were not neatly confined and taken in order. As such, they are not stated here in the exact order presented in the debate.

[14] Following the adoption of the Motion to strike these four words, this "for the same purpose" language was again discussed by the whole Convention at various places. Including id. at 1331-33, 1358.

It was moved by Mr. Ainslie to strike the words "for the same purpose" from the second sentence of section 3 as originally reported. Id. at 1121-22. This would cause the proposed section to read like this:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water ~~for the same purpose~~; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

As to Mr. Ainslie's amendment to strike "for the same purpose," Mr. Poe attempted to defend the inclusion of this language, "for the same purpose" in Section 3 and argued the included language was necessary as follows:

> ***
>
> **What this law is intended to get at** is that the man who takes water for manufacturing purposes, and appropriates that water while it is running along there in his ditch, has the right to the use of it during the time it is passing through his ditch. The moment it leaves his ditch it becomes subject to relocation. Now, what I claim, Mr. Chairman is this: **that so long as that man uses that water for the purpose for which he took it out of its original bed**, to-wit: for the purpose of manufacturing, **he has the right to use that water for that purpose.** So, if he has taken it out for mining purposes he has the right to use it for that purpose; and if he has taken it out for irrigation purposes, he has the right to use it for that purpose; **but the moment** the manufacturer might conceive of a time when he could make the water more profitable for irrigating purposes than for manufacturing purposes, then he loses his priority right as a manufacturer, because **he undertakes to appropriate it for a purpose which he never intended when he took it, and his priority right does not come in**, and those men who have located along the line of that ditch then step in and say 'here, we are first entitled to the use of this for agricultural purposes.' We do not propose that we shall take the ditch away from him; the right to his work can never be forfeited; but the water was taken for a specific use, the use of manufacturing. He now undertakes to say that he has a priority right to use that water for another purpose; **but the law, and in my opinion is that this article, if it is adopted, will**

> confine him to the use for which he originally took it; and I am satisfied, Mr. Chairman, that if this article is adopted it will be of great benefit. **There is no use in talking about depriving a man of a vested right; you cannot do that, however much you may attempt it. The only attempt here made is this: that that man having taken water for manufacturing purposes, so long as he uses it for that purpose and that alone he has a priority right, but if he should attempt to appropriate it for another purpose, then his priority right would be gone.**

Id. at 1128-29, see also id. at 1139 (emphasis mine).

Mr. Ainslie then defended his motion to strike "for the same purpose" as follows:

> The CHAIR. **The question is upon the amendment** offered by the gentlemen from Boise **to strike out the words 'for the same purpose.'**
>
> Mr. AINSLIE. The gentleman from Cassia county, as I understand, says the supreme court of California refers to that matter. I never knew a decision in the supreme court of California or any other mining state or territory that refers to any such thing as that. All statements go to the proposition that priority of appropriation of water for any beneficial purpose whatever gives the best right. That principle is recognized by the supreme court of every mining state and territory of the United States. Now, sir, **the reason I want to strike out 'for the same purpose' is this: that there may be a conflict of the right to the water between** manufacturing and agricultural **purposes** and for mining purposes. **And I say that we are going to sustain the doctrine of he who is first in point of time is stronger than he who is best in right. That is the only correct doctrine that can be maintained.** If a person owns water for mining purposes, and only uses it for three or four hours of the day, *if he is not using that water*, anybody in God's world has the right to use it when he is not using it. Nobody contradicts that right, and that has nothing to do with striking out '**for the same purpose**;' but that **confines it to three of four purposes**. If a person takes water for mining purposes upon the same stream that is already appropriated, then the prior appropriator has priority over the subsequent appropriator for the same purpose. And if a person takes it out for mining purposes, and another person comes and takes it for mining or for agricultural purposes, subsequent to that time, **there is a conflict at once between those two parties, and if you strike out those four words, 'for the same purpose,' it places them all upon the same level with the qualifying words following.** 'But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose.' That does not conflict by striking those four words out; nor does it conflict by

> giving the agriculturist priority over the manufacturer. **But it recognizes to the fullest extent the priority of appropriation by any person who has taken the water; and that I believe is the true doctrine in these mining countries and all countries on the Pacific Coast. That is the reason I ask to have those four words struck out. It does not affect the matter at all, except the way it is there now it confines priority of appropriation between persons of the same class**: priority between men who have appropriated for mining purposes, and priority between men who have appropriated for agriculture, but does not give priority of appropriation by the miner any preference over priority of appropriation for manufacturing or agricultural purposes, and that is what I insist on, no matter what the rights are if the use is for beneficial purposes.

Proceedings and Debates at 1156-57 (italicized emphasis original, bold emphasis mine).

> ('Question, question.')
>
> The vote was taken upon the question of the amendment offered by Mr. Ainslie to strike out the words 'for the same purpose' in the third line.
>
> (Division demanded. On the rising vote, ayes 18, nays 11, and the amendment was carried.)

Id. at 1158.

3. **Motion to strike most of Section 3 as originally drafted.**

Judge Morgan moved to strike out all of Section 3 after the word "denied" in line 2, and insert "and those prior in time shall be superior in right." Id. at 1122. This would have caused the proposed Section 3 to read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied and those prior in time shall be superior in right. ~~Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.~~

A part of the debate on this amendment went as follows:

> SECRETARY reads: Strike out all of Section 3 after the word 'denied' in the second line, and insert, 'and those prior in time shall be superior in right.'
>
> ***
>
> Mr. CLAGGETT. I would suggest to my colleague that that matter is passed upon already. The very sentence says: 'Priority of appropriation shall give the better right as between those using the water.' By striking out 'for the same purpose' it leaves it just the same.
>
> ('Question, question.')
>
> The vote was taken on the adoption of the amendment. Lost.

Id. at 1158.

4. **Motion to strike out the preference for agricultural purposes over manufacturing purposes.**

Mr. Wilson proposed two amendments. The first Wilson Motion was to strike out all of Section 3 after the word "purpose" in line 7. Id. at 1118-19, 1121. Mr. Wilson's explanation is on pages 1118-19. This would have caused the proposed Section 3 to read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as prescribed by law) have the preference over those claiming for any purpose~~; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes~~.

This motion was withdrawn, as stated in the next section. Id. at 1127.

5. **Motion to insert "power or motor."**

During the discussion of his proposed amendment to strike out the preference for agricultural purposes over manufacturing purposes stated immediately above, Mr. Wilson withdrew that Motion, and in its place, offered still another amendment. This amendment was to insert the words "power or motor" after the word "manufacturing" in line 8. Id. at 1126. The Wilson amendment would have caused Section 3 read like this:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing power or motor purposes.

The voting on this amendment went as follows:

> SECRETARY reads: Insert the words 'power or motor' after the words 'manufacturing' in line 8, section 3. (Vote.)
>
> A division was demanded. On the rising vote ayes 4, and the amendment was lost.

Proceedings and Debates at 1158.

6. **Motion to insert "riparian rights" related to irrigation.**

Following further debate, an amendment was offered by Mr. Vineyard. That amendment was:

> Mr. VINEYARD. I have sent to the clerk's desk an amendment which I desire to have read. I am in favor of this section [original version of Section 3 as it was reported out of committee] as it stands with the addition of that amendment.
>
> SECRETARY reads: Add in line 8 after the word 'purposes' the following: 'but no appropriations shall defeat the right to a reasonable use

> of said water by a riparian owner of the land through which said water may run.'
>
> Mr. VINEYARD. I want to add to my amendment after the word 'use' the following, 'for irrigation.'

Id. at 1131. Thus, Mr. Vineyard's proposed amendment would have caused Section 3 to read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority or appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes but no appropriations shall defeat the right to a reasonable use for irrigation of said water by a riparian owner of the land through which said water may run.

Mr. Vineyard defended his motion and a portion of the debate on Mr. Vineyard's riparian amendment went as follows:

> Mr. VINEYARD.
>
> ***
>
> **Now, there is an effort here to make every other right to the use of water secondary to its use for agricultural purposes, notwithstanding the time of its appropriation**. That is the effect of this amendment. Priority of right is governed by priority in time, except in instances here specified. **Now, if the doctrine of appropriation is to obtain in this territory absolutely, it will be for this convention to announce that doctrine as against the doctrine of the right of the riparian owner for the use of the waters for irrigation, which would be cut off here.**

Id. at 1131 (emphasis mine).

> Mr. VINEYARD. **But suppose the doctrine of appropriation obtains here. A man who gets a patent from the government to his land, although he has no appropriation, somebody has appropriated the**

water of that stream, either above or below, and claims another use of the stream; **what becomes of the rights of the owner of the land?**

Mr. POE. Let me ask you a question right there. Suppose that water had been appropriated by some party prior to the time that he located that land. Now, I will ask you if he does not have to take that land as he found it?

Mr. VINEYARD. **He takes under the act of congress of 1866; but no vested water rights.**

Mr. POE. **That water has been appropriated.**

Mr. VINEYARD. That is, for the purpose for which it had been appropriated, and no other purpose.

Mr. POE. **But he has no right to go and take that water out of that stream just because he does live along the stream, subject to that right.**

Id. at 1132 (emphasis mine).

Mr. VINEYARD.

***

Would he have the right to do it to the exclusion of the riparian owner along the banks through which the water ran, or **could that water be taken absolutely away? It could be if you engraft in the constitution here that the doctrine of appropriation shall have precedence to the doctrine of the common law upon the subject of riparian ownership**. That is the second effect of it.

Mr. AINSLIE. Will the gentleman allow me to ask him a question?

Mr. VINEYARD. With pleasure.

Mr. AINSLIE. If the waters of a stream are already appropriated and taken out, how could the man go to the head of that ditch, who never had any riparian rights or ownership?

Mr. VINEYARD. I am not talking about a ditch, Mr. Ainslie. I am taking about a natural channel, not about artificial ditches. I am talking about a stream like the Boise river where it flows through his ranch or farm. **Can a man by prior appropriation exclude the riparian owner of the land through which that stream runs from a reasonable use of the water**

> for irrigation? I say no, unless you overturn the common law. That is all there is to it. I want that added by this amendment.

Id. at 1133 (emphasis mine).

Mr. Vineyard's riparian amendment was not well received as illustrated by some of the following comments:

> Mr. ALLEN.
>
> ***
>
> For if we take the proposition of the gentleman who has just taken his seat (Mr. VINEYARD) we throw aside all the experience of California, Utah and Colorado and go back to the primitive age when riparian doctrine was first established.

Id. at 1134.

> Mr. McCONNELL
>
> ***
>
> **Now, in regard to this riparian right business**, I had my attention called to a question since I have been here, on that subject; and as I told the gentlemen of the committee, **that was very largely what was the occasion of calling of the late constitutional convention in California. They found that under those claims of riparian right large capitalists were crushing out the poor settlers, and there was a clamor for a constitutional convention that this thing might be regulated**, so as to give every many an equal show. I believe I had the first irrigating ditch that was ever taken out of the waters for this or Boise county for irrigating purposes, and under the plea of riparian rights today one of the finest farms in Boise county is left a desert after the crop was planted and grown. **Parties came in above, and under the claim of riparian rights, diverted the water, and the man who has been cultivating the land and using that water for twenty-six years is today deprived of it and is compelled to go into the courts, and probably spend as much in litigating for what should be his vested rights, what every man would admit are his vested rights, as the farm is worth**...

Id. at 1137 (emphasis mine).

Further debate and voting on this amendment continued as follows:

> Mr. CLAGGETT. That same doctrine of priority protects the riparian owner, provided he takes up his land first; and as said by the gentleman from Ada, if all the water is taken out and applied upon their land then when a man comes and takes up the land and finds that the water is all gone, he takes the land subject to the other man's rights.
>
> Mr. GRAY. **He takes it as he finds it.**
>
> Mr. CLAGGETT. **Certainly.**
>
> The CHAIR. The question is on the amendment offered by the gentleman from Alturas. (Vote and lost).

Proceedings and Debates at 1161 (Emphasis mine).

7. **Motion to insert "Compensation for taking by subsequent appropriator."**

Mr. Ainslie then offered the following amendment, his second, to Section 3:

> SECRETARY reads: Continue Section 3 as follows: 'but the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in Section 14 of Article 1 of this Constitution. [Sic]

Id. at 1145. Mr. Ainslie's two proposed amendments to Section 3 would now make the section read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water ~~for the same purpose~~; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes, but the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in Section 14 of Article 1 of this constitution.

The discussion on this amendment went in part as follows:

> Mr. AINSLIE. I will explain that, Mr. Chairman, that in the Bill of Rights the other day in regard to private property and prior appropriation of

> water, is inserted private property for public as well as private uses, but private use is denominated as public use in Article 14. The article was amended so that I have not got the fully text of it.
>
> **If we recognize the principle of priority of rights, which is practically the law, and not only the law, but common sense also, and** ***if we can by this provision of the irrigation law provide that persons may have prior right to the use of water for agricultural purposes, notwithstanding the prior appropriation by persons who want the same for manufacturing purposes***, if the manufacturer has the prior right ***he ought to receive compensation for the use of his water*** **by agriculturalists** under Article 14 of the Bill of Rights. ***And that would go to the question of taking private property and giving it to another without giving anything for it. By protecting the prior appropriator and recognizing his right, he would be entitled to compensation if he was shut down in order to allow the agriculturists to cultivate their farms.*** **Let them pay the manufacturer for the use of the water.**

Id. at 1145-46 (both bold and italicized emphasis mine). Then, the final debate on this provision went as follows:

> Mr. AINSLIE. I would like to have the committee on Irrigation and Mining accept that amendment.
>
> Mr. ALLEN. That chairman is not present, but for one, so far as the idea corresponds with that in the Bill of Rights, I think there would be no objections.
>
> Mr. AINSLIE. **That would secure all their constitutional rights**, and I move the adoption of it.
>
> Mr. GRAY. Wouldn't it be proper to be in the next section?
>
> Mr. CLAGGETT. So far as that matter is concerned, I think that whole subject is covered by sections 5 and 6, so far as it ought to be covered. **I don't believe there should be absolute priority in irrigation by any claimants, but let that right be limited as it is here, and in the other sections, so that when the first man comes in and takes up the water he is not going to be allowed to play the dog-in-the-manger policy.** There may in ordinary years enough water to supply all of the people that settle along a ditch or canal, which is being distributed, but **when there comes a dry season, is one-half of the farms to be absolutely destroyed because the other man has an absolute priority, or is there to be an equitable distribution under such rules and regulations as may be provided in law?** Sections 5 and 6 deal specifically with that question.

> Mr. GRAY. I say, Mr. Chairman, that the man first in time is first in right. **If he were there first, and the water is short, it is his. If there is more than he wants, he shall not be allowed to play the dog-in-the-manger policy.** That is, if he does not need the water, as a matter of course, the general law will keep him from doing that; but if he was there first, he shall be first served, and when he has supplied his needs, then his neighbors below him can be supplied, and so on down.
>
> Mr. AINSLIE. **I have read these sections carefully, and it is not provided for in any other section; but if you contemplate making the agricultural interests of the territory superior to the manufacturing interests, as proposed in the section as it stands, without this amendment,** then any person, who has appropriated water for manufacturing purposes alone, and is using it for that, and during a dry season the water becomes scarce, the farmers below the line of that ditch, if they have build another ditch appropriating those same waters, **could deprive the manufacturer of his prior right to that water, deprive him of a prior appropriation without compensation.** I go this far in a conservative way, and say while we may give them a prior right to use the water if there is not enough for the agriculturist and the manufacturer both, **give the agriculturist a prior right to the use of the water, but include in section 14 of your Bill of Rights that he shall pay the manufacturer for its use.**
>
> ('Question, question.')
>
> Vote on the question of the amendment offered by the gentleman from Boise. Division. On the rising vote, ayes 13, nays 12. And the amendment was adopted.

Id. at 1161-63 (emphasis mine).

8. **Motion to establish preferences "in any organized mining district."**

Mr. Heyburn offered an amendment to Section 3 relating to mines. It provided:

> SECRETARY reads: Amend section 3 by adding after the last word 'in any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes.'

Id. at 1148. This amendment would make Section 3, as originally reported out of the standing committee, read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. In any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes.

The voting on this amendment went as follows:

> The CHAIR. The question is on the amendment offered by the gentlemen from Shoshone.
>
> Mr. STANDROD. I would like to have the amendment read.
>
> SECRETARY reads Mr. Heyburn's amendment.
>
> ('Question, question.')
>
> Rising vote taken; ayes 21, nays 6; and the amendment was adopted.

Proceedings and Debates at 1166.

9. **Finally, an additional [or new] section was proposed.**

> ADDITIONAL SECTION PROPOSED [to apply within an organized mining district]
>
> Mr. HEYBURN. Mr. Chairman, I desire to propose, following that, a new section.
>
> SECRETARY reads: 'Where land has been located along or covering any natural stream for any purpose, which contemplates the use of the water of such stream, then no person shall be permitted to take the water from said

stream at a point above the land so located to the exclusion of such locator after such location.'

***

Mr. HEYBURN. It should follow the mining section because it is intended to apply to this.

Id. at 1166.

Mr. CLAGGETT. I do. I see a multitude of points that do not lie in the bill, they lie on the outside. **We have sacrificed the doctrine of riparian ownership to the doctrine of appropriation for agricultural purposes.**

***

We have done that by the consent of the entire convention. Now what does my friend want? He wants to reserve and preserve the doctrine of riparian ownership as to mining claims, ... and when somebody has come along and taken the water to some beneficial use in the matter of mining, then by reason of the right of riparian ownership this original claim owner can demand that that water be turned on to him at any time. Now, I say that the doctrine of priority appropriation should govern in all particulars which are absolutely necessary and which we have provided for here.

Id. at 1169 (emphasis mine).

('Question, question.')

The vote was taken on Mr. Heyburn's proposed section and the motion was lost.

Id. at 1176.

10. **Section 3 adopted as amended.**

Mr. CLAGGETT. I move the adoption of Section 3 as amended (Seconded. Vote and carried).

Id. at 1176; see also id. at 1183.

Following the above actions by the Convention, Article 3 then read:

> Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring to use of the same, those using the water for domestic purposes shall, (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public [use] and private use, as referred to in Section 14 of Article I of this Constitution.

On July 26, the nineteenth day of the Convention, the entire Article XV, including the above version of Section 3, was then voted upon and adopted. Proceedings and Debates at 1183-85.

On July 27, 1889, "Article XV – Agriculture and Irrigation" was presented to the whole Convention for its final reading and its adoption was moved. Id. at 1237. At this point, further debate was sought, but a vote was taken instead, and Article XV was adopted and sent to the Committee on Revision to become one of the articles in the Constitution. Id. at 1237-39.

11. **Renewed Motion to grant preference for domestic use only.**

However, the debate on Section 3 of Article XV was far from being over. On July 29, the twenty-first day of the Convention, it was again moved to amend the then existing Section 3 by:

1. eliminating all use preferences except for domestic use; and
2. to strike or eliminate the "compensation for taking by a subsequent appropriator" provision and the "organized mining district" provision which had been added/adopted three (3) days earlier on July 26.

Id. at 1330-34.

The proposed amendment of July 29 was for Section 3 to read as follows:

> The CHAIR. The secretary will now read the substitute proposed by the gentleman from Shoshone.
>
> SECRETARY reads: 'The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better rights as between those using the water, but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall, subject to such limitations as may be prescribed by law, have preference over those claiming for any other purpose.'

Id. at 1340-41.

After significant and spirited debate spread over some additional thirty-four (34) pages of the reported proceedings (pages 1330-1364), the renewed motion to amend Section 3 raised on July 29 failed. Section 3 remained as it was previously adopted on July 26, 1889, and as ultimately reported in the original Constitution. Id. at 1364, 1365, 2079, 2080.

12. **Summary**

In an effort to summarize the relevant parts of the debate relating to Section 3, as it relates to the issues in the present suit, the concerns fell into three fairly distinct categories.

First were the policy reasons for establishing the express preferences in times of scarcity between the competing uses of domestic, agriculture, and manufacturing (including water used for power generation to operate plants and mills) in Idaho's version of the prior appropriation doctrine, with a primary one being the recognition of the need for timely administration to protect growing crops.

The second was, having resolved that in times of scarcity some preference for the purpose of water use should be placed in the Constitution, how to protect the senior vested property rights created by the prior appropriation doctrine; i.e. compensation for any taking by a preferred use.

Third was whether any riparian rights should be established. The issue was brought up twice, once relative to agriculture, and once relating to mining. Notions of riparian or "equal" standing were strongly rejected each time.

VI. Article XV, §§ 4 and 5.

Sections 4 and 5 were adopted as follows:

SECTION 4

> Whenever any waters have been, or shall be appropriated, or used, for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters, so dedicated, shall have once been sold, rented or distributed to any person who has settled upon, or improved land for agricultural purposes, with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns shall not thereafter without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.

Proceedings and Debates at 2080.

SECTION 5

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article, provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be

> sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used, and times of use, as the legislature, having due regard, both to such priority of right, and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Id.

The adoption and the intent of the framers with respect to what are now sections 4 and 5 of the Constitution are most easily expressed by simply quoting from the Idaho Supreme Court.

In Mellen v. Great Western Belt Sugar Co., 21 Idaho 353, 122 P. 30 (Idaho 1913), the Idaho Supreme Court discussed the meaning of Sections 4 and 5 as follows:

> **The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from the natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes** to be used 'under a sale, rental or distribution' and to point out the respective rights and priorities of the users of such waters. **It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.** And so sec. 4 is dealing chiefly **with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities as between water users and consumers who have settled under these ditches and canals and who expect to receive the water under a 'sale, rental or distribution thereof.' The two sections must therefore be read and construed together.**
>
> It is plain that the framers of the constitution in the adoption of sec. 5 meant to date the priorities of claimants from the time of 'settlement or improvement.' That is to say, that one who improves his land with a view to receiving water for the irrigation thereof and who proceeds with diligence and in good faith to put his land in condition for irrigation, is entitled to have his priority date from the time he commenced to make such improvement. So, also, one who actually settles upon such land and proceeds with diligence and in good faith to prepare his land for irrigation is entitled to have his priority date from the time of such settlement. One who purchases a water right for his land from such canal or ditch company

is placed upon exactly the same footing as any other user of water under that canal system. His priority cannot date from the time of his purchase of such water right, but must date from the time he either settles upon the land or from the time he begins to improve the land for irrigation.

So it will be seen that the purchaser of a water right from a canal company is in no better condition than he would have been had he not purchased such a right, for the reason that he still is obliged to either settle upon or improve the land the same as one who has never purchased a water right.

The effect of these two sections of the constitution was discussed somewhat by the members of the constitutional convention. Mr. Gray and Mr. Hampton both protested that they did not understand the purpose of the committee in drafting sections 4 and 5, and that they did not understand the meaning intended to be conveyed thereby. **The president of the convention, Mr. Claggett, on the other hand, seemed to have a very clear understanding of the provisions and was the only one who spoke in favor of their adoption, and his discussion and explanation seems to have been accepted by the majority of the convention as they voted down the amendments presented by Gray, Hampton and Poe, and adopted the provisions as they now stand. We quote the following** as a part of the debate and proceeding had in this connection:

> Mr. Claggett: I will state to the committee that he heart of this bill lies in sections 4 and 5 as a practical measure. This portion of section 4 amounts to this: that whenever these canal owners – if the gentleman will see, 'for agricultural purposes under a sale, rental or distribution thereof,' – whenever one of these large canals is taken out for the purpose of selling, renting or distributing water, or the appropriation is made hereafter for that purpose, and that after that has once been done, inasmuch as priorities will immediately spring up along the line of that canal, even before the canal is located; for instance, if a company should start in here to take a large quantity of water out to supply a given section of country, and should appropriate or give notice to the world that they were appropriating it for agricultural purposes 'under a sale, rental or distribution thereof,' then immediately, just as soon as the ditch was surveyed, people would come in and begin to locate farms and improve them right along the line of that ditch; and therefore it is necessary in order to protect them, inasmuch as they have spent this money in settling there under a promise, which was made by the company, that the water should be used for agricultural purposes, that the water should not be allowed to be diverted from that purpose and

> applied to the running of manufactories or anything else of that sort.
>
> Mr. Gray: Suppose he won't pay for it.
>
> Mr. Claggett: It is dedicated to the use, and when it has once been sold to any one particular party in one year, then he have the right to demand it annually thereafter upon paying for it...
>
> Mr. Claggett: Mr. Chairman, **both of these sections apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental or distribution.'** The first section protects the person who comes in, by making it 'an exclusive dedication' to agricultural uses after it has been so appropriated and so used.
>
> **These conditions necessarily result in an affirmance of the judgment as to those appellants who rely on contracts for water rights from the irrigation and canal company, and who do not connect themselves with an original appropriation of the water from the natural stream.**

Mellen, 21 Idaho at 359-61 (emphasis mine).

VII. Article XV, § 6.

Section 6 was adopted as follows:

SECTION 6

> The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water, sold, rented, or distributed, for any useful or beneficial purpose.

Proceedings and Debates at 2080.

This section imposes a duty on the legislature to provide the method or means for fixing compensation for supplying water to any city or town, and until the legislature provides such a

method, the contract rates for such supply will be enforced. Section 6 is not at issue in the present case.

VIII. Article XV, § 7 -- Creation of a State Water Resources Conservation Agency.

The meaning of section 7 is at issue in this case because of CMR Rule 20.03. Then Governor Robert E. Smylie convened an extraordinary session of the Idaho Legislative during July of 1964 for six (6) purposes. One of those was:

> 1. To consider the passage of, and to enact, a resolution submitting a constitutional amendment to the people of Idaho providing for the creation of a water resources conservation agency;

See Proclamation, Session Laws of Idaho, 1965.

As originally proposed, and then adopted, § 7 read as follows:

> (S.J.R. No. 1)
>
> A JOINT RESOLUTION
>
> PROPOSING AN AMENDMENT ADDING A NEW SECTION, SECTION 7, TO ARTICLE 15 OF THE CONSTITUTION OF THE STATE OF IDAHO CREATING A WATER RESOURCE AGENCY COMPOSED AS THE LEGISLATURE MAY NOW OR HEREAFTER PRESCRIBE, WITH POWER TO FORMULATE AND IMPLEMENT A STATE WATER PLAN, CONSTRUCT AND OPERATE WATER PROJECTS, ISSUE REVENUE BONDS, GENERATE AND WHOLESALE HYDROELECTRIC POWER, APPROPRIATE PUBLIC WATER, TAKE TITLE TO STATE LANDS AND CONTROL STATE LANDS REQUIRED FOR WATER PROJECTS.
>
> *Be It Resolved by the Legislature of the State of Idaho:*
>
> SECTION 1. That the Constitution of the State of Idaho be amended by adding Section 7 to Article 15 to read as follows:
>
> SECTION 7. STATE WATER RESOURCE AGENCY.—There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and

> implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the legislature.
>
> SECTION 2. That the question to be submitted to the electors of the State of Idaho as the next general election shall be as follows:

Id. at 72.

The section was ratified by the people of Idaho voting in the general election of November 3, 1964. Section 7 has been amended once as proposed by S.J.R. No. 117 (S.L. 1984, p. 689) as follows:

> Be It Resolved by the Legislature of the State of Idaho:
>
> SECTION 7. STATE WATER RESOURCE AGENCY. There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to ~~formulate and implement a state water plan for optimum development of water resources in the public interest; to~~ construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature. Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Id. at 689-90. The amendment was ratified at the general election of November 6, 1984 to read as it now appears.

The question presented by the Plaintiffs in this case is whether Article XV, § 7 limits or conditions senior water rights.

According to Plaintiffs, § 7 was enacted to ward off the State of California's interest in diverting water from Southern Idaho in the early 1960's, and did so by enacting § 7 which

> Authorizes the Idaho Water Resource Board to 'formulate and implement a state water plan for optimum development of water resources in the public interest.' The State Water Plan does not call for senior water users to suffer water shortages at the hands of junior appropriators.

Pl.'s Memo. at 27; citing State Water Plan, ¶ 1 G (requiring conjunctive management).

More will be stated on this later. However, suffice it to say at this point, that section 3 was not altered or amended by section 7. The two must simply be read together -- that is "water resources board shall have the power to formulate and implement a state water plan for optimum development of water resource sin the public interest -- consistent with the established law of this state, including the prior appropriation doctrine."

X.

GENERAL ANALYSIS

1. As presently used in Idaho water law, what does the phrase "Conjunctive Management" really mean?

The Director defines conjunctive management in the IDAPA as:

> 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.

IDAPA 37.03.11.010.03.

In A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568 (Idaho 1998), the Idaho Supreme Court stated:

> **Conjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and 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 Irrigation, 131 Idaho at 422 (emphasis mine). The Supreme Court then commented on a 1994 Interim Legislative Committee, which committee had been charged with specific duties and, after its investigation, filed its report. The Idaho Supreme Court stated:

> In 1994, an interim legislative committee charged with reviewing the progress of the SRBA noted **the pendency of studies on conjunctive management investigating the effect of ground water pumping on natural springs that flowed directly into the Snake River.** The committee reported:
>
> > **Conjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication.** In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls dam.
> >
> > **Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River.** To conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface water is necessary.
> >
> > Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, **they generally relate to two classic elements of a water right – its source and priority. The SRBA should determine the ultimate source of the ground and surface water**

> **rights being adjudicated.** This legal determination must be made in the SRBA. The IDWR should provide recommendations to the SRBA District Court on how it should do so. Further, **the SRBA District Court must determine the relative priority between surface and ground water rights.**
>
> **If** the SRBA proceeds and **these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another generation of ground and surface water users will be uncertain regarding their relationship to each other.**

Id. (internal citations omitted) (emphasis mine); citing 1994 INTERIM LEGISLATIVE COMMITTEE REPORT ON THE SNAKE RIVER BASIN ADJUDICATION, p. 36-37.

To this Court (and despite the definition offered in IDAPA 37.03.11.010.03), the term "conjunctive management" as presently used in Idaho water law is a term of art with lots of "wiggle room" or discretion; it is not a well defined legal phrase which has a well settled meaning. To borrow from Mr. Ainslie (who was characterizing the language "or any other use necessary to complete development of the material resources of the State"), such a phrase "is **a regular rainbow-chasing expression**..." Proceedings and Debates at 1630 (emphasis mine). Or, as Mr. Reid in the same debate stated:

> As a lawyer, if I desired litigation to spring up, and **litigation which would be susceptible, from so many considerations**, to throw people into trouble and make business for lawyers, I should vote for this, but I am legislating for the good of the people, and I think the matter should be put certain and definite, and **you have made it so broad it is going to be inoperative and you destroy the very purpose you wish to achieve. Limit it to what you propose.** That is the reason I offer the amendment. I offer it in good faith. I do not want the law to be a nullity on our statute book.

Id. at 1628-29 (emphasis mine).

As will be discussed in greater detail later in this decision, in its present operative sense, the phrase "conjunctively managed" is, in some respects, an empty vessel to be filled later in the discretion of the Director. In the past, similar concerns with the phrase have not missed the attention of either the SRBA district court or the Idaho Supreme Court.

More particularly, this Court believes it is for this "term of art" or "Director's discretion" reason that the SRBA District Court, in ruling on Basin Wide Issue 5,[15] specifically rejected the language "to be conjunctively managed," but instead inserted the language "connected sources."

> The SRBA Court specifically warned of the dangers of allowing 'conjunctive administration' to redefine water rights decreed in the SRBA:
>
> > **Although IDWR is charged with the sole authority for administering water rights, such water rights cannot be 'administered' in a manner inconsistent with the prior appropriation doctrine.** The argument is that subjecting a water right to the undefined term 'conjunctively,' could be construed at some point in the future to supercede or modify the concept of prior appropriation. The other related concern is that IDWR has promulgated administrative rules for conjunctive management and that the proposed general provision as worded can be reasonably interpreted to incorporate by reference these administrative rules into the decree. ***Since administrative rules are subject to change, every time the rules change, the scope of the water rights affected by the general provision would also change. Also, to the extent the administrative rules, now or in the future, allow IDWR to administer water in a manner inconsistent with the prior appropriation doctrine, the incorporation of the administrative rules into a water right decree effectively diminishes the owner's property interest.***

Pl.'s Memo. in Support of S.J. at 47-48; Thompson Aff., Ex. K Order Setting Trial Date. etc. (Basin-Wide Issue 5) (Conjunctive Management General Provision) at 3-4 (May 26, 2000) (bold and italicized emphasis in original; bold only emphasis mine).

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[15] See Order on Cross Motions for Summary Judgment: Order on Motion to Strike Affidavits; dated July 2, 2001: see also Basin Wide Issue No. 5; Connected Sources General Provisions (Conjunctive Management) Memorandum Decision and Order of Partial Decree; dated February 27, 2002, in particular Exhibit A, attached thereto.

The Idaho Supreme Court has also honed in on the problem. In State v. Nelson, 131 Idaho 12, 951 P.2d 943 (Idaho 1998), in speaking to water administration and the CMR's the Idaho Supreme Court stated:

> **The IDWR has the power to issue 'rules** and regulations as may be necessary for the conduct of its business.' **These rules and regulations are subject to amendment or repeal** by the IDWR. Additionally, the **IDWR's Director is in charge of distributing water** from all natural water resources **or supervising the distribution. Including these General Provisions in a decree will provide finality to water rights, and avoid the possibility that the rules and regulations could be changed at the sole discretion of the Director** of the IDWR.
>
> **Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.'** An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. Additionally, pursuant to Idaho Code section 42-220, all rights that are decreed pass with conveyance of the land and therefore the land could be sold with the certainty that the water would be distributed as decreed. Further, these General Provisions describe common practices in the Big Lost which are unique and sometimes contrary to general water distribution rules.
>
> **A decree is important to the continued efficient administration of a water right.** The watermaster must look to the decree for instructions as to the source of the water. **If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.**
>
> Additionally, we conclude that the General Provisions provided by I.C. § 42-1412(6) should be included in a decree if they are deemed necessary for the efficient administration or to define a water right. **Provisions necessary for the efficient administration of water rights should be preserved in the SRBA decree, not merely in the Administrative rules and regulations.**

Id. at 16 (internal citations omitted) (emphasis mine).

2. CMR's Generally

Generally speaking, what are the CMR's? IDAPA 37.03.11.001 provides:

> 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.** It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently.

IDAPA 37.03.11.001 (emphasis mine).

At this juncture, several points are worth noting. First, in A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 428, 958 P.2d 568 (1998), on re-argument, the Idaho Supreme Court stated:

> While the district court noted the adoption by the IDWR of IDAPA 37.03.11 setting forth the department's "Rules for Conjunctive Management of Surface and Ground Water Resources," these rules do not necessarily overlap the SRBA proceedings. They do not provide for administration of interconnected surface and ground water rights in the SRBA, nor do they deal with the interrelationship of water rights within the various Basins defined by the Director and the SRBA district court, and they do not deal with the interrelationship of those Basins to each other and to the Snake River in the SRBA proceeding.[16] **The rules adopted by the IDWR are primarily directed toward an instance when a 'call' is made by a senior water right holder, and do not appear to deal with the rights on the basis of 'prior appropriation' in the event of a call as required.**

Id. at 422 (footnote and emphasis mine). Thus, Idaho Supreme Court has previously reviewed the CMR's, and on at least one occasion found that the rules do not even deal with the subject water rights on the basis of "prior appropriation" in the event of a call as required. Of course, this is very problematic given the legislative charge to the Director in I.C. §§ 42-602 and 42-603.

The second point this Court wishes to draw attention to is the language in IDAPA 37.03.11.001, "in an area having a common ground water supply." Despite the definition in

[16] This Court believes that since the qualifier in this sentence references "the SRBA" District Court, and since the SRBA District Court has now adopted the Basin Wide Issue 5 – "Connected Sources" general provision, this sentence of the Idaho Supreme Court made in 1998 would no longer be a correct statement. The Basin Wide Issue 5 general provisions was filed on February 27, 2002. However, the accuracy of the next (bolded) sentence remains.

IDAPA 37.03.11.010.01, and the Director's finding in IDAPA 37.03.11.050 (Rule 50), by virtue of the SRBA Court's Basin Wide 5 Order, all water – ground and surface – is deemed to be hydraulically connected unless it is specifically exempted.

The language of the Basin Wide Issue 5 "Connected Sources" Order now to be incorporated as a general provision in all SRBA partial decrees, is as follows:

> The following water rights from the following sources of water in Basin ___ shall be administered separately from all other water rights in Basin ___ in accordance with the prior appropriation doctrine as established by Idaho law:
>
> Water Right No. Source
>
> The following water rights from the following sources of water in Basin ___ shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.
>
> Water Right No. Source
>
> Except as otherwise specified above, all water rights within Basin ___ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

Memorandum Decision and Order of Partial Decree, Basin Wide Issue No. 5, Connected Sources General Provision (Conjunctive Management); Ex. A (Feb. 27, 2002).

3. The Statutory Authority for the CMR's

IDAPA 37.03.11.000 recites the legal authority for the adoption of the CMR's. The two statutes listed are I.C. § 42-603 and I.C. § 42-1805(8). I.C. § 42-603 provides:

> **42-603. Supervision of water distribution – Rules and regulations.— 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.

I.C. § 42-603 (emphasis mine). A strong emphasis is placed by this Court upon the legislative authorization "as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof."

See also Idaho Code § 42-602, which states in part:

> **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.

Idaho Code § 42-602 (WEST 1996) (emphasis mine).

4. The nature of a water right in Idaho.

A water right is a constitutionally recognized property right. Idaho Const., Art. XV, § 3. The Idaho Supreme Court stated in Nelson:

> Finality in water rights is essential. **'A water right is tantamount to a real property right, and is legally protected as such.'** An agreement to change any of the definitional factors of a water rights would be comparable to a change in the description of property. Additional, pursuant to Idaho Code section 42-220, all rights that are decreed pass with conveyance of **the land and therefore the land could be sold with the certainty that the water would be distributed as decreed.**

Nelson, 131 Idaho at 16 (emphasis mine).

The nature of the right is called an usufructuary right. Mr. Poe, in the constitutional debate, stated the following:

> Now, the right to water; no man can acquire any right to water. There is no such thing as property in water. It is what is called a usufructuary right, or the right to the use.

Proceedings and Debates at 1128. See also, Mr. Heyburn's comments at id. at 1168.

Or, as Counsel for IGWA correctly writes in their book, Handbook on Idaho Water Law, January 1, 2003 at pages 2-3:

> A water right is a property right, but the water right owners do not "own" the water itself. This is because Idaho's rivers, streams, lakes and ground water all belong to the people of the state. **A water right is a legally protected right to *use* the public's water.** Water rights are often described by lawyers as "usufructuary," meaning a right to the use of a thing, not ownership of the thing itself. **Usufructuary rights are nevertheless property rights – real estate – fully protected against unconstitutional takings.**

Id. at 2-3 (italicized emphasis in original, bold emphasis mine).

A water right is described and defined by the stated elements of the right. The traditional elements of a water right are: source, priority date, amount, period of use, purpose of use, point of diversion, and place of use. See Olson v. Idaho Dep't of Water Resources, 105 Idaho 98, 666 P.2d 188 (1983). See also I.C.§ 42-1411(2)(h), (i), and (j), which statutorily adds to the traditional elements as follows:

> (2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:
>
> ***
>
> (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except that the place of use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the irrigation project would qualify to be so described under section 42-219, Idaho Code;
>
> (i) conditions over the exercise of any water right included in any decree, license, or approved transfer application; and
>
> (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

Idaho Code § 42-1411(2) (WEST 2006).

5. The Prior Appropriation Doctrine

Generally stated, there are two systems of water rights in the United States relating to the use of water. One is the riparian rights system and the other is the prior appropriation doctrine. The prior appropriation doctrine is firmly rooted in Idaho law. It was in effect in Idaho when Idaho was still a territory. Malad Valley Irrigation Co. v. Campbell, 2 Idaho 411, 411, 18 P. 52 (Idaho 1888). As discussed earlier in this decision, various parameters of the prior appropriation doctrine were discussed at length during the Constitutional Convention. There were also two distinct attempts to inject portions of the riparian doctrine in the Constitution, one for agricultural use and the other for mining.[17] The first was Mr. Vineyards' motion. See Proceedings and Debates at1131-38, 1159-60. The second was Mr. Heyburn's proposed amendment. See id. at 1166-76. Each was firmly rejected.

Following adoption of the Constitution, the Idaho Supreme Court and the United States Supreme Court also addressed and rejected riparian rights in at least the following cases: Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 493, 101 P. 1059 (Idaho 1909) (riparian rights are repugnant to the constitution and exist only to the extent they do not conflict with right acquired through prior appropriation); Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 121 (1912) (rejecting the riparian rights of appropriation); Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 584, 513 P.2d 627 (Idaho 1973) (rejecting "correlative rights" in ground water).

In rejecting the riparian rights doctrine and adopting the prior appropriation doctrine, the framers' intent was clear that an owner of land, simply as the owner, has no right to have a

[17] This Court clearly recognizes that waters within an organized mining district are not at issue in this case. The reason this mining matter is placed in this decision is to punctuate the intent of the framers in which they reject any notion of riparian or "equal rights" in water administration in this State.

stream of water flow to, by, through, over, or under his land. See Proceedings and Debate of the Constitutional Convention of Idaho at 1132.

The underlying theory or premise of the riparian rights doctrine is equality of rights and reasonable use. There is no priority of rights. The reasonable use by each is limited by a like reasonable use in every other riparian.

The underlying theory or premise of the prior appropriation doctrine is that he who first appropriates a supply of water to a beneficial use is first in right. There is no equality of rights. The prior appropriation doctrine, in its truest sense, makes no distinction between those beneficial uses for natural wants (domestic) and those for agricultural or manufacturing, etc. However, and as chronicled by this Court earlier in this decision, Idaho's version of the prior appropriation doctrine does have a preference system, as stated in Article XV, § 3 of the Idaho Constitution.

This "preference" system as stated in Section 3 was in part addressed by the Idaho Supreme Court in Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 P. 741 (Idaho 1911), as follows:

> From the language thus used in this section appellant argues that it was the intention of the framers of the constitution to make an appropriation of water for domestic uses a right superior to an appropriation made for manufacturing uses, without reference to the time or priority of such appropriations.
>
> ***
>
> We do not think the language thus used in the constitution was ever intended to have this effect, for it is clearly and explicitly provided in said section that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that priority of appropriation shall give the better right as between those using the water. This clearly declares that the appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the use, but recognizes the right of appropriations for

> domestic purposes as superior to appropriations for other purposes, when the waters of any natural stream are not sufficient for the service of all those desiring the same. **This section clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property** for public and private use as referred to in section 14, art. 1, of the Constitution.
>
> **It clearly was the intention of the framers of the constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrary and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section**, which declare that the right to divert and appropriate the unappropraited waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right.

Montpelier Milling, 19 Idaho at 218-19 (emphasis mine).

Another tenet of the prior appropriation doctrine of Section 3, Article XV, which cannot be overstated as it relates to the present case, is that by definition the rights of the various appropriators are never equal.[18]

The basis, measure and limit of the water right under the prior appropriation doctrine is the beneficial use to which he has put the water. See Wells A. Hutchins, Idaho Law of Water Rights, 5 Idaho L. Rev. 1, 39 (1968).

Because water must be put to a beneficial use, a water right holder cannot lawfully waste water. As Mr. Gray stated in the Constitutional debates:

> When I go there first I will take what I need; we cannot have any more than we need as a matter of course; the law will not permit us to do that.

Proceedings and Debates at1136.

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[18] This means appropriators diverting from the natural stream or the aquifer as opposed to those who procure a water right under a "sale, rental, or distribution." Idaho Const. Art. XV, § 4-5.

It is the policy of the law to prevent wasting of water. Stickney v. Hanrahan, 7 Idaho 424, 433, 63 P. 1891 (Idaho 1900); Twin Falls Land & Water Co. v. Twin Falls Canal Co., 7 Fed.Supp. 237, 251 (D. Idaho 1933).

The Idaho Supreme Court stated in Martiny v. Wells, 91 Idaho 215, 218-19, 419 P.2d 470 (Idaho 1966):

> **Wasting of irrigation water is disapproved by the constitution and laws of this state.** As we said in Mountain Home Irrigation District v. Duffy, supra, **it is the duty of a prior appropriator of water to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof.**
>
> ***
>
> Under the facts involved in this case, **the court's conclusion that the best use of the water was the use made of it by defendant, is immaterial** and lends no support to the judgment. **The policy of the law against the waste of irrigation water cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator.**

Martiny, 91 Idaho at 218-19 (emphasis mine).

The burden of proof to establish waste is allocated to the junior appropriator. Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220 (Idaho 1976).

And, as stated by Mr. Hutchins in his law review article:

> *Beneficial use.* – It is provided by statute that no licensee nor any claimant of a decreed water right 'shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed.' **The supreme court also has held that the appropriator is held to the quantity of water he is able to divert and apply to a beneficial use at a particular time, within the limit of his appropriation.**
>
> *Economical and reasonable use.* – In addition to beneficial use, the factors of economy and reasonableness of use of water have been imposed upon the appropriator; but in some of the decisions the courts have been careful not to push their interpretation of reasonableness to the point of imposing

unreasonableness upon the appropriator. In one decision the Idaho Supreme Court said that:

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

A federal court agreed, in the same year, that conservation of water is a wise public policy, but added that so also is the conservation of the energy and well-being of the water user and that economy of use is not synonymous with minimum use. The Idaho court has recently held that the fact a junior appropriator could use water already decreed to a senior appropriator more efficiently was immaterial to a determination of who had the superior right.

Hutchins at 39-40; citing Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 44, 147 P. 1073 (Idaho 1915); Caldwell v. Twin Falls Salmon River Land & Water Co., 225 Fed. 584, 596 (D. Idaho 1915) Clark v. Hansen, 35 Idaho 449, 455-56, 206 P. 808 (Idaho 1922) (emphasis mine).

However, Idaho's version of the prior appropriation doctrine also includes other significant components or aspects, incorpreal property rights, if you will, which are very much a part and parcel of the doctrine which attaches to the water right; more particularly, the concomitant tenets and procedures related to a delivery call, which have historically been held necessary to give the constitutional protections pertaining to senior water rights. The battle cry of IDWR throughout their briefing in this case is that while "priority of appropriation shall give the better right as between those using the water," "it is not the only fundamental principle or important principle." See IDWR's Memo. in Opposition to S.J., at 8 (Dec. 6, 2005). In other

words, IDWR argues that there is a lot more to Idaho's version of the prior appropriation doctrine than just "first in time." This Court fully agrees. With that point in mind, however, the issues in this case deal with the administration of established/decreed rights and not with the process of adjudication of those rights.

As such, there are two additional primary and essential principles of Idaho's version of the prior appropriation doctrine which are at issue in the administration of established rights but which are absent from the CMR's. They are that in times of shortage there is the presumption of injury to a senior by the diversion of a junior, and the well engrained burdens of proof.

Injury in this context is universally understood to mean a decrease in the volume or supply of water to the detriment of the senior.

These concepts arise out of the Constitution and are stated in Moe v. Harger, 10 Idaho 302, 7 P. 645 (Idaho 1904), as follows:

> **This court has uniformly adhered to the principle *announced both in the constitution* and by the statute that the first appropriator has the first right; and it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable as its application and so generally and uniformly applied** by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.
>
> ***
>
> It is therefore clear that no water will be left for some of the subsequent appropriators. Where prior appropriators have diverted the amount of water to which they are entitled and, for example, say one hundred inches, to which the next appropriator is entitled, is left in the stream and a settler above diverts a part or all of the remaining water, **the presumption must at once arise that such diversion will be to the injury and damage of the appropriator entitled thereto. So soon as the prior appropriation**

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

Moe, 10 Idaho at 305-07 (emphasis mine).

And in Josslyn v. Daly, 15 Idaho 137, 96 P. 568 (Idaho 1908), the Idaho Supreme Court stated:

> **It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should,** as we observed in Moe v. Harger, **produce 'clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion.' The burden is on him to show such facts.** In this case there can be no reasonable doubt but that the **appellant is entitled to have at least the volume of water flow from these springs into Seaman's creek as great and to as full an extent as it was at the time the decree was entered** in Daly v. Josslyn, **provided these springs flow that much water at this time.**

Josslyn, 15 Idaho at 149 (internal citations omitted) (emphasis mine); see also Cantlin v. Carter, 88 Idaho 179, 186-87, 397 P.2d 761 (Idaho 1964).

In summary, at least three additional components or tenets of the prior appropriation doctrine relative to the administration/delivery/curtailment cases are:

1. in an appropriated water source, when a junior diverts or withdraws water in times of a water shortage, it is presumed that there is injury to a senior;
2. as soon as the senior establishes his prior appropriation and use, the burden then shifts to the junior who claims the diversion will not injure

the senior, to establish that fact first by clear and convincing evidence; and

3. that these two rules of law derive from the historical development of the prior appropriation doctrine, which carried over into the Constitution.

Moe, 10 Idaho at 305-07. Each has been reaffirmed by the Idaho Supreme Court, and each remains as part and parcel of Idaho's version of the prior appropriation doctrine, which is the law in this State today.

6. Futile Call

Futile call is defined by the CMR's as:

> 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.

IDAPA 37.03.11.010.08.

In Wells A. Hutchins's law review article, Hutchins describes the concept of futile call as follows:

> If neither the surface flow nor underflow of the stream, if undisturbed, would reach the point of diversion of a prior appropriator, such appropriator cannot complain of a diversion of water above him by a junior appropriator; **but the burden rests upon the latter** to show that neither the surface flow nor underflow if uninterrupted would reach the senior appropriator's diversion. **The same burden rests upon a junior appropriator of ground water, to show by direct and convincing testimony that his diversion will not injure or affect the diversion of a prior appropriator.**

Hutchins at 52 (emphasis mine).

7. **Transfer of a Water Right v. Delivery Call to Fulfill a Water Right**

While an in depth discussion regarding the concept and laws of a "transfer" versus a "delivery call" is not necessary, because the CMR's seem to "borrow" some transfer concepts and apply them to delivery or distribution calls, several points need to be addressed. Under Idaho law, a "transfer" of a water right refers to a change or alteration of one or more of the elements of the already established right. Idaho Code § 42-222 (WEST 2006); Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (Idaho 1993). On the other hand, a water delivery call is defined in the CMR's as: "a request from the holder of a water right for administration of water rights under the prior appropriation doctrine." IDAPA 37.03.11.010.04. Both a "transfer" request and a "delivery call/distribution demand," are addressed to the Director of IDWR.

The basic requirements for a transfer of a water right are codified in I.C. § 42-222, but the fundamental principles and overriding focus has been to scrutinize the proposal to prevent injury to one or more junior water rights, and/or secondly to prevent enlargement of the existing right. While I.C. § 42-222 statutorily protects all water rights from injury, the injury analysis focuses on the protection of junior water right holders who are entitled to those conditions in the source maintained as they found them when they first made their request for appropriation. Crockett v. Jones, 47 Idaho 497, 503-04, 227 P. 550 (Idaho 1929). Of primary import to the present case, when a transfer is proposed, the Director is allowed to re-examine and alter the elements of a right as a condition of granting the transfer. Hardy v. Higginson, 123 Idaho 485, 489, 849 P.2d 946 (Idaho 1993). In particular, one way to protect a junior water right from injury resulting from a transfer is to re-examine the quantity element of the right to be transferred and reduce the

quantity to the historical use (as opposed to the quantity stated in the decree or license). Thus, the three salient points of a transfer regarding the case at hand are:

1. The Director can "re-adjudicate" or adjust virtually any of the elements of the water right;
2. the focus is on the injury which might be caused to a junior; and
3. the burden of proof of no injury is on the senior seeking the transfer.

Water delivery calls or distribution demands, on the other hand, have an entirely different focus. According to Moe v. Harger, 10 Idaho 302, 307, 7 P. 645 (Idaho 1904), the mechanics of a water delivery call by a senior are:

1. When there is a water shortage;
2. the senior establishes his prior appropriation and right of use;[19]
3. injury to the senior is presumed by the diversion of the junior; and
4. the burden of proof is then on the junior to prove a lack of injury by an evidentiary standard of clear and convincing evidence.

Id. at 307.

In summary, suffice it to say, that in a transfer application, the burden is on the senior seeking the transfer to demonstrate no injury to the junior. In a water delivery call, just the opposite is true; the burden is on the junior to overcome the presumed injury to the senior by an evidentiary standard of clear and convincing evidence and the quantity element is not re-examined as a legally recognized condition of allowing the delivery call.

[19] This would be by a preponderance of the evidence standard, and in present day proceedings this would be established by the senior providing the Director a certified copy of his partial decree from the SRBA, together with the Basin Wide Issue 5 – Connected Sources language, showing the rights to be hydraulically connected, i.e., which, if any, were excepted.

8. Director's Duty to Administer/Distribute Water.

Because in the real world a water right is only as good as how it is administered, there have developed some rather well defined principles of administration. Those are:

1. The Idaho Legislature has adopted I.C. §§ 42-602, 42-603, and 42-607, which impose upon the Director and his watermasters the duty to administer water.

I.C. § 42-602 governs a watermaster's duties in "clear and unambiguous terms." R.T. Nahas Co. Hulet., 114 Idaho 23, 27 (Idaho App. 1988). The Idaho Supreme Court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." Musser v. Higginson, 125 Idaho 392, 395 (Idaho 1994).

2. In times of shortage, watermasters must distribute water according to the elements and priority dates of an "adjudication or decree." State v. Nelson, 131 Idaho 12, 16 (Idaho 1998); see also I.C. § 42-607; Stethern v. Skinner, 11 Idaho 374, 379 (Idaho 1905).

3. The priority system provides certainty to water right holders and "protects and implements established water rights." Almo Water Co. v. Darrington, 95 Idaho 16, 21 (Idaho 1972). Moreover, senior water right holders are "entitled to presume that the watermaster is delivering water to them in compliance with the priorities expressed in the governing decree." Id.

4. Of primary importance to the "takings issue" presented in this case is that individual water users or right holders have no authority to administer water on their own. Authorization to administer/distribute/curtail water is vested only in the Director and his watermasters and the Director has a clear legal duty to do so.

XI.

SPECIFIC ISSUES

1. Issue – Generally, whether the factors the Director takes into account in responding to a call are facially unconstitutional.

The Plaintiffs allege that CMR's are contrary to law and ultimately unconstitutional with respect to both (1) how the Director is to respond to a delivery call by a senior water right holder; and (2) the criteria or factors the Director must consider when responding to the call. The Plaintiffs identify numerous factors alleged to be contrary to law; factors such as: "material injury," "reasonableness of the senior water right diversion," "that the senior right could not be satisfied using alternate points and/or means of diversion," the concept of "full economic development," "compelling a surface user to convert his point of diversion to a ground water source," and "reasonableness of use." The Plaintiffs also allege that the consideration of these factors results in unreasonable burdens and delays ultimately impairing or interfering with the right of the senior making the call.

This Court agrees in part and disagrees in part with the foregoing assertions of the Plaintiffs. 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. This determination must be evaluated in the context of the standard of review for a constitutional challenge to a statute or administrative rule. In particular, there is a presumption of constitutionality and if the provision can be construed in a manner which is constitutional, the provision will withstand the challenge. See State v. Prather,

135 Idaho 770, 772, 25 P.3d 83, 86 (Idaho 2001). In this respect, the Court finds that Plaintiffs did not meet this standard.

However, the Court finds the CMR's constitutionally deficient for failure to also integrate the concomitant tenets and procedures related to a delivery call, which have historically been held to be necessary to give effect to the constitutional protections pertaining to senior water rights. Specifically, the CMR's fail: 1) to establish a procedural framework properly allocating the well established burdens of proof; 2) to define the evidentiary standards that the Director is apply in responding to a call; 3) to give the proper legal effect to a partial decree; 4) to establish objective criteria necessary to evaluate the aforementioned factors; and 5) to establish a workable, procedural framework for processing a call in a time frame commensurate with the need for water – especially irrigation water.

2. Issue – Specifically, the factors to be considered by the Director can be construed consistently with the prior appropriation doctrine.

The factors and policies contained in the CMR's and alleged by the Plaintiffs to be contrary to law can be construed consistent with the prior appropriation doctrine. At first blush, many of the factors and policies set forth in the CMR's appear to be more akin to principles associated with the riparian doctrine, which as discussed earlier, has been specifically rejected in Idaho (riparian principles exist only to the extent they do not conflict with rights acquired through prior appropriation). Nonetheless, some of these factors and policies have also been considered in the context of the prior appropriation doctrine, although one must be careful to evaluate the context in which they were made. For example, the CMR's make a general statement of policy of reasonable use of surface and ground water.

> **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 by 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 public policy of reasonable use of water as described in this rule.**

IDAPA 37.03.11.020.03. (emphasis mine). The above quoted rule comes from at least three (3) distinct sources, namely: Article XV, § 5 (which deals chiefly with the subject of priorities as between water users in canal systems who expect to receive water under a "sale, rental, or distribution" from the canal, and not from the original diverter/water right holder); Article XV. § 7 (creating a State Water Resource Agency to formulate and implement a state water plan for optimum development of water resources in the public's interest; "optimal development" must be read together with section 3 to be "optimal development in accordance with the prior appropriation doctrine"); and the Rule announced in the Schodde case.[20] See Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1912). While the above rule is a "cut and paste" from these three distinct sources, none of which are "curtailment" sources, the Idaho Supreme Court did state in Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (Idaho 1915):

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[20] Schodde placed a waterwheel in the Snake River and sought to maintain a right to use the current of the river to operate the wheel which would be negatively affected by the construction of Milner Dam. The U.S. Supreme court stated:

> [T]he license given by the terms of § 3184 of the Revised Statutes of Idaho... does not confer upon such riparian owner the power to appropriate, without reference to beneficial use, the entire volume of a river or its current, to the destruction of rights of others, to make appropriations of unused water.

Schodde, 224 U.S. at 123. The Idaho Supreme Court in Arkoosh v. Big Wood Canal Co., stated:

> Schodde... is clearly distinguishable because therein the interference was not with a water right but with a current. In other words, the same amount of water went to Schodde's place as before ... this is an action for an injunction to restrain appellant from interfering with respondents' water rights.

Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 397 (Idaho 1929).

> 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 water of the state in the interest of agriculture and for useful and beneficial purposes.

Washington State Sugar Co., 27 Idaho at 44. In Farmer's Cooperative Ditch Co. v. Riverside Irrigation Dist., 16 Idaho 525, 102, P. 481 (Idaho 1909), the Idaho Supreme Court stated:

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

Farmer's Cooperative Ditch Co., 16 Idaho at 535-36. In Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61 (1960), the Supreme Court reiterated that the policy of the state is to secure the maximum use and benefit and least wasteful use of its resources. Poole, 82 Idaho at 502. Accordingly, at least on its face, the integration of this policy is not necessarily inconsistent with Idaho's version of the prior appropriation doctrine.

The CMR's define the factor of "material injury" as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho law..." IDAPA 37.03.11.010.14. The result is that a senior user cannot call for water if the water is not, or will not, be put to a beneficial use, irrespective of whether the right is decreed. Idaho Code § 42-220 codifies that "neither such licensee nor anyone 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." Idaho Code § 42-220 (WEST 2006). In addition, this concept was discussed in the constitutional debates. See Proceedings and Debates at 1136. Idaho case law is also replete with references to

the established principle that a water right holder is not entitled to divert more water under his right, albeit established, than he can put to a beneficial use. See Coulson v. Aberdeen – Springfield Canal Co., 39 Idaho 320 (Idaho 1924); Hutchins at 38-41 (numerous citations omitted). As a corollary, it therefore follows that a senior cannot make a call for water under his right if the water is not being put to a beneficial use consistent with his right or decree. No water user has a right to waste water. In an SRBA district court case deciding whether a remark should be included in the face of a partial decree to qualify that the amount of water that can be sought incident to a call was limited to its beneficial use, as opposed to the actual quantity stated in the decree, this Judge, then presiding in the SRBA, rejected the necessity of such a remark but held:

> Implicit in the quantity element in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: 'Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed'.' State v. Hagerman Water Right Owners, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997); quoting I.C. § 42-1402. However, **the quantity element in a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time** (i.e. there is no right to divert water that will be wasted). A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 415, 958 P.2d 568 (1997). **The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short result in a loss or reduction to the water right.** State v. Hagerman Water Right Owners, at 730, 947 P.2d at 403.
>
> Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In State v. Hagerman Water Rights

Owners, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:

> A water user is not entitled to waste water... It follows that a water right holder cannot avoid a partial forfeiture by wasting portion of his or her water right that cannot be put to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, a forfeiture has taken place.

Id. (citations omitted).

> NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

Memo. Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman (Nov. 23, 1999) (Barry Wood, SRBA Presiding Judge) (emphasis mine). On this basis the Court does not find the concept of "*material injury*" to be facially inconsistent with prior appropriation.

The concept of "reasonableness of diversion" is also a tenet of the prior appropriation doctrine. It is established with respect to both ground and surface water that a water user may not command the entirety of a volume of water of a ground or surface source to support his appropriation for a beneficial use involving less than the entire volume. Rather, there is a "reasonableness" limitation imposed on the appropriation. In Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1911), the U.S. Supreme Court upheld the determination that a water user could not appropriate the entire flow of the river to satisfy a limited beneficial use. Schodde, 224 U.S. at 107. As discussed earlier, however, Schodde dealt with the current of the

river, not the water right. The Court discussed a limitation based on the reasonableness of the diversion in contrast to the quantity actually being put to beneficial use. Id. As far as ground water is concerned, following the enactment of the Idaho Ground Water Act in 1951, I.C. § 42-226, *et seq.*, senior ground water pumpers were protected only to the extent of reasonable ground water pumping levels as established by the Director. Idaho Code § 42-226 (WEST 2006). Prior to its enactment and application, ground water pumpers were protected to historic pumping levels but subject to subsequent appropriators bearing the cost of changing the senior's method or means of diversion. Parker v. Wallentine, 103 Idaho 506, 512, 650 P.2d 648 (Idaho 1982); (citing Noh v. Stoner, 53 Idaho 651, 26 P.2d 1112 (Idaho 1933); Hutchins, Protection in Means of Diversion of Ground Water Supplies, 29 Cal L. Rev. 1, 15 (1941)). The overriding policy in support of this reasonableness limitation rests on the policy of the maximum use and benefit of the state's water resources. Parker 103 Idaho at 513; citing Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61, 65 (Idaho 1960).

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. As explained in Noh, the Idaho Supreme Court expressly held that although a senior was protected to historic pumping levels, to ensure full economic development of water resources, subsequent appropriators could nonetheless compel the senior to change his method or means of diversion, albeit at the expense of the subsequent appropriator. Noh, 53 Idaho at 657. How this principle would apply to hydraulically connected surface spring users has yet to be decided. In particular, whether the senior surface user is protected to historic levels but could be compelled to convert to ground water at the expense of subsequent appropriators, or whether the means and level of diversion prevents a Schodde type situation, in that a senior spring user cannot tie up the entire

volume of water of an aquifer in order to maintain the natural flow of a spring.[21] In all likelihood, this determination would have to be determined on a fact specific basis. Nevertheless, the principles are generally consistent with the prior appropriation doctrine.

This same reasoning relates 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 inures to the senior. Provided, however, that the subsequent appropriator must bear the cost of supplying the replacement and the replacement must be timely. This replacement reasoning is also consistent with the nature of a water right. A water right is an usufructuary right. Proceedings and Debate at 1128. See also, Mr. Heyburn's comments at id. at 1168. The appropriator has the right to divert and put the water to beneficial use but does not own the corpus of the water. See id.

3. Issue - The CMR's fail to incorporate any of the necessary and historically established constitutional protections pertaining to water rights.

Although the factors enumerated above, which are listed in the CMR's, survive a facial challenge, the absence of any of the concomitant historically and constitutionally established procedural components, including: presumption of injury, burden of proof, objective standards for review, and failure to give due effect to the partial decree for a senior water right, do not withstand such a challenge. Such components are necessary to protect and prevent diminishment to vested senior property rights. Stated another way, it is these concomitant procedural components which give the primary effect and value to "first in time, first in right."

[21] This Court refers to this as the "bath tub" example; more specifically, with the aquifer being the bath tub and the spring being the overflow from the bathtub, and the result being that the only time the "over-flow" produces water is when the bath tub is full.

This Court acknowledges that most of the issues pertaining to the principles comprising the prior appropriation doctrine have developed in the context of surface water only. Applying these same principles to the integration of surface and ground water presents an entirely new set of complexities. Nonetheless, because the law requires administration in accordance with Idaho's version of the prior appropriation doctrine, these surface/ground water complexities cannot override the procedural mechanisms that have historically and constitutionally been in place to ensure that the administration of a water right does not undermine the decreed elements of such a water right. The lack of any meaningful timely process, objective standards or established burdens allows administration of the right under the CMR's to circumvent certain constitutional protections that have been historically accorded water rights. The result is a diminishment of the senior water rights which amounts to an unlawful taking.

A. CMR's improperly allow re-evaluation or de facto re-adjudication of a decreed right.

With the exception of the water rights from Basin 01 (the main stem of the Snake River upstream from Milner Dam), the water rights at issue are within one or more organized water districts in accordance with I.C. § 42-602, *et seq.* Significant to this analysis is that many of these rights have been adjudicated and decreed in the SRBA.[22] This means that the elements of the rights have already been judicially determined. Accordingly, most but not all issues pertaining to quantity, reasonable use, waste, beneficial use, reasonableness of diversion, etc. should have been previously identified in the Director's investigation and subsequent

[22] Some may still be in the process of being adjudicated in the SRBA but are being administered according to the Director's recommendation.

recommendation to the SRBA Court as part of the SRBA adjudication process.[23] These issues would then have been litigated and ultimately adjudged. This does not mean, as IGWA correctly points out, that a senior initiating a call is always using the right consistent with its decreed elements. For example, if a water user is not irrigating the full number of acres decreed under the right he would be precluded from making a call for the full decreed quantity. Clearly, the Director has the duty and authority to consider such circumstances when responding to a call.

In State v. Hagerman Water Rights Owners, 130 Idaho 736, 947 P.2d 409 (Idaho 1997), the Idaho Supreme Court discussed the effect of a decreed right in the SRBA pointing out that decreed rights are not insulated from being lost or reduced based on evidence that the right has been forfeited. Hagerman Water Rights Owners, 130 Idaho at 741. Consistent with this reasoning is the acknowledgment that a partial decree is not conclusive as to any post-adjudication circumstances or unauthorized changes in its elements. However, that same reasoning does not permit the Director the authority 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. As this Court previously discussed in a prior section of this decision, a delivery call does not convert a water right to a transfer proceeding.

The consequence of a de-facto re-evaluation process is that the senior is put in the position of having to re-defend the elements of his adjudicated right every time he makes a delivery call for water. This creates several problems. First, it fails to give conclusive effect to the adjudicated right. To the extent the senior is using the right consistent with its decreed elements, it is *res judicata* as to the scope and efficiencies of the water right. It should be pointed out that in the course of the SRBA proceedings, a claimant either had to overcome the presumptive effect of the Director's recommendation by proving up the elements of his water

[23] Issues related to specific aquifer levels may not be identified and litigated as part of the adjudication process.

right; or had to have the Director's concurrence with any proposed settlement. It is contrary to law that the Director, or any party to the SRBA could, in effect stipulate to the elements of a water right in one proceeding and then collaterally attack the same elements when the right is later sought to be enforced. A decreed water right is far more than a right to have another lawsuit, only this time with the Director.

Second, in order to give any meaningful constitutional protections to a senior water right, a delivery call procedure must be completed consistent with the exigencies of a growing crop during an irrigation season. The SRBA adjudication process for a water right extends well beyond the time frame of an irrigation season. The same is also true in an administrative transfer proceeding in which the elements of the right are properly and legally subject to a complete re-evaluation. See I.C. § 42-222. Ultimately, putting the senior in the position of having to re-defend a decreed right in a delivery call undermines the water right, as the process cannot be completed consistent with the exigencies related to the irrigating of crops. Moreover, any delay occasioned by the process impermissibly shifts the burden to the senior right, thus diminishing the right. The concept of time being of the essence for a water supply for irrigation rights is one of the primary basis for the preference system in § 3 of Article XV of the Constitution.

> The CHAIR. ... I will say to the gentleman that I was on that committee, and the object of putting in that clause was, that where water had been used for the three purposes from one ditch, and the water ran short, the preference should be given first to domestic purposes, household use, and next to agricultural purposes, because **if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost. That is the reason the committee saw fit to state it in that manner.**

Proceedings and Debates at 1115 (emphasis mine); see also id. at 1122-23.

B. The CMR's omission of presumption of injury, burdens of proof, or evidentiary standards, which are part and parcel of Idaho's version of the prior appropriation doctrine, is unconstitutional on its face.

In a prior section of this decision, this Court discusses certain principles and tenets of Idaho's version of the prior appropriation doctrine. The CMR's list the factors the Director is to consider when responding to a delivery call. However, the CMR's exclude the procedures for responding to a call that are integral to the prior appropriation doctrine. It is well established in Idaho that incident to a call a senior must show by a preponderance of the evidence that his water right is hydraulically connected to juniors alleged to cause injury. Moe, 10 Idaho at 305-07. Upon such a showing, injury is then presumed. Id. Hydraulically connected juniors then have the burden of demonstrating by a standard of clear and convincing evidence that curtailing their rights would not result in a return to the senior making the call. Id. These respective burdens are integral to the constitutional protections accorded water rights. Id. The CMR's make absolutely no reference to these relative burdens of proof. Counsel for the IDWR acknowledged this at oral argument: "The [CMR's] do not as I recall, specifically mention burden of proof. The senior is required to make a call, and **the director evaluates the criteria.**"[24] Tr. page 72 (emphasis mine). Given the complexities and uncertainties associated with the integrated administration of ground and surface water, the application of the appropriate evidentiary standards and relative burdens are essential in order for the Director's findings to be in compliance with established constitutional procedures. Under these circumstances, no burden equates to impermissible burden shifting.

[24] To this Court, this statement speaks volumes as to the shortcomings of the CMR's as presently drafted. This approach significantly and immediately diminishes the senior right. This procedure also nearly instantaneously places the calling right and the Director in an adversarial position. This position is inconsistent with I.C. § 42-607 and with the burden being on the junior.

There is also a significant difference in standards of required proof based on clear and convincing evidence, a preponderance of evidence, and simply a discretionary standard of "reasonableness" in the eyes of the Director as used in the administrative process. The evidentiary standard of "preponderance of evidence" means "such evidence, as when weighed with that opposed to it, has more convincing force and from which it results, that the greater possibility of truth lies therein." Big Butte Ranch, Inc. v. Grasmick, 91 Idaho 6, 9, 415 P.2d 48, 51 (Idaho 1966). The evidentiary standard of "clear and convincing evidence is a heightened standard and means "a greater degree of proof than a mere preponderance." Idaho State Bar v. Topp, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (Idaho 1996). The CMR's need to define the appropriate standard the Director is to apply when responding to a call, and allocate the burdens according to established principles of the prior appropriation doctrine. As discussed in the next section, a discretionary standard of "reasonableness" in the eye of the Director does not comport with the Constitution.

C. The CMR's are also devoid of any objective standards against which the Director is to apply the various criteria.

The application of the CMR's is further problematic because of the absence of any objective standards from which to evaluate the criteria the Director is to consider when responding to a delivery call. The CMR's list the various criteria the Director is to consider when responding to a delivery call, and then evaluate these criteria in the context of a "reasonableness standard." However, there is nothing more concrete to establish what is or is not reasonable. For example, there is a significant difference between a finding of unreasonableness based on a water user's ability to employ new technology to conserve water,

such as converting from flood to sprinkler irrigating and a finding of unreasonableness based on waste.[25] See State v. Idaho Dept. of Water Administration, 96 Idaho 440, 448, 530 P.2d 934, 932 (Idaho 1974); see also Wells A. Hutchins, Idaho Law of Water Rights, 5 Idaho L. Rev. 1 (1968). Another problem is the absence of any standards governing when a call becomes futile taking into account the delayed impact associated with ground water movement and when pumping actually becomes adverse to a senior. Questions arise, such as how far into the future may a senior consider when making a call, when does pumping actually become adverse to a senior, and can a senior make an anticipatory call. The way the CMR's are now structured, the Director becomes the final arbiter regarding what is "reasonable" without the application or governance of any express objective standards or evidentiary burdens. The determination essentially becomes one of discretion, which is inconsistent with the constitutional protections specifically accorded water rights. The absence of any standards or burdens also eliminates the possibility for any meaningful judicial review of the Director's action as under applicable standards of review, as any reviewing court would always be bound by the Director's recommendation as to what constitutes reasonableness.

The Idaho Supreme Court acknowledged these procedural constitutional deficiencies in the CMR's in A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568 (Idaho 1997) in the context of determining the necessity for a general provision on conjunctive management in the SRBA, when it stated:

> The Rules [CMR's] adopted by the IDWR are primarily directed toward an instance when a 'call is made by a senior rights holder, and do not appear to deal with the rights on the basis of 'prior appropriation' in the event of a call as required.

[25] It would seem that every mandate requiring greater efficiencies through technology would have to come from the legislature, subject to constitutional review by the Idaho Supreme Court, as opposed to an ad hoc determination by the Director who is charged with the administration of a decreed right.

A&B Irrigation District, 131 Idaho at 422; (citing Musser v. Higginson, 125 Idaho 392, 871 P.2d 889 (Idaho 1994)).

In the final analysis, one only need to step back from the trees and look generally at the process currently in place. In the Director's effort to satisfy all water users on a given source, seniors are put in the position of re-defending the elements of their adjudicated water right every time a call is made for water. The call is the process and means by which effect is given to a water user's priority, which is the essence of the right under a prior appropriation system. The mechanism now in place also creates a process that cannot be completed within the attendant time frame exigencies associated with water usage for a crop in progress. In practice, an untimely decision effectively becomes the decision; i.e. "no decision is the decision." Finally, the Director is put in the expanded role of re-defining the elements of water rights in order to strategize how to satisfy all water users as opposed to objectively administering water rights in accordance with the decrees. While full economic development of the state's water resources may be consistent with prior appropriation, even to satisfy prior appropriation, it must be a policy that cuts both ways.

Additionally, the Director or his watermasters are the only ones who can administer these water rights. See Idaho Code 42-603. The individual owner cannot. Therefore, to the extent the Director's application of the CMR's diminish proper administration of the senior's water right, they are unconstitutional. In other words, and assuming the water would otherwise be available, inherent in the senior's water right is the right to use the water. While some minimal due process is required, setting up a procedural labyrinth of requiring a senior water right holder to initiate a contested case proceeding (CMR 30.02.) in accordance with the administrative proceedings which cannot be completed during the irrigation season prevents timely administration to a

growing crop, and is not what either the framers of the constitution had in mind or what the legislature had in mind in adopting I.C. § 42-607.

D. This Court's view on incorporating the procedural framework and the CMR's.

The CMR's attempt a basic framework for the integrated management of ground and surface sources. However, based on the foregoing discussion, and by way of illustrating the deficiencies and providing context, it is this Court's view that the CMR's need to also incorporate the following:

1. Showing by senior making the call:

The senior making a call would be required to file a call with the Director in writing. Previously, in a related case, this Court held that the provisions of Idaho Code § 42-406 should be "self-executing" in that the watermaster should simply engage in curtailment to satisfy rights in order of priority. This Court has since reversed itself on that point.[26] A call in writing is not only necessary to put the Director on notice that the senior is not receiving sufficient water on a given source, but also to initiate a process which incorporates the historically established constitutional burdens and procedures. These procedures and burdens not only protect seniors but also protect junior rights in the event a call is futile. Simply put, the CMR's as currently worded only give "lip service" to these burdens and procedures and do not give a water user the opportunity to exercise the process. In conjunction with making the call, the senior should also be required to produce his decree and could also be required to submit an affidavit attesting he is

[26] See Order Denying IDWR's I.R.C.P. 12(c) Motion for Judgment on the Pleadings and Motion to Dismiss, filed Nov. 1, 2005; See also Order on Motion for Reconsideration of Court's Order Denying IDWR's I.R.C.P. 12(c) Motion for Judgment on the Pleadings and Motion to Dismiss, filed Jan. 30, 2006; and Order on IDWR's Renewed Motion for Reconsideration of Court's Order Denying IDWR's I.R.C.P. 12(c) Motion for Judgment on the Pleadings and Motion to Dismiss, filed April 28, 2006 (Gooding County Case No. 2005-426).

beneficially using all water or all water being sought will be beneficially used consistent with the elements contained in the decree. For example, the senior should be required to at least attest as to the number of acres authorized under the right sought to be irrigated.

The senior must then also demonstrate hydraulic connectivity with juniors alleged to be causing injury. This can be demonstrated by producing the general provision on connected sources issued in every sub-basin within the SRBA. Memorandum Decision and Order of Partial Decree, Basin Wide Issue No. 5, Connected Sources General Provision (Conjunctive Management) (Feb. 27, 2002).

At this point, injury by hydraulically connected juniors is presumed. See Moe, 10 Idaho at 306-07.

2. Application of methodology to determine scope of juniors causing injury.

The determination of which specific juniors are causing injury with respect to ground water is infinitely more complex than making the same determination as between surface users, and the methodology and science is not exact. The methodology and science, and hence the result, has and will change as the accuracy of data and science improves. Nonetheless, and as suggested by at least one affidavit filed in this case, perhaps the state's collaborative ground water model (Enhanced Snake Plain Aquifer Ground Water Model, or "ESPAM") may in fact present the best evidence presently available.[27] The application of which, if based upon sound

[27] See Aff. Gregory K. Sullivan (December 6, 2005). The Director states he in fact used this computer model in fashioning his Order of May 6, 2005 (See ¶ 42, p. 10); Order of June 24, 2005 (See ¶ 13, p. 4); and Order July 22, 2005 (See p. 3). This Court expresses no opinion on whether this computer model is the best available science currently available.

admissible standards, could determine the relative effects of curtailment of certain wells as well as arguably satisfy the clear and convincing evidence standard.[28]

3. Application of criteria for determining futile call.

The CMR's do not specify criteria for determining when a call against ground water is futile, taking into account delays in impact of subterranean flows. For example, what period of time between curtailment and receipt by the calling senior of a beneficial quantity must pass before a call is considered futile? Also, when does pumping by the junior become adverse to the senior? Must the senior experience actual deprivation of water or can the call be made on an anticipated reduction? To this Court's knowledge, Idaho has yet to address this issue. Although the determination would be a mixed question of law and fact, some of the legal standards or criteria may have to come from the legislature, subject to constitutional review by the Idaho Supreme Court.

Following the application of any such criteria to the results of a reliable ground water model, or other suitable method of proof, the Director would have the best scientific evidence based on a clear and convincing standard regarding which juniors are causing injury and subject to curtailment. The Director could then promptly issue a preliminary recommendation in accordance therewith, and serve the affected parties.

4. Notice to juniors subject to curtailment and notice to seniors of futility of call as to certain connected juniors, and notice of hearing.

[28] This could result, of course, in curtailment of ground water diversions which have a more direct and immediate hydraulic connection to the calling right as opposed to curtailment based solely upon priority. See Director's Order Regarding IGWA Replacement Water Plan, ¶ 8, p. 3 (May 6, 2005).

The parties who may be curtailed are entitled to at least minimal due process of law, notice of the proposed action, and the opportunity to be heard.

5. Hearing.

The Director could then conduct a hearing whereby juniors and seniors would have the opportunity to put on evidence and try to rebut the preliminary findings of the Director based on the results of either the ground water model or other suitable method. Juniors would also have the opportunity to put on evidence to try and establish that the senior is wasting water contrary to the partial decree as well provide a mitigation plan for replacement water; or to try to establish a futile call. Obviously, if the senior is wasting water then there is no "material injury" to the extent of the quantity wasted.

6. Burdens of Proof.

The burden is also on the junior to show by clear and convincing evidence that uninterrupted flows would not result in a usable quantity to the senior. Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220 (Idaho 1976) (burden on junior to demonstrate uninterrupted flows would reach point of diversion of seniors); Martiny v. Wells, 91 Idaho 215, 219, 419 P.2d 470 (Idaho 1966) (burden on junior to show water not tributary); Jackson v. Cowan, 33 Idaho 525, 528, 196 P. 216 (Idaho 1921) (burden of proving stream would not reach reservoir on junior); Josslyn v. Daly, 15 Idaho 137, 149, 96 P. 568 (Idaho 1908) (junior must produce clear and convincing evidence showing prior appropriation not affected by diversion); Moe v. Harger, 10 Idaho 302, 306, 77 P. 645 (Idaho 1904) ("theories neither create nor produce water.")

7. **Ruling on replacement water or changing means or method of diversion.**

In ruling on replacement water, or requiring a senior to change his point of diversion, the Director could then make a ruling, taking into account whether the senior is protected to historical diversion levels or reasonable aquifer levels; depletionary effects by juniors on the aquifer and integrated rate of recharge for the aquifer; whether requiring replacement water or change in means or method of diversion would result in injury to senior, or other hydraulically connected water users.

8. Final Decision.

The Director would then issue a final decision, applying the relative evidentiary standards. Juniors seeking to prove waste must also satisfy the clear and convincing standard. Juniors seeking to supply replacement water must also demonstrate by clear and convincing evidence that no injury would result to the senior making the call.

9. Time is of the essence.

At least as to curtailment for irrigation water the CMR's must recognize that time is of the essence and set up procedural time frames commensurate with these constitutional principles. Anticipatory calls may well be necessary to accommodate the time constraints.

IGWA argues that no where does the Constitution speak of "immediate administration." IGWA's Memo. at 27 (Dec. 6, 2006). IGWA's statement is correct to the extent the words "immediate administration" are not used. However, as chronicled in the historical portion of this decision, a primary consideration of the preference system in Section 3 was to protect "crops in progress, being green..." Proceedings and Debates at 1115 and 1123. I.C. § 42-607 provides the

means for curtailment – the watermaster fastens the headgate or other diversion device. In fact, the constitution contemplates timely administration in two respects: priority in time and preference in use. That was the "real world" then and it is the real world today.

4. Issue -- CMR's Exemption of Domestic and Stock Watering Ground Water Rights from Administration

The Constitutional Provision. As stated earlier, Article XV, Section 3 provides, in part:

> ...Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law[29]) have the preference over those claiming for any other purpose... But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

The CMR Provisions: IDAPA 37.03.11.020.11. provides in part

> **11. Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition** set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering is within the limits of the definition set forth in Section 42-1401A(11), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

IDAPA 37.03.11.020.11 (emphasis mine).

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[29] For the limitations prescribed by the legislature to domestic purposes, see Idaho Code § 42-111 (WEST 2006).

Limitations prescribed by law: I.C. § 42-111 provides in part:

> **42-111. Domestic purposes defined.** – (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic use" means:
>
> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
>
> (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five (2,500) gallons per day.
>
> (2) For purposes of sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

I.C. § 42-111.

I.C. § 42-1401A(11) provides:

> **42-1401A. Definitions.** – The following terms are defined for purposes of this chapter as follows:
>
> (11) "Stock watering use" means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

Idaho Code § 42-4201A(11) (WEST 2006).

Applicable provisions of I.C. § 42-602, *et seq*: I.C. § 42-602 provides:

This Court has already quoted I.C. §§ 42-602 and 603. These are incorporated herein by reference.

I.C. § 42-607 provides

> **42-607. Distribution of water. – It shall be the duty of said watermaster to distribute the waters of the** public stream, streams or

> **water supply, comprising a water district,** among the several ditches taking water therefrom **according to the prior rights of each respectively, in whole or in part,** and to shut and fasten, or cause to be shut and fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, **when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others** in such stream or water supply; provided, that any person or corporation claiming the right to use 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, and the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit or licensed right in such stream or water supply. So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.

Idaho Code § 42-607 (WEST 2006) (emphasis mine).

Summarily stated, the CMR's attempt to exclude administration of domestic water rights from ground water sources is both facially unconstitutional and is also otherwise unlawful as being in violation of I.C. §§ 42-602, 42-603, and 42-607.

As to being facially unconstitutional, Article XV, § 3 grants domestic use (subject to legislatively created restrictions), in times of scarcity, a preference for use over other uses. However, this preference is subject to the following: "But the usage by subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in Section 14 of Article I of this Constitution." Idaho Const. Art. XV, § 3.

Thus, the Constitution provides the method for dealing with domestic ground water uses in times of shortage and ignoring them to the detriment of seniors is not the method.[30] Such conduct, especially the cumulative effect, diminishes the value of senior rights, which is an unlawful taking.

> Mr. BEATTY. They ought to have no right, but you propose by this section [section 3] to give them that right because they are going to use the water for domestic purposes. These people that come and start the town propose to use it for domestic purposes, and that, you say, by this section, shall be a superior right to that of the farmer who took it up for agricultural purposes.
>
> Mr. HASBROUCK. That is only in time of scarcity.
>
> Mr. BEATTY. It matters not whether it is in time of scarcity or not. Why should you, because water is scarce, take it away from the man who was first entitled to it, in times of scarcity or any other time.

Proceedings and Debates at 1141. Thus, the framers of the Idaho constitution clearly understood the cumulative effect of domestic use. It must be remembered that the framers also considered a specific proposed Amendment to Section 3 which could have given domestic uses an absolute preference without the requirement of compensation. Had this amendment been adopted, it would support the CMR's exclusion of domestic rights. However, this amendment was specifically withdrawn.

I.C. § 42-602 requires the Director (in water districts) (and the Constitution makes the requirement apply everywhere in the State) to administer water in accordance with the prior appropriation doctrine; and this includes domestic uses. As such, the Director is without authority to "pick and choose" which parts or tenets of the doctrine he wants to utilize or follow. The Director's duty is to administer water in accordance with the prior appropriation doctrine; that is, all of the rights in accordance with all of the doctrine.

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[30] It should be noted that the CMR's are entirely silent on any of the preferences set forth in Article XV. § 3.

In addition to the Constitutional infirmity, through I.C. § 42-603 the legislature authorized the Director to adopt rules and regulations "for the distribution of water from ... ground water ... sources as shall be necessary to carry out the laws in accordance with the priority of the rights of the users thereof." The legislative intent here is clear and unambiguous.

The exclusion of junior ground water users for domestic purposes does not respond to this legislative charge. The Idaho Supreme Court in Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 41 P.3d 237, 241 (Idaho 2001) states the following legal principle:

> **When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.** However, regulations of administrative agencies are generally upheld if they are reasonably directed to the accomplishment of the purposes of the statutes under which they are established.
>
> A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statutes under which it is made just as though it were prescribed in terms therein. **To be valid, an administrative regulation must be adopted pursuant to authority granted to the adopting body of the legislature. A regulation that is not within the expression of the statute, however, is in excess of the authority of the agency to promulgate that regulation and must fail.**
>
> **In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative powers to modify, alter, enlarge or diminish provisions of a legislative act that is being administered.**
>
> The final responsibility for interpretation of the law rests with the courts. **A court must always make an independent determination whether the agency regulation is 'within the scope of the authority conferred' and that determination includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute.** The Yamaha court [see Yamaha Corp. of America .v State Board of Equalization, 19 Cal.4th 1, 78 Cal.Rptr.2d 1, 960 P.2d 1031, 1041 (Cal. 1998).] described the narrow standard under which quasi-legislative rules are reviewed as 'limited to a

> determination whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law' and distinct from the broader standard courts apply to interpret rules.

Roeder Holdings, 136 Idaho at 813 (internal citations omitted) (emphasis mine).

Moreover, I.C. § 42-111 recognizes a domestic use not to exceed thirteen thousand (13,000) gallons per day.[31] This Court would characterize that quantity as being fairly generous or "beefy." Taking into account the cumulative effects of such rights, particularly in a relatively confined geographical area, could easily exacerbate the effect of ground water withdrawal for domestic purposes. The CMR's recognize the concept of "ground water rights either individually or collectively causes material injury..." IDAPA 37.03.11.020.01.

For a case that judicially recognizes the obvious collective effect of multiple small ground water withdrawals for domestic purposes, see the Washington Supreme Court case of State of Washington v. Campbell & Gwinn, 146 Wash.2d 1, 43 P.3d 4 (Wash. 2002).

Going back in time to the constitutional debates and tracing the development of Section 3 through the Convention by the various proposed amendments, it is absolutely clear that while the framers recognized the importance of domestic rights, and ultimately granted these rights a preference over other uses in times of shortage, priority is still recognized and the junior domestic uses must pay. Therefore, the Director's wholesale exclusion of such domestic rights from administration is unequivocally unconstitutionally and can amount to an unlawful taking of prior vested water rights. The Legislature, by enacting I.C. §§ 42-1420 and 42-227, cannot change Article XV, § 3.

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[31] It should also be noted that the constitutional preference for domestic purposes would also likely include domestic uses of water under a municipal water right, yet municipal water rights are not exempted under the CMR's.

5. Issue – Whether the CMR's Concept of "Reasonable Carryover" Injures Vested Senior Storage Water Rights and Violates Idaho's Constitution and Water Distribution Statutes.

The issue regarding storage water arises from the CMR's Rule 42.01.g. and the Director's application/threatened application as stated in his orders relating to Plaintiffs' delivery call of January 14, 2005; specifically, the three attached to Plaintiffs' Complaint. See Pl.'s Compl., Ex. B, Order Regarding IGWA Replacement Water Plan; Ex. C, Order Approving IGWA's Replacement Plan for 2005; and Ex. D, Supplemental Order Amending Replacement Water Requirements (Aug. 15, 2005).

The applicable CMR provides:

> **042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).**
>
> **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:
>
> ***
>
> **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 employment 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.

IDAPA 37.03.11.042.01.g. (emphasis mine).

This Court's review of the rather voluminous record has revealed that the actual storage rights at issue are not in the record in this case. However, footnote 1 to Plaintiffs' Complaint provides as follows:

> The United States Bureau of Reclamation holds various water rights for the 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. The nature and extent of the spaceholers' [sic] ownership interests in the storage water rights is currently at issue before the Idaho Supreme Court on appeal from the SRBA District Court (Case No. 39576, Consolidated Subcase No. 91-63). The plaintiffs own storage space in these reservoirs pursuant to contracts they entered into with Reclamation, and in some cases have filed their own storage water right claims. **For purposes of the priority dates attached to the storage space held by plaintiffs in various reservoirs**, a portion of Reclamation's water rights are described as follows: 1) Water Right No. 01-00285, 1.7 million acre-feet, decree, American Falls, **March 30, 1921**; 2) 01-02064, 1.8 million acre-feet, license, American Falls, **March 30, 1921**; and 3) 01-02068, 1.4 million acre-feet, Palisades, **June 28, 1939**.

Pl.'s Compl. n. 1 ¶ 10.B (emphasis mine).

Additionally, and for the purpose of this ruling, the Director in his Orders of May 6, 2005; June 24, 2005; and July 22, 2005 (see Pl.'s Compl. Ex. B, C, and D) acknowledges that Plaintiffs have storage rights (the exact amount may be at issue and obviously, the nature of the title – legal v. equitable – is presently before the Idaho Supreme Court).

The gist of the argument between the parties can basically be stated as follows: Is the vested property right of the Plaintiffs' storage right the face amount of the right (contract, license or partial decree) or is it some yearly variable amount expressed in terms of "reasonable carryover" as determined by the Director?[32]

Mr. Roger Ling of the Surface Water Coalition asserts that:

> The most flagrant abuse in the doctrine of the Conjunctive Management Rules and that [Sic] the provision in Rule 42 which provides that the Director has the authority to determine the extent to which water supplies

[32] In practice, this argument may be better illustrated by an example. Assume the senior has a natural flow right out of the main stem of the Snake River for diversion of 100 cfs and a storage right in an upper basin reservoir of 1000 AFA. Of this 1000, 900 AFA is actually in storage. Further assume that at the time of the delivery call by the senior, there is only 80 cfs available in the river. Assuming the storage right is senior to the junior diversion, can the senior curtail the junior to get the other 20 or must the senior go to his storage right?

> are available to it before it will determine whether or not there is material injury.

Transcript of Oral Arguments on Plaintiffs' Motion for Summary Judgment, April 11, 2006, pages 38-39.

Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, lodged October 14, 2005, states in part as follows:

> The 'material injury' factors in Rule 42 also contain a concept of 'reasonable carryover.' As written, the Rule allows the Director to avoid administration even though junior ground water rights interfere with storage water rights. In other words, the Rules allow the Director to refuse to order curtailment of junior ground water rights to satisfy senior storage water rights under the theory that a senior is only entitled to an amount of 'reasonable carryover' storage water, not the amounts listed on the relevant storage water rights and contracts seniors have with the United States Bureau of Reclamation. *See May 2, 2005 Amended Order* at 15-16 ¶ 70' Ex. A to *Rassier Aff.* (listing Plaintiffs' storage space and storage water right entitlements).

Pl.'s Memo. in Support of Pl.'s Mot. S.J. 40 (Oct. 14, 2005).

The Director's further threatened application of the CMR's is recited in Plaintiffs' Memorandum of October 14, 2005 at pages 41 and 44 as follows:

> By way of example of Plaintiffs' request for administration in 2005, the Director determined the following 'reasonable carryover' storage water amounts, contrary to the licensed and decreed water rights, and vastly less than what has historically been carried over by the respective entities (in acre-feet):

	Reasonable Carryover Determined by Director	Total Storage Rights Owned by Entity
A&B Irrigation District	8,500	137,626
American Falls Res. Dist. #2	51,200	393,550
Burley Irrigation District	0	226,847
Milner Irrigation District	7,200	90,591
Minidoka Irrigation District	0	366,554
North Side Canal Company	83,300	859,898
Twin falls Canal Company	38,400	245,930

> *May 2, 2005 Amended Order* at 15-16, ¶ 70 (storage rights) compared to 26, ¶ 119 (reasonable carryover determinations), Ex. A to *Rassier Aff.* Strikingly, although Burley and Minidoka irrigation districts have vested property rights in 226,487 acre-feet and 366,554 acre-feet of storage space in Reclamation reservoirs in Water District No. 1, the Director, under a Rule 42 'reasonable carryover' analysis, determined they have ***no right to carry over any water*** for any purposes of administration against junior priority ground water rights. Even though Burley and Minidoka had averaged approximately 95,900 acre-feet and 150,300 acre-feet of carryover storage between 1990 and 2004, the Director refused to acknowledge any amount of carryover storage under their senior rights. *See Order* at 20, 21. ¶ 95, Ex. A to *Rassier Aff.*

Pl.'s Memo. in Support of Pl.'s Mot. for S.J. at 40 (emphasis in original).

The threatened application of this rule by the Director is still further stated by the Plaintiffs in their Memorandum as follows:

> Just such a 'determination' was made in the Director's May 2, 2005 *Amended Order* in responding to Plaintiffs' request for water administration. For example, instead of honoring the decreed elements of Plaintiffs' senior water rights, the Director arbitrarily picked a single water year (1995) and 'determined' the total amount of water diverted by Plaintiffs that year was all the water they were entitled to demand for purposes of administration in 2005:
>
> > 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 these 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 affects can be significant.
> >
> > ***
> >
> > 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***...

> [Citing to the Director's] May 2, 2005 *Amended Order* at 20, 25 (emphasis added). See Ex. A to *Rassier Aff.*
>
> Clearly, the Rules allow the Director to 'redefine' senior water rights for purposes of administration. Instead of looking at the face of the decrees or licenses to determine how Plaintiffs' water rights would be administered according to priority, the Director arbitrarily determined that 1995 would serve as the 'minimum supply' needed to make full water deliveries and that total amount would serve as the basis for the rights in administration. Moreover, the Rules permit the Director to determine a water user's 'need' based upon 'combined' diversions of natural flow and storage, even though those rights are separate water rights entitled to separate priority administration pursuant to Idaho's constitution and water distribution statutes. Such a process flies in the face of the prior appropriation doctrine and renders court adjudications, like the SRBA, which has been progressive for almost twenty-six years, meaningless.

Id. at 43-44.

In its Memorandum in Opposition of Summary Judgment, IDWR argues that because the "reasonable carryover" provision could be applied consistent with the constitution in the event an entity, such as an irrigation district or a canal company, stores water from a natural stream under a license or decree from supplemental storage rights, it withstands the constitutional scrutiny required in a facial challenge. IDWR Memo. at 58 (Dec. 6, 2005). As stated in this Court's Notice of Clarification of Oral Order of November 29, 2005, filed December 16, 2005, this Court's review is broader than the facial challenge alone.

In its Memorandum in Opposition of Summary Judgment, IGWA argues that various federal and Idaho Supreme Court cases support the argument that reasonable restrictions on use of carryover storage do not conflict with Idaho's version of the prior appropriation doctrine. IGWA Memo. at 50-52; citing Washington County Irrigation Dist. V. Talboy, 55 Idaho 382, 385, 43 P.2d 943, 945 (Idaho 1935); Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1133-34 (10th Cir. 1981); Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 85 (Idaho

1945); and Caldwell v. Twin Falls Salmon River Land and Water Co., 225 F. 584, 595 (D. Idaho 1915). IGWA further argues that it should not be the junior right holder's burden to ensure a senior's storage water reliability to a level beyond that existing when it was first appropriated. In other words, a junior's right should not be converted into a kind of insurance or guarantee that senior's full storage volume will be obtained under every set of climatic conditions or every circumstances of a senior's storage use. IGWA Memo. at 52 (Dec. 6, 2005).

Factually speaking, Plaintiffs assert that they acquired storage water rights to supplement their natural flow diversions and that all of the Plaintiffs' storage rights have priority dates earlier in time than 1951 (the date of the enactment of the Idaho Ground Water Act). As such, both categories of Plaintiffs' rights, that is their natural flow rights as well as their storage rights,[33] are senior to thousands of hydraulically connected junior ground water rights in Water Districts 120 and 130. Plaintiffs' purposes in securing the storage rights are obvious -- the storage water rights were acquired to both supplement their natural flow diversions in a current year necessary to cover shortages caused by naturally occurring conditions (e.g. a drought), and to ensure Plaintiffs would have a sufficient water supply in future years in times of shortage caused by naturally occurring conditions. The purposes of storage was never to serve as a slush fund in order to allow the Director to spread water and avoid administering junior ground water rights in priority; nor was it ever intended to cover shortages caused by junior diversions.

Simply put, whether it is this year, next year, or years from now, a senior cannot exercise his water right and "use" the water in storage if the water represented by the right is not present in storage. Absent a proper showing of waste, senior storage right holders are allowed to store up to the quantity stated in the storage right, free of diminishment by the Director. Otherwise,

[33] In accord with Paragraph 10 of IDWR's Answer to the Plaintiffs' Complaint, this Court is aware that the exact ownership interest of the storage rights is currently before the Idaho Supreme Court in United States v. Pioneer Irr. Dist., Docket No. 31790, appeal filed April 14, 2005.

why would there even be a quantity element to a storage right? In Washington County Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943 (Idaho 1935), the Idaho Supreme Court characterized the vested property interest in the reservoir storage water as follows:

> **After the water was diverted from the natural stream and stored in the reservoir, it was no longer 'public water' subject to diversion and appropriation** under the provisions of the Constitution (article 15, § 3). It then **became water 'appropriated for sale, rental or distribution'** in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The **waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.** A subsequent appropriator claiming a part or all of such waters would be the only person who could question the lack, extent, or nature of its application to a beneficial use.
>
> ***
>
> **No one can make an appropriation from a reservoir or canal for the obvious reasons that the waters so stored or conveyed are already diverted and appropriated and are no longer public waters.** This does not mean, however, that the reservoir or canal may waste the water or withhold it from persons who make application to rent the same. If, on the other hand, the owner of the reservoir owns land subject to irrigation from such reservoir, he may apply it to his own land or sell it to others, or both, according to the priorities of their applications.

Id. at 389-90 (internal citations omitted).

Because the stored water is a vested property right, the Plaintiffs also have the right to (subject to the limitation on waste) supplement their natural flow right diversions, rent the water to others for lawful purposes, or carry it over to future years. Bennett v. Twin Falls Water Side Land and Water Co., 27 Idaho 643, 651, 150 P. 336 (Idaho 1935).

Several other points are also apparent from the Director's above threatened application of the CMR's to vested storage water rights.

First, the threatened application of diminishing the senior's storage is not in accord with the prior appropriation doctrine or established Idaho case law.

Second, the threatened application of diminishing the senior's storage is an unconstitutional taking. Storage water is a recognized beneficial use and it is a vested property right.

Third, an irrigation water year is from November 1 of a given year through October 31 of the following year. See Pl.'s Compl., Ex. B (Director's Order of May 6, 2005). With all due respect, unless the Director has newly acquired powers of accurate prediction of future weather, he cannot, during the current irrigation season, reliably determine next year's storage needs for irrigation because no one knows what an upcoming winter will bring in terms of water. In other words, and because one of the lawful purposes of storage is to carry water over to future years, under the water law doctrine of "waste," meaning the senior cannot divert more than he can apply to beneficial use, unless the Director can objectively establish that the senior's current actual storage, plus the upcoming winter's yield of water to storage will exceed the senior's vested storage right (thus amounting to "waste"), the Director has no lawful authority to presently diminish the senior' storage right.[34] More importantly, the burden would be on the junior to establish the waste. Absent such a showing, it is an unlawful taking no matter how one tries to rationalize the conduct.

Fourth, and probably the most obvious point, is that determining future irrigation needs based upon the theory of what happened in 1995 is without any rational basis in fact or law. As the Idaho Supreme Court has already expressed in Moe v. Harger, 10 Idaho 302, 77 P. 645 (Idaho 1904):

> This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right;

[34] Evidence that the Director recognizes the winter water issue can be found in ¶ 4. p. 4 of his July 22. 2005. Order. wherein he writes: "on June 30, 2005, maximum storage in the Upper Snake River Basin Reservoirs had accrued... winter-water savings accounts had filled to 100 percent." See Pl.'s Compl., Ex. D. In other words, the Director could not accurately determine the reservoir water storage picture until the end of June of that year.

> and **it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured if affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts.** ***Theories neither create nor produce water***, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user.

Moe, 10 Idaho at 305-06 (emphasis mine).

The foregoing illustrates why allowing the Director to presently determine what is 'reasonable' carryover in his mind (which in some instances is zero, despite the established senior water right for that purpose), and thereby justify his refusal to administer junior priority ground water rights in a timely fashion, results in an unlawful taking. Absent a showing that present storage equates to waste, the Director has no lawful authority to diminish the respective storage rights. Again, the responsibility to "optimize the water resources of the State" has to include the remainder of the Constitution "in accordance with the prior appropriation doctrine."

In summation, the reasonable carryover provision of the CMR's is unconstitutional, both on its face, and as threatened to be applied to the Plaintiffs in this case.

6. Issue – Whether the CMR's violate the Equal Protection Clause.

The Plaintiffs also argue that the CMR's violate the Equal Protection clauses of the Idaho and federal constitutions. In so arguing, they maintain that the CMR's allow junior priority ground water right holders to divert water in the face of a potentially adverse delivery call, while junior surface water right holders are immediately curtailed without the benefit of similar rules.

The Defendants, on the other hand, argue that the CMR's do not violate Equal Protection. They first argue that ground water users and surface water users are not similarly situated.

because of the factual and legal issues inherent in administration of ground water, due to its increased complexities, that are not ordinary present in the administration of surface water. Given the unique complexities of administration of ground water, the Defendants assert that the CMR's differences in administrative procedures are rationally related to a legitimate state interest.

> Equal Protection Clause jurisprudence has been summarized as follows by the United States Supreme Court:
>
> > The Equal Protection Clause ... commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' **Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.**
> >
> > As a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.' Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
>
> Even though a statute or regulation is valid under this analysis, selective or discriminatory enforcement of that statute or regulation may amount to a violation under either the Idaho or United States Constitutions, but only if the challenger shows a deliberate plan or discrimination based upon some improper motive like race, sex, religion, or some other arbitrary classification.

Anderson v. Spalding, 137 Idaho 509, 514, 50 P.3d 1004, 1009 (Idaho 2002); quoting Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12 (1992) (internal citations omitted) (emphasis mine).

"The first step in an equal protection analysis is to identify the classification at issue." McLean v. Maverik Country Stores, Inc., --- P.3d ----, 2006 WL 1042332, *3 (Idaho 2006). In this water administration case, the classification is based upon the source of water in a water right, e.g., whether the water is from a ground water source, or whether the water is from a surface water source. The definitions of ground water and surface water are found in Rule 10 of the CMR's.

"The second step is identifying the standard by which the classification will be tested." Id. In doing so, it is helpful to look at case law in Idaho on the subject.

> The state has wide discretion to enact laws that affect some groups or citizens differently from others. It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional. **Under either the Fourteenth Amendment or the Idaho Constitution, a classification will survive rational basis analysis if the classification is rationally related to a legitimate governmental purpose.** On rational basis review, courts do not judge the wisdom or fairness of the legislation being challenged. **Under the 'rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it.**

Id. (internal citations omitted) (emphasis mine).

> Equal protection issues focus upon classifications within a statutory scheme that allocate benefits and burdens differently among categories of persons affected. The Equal Protection Clause ... is designed to ensure that those persons similarly situated with respect to a governmental action should be treated similarly. **When reviewing the constitutionality of statutes impacting on** social or **economic areas, the rational basis test is generally appropriate. Under the rational basis test, the equal protection clause is violated only if classification is based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be advanced to justify those goals.**

Madison v. Craven, 141 Idaho 45, 48, 105 P.3d 705, 709 (Idaho App. 2005) (internal citations omitted) (emphasis mine).

As stated above, the first step is to determine what the classification is; and in this case the classification is based upon the source of water in a water right, e.g., whether the water is from a ground water source, or whether the water is from a surface water source.

The next step then is to determine what sort of scrutiny would apply to this classification. It seems to this Court that a rational basis should be applied for several reasons. First, the two classifications (ground and surface) are not similarly situated in all relevant respects. The United States Supreme Court has stated that the Equal Protection Clause was written to prevent the government from treating people differently who are alike *in all relevant respects*. Nordlinger. 505 U.S. at 10. In this case, water users whose diversion is from a ground water source are not similarly situated to water users whose diversion is from a surface water source. There are well recognized complexities and difficulties inherent with ground water sources that are simply not present in many surface water sources (i.e. at a minimum, there is usually more difficulty determining the degree to which the use of ground water even affects other users, whereas this may be facially apparent with surface water). Therefore, the two classifications are not similarly situated in all respects.

Even if it is determined that they are similarly situated, i.e., from connected sources, it is still apparent that rational basis would apply, because the courts have held that when reviewing statutes that impact in the economic area, rational basis is the proper test to apply. See Madison. 141 Idaho at 48. It is clear that a water right is an economic right, not a suspect classification, such as race or gender, for which the strict scrutiny test would be applied.

Applying the rational basis test to this case, it is clear that the legislature had a legitimate state interest in authorizing the Director to promulgate the CMR's and establishing the classification at issue here: the administration of junior ground water and senior surface water

together. Further, the CMR's, as written (although otherwise defective) are rationally related to this interest, in that the distinction posed here is based on the different complications created through administration of ground water.

7. Issue – Whether administration, or lack thereof, pursuant to the CMR's constitutes an unlawful taking.

As stated many times in this decision, a water right is a vested property right. In State v. Nelson, 131 Idaho 12, 16, .P.2d 943, 947 (Idaho 1998), the Idaho Supreme Court stated:

> Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of the property.

Nelson, 131 Idaho at 16. However, as discussed earlier, a water right is not the right to own the physical characteristics of the water (i.e. its molecules), but a right to use the water. Therefore, a diminishment in the right to use the water defeats the very purpose of the right. Further, any action which undermines the priority of the water right undermines the core value of the right – the right to use the water before all those who acquired their rights subsequent to the senior user. Therefore, this case raises the question of whether the CMR's diminishment of a senior's water right, as discussed above, constitutes a taking.

The United States Supreme Court has recognized that any permanent, physical invasion of one's property constitutes a taking, no matter how minor or de minimus the invasion may be. Loretto v. Teleprompter CATV Corp., 458 US 419, 434-35, 102 S.Ct. 3164, 3175-76 (1982). In Loretto, the United States Supreme Court determined that a city ordinance requiring landlords to install small cable boxes on their property constituted an outright physical taking. Id.

Further the Idaho Supreme Court has stated:

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. **The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.**

Roark v. Caldwell, 87 Idaho 557, 566, 394 P.2d 641, 646 (Idaho 1964); quoting The Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513, 514 (Tex. 1921) (emphasis mine).

It has been determined that there are two types of takings: physical takings, where the government occupies a permanent, physical presence on the property (See Loretto); and regulatory takings. In discussing regulatory takings, the Idaho Supreme Court has stated:

> [I]n addition to an outright taking, governmental interference with an owner's use or enjoyment of his private property may also require compensation... '[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'

McCuskey v. Canyon County Commissioners, 128 Idaho 213, 215, 912 P.2d 100, 102 (Idaho 1996). This Court determines that diminishment of water rights, which occurs as a direct result of administration pursuant CMR's, constitutes a physical taking.

The Director and/or other IDWR employees [watermasters] are state of Idaho employees; i.e., "the government" for purposes of a takings analysis. Only the Director and/or his watermasters can administer water. I.C. § 42-602. A private person cannot administer water. In fact, it is a criminal act to do so. See I.C. § 18-4301, *et. seq.*, but in particular I.C. § 18-4304. Therefore, in order for a senior water user to obtain administration in times of scarcity to be able to exercise his vested property right, he must go through the government. As such, the government's conduct in failing to administer the water right in accordance with the prior appropriation doctrine could amount to a physical taking. See also Idaho Const. Art. XV, § 3.

The framers of the Idaho Constitution clearly understood the diminishment of the senior's water right to be a taking requiring compensation. They added a specific amendment to section 3 to cover this very issue.

Here, through the CMR's the Director is allowed to administratively re-adjudicate the water right decree, by determining how much water he believes the senior is *actually* entitled to. Further, the burden is placed on the senior user to essentially re-prove the beneficial use element of the decree, and that he will not waste it. As previously discussed, this approach is not the law in Idaho. Finally, in the area of storage rights, the Director has the authority to disregard the amount actually licensed to the storage right user, and determine instead a "reasonable" amount of carryover; and even could determine that no amount of carryover is appropriate, regardless of what storage rights have vested to the senior user.

The Plaintiffs' storage rights were developed and acquired years before many of the junior ground water rights were licensed and years before Idaho adopted the Ground Water Management Act. Reservoirs were constructed primarily for flood control and water storage. To now suggest that a purpose of the stored water is to avoid administration of junior ground water rights at the expense of the senior is simply without merit.

If the government attempted to change the physical description of real property to the point where a party was left with less property than originally deeded, the courts would have no trouble determining that a taking had taken place. See e.g. C&G, Inc. v. Canyon Highway District, 139 Idaho 140, 75 P.3d 194 (Idaho 2003). Here, because the Director, through the CMR's has the ability to decrease the amount of water a senior user is entitled without establishing waste, he is essentially given the power to alter the property right.

Additionally, the CMR's for the various reasons discussed above, diminish the senior water user's ability to use their water by not administering water in times of shortage in a timely manner, and by shifting the burden to the senior. This diminishment and the uncertainty created thereby de-values the right, and therefore, as for as this Court cam determine in accordance with the law stated above, constitutes an unconstitutional taking without just compensation.

XIII

CONCLUSION

In times of scarcity, administration of water under Idaho's version of the prior appropriation doctrine is not a user friendly business. To the contrary, it is harsh -- there are winners and there are losers. To the extent a person is applying water in accordance with his decreed water right and is not wasting water, he is, under the Idaho Constitution, allowed to be "the dog-in-the-manger."[35] Rules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, they are essential to proper administration and to protect vested property rights. With that said, rules for the administration of water must also be in accordance with the established law. This too was the charge by the legislature. See I.C. §§42- 602-603. The first Rule of "Conjunctive Management" is Idaho's version of the prior appropriation doctrine; and in particular, all of the prior appropriation doctrine -- that is to say, including those portions which are harsh and abrupt, and benefit some to the detriment of others.

Or as Mr. Heyburn in the constitutional debate phrased such a dilemma (in debating a proposed additional section to the constitution):

[35] See Proceedings and Debates at 1162.

> I am just as well aware of the possibility of working an injustice in this section, perhaps, as the gentlemen who have so plainly and specifically stated such possibilities. **A man might do a great many unjust things if he is clothed with this right, and if the right is absolutely taken away from him he might be deprived of a great many very plain and just rights.**

Proceedings and Debate from the Idaho Constitutional Convention, 1889, at 1171 (emphasis mine).

One final matter which is of great interest to this Court is the Director's own written words, wherein he concisely describes with clarity, how irrigation water is to be administered:

> 4. In water districts, watermasters must summarily determine: (1) whether a water right holder calling for delivery of water is receiving the water authorized by the water users water right; (2) if not, what junior water right diversions must be curtailed; and (3) whether there are alternative means to provide the water to senior water rights to reduce or eliminate injury to the senior water rights.

Pl.'s Compl., Ex. B, Director's Order entered May 6, 2005.

However, immediately following this recognition of the law, he promptly engaged on a course under the CMR's inconsistent with his own words.

Because (1) the Director has a clear legal duty to administer water in accordance with priority, (2) the CMR's do not contain reasonable and objective standards, omit significant concepts of the law; try to re-write others; and fail to establish a time frame for administration commensurate with the needs for irrigation; the result is a diminishment of vested rights. The diminishment results in an unconstitutional taking. The end result is this Court must declare the CMR's, as written, are both not in accord with the statute authorizing the Director to promulgate rules and the Rules are also otherwise unconstitutional and void in the respects noted herein.

For the foregoing reasons, the Plaintiffs' and related Intervenors' Motions for Summary Judgment are hereby GRANTED as stated herein. Counsel for the Plaintiffs is to prepare the appropriate judgment. Each party is to bear their own costs and attorneys' fees.

IT IS SO ORDERED.

Dated: June 2, 2006

Signed: B Wood
Barry Wood, District Judge