IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and **TWIN FALLS CANAL COMPANY,** Petitioners, vs. **DAVID K. TUTHILL, JR.**, in his capacity as Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,** Respondents.	**CASE NO. CV-2008-551**

SURFACE WATER COALITION'S JOINT OPENING BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

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STATEMENT OF THE CASE

In 2005, seven senior surface water users[1] made a call for water alleging that junior ground water right holders were pumping their full right from the Eastern Snake Plain Aquifer ("ESPA") resulting in depletions to Snake River reach gains and injury to their senior surface water rights. For each of the years 2005, 2006, and 2007, the record and findings in this case are undisputed that pumping by the junior water right holders[2] has injured the Surface Water Coalition's senior water rights.

No water has been provided to any SWC member from junior pumpers for use during the irrigation season when the senior rights were injured. Consequently, the process *de facto* curtailed the senior right holders such that they had to "make do" with what was made available to them from what was left over from the junior pumpers' use, while the junior water right holders pumped their full rights unfettered. Ironically, during each of the irrigation seasons of 2005, 2006, and 2007, junior rights were under "administration" by the Director of the Idaho Department of Water Resources to assure that the senior rights would not be curtailed but instead receive their full water rights. Such "administration" provided no water to senior rights during the irrigation season, and curtailed no junior pumpers. "Administration" thus resulted in senior rights being curtailed and junior pumping interests drawing full water rights from the aquifer. Thus, after three years of "administration," seniors received no timely water, and no juniors were curtailed, precisely the predicament that led the seniors to make the call in the first instance.

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[1] The "Surface Water Coalition", "SWC", or "Coalition" is comprised of American Falls Reservoir District #2 ("AFRD#2"), A&B Irrigation District ("A&B"), Burley Irrigation District ("BID"), Minidoka Irrigation District ("MID"), Milner Irrigation District ("Milner"), North Side Canal Company ("NSCC") and the Twin Falls Canal Company ("TFCC").

[2] Unless specifically provided, the use of the terms "ground water users" or "IGWA" refers to the City of Pocatello and the Idaho Ground Water Appropriators, Inc.

This brief details the various nimble, but illegal, pirouettes by the Director to evade application of Idaho's prior appropriation doctrine such that the junior interests either curtailed the use that injured the senior, or provided mitigation water in a timely manner. As discussed herein, the Director's *Final Order* should be reversed and the Director should be ordered to timely administer the Coalition's injured senior water rights.

ISSUES PRESENTED ON APPEAL

The Coalition presents the following issues on appeal. The Court should rule that the following actions (i) violated constitutional or statutory authority; (ii) overstepped the statutory authority of the agency; (iii) were created upon unlawful procedure; (iv) were unsupported by the substantial evidence on the record; and/or (v) were arbitrary, capricious or an abuse of discretion. *See* Idaho Code § 67-5279(3):

A. The Director's failure to provide timely and lawful administration of junior priority ground water rights to satisfy the Coalition's senior surface water rights.

B. The Director's application of the Conjunctive Management Rules in an attempt to administer junior priority ground water rights to satisfy the Coalition's senior surface water rights.

C. The Director's failure to recognize and give due deference to the Coalition's decreed senior surface water rights.

D. The Director's creation of a "Replacement Water Plan" scheme, that is not authorized by statute or the CM Rules and does not provide the holder of the senior water right with an opportunity to participate in any manner prior to approval of the Replacement Water Plan by the Director.

E. The Director's approval of "Replacement Water Plans" through various orders issued in 2005 through 2008 based upon unilateral changes to standards, processes and criteria by the Director and his failure to require that any water be provided to Coalition members during those irrigation seasons, even though the Director found that Coalition members were suffering material injury.

F. The Director's stated intent to continue using the "Replacement Water Plan" process even though the Hearing Officer found that the Director should follow the procedures for mitigation plans and that replacement plans, as used by the Director, did not provide replacement water in the season of need.

G. The Director's failure to properly provide for "reasonable carryover" water for the Coalition's use in subsequent irrigation seasons.

H. The Director's determination that "reasonable carryover" storage is not required until an undetermined and undefined date during *the following irrigation season* – thus effectively eliminating carryover storage as a consideration in a call proceeding and ensuring that no storage water is ever provided to actually "carryover" from one year to the next.

I. The Director's limitation on Twin Falls Canal Company's headgate deliveries to 5/8 miner's inch even though TFCC's decreed water rights provide for 3/4 miner's inch deliveries.

J. The Director's use of a 10% "trim line" to exclude certain junior priority ground water rights from administration even though it is undisputed that diversions under those water rights are materially injuring the Coalition's senior water rights.

K. The Director's reliance on evidence not in the record of the contested case.

L. The Director's failure to issue a final order in compliance with Idaho Code §§ 67-5244 and 67-5246.

FACTUAL & PROCEDURAL BACKGROUND

I. The Coalition's Senior Priority Water Rights Are Materially Injured by Out-of-Priority Groundwater Diversions.

It is undisputed that diversions by junior priority ground water rights are depleting the ESPA, thus impacting reach gains in the Snake River and its tributaries and materially injuring the Coalition's senior priority surface water rights. *See* R. Vol. 1 at 1; R. Vol. 8 at 1382-85.[3] In addition, the Director, in adopting the Hearing Officer's *Recommended Order*, *see* R. Vol. 39 at 7382, recognized that the Coalition's "existing facilities ... are reasonable" and that there is "no evidence of decayed or damaged systems" that "cause water to be wasted in transit," R. Vol. 37 at 7101-02. In fact, the "members of SWC monitor the use of water closely." *Id.* at 7103. It is undisputed that the Coalition members divert and use water reasonably, without any unlawful waste. R. Vol. 37 at 7101-03. In addition, it is also undisputed that the Coalition is not required to meet some theoretical "achievable farm efficiency" before seeking administration of junior ground water rights. *Id.* at 7103. The Director's determinations on these points are not challenged. The issues before the Court, therefore, address the Director's response to the Coalition's water delivery call, including the application of the CM Rules from 2005 through 2007. While the Director's *Final Order* correctly finds injury to the Coalition's senior surface water rights, the actual implementation of the order for administration is not supported by the law, rules or evidence in the record. To this extent, the *Final Order* should be set aside.

[3] The Hearing Officer made this clear in the *Recommended Order*. *See* R. Vol. 37 at 7076 ("Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights"); *see also Id.* at 7052 ("Consumptive use from ground water pumping has resulted in a net reduction in aquifer recharge"). The Director adopted these findings in his *Final Order*. *See* R. Vol. 39 at 7382, ¶ 8.

II. The Director's Untimely Administration has Failed to Provide Water to the Senior Priority Water Rights that are Being Materially Injured.

The Coalition requested that the Director administer hydraulically-connected junior priority ground water rights on the ESPA on January 14, 2005. R. Vol. at 1. In response, the Director issued an *Amended Order* on May 2, 2005.[4] R. Vol. 8 at 1359. Since the issuance of the *Amended Order*, which determined that the Coalition's senior water rights were being materially injured, the Director has issued multiple orders addressing the material injury suffered by the Coalition members and imposing mitigation requirements on the ground water users. *See* R. Vol. 13 at 2424 (*Supp. Order*); R. Vol. 16 at 2994 (*2nd Supp. Order*); R. Vol. 20 at 3735 (*3rd Supp. Order*); R. Vol. 21 at 3944 (*4th Supp. Order*); R. Vol. 23 at 4286 (*5th Supp. Order*); R. Vol. 25 at 4714 (*6th Supp. Order*); Ex. 4600 (*7th Supp. Order).*[5] To date, no water has been provided to the Coalition during the irrigation season when injury is occurring and the Director's newly created "replacement water plan" scheme has proven to be wholly ineffective, in addition to being unlawful. Relevant to these proceedings, the *Amended Order* determined the following:

1. That the Coalition's senior priority surface water rights are being materially injured by out-of-priority ground water diversions, R. Vol. 8 at 1382-85;

2. That the Director would not distribute water to the Coalition's licensed and adjudicated decreed natural flow and storage water rights, but instead to a unilaterally derived, non-adjudicated "minimum full supply" calculation based upon actual diversions from a single cool, wet year (1995). R. Vol. 8 at 1379-80 & 1385;

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[4] The Director's initial *Order*, dated April 19. 2005, R. Vol. 7 at 1157, was superseded by the *Amended Order*.
[5] The Director also issued an *Eighth Supplemental Order* on May 23, 2008 (after the hearing in this case and before the *Final Order* was issued). R. Vol. 38 at 7198 (*8th Supp. Order*). No hearing was been held on this order therefore the Coalition objects to any evidence used in this order relied upon by the Director that was not before the Hearing Officer. *See* Idaho Code §§ 67-5242, 5244, 5249, 5251. The Director's findings in the *8th Supp. Order* were not properly before the Hearing Officer and are not part of the agency record in this proceeding.

3. That the Coalition's right to carryover storage water from one season to the next would be based on an equation created by the Director that limited the amount of carryover that would be provided to less than the storage capacity owned by the Coalition's entities, R. Vol. 8 at 1384;

4. That the junior ground water users were not required to comply with the CM Rules' procedures for mitigation plans (Rule 43), but that they could continue pumping out-of-priority through a "replacement water plan," which the Director could unilaterally approve without any hearing and without any opportunity for the Coalition to meaningfully participate and protect its senior water rights; R. Vol. 8 at 1403; *see also* R. Vol. 7 at 1283 & R. Vol. 9 at 1557;

5. That certain junior ground water rights would be excluded from administration even though the Director recognized that they were materially injuring the Coalition's senior surface water rights, R. Vol. 8 at 1386;

What followed was three years of ineffective administration, leaving the Coalition without any water while the ground water users continued to pump their full rights out-of-priority. To date, even though the material injury suffered by the Coalition members has persisted, the Director has refused to follow through with the ordered curtailment and has failed to require that mitigation water to be provided in a timely manner for use during the irrigation season. The Director issued seven "supplemental" orders between 2005 and 2007, each claiming to account for the mitigation efforts of the ground water users, each claiming to recognize, at least in part, the ongoing material injury suffered by the Coalition members and, yet, each refusing to order curtailment while the material injury persisted.

Each year the Director has delayed a final determination as to the ground water users' annual mitigation obligations until ***months after*** the irrigation season – some years waiting until the following summer (long after the water was needed for crops growing during the previous season)! *See* R. Vol. 20 at 3735 (*Third Supplemental Order*, dated ***June 29, 2006***, which determined the final ***2005*** replacement water requirements). Such actions have diminished the Coalition's senior priority water rights and have effectively eliminated the Director's consideration of carryover storage in conjunctive administration. In summary, the Director's system of conjunctive administration has completely failed to provide the Coalition members with the certainty and legal protections that their senior priority water rights are entitled to under Idaho law, and has allowed junior water right holders to pump at full capacity while inflicting material injury on senior water right holders.

Several parties, including the Coalition, the U.S. Bureau of Reclamation, ground water users and the City of Pocatello challenged the Director's *Amended Order* in the spring of 2005. Over the next three years, the CM Rules were challenged as facially unconstitutional, *see AFRD#2, et al. v. IDWR, et al.*, 143 Idaho 862 (2007), the Director issued multiple supplemental orders, and a hearing on the parties' petitions was held from January 18 through February 5, 2008.

The Hearing Officer, the Honorable Gerald F. Schroeder, issued an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("*Recommended Order*"), on April 29, 2008, R. Vol. 37 at 7048, and an *Order Regarding Objections to Recommended Order*, on June 10, 2008, R. Vol. 38 at 7257. The Director then issued his *Final Order* on September 5, 2008. R. Vol. 39 at 7381. Although termed a "Final Order," the Director failed to fully decide all of the issues challenged and presented at the hearing. In particular, he left for some future

date, the issuance of an order "detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover." R. Vol. 39 at 7386. The Director indicated that yet another administrative hearing on that future order would be required. *Id.* This appeal followed.

LEGAL STANDARDS

I. Standard of Review on Appeal of a Final Agency Order

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005).

Generally, a Court is charged with deferring to an agency's decision. *See Mercy Medical Center v. Ada Cty.*, 146 Idaho 226, 192 P.3d 1050, 1053 (2008) (Court should not substitute its judgment for that of the agency as to questions of fact so long as the decision is "supported by substantial and competent evidence"); *St. Joseph Reg. Med. Ctr. v. Nez Perce Cty.*, 134 Idaho 486, 488 (2000) (same). The Court, however, is "free to correct errors of law." *Mercy Medical Center, supra.* 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"[6] 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 action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho

[6] An agency's decision must be supported by "substantial evidence". *Hunnicutt, supra.* at 260; *see also Chisolm v. IDWR*, 142 Idaho 159, 164 (2005). 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. 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).

544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id.*

As set forth below, the Director's methods and implementation of conjunctive administration did not comport with Idaho law. The Director's failure to timely administer junior priority ground water rights, create and approve a "replacement water plan" process, and eliminate the right and practice to "reasonable carryover" storage, constitutes an unconstitutional application of the Department's CM Rules. The Court must correct these errors of law accordingly.

II. The Procedures for Responding to a Water Call are Well-Established Under Idaho Law and Guide the Director's Duty to Administer Water Rights.

The procedures to be implemented in responding to a water call have been well established through statute, case law and regulation, including the CM Rules. Drawing from the Supreme Court's decision in *AFRD#2, supra*, Justice Schroeder clearly delineated these procedures in his *Recommended Order*. R. Vol. 37 at 7072-75.

The purpose of administration is to distribute water by priority to senior water rights. Stated another way, the purpose is to ameliorate material injury to a senior right caused by junior priority rights, assuming those junior rights seek to continue to divert out-of-priority. The 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." *See also* R. Vol. 37 at 7075-76. Importantly, any hindrance to either a natural flow or to a storage water right (including the right to carryover storage) constitutes "material injury" that must be mitigated either through curtailment or an approved Rule 43 mitigation plan. *Id.*

The holder of a senior water right initiates a water call by filing a petition, under oath, with IDWR alleging that by reason of the junior's diversion of water, the senior is suffering

material injury (the "initial showing"). *See* CM Rule 40.01;[7] *AFRD#2, supra* at 877. Upon making the "initial showing," the senior is presumed to be entitled to his decreed or licensed water right. *AFRD#2, supra*, at 878-79; R. Vol. 37 at 7072-73; R. Vol. 39 at 7392. This presumption remains throughout the proceedings. In any event, the holder of the senior water right cannot be forced to re-prove or re-adjudicate the senior water right – nor can the rules or statutes be read to create that burden. *See AFRD#2, supra* at 878.

Following the initial showing, the burden then shifts to the junior water right holders to present evidence indicating that the call is futile or to challenge, in some other constitutionally permissible way, the senior's call. *AFRD#2, supra*; R. Vol. 37 at 7074; *see* CM Rule 42.01 (factors to be considered in determining defenses to material injury and reasonableness of water diversions); R. Vol. 37 at 7078 ("the factors set forth in CM Rules 42.01 are in the nature of defenses to the claim of material injury"). For example, the holder of the junior water right may present evidence attempting to show that the amount of water authorized will not be put to beneficial use or is not needed by the holder of the senior water right. *See* R. Vol. 37 at 7083-86. The requirement that water called away from a junior must be put to a beneficial use by a senior is not only common sense (in that it protects from waste), but it fulfills the goals of proper administration. *Id.* Thus, while the senior water right enjoys a presumption that it is entitled to the amount of water shown in its decree or license, the junior water right is protected by the ability to allege, and present evidence, that the requested water will be wasted or otherwise not put to beneficial use.

In this case it is undisputed that the ground water users failed to meet their burden and prove a valid defense to the Coalition's water delivery call.

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[7] The *Rules for the Conjunctive Management of Surface and Ground Water Sources*, IDAPA 37.03.11 ("CM Rules")

ARGUMENT

I. The Director Unconstitutionally Applied the CM Rules By Failing to Provide for Timely Administration of Junior Priority Ground Water Rights.

From 2005 through 2007, the Director failed to provide for "timely administration" of any junior priority ground water rights. Accordingly, the Director's application of the CM Rules was unconstitutional.

A. The 2005 Irrigation Season

In 2005, the Director issued a series of orders regarding IGWA's "replacement water plans" – allowing hydraulically connected junior ground water rights to avoid curtailment that year. Initially, the Director found numerous deficiencies with the various plans submitted. *See* R. Vol. 9 at 1557 (*Order Regarding IGWA Replacement Water Plan*); & 1573 (*Order Regarding Simplot Replacement Water Request*); & 1583 (*Order Regarding Water Resource Coalition Replacement Water Plan*). The plans were approved with certain conditions, including the following:

> 2. IGWA must submit the following:
>
> a. ***Documentation that the 20,000 acre-feet of storage water*** proposed for lease … and any other storage water available or dedicated to IGWA for replacement water ***is leased to the Water District 01 Rental Pool for delivery and use as replacement water by the Coalition.***
>
> * * *
>
> d. Documentation about high lift water rights and exchanges as follows:
>
> i. Copies of executed contracts to lease water rights authorizing diversion from Snake River natural flow; and
>
> ii. ***An approved exchange of water rights*** authorizing the exchange of water rights authorizing diversion of Snake River natural flow, and leased by IGWA, with storage water held by the USBR physically deliverable between Near Blackfoot and Minidoka.

> 3. ***The exchange must be approved under Idaho Code § 42-240*** or as a temporary exchange under Idaho Code § 42-222A. Any temporary exchange must be preceded by a drought declaration for all the counties in which water will be diverted or left in the Snake River pursuant to the exchange.

R Vol. 9 at 1568-69 (emphasis added). IGWA never complied with the above conditions – no storage water was leased for the Coalition's use in 2005 and no exchange was ever approved by the Department.

Despite IGWA's non-compliance (which was due on or before May 23, 2005), the Director failed to curtail as initially ordered in 2005. *See* R. Vol. 8 at 1567 & 1569 (Director assures Coalition that any failure to comply with these conditions would result in "immediate curtailment consistent with the Director's Amended Order issued on May 2, 2005"). Instead, the Director approved another plan on June 24, 200 – ordering the ground water users to assign storage water to the Director to be allocated to the Coalition. R. Vol. 12 at 2181.

In their *Petition for Reconsideration* of the June 24, 2005 order, the ground water users refused to comply with the Director's requirements, claiming that its replacement water plan "did not purport to 'dedicate' any specific source of water, or portion thereof, to meeting a 2005 replacement water obligation." R. Vol. 13 at 2358.[8] In fact, "IGWA never has stated that it would invariably and absolutely provide this particular water to the SWC in 2005."[9] R Vol. 13

[8] Indeed, IGWA admitted that it did not have actual water to provide the Coalition at that time of the irrigation season since "IGWA's members have other obligations that also must be met with the water supplies it has acquired" (namely its proposed mitigation activities in Water District No. 130). R. Vol. 13 at 2359. Former Director Dreher's April 25, 2006 letter to IGWA's counsel documents the various obligations junior ground water right holders had and the fact they did not have sufficient water to meet all of those obligations, both to senior surface water right holders in Water District No. 130 (namely Blue Lakes Trout Co. and Clear Springs Foods, Inc.) and the Surface Water Coalition. R. Vol. 21 at 3724-25.

[9] In a July 8, 2005 order the Director removed the requirement for IGWA to assign the 20,000 acre-feet to the Department for allocation to the Coalition "as a result of the increased likelihood that the exchange will be approved and the resultant availability of additional storage water from the exchange with the USBR." R. Vol. 13 at 2344. Despite the Director's belief and the so-called "increased likelihood" of an approved exchange of storage water with the USBR, no exchange was ever approved pursuant to Idaho Code § 42-240 in 2005.

at 2362. Still, no curtailment was ordered, even though the Coalition received no water during the 2005 irrigation season and continued to suffer material injury.

Although the Director ordered IGWA to provide replacement storage water for the Coalition's use, he completely failed to implement the mandate at the time he approved IGWA's "replacement water plan" in late June, 2005. Then, in late July, 2005, the Director issued a *Supplemental Order Amending Replacement Water Requirements*. *See* R. Vol. 13 at 2424. In this order the Director revised his "predicted shortages" to the Coalition members, but still provided no water to the Coalition members – rather, it ordered that the Director would "hold" water for use by the Coalition at some unspecified time. R. Vol. 13 at 2433. Although it was the peak of the 2005 irrigation season, the Director continued to refuse to order that any water to provided to the Coalition members. Rather, junior ground water rights pumped unabated and the Director unlawfully shifted the risk of shortage to the Coalition.

Five months later, well after the irrigation season had ended, the Director issued a *Second Supplemental Order Amending Replacement Water Requirements* on December 27, 2005. R. Vol. 16 at 2994. In this order the Director again revised his injury calculation for the Coalition members in 2005 and found that TFCC has shortages of 152,200 acre-feet. *Id.* at 3006-07. Yet, the Director admitted that no storage water was delivered to TFCC during the 2005 irrigation season:

> 4. Although IGWA secured at least 27,700 acre-feet of replacement water in 2005, which was the minimum amount required by the May 2 Order, only incremental increases in reach gains resulting from the lease and non-use of water rights held by FMC Idaho, LLC, the non-irrigation of leased lands, and mitigation actions in Water District No. 130 were provided during the 2005 irrigation season.

R. Vol. 16 at 3007.[10]

[10] Although the Director found IGWA secured "at least 27,700 acre-feet" of replacement water in 2005, no formal exchange pursuant to Idaho Code § 42-240 was ever filed or approved in compliance with state law. Accordingly,

In an apparent "after-the-fact" accommodation, the Director ordered IGWA to provide TFCC:

> with the remainder of the 27,700 acre-feet of minimum replacement water required in 2005, that was not provided from incremental increases in reach gains, plus an additional 18,340 acre-feet of replacement water in 2006, subject to the final determination of 2005 material injury, such that the remainder of the replacement water due for 2005 material injury is provided at the beginning of the 2006 irrigation season (March 15) in addition to the water supplies otherwise available to the Twin Falls Canal Company.

R. Vol. 16 at 3009.

In December 2005 the Director ordered IGWA to provide the water it failed to secure and provide to the Coalition for the injury that was suffered during the 2005 irrigation season by March 15, 2006. As it turns out, no replacement storage water resulting from material injury occurring in 2005 was actually provided to TFCC until July 17, 2006, when the Director issued his *Fourth Supplemental Order on Replacement Water Requirements for 2005*, over a year after the Director's first injury finding for the 2005 irrigation season. R. Vol. 21 at 3944. The Director testified that his intent was to provide replacement water "up front", Tr. P. Vol. I at 85, but admitted at hearing that "it didn't play out that way," *Id.* at 98. Clearly, the water was not provided at a time when it was needed during the 2005 irrigation season.

In fact, in his *Third Supp. Order*, the Director attempted to erase the outstanding mitigation obligation for 2005 due to the fact that the reservoirs filled prior to the ***next*** irrigation season (2006). R. Vol. 20 at 3751 (¶38) & 3756 (¶7). Stated another way, although the ground water users did not secure the storage water as ordered in 2005, and the Director failed to order the delivery of storage water to the Coalition in 2005, the fact that the winter of 2005-06 provided enough water to fill the Coalition's storage space for 2006 was apparently sufficient to

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the Director's finding was in error since IGWA did not "secure" the storage water that it had claimed to have leased and offered in its "replacement water plan" filed on April 29, 2005. R. Vol. 7 at 1283.

forgive the injury to the Coalition's senior water rights that occurred during the 2005 irrigation season. The Director's "hindsight" approach to justify his failure to provide timely administration in 2005 is not supported by the law.

Moreover, the Director's flawed reasoning and "after-the-fact" approach to water right administration is illogical. It is obvious that water provided in 2006 does not remedy an injury that occurred in 2005. However, under the Director's scheme, juniors are allowed to pump the entire irrigation season and deplete Snake River reach gains while the senior is provided no water. Then, the Director gets to "wait and see" how the winter turns out before deciding whether what he did the prior year was right or not. In the end, even when the Director finds material injury is occurring to a senior water right, junior water rights receive the benefit and certainty of being authorized to pump the entire irrigation season, and seniors shoulder the risk of depleted water supplies along with the uncertainty of reduced storage heading into the winter. The Director's approach flips the prior appropriation doctrine upside down and impermissibly shifts the burden of water shortage to senior water rights.

B. The 2006 Irrigation Season

Although the delivery call contested case was stayed for a time in the spring of 2006 the Director did not issue an order for water right administration until June 29, 2006. In the *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006*, the Director found that TFCC was injured to the amount of 127,900 acre-feet for 2005. R. Vol. 20 at 3745. The Director also concluded that "there is no likely material injury to any member of the Surface Water Coalition predicted during the 2006 irrigation season". R. Vol. 20 at 3756. The Director made this finding on June 29, 2006, or about halfway into the irrigation season. *See Id.* at 3757.

This order was issued about three weeks after the CM Rules were declared unconstitutional on June, 2, 2006 by Judge Wood in his summary judgment order in *AFRD #2 v. IDWR* (Case No. 2005-600, Gooding County Dist. Ct., 5th Jud. Dist). In light of Judge Wood's order, on June 14, 2006 the Coalition specifically requested the Director to properly administer junior priority ground water rights pursuant to his clear legal duty under Idaho's water distribution statutes. R. Vol. 20 at 3662. The Coalition again requested the Director to reconsider his June 29, 2006 order and perform the administration required by Idaho law for the 2006 irrigation season. R. Vol. 21 at 3919-20. Despite these repeated requests, the Director refused to administer any junior priority ground water rights that year. R. Vol. 21 at 3924-26 & 3929-30.[11] No opportunity to challenge the Director's orders was provided and he refused to issue any orders further regarding administration that year.

Although the Director committed to "take such additional action as is appropriate and consistent with Idaho law" no further water right administration occurred in 2006. R. Vol. 21 at 4000. Similar to 2005, the Director chose to "wait out" the 2006 irrigation season without requiring any administration or mitigation water to be provided to the Surface Water Coalition. All the while, junior ground water users were authorized to pump their full water rights throughout the entire 2006 irrigation season.

It was not until May 23, 2007, when the Director issued a *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*, that the Director made his final accounting for the 2006 irrigation season. *See* R. Vol. 23 at 4286. Consistent with his continued "after-the-fact" approach to administration witnessed in prior years, the Director determined, in May 2007, that no Surface Water Coalition member was injured in

[11] Instead, the Director suspended the administrative case on the Coalition's water delivery call, and then sought stays of Judge Wood's judgment (which were denied by both the District Court and the Idaho Supreme Court). R. Vol. 21 at 3944 & 3999.

2006.[12] R. Vol. 23 at 4294. The Director "surmised" no Coalition member was injured in 2006 based only upon assumptions about how those entities delivered water and operated their projects during that irrigation season:

> 7. The fact that American Falls Reservoir District No. 2, North Side Canal Company and Twin Falls Canal Company diverted less water in 2006 than the minimum full supply determined to be needed indicates that not as much water was generally needed by those members of the Coalition in 2006 in the early irrigation season during March and April. This was likely due to the higher than normal winter precipitation and subsequent above normal soil moisture conditions. Or Coalition members may have sought to conserve available storage water out of concern that supplies might not be adequate given the above normal temperatures and below normal precipitation in the long range forecast for August, September, and October issued periodically by the National Weather Service Climate Prediction Center. . . .
>
> * * *
>
> 12. While the calculation of Twin Falls Canal Company's Final 2006 Presumed Shortages and Material Injury appears as a positive number, which would indicate material injury, Finding 10 presumed that each member of the Surface Water Coalition would divert its minimum full supply in 2006. Due to conditions in 2006, *see* Finding 7, the Twin Falls Canal Company diverted 80,078 acre-feet less than its minimum full supply (1,075,900) and carried over 40,162 acre-feet more than its reasonable carryover storage supply (38,400). Therefore, as predicted in the June 29 Order, Twin Falls Canal Company was not materially injured in 2006.

R. Vol. 23 at 4292 & 4294.

Based on his "assumptions," the Director determined (in May 2007) that no injury had occurred during the 2006 irrigation season. Again, the process begs the question, even if the Director had found injury for 2006, how could he have mitigated the 2006 injury in the summer of 2007? The answer clearly is that he couldn't; and further demonstrates the arbitrary and unlawful procedure used that year.

[12] Of course administering water rights is much easier and more convenient "after the fact", and it benefits juniors who are in no danger of curtailment under that regime. However, such a scheme provides no assurance or lawful distribution of water to senior rights during the irrigation season. Instead, seniors bear the burden of all uncertainty and must shoulder the risk of shortage during the irrigation season.

C. The 2007 Irrigation Season

With respect to the 2007 irrigation season, the Director found material injury to TFCC in the amount of 58,914 acre-feet. R Vol. 23 at 4297. Yet, once again the Director ordered no water to be provided to TFCC during the 2007 irrigation season. Instead, the Director "conditionally approved" IGWA's replacement water plan, claiming that it "will mitigate for the predicted material injury to members of the Surface Water Coalition ... pending ongoing review by the Director of natural flow quantifications and timely replacement water acquisitions." R. Vol. 23 at 4302. Importantly, IGWA did not have any actual storage water to provide to TFCC as of the date of the Director's May 23, 2007 order. Yet, the Director nonetheless authorized junior priority ground water right holders to pump their full rights in 2007.

The Director further found he would make a "final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2007 is complete." R. Vol. 23 at 4302. In short, the Director informed the Coalition, in May 2007, that he would not order any mitigation water to be provided until December 2007, well after the irrigation season. The Director continued the "after-the-fact" scheme of administration, claming that "credits" and "debits" would continue to accrue until they cancel each other out. R. Vol. 23 at 4302-03. In other words, the Director excused the continued depletion of the Coalition's water supply, as simply a "debit" that could be carried forward and eventually "canceled out" when their reservoir space filled. With continued after-the-fact administration, this was nothing more than a promise not to provide the Coalition with any water.

Given the Director's history of not providing water during the course of the 2005 and 2006 irrigation seasons, TFCC was forced to rent 40,000 acre-feet of water from the Water

District 01 Rental Pool. Since the Director had yet to order any storage water to be provided during the irrigation season, TFCC rented "wet" water to provide to its shareholders. Tr. P. Vol. VIII at 1630, lns. 14-25 ("Realizing that the plight that we were in, we went to the water bank and rented 40,000 acre-feet of water").

Former Director Dreher testified that his intent was that during the whole process he would continually afford the opportunity to provide pertinent information that should be considered. Tr. P. Vol. II at 275. Since climatic conditions in 2007 were hot and dry, the Coalition managers filed affidavits with the Director on June 20, 2007 to explain their entities' increased demand for water that season. *See See* R. Vol. 24 at 4432 (Billy Thompson, MID), 4443 (Ted Diehl, NSCC), 4464 (Vince Alberdi, TFCC), 4502 (Dan Temple, A&B), 4510 (Lynn Harmon, AFRD#2), 4521 (Randy Bingham, BID) & 4529 (Walt Mullins, Milner). The Coalition further requested an updated material injury determination from the Director. R. Vol. 23 at 4538. Director Tuthill apparently disagreed with former Director Dreher's stated intent as he refused to consider the information from the Coalition managers and proceeded to issue a *Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan* on July 11, 2007. R. Vol. 25 at 4714 & 4719 ("the Director stated that the filings were outside the scope of the June 22 hearing and ***could not be used by the parties during the proceeding and would not be considered by the Director*** in ruling on IGWA's 2007 Replacement Water Plan") (emphasis added). [13] In this *Sixth Supp. Order*, the Director reduced the injury determination for TFCC, R. Vol. 25 at 4720, and allowed IGWA to "underwrite" the water TFCC had already rented (and paid for) that year from the Water District

[13] The Hearing Officer concluded that the Director's non-responsiveness effectively trapped the projects with less water than needed; thus, unconstitutionally re-adjudicating the Coalition's senior water rights downward. R. Vol. 37 at 7092-94.

01 Rental Pool, R. Vol. 23 at 4721.[14] The Hearing Officer recognized the Director's failure to carry out his order. R. Vol. 37 at 7069-71 ("However, the Order also provided that 'The replacement water will be delivered to Twin Falls Canal Company as it is needed during the irrigation season ...,' quoting from IGWA's 2007 Replacement Water Plan. Conclusion of Law 4. ***That was not done***.") (emphasis added). As had become the norm, the Director again failed to provide for any administration or actual mitigation water during the 2007 irrigation season.

On December 20, 2007, the Director issued the *Seventh Supplemental Order Amending Replacement Water Requirements. See* Ex. 4600. The Director stated the purpose of the order was "to provide the parties with the most up-to-date water right accounting and obligations owed by the Idaho Ground Water Appropriators, Inc." *Id.* at 1. The Director further adjusted his injury calculation for TFCC downward (using the "minimum full supply," and refused to acknowledge the calculated shortage TFCC had experienced. *Id.* at 6, ¶ 12.[15]

Since TFCC did not rely upon the Director's "guarantee", the Director assumed the water was not needed. The Director never considered whether TFCC was forced to reduce diversions and water deliveries to its shareholders due to the fact the water supply was not available during the irrigation season. In 2007, TFCC carried over some storage water and did not run its account "dry." However, the Director used this fact against TFCC, by assuming the water was not required. Again, the flawed logic and "after-the-fact" administration benefited junior priority ground water users that were allowed to pump their full rights throughout the 2007 irrigation season. No water was ordered to be provided during the irrigation season, and IGWA only

[14] Despite this allowed "underwriting", the Director never ordered IGWA to provide the water or pay for the water leased by TFCC during the 2007 irrigation season.

[15] In this finding the Director assumed that TFCC did not need additional water during the irrigation season since it did not rely upon the Director's "guaranteed [] full minimum supply" as set forth in the *Sixth Supp. Order*. Apparently, notwithstanding the Director's previous failure to implement any order or provide any replacement water directly to TFCC during the 2005 and 2006 irrigation seasons, TFCC was supposed to rely upon the Director's "promise" to deliver water during the 2007 irrigation season.

assigned 14,345 acre-feet over to TFCC on January 9, 2008 (during the administrative hearing in this matter), months after the close of the irrigation season. R. Vol. 34 at 6431-32. As evidenced by IGWA's filing, the 14,345 acre-feet was only acquired on January 9, 2008 by an addendum to a lease with the City of Pocatello. *Id.* at 6437-38. Admittedly, IGWA did not have the water necessary to provide to TFCC during the 2007 irrigation season. The Director's *Seventh Supplemental Order* expressly recognized that IGWA did not have sufficient storage water during the 2007 irrigation season to back up its so-called "guarantee". Ex. 4600 at 8. Despite the recognized failure, no junior priority ground water right was ordered to curtail in 2007.

The Director had already allowed junior ground water users to pump their full rights even though they could not have backed up the "guarantee" to provide actual water during the 2007 irrigation season. This "pump-first, ask questions later" process did not follow the law and left the Coalition's senior water rights injured for a third consecutive irrigation season.

Based upon the evidence provided, Justice Schroeder confirmed the above facts:

> The transfer from the Director to the Twin Falls Canal Company was completed during the course of this hearing [held January 16, 2008 to February 6, 2008]. Following the pattern from 2005, rather than the water being provided in the year it was determined to be due, it was provided in the subsequent year.

R. Vol. 37 at 7071. In affirming the above finding the Director expressly recognized that no water has ever been provided to the Coalition during the irrigation season from 2005 through 2007. R. Vol. 39 at 7382 ¶ 8.

D. The Director's Untimely Administration Violated Idaho Law

As set forth above, from 2005-2007 the Director failed to either curtail junior priority ground water rights or order the delivery of mitigation water to the injured senior surface water rights held by the Surface Water Coalition pursuant to an approved Rule 43 mitigation plan.

Instead, the Director used a charade of "supplemental orders" to continually change his injury determinations, approve IGWA's "replacement water plans", and wait until after the irrigation season to order any relief – which would then be "debited" or credited" until canceled by the filling of the reservoir system. The resulting "after-the-fact" administration was untimely under Idaho law and constitutes an unconstitutional application of the CM Rules. Moreover, by failing to designate his "supplemental" orders as "final" agency orders, the Director prevented the Coalition from challenging those decisions in district court.[16]

Idaho's constitution and water distribution statutes require water rights to be administered by priority. IDAHO CONST. art. XV, § 3; Idaho Code §§ 42-602, 607. The Director's own water district orders, issued upon authorization of the SRBA Court, further require the watermaster to curtail out-of-priority diversions "causing injury to senior priority water rights if not covered by a stipulated agreement or ***mitigation plan*** approved by the Director. Ex. 1020 (*Final Order Creading Water District 120*, at 5; *Final Order Creating Water Disctrict 130*, at 5) (emphasis added). The CM Rules require either administration or mitigation[17] to occur during the irrigation season, not at some later date after the senior water right has already suffered the injury:

> [U]pon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:
>
> a. ***Regulate the diversion and use of water in accordance with the priorities of rights*** of the various surface or ground water users whose rights are included in the district . . .

[16] The use of a "replacement water plan" process further violates Idaho law in that it has allowed the Director to prevent injured senior water right holders from obtaining efficient and timely judicial review of his decisions. By not designating his orders approving "replacement water plans" as final agency actions, the Director precluded any judicial relief on his decisions, until now, four years later.

[17] With respect to the timing of providing "mitigation" under a Rule 43 Mitigation Plan, the CM Rules are clear, water must be provided during the irrigation season. *See* CM Rules 43.03.a ("Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law."); 43.03.b ("Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right,"); 43.03.c ("Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage").

> b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a ***mitigation plan*** that has been approved by the Director.

CM Rule 40.01 (emphasis added).

The law does not allow the Director or watermaster to "wait and see" how the water year turns out before administering water rights. By that time, it is too late to remedy injury that has already occurred. Instead, the *AFRD#2* Court affirmed the well-established law that requires water right administration to occur during the irrigation season:

> We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion 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.***

143 Idaho at 874 (emphasis added).

The Court affirmed Judge Wood's analysis regarding the timing of conjunctive water right administration, where, in his June 2, 2006 *Order on Summary Judgment*, Judge Wood found:

> [I]n order to give any meaningful constitutional protections to a senior water right, a delivery call procedure ***must be completed consistent with the exigencies of a growing crop during an irrigation season.*** ... Ultimately, putting the senior in the position of having to redefend a decreed right in a delivery call undermines the water right, as the process cannot be completed consistent with the exigencies related to the irrigating of crops. Moreover, ***any delay occasioned by the process impermissibly shifts the burden to the senior right, thus diminishing the right.*** The concept of time being of the essence for a water supply for irrigation rights is one of the primary basis for the preference system in § 3 of Article XV of the Constitution.

Order at 93 (emphasis added) (excerpts from Judge Wood's *Order* including his analysis of Idaho's Constitutional Convention are attached hereto as *Attachment A* for the Court's convenience).

Justice Schroeder confirmed this requirement:

> **2. Replacement Water has not been provided in the season of need.** When a determination is made that surface water users are suffering material injury from ground water pumping, they are entitled to curtailment or replacement water in the season of material injury. The theory underlying predicting material injury and allowing replacement water as mitigation instead of requiring curtailment is that the replacement water will be provided in time and in place in stages comparable to what would occur if curtailment were ordered.

R. Vol. 37 at 7112-13.

Waiting until the end of the irrigation season, after the irrigation season, or until the following year to order water to be provided for injury to a senior irrigation water right is clearly untimely administration. Yet, that is exactly what the Director did in this case. The practice wrongly diminishes senior water rights. *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").

Although the Director found injury to TFCC in May 2005 no water was ever delivered to TFCC during the 2005 irrigation season.[18] With respect to 2006, although the Director found no injury on June 29, 2006, he then failed to provide for any further administration that year and instead waited until May 2007 to conclude the Coalition had not been injured in 2006 (based wholly upon assumptions about how the projects were operated that year). Finally, in 2007 the Director issued a series of orders culminating with a revised injury finding in December of that year. IGWA was then ordered to provide water to TFCC in January 2008 for injury that had been suffered during the 2007 irrigation season.

Since Idaho law provides for a constitutional right to timely water right administration, the Director unconstitutionally applied the CM Rules. The Court should declare the Director's application of the CM Rules unconstitutional and correct it accordingly.

[18] Instead, storage water was provided to TFCC in July of 2006.

II. The Director Unconstitutionally Applied the CM Rules in Failing to Honor the Coalition's Decreed Senior Surface Water Rights.

Rather than requiring that the holder of the junior water rights (the ground water users) present evidence, or challenge the material injury finding in some other "constitutionally permissible way," the Director unilaterally determined that the Coalition members were not entitled to the decreed quantity of their water rights. Instead of granting due deference to the Coalition's decrees, *see* Idaho Code § 42-1420 (decrees are binding as to the "nature and extent" of the water right), the Director based his administrative efforts on the predicted "minimum" amount of water the senior water rights would need to meet crop requirements – the so called "minimum full supply," R. Vol. 8 at 1383-84. This act exceeded his statutory authority and resulted in an unconstitutional application of the CM Rules. Idaho law requires IDWR, the Director, and the watermasters to distribute water to water rights. The Director has no authority to create a so-called "minimum full supply" and then distribute water to that standard. The process wholly ignores the decreed elements of a senior's water right.[19]

The Director used diversions from a single wet, cool year (1995) to set this amount. R. Vol. 8 at 1383-84.; *see also* R. Vol. 37 at 7092 ("According to the Snake River Heise Natural Flow information from 1911-2004 (exhibit 1000) 1995 was in the top third of wet years. . . . Basing the minimum full supply on a wet year makes it likely that material injury was underestimated in 2005 and subsequent years,"); at 7110 ("A conclusion of this recommendation is that the use of the year 1995 to establish the minimum full supply of water underestimated the amount of water necessary to meet the needs of SWC members within their water rights."). The

[19] Even assuming, for argument's sake, that a "minimum full supply" is allowable, it is clear the Director unconstitutionally applied the concept by not holding junior priority ground water right holders to their "minimum full supply". Such an application of the CM Rules, by holding seniors to a "bare minimum" while juniors are authorized to pump their full water rights clearly violates the Equal Protection clauses of the United States and Idaho Constitutions.

Director asserted that, whenever the available water dipped below this "minimum full supply," he would order curtailment or require an approved mitigation plan. As initially conceived by the Director, this "minimum full supply" was to be adaptive – increasing and decreasing as conditions changed or shifted through the irrigation season(s). R. Vol. 37 at 7087; R. Vol. 23 at 5302 ("The Director will continue to monitor water supply and climate conditions through the 2007 irrigation season and issue additional orders ... or further instructions"); Tr. P. Vol. I at 179, lns. 16-18 (former Director Dreher testifying that "We start with the minimum full supply as the floor and provide a mechanism to adjust upwards if it's a drought year").

Contrary to the Director's process of starting at the "floor" or the "minimum" amount, Idaho's water distribution statute expressly requires watermasters to honor and distribute water to water rights:

> ***It shall be the duty of said watermaster to distribute the waters*** of the public stream, streams or water supply, . . . ***according to the prior rights of each respectively,*** and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do ***in order to supply the prior rights of others*** in such stream or water supply . . .

Idaho Code § 42-607 (emphasis added).

The above statute governs a watermaster's duties in "clear and unambiguous terms." *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). The Idaho Supreme Court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994). In times of shortage, watermasters must distribute water according to the elements and priority dates of an "adjudication or decree." *State v. Nelson*, 131 Idaho 12, 16 (1998); *see also 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"). The diversion rates, or annual volume for storage

water rights, represent quantity elements that are entitled to protection in administration. Justice Schroeder plainly recognized the right a senior has for purposes of administration as against junior water rights. R. Vol. 37 at 7078 ("to the extent water is available within the amount of the water right but is diminished by junior users, the presumption favors the senior users' rights to the water.") (emphasis added).

A watermaster's duty to administer water rights according to the plain terms of a decree has been in place for over a century:

> We think the position is correct, and we are also satisfied that in a case like this where the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.

Stethem v. Skinner, 11 Idaho 374, 379 (1905).

The priority system provides certainty to water right holders and "protects and implements established rights." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972). Moreover, senior water right holders are "entitled to presume that the watermaster is delivering water to them in compliance with the governing decree." *Id.* In other words, the Director and watermaster have a clear legal duty to curtail junior water rights to satisfy senior rights in times of shortage. The Director carried this mandate forward into the orders forming Water Districts 120 and 130 for, among other purposes, conjunctive administration:

> 10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
>
> * * *
>
> d. Curtail out-of-priority diversions determined by the Director to be causing injury to ***senior priority water rights*** if not covered by a stipulated agreement or a mitigation plan approved by the Director.

Ex. 1020 (*Final Orders* creating Water Districts 120 & 130, each at 5 (February 19, 2002)) (emphasis added).

The CM Rules provide the following with respect to conjunctive administration and the Director's obligation to distribute water to a senior's water right. *See* CM Rule 10.14 (material injury is impact or hindrance to "water right"); 10.25 ("water right" defined as the "legal right to divert and use" water); 20.01 (CM Rules apply when there has been injury to "senior-priority water rights"); 40.01.a (upon a finding of material injury, the Director must regulate diversions "in accordance with the priorities of rights"); & 40.02 ("The Director, through the watermaster, shall regulate the use of water within the water district pursuant to Idaho law and the priorities of water rights").

The above statutes and rules are clear, the Director and watermasters must regulate and distribute water to water rights. Noticeably absent from the CM Rules is any definition or use of the term "minimum full supply". Similar to the "replacement water plan" concept, *infra*, Part III, the Director unilaterally created the "minimum full supply" process without any statutory or regulatory authority. The Director has no authority to substitute a derived "minimum full supply" concept for the elements of a decreed water right for purposes of conjunctive administration. However, contrary to the law, in this case the Director used the "minimum full supply" analysis as a substitute for distributing water to the Coalition's decreed senior water rights, even going so far to use it as a "cap" on the amount of water they were entitled to divert and use as against junior ground water rights.

In the *Amended Order* the Director ignored the quantity elements of the Coalition's previously decreed and licensed water rights. Instead, the Director arbitrarily determined that their "total" diversions of natural flow and storage water in one year (1995) represented their

"minimum full supply" entitled to protection in administration against junior priority ground water rights. R. Vol. 8 at 1384-85 & 1402. The Director arrived at this calculation by "combining" the Coalition members' natural flow and storage water rights: R. Vol. 8 at 1402 (¶43). In describing the Director's derived concept, the Hearing Officer acknowledged that the "the minimum full supply is not linked to the licensed or decreed water right or to the storage space to which an irrigator is entitled. . . . The minimum full supply is intended to establish the amount necessary to meet water needs independent of the licensed, decreed or contracted rights." R. Vol. 37 at 7087. The Director then proceeded to use the "minimum full supply" calculations in applying the CM Rules in administration from 2005 through 2007.

In 2007, the new Director modified the use of the "minimum full supply" concept and applied it as a "cap" on the amount of water that the Coalition members (notably AFRD #2 and NSCC) were able to use that year. In the *Recommended Order*, the Hearing Officer explained the change in procedure in 2007 and how it was inappropriately applied and forced the readjudication of the senior water rights. *See* R. Vol. 37 at 7092-95.

Using the "minimum full supply" as a cap constitutes an unconstitutional application of the CM Rules. However, even using the "minimum full supply" as a baseline and refusing to use the decreed water rights for administration, violates Idaho law and effects an unlawful administrative re-adjudication of water rights that have already been licensed or judicially determined. The law is clear regarding the "conclusive" and binding effect of prior licenses and decrees on the Department, Director, and watermasters. *See* Idaho Code §§ 42-220, 1420.

First, the Idaho Supreme Court has set forth the following presumption with respect to a senior's decreed water right:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner to 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***, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed.

AFRD#2, 143 Idaho at 877-78 (emphasis added).

The presumption applies to a senior's water right, not some other standard such as a "minimum full supply" contrived by the Director. Administration of water rights according to prior decrees and licenses requires the Director to honor all elements of those water rights. The presumption is consistent with the law requiring juniors to prove, by clear and convincing evidence, non-interference with senior water rights. *See Jackson v. Cowan*, 33 Idaho 525, 528 (1921); *Josslyn v. Daly*, 15 Idaho 137, 149 (1908); *Moe v. Harger*, 10 Idaho 302, 305 (1904).

Second, the Coalition is entitled to have both its natural flow water rights and its storage water rights protected through administration. Nothing in Idaho law permits the Director's new scheme whereby a water right holder's separate rights are melded into one for purposes of administration against junior priority ground water rights. Although the Coalition uses both natural flow and storage water rights, the Director failed to analyze injury by junior ground water diversions to those separate senior rights as required by Idaho law. If a junior water right interferes with either a senior's natural flow water or its storage water right, the junior is subject to administration. The Director's process precludes priority administration to the Coalition's senior storage rights by reducing their total storage space and making it simply a component of the "minimum full supply". In addition, the concept further results in senior water right holders being forced to exhaust nearly all of their storage water supplies in order for the Director to find "material injury" to their "combined" supply under various natural flow and storage water rights.[20]

[20] Yet, even in that situation the Director has refused to find injury. For example, in 2007 although NSCC diverted and used approximately 750,000 acre-feet of storage water due to hot and dry conditions, the Director refused to

Idaho law does not permit watermasters to take two water rights with differing priorities and "combine" them into one "supply" for purposes of water right administration. Such a system clearly is contrary to the Idaho Constitution (art. XV, § 3) and controlling water distribution statutes (Idaho Code §§ 42-602, 607). Indeed, each water right stands on its own and is entitled to protection from interference by junior ground water use. The Coalition's storage water rights represent vested property right interests, and once the water is stored it becomes private water no longer subject to diversion and appropriation. *See Washington Cty. Irr. Dist. v. Talboy*, 66 Idaho 199, 208 (1945). Accordingly, the Coalition's separate storage water rights are not subject to re-allocation by the Director under a "combined" use or "minimum full supply" criteria that was adopted in the May 2, 2005 Order and carried forward through the 2007 irrigation season. The Director's "minimum full supply" concept is without any support in statute or rule and effectively precludes the watermasters from performing their legal duty to administer water rights according to the "adjudication or decree". *See State v. Nelson*, 131 Idaho 12, 16 (1998); *Crow v. Carlson*, 107 Idaho 461, 465 (1984); *Stethem v. Skinner*, 11 Idaho 374, 379 (1905).

By not honoring the decreed elements of the Coalition's natural flow and storage water rights, the Director unconstitutionally applied the CM Rules through the "minimum full supply" criteria that he created. Therefore, the Court should correct this error of law on appeal.

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find any injury to NSCC even though it only carried over approximately 61,000 ace-feet (about 22,000 acre-feet less than its "reasonable carryover" determination).

III. The Director's "Replacement Water Plans" Concept Does Not Comply With the CM Rules and is Unconstitutional.[21]

A. The Creation and Implementation of the "Replacement Water Plan" Concept

In response to the Coalition's request for administration filed in January, 2005, IGWA filed an Application for Approval of Mitigation Plan, pursuant to the provisions of CM Rule 43, on February 8, 2005. R. Vol. 1 at 126. The Department scheduled a hearing on IGWA's Application for March 22-25, 2005. R. Vol. 1 at 186. On March 18, 2005, the Department continued the hearing on IGWA's Application, to be rescheduled at a later date. R Vol. 2, p. 454. To date, more than four years after the initial request for administration, the Department has not held a hearing on any mitigation plan filed in response to the Coalition's request.

Rather than follow the stated procedures set forth in CM Rule 43, when the Director issued his Orders of April 19, 2005 and May 2, 2005,[22] he unilaterally created a "new" procedure, without any authority under existing law:

> As required herein, the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices not later than 5:00 pm on April 29, 2005. Requests for extensions to file a plan for good cause will be considered on a case-by-case basis and granted or denied based on the merits of any such individual request for extension. The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension. A plan that is approved or approved with conditions will be enforced by the Department and the watermasters for Water Districts No. 120 and No. 130 through curtailment of the associated rights in the event the plan is not fully implemented.

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[21] This issue is also an issue on appeal in the Spring Users' call matter. *See Clear Springs, et al. v. IDWR, et al.* (Gooding County Dist. Ct., 5th Jud. Dist. Case No. 2008-444). In addition to the reasons described in Clear Springs' *Opening Brief*, and the *Spring Users Joint Reply Brief*, the Director's creation of a "replacement water plan" scheme is arbitrary and capricious and in violation of the law, and should be rejected

[22] The provisions of the two Orders are substantially identical as to "replacement water plans".

R. Vol. 8 at 1404-05.

Seeking to protect their senior water rights, the Coalition filed an immediate *Protest, Objection and Motion to Dismiss "Replacement Water Plans"* on May 5, 2005 on the grounds that the Director's procedure violated due process, the provision of Rule 43 and the provisions of the Idaho Administrative Procedures Act. R. Vol. 8 at 1507. Without providing any opportunity for hearing, on May 6, 2005, the Director issued an *Order Regarding IGWA Replacement Water Plan* that conditionally approved the plan and required IGWA to submit additional information. R. Vol 9 at 1583. IGWA submitted additional information and on June 24, 2005, again without a hearing, the Director entered the *Order Approving IGWA's Replacement Water Plan for 2005.* R. Vol. 12 at 2174. The Order determined that the minimum amount of replacement water to be provided by IGWA for mitigation in 2005 was 27,700 acre-feet, and that of this amount 21,241 acre-feet of storage was to be leased by IGWA and assigned to IDWR for allocation to the Coalition. This was never done. *See supra*, Part I.

On July 22, 2005, again without a hearing, the Director issued a *Supplemental Order Amending Replacement Water Requirements.* R. Vol. 13 at 2424. The Supplemental Order restated that the minimum amount of replacement water to be provided by IGWA for mitigation in 2005 remained 27,700 acre-feet.[23]

On May 8, 2007, IGWA submitted the *Ground Water District's Replacement Water Plan for 2007*, R. Vol. 23 at 4237, which was amended after the Director issued a letter of potential curtailment. *See* R. Vol. 23 at 4289. The Coalition filed a *Protest and Motion to Dismiss the Ground Water Districts' Amended Joint Replacement Water Plan for 2007*on May 21, 2007. R.

[23] Yet, as stated above, no water was provided.

Vol. 32 at 4262, which, among other things, demanded a hearing on the proposed replacement plan.[24]

Former Director Dreher testified at hearing that it was his intent throughout the whole process to continually afford the opportunity of parties to provide pertinent information that should be considered. Tr. P. Vol. II at 275. Although Director Tuthill "granted" the Coalition's request for hearing on the replacement water plan, he apparently disagreed with the former Director's intent and restricted the ability of the Coalition to put on evidence of its entities' injuries – effectively eliminating the Coalition's ability to address the adequacy of the 2007 "replacement water plan":

> Based on argument raised through prior briefing and discussion at the June 5 status conference, the Director should not vacate the hearing on the 2007 Replacement Plan. The 2007 Replacement Plan was conditionally approved by the Director upon a subsequent showing by IGWA of the Plan's ability to provide timely, in-season replacement water and reasonable carryover water. A hearing on the 2007 Replacement Plan is appropriate ***in order to provide the Director with additional information on timely acquisitions of water*** and other interested parties the opportunity to cross-examine any witnesses called by IGWA in support of its Plan and raise argument.
>
> ***The hearing on the 2007 Replacement Plan is limited in scope to presentation of information regarding the implementation of the Plan by IGWA to demonstrate that timely, in season replacement water and reasonable carryover water can be provided to members of the Surface Water Coalition.*** IGWA should be prepared to identify with specificity the water it has acquired, the quantities it has acquired, and the means by which such water can be timely delivered to members of the Surface Water Coalition. Based on IGWA's concerns that disclosure of its sources of water may prejudice its subsequent acquisition, the Director may review such information confidentially, to the extent that argument at the hearing supports such review.

[24] Without a hearing, the Director issued the *Fifth Supplemental Order Amending Replacement Water Requirements* dated May 23, 2007, finding a predicted 2007 in season material injury to Twin Falls Canal Company of 58,914 acre-feet, material injury to Twin Falls' carryover storage of 38,400 acre-feet and to American Falls Reservoir District No. 2 carryover storage of 43,017 acre-feet, approving IGWA's replacement plan, denying the Coalition's Motion to Dismiss, but curiously granted the Coalition's request for hearing even though the Coalition's requested relief had been denied R. Vol. 23 at 4286.

> ***The hearing on IGWA's 2007 Replacement Plan will not include argument or presentation of evidence on any other orders issued by the Director, or the Director's method and computation of material injury.***

R. Vol. 23 at 4397 (emphasis added).

In essence, the Director was more concerned about assuring compliance with his unilateral Orders and avoiding curtailment than he was in addressing the scope of the injury and timeliness of delivery to the senior water right holder. Consequently, and given the Director's "pre-approval" of IGWA's plan, the hearing was not "meaningful" as it was clear the Director had no intention of denying the plan or ordering any administration of affected junior priority ground water rights that year. Effectively, the Director allowed the "replacement water plan" component of administration to have priority over the protection and timely distribution of water to senior surface water rights.[25]

The limited hearing was held June 22, 2007. At the time of the hearing, the Director refused to consider the material submitted by the Coalition and again approved IGWA's replacement water plan for 2007. R. Vol. 35 at 4714 & 4727.

B. The Hearing Officer Found that the Replacement Water Plans Did Not Follow the Procedural Steps for Mitigation Plans and did not Provide Water in the Season of Need

In the *Recommended Order*, the Hearing Officer found that the replacement water plan violated the statutes and regulations. *See* R. Vol. 37 at 7111-13. He found that the replacement water plan should go through the same procedural steps as a CM Rule 43 mitigation plan and that water was not provided in season. *Id.*

[25] Even when presented with evidence of injury exceeding his findings, the Director refused to consider it. *See supra.*

C. The Director Still Plans on Using Replacement Water Plans

In the *Final Order*, the Director acknowledges that IGWA should file a Rule 43 mitigation plan "now that a record has been developed". R. Vol. 39 at 7373-84. However, without citing any authority, and despite Justice Schroeder's recommendation that "a replacement plan should go through the procedural steps for approval of a mitigation plan", the Director goes on to state that "Replacement water plans serve a necessary role in the interim period after a delivery call is filed by a senior water user and before a record is developed upon which juniors can base a mitigation plan". *Id.* Remarkably, the Director states that "Authorizing replacement water plans ensures that the senior water user making the delivery call is made whole during the pendency of the proceeding and the junior is not irreparably harmed prior to a hearing on the call." *Id.* (emphasis added). The facts in this case clearly demonstrate otherwise. Stated another way, there is no "substantial evidence" in the record to support the Director's finding that the Coalition has been "made whole" through the use and implementation of the newly created "replacement water plan" process.

D. The Director's Replacement Water Plan Concept Violates the Conjunctive Management Rules

In the May 2, 2005 *Amended Order*, the Director elected to forego Rule 43 mitigation plan procedures and created a new "replacement water plan" concept. No provision was made in the *Amended Order*, or any subsequent order, for a hearing on a replacement water plan prior to at least conditional approval of the plan by the Director.[26] Effectively, the procedure set forth in the *Amended Order* and subsequent Orders eliminate the right of the Coalition to address the replacement water plans in any "timely and meaningful manner", eliminate the ability of the

[26] Although the Director allowed a restricted hearing in 2007 (limited to issues regarding IGWA's replacement water acquisition), he had already tentatively approved IGWA's replacement water plan, and restricted the issues that could be addressed by the Coalition. Hence, the hearing was meaningless and did not provide any of the due process protections required by Idaho law and CM Rule 43.

Coalition to address concerns at a timely and meaningful hearing and fail to follow the procedures required for Rule 43 mitigation plans set forth in the Department's CM Rules.

No statute or administrative rule allows the Department to vary from the mitigation procedures set forth in CM Rule 43. Under CM Rule 40, the Director, through the watermasters, is required to "regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users." CM Rule 40.01(a). The Rule specifically provides that diversions under junior priority ground water rights are ***only allowed*** when a Rule 43 "mitigation plan" – ***not*** a "replacement water plan" - has been ***approved by the Director***. *See also* CM Rules 40.01(b), 40.02, 40.04, 40.05 & 41.02. Moreover, the Director's Water District 120 and 130 Orders specifically refer to "mitigation plans", not "replacement water plans". *See* Exhibit 1020 (orders at 5).

Approval of a mitigation plan must follow the procedure described in CM Rule 43 requiring, among other things, notice, a right to hearing and consideration of the plan under the procedural provisions of Idaho Code § 42-222. Since there has been no approval of a Rule 43 mitigation plan during the course of the Coalition's water call, the Director has unlawfully allowed junior ground water rights to divert out-of-priority. The unilateral approval of such plans violates a senior's right to due process and allows the Director to administer water rights for particular irrigation seasons with unfettered discretion. Furthermore, without any statutory or regulatory criteria by which to judge a "replacement water plan," the Director serves as the sole arbiter of what qualifies and what does not. The use of a "replacement water plan" concept, with no defined standards or processes, plainly thwarts established law.

Moreover, in practice, the Director's unilateral approval of such plans has even prevented the Coalition from obtaining timely judicial review of his orders since he has not designated

these approval orders as "final" agency orders. Instead of being allowed to exercise a statutory right to judicial review, the Coalition has been relegated to four years of administrative purgatory, and contrary to the Director's finding, the Coalition is not, and has not been, "made whole during the pendency of the proceeding."

The Director's replacement plan procedure must be evaluated in light of the express provision of Idaho Code § 42-110 that grant a senior water right holder the right to divert his water right at the point of diversion, subject, however, to all **prior** rights:

> RIGHT TO DIVERT WATER. The proprietors of any ditch, canal or conduit, or other works for the diversion and carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any valid claim, permit, license or decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights. Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.

Idaho Code § 42-110.

The Director has no legal right or authority, nor has the Director cited any legal right or authority, that grants him the right to unilaterally create new rules and procedures without following the provisions of the Idaho Administrative Procedures Act. See Idaho Code §§ 67-5201, *et seq.* The Director's basic argument is that use of the Rule 43 mitigation procedures is too lengthy a process, and that in order to avoid curtailment, the Director has the right to create a new procedure to achieve his ends. This is in spite of the fact that the Director found material injury occurring in 2005 and 2007 and the Coalition's members received ***absolutely no in-season water*** from the Director's use of the "replacement water plan" concept, while all junior ground water right holders were permitted to divert without any ordered curtailment.

E. The Director's Replacement Water Plan is Unconstitutional

Individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state. IDAHO CONST. art. 15, § 4; *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959).

In *Nettleton, supra,* the Court addressed the due process requirements that are imposed on IDWR in its administrative capacity:

> The constitutional guarantee of procedural due process applies to governmental taking of legitimate property interests within the meaning of the Fifth or Fourteenth Amendments. It demands that if such a deprivation takes place, it must be accompanied by some type of notice and hearing. The United States Supreme Court ... held that except in 'extraordinary circumstances' where some valid governmental interest justifies the postponement of notice and hearing, due process requires an adversary proceeding before a person can be deprived of his property interest.

98 Idaho at 90.

In *Nettleton*, the Court was dealing with someone holding an unadjudicated water right, and went on to hold that due process was satisfied for someone in his circumstances. That is not the case at hand. In this case, IDWR is dealing with entities holding decreed and licensed water rights. Before IDWR allows water to be taken from materially injured senior water right holders, IDWR must afford the senior the right to an adversary hearing to be held at a "meaningful time and in a meaningful manner".[27] *See Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999).

An examination of the Director's replacement water plans shows:

[27] As noted by the Hearing Officer, by this point in time in this proceeding, the Director should require the filing of a Rule 43 mitigation plan and should hold a hearing on the plan. The Director has not required the filing of a Rule 43 mitigation plan, nor has the Director attempted to schedule any hearing on such a plan. Based upon his actions and Orders, the Director appears to plan on continually administering based upon his contrived "replacement water plan" concept.

1. The Director does not afford any opportunity for hearing before approving a replacement water plan.

2. In one circumstance, 2007, the Director held a hearing after tentatively adopting replacement water plan, but refused to allow the Coalition to present any evidence of need or other evidence contrary to the Director's findings, and limited the scope of the Coalition's participation to examining the legitimacy and practicality of IGWA's proposal.

As noted by the Hearing Officer, by this point in time in this proceeding, the Director should require the filing of a Rule 43 mitigation plan and should hold a hearing on the plan. The Director has not required the filing of a Rule 43 mitigation plan, nor has the Director attempted to schedule any hearing on such a plan. Based upon his actions and Orders, the Director appears to plan on continually administering based upon his contrived "replacement water plan" concept. This is contrary to existing law.

Senior water right holders are entitled to a hearing. This was contemplated by the Department and the legislature when CM Rule 43 was adopted. The Director cannot constitutionally deprive senior water right holders of their property without notice and the right to be heard. Therefore, the Director's "replacement water plan" process plainly violates Idaho law and should be set aside.

F. Colorado Addressed This Same Issue and Found that the State Engineer exceeded his Authority

Fortunately, there is some guidance provided by other court decisions concerning the "replacement water plan" concept. The Colorado Supreme Court addressed this concept in the case of *Simpson v. Bijou Irrigation Company*, 69 P.3d 50 (2003).[28] There, the Colorado court

[28] Colorado's water administration is organized somewhat differently than the procedure used in Idaho. However, the Colorado legislature had given the State Engineer (the equivalent of the Director of the Idaho Department of Water Resources) great latitude to promulgate rules to enforce the terms of compacts entered into pertaining to the

found proposed rules which provided for the State Engineer (Colorado's equivalent to the Director of IDWR) to authorize out-of-priority diversions requiring replacement plans in the absence of an "augmentation plan" (Colorado's equivalent to a Rule 43 mitigation plan) submitted pursuant to state law exceeded the Engineer's authority and were contrary to law. *Id.* at 67. The Court held that the State Engineer in Colorado had no legal or constitutional authority to deviate from the statutes, rules and Constitution of the State of Colorado and use a procedure that did not comply with statutory and constitutional augmentation. Similarly, the Director of IDWR has no legal or constitutional authority to deviate from the statutes, rules and Constitution of the State of Idaho and use a procedure that does not comply with statutory and constitutional mitigation.

IV. The Director's *Final Order* Ignores the "Reasonable Carryover" Provisions of Existing Idaho Law and the CM Rules.

Even though the CM Rules and the Supreme Court's *AFRD#2* decision specifically recognize that a senior water right holder is entitled to a "reasonable carryover" of storage water, the Director's *Final Order* has effectively written the provision out of the CM Rules contrary to Idaho law. *See* R. Vol. 39 at 7384-86 & 7391. In doing so, the Director has exceeded his

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South Platte River. Colorado law gave the State Engineer the broadest latitude possible in administering water "to encourage and develop augmentation plans" and authorized the State Engineer to "take such other reasonable action as may be necessary in order to allow continuance of existing uses". The State Engineer interpreted this to allow him to establish rules creating a replacement water plan concept, the term "replacement plan" being undefined by Colorado law or rules. The Colorado Supreme Court defined a replacement plan to be "the functional equivalent of a 'substitute supply plan' referring to the source of water that a junior or undecreed well user makes available to a senior appropriator to offset any injury caused to the senior by the junior's or undecreed well user's out-of-priority depletions." *Simpson*, 69 P.3d at 55, n. 2.

After reviewing Colorado law and administrative rule provisions, the Colorado Supreme Court held that proposed rules allowing the State Engineer to authorize out of priority diversions requiring replacement plans in the absence of an augmentation plan submitted pursuant to state law were in excess of the State Engineer's statutory authority and contrary to law. *Simpson*, 69 P.3d at 67.

The situation in Idaho is very similar. The Director, attempting to grant himself greater authority than that set forth in statute or rule, fashioned a new "replacement water plan" concept exceeding any authority granted to the Director. The Director must follow existing law and rules, and any attempt by the Director to unilaterally create new procedures is contrary to law and outside the scope of his authority.

statutory authority and has unconstitutionally applied the CM Rules to the Coalition's senior storage water rights.

The Idaho Supreme Court has described storage water, and "carryover storage" as follows:

> Storage water is water held in a reservoir and is intended to assist the holder of the water right in meeting their decreed needs. Carryover is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water. *See Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945). One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right. I.C. § 42-202.

AFRD #2, 143 Idaho at 878.

> ***The right to carry or hold over water*** for distribution in ***succeeding seasons*** according to the quantities contributed, i.e., portions of live storage individual irrigation organizations were entitled to in any given year but not drawn out by them for their members, has twice been approved by this Court.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 203-04 (1945) (emphasis added).

The *Rayl* Court identified the key role that storage serves in meeting the needs of irrigators in future years:

> ***But the very purpose of storage is to retain and hold for subsequent use***, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

66 Idaho at 208 (emphasis added).

Carryover storage is water stored under a storage water right that is not used in the irrigation season it is stored, but instead is "carried over" for use in "succeeding seasons" or "years of drought or low water". *See Rayl, AFRD #2, supra.* Although some storage water may not be used in the same year it is stored, it is critical for that water to be available for future use to protect against drought and future dry years. The ability to store water for future use is a fundamental component of a storage holder's water right and its ability to manage the water

supply for the benefit of its landowners or shareholders. If water is stored and not used that irrigation season, the storage holder is entitled to carry that water over in its space for future use as part of its storage water supply in subsequent irrigation seasons.

CM Rule 42.01(g) expressly provides that "the holder of a surface water storage right ***shall be entitled*** to maintain ***a reasonable amount of carry-over storage*** to assure water supplies for future dry years." (Emphasis added). The plain language of the rule imposes an obligation on the Director to provide for a "reasonable carryover" of storage water for a senior water right holder. The *AFRD #2* Court upheld the facial constitutionality of this rule. *See* 143 Idaho at 880. There, the Supreme Court defined carryover as "the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *Id.* at 878 (emphasis added); *see also, e.g.* R. Vol. 33 at 6306; R. Vol. 34 at 6388; Tr. P. Vol. VII at 1607, lns. 12-20. The Rule's requirement to protect "carryover storage" is consistent with the Idaho Supreme Court's treatment of storage water and the fact that storage water rights are protected from injury similar to natural flow water rights.

Storage water rights play a vital role for the Coalition's irrigation projects in southern Idaho. The Coalition irrigation districts and canal companies rely upon storage water for their landowners' and shareholders' irrigation needs when there is insufficient water for their natural flow water rights. Storage water rights, particularly the right to carry water over from one year to the next, is even more important for those Coalition members that rely upon their storage water rights as the primary supply of water for their projects. *See* R. Vol. 37 at 7054-57 (identifying the individual water rights of the Coalition members and their differences in relying upon natural flow and storage water as a primary water supply).

The need for carryover storage was thoroughly explained by the Coalition managers in their testimony in this case. For NSCC, carryover is the lifeblood of the system "because it does not have senior natural flow rights to satisfy early season irrigation demand. Inadequate storage jeopardizes the entire Project." R. Vol. 33 at 6307. NSCC's manager, Ted Diehl, described the importance of carryover storage for his project's water supply:

> Q. [BY MR. THOMPSON]: Can you describe – can you tell Justice Schroeder what the importance of carryover storage is for North Side Canal Company?
>
> A. [BY MR. DIEHL]: It's very important. And we go out of our way and try and make sure that we carry some water over. Some years are not very good and some years are real good. But that kind of gives us an indicator with snowshed where we might be in water supply. And if we – if we have a good carryover, we're relatively assured that we'll have enough water for our farmers.

Tr. P. Vol. X at 1869, ln. 21 to 1870, ln. 6.

Carryover storage is critical for NSCC's project. For example, dry conditions in 2007 forced NSCC to use all of the 350,000 acre-feet of carryover storage from the 2006 irrigation season *and NSCC was still forced to cut their deliveries to ½ inch per share* in 2007. R. Vol. 33 at 6305-06.[29] Remarkably, however, the Director's "reasonable carryover" determination for NSCC is 83,000 acre-feet, R. Vol. 8 at 1384 – a number that would have entirely depleted NSCC's water supply during the 2007 irrigation season.

Vince Alberdi, TFCC's manager, testified that carryover is the "hinge between one year and the next year." Tr. P. Vol. VIII at 1608, lns. 7-14. At the end of the 2006 irrigation season, TFCC had 78,562 acre-feet of storage. Tr. P. Vol. VIII at 1629-30. Yet, this proved insufficient for the conditions in 2007 as TFCC was forced to rent an additional 40,000 acre feet that year.

[29] NSCC tries to be conservative with its carryover, recognizing that "the more carryover the storage holders have the better for all Water District 1 water users since it helps all storage in the system." R. Vol. 33 at 6306-07. At time, this requires that NSCC "self-mitigate by cutting deliveries ... to provide carryover water for the next year." *Id.*

Id. Like NSCC, above, TFCC's supply would have been entirely depleted, and even more rental water would have been required, under the Director's limited "reasonable carryover" determination of 38,400 acre feet. *See* R. Vol. 11 at 1384. This number is a far cry from the 78,562 acre-feet carried over in 2006 (which proved insufficient) and the 85,000 to 90,000 acre feet, on average, that TFCC has had available for carryover storage throughout the last 22 years. Tr. P. Vol. VIII at 1608, ln.15 through 1609, ln.17.

Lynn Harmon, AFRD #2's manager, reiterated the critical value of carryover storage for his project as well. *See* R. Vol. 32 at 6138-39. AFRD #2 is primarily dependent upon storage water for its project and holds a storage right for 393,500 acre-feet in American Falls Reservoir. Although AFRD #2 had 107,681 acre-feet in carryover from 2006, its space only filled to 383,201 acre-feet in 2007 (about 10,000 acre-feet less than its full right). *See* R. Vol. 25 at 4718. Nonetheless, AFRD #2 was forced to reduce deliveries to its landowners in 2007 and was only left with 3,495 acre-feet in carryover storage at the end of the 2007 irrigation season. *See* R. Vol. 32 at 4512; Ex. 4600 at 6. Moreover, AFRD #2 was provided 8,500 acre-feet through a mitigation agreement between the SWC and the Water Mitigation Coalition.[30] Had AFRD #2 been able to carry over more water from 2006, assuming proper administration, it is clear that additional water would have been used in the 2007 irrigation season.

Randy Bingham, BID's manager, characterized carryover storage as "a vital part to an adequate water supply to BID" that provides BID with "sure knowledge" that its water users will have "that much water ... to use in the future year." R. Vol. 34 at 6388. Finally, to MID, carryover is a "critical" factor in its planning process. R. Vol. 32 at 6129. Carryover also

[30] This agreement between the SWC and Water Mitigation Coalition provides, among other things, for storage water to be delivered for mitigation of pumping under certain junior priority ground water rights held by members of the Water Mitigation Coalition (J.R. Simplot, Basic American Foods, and ConAgra Foods). *See* R. Vol. 23 at 4299-4300.

reduces the dependency on a wet winter and spring – in that "it takes less snow water to refill the reservoir so that other water rights are full quicker." *Id.*; *see also* R. Vol. 32 at 6129 (Billy Thompson, MID manager, testifying that, with sufficient carryover, MID can make its deliveries in the following irrigation season even if there is "70% or less of normal snow pack"); *see also*; R. Vol. 33 at 6248 (Walt Mullins, Milner manager, testifying that with the increased uncertainty in water supply, Milner has become more dependant on carryover to meet the needs of its water users).

The Director ignores the law relative to storage water rights as well as the importance of carryover, by concluding that "reasonable carryover should be provided in the season in which the water can be put to beneficial use, not the season before." R. Vol. 39 at 7391. The Director apparently based his conclusion upon a misinterpretation of Justice Schroeder's *Recommended Order*. R. Vol. 39 at 7391, ¶ 16. Whereas Justice Schroeder recommended the Coalition should be provided "reasonable carryover" storage for one year, the Director misconstrued the statement about "requiring curtailment to reach beyond the next irrigation season" as meaning no storage should be provided until the following year. This was an incorrect reading of the *Recommended Order* and is contrary to existing Idaho law.

Justice Schroeder clearly acknowledged the Coalition's right to "carryover storage" and the requirement that it had to be provided during the irrigation season so that the water could actually be carried over for use the following year:[31]

> **5. There is a right to reasonable carryover of storage water and there may be curtailment or a requirement of mitigation to meet that amount.** . . . The logic of the ground water users' position is that it is a

[31] The Coalition disputes the Hearing Officer's "one-year" limitation for carryover storage given the plain language of the CM Rules and the Idaho Supreme Court's prior decisions recognizing water carried over is needed and can be used in future "dry years" or "succeeding seasons". *See* CM Rule 42.01(g), *Rayl*, 66 Idaho at 203-04. Whereas the Director's *Final Order* eviscerates the right to carryover storage even for one year, his decision plainly violates Idaho law.

question of timing and that it places the issue of curtailment or mitigation in the actual year of shortage, not in a prospective analysis that might never develop if there is sufficient water in storage to meet irrigation needs. However, the position advocated by IGWA and Pocatello runs contrary to the Conjunctive Management Rules, the decision of the Idaho Supreme Court, and the history defining the purposes of the elaborate BOR reservoir system.

* * *

10. According to the May 2, 2005 Order the initial determination of carryover storage was to be made at the beginning of the irrigation season to project if there would be a shortage to be addressed by replacement water. The approach utilized by the former Director was that early in the irrigation year a determination of would be made as to the amount of carryover storage to which the various surface water districts were entitled. The ground water users were obligated to contract to provide replacement water during the irrigation season or face curtailment in the event of shortages. The amount of replacement water was due in the current irrigation season.

R. Vol. 37 at 7106 & 7108 (underlining added).

Contrary to existing law and Justice Schroeder's recommendation, the Director refused to recognize any right to "reasonable carryover" storage in his *Final Order*. R. Vol. 39 at 7391. The Director wrongly found that "it is not appropriate to require junior ground water users to provide predicted shortfalls [in carryover storage] until the spring when the water can be put to beneficial use during the season of need." *Id.* The Director's finding erases the whole purpose of "carryover storage" by not requiring water to be provided at a time when it can actually be "carried over" to the next irrigation season. In other words, under the Director's scheme, the Coalition is not provided with any water in a timely manner so that it can be "carried over" for subsequent use. This finding violates Idaho law and impermissibly shifts the risk of water shortage to the senior water right holder. Justice Schroeder explained the perils in not providing "carryover storage" in a timely manner and how that injures the Coalition's senior water rights:

2. A hindrance to reasonable carry-over storage constitutes material injury. The argument has been made that storage is not a beneficial use of water. The logic of this position is that beneficial use is the measure of a water right, and until there is insufficient water to serve crop needs there is no

impingement on the beneficial use and no material injury to a water right. The logic has sense to it, but fails. CM Rule 10.14 is broad enough to encompass a storage right, and CM Rule 42.01.g. sets forth the right to carryover storage in enumerating factors that may be considered in determining if there is material injury. Storage water is held to meet crop needs as requirements arise, and that right is protected.

3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights. Once it is established that the Snake River and the Eastern Snake Plain Aquifer are connected the conclusion is inevitable that withdrawal of water from the aquifer reduces flow in the Snake River. . . . Times of shortage call the CM Rules into play. The evidence in this case establishes that during recent periods of water shortage ground water pumping has affected the quantity and timing of water available to SWC members. Natural flow rights have been exhausted earlier and storage has been used earlier and more extensively, limiting the application of water during the irrigation season and diminishing the amount of carryover storage to which the surface water users are entitled.

R. Vol. 37 at 7076.

13. The amount of carryover to be provided by replacement has fallen short in instances of meeting the standard of reasonable carryover. In 2007 Twin Falls Canal Company would have ended with a negative balance in its carryover except for its prophylactic action of renting 40,000 acre-feet of water at a cost close to $850,000. Considering the much greater dependence of other members of SWC on storage water, cutting the margin close threatens the ability to meet crop needs. It also shifts the risk from junior water users to senior users. A conclusion of this recommendation is that the use of the year 1995 to establish the minimum full supply water underestimated the amount of water necessary to meet the needs of SWC members within their water rights. This had the collateral effect of underestimating the amount of carryover storage that is reasonable to meet future crop needs.

R. Vol. 37 at 7110.

In addition to Justice Schroeder's analysis, former Director Karl Dreher confirmed the requirement and right to carry storage water over to the next year. In the event junior ground water users provided mitigation water to prevent injury to the Coalition's "reasonable carryover", instead of curtailment, the former Director explained the water was required up front,

not the following year, since they were receiving the benefit of out-of-priority diversions the irrigation season injury was found:

> Q. [BY MR. BROMLEY]: And for purposes of reasonable carryover, when, under your methods, were you envisioning that to be owed or due?
>
> A. [BY MR. DREHER]: Certainly, during the irrigation season prior to the subsequent year. So in 2005 the amount for reasonable carryover would have been due during that irrigation season so that both sides, the ground water folks and the surface water folks, would know going into 2006 what they had.
>
> And at least my intent was that if the amount necessary to provide reasonable carryover was not provided in 2005, that there would be some level of curtailment in 2006. And I couldn't have made that determination unless the replacement water was provided up front.

Tr. P. Vol. I at 103, lns. 11-25.

In discussing the reasonable carryover provisions in his May 2, 2005 Order, former Director Dreher specifically recognized that carryover allows the Coalition managers to "plan for future needs to supply" and that, "as a component of their planning process ... reasonable carryover must be supplied in that prior irrigation season." *See* Tr. P. Vol. II, at 269 ln.3 to 270, ln.10. Such a requirement allows the managers to better understand "a minimum carryover they would have going into the storage season so that they could plan for next year's water supply." *Id.* Former Director Dreher also acknowledged the need to have that water provided during the irrigation season to protect the senior storage water rights and the future use of that water:

> Q. And without – without some identifiable carryover, those managers in planning would face greater uncertainties as to what next year's water supply would be; correct?
>
> A. Yeah, that's correct. And the reason for that is because if – if you wait until the subsequent irrigation year – in the case of the May 2nd *Order*, it would be the year 2006. If you wait till 2006 to attempt to provide reasonable carryover, there may or may not be water available to provide. So that's why I felt it was important that the carryover storage to be provided for 2006, be provided during the irrigation season of 2005.

Id.

Contrary to the former Director's explained requirement in the prior orders and Justice Schroeder's recommendation, the Director's *Final Order* erases the injuring junior ground water users' obligation to provide "carryover storage" in a timely manner. In addition, the Director attempted to justify his "new" procedure by a standard not provided for in the law, an after-the-fact "mostly filled" analysis. The Director claimed that since the reservoirs "mostly filled" in 2006 and 2008,[32] it is "appropriate" to determine "reasonable carryover in the season" that it is needed. The Director fails to provide any legal support for his "mostly filled" standard for determining whether or not mitigation will be required. Nor does the Director provide any guidance as to what exactly constitutes "mostly filled," such that junior ground water users can avoid administration. By allowing the junior water rights to continue depleting the aquifer and reach gains, waiting to determine whether the reservoirs "mostly fill," the Director has erased the "reasonable carryover"[33] provisions from the CM Rules and placed the Coalition's senior water rights in jeopardy of continued material injury.

Furthermore, by waiting until the next irrigation season to make a "reasonable carryover" determination, the Director deprives the senior and junior water rights of their ability to plan ahead for a potential dry year and to minimize the impacts of administration on the junior and senior water rights. Rather than providing storage water for "reasonable carryover" as required, the holder of the junior water right is left to hope that the reservoirs "mostly fill" so that

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[32] Information relating to the 2008 irrigation season (which occurred *after* the hearing and *after* the *Recommended Order* was issued, including the storage levels of the reservoirs in the upper snake system, was not part of the record in this case. As such, the Director erred in relying on any information from the 2008 water year in his *Final Order*. *See* IDAPA 37.01.01.650.01 ("The agency shall maintain an official record for each contested case and ... based its decision in a contested case on the official record for that case"); IDAPA 37.01.01.712 ("Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding");

[33] Water supplied in the current irrigation season – rather than the prior fall – cannot be termed "carryover." *See AFRD#2, supra.*

curtailment can be evaded. If the reservoirs don't "mostly fill," however, the holder of the junior water right is left with very few options as the planning horizon has been compressed into the day of need. During dry years, there may not be water available to rent for mitigation, or the price may be too high, leaving the junior with no choice but to curtail. However, since the effects of curtailment will not be fully realized during that irrigation season, the senior water right will be left with an insufficient water supply for yet another season. This "wait and hope for the best" method of administration fails to provide any certainty to the materially injured senior water right and is inconsistent with the requirements under Idaho water law. Of course under the Director's "new" scheme as outlined in the *Final Order*, junior ground water users benefit because they have no obligation to secure "reasonable carryover" before they turn on the pumps for the irrigation season.

The Director's failure to recognize and provide for "reasonable carryover" in a timely manner violates existing law and constitutes an unconstitutional application of the CM Rules to the Coalition's senior storage water rights. Whereas the Idaho Supreme Court, Justice Schroeder, and the former Director have all identified the legal right and purpose for "carryover storage" in administering junior priority ground water rights, the current Director has charted a new course not authorized by law. Therefore, this Court should reverse the Director's "reasonable carryover" determination in the *Final Order*.

V. TFCC's Decreed Water Rights Provide For 3/4 Inch Per Share Water Deliveries and the Evidence Does Not Support the Director's 5/8 Inch Finding.

The Hearing Officer's determination, which was adopted by the Director in the *Final Order*, that TFCC's deliveries should be calculated at 5/8 inch at the headgate, instead of 3/4 inch, is not supported by the substantial evidence in the record – which includes prior decrees and the testimony of TFCC shareholders that demonstrate less than 3/4 inch per share represents

an injury to the water right and further impacts crop yields and farming operations. R. Vol. 37 at 7102; R. Vol. 39 at 7382.

A prior decree is binding as to the "nature and extent" of the water right. *See* Idaho Code § 42-1420. As such, the Department is bound to accept a prior decree for purposes of administration. In addition, the administrative process cannot be used to re-adjudicate the prior decree. *AFRD#2, supra* at 878; R. Vol. 37 at 7072. Rather, in water right administration, the Director's discretion is limited to reviewing the decrees and considering those "post adjudication factors" that impact the proposed water use.

TFCC acquired three natural flow rights – each of which were decreed in prior adjudications: 1) the June 20, 1913 *Foster Decree* (1-209); 2) the June 25, 1929 *Woodville Decree* (1-4); and 3) the July 10, 1968 *Eagle Decree* (1-10). R. Vol. 37 at 7056; *see also* Ex. 8000 (*SWC Ex. Rpt. at 2-37* & Appendix A, A-3. In addition, TFCC acquired storage water rights in Jackson Lake and American Falls Reservoir. *Id.* Importantly, none of these water right artificially limits or conditions TFCC's internal water deliveries to its shareholders. Indeed, Justice Schroeder recognized that "the allocation of water within a district is a matter of ***internal management***." R. Vol. 37 at 7100. The Director and watermaster are required to distribute water to TFCC's water rights, not according to a "per share" or "per acre" calculation that differs from what can be beneficially used within the authorized diversion rates of TFCC's decreed water rights. At hearing, Lyle Swank, the Watermaster for Water District 1 testified that he distributes water pursuant to the prior decrees. Tr. P. Vol. IV at 837, ln.18 to 838, ln.16. Indeed, the law demands as much. *See* Idaho Code §§ 42-602 & 42-607.

The history of the development of the TFCC project, as documented in the evidence presented at hearing, demonstrates that TFCC has historically delivered and beneficially used 3/4

inch per share, and that such deliveries are within the decreed quantities of TFCC's water rights and the conveyance system as it has been developed and improved over the course of the past 100 years. *See* Tr. P. Vol. VIII, at 1601, lns. 3-22 (testimony of Vince Alberdi indicating the historical use of 3/4 inch delivery and testifying that such deliveries are put to beneficial use); *see also* id. at 1604-05. Mr. Alberdi's testimony that TFCC has historically diverted and used 3/4 miner's inch under its water rights is consistent with the testimony of TFCC shareholders. All of TFCC's shareholders, some of whom have spent their entire lives on the project, testified that 3/4 inch had been delivered and beneficially used in their irrigation operations. R. Vol. 33 at 6269 (Chuck Coiner testimony), at 6357-58 & 6362 (Phil Blick testimony); at 6337 (John O'Connor testimony); at R. Vol. 40 at 7543-44 &7545 (Dan Shewmaker testimony). There was no evidence to dispute these facts hence the Director's decision for 5/8 inch delivery is not supported by any "substantial evidence" in the record

TFCC's decision on how to distribute water to its shareholders is dependant upon the particular water year and, as demonstrated over the past 17 years, that distribution has included deliveries up to 3/4 inch per share. *See* Ex. 1004 (p. SWC 112) (information submitted by TFCC in response to Director's request in March 2005); Tr. P. Vol. VIII, at 1601-15. Reduced deliveries – i.e. 5/8 inch per share or less – have injured TFCC's water rights and resulted in impacts to its shareholders' crop yields and farming operations. R. Vol. 33 at 6363-64; 6270-72; 6338-39; R. Vol. 40 at 7546-50. TFCC's management decision on when to delivery 3/4 inch takes into account various factors like the amount of storage TFCC has at the time, the state of Snake River spring flows and reach gains, the weather and cropping patterns. *See* Tr. P. Vol. VIII at 1606, lns. 9-23; Tr. P. Vol. X. at 1822-24.

As originally proposed before construction and acquisition of its decreed water rights, the TFCC project was intended to deliver 5/8 miner's inch to 240,000 acres. However, the total acreage actually developed was limited to just over 200,000 acres. *See State v. Twin Falls Land & Water Co.*, 37 Idaho 73, 81 (1922) ("there is now being watered under this system 203,620.68 acres of land"). While TFCC recognizes its original obligation to deliver at least 5/8 inch per share, as evidenced in its operation policy, that obligation did not prevent the Company from acquiring additional water rights or improving its system such that more than 5/8 inch per share could be delivered and used within the limits of those water rights. *See* R. Vol. 29 at 5563-5566; Tr. P. Vol. VIII at 1602, lns. 15-25 (Vince Alberdi testifying that 5/8 inch delivery "is what the allocation that our water right provides for our user on a minimal basis"). This is especially the case here, where the alleged 5/8 inch per share "limitation" was based on the original pre-construction intention that TFCC would develop and provide water to 240,000 acres – nearly 40,000 more acres than were actually developed and irrigated.

Thereafter, TFCC acquired additional natural flow and storage water rights (as noted above) and took steps to recover water on the project. As such, the Company was then able to deliver 3/4 miner's inch per share pursuant to its water rights. This historical delivery has continued to recent years. *See* Exhibit 1004 (SWC 112); Tr. P. Vol. VIII at 1601-15.

The Hearing Officer's reliance upon *State v. Twin Falls Canal Company*, 21 Idaho 410 (1911) (*West* case) was not a case that decided what TFCC was authorized to distribute to its shareholders under its water rights. Indeed, the case was decided before TFCC acquired additional natural flow and storage water rights, it did not take into account subsequent actions on the project to recover water, and did not at the time recognize the full development that was eventually to occur on the project (approximately 200,000 acres instead of 240,000 acres).

These issues were later recognized by the courts. *See State v. Twin Falls Land & Water Co.*, 37 Idaho 73, 86-88 (1923) (*Rice* case); *Twin Falls Land & Water Co. v. Twin Falls Canal Co.*, 79 F.2d 431 (9th Cir. 1935). In summary, the 1911 *West* case did not hold that TFCC could only delivery 5/8 miner's inch to its shareholders when history and the actions taken by the Company subsequent to that time demonstrate otherwise.

The fact that TFCC has been able to deliver 3/4 miner's inch per share under its water rights where other companies and districts could not is irrelevant given the different water rights and project designs.[34] The different water rights held by the various members of the Surface Water Coalition further highlights the different deliveries that are made to landowners and shareholders on those projects. *See* R. Vol. 37 at 7054-56. Moreover, the 3/4 miner's inch is even less than the standard 1 miner's inch (0.02 cfs) per acre that is provided for by Idaho law. *See* Idaho Code § 42-202(6) (even then the code recognizes that more than 1 inch per acre may be allowed if "it can be shown to the satisfaction of the department of water resources that a greater amount is necessary."); *see also* Ex. 4614 (sample ground water right with condition that 0.02 cfs per acre could be diverted and applied).

Finally, TFCC's natural flow water rights, listed above, have been recommended in the SRBA in a manner consistent with TFCC's historical delivery of 3/4 inch at the headgate. *See* Ex. 4001A. Objections have been filed on this point, *see* Ex. 9729,[35] and will be addressed in due course in the SRBA. The SRBA is the proper forum for determining the extent of the development of TFCC's previously decreed water rights. *See* Idaho Code § 42-1406A.

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[34] Ted Diehl, NSCC's manager, addressed this during the hearing:

> A. I remember Director Dreher called me once and said, "How come you only have five-eighths for a water right and Twin Falls has three-fourths.?"
> And I said, "That's the difference between your bank account and mine. If I could get part of your money, I'd feel better about it. But I'm not able to. And we don't have the water that Twin Falls owns." It makes a difference. It all has to do with priority rights.

Tr. P. Vol. IX at 1880, lns. 7-15.

As demonstrated by the evidence at hearing, TFCC delivers 3/4 miner's inch to its shareholders within the limits of its water rights. Therefore, the Director's decision with respect to TFCC's "full headgated delivery" is not supported by the record in this case. Rather, the history of the development of the TFCC project demonstrates that TFCC has historically delivered and beneficially used 3/4 inch per share, that such deliveries are within the quantity limits of TFCC's decreed water rights and that TFCC's conveyance system can supply this amount of water to its shareholders. *See, e.g.* Tr. P. Vol. VII, at 1601, lns. 3-22 (Manager Vince Alberdi testifying that TFCC historically delivered ¾ inch per share and that such deliveries are put to beneficial use). Furthermore, no evidence was provided and the Director did not find that a 3/4 inch delivery was wasteful. Just the opposite, former Director Dreher testified that he accepted TFCC's reference to the 3/4 inch full headgate delivery. Tr. P. Vol. I at 120-21; & 146, lns. 1-9.[36] While the internal company decision to determine a delivery amount varies upon the water year and various conditions, there is no dispute that TFCC has the ability and the right to deliver 3/4 miner's inch under its previously decreed water rights.

The evidence and testimony presented during the hearing do not support the Director's 5/8 inch determination. Therefore, since the Director's *Final Order* is not supported by "substantial evidence" on this issue, the Court should reverse the Director's determination.

[36] The Court is reminded that former Director Dreher's statement was not made in a vacuum. Rather, Director Dreher supervised the Water District 1 watermasters for over 10 years (1995-2006), during which time there were numerous years in which the watermaster supervised the diversion and use of water by TFCC at the Snake River and 3/4 inch was delivered to the shareholders' field headgates. *See* Ex. 1004 (p. SWC 112). At no time did Director Dreher or the watermaster question the deliveries that occurred. Rather, those deliveries were within the quantities of TFCC's decreed water rights and presumed to be beneficially used consistent with TFCC's prior decrees.

VI. The Use of a 10% Trim Line to Exclude Junior Water Rights that are Materially Injuring the Coali8tion's Senior Water Rights was Arbitrary and Capricious (Appeal Issue I).

The Director's use of the 10% trim line is an issue on appeal in the Spring Users' call matter. *See Clear Springs, et al. v. IDWR, et al.* (Gooding County Dist. Ct. 5th Jud. Dist. Case No. 2008-444). For the reasons described in Clear Springs *Opening Brief*, and the *Spring Users Joint Reply Brief*, the Director's use of a 10% trim line to allow injurious diversions to continue is arbitrary and capricious and in violation of the law, and should be rejected.

VII. The Director's Piecemeal Final Order Process Violates Idaho's Administrative Procedures Act (I.C. §§ 67-5244 and 67-5246) and Imposes an Unreasonable Burden on the Water Users.

The Director's *Final Order* did not resolve all issues in dispute. Rather, the Director asserted that:

> 25. Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing on the order will be provided.

R. Vol. 39 at 7386.

The Idaho Administrative Procedures Act, Idaho Code sections 67-5244 and 67-5246, along with Department Procedural Rules 720 and 740 (IDAPA 37.01.01.720 & .740), each provide that, following the issuance of a *Recommended Order*, the Director must issue a *Final Order* within certain, specifically defined timeframes. The statutes and rules do not allow the Director to only decide some issues and then delay a decision on other issues until some, undefined, future date.

During the administrative proceedings, the Coalition challenged the Director's May 5, 2005 *Amended Order*, including the Director's method for calculating material injury (the

"minimum full supply" scheme) and its inability to provide a sufficient water supply to the Coalition's senior water rights. *See e.g.*, R. Vol. 9 at 1704 (Coalition *Petition Requesting Hearing*). During the hearing, the Coalition provided expert testimony and reports, *see* Ex. 8000, and legal argument, *see supra*, addressing the Coalition's senior water rights and the ability of the Coalition members to beneficially use the amounts previously decreed – including the deference that should be provided to the decreed diversion rates. The Hearing Officer repeated the Supreme Court's mandate that the prior decrees receive due deference, R. Vol. 37 at 7072-73, and that the "minimum full supply" scheme "departs from the practice of recognizing a call at the level of the licenses or decrees," *Id.* at 7090. The Hearing Officer recognized that, while a senior water right will only be administered the water that can be beneficially used, the license or decree is the guidepost for administration. *Id.* at 7090-91. The Director did not revise this determination in the *Final Order*. *See* R. Vol. 39 at 7382 & 7387 (any factual or legal conclusions in the *Recommended Order* that are not addressed in the *Final Order* are adopted by the Director).

After three long years, an extensive hearing and a significant amount of time and resources spent, the Director issued a *Final Order* but failed to address and quantify his method for determining material injury in the future. R. Vol. 39 at 7386. Rather, he indicated that "before the end of 2008" another, second, Final Order would be issued that would presumably detail yet another new approach for determining and predicting material injury. The failure to issue a complete final order violates Idaho's Administrative Procedures Act and the Department's procedural rules. Moreover, it impermissibly prevents the Coalition from obtaining timely judicial review of the Director's actions. Incredibly, the Director stated that another, second, administrative hearing would then be required to address any concerns with the

Director's "new" methods. In short, the Coalition is left without any guidance for future administration unless it is provided by this Court on judicial review. Such actions are arbitrary and capricious and the Court should order the Director to issue a Final Order that encompasses all issues in dispute.

CONCLUSION

Thus went the Director's dance, from stage to stage. Because no party here challenges, or has appealed, the obvious finding that the pumpers' use of water from the aquifer injured the seniors' rights, the ground water users had a choice to timely provide mitigation water or curtail. There is, under the Idaho's prior appropriation doctrine, no other choice.

The Director, however, created an illegitimate third option: curtail the senior while the junior illicitly pumped his full water right. The result is the vary circumstance that prompted the Coalition's request for administration in the first instance. The Director's evasive administration was designed to change nothing from the wrongful circumstance that gave rise to the call in the first place, and changed nothing.

It is respectfully submitted that the Idaho Supreme Court determined that the CM Rules are facially constitutional, but that until the Director had the opportunity to perform administration, conduct a hearing, and issue a final order, it would be premature to determine whether the rules were being constitutionally applied. *See AFRD#2.* The executive branch has taken the opportunity to unconstitutionally apply the CM Rules by preferring junior ground water rights over the Coalition's senior surface water rights.

The priority doctrine is enshrined in the constitution. The priority doctrine dictates the fulfillment of senior water rights before junior rights. Thus, when the senior right is not fulfilled, or is being injured, the junior has a choice of either not taking the seniors water or timely

providing water to seniors---through mitigation or curtailment. Any other result not only offends the constitution's priority doctrine, but results in the involuntary curtailment of the senior while the junior pumps full bore.

The Court is respectfully requested to take Idaho's prior appropriation doctrine in hand to require that for any time the senior lacks water needed under its right, the junior water rights conjunctively connected to the injured senior right either timely provide mitigation water or quit pumping the water that belongs to the senior. The current process of curtailing the senior so the junior may pump a full right not only violates the constitutionally enshrined priority doctrine, but affronts justice. Even though the executive branch of state government abets the juniors to purloin the seniors' water with a charade of compliant and clearly unconstitutional orders, the Courts as the final sentry of constitutional rights cannot do other than require the senior be served first, or the junior curtail.

Respectfully submitted this 3rd day of April, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of April, 2009, I served true and correct copies of the **SURFACE WATER COALITION'S OPENING BRIEF**, upon the following by the method indicated:

Deputy Clerk Gooding County District Court 624 Main St. P.O. Box 27 Gooding, ID 83330	____ U.S. Mail, Postage Prepaid __✓__ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
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Travis L. Thompson

Attachment A

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

AMERICAN FALLS RESERVOIR DISTRICT # 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs, v. THE IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, and KARL J. DREHER, in his official capacity as Director of the Idaho Department of Water Resources, Defendants.	)	Case No. CV-2005-0000600

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

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

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

IX.

CONSTITUTIONAL FRAMEWORK

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

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

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

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

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

Id. at 1138 (emphasis mine).

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

Id. at 1146 (emphasis mine).

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

Id. at 1161 (emphasis mine).

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

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

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

And lastly,

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

Id. at 1171 (emphasis mine).

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

> [Mr. BEATTY]...

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

Proceedings and Debates at 1118 (emphasis mine).

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

Id. at 1332 (emphasis mine).

II. Idaho Constitution: Article XV, § 3.

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

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

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

Id. at 2079-80.

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

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

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

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

III. Principles of Constitutional Interpretation

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

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

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

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

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

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

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

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

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

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

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

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

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

Idaho Code § 42-602 reads:

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

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

Idaho Code § 42-603 reads:

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

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

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

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

V. The Idaho Constitutional Convention and Article XV.

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

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

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

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

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

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

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

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

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

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

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

SECTION 1

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

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

Id. at 2079.

SECTION 2

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

Id.

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

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

1114-1148

1154-1176

1183

1185

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

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

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

1237-1239

1331-1333

1340-1365

1407.

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

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

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

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

SECTION 3

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

Mr. CHANEY. **Over manufacturing.**

Mr. SHOUP. If any person or company has been using this water for mining, and any person desires to use it for agriculture, they shall have the preference over those using it for mining?

The CHAIR. I don't know that the chairman of the committee is present. **I will say to the gentleman that I was on the committee, and the object of putting in that clause was, that where** water had been used for the three purposes from one ditch, and the **water ran short, the preference should be given first to domestic purposes**, household use, **and next to agricultural purposes, because if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost.** That is the reason why the committee saw fit to state it in that manner.

Id. at 1115 (emphasis mine).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1158.

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

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

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

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

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

Id. at 1158.

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

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

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

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

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

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

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

The voting on this amendment went as follows:

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

Proceedings and Debates at 1158.

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

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

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

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

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

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

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

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

Id. at 1131 (emphasis mine).

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

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

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

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

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

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

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

Id. at 1132 (emphasis mine).

Mr. VINEYARD.

***

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

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

Mr. VINEYARD. With pleasure.

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

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

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

Id. at 1133 (emphasis mine).

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

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

Id. at 1134.

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

Id. at 1137 (emphasis mine).

Further debate and voting on this amendment continued as follows:

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

Proceedings and Debates at 1161 (Emphasis mine).

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

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

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

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

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

The discussion on this amendment went in part as follows:

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

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

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

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

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

Id. at 1161-63 (emphasis mine).

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

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

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

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

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

The voting on this amendment went as follows:

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

Proceedings and Debates at 1166.

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

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

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

***

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

Id. at 1166.

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

***

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

Id. at 1169 (emphasis mine).

('Question, question.')

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

Id. at 1176.

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

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

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

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

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

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

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

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

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

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

Id. at 1330-34.

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

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

Id. at 1340-41.

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

12. **Summary**

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

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

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

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

VI. Article XV, §§ 4 and 5.

Sections 4 and 5 were adopted as follows:

SECTION 4

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

Proceedings and Debates at 2080.

SECTION 5

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

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

Id.

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

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

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

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

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

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

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

applied to the running of manufactories or anything else of that sort.

Mr. Gray: Suppose he won't pay for it.

Mr. Claggett: It is dedicated to the use, and when it has once been sold to any one particular party in one year, then he have the right to demand it annually thereafter upon paying for it...

Mr. Claggett: Mr. Chairman, **both of these sections apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental or distribution.'** The first section protects the person who comes in, by making it 'an exclusive dedication' to agricultural uses after it has been so appropriated and so used.

These conditions necessarily result in an affirmance of the judgment as to those appellants who rely on contracts for water rights from the irrigation and canal company, and who do not connect themselves with an original appropriation of the water from the natural stream.

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

VII. Article XV, § 6.

Section 6 was adopted as follows:

SECTION 6

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

Proceedings and Debates at 2080.

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

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

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

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

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

See Proclamation, Session Laws of Idaho, 1965.

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

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

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

SECTION 2. That the question to be submitted to the electors of the State of Idaho as the next general election shall be as follows:

Id. at 72.

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

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

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

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

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

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

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

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

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

X.

GENERAL ANALYSIS

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

The Director defines conjunctive management in the IDAPA as:

> Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply.

IDAPA 37.03.11.010.03.

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

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

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

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