Nos. 33249, 33311, 33399

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

v.

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

IDAHO GROUND WATER APPROPRIATORS, INC.,
Intervenor-Appellant.

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

On Appeal from the District Court of the Fifth Judicial District
Of the State of Idaho, in and for the County of Gooding,
The Honorable R. Barry Wood
District Judge, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

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

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

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

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

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

ADDITIONAL ISSUES ON APPEAL[5]

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

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

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

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

STANDARD OF REVIEW[6]

I. Summary Judgment & Constitutional Issues

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

II. Facial Constitutional Challenges & Declaratory Judgment Actions

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

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

2) A factual foundation is necessary for a court to review a facial constitutional challenge to administrative rules.

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

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

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

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

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

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

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

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

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

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

This notwithstanding, the Defendants and IGWA allege that the district court "invented a hybrid analysis for evaluating Plaintiffs' claims." *Defs. Br.* at 40-42, *IGWA Br.* at 2.[13] In addition to ignoring I.C. § 67-5278, the Defendants misinterpret *Korsen*. In *Korsen*, the lower courts did not examine the challenged statute "***as it applied to Korsen's specific conduct***." 138 Idaho at 712 (emphasis added). In fact, the "hybridized" analysis that this Court disapproved of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] Order at 90, 94, 117, 124.

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

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

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

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

ARGUMENT

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[31] In *Josslyn v. Daly*, the Court held:

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

15 Idaho 137, 149 (1908)

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

In short, a senior appropriator is *entitled* to have his water right *protected from interference by junior appropriators*, and the Department has a "clear legal duty" to distribute water on that basis.[33] The district court rightly found that these "concepts arise out of the Constitution" and constitute "incorporeal property rights," vested in the senior appropriator, that must be respected and upheld. Order p. 76, 77.[34] The protection is required whether it is against a surface water user attempting to divert water out-of-priority up river or a well owner that accomplishes the same effect by pumping tributary groundwater.

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

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

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

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

"integral to the constitutional protections accorded water rights" and "give the primary effect and value to 'first in time, first in right.'" Order at 90, 94.[35]

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

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

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

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

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

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

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

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

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

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

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

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

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

[40] In addition, "contested cases" under the Department's procedural rules provide for discovery, motion practice, and post-hearing appeal processes. R. Vol. IV, p. 837-871. Clearly, proceeding through a formal "contested case", like a lawsuit, takes time and is certain to extend beyond an irrigation season when administration is required.
[41] R. Ex. 4, *Creamer Aff.*, Ex. D (February 14, 2005 Order at 31, ¶ 38, and at 34).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[46] In addition, the "phased-in" curtailment provision in Rule 40.01.a further unlawfully delays administration by allowing juniors to curtail over a period of up to five years, while the senior must continue to suffer the shortage in the interim. The "phased-in" curtailment provision is another example of how the Rules violate the constitution. This issue was addressed in the briefing before the district court. R. Vol. V, pp. 1213-1215; Vol. VII, pp. 1903-906.
[47] R. Ex. 4, *Creamer Aff.*, Ex. D (February 14, 2005 Order at 33). Plaintiffs are unaware of any conjunctive administration case that has ever been decided under "informal resolution" procedures. The Defendants' claim that "informal procedures" are available under the Rules is a hollow promise since in reality such a process is never used.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Following that decision and during the course of the proceedings before the special master, the IDWR stated that the Director's recommendation was based on current non-application to "reasonable beneficial use." ***The IDWR stated that the concept of beneficial use allows for constant re-evaluation of whether the water is being used beneficially.*** ...
>
> ***The special master determined*** that absent a claim of forfeiture, abandonment, adverse possession, or estoppel, ***a reduction in beneficial use after a water right vests is not a basis upon which a water right may be reduced.*** ...
>
> Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, ***the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights.***

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

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

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

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

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

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

R. Vol. IX, p. 2322.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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determination based upon conditions presumed to have existed when Clear Springs made its original appropriations. R. Vol. V, p. 1139 (July 8, 2005 Order at 12-13, ¶¶ 55-56; relying upon Rule 42.01.a "The amount of water available in the source from which the water right is diverted."). Further, the quantity element was unlawfully re-conditioned to merely representing an entitlement at a spring flow "seasonal high", instead of the year-round diversion rate that was decreed by the SRBA Court. R. Vol. V, p. 1140 (July 8, 2005 Order. at 14, ¶ 61). As such, such, the Director administratively reduced Clear Springs' decreed water rights. Such a determination, provided by the Rules, contradicts the unambiguous quantity terms of Clear Springs' decrees and plainly violates the watermaster's "clear legal duty" to distribute water according to those decrees.
Furthermore, the Director's "material injury" analysis shows how the burden under the Rules inevitably falls on a senior right holder. In fact, the Director even refused to curtail any interfering junior ground water rights "***unless Clear Springs extends or improves the collection canal*** . . . or ***unless Clear Springs demonstrates to the satisfaction of the Director that extending and improving the collection canal for the Crystal Springs Farm is infeasible.***" R. Vol. V, pp. 1161, 1164-65 (July 8, 2005 Order at 35, ¶ 35 and at 38-39) (emphasis added). Accordingly, the context of "material injury" in the Rules plainly conflicts with the "injury" definition provided by Idaho law and is the vehicle for a "re-adjudication" of a senior's decreed water right.

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

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

Order at 96.

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

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

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

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

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

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

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

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

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

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

The Defendants argue that because the concepts of "beneficial use", "waste", and "futile call" are limits of a water right, "state regulation" of a right pursuant to those factors does not constitute a "taking". *Defs. Br.* at 33. The Defendants miss the point and fail to recognize that as a "legally protected" property right interest, a water right is not subject to arbitrary changes by a state agency "in the interests of the common welfare." Moreover, the claim that "water belongs to the state" does not vest the Defendants with authority to "take" water that would otherwise be diverted and used by a senior and distribute it to a junior right instead.[66] Yet this is exactly what happens under the Rules. Instead of receiving water they are lawfully entitled to divert and use, seniors must suffer shortages while juniors receive the benefit of countless "contested cases" and "reasonableness" determinations that preclude priority water distribution. Such a "common property" scheme for water distribution that results under the Rules was firmly rejected in *Kirk v. Bartholomew*, *supra*, 3 Idaho at 372.[67] Since the Plaintiffs must go through the state (i.e. the watermaster) to receive water pursuant to their rights, the district court correctly found that a failure to properly distribute water to a senior effects a "physical taking" that injures the senior. Order at 122. This Court should affirm.

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

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

[67] *See also*, R. Vol. IV, pp. 1007-08.

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

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

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

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

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

Order at 114.

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

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

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

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

Id. at 389.

The Court further stated:

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

Id. at 389-390

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

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

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

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

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

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

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

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

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

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

66 Idaho at 201 (emphasis added).

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

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

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

66 Idaho 204-205.

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

The Court also noted:

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

Id. at 208.

Finally, the Court stated:

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

66 Idaho 210-11 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

ATTORNEYS' FEES

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

CONCLUSION

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

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

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

Dated this 10th day of November, 2006.

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CERTIFICATE OF SERVICE

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

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