IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, AND 36-07148.	)	CASE NO. CV-2008-444
(Clear Springs Delivery Call)	)	
IN THE MATER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427.	)	
(Blue Lakes Delivery Call)	)	

SPRING USERS JOINT REPLY BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

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INTRODUCTION

Petitioner, Clear Springs Foods, Inc. ("Clear Springs") and Cross-Petitioner, Blue Lakes Trout Farm, Inc. ("Blue Lakes", collectively "Spring Users") file this joint reply to the brief filed by the Respondents, David R. Tuthill and the Idaho Department of Water Resources (collectively "Director" or "IDWR"), and to the brief filed by the Cross-Petitioner, Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "IGWA").

The Spring Users' water supplies have been drastically reduced by ground water pumping and reductions in natural and man-made recharge. Ground water diversions deplete the Eastern Snake Plain Aquifer ("ESPA") by 2 million acre-feet per year, reducing spring flows from Milner to Hagerman. The regional effects of ground water pumping have prompted water delivery calls by spring and surface water users from above Milner Dam, to down Hagerman. After years of judicial and administrative actions paving the way for administration of ESPA ground water rights, the Spring Users made their water delivery calls in 2005. Yet, after several years of administration by mitigation (the Director has not curtailed any ESPA ground water rights), the Spring Users' water supplies continue to decline.

The three basic procedural components of the Conjunctive Management Rules ("CM Rules") are (i) material injury determination, (ii) regulation of out-of-priority, hydraulically-connected junior ground water rights and (iii) consideration of mitigation plans submitted by junior ground water users to avoid curtailment. In many respects, the Director's *Orders* apply these procedures within the scope of his authority and discretion, and are supported by substantial evidence. However, in certain respects, the Director deviates from the procedures and standards of the CM Rules and exceeds his authority. At times the Director improvises new

standards and makes findings that are either not supported by substantial evidence or flatly contradict the evidence.

In making material injury determinations, the Director has taken it upon himself to determine the "nature and extent" of the Spring Users water rights in direct conflict with the Spring Users' decrees issued by the Snake River Basin Adjudication ("SRBA") District Court. In doing so, he narrowly redefines the quantity element of the water rights and creates a new injury standard-whereby there is a presumption *against* injury unless the senior water right is deprived of water during the entire period of use. As a consequence, the Director imposes upon the calling senior the burden of reproving its water right.

The Director's "10% clip" creates a new injury standard based on an ill-conceived notion of model uncertainty, which replaces the no effect standard implicit in the CM Rules and traditionally applied by the Director to prevent injury resulting from new permit and transfer applications affecting the ESPA.

The Director has improvised a mitigation process that allows out-of-priority ground water diversions to resume or continue pumping without an approved mitigation plan, in conflict with the requirements of CM Rules 40 and 43. The Director's newly created replacement water plan process similarly conflicts with the CM Rules.

In their various defenses to the water delivery calls, IGWA revises history and legal authorities to preclude GW administration, disregards the constitutional and statutory mandate to distribute water in accordance with priority, and seeks to replace the "first in time" principle with their conception of "full economic development." Ironically, after successfully defending the constitutionality of the CM Rules, IGWA seeks to replace priority administration under the

procedural requirements of the CM Rules with a determination allowing water uses that best serve IGWA's concept of "full economic development."

ARGUMENT

I. Title 42, Idaho Code and the Conjunctive Management Rules Provide a Clear Structure for Responding to a Call for Priority Administration and the Director Does Not Have Unfettered Discretion in Responding to Such a Call.

The Director does not have unlimited discretion in responding to a call for priority administration. Rather, Title 42, Idaho Code and the CM Rules establish the framework for administration and define the parameters of the Director's discretion. "As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and ***they cannot confer it upon themselves***." *Washing Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879 (1979) (emphasis added). "An administrative agency is limited to the power and authority granted it by the legislature." *Roberts v. Transp. Dept.*, 121 Idaho 727, 732 (App. Ct. 1991). Furthermore, any rule promulgated by an administrative agency cannot provide more authority than authorized by statute. *Holly Care Center v. State, Dept. of Employment*, 110 Idaho 76, 78 (1986) ("administrative rules are invalid … which are not reasonably related to the purpose of the enabling legislation").

In this case, the Director applied the CM Rules in responding to the Spring Users' calls for priority administration. He correctly determined that the Spring Users' senior water rights were being materially injured by out-of-priority groundwater diversions (the evidence demonstrates as much) and that the groundwater users must either replace the depleted water or have their diversions curtailed. The statutes and CM Rules provide the Director with the discretion to make these decisions.

The Director overstepped his authority, however, when he relied upon the rules to create new policies, *see infra* Part II.F, reviewed and reinterpreted "the nature and extent" of a decreed water right (adding new conditions and limitations to the use of that rights), *see infra* Part II.A, devised a new administration scheme whereby certain water users are not held accountable for their injurious depletions, *see infra* Parts II.B & II.C, and forced the Spring Users to continue suffering material injury by delaying full administration, *see infra* Parts II.D & II.E.

Neither the statues nor the CM Rules provide the Director with such discretion. For example, in determining that certain of the Spring Users' water rights should be limited by a newly created "seasonal variation" limitation, the "Director undertook an ***analysis of the historic nature and extent of the senior water rights*** held by Blue Lakes and Clear Springs." *IDWR Br.* at 42 (emphasis added). Yet, such review is specifically vested in the SRBA Court, whose partial decrees "shall be conclusive as to the ***nature and extent of all water rights*** in the adjudicated water system." Idaho Code § 42-1420 (emphasis added). The Director did not have any authority to conduct such a review. *See Washington Water, supra* (Agency jurisdiction is limited by statute and an agency "cannot confer it upon" itself). To the extent that the Director's actions exceeded the discretion provided in the statutes and CM Rules, the Director's actions must be overturned.

A. The CM Rules Must be Interpreted and Applied in a Manner that is Consistent with Chapter 6, Title 42, Idaho Code.

Statutory authority for the distribution of water among appropriators is contained in Chapter 6, Title 42, Idaho Code. There, the director is charged with "distribut[ing] water in water districts in accordance with the prior appropriation doctrine." Idaho Code § 42-602; *see also Id*. at § 42-607 ("It shall be the duty of said water master to distribute the waters of the public stream … according to the prior rights of each … and to shut and fasten, or cause to be

shut or fastened …the headgates … when it times of scarcity of water it is necessary so to do in order to supply the prior rights of others"). In "clear and unambiguous terms," these provisions implement the constitutional mandate that senior rights are protected in times of shortage. *See R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988); *see also Musser v. Higginson*, 125 Idaho 392, 395 (1994) (identifying the responsibility of the Director as "clear legal duty"). Any rules promulgated for the distribution of water, such as the CM Rules, must be adopted and applied "in accordance with the priorities of rights to the users." Idaho Code § 42-603; *see also Roberts*, 121 Idaho at 732 ("An agency must exercise any authority granted by statute within the framework of that statutory grant"); *Grayot v. Summers*, 75 Idaho 125, 132 (1954) (regulations must be adopted pursuant to statutory authority or the regulation is "void and of no force or effect"); *Holly, supra* at 78 ("administrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law").

B. The CM Rules' Procedures for Responding to a Delivery Call Are Clearly Defined and Provide the Director with Limited Discretion.

The CM Rules provide the procedure to follow, and authority of the Director, in water delivery calls.

> First, a "delivery call is made by the holder of a senior-priority water right (petitioner) alleging … [that] the petitioner is suffering material injury." CM Rule 40.01.
>
> Second, the Director reviews the call and determines whether the senior water right is, in fact, being materially injured. CM Rules 40.01 & 42. CM Rule 42 provides a list of factors that the Director may consider in determining material injury.
>
> Third, the Director "regulate[s] the diversion and use of water in accordance with the priorities of rights of the various" water users. CM Rule 40.01(a).
>
> Fourth, the Director may consider, and approve, mitigation plans submitted by the holder of the junior water right(s). CM Rules 40.01(b) & 43. CM Rule 43

According to the plain language of the CM Rules, the Director has discretion in determining material injury, CM Rule 42, and in reviewing and approving a mitigation plan, CM Rule 43. This discretion includes the ability to (i) confirm that the senior will put the called-for water to beneficial use; (ii) confirm that the senior has not forfeited its water right; (iii) evaluate reasonableness of the diversion works; (iv) determine extent to which junior diversions from connected sources impact the senior water right; and (v) determine whether a proposed mitigation plan will prevent injury to the senior water right. *See generally* CM Rules 42 & 43; *see also AFRD#2, supra* at 876-78. However, "the exercise of administrative discretion cannot be totally free of proscription." *Nicolaus v. Bodine*, 92 Idaho 639, 642 (1968). Any discretion exercised must be guided by the "presumption … that the senior is entitled to his decreed water right," *AFRD#2, supra*, at 878, and the "clear legal duty" contained in Chapter 6, Title 42, Idaho Code, *Musser*, 125 Idaho at 395.

C. Decisions of the Director Must be Supported by Substantial Evidence

Generally, a Court is charged with deferring to an agency's decision. *See St. Joseph Reg. Med. Ctr. v. Nez Perce Cty.*, 134 Idaho 486, 488 (2000) ("The reviewing court may not substitute its judgment for that of the decision make on questions of fact"); *Idaho State Insurance Fund v. Hunnicutt*, 110 Idaho 257, 260 (1986) (recognizing that the Court "should not 'displace'" an agency's "choice between two fairly conflicting views, even though the court would justifiably have made a difference choice"). However, an agency's decision must be overturned it if (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure, " (d) "is not supported by substantial evidence in the

record as a whole" or (e) "arbitrary, capricious or an abuse of discretion." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005) (citing Idaho Code § 67-5279(3)).

An agency's decision must be supported by "substantial evidence". *Hunnicutt, supra*. at 260; *see also Chisolm v. IDWR*, 142 Idaho 159, 164 (2005) ("Substantial evidence … need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder"). The "reviewing courts should evaluate whether 'the evidence supporting [the agency's] decision is substantial." *Id*. at 261. The Director cannot use his discretion as a shield to hide behind a decision that is not supported by substantial evidence. Such decisions are "clearly erroneous" and should be reversed. *Galli v. Idaho County*, 146 Idaho 155, 159 (2008) ("A decision is clearly erroneous when it is not supported by substantial and competent evidence"). A court is not required to defer to an agency's decision that is not supported by the record. *See Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

D. The Hortatory Policy Statements in CM Rule 20 are Not Prescriptive; Rather, they Must Be Read in Light of the Standards and Procedures in CM Rules 40 and 42.

CM Rule 20 provides "general statements of purpose and policies for conjunctive management of surface and ground water resources." These "general statements" are not an open ended invitation for the Director to create his own policies in administering water rights. Moreover, these "general" provisions cannot be read to override the substantive standards and procedures in CM Rules 40 and 42. In other words, the Director is not free to create "new" substantive procedures for administration under the guise of the Rule 20 general statements. Rather, "Rule 20.03 is, in name and substance, a 'merely hortatory' statement of general policy and purpose." R. Vol. 16 at 3766. As such, any consideration of "full economic development"

or "optimum development of water resources" must be tempered by the Director's ***obligation*** to "regulate" junior diversions as well as the constitution and water distribution statutes.[1] The Director cannot use these "hortatory statements" as an attempt to evade his duty to curtail junior water rights that are materially injuring senior water rights – absent an approved mitigation plan. The Director cannot use these "hortatory statements" to justify decisions that are not supported by substantial evidence. In short, the Director cannot use these "hortatory statements" to condone the continued depletion of the aquifer and springs while the senior water rights continue to suffer material injury.

II. The Director exceeded his Authority under the Statutes and CM Rules.

In its response brief, IDWR seeks to define all of the Director's actions as "discretionary" and, therefore, not subject to review. IDWR claims that the Director has the discretion to create new administrative schemes (i.e. "replacement water plans") and can even make them up as he goes along. IDWR claims that the Director has discretion to make decisions – even though he admits there is no evidence to support that decision. In truth, however, the Director does not have such discretion. Therefore, to the extent that the Director overstepped his authority in responding to the Spring Users' calls, those decisions should be reversed.

[1] Contrary to IDWR's and IGWA's claims, the reference to "full economic development" in Idaho's Ground Water Act (Idaho Code § 42-226) does not apply to the administration of surface water rights, such as those held by the Spring Users. *See Musser*, 125 Idaho at 395. The policy of "optimum development of water resources" in Article XV, § 7 is also limited in that it concerns the state water plan and the Board's planning authority, not the Director's administration of existing water rights. *See Infra*, Part II.F. To the extent IDWR implies that CM Rule 20's reference to these provisions creates a "new" substantive standard to apply in conjunctive administration, it is erroneous. IDWR cannot take a constitutional or statutory provision out-of-context and apply it in conjunctive administration.

A. The "Historic Nature and Extent" of the Spring Users' Decreed Water Rights is Binding on the Director & A the Director Cannot Concoct a "Seasonal Variation" to Alter the Spring Users' Water Rights or Priority Administration.

Spring flows were inadequate to supply the decreed quantities of the Spring Users' second priority water rights[2] during the majority of each year from 2004-2007. However, the Director concludes that Spring Users' second priority water rights were not injured. As explained in the Respondent's Brief, to reach this implausible conclusion "the Director undertook an analysis of ***the historic nature and extent*** of the senior surface water rights held by Blue Lakes and Clear Springs." *IDWR Br*. at 42 (emphasis added). There is no provision in the CM Rules or chapter 6, Title 42 of the Idaho Code authorizing the Director to reexamine "the nature and extent" of a senior water right for purposes of administration. Such authority is specifically vested in the SRBA Court. *See* Idaho Code § 42-1420 ("The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system").

The Respondents attempt to avoid this conflict by characterizing decreed water rights as representing only a seasonal maximum, to which the Director "defers," rather than a quantity entitlement throughout the period of use. Respondents assert that most water rights are decreed based on maximum ("point in time") measurements that are "rarely met during the season of use due to seasonal fluctuations in water supplies and that a senior water right is "only entitled to the supply of water available at the time of" appropriation. *IDWR Br*. at 54-55.

The Director "defers" to the seasonal maximum. However, since decrees are silent as to "seasonal variations" and are not based on a full set of water measurements establishing water availability through the period of use, the Director contends that his discretion allows him to

[2] The term "second priority water rights" refers to water rights 36-4013A (Clear Springs) and 36-7210 (Blue Lakes).

examine "historic" water supplies – and, consequently, the quantity of water for which the water right holder is entitled to seek priority administration. If there is no such historic water supply data available, apparently the Director will find that a water right is satisfied so long as the decreed quantity appears at *any time* during the period of use, no matter how fleeting.

The Director's approach to injury determinations under the CM Rules completely undermines decreed water rights. In an adjudication, the Director is required to evaluate the extent and nature of each claimed water right. Idaho Code § 42-1410. Based upon that examination, the Director is required to make recommendations to the court defining the elements of the right "to the extent the director deems appropriate and proper, to define and administer the water rights," and include "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director. Idaho Code § 42-1410(2)(j). After resolution of objections, the District Court is required to "enter a partial decree determining the nature and extent of the water right . . . including a statement of each element of a water right." The decrees are conclusive as to the nature and extent of the adjudicated water rights, and are binding upon the Director. *See Id*. at § 42-1420.

If there was a distinction to be made between the maximum quantity of a water right and seasonal water flow for purposes of administration, the Director was required to raise that distinction in the SRBA.

> Thee ***Partial Decree*** issued for 36-07694 is a judgment certified as final pursuant to I.R.C.P. 54(b). To the extent the license, director's recommendation and ***Partial Decree*** were alleged to be issued in error; those issues should have been timely raised in the SRBA 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 reexamination of prior existing conditions in the context of applying a "material injury" analysis through the application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11 *et seq*.

Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration, Subcase 92-0021 at 8 (2005). (Emphasis Added).

The Director's reliance on "historic seasonal variations" in spring flows as a basis for finding that the Spring Users' second priority water rights are not injured is completely misplaced. As explained in the Spring Users' prior briefing the Director has no basis to conclude that the Spring Users' second priority rights were satisfied by water flows that were adequate to supply their rights only a fraction of the year.

1. The Director's No-Injury Finding for Water Right #36-7210 is Not Supported by Substantial Evidence.

All the available data shows that there were sufficient flows in Alpheus Creek to fill Blue Lakes' second priority water right (#36-7210) at the time the water right was appropriated (in 1971). The three available measurements at the time of the beneficial use exam show water flows far in excess of what was required to fill this right – far higher than the Alpheus Creek flows in recent years. The USGS water measurements (Ex. 18), which the former Director referenced in his May, 19, 2005 Order (R. Vol. 1 at 56-57, ¶ 58), show that water flows were sufficient to fill water right 36-7210 throughout the 1970s and 1980s and much of the 1990s.

As previously discussed, the data in the former Director's own May 19, 2005 Order, *see* Ex. 205, shows that flows were much higher in 1995/1996 than they were in 2004. Presumably, if Blue Lakes had appropriated water right 36-7210 in 1995 (when Alpheus Creek flows were much lower than they were during the 1970s), the Director would find that it was injured in 2004. Importantly, Alpheus Creek flows, and all other spring flows, have declined from their

levels during the 1970s. As such, Alpheus Creek flows were sufficient to fill Blue Lakes' 1971 water right ***year round*** at the time of appropriation – at a minimum, the historic water supply at the time of appropriation was much higher than it is today.

The Respondents' continue to rely upon the former Director's extemporaneous hearing testimony suggesting that there is something anomalous about the 1977 measurements such that they are unreliable, to suggest that there is a "lack of information to support Blue Lakes' position" that its water right is injured. *IDWR Br*. at 52. This demonstrates the extent to which the Director has shifted the burden to Blue Lakes to reprove its decreed water right.

The Director does not deny that IDWR, through the Water District 130 Watermaster, has acknowledged the injury to Blue Lake's second priority right and curtailed junior spring rights to supply that right. *IDWR Br*. at 56-57. The Director simply asserts that administration of surface water rights is different than administration of ground water rights, because the effects of surface diversions can be shown with greater certainty. The extent of the connection between water rights has nothing to do with whether "historic water supplies" were adequate to fill a water right.

The Director's position that water right 36-7210 is not injured is clearly erroneous. The Director is required to treat Blue Lakes decree as conclusively defining the nature and extent of a water right. The Director has no authority to reexamine and redetermine this for purposes of administration. Even if he had such authority, the evidence refutes his findings. As such, the Director's "no injury" determination cannot stand.

2. No Substantial Evidence Exists in the Record to Support the Director's No-Injury Finding for Clear Springs' Water Right #36-04013A.

In the July 8, 2005 Order, the former Director acknowledged he did not have any water diversion data from 1955 to support his "non-injury" finding for water right 36-4013A:

> 54. … ***There are no known measurements, nor any other means, for reasonably determining the intra-year variations in the discharges from the springs comprising the source for these water rights on the dates of appropriation for these water rights***. However, the factors that are known to cause both inter-year and intra-year variations clearly existed at the time the appropriations for these rights were initiated.

R. Vol. 3 at 498-99 (emphasis added).

Although the former Director did have water diversion data available that clearly showed Clear Springs' 1955 water right was satisfied year-round from 1988 through 2001,[3] he disregarded these records and concluded the water right was not injured because it was being temporarily met at "seasonal high" spring discharges in subsequent years. R. Vol. 3 at 500. In the July 11, 2007 *Final Order*, Director Tuthill affirmed this "no injury" finding without any supporting evidence.

Like the former Director, Director Tuthill refused to recognize the water diversion records from 1988-2001 (Ex. 158), and instead erroneously concluded that "based upon review of the record developed at the hearing, there is insufficient credible evidence presented to find that water right no. 36-04013A was injured". R. Vol. 16 at 3955. Despite this finding, the Respondents fail to point to any supporting evidence. Moreover, the Director ignores the fact that Hearing Officer Schroeder, the person who actually reviewed the evidence presented at hearing, *found that Clear Springs' 1955 water right was being materially injured*. R. Vol. 16 at 3847. The Director's "no-injury" finding for Clear Springs' 1955 water rights is erroneous and must be reversed. *See Galli, supra* ("A decision is clearly erroneous when it is not supported by substantial and competent evidence").

[3] The water diversion records for Clear Springs' Snake River Farms from 1988 through 2004 were presented to the Director on May 2, 2005 and were referenced in his July 8, 2005 Order. R. Vol. 3 at 495-96 ¶ 35, & 528. The daily diversion records for 2004 through 2007 were provided by the Department at hearing. Ex. 158.

Here, IDWR freely admits that it has ***no*** evidence to support the Director's finding that Clear Springs' 1955 water right (#36-04013A) was not satisfied "at all times of the year when it was appropriated". *IDWR Br.* at 48. Absent *any* evidence, it is inconceivable that any reasonable person would accept the Director's conclusion. *See Lane Ranch Partnership v. City of Sun Valley*, 166 P.3d 374, 380 (Idaho 2007). ("Substantial evidence" as "relevant evidence which a reasonable mind might accept to support a conclusion"._

The Director's attempt to justify his actions is illogical. The Director cites to the "period of record in which consistent data has been kept," asserting that it "shows that the water rights has not been met in all months." *Id*. The Director attempts to extrapolate conclusions from this data, measured from 1988 through 2007, which, according to the Director, showed that "the water right has not been met in all months." *Id*. Yet, that information shows, and the Director recognizes, that from 1988 through 2001 "water right no. 36-4013A ***was filled for a period of 12 months***." *Id*. (emphasis added); *see also* Ex. 156.

Accordingly, the Director's "no injury" determination was based on his conclusion that water right 36-4013A was not filled in all months of the year from 2002-2007. *Id*. This reasoning is circuitous and defeats, rather than supports, the argument. The fact that Clear Springs' 1955 water right was filled on a year-round basis prior to 2002, and then was not filled in all months after that, while hydraulically connected junior ground water rights pumped unabated, establishes material injury and provides the very basis for the call that was made in May 2005!

More importantly, the Director's own information demonstrates the fallacy of his illogical claim. While the spring flows were sufficient to fill water right 36-4013A year round from 1988 through 2001, the evidence suggests that spring flows were significantly higher at the

time that the water right was appropriated in 1955. *See* R. Vol. 1 at 76 & R. Vol. 3 at 526. The Director cannot explain how higher spring flows at the time of appropriation resulted in less water available to Clear Springs. Confusingly, IDWR asserts that "inherent seasonal variability and the lack of any historical information to support that water right no. 36-04013A was filled at all times when it was appropriated led the Director to his conclusion that the right was not injured." *IDWR Br.* at 48. Although the "substantial evidence" demonstrates that Clear Springs' 1955 water right was filled at all times from 1988 – 2001 and that spring flows in the region were higher in the 1950s, the Director apparently believes that his *assumption* about "seasonal variability," combined with the "lack of any historical information," justifies a "no-injury" finding. The Director's discretion does not extend to these extravagant lengths. Relying upon "assumptions" and an absence of information does not satisfy Idaho's substantial competent evidence test – particularly where, as here, the evidence demonstrates that the conclusions are wrong. The Idaho Supreme Court has struck down similar agency decisions based upon "assumptions" and "inferences", rather than substantial evidence.

For example, in *Galli v. Idaho County*, the Court rejected a decision by that the Idaho County Board of Commissioners after finding the decision was not supported by substantial and competent evidence. 166P.3d at 236. The court found "no evidence" to support the Board's finding and determined the Board "merely inferred" certain findings. *Id.* In reviewing the Board's decision and the lack of evidence to support it, the Court held:

> It is noted that no evidence, other than the existence of cabins and fences, spoke towards the amount of use. The only documentation was the survey map and notes, which is not adequate to show regular public use for five years. The district court incorrectly stated that a party must prove the existence of the road by direct evidence. Although direct evidence is not required, there must be sufficient circumstantial evidence to support any inferences. It cannot be said that existence of the roads in a 1902 survey supports a finding by substantial and competent evidence to infer regular use by the public from

> 1899 to 1904. This Court finds that the district court was correct in holding the Board's decision clearly erroneous.

166 P.3d at 238.

Here, like the facts in *Galli*, IDWR is relying solely upon "inference" and a lack of documented evidence to support the Director's decision. IDWR asks the Court to uphold the Director's no-injury finding solely upon "inherent" seasonal variability and "the lack of any historical information". *IDWR Br.* at 48. The lack of evidence plainly fails the "substantial evidence" test set forth in *Galli*. Accordingly, the Director's "no injury" finding for Clear Springs' 1955 water right is clearly erroneous must be reversed.

In addition to failing to identify any "substantial and competent evidence," IDWR attempts to direct the Court away from the fact spring flows were higher in the 1950s than in 1988 to 2007. Apparently realizing the "facts" are detrimental to its cause, IDWR claims the spring flow data (R. Vol. 3 at 526) "should not be used" since it was purportedly only meant to "help visually explain" changes in spring flows in the Thousand Springs area over time. *IDWR Br.* at 47. The graph clearly shows that the average annual spring discharge to the Snake River in the Thousand Springs area was well over 6,000 cfs in the 1950s, whereas that same flow was less than 5,000 cfs from 1988 to 2004. The former Director also noted, in his July 8, 2005 *Order*, that the average rise in ground water levels near Jerome, Idaho from the early 1900s to the early 1950s was 20 to 40 feet. R. Vol. 3 at 488. The study (USGS Professional Paper 1408-A) relied upon by the Director for this statement also explained that the average ground water level rise over most of the eastern plain was 40 to 50 feet. Ex. 103 at A40. Clear Springs' Snake River Farm facility is located less than 10 miles downgradient from Jerome, Idaho.

Despite the rising ground water levels into the 1950s and the highest average annual spring flows at that time in the Thousand Springs area, IDWR would have the Court believe this information "is simply not comparable to anything that might have occurred at Clear Springs' facility in the Buhl Gage to Thousand Springs reach during the time that water right no. 36-04013A was appropriated" in 1955. *IDWR Br.* at 46-47. IDWR asks the Court to ignore the evidence in the record, which shows that spring flows at Clear Springs' Snake River Farm facility were higher in 1955, and affirm the Director's conclusion based upon an "assumption" and a "lack of historical information". Nothing in Idaho law supports IDWR's arguments. The Idaho Supreme Court has instructed just the opposite in reviewing an agency decision that is not supported by the facts:

> In deciding whether the agency's findings of fact were reasonable, reviewing courts should not "read only one side of the case and, if they find any evidence there," sustain the administrative action and ignore the record to the contrary. … [R]eviewing courts should evaluate whether "the evidence supporting that decision [under review] is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view."

Hunnicutt, supra at 260-61 (citing *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 481, 488 (1951).

When viewed in "the light that the record in its entirety furnishes," it is clear that the Director's "no-injury" finding is not supported by substantial evidence. The Director's finding is clearly erroneous and must be reversed.

B. There is No "Scientifically Certain" Standard for Water Right Administration in Idaho; as such, the Director Erred in Applying an Assumed 10% Model Uncertainty Against the Spring Users' Senior Surface Water Rights in Favor of Junior Ground Water Rights.

IDWR argues that the Director properly assigned a Model uncertainty and applied a "10% trim line" in response to the Spring Users' calls because such a finding resolves the alleged

"tension" between "strict priority administration" and "full economic development". *IDWR Br.* at 15. It asserts that the Director has the "discretion" to exclude some hydraulically connected junior ground water rights from administration because, in his opinion, "the best available science failed to show any measurable benefit" to the Spring Users. *Id.* at 14. IDWR further contends that, had he not used the 10% trim line, "it would have resulted in hundreds of thousands of acres curtailed with no reasonable degree of scientific certainty that such additional curtailment would provide any useable quantity of water" to the Spring Users. *Id.* at 23. Stated another way, IDWR claims the Director was not "scientifically certain" that administration of junior ground water rights outside the "10% trim line" would benefit the affected spring reaches, therefore administration was excused.

Idaho law, including the CM Rules, do not prescribe a "scientifically certain" standard in order to conjunctively administer surface and ground water rights.[4] Instead, in times of shortage, Chapter 6, Title 42, and the CM Rules require the Director and watermasters to distribute water to senior rights first and administer *all* water rights to the connected sources. Idaho Code §§ 42-602 & -607, CM Rule 40. When a senior surface water right is injured, the CM Rules specifically require the Director and watermasters to "regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users ***whose rights are included within the water district***." CM Rule 40.01(a) (emphasis added); *see also*, CM Rule 40.02 (Director "shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604.").

All water rights within Water District 130, not just some, are subject to conjunctive administration. If a ground water user on the ESPA in Water District 130 believed his water

[4] Despite rejecting IGWA's "reasonable certainty" arguments after hearing, IDWR now apparently adopts it for purposes of its "10% trim line" argument. *Compare* R Vol. 16 at 3703 to *IDWR Br.* at 23. IDWR's arguments contradict the Director's own findings on this issue.

right should be absolutely exempted from administration together with other surface water rights he had the opportunity to make the case for a "separate streams" provision for his water right in the SRBA. None of the affected ground water right holders in this matter made such a case, nor would they have been able to prove such a designation since all water in the ESPA is hydraulically connected to the Snake River and its tributary springs. Despite their failures in the SRBA, the Director essentially adopted a "separate streams" provision for certain ground water users in this case by a wholesale exemption from administration under the "10% trim line" theory. The CM Rules do not grant the Director with the discretion to make such a decision.

Furthermore, this decision was not supported by the facts or the law. First, the Director determined the Spring Users' calls were not "futile." As such, he had an obligation to administer *all* hydraulically connected junior priority ground water rights "within the water district". R. Vol. 16 at 3708-09. The fact that some ground water rights within the water district are located farther away from the springs than others does not change the undeniable fact that they are "hydraulically connected" to the Spring Users' senior rights and the fact they contribute to the material injury and are subject to administration. Hearing Officer Schroeder described the effects in his decision rejecting IGWA's "futile call" defense:

> What these facts establish is that in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may take years, not days or weeks. This is the reverse process of the depletion of the water flowing to the springs from the aquifer over a substantial number of years. The Director's orders of curtailment recognized that the Spring Users' calls were not futile, though remediation would take considerable time. The evidence supports that determination.

R. Vol. 16 at 3709.

Since the Director found the Spring Users' calls were not "futile", his duty was to administer *all* junior ground water rights within the water district. Nothing in the law allowed him to temper his duty through the use of a "10% trim line" that exempted some ground water users (found to be materially injuring the senior water right) but not others.

While IDWR argues that an undefined "scientifically certain" standard justified the Director's decision, it has no supporting evidence. Just the opposite, IDWR's own witness Dr. Allan Wylie testified that the potential impact of those wells outside the "10% trim line" *was not certain*, and that it could be understated by 20%:

> Q. [BY MR. BROMLEY] So if a water right was located within the 10 percent clip, could that possibly contribute as little as zero percent or as much as 19 percent to the particular reach at issue?
>
> A. [BY DR. WYLIE] If the – binder here was the 10 percent line, and the water right was on the greater than 10 percent side, right at 11 percent, then that water right could contribute, the best guess would be 11 percent. It ***could be*** as low as 1 percent or as high as 21 percent.

Tr. P. at 818, lns. 10-18 (emphasis added).[5]

The "10% trim line" only assumed facts about certain ground water rights located within Water District 130 and all ground water rights within Water District 120. Importantly, the Director had no "scientific certainty" or method to test whether those wells contributed 0% or 20% of the depletions from their diversions to the Spring Users' water rights. In the face of this

[5] Dr. Wylie further recognized the acres outside the "10% trim line" did have a hydrologic effect on the spring flows supplying Spring Users' water rights and that the diversions could have more than a 10% impact:

> Q. [BY MR. SIMPSON] But it's equally likely that – that some of those areas outside of the 10 percent clip – clip line, could have a 10 percent impact on that reach?
>
> A. It's possible that areas outside the 10 percent clip line could have an impact, that's right.
>
> Q. Of at least 10 percent?
>
> A. Of at least 10 percent.

Tr. P. at 1106, lns. 13-19.

uncertainty the Director chose 0% and removed those wells outside the "10% trim line" from administration altogether.[6]

Although pumping from of over 600,000 acres of junior priority ground water development contributes both individually and collectively to the injuries suffered by Clear Springs and Blue Lakes, the Director used the "10% trim line" to sever those rights from water right administration. This decision is contrary to the law and is not supported by the evidence. Whereas the uncertainty could be "high" or "low", the Director erred on the side of the junior priority ground water user and exempted over 600,000 acres from administration, even though many of those ground water rights are junior to the ground water rights that are subject to administration (those located inside the trim line). This finding is clearly erroneous and should be set aside.

IDWR has no support for the Director's use of the "10% trim line". In its brief IDWR even goes so far as to contradict the Director's own determination regarding "futile call". IDWR alleges that the 10% gage uncertainty has a "history of use in surface-to-surface water administration" and that somehow supports the way the Director used it in this case. *IDWR Br.* at 16. The Director's cited testimony on this issue concerned a "futile call" order on the Big Lost River. *Id.* Contrary to IDWR's arguments, Hearing Officer Schroeder aptly explained that a "surface to surface" water right "futile call" analogy is not applicable in this case:

> The relationship of water in the aquifer to surface water differs from that of surface water to surface water in ways that affect interpretation of the futile

[6] Dr. Wylie explained that this decision had the effect of ignoring those hydraulically connected junior ground water rights' effects on the Spring Users' water rights and reducing the material injury finding:

> Q. [BY MR. SIMPSON] And so any of those rights outside the 10 percent clip line that are a portion of the 600,000 plus acres, then their impact on the Snake River Farms that would occur over time would not be considered under the curtailment order; would they not?
>
> A. They would not.

Tr. P. at 1102, lns. 7-12.

> call rule. … The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water.

R Vol. 16 at 3708-09.

The Director affirmed this decision in his final order. R. Vol. 16 at 3957. Therefore, IDWR's contradictory argument in its brief before the Court, that a "surface to surface" futile call scenario supports the "10% trim line" is clearly unfounded.

Next, IDWR argues that since mitigation actions outside the "10% trim line" were not accepted it was ok to exempt those wells outside the line. *IDWR Br.* at 16. This argument is of no merit. If a ground water right injures a senior surface water right it is subject to administration under Idaho law. If that ground water right can effectively mitigate for its depletions, regardless of where the mitigation occurs in the aquifer, the Director should consider it. The fact the Director drew an arbitrary line to exclude over 600,000 acres from administration is not justified just because he does not accept mitigation actions in that same area.

Finally, IDWR resorts to its "complexity" argument claiming that removing the "10% trim line" would result in "the ministerial administration of hydraulically connected ground and surface water sources without regard to the complexities associated with conjunctive administration". *IDWR Br.* at 17. The fact that the Director's and watermaster's duties to distribute water to water rights are "ministerial" as defined by the Idaho Supreme Court does not help IDWR's argument. *See Musser*, 125 Idaho at 395 ("We conclude that the director's duty to distribute water pursuant to this statute is a clear legal duty."); *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") (emphasis added); *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***") (emphasis added).

Nonetheless, conjunctive administration is not so "complex" that the Director can disregard the law to justify his decision. Moreover, factually, conjunctive administration is only a matter of location and timing regarding a ground water right's impact on a spring source. Those closer to the spring affect it more and sooner. Those farther away affect it less and over a longer time. The best available science (the ESPA Model) answers these questions for the Director. Despite the differences, the ground and surface water rights are all *legally connected*, both pursuant to the CM Rules definition of the ESPA as a "common ground water supply" and the SRBA Court's "connected sources" general provision. Removing the "10% trim line" ensures that all water rights are administered together on equal footing as required by the law.[7]

C. The Director's Use of a Percentage of Reach Gains to Limit Administration is Not Supported by the Record.

The Director's assigned percentage of reach gains to limit the extent of administration to satisfy Clear Springs' senior water rights is not supported by the law and it is not defendable by IDWR's own expert witness. Accordingly, the Director's decision to use that process was arbitrary and should be set aside.

IDWR argues that the Court should accept the Director's methodology and assignment of a 6.9% figure as a percentage of reach gains to Clear Springs on the basis that "no alternative science was presented at hearing." *IDWR Br.* at 22. To the contrary, IDWR's own expert, Dr.

[7] Although juniors retain the ability to prove any defenses to a call, removing the "10% trim line" will not cripple the Director for purposes of conjunctive administration. He would still retain all the tools to administer water consistent with the prior appropriation doctrine. As it stands now, as long as you pump on the other side of the "10% trim line" fence a water user has nothing to worry about. For those 600,000 plus acres that do impact the Spring Users' spring sources – this result is unlawful and not supported by the evidence. Since the Director exempted certain hydraulically connected ground water rights from administration based only upon a claimed model uncertainty, and that decision is not supported by substantial evidence, the "10% trim line" determination should be reversed and set aside.

Wylie testified that big spring complexes like the ones that supply Clear Springs' water rights receive *more* water from the aquifer as ground water levels rise. Tr. P. at 846, lns. 8-25 & 847, lns. 1-9. Clear Springs' expert witnesses confirmed this testimony in their analysis. Tr. P. at 1657-1659. Dr. Brockway identified a number of possible technically defensible procedures. Chief among Brockway's criticisms of the Director's methodology was that the linear assumptions made in the calculation do not reflect actual on-the-ground hydrogeological evidence. Dr. Brockway offered that a "Correlation procedure" with observation well data and spring flow data to correlate the relationship between pumping and springs flows was scientifically available. Dr. Wylie confirmed this procedure could be used to identify relationships between pumping and the resulting effect on spring discharges. Tr. P. at 1077-79.

IDWR's effort to classify the Director's methodology as "acceptable science" fails. Notably, it was not reviewed by anyone outside of the Department and the Department's own expert modeler, Dr. Wylie, disputed the linear calculation. The record is devoid of any defendable supporting evidence for the reach gain calculation offered by the Director. Clear Springs is likely to receive a *greater percentage* of the increase in water flows as ESPA water levels rise in response to curtailment. The Director ignored this evidence and chose to rely upon the 6.9% figure.

Under IDWR's reasoning, the Court should turn a blind eye to science that is not defedable. *IDWR Br.* at 22. This contradicts the "substantial evidence" test. The evidence in the record does not support the Director's decision. Given the recognition of the relationship between spring flows and groundwater pumping, the decision to assign a percentage of reach gains to limit administration is clearly erroneous and should be set aside.

D. The Director's Administration of Mitigation is Inconsistent with the CM Rules.

The Director's administration of mitigation plans has been ill-conceived, inconsistent, and largely ineffective in protecting the Spring Users' senior water rights. The CM Rules' allowance for mitigation, as an *alternative* to curtailment, does not negate the duty to completely offset the injury caused by junior ground water pumping, "in time, in kind and in place." Tr. P. at 681, ln. 10 to 682, ln. 1.[8]

1. The CM Rules Do Not Authorize "Replacement Water Plans."

The Director's entire justification for creating a replacement water plan scheme is derived from *two words* – selected from one provision in the CM Rules. *IDWR Br*. at 28 & 32-33. It claims that the use of the words "replacement water" – in a provision identifying factors that may be addressed in considering whether a *Rule 43 mitigation plan* should be approved – provide the Director with sufficient authority to create a new scheme (one where the holder of the senior water right is precluded from protesting or otherwise participating in the approval process). The Director even claims that his newly devised replacement plan scheme is akin to a preliminary injunction (to "preserve the status quo, pending final judgment"). *Id*. at 31. Finally, the Director claims that the Court must defer to the Director's newly created scheme due, in part, to the fact that he is making this up as he goes along. *Id*. at 32-33. None of these arguments can sustain the weight of the Director's assertions.

First, a "replacement water plan" is not similar to a preliminary injunction. To assert such ignores the Director's own actions. Idaho Rule of Civil Procedure 65 provides the standard and procedure for a preliminary injunction. In such proceedings, notice must be given the adverse party, a *hearing* must be held, the adverse party must be provided an opportunity to

[8] This is consistent with the no effect standard the Director applies in considering ESPA ground water right permit and transfer applications. Ex. 212 at 4 & 5; Tr. P. at 631-633.

respond and a *bond* must, generally, be posted. Here, the ground water users submitted their replacement water plans, the Spring Users were not permitted to protest the plans, the plans were accepted without hearing and no bond or other assurance was ever required to mitigate the injury in the interim. In the end, the only "status quo" that was preserved, was the material injury suffered by the Spring Users' senior water rights.

Similarly, the Director does not have the discretion to create a new administration scheme based on two words selected from a regulation. This Court is not required to defer to such an abuse of discretion. Under the applicable case law, the Court need only defer to the Director's decision if it meets the four prong test set forth in *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849 (1991). Here, the Director cannot meet that test.

First, while the Director is charged with administering the State's water resources, his creation of a new administration scheme that prevents interested parties (in particular, the holder of the materially injured senior water right) from participating is ***not reasonable***. This is particularly true where the applicable regulations do not allow for such an action and the Director's sole justification is based on the selection of *two words* from the regulations.

Next, neither the statutes nor the regulations speak to the replacement water scheme. However, that does not mean that the Director can invent a new administration scheme merely because the CM Rules authorize an ***approved*** mitigation plan that provides "replacement water." The Director is "limited to the power and authority granted it by the legislature." *Roberts, supra*, at 732. Nothing in the Title 42, establishing the Director's authority, authorizes the Director to create a new administrative scheme that prevents participation from the holder of the injured water right.

Finally, the Director cannot satisfy any of the "rationales underlying the rule of deference." *See IDWR Br*. at 33. The Director's "expertise in his authority and ability to administer the State's water resources" does not grant the Director discretion to invent a new administrative scheme particularly where the CM Rules already provide procedures for Rule 43 mitigation plans. It is not "a practical interpretation of the CM Rules" to prevent the Spring Users from participating and challenging a replacement water plan that will not mitigate injury to the senior water right. Furthermore, the fact that the legislature has not spoken to the replacement water plan scheme is not surprising considering the fact that the Director is making this up as he goes along. *See IDWR Br*. at 33 (asserting that the replacement water plan scheme was first "advanced … contemporaneous with the first orders"). Accordingly, the Director abused his discretion in creating the replacement water plan scheme.

2. The Director's Failure to Require Timely Submission and Approval of Mitigation Plans is Arbitrary and Capricious

Respondents' Brief does not address Blue Lakes' Cross-Petition and briefing regarding the Director's failure to require timely submission and approval of mitigation plans. *Blue Lakes' Br*. at 31. Under the CM Rules, approval of a mitigation plan is a *prerequisite* for the Director to allow out-of-priority ground water diversions. Nonetheless, in 2006 and 2007, the Director allowed ground water users to resume pumping in the spring, despite the fact that mitigation plans for those years had not been submitted or approved. This violates the CM Rules, and results from the Director's failure to require the ***timely*** submission and approval of mitigation plans. *See AFRD #2*, 143 Idaho at 874 ("a timely response is required when a delivery call is made and water is necessary to respond to that call").

CM Rule 40 requires the Watermaster to *immediately* curtail junior ground water rights after the director has determined that they are causing material injury to a senior water right. CM

Rule 40.01(a) & .02(a). There are only two exceptions to this directive. First, curtailment may be "phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment," in cases "where the material injury is delayed or long range." (assuming the senior's injury is fully mitigated by other actions in addition to the phased-curtailment, i.e. direct replacement water, etc.) *Id*. at 40.01(a). Second, the Watermaster may "[a]llow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that ***has been approved by the Director***." *Id.* at 40.01(b) (emphasis added). Rule 40 is clear and consistent in its recognition that ground water diversions are permitted ***only*** where a mitigation plan "has been approved by the Director." *See* CM Rule 40.02(c) (Watermaster may allow junior diversions if "the holder of a junior-priority ground water right is a participant in ***such approved mitigation plan, and is operating in conformance therewith***") (emphasis added); CM Rule 40.04 (actions of watermaster under an approved mitigation plan).

An approved Rule 43 mitigation plan is a *prerequisite* to resumption or continuation of out-of-priority ground water pumping under CM Rule 40. During his testimony, Tim Luke, Manager of IDWR's Water Distribution Section, confirmed that the CM Rules require that a mitigation plan be approved *before* those rights are allowed to begin pumping. Tr. P. at 720, lns. 15-24. The rule does not permit the Director to allow out-of-priority ground water diversions to resume or continue while the junior ground water users develop and submit mitigation plans, as the Director did in 2006 and 2007. In order to comply with CM Rule 40, the Director must require that mitigation plans be submitted and approved *before the beginning of the irrigation season* – or curtailment must be ordered. No ground water pumping can be allowed until a mitigation plan for that diversion is approved by the Director.

In the Magic Valley, the ground water irrigation season begins as early as March 15th, with most of the pumps running by June 1st. Tr. P. at 491, lns. 19-23 (Yenter); & Tr. P. at 689, lns. 3-5 (Luke). In order for IDWR to review and approve mitigation plans prior to the start of the irrigation season, the plans must be submitted no later than December or January. Tr. P. at 689, lns. 3-10. Yet the Director has set no deadline for submission of mitigation plans to allow the resumption of ground water pumping in the spring. Instead, the Director has repeatedly delayed, stayed, or foregone altogether any curtailment of out-of-priority ground water diversions.

The Director took no action on IGWA's May 30, 2006 mitigation plan, contending that Judge Wood's 2006 decision that the CM Rules were invalid deprived him of any authority to act. However, as former Director Dreher recognized, without the CM Rules he still had the authority *and duty* to administer ground water rights pursuant to Title 42, Chapter 6, Idaho Code, including the authority to accept mitigation to offset depletions causing injury. Tr. P. at 1339, ln. 14 to 1341, ln. 18. IGWA's attempt to provide mitigation for surface water users as late as July of 2006 further contradicts the Director's justification for taking no action. Ex. 251; Tr. P. at 695, ln. 20 to 697, ln. 15.

On April 11, 2007, IGWA submitted the same "joint replacement plan" that it had submitted in 2006, knowing that it was inadequate to meet its 2007 mitigation obligation. Tr. P. at 1883, ln. 17 to 1884, ln. 15. The Director's first response was to send "potential curtailment" notices advising certain ground water users that he intended to issue curtailment notices on May 14, 2007. R. Vol. 7 at 1357. Further action was delayed by IGWA's attempt to obtain an order from the Jerome County District Court prohibiting the Director from issuing curtailment orders. After the Court dismissed IGWA's complaint on June 6, 2007, the Director issued curtailment

orders on June 15, 2007, in which he delayed further action until July 6th, and gave ground water users until June 29 to submit additional mitigation.

On June 29, 2006, IGWA filed a supplemental replacement water plan, which promised a small amount of additional mitigation water (recharge) after the end of the irrigation season to reduce its mitigation shortfalls by a fraction of a cfs. Even though the mitigation shortfalls remained significant, the Director rescinded his curtailment orders, asserting that, with over half of the irrigation season over, curtailing junior ground water rights would not provide significant quantities of water to Blue Lakes and Clear Springs. To reach this conclusion, the Director switched his analysis of mitigation from its long term or "steady-state" effects, to its short term or "transient effects," during which the quantity of water produced is necessarily much smaller. Thus, by delay and "sleight-of-hand" analysis, the Director enabled IGWA to avoid curtailment for yet another year during which there was no approved mitigation plan, and no effective or full mitigation for Blue Lakes' or Clear Springs' injury.[9] By failing to require timely submission and approval of a mitigation plan – ***prior*** to the resumption or continuation of ground water pumping, the Director violated CM Rules 40 and 43.

3. The Director Has Not Enforced Mitigation Plan Requirements and Shortfalls Have Not Been Carried Forward

The CM Rules do not allow the continuation of out-of-priority junior ground water diversions if an approved mitigation plan is not followed or is not effective in mitigating the injury caused by those diversions:

[9] With no deadlines or procedures for the submission and approval of mitigation plans, this mitigation plan pattern will no doubt be repeated in future years and other mitigation plan proceedings. CM Rule 43.02 requires the Director to "provide notice, hold a hearing as determined necessary, and consider the [mitigation] plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights." The Director failed to provide notice or an opportunity for a hearing on any of IGWA's replacement water in 2006 or 2007. Tr. P. at 723, lns. 15-22 (Luke). This lack of notice and hearing is another consequence of the Director's failure to require that mitigation plans be submitted far enough in advance of the irrigation season to allow time for notice and hearing.

> ***05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective***. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or ***the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights***, the watermaster will notify the Director who will ***immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use*** of ground water rights otherwise benefitting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

CM Rule 40.05 (emphasis added).

Apparently, during each irrigation season for which IGWA has submitted a mitigation plan, the Director has been unable to determine the extent to which IGWA's plan has been either followed or effective (perhaps due in part to the tardiness of IGWA's mitigation plans). IDWR developed a practice of conducting "post-season accounting" of the actual mitigation actions of IGWA's members to determine the extent to which the mitigation requirements of the 2005 Orders have been met. In theory, IGWA's "shortfalls" and "overages" would be "carried forward" and added to IGWA's mitigation obligations for the subsequent irrigation seasons. Hearing Officer Schroeder expressly required this procedure, and the Director affirmed it. *See* R. Vol. 16 at 3716 ("A failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years.").

However, as explained by the former Director, his carry-forward concept actually leaves the prior year's shortfall behind and unmet, because, in his mind, long term (i.e. steady state), the failure to meet the prior year's mitigation obligation is not significant.

> Q. Where the question arose is there was some time delay from the time a curtailment order issued until IGWA would submit a mitigation plan or it got reviewed and evaluated and got approved. And then once the plan was approved, I assume that it would -- you would have to wait until the end of year, end of the irrigation season, to determine whether or not IGWA in fact did what it proposed to do under the proposed plan?

A. That's correct.

Q. Some kind of year-end accounting?

A. That's correct.

Q. So let's say you got to the end of year one, if IGWA was obligated to provide the reach gain of 10 CFS and they were over and actually provided 11, or if they were under and provided 9, how does that affect their obligation the second year?

A. Well, any obligation the second year would carry forward. Again remember these measurements were made at steady state conditions. So if whatever actions were taken in year one resulted in less than 10 CFS at steady state conditions, which steady state conditions might take 40, 50 years to reach. It's not like there was a huge amount of water that -- that the spring users were deprived of, because of the transient approach, I guess, if you would to steady state conditions. So in that event, if they had done – if they provided 11 CFS, great. That meant for the second year they'd only need to provide another 9 CFS to reach the second year goal of 20. And if they'd only provided 8 CFS, then they'd have to provide another 12 CFS to meet the second year goal of 20.

Q. So you contemplated somewhat of a rolling forward number?

A. That's correct.

Tr. P. at 1258, ln. 24 to 1260, ln. 7.

The Director's concepts of post-season accounting and carrying shortfalls forward is, at best, confusing – leaving administrators and water users uncertain as to how mitigation plans will be administered. The following testimony of Tim Luke exemplifies this problem:

Q. The unmet obligation, in this case 6.6 CFS in 2007, will that carry over into the following year 2008 to the extent that that plays out, it's borne out by the after-the-fact accounting if it occurs, will the obligation of the ground water users then increase from 40 CFS for 2008 to 46.6? Is that how it works?

A. You know, I'm really not sure how the director is going to handle that. Again, that would be my anticipation of one way that he might handle it. But I just don't know for certain how he's planning on handling that carryover.

Tr. P. at 558, lns. 7-17.

The Director's procedures for post-season accounting and forgiving shortfalls in meeting mitigation obligations are not contained in the CM Rules. Delaying evaluation of mitigation plan compliance and effectiveness until after the irrigation season is contrary to CM Rule 40.05, which requires the Director to "immediately" curtail diversions or take other actions to protect senior-priority water rights. The Director has no authority to disregard unmet mitigation requirements.

Assuming, *arguendo*, the Director has authority to delay enforcement of mitigation obligations to future years by allowing IGWA to carry them forward, then the shortfalls must be added to the subsequent year's mitigation requirement. Truly carrying forward IGWA's mitigation shortfalls for the Spring Users would result in the following accounting and subsequent year mitigation requirements:

Clear Springs:

	2005 Order Required[10]	Excess/Shortfall from prior year	Total	Provided	Excess/Shortfall
2005	8 cfs		8 cfs	8.2 cfs	0.2 cfs
2006	16 cfs	(0.2 cfs)[11]	15.8 cfs	9.5 cfs	(6.3 cfs)
2007	23 cfs	6.3 cfs[12]	29.3 cfs	10.1 cfs	(19.2 cfs)
2008	31 cfs	19.2 cfs	50.2 cfs		

Blue Lakes:

	2005 Order Required[13]	Excess/Shortfall from prior year	Total	Provided	Excess/Shortfall
2005	10 cfs		10 cfs	12.2 cfs	2.2 cfs
2006	20 cfs	(2.2 cfs)	17.8 cfs	16.5 cfs	(1.3 cfs)
2007	30 cfs	1.3 cfs	31.3 cfs	22.9 cfs	(8.4 cfs)
2008	40 cfs	8.4 cfs	48.4 cfs		

In Respondent's Brief, the Director "concurs that all obligations must be carried forward in order to properly administer Blue Lakes' and Clear Springs' senior water rights." *IDWR Br*. at

[10] R. Vol. 3 at 523.
[11] Excess water from the prior year is deducted from the current years' obligations
[12] Shortfalls from the prior year are added to the current years' obligations.
[13] R. Vol. 1 at 73.

41. Simply mentioning the prior year's shortfalls in the subsequent year's mitigation orders, without actually adding those shortfalls to the subsequent year's mitigation requirement does not carry the shortfall forward. If the court determines that the Director can delay evaluation and enforcement of mitigation plan requirements to future years, then, at a minimum, the court should require that those unmet obligations be carried forward. *See* R. Vol. 16 at 3716.

E. Phased-in Curtailment Does Not "Mitigate" the Senior Water Right Contrary to Idaho Law.

IDWR argues that the Director's "phased-in" curtailment approach is valid since it is referenced in the CM Rules and the Idaho Supreme Court denied a facial constitutional challenge to the Rules in the *AFRD #2 v. IDWR* case. *See IDWR Br.* at 26. However, IDWR fails to acknowledge that the Court did not approve the Director's application of the rule's "phased-in" curtailment concept in the *AFRD #2* decision. *See AFRD #2*, 143 Idaho at 872 ("this Court's review will be in terms of the CM Rules' constitutionality on their face and not in terms of the Rules' 'threatened application' or 'as applied'.").

The Director's use of "phased-in" curtailment to authorize the continued material injury to the Spring Users' senior water rights over a five year period was unconstitutional. While "phased-in" curtailment *might* be constitutional – provided a senior water right is made whole during the interim (by replacement water or other actions in addition to phased curtailment) – the failure to require full mitigation for five years is unconstitutional.

Nothing in Idaho law authorizes a junior to materially injure a senior water right, even temporarily, as suggested by IDWR's interpretation of the CM Rules. Instead, in times of shortage, any junior materially injuring a senior water right must either have an approved Rule 43 mitigation plan in place or face curtailment. *See* Idaho Code § 42-607; CM Rule 40.01. IDWR's reference to the former Director's testimony is of no support. While the former

Director opined that "ground water rights in Idaho had never been subject to this kind of administration before," and injury to the Spring Users "had gone on for a long period of time", those theories are not lawful reasons to justify continued injury to a senior water right. Stated another way, the fact that junior priority ground water rights had not been subject to conjunctive administration before or the fact the Spring Users had suffered prior injuries does not excuse continued injury for any amount of time – let alone five more years!

Contrary to IDWR's argument, Idaho law does not allow a junior to "share" in the senior's water right as has happened when the Director authorized "phased-in" curtailment without requiring that the Spring Users be made whole in the interim. Since the Director only "phased-in" mitigation requirements, did not fully mitigate the Spring Users' injuries, and ordered no actual curtailment, the Director's application of the rule was unconstitutional and should be set aside.

F. Optimum Development of Idaho's "Unappropriated" Water Resources Does Not Give the Director Authority to Condition or Limit Administration of Appropriated Water Rights Under the Guise of an Undefined "Public Interest" Criteria.

IDWR asserts that when the Director considers the "public interest" in water right administration it simply references his "duty to account for all principles of the prior appropriation doctrine in addressing a delivery call". *IDWR Br.* at 58. The Director is not authorized to "weigh" and choose the application of Idaho's "prior appropriation doctrine" in administration, rather he must distribute water to senior rights in times of shortage. *See* Idaho Code § 42-607. If a senior water right is injured by a junior's diversion, the Director and the watermaster have a duty to regulate and curtail that junior use. Under the CM Rules, a junior must have an approved Rule 43 mitigation plan in place or face curtailment. Although a call may be denied if a senior is "wasting" the water, or if a junior can prove a valid defense to the

call (i.e. "futile call")[14], administration is not conditioned upon the Director's "subjective" consideration of what he determines to be in the "public interest" in a particular case. The law does not give the Director that discretion.

IDWR cites Article XV, § 7, and CM Rule 20's "hortatory" reference to that provision, in support of its "public interest" criteria. *IDWR Br.* at 59. IDWR ignores the plain language and purpose of that constitutional provision. Article XV, § 7 provides:

> There shall be constituted a Water Resource Agency [now Idaho Water Resource Board], composed as the Legislature may now or hereafter prescribe, which shall have the power to construct and operate water projects; . . . Additionally, the State Water Resource Agency shall have power to ***formulate and implement a state water plan for optimum development of water resources in the public interest.*** The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law.

IDAHO CONST., Art. XV, §7 (emphasis added).

The provision is unambiguous and plainly refers to the "optimum development" of the State's water resources in the context of the Idaho Water Resource Board's authority to develop a "state water plan" – not in respect to the Director's authorities or duties to administer water rights. The Legislature has further refined the Board's authority to "formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest." Idaho Code § 42-1734A (emphasis added). When the Director and watermasters administer water rights, they regulate "appropriated" not "unappropriated" water resources.

Like a statute, the plain language of Art. XV, §7 of the Idaho Constitution must be followed as written. *See Sweeney v. Otter*, 119 Idaho 135, 138 (1990) ("Where a statute or

[14] The Director did not find the Spring Users were "wasting" water in this case and IGWA failed to carry its burden to prove any applicable defenses to the Spring Users' calls. R. Vol. 16 at 3843. Accordingly, the Director had no authority to limit or condition administration based upon some subjective "public interest" criteria not provided for in statute or the CM Rules.

constitutional provision is clear we must follow the law as written. . . . Where the language is unambiguous, there is no occasion for the rules of construction"); *see also, Moon v. Investment Board*, 97 Idaho 595 (1976) ("where a statute or constitutional provision is plain, clear, and unambiguous, it 'speaks for itself and must be given the interpretation the language clearly implies'"). Here, Article XV, § 7 only refers to the Water Board and state water plans, not the Director and administration of existing water rights.

Although IDWR believes CM Rule 20's reference to the provision justifies their argument, Idaho law does not allow an administrative agency to stretch the plain meaning of the constitution or imply additional authorities which are not expressly stated. *See Poison Creek Publishing, Inc. v. Central Idaho Publishing, Inc.*, 134 Idaho 426, 429 (Ct. App. 2000) ("Idaho has also recognized that 'where a constitution or statute specifies certain things, the designation of such things excludes all others'"). Accordingly, contrary to IDWR's belief, the plain language of Article XV, § 7 does not speak to water right administration, only the Water Board's planning authorities. As such, it is no support to IDWR's "public interest" argument.

Apart from ignoring the plain language Idaho's constitution, IDWR also misinterprets prior decisions from the Idaho Supreme Court to support its position. Although the *Baker* and *Parker* Courts affirmed that state policy is to put water to its "maximum use and benefit", those decisions concerned Idaho's Ground Water Act (Idaho Code § 42-226). These decisions did not enlarge the constitutional provision to mean something it does not expressly state. Article XV, § 7 requires the Water Board to formulate a state water plan for the "optimum development of water resources in the public interest". Idaho's Ground Water Act promotes "full economic development of <u>underground water</u> resources". Idaho Code § 42-226 (emphasis added). The provisions are consistent, but they do not create additional authority or power for the Director to

apply in water right administration to limit or condition the delivery of water to the Spring Users' water rights in the name of a "public interest" criteria. Indeed, the Director has specifically ruled in this case that Idaho's Ground Water Act does not apply to the Spring Users' "surface" water rights:

> The spring water in this case are [surface] water and were adjudicated as such in the partial decrees that were entered. . . . Treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees.

R Vol. at 3696-97; R. Vol. 16 at 3957.

It is undisputed as a matter of law that the Spring Users hold decreed "surface" water rights which are not subject to Idaho's Ground Water Act. *See also, Musser, supra* at 395 ("we fail to see how Idaho Code § 42-226 in any way affects the director's duty to distribute water to the Mussers [holders of surface water rights], whose priority date is April 1, 1892."). Therefore, IDWR's reliance upon cases construing Idaho's Ground Water Act (I.C. § 42-226) are inapplicable to surface water rights and provide no support for its "public interest" criteria for conjunctive administration of the Spring Users' surface water rights.

Finally, IDWR relies upon Idaho Code § 42-101, and the fact the "public trust doctrine" does not apply to water, as supporting its argument. Although IDWR is directed to "equally guard all the various interests involved", it is in reference to "those making a beneficial application of the same", not some undefined "public interest". Idaho Code § 42-101. In other words, IDWR must properly administer both junior and senior priority water rights. The statute does not ask the Director to consider some undefined class of non-water users, or the "public interest", as being part of the administration of defined water rights. In no way does the statute suggest the delivery of water to a senior right should be limited or conditioned upon what he

determines to be in the "public interest". Accordingly, the statute does not support IDWR's proposition.[15]

Although Idaho law has specifically defined that the "local public interest" can be considered in the granting of new water rights or the transfer of existing water rights, it does not condition or limit the Director in his duty to administer water rights. *See* Idaho Code §§ 42-203A(5)(e) & 42-222(1). IDWR can provide no support for imposing an alleged and undefined "public interest" criteria in the context of conjunctive administration. Accordingly, the Director erred in his application of such a criteria to justify limiting the administration of junior priority ground water rights that were injuring the Spring Users' senior surface water rights. The Court should correct this error of law.

III. IGWA's Appeal Should be Denied

> A difficulty in this case is that ***IGWA does not address a core issue – the effect of the doctrine of 'first in time, first in right' in water rights***. The end result of the arguments is that even though junior aquifer depletions have encroached upon senior rights over the years, there is no remediation for the harm because the result is harsh. The Spring Users have rights senior to the ground water users. ***Those senior rights have been damaged by depletions to the aquifer, reducing the flows from the springs***.

R. Vol. 16 at 3844-3845 (emphasis added).

IGWA seeks to turn Idaho's priority doctrine on its head. In challenging the Director's attempt to rigorously apply the CM Rules, IGWA places itself at odds with the arguments it made in successfully defending the CM Rules from a final constitutional challenge in *AFRD#2*,

[15] IDWR's reliance on *Idaho Conservation League, Inc. v. State* is perplexing and irrelevant. Although the Court affirmed the SRBA Court's decision that it was without jurisdiction to consider the "public trust doctrine" in decreeing water rights, that decision does not help IDWR's argument in this case. Just the opposite, the Legislature has plainly stated that the "public trust doctrine" shall not apply to "the appropriation or use of water, or the granting, transfer, ***administration***, or adjudication of water or water rights as provided for in article XV of the constitution of the state of Idaho and title 42, Idaho Code, or any other procedure or law applicable to water rights in the state of Idaho." Idaho Code § 58-1203(2)(b) (emphasis added). Accordingly, this law does not support IDWR's claim that the Director should consider the "public interest" in water right administration.

supra . There, IGWA asserted that the CM Rules are constitutional, due in part, to the Rules' incorporation of "all elements of the prior appropriation doctrine as established by Idaho Law." CM Rule 20.02; *see also AFRD#2, supra*, at 873. Now, IGWA claims that "this case will fundamentally define the legal framework within which the ESPA will be managed for the current and future benefit of Idahoans." *IGWA Br.* at 4. Apparently, IGWA would have the Court believe that this is a case of first impression, wherein the Court is asked to define administration and set forth the rights and duties of the water users. To the contrary, Idaho's water law is well settled – established through more than a century of water use, and statutory and case law establishing the rights and burdens of the water users in an administrative context.

IGWA proposes an administrative scheme that would force the senior water user to suffer material injury based on *IGWA's* determination that the junior water user is putting the water to a higher and better beneficial use. In seeking to insulate hydraulically connected ground water rights from priority administration, IGWA shields its untenable demands behind notions of "full economic" or "optimum" development of the Eastern Snake Plain Aquifer ("ESPA")[16] – using these terms to justify an administrative scheme wherein the senior water user is forced to suffer material injury so that the junior can continue depleting the water source without consequence.[17] This reverse-priority administration scheme is contrary to law and cannot be condoned.

IGWA seeks to elevate ground water rights to some higher legal status than the Spring Users' surface water rights in order to allow for the maximum economic development of the resource. In essence, IGWA would have the Court permit an administrative scheme that promotes ground water development at the expense of senior surface water users. It is not

[16] IGWA even attempts to coin a *new* administrative burden and standard - "the law against monopolistic use of Idaho's water resources," *IGWA Br.* at 35-36 – and asserts that the Director has given the Spring Users an "unreasonable monopoly" over ESPA water in violation of this law.

[17] All spring and surface water supplies connected to the ESPA have declined and, as of March, 2007, there had been eighteen water delivery calls by spring and surface water users. Ex. 338.

surprising that IGWA cannot cite to any legal support for this misguided contention. On the contrary, the law regarding priority administration is clear: "first in time is first in right." *See* IDAHO CONST. art. XV, § 3; Idaho Code §§ 42-106, -602 & -607. IGWA's inequitable administration scheme plainly flies in the face of Idaho water law.

A. The Spring Users Are Not Prevented From Seeking Priority Administration for their Decreed Senior Priority Rights Based on Minimum Flows at the Murphy Gauge

IGWA opens its brief by asserting that the Spring Users should have no legal right to seek priority administration – basing this notion on unwritten policy statements, the State Water Plans and the Swan Falls Agreement. It claims that the State and Idaho Power promoted an expansion of ground water development in the 1950's based on "advances in pumping technology and hydropower generation and deliver" making it "economically feasible for farmers to irrigate from ground water wells." *IGWA Br*. at 24. However, according to IGWA, Idaho's prior appropriation doctrine – the law in Idaho since statehood – presented an unacceptable obstacle to future ground water development because it would require the ground water users to be responsible for their inevitable depletions to the aquifer. *Id*. As such, IGWA claims that the Ground Water Act of 1951 was enacted to allow development of the ground water resource while preventing the risk of administration when their depletions injured senior surface water rights. This notion, that the Idaho Legislature selected junior priority ground water development and gave it unequal and enhanced treatment over senior surface water rights, is untenable. Yet, IGWA claims that this view permeated Department policy and was subsequently incorporated into State Water Plans and the Swan Falls Agreement. These arguments are without merit and were properly rejected by the Director and Hearing Officer.

1. The Spring Users Decreed Water Rights Are Not Limited by an Unwritten and Undefined Licensing Practices Alleged by IGWA

Without citing to any written policy statements, IGWA claims that IDWR's licensing practices for aquaculture facilities "deviated from traditional licensing practices" and created a culture wherein aquaculture rights were not protected like other water rights and could not seek priority administration. *IGWA Br*. at 25. IGWA interprets the misguided opinions of a few employees and contends there was a "universal understanding." *Id*. at 28. This argument fails for a number of reasons. First, none of decrees for the Spring Users' water rights provide such a limitation. *See* Exs. 30, 301-06. Furthermore, no party objected to the lack of any such limitation on the Spring Users' water rights. One purpose of the SRBA is to provide all conditions necessary for the administration of water rights. Idaho Code §§ 42-1411(2)(j) & -1412(6). Once a right is decreed, it is binding upon IDWR and all parties, including IGWA's members. *Id*. at § 42-1420. There is no such limitation on the Spring Users' licenses or decrees, therefore, IGWA's theory fails.

Second, IGWA cites to the 1977, 1982 and 1986 State Water Plans (Ex. 438, 439 & 440). As discussed below, these general policy statements of the State do not deprive the Spring Users of their legally vested rights as senior water users. Furthermore, these plans post-date all of the Spring Users senior water rights. Accordingly, any "policy" allegedly derived from these plans could not retroactively impact the Spring Users' water rights. Such an action would result in an unconstitutional taking of the Spring Users' and others' senior water rights.

Finally, IGWA cites to the testimonies of A. Kenneth Dunn, former Director of IDWR, R. Supp. Vol. 7 at 4787, and Ronald Dean Carlson, former IDWR employee, *id* at 4841, to support its contention that ground water users are above reproach. IGWA interprets their testimony to mean that "the Department understood that ground water rights could not be

curtailed in an attempt to increase spring flows." *IGWA Br*. at 25. Yet, neither Director Dunn nor Mr. Carlson could cite to any formal written policy, let alone any statutes or administrative rules to support IDWR's so-called "understanding". *See* Tr. P. 1031, lns. 21-24 (Director Dunn testifying that the "policy wasn't written"). In fact, according to Director Dunn, the Department **cannot** "regulate the use of water under a water right by preventing that water right holder from protecting their right against junior water right holders." Tr. P. at 1027, lns. 4-10; *see also* R. Supp. Vol. 7 at 4795 ("spring water rights ***would have the same right to make a call against ground water pumping as other ground water pumpers***") (emphasis added). In fact, the "State had the responsibility to protect the senior water right holder." Tr. P. at 11-24. Otherwise, the senior water users would be "deprived of their property interests." *Id*. Execution of the Swan Falls Agreement did not "change that position." R. Supp. Vol. 7 at 4795.

IGWA ignores this testimony. Rather, they cling to Director Dunn's conflicting statement that the Spring Users "could not make a delivery call against ground water users." *Id.* at 4797. Given this drastic change in position by Director Dunn, this testimony cannot be relied upon to support the contention that the Department could unilaterally impose restrictions on the Spring Users' water rights that prevented them from seeking priority administration. Moreover, there is no law to support IGWA's claimed "unwritten policy". Clearly, the argument fails.

2. Idaho State Water Plans Do Not Prevent the Spring Users from Seeking Priority Administration.

IGWA also claims that the State Water Plans "confirm" that the Spring Users cannot seek priority administration. *IGWA Br*. at 26-29. It draws support for this contention from a few cherry-picked statements in State Water Plans and transcripts of public hearings in conjunction with those plans. However, none of these statements provide any indication that the Spring

Users' water rights were stripped of their legal right to priority administration. On the contrary, the State Water Plans affirm the vested rights of the Spring Users.

Comprehensive state water plans formulated by the Idaho Water Resource Board ("Board") are policy pronouncements which do not and ***cannot*** supplant Idaho water law or the prior appropriation doctrine set forth in the Idaho Constitution and water distribution statutes. State water plans are intended to set forth "statewide policies, goals and objectives" seeking to promote the "conservation, development, management and ***optimum use of all unappropriated water resources*** and waterways of this state in the public interest." Idaho Code § 42-1734A(1) (emphasis added). As articulations of policy, State Water Plans do not give rise to any additional regulatory power or alter the legal authority of the Board or any other state agency. Idaho Code § 42-1730(9) provides that "[t]he comprehensive state water plan ... shall not alter any existing responsibilities, jurisdiction or planning functions of state agencies."[18] State water plans cannot override or supersede existing water rights and priorities through the policy and planning process. *See* Tr. P. at 1027-28 (Director Dunn testifying that State Water Plans only apply to "unappropriated waters").

In formulating such plans, the Board must "protect[] and preserve[]" "[e]xisting rights, established duties, and the relative priorities of water established in article XV, section 3, of the constitution of the state of Idaho." Idaho Code § 42-1734A(1)(a). Indeed, the Board is specifically stripped of any "power or authority" to do anything which would "modify, set aside or alter ***any existing right or rights*** to the use of or the priority of such use as established under existing laws except pursuant to the owner's consent or eminent domain." Idaho Code § 42-1738 (emphasis added). IGWA's demand that the Department strip the Spring Users of their legal

[18] IGWA wholly ignores this provision when it claims that "the Director therefore has a legal duty to manage the Snake River watershed consistent with the minimum stream flows established by the State Water Plan." *IGWA Br.* at 28-29.

right to priority administration blindly ignores these statutory provisions limiting the Water Board's authority and the effect of State Water Plans.[19]

Notwithstanding the governing law, IGWA cites to the language of the State Water Plans, comments made by members of the Board in developing the plans and even the testimony of the prior Director, hoping to convince the Court to adopt its "protect-ground-water-users-at-all-costs" scheme of priority administration. *See IGWA Br*. at 26-28. However, none of these selected statements support the contention that the Spring Users should be forced to continue suffering material injury at the hands of out-of-priority ground water diversions.

The State Water Plans cited by IGWA recognize the basic legal premise that they may not override Idaho's prior appropriation doctrine. The 1986 plan indicated that *"**it must be recognized that** **[]** **existing water rights are protected***." Ex. 440 at 38 (emphasis added). Both the 1977 and 1982 plans recognize that, while "development of the Snake Plan aquifer may reduce the present flow of springs tributary to the Snake River," "adequate water for aquaculture ***will be protected***." Ex. 438 at 118; Ex. 439 at 44 (emphasis added). In light of these statements, the provisions that "different water diversion facilities" may need to be constructed clearly does not prevent priority distribution of water between junior and senior water rights. Nothing in the State Water Plans prevents senior surface water right holders from seeking the administration of junior priority ground water rights, especially when these out-of-priority ground water diversions continue to deplete a senior's water supply.

IGWA stresses language by prior Board members that spring users, "in an ***extreme*** case" "might even have to pump water," and that "the State is not gonna promise someone who uses those spring flows that it's always gonna be there." *IGWA Br*. at 27 (emphasis added). It quotes

[19] IGWA attempts to get around this fatal flaw in its argument by asserting that the State Water Plans "reinforced" existing state policy. *IGWA Br*. at 26. Yet, as discussed above, the former Director of IDWR recognized that the Spring Users could seek priority administration. *See* R. Supp. Vol. 7 at 4795.

former Director Dunn in stating that "there was no guarantee that [spring users] would continue to have the kinds of artificially-inflated flows that they had been experiencing since the inception of their water right, not unlike other users of ground water." *Id*. at 28. These comments, however, cannot be construed in the manner that IGWA desires and certainly don't support the contention that the Spring Users' rights have been stripped of vital legal rights. Moreover, the statement does not take into account the fact that the Spring Users hold "surface" not "ground" water rights.

While the Conjunctive Management Rules, on their face, authorize the Director to consider whether a point of diversion might be changed, CM Rule 42.01.h, the Director has determined that this is not such "an extreme case" and that the Spring Users diversions are reasonable.[20] R. Vol. 1 at 58-60; R. Vol. 3 at 501-02. Furthermore, "treating the decreed [surface] water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees." R. Vol. 14 at 3236-37.

Next, the State cannot promise that water will always be there. Indeed, recognition that the water *may not* always be there is the essence of the prior appropriation doctrine.[21] Finally, IGWA cannot hide its injurious diversions behind the claim of "artificially-inflated flows." To the contrary, "water in the aquifer is subject to conjunctive management regardless of its source." R. Vol. 14 at 3238. "Facts about the source may be informative as to whether shortages are the result of weather or pumping, but once water enters the aquifer and river channels of the Eastern Snake River Plain from whatever source it is subject to administration by priority." *Id*. at 3239.

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[20] The Springs Users do not concede the Director has the authority to order a senior surface water right holder to drill a well to access water to satisfy a surface water right. This case does not present that set of facts. Indeed, if ordered to drill a well to access water for a senior surface water right without compensation or mitigation, it is obvious such an action would constitute an unconstitutional taking of the senior's water right. No such unconstitutional application of the Rules was made in the Spring Users' case.

[21] *See Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition & Preliminary Injunction*, issued on June 12, 2007 in *IGWA, et. al. v. IDWR, et al.*, (5th Jud. Dist., Case No. CV 2007-526) (attached as Exhibit B to Clear Springs' *Opening Brief*).

Accordingly, to the extent that the material injury is caused by out-of-priority diversions by junior ground water users, they must either curtail or mitigate that injury. *See* CM Rules 40 & 42. Nothing in the State Water Plans provides otherwise or excuses conjunctive administration altogether.

Rather than dictating new water law, the State Water Plans are constrained by the parameters of Idaho water law and cannot be used to replace or alter the well-established constitutional and statutory principles of priority administration.

3. The Swan Falls Agreement Does Not Impair the Spring Users' Ability to Seek Priority Administration.

> Regardless of historical belief and understanding of many concerned interests, the Spring Users were not parties to the Swan Falls Agreement, and nothing in this record indicates that they agreed to the understanding [that the Swan Falls Agreement precludes a delivery call by the Spring Users]. The Agreement does not explicitly address the issue. Further, of significance, the partial decrees entered in this case do not reflect any conditions or limitations attributable to the Swan Falls Agreement.

R. Vol. 14 at 3240.

The Spring Users are not parties to the Swan Falls Agreement. Rather, the Agreement was the result of years of litigation and lengthy negotiations between Idaho Power Company and the State of Idaho. In the end, an agreement was reached, which subordinated ***Idaho Power's*** water rights above certain flow, measured at the Murphy gauge. *See* Ex. 437 at 3, ¶ 7(A); Idaho Code § 42-203C. ***Idaho Power*** also subordinated its water rights to then existing uses, including persons dismissed from Ada County Case No. 81375, as well as persons beneficially using water prior to October 1, 1984, and filing an application of claim for such use by June 30, 1985. Ex. 437 at 4, ¶ 7(C), (D).

IGWA erroneously argues that the Swan Falls Agreement "confirms" that spring flows are "not absolutely protected" – i.e. that the Springs Users cannot seek priority administration from ground water users. *IGWA Br*. at 29-32. However the plain language of the Swan Falls Agreement, and the legislation implementing it, shows that it applied only to the hydropower water rights listed in the Agreement. Former Director Dunn recognized this fact during his testimony at the hearing:

> Q. Okay. So the only -- the only water rights subordinated, if you will, under the Swan Falls agreement were the hydropower rights; correct?
>
> A. That's correct.
>
> Q. Okay. So with respect to the administration of ground water and surface water rights upstream from Swan Falls, was that administration of those rights in any way addressed specifically in the Swan Falls agreement?
>
> A. No. They were never changed.

Tr. P. 1026, lns. 9-17; *see also* R. Vol. 13 at 2879 (Director Dunn testifying that "the Agreement does not specifically discuss spring users' water rights at Thousand Springs").

In 2004, Hon. Judge Thomas Nelson, counsel for the Idaho Power during the Swan Falls Agreement negotiations, testified that the intent of the Agreement was never to impact rights to the springs and that there were "a number of problems" with the notion that "the Swan Falls Agreement subordinated the rights of spring flow users below Milner particularly in the Thousand Springs Reach." R. Vol. 12 at 2830. Among the reasons given by Judge Nelson for this erroneous view, perpetuated in this proceeding by IGWA, were that: (1) the terms of the Agreement, including the subordination provision in Section 7, ***only*** define Idaho Power's water rights; (2) Section 17 of the Agreement provides that the Agreement is the entire Agreement between the parties, and there are no other promises, covenants, or understandings outside of it;

(3) the parties to the Agreement were the State and Idaho Power, which had no authority to act for anyone else; and (4) the State had no authority to unilaterally subordinate existing uses of non-parties, which would have raised substantial constitutional problems. *Id*.

Furthermore, the fact that Director Dunn's personal, and incorrect, interpretation of the Swan Falls Agreement is not the policy and position of IDWR is made clear by comments made by a subsequent Director, Karl Dreher. *See* Tr. P. at 1038, lns. 4-12 (Director Dunn testifying that his interpretation of the Swan Falls agreement was "personal" and did not reflect the position of IDWR). On June 23, 2004, Director Dreher submitted a memorandum to the Interim Natural Resources Legislative Committee on Water Supply and Management Issues in response to questions regarding the effect of the Swan Falls Agreement on conjunctive administration. R. Vol. 13 at 3124-27. In this memorandum, Director Dreher rejected the view "that the Swan Falls Agreement also subordinated all uses from the springs in the Thousand Springs Area." *Id*. at 3125. Director Dreher concluded that "the prior appropriation doctrine as established by Idaho law governs the administration of both the surface water rights from sources in the Thousand Springs Area and ground water rights" from the ESPA. *Id*. at 3126. Furthermore, the actions taken by the State and IDWR following the Swan Falls Agreement were predicated on the premise that "the Agreement only defined the relationship between surface and ground water rights and nonconsumptive hydropower rights held by Idaho Power." *Id*.at 3127.

IGWA's claim that administration could not be sought so long as minimum flows were met is not supported by the plan language of the agreement. Paragraph 14 of the Swan Falls Agreement provides:

> This Agreement ***shall not be construed to limit or interfere with the authority and duty*** of the Idaho Department of Water Resources ["IDWR"] or the Idaho Water Resource Board ["IWRB"] to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

Ex. 437 at 8, ¶ 14 (emphasis added). Such legal authority includes IDWR's "clear legal duty" to enforce and administer water rights in accordance with the priority system. *Musser v. Higginson*, 125 Idaho 392, 395 (1994). It also includes the Board's duty in formulating State Water Plans to "protect[] and preserve[]" "existing rights, established duties, and the relative priorities of water established in article XV, section 3" of the Idaho Constitution. Idaho Code § 42-1734A(1)(a); *see also* Idaho Code § 42-1738 (the Board "shall have no power or authority" to "modify, set aside or alter any existing right or rights to the use of or the priority of such use as established under existing laws").[22]

IGWA's attempt to evade its obligations under the prior appropriation doctrine cannot stand. Its attempt to divine a historical limitation on the Spring Users' water rights – stripping them of the legal right to priority administration shared by all water users in the State – should be seen for what it truly is: an attempt to evade responsibility for the injury caused by junior ground water pumping. The law and facts demand that the junior ground water users depriving the Spring Users of the senior water rights must curtail or mitigate.

B. The Policy of Full Economic Development Does Not Authorize the Director to Limit Priority Administration of Junior Ground Water Rights

Citing an unrelated constitutional provision, hortatory statement in the CM Rules and the Ground Water Act, IGWA seeks to impose new burdens on the Spring Users' surface water

[22] IGWA's argument regarding the impact of the Swan Falls Agreement is also incompatible with that legislation that implemented the Swan Falls Agreement. *See* Idaho Code §§ 42-203B, C & D. Pursuant to this legislation, in order for IDWR to grant to a ground water user, or any other party, a water right to trust water made available by the Swan Falls Agreement subordination, IDWR must first determine whether the proposed use would significantly reduce the amount of trust water available to Idaho Power, and if so, then apply public interest criteria which include assessing economic impacts on electric utility rates in Idaho. Idaho Code § 42-203C. This legally mandated process under the Agreement and legislation, under which subordination of Idaho Power Company's water rights cannot occur until IDWR makes such determinations regarding impact of proposed water uses on water supply or rates for power, does not square with IGWA's theory that the Agreement subordinated not only Idaho Power's rights, but also the spring users' rights, which have nothing to do with power supply or rates.

rights. Clinging to notions of "full economic" or "optimum" development, IGWA demands that the Spring Users' calls be denied.

The CM Rules provide the framework for conjunctive administration of ground and surface water rights by "prescrib[ing] procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." CM Rule 11.01. Upon making a determination that the senior water user is being materially injured by out-of-priority junior-priority groundwater diversions, the director is required "regulate the diversion and use of water in accordance with the priorities of rights." CM Rule 40.01.a.

According to Rule 20.03, both "optimum development" and "full economic development" are "integrated" into the provisions of the CMRs.[23] For example, Rule 42 authorizes, but does not require, the Director to evaluate whether a senior's needs could be met "by employing diversion and conveyance efficiency and conservation practices," or "alternate reasonable means of diversion or alternate points of diversion." *See* CM Rule 42.01.g & .h.

Likewise, the Director may allow out-of-priority diversions to continue by junior-priority groundwater users so long as a "Mitigation Plan" has been approved by the Director, and is effectively operating. *See* CM Rule 40.01.b. The Director may also "lessen the economic impact of immediate and complete curtailment" by implementing a phased-in curtailment procedure, whereby the curtailment of junior-priority groundwater diversions is phased-in over no more than 5-years, so long as mitigation is provided to compensate for the reduction in curtailment in each of those 5-years. *See* CM Rules 20.04 & 40.01; R. Vol. 16 at 3842. Phased-in curtailment allows for the Director to address the economic impact of complete and immediate

[23] CM Rule 20.03 provides that the "rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use [which] includes the concepts of priority in time … optimum development … and full economic development."

curtailment, by allowing the junior-priority groundwater users to spread the effects and impacts of curtailment over a five-year period, while providing mitigation to compensate for the material injury caused by the out-of-priority diversion.

IGWA is dissatisfied with the manner in which the CM Rules integrate the principles and policies referenced in Rule 20.03. For example, it complains that the Director should be required to find that a spring diversion is per se unreasonable, no matter how efficient it is in capturing spring discharges, if priority administration to address the spring user's water shortage affects more than some undefined threshold number of ground water users. Such a demand does not comport with the CM Rules.

1. The "Hortatory" Policy Statements in CMR 20.03 Do Not Authorize the Director to Forego Priority Administration of Ground Water Rights

In its briefing to the district court in *AFRD No. 2 v. IDWR*,[3] IDWR assured the district court that the CMRs are constitutional because they "emphasize the importance of priority more than any other principle or policy," and explained the role of the Rules' policy statements regarding "reasonable use." It confirmed that Rule 20.03 "imposes no such standards or requirements of its own." Ex. 230 at 18. In particular,

> ***The Rule does not require, instruct or authorize the Director to apply the stated policies in any particular way, or to reach any particular outcome. Rule 20.03 is, in name and substance, a 'merely hortatory' statement of general policy and purpose***. *Bonner General Hosp. v. Bonner County*, 133 Idaho 7, 10, 981 P.2d 242, 245 (1999) (holding that a codified statement of legislative purpose that did not purport to impose requirements was 'merely hortatory').

[3]This brief was signed by IGWA's counsel, Candice McHugh, who at the time was a Deputy Attorney General for IDWR.

Id. (emphasis added). Furthermore, as to the priority of the water rights, the Department recognized that:

> ***[T]he Rules are best and most accurately viewed as presuming that the rule 'first in time is first in right' controls absent facts to the contrary***. The Plaintiffs' argument essentially assumes that the Rules will be used to subject senior rights to some form of strict scrutiny and/or micromanage the senior's use of water. To the contrary, ***the permissive and hortatory nature of the language for considering reasonableness, efficiency, and the policies of optimum and full development of the state's water lends itself to just the opposite; administration in accordance with priority is presumed and required, and the Rules impose a burden on the Director, when responding to a delivery call, to determine a factual basis for distribution of less that the full quantity off water stated in the decree***.

Id. at 18-20 (emphasis added).

Rule 20.03 does not provide an independent basis for administrative action. IGWA's attempt to expand this language to create onerous burdens on the senior water users and avoid administration cannot stand.

2. The Policy of "Full Economic Development" in the Ground Water Act Does Not Apply to Surface Water Rights

Statutory interpretation starts with the plain meaning of the statute. *State v. United States*, 134 Idaho 940, 944 (2000). If the statutory language is clear and unambiguous, courts should apply the statute without engaging in statutory interpretation. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732 (1997). "There is no indication that the words of the Ground Water Act should be interpreted in any way other than as they are normally used. *Parker v. Wallentine*, 103 Idaho 506, 511 (1982).

The title of the original, 1951 Ground Water Act describes the subject of the act as:

> Relating to the ***underground water resources*** of the State; ***Defining such waters as ground waters*** and declaring them to be subject to appropriation for

> beneficial use; confirming ground water rights heretofore acquired; excepting certain wells used for domestic purposes and providing for inspection thereof.

1951 Ida. Session Laws, ch. 200, § 5, p. 423 (emphasis added).

The purpose and scope of the Ground Water Act is set forth in I.C. § 42-226:

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

Id., p. 81, ln. 12 - p. 84, ln. 8 (emphasis added).[24]

The purpose and scope of the Ground water Act is discussed in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 (1973). There, the Court recognized that the Ground Water Act was passed to address the problem of aquifer overdrafting. *Id.*, at 580. Diversion of surface water rights, of course, do not draft water from an aquifer.

As explained in *Baker*, section 42-226, expresses the intent of the legislature to address certain issues. First, the statute confirms that the prior appropriation doctrine applies to groundwater rights. *See* Idaho Code § 42-226 ("[T]he traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state"). Second, the Court held that the Groundwater Act addresses the "race to the bottom of the aquifer" by modifying priority administration as between groundwater users:

[24] The definitional section of the Ground Water Act defines ground water as "all water ***under the surface of the ground*** whatever may be the geological structure in which it is standing or moving." Idaho Code § 42-230(a) (emphasis added). IGWA's expert, Ron Carlson, acknowledged that the definition of ground water in the Ground Water Act does not apply to spring water or any water "after it's seen the light of day." R. Vol. 12 at 2438-39 (depo. trans. at 45, ln. 23 - p. 47, ln. 7).

> [While] the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels.

Baker, supra, pp. 582-83.

The *Baker* Court discussed the important point that it was the legislature that limited the application of the priority doctrine in Idaho and included the "reasonable use" aspect of the riparian doctrine for the limited purpose of ensuring the "full economic development" of the state's ground water resource. Moreover, the Court recognized that the Ground Water Act was intended to apply to the protection of aquifers from over pumping because the legislature applied "reasonable use" requirements only to groundwater users:

> Idaho's Ground Water Act seeks to promote "full economic development" of our ground water resources.
> …
>
> In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in **ground** water in order to promote full economic development of the resource.
> …
>
> [A]lthough a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.

Baker, supra at 584.

Because, as discussed in *Baker, supra*, the Ground Water Act was intended to address the impacts of ground water diversions upon aquifer levels through the adoption of "reasonable use" principles, and because such principles are contrary to the prior appropriation doctrine and

cannot be applied without specific legislative direction, the principles enunciated in the Ground Water Act are not applicable to surface water right holders such as the Spring Users.

3. The CM Rules Confirm that the Policy of Full Economic Development Does not Apply to Surface Water Rights

Consistent with the Ground Water Act, the CM Rules define ground water as: "Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code." CM Rule 10.10. Rule 10.07 of the CMRs defines the phrase "full economic development of underground water resources," as follows:

> **07. Full Economic Development of Underground Water Resources**. The ***diversion and use of water from a ground water source*** for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does no result in material injury to senior-priority surface or ground water rights, and that furthers the principle and reasonable use of surface and ground water as set forth in Rule 42.

CM Rule 10.07 (emphasis added).

Rule 10.07 provides IDWR's interpretation of the statutory phrase. It contemplates consideration of the impact of ground water diversion on full economic development of the ground water resources, and specifically on senior-priority surface and ground water rights.

4. The Policy of "Optimum Use" of Unappropriated Water Does Not Alter the Requirement for Priority Administration of Established Water Rights

Water is not distributed according to who makes the "best" or most "economic" use of the water in the Director's or watermaster's subjective opinion, instead it is distributed by water rights. The reference to "optimum use" of water in the Idaho Constitution refers to the Idaho Water Resource Board's authority to "formulate and implement a state water plan for optimum

development of water resources in the public interest." IDAHO CONST. art. XV, § 7. The Board's statutory authority is limited to formulating and implementing a comprehensive state water plan for "conservation, development, management and optimum use of all ***unappropriated water resources and waterways*** of this state in the public interest." Idaho Code § 42-1734A (emphasis added). Administration of vested water rights does not concern "unappropriated water." Accordingly, the reference to "optimum use" of water in the constitution and statutes does not provide authority to the Director and watermasters to decide whether or not to administer junior priority ground water rights under the auspices that distribution to a senior surface water right would not represent the "optimum use" of the water.

5. The Director Cannot Refuse Administration to the Spring Users' Senior Surface Water Rights Based Upon IGWA's Arguments About "Full Economic Development" of Ground Water Resources.

IGWA argues that administration to satisfy the Spring Users' senior water rights should be precluded on the basis that it will interfere with Idaho Code § 42-226. *IGWA Br.* at 32. Essentially, IGWA argues that the Spring Users' surface water rights should be subject to Idaho's Ground Water Act and the provision regarding "full economic development" as it relates to certain junior priority ground water rights. This argument was rejected as a matter of law by the Hearing Officer and Director. In his SJM Order issued on November 14, 2007, Hearing Officer Schroeder determined:

> The Spring Users diversions are of water that has emerged from the ground, not by pumping or other artificial means. The partial decrees identify Alpheus Creek and Springs as the source of the Spring Users' water. The points of diversion are locations after the water has left the ground. Treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees.

R. Vol. 14 at 3236-37.

Accordingly, the Spring Users' surface water rights are not subject to Idaho's Ground Water Act, or any provision that would apply to certain junior priority ground water rights. Moreover, there is no requirement in the law that would abrogate the Director's duty to deliver water to the Spring Users' senior surface water rights on that basis. The Director found injury to the Spring Users' water rights caused by junior priority ground water diversions, and Idaho law required a response for purposes of administration pursuant to the prior appropriation doctrine. IGWA's "full economic development" argument would have the Court ignore Idaho law and administration altogether in favor of junior priority ground water rights. In response to IGWA's petition for reconsideration, the Hearing Officer rejected such an argument:

> A difficulty in this case is that IGWA does not address a core issue – the effect of the doctrine of "first in time, first in right" in water rights. The end result of the arguments by IGWA is that even though junior aquifer depletions have encroached upon senior rights over the years, there is no remediation for the harm because the result is harsh. The Spring Users have rights senior to the ground water users. Those senior rights have been damages by depletions to the aquifer, reducing the flows from the springs. . . . The reduction of the aquifer by junior ground water users, is however, subject to remediation. . . . In the early stages of development of water law in Idaho the Idaho Supreme Court rejected the concept of a "common right" to water whereby priority would be ignored and water apportioned among users as a common property, balancing one need with another. *Kirk v. Bartholomew*, 3 Idaho 367, 29 Pac. 40 (1892). "As between appropriators, the first in time is first in right." Idaho Code section 42-106. The principle has limits, but it is a staring point that must be addressed.

R. Vol. 16 at 3844-45.

IGWA's continued arguments fail to recognize the core principle of the prior appropriation doctrine – "first in time is first in right." Idaho Code § 42-106. As set forth above, the argument does not "trump" administration and justify injury to the Spring Users' senior water rights. Moreover, IGWA's claim that curtailment of acres under junior priority ground water

rights must be precluded because the water resulting in the springs is less than what the juniors would pump and not all water would arrive at the Spring Users' facilities is also unavailing. Again, the Hearing Officer plainly found that curtailment would provide water that would be beneficially used under the Spring Users' senior rights, and that it would not be wasted:

> Using the ESPAM establishes the increased amount of water that will go to the reaches. The percentage of that water that will go to the particular Spring Users is a useable quantity.

R. Vol. 16 at 3710.

> IGWA maintains that curtailment of a large volume of water to provide small percentages of water to the Spring Users constitutes a waste of water. There is nothing to indicate that the Spring Users are wasting water in their practices . . . It would be speculation to conclude that the result of the curtailment would be the waste of water.

R. Vol. 16 at 3694.

Contrary to IGWA's claims, administration is required in this case and the injury to the Spring Users caused by junior ground water pumping is not precluded. The evidence demonstrated that injury is occurring and that curtailment would provide water to use under the Spring Usrs' senior surface water rights. Consequently, IGWA's reliance upon I.C. § 42-226 to avoid administration is not supported by the facts or the law.

C. The Evidence Demonstrates that the Spring Users are Suffering Material Injury Due to Out-of-Priority Ground Water Diversions.

IGWA complains about the Director's and Hearing Officer's refusal to consider pre-decree beneficial use information – even claiming that the Hearing Officer created a situation where it would be impossible for IGWA to rebut the claim of material injury. *IGWA Br*. at 51. Remarkably, however, IGWA did not even try to rebut the testimony presented at hearing – waiting, rather, until the hearing was over to protest that the testimony and evidence was

"general" and did not meet some divined standard created by IGWA. Its arguments on this point misinterpret the law and wholly ignore the effect of the Spring Users' SRBA decrees.

IGWA apparently believes that only an "expert" may testify about the injuries a water user experiences as a result of out-of-priority diversions.[25] Yet, neither the law, nor the CM Rules create such a burden. Notably, Idaho law defines injury to a water right as an action that "diminishes" a water right's priority or reduces the quantity of water available for use under the right. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) (to "diminish one's priority works an undeniable injury to that water right holder"); *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 8 (1944) (defining injury to a water right for purposes of a transfer as an enlarged use that "increases the burden on the stream, or decreases the volume of water in the stream"); *see also*, Idaho Code § 42-203A(5) (defining injury in context of application for permit when a new use will "reduce the quantity of water under existing rights"). Accordingly, the law does not require the standard that IGWA seeks to create.

In addition, CM Rule 10.14 defines material injury as the "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." It does not say, as IGWA misreads, that a senior water user must show that it can raise better or more fish or grow better or more crops in order to experience or show material injury. *See IGWA Br*. 53-55. Yet, IGWA complains that the "record is devoid of evidence that an additional 10 cfs and 2.6 cfs will allow Blue Lakes and Clear Springs to produce more or larger or healthier fish." *IGWA Br*. at 17. Apparently, IGWA would have the Court create a rule wherein administration is conditioned on a watermaster's subjective determination of who grows the best crop, raises the biggest fish or makes the most money with the water. To the contrary, the watermaster has no authority to tell

[25] *See* CM Rule 10.14 (defining "material injury" as something that impacts "the exercise of a water right"). The Rules ***do not*** contemplate that every water user must hire an expert to testify that he or she could raise better fish or grow better crops.

water users what crops to grow or how many fish to raise with each drop of additional water that would be realized through curtailment of junior water rights:

> The court 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, so long as there is not an enlargement of use of the water right.

Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue at 17 (In Re SRBA Case No. 39576, Subcase Nos. 36-02708 et al., Twin Falls County Dist. Ct., Fifth Jud. Dist.) ("*Facility Volume Order*").[26]

If a senior water right holder can put the water to beneficial use under a decreed right and a junior's diversion interferes with that use, the result is injury to the senior water right. Furthermore, the fact that fish need water goes without saying. IGWA's attempt to downplay this elemental fact by demanding that the Spring Users demonstrate the exact number and weight of fish that can be raised with each incremental increase of water defies over a century of water right administration. *See e.g.*, *Facility Volume Order* at 9 ("This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water"). Just as the SRBA Court rejected this proposition in the context of a "facility volume" remark, the same principle applies here to reject IGWA's theory that the Spring Users' production must be regulated, not the quantities under their water rights.

Furthermore, the Spring Users' water rights were partially decreed in the SRBA Court in 2000. *See* Exs. 31 & 301-06. In that process, the Department recommended and the Court

[26] The *Facility Volume Order* was originally attached to the *Third Affidavit of Daniel Steenson*, filed November 27, 2007. The Spring Users recently discovered that this document is incomplete in the Agency Record. A *Motion to Augment & Correct the Record*, was filed on February 19, 2009, to correct this oversight.

adjudicated the extent of beneficial use for the Spring Users' rights. IGWA's members, including the Ground Water Districts, had the opportunity to file objections to the Springs Users' rights. Although they sought certain modifications through late filed motions to alter or amend, none of the ground water right holders contested the Spring Users' diversion rates or the year-round period of use for their water rights. Consequently, the Spring Users' water rights' diversion rates – representing the quantity of water that the Spring Users' are entitled to beneficially use under their respective rights – were recommended and decreed. IGWA now seeks, through the priority administration of those same rights, to challenge the previously decreed elements – in particular, the diversion rate. During the administrative proceedings, IGWA sought to discover, and use against the Spring Users, evidence of beneficial use that pre-dated the SRBA partial decrees. R. Supp. Vol. 2 at 4192-94; *see also IGWA Br*. at 50-51 (admitting that it sought pre-decree beneficial use information). IGWA claimed there, as it does now, that this information was necessary to prove that the Spring Users could not beneficially use the water in their decrees – forcing the Spring Users to re-prove their decreed diversion rates. In essence, IGWA is attempting to impermissibly shift the burden to the Spring Users to re-prove their water rights as a pre-condition to administration or to prove material injury. The Supreme Court soundly rejected this subterfuge in *AFRD#2*:

> Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules.

143 Idaho at 873.

> Nowhere do the Rules state that a senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02.

Id. at 873-74.

> The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has . . . The presumption under Idaho law is that the senior is entitled to his decreed water right.

Id. at 877-78

The Hearing Officer confirmed the *AFRD#2* Court's above conclusions and rejected IGWA's attempt to discover pre-decree beneficial use information and force the Spring Users to re-prove a right they already acquired in the SRBA. R. Supp. Vol. 3 at 4401-06. The Hearing Officer correctly recognized that such pre-decree information would be of minimal relevance – at best. *Id*. at 4403.

IGWA ignores the law set forth in *AFRD #2*, and the fact the Hearing Officer followed it, and instead claims that the Hearing Officer's decision "deprived the Ground Water Users of the information necessary to evaluate Blue Lakes' and Clear Springs' water needs." *IGWA Br*. at 55.[27] IGWA claims that the decision has "effectively written [aspects of the material injury rule] out of the CM Rules," *id*., that the Spring Users were "permitted to 'prove' their allegations of material injury without evidence that an additional 10 cfs or 2.6 cfs will enable the production of more, larger or healthier fish," *id*. at 55-56, and that the "bar has been set so low" that material injury can be shown "regardless of whether the water will actually be put to beneficial use," *id*. at 56.[28] Again, the argument ignores the legal protections provided to a senior water right. A

[27] Without any support in the record, IGWA baldly asserts that "the Hearing Officer recognized that the suppression of [pre-decree] information would make it impossible for the Ground Water Users to disprove the Spring Users' claims of material injury." *IGWA Br*. at 51.

[28] IGWA even attempts to convince the Court that use of pre-decree information is necessary to prevent "junior-priority water users to make delivery calls by proxy through senior-appropriators" – such as in a situation where a power user "could conspire to make a delivery call by a proxy through an unsubordinated spring water right hold

senior does not have to "re-prove" his decreed right. Finally, IGWA audaciously claims that the Spring Users' "chose to hide" pre-decree information, *id*. at 53, and that the Spring Users' "stratagem to suppress the information" "paid off" by working an "injustice" against IGWA, *id*. at 56-57. These extraordinary arguments ignore the law and facts.

First, the Supreme Court confirmed, and the Hearing Officer and Director applied, the proper burdens of proof for administrative proceedings. *AFRD#2*, *supra*; *see also* R. Vol. 16 at 3698-3700. Importantly, there is a "***presumption*** that a senior water user is entitled to the amount of water set forth in the partial decree." *Id*. at 3698 (emphasis added). Following allegations of material injury made under oath, the Director makes a material injury determination and the burden shifts to the junior water users to "show a defense to a call for the amount of water in the partial decree." *Id*. at 3698-99. IGWA would have the Court erase its burden – claiming that enforcement of this burden sets the bar "so low" that a finding of material injury is inevitable. *IGWA Br*. at 56. However, the Court cannot overlook the long-standing presumptions associated with the administration of water rights. *AFRD#2, supra* at 878 ("The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of the petition containing information about the decreed right"). The Spring Users should not be forced to reprove their decreed water rights. The law does not make such a demand and neither should the Court.

Furthermore, the undisputed testimony at the hearing is that the Spring Users could and would beneficially use all the water under their senior water rights if it was available. This testimony was based on the decreed water rights and the experiences and testimonies of Larry Cope, CEO of Clear Springs, Dr. John R. MacMillan, Ph.D., Vice-President of Clear Springs,

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acting as nothing more than a strawman." *IGWA Br*. at 56. This bizarre and meritless argument is not based on any facts in the record and should be ignored.

and Gregory Kaslo, Blue Lakes' Vice President. Mr. Cope testified that the Clear Spring facility was built and operated to beneficially use the extent of Clear Springs' water rights and that additional water up to that extent would be beneficially used for fish propagation. T. Pr. at 85-90. Dr. MacMillan testified that spring flows supplying Clear Springs' water rights were so low in 2005 that raceways had to be shut down and dried up. T. Pr. at 216, lns. 10-25 & 217, lns. 1-5; *see also* Exs. 204-05 & 308 at 2. He testified that in 2006, Clear Springs was able to turn water back into the raceway and that the water was beneficially used for fish production. *Id*. at 217, lns. 21-24. Likewise, additional water could be put to beneficial use by Clear Springs. *Id*. at 218, lns. 1-5. Mr. Kaslo testified that Blue Lakes could beneficially use their decreed diversion rates and that it "absolutely [] could raise more fish." *Id*. at 279-81. Furthermore, Spring Users use this water for more that just raising fish for market. For example, water is used for research and brood facilities in the aquaculture operations at Clear Springs' Snake River Farm facility. *See* Tr. P. 199-200; 203-04 & 208-09.

Supporting the Spring Users' testimony, Cindy Yenter, Watermaster for Water District 130 confirmed that additional water could be put to beneficial use. *Id*. at 494, lns. 1-4; 501, lns. 12-18; 502, lns. 5-19. Former Director Dreher also testified that he analyzed the "history development and use" of water at the facilities and "found that they had beneficially used the entire amount of the water and could, if the water was delivered to the spring, make beneficial use." *Id*. at 1395, lns. 16-23. Remarkably, IGWA did not even attempt to dispute this testimony! Yet, now it degrades this testimony as "generic testimony," *IGWA Br*. at 54, and complains that it is inadequate for IGWA's newly created standard for administration. IGWA cannot have it both ways. It cannot sit idly by and allow testimony to be given then, without providing any contrary evidence, complain that that testimony is inadequate on appeal.

The law demands that the Spring Users have certainty in their decrees. *See* Idaho Code § 42-1420. To claim that the Spring Users "hid" pre decree information, or devised "stratagem to suppress the information," ignores the protections afforded a decreed water right and the fact the water rights have already been adjudicated by the SRBA Court and have certain legal protections as affirmed by the Idaho Supreme Court in *AFRD #2*. Indeed, the Spring Users' SRBA decrees are "conclusive as to the nature and extent" of their water rights. *See* Idaho Code § 42-1420; *Crow v. Carlson*, 107 Idaho 461, 465 (1984) ("The [] decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use."). IGWA wholly ignores the law on this point.

Finally, IGWA attempts to denigrate the licenses and partial decrees and the Department's and SRBA Court's actions associated with the Spring Users' partial decrees. It claims that "the Department has not … evaluated the extent of beneficial use" for the Spring Users' rights. *IGWA Br*. at 52-53. Rather, ignoring the binding nature of the Spring Users' licenses, Idaho Code § 42-220 (a "licenses shall be binding upon the state … and shall be prima facie evidence as to such right"),[29] IGWA claims that the Department improperly relied upon the prior licenses for those rights. *Id*.[30] Accordingly, IGWA asserts it was "improper for the Hearing Officer to assume" that the information in the partial decrees regarding beneficial use was correct. *Id*. These arguments should be seen for what they are: red herrings. There is no

[29] IGWA ignores the law with respect to licensed water rights. IGWA's members, like IDWR, are bound by the effect of the licenses since they had the opportunity to protest the water right applications if they disagreed with the diversion rates the Spring Users' were seeking to appropriate. *See Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* at 13 (In re SRBA Case No. 39576, Subcase No. 29-11609, Twin Falls County Dist. Ct., Fifth Jud. Dist.) ("However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceeding and their privies."); affirmed by the Idaho Supreme Court, *City of Pocatello v. State of Idaho*, 145 Idaho 497 (2008).

[30] In another distortion of the testimony, IGWA asserts that "the Department historically licensed aquaculture facilities based on maximum facility volume and not based on whether the maximum authorized amount was ever put to beneficial use." *IGWA Br*. at 52-53. The Court is urged to read the transcript citations provided by IGWA as none of them support IGWA's contentions. Furthermore, the SRBA Court firmly rejected the ground water users' attempt to place a "facility volume" limitation on the Spring Users' water rights. *Facility Volume Order* at 9.

legal or factual substance to these arguments – especially here, where IGWA failed to raise these pre-decree beneficial use objections in the proper forum, either before IDWR at the time of licensing or before the SRBA Court. IGWA's attempt to use pre-decree beneficial use information is nothing more than an improper attempt to force the Spring Users to re-adjudicate their water rights. *See AFRD#2, supra*, at 878; Idaho Code § 42-1420 ("The decree entered in a general adjudication ***shall be conclusive*** as to the nature and extent of" that water right) (emphasis added).

D. The Director Reviewed the Facts and Appropriately Determined that the Spring Users' Points of Diversion are Reasonable.

IGWA objects to the Director's refusal force the Spring Users' to convert to ground water pumping. *IGWA Br*. at 57-61. Essentially IGWA would have the Court believe the Spring Users' surface water rights are "ground water" rights. This was rejected by the Hearing Officer and the Director as a matter of law. R. Vol. 14 at 3236. IGWA also complains that the Director should have considered the "global effect of [the Spring Users'] method of appropriation." *Id*. at 58. IGWA's attempt to read a "global effect" criteria into the CM Rules must be rejected. Indeed, the plain language of the CM Rule contradicts IGWA's newly created rule or criteria.

CM Rule 42.01, from which IGWA claims to draw support for its newly-devised rule, provides a list of factors that the "Directory ***may*** consider"[31] in determining whether there is material injury. (Emphasis assed). The rule provides:

> Factors the Director may consider in ***determining whether the holders of water rights are suffering material injury and using water efficiently and without waste*** include, but are not limited to, the following:
>
> a. The amount of water available in the source from which the water rights is diverted.

[31] IGWA ignores this language and asserts that the Director is required to consider the factors contained in CM Rule 42.01. The plain language of the rule does support IGWA's claim.

…

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

CM Rule 42.01.a & .h (emphasis added).

The bolded language, above, provides the basis and purpose for the Director's consideration of the listed factors – i.e. to determine either (i) whether ***the senior*** is suffering material injury and/or (ii) whether ***the senior*** is "using water efficiently and without waste." It does not, as IGWA alleges, require the director to "analyze whether the global effect of their method of appropriation … should be absolutely protected" such that it "prevent(s) optimum development of the resource." *IGWA Br*. at 58. Likewise, it was not written "to protect junior-priority water users from a senior water user whose means of diversion, if absolutely protected, would prevent optimum development of the resource." *Id*. Unsurprisingly, IGWA cannot cite to any legal support for this expansive reading of Rule 42. Just because the Supreme Court affirmed that this rule, on its face, potentially authorizes the Director to take actions cannot be interpreted to expand the plain language of rule. *Id*. (misrepresenting the holding in *AFRD#2*, 143 Idaho at 870, to support its contention that CM Rule 42.01 required consideration of a "global effect").[32]

[32] The language in *AFRD#2* addressing this issue is very brief. The Supreme Court stated:

> It is also important to point out those issues … from which no appeal was taken. The district court noted that the CM Rules incorporate concepts to be considered in responding to a delivery call, such as: material injury; … compelling a surface user to convert his point of diversion to a ground water source … The court observed that the Rules are not facially unconstitutional in having done so.

143 Idaho at 869. IGWA drastically expands this language by reading it to provide "instruction" to the Director regarding how he is to apply CM Rule 42.01. *IGWA Br*. at 59-60. Mere recognition that the rules are "not facially unconstitutional" does not compel the results that IGWA desires.

Contrary to IGWA's belief, CM Rule 42.01 was not applied in a manner that would "protect the senior-priority water user from his own inefficiency." *IGWA Br*. at 58. This fact was made clear in the Director's response to Clear Springs call. In the Clear Springs' *Order*, the Director applied Rule 42.01, recognized that one of Clear Springs' diversion structures was inefficient and required Clear Springs to repair the structure ***before*** curtailment would be authorized. R. Vol. 3 at 523.[33]

Importantly, the Director further determined that the facts did not support any mandated conversion to ground water pumping. In fact, former Director Dreher explained that drilling wells was not reasonable and would not "increase the supply overall" because it would result in the taking of water that was destined for another spring. T. Pr. at 1359-61. Furthermore, it would constitute an unreasonable "expense that should [not] be born by the senior if the need for the horizontal well was caused by injury from junior priority rights." *Id*. In fact, drilling a well is "not a reasonable expectation of the senior spring right." *Id*. at 1440, lns. 15-20. Brian Patton, chief of the IDWR planning bureau, recognized that "vertical or horizontal wells" were not considered "because of the uncertainty of ground water supplies in that area and the large amounts of replacement water" that would be required to mitigate for the material injury. T. Pr. at 357, lns. 8-12. Mr. Patton's and the Watermaster's (Cindy Yenter) investigation of the diversion facilities confirmed the Spring Users' means of diversion were reasonable. *See* Exs. 22 & 130. Both the Hearing Officer and Director confirmed these findings.

As this evidence demonstrates, Rule 42.01 was *not* "effectively eliminate[d]" from the CM Rules, as IGWA contends. *IGWA Br*. at 59. Rather, the Department reviewed the facts of

[33] This also demonstrates that the Spring Users' diversions are not "absolutely protected." *See, e.g., IGWA Br*. at 60 & 61. Rather, the Director may require, as a prerequisite to curtailment, that the Spring Users, or any other senior calling water user, improve their points of diversion to eliminate waste and improve efficiencies. *See* CM Rules 42.01.

this case and properly determined that they did not support the drastic, or "extreme," measure of forcing a surface water user to begin pumping ground water to fill its senior surface water rights. *See surpa*, n.7.

Finally, implying that the Director improperly applied Rule 42.01, IGWA's claims that the "Director *must* use his discretion" and apply Rule 42.01 using IGWA's newly-minted "global effects" theory, *IGWA Br*. at 60-61.[34] First, the plain language of Rule 42.01 provides that the Director "may" consider the 42.01 factors. That notwithstanding, the Hearing Officer considered IGWA's arguments and recognized that forcing a surface water user, with a decreed water right, to convert their point of diversion would constitute an unauthorized attack on the decree. R. Vo. 14 at 3236-37.[35] Indeed, "treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees." *Id*.

The Court's decision in *Schodde*, 224 U.S. 107, is inapposite here. There, the Court concluded that a senior water user could not control the current of a stream and that the senior could be forced to use a different diversion structure. *Id*. at 122-24. It did not, as IGWA claims, create a "global effect" rule for priority administration that would require every water right holder to change the source to access water for a decreed water right. Likewise, *Schodde* did not hold that the Director can unilaterally force a water user to transfer its decreed surface water right to a ground water source as a prerequisite to that senior water users' ability to exercise its legal right to priority administration. Moreover, contrary to IGWA's and IDWR"s reliance upon the case, the Idaho Supreme Court has distinguished the facts in *Schodde* from water right

[34] IGWA even attempts to draw support from *AFRD#2* to support this theory. *IGWA Br*. at 60. Yet, as discussed above, *supra*, n. 15, IGWA's expansive reading of *AFRD#2* is not supported by the plain language of that decision.
[35] IGWA complains that "the Rules have no application at all if they do not apply to surface water rights, regardless of whether the right is permitted, licenses or decreed." *IGWA Br*. at 60. The Director should not be permitted to go behind a decreed water right and unilaterally change an element of that decreed water right. *See* Idaho Code § 42-1420.

interference or administration cases: "*Schodde* . . . is clearly distinguishable because therein the interference was not with a water right but the current. In other words, the same amount of water went to Schodde's place as before. . . . This is an action for an injunction to restrain appellant from interfering with respondents' water rights. . . .". *See Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 397 (1929) (emphasis added). Here, the decreed amount of water is not being provided to the Spring Users, and the case involves their "water rights", not the current of a river.

Interpreting *Schodde* in such a manner ignores the "first in time" "first in right" mandate of Idaho water law. *See* Idaho Code § 42-106.

E. The Director Appropriately Determined that the Call is Not Futile.

IGWA claims, in both sections II.C and V of its brief, that the Spring Users' calls are futile. In both sections, IGWA ignores the law, misconstrues the facts and fails to recognize provisions of the CM Rules that demand administration in the face of material injury – even if there is a futile call. As the Hearing Officer correctly recognized, "once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the case would be futile." R. Vol. 16 at 3699 (*citing AFDR#2, supra*). The Supreme Court has long held that, "where an appropriator seeks to divert water on the grounds that it does not … prejudice a prior appropriator he should … produce '***clear and convincing evidence*** showing that the prior appropriation would not be injured or affected by the diversion." *Cantlin v. Carter*, 88 Idaho 179, 186-87 (1964) (citing *Moe v. Harger*, 10 Idaho 302 (1904)). Similarly, in its summary judgment decision in the Basin-Wide Issue 5 subcase (on the proposed conjunctive management general provision), the SRBA district court explained that once the connection between the sources for the senior and junior water rights has been established (as in this case),

"the burden would shift to the junior to show by clear and convincing evidence that curtailment would be futile." R. Vol. 13 at 3054, n.10.

IGWA derives much of its futile call defense on the hortatory,[36] policy statements in CM Rule 20.03 – claiming that full economic development of the ground water resource demands that the Spring Users' call be deemed futile. *See IGWA Br*. at 61-63. Importantly, as in the administrative proceedings, IGWA cites no legal authority to support its characterization of the futile call defense and repetition does not make it right.[37] Whether a call is futile is a factual question, not a policy issue. In the Basin-Wide Issue 5 subcase, the SRBA district court explained the futile call defense as follows:

> [T]he concept of "futile call" prevents the curtailment of a junior right on the same source if curtailment would not provide water to the senior in sufficient quantity to apply to beneficial use. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P2d 1220, 1223 (1976); citing *Albion – Idaho Land Co v. NAF Irrigation Co.*, 97 F. 2d 439, 444 (10th cir. 1938); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). The relative location of the points of diversion on a given source gives rise to this concept.

Id. at 30. *Gilbert v. Smith*, cited by the SRBA Court, provides:

> We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water. *Albion-Idaho Land Co. v. NAF Irr. Co*., 10 Cir., 97 F.2d 439, 444 (1938); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). *See also, Washington v. Oregon*, 297 U.S. 517, 522-523, 56 S.Ct. 540, 80 L.Ed. 837 (1936). Nevertheless, ***it was appellants' burden here to show that neither the***

[36] The hortatory nature of these statements is addressed *supra*, at Part II.A.

[37] IGWA attempts to justify its lack of legal support by claiming that the issue of what amounts to a "reasonable" time for the effect of curtailment to be felt by the senior water user is an issue of first impression for the Court. *See IGWA Br*. at 40 ("Idaho law lacks a definite point at which the waste of water becomes unreasonable). Even if this is so, the long-standing case law addressing futile calls defeats IGWA's claims. *See supra*. Furthermore, IGWA's arguments ignore the CM Rule provisions that demand curtailment even in the case where a call is deemed futile. CM Rule 20.04.

> ***surface nor underflow of Densmore or Birch Creeks, if uninterrupted, would reach the point of diversion of the respondents, as senior appropriators***.

97 Idaho at 739 (emphasis added).

In short, IGWA ***must prove*** that a call will be futile. Yet, IGWA did not produce any futile call evidence or argument during the hearing on this matter. Therefore, IGWA failed to meet its legal burden to show its alleged defense. In fact, IGWA's own expert testified that he did not do any analysis regarding futile call:

> MR. STEENSON: And you have not done any analysis to determine whether the Blue Lakes Trout Farm or Clear Springs calls may be futile as to any individual or groups of wells, correct?
>
> DR. BRENDECKE: That's correct.

Tr. P. at 95, lns. 15-21. Rather, IGWA clings to a claim that the effects of curtailment won't be felt for "more than 100 years," *IGWA Br*. at 62, and the claim that there may be more water or that the Spring Users may not be in business at that time, *id*. at 42 (hypothesizing that "the possibility that intervening events such as above-average precipitation, managed recharge, decreased water demand, and market and economic factors could nullify" the need for water). Therefore, according to IGWA, the Spring Users' call must be futile. Contrary to IGWA's desires, priority administration is not based on the hypothetical uncertainties of the junior appropriator.[38] IGWA's attempt to change the futile call defense into a surrogate for the hortatory policy statements of CM Rule 20.03 must be rejected.

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[38] The Jerome County District Court recognized as much:

> The doctrine of prior appropriation has been the law in Idaho for over 100 years. It is set forth in our State Constitution at Article 15 and in our statutes at Idaho Code Section 42-106, which was enacted in 1899. Prior appropriation is a just, although sometimes harsh, method of administering water rights here in the desert, where the demand for water often exceeds water available for supply. The doctrine is just because it acknowledges the realty that in times of scarcity, if everyone were allowed to share in the resource, no one would have enough for their

IGWA misstates the facts and asserts that the Spring Users' calls are futile due to the length of time required to realize the effects of curtailment.[39] *IGWA Br*. at 61-64. Yet, as discussed above, IGWA did not meet its burden in challenging the Director's finding that calls were not futile. IGWA conveniently ignores the undisputed facts that demonstrate that about 60% of the water resulting from curtailment will occur in the spring reaches within the first four years. Ex. 461 at Figs. 12 & 13. Moreover, the Director previously found that 50% of the water resulting from curtailment of ground water rights within a 10 km band from the springs *will reach the springs within the first 6 months*. *See* Ex. 220 at 2. Contrary to IGWA's interpretation of the evidence, it is clear the Department has performed evaluations to show that water resulting from curtailment will be available to satisfy the Spring Users' senior rights, and that the majority of that water will be realized within the first four years.

Even assuming that IGWA's misrepresentations were true, the CM Rules provide for mitigation *even if a call is futile*. "Although a call may be denied under the futile call doctrine, ***these rules may require mitigation*** or staged or phased ***curtailment of a junior-priority use*** if diversion and use of water by the holder of the junior-priority water right causes material injury, ***even though not immediately measurable***." CM Rule 20.04 (emphasis added). The Director determined that the "diversion and use of water by the holder of the junior-priority water right

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needs, and so first in time-first in right is the rule. The doctrine is harsh, because when it is applied, junior appropriators may face economic hardship or even ruin.

Tr. P. at 1, lns. 8-21 (attached to District Court's *Order*) *See* Exhibit B to Clear Springs *Opening Brief*.

[39] Previously, IGWA attempted to redefine the term "waste" as it relates to Idaho water law by asserting that "waste," as used in the *definition* of "futile call" refered to the quantities of water that, once curtailed, may not reach the senior appropriator. IGWA is wrong. The term "waste" is a term-of-art in Idaho water law addressing the ***use*** of water. *See, State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735 (1997) (quoting *Kuntz v. Utah Power & Light Co.*, 117 Idaho 901, 904 (1990)) ("The policy of the law of this [s]tate is to secure the maximum use and benefit, ***and least wasteful use***, of its water resources"); *see also Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 535 (D.C. Cir. 1940) (same – applying Idaho law). Even the CMR recognize that "waste" deals with the use of water – not the scope of delivery following curtailment: "In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., ***the Director shall consider whether the petitioner making the delivery call is … diverting and using water efficiently and without waste***." CM Rule 40.03 (emphasis added).

causes material injury" to the Spring Users' water rights. Therefore, curtailment or mitigation is appropriate.

The Director, and Hearing Officer, reviewed all of the facts, recognized that there would be a delay in realizing the impacts of curtailment and determined that the calls were not futile. IGWA failed to rebut this finding. Indeed, IGWA did not provide any evidence as to what would be a "reasonable" delay.

On the contrary, IGWA's expert, Dr. Brendecke, provided testimony supporting the conclusion that the Spring Users' calls are not futile and that IGWA are "certainly responsible for some portion of their depletion or injury to those water rights."

> MR. STEENSON: As you've testified previously, changes in aquifer levels directly affect spring flows?
>
> DR. BRENDECKE: I would agree with that statement on a general basis.
>
> MR. STEENSON: As aquifer levels decline, spring discharges decline, correct?
>
> DR. BRENDECKE: Some aquifer levels decline have more impact on spring flow declines than others.
>
> MR. STEENSON: Ground water diversions have reduced ground water levels and spring discharges, to some extent?
>
> DR. BRENDECKE: Ground water pumping withdraws water from the aquifer which would have the tendency to reduce water levels in the aquifer.

Tr. P. at 81, lns. 8-21.

> MR. STEENSON: Do you believe that the ground water users bear some responsibility for the shortages being experienced by Blue Lakes, Clear Springs, and other springs below Milner?

> DR. BRENDECKE: Well, ***they're certainly responsible for some portion of their depletion or injury to those water rights*** that are placing this call.

Id. at 128, lns. 4-11 (emphasis added).

F. Model Uncertainty Cannot Be Used to Evade the Mandates of the Prior Appropriation Doctrine.

IGWA's claim that curtailment is unreasonable does not comport with the undisputed facts. First, it is undisputed that ground water pumping causes declines in spring flows. *See, e.g.*, Tr. P. at 81, lns. 8-21. In fact, all groundwater depletions from the ESPA cause reductions in flows in the Snake River and spring discharges equal in quantity to the ground water depletions over time. R. Vol. 1 at 47, ¶ 11; R. Vol. 3 at 489, ¶ 11. Second, it is also undisputed that IGWA must curtail or mitigate for the material injury it causes to the Spring Users' senior water right. Tr. P. at 128, lns. 4-11. Third, it is undisputed that a vast majority of the benefits of curtailment will reach the Spring Users points of diversion within the first 4 years, not only at some distant point in the future as claimed by IGWA (i.e. 100 years). *See* Ex. 461 at Figs. 12 & 13 & Ex. 220 at 2. Fourth, it is undisputed that this case involves hydraulically connected sources of water. R. Vol. 3 at 488-89. Finally, it is undisputed that the Model is the best science available for determining the impacts of ground water depletions to the aquifer. R. Vol. 16 at 3704.

Ignoring these undisputed facts, IGWA challenges the reliability of the Model and complains that there must be "reasonable certainty that the water" will reach the calling senior – even attempting to create yet another rule ("the rule against arbitrary curtailment"). *IGWA Br*. at 64-69.

IGWA criticizes the model due to its failure to "perfectly predict the effects of curtailment." *IGWA Br*. at 65. Yet, there will always be model uncertainty and perfection is not

required in water right administration. All parties agree that there is uncertainty in the model. This does not mean, as IGWA asserts, that administration must cease or that curtailment must be prohibited on that basis. Indeed, model uncertainty is ***not*** a defense to priority administration. As best, any model uncertainty is a nullity, since it will impact all water users. *See* Clear Springs *Opening Brief* at Argument, Part II. Model uncertainty of 10%, for example, may mean that the impact of a ground water diversion is 10% more or less than the predicted effect. Either way there is still an effect. Redefining the level of uncertainty in the model, as IGWA demands, would not impact the demands of priority administration.

Regardless of model uncertainty, however, the burden is on IGWA, as the junior ground water users, to establish by clear and convincing evidence that their hydraulically connected diversions will have no impact on senior surface water rights. *AFRD#2, supra* at 878. As discussed above, IGWA failed to meet this burden and cannot now – while the case is on appeal – seek to rebut the testimony it failed to challenge. Furthermore, IGWA cannot cite to any legal support for its demand that the model must perfectly predict impacts before conjunctive administration can occur.

IGWA further uses its challenge to the model as an opportunity to assert, yet again, that the Court should develop a "trimeline" or futile call standard to guide future administration. However, IGWA has never provided any evidence to suggest what this standard should be or to explain why the standard should be applied at the expense of senior diversions. Rather, IGWA misrepresents the testimony of Larry Cope, Clear Springs CEO. IGWA asserts that Mr. Cope testified that "he expected no less than two-thirds of the amount curtailed will accrue to the spring that supplies Clear Springs' water right within ten years." *IGWA Br*. at 36 & 40 (citing Tr. P. 154, l.17 to 159, l.16). Yet, Mr. Cope's testimony actually supports curtailment in this

matter. "I have seen data that would suggest to me that appropriate actions taken on the plain would bring ***two-thirds of our water back within a 10-year time frame***." Tr. P. at 159, lns. 12-16. As discussed above, it is undisputed that 60% of the benefits of curtailment will be realized within four years of curtailment. Ex. 461 at Figs. 12 & 13. Accordingly, Mr. Cope's testimony is consistent with the model results set forth in the Curtailment Scenario.

It is informative and compelling exercise is to consider what other states have done to define such a standard. Colorado, for example has adopted the following definition for "nontributary ground water" that is not subject to conjunctive administration with surface water sources:

> "Nontributary ground water" means ground water, located outside the boundaries of any designated water basins in existence on January 1, 1985, ***the withdrawal of which will not within one hundred years, deplete the flow of a natural stream***, including a natural stream as defined in ssections 37-822-101(2) and 37-92-102(1)(b), ***at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal***.

C.R.S. 37-90-103(10.5) (emphasis added).

Of even greater interest is IDWR's "no effect" standard for injury applied to allow case-by-case approval of permit applications despite IDWR's moratorium on processing new applications affecting the ESPA. Ex. 212. This standard is particularly interesting because it was authored by Director Keith Higginson in his 1993 *Amended Moratorium Order*. Mr. Higginson was the author of the Conjunctive Management Rules in 1994.

> [A] moratorium is established on the processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the [ESPA] and all tributaries thereto . . .
>
> The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium order if . . .

b) The Director determines that the development and use of water pursuant to an application ***will have no effect on prior surface and ground water rights*** because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

Ex. 212 at 4 & 5; Tr. P. at 631-33.

The Court should not accept IGWA's invitation to establish a "trimline" or futile call standard, that is to be imposed in a discriminatory manner and force senior water users to continue suffering material injury. Rather, the Court should affirm the long-standing demands of the prior appropriation doctrine that "first in time is first in right." Idaho Code § 42-106.

G. The Director Did Not Exceed His Authority By Issuing the 2005 Orders on an Emergency Basis

The Director made the 2005 orders effective upon issuance pursuant to Idaho Code § 67-5247, and provided aggrieved parties with an opportunity for hearing. The CMRs require the Director to regulate junior ground water diversions upon a finding of material injury to a senior that has filed a water delivery call. The CMRs do not require or provide for a hearing as a prerequisite to the Director performing this administrative duty. CM Rule 40.01.a. The constitutionality of the Rules was upheld in *AFRD#2, supra*. The water distribution statutes in Title 42, chapter 6 of the Idaho Code do not require hearings before watermasters administer priority water delivery calls, though they may certainly be requested.

It is therefore difficult to see how IGWA's due process or property rights were adversely affected, when the Director provided an opportunity for a hearing that was not required by the Rules, and no curtailment has occurred in the nearly four years since the 2005 orders were issued. In *AFRD #2* the Court squarely addressed the timeliness issue in delivering water in response to a call:

> We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.

154 P.3d at 445.

The process IGWA advocates would require a full hearing each time a water delivery call is filed, and before the Director takes any action. This demand is untenable and would ensure that senior water users will be forced to suffer their material injury, *ad infinitum*.

CONCLUSION

For the foregoing reasons, the Court should reverse the Director's Order to the extent he acted arbitrarily and capriciously and without substantial evidence. In addition, the Court should deny IGWA's appeal.

RESPECTFULLY submitted, this 9th day of March, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of March, 2009, I served true and correct copies of the **SPRING USERS' JOINT REPLY BRIEF** upon the following by the method indicated:

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Courtesy Copy to Judge's Chambers: Snake River Basin Adjudication 253 3rd Ave. N. P.O. Box 2707 Twin Falls, ID 83303-2707	____ U.S. Mail, Postage Prepaid __X__ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
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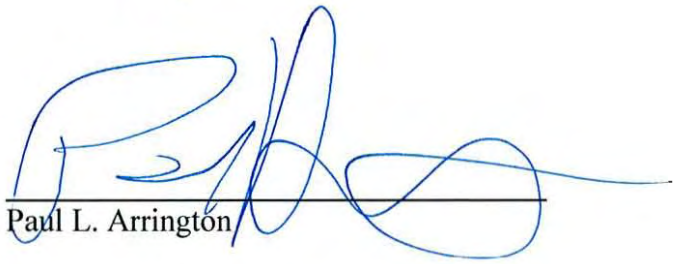

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