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

A & B IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents. **IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A & B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA**	Case No. 2009-000647 **MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW**

Ruling:

The 1951 Idaho Ground Water Act, I.C. § 42-226 *et seq.*, applies retroactively with respect to the administration of ground water rights including the management of ground water levels.

The Director did not err in finding that reasonable pumping levels had not been exceeded based on determination that the 36-2080 right suffered no material injury at current levels. Consistent with a finding of no material injury, Director was not required to make a determination on reasonableness of pumping levels.

The Director erred in failing to apply proper evidentiary standard of clear and convincing evidence in finding of no material injury to A & B's right. Remanded for purpose of applying correct evidentiary standard.

The Director did not err by analyzing material injury to the 36-2080 right in cumulative as opposed to analyzing injury separately to the 177 points of diversion based on the way in which the right was licensed and decreed.

The Director did not err by failing to designate a Ground Water Management Area pursuant to I.C. § 42-233b.

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, Sarah W. Higer, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, on behalf of Petitioner A & B Irrigation District, ("A & B"), (Travis Thompson argued);

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources, ("Director," "IDWR" or "Department") (Chris M. Bromley argued);

Randall C. Budge, Candice M. McHugh, Scott J. Smith, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, on behalf of Respondent Idaho Ground Water Appropriators, Inc. ("IGWA") (Candice M. McHugh argued);

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, A. Dean Tramner, Pocatello, Idaho, on behalf of Respondent City of Pocatello ("City of Pocatello") (Sara A. Klahn argued);

Jerry R. Rigby, Rigby, Andrus & Rigby, Chartered, Rexburg, Idaho, on behalf of Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, and Stan D. Neville, ("Fremont-Madison *et. al.*").

I.

STATEMENT OF THE CASE

A. Nature of the Case

This case is a proceeding for judicial review of the *Final Order Regarding the A & B Delivery Call* ("*Final Order*") issued June 30, 2009, by David R. Tuthill, Jr., Director of IDWR. Record ("R.") R. 3318-3325. Following the retirement of Director Tuthill on June 30, 2009, Gary Spackman was appointed Interim Director. The *Final Order* was issued at the conclusion of proceedings relating to a *Petition for Delivery Call* originally filed with the Department by A & B on July 26, 1994. R. 12-14. The *Petition for Delivery Call* also requested that the Director designate the Eastern Snake Plain Aquifer ("ESPA") as a Ground Water Management Area ("GWMA") pursuant to Idaho Code § 42-233b. The *Final Order* denied both the delivery call and the request for GWMA designation. On August 31, 2009, A & B filed the instant *Notice of Appeal and Petition for Judicial Review of Agency Action* ("*Petition for Judicial Review*") pursuant to the Idaho Administrative Procedure Act, Title 67, Chap 52, Idaho Code.

B. Course of Proceedings

On June 26, 1994, A & B filed the *Petition for Delivery Call* seeking administration of ground water rights diverting from the ESPA that were junior in priority to water right 36-2080, as well as GWMA designation of the ESPA. R. 12-14. The *Petition* alleged *inter alia* that junior priority ground water pumping from the ESPA had lowered the water table an average of 20 feet and in excess of 40 feet in some areas. The Petition also alleges that the declines in the water table level resulted in reducing A & B's diversions from its authorized 1,100 cfs to 974 cfs and reduced diversions from 40 wells serving approximately 21,000 acres to a diversion rate insufficient to irrigate the lands served by the wells. R. 13.

Notice of the filing was served on approximately 7,200 holders of water rights who divert from the ESPA with priorities junior to September 16, 1994. R. 669. Responses were received from over 200 junior water right holders or entities representing water right holders. *Id.* Thereafter, A & B, IDWR and the participating respondents

entered into a stipulation, which among other things, stayed the *Petition for Delivery Call* until such time as any party filed a *Motion to Proceed* to have the stay lifted. R. 1106.

On March 16, 2007, A & B filed a *Motion to Proceed* with the Department, moving to lift the stay agreed to by the parties. Following a status conference on the *Motion to Proceed*, the Director issued an order lifting the stay. *Id.* On January 29, 2008, the Director issued an *Order* ("*January 29, Order*") denying A & B's *Petition for Delivery Call* and request for GWMA designation. R. 1105-1151. The *January 29, Order* concluded, based on the application of the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CMR"), that A & B's 36-2080 water right had not suffered "material injury." *Id.* at 1151. In response, A & B requested an administrative hearing challenging the *January 29, Order*. R. 1182. An evidentiary hearing was conducted December 3 through 17, 2008, before Hearing Officer Gerald F. Schroeder ("Hearing Officer"). Respondents IGWA, City of Pocatello and Fremont Madison *et. al.* participated in the hearing. R. 116-17.

On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("*Recommended Order*"). R. 3078-3120. The *Recommended Order* agreed with the conclusion of the Director's *January 29, Order*, that A & B's water right no. 36-2080 had not suffered material injury and that designation of a GWMA would not add any benefit to the management of the ESPA that could not already be accomplished through the water districts already in existence. *Id.* On May 29, 2009, the Hearing Officer issued an *Order Granting in Part and Denying in Part A & B's Petition for Reconsideration*, correcting certain errors in the *Recommended Order* but otherwise affirming the *Recommended Order*. R. 3231-3233. On June 19, 2009, the Hearing Officer issued a response to *A & B's Petition for Clarification* which clarified the Hearing Officer's use of the term "total project failure." R. 3262. A & B filed exceptions to the *Recommended Order* on June 30, 2009. R. 3318. On June 30, 2009, the Director issued the *Final Order* accepting all substantive recommendations of the Hearing Officer. On August 4, 2009, the Director issued an *Order Denying Petition for Reconsideration* making the *June 30, 2009, Order*, final. R. 3360.

On August 31, 2009, A & B timely filed the *Petition for Judicial Review* now before the Court. IGWA, City of Pocatello and Fremont-Madison *et. al.* all appear as Respondents. This case was assigned to the undersigned Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication ("SRBA").

C. Statement of Relevant Facts

1. A & B Irrigation Project

The North Side Pumping Division of the Minidoka Project was developed by the United States Bureau of Reclamation ("USBOR"). The project was completed in 1963. A & B is an irrigation district organized by the landowners of the North Side Pumping Division of the Minidoka Project. The USBOR transferred operation and maintenance of the project to A & B in 1966 pursuant to a repayment contract. The project consists of two units. Unit A serves approximately 15,000 acres with surface water diverted from the Snake River. Unit B serves approximately 66,000 acres with ground water pumped from the ESPA primarily authorized under the 36-2080 water right.[1]

2. Water Right 36-2080

Water right 36-2080 is a ground water right held in trust by the USBOR for the benefit of the landowners within A & B Irrigation District. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). The right was decreed with a priority date of September 9, 1948, and cumulatively authorizes the diversion of 1100 cfs from 177 separate points of diversion (wells) for the irrigation of 62,604.3 acres from April 1 to October 31. The decreed quantity calculates to 0.88 miner's inches per acre.[2] A partial decree was issued for the right in the SRBA on May 7, 2003. Exh. 139.

A subsequent administrative transfer approved the use of up to 188 wells and expanded the authorized number of acres to 66,686.2. A & B currently operates 177

[1] Unit B is also irrigated with other ground water rights, including enlargement rights, which cumulatively authorize the irrigation of 66,686.2 acres. R. 1112.

[2] This is calculated as follows: 1,100 cfs / 62,604.3 acres = .0176 cfs or 0.88 (0.0176/.02) miner's inches per acre. However, this is an average, as not all wells produce 0.88 inches per acre some produce more and others less. R. 3108. Well capacity ranges from 0.8 cfs to 10.6 cfs. R. 3093

wells. R. 3081. The place of use for all points of diversion is described as "the boundary of A & B Irrigation District service area pursuant to Section 43-323, Idaho Code." R. 3094. As a result, water diverted from any one of the wells is appurtenant to all acres within the place of use. R. 3092. The rate of diversion for the right is decreed in the cumulative and does not ascribe any rate of diversion to a particular well. The USBOR applied to have the right licensed in this manner to provide for the greatest amount of flexibility in distributing water throughout the project. R. 3093-94; Exh. 157D.

Despite being decreed in this manner, the Unit B ground water project is not a system of interconnected wells. The Unit is comprised of 130 independent well systems. R. 3093. A well system consists of one or more wells that provide water to a distribution system that services a particular number of acres. On average, five farm units are served from each well system. Eighty-eight of the systems consist of a single well. Approximately 40 of the systems consist of two wells. The Unit has two or three systems comprised of three wells. R. 3092-93. Water delivery for the average well system requires less than one mile of canal with a capacity of 5.6 cfs. R. 3095. Although not all of A & B's wells are underperforming, because of the design of the system and the geographic layout of the lands within the Unit, water cannot readily be distributed throughout the Unit from areas served by wells capable of pumping more than required for the area of service, to areas served by underperforming wells. R. 3095.

3. Historical Development of the Unit B Ground Water Project System

The Unit B ground water project was originally designed as an open discharge system where water was pumped from the ground into surface ponds and delivered through open lateral systems to the user. R. 3098. Irrigation was initially accomplished by gravity flow. R. 3099. Gravity flow has been replaced by more efficient sprinkler systems. R. 3099. As of 2007, only 3 to 4 percent of the irrigation in Unit B was gravity flow. *Id.* The original conveyance system included 109.71 miles of laterals and 333 miles of drains. The current system includes 51 miles of laterals, 138 miles of drains and 27 miles of distribution piping. Sixty-nine water injection wells have also been eliminated and the water applied to other purposes. R. 3099. In sum, the current system

is more efficient than the original system. Conveyance loss system wide is between 3 and 5 percent. R. 3099. These efficiencies reduced the amount of water re-entering the ESPA. R. 3102.

A & B maintains the Unit B ground water project system on an annual basis including a "rectification" program for underperforming wells. The rectification program includes deepening wells, drilling new wells and increasing horsepower to existing pumps. A & B's criteria for rectification targets wells delivering below 0.75 miner's inches per acre. R. 3101.

4. Declines in ESPA Levels

The project was developed when water levels in the ESPA were at their peak. Gravity flow irrigation from the Snake River resulted in significant amounts of recharge to the ESPA. Ground water pumping was also limited. Since that time changes in irrigation practices reducing incidental recharge, ground water pumping and drought have all contributed to declines in aquifer levels. Declines in aquifer levels since the wells were installed range from 8.5 feet to 46.4 feet. Although the overall annual recharge to the ESPA exceeds depletions from ground water pumping, less water enters the project area than leaves the area. Despite declines in certain areas the aquifer is not being "mined" by ground water pumping. R. 3113.

5. A & B's Delivery Call

The declines in aquifer levels have resulted in A & B being unable to pump the full amount of its authorized rate of diversion during peak demand periods. The declines reduced cumulative withdrawals from 1,100 cfs (0.88 miner's inches per acre) to 974 cfs (0.78 miner's inches per acre) for the entire project. Depletions have also resulted in some wells being abandoned. The shortages are not uniform throughout the project. A & B alleges ground water pumping by juniors has materially injured the 36-2080 water right. R. 3113. However, certain areas within the project, which lie over hydrogeologic regions of poor transmissivity, have realized the greatest shortages. These areas are primarily located in the southwest region of the project but shortages are not exclusively limited to that area. R. 3111; Exh. 200N & 216.

D. Decision of the Director

The Hearing Officer's *Recommended Order* determined the following: 1) A & B's 36-2080 right was subject to the provisions of the Idaho Ground Water Act (I.C. §§ 42-226 *et seq.*) ("GWA") and A & B's wells had not exceeded reasonable pumping levels; 2) 0.75 miner's inches per acre was the minimum quantity necessary to satisfy A & B's water requirements despite the 36-2080 right being decreed in the aggregate for 0.88 miner's inches per acre; 3) inherent hydrogeologic conditions making pumping difficult in certain areas of the project was not a basis for curtailment; 4) A & B was required to take reasonable measures to move water to underperforming areas within the project; 5) A & B had not suffered material injury to its senior water right; and 6) no additional benefit to the management of the ESPA would result from the formation of a GWMA. R. 3078. In the *Final Order* the Director accepted all substantive recommendations of the Hearing Officer. R. 3318.

II.
ISSUES PRESENTED ON APPEAL

A & B raises the following issues on appeal:

A. Whether the Director erred in concluding that the provisions of the GWA apply to pre-enactment water rights?

B. Whether the Director unconstitutionally applied the CMR by disregarding the proper presumptions and burdens of proof resulting in: (i) reducing A&B's diversion rate per acre from 0.88 to 0.75 miner's inches; (ii) creating a new "failure of the project" standard for injury; and (iii) using a "minimum amount needed" for crop maturity standard?

C. Whether the Director erred in failing to separately analyze A & B's 177 individual points of diversion, as opposed to cumulatively, for purposes of determining injury to A & B's senior water right?

D. Whether the Director erred and unconstitutionally applied the CMR by concluding that A & B must interconnect individual wells or well systems across the project before a delivery call can be filed even though water right 36-2080 was developed, licensed and decreed with as many as 130 individual well systems?

E. Whether the Director erred in finding that A & B has not been required to pump water beyond a "reasonable ground water pumping level" even though (1) the Director provided no factual support for this conclusion, (2) the evidence demonstrates that A&B has been forced to drill wells deeper and even abandon wells as water supplies become more and more depleted, and (3) no such level has ever been determined as required by Idaho Code § 42-226?

F. Whether the Director erred in failing to designate all or a portion of the ESPA as a GWMA pursuant to Idaho Code § 42-233b?

G. Whether the Director violated I.C. § 42-231 by failing to protect the ESPA, set a reasonable pumping level or designate a GWMA?

H. Whether the Director erred by failing to issue a final order in compliance with I.C. § 67-5248?

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held March 2, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or March 3, 2010.

IV.

APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, I.C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4). *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[3] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was <u>not</u> substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

[3] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.,* 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

V.
ANALYSIS AND DISCUSSION

A. The Director Did Not Err in Concluding the GWA Applies to the Administration of the Right to Use Water Rights Pre-dating its Enactment.

A & B argues the Director erred in adopting the Hearing Officer's conclusion that the GWA applies to water rights appropriated prior to its enactment. Water right 36-2080 has a priority date of September 9, 1948. The GWA was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, pp. 423-29 (codified as Idaho Code §§ 42-226 *et. seq.*). The significance of whether the GWA applies to water rights established prior to its enactment comes from I.C. § 42-226 which was amended in 1953 to provide:

> [W]hile the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, *but early appropriators of underground water shall be protected in the maintenance of reasonable pumping levels* as may be established by the state reclamation engineer as herein provided.

1953 Idaho Sess. Laws, ch. 182, p. 278 (emphasis added).[4]

A & B argues that because water right 36-2080 was established prior to the enactment of the GWA, the right is not subject to the "reasonable pumping level" provision of I.C. § 42-226. A & B argues instead that the right is protected to historic pumping levels as provided by common law. In support of its argument, A & B cites to the plain language of the 1987 amendment to I.C. § 42-226, which remains in the current version of the statute, and provides: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." 1987 Idaho Sess. Laws Ch. 347, p. 743. Among other things, A & B also points out where this same provision has been cited to by both the Idaho Supreme Court and the SRBA District Court for the proposition that the GWA does not apply to water rights pre-existing its enactment. *See Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994); *In re: SRBA Case No. 39576, Order on Cross Motions for Summary Judgment*, Subcase No. 91-00005, p.22 (July 2, 2001)(citing *Musser*). The issue of whether the GWA applies to pre-existing water rights is a question of law over which a reviewing court exercises free review. *Farber v. Idaho State Insurance Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). Moreover, the issue requires a comprehensive review of the GWA in its entirety.

1. Application of Standards of Statutory Interpretation to the GWA.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. *Farber at* 310, 208 P.3d at 292 (2009) (citing *Payette River Prop. Owners Ass'n v. Bd. Of Comm'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)). Statutory interpretation begins with the literal language of the statute. *Id.* (citing *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006)). When the statutory language is unambiguous, the clearly expressed intent of the

[4] The original language has since been amended but not in substance. I.C. § 42-226 currently provides:

> [W]hile the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. *Prior appropriators of underground water shall be protected in the maintenance of reasonable pumping levels* as may be established by the director of the department of water resources as herein provided.

legislative body must be given effect, and the court need not consider rules of statutory construction. *Id.* (citing *Payette River*, 132 Idaho at 557, 976 P.2d at 483). Statutory provisions should not be read in isolation, but must be interpreted in the context of the entire document. *Id.* (citing *Westerburg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988)). The statute should be considered as a whole and the words given their plain, usual, ordinary meaning. *Id.* A statute is passed as a whole and not in parts or sections. Each part or section should therefore be construed in connection with every other part or section so as to produce a harmonious whole. It is not proper to confine interpretation to the one section to be construed. SUTHERLAND, STAT. CONST. § 46:05 (6th ed. 2001).

2. When Construed in its Entirety, it is Clear the Legislature Intended the GWA to Apply to the *Administration* of *All* Rights to the Use of Ground Water Whenever or However Acquired.

The language of the 1987 amendment to I.C. § 42-226, which provides "[t]his act shall not affect the rights to the use of ground water in this state acquired before its enactment" appears, when read in isolation, to exempt water rights existing prior to the enactment of the GWA from its application. However, when construing the Act in its entirety, and specifically taking into account the plain language of I.C. § 42-229, it becomes clear that the Legislature intended a distinction between the "right to the use of ground water" and the "*administration* of all rights to the use of ground water." This distinction is significant in that the plain language of the Act makes clear that the Act applies retroactively to the later category unless specifically exempted.

Prior to the enactment of the GWA in 1951, Idaho did not have a statutory scheme in place specifically governing the appropriation and administration of ground water. In discussing the enactment of the GWA in 1951, the Idaho Supreme Court has noted that:

> In the years since World War II, most western states have enacted legislation establishing administrative controls over ground water withdrawals . . . Idaho was in the vanguard of this movement when we enacted our Ground Water Act in 1951 I.C. §42-226 et seq.

Baker v. Ore-Ida Food, 95 Idaho 575, 580, 513 P.2d 627, 632 (1973).

In its original form, Section 1 of the Act (now codified as I.C. § 42-226) re-affirmed that the traditional policies of this state pertaining to the beneficial use of water through appropriation apply to ground water:

> Section 1 GROUND WATERS ARE PUBLIC WATERS
>
> It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. ***All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.***

1951 Idaho Sess. Law, ch. 200, pp. 423-424. (emphasis added).

Section 1 of the Act was subsequently amended by the Legislature in 1953, 1980, and 1987.[5] The phrase: "*All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed*" remained in force until the 1987 amendment when that provision was replaced by the following provision now at issue: "*This act shall not affect the rights to the use of ground water in this state acquired before its enactment.*" 1987 Idaho See. Laws ch. 347, p. 743. (emphasis added). By its plain language, the 1987 amendment applies only to "the rights to the use of ground water."

In its original form, Section 4 of the Act (now codified as I.C. § 42-229) provided as follows:

> Section 4. METHODS OF APPROPRIATION
>
> The ***right to the use of ground water of this state*** may be acquired only by appropriation. Such appropriations may be perfected by means of diversion and application to beneficial use or by means of the application permit and license procedure in this act provided. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of chapter 2 of title 42, Idaho Code, may be completed under the provisions of said chapter 2 and rights to the use of ground water may be thereby acquired. ***But the administration of all rights to the use of ground water, whenever or***

[5] In 1953, Section 1 was amended to include the "full economic development" and "reasonable ground water pumping levels" provisions. See *Supra* fn. 4

however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provision of this act.

1951 Idaho Sess. Laws, ch. 200, p.424. (emphasis added). The plain language of the last sentence of this provision specifically addresses and applies to "the *administration*" of the right to the use of ground water. The last sentence of the original Section 4 has remained unchanged and appears in its original form in the current version of I.C. § 42-229.

When the two above-mentioned provisions are read in conjunction it is clear that the last sentence of I.C. § 42-226 governs the applicability of the GWA to rights to the use of ground water acquired before its enactment, whereas the last sentence of I.C. § 42-229 applies to the *administration* of rights to the use of ground water acquired before its enactment. By its plain language then, the GWA applies to the *administration* of rights to the use of ground water "whenever or however" acquired. I.C. § 42-229.

A & B's argument that the 1987 amendment language to what is now I.C. § 42-229 excludes the application of the GWA from pre-existing water rights leads to two problematic results. First, the interpretation renders the "whenever or however acquired" language of the last sentence of I.C. § 42-229, which pertains to the administration of the right to use ground water, meaningless. Courts must give effect to all the words and provisions of a statute so that none will be void, superfluous or redundant. *Faber*, 147 Idaho at 310, 208 P.3d at 293. Second, the argument results in the conclusion that pre-existing water rights are insulated from *all* administrative provisions enumerated in the GWA, including but not limited to provisions regarding the equipping of wells with flow valves, rights of inspection by IDWR, maintenance of casings, pipes, fittings, etc. *See* I.C. § 42-237a.g. This conclusion leads to an absurd result and must be rejected. As shown above, the Director has the authority under the GWA to administer rights to the use of ground water "whenever or however acquired."

3. Within the Structure of the GWA, the Management of Ground Water Pumping Levels was Intended to be Addressed under the Purview of the *Administration* of Ground Water Rights.

The GWA vests the Director with a number of enumerated powers and responsibilities associated with the supervision and administration of ground water rights. Of significance to the facts of this case, the maintenance of ground water levels is one such power:

> To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria . . . .

I.C. § 42-237a.g.[6]

Within the structure of the GWA, the management of ground water pumping levels was therefore intended to be addressed under the purview of the *administration* of groundwater rights. Although (as is discussed below) the common law may have protected the means of diversion of senior appropriators to historic pumping levels, ground water pumping levels have never been treated as an element of a water right, nor have pumping levels been memorialized in any decree or license. *See. e.g.* I.C. § 42-1409 (required elements in Notice of Claim – no reference to well depth); I.C. § 42-222 (setting forth changes to water right requiring transfer proceeding – no reference to well depth); I.C. § 42-202 (contents of permit application – no reference to well depth). Likewise in *Baker v. Ore-Idaho Foods*, the Idaho Supreme Court recognized most western states, including the state of Idaho via the GWA "have enacted legislation establishing *administrative* controls over ground water withdrawals." *Baker*, 95 Idaho at 580, 513 P.2d at 632 (emphasis added).

[6] This provision was originally included in the 1953 version of the GWA and read the same except that it referred to the "state reclamation engineer."

The fact that (1) pumping level is not considered an element of a right, (2) the GWA delegated a number of duties to IDWR associated with the maintenance of ground water levels, and (3) the acknowledgement by the Idaho Supreme Court that the GWA established administrative controls over the withdrawal of groundwater in *Baker v. Ore-Ida Foods* all strongly suggest that the issues pertaining to ground water levels fall under the category of the administration of the right to the use of ground water. The plain language of I.C. § 42-229 makes clear that the *administration* of the right to the use of ground water shall be governed by the GWA "whenever or however" the water right was acquired.

4. The Case Law Applying the GWA is Consistent with this Interpretation.

The limited case law applying the provisions of the GWA is consistent with the conclusion that the management of ground water levels is a matter of administration and therefore is subject to the retroactive application of the GWA. In *Noh v. Stoner*, 53 Idaho 651, 26 P. 531 (1933), prior to the enactment of GWA in 1951, the Idaho Supreme Court addressed the issue of maintenance of water tables in a dispute involving a junior well interfering with a senior ground water right. The Court held that senior well owners were protected absolutely to the extent of their historical pumping level. Junior well owners could not be enjoined from pumping so long as they held the senior harmless for the cost of modifying or lowering the senior's means of diversion such that the senior received the same flow of water. *Id.* at 657, 26 P.2d at 1114.

In *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court addressed the application of the GWA in a dispute between ground water pumpers over the maintenance of ground water tables. The Court concluded the GWA was "consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Id.* at 584, 513 P.2d at 636 (citing Idaho Const. Art. 15 § 7). The Court held:

> [A] senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to

> accept some modification of their rights in order to achieve the goal of full economic development. . . .
>
> In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water to promote full economic development of the resource . . . .
>
> We conclude that our legislature attempted to protect historic water rights while at the same time promoting full economic development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of diversion demands an unreasonable pumping level his historic means of diversion will not be protected.

Id. at 584, 513 P.2d at 636 (citations omitted). The Court determined the holding in *Noh* was "inconsistent with the full economic development of our ground water resources" and that "the Ground Water Act was intended to eliminate the harsh doctrine of *Noh*." *Id.* at 581-82, 513 P.2d at 633-34. Further:

> Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law. . . . We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the GWA.

Id. at 583, 513 P.2d at 635 (citations omitted). Although the Court never specifically addressed the issue of whether or not the reasonable pumping level provisions of the GWA were intended to apply to pre-existing rights, two of the senior rights held by the plaintiffs who made the delivery call had priorities pre-dating the enactment of the GWA. Consequently the Court did in fact apply the reasonable pumping provision to pre-existing rights. While the case is not dispositive of the issue, the ruling makes it clear that the Legislature through the enactment of the GWA modified the common law rule in *Noh*.

In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), a subsequent case involving a delivery call by a holder of a domestic ground water right, the Idaho Supreme Court applied the historic pumping level rule in *Noh* to the circumstance where it was

determined that the GWA did not apply. In *Parker*, the senior domestic water right had a priority date of 1964. The Idaho Supreme Court held that prior to the 1978 amendment the GWA did not apply to domestic wells. In reaching the holding the Court relied on the original 1951 version of the GWA which provided an exclusion for domestic use until 1978 when the GWA was amended to eliminate the exclusion.[7] *Id.* at 510, 650 P.2d 652. The Court held that the 1951 version of the language excluding domestic wells to be unambiguous. *Id.* at 511, 650 P.2d 653. After determining that the GWA did not apply the Court distinguished the holding in *Baker* and applied the ruling in *Noh*.

> Although this Court in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 581-83, 513 P.2d 627, 633-35 (1973), held that *Noh* is not applicable to cases determined under the reasonable pumping level provisions of the Ground Water Act, *Noh* is applicable to circumstances such as these in which [the GWA] does not apply.

Id. at 513, 650 P.2d 655. On first impression the holding in *Parker* appears inconsistent with the holding in *Baker*, which arguably overruled the rule in *Noh* independent of the GWA. However, it is important to note that prior to the 1978 amendment, the GWA did not apply in any respect, retroactively or otherwise to domestic wells. This blanket exclusion was solely limited to domestic wells. Accordingly, the holding in *Parker* is consistent with *Baker* for purposes of applying the GWA to water rights that are not expressly exempt from its application.

5. The *Musser* Decision

The issue of whether the GWA was intended to apply retroactively to the administration of pre-existing rights has never been squarely addressed by the Idaho Supreme Court. However, as correctly argued by A & B, the Idaho Supreme Court decided the case of *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994), in part, on the basis that the "statute [I.C. § 42-226] does not affect the rights to the use of ground water acquired before enactment of the statute." *Id.* at 396, 871 P.2d at 813 (citing the language of the 1987 amendment to I.C. § 42-226). In *Musser*, the Director

[7] Section 2 of the original version of the GWA provided an exclusion for domestic wells as follows: "The excavation and opening of wells and withdrawal of water therefrom for domestic purposes *shall not be in any way affected by this act.*" 1951 Idaho Sess. Laws, ch. 200, p. 424 (now codified as I.C. § 42-227)

refused to honor the demand for a delivery call initiated by a senior surface user. The Director reasoned he lacked the authorization to conjunctively administer ground and surface water within a water district without a formal hydrologic determination that conjunctive management was appropriate. *Id.* at 394, 871 P.2d at 811. The district court issued a writ of mandate, ordering the Director to administer the rights. The Director appealed. *Id.*

On appeal, the Director argued that although he had a mandatory statutory duty to administer water within a water district, I.C. § 42-226 left to the Director's discretion the means used to respond to delivery calls. The Supreme Court rejected the argument citing the principle that, although certain details regarding how an agency is to carry out a mandatory duty are left to the agency's discretion such, is not a basis for relief from mandamus. *Id.* at 394-395, 871 P.2d at 811-12 (citations omitted). The Supreme Court held:

> This principle applies to this case. The director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water.

Id. The basis for the holding is the Director's duty to distribute water pursuant to I.C. § 42-602. The Court then goes on to address the Director's explanation for refusal to honor the demand:

> The director defended his refusal to honor the Mussers' demand by claiming that a 'policy' of the department prevented him from taking action. In his testimony at the hearing to consider whether the writ would issue, the director referred to I.C. § 42-226 and stated 'a decision has to be made in the public interest as to whether those who are impacted by ground water development are unreasonably blocking full use of the resource.'
>
> We note that the original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, § 1, p. 423. *Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute. Therefore, we fail to see how I.C. § 42-226 in anyway affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892.*

(emphasis added). In 1978, I.C. § 42-227 was amended to eliminate the exclusion. 1978 Idaho Sess. Laws, ch. 323, p. 819.

Id. at 396, 871 P.2d at 813 (emphasis added).

This language is compelling if read outside of the context of the entire GWA. It is important to note, however, that *Musser* was decided based on principles governing mandamus in relation to the Director's duty to distribute water in water districts pursuant to I.C. § 42-602 and not the application of the GWA. In citing to I.C. § 42-226, the Court was responding to one of the defenses raised by the Director. Since enactment, the GWA has undergone several amendments and I.C. § 42-226 is only one component of the act. The application of I.C. § 42-226 or the GWA was not before the Court in *Musser*. Accordingly, the Court did not have the occasion to analyze the issue in the framework of the entire GWA, nor was it necessary.[8] As shown above, it is clear when read in its entirety that the intent of the legislature in passing the GWA was to distinguish between the right to the use of ground water and the administration of the right to the use of ground water. It is also clear that under the plain language of I.C. § 42-229 the GWA applies to the administration of all rights to the use of ground water whenever or however acquired.

6. The More Reasonable Interpretation and Purpose of the Language of the 1987 Amendment.

As noted previously, the GWA was the first statutory scheme in place specifically governing the appropriation and administration of ground water. However, the GWA was not the first authorization of the ability to appropriate a ground water right. The more reasonable interpretation of the intent of the original language "[a]ll rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed" was to acknowledge this very point and eliminate any confusion that ground water rights of existing holders were unauthorized or that existing right holders would have to make application under the GWA. While this interpretation is straight forward, the confusion arises as a result of the 1987 amendment, which when read independently from the rest of the act, appears to exempt pre-existing

[8] The SRBA also cited *Musser* for the proposition that the 1951 GWA did not apply to pre-existing water rights. The issue of the retroactive application of the GWA was not before the Court. In Re: SRBA Case

rights from the GWA. However, the more plausible justification behind the amendment and its choice of language was to avoid confusion in the forthcoming SRBA. Namely, that the validated and confirmed language could be construed as a legislative determination of the validity of pre-existing rights. Accordingly, this Court concludes that both the original language and the 1987 amendment were not intended to exempt pre-existing rights from the application of the GWA but rather to establish that pre-existing rights were acknowledged as valid and not supplanted by the operation of the GWA. Therefore this Court holds the Director did not err in concluding that the reasonable pumping level provisions of the GWA apply to pre-enactment water rights.

B. The Director did not err in determining that A & B had not been required to pump below a reasonable pumping level. This determination however, is dependent on the Director's material injury analysis and his determination that there is sufficient water available to supply 0.75 miner's inches per acre.

A & B argues the Director erred by concluding A & B had not been forced to exceed reasonable ground water pumping levels to satisfy its right without first establishing a reasonable ground water pumping level from which to make the determination. In his *January 29, 2008 Order,* the Director determined "[a]though ground water levels throughout the ESPA have declined from their highest levels reached in the 1950's, ground water levels generally remain of pre-irrigation developmental levels. There is no indication that ground water levels in the ESPA exceed reasonable ground water levels required to be protected under the provisions of Idaho Code § 42-226." R. 1109. In the *Recommended Order*, the Hearing Officer determined: 1) A & B is not protected to historic levels; 2) that the aquifer is not being mined in that more water enters the aquifer than is being removed by ground water pumping; and 3) that A & B's poorest performing wells could not be used as a measure for establishing the reasonableness of the ground water levels. R. 3113. Ultimately the Hearing Officer concluded "[t]he right to water [quantity] established in the partial decree remains, but that right is dependent upon A & B's ability to reach the water from those wells or to

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No. 39576, *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits*, Subcase 91-00005 (Basin-Wide Issue 5) (July 2, 2001), p.22.

import it from other wells." *Id.* The Director adopted the Hearing Officer's recommendation in the *Final Order*. R. 3321.

Idaho Code § 42-237a.g. sets forth the Director's duties with respect to establishing ground water levels:

> In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources ***in his sole discretion*** is empowered . . . .
>
> g. To supervise and control the exercise and administration of all rights to the use of ground waters ***and in the exercise of this discretionary power*** he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he ***may*** establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, ***contrary to the declared policy of this act***[9], the present or future use of any prior surface or ground water right ***or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge.***

(emphasis added). Accordingly, the GWA does not mandate that the Director establish ground water levels automatically as a matter of course in conjunction with a delivery call by a ground water pumper.

The Hearing Officer's conclusion that reasonable pumping levels had not been exceeded was based on the finding that sufficient water was available satisfy the 36-2080 right at current pumping levels following the consideration of factors associated with the material injury analysis. In light of this finding the Hearing Officer concluded it was not necessary for the Director to establish a reasonable level in conjunction with the delivery call. This Court agrees and affirms the determination, subject to one proviso.

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[9] The policy of the GWA is included in I.C. § 42-226 which provides in relevant part: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided."

The Director's conclusion is based on two threshold determinations made in conjunction with the material injury analysis. First, the Director's determination that sufficient water exists at current pumping levels relies on the finding that 0.75 miner's inches per acre is sufficient quantity to satisfy the purpose of use for the 36-2080 right despite the right being decreed for 0.88 miner's inches per acre. Second, the Director's determination that it was appropriate to analyze injury cumulatively based on injury to the entire right as opposed to evaluating injury to the 177 separate points of diversion. The significance of which would require A & B to move available water around within the project from wells capable of over performing to those areas served by underperforming wells. In other words injury would not be determined without looking at the depletive effects to entire right as opposed to individual points of diversion. These threshold issues are addressed separately in this opinion. To the extent the Director erred in either of these determinations it may require that the Director revisit the issue of the reasonableness of the pumping levels.

C. The Director erred in failing to apply the constitutionally protected presumptions and burdens of proof.

A & B argues the Director unconstitutionally applied the CMR by failing to apply the proper presumptions and burdens of proof resulting the reduced diversion rate per acre for the 36-2080 right from 0.88 to 0.75 miner's inches. This Court agrees. The 36-2080 right was licensed and ultimately decreed with a diversion rate of 0.88 miner's inches per acre for the 62,604.3 acre place of use.[10] Following application of the CMR, Rule 42 in particular, the Director determined that 0.75 miner's inches met A & B's minimum irrigation needs. The 0.75 miner's inches per acre, among other things, was therefore used to arrive at the finding of no material injury.

1. The CMR, Material Injury, and Efficient use of Water Without Waste.

[10] The fact that the right was decreed for 1,100 cfs to a 62,604.3 place of use involves a separate issue addressed later in this opinion.

The 36-2080 right is included in an organized water district. CMR Rule 40 pertains to responses to delivery calls in organized water districts, and in relevant part provides as follows:

> **040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).**
>
> **01. Responding To a Delivery Call.** When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of a diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering ***material injury***, and upon a finding by the Director as provided in Rule 42 that ***material injury*** is occurring, the Director, through the water master, shall:
>
> **a.** Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . . .

IDAPA 37.03.11.040.01.a (emphasis added). CMR Rule 040.03 provides:

> **Reasonable exercise of rights.** In determining whether diversion and the use of water under rights will be regulated under Subsection 040.01.a. or 040.01.b, the Director shall consider whether the petitioner making the delivery call is ***suffering material injury to a senior-priority water right and is diverting and using water efficiently without waste***, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. ***The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.***

IDAPA 37.03.11.040.03. (emphasis added). CMR 010.14 defines "***material injury***" as: "***Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set for in Rule 42.***" IDAPA 37.03.11.010.14 (emphasis added).

CMR Rule 42 sets forth the factors for determining material injury and the use of water efficiently without waste as follows:

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

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

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

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

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

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

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

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices. . . .

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

IDAPA 37.03.11.042.01.a.-h.

2. *American Falls Reservoir Dist. No. 2 v. IDWR*

In *American Falls Reservoir Dist. No. 2 v. IDWR,* 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD #2*), the Idaho Supreme Court addressed the constitutionality of the CMR in the context of a facial challenge. The issue arose as a result of senior surface right holders challenging the constitutionality of the CMR because the Rules required the senior making the call to prove material injury after the Director requested information from the surface users for the prior fifteen irrigation seasons instead of automatically giving effect to the decreed elements of the water right. The district court held the CMR to be facially unconstitutional for failing to "also integrate the concomitant tenets and procedures relating to a delivery call, which have historically been necessary to give effect to the constitutional protections pertaining to senior water rights. . . ." *Id.* at 870, 154 P.3d at 441. The district court held that "under these circumstances, no burden equates to impermissible burden shifting." *Id.* at 873, 154 P.3d at 444.

On appeal, the Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards based on the application of principles unique to facial challenges. Integral to the Supreme Court's determination was the recognition that:

> CM Rule 20.02 provides that: '[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.' 'Idaho law' as defined by CM Rule 10.12 means '[T]he constitution, statutes, administrative rules and case law of Idaho.' Thus, the Rules incorporate by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules.'

Id. at 873, 154 P.3d at 444. Accordingly, even though the CMR do not expressly address the burdens and presumptions the Director could still apply the CMR in a constitutional manner by including the constitutional burdens and presumptions. The Court then held that "**the Rules do not permit or direct the shifting of the burden of proof . . . [r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules.**" *Id.* at 874, 154 P.3d at 445 (emphasis added). Further:

> **The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has.** . . . While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, **the burden is not on the senior water rights holder to re-prove an adjudicated right. 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. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.** The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. **Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.**

Id. at 877-78, 154 P.3d at 448-49 (emphasis added).

3. The Significance of a Licensed or Decreed Water Right.

In applying the factors as set forth in CMR Rule 42, the Director concluded that despite a decreed rate of diversion of 0.88 miner's inches per acre, the minimum rate of diversion per acre that would satisfy A & B's irrigation requirements was 0.75 miner's inches. The Director concluded sufficient water supply was available to provide the 0.75 miner's inches and denied A & B's delivery call. The issue arises as a result of the variance between the quantity decreed for the water right and the quantity the Director determined was actually needed to accomplish the decreed purpose of use, or put differently, the quantity that could be put to beneficial use.

As part of Idaho's licensure statutes the permit holder is required to make proof of beneficial use and the Department is required to examine such use. I.C. § 42-219. Idaho Code § 42-219 provides:

> [U]pon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law

> has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall . . . state . . . the purpose for which such water is used, the quantity of water which may be used, ***which in no case shall be an amount in excess of the amount that has been beneficially applied.***

Id. (emphasis added). Idaho Code § 42-220 provides that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . . ." Further, "neither such licensee nor anyone claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed . . . ." I.C. § 42-220.

Idaho's adjudication statutes require the Director to evaluate the extent and nature of each water right for which a claim was filed based on state law. I.C. § 42-1410. The Department's role in the adjudication "is that of an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported." Further, [t]he director shall make recommendations as to the extent of beneficial use and administration of each water right under state law. . . . I.C. § 41-1401B. Idaho Code § 42-1402 provides: "The right confirmed by such decree . . . shall describe the land to which such water shall become appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed . . . ." Idaho Code § 42-1411 requires the Director to prepare and file a director's report which among other things determines the quantity of water used. The statute further provides that "[e]ach claimant of a water right has the ultimate burden of persuasion for each element of the water right." Further, that because the "director's report is prima facie evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report." I.C. § 42-1411(5). Finally, Idaho Code § 42-1420 provides "the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system." I.C. § 42-1420.

Accordingly, both Idaho's licensure and adjudication statutory schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. **In sum, the quantity specified in a decree of an adjudicated water right is a judicial determination of beneficial use consistent with the purpose of use for the water right.**

4. The License or Decree However, is not Conclusive as to the Quantity Put to Beneficial Use Due to Post-Decree Factors.

Although a license or decree among other things includes a determination of beneficial use for a water right, it is not conclusive that the water user is actually putting the full quantity to beneficial use. In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court acknowledged in the context of the SRBA that the Director was not obligated to accept a prior decree as conclusive proof of a water right because water rights can be lost or reduced based on evidence that the water right has been forfeited. *Id.* at 741, 947 P.2d at 414. The Supreme Court acknowledged this same point in *AFRD#2* noting that there may be post-adjudication factors relevant to the determination of how much water is actually needed. *AFRD#2* at 878, 154 P.3d at 449.

Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.[11] Year to year variations in water

[11] Also, the rate of diversion for an irrigation water right sets a maximum rate of diversion to satisfy the peak water demand for the most water intensive crop grown in the region. In the event the senior is irrigating a less water intensive crop, the maximum rate of diversion may not be required. However, this limitation is less significant in the administration of ground water and tempered by the fact that any relief

requirements also result from the types of crops that may be planted. The Idaho Legislature specifically acknowledged water users could reduce water requirements through the implementation of efficiencies and authorized the ability to expand irrigated acreage so long as the rate of diversion was not increased. *See* I.C. § 42-1426.

In this case, the Director determined that A & B successfully implemented a number of measures that have reduced the amount of water required to irrigate the 62,604.3 acres: including the conversion of 1440 acres from ground to surface water irrigation; reduction of conveyance losses from approximately 8 percent to 3 percent; conversion of 96 percent of the irrigation systems to sprinkler; and the re-use of drain water. R. 1148. It should therefore come as no surprise that a water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed. As such, the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season.

5. Waste Results from the Failure to Put the Full Diverted Quantity to Beneficial Use.

If circumstances do not require the full amount of the decreed quantity to accomplish the purpose of use but the senior nonetheless continues to divert the decreed quantity, the issue is one of waste. The wasting of water is not only contrary to Idaho law but it is a recognized defense to a delivery call. In *Martiny v. Wells*, 91 Idaho 215, 218-19, 419 P.2d 470 (1966), the Idaho Supreme Court held:

> Wasting of irrigation water is disapproved by the constitution and laws of this state. As we said in *Mountain Home Irrigation District v. Duffy*, supra, ***it is the duty of a prior appropriator of water to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof.***

Id. (emphasis added). Simply put, a water user has no right to waste water. If more water is being diverted than can be put to beneficial use, the result is waste.

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from regulation of junior wells is typically not instantaneous. Therefore, even though a senior may not be irrigating the most water intensive crop in the current irrigation season administration needs to take into account the ability of a senior to rotate to a more water intensive crop in the next irrigation season.

Consequently, Idaho law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use.

This exact issue was addressed in context of the SRBA. The SRBA Court addressed the issue of whether or not partial decrees should include a remark qualifying that the amount of water that could be sought incident to a delivery call was limited to the quantity that could be beneficially used as opposed to the quantity actually stated in the decree. The Hon. R. Barry Wood presiding, expressly rejected the necessity of such a remark based on the following reasoning:

> Implicit in the quantity element in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: 'Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed'.' State v. Hagerman Water Right Owners, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997); quoting I.C. § 42-1402. However, **the quantity element in a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time** (i.e. there is no right to divert water that will be wasted). A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 415, 958 P.2d 568 (1997). **The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short result in a loss or reduction to the water right.** State v. Hagerman Water Right Owners, at 730, 947 P.2d at 403.
>
> Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In State v. Hagerman Water Rights Owners, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:
>
> > A water user is not entitled to waste water...It follows that a water right holder cannot avoid a partial forfeiture by wasting portion of his or her water right that cannot be put

> to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, forfeiture has taken place.
>
> Id. (citations omitted).
>
> NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

American Falls Reservoir District # 2 v. IDWR, Gooding Dist. Court Case No. CV-2005-0000600, page 95 (June 2, 2006) (Hon. R. Barry Wood) (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)) (emphasis in original). The significance of the decision is the recognition that the partial decree is a determination of beneficial use. The inclusion of the remark would require the senior to "prove up" the extent of beneficial use every time administration is sought. The decision did not reject the argument that the senior has no right to call for water that is not or will not be put to beneficial use. However, implicit in the rejection of the remark is the recognition that the senior's failure to put the decreed quantity to beneficial use is a defense to a delivery call. The SRBA Court rejected the inclusion of an undefined limitation on the decreed quantity requiring the senior making the call to re-establish the extent of beneficial use.

In sum, if a water user is not making beneficial use of the water diverted, irrespective of the quantity decreed, the result is waste. Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use. Therefore a decree or license does not insulate a senior appropriator from an allegation of waste or the failure to put the decreed quantity to beneficial use. Waste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call.

6. The Burden to Establish Waste as a Defense is on the Junior Appropriator and Must be Shown by Clear and Convincing Evidence.

Idaho law provides that the burden of establishing waste is on the junior appropriator. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). Idaho law has also consistently required that incident to a delivery call the burden is on the junior to establish by clear and convincing evidence that the diverting of water by the junior will not injure the right of the senior appropriator on the same source. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904). Accordingly whether the junior's defense is that there is no injury because the diversions of the junior do not physically interfere with the right of the senior (i.e futile call) or that the senior is not injured because the senior is putting less than the decreed quantity of water to beneficial use or wasting water, that burden rests on the junior. Clear and convincing evidence refers to a degree of proof greater than a mere preponderance of the evidence or evidence indicating that the thing to be proved is highly probable or reasonably certain. *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008); *Idaho State Bar v. Top*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996).

A determination that a portion of a decreed water right is being wasted (or is not being put to beneficial use) is a diminishment of a property right. The decreed quantity is reduced by the amount determined not being put to beneficial use. Whether the senior is deprived of water for part of an irrigation season, an entire irrigation season or the quantity element is permanently reduced through a finding of partial forfeiture, the senior's right to divert water up to the decreed quantity is nonetheless diminished.[12] The

[12] The counter-argument raised by Respondents is that there is not a diminishment in the property right because the senior's property right is limited to the amount that can be put to beneficial use. While that may be true, the argument overlooks the fact that the decree is a determination of the beneficial use subject to various defenses. The burden is on the junior to show by clear and convincing evidence that less than the decreed amount is being put beneficial use. To conclude otherwise accords no presumptive weight to the decree. This is precisely the reason why the SRBA Court rejected including a remark expressly limiting quantity to that put to beneficial use. The inclusion of such a remark would have resulted in an unlawful shifting of the burden of proof by making the senior re-prove quantity in conjunction with a delivery call. Simply put, the senior is entitled to the quantity reflected in the decree unless it can be shown by clear and convincing evidence that the full quantity is not or would not be put to beneficial use. The process gives proper presumptive weight to the decree and at the same time takes into account that the decree is not conclusive. However, the standard of proof (clear and convincing evidence) required for establishing that less than the decreed quantity is being put to beneficial use is much higher than the standard of proof (preponderance) initially required in the adjudication and distinguishes what is truly a defense to the right from a re-adjudication of the right.

Idaho Supreme Court has consistently held that actions resulting in the diminishment of a water right must be proved by clear and convincing evidence. Forfeiture or abandonment of a water right must be established by a standard of clear and convincing evidence. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984); *Jenkins v. IDWR*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). The same is true with respect to establishing prescriptive title to the water right of another. *Gilbert* at 739, 552 P.2d at 1224 (citing *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945)). Similarly, a futile call defense requires a showing of clear and convincing evidence that diversions by a junior appropriator will not injure the rights of a senior appropriator.

The application of the clear and convincing standard of proof only makes sense from a common sense perspective. If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. In making a determination of whether or not to regulate juniors, the Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use. If the Director regulates juniors to satisfy the senior's decreed quantity there is no risk of injury to the senior. However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director's determination is incorrect. There is no remedy for the senior if the Director's determination turns out to be in error and the senior comes up short of water during the irrigation season. Any burden of this uncertainty should be borne by the junior. The only way to eliminate risk to the senior while at the same time give effect to full economic development and optimum use of the water resources is to require a high degree of certainty supporting the Director's determination. Put differently, if the Director has a high degree of certainty that the senior is exceeding beneficial use requirements then there is no risk of injury to the senior. However, if the Director's determination is only based on a finding "more probable than not," the senior's right is put at risk and the junior is essentially accorded the benefit of that uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

7. Reconciling the Alleged Disparity Between the Decreed Quantity and the Quantity of Water Actually Required to Satisfy the Purpose of Use Consistent with Idaho Law and Without Re-Adjudicating the Quantity Element.

In recognizing that a difference can exist between the decreed quantity and the quantity put to beneficial use, the question becomes how the Director can give proper effect to the decree and still administer to the quantity put to beneficial use without resulting in a *de facto* re-adjudication of the water right? The answer lies in the application of the constitutionally engrained presumptions and burdens of proof.

The following example illustrates the conundrum that occurs when proper effect is not given to the decree. Assume for the sake of discussion that A & B claimed the 36-2080 right in the SRBA with a diversion rate of 0.88 miner's inches per acre. The Director investigated the claim and recommended a diversion rate of 0.75 miner's inches. A & B filed an objection to the recommendation. IGWA, the City of Pocatello and Fremont Madison *et al.* file responses and a trial is held. At trial A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondents present conflicting evidence including expert testimony that 0.75 miner's inches or less is sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Ultimately, the SRBA Court finds that A & B established a quantity of 0.88 miner's inches by a preponderance of the evidence and issues a partial decree for that quantity. Six months later A & B is unable to pump the full decreed quantity and seeks administration from the Department. The Director performs a "material injury" analysis and concludes that 0.75 miner's inches is sufficient to satisfy A & B's purposes of use. A & B disagrees with the determination and requests a hearing. At the hearing A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondent's present conflicting evidence, including the expert testimony that 0.75 miner's inches or less would be sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Déjà Vu? Ultimately the Director concludes by a preponderance of the evidence that 0.75 miner's inch per acre is sufficient. The example illustrates that under

the Director's application of the CMR the senior can be forced to re-litigate the exact same issue when proving up the elements of the water right and when subsequently seeking administration for the same right.

In this case the Hearing Officer's recommendation acknowledged that "the analysis of experts varies dramatically" on the amount of water needed to meet the minimum requirements for the crops. "Farmers with comparable experience differ on the amount needed to meet minimum requirements. Experts with comparable education have similar disagreements." R. 3109. The Hearing Officer ultimately concluded "the Director's determination is supported by substantial evidence." R. 3110. No reference was made to the evidentiary standard applied.

In *AFRD #2* the Supreme Court made it clear that the CMR should not be read to require the senior to re-prove or re-adjudicate a decreed right but also acknowledged that there may be post-adjudication factors relevant to the determination of how much water is actually needed. At the district court level in *AFRD#2* Judge Wood opined that "a decreed water right is far more than a right to have another lawsuit only this time with the Director." *American Falls Reservoir District # 2 v. IDWR*, at 93. Absent the application of an evidentiary standard of clear and convincing evidence this Court has difficulty distinguishing how this is not a re-adjudication of A & B's right. Issues pertaining to necessary quantity, beneficial use, evapotranspiration of crops, waste and the like should have been identified in Director's recommendation and ultimately litigated in the context of the SRBA proceedings. The Director reasons that it is not a re-adjudication of A & B's right because A & B still has the right to divert up to the full 0.88 miner's inches when water is available but that the Director will only consider the administration of junior's based on the determination of actual need of the senior, which is the 0.75 miner's inch per acre. This Court fails to see the distinction. In a prior appropriation system a water right becomes meaningless if not honored in times of shortage. The call is the means by which effect is given to the priority date. The priority date is the essence of a water right in a prior appropriation system.

The problem arises with the initial determination of "material injury." *In AFRD #2* the Supreme Court held once the initial determination is made that "material injury" is occurring or will occur, the junior then bears the burden of proving that the call would be

futile or to challenge, in some other constitutionally permissible way, the senior's call. *AFRD #2*, 143 Idaho at 878, 154 P.3d at 449. However, the Director's "threshold" material injury determination includes what would otherwise be a defense to a delivery call. The problem with this approach is that it circumvents the constitutionally inculcated presumptions and burdens of proof.

The CMR distinguish between "material injury" and "using a water right efficiently without waste." CMR Rule 010.14 defines "material injury" as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." CMR Rule 010.25 defines "water right" as the legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree, permit or license . . . ." Prior to regulating junior rights in an organized water district, CMR Rule 040.03 requires the Director to consider whether the senior is suffering "material injury" ***and*** "is diverting and using water efficiently and without waste." The factors in Rule 042.01 also provides "[f]actors the Director may consider in determining whether holders of water rights are suffering material injury ***and*** using water efficiently without waste include. . . ." (emphasis added). Although the CMR address the two concepts in conjunction with each other, the Supreme Court held the rules cannot be read as a burden shifting provision to require the senior to re-prove or re-adjudicate his right. *AFRD#2* 143 Idaho at 877-78, 154 P.3d at 448-49.

Therefore, this Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence. Accordingly, this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. The case is remanded for this purpose.

D. The Director Did Not Err by Failing to Separately Consider Depletions to Individual Points of Diversion For Purposes of Determining Material Injury to the 36-2080 Right.

A & B argues the Director erred in failing to determine material injury based on depletions to the 177 individual points of diversion as opposed to determining injury

based on depletions to the cumulative decreed quantity. A & B argues further that the Director erred by requiring that A & B take reasonable steps to interconnect individual wells or systems within the Unit prior to seeking regulation of junior pumpers. The Hearing Officer concluded that it was proper to consider the system as a whole but that consideration must be given to account for the fact that water from one well is not accessible to the entire acreage:

> Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A & B's obligation to show interconnection of the entire system to defend its water rights and establish material injury. However, it is equally clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, there is an obligation of A & B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from juniors. A & B has some interconnection within the system to utilize the water it can pump. But the record does not establish whether further interconnection is either financially or technically practical.

R. 3096. This Court agrees that the system must be considered as a whole based on the way in which the water right is decreed. Further, that the extent to which the Director may require A & B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A & B must make reasonable efforts to maximize interconnection of the system and placed the burden on A & B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

The way in which the 36-2080 water right was licensed and ultimately decreed in the SRBA is not typical. The partial decree does not define or limit the place of use for any of the 177 points of diversion within the boundaries of the Unit. Instead, the decree lists the 177 different points of diversion and describes the place of use as "the boundary of A & B Irrigation District service area pursuant to Section 43-323, Idaho Code." *See* Exh. 139. The legal effect is that water diverted from any one of the points of diversion is appurtenant to and therefore can be used on any and all of the 62,604.3 acres within the defined place of use. The license or partial decree also does not describe or assign a rate of diversion or volumetric limitation to any of the individual points of diversion. Instead,

the right is licensed and decreed at the cumulative diversion rate of 1,100 cfs with a 250,417.20 AFY limitation for the entire water right. The legal effect is that up to the full rate of diversion can be diverted from any combination of the 177 points of diversion up to the AFY volumetric limitation and applied to any of the lands within the Unit.

Structuring the right in this manner was not due to oversight. The USBOR applied for the right to be licensed as such in order to provide for the greatest amount of flexibility in distributing water throughout the project. R. 3093-94. In a response from the USBOR to the Department regarding the permit application, the USBOR states:

> We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land area within the project served by each of the specific wells on the list.

Exh. 157D.

Although decreed as such, the Unit presently does not consist of a system of interconnected wells and due to the geographic terrain, water cannot presently readily be distributed throughout the entire project from any particular well or system. Nonetheless, the right is essentially decreed as having alternative points of diversion for the 1100 cfs for the entire 62,604.3 acres. Therefore, because no rate of diversion or volumetric limitation is decreed to a particular point of diversion, A & B has no basis on which to seek regulation of juniors in order to divert a particular rate of diversion from a particular point of diversion, provided a sufficient quantity can be diverted through the various alternative points of diversion that are appurtenant to the same lands. Simply put, based on the way in which the right is decreed A & B does not get to dictate particular quantities that need to be diverted from particular points of diversion.

If A & B wishes to have its right administered on a more regionalized basis, it would be incumbent on A & B undergo a transfer proceeding to have particular points of diversion assigned to more discrete places of use within the Unit. The drawback would be that A & B may have to forgo the high degree of flexibility it currently holds with respect to the use of the water within the project. The current flexibility with respect to the use of the right results in uncertainty over the availability of water to subsequent appropriators because A & B is authorized under the right to divert up to its decreed

amount from any combination of its points of diversion at its discretion. However, A & B can't have it both ways. Flexibility has its benefits and burdens. The Director also has flexibility when it comes to responding to requests for regulation. Until such time as the right is defined with more particularity, the extent to which the Director can require interconnectedness is left to his discretion.

1. Issues with Respect to Enlargement Claims.

Another problem with seeking regulation of juniors to satisfy underperforming wells is that A & B has been allowed to establish enlargement claims pursuant to I.C. § 42-1426, based on areas of the project that produce water in excess of what is required in a particular area of the project. A & B irrigates approximately 2000 enlargement acres. The way in which the right is decreed creates an anomaly whereby A & B seeks regulation of juniors to satisfy underperforming points of diversion for the 36-2080 right while at the same time continues to irrigate enlargement acres from alternative points of diversion authorized under the same right. The indirect result is that the enlargement rights are protected under the September 9, 1948, priority date and the subordination provision that applies to all enlargement rights is circumvented.[13] Accordingly, prior to seeking regulation of pumpers junior to September 9, 1948, it would be incumbent on A & B to first apply the water servicing the enlargement acres on its original lands or alternatively to factor that quantity of water used in conjunction with the enlargement acres into the Director's material injury analysis in determining water shortages, if any, to the 36-2080 right. Thereafter, if there is insufficient water to satisfy the enlargement

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[13] The following subordination remark is included in all enlargement rights perfected pursuant to I.C. § 42-1426:

> This water right is subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to section 42-1426, Idaho Code, the earlier priority is the superior right.

The remark was included in decrees for enlargement rights following the Idaho Supreme Court's holding in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). Ironically the inclusion of the remark was challenged by A & B in the SRBA with respect to its enlargement claims stemming from the 36-2080 right. *In Re: SRBA Case No. 39576, Order on Challenge, (A & B) Irr. Dist.*, Subcase Nos. 36-2080 *et. al.* (April 25, 2003) (Hon. Roger S. Burdick). The inclusion of the remark was affirmed by the Idaho Supreme Court in *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist. et. al.*, 141 Idaho 746, 118 P.3d 78 (2005).

rights A & B can seek administration in accordance with the priority limitations assigned to the enlargement acres.

Therefore, based on the way in which the right is structured and in giving proper legal effect to the decree, this Court holds the Director did not err in considering the project as a whole for purposes of determining material injury.

2. The Director Erred in Applying a "Failure of the Project Standard."

A & B argues that the Hearing Officer erred by applying a failure of the project standard. The Hearing Officer concluded:

> There is evidence that in 2007 there was 5000 acres in Unit B that were being served by well systems that delivered less than 0.75 miner's inches per acre. The limited amount of this acreage is a result of costly rectification efforts. . . . The wells that are short in the production of water that are unlikely to be susceptible to successful remediation are limited to the southern portion of the project. They do not serve a sufficient portion of the project to deem their failure a failure of the project as a whole considering the terms of the license and partial decrees.

R. 3097. A & B also notes that underperforming wells are not just located in the southern part the Unit but rather are located throughout the project. *See* Exh. 200N & 216.

Whether or not the Hearing Officer actually applied or relied on a "failure of the project standard" or was making a finding of fact is not entirely clear.[14] However, A & B is correct in that there is not a recognized legal basis for applying a failure of the project standard - even based on the way in which A & B's right is decreed. The fact that an injury may be arguably be so slight as to represent only a small portion of the overall project is irrelevant. Injury to a water right is still injury. However, as previously discussed, the Director must evaluate material injury from the perspective that A & B has

[14] The *Hearing Officer's Response to A & B's Petition for Clarification* states:

> In context the finding that there has not been a 'total project failure' is a finding of fact, not a measure of material injury. Material injury may occur before a total project failure. It is a finding made because of the extensive evidence offered concerning the nature and operation of the project, not as a threshold requirement before curtailment or mitigation can be sought.

R. 3262.

the obligation to move water around within the Unit as all points of diversion are appurtenant to all lands within the Unit. If performing wells are capable of producing sufficient water to compensate for underperforming areas then injury may not exist. Alternatively, if performing wells are incapable of producing additional water needed to compensate for underperforming wells then injury may exist. This Court recognizes, however, that the regulation of juniors to increase performance of underperforming wells located in regions of poor transmissivity may be subject to a futile call defense.[15]

In sum, aside from there being no legally recognized *de minimus* threshold exclusion for finding injury, based on this Court's analysis there is no reason to engage in a "failure of the project" standard, as established legal principles governing water law adequately address the issue.

E. The Director Did Not Err in Failing to Designate All or a Portion of the ESPA as a Ground Water Management Area (GWMA) Pursuant to Idaho Code § 42-231.

A & B next argues that the Director erred by failing to designate a GWMA for either all or a portion of the ESPA. The Director concluded that the designation of a GWMA was not necessary because the water rights are now included in an organized water district. The Director reasoned that the designation of a GWMA would not confer any additional management function that is not already available in an organized water district. This Court agrees.

The decision of whether or not to designate a GWMA is discretionary with the Director. Idaho Code § 42-231 sets forth the duties of the Director with respect to the management of ground water:

> It shall likewise be the duty of the [Director] to control the appropriation and use of the ground water of this state as in this [GWA] provided and to

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[15] CMR 010.08 defines "Futile Call" as:

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

IDAPA 37.03.11.010.08.

do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this [GWA].

Idaho Code § 42-237a defines the power of the Director with respect to carrying out the provisions of the GWA:

> In the administration and enforcement of this act and in effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources *in his sole discretion*, is empowered:
> . . .
> g. To supervise and control the exercise and administration of all rights to the use of ground waters *and in the exercise of this discretionary power he may* initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. . . .

(emphasis added). Idaho Code § 42-233a provides:

> When a 'critical ground water area'[16] is designated by the [Director], or at anytime thereafter during the existence of the designation, the director *may approve a ground water management plan for the area.* The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and any other hydraulically connected sources of water.

(emphasis added).

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[16] Idaho Code § 42-233a defines "critical ground water area" as:

> [A]ny ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

Idaho Code § 42-233b sets forth the conditions for the designation of a GWMA.[17] In this case, the Director determined factually that despite declines, the aquifer was neither being mined nor that reasonable pumping levels had been exceeded. Further that a moratorium on new permit applications was in effect. Hence, the aquifer was not approaching critical ground water area conditions thereby triggering the need for the designation of a GWMA. However, even if the Director concluded aquifer levels met the criteria of a critical ground water area, the designation of a GWMA is still not mandatory. The designation of a GWMA is one of the tools or mechanisms available to the Director for carrying out his duty to manage the aquifer as required by I.C. § 42-231.

Another mechanism available is the creation of an organized water district pursuant to I.C. § 42-602.[18] Unlike the designation of a GWMA, the Director is required

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[17] Idaho Code § 42-233b provides as follows:

> **Ground water management area.** – 'Ground water management area' is defined as any ground water basin or designated part thereof which the director of the department of water resources *has determined may be approaching the conditions of a critical ground water area.*
>
> When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director *may* approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.
>
> Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.
>
> The director *may* require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.
>
> *The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. . . .*

(emphasis added).

[18] Idaho Code § 42-602 *et seq.* sets forth the requirements for the creation and distribution of water in water districts as follows:

> **Director of the department of water resources to supervise water distribution within water districts.** – The director of the department of water resources shall have direction

to create water districts. I.C. § 42-604.[19] However, the creation of water districts only applies with respect to adjudicated water rights.[20] I.C. § 42-604. Because a GWMA designation does not have the same restriction, the designation of a GWMA has been used as a mechanism prior to water rights being decreed in the SRBA and included in the boundaries of an organized water district. However, the position of the Director is that after an organized water district is created as required then a GWMA is no longer necessary:

> Following the creation of water districts in accordance with chapter 6, title 42, Idaho Code, the Director rescinded, in whole or in part, his orders that

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> 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.*

(emphasis added). Idaho Code § 42-607 governs the distribution of water within a water district:

> **Distribution of water.** – It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom *according to the prior rights of each respectively* . . . .

(emphasis added).

[19] Idaho Code § 42-604 requires the creation of water districts:

> **Creation of water districts.** – The director of the department of water resources *shall divide the state into water districts* in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream of water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: *provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.*

(emphasis added).

[20] Prior to entry of the final decree in the SRBA the Department has sought interim administration from the SRBA Court, pursuant to I.C. § 42-1417, prior to creating water districts.

> created the American Falls and Thousand Springs Ground Water Management Areas. The Director determined that preserving the ground water management areas was no longer necessary to administer water rights for the protection of senior surface and ground water rights because administration of such rights is now accomplished through the operation of water districts.

R.1110.

Water District Nos. 100, 110, 120, 130 and 140 were either established or boundaries revised between February 19, 2002, and December 20, 2006, in order to provide for the administration of water rights diverting from the ESPA. There has also been in effect since 1992 a moratorium on permit applications for new water rights developed from the ESPA.

At the hearing Tim Luke from the Department testified as to the administrative difference between a GWMA and an organized water district:

> **Q.** No effective difference between what you can do administratively in a water district and ground water management area?
>
> **A.** I think anything that you do in a ground water management area can also be done in a water district.
>
> **Q.** Greater flexibility of the water district.
>
> **A.** I think so.

Tr. pp. 1324-25.

In regards to flexibility, the CMR expressly distinguish between delivery calls made within an organized water district (CMR 040), from those made in a ground water management area (CMR 041). The process for responding to a delivery call in an organized water district requires less procedural components prior to the regulation of junior water users.

The Hearing Officer ultimately concluded that "[t]he benefit of designating the ESPA as a [GWMA] is not apparent. There may be no harm in doing so, but it would appear to add an administrative overlay without identifiable benefits." R. 3116. This Court agrees.

For the above-stated reasons, the Director did not abuse discretion by failing to designate the ESPA as a GWMA, and his decision is therefore affirmed.

F. The Director's *Final Order* Complies with Idaho Code § 67-5248(1).

Idaho Code § 67-5248(1)(a) provides in relevant part that an order must be in writing and shall include "a reasoned statement in support of the decision." It further provides that findings of fact, if set forth in statutory language, "shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings." *Id.* A & B argues that certain conclusions set forth in the *Final Order* do not comply with Idaho Code § 67-5248(1)(a) on the grounds that they are not supported by reasoned statements. At issue is the Director's conclusion that "[t]he record does not support the relief requested by A & B in its Exceptions Brief," and his conclusion that the Hearing Officer's interpretations of "the State Constitution, Idaho Statutes and the Conjunctive Management Rules" in previous delivery call proceedings will not be incorporated into the *Final Order*. R. at 3322.

With respect to the conclusion that "[t]he record does not support the relief requested by A & B in its Exceptions Brief," A & B reads this statement in isolation. Such a reading is too narrow. The *Final Order* expressly incorporates "the Findings of Fact entered previously by the Director and recommendations of the Hearing Officer," as well as the "Conclusions of Law set forth in the Director's orders in the above-captioned matter" unless expressly modified by the *Final Order*. R. at 3321 & 3322.

Aside from a couple newly raised procedural issues which were specifically addressed in the *Final Order*,[21] A & B's Exceptions Brief asserts the same substantive arguments it set forth at hearing before the Hearing Officer, in its *Petition for Reconsideration*, and in its *Petition for Clarification*. These arguments have been fully addressed, and reasoned statements supporting the resulting conclusions set forth, by the Director in his *January 29, Order*, as well as by the Hearing Examiner in his *Recommended Order*, his *Order on Clarification* and his *Order on Reconsideration*. Indeed, A & B does not identify any *specific* exception set forth in its Exceptions Brief that it alleges has not been addressed in this matter or that the resulting conclusion has

not been supported with a reasoned statement. The Director is not required to engage in the needless duplication of established findings where, as here, he incorporates by reference and accepts findings of fact and conclusions of law previously entered in the same matter.

Likewise, the conclusion that the Hearing Officer's interpretations of "the State Constitution, Idaho Statutes and the Conjunctive Management Rules" in previous delivery call proceedings will not be incorporated into the *Final Order* complies with Idaho Code § 67-5248(1)(a). The Director supported his conclusion with reasoned statements, including but not limited to, that the records developed in the other delivery call proceedings are distinct from the record developed in this proceeding.

Accordingly, the Director did not err by failing to issue a final order in compliance with I.C. § 67-5248.

VI.
CONCLUSION AND INSTRUCTIONS ON REMAND

In conclusion, this Court holds and provides the following instructions on remand:

1. The decision of the Director that the 1951 GWA applies to the administration of pre-enactment water rights is **affirmed**.

2. The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

3. The decision of the Director that A & B has not been required to exceed reasonable pumping levels is **affirmed.** This is based on the finding of no material injury

[21] These procedural issues revolve around the Director's ability to shorten time to file exceptions.

3. The decision of the Director that A & B has not been required to exceed reasonable pumping levels is **affirmed.** This is based on the finding of no material injury at existing pumping levels. On remand, following the application of the appropriate evidentiary standard a finding of material injury may require that the Director reevaluate this determination.

4. The decision of the Director to evaluate material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion is **affirmed.** The decision of the Director to require A & B to take reasonable steps to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability is **affirmed.**

5. The decision of the Director not to designate the ESPA as a GWMA is **affirmed.**

6. The Director did not fail to issue a final order in compliance with I.C. § 67-5248.

IT IS SO ORDERED

Dated May 4, 2010

ERIC J. WILDMAN
Presiding Judge of the Snake River Basin Adjudication