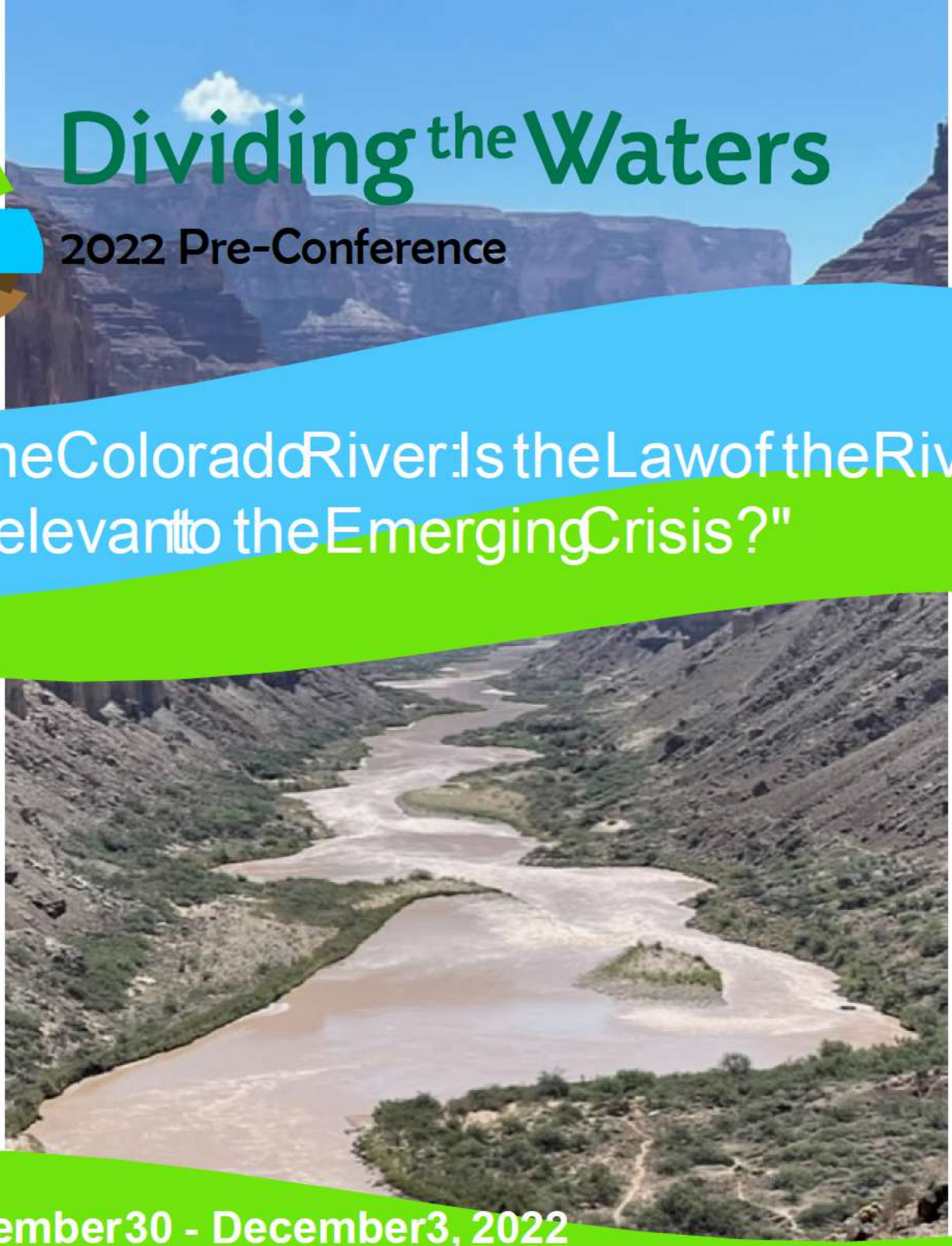
Dividing the Waters

2022 Pre-Conference

The Colorado River: Is the Law of the River Relevant to the Emerging Crisis?"



November 30 - December 3, 2022
Santa Fe, New Mexico



Dividing the Waters

NJC THE NATIONAL JUDICIAL COLLEGE

DIVIDING THE WATERS PRE-CONFERENCE WORKSHOP
SANTA FE 2022
AGENDA

9 – 9:15 Welcome and introductions (presenters and attendees)

9:15 – 10:30 Prior appropriation basics

- Origins of the doctrine
- Beneficial use is the basis, measure and limit of a right
- Quantification
- Appurtenance
- Diversion
- Priority
- Use It or Lose It

10:30 – 10:45 Break

10:45 – noon Water codes based on prior appropriation principles

- State water agencies
- Permitting for new uses (incl. standards for permitting decisions)
- Water right administration
- Transfers (incl. the injury rule)
- Municipal water supply considerations
- Instream flow protections

Noon – 12:30 Lunch (on-site, probably buffet line or boxes)

12:30 – 1:40 Groundwater issues

- Groundwater resource basics
- Evolution of groundwater use and groundwater laws
- Differing legal regimes for groundwater allocation and use
- Prior appropriation for groundwater – less complete protection for seniors
- Addressing groundwater overdraft/mining
- Local vs. state control of groundwater management
- Conjunctive management challenges – technical and legal dimensions
-

1:40 – 1:55 Break

1:55 – 2:30 Federal dimensions

- Reserved rights for tribal and federal lands reserved for a specific purpose
- Reclamation project basics (authorizations, water rights, contracts)
- Interstate allocation (compacts and their enforcement)

Divider 1

Reed Benson

Don and Mabel Dickason Endowed Chair in Law and
Professor of Law, School of Law, University of New Mexico





DIVIDING THE WATERS: WATER LAW WORKSHOP 2022

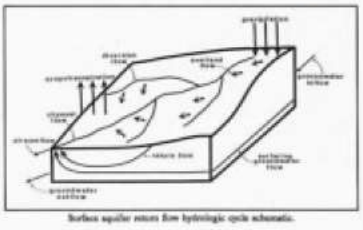
Overview of the workshop

Welcome and introductions
Prior appropriation basics
Water codes based on prior appropriation
Lunch break – noon to 12:30
Groundwater issues
Federal dimensions of water law
General adjudications and complex cases

Why prior appropriation?

The early West chose appropriation in the 1800s

- Major departure from riparian rights doctrine
- Uses required diverting, consuming water



Two aspects of "Beneficial Use"

'**Beneficial use is the basis, the measure, & the limit**' of water right in appropriation states

Prior appropriation's bedrock requirement is that water be applied to beneficial use. This means:

1. **Purpose** or type of use must be recognized as valuable: irrigation, domestic, industry, etc.
2. **Quantity** of use must be reasonably necessary to fulfill the purpose of the right, not wasteful

A water right is established for a specific beneficial use, e.g. irrigation of a particular 100 acres

More prior appropriation basics

Diversion: withdrawing water from the source

- necessary for most uses, but is it mandatory?

Appurtenance: rights are tied to a specific parcel

- unless place of use is changed *(more later on this)*

Priority: oldest rights take priority if water is short

- date is based on earliest actions to appropriate

Use It or Lose It: nonuse of water puts right at risk

- years of continuous nonuse can result in loss

Break for caffeine etc.

Appropriation-based water codes

Western states adopted water codes in the late 19th and early 20th centuries, making water law statutory

- statutes mostly codified appropriation principles

Basic points about western water codes:

- most require permits for new uses
- adjudications confirm/quantify pre-code rights
- state water agencies given key powers and duties
  + incl. administering water rights by priority

Statutory water right decisions

Permitting for new uses:

- key standards: water availability, harm to others

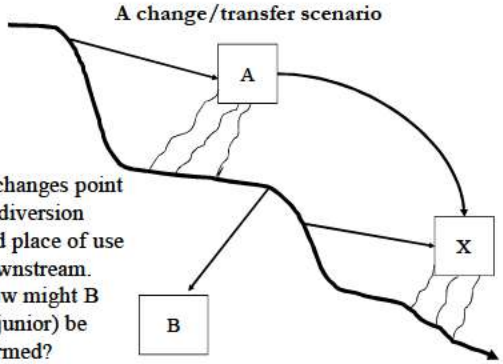
Transfers (changes) to existing rights:

- type of use, place of use, and/or diversion point
- key standard: injury to existing rights

Either usually involves administrative process

- notice, opportunity to object
- hearing, esp. on disputed factual/technical issues
- approval often includes key terms & conditions

A change/transfer scenario



A changes point of diversion and place of use downstream. How might B (a junior) be harmed?

Revising appropriation principles

Forfeiture: right lost if not used for set # of years
- no intent needed, but defenses are available

Public interest criteria, esp. for new permits
- often vaguely defined; state agency must decide

Municipal water rights may get special treatment
- in recognition of need to plan for future growth

Provisions for 'instream' uses; no diversion needed
- state agency acts to protect water for public uses

Lunch!

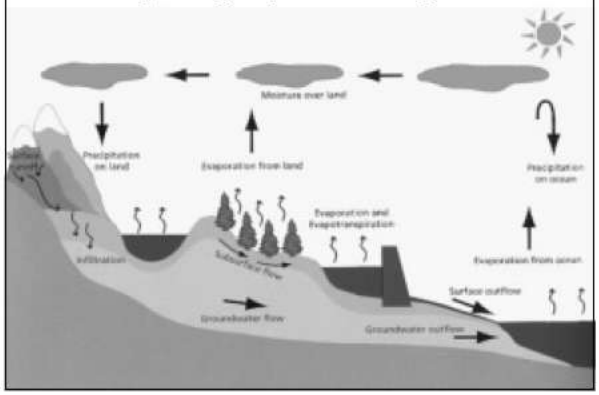
Groundwater law is a bit different

Groundwater was long considered unknowable: 'so secret, occult and concealed' that any effort to craft legal rules for its use would be infeasible

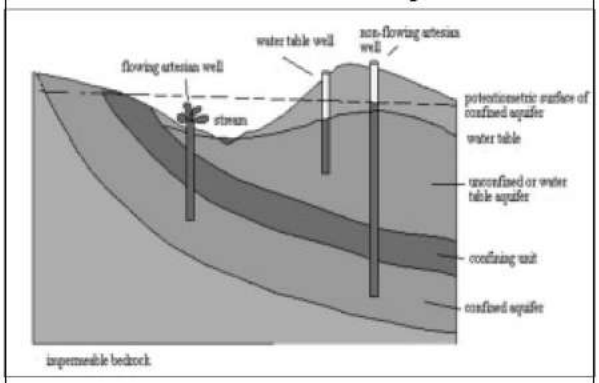
Early groundwater law reflected this ignorance:
- rule of capture: overlying owner's use unlimited
- "underground streams" vs. "percolating" water

Today's law developed mostly in mid-late 1900s
- as understanding and use of groundwater grew

The hydrologic cycle includes groundwater



Confined and unconfined aquifers

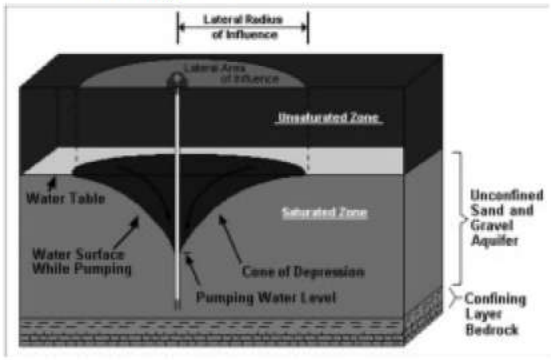


4 basic groundwater law systems

1. Absolute Ownership (capture)—unlimited use by any overlying owner—some eastern states & TX
2. 'American' Reasonable Use—'reasonable' use on overlying lands (AZ, many east/midwest states)
3. Correlative Rights (equitable sharing of water among overlying owners—mostly California)
4. Prior Appropriation: first in time, first in right, subject to limits (most western states)

Note: legal treatment of groundwater may vary within a state

"Cone of depression"



Groundwater statutes

The fact pattern shows some key points about groundwater statutes based on prior appropriation

- State agency has important duties, esp. in identifying technical characteristics of aquifers
- Senior users are not fully protected despite their priority; law seeks to maintain access to aquifer
- Pumping is limited for purposes of ensuring long-term viability of aquifer as water supply
- Limits are applied at local/aquifer scale

Groundwater: some special issues

Some groundwater uses get special legal treatment

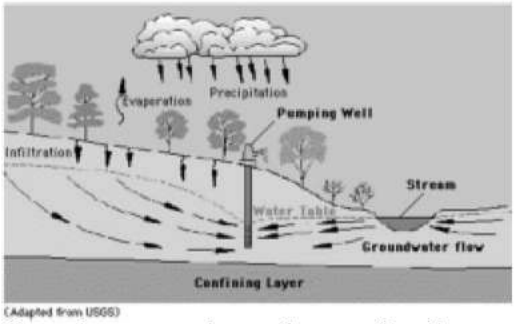
- *e.g.,* domestic wells may be more-or-less exempt

Control/management of groundwater tends to be more localized; often shared between state & local

- many states give special districts much authority

Pumping often depletes groundwater over time

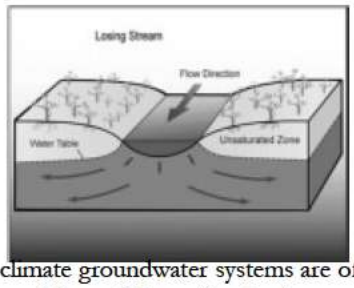
- where pumping > recharge, aquifers are mined
- finite aquifers are used up over time; *how long?*



(Adapted from USGS)

Groundwater pumping can harm surface flow; diagram illustrates 2 ways that it can happen

Arid Systems and/or Mined Aquifers



Arid-climate groundwater systems are often recharged through loss of water from a stream (or a ditch) to the groundwater system.

Conjunctive management

Many states have had to grapple with regulating groundwater use to address surface flow impacts

It's challenging, partly due to technical questions

- e.g., where, when, and how much does pumping affect flows in surface streams?

Legal issues also tough, partly due to lagged effects

- esp. in states w/ 2 different water right regimes

Surface v. groundwater user conflicts are common

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Some key federal law principles

Most water law is state law, but federal law governs in several important areas of the field

The earliest federal interest in water was navigation

- but federal law applies beyond 'navigable' waters

Federal involvement in water grew thru 1900s

- water project development, incl. Federal Power Act licensing for non-federal hydropower
- environmental laws, incl. Clean Water Act, ESA

Water for tribal and federal lands

Unlike other water rights, "reserved" rights for tribal and federal lands are based on federal law

Winters v. US (1908) is the source of the doctrine

- found a treaty-based right for Indian reservation
- *AZ v. CA* (1963) extended it to federal lands

Priority = date of reservation for specific purpose

Quantified based on purpose(s) of the reservation

Today, most such claims are heard in state courts

Federal water projects

Federal agencies built hundreds of water projects throughout the 20th century for various purposes

Bureau of Reclamation: water supply is primary

Corps of Engineers: flood control is primary

Most projects individually authorized by Congress

- authorized purposes govern dam operations

Reclamation projects store and supply water in accordance with state water rights, contracts

Interstate water allocation

Federal law governs allocation of interstate waters

- basic principle is "equitable apportionment"

Interstate compacts govern many western rivers

- approved compact is both contract and statute
- each has its own regime for allocating water
- states must manage water to meet compact duty

Compact enforcement is typically thru SCOTUS

Divider 2

Fact Patterns





FACT PATTERN FOR PART I – BASIC PRIOR APPROPRIATION PRINCIPLES

These actions, consolidated for purpose of appeal, were brought by appellant in the Yavapai County Superior Court seeking a permanent injunction against appellees to enjoin the use of waters of the Verde River upon certain land situate in Yavapai County, and asking for determination with respect to whether or not valid and existing water rights were legally existing appurtenant to such land. In the basic actions, each of the parties filed motions for summary judgment and each motion submitted to the lower court upon an agreed statement of facts together with supporting memoranda and exhibits. The statement of facts agreed to by the parties is as follows:

1. That the defendants and their predecessors in interest have made valid appropriations of water from the Verde River for irrigation purposes upon a portion of the lands owned by them;

2. That prior to 1933 in the Kovacovich action and prior to 1950 in the Ward action, certain additional lands owned by the respective defendants were not used for farming purposes nor was irrigation water applied thereon;

3. That neither the defendants nor their predecessors in interest ever made application under the Arizona Water Code to appropriate water for these additional lands;

4. That during and after 1933 in the Kovacovich action and during 1950 in the Ward action, the defendants, respectively, undertook in addition the cultivation of approximately thirty-five (35) acres and forty (40) acres of land adjacent to the land upon which the parties already had a valid water appropriation by irrigating said lands with water from the Verde River; and

5. That because of water-saving practices, no more water was thus used by the defendants to irrigate all of their lands here involved than was formerly used upon only their lands with a valid water appropriation.

The lower Court denied injunctive relief in each action and confirmed the right of appellees to beneficially use, as presently used, that quantity of water used by the appellee Kovacovich during or prior to 1933 and by the appellee Ward during or prior to 1950.

Subsequent to entry of judgment by the lower Court, appellees C. B. Reddell and Vera L. Reddell purchased the lands involved in the Ward action and were duly substituted as parties appellee.

The following issues raised in the lower Court are here presented to this Court for determination:

1. Does an owner of land which has no valid water appropriation have the legal right to make beneficial use of water upon such land for irrigation purposes with water formerly used upon the owner's adjacent land which has a valid water right, if no greater quantity of water is used by the owner upon the combined area because of water-saving practices?

2. Is injunctive relief the proper remedy to prevent the diversion and use of water for irrigation upon lands not having an appurtenant water right?

The Court below found for appellees on the first issue but, found that had appellant been entitled to relief, injunction would have been the proper remedy.

In essence this case involves the narrow issue of whether or not an owner of land having a valid appurtenant water right may through water-saving practices apply the water thus saved to immediately adjacent lands owned by that person, without need to apply for the right to use such additional waters under the State Water Code. The further issue is that since the application of such waters would not result in less quantity of water flowing to the use of the appellants herein as owners of lower and subordinate water rights than would have previously occurred, have appellants been damaged whereby they are entitled to injunctive relief?

It was argued that decision of this issue in favor of appellants would result in penalizing persons who, through their industry, effort and expenses, engage in watersaving practices. The water-saving practices here referred to include improvement of ditches and concrete lining of ditches. This Court is of the opinion that the water-saving practices entered into by appellees not only result in conservation of water but also other benefits to appellees such as weed and vegetation growth control along such irrigation ditches and reduction of time and cost of maintenance of such ditches. Certainly any effort by users of water in Arizona tending toward conservation and more economical use of water is to be highly commended. However, commendable practices do not in themself create legal rights.

Historically, the development of water rights in Arizona created confusion by attempts to apply some of the strict concepts of common law riparian rights to the peculiar circumstances of not only the use of water but the need for its economical use prevalent in Arizona. The confusion concomitant with early attempts to apply the law with respect to use of water in Arizona progressed through several stages, including that where the right to use water appeared to be vested in the owner of land whereby same could be traded, leased or sold in much the same manner as other property. In an efflort to achieve some degree of order out of the chaos then existing, our Courts through a series of decisions developed and applied what we today refer to as the 'Doctrine of Beneficial Use.' * * *

The holding in all of these cases is to the effect that a water right is attached to the land on which it is beneficially used and becomes appurtenant thereto, and that the right is not in any individual or owner of the land. It is in no sense a floating right, nor can the right, once having attached to a particular piece of land, be made to do duty to any other land, with certain exceptions, e. g., where the land is washed away.'

This doctrine was further implemented by enactment of a series of statutes, today referred to as the State Water Code, wherein matters pertaining to application of waters to new lands or changes in use of waters previously appropriated was placed under the jurisdiction of the Arizona State Land Department. In addition these statutes prescribe certain standards to be followed by the State Land Department with respect to applications for acquisition of change in the use of water. Title 45, Chapter 1, Articles 1-6, Arizona Revised Statutes.

This Court is of the opinion that the Doctrine of Beneficial Use precludes the application of waters gained by water conservation practices to lands other than those to which the water was originally appurtenant. It has been argued that if the Court were to accept the position of appellees that appellees could allow the land to which the water right is appurtenant to lie fallow but continue to use the same quantity of water upon other adjacent lands owned by the same person. Again the need for land to lie fallow from time to time is a well recognized, beneficial need in order to preserve and maintain the proper fertility of the land. Although this may be a commendable practice, this is not sufficient to alter the established doctrine with respect to use of water. Under the doctrine of beneficial use, the appellees are not entitled under all circumstances to appropriate a given number of acre feet of water per year. Beneficial use is the measure and the limit to the use of water. A.R.S. § 45-101, subsec. B. The appellees may only appropriate the amount of water from the Verde River as may be beneficially used in any given year upon the land to which the water is appurtenant even though this amount may be less than the maximum amount of their appropriation. They may not take a quantity of water in excess of their appropriation even though they could beneficially use the same upon water right land. If in a given year, this should constitute an appropriation and use of all the water available at that particular point on the Verde River, subordinate owners of water rights have no cause to complain. However, in those years when water in excess of that which appellees may beneficially use upon the appurtenant land to which their water right attaches, all water which may flow to lower and subordinate owners of water rights is no longer of concern to appellees. Any practice, whether through water-saving procedures or otherwise, whereby appellees may in fact reduce the quantity of water actually taken injures to the benefit of other water users and neither creates a right to use the waters saved as a marketable commodity nor the right to apply same to adjacent property having no appurtenant water rights. It is believed that any other decision would result in commencement of return to the very area of confusion and chaos which gave rise to the development and application of the concept of beneficial use.

With respect to the issue of whether or not appellants are entitled to injunctive relief in proceedings of this nature, this Court concurs in the decision of the lower Court. The right to injunctive relief with respect to enforcement of water rights has been heretofore clearly established. Extensive discussion of this point is not believed necessary in the light of the established decisions with respect to use of injunctive relief.

FACT PATTERN FOR PART II – STATUTES BASED ON PRIOR APPROPRIATION

A group of ranchers who water their cattle at the aptly named Sinking Creek have complained to the Department of Ecology (Ecology) for over two decades about the detrimental effect on the creek's flow of groundwater pumping by irrigation farmers in the surrounding area. After numerous investigations, Ecology determined that there was a connection between the groundwater withdrawals and the diminished flow of the creek. Ecology also decided that the water rights of the various ranchers were superior to those possessed by the irrigation farmers.

Accordingly, Ecology issued cease and desist orders which prohibited the irrigation farmers from making any further groundwater withdrawals. Through a complicated procedural history which will be explained below, the dispute was brought to this court to decide if Ecology possesses the authority to issue these orders. We hold that it does not. We also hold that the trial court correctly exercised its jurisdiction in hearing this matter.

Sinking Creek is a non-navigable stream located in Lincoln County just south of the town of Wilbur. With the exception of the Pollution Control Hearings Board (PCHB) and Ecology, the remaining appellants are all cattle ranchers (Ranchers) who claim to have traditionally watered their cattle at the creek or its adjacent ponds and springs. These Ranchers claim pre–1917 riparian rights to the water in Sinking Creek. They also claim subflow irrigation rights for irrigation of pasture and annual crops on their land. Some of these rights are supported by claims filed pursuant to RCW 90.14; others are not. The Ranchers assert priority dates going as far back as 1883. There has never been a formal adjudication of the waters in or surrounding Sinking Creek.

On the other side of this dispute is a group of irrigation farmers (Irrigators) who own farms and wells in the surrounding area. The Irrigators own 29 certificates of groundwater rights obtained pursuant to RCW 90.44. The first groundwater permit for irrigation in this area was issued by Ecology's predecessor agency in the early 1950s. The last groundwater permit was issued by Ecology in 1979. These permits specify a maximum amount of groundwater that may be pumped, and state that "authorization to make use of public waters of the state is subject to existing rights". Clerk's Papers (CP), at 997. At least some of the Ranchers have actively opposed the granting of further groundwater permits since 1968.

In the mid–1960s, Ecology began receiving complaints from the Ranchers that the creek and its attendant springs were flowing less and drying up earlier than normal. The Ranchers blamed this decreased flow on the concurrent increase in groundwater withdrawals by neighboring Irrigators. In 1967, Ecology instituted a groundwater level monitoring program. Groundwater pumping from the Irrigators' wells increased twenty-fold in the period from 1968 through 1979. In 1978, Ecology undertook a more comprehensive study of the problem, culminating in a 1982 report which concluded that the diminished amount of surface water in the area was at least partially due to increased groundwater withdrawals. In 1985, an Ecology study of respondent Rettkowski's aquifer showed measurable water level changes 4 ½ miles away when his well was pumped at 2,800 gallons per minute. This study predicted a rate of permanent water level decline in the area of 1 or 2 feet per year due to proposed groundwater withdrawals.

In early 1989, a number of the Ranchers once again petitioned Ecology to do something to restore the flow of surface water in the Sinking Creek area. In the spring of that year, Ted Olson from Ecology visited with appellants Rosman and Nelson, and toured their ranches to witness the problem himself. Based primarily on these visits and discussions, Olson concluded that the Ranchers had water rights superior to those of the Irrigators. On June 7, 1990, Olson sent a letter to his supervisor, Hedia Adelsman, outlining his findings as to the priorities of the Nelson and Rosman water claims. He also forwarded this report to the Rosmans, who sent back a "corrected" copy of the report.

On September 22, 1989, Ecology notified the Irrigators about an upcoming meeting to discuss the water problems in the Sinking Creek area. This letter also alerted the Irrigators to the possibility that Ecology would regulate groundwater withdrawals. On October 5, 1989, Ecology held a meeting to discuss the decreased amount of surface water in the area and to encourage the Ranchers and Irrigators to agree to a solution. Similar meetings were held on March 29, 1990, and May 21, 1990. At this last meeting, Olson warned that if a negotiated settlement was not reached by July 1, 1990, Ecology would issue regulatory orders to reduce water use based on priority dates.

On July 15, 1990, the Irrigators sent a letter to appellants Rosman and Nelson stating their wish to avoid litigation and settle the situation amicably. Therein, they proposed three different solutions, ranging from more efficient use of wells and irrigation water to the outright purchase of the ranchers' land by the Irrigators. Nonetheless, Ecology issued a letter to the Irrigators 5 days later which warned that Ecology had "no alternative except to issue orders regulating the use of ground water for irrigation to protect senior surface water rights." CP, at 875.

On August 31, 1990, Ecology issued cease and desist orders to the Irrigators. The orders contained a lengthy "findings of fact" section which included a unilateral determination by Ecology of the existence and validity of the water rights claims of the Ranchers, and a determination that they were senior in time to the Irrigators. These orders mandated that the Irrigators "cease and desist from any further withdrawals of ground water after October 1, 1990". *E.g.,* CP, at 71. The Irrigators were also informed that they could appeal these orders to the PCHB. There has never been a formal adjudication of water rights in the Sinking Creek basin. The Irrigators timely appealed, and the PCHB stayed Ecology from enforcing these orders.

The PCHB also scheduled a 2–week hearing on the orders to begin on November 21, 1991. On August 20, 1991, the Irrigators filed a petition for review and a writ of certiorari in the Lincoln County Superior Court. In their petition, the Irrigators requested that the court review the legality of Ecology's orders, vacate those orders, enjoin Ecology from further action until such a time as the water rights in the Sinking Creek basin had been adjudicated, and order Ecology to petition for such an adjudication of rights. On November 19, 1991, the Superior Court ruled that the Irrigator's arguments should first be heard by the PCHB, but retained concurrent jurisdiction so that the Irrigators could renew their petition/writ after the PCHB had an opportunity to rule.

* * *

Following this hearing, the Superior Court ruled in favor of the Irrigators. On the issue of its own jurisdiction, the court ruled that the PCHB ruling was an appealable final decision, that the irrigators had exhausted their administrative remedies, that the court had inherent power under our constitution to review agency action that is violative of fundamental rights, and that the court had original jurisdiction to hear the Irrigators' due process claims. Addressing the due process issue, the court held that Ecology violated the Irrigators' due process rights by issuing its orders without a predeprivation notice, or an opportunity to be heard and to present evidence on their own behalf. The court also held that Ecology exceeded the scope of its statutory authority by conducting an extrajudicial adjudication of water rights. Moreover, the court held that the cease and desist orders were invalid on their face because they failed to specify which statute, rule, regulation, directive or order the Irrigators had violated.

It is this decision of the Superior Court that the Ranchers, Ecology and the PCHB now challenge. Although numerous issues and arguments are raised, the decisive inquiries are whether Ecology possesses the statutory power to: (1) determine the priorities of water rights in the basin, and (2) issue enforcement orders consistent therewith.

Our review of the statutory framework and relevant cases convinces us that both questions must be answered in the negative. The authority to adjudicate and enforce water rights in these circumstances is specifically granted to the superior courts by RCW 90.03. Accordingly, we affirm the ruling of the Superior Court.

We recognize that litigation of these complex issues can be protracted, especially in the first few trials. As the law develops, however, the process will become more refined. If we begin this undertaking with the correct—rather than expedient—methodology, we will ultimately encourage settlement and more rapid resolution of these disputes. The allocation of water rights in this state is of such great magnitude that we cannot tolerate a "cheap and easy" solution.

The resolution of this case turns on a fundamental rule of administrative law—an agency may only do that which it is authorized to do by the Legislature. The Administrative Procedure Act of 1988 (APA), RCW 34.05, specifically provides that a court "shall grant relief from an agency order ... if it determines that ... [t]he order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law". RCW 34.05.570(3)(b).

Under RCW 90.03 (hereinafter the Water Code), a "first in time, first in right" rule is followed for appropriations of both groundwater and surface water. RCW 90.03.010. Ecology claims that it was attempting to follow this rule when it issued the cease and desist orders to the Irrigators.[1] While Ecology cannot point to any statute which specifically authorizes the procedures it followed in issuing these orders, it argues that it derives inherent authority to do so from the penumbra of a number of statutes. Primarily, Ecology rests upon its enabling statute as vesting it with the plenary authority to protect senior water rights from encroachment or diminution by junior appropriators. That statute proclaims that Ecology "shall regulate and control the diversion of water in accordance with the rights thereto". RCW 43.21A.064(3). Ecology additionally points out that it is authorized to issue regulatory orders "whenever it appears to [Ecology] that a person is violating or is about to violate any of the provisions of [the Water Code]". RCW 43.27A.190.

However, these broad enabling statutes are silent as to how Ecology is to determine water rights in a regulatory context. This silence is even more telling when compared to the elaborate general adjudication process for determining water rights entrusted to the superior courts by RCW 90.03. Nowhere in Ecology's enabling statutes was it vested with similar authority to conduct general adjudications or even regulatory adjudications of water rights. An administrative agency cannot modify or amend a statute through its own regulation. *State v. Thompson,* 95 Wash.2d 753, 759, 630 P.2d 925 (1981). The absence of a specific grant to Ecology to determine water rights, coupled with an explicit grant to another branch of government to do exactly that, makes Ecology's determination of such rights seemingly ultra vires.

Since Ecology has no explicit statutory authority to rely upon, it asks instead that we extend a number of previous cases to allow it the authority to make "tentative determinations" of the priorities of existing water rights in order to regulate. Ecology argues that it only "tentatively determined" that the Irrigators' rights were junior to those of the Ranchers, and that a final determination would occur if the PCHB hearings were allowed to proceed.

There are two problems with this argument. First, the concept of "tentative determinations" in the cases cited by Ecology was developed in a different context.[2] Each of those cases dealt with the authority of Ecology (or its predecessor agency) to grant permits to appropriate water. The inquiry in that situation is relatively straightforward: is there water available to apportion, is the proposed use beneficial and not detrimental to the public interest, and is there any conflict with existing water rights. RCW 90.03.290. In the permitting situation, Ecology's determination is limited to tentatively determining whether there are existing water rights with which the proposed use will conflict. Ecology investigates an application for a permit to tentatively determine the existence of water rights[3] and the availability of water.

Once the permit has been granted, the situation is significantly different. Permit holders have a vested property interest in their water rights to the extent that the water is beneficially used. Unlike the permitting process, in which Ecology only tentatively determines the existence of claimed water rights, a later decision that an existing permit conflicts with another claimed use and must be regulated necessarily involves a determination of the *priorities* of the conflicting uses. In order to properly prioritize competing claims, it is necessary to examine when the use was begun, whether the claim had been filed pursuant to the water rights registration act, RCW 90.14 and whether it had been lost or diminished over time. These determinations necessarily implicate important property rights. It is because of the complicated nature of such inquiries, and their far-reaching effect, that the Legislature has entrusted the superior courts with responsibility therefor. RCW 90.03.110.

The second problem with Ecology's argument that it was only "tentatively determining" water rights is that the PCHB has no jurisdiction to conduct adjudicative hearings regarding such rights. The statute creating the PCHBspecifically forbids it to conduct hearings on "[p]roceedings by [Ecology] relating to general adjudications of water rights". RCW 43.21B.110(2)(c). Both Ecology and the PCHB argue that this case did not involve a general adjudication, but rather an appeal of an administrative order issued by Ecology, which would be within the jurisdiction of the PCHB. RCW 43.21B.110(1)(b), (c).

This bootstrap argument is unpersuasive. The administrative orders in question were based upon Ecology's determinations of the existence, quantities, and relative priorities of various legally held water rights. Ecology cannot sustain the argument that it conducted only a little, or a limited, or a tentative, adjudication, so that it is then permitted to have the PCHB conduct a more thorough adjudication. The PCHB *cannot* adjudicate priorities between water users. Nor can Ecology determine allegedly senior water rights outside of the context of a general adjudication. "A general adjudication, pursuant to RCW 90.03, is a process whereby all those claiming the right to use waters of a river or stream are joined in a single action to determine water rights and priorities between claimants." *Acquavella,* at 652, 674 P.2d 160. Although initiated by Ecology, this adjudication is conducted under the auspices of the superior court. RCW 90.03.110.

Ecology's role in such an adjudication is to advise the court as to the parties claiming a right in the body of water, as well as the priority, amount, and validity of such rights. RCW 90.03.110, .160–.170, .190. However, these determinations are not made by Ecology sua sponte. Rather, hearings are conducted by Ecology at which all parties claiming water from a particular basin get to present evidence as to their claims, examine the evidence of other parties claiming a right to use water, and, if warranted, question the validity of such other competing claims. RCW 90.03.160–.200. A general adjudication ensures that all interested parties are heard in a formal adjudicative setting and that adequate due process is afforded to all.

Were Ecology allowed to allocate water resources solely on the basis of its own determination of priorities, general adjudications might become unnecessary. Ecology could circumvent the general adjudication process by conducting minor, ad hoc investigations and subsequent piecemeal adjudications throughout the state. This result could prove detrimental to the general adjudication process statewide in light of Ecology's statutory role as the initiator of general adjudications in the superior court. RCW 90.03.110. There would be no reason to grant a petition to initiate a general adjudication if Ecology could conduct its own investigation and solve the conflict as it sees fit. We have previously refused the pleas of potential appropriators to narrow the scope and use of general adjudications, and we can see no reason to treat Ecology differently.

* * *

To summarize, we hold that Ecology had no authority to issue these cease and desist orders without first utilizing a general adjudication pursuant to RCW 90.03 in order to determine the existence, amount, and priorities of the water rights claimed in the Sinking Creek basin. The Superior Court properly exercised its authority, and we affirm its order holding the cease and desist orders null and void. Although the conclusion Ecology reached as to the relative priorities of the water rights in the Sinking Creek basin may ultimately prove to be correct, the only method of ascertaining this will be through a general adjudication.

FACT PATTERN FOR PART III – GROUNDWATER RIGHTS AND MANAGEMENT

This is an appeal from a judgment for plaintiffs enjoining defendants from operating their irrigation wells. Defendants' wells pumped from a ground water aquifer underlying both plaintiffs' and defendants' land. This Court must for the first time, interpret our Ground Water Act (I.C. s 42-226 et seq.) as it relates to withdrawals of water from an underground aquifer in excess of the annual recharge rate. We are also called upon to construe our Ground Water Act's policies of promoting 'full economic development' of ground water resources and maintaining 'reasonable pumping levels.'

This case focuses on approximately 20 irrigation wells developed during the late 1950's and early 1960' in the Cottonwood Creek-Buckhorn Creek area of Cassia County in southern Idaho. The parties to this suit were engaged in farming operations in that area. Underlying this area is a limestone aquifer of unknown depth. This aquifer is recharged primarily by means of precipitation. There is not enough annual recharge water to satisfy the needs of all the well owners during the summer irrigation season.

Plaintiffs-respondents Baker, et al., originally brought this action in July 1965 seeking to enjoin defendants-appellants Ore-Ida Foods, et al. from pumping irrigation water from their wells until such time as plaintiffs' wells resumed normal production. In February, 1969 the case was tried to the district court sitting without a jury. The trial was essentially a battle between three hydrology experts presented respectively by the plaintiffs-respondents, defendants-respondents and defendants-appellants. The record in the case in voluminous including prolix water records extending back more than 20 years. The district court entered its amended decree October 5, 1971.

The district court found that the parties and their predecessors in interest had developed irrigation wells having a certain order of priority.[1] The district court also found that all of the wells drew water from a common aquifer underlying the area. The aquifer was of unknown depth but was capable of a metes and bounds description. The court further found that the aquifer is recharged primarily by precipitation, at an average rate of 5,500 acre ft. per year. The court concluded that during the period 1961 though 1968 the parties had withdrawn water from the aquifer far in excess of the annual recharge rate causing a 20 ft. per year drop in the aquifer's water level. In other words the parties were apparently 'mining' the aquifer, i. e., perennially withdrawing ground water at rates beyond the recharge rate.

The court calculated that one cubic foot per second of water flowing for 24 hours would produce 1.983 acre ft. and held that the average annual natural recharge could be pumped entirely by the four senior wells.[2] The court enjoined pumping from all other wells and assigned further administration of its decree to the Idaho Department of Water Administration (IDWA), (formerly the Department of Reclamation, see I.C. s 42-1801a). The decree granted the IDWA full power to expand or limit the amounts of available water for pumping so long as the pumping never exceeded the annual rate of recharge. The amended decree also granted the IDWA the authority to modify its determination of the annual recharge rate.

* * *

Appellants assert that Idaho's Ground Water Cat, I.C. s 42-226 et seq., has superseded Idaho's common law rules relating to ground water. Appellants argue that, although they are junior, they are nevertheless entitled, under the doctrine of correlative rights, to a mutual pro rata share of the water in the aquifer. Appellants further assert that pursuant to the Ground Water Act senior appropriators may only enjoin junior appropriators from pumping by showing that the juniors' pumping has exceeded reasonable pumping levels.

* * *

The early ground water decisions mirror the riparian doctrine by holding that ground water rights depend on land ownership. The oldest and most rigid theory of ground water allocation is the common law rule of absolute ownership under which a landowner has an unqualified right to remove unlimited amounts of the water underlying his land. Greenleaf v. Francis, 35 Mass. 117 (1936). American courts followed the absolute ownership doctrine until 1862 when the Supreme Court of New Hampshire modified the doctrine by adopting the rule of reasonable use as to percolating ground waters. Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 577-579 (1862). Under reasonable use a landowner could withdraw percolating waters under his land to the extent that such withdrawals were reasonably consistent with the similar rights of other neighboring landowners. However, the reasonable use doctrine prohibited the transportation of ground water for use in areas other than the overlying land.

California altered the reasonable use theory by creating its unique doctrine of correlative rights which requires that a common but insufficient water supply be divided among competing overlying landowners so that each receives an amount of the available water proportionate to his ownership of the overlying land. When there is more than enough water to meet the needs of the overlying owners surplus water may be used on non-overlying lands. However, such transportation is forbidden when there is not enough water to fill the pro rata shares of overlying owners.

In summary, American courts apply one of the following doctrines to ground water:
1. Absolute ownership;
2. Absolute ownership as modified by reasonable use;
3. Correlative rights;
4. Prior appropriation.

The courts and legislatures have drawn further distinctions in applying these doctrines depending on whether the ground water lies in a rechargeable or a non-rechargeable aquifer. In a non-rechargeable aquifers the water is simply a stock resource and it can reasonably be determined when it will be totally exhausted. Decisions must be made as to whether to use it, when to use it and how to use it. New Mexico pioneered this area by imposing strict controls on withdrawals from its numerous non-rechargeable aquifers.

A rechargeable aquifer, however, is a flow resource and the real problem is how best to utilize the annual supply without overdrafting the stock which maintains the aquifer's water level. In the years since World War II, most western states have enacted legislation establishing administrative controls over ground water withdrawals.

* * *

We turn now to problems concerning the maintenance of water table levels. An early Idaho case dealing with assessments by an irrigation district set forth the following remarks concerning ground water:

'We conclude, however, that he had no right to insist the water table be kept at the existing level in order to permit him to use the underground waters. There is no proof that he secured water from a natural subterranean stream. The evidence tends to show that he secured it from water collected beneath the surface of the ground due to seepage and percolation. To hold that any land owner has a legal right to have such a water table remain at a given height would absolutely defeat drainage in any case, and is not required by either the letter or spirit of our constitutional and statutory provisions in regard to water rights.'

In a subsequent water table case, Noh v. Stoner, 53 Idaho 651, 657, 26 P.2d 1112, 1114 (1933) the Court upheld an injunction forbidding a junior well owner from interfering with a senior's appropriation of ground water. The Court stated:

'If subsequent appropriators desire to engage in such a contest (a race for the bottom of the aquifer) the financial burden must rest on them and with no injury to the prior appropriators or loss of their water. Otherwise, if the users (seniors) go below the appellants (juniors) and respondents were to go below them appellants would in turn, according to their theory, be deprived of their water with no redress.'

Noh suggests that a senior appropriator of ground water is forever protected from any interference with his method of diversion. Under Noh the only way that a junior can draw on the same aquifer is to hold the senior harmless for any loss incurred as a result of the junior's pumping. If the costs of reimbursing the senior became excessive, junior appropriators could not afford to pump from the aquifer. Noh was inconsistent with the full economic development of our ground water resources.

Apparently our Ground Water Act was intended to eliminate the harsh doctrine of Noh:

'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*: and, while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer (director of the department of water administration) as herein provided. 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.' (Emphasis in original) I.C. 42-226.

‘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 state reclamation (director of the department of water administration) is empowered: (Emphasis in original) I.C. 42-237a.

‘g. To supervise and control the exercise and administration of all rights hereafter acquired to the use of ground waters and in the exercise of this power he may by summary order, 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 state reclamation engineer (director of the department of water administration) 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 the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.’ (Emphasis supplied) I.C. 42-237a, subd. g.

* * *

The Idaho Ground Water Act, I.C. s 42-237a(g) provides in pertinent part:

‘* * * 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 the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.’ (Emphasis supplied)

We now hold that Idaho's Ground Water Act forbids ‘mining’ of an aquifer. The evidence herein clearly shows that the pumping by all parties was steadily drawing down the water in the aquifer at the rate of 20 ft. per year. Since our statute explicitly forbids such pumping, the district court did not err in enjoining pumping beyond the ‘reasonably anticipated average rate of future natural recharge.’

Perhaps dispositive of this case is the Act's prohibition of ground water ‘mining.’ The trial court found that the four senior appropriators would exhaust the aquifer's entire annual recharge. If the junior appropriators were permitted to continue pumping in the amount of their asserted rights they would mine the aquifer. Even so, appellants argue that ‘under the facts presented, the court of equity should have decreed that each of the parties had a proportional interest in the water resource.’ Appellants argue that our Act's phrases ‘reasonable pumping levels' and ‘full economic development’ command a decree granting each of the appropriators, regardless of seniority, a proportionate amount of the aquifer's water.

We reiterate our holding that Idaho's Ground Water Act clearly prohibits the withdrawal of ground water beyond the average rate of future recharge. I.C. s 42-237a(g). In this regard Idaho

differs from those of other less fortunate states because we have not yet had to develop legislation regarding withdrawals from non-rechargeable aquifers.

Idaho's Ground Water Act seeks to promote 'full economic development' of our ground water resources. I.C. s 42-226. Other western states have enacted analogous ground water legislation enunciating the same policy. Sax, J. L. Water Law, Planning & Policy 469 (1968). We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, s 7. Full economic development of Idaho's ground water resources can and will benefit all of our citizens.

Appellants contend that our Act's use of the phrase 'reasonable pumping levels' means that senior appropriators are not necessarily entitled to maintenance of historic pumping levels. We agree with appellants in this regard. However, our agreement avails appellants nothing because the trial court found the aquifer's water supply inadequate to meet the needs of all appropriators.

A senior appropriator is only entitled to be protected to the extent of the 'reasonable ground water pumping levels' as established by the IDWA. I.C. s 42-226. 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 rder to achieve the goal of full economic development.

* * * We conclude that our legislature attempted to protect historic water rights while at the same time promoting full 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 appropriation demands and unreasonable pumping level his historic means of appropriation will not be protected.

Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated to the IDWA the function of ascertaining reasonable pumping levels. See Young and Ralston, Reasonable Pumping Lifts for Idaho, Water Information Bulletin No. 21, IDWA, 1971. Implicit in this delegation is the recognition that reasonable pumping levels can be modified to conform to changing circumstances. Idaho's Administrative Procedure Act, I.C. s 67-5215 sets out standards for judicial review of such agency action.

In the case at bar it is apparent under our Ground Water Act that the senior appropriators may enjoin pumping by the junior appropriators to the extent that the additional pumping of the juniors' wells will exceed the 'reasonably anticipated average rate of future recharge.' The seniors may also enjoin such pumping to the extent that pumping by the juniors may force seniors to go below the 'reasonable pumping levels' set by the IDWA.

A necessary concomitant of this statutory matrix is that the senior appropriators are not entitled to relief if the junior appropriators, by pumping from their wells, force seniors to lower their pumps from historic levels to reasonable pumping levels. It should also be noted that those reasonable pumping levels are subject to later modification by the IDWA.

Divider 3

Hon. Eric J. Wildman

5th Judicial District Judge, State of Idaho





General Adjudications/Complex Litigation



- Objectives
  - What is a general adjudication?
  - Why adjudicate water rights?
  - How is it accomplished?
  - Suggestions for handling complex cases.

For more information see www.srba.state.id.us

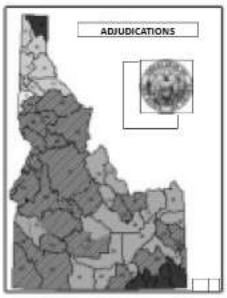
1

What is a "general adjudication?"

- The adjudication of all the claims to the use of water from a source including all its tributaries and connected groundwater in a single comprehensive lawsuit.
- All water users on source are joined, failure to file a claim could result in losing water right.
- "Quasi in-rem action"

2

Idaho Water Rights Adjudications



- Sub-basin Boundaries
- Snake River Basin (1987)
- Coeur d'Alene-Spokane River Basin (2008)
- Palouse River Basin (2017)
- Bear River Basin (2022)
- Clark Fork-Pend Oreille River Basin (2022)

3

The significance of a "general adjudication."

- The United States and Indian tribes waive sovereign immunity for the purpose of being joined in a general adjudication commenced by a state. 42 U.S.C. § 666 (McCarran Amendment).
- Federal government controls 65% of land in Idaho.

4

Why Adjudicate Water Rights?



- Inventory of all water rights on a source (previously no comprehensive inventory)
  - Beneficial use rights
    - 1963 groundwater (Idaho)
    - 1971 surface water (Idaho)
  - No federal/tribal determination
  - Removing forfeited rights
- Essential for administering in priority in times of shortage "first in time . . ."
- Essential for conjunctive management
- Essential for issuing new water rights to avoid over appropriation
- Creates certainty in water rights (in relation to other rights)
- Facilitates water markets and transfers
- Facilitates resolution of interstate water disputes
- Necessary to determine federal and tribal rights
- Binding affect on all water users
  - Prior piecemeal adjudications
- Essential for sustainability planning

5

What is adjudicated?

- The elements of the water right (statutorily defined) including:
  - Ownership
  - Source
  - Quantity
  - Priority Date
  - Point of diversion
  - Purpose of use
  - Place of use
  - Any other matters necessary for definition or administration of the water right

6

Procedural Considerations

- Dilemma: One lawsuit potentially comprised of thousands of parties
  - Partial decree v. final unified
- Consideration Highlights:
  - Notice
    - Commencement Notice Process
    - Adjudication-Wide Notice
    - Notice within individual "sub-cases"
  - Supplemental Procedural Rules
    - Supplement adjudication statutes
    - Supplement Civil Procedural Rules
    - Address notice process
    - Simplifies pleading process "check the box"
      - Pro se litigant considerations
    - Utilization of special master process
  - Legal Issues of Adjudication -Wide Significance (Binding precedence can originate out of sub-case)
    - Adjudication-Wide Issue Designation process
    - Separation or Consolidation of legal issue into new case
    - Use of test-case
  - Process for decreeing uncontested rights
    - Prima facie weight given to director's report /hydrographic survey or claim for state-law based rights? (statutorily defined)
    - Court review/hearing/decree
  - State agency's role in the process
    - Party or independent expert? (statutorily defined)

7

Federal/Tribal Claims

- Different Process
  - Based on federal law
  - Accorded no prima facie weight
  - Even if uncontested must prove elements
  - Typically, bifurcated proceedings:
    - Entitlement: statutory or treaty interpretation
    - Quantity amount necessary for purpose of federal

8

Complex case management

- Early Control
  - Error on side of sufficient notice
  - Initial Procedural Order
    - Deadline for appearances (any party to adjudication)
    - Notification of consequences (party to lawsuit-expected to prosecute)
    - Parties set forth with particularity issue intend to raise
    - Consider coalition/common counsel/interest already represented
    - Date of scheduling conference
- Initial Scheduling Conference
  - Confirmation of parties
  - Identify /alignment of issues
  - Bifurcation/separation proceedings (i.e federal claims)
    - Legal v. factual issues
    - Dispositive motions?
  - Proposal from Parties/Stip. Scheduling
- Dual Track/Settlement/Litigation
  - Settlement track
    - Stay of litigation during settlement?
    - Use of moderator?
    - Status conference /progress report?
    - Important parties confirmed!!!

9

Other Considerations

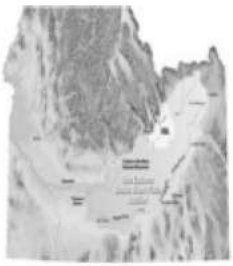
- Notice
  - Important sufficient notice and parties confirmed
    - Prejudice from late intervenors
    - Settlement issues
- Prior Decree issues/implications
  - Must file in adjudication
  - Identify decrees
  - Ensure parties claiming are joined
  - Cumulative quantity implications
  - Binding effect?
- Essential Processes
  - Change of ownership during pendency
  - Transfers during pendency
- Recommended Processes
  - Preliminary recommendations
    - Error correction/informational hearing
  - Initial hearing process
    - Scheduling /settlement opportunity
- Unintended Consequences
  - Wild/Scenic instream claims
- Law of the Case Considerations
- Policy decisions to higher court

10

Administration of Water Rights

- Once adjudicated administrative agency has statutory authority over water related issues, including water rights. (State variations).
  - -Permits for new water rights
  - -Transfers of existing water rights
  - -Priority enforcement of water right decrees
  - -Conjunctive management
  - -Curtailment of illegal diversions

Conjunctive Management



- Large Number parties
  - Not one to one ratio
  - Area common ground water supply
- Potential for Multiple Cases tied to one delivery call
  - Injury determination
    - Senior efficient use
    - Scope of curtailment
    - Futile call-trim-line (diminishing returns)
  - Mitigation/replacement water plan
- Preliminary Injunction Considerations

SRBA Final Unified Decree



Divider 4

Supplemental Materials, Part 1





ADJUDICATION/COMPLEX LITIGATION/CONJUCTIVE MANAGEMENT MATERIALS

- Notice of Scheduling Conference-Tribal Claims
- Basin-Wide Issue
    - Motion to Designate
    - Order Designating Basin-Wide Issue
    - Memorandum Decision
- Bear River Adjudication
    - Petition to Commence
    - Memorandum Decision on Commencement
    - Procedural Rules
- Rules for Conjunctive Management
    - *Clear Springs Foods v. Spackman*, 252 P.3d 71 (2011)(full economic development, reasonable pumping levels, material injury, hearing prior to curtailment)
    - *A &B Irr. Dist. V. IDWR,* 153 Idaho 500 (2012)(reasonable pumping levels, material injury to senior rights)
    - *Idaho Ground Water Appropriators v. IDWR*, 369 P.3d 897 (2016)(director's discretion in using trim-line in responding to delivery call)
    - *Rangen v. IDWR,* 369 P.3d 897 (2016)(use of trim-line in responding to delivery call)
- Relevant Cases
    - *3G AG LLC v. IDWR*, 509 P.3d 1180 (2022) (transfer resulting in an enlargement).

DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN - 9 2015
By _____ Clerk
Deputy Clerk

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

In Re CSRBA	) Water Right Claim Nos.:) See Attached List (Exhibit A)
Case No. 49576	) NOTICE OF SCHEDULING CONFERENCE

I.
PROCEDURAL BACKGROUND

The United States of America, as trustee on behalf of the Coeur d'Alene Tribe ("Tribe"), filed 353 claims on behalf of the Tribe in the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA"). The claims, which will be referred to herein collectively as "the Tribal claims," can be broken down into the following categories: 17 domestic, commercial, municipal and industrial ("DCMI") claims; 72 instream flow for fish habitat claims; 44 irrigated agriculture claims; 1 lake level maintenance claim; 24 springs/seeps claims; and 195 wetlands claims. Objections to some or all of the 353 claims were filed by various parties. The majority of objectors are consolidated into groups represented by common counsel. In addition, there are individual self-represented litigants who objected to some or all of the claims.

II.
PURPOSE

The purpose of this Order is to initiate a framework for the orderly resolution of the Tribal claims, including both a litigation and settlement track.

III.
OPPORTUNITY TO REVIEW PARTY STATUS

As an initial matter, it is important to emphasize that parties who filed objections and/or responses to the Tribal claims are now parties to this action and will be expected to prosecute

their objections and/or responses. *CSRBA Administrative Order 1, Rules of Procedure*, § 2.q. Past experience has shown that in cases of this nature individuals may file objections without realizing that by doing so they will become a party to a lawsuit and will be expected to fully participate in the legal proceedings. Accordingly, before the process gets underway parties should take the opportunity to examine whether, with this understanding, they still wish to proceed. In making that decision, parties should also consider whether their interest is adequately represented by another party to the action. Following such a review any party wishing to withdraw from any of the above-captioned subcases should file a "Notice of Withdrawal" so indicating no later than February 6, 2015.

IV.
BIFURCATION OF PROCEEDINGS

The claims in these subcases are brought pursuant to federal law. Past experience has shown that the most efficient way to process claims based on federal law may be to bifurcate the proceedings between issues of entitlement which can be decided as a matter of law and issues of quantification which may require resolution of factual issues. Once the legal issues are determined then, if necessary, the Court proceeds with the factual issues. Following the scheduling conference set forth herein, the Court will make the determination whether to bifurcate the proceedings between issues of entitlement and quantification.

V.
CONSOLIDATION AND THRESHOLD LEGAL ISSUES

At this stage of the proceeding each subcase is independent from one another. However, recognizing that each claim or category of claim shares common issues of law and/or fact, the Court will make a determination as how to best consolidate the subcases for purposes of promoting judicial economy. At this stage, although there are different categories of claims, the common legal issues shared by each claim have yet to be determined. Legal issues common to all claims should be decided in a consolidated proceeding. Following the scheduling conference set forth herein, the Court will make the determination regarding the consolidation of subcases and/or threshold legal issues.

VI.

OPPORTUNITY TO SUBMIT PROPOSED SCHEDULING ORDERS

A scheduling conference will be held in the above-captioned subcases at the time and place set forth below. Prior to the scheduling conference, each party will be given the opportunity to submit a proposal for scheduling in these matters. Such proposals may include proposals for the consolidation of subcases and/or threshold legal issues, proposals for timeframes for litigation, and proposals for alternative dispute resolution. Any party that wishes to submit a proposal for scheduling must file it with the Court **on or before February 6, 2015,** and serve a copy on those parties identified on the *Certificate of Mailing* attached hereto.

VII.

ORDER & NOTICE OF SCHEDULING CONFERENCE

A scheduling conference will be held in the above-captioned subcases at the time and place set forth below. Due to the geographic location of counsel, the Court, and the parties, the scheduling conference will be held that at the Snake River Basin Adjudication District Court ("SRBA District Court") in Twin Falls, Idaho. By doing so, the Court will be able to make use of its telephone and video teleconference systems to allow parties and counsel statewide to participate by telephone or by video teleconference. All parties will be permitted to appear by telephone or video-teleconference.

The Court will begin the scheduling conference by taking a roll call of those parties participating by telephone or video teleconference. If you are participating by telephone or video teleconference, please wait to identify yourself to the Court until the Court calls your name during the roll call. Thereafter, each party will have the opportunity to address the Court with respect to the issue of the scheduling of proceedings associated with the above-captioned subcases.

THEREOFRE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. Hearing Date: Notice is hereby given that a scheduling conference in the above-captioned subcases is set for **February 12, 2015, at 1:30 p.m. (Pacific Time), 2:30 p.m. (Mountain Time) at the Snake River Basin Adjudication District Court, 253 3rd Avenue**

North, Twin Falls, Idaho. Telephone participation will be available by dialing 1-215-446-0193 and entering 406128# when prompted. **However, no cell phones or speaker phones will be permitted as they interfere with our sound system making the proceeding difficult to accurately record.** Video teleconferencing ("VTC") will also be available by appearing at either (1) the Idaho Department of Water Resources, Northern Regional Office, 7600 N. Mineral Drive, Suite 100, Coeur d'Alene, Idaho, or (2) the Idaho Department of Water Resources, Idaho Water Center, 322 E. Front St., Conference Rm. B, Boise, Idaho.

2. Deadline to submit proposals for scheduling: Any party that wishes to submit a proposal for scheduling in the above-captioned subcases must file it with the Court **on or before February 6, 2015,** and serve a copy on those parties identified on the *Certificate of Service* attached hereto.

3. Opportunity to review party status: Any party that wishes to withdraw as a party from some or all of the above-captioned subcases shall filed a "Notice of Withdrawal" with the Court **on or before February 6, 2015.**

IT IS SO ORDERED.

DATED: January 8, 2015

ERIC J. WILDMAN
Presiding Judge
Coeur d'Alene-Spokane River Basin Adjudication

EXHIBIT A

Subcase Nos:

91-07755	92-10921	93-07510	93-07560	93-07610	94-09251
91-07756	92-10922	93-07511	93-07561	93-07611	94-09252
91-07757	93-07462	93-07512	93-07562	93-07612	94-09253
91-07758	93-07463	93-07513	93-07563	93-07613	94-09254
91-07759	93-07464	93-07514	93-07564	93-07614	94-09255
91-07760	93-07465	93-07515	93-07565	93-07615	94-09256
91-07761	93-07466	93-07516	93-07566	93-07616	94-09257
91-07762	93-07467	93-07517	93-07567	93-07617	94-09258
91-07763	93-07468	93-07518	93-07568	93-07618	94-09259
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91-07767	93-07472	93-07522	93-07572	93-07622	94-09263
91-07768	93-07473	93-07523	93-07573	93-07623	94-09264
91-07769	93-07474	93-07524	93-07574	93-07624	94-09265
91-07770	93-07475	93-07525	93-07575	93-07625	94-09266
91-07771	93-07476	93-07526	93-07576	93-07626	94-09267
91-07772	93-07477	93-07527	93-07577	93-07627	94-09268
91-07773	93-07478	93-07528	93-07578	93-07628	94-09269
91-07774	93-07479	93-07529	93-07579	93-07629	94-09270
91-07775	93-07480	93-07530	93-07580	93-07630	94-09271
91-07776	93-07481	93-07531	93-07581	93-07631	94-09272
91-07777	93-07482	93-07532	93-07582	93-07632	94-09273
91-07778	93-07483	93-07533	93-07583	93-07633	94-09274
91-07779	93-07484	93-07534	93-07584	93-07634	94-09275
91-07780	93-07485	93-07535	93-07585	93-07635	94-09276
91-07781	93-07486	93-07536	93-07586	93-07636	94-09277
91-07782	93-07487	93-07537	93-07587	93-07637	94-09278
91-07783	93-07488	93-07538	93-07588	93-07638	94-09279
91-07784	93-07489	93-07539	93-07589	93-07639	94-09280
91-07785	93-07490	93-07540	93-07590	93-07640	94-09281
91-07786	93-07491	93-07541	93-07591	93-07641	94-09282
91-07787	93-07492	93-07542	93-07592	93-07642	94-09283
91-07788	93-07493	93-07543	93-07593	93-07643	95-16668
91-07789	93-07494	93-07544	93-07594	93-07644	95-16669
92-10906	93-07495	93-07545	93-07595	93-07645	95-16670
92-10907	93-07496	93-07546	93-07596	93-07646	95-16671
92-10908	93-07497	93-07547	93-07597	93-07647	95-16672
92-10909	93-07498	93-07548	93-07598	93-07648	95-16673
92-10910	93-07499	93-07549	93-07599	93-07649	95-16674
92-10911	93-07500	93-07550	93-07600	93-07650	95-16675
92-10912	93-07501	93-07551	93-07601	93-07651	95-16676
92-10913	93-07502	93-07552	93-07602	93-07652	95-16677
92-10914	93-07503	93-07553	93-07603	94-09244	95-16678
92-10915	93-07504	93-07554	93-07604	94-09245	95-16679
92-10916	93-07505	93-07555	93-07605	94-09246	95-16680
92-10917	93-07506	93-07556	93-07606	94-09247	95-16681
92-10918	93-07507	93-07557	93-07607	94-09248	95-16682
92-10919	93-07508	93-07558	93-07608	94-09249	95-16683
92-10920	93-07509	93-07559	93-07609	94-09250	95-16684

(Subcase list: CSRBATRIBE)
1/08/15

EXHIBIT A

Subcase Nos:

95-16686
95-16687
95-16688
95-16689
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95-16738
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95-16741
95-16742

(Subcase list: CSRBATRIBE)
1/08/15

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Attorneys for the State of Idaho

DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUL 10 2015
By _____ Clerk
_____ Deputy Clerk

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

In Re CSRBA	**MOTION TO DESIGNATE BASIN-WIDE ISSUE**
Case No. 49576	

Pursuant to Administrative Order No. 1, Section 21, the State of Idaho moves the Court to designate the following as a basin-wide issue:

> What information must be included in the quantification of *de minimis* domestic and stockwater decrees?

The purpose of the proposed basin-wide issue is to clarify whether it is necessary to quantify actual historic beneficial use for *de minimis* domestic and stockwater rights if use is capped at the statutory limits of either 2,500 or 13,000 gallons per day and the water user is required to establish actual historic beneficial use prior to any action for administration or distribution of the water right.

Additional points and authorities in support of this Motion are provided in the accompanying Memorandum in Support of Motion to Designate Basin Wide Issue.

Respectfully submitted this 9th day of July, 2015.

STEVEN W. STRACK
Deputy Attorney General

DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV 18 2015
By _____ Clerk
_____ Deputy Clerk

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

In Re CSRBA	**Subcase No: 00-40001 (Basin-Wide Issue 1)**
Case No. 49576	**ORDER DESIGNATING BASIN-WIDE ISSUE**

I.
BACKGROUND

On July 10, 2015, the State of Idaho filed a *Motion to Designate Basin-Wide Issue* in the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA"). The *Motion* requests that the Court designate the following issue as a basin-wide issue: "What information must be included in the quantification of *de minimis* domestic and stockwater decrees?" The stated purpose of the proposed issue "is to clarify whether it is necessary to quantify actual historic beneficial use for de minimis domestic and stockwater rights if use is capped at the statutory limits of either 2,500 or 13,000 gallons per day and the water user is required to establish actual historic beneficial use prior to any action for administration or distribution of the water right." Parties to the adjudication were provided notice of the *Motion* pursuant to Docket Sheet procedure, and were given the opportunity to participate in the proceedings. *Notices of Intent to Participate* were filed by numerous parties.[1] In addition, a *Brief in Response Opposing the Motion* was filed by Edward Anderson ("Anderson").

[1] *Notices of Intent to Participate* were filed by the Coeur d'Alene Tribe, the United States, Benewah County, Beull Bros. Inc., Jack A. Buell, Eleanor L. Buell, David Bradley Corkill, Mary Corkill, Whiteman Lumber Co. Inc., and members of the North Idaho Water Rights Alliance (a complete list of which is attached as Exhibit "A" to the *Notice of Intent to Participate* filed by the Alliance on October 16, 2015).

A hearing on the *Motion* was held before this Court on October 20, 2015. All the parties participating in the hearing concurred that a basin-wide issued should be designated in the form proposed by the State, save the Coeur d'Alene Tribe ("Tribe"). While the Tribe agreed that a basin-wide issue should be designated, it requested that the following issue be designated in the stead of the one proposed by the State: "whether the decree in the CSRBA must contain a definite and certain quantity of water based on actual beneficial use for domestic and stockwater claims." However, the Tribe conceded that it did not oppose the State's proposed issue if read in conjunction with the stated purpose set forth in the State's *Motion*. Anderson, the only person to file an opposition to the State's *Motion*, did not appear at, or participate in, the hearing. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision the next business day, or October 21, 2015.

II.

ANALYSIS

CSRBA Administrative Order 1, Rules of Procedure, § 21.a. sets forth the criteria for designating a basin-wide issue. It provides that any party to the adjudication "may file a *Motion to Designate Basin-Wide Issue* if that Party believes an issue materially affects a large number of parties to the adjudication." *Id.* A motion to designate basin-wide issue must state (a) the issue, in 20 words or less; (b) why the issue is broadly significant and better resolved as a basin-wide issue; (c) the need for its early resolution; (d) the type of right(s) affected by the issue; and (e) a description of how those rights will be affected. *Id.* The decision to grant or deny a motion to designate basin-wide issue rests in the sound discretion of this Court.

The Court finds that the *Motion* at issue here meets the criteria set forth in *CSRBA Administrative Order 1, Rules of Procedure*, § 21.a. The type of rights affected are *de minimis* domestic and stockwater rights located throughout the Coeur d'Alene-Spokane River water system that have been claimed in the CSRBA. It has been the general practice of the Department in the CSRBA to quantify *de minimis* domestic and stockwater claims in its recommendations to the Court by referring to the respective statutory caps of 13,000 or 2,500 gallons per day as the recommended quantity, coupled with the remark that "[t]he quantity of

water decreed for this water right is not a determination of historical beneficial use."[2] The Tribe has objections to this practice in numerous subcases involving *de minimis* claims. It alleges that Idaho law requires *de minimis* claims to be quantified based on actual historic beneficial use. Further, that the decreed quantity of the water rights it has objected to should be "[t]he quantity of water actually diverted at the time the water right was first applied to a beneficial use."

The Tribe's objections are the catalyst for the State's *Motion*. The State asserts that resolving the quantification issue of *de minimis* quantification in a single basin-wide proceeding is preferable to dealing with the issue piecemeal in individual subcases. This Court agrees. The issue proposed by the State is a purely legal issue and will not require the need to develop factual records specific to each individual subcase in which the Tribe filed an objection. Additionally, the issue proposed by the State in its *Motion* is one of broad significance, potentially affecting *de minimis* water rights located throughout the Coeur d'Alene-Spokane River water system that are claimed in the CSRBA. There is also merit to addressing the issue in a basin-wide proceeding at this early stage of the CSRBA. The Tribe has objected to the recommended quantity of various *de minimis* claims in basins 91 and 92. However, the Director's Reports for state based claims filed in basins 94 and 95 have not yet been filed in the CSRBA. Granting the State's *Motion* may avoid the need for the filing of additional objections by the Tribe to the recommended quantification of *de minimis* claims in those basins to be reported in the future, thereby promoting judicial economy.

In addition to the above, the Court further finds that the *Motion* is largely unopposed. Only one response in opposition to the *Motion* was filed. The filing was made by Anderson, who asserts generally that the regulation of domestic and livestock water use by the State of Idaho is unconstitutional. The opposition is conclusory and does not specifically address the legal question of whether the issue proposed by State is appropriately addressed as a basin-wide issue. That said, the Court finds that the granting of the State's *Motion* will not prejudice or preclude Anderson from raising the issue of constitutionality in the context of the basin-wide proceedings should he so desire. The Court therefore holds that Anderson's *Opposition* fails to set forth sufficient grounds on which to deny the State's *Motion*.

[2] This practice is general, not universal, as some of the Department's recommendations to the Court concerning *de minimis* claims do identify an actual historic diversion volume in the quantity element of the recommendation.

The only other issue raised in relation to the State's *Motion* was raised by the Tribe. The Tribe does not oppose the designation of a basin-wide issue, but rather supports it. Indeed, in its *Notice of Intent to Participate*, the Tribe asserted that it "does not object to the designation of the proposed Basin-Wide Issue." However, at the hearing the Tribe for the first time asked that the Court designate the following basin-wide issue in the stead of the issue proposed by the State: "whether the decree in the CSRBA must contain a definite and certain quantity of water based on actual beneficial use for domestic and stockwater claims." The Court declines to designate the issue raised by the Tribe as a basin-wide issue. The Tribe did not file its own *Motion to Designate Basin-Wide Issue* to raise the issue it now seeks to have adopted. Further, by raising its own proposed basin-wide issue for the first time at hearing, other parties to the adjudication were not given proper or adequate notice of the proposed issue. Therefore, the Court declines to adopt the Tribe's proposed issue. That said, the Court notes that the State's proposed issue is broad enough to encompass the proposed issue raised by the Tribe. That such is the case is evidenced by the stated purpose behind the issue proposed by the State, which is "to clarify whether it is necessary to quantify actual historic beneficial use for de minimis domestic and stockwater rights if use is capped at the statutory limits of either 2,500 or 13,000 gallons per day and the water user is required to establish actual historic beneficial use prior to any action for administration or distribution of the water right." Therefore, the Tribe will not be prejudiced in making its arguments on the merits under the issue proposed by the State.

III.

ORDER

Therefore, based on the foregoing, the following are hereby ordered:

1. The State of Idaho's *Motion to Designate Basin-Wide Issue* **is hereby granted.**

2. The following issue is designated as a basin-wide issue: What information must be included in the quantification of *de minimis* domestic and stockwater decrees?

3. All future filings in this matter shall be filed under CSRBA subcase no. 00-40001 (i.e., Basin-Wide Issue 1).

4. Service of all documents filed in this subcase shall be made on the parties listed in the *Certificate of Mailing* attached to this *Order*.

5. The parties to this proceeding shall abide by the following briefing deadlines:

A. Opening Brief(s) shall be filed on or before **December 21, 2015.**
B. Response Brief(s) shall be filed on or before **January 11, 2016.**
C. Optional Reply Brief(s) shall be filed on or before **January 25, 2016.**

6. Notice is hereby given that a hearing on the basin-wide issue is set for **February 1, 2016 at 1:30 p.m. (Pacific Time)**, at the Snake River Basin Adjudication District Court, 253 3rd Avenue North, Twin Falls, Idaho. Telephone participation will be available by dialing 1-720-279-0026 and entering 786692# when prompted. **However, no cell phones or speaker phones will be permitted as they interfere with our sound system making the proceeding difficult to accurately record.** Video teleconferencing ("VTC") will also be available by appearing at either (1) the Idaho Department of Water Resources, Northern Regional Office, 7600 N. Mineral Drive, Suite 100, Coeur d'Alene, Idaho, or (2) the Idaho Department of Water Resources, Idaho Water Center, 322 E. Front St., Conference Rm. B, Boise, Idaho.

Dated November 18, 2015

ERIC J. WILDMAN
Presiding Judge
Coeur d'Alene-Spokane River Basin Adjudication

DISTRICT COURT - CSRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAR - 7 2016
By _____ Clerk
Deputy Clerk

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

In Re CSRBA	)	**Subcase No: 00-40001**
	)	**(Basin-Wide Issue 1)**
Case No. 49576	)	
	)	**MEMORANDUM DECISION**
	)	
	)	

I.
PROCEDURAL BACKGROUND

1. On July 10, 2015, the State of Idaho moved the Court to designate the following basin-wide issue in the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA"): "What information must be included in the quantification of *de minimis* domestic and stockwater decrees?"

2. Parties to the adjudication were provided notice of the *Motion* pursuant to Docket Sheet procedure, and were given the opportunity to participate in the proceeding. Notices of intent to participate were filed by the Coeur d'Alene Tribe ("Tribe"), the United States, Benewah County, Buell Bros., Inc., Jack Buell, Eleanor Buell, David Corkill, Mary Corkill, Whiteman Lumber Co. Inc., and members of the North Idaho Water Rights Alliance.[1] In addition, a response in opposition to the *Motion* was filed by Edward Anderson. Edward Anderson was the only party who opposed the designation of the basin-wide issue.[2]

[1] A list of the members is attached as Attachment "A" to the *Notice of Intent to Participate* filed by the North Idaho Water Rights Alliance on October 16, 2015.

[2] Anderson opposed the *Motion* on the basis that "[t]he regulation of domestic and livestock water use is unconstitutional." The Court rejected the opposition on the grounds it was conclusory and did not specifically address the legal question of whether the issue proposed by the State is appropriately addressed as a basin-wide issue. *Order Designating Basin-Wide Issue*, p. 3 (Nov. 18, 2015).

3. On November 18, 2015, following hearing, the Court entered an *Order* designating the issue proposed by the State as basin-wide issue 1. Thereafter, the parties were given the chance to submit briefing.

4. The State and the Tribe briefed the issue. Benewah County, Buell Bros., Inc., Jack Buell, Eleanor Buell, David Corkill, Mary Corkill, Whiteman Lumber Co., Inc., and the members of the North Idaho Water Rights Alliance joined in the State's briefing.

5. Oral argument was held before the Court on February 1, 2016. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or February 2, 2016.

II.
ANALYSIS

A. Historical background.

In the Snake River Basin Adjudication ("SRBA"), it came to be the practice of the Director of the Idaho Department of Water Resources to quantify *de minimis* domestic and stockwater claims in his Director's Reports to the Court in a certain, generally uniform, manner.[3] He would recommend a specific rate of diversion under the quantity element, coupled with the remark "[t]he quantity of water under this right shall not exceed 13,000 gallons per day." In conjunction, he would recommend the following remark under the other provisions element: "[t]he quantity of water decreed for this water right is not a determination of historical beneficial use."

This practice arose out of basin-wide issue 12 in the SRBA. In that subcase, the Court designated the following basin-wide issue: "What should be the form and content of decrees for state-law based claims to *de minimis* amounts of stockwater?" At controversy was how to properly quantify *de minimis* stockwater claims. Prior to basin-wide issue 12, it had been the practice of the Director to quantify such claims by recommending a rate of diversion coupled with a remark identifying the number of stock associated with the claim. The United States objected to the Director's use of the number of stock as a means of quantification.

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[3] The term "*de minimis* domestic and stockwater" use refers collectively to those water uses defined in Idaho Code §§ 42-1401A(4) and (11).

The quantification issue was ultimately resolved by agreement of the parties and IDWR. They agreed to omit any reference to number of stock associated with the claim:

> Originally, IDWR included number of stock as a remark to purpose of use. Subsequently, IDWR proposed to include number of stock as a remark under quantity. The number of stock, along with other variables, was used to arrive at a diversion rate which attempted to recognize the actual and historic use for a particular stockwater right. During the hearing on this matter, IDWR abandoned number of stock in favor of capping stockwater uses to 13,000 gallons per day for all livestock and wildlife uses regardless of actual historic use. Under this method of determining quantity, the parties and IDWR agreed that it is not necessary to include the number of stock as a remark to quantity or purpose of use. The court concurs with this agreement.

SRBA Subcase No. 00-91012, *Special Master's Second Amended Recommendation*, pp.6-7 (Aug. 12, 1996) (internal citations omitted).[4] The parties and IDWR concurred that the quantity element for *de minimis* claims involving diversions should be decreed with the following remark: "claimed rate not to exceed 13,000 gallons per day." *Id.* at 7. The Court instructed that the use of such a remark "represents the upper limit for every *de minimis* claim and may not reflect the actual or historical beneficial use for any claimant." *Id.* at 9.

The Court's holding in basin-wide issue 12 resulted in the Director's practice of quantifying *de minimis* claims in his recommendations in the manner described above.[5] Of course parties to the SRBA were permitted to object to the Director's recommendation for any particular *de minimis* claim, including his quantity recommendation. I.C. §§ 42-1411(5) and 42-1412(1). In such cases, the Court entered partial decrees for those contested claims consistent with the outcome of the objections. I.C. § 42-1412(6). However, if recommendations were uncontested, the Court entered partial decrees for the claims consistent with the Director's Reports. I.C. § 42-1412(7).

The Director has carried the practice of recommending *de minimis* claims into the CSRBA. As of the date of this decision, the Director has issued CSRBA Director's Reports for state-based claims in Basins 91, 92, 93 and 94. The Tribe has objected to his recommendations

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[4] That portion of the *Special Master's Second Amended Recommendation* discussed and at issue here was adopted in its entirety by the Court. SRBA Subcase No. 00-91012, *Memorandum Decision and Order Re: Basin-Wide Issue 12*, p.5 (April 25, 1997).

[5] Although basin-wide issue 12 involved only *de minimis* stockwater claims, the Director adapted the recommendation practices that resulted to *de minimis* domestic claims.

for various *de minimis* domestic and stockwater claims in Basins 91 and 92.[6] The Tribe's objections allege that Idaho law requires *de minimis* water rights to be quantified based on actual historic beneficial use in the adjudication. *See e.g.*, CSRBA Subcase No. 92-10086, *Standard Form 1 Objection* (May 7, 2015). Further, that the Director's recommendations are "not in compliance with [his] legal duty to determine the quantity of water put to beneficial use by those claimants that claim their water right based upon the constitutional method of acquiring a water right." *Id.* The State moved the Court to designate the basin-wide issue in response to the Tribe's objections.

B. The Director's recommendations of *de minimis* domestic and stockwater claims satisfy, and are consistent with, his statutory obligations.

The Tribe argues that the CSRBA Director's Reports for *de minimis* claims fail to satisfy the Director's obligations under Idaho law. It is the duty of the Director in a general stream adjudication to prepare Director's Reports on the water system to be filed with the Court. I.C. § 42-1411. The Director's Reports are to include recommendations for the elements of state-based water right claims filed in the adjudication. I.C. § 42-1411(2). The Legislature affords the Director discretion in determining those elements, providing that he "shall determine the . . . elements to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law." *Id.* The parties dispute whether the Director has abused that discretion by quantifying *de minimis* claims in the manner described above. For the reasons set forth herein, the Court holds that he did not.

i. *De minimis* water rights occupy a unique status in the law.

De minimis domestic and stockwater water rights refer to a specific category of rights defined by statute. I.C. §§ 42-1401A (4) and (11). To qualify as a *de minimis* water right, a water right must meet certain criteria which place limitations on the scope of the purpose of use, quantity or both. *Id.* Water rights for *de minimis* domestic and stockwater use occupy a unique status in the law. They differ from water rights for other uses in legally meaningful ways. These differences are observed in many areas, including the acquisition, adjudication and

[6] The objection deadline for Basin 94 has not yet expired. Parties to the adjudication have until July 28, 2016, to file objections to the Director's recommendations for state-based claims in Basin 94.

administration of such rights. For instance, the Legislature has afforded various *de minimis* domestic and stockwater uses special exemptions in the area of acquisition. It has exempted the use of ground water for domestic purposes from the permitting and licensing procedures required for other uses. I.C. § 42-227. The instream use of water for stockwatering purposes is likewise exempted. I.C. § 42-113(1). These exemptions evidence the Legislature's acknowledgement that water rights for *de minimis* water uses, due to their unique nature and limited impact, are treated differently than water rights for other uses. Differences are also visible in the area of adjudication, where *de minimis* domestic and stockwater rights enjoy the unique legal position of being deferrable in both the SRBA and CSRBA.[7]

However, the unique legal status of *de minimis* rights is perhaps most apparent in the area of administration. It begins with Idaho's Constitution, which grants water rights for domestic purposes preference over other water uses in times of shortage.[8] Idaho Const. Art. XV, § 3. It continues with Idaho's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), which broadly exempt *de minimis* ground water rights from conjunctive administration:

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

IDAPA 37.03.11.020.11. The Idaho Supreme Court has upheld the constitutionality of this exemption against a facial challenge. *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 880-881, 154 P.3d 433, 451-452 (2007) ("*AFRD#2*").

As a result of their unique status, the circumstances in which *de minimis* rights may be subject to priority administration are limited. Broadly removed from consideration is the most

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[7] Twin Falls County Case No. 49576, *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims* (Nov. 12, 2008); Twin Falls County Case No. 39576, *Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses* (Jan. 17, 1989). The Legislature expressly conditioned the commencement of the CSRBA on the requirement that *de minimis* claims be deferrable. I.C. § 42-1406B(1).

[8] The preference contemplates that if it is exercised, junior domestic water right holders must compensate seniors for any taking of their water. Idaho Const. Art. XV, § 3.

complex and litigious category of priority administration – conjunctive administration where the senior is a non-*de minimis* water right holder. IDAPA 37.03.11.020.11. This leaves very limited categories of conjunctive administration where the Director may have to actively administer *de minimis* water rights based on priority. These include administration between two *de minimis* water right holders and administration where the senior injured party is a *de minimis* water right holder. These categories of administration rarely occur. *2nd Aff. of Carter Fritschle*, ¶5. When they do, they simply do not involve the same complexities as other categories of priority administration. *Id.* The quantities of water involved, and any resulting material injury, will necessarily be very small (i.e., *de minimis*). Likewise, the number of water users involved will be small. If there is a finding of material injury, the amount of curtailment and/or mitigation required to cure that injury will be on an extremely limited scale as compared to other categories of priority administration. As set forth below, the Director certainly has the experience and expertise, given these realities, to properly administer *de minimis* water rights based on his CSRBA recommendations.

Unlike in conjunctive administration, there is no exemption removing *de minimis* water rights from surface water administration. However, surface water administration focuses on rate of diversion. *See e.g. Report Re: Quantification of Small Domestic and Stockwater Uses*, pp.2-5.[9] The available flow of water in a given surface water source may change on a daily basis. *Id.* In addition, flow shortages are often seasonal and temporary. In order to properly administer a surface water source in times of shortage, an administrator must distribute water based on the flow available at that instant. *Id.* at pp.2-3. As a result, the quantity description paramount to the proper administration of surface water is rate of diversion. *Id.* at pp.2-5. The Director delineates rate of diversion in his recommendations of *de minimis* claims in cubic feet per second. The Director is not statutorily required to further quantify the right in terms of an annual volume unless he determines such is necessary for the proper administration of the right. *See* I.C. § 42-1411(2)(c). As set forth in more detail below, since the Director's recommendations contain a recommended rate of diversion for *de minimis* claims, they contain the information necessary for the proper administration of such rights in surface water administration.

[9] A copy of the *Report Re: Quantification of Small Domestic and Stockwater Uses* is attached to the State's Opening Brief filed December 21, 2015.

ii. The Director acted within the bounds of his discretion when recommending *de minimis* water rights in the CSRBA.

To address what information must be included in the quantification of *de minimis* domestic and stockwater decrees, it is necessary to turn to the adjudication statutes. The statutes place emphasis on administration. They instruct the Director to make his recommendations to the extent he deems appropriate and proper "to define and *administer* the water rights." I.C. § 42-1411(2) (emphasis added). Further, to recommend the quantity of water used by describing the rate of diversion or annual volume of diversion "as necessary for the proper *administration* of the water right." I.C. § 42-1411(2)(c) (emphasis added). Given the statutory emphasis, the unique legal position *de minimis* rights occupy in the area of administration cannot be ignored.

Taking into account that position, the Court finds that the Director acted within the bounds of his discretion in quantifying *de minimis* claims in his CSRBA Director's Reports. The Director's Reports are based on the Department's investigation of the *de minimis* claims. *Aff. of Carter Fritschle*, ¶8. Based on that investigation, the Director issued Director's Reports that establish *prima facie* evidence of the existence of the claims, as well as of ownership, source, priority, quantity, purpose of use, point of diversion, place of use, and period of use. I.C. § 42-1411(4). With respect to quantity, the Director's practice is to recommend a rate of diversion to describe the use. This is generally 0.02 cfs or 0.04 cfs for a *de minimis* claim. Recommending quantity in terms of rate of diversion is explicitly authorized by statute and does not constitute an abuse of discretion. I.C. § 42-1411(2)(c).

The Director further defines quantity by recommending the remark that the quantity of water used shall not exceed the appropriate statutory cap of either 13,000 or 2,500 gallons per day. This remark, and the limitation it prescribes, is functional to define the right as falling within the statutory parameters set for *de minimis* rights in Idaho Code §§ 42-1401A(4) and/or (11). An example is illustrative. A typical domestic well is designed to produce a rate of diversion of about 18 gallons per minute, or 0.04 cfs. *Report Re: Quantification of Small Domestic and Stockwater Uses*, p.4. Continuous diversion of 0.04 cfs for a 24 hour period would produce about 25,920 gallons per day, thereby exceeding the statutory limits set forth in Idaho Code § 42-1401A(4). *Id.* The quantity remark limiting the claim to 13,000 gallons per day functions to define the claim as a *de minimis* claim in accordance with statute. Of course the

remark is also relevant to the proper administration of the right, as it establishes that the right is subject to the broad exemption from conjunctive administration set forth in the CM Rules. The quantity remark is therefore appropriate and proper to both define and administer *de minimis* rights. The Director does not abuse his discretion by including it in his recommendations.

The other remark the Director recommends is: "[t]he quantity of water decreed for this water right is not a determination of historical beneficial use." The Director includes this remark in the "other provisions" section of his recommendations. The remark makes clear to the water right holder, and other water users, that the Director's recommendation does not bestow upon the holder an entitlement to use up to 13,000 gallons per day under the quantity remark. That is not the purpose or meaning of the quantity remark. The purpose is to define the right as one falling within the statutory parameters set forth in Idaho Code §§ 42-1401A(4) and/or (11). However, since some confusion could arise regarding the meaning of the quantity remark, the Director includes the other provisions remark to clarify the purpose and meaning of the quantity remark. In addition, it functions as a reiteration of the law that the right is limited to that amount put to beneficial use, thereby protecting against waste. *E.g., In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013) ("The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law"); I.C. § 42-220 ("neither [a] licensee nor anyone claiming a right under [a] 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"). Therefore, the Court finds the other provisions remark is appropriate and proper to define and administer *de minimis* rights and is not an abuse of discretion.

Given that the recommended rate of diversion and remarks do not constitute abuses of discretion in their own rights, the Court turns to whether the Director's quantity recommendation as a whole constitutes an abuse of discretion. The Court holds it is not. As set forth above, the instances where *de minimis* water rights may be subject to priority administration are limited under the law. When such instances do arise, they will inevitably involve the administration of very small amounts of water. Given the Director's experience and expertise, he has the ability to properly administer *de minimis* rights in these instances based upon his recommendations. Once his recommendations are adjudicated and decreed by the Court, he may rely upon the decrees to establish the existence and legal validity of the rights at issue. In addition, he may rely upon the

decrees to establish the ownership, source, priority, purpose of use, point of diversion, place of use, and period of use of the rights. All of these elements assist the Director to properly administer the rights and are included in his recommendations to the Court.

With respect to quantity, the Director may rely on the remarks to establish that the rights meet the statutory requirements of Idaho Code §§ 42-1401A(4) and/or (11) and are therefore exempt from certain categories of administration. In the limited circumstances where priority administration is required, it is a relatively easy task for the Director to determine the amount of water to be administered by evaluating the decrees and the facts and circumstances surrounding the particular call. Indeed, the Director does so routinely in complex conjunctive administration involving non *de-minimis* rights and large quantities of water. There is simply no evidence in the record that the Director could not properly determine the amount of water to be administered to a *de minimis* right given his recommendation of a rate of diversion coupled with the discussed remarks.[10] For the reasons stated herein, the Tribe's argument that the Director's CSRBA Director's Reports do not fulfill his duties under Idaho law is rejected.

C. The Director's recommendations are subject to objection.

This Court holds that the Director's recommendations for *de minimis* water rights in the CSRBA are consistent with, and satisfy, his statutory obligations under Idaho law. However, the Director's recommendations are just that – recommendations. Any party to the adjudication may object to any element of a recommendation for a water right claim if he or she disagrees with it. I.C. § 42-1411(5). Once such an objection is made, the contested case will proceed to trial in accordance with the procedures set forth in the adjudication statutes and this Court's *Amended CSRBA Administrative Order 1, Rules of Procedure*.

The Tribe represents it has objected to various recommendations for *de minimis* water right claims in the CSRBA that divert water from small streams located within the Tribe's

[10] It must be remembered that while the decreed quantity may establish the maximum authorized rate of diversion of a *de minimis* right, it is not the be-all and end-all when considering the amount of water to which the right holder is entitled in times of priority administration. This is because, the decreed quantity notwithstanding, no senior water right holder is entitled to call for more than he or she may legally put to beneficial use. In this respect, the Idaho Supreme Court has accurately noted that water rights adjudications neither address, nor answer, all of the questions presented in delivery calls. *AFRD#2*, 143 Idaho at 876,154 P.3d at 447. The amount of water a water right holder is entitled to in times of priority administration is one such question. That is for the Director's consideration when evaluating the facts and circumstances surrounding a particular call.

Reservation. Tribe's *Response Brief*, p.25. These objections implicate, among other things, the recommended quantity of those claims. *See e.g.*, CSRBA Subcase No. 92-10086, *Standard Form 1 Objection* (May 7, 2015). It has voiced its concern that even *de minimis* uses may have significant impacts on the availability of water in these small streams. The record establishes that the cumulative impact of *de minimis* water use in the Coeur d'Alene-Spokane River system as a whole is insignificant when compared against the total available water supply. *Aff. of Carter Fritschle*, ¶¶6-7. However, the Court realizes that such uses may be consequential when compared against the water supply of a given localized water source, which may be limited. The Tribe argues it may be appropriate to have a more particularized quantification decreed for certain *de minimis* rights that divert from these limited sources than that recommended by the Director. Future administration of these rights as between tribal and non-Indian water right holders is another basis argued for a more particularized quantification of such rights. The Court need not reach the legal merit of such objections in the context of this proceeding. Any such objection would need to be undertaken on a case-by-case basis, taking into account the facts and circumstances surrounding a particular claim. However, the Court reiterates that if the Tribe disagrees with the recommended quantity associated with a particular *de minimis* water right claim, it may file and pursue an objection to that recommendation consistent with Idaho law. I.C. § 42-1411(5).

Indeed, objections to quantity recommendations associated with *de minimis* claims were filed and pursued in the SRBA both prior to, and more importantly following, the resolution of basin-wide issue 12. *See .e.g.*, SRBA Subcase Nos. 27-2080B & 27-12123. Similarly, in the CSRBA, parties have objected to quantity recommendations associated with *de minimis* claims. *See e.g.*, CSRBA Subcase Nos. 91-7584 & 92-10972. Where such objections have been made, the Court in both the SRBA and the CSRBA has entered partial decrees for the claims consistent with the outcome of the objection.[11] *Id.; see also* I.C. § 42-1412(6). Therefore, if the Tribe disagrees with a recommendation for a particular *de minimis* claim, it may file an objection consistent with Idaho law.

[11] Resolution of such objections may take many forms and may result in the Court decreeing the quantity element of a *de minimis* claim in a manner that differs from that recommended by the Director. For instance, resolution may involve the inclusion of an annual volume of diversion limitation in addition to a rate of diversion limitation. *See .e.g.*, SRBA Subcase No. 27-2080B &27-12123; CSRBA Subcase Nos. 91-7584 & 92-10972. Or, it may result in the removal of the Director's quantity and/or other provisions remark. *See e.g.*, CSRBA Subcase Nos. 91-7584 & 92-10972. The outcome of any given objection must, of course, be undertaken on a case-by-case basis taking into account the facts and circumstances surrounding a particular water right claim.

D. The Director's recommendations comply with the McCarran Amendment.

The Tribe argues that the manner in which the Director has recommended *de minimis* water rights in the CSRBA is inconsistent with the McCarran Amendment. The McCarran Amendment is a federal statute enacted in 1952. It states in part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source . . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666. The Amendment applies to general adjudications in which the rights of all claimants in a water system are ascertained. *In re Snake River Basin Water System*, 115 Idaho 1, 6-9, 764 P.2d 78, 83-86 (1988). Where a state court undertakes a general adjudication, the McCarran Amendment provides it with jurisdiction to adjudicate Indian water rights held in trust by the United States. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 809-813 (1976).

The Tribe argues that the method in which the Director recommends *de minimis* rights does not result in a complete ascertainment of those rights as contemplated by the McCarran Amendment. Specifically, that his recommendations do not adequately quantify *de minimis* rights. This Court disagrees. As set forth above, the Director's recommendations satisfy his statutory duty to recommend the elements to the extent he deems appropriate and proper to define and administer the water rights. Contrary to the Tribe's assertions, a simple review of the Director's recommendations reveal that they represent a complete ascertainment of *de minimis* water rights claims. They establish *prima facie* evidence of the existence of the rights, as well as of the user's entitlement to the use of water for domestic or stockwater purposes. There is no uncertainty in this respect. The recommendations also establish *prima facie* evidence of the elements of the rights. With respect to quantity, they are *prima facie* evidence of the authorized rate of diversion, that the right falls within the statutory parameters set for *de minimis* rights in

Idaho Code §§ 42-1401A(4) and/or (11), and that the right is limited by beneficial use. Establishing *prima facie* evidence of the existence of the rights, the authorized uses associated with the rights, as well as the elements of the right results in a complete ascertainment of *de minimis* rights.

It must be noted that the United States agreed to, and in fact insisted upon (at least with respect to *de minimis* stockwater uses), the method of recommending *de minimis* water rights used by the Director in the SRBA and CSRBA. SRBA Subcase No. 00-91012, *Special Master's Second Amended Recommendation*, pp.6-7 (Aug. 12, 1996). It is the United States that has filed Tribal water rights in the adjudication as trustee on behalf of the Tribe. It does not join in the Tribe's position in this basin-wide issue, nor does it otherwise object to the Director's practice of recommending *de minimis* claims. However, the Director's recommendations are not binding on the parties to the CSRBA. To the contrary, if a party disagrees with the Director's quantity recommendation for a particular *de minimis* claim, the adjudication statutes permit that party to file and pursue an objection to that effect. For these reasons, the Tribe's argument that the Director's recommendations do not result in a complete ascertainment of *de minimis* rights so as to satisfy the McCarran Amendment is rejected.

III.
CONCLUSION

In addressing the information which must be included in the quantification of *de minimis* domestic and stockwater decrees, it is necessary to look to the adjudication statutes. The statutes instruct the Director to make his recommendation for state-based claims to the extent he deems appropriate and proper "to define and administer the water rights." I.C. § 42-1411(2). The Court finds that the Director's recommendations for *de minimis* domestic and stockwater claims satisfy this statutory obligation. Where a recommendation for a claim is uncontested, the adjudication statutes direct this Court to enter a partial decree for the claim consistent with the Director's Report. I.C. § 42-1412(6). However, any party to the adjudication may object to any element of a recommendation for a water right claim if he or she disagrees with it. I.C. §§ 42-1411(5) and 42-1412(1). Therefore, if the Tribe disagrees with the Director's quantity recommendation for a given claim, it may object. In such cases, the Court enters partial decrees for those contested

claims consistent with the outcome of the objections. I.C. § 42-1412(6). The Court finds that this statutory process results in a complete ascertainment of state-based claims filed in the adjudication and satisfies the McCarran Amendment.

IT IS SO ORDERED.

DATED: March 7, 2016

ERIC J. WILDMAN
Presiding Judge
Coeur d'Alene-Spokane River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: March 7, 2016

ERIC J. WILDMAN
Presiding Judge
Coeur d'Alene-Spokane River Basin Adjudication

DISTRICT COURT - BRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV 20 2020
By Clerk
Deputy Clerk

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ISB No. 3444

Copies of documents filed with the court in this matter should be served on the above address and the Director of the Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General Adjudication of Rights to the Use of Water from the Bear River Basin Water System	CASE NO. 00-79576 PETITION TO COMMENCE BEAR RIVER BASIN ADJUDICATION Fee: Exempt

The State of Idaho, by and through Attorney General Lawrence Wasden, petitions and alleges as follows:

NATURE OF THE CASE

1. This is an action for the general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Bear River basin water system and for the administration of such rights.



JURISDICTION

2. This court has jurisdiction under state law in accordance with chapter 14, title 42, Idaho Code.

3. This court has jurisdiction of all claims of the United States under the McCarran Amendment, 43 U.S.C. § 666, which states in part as follows:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

PETITIONER AND PARTIES

4. Petitioner is the State of Idaho, through the Idaho Attorney General. The State of Idaho in its proprietary, governmental and representative capacities claims some right, title or interest to the use of waters of the Bear River basin water system. This petition is made at the request of the Director of the Idaho Department of Water Resources ("Director") pursuant to Idaho Code § 42-1405(2). The public interest and necessity would be served by a general adjudication of the Bear River basin water system because the adjudication would provide a complete and accurate recording of existing water rights, thereby helping the state and its residents to better understand and manage Idaho's water resources.

5. The United States in its proprietary, governmental, trustee and representative capacities is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, by reservation under federal law or otherwise, and the United States is a necessary party to the general adjudication of rights to the use of water from the Bear River basin water system.

6. Though petitioner has knowledge of some defendants, the true names or capacities, whether individual, corporate, governmental, associate, representative, or otherwise, of defendants named herein as "all claimants to the use of water from the Bear River basin water system" are not known to petitioner; however, the Director will identify and serve all persons in accordance with the procedures set forth in Idaho Code § 42-1408.

ALLEGATIONS IN SUPPORT OF COMMENCEMENT OF THE GENERAL ADJUDICATION

Authority

7. Idaho Code § 42-1406C(1) authorizes the filing of a petition with the district court to commence an adjudication within the terms of the McCarran Amendment, 43 U.S.C. § 666, of the water rights from surface water and ground water sources of the Bear River basin water system provided that the petition includes a request for the deferral of the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A, and a request that the commencement order be issued only if the court determines it is possible to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A, within the terms of the McCarran Amendment.

8. Idaho Code § 42-1406C(3) provides that the petitioner may petition a court of special jurisdiction for water right adjudications. Unless otherwise ordered by the Supreme Court, special jurisdiction for the water rights adjudication authorized by this section shall reside in the Snake River Basin Adjudication District Court of the Fifth Judicial District of the State of Idaho.

9. On June 17, 2020, the Idaho Supreme Court issued an *Order Re: Appointment of District Judge, Confirmation of Special Jurisdiction and Determination of Venue for the General Adjudication of the Bear River Basin*, appointing the presiding judge of the Snake River Basin

Adjudication District Court as the presiding judge over these general adjudication proceedings, conferring special jurisdiction for these general adjudication proceedings in the Snake River Basin Adjudication District Court, and designating the Snake River Basin Adjudication District Court of the Fifth Judicial District of the State of Idaho as the county and court of venue for these general adjudication proceedings.

Boundaries of the Water System

10. Petitioner proposes to adjudicate the rights to the use of surface and ground water of the Bear River basin water system.

11. The proposed boundaries of the water system are described as follows:

> Beginning at the southeast corner of the state of Idaho at a point marking the southeast corner of Bear Lake County located at the southeast corner of Government Lot 3, Section 26, Township 16 South, Range 46 East, B.M.; thence continuing west along the southern boundary of the state of Idaho to a point in Cassia county located at the southwest corner of Government Lot 7 (SE¼SE¼), Section 28, Township 16 South, Range 28 East, B.M.;
>
> Thence continuing northeasterly along the ridge lines and mountain peaks of the Black Pine and Deep Creek Mountains to a point on Deep Creek Peak in Power county located in the NE¼ of the NE¼ of Section 13, Township 11 South, Range 32 East, B.M.;
>
> Thence continuing southeasterly then turning northerly following the ridge lines and mountain peaks that mark the southern edges of the boundary of the Bannock Creek drainage to a point on Bradley Mountain in Power County located in the SE¼ of the NW¼ of Section 14, Township 10 South, Range 34 East, B.M.;
>
> Thence continuing southeasterly along the ridge lines and mountain peaks separating the Dairy Creek Drainage to the southwest and the Hawkins Creek drainage to the northeast to a point on the boundary line separating Bannock and Oneida counties in the NE¼ of the SE¼ of Section 22, Township 11 South, Range 35 East, B.M.;
>
> Thence continuing southeasterly along the boundary separating Bannock and Oneida counties, diverting southerly from the county boundary briefly for about 3.5 miles in Township 12 South, Range 36 East, before rejoining and continuing to follow the county boundary to a point where Bannock, Franklin, and Oneida

county boundaries intersect in the NW¼ of the NW¼ of Section 22, Township 13 South, Range 37 East, B.M.;

Thence continuing southerly for about two miles until reaching Oxford Peak and turning northeasterly following the ridge lines and mountain peaks of the Portneuf Range crossing into Caribou County to a peak on Buckskin Mountain in the SW¼ of the NE ¼ of Section 22, Township 09 South, Range 39 East, B.M.;

Thence continuing east and then northerly moving along the ridge lines and mountain peaks to a point in Caribou County located in the SW ¼ of the NE ¼ of Section 33, Township 06 South, Range 41 East, B.M.;

Thence continuing southeasterly along the ridge lines and mountain peaks of the Aspen Range to a point on the boundary line separating Caribou and Bear Lake counties located on the boundary between the SE¼ of the NE¼ of Section 36, Township 9 South, Range 43 East B.M. and Government Lot 2 (SW¼NW¼) of Section 31, Township 9 South, Range 44 East B.M.;

Thence continuing southeasterly along the county line to a point on the eastern boundary of the state of Idaho in Government Lot 1 (NE¼NW¼) of Section 35, Township 10 South, Range 46 East, B.M.; thence south along the eastern boundary of the state of Idaho to the point of beginning.

Such that the water system includes all surface water and ground waters within the proposed boundary. This includes, but is not limited to, the surface and ground water of Beaver Creek, Christy Creek, Deep Creek, Cub River, Logan River, Malad River, Spring Creek, and Worm Creek drainages before such waters reach Utah; the Erwine Creek, Garett Creek, Giraffe Creek, North Willow Creek, Poison Creek, Potato Creek, and Robinson Creek Drainages before such waters reach Wyoming; the Raymond and Salt Creek drainages after such waters cross into Idaho from Wyoming. All of these drainages are ultimately tributaries of the Bear River in Utah, except for the Deep Creek Drainage which is tributary to the Great Salt Lake, and contain portions of Bannock, Bear Lake, Caribou, Cassia, Franklin, Oneida, and Power Counties in Idaho.

12. The proposed boundaries are illustrated on **Exhibit A**, which is attached hereto and incorporated by reference.

Scope of Adjudication

13. There are no classes of uses proposed to be excluded from the adjudication.

14. Petitioner proposes to include in the adjudication persons holding a permit, as of the date of entry of the order commencing the general adjudication, for which proof of beneficial use was filed on or prior to the date of entry of the order commencing the general adjudication.

15. Petitioner proposes the deferral of the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A.

16. Petitioner requests that a commencement order be issued only if the court determines it is possible to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A within the terms of the McCarran Amendment.

List of Counties

17. Bear Lake County is located fully within the proposed boundaries of the water system.

18. The counties where only a portion of the county is included within the proposed boundaries of the water system are: Bannock County; Caribou County; Cassia County, Franklin County; Oneida County; and Power County.

Service

19. Service of claimants will occur as set forth in subsections (2) and (3) of Idaho Code § 42-1408.

20. Service of claimants not disclosed following completion of the service required by subsections (2) and (3) of Idaho Code § 42-1408 will occur as set forth in Idaho Code § 42-1408(4).

21. The method of service set forth at Idaho Code § 42-1408 and in paragraphs 19 and 20 above is reasonably calculated to notify all claimants within the water system of the commencement of the general adjudication.

PRAYER FOR RELIEF

WHEREFORE, the petitioner petitions this court as follows:

1. To enter an order in accordance with Idaho Code § 42-1406C that does all of the following:

a. Commences a general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Bear River basin water system within the state of Idaho;

b. Describes the boundaries of the water system as set forth in paragraph 11;

c. Lists the counties wholly or partly located within the boundaries of the water system;

d. Determines that it is possible to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A within the terms of the McCarran Amendment;

e. Establishes a process to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A;

f. Directs all claimants of rights to the use of surface and ground waters from the water system, including holders of permits for which proof of beneficial use was filed on or prior to the date of entry of the commencement order, to file a notice of claim with the Director as provided in Idaho Code § 42-1409, unless claimants elect to defer the adjudication of

domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A.

g. Approves the method of ascertaining and serving claimants not disclosed following the completion of the service required by subsections (2) and (3) of Idaho Code § 42-1408 as set forth in paragraph 20;

h. Authorizes the Director to investigate all uses of water from the system in accordance with Idaho Code § 42-1410 and to file a report in accordance with Idaho Code § 42-1411; and

i. Contains a statement that the district court files will contain affidavits of service and other documents stating the persons served with a copy of the notice of commencement order.

2. To determine all rights to the use of water within the water system, including those of the United States.

3. To make all determinations necessary and proper for the administration of the water rights determined in the general adjudication.

4. For such other and further relief as the court deems just and proper.

DATED this 20th day of November, 2020.

LAWRENCE G. WASDEN
Attorney General
State of Idaho

Bear River Basin Water System

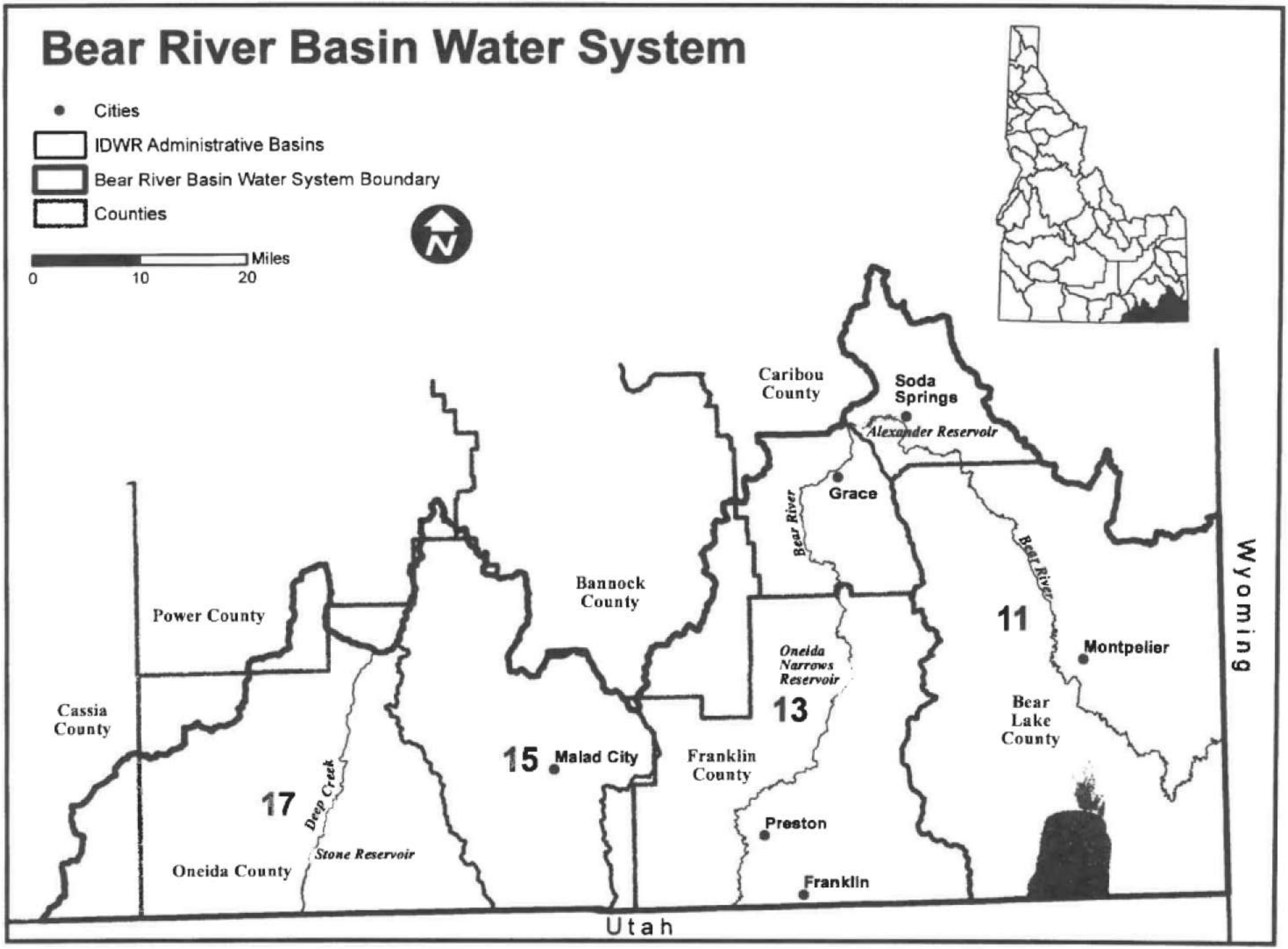


Exhibit A

DISTRICT COURT - BRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUN 15 2021
By _____ Clerk
Deputy Clerk

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

IN RE: THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE BEAR RIVER BASIN WATER SYSTEM	)	**Case No.: 79576**
	)	**MEMORANDUM DECISION ON PETITION TO COMMENCE BEAR RIVER BASIN ADJUDICATION**

I.
BACKGROUND

On November 20, 2020, the State of Idaho filed a *Petition* seeking commencement of a general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Bear River basin water system and for the administration of such rights. The *Petition* is filed pursuant to Idaho Code § 42-1406C, which authorizes the filing of the *Petition* before the Snake River Basin Adjudication District Court of the fifth judicial district of the state of Idaho, in and for the county of Twin Falls. The *Petition* seeks an order from the Court which does the following:

> a. Commences a general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Bear River basin water system within the state of Idaho.
>
> b. Describes the boundaries of the water system . . . .
>
> c. Lists the counties wholly or partly located within the boundaries of the water system.
>
> d. Determines that it is possible to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A within the terms of the McCarran Amendment.
>
> e. Establishes a process to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of section 42-1401A, Idaho Code.

f. Directs all claimants of rights to the use of surface and ground waters from the water system, including holders of permits for which proof of beneficial use was filed on or prior to the date of entry of the commencement order, to file a notice of claim with the Director as provided in Idaho Code § 42-1409, unless claimants elect to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A.

g. Approves the method of ascertaining and serving claimants not disclosed following the completion of the service required by Idaho Code § 42-1408(2) (a) through (d) . . . .

h. Authorizes the Director to investigate all uses of water from the system in accordance with Idaho Code § 42-1410 and file a report in accordance with Idaho Code § 42-1411; and

i. Contains a statement that the district court files will contain affidavits of service and other documents stating the persons served with a copy of the notice of commencement order.

Petition, pp.7-8.

The *Petition* seeks a determination by this Court of all rights to use of the water system including those of the United States as well as all determinations necessary for the proper administration of the water rights determined in the adjudication. The *Petition* also provides that an order commencing the adjudication be issued only if the Court determines that it is possible to defer the adjudication of *de minimis* domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A within the terms of the McCarran Amendment.

On June 17, 2020, the Idaho Supreme Court issued an *Order Re: Appointment of District Judge, Confirmation of Special Jurisdiction and Determination of Venue for the General Adjudication of the Bear River Basin* designating the Snake River Basin Adjudication District Court of the fifth judicial district of the State of Idaho as the county and court of venue for this general adjudication proceeding.

On November 25, 2020, this Court entered an *Order Setting Commencement Hearing and Procedures for Hearing* for the purpose of determining those matters described in the *Petition*. The *Order* set forth notice and service requirements for the commencement hearing as required by Idaho Code § 42-1407, the issues to be addressed at the commencement hearing as well as the procedures for appearing, presenting evidence, and making statements or legal arguments at the

hearing. The *Order* also required service to any Indian tribes residing within the boundaries or having interests in any portion of the Bear River basin water system.

On March 3, 2021, the State of Idaho filed an *Affidavit of Service* describing the service process and establishing compliance with the requirements set forth in the Court's *Order* and Idaho Code § 42-1407. The commencement hearing on the *Petition* was held May 24, 2021. The United States appeared in opposition to those elements of the *Petition* related to the deferral of *de minimis* domestic and stock water rights.

II.

ANALYSIS

A. The proposed scope of the Bear River Basin Adjudication is consistent with the requirements of the McCarran Amendment.

1. The McCarran Amendment requires a comprehensive adjudication of all rights on the source and its tributary sources.

Idaho Code § 42-1406C(1) provides that: "Effective management of the waters of the Bear River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water be determined." The statute also provides that the adjudication be commenced "within the terms of the McCarran amendment." I.C. § 42-1406C(1). "The McCarran Amendment waives federal sovereign immunity in certain general water adjudications, allowing the United States' and Indian tribes' water rights to be determined in state-court proceedings."[1] In *In Re SRBA Case No. 39576*, 128 Idaho 246, 251, 912 P.2d 614, 619 (1995); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-10 (1976); *United States v. Dist. Court in and for Eagle County, Colo.*, 401 U.S. 520, 524 (1971).

[1] The McCarran Amendment provides, in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law; by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a).

This waiver or consent to state court jurisdiction also extends to tribal water rights. *Colorado River Water Conservation Dist.*, 424 U.S. at 809.

Compliance with the McCarran Amendment requires a comprehensive adjudication of all of the water rights on the stream system. In *United States v. Dist. Court in and for Eagle County, Colo.*, the United States Supreme Court, explained the requirement, quoting the amendment's sponsor, Senator McCarran as follows:

> S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherever it is necessary to adjudicate all of the rights of various owners on the given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream be joined as parties defendant, any subsequent decree would be of little value.

United States v. Dist. Court in and for Eagle County, Colo., 401 U.S. at 525. (*quoting* S. Rep. No. 820755). In *Colorado River Water Conservation Dist.*, the United States Supreme Court enunciated the policy behind the requirement:

> The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. . . . The consent to jurisdiction given by the McCarran Amendment bespeaks policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

Id. at 819. In *In Re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (1988), the Idaho Supreme Court held that the McCarran Amendment required the Snake River Basin Adjudication to adjudicate the rights of all those who use a river system within a state, including those who use the water of the tributaries. *Id.* at 9, 764 P.2d at 86.

Accordingly, in order for the Bear River Basin Adjudication to be commenced within the terms of the McCarran Amendment, the Court must find that the proposed boundaries of the adjudication include all hydrologically connected surface and ground water sources within the system located in the State of Idaho and include all claims to the use of water within that same system.

2. The proposed boundaries of the adjudication include all hydrologically connected surface and ground water sources within the Bear River basin water system.

Idaho Code § 42-1406C(1) requires that an order commencing the adjudication define the source or sources within the state to be adjudicated. The Bear River Basin water system covers portions of Idaho located within Bannock, Bear Lake, Caribou, Cassia, Franklin, Oneida, and Power Counties. The *Petition* more particularly describes the boundaries for the adjudication as follows:

> Beginning at the southeast corner of the state of Idaho at a point marking the southeast corner of Bear Lake County located at the southeast corner of Government Lot 3, Section 26, Township 16 South, Range 46 East, B.M.; thence continuing west along the southern boundary of the state of Idaho to a point in Cassia county located at the southwest corner of Government Lot 7 (SE¼SE¼), Section 28, Township 16 South, Range 28 East, B.M.;
>
> Thence continuing northeasterly along the ridge lines and mountain peaks of the Black Pine and Deep Creek Mountains to a point on Deep Creek Peak in Power county located in the NE¼ of the NE¼ of Section 13, Township 11 South, Range 32 East, B.M.;
>
> Thence continuing southeasterly then turning northerly following the ridge lines and mountain peaks that mark the southern edges of the boundary of the Bannock Creek drainage to a point on Bradley Mountain in Power County locate in the SE¼ of the NW¼ of Section 14, Township 10 South, Range 34 East, B.M.;
>
> Thence continuing southeasterly along the ridge lines and mountain peaks separating the Dairy Creek Drainage to the southwest and the Hawkins Creek drainage to the northeast to a point on the boundary line separating Bannock and Oneida counties in the NE¼ of the SE¼ of Section 22, Township 11 South, Range 35 East, B.M.;
>
> Thence continuing southeasterly along the boundary separating Bannock and Oneida counties, diverting southerly from the county boundary briefly for about 3.5 miles in Township 12 South, Range 36 East, before rejoining and continuing to follow the county boundary to a point where Bannock, Franklin, and Oneida county boundaries intersect in the NW¼ of the NW¼ of Section 22, Township 13, South, Range 37 East, B.M.;
>
> Thence continuing southerly for about two miles until reaching Oxford Peak and turning northeasterly following the ridge lines and mountain peaks of the Portneuf Range crossing into Caribou County to a peak on Buckskin Mountain in the SW¼ of the NE¼ of Section 22, Township 09 South, Range 39 East, B.M.;

Thence continuing east and then northerly moving along the ridge lines and mountain peaks to a point in Caribou County located in the SW¼ of the NE¼ of Section 33, Township 06 South, Range 41 East, B.M.;

Thence continuing southeasterly along the ridge lines and mountain peaks of the Aspen Range to a point on the boundary line separating Caribou and Bear Lake counties located on the boundary between the SE¼ of the NE¼ of Section 36, Township 9 South, Range 43 East B.M. and Government Lot 2 (SW¼NW¼) of Section 31, Township 9 South, Range 44 East B.M.;

Thence continuing southeasterly along the county line to a point on the eastern boundary of the state of Idaho in Government Lot 1 (NE¼NW¼) of Section 35, Township 10 South, Range 46 East, B.M.; thence south along the eastern boundary of the state of Idaho to a point of beginning.

Such that the water system includes all surface water and ground waters within the proposed boundary. This includes, but is not limited to the surface and ground water of Beaver Creek, Christy Creek, Deep Creek, Cub River, Logan River, Malad River, Spring Creek, and Worm Creek drainages before such waters reach Utah; the Erwine Creek, Garrett Creek, Giraffe Creek, North Willow Creek, Poison Creek, Potato Creek, and Robinson Creek Drainages before such waters reach Wyoming; the Raymond and Salt Creek drainages after such waters cross into Idaho from Wyoming. All of these drainages are ultimately tributaries of the Bear River in Utah, except for the Deep Creek Drainage which is tributary to the Great Salt Lake, and contain portions of Bannock, Bear Lake, Caribou, Cassia, Franklin, Oneida and Power Counties in Idaho.

Petition, pp.4-5. The Court finds that the proposed boundaries for the Bear River Basin Adjudication satisfy the requirements of a McCarran Amendment adjudication.

B. The deferral procedure for *de minimis* domestic and stock water claims is consistent with the requirements of the McCarran Amendment.

1. The deferral procedure for *de minimis* domestic and stock water claims.

Idaho Code § 42-1406C(1) requires that a petition request that a commencement order be issued only if the court determines it is possible to defer the adjudication of domestic and stock water rights as defined by Idaho Code § 42-1401A(4) and (11) and comply with the terms of the McCarran Amendment. The State of Idaho made such a request in the *Petition*. The Court finds the deferral procedure proposed by the State for *de minimis* domestic and stock water claims is consistent with the requirements of the McCarran Amendment for the reasons set forth in this Court's *Memorandum Decision on Optional Deferral Process* issued contemporaneously

herewith. The Court's *Memorandum Decision on Optional Deferral Process* is incorporated herein by reference and will not be repeated.

III.

CONCLUSION

For the reasons set forth above, the Court concludes that the adjudication of the Bear River basin water system as authorized by Idaho Code § 42-1406C and as proposed in the *Petition* constitutes a comprehensive determination of all of the rights of the system within the State of Idaho and therefore satisfies the terms of the McCarran Amendment. Having further concluded that the deferral procedure for *de minimis* domestic and stock water claims is within the terms of the McCarran Amendment, the Court will issue a separate order commencing the Bear River Basin Adjudication contemporaneously with this *Memorandum Decision.*

DATED: June 14, 2021

ERIC J. WILDMAN
Presiding Judge
Bear River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: June 14, 2021

ERIC J. WILDMAN
Presiding Judge
Bear River Basin Adjudication

DISTRICT COURT - BRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUN 29 2022
By _____ Clerk
_____ Deputy Clerk

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

IN RE: THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE BEAR RIVER BASIN WATER SYSTEM	**BRBA ADMINISTRATIVE ORDER 1**
Case No. 79576	**RULES OF PROCEDURE**

This order establishes procedures for the trial of claims or issues in the Bear River Basin Adjudication ("BRBA") and is entered under the Presiding Judge's authority to effectively and expeditiously manage proceedings in this case and may be amended as needed.

IT IS ORDERED that any party to the adjudication desiring to litigate any claim or issue in the BRBA, including all or a portion of a recommendation, notice of federal claim or negotiated agreement in a Director's Report shall comply with these ***Rules of Procedure.***

DATED: June 29, 2022

ERIC J. WILDMAN
Presiding Judge
Bear River Basin Adjudication

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PROCEDURES IN THE BEAR RIVER BASIN ADJUDICATION

1. SCOPE AND PURPOSE

a. The litigation of the Bear River Basin Adjudication ("BRBA") will be governed by the Idaho Rules of Civil Procedure ("I.R.C.P."), the Idaho Rules of Evidence ("I.R.E.") and the Idaho Appellate Rules ("I.A.R.").

b. These procedures supplement the I.R.C.P., I.R.E., I.A.R., and any other applicable laws or orders of this Court only to the extent necessary to allow for the fair and expeditious resolution of all claims or issues in the BRBA.

c. Special jurisdiction and venue for the BRBA was confirmed in the Presiding Judge of the Snake River Basin Adjudication district court of the fifth judicial district of the state of Idaho, in and for the County of Twin Falls. I.C. § 42-1406B(2).

2. DEFINITIONS

a. **AO1** - BRBA Administrative Order 1, Rules of Procedure.

b. **Basin-Wide Issue** - An issue designated by the Presiding Judge as potentially affecting the interests of a large number of Claimants to the use of water within the BRBA and the resolution of which will promote judicial economy.

c. **Claimant** - Any person who has filed a claim to the use of water in the BRBA.

d. **Clerk of the Court** - The Clerk of the BRBA Court.

e. **Court** - The BRBA Court located at 253 Third Avenue North, Twin Falls, Idaho 83301. Mailing address: PO Box 2707, Twin Falls, ID 83303-2707; Telephone: (208) 736-3011; FAX: (208) 736-2121; Internet: www.brba.idaho.gov

f. **Director** - The Director of the Idaho Department of Water Resources.

g. **Director's Report** – Report of the Director as defined by I.C. § 42-1411.

h. **Docket Sheet Procedure** - The procedure established to give notice of proceedings to BRBA Claimants and parties.

i. **Domestic Use** - Domestic water use is defined by I.C. §§ 42-111 and 42-1401A(4).

j. **IDWR** - The Idaho Department of Water Resources.

k. **Initial Hearing** - The first hearing before the Court held for the purpose of facilitating settlement, setting additional hearings and setting trial schedules.

l. **IWATRS** - The Court's computerized registry of actions that lists all Pleadings and documents filed or lodged with the Court, all orders entered by the Presiding Judge or Special Masters, and also provides additional information such as lists of upcoming hearings. IWATRS' registry of actions may be accessed via the Court's website (www.brba.idaho.gov), and includes links for viewing scanned copies of Pleadings, orders, and other Court documents.

m. **Notice of Federal Claim** - A claim established under federal law provided by I.C. § 42-1411A, and processed in accordance with Section 13.b. if no objection is filed and Section 14 if an objection is filed.

n. **Objector/Respondent** - Unless the context indicates otherwise, a Party to the adjudication filing an objection or response to a water right Recommendation reported in a Director's Report as provided by I.C. §§ 42-1411 and 42-1412 or claimed under federal law as provided by I.C. § 42-1411A.

o. **Partial Decree/Judgment** - The final determination of the elements of a water right. A Partial Decree shall be treated as a final judgment in individual Subcases for purposes of appeal, motions for attorney fees and other post-judgment motions under I.R.C.P. 54(b). The Court may also certify any order as final in accordance with I.R.C.P. 54(b).

p. **Party to a Subcase** - The Claimant, any Objector or Respondent to a water right Recommendation, any Party to a Subcase which has been consolidated with another Subcase, any Party to the Adjudication granted leave to participate in a Subcase by the Presiding Judge or a Special Master, and any Party to the Adjudication once they have filed a *Motion to Alter or Amend* the *Special Master's Recommendation*.

q. **Party to the Adjudication** - Pursuant to I.C. § 42-1401A(6), Party to the Adjudication means any person who is a Claimant or any person who is served or joined.

r. **Pleadings** - All documents defined as Pleadings by the I.R.C.P., and objections, responses to objections, and notices of claims.

s. **BRBA** - The Bear River Basin Adjudication.

t. ***Pro Se*** - Claimants or other parties representing themselves without legal counsel.

u. **Recommendation** - The statements by the Director, as set out in a Director's Report, as to elements of a water right claim.

v. **Special Master** - A person appointed by the Presiding Judge through an *Order of Reference* to hear Subcases or other matters and who reports to the Presiding Judge. I.C. § 42-1422; I.R.C.P. 53.

w. **Special Master's Recommendation** - A final written submission to the Presiding Judge containing the decisions and Recommendations of the Special Master under the *Order of Reference*.

x. **Stock Watering Use** - Stock watering use as defined by I.C. § 42-1401A(11).

y. **Subcase** - A water right which is the subject of any post-Director's Report pleading.

3. PLEADINGS

a. All Pleadings shall comply with the I.R.C.P. and these *Rules of Procedure*.

b. Documents or Pleadings filed in any courthouse other than the BRBA Courthouse in Twin Falls will not be accepted and will not be deemed "filed" until received by the Clerk of the BRBA Court.

c. Pleadings shall be signed by counsel as required by I.R.C.P 11(a) or by *Pro Se* Claimants or other parties.

d. **Caption** - The following caption shall be used on all Pleadings in the BRBA and must begin 2 inches from the top of the page. Pleadings filed in the individual Subcases shall include the name and main case number for the BRBA and the Subcase (water right) number inserted above the document name. Pleadings filed in the Basin-Wide Issues shall include the Basin-Wide Issue number inserted above the document name.

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for court file stamp

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Name of Party Filing Document:
Attorney Name & Address
ISB #

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

In Re BRBA) (SUBCASE NUMBER)
)
Case No. 79576) (DOCUMENT NAME)
)

(Begin Document Text Here)

e. The document name shall identify the specific type of document and the action or relief requested.

f. All documents or Pleadings shall include the name of the document typed at the bottom of each page, including all attachments or exhibits. I.R.C.P. 10(a).

g. All attached exhibits must be legible and subject to reproduction or must be accompanied by a typewritten duplicate. I.R.C.P. 10(a).

h. **Filing by FAX** - Documents and Pleadings may be filed by FAX pursuant to I.R.C.P. 5(d)(3):

(1) FAX filings are only accepted for filing during the normal working hours of the Clerk of the BRBA Court: 8:30 a.m. to 5:00 p.m. (Mountain Time), Monday through Friday. Any FAX transmission not completed by 5:00 p.m. will be file stamped the next business day.

(2) Documents or Pleadings filed by FAX are limited to 10 pages, **including** attachments and exhibits.

(3) The signature on the FAXed copy shall constitute the required signature under I.R.C.P 11(a). Do not send the original by mail.

(4) Except for Standard Forms 5 and 7, BRBA Standard Forms **will not** be accepted for filing by FAX.

(5) The Clerk of the BRBA Court shall accept for filing a copy of any FAXed document or pleading not transmitted directly to the Court. The signature on the FAXed copy shall constitute the required signature under I.R.C.P. 11(a).

i. **Filing by Electronically Transmitted Document**

[Reserved]

j. **Injunctive Relief**

(1) Any action for injunctive relief may be brought pursuant to I.R.C.P. 65 or I.R.C.P. 74.

(2) On receipt of any motion or petition for injunctive relief, the Clerk of the Court shall assign a separate Subcase file number to the matter. This new Subcase file number shall be included on all documents filed regarding the injunctive relief matter.

(3) Injunctive relief proceedings will be handled on an expedited basis as described in the Idaho Rules of Civil Procedure, and all related documents will appear on the Docket Sheet.

k. **Multiple Subcases** - When filing a document affecting multiple Subcases, the filing party shall provide the Court a copy of the document for each Subcase affected. If the document is filed by FAX, the copies shall be mailed to the Court the same day. When Subcases are consolidated by court order and a lead Subcase is designated, only one document needs to be filed in the lead Subcase; however, service is still required on all parties in each Subcase. Restrictions on the use of standard forms (Section 4) for multiple Subcases are set forth in the instructions located on the face of the standard forms.

l. **IDWR Central Depositories** - IDWR shall maintain copies of all Pleadings and other documents filed or lodged in the BRBA and which appear on the Docket Sheet. Copies shall be available for inspection and copying during normal business hours at its central office located at 322 E. Front Street, 6th Floor, Boise, Idaho. The mailing address is: IDWR Document Depository, PO Box 83720, Boise, Idaho 83720-0098; telephone is (800) 451-4129; FAX is (208) 287-6701. Most documents may be viewed online at www.idwr.idaho.gov or on the Court's website at www.brba.idaho.gov.

m. **IDWR Regional Depositories** – IDWR Northern Regional Office shall make available for inspection and copying objections, responses and supporting documents, if any, for all water rights reported in that region. These Pleadings and IDWR's investigative files for reported water rights shall be available for inspection and copying during normal business hours.

4. STANDARD PLEADING FORMS

a. Parties must use the following standard forms:

(1) *Objection* (Standard Form 1).

(2) *Response to Objection* (Standard Form 2).

(3) *Motion to File Amended Notice of Claim* (Standard Form 3).

(4) *Motion to File a Late Notice of Claim* (Standard Form 4).

(5) *Stipulated Elements of a Water Right* (Standard Form 5).

(6) *Motion to File a Late Objection and/or Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim* (Standard Form 7).

b. The standard forms may be obtained from IDWR or the BRBA Court or downloaded from either the Court's website or from IDWR's website. A copy of each standard form is attached to these rules.

c. A party may copy or reproduce any standard form. The form may be electronically modified to include only those sections being used. No other portion of the forms may be modified unless ordered by the Court. The Court will not accept incorrect or incomplete forms. Refiling of returned incorrect or incomplete forms must be made under the original filing deadline or pursuant to a motion and order for a late filing.

d. **Use of standard forms**:

(1) *Objection* (Standard Form 1) and *Response to Objection* (Standard Form 2) -

(a) Objections and responses to a Recommendation or Notice of Federal Claim in a Director's Report shall be on BRBA Standard Forms 1 and 2. No other form of objection or response may be filed with the Court.

(b) A Claimant **may not** amend a claim by filing an objection or a response (see Section 4.d.(2)).

(c) The Director shall notify Claimants that the Court requires the use of standard objection or response forms. This notice may be included in the *Notice of Filing the Director's Report*.

(d) **Deadlines for Filing an Objection or a Response Form** - The *Notice of Filing the Director's Report*, filed by IDWR, shall set out the dates when objections and responses are due and shall be computed to include weekends and holidays. The objection or response must be **received** by the Court by the deadline specified.

(e) Any party filing 25 or more objections or responses must contact the Clerk of the BRBA Court at least 7 days prior to the deadline for filing their Pleadings.

(f) **Service of an Objection or a Response Form** - A party filing an objection or a response must send a copy, including supporting documents, to each individual identified on that form's certificate of mailing.

(2) *Motion to File Amended Notice of Claim* (Standard Form 3) -

(a) In reporting areas where a Director's Report **has not** been filed, an amended notice of claim shall be filed with IDWR. A *Motion to File Amended Notice of Claim* is not required to be filed with the Court.

(b) In reporting areas where a Director's Report **has** been filed, a *Motion to File Amended Notice of Claim* must be filed with the Court.

(c) A *Motion to File an Amended Notice of Claim* must be filed using Standard Form 3 and must be used for a single water right only.

(d) After the Director's Report has been filed for a particular claim, leave of Court is required to amend the claim through the filing of a Standard Form 3 unless the parties stipulate to the elements as provided in Section 4.d.(4)(e). The Court will decide whether to require a hearing depending on the nature and extent of the amendment. Leave to amend a notice of claim shall be freely given when justice so requires, and the Court may make such order for the payment of costs as it deems proper.

(e) IDWR investigation of amended claim - IDWR shall prepare an Amended Director's Report for any amended claim, including claims amended at trial to conform to the evidence. Notice of filing of the Amended Director's Report will appear on the Docket Sheet pursuant to Section 5. The Claimant may be ordered to pay all necessary costs associated with investigating and reporting the amended claim.

(3) *Motion to File a Late Notice of Claim* (Standard Form 4) -

(a) In reporting areas where a Director's Report **has not** been filed, a late notice of claim shall be filed with IDWR. A *Motion to File a Late Notice of Claim* is not required to be filed with the Court.

(b) In reporting areas where a Director's Report **has** been filed, a *Motion to File a Late Notice of Claim* must be filed with the Court.

(c) A *Motion to File a Late Notice of Claim* must be filed using Standard Form 4 and must be used for a single water right only.

(d) A *Motion to File a Late Notice of Claim* shall proceed before the Presiding Judge, shall follow Docket Sheet motion practice procedure (Section 7.f.), and will be reviewed under the criteria of I.R.C.P. 55(c). Parties to the adjudication opposing the *Motion to File a Late Notice of Claim* shall proceed in accordance with Section 7.f.(4)(b) herein.

(e) A *Motion to File a Late Notice of Claim* shall have attached:

1) A completed Notice of Claim (available from IDWR); and

2) The claim filing fee and late claim fee for claims. Payment shall be in the form of a check made payable to: State of Idaho Department of Water Resources. To determine the exact amount of these fees, call IDWR at (800) 451-4129.

3) Pursuant to I.C. §§ 42-1414 and 42-1415, additional costs may apply to late notices of claim or to amended notices of claim other than for Domestic Use and Stock Watering Use as defined herein.

(f) When a *Motion to File a Late Notice of Claim* is granted, the Clerk of the Court shall forward the check and completed Notice of Claim to IDWR. If the motion is denied, the Clerk of the Court shall return the claim filing fee and the late claim fee.

(g) IDWR shall file a Director's Report for late-filed claims on at least an annual basis, or more frequently as determined necessary by the Court.

(h) Notice of the filing of the Director's Report for a late claim shall appear on the Docket Sheet.

(i) Unless otherwise ordered by the Court, objections or responses to Director's Reports for late claims shall be as set forth in the late claims Director's Report.

(4) *Stipulated Elements of a Water Right* (Standard Form 5) -

(a) Where parties reach an agreement on a contested water right Recommendation, they shall file either a stipulation with the Court using Standard Form 5 or some other stipulation acceptable to the Court. Subcases may also be resolved orally on the record.

(b) Standard Form 5 may only be used if **all** parties have stipulated to **all** elements of **one** water right and may be submitted at any time following the close of the statutory response period.

(c) Standard Form 5 is used to report the stipulated elements of **one** water right acquired under state law or **one** federal reserved water right.

(d) When IDWR does not concur with a proposed settlement, the Presiding Judge or Special Master shall conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a Partial Decree for the water right as stipulated in the Standard Form 5 or proposed settlement.

(e) Where the stipulated elements require an amendment of the claim and IDWR concurs with the proposed settlement, leave of Court to amend the claim is not required. In that case, the Standard Form 5 can be used as an Amended Claim and an Amended Director's Report if one is required by the Court, by checking the appropriate box. If the settlement results in an expansion of the water right beyond what was originally claimed (i.e. increase in rate of diversion, acreage, more consumptive purpose of use, etc.), or results in a change that would potentially affect a party not already a Party to the Subcase, then an Amended Claim/Director's Report is required to provide notice to third parties not already parties to the Subcase. The Amended Claim/Director's Report shall appear on the Docket Sheet to provide notice and an opportunity to object to persons not already party to the Subcase.

(f) Standard Form 5 or a substantially similar form of proposed settlement may be used to report the stipulated elements of one water right established under federal law; provided, however, that IDWR concurrence shall not be required for any proposed settlement of a federal reserved water right.

(5) *Motion to File a Late Objection* or *Motion to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim* (Standard Form 7).

(a) Where the time period for filing objections has expired, a *Motion to File a Late Objection* (Standard Form 7) must be filed with the Court. *Motions to File Late Objection* will be reviewed under the criteria of I.R.C.P. 55(c). When a *Motion to File a Late Objection* is filed to a previously "unobjected-to" Recommendation or Notice of Federal Claim:

1) The motion shall appear on the Docket Sheet; and

2) A hearing on the motion shall be scheduled by the Special Master assigned to that reporting area and notice of the hearing shall appear on the Docket Sheet.

(b) Where a Partial Decree or a final order disallowing a water right claim has been issued for a water right claim a *Motion to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim* (Standard Form 7) must be filed with the Court. *Motions to Set Aside and Modify Partial Decree or Final Order Disallowing Water Right Claim* will be reviewed under the criteria of I.R.C.P. 60(a) or 60(b).

5. FILING OF AMENDED DIRECTOR'S REPORTS

Unless otherwise ordered by the Court, if an Amended Director's Report is required under these Rules or is otherwise filed by IDWR, the Amended Director's Report shall be docketed in the Subcases indicating the type of amendment made and will appear on the Docket Sheet. Any party wishing to file an objection to an Amended Director's Report may do so by filing an Objection within 21 days following the notice of filing the Amended Director's Report on the Docket Sheet, unless a different schedule is ordered by the Court or Special Master. Parties who previously filed Objections and/or Responses in a Subcase are required to file new Objections and/or Responses to an Amended Director's Report, unless the Court or Special Master orders otherwise.

6. EVIDENCE AND DOCUMENT PRESERVATION

a. After a Director's Report has been filed, employees or contractors of IDWR may go on a Claimant's property in that reporting area to further investigate a reported claim only with permission from the Claimant or leave of the BRBA Court.

b. No party to the BRBA may destroy any document or evidence kept in any medium which relates to a pending claim in the BRBA or has been prepared for use in the BRBA, except on motion and order by the BRBA Court. This order is intended to override any records management or document destruction program used by any party. This order does not apply to documents protected by the attorney-client privilege or to attorney work product.

c. IDWR may not destroy any document or evidence, in any medium, relating to a water right or which has been used or relied upon in making a Recommendation in a Director's Report. Further, IDWR shall keep all policies and procedures, past or current, in draft or

final form, which were actually relied upon by IDWR, its employees or agents in making any Recommendation in a Director's Report.

7. DOCKET SHEET PROCEDURE

a. The Docket Sheet and corresponding Docket Sheet Procedure is the method used by the Court to provide notice to the parties to the BRBA of certain filings and proceedings identified in these Rules of Procedure. The identified filings and proceedings consist of those which can affect claims outside the scope of a Subcase and therefore basin-wide notice is necessary. The Docket Sheet is published by the Court on the 7th day of each month and is available at the County Clerk's office for each county included in whole or in part in the adjudication, the Court's website, and by annual subscription available via electronic media or paper printout.

b. The Docket Sheet shall include the following sections:

(1) A chronological list of all orders, Pleadings (except objections, responses, Pleadings or orders filed in Subcases) and other documents (i.e., motions for late or amended claims or motions for late objections) filed with the Court since the last Docket Sheet including:

(a) The BRBA case number;
(b) The document name;
(c) The name of the party and the party's attorney, if any; and
(d) The date the document was filed.

(2) A chronological list of all objections and responses filed since the last Docket Sheet including:

(a) The Subcase number;
(b) The name of the Claimant, Objector or Respondent;
(c) The address of the Objector or Respondent if not represented by an attorney;
(d) The name and address of the attorney representing the Objector or Respondent;
(e) The box number(s) checked on the objection or response form;
(f) The date the document was filed; and
(g) The source of the water right as stated in the Director's Report.

(3) A chronological list of the hearings scheduled for the next three months (except hearings in Subcases) including:

(a) The BRBA case number;
(b) The date and time of the hearing;
(c) The subject; and

(d) The names of the parties.

(4) A list of all Special Master's Reports and Recommendations issued since the last Docket Sheet;

(5) A list of all Amended Director's Reports issued since the last Docket Sheet; and

(6) A list of all Partial Decrees issued since the last Docket Sheet.

c. The BRBA Court shall compile the Docket Sheet and send copies to:

(1) The Clerk of the District Court in each county located within the boundaries of the BRBA. The Docket Sheet shall be posted by the Clerk of the District Court in each county or the Clerk shall post a notice telling where in the county building the Docket Sheet is available for inspection. Depending on the particular county, the Docket Sheet may be in printed hard copy version, as electronic media or via internet access to the Court's website.

(2) One copy to IDWR for inclusion in the document depository:

IDWR
Document Depository
PO Box 83720
Boise, ID 83720-0098

IDWR shall make the Docket Sheet available for inspection at its central and regional offices.

(3) The Docket Sheet is also available on the Court's website.

d. The Court charges an annual subscription fee based on the actual cost of copying and mailing. The Docket Sheet is available in electronic medium or a paper printout version upon request. The Court shall maintain a Docket Sheet mailing list.

e. Service of Pleadings and other documents under the Docket Sheet Procedure.

(1) Pleadings or other documents shall be filed with the Clerk of the BRBA Court, 253 Third Avenue North, PO Box 2707, Twin Falls, Idaho 83303-2707.

(2) Copies of any pleading or other document shall be delivered or mailed to:

(a) IDWR Document Depository, PO Box 83720, Boise, Idaho 83720-0098;

(b) Chief, Natural Resources Division, Office of the Attorney General, State of Idaho, PO Box 83720, Boise, Idaho 83720-0010;

(c) U.S. Department of Justice, Environment and Natural Resources Division, 550 West Fort Street, MSC 033, Boise, Idaho 83724. Documents served by messenger or overnight delivery service should be sent to the U.S. Department of Justice, Environment and Natural Resources Division, c/o U.S. Attorney's Office, 1290 West Myrtle Street, Suite 500, Boise, ID 83702; and

(d) All parties identified in the pleading from whom relief is sought. If relief is sought against a class or group, service shall be made on the representative of that class or group.

f. Motion practice under the Docket Sheet Procedure.

(1) **Hearing Date** - Unless otherwise ordered, a motion to be heard by the Presiding Judge will be heard on the third Tuesday of the second month following its appearance on the Docket Sheet. Any motion filed with the Court before 5:00 p.m. (Mountain Time) of the last working day of a month will be placed on the Docket Sheet for that month. For example, a document filed before 5:00 p.m. on August 31, 2012, will appear on the Docket Sheet on September 7, 2012. The hearing will be held on Tuesday, November 20, 2012.

(2) **Expedited Hearings** - Any party moving for an order to expedite a hearing controlled by Docket Sheet motion practice procedure (Section 7.f.) shall contact the Clerk of the Court for a hearing date. The party shall then send a copy of the notice of hearing, the motion and supporting documents to all parties listed in Section 7.e.(2) and each person on the current copy of the *Court Certificate of Mailing for Expedited Hearings* which is available from the Clerk of the BRBA Court or from the Court's website. Parties to the adjudication seeking to be added to the expedited mailing list shall make a written request to the Clerk of the BRBA Court. Parties preferring expedited service electronically via e-mail in lieu of a hard copy may specify as such in written request. This section does not apply to hearings regarding matters that are not required to appear on the Docket Sheet.

(3) Notice of hearings under the Docket Sheet Procedure:

(a) Service of a notice of hearing shall be made pursuant to Section 7.e. A party requesting and receiving an expedited hearing shall meet the service requirements of Section 7.f.(2).

(b) Compliance with the Docket Sheet Procedure constitutes notice to all parties to the adjudication.

(4) Briefing schedule under the Docket Sheet Procedure.

(a) **Documents in Support of a Motion** - All documents and briefs in support of a motion shall be filed with the motion and served on the parties listed in Sections 7.e. or 7.f.(2).

(b) **Responses to Motions** - Parties may file documents and briefs supporting or opposing a motion by the fifteenth day of the month following the motion's first appearance on the Docket Sheet. Service shall be made on the movant and the parties identified in Sections 7.e. or 7.f.(2). If a motion is to be heard on an expedited basis, a response shall be filed with the Court at least one day prior to hearing and served on the *Court Certificate of Mailing for Expedited Hearings*.

(c) **Replies to Responses** - Documents or briefs in reply to responses must be filed before the last working day of the month following the motion's first appearance on the Docket Sheet, unless the matter is set on an expedited basis. Service shall be made on the party who filed the response and on the parties identified in Sections 7.e. or 7.f.(2). A matter set on an expedited basis will rarely allow time for a reply to be filed prior to hearing.

(d) **Extensions** - For good cause a party may move for an extension of time to file a response or reply to a motion. A *Motion for Extension of Time* shall be filed with the Court and served as provided in Sections 7.e. or 7.f.(2), prior to the date the brief is due. If the motion is granted, the movant shall serve a copy of the order as provided in Sections 7.e. or 7.f.(2).

8. COURT FEES

Unless otherwise precluded by applicable law, the following fees apply in the BRBA. You must contact the Clerk of the BRBA Court for the amount of the fee.

a. **Transcript fee** - A per-page fee is charged for the preparation of any transcript of any BRBA hearing. Arrangements for transcripts must be made through the BRBA court reporter. Fees must be paid to the court reporter **prior** to preparation of the transcript.

b. Appellate fees -

(1) The Idaho Supreme Court requires payment of a filing fee for all appeals. This fee must accompany any notice of appeal.

(2) All appeals to the Idaho Supreme Court must include a clerk's record. Payment of a per-page fee for the preparation of the clerk's record is required. An estimate of this fee must be paid at the time the notice of appeal is filed.

c. **Fees for services** - Fees for services including but not limited to the copying of files or records, the certifying of files or records, affixing court certificate and seal, and the copying of an audiotape or CD of any BRBA hearing shall be as provided in I.C. § 31-3201.

9. ERROR CORRECTION PROCEDURE

a. Upon written notification by IDWR of an error in a Partial Decree and compliance with the service requirements for correspondence as set forth in Section 11.k., depending upon the nature of the error, the Court in its discretion, may:

(1) Correct the error without a hearing pursuant to I.R.C.P. 60(a); or

(2) Issue a Notice of Court's Intent to correct the error, pursuant to Docket Sheet notice, allowing an opportunity for parties to be heard on the Court's intended action.

b. Notification by Claimant or other party to the BRBA:

(1) Use the Standard Form 7.

10. SPECIAL MASTERS

a. The Presiding Judge may refer Subcases and other matters to a Special Master by an *Order of Reference* pursuant to I.R.C.P. 53.

b. Subcases referred to a Special Master will proceed in accordance with the I.R.C.P. and these *Rules of Procedure*. Each Subcase shall proceed in the same manner as any court case. Special Masters are exempt from the time requirements of I.R.C.P. 53.

c. A Special Master shall file reports with the Presiding Judge on the matters submitted by the *Order of Reference* and, if required, shall include findings of fact and conclusions of law. I.R.C.P. 53(i). Service shall be made on the parties to the Subcases covered. Notice of the filing of the *Special Master's Recommendation* shall appear on the Docket Sheet.

d. **Permissive Review** - A Special Master or any Party to the Subcase may seek permissive review by the Presiding Judge of the Special Master's interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion and on which immediate consideration of the determination may advance the orderly resolution of the litigation following the procedures set forth in I.A.R. 12. The Special Master shall review the motion and responses and recommend, with findings, whether it should be granted or denied. The motion and the Special Master's recommendation shall be forwarded to the Presiding Judge for determination.

11. PROCEDURE FOR WATER RIGHTS WHERE AN OBJECTION HAS BEEN FILED

a. When the first objection to a Recommendation or Notice of Federal Claim is filed, a Subcase file shall be opened and separately docketed on IWATRS. The water right number becomes the Subcase number. All subsequent filings for that water right, including objections and responses, will be docketed under that Subcase.

b. Subcases will generally be referred to a Special Master by an *Order of Reference*. Depending upon the nature of the claim, court staffing, or for case management purposes, the Presiding Judge may elect to preside over a particular Subcase or administrative basin.

c. Unless otherwise ordered by the Presiding Judge or a Special Master, each Subcase shall proceed separately from other Subcases or matters at issue in the BRBA.

d. After the objection period has expired, IDWR shall coordinate with the Special Master the timing of the filing of a case management report to be used for the scheduling and efficient processing of Subcases at the Initial Hearing. The case management report shall also include those claims for which no objection has been filed but may be affected by the outcome of the proceedings involving a contested claim. I.C. § 42-1412(7). The case management report is not served on the parties.

e. **Scheduling**

(1) At the end of the objection period, the Court may hold an Initial Hearing for each Subcase. At the Initial Hearing, each Claimant, Respondent, and/or Objector shall be given an opportunity to meet with IDWR in an attempt to reconcile the difference between the Director's Report, the claim and the objection(s) for each Subcase. If the objection(s) cannot be reconciled, the Court shall set the matter for trial. The Claimant and objecting party, if any, must be present at the Initial Hearing. Any Claimant whose water right has been identified as potentially being affected by the outcome of a contested claim shall be present at the Initial Hearing.

f. **Procedures on I.C. § 42-1425 Objection to Accomplished Transfer**

(1) Where an Objector, in a Standard Form 1, objects to a recommendation in a Director's Report because it includes an accomplished transfer under I.C. § 42-1425 resulting in injury and/or enlargement, the Special Master shall address the objection at the initial hearing. Following the initial hearing, the Special Master shall, unless waived by the parties, issue a scheduling order remanding the water right to the Director pursuant to I.C. § 42-1425(2)(a) for the limited purpose of determining whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. The proceedings before the Director on remand do not constitute an independent administrative proceeding under Idaho's Administrative Procedures Act, but rather an opportunity to submit information and/or argument to the Director,

limited to injury or enlargement, that may have not otherwise been considered by the Director in preparing the recommendation. Following the proceedings before the Director, the Director shall submit a supplemental report setting forth his findings and conclusions and, if necessary, an amended Director's Report. Parties can elect to waive this process and proceed on the evidence to be presented at a subsequent BRBA proceeding before the Special Master. Once waived any subsequent request for remand for this purpose is discretionary with the Special Master or Presiding Judge.

(2) If a Party files a *Motion to Amend Objection* or a *Motion to File Late Objection* that seeks to object to a recommendation because it includes an accomplished transfer and the initial hearing has already been held, the Special Master or Presiding Judge shall address the request for remand at the hearing on the motion.

g. **IDWR Involvement**

(1) IDWR is an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported. I.C. § 42-1401B.

(2) The Court in its discretion may call IDWR as a witness in any Subcase involving a water right pursuant to I.R.E. 614(a) or I.R.E. 706.

(3) Any Party to a Subcase involving a water right acquired under state law may call a representative of IDWR as a witness. In a Subcase involving a water right acquired under federal law, leave of Court is required. A deposition of the witness may be taken by any Party and the witness shall be subject to cross-examination by the parties, including the Party calling IDWR as a witness. I.R.E. 706. Should any Party choose to cross-examine IDWR or call IDWR at trial, IDWR must be notified, in writing, consistent with any deadlines set forth in the pre-trial scheduling order and no later than the pre-trial conference.

(4) The Court on its own motion or the motion of any Party may request a Supplemental Director's Report from IDWR setting forth the basis of IDWR's Recommendation on the disputed element(s) of any water right acquired under state law. If a Supplemental Director's Report is requested by a Party, the Presiding Judge or Special Master will determine, in his or her discretion, whether to grant or deny the request. IDWR shall serve the report on each Party and shall file the report with the Court. The Court may consider the report for any pre-trial matter or in lieu of any direct testimony by IDWR at trial.

(5) A representative of IDWR shall attend all hearings in contested Subcases involving a water right acquired under state law unless excused by the Presiding Judge or the Special Master.

h. Service of documents in a Subcase need be made only on parties to the Subcase and IDWR. When a document is filed in a Subcase, the Docket Sheet Procedure **is not required to be followed**, except for: motions and notices of hearings to designate Basin-

Wide Issues; proceedings on Basin-Wide Issues; *Special Master's Recommendations*; notices of challenge to a *Special Master's Recommendation*; motions and notices of hearings for entry of Partial Decrees; proceedings by the Presiding Judge on decrees; motions or orders for I.R.C.P. 54(b) certification or permissive review; actions for injunctive relief; notices of appeal; and any other matter ordered by the Court to follow the Docket Sheet Procedure.

i. **Motion to Participate** - Any Party to the Adjudication who is not a Party to a Subcase may seek leave to participate in a Subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. A Party to the Adjudication who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a Party to the Subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend*.

j. If all parties to a Subcase stipulate to all elements of one water right, a Standard Form 5 may be submitted at any time following the close of the response period.

k. If a Party must correspond with the BRBA Court, the Party shall identify the Subcase involved and must include a statement that all Parties to the Subcase have been sent a copy of the correspondence and any attachments. If these procedures are not followed, the correspondence may not be accepted by the Court.

12. HEARINGS

a. **Resetting Subcase Hearing Dates** - Any Party to the BRBA who requests that a hearing be reset shall comply with the following requirements:

(1) Contact the Clerk of the BRBA Court to obtain alternative dates and times;

(2) Contact each Party to the Subcase(s) or their attorney, if any, and reach an agreement on an alternative date and time provided by the clerk; and

(3) Prepare and file with the Court a *Stipulation to Reset* the hearing. The hearing must be reset on one of the dates and times provided by the clerk or it will not be accepted for filing. The stipulation must specify the agreed upon date and time and must contain a statement that the Party moving to reset the hearing has contacted each Party or their attorney and that all have agreed on the alternate date and time. If granted, the Court will send a notice resetting the hearing.

(4) If the parties cannot reach agreement, the Party wishing to change the date and time must file a *Motion to Change the Hearing Date* at least 14 days prior to the scheduled hearing.

b. **Participation in Hearings by Telephone and Zoom Meetings** – This section supplants I.R.C.P. 7.2. Unless otherwise ordered by the Court, telephone participation and/or Zoom participation will be allowed in all hearings, except as follows:

(1) Oral testimony will not be allowed by telephone. Oral testimony may be allowed by Zoom as determined by the Court.

(2) The Court may require in-person or Zoom attendance at Initial Hearings, settlement conferences, and trials.

(3) A notice setting hearing will specify participation restrictions, telephone conferencing numbers and Zoom participation instruction.

(4) In cases where telephone or Zoom participation is restricted, telephone or Zoom participation may still be permitted upon request, if available, for monitoring proceedings.

(5) Speakerphones and cell phones often pick up background noise and/or cause interference with sensitive courtroom equipment. **Therefore, the use of speakerphones and cell phones is discouraged.**

(6) Place your call to the Court a few minutes prior to the scheduled start of your hearing so that the Clerk of the Court may identify who is participating by telephone or Zoom.

13. PROCEDURES FOR WATER RIGHTS WHERE NO OBJECTION HAS BEEN FILED

a. Claims for water rights based on state law where no objection has been filed shall proceed in accordance with I.C. § 42-1412(7).

b. Claims for water rights based on federal law where no objection has been filed shall proceed in accordance with I.C. § 42-1411A(14). Unless otherwise ordered by the Court, the Claimant may present evidence to establish the required prima facie showing through the filing of affidavits.

14. NOTICE OF CLAIMS BASED ON FEDERAL LAW

Notice to parties to the adjudication of the filing of Notice of Claims based on federal law will be reported in a Director's Report and will appear in substantially the same format as the Director's Recommendations for claims based on state law. The filing of the Director's

Report will proceed according to the same filing and service procedures as claims based on state law. The Director's Report shall state that the claim is based on federal law and shall include instruction and deadlines for filing Objections and Responses.

15. PROCEDURES FOR UNPERFECTED WATER RIGHT PERMITS

Unperfected water right permits will be adjudicated in conformance with I.C. § 42-1421; provided, however, the Court can make a determination whether to stay BRBA adjudication proceedings to allow completion of the administrative process and issuance of the license. In the event of such a determination IDWR shall notify the Court by filing a *Notice of Completed Administrative Proceeding* upon issuance of the license. Unperfected water right permits that are adjudicated may be subject to later amendment in the BRBA in the event of a subsequently issued license.

16. CONSOLIDATION OR SEPARATION OF SUBCASES AND ISSUES

Any matter at issue in any proceeding in the adjudication, including portions of or entire Subcases, may be consolidated with or separated from any other matter at issue in the adjudication. Any Party to a Subcase may move for consolidation or separation of claims or issues. The Presiding Judge or Special Master may order consolidation or separation on the basis of such motion or on their own. I.R.C.P. 42. If a motion to consolidate concerns issues from Subcases which are all before the same Special Master, it shall be served only on parties to those Subcases and shall be decided by the Special Master. If such a motion concerns Basin-Wide Issues or issues from Subcases which are not all before the same Special Master, it shall be served on all parties to those Subcases, noticed through the Docket Sheet Procedure and decided by the Presiding Judge or a Special Master by *Special Order of Reference*.

NOTE: A motion to consolidate Subcases is appropriate in situations where common issues of law or fact present themselves in more than one Subcase and resolution of those issues can be most expeditiously and effectively achieved through presentation to the Presiding Judge or a Special Master in consolidated hearings.

17. SETTLEMENT CONFERENCES

a. **Mediated Settlement Conferences** – The Presiding Judge or Special Master may order a Subcase to mediation pursuant to I.R.C.P. 37.1. When available, a Special Master not

assigned to the Subcase may be appointed to act as mediator at no charge to the parties. Unless otherwise ordered by the Court, each Party is required to be present, together with the individual(s) possessing full settlement authority on every aspect of the contested Subcase, and participate in the settlement conference.

b. **Informal (non-mediated) Settlement Conferences** – The Presiding Judge or Special Master may order the parties to participate in a settlement conference without a mediator.

c. **IDWR Participation** – A representative of the Department may, at the discretion of the Presiding Judge or Special Master, attend or not attend any settlement conference ordered by the Presiding Judge or Special Master.

18. PROCEEDINGS ON A SPECIAL MASTER'S RECOMMENDATION

a. The Special Master shall prepare and file with the Court a *Special Master's Recommendation* which shall be served on the parties to the Subcase and notice of its entry shall appear on the Docket Sheet. Any Party to the Adjudication, including parties to the Subcase, may file a *Motion to Alter or Amend* within 21 days from the date the *Special Master's Recommendation* appears on the Docket Sheet. The additional time provisions of I.R.C.P. 2.2(c) shall not apply to this prescribed period. Any Party to the Adjudication not already a Party to the Subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation* which shall set forth the Party's name; the water right number; the name, address and telephone number of the attorney; and a short statement of the Party's position on the issues presented in the *Motion to Alter or Amend*. **Failure of any Party in the adjudication to pursue or participate in a *Motion to Alter or Amend* the *Special Master's Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge**. This waiver shall also apply to further proceedings in the Subcase if remanded back to the Special Master.

b. Where a *Motion to Alter or Amend* is filed in a Subcase, notice will appear on the Docket Sheet and the motion will be decided by the Special Master without responsive briefing or a hearing, unless ordered by the Special Master. No second *Motion to Alter or Amend* may be filed on the decision granting or denying a *Motion to Alter or Amend*.

c. Any Party who first filed or participated in a *Motion to Alter or Amend* before the Special Master may file a *Notice of Challenge* to the decision on a *Motion to Alter or Amend*. A

Notice of Challenge shall be filed within 14 days following the date of the filing of the decision on a *Motion to Alter or Amend*. The additional time provisions of I.R.C.P. 2.2(c) shall not apply to this prescribed period. The *Notice of Challenge* shall include a detailed statement of the issue(s) and a detailed description, including hearing dates and times, of any transcript(s) requested. Once raised and detailed, the issue(s) on challenge **may not** be amended to include additional issue(s) not specifically identified in the *Notice of Challenge* except on motion and leave of court. The *Notice of Challenge* shall appear on the Docket Sheet and shall be served on all parties to the Subcase(s) challenged, the BRBA court reporter and the parties listed in Section 7.e.

d. If a transcript is requested in a *Notice of Challenge*, the Party filing the *Notice of Challenge* must contact the BRBA court reporter for an estimate of the cost for preparation of the transcript. The estimated fee must accompany the *Notice of Challenge* served on the court reporter.

(1) The transcript shall be lodged with the Court within 35 days following the deadline for filing a *Notice of Challenge*. An extension of the time for lodging may be granted by the Court for good cause.

(2) There will be no time for settlement of the transcript. If the transcript is incomplete or erroneous, the requesting Party may file the appropriate motion to correct the transcript.

(3) One copy of the transcript shall be served on the challenger and the opposing Party. When multiple parties are involved, the parties are required to submit a stipulation to the Court stating which parties are to receive the transcript copies.

e. At the close of the time period for filing a *Notice of Challenge*, the Court will issue a scheduling order. Unless otherwise ordered, the following schedule for briefing and oral argument shall be set:

(1) Opening briefs shall be filed within 21 days following the deadline for filing *Notice of Challenge*. If a reporter's transcript is requested, opening briefs shall be filed within 21 days following lodging of the transcript. Briefs shall be limited to 25 pages and shall be served on the parties to the Subcase and any Party filing a *Notice of Challenge*.

(2) Responsive briefs shall be filed within 14 days after the deadline for filing opening briefs. Responsive briefs shall be limited to 25 pages and shall be served on the parties to the Subcase and any Party filing a *Notice of Challenge*.

(3) Challenger's optional reply briefs shall be filed within 10 days after the deadline for filing responsive briefs. Reply briefs shall be limited to 25 pages and shall be served on the parties to the Subcase and any Party filing a *Notice of Challenge*.

(4) All parties lodging briefs in conjunction with a *Notice of Challenge* are required to submit an original and one copy to the Court. The time computation provisions of I.R.C.P. 6(a) shall apply and should be referred to by the parties in the event that any briefing deadlines fall on a Saturday, Sunday, or legal holiday.

(5) Unless otherwise ordered by the Court, only those parties filing briefs will be allowed oral argument, and each Party will be limited to 30 minutes.

f. In the event the Presiding Judge elects to preside over an administrative basin or Subcase in lieu of referring the basin or Subcase to a Special Master, the Presiding Judge may modify the procedures set forth herein upon notice to the parties through the Docket Sheet Procedure.

19. ENTRY OF PARTIAL DECREES AND ORDERS DISALLOWING WATER RIGHT(S)

a. The form of the Partial Decree for a water right shall be decided by the Presiding Judge.

b. The Presiding Judge shall enter a Partial Decree for uncontested water rights or any water right not referred to a Special Master by an *Order of Reference*.

c. Following review of a *Special Master's Recommendation* and the resolution of any challenges, the Presiding Judge shall enter a Partial Decree. The Partial Decree shall be served only on parties to the Subcase and notice of its entry shall appear on the Docket Sheet. A certified copy of the Partial Decree shall be served on IDWR in compliance with I.C. §§ 42-1403 and 42-1412(6).

d. Parties seeking to modify a Partial Decree or set aside a final order disallowing water right shall comply with I.R.C.P. 60(a) or 60(b). Parties seeking to modify a Partial Decree or set aside a final order disallowing water right shall file with the Court a *Motion to Set Aside and Modify a Partial Decree or Final Order Disallowing Water Right Claim* (Standard Form 7) in accordance with Section 4.d.(5)(b). Partial Decrees are final judgments and cannot be modified by an administrative proceeding except as provided in I.C. § 42-222.

e. Orders disallowing water right(s) are final judgments and shall be certified pursuant to I.R.C.P. 54(b).

20. APPEALS FROM PARTIAL DECREES

a. Appeals from a Partial Decree or any final order of the Court by a Party to a Subcase may be brought pursuant to I.R.C.P. 54(b) or I.A.R. 12.

b. Motions and proceedings for certification of a judgment as final shall follow Docket Sheet motion practice procedure (Section 7.f.).

c. The following procedures shall supplement the Idaho Appellate Rules as follows:

(1) Rule 17. Notice of Appeal – Contents.
Appellant shall state whether the requested transcript and record shall be provided in hard copy or electronic format. Refer to I.A.R. 27 for associated costs.

(2) Rule 25. Reporter's transcript – Contents.
If an appeal is filed in the BRBA and a transcript is requested by the appellant, the notice of appeal must state specifically the Subcase number, the Special Master or Judge presiding and the date(s) of the hearing(s) for the requested transcript. If a partial transcript is requested, the appellant must specifically indicate which portions of the hearings are to be included.

(3) Rule 27. Clerk's or agency's record – Number – Clerk's fees – Payment of estimated fees – Time for preparation – Waiver of clerk's fee.

(a) Number and Use of Record. When an appeal involves multiple appellants and/or Respondents, the parties must determine by stipulation which Party shall be served with the appellant's copy of the record and which Party shall be served with the Respondent's copy. If no stipulation is received by the Court prior to the service of the record, the Clerk of the Court will provide the appellant's copy to the first appellant listed in the caption of the Clerk's Certificate of Appeal. The Respondent's copy shall be provided to the first Respondent listed in the caption of the Clerk's Certificate of Appeal.

(b) Clerk's fee. When more than one Party files a notice of appeal, the cost of preparing the clerk's record on appeal is divided among the parties. The cost of those documents required under I.A.R. 28 and this supplement to I.A.R. 28 is divided equally among the parties. The cost of including any additional documents is paid by the Party or Parties requesting their inclusion.

(4) Rule 28. Preparation of clerk's or agency's record – Content and arrangement.

(a) Only documents filed or lodged in the Subcase(s) at issue in the notice of appeal will be included in the clerk's record. Documents filed or lodged in other Subcases may be included only by motion granted by the Presiding Judge. Any such motion shall be filed simultaneously with the Notice of Appeal.

(b) In addition to the documents automatically included in a clerk's record, pursuant to I.A.R. 28(a) and (b)(1), the following BRBA documents will be automatically included in the clerk's record for any appeal:

1) Notice and Amended Notice(s) of Claim to a Water Right.
2) Director's Report for a water right on appeal.
3) Notice of Filing Director's Report which establishes the deadlines for filing objections and responses.
4) All Objections filed.
5) All Responses filed.
6) Standard Form 5 Stipulations.
7) Amended Director's Reports.
8) Special Master's Reports and Recommendations.
9) Motion to Alter or Amend Special Master's Report and Recommendations.
10) Order on Motion to Alter or Amend.
11) Any Motion for Reconsideration or Motion for Permissive Review.
12) Any Order Granting or Order Denying the Motion for Reconsideration or Motion for Permissive Review.
13) Notice of Issuance of Special Master's Recommendation (reiterates deadline from the service of the Docket Sheet – for filing Motions to Alter or amend).
14) Notice of Challenge.
15) Order and/or Memorandum Decision on Challenge.
16) Partial Decree.

(c) The clerk's record shall include those additional documents specifically requested in the Notice of Appeal.

(5) Filing a notice of appeal in multiple Subcases or in consolidated Subcases.
To file a notice of appeal for multiple Subcases or for consolidated Subcases, parties must consider how those Subcases were decreed by the Court. If the Court treated the Subcases as one group and issued one Order of Partial Decree or one interlocutory decision for the group, the appellant need only file one Notice of Appeal listing all the Subcases in the group. There would be only one appellate fee and one record on appeal. If multiple Subcases were treated as a group by the Court, but where Orders of Partial Decree were issued individually or if an interlocutory decision was entered in each individual Subcase, then the appellant must file an individual notice of appeal for each Subcase. Each notice of appeal would require a separate fee and record on appeal.

21. BASIN-WIDE ISSUES

a. **Designation -**

(1) Any Party to the Adjudication may file a *Motion to Designate Basin-Wide Issue* if that Party believes an issue materially affects a large number of parties to the adjudication. The motion to designate shall be decided by the Presiding Judge or a Special Master by *Special Order of Reference*. A motion to designate shall state:

(a) The issue, in 20 words or less;
(b) Why the issue is broadly significant and is better resolved as a Basin-Wide Issue;
(c) The need for its early resolution;
(d) The type of right(s) affected by the issue; and
(e) A description of how those rights will be affected.

(2) The Presiding Judge may enter a *Notice of Intent to Designate Basin-Wide Issue*.

(3) Unless otherwise ordered, a motion or notice of intent to designate shall follow the Docket Sheet motion practice procedures (Section 7.f.).

(4) Any Party to the Adjudication may respond to a motion or notice of intent to designate. The response shall be served on the movant, if any, and the parties listed in Section 7.e. or, if being heard on an expedited basis, to the addresses on the *Court Certificate of Mailing for Expedited Hearings* which is available from the Clerk of the BRBA Court.

(5) A motion or notice of intent to designate may be filed at any time after the filing of a Director's Report which raises the issues that are the subject of the motion. The motion shall not be heard until after the objection and response periods to the Director's Report have run.

(6) On receipt of a motion or notice of intent to designate, the Clerk of the Court shall assign a separate Subcase number to the Basin-Wide Issue. This new Subcase file number shall be included on all documents filed in the Basin-Wide Issue and all entries appearing on the Docket Sheet.

(7) When Basin-Wide Issues are designated by the Presiding Judge, hearings may be expedited, and all parties to the adjudication will be given notice of proceedings through the Docket Sheet Procedure.

b. Service -

(1) When the Presiding Judge issues an *Order Designating Basin-Wide Issue*, a separate certificate of mailing shall be created for each Basin-Wide Issue. This Basin-Wide Issue certificate of mailing will consist of the parties who filed the motion to designate or a response thereto, a response to the notice of intent or a brief in response to the order designating. Parties to the adjudication may also become parties to the Basin-Wide Issue by filing a *Notice of Intent to Participate* no later than 30 days after publication of the order designating in the Docket Sheet or within the time specified on the order designating.

(2) Any pleading filed in the Basin-Wide Issue shall be served on the parties listed on the Basin-Wide Issue certificate of mailing. Parties to the adjudication will be given notice of further proceedings through the Docket Sheet.

(3) Only those parties listed on the Basin-Wide Issue certificate of mailing will be permitted to file Pleadings or participate in oral argument on the Basin-Wide Issue.

c. **Proceedings on Basin-Wide Issues to be Heard by the Presiding Judge** - A Basin-Wide Issue will proceed as specified in the order designating, which will state the briefing schedule and the date for oral argument. Once the hearing has been held, the Presiding Judge will issue a memorandum decision.

d. **Proceedings on Basin-Wide Issues Assigned to a Special Master -**

(1) A Basin-Wide Issue, once designated, may be assigned by the Presiding Judge to a Special Master by a *Special Order of Reference*. The Special Master shall:

(a) Issue a scheduling order stating the briefing schedule and the date for oral argument, and

(b) After hearing, file a *Special Master's Recommendation* with the Presiding Judge.

(2) **Challenges to a *Special Master's Recommendation on a Basin-Wide Issue*** - Any Party to the Basin-Wide Issue may file a *Notice of Challenge* within 30 days after the issuance of the *Special Master's Recommendation*. When a challenge has been filed, the Presiding Judge shall issue a scheduling order setting a briefing schedule and the date for oral argument.

22. IDWR ADMINISTRATIVE PROCEEDINGS TO CHANGE REPORTED WATER RIGHTS

a. In a reporting area where a Director's Report **has not** been filed or where a Partial Decree has been issued, a Claimant requesting an administrative change to their water right claim(s) must contact IDWR. Notice to the BRBA Court is not required.

b. In a reporting area where a Director's Report **has** been filed and prior to the issuance of the Partial Decree, Claimants seeking to change their address or the ownership of a water right claim shall follow the procedures outlined under subsections (1) and (2) below. Claimants seeking to change point of diversion, place of use and period of use shall follow the procedures outlined under subsection (3).

(1) **Change of Address, Change of Ownership** (I.C. §§ 42-248 and 42-1409(6)) - Unless the Court orders otherwise, water right Claimants are required to notify IDWR of any change of address or ownership. Claimants shall use the appropriate forms provided by IDWR. Upon the completion of the processing of such a change, IDWR shall file with the Court a *Notice of Completed Administrative Proceeding* and shall attach a copy of the Amended Director's Report reflecting the change of address or

ownership. Change of address and ownership forms may be downloaded off of IDWR's website.

(2) **Split Water Rights** - Unless the Court orders otherwise, when notice is given to IDWR for a change in ownership of a water right proposing to split a water right, IDWR shall immediately notify the Court by submitting a *Notice of Administrative Proceeding*. Upon receipt of the *Notice of Administrative Proceeding*, the Court may stay BRBA proceedings for that water right during the pendency of the administrative proceeding, or the Court may proceed as determined by the Court on a case-by-case basis. Once the administrative proceeding is complete and all appeal times have run, IDWR shall file with the Court a *Notice of Completed Administrative Proceeding* with an attached Amended Director's Report reflecting the division or split that has occurred. IDWR must also attach a copy of an Amended Director's Report for any and all overlapping water right claims. This procedure **cannot** be used to accomplish an enlargement as provided by I.C. §§ 42-1425, 1426 or 1427.

(3) **Other Changes - Period/Place/Purpose of Use/Nature of Use and Point of Diversion Proceedings Under I.C. § 42-222** - Claimants seeking a change in their claimed water right under I.C. § 42-222 shall contact IDWR. When an application is made with IDWR for a change pursuant to I.C. § 42-222 for a water right which has been reported in a Director's Report but where a Partial Decree has not been entered, IDWR shall immediately notify the Court by submitting a *Notice of Administrative Proceeding* stating the type of change sought. Upon receipt of the *Notice of Administrative Proceeding*, the Court may stay BRBA proceedings for that water right during the pendency of the administrative proceeding, or the Court may proceed as determined by the Court on a case-by-case basis. Once the administrative proceeding is complete and all appeal times have run, IDWR shall submit a *Notice of Completed Administrative Proceeding* with an attached Amended Director's Report which shall report all administrative changes made pursuant to I.C. § 42-222. IDWR shall include Amended Director's Reports for any and all overlapping water right claims.

c. Amended Director's Reports issued as a result of IDWR administrative proceedings shall follow the procedure and deadlines in Section 5.

23. DEFERRAL AND FILING PROCEDURES FOR DOMESTIC AND STOCKWATER USES

a. Parties to the adjudication may elect to defer the adjudication of Domestic Use and Stock Watering Use claims as defined herein in accordance with the procedures set forth in the *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims in the Bear River Basin Adjudication* entered in Twin Falls County Case No. 79576 on June 15, 2021.

b. Claimants filing for Domestic Use or Stock Watering Use in a reporting area where the deadline for filing claims has expired, but no Director's Report has been filed should follow the procedures set forth in section 4.d.(2)(a).

c. Claimants filing for Domestic Use and Stock Watering Use claims in a reporting area where a Director's Report has been filed should follow the procedures for filing late claims as set forth in Section 4.d.(3)(b) and (e).

24. PROCEDURES FOR *PRO HAC VICE* ADMISSION

a. Admission pro hac vice must be obtained from the Presiding Judge in each individual Subcase in which the out-of-state attorney intends to appear, whether on behalf of a Claimant, Objector, or Respondent.

b. Idaho Bar Commission Rule 227 requires that the applicant for limited admission submit a copy of the motion and a $325 filing fee to the Idaho State Bar. In the BRBA, this requirement applies only to the first motion to appear filed in any given BRBA Subcase and does not apply to motions to appear filed in subsequent Subcases.

c. Service in any Subcase in which an attorney is admitted *pro hac vice* shall be made on the designated local counsel. The BRBA Court may send courtesy copies to other counsel provided such arrangements are made in advance with the Clerk of the BRBA Court.

d. The Presiding Judge or the Special Master to whom a Subcase is referred is authorized to excuse the attendance of the designated local counsel pursuant to Idaho Bar Commission Rule 227(b).

e. The Presiding Judge or Special Master may allow another attorney licensed in Idaho to personally appear in the stead of the designated local counsel. Provided, however, the responsibilities and obligations applicable under Idaho Bar Commission Rule 227 shall apply to both the designated local counsel and the counsel appearing in his or her stead.

f. In any motion for admission *pro hac vice*, the out-of-state attorney shall certify to the BRBA Court that he/she is familiar with *BRBA Administrative Order 1, Rules of Procedure*, Idaho Bar Commission Rule 227, the Idaho Rules of Civil Procedure, and the Idaho Rules of Evidence.

25. SELF REPRESENTED LITIGANTS

While an individual who is not authorized to practice law in the State of Idaho has the right to represent himself or herself *Pro Se* in the BRBA, such an individual may not represent a business entity in the BRBA under Idaho law. See e.g., *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 149 Idaho 737, 744–45 215 P.3d 457, 464–65 (2009) (holding, "[T]he law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body or a judicial body").

26. COURT INFORMATION FOR THE PUBLIC AND PARTIES

The IWATRS computerized register of actions (ROA) is available to the parties to the adjudication and the public. The BRBA Court's home page and electronic records can be accessed via the Internet at URL: *www.brba.idaho.gov*. Most documents are scanned and can be viewed and downloaded at no cost via links within the ROA for a particular Subcase or the main case.

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

In Re BRBA)
)
Case No. 79576)
)
)

A. Subcase _____
(Insert water right number)

STANDARD FORM 1
OBJECTION

Please **print or type** the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: _____

Address: _____

_____

Daytime Phone: _____

Name & Address of Attorney, if any:

_____

_____

_____

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: _____

Address: _____

_____

D. I object to the following elements or general provision as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
   Should be: _____

2. ☐ **Source**
   Should be: _____

3. ☐ **Quantity**
   Should be: _____

4. ☐ **Priority Date**
   Should be: _____

5. ☐ **Point of Diversion**
   Should be: _____

6. ☐ **Instream Flow Beginning and Ending Point**
   Should be: _____

7. ☐ **Purpose(s) of Use**
   Should be: _____

8. ☐ **Period of Year**
   Should be: _____

9. ☐ **Place of Use**
   Should be: _____

10. ☐ **General Provision** ☐ Individual Water Right ☐ All Water Rights

☐ Should not be recommended.

☐ This general provision was not recommended but should be recommended as described below.

Should be: _____

☐ General provision was recommended but should be modified as described below.

Should be: _____

11. ☐ **I object** because the recommendation contains an accomplished transfer under Idaho Code § 42-1425 resulting in injury to my water right(s) and/or enlargement of the original right.

12. ☐ **I object because:**

☐ This water right should not exist.

☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION(S): _____

_____

_____

_____

_____

_____

_____

(Signature of person filing objection)

_____

(Attorney signing in representative capacity)

INSTRUCTIONS FOR MAILING

You must mail the Objection, to the Clerk of the court. **FAX filings will not be accepted**. You must also send a copy to all the parties listed below in the Certificate of Mailing.

F. CERTIFICATE OF MAILING

I certify that on _____, 20___, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to: Clerk of the District Court
   Bear River Basin Adjudication
   253 Third Avenue North
   PO Box 2707
   Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

   Name: _____
   Address: _____
   _____

3. Copies to:

   IDWR Document Depository
   PO Box 83720
   Boise, ID 83720-0098

   United States Department of Justice
   Environment & Nat'l Resources Div
   550 W Fort Street, MSC 033
   Boise, ID 83724

   Chief, Natural Resources Division
   Office of Attorney General
   State of Idaho
   PO Box 83720
   Boise, ID 83720-0010

_____
Signature of Objector or attorney
mailing on Objector's behalf

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

In Re BRBA)
)
Case No. 79576)
)
)
)

A. Subcase _____
(Insert water right number From the Objection Form)

STANDARD FORM 2
RESPONSE TO OBJECTION

Please **print or type** the following information:

B. NAME AND ADDRESS OF PERSON RESPONDING

Name: _____

Address: _____

_____

Daytime Phone: _____

Name & Address of Attorney, if any:

_____

_____

_____

C. NAME AND ADDRESS OF PERSON WHO FILED THE OBJECTION TO WHICH YOU ARE RESPONDING

Name: _____

Address: _____

_____

D. I am responding to the Objections to the following elements or general provision. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
2. ☐ **Source**
3. ☐ **Quantity**
4. ☐ **Priority Date**
5. ☐ **Point of Diversion**
6. ☐ **Instream Flow Beginning and Ending Point**
7. ☐ **Purpose(s) of Use**
8. ☐ **Period of Year**
9. ☐ **Place of Use**
10. ☐ **General Provision**
11. ☐ **Accomplished Transfer**
12. ☐ **Recommendation:**

    ☐ This water right should not exist.

    ☐ This water right was not recommended, but should be recommended with the elements described above.

_____

(Signature of person filing)

_____

(Attorney signing in representative capacity)

INSTRUCTIONS FOR MAILING

You must mail the Response, including all attachments, to the Clerk of the Court. **FAX filings will not be accepted**. You must also send a copy to all the parties listed below in the Certificate of Mailing.

E. CERTIFICATE OF MAILING

I certify that on _____, 20___, I mailed the original and copies of this response, including all attachments, to the following persons:

1. Original to:

   Clerk of the District Court
   Bear River Basin Adjudication
   253 Third Avenue North
   PO Box 2707
   Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

   Name: _____
   Address: _____
   _____

3. One copy to the party who filed the Objection at the following address:

   Name: _____
   Address: _____
   _____

4. Copies to:

   IDWR Document Depository
   PO Box 83720
   Boise, ID 83720-0098

   United States Department of Justice
   Environment & Nat'l Resources Div
   550 W Fort Street, MSC 033
   Boise, ID 83724

   Chief, Natural Resources Division
   Office of Attorney General
   State of Idaho
   PO Box 83720
   Boise, ID 83720-0010

_____
Your signature or signature of attorney mailing on your behalf

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

In Re BRBA	)	**Subcase** _____ (Insert water right number)
Case No. 79576	)	**STANDARD FORM 3**
	)	**MOTION TO FILE AMENDED NOTICE OF CLAIM**

INSTRUCTIONS

This form is used to file an amendment to a Notice of Claim in a reporting area where the Director's Report has been filed. Forms may be obtained from the BRBA Court, the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form.

The water right number for your amended claim must be indicated above in the blank space following "Subcase." You must use a **separate form for each** amended Notice of Claim.

By filing a *Motion to File an Amended Notice of Claim*, you certify that it is well-grounded in fact; is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and is not filed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

A *Motion to File an Amended Notice of Claim* may require a hearing before the Presiding Judge or Special Master or may be granted by leave of the court or by written consent of the parties and the Idaho Department of Water Resources. Leave to amend a claim shall be freely given when justice so requires.

☐ I have read ***BRBA Administrative Order 1***, Rules of Procedure.

My name is _____

My address is _____

_____

My phone number is: work _____ Home _____

☐ I am an attorney representing _____

My name is _____

My address is _____

_____

My phone number is _____

☐ I must amend my Notice of Claim to the use of water in the BRBA because:

_____

_____

_____

☐ I am providing legal and factual documentation to support my amended Notice of Claim. You must describe these documents and attach a readable copy.

_____

_____

_____

I have attached:

☐ A fully completed amended Notice of Claim (available from IDWR).

☐ Any additional claim filing fee required pursuant to I.C. §42-1414(2). To determine this amount, contact IDWR at (800) 451-4129.

I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of $_____.

(Signature of person filing motion)

(Attorney signing in representative capacity)

INSTRUCTIONS FOR MAILING

You must mail this motion to the Clerk of the court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

CERTIFICATE OF MAILING

I certify that on _____, 20___, I mailed the original and copies of this motion, including all attachments, to the following persons:

1. Original to:

   Clerk of the District Court
   Bear River Basin Adjudication
   253 Third Avenue North
   PO Box 2707
   Twin Falls, ID 83303-2707

2. One copy to each party involved in the Subcase, including the claimant, all objectors, respondents and any party granted participation. Attach a list of names and addresses.

3. Copies to:

   IDWR Document Depository
   PO Box 83720
   Boise, ID 83720-0098

   United States Department of Justice
   Environment & Nat'l Resources Div
   550 W Fort Street, MSC 033
   Boise, ID 83724

   Chief, Natural Resources Division
   Office of the Attorney General
   State of Idaho
   PO Box 83720
   Boise, ID 83720-0010

Signature of Movant or attorney
mailing on Movant's behalf

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

In Re BRBA	)	**Subcase** _____ (Insert water right number)
	)	**STANDARD FORM 4**
Case No. 79576	)	**MOTION TO FILE A LATE NOTICE OF CLAIM**

INSTRUCTIONS

This form is used to file a late Notice of Claim in a reporting area where the Director's Report has been filed. Forms may be obtained from the BRBA Court, the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form.

The water right number for your late Notice of Claim must be indicated above in the blank space following "Subcase." To obtain your water right number, contact the Idaho Department of Water Resources. You must use a **separate form for each** late Notice of Claim.

By filing a Motion to File a Late Notice Claim, you certify that it is well-grounded in fact; is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and is not filed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

☐ I have read ***BRBA Administrative Order 1***, Rules of Procedure.

My name is _____

My address is _____

_____

My phone number is: work _____ Home _____

☐ I am an attorney representing _____

My name is _____

My address is _____

_____

My phone number is _____

☐ I did not file a Notice of Claim to the use of water in the BRBA because:

_____

_____

_____

☐ I filed a Notice of Claim and elected to defer judicial proceedings on my domestic or stock watering use. I desire to reinstate my Notice of Claim for domestic or stock watering use.

☐ I am providing legal and factual documentation for my claimed use of water. You must describe these documents and attach a readable copy. (You do not need to fill this out if you are reinstating a Notice of Claim for domestic or stock watering use, but you must attach a copy of your Notice of Claim.)

_____

_____

_____

A Motion to File Late Notice of Claim will require a hearing before the Presiding Judge.

Follow these instructions regarding the hearing on the motion.

1. Contact the Clerk of the BRBA Court at (208) 736-3011 to request a hearing date and time.

2. Fill in the following information:

   This motion will be heard on _____
   (insert date and time)
   at the BRBA Courthouse, 253 Third Avenue North, Twin Falls, Idaho.

I have attached:

☐ A fully completed Notice of Claim (available from IDWR).

☐ A claim filing fee for a domestic and stock watering use. IDWR may charge this fee pursuant to I.C. §42-1414. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of $_____.

☐ A claim filing fee and a late claim fee for those claims other than domestic or stock watering use for which a notice of claim was not filed. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of $_____.

_____

(Signature of person filing motion)

_____

(Attorney signing in representative capacity)

INSTRUCTIONS FOR MAILING

You must mail the Motion, to the Clerk of the court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

CERTIFICATE OF MAILING

I certify that on _____, 20___, I mailed the original and copies of this Motion, including all attachments, to the following persons:

1. Original to:

   Clerk of the District Court
   Bear River Basin Adjudication
   253 Third Avenue North
   PO Box 2707
   Twin Falls, ID 83303-2707

2. Copies to:

   IDWR Document Depository
   PO Box 83720
   Boise, ID 83720-0098

   United States Department of Justice
   Environment & Nat'l Resources Div
   550 W Fort Street, MSC 033
   Boise, ID 83724

   Chief, Natural Resources Division
   Office of Attorney General
   State of Idaho
   PO Box 83720
   Boise, ID 83720-0010

_____
Signature of Movant or attorney
mailing on Movant's behalf

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

In Re BRBA	**SUBCASE:** _____
Case No. 79576	**STANDARD FORM 5** **STIPULATED ELEMENTS OF A WATER RIGHT** ☐ **AMENDED NOTICE OF CLAIM / DIRECTOR'S REPORT**

This form is used to report the stipulated elements of one water right acquired under state law. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right.

The parties agree that the Bear River Basin Adjudication Court has jurisdiction of the parties and subject matter to enter a partial decree for this water right; that they have been served with sufficient process, according to the law; and that they have appeared, prosecuted, and defended their positions with regard to this water right dispute.

The parties and IDWR agree and stipulate that the elements of this water right should be decreed as described per the attached. The parties and IDWR have further indicated their concurrence by initialing each of the attached pages. Attached pages should include a copy of the Director's Recommendation, noting where stipulated changes have been made.

CLAIMANT/OBJECTOR:

_____
Date

OBJECTOR:

_____
Date

IDWR CONCURRENCE:

_____
Date

_____
Date

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

In Re BRBA

Case No. 79576

Subcase _____
(Insert water right number)

STANDARD FORM 7

☐ **MOTION TO FILE LATE OBJECTION**
OR

☐ **MOTION TO SET ASIDE AND MODIFY PARTIAL DECREE OR FINAL ORDER DISALLOWING WATER RIGHT CLAIM**

NAME AND ADDRESS OF PERSON FILING MOTION FOR LATE OBJECTION OR MOTION TO SET ASIDE PARTIAL DECREE/FINAL ORDER DISALLOWING

Name: _____

Address: _____

Daytime Phone: _____

☐ I am an attorney representing _____

My name is _____

My address is _____

_____

My phone number is _____

CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT OR PARTIAL DECREE/FINAL ORDER DISALLOWING

Name: _____

Address: _____

_____

If you are seeking to file a late Objection, list the reason(s) this objection is late and why it was not filed by the Objection deadline:

_____

_____

_____

_____

If you are seeking leave to file a late Objection,

YOU MUST ATTACH A COMPLETED STANDARD FORM 1 (Objection form).

If you are seeking to set aside and modify a Partial Decree/Final Order Disallowing, indicate the basis for your motion:

- ☐ Idaho Rule of Civil Procedure 59 (e)
- ☐ Idaho Rule of Civil Procedure 60(a)
- ☐ Idaho Rule of Civil Procedure 60(b)

And list the reason(s) why the Partial Decree/Final Order Disallowing should be set aside:

_____

_____

_____

_____

_____

(Signature of person filing motion)

_____

(Attorney signing in representative capacity)

INSTRUCTIONS FOR MAILING

You must mail this motion, to the Clerk of the court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

CERTIFICATE OF MAILING

I certify that on _____, 20___, I mailed the original and copies of this motion, including all attachments, to the following persons:

1. Original to:

   Clerk of the District Court
   Bear River Basin Adjudication
   253 Third Avenue North
   PO Box 2707
   Twin Falls, ID 83303-2707

2. One copy to the each party involved in the Subcase including the claimant, all objectors, respondents and any party granted a motion to participate. Attach a list of names and addresses.

3. Copies to:

   IDWR Document Depository
   PO Box 83720
   Boise, ID 83720-0098

   United States Department of Justice
   Environment & Nat'l Resources Div
   550 W Fort Street, MSC 033
   Boise, ID 83724

   Chief, Natural Resources Division
   Office of Attorney General
   State of Idaho
   PO Box 83720
   Boise, ID 83720-0010

_____
Signature of Movant or attorney
mailing on Movant's behalf

CERTIFICATE OF MAILING

I certify that a true and correct copy of the BRBA ADMINISTRATI ORDER 1 was mailed on June 29, 2022, with sufficient first-class postage to the following:

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/S/ DIANA R DELANEY
Deputy Clerk

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IDAPA 37
TITLE 03
CHAPTER 11

37.03.11 - RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES

000. LEGAL AUTHORITY (RULE 0).

These rules are promulgated pursuant to Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code, which provides that the Director of the Department of Water Resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. (10-7-94)

001. TITLE AND SCOPE (RULE 1).

These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water Resources." The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. (10-7-94)

002. WRITTEN INTERPRETATIONS (RULE 2).

In accordance with Section 67-5201(19)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements that pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. (10-7-94)

003. ADMINISTRATIVE APPEALS (RULE 3).

Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department's Rules of Procedure, IDAPA 37.01.01. (10-7-94)

004. SEVERABILITY (RULE 4).

The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. (10-7-94)

005. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 5).

Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law. (10-7-94)

006. -- 009. (RESERVED).

010. DEFINITIONS (RULE 10).

For the purposes of these rules, the following terms will be used as defined below. (10-7-94)

01. Area Having a Common Ground Water Supply. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. (Section 42-237a.g., Idaho Code) (10-7-94)

02. Artificial Ground Water Recharge. A deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code, and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply. (10-7-94)

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

water supply. (10-7-94)

04. Delivery Call. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. (10-7-94)

05. Department. The Department of Water Resources created by Section 42-1701, Idaho Code. (10-7-94)

06. Director. The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or an employee, hearing officer or other appointee of the Department who has been delegated to act for the Director as provided by Section 42-1701, Idaho Code. (10-7-94)

07. Full Economic Development of Underground Water Resources. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42. (10-7-94)

08. Futile Call. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource. (10-7-94)

09. Ground Water Management Area. Any ground water basin or designated part thereof as designated by the Director pursuant to Section 42-233(b), Idaho Code. (10-7-94)

10. Ground Water. Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code. (10-7-94)

11. Holder of a Water Right. The legal or beneficial owner or user pursuant to lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose. (10-7-94)

12. Idaho Law. The constitution, statutes, administrative rules and case law of Idaho. (10-7-94)

13. Junior-Priority. A water right priority date later in time than the priority date of other water rights being considered. (10-7-94)

14. Material Injury. Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42. (10-7-94)

15. Mitigation Plan. A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply. (10-7-94)

16. Person. Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. (10-7-94)

17. Petitioner. Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule. (10-7-94)

18. Reasonable Ground Water Pumping Level. A level established by the Director pursuant to Sections 42-226, and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law. (10-7-94)

19. **Reasonably Anticipated Average Rate of Future Natural Recharge**. The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change. (10-7-94)

20. **Respondent**. Persons against whom complaints or petitions are filed or about whom investigations are initiated. (10-7-94)

21. **Senior-Priority**. A water right priority date earlier in time than the priority dates of other water rights being considered. (10-7-94)

22. **Surface Water**. Rivers, streams, lakes and springs when flowing in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code. (10-7-94)

23. **Water District**. An instrumentality of the state of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law. (10-7-94)

24. **Watermaster**. A person elected and appointed as provided in Section 42-605, and Section 42-801, Idaho Code, to distribute water within a water district. (10-7-94)

25. **Water Right**. The legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law. (10-7-94)

011. -- 019. (RESERVED).

020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES (RULE 20).

01. **Distribution of Water Among the Holders of Senior and Junior-Priority Rights**. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. (10-7-94)

02. **Prior Appropriation Doctrine**. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. (10-7-94)

03. **Reasonable Use of Surface and Ground Water**. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule. (10-7-94)

04. **Delivery Calls**. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. (10-7-94)

05. Exercise of Water Rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made. (10-7-94)

06. Areas Having a Common Ground Water Supply. These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code. (10-7-94)

07. Sequence of Actions for Responding to Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state. (10-7-94)

08. Reasonably Anticipated Average Rate of Future Natural Recharge. These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge. (Section 42-237a.g., Idaho Code) (10-7-94)

09. Saving of Defenses. Nothing in these rules shall affect or in any way limit any person's entitlement to assert any defense or claim based upon fact or law in any contested case or other proceeding. (10-7-94)

10. Wells as Alternate or Changed Points of Diversion for Water Rights from a Surface Water Source. Nothing in these rules shall prohibit any holder of a water right from a surface water source from seeking, pursuant to Idaho law, to change the point of diversion of the water to an inter-connected area having a common ground water supply. (10-7-94)

11. Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury. (10-7-94)

021. -- 029. (RESERVED).

030. 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 WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS OR WITHIN AREAS THAT HAVE NOT BEEN DESIGNATED GROUND WATER MANAGEMENT AREAS (RULE 30).

01. Delivery Call (Petition). When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230: (10-7-94)

a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water. (10-7-94)

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records. (10-7-94)

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury. (10-7-94)

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated. (10-7-94)

02. Contested Case. The Department will consider the matter as a petition for contested case under the Department's Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. (10-7-94)

03. Informal Resolution. The Department may initially consider the contested case for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without prejudicing the interests of any party. (10-7-94)

04. Petition for Modification of an Existing Water District. In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. (10-7-94)

05. Petition for Creation of a New Water District. In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area having a common ground water supply which is not in an existing water district, and the water rights have been adjudicated, the Department may consider such to be a petition for creation of a new water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

06. Petition for Designation of a Ground Water Management Area. In the event the petition proposes regulation of ground water rights from an area having a common ground water supply within which the water rights have not been adjudicated, the Department may consider such to be a petition for designation of a ground water management area pursuant to Section 42-233(b), Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

07. Order. Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district; (10-7-94)

d. Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district; (10-7-94)

e. Create a new water district following the procedures of Section 42-604, Idaho Code, provided that

the water rights to be included in the new water district have been adjudicated; (10-7-94)

f. Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code; (10-7-94)

g. By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect 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. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well; or (10-7-94)

h. Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights. (10-7-94)

08. Orders for Interim Administration. For the purposes of Rule Subsections 030.07.d. and 030.07.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the water rights involved. (10-7-94)

09. Administration Pursuant to Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40. (10-7-94)

10. Administration Pursuant to Rule 41. Upon the designation of a ground water management area, the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41. (10-7-94)

031. DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY (RULE 31).

01. Director to Consider Information. The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply. (10-7-94)

02. Kinds of Information. The information considered may include, but is not limited to, any or all of the following: (10-7-94)

a. Water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and (10-7-94)

b. The testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district or designation of a ground water management area. (10-7-94)

03. Criteria for Findings. A ground water source will be determined to be an area having a common ground water supply if: (10-7-94)

a. The ground water source supplies water to or receives water from a surface water source; or (10-7-94)

b. Diversion and use of water from the ground water source will cause water to move from the surface

water source to the ground water source. (10-7-94)

c. Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source. (10-7-94)

04. **Reasonably Anticipated Average Rate of Future Natural Recharge**. The Director will estimate the reasonably anticipated average rate of future natural recharge for an area having a common ground water supply. Such estimates will be made and updated periodically as new data and information are available and conditions of diversion and use change. (10-7-94)

05. **Findings**. The findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07. (10-7-94)

032. -- 039. (RESERVED).

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 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 watermaster, shall: (10-7-94)

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, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or (10-7-94)

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director. (10-7-94)

02. **Regulation of Uses of Water by Watermaster**. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code, and under the following procedures: (10-7-94)

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source. (10-7-94)

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director. (10-7-94)

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority. (10-7-94)

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by Section 42-606, Idaho Code. (10-7-94)

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated. (10-7-94)

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and 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. (10-7-94)

04. Actions of the Watermaster Under a Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan. (10-7-94)

05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. (10-7-94)

06. Collection of Assessments Within Water District. Where a mitigation plan has been approved, the watermaster of the water district shall include the costs of administration of the plan within the proposed annual operation budget of the district; and, upon approval by the water users at the annual water district meeting, the water district shall provide for the collection of assessment of ground water users as provided by the plan, collect the assessments and expend funds for the operation of the plan; and the watermaster shall maintain records of the volumes of water or other compensation made available by the plan and the disposition of such water or other compensation. (10-7-94)

041. ADMINISTRATION OF DIVERSION AND USE OF WATER WITHIN A GROUND WATER MANAGEMENT AREA (RULE 41).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows: (10-7-94)

a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient. (10-7-94)

b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area. (10-7-94)

02. Order. Following the hearing, the Director may take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Find that the water supply of the ground water management area is insufficient to meet the

demands of water rights within all or portions of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water, provided that the Director shall consider the expected benefits of an approved mitigation plan in making such finding. (10-7-94)

d. Require the installation of measuring devices and the reporting of water diversions pursuant to Section 42-701, Idaho Code. (10-7-94)

03. **Date and Effect of Order**. Any order to cease or reduce withdrawal of water will be issued prior to September 1 and shall be effective for the growing season during the year following the date the order is given and until such order is revoked or modified by further order of the Director. (10-7-94)

04. **Preparation of Water Right Priority Schedule**. For the purposes of the Order provided in Rule Subsections 041.02 and 041.03, the Director will utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule. (10-7-94)

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

01. **Factors**. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following: (10-7-94)

a. The amount of water available in the source from which the water right is diverted. (10-7-94)

b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)

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 and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (10-7-94)

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. (10-7-94)

e. The amount of water being diverted and used compared to the water rights. (10-7-94)

f. The existence of water measuring and recording devices. (10-7-94)

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; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10-7-94)

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. (10-7-94)

02. **Delivery Call for Curtailment of Pumping**. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan. (10-7-94)

043. MITIGATION PLANS (RULE 43).

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

a. The name and mailing address of the person or persons submitting the plan. (10-7-94)

b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or

time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

044. -- 049. (RESERVED).

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).

01. **Eastern Snake Plain Aquifer**. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. (10-7-94)

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)

b. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)

d. The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area. (10-7-94)

051. -- 999. (RESERVED).

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Supplemental Materials, Part 2





150 Idaho 790
Supreme Court of Idaho,
Jerome, December 2010 Term.

CLEAR SPRINGS FOODS, INC., and Blue Lakes Trout Farm, Inc., Petitioners/Cross–Appellants,
v.
Gary SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and the Idaho Department of Water Resources,
Respondents,
and
Idaho Ground Water Appropriators, Inc.; North Snake Ground Water District; and Magic Valley Ground Water District,
Cross–Petitioners/Appellants,
and
Idaho Dairymen's Association, Inc., and **Rangen**, Inc., Intervenors.

No. 37308–2010.
|
March 17, 2011.
|
Rehearing Denied June 6, 2011.

Synopsis
Background: Junior groundwater users moved to intervene in proceeding initiated by senior appropriators of surface water rights to curtail withdrawals from aquifer. Following a hearing, the Director of the Idaho Department of Water Resources adopted hearing officer's recommendations. Senior appropriator filed petition for judicial review, and junior groundwater appropriators and another senior appropriator filed cross-petitions. The District Court of the Fifth Judicial District, Gooding County, John M. Melanson, J., affirmed after modification. Junior groundwater appropriators appealed, and senior appropriators cross-appealed.

Holdings: The Supreme Court, Eismann, C.J., held that:

[1] settlement agreement between State and power company in which power company agreed to the partial subordination of its water rights did not bind senior appropriators;

[2] curtailment orders did not violate full economic development provision of the Ground Water Act;

[3] Ground Water Act and conjunctive management rules did not require Department to allow junior appropriators to withdraw as much water from the aquifer as they needed so long as their withdrawals did not exceed the annual recharge;

[4] senior appropriators were not required to show they would generate more income if groundwater withdrawals from aquifer were curtailed;

[5] Director of Department did not abuse his discretion by relying on ground water model, despite model's known limitations;

[6] final curtailment orders did not violate due process rights of junior appropriators; and

[7] Director did not abuse his discretion by excluding ground water model's margin of error when he issued curtailment orders.

Affirmed.

See also 104 Idaho 575, 661 P.2d 741; 115 Idaho 1, 764 P.2d 78.

Procedural Posture(s): On Appeal.

West Headnotes (28)

[1] **Administrative Law and Procedure**⇐Particular questions for review

Review on appeal is limited to those issues raised before the administrative tribunal, with the exception of an issue the administrative tribunal lacked the authority to decide. West's I.C.A. § 67–5279(3).

4 Cases that cite this headnote

[2] **Administrative Law and Procedure**⇐Scope and Standards of Further Review

On an appeal of an agency decision from the

district court, the Supreme Court reviews the decision of the district court to determine whether it correctly decided the issues presented to it.

10 Cases that cite this headnote

[3] **Administrative Law and Procedure**⇐Preservation of grounds for review

In an appeal of an agency decisions, the Supreme Court will not consider issues that were not raised before the district court even if those issues had been raised in the administrative proceeding.

24 Cases that cite this headnote

[4] **Administrative Law and Procedure**⇐Scope and Standards of Further Review

Where in an appeal of an agency decision the lower court reaches the correct result by an erroneous theory, the Supreme Court will affirm the order on the correct theory.

4 Cases that cite this headnote

[5] **Water Law**⇐Subordination agreements

Settlement agreement between State and power company in action regarding company's water rights, in which company agreed to the partial subordination of its water rights for generating hydroelectric power to subsequent beneficial upstream uses, did not subordinate the rights of senior appropriators of surface water in river plain and river plain aquifer to junior groundwater users in the plain and aquifer; only the resolution of power company's rights were at issue in the action, nothing in the settlement agreement purported to subordinate a third party's water rights, State could not have subordinated the water rights of the senior appropriators with paying senior appropriators just compensation, and predictions in State water plan adopted pursuant to such agreement on the water available to senior appropriators had no legal effect. West's I.C.A. Const. Art. 15, § 3; West's I.C.A. § 55–101.

1 Cases that cite this headnote

[6] **Water Law**⇐Realty or personalty

Water rights are real property. West's I.C.A. § 55–101.

1 Cases that cite this headnote

[7] **Constitutional Law**⇐Water
Eminent Domain⇐Water rights
Water Law⇐Nature and Character of Water and Water Rights

When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor. West's I.C.A. Const. Art. 15, § 3; West's I.C.A. § 55–101.

[8] **Water Law**⇐First in time, first in right

Priority in time is an essential part of water law and to diminish one's priority works an undeniable injury to that water right holder.

[9] **Eminent Domain**⇐Water rights
Water Law⇐Priorities

When there is insufficient water to satisfy both

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the senior appropriator's and the junior appropriator's water rights, giving the junior appropriator a preference to the use of the water constitutes a taking for which compensation must be paid. West's I.C.A. Const. Art. 15, § 3.

1 Cases that cite this headnote

[10] **Water Law**⇐First in time, first in right

Priority of appropriation gives the better right between those using the water. West's I.C.A. Const. Art. 15, § 3.

[11] **Water Law**⇐Delivery call petition by senior user
Water Law⇐Effect of senior riparian rights

Curtailment orders issued against junior groundwater users by the Director of the Idaho Department of Water Resources, because of material injury to senior appropriators' surface water rights in river plain and river plain aquifer, did not violate full economic development provision of the Ground Water Act; such provision prohibited a ground water appropriator with an unreasonably shallow well from blocking further use of an aquifer, provision did not address reasonable aquifer levels, and provision did not apply to senior appropriators, who used surface waters flowing from springs. West's I.C.A. §§ 42–226, 42–237a.

[12] **Water Law**⇐Delivery call petition by senior user
Water Law⇐Effect of senior riparian rights

Neither the Ground Water Act nor the conjunctive management rules contained a full economic development principle that required Idaho Department of Water Resources to allow junior groundwater users in river plain and river plain aquifer to withdraw as much water from the aquifer as they needed so long as their withdrawals did not exceed the annual recharge, when senior appropriators of surface water rights in the plain and aquifer petitioned for curtailment orders; rules did not state that priority as between senior surface water users and junior ground water users was to be disregarded as long as an aquifer was not being overdrawn by ground water users, and the Act only modified the rights of ground water users with respect to being protected in their historical pumping levels. West's I.C.A. § 42–226; IDAPA 37.03.11.020.03.

2 Cases that cite this headnote

[13] **Water Law**⇐Quantity of Water
Water Law⇐Waste

Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director of the Idaho Department of Water Resources.

[14] **Water Law**⇐First in time, first in right
Water Law⇐Abandonment, Relinquishment, Cancellation, or Forfeiture of Rights

The first appropriator of water for useful or beneficial purposes has the prior right thereto, and the right, once vested, will be protected and upheld, unless abandoned.

[15] **Water Law**⇐Actual use of water and application to beneficial use

The right to appropriate water under the Idaho

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Constitution is for beneficial uses, not merely for profitable businesses. West's I.C.A. Const. Art. 15, § 3.

[16] **Water Law**⇐Actual use of water and application to beneficial use

A beneficial use, for purposes of the right to appropriate water in the Idaho Constitution, is not limited to a use that generates a profit, or even income. West's I.C.A. Const. Art. 15, § 3.

1 Cases that cite this headnote

[17] **Water Law**⇐Delivery call petition by senior user
Water Law⇐Limits imposed by beneficial use requirement

Senior appropriators of surface water rights in river plain and river plain aquifer, who used the water to grow fish, were not required to show that they would have been able to grow more fish and sell such fish for a profit, in order to establish a material injury and obtain curtailment orders from the Idaho Department of Water Resources against junior groundwater users; the right to appropriate water for a beneficial use under the Idaho Constitution did not require that the beneficial use generate income or a profit, and conjunctive management rules did not require showing an impact on the profitability of the senior appropriator's business. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.010.14.

2 Cases that cite this headnote

[18] **Water Law**⇐Injunction
Water Law⇐Other relief
Water Law⇐Injunction and enforcement
Water Law⇐Damages

Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference.

[19] **Water Law**⇐Judicial review

Junior groundwater users waived in the Supreme Court argument that delivery calls were futile, when they appealed district court decision affirming orders by Idaho Department of Water Resources curtailing ground water pumping after senior appropriators of surface water rights in river plain and river plain aquifer petitioned for curtailment orders; though junior appropriators argued in proceedings before the Department that any curtailment orders would be futile, junior appropriators did not make the argument in the district court.

[20] **Water Law**⇐Calls by senior rights holders in general
Water Law⇐Availability; prevention of overdraft, exploitation, groundwater mining, and other depletion of resources

Director of Idaho Department of Water Resources did not abuse his discretion by relying on Department's ground water model for aquifer, in proceeding on petition by senior appropriators of surface water rights in river plain and river plain aquifer seeking curtailment orders against junior groundwater users, though model had known limitations, where the model was the best science available for administering hydraulically connected surface and groundwater rights on the aquifer. West's I.C.A. § 67–5279(3)(e).

[21] **Constitutional Law**⇐Water
Water Law⇐Nature and Character of Water and Water Rights

The owner of a water right must be afforded due process of law before the right can be taken by the State. U.S.C.A. Const.Amend. 14; West's I.C.A. § 55–101.

[22] **Constitutional Law**⇐Duration and timing of deprivation; pre- or post-deprivation remedies

Due process does not necessarily require a hearing before property is taken. U.S.C.A. Const.Amend. 14.

[23] **Constitutional Law**⇐Water
Water Law⇐Delivery call petition by senior user
Water Law⇐Administrative Proceedings and Review

Though Director of Idaho Department of Water Resources initially violated due process rights of junior groundwater users, in proceeding on petition by senior appropriators of surface water rights in river plain and river plain aquifer, by issuing curtailment orders without first holding a hearing, given that the flows used by the senior appropriators had been gradually declining over a number of years, final curtailment orders did not violate junior appropriators' due process rights, as the final orders were only issued after junior appropriators were given a notice and a hearing. U.S.C.A. Const.Amend. 14; West's I.C.A. §§ 42–101, 42–226.

[24] **Water Law**⇐Nature and Character of Water and Water Rights
Water Law⇐Ownership Of, and Title To, Waters

A water right does not constitute ownership of the water.

2 Cases that cite this headnote

[25] **Water Law**⇐Powers and authority
Water Law⇐Duties
Water Law⇐Rules and regulations, in general

The State has the duty to supervise the appropriation of the waters within the State and allotment to those diverting such waters for any beneficial purpose. West's I.C.A. §§ 42–101, 42–226.

[26] **Water Law**⇐First in time, first in right

Between water appropriators, the first in time is the first in right.

1 Cases that cite this headnote

[27] **Water Law**⇐Delivery call petition by senior user

Director of Idaho Department of Water Resources did not abuse his discretion by excluding ten percent margin of error in Department's ground water model for aquifer, when he issued curtailment orders against junior groundwater users in proceeding on petition by senior appropriators of surface water rights in river plain and river plain aquifer; though ground water model had a margin of error of up to 10% and there was no way no know whether the error was high or low, Director acted within his discretion by deciding not to curtail appropriators who were within that margin of error when deciding whether they were causing

material harm to senior appropriators' rights. West's I.C.A. § 42-226; IDAPA 37.03.11.020.03.

[28] Water Law⇐Judicial review

Argument by senior appropriators of surface water rights in river plain and river plain aquifer, that the decision by the Director of Idaho Department of Water Resources to not curtail junior groundwater appropriators who were within the margin of error of ground water model for the aquifer resulted in a shifting of the burden of proof from the junior appropriator to the senior appropriators, would not be considered by Supreme Court in senior appropriators' cross-appeal of district court decision affirming decision of the Director, where the senior appropriators did not raise the argument in the district court.

1 Cases that cite this headnote

Attorneys and Law Firms

**74 Racine Olson Nye Budge & Bailey, Pocatello, for appellants. Thomas J. Budge argued.

Barker Rosholt & Simpson, LLP, Twin Falls, for cross-appellant Clear Springs Foods, Inc. John K. Simpson argued.

Ringert Law, Chartered, Twin Falls, for cross-appellant Blue Lakes Trout Farm, Inc. Daniel V. Steenson argued.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondents. Christopher M. Bromley argued.

Opinion

EISMANN, Chief Justice.

*793 This is an appeal from a decision on judicial review upholding curtailment orders issued against junior groundwater users because their withdrawals of water from the aquifer were causing material injury to senior appropriators' surface water rights. The senior appropriators also cross-appeal the failure to curtail additional groundwater pumping. We affirm the judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

The Snake River rises in western Wyoming, flows westward across the entire breadth of Idaho, turns northward forming Idaho's western boundary, and ultimately empties into the Columbia River. It is the largest and longest tributary of the Columbia River. As it crosses southern Idaho, it courses through the Snake River plain, a prominent depression extending about 400 miles in an east-west direction and ranging from 50 to 125 miles in width. Underlying the eastern portion of the plain is the Eastern Snake River Plain Aquifer (Aquifer), which is about 170 miles long and 60 miles wide. It is estimated that it contains up to a billion acre feet of water, which would be *794 **75 roughly the amount of water contained in Lake Erie.

Clear Springs Foods, Inc., (Clear Springs) and Blue Lakes Trout Farm, Inc., (Blue Lakes) (collectively called "Spring Users") are both engaged in fish farming. They each have water rights in certain springs emanating from the canyon wall along a section of the Snake River below Milner Dam in south central Idaho. Those springs are fed by the Aquifer. Members of the Idaho Ground Water Appropriators, Inc., the North Snake Ground Water District, and the Magic Valley Ground Water District (collectively called "Groundwater Users") have ground water rights entitling them to pump water from wells drilled into the Aquifer.

The Aquifer is predominately fractured Quaternary basalt having an aggregate thickness that, in some locations, may exceed several thousand feet. It decreases to shallow depths in the area where the springs emanate. The fractured basalt is characterized by high hydraulic conductivities that are typically 1,000 feet per day, but they range from 0.1 to 100,000 feet per day.

The ground water in the Aquifer is hydraulically connected to the Snake River and tributary surface waters at various places and in varying degrees. As a result, ground water can become surface water, and surface water can become ground water. The amount that

becomes one or the other is largely dependent upon ground water elevations. When water is pumped from a well, it causes a cone-shaped lowering of the ground water elevation near the well. Surrounding ground water then flows into the cone from all sides, depleting ground water away from the well. When that occurs in an area hydraulically connected to a reach of the river or its tributaries, it results in a loss of water from the river or a loss of gain to the river.

Beginning in the 1950's, groundwater appropriations from the Aquifer increased dramatically. It now receives about 7.5 million acre-feet of recharge on an average annual basis and discharges about the same amount of water, with nearly 2.0 million acre-feet annually of that discharge in the form of depletions from ground water withdrawals. About 95% of the ground water diverted from the Aquifer is used for irrigation. The remainder is used for public, domestic, industrial, and livestock purposes.

After about two decades of increased groundwater pumping, the resulting decrease in river flow caused the Idaho Power Company to commence litigation against the State and various water users regarding its water rights at the Swan Falls Dam. *Idaho Power Co. v. State, By and Through Dept. of Water Resources*, 104 Idaho 575, 661 P.2d 741 (1983). It sought a determination of the validity of those water rights and a ruling that they were not subject to future upstream depletion. *Id.* at 578, 661 P.2d at 744. That dam was the first hydroelectric dam on the Snake River and is located in southwestern Idaho near Murphy, the county seat of Owyhee County. It had been constructed in 1901 by the Trade Dollar Consolidated Mining Company to provide electrical power to the mines in the area of Silver City, *id.* at 578, 661 P.2d at 744, which was then the county seat. In 1915, that company and four other electric power suppliers merged to form the Idaho Power Company. *Id.* In that merger, Idaho Power acquired the Swan Falls Dam and power plant. *Id.* Because of the diminished river flow, an Idaho Power ratepayer had filed a complaint with the Idaho Public Utilities Commission alleging that he and other ratepayers were being overcharged because Idaho Power had failed to preserve its power generation water rights at Swan Falls. *Id.* at 582, 661 P.2d at 748. After Idaho Power's motion to dismiss for lack of jurisdiction had been denied, it answered indicating that it would file an action to protect its Swan Falls water rights, which it did. *Id.*

One of the issues in that case involved a subordination clause in the federal license issued to Idaho Power in 1955 for its Hells Canyon project. In the 1950's, Idaho Power had desired to construct three dams in Hells Canyon, which is North America's deepest river gorge. To obtain political support for that project, it proposed that its federal license include a clause subordinating its water rights to future upstream depletion. *Id.* at 580, 661 P.2d at 746. Consistent with that request, the federal license for the three ***795 **76** dams contained a subordination clause with no conditions attached. *Id.* at 581, 661 P.2d at 747. In Idaho Power's litigation to determine its water rights at Swan Falls, the district court held that the subordination clause in the federal license for the Hells Canyon project applied to all of Idaho Power's water rights used in hydropower production at all of its facilities on the entire Snake River watershed, including the one at Swan Falls. *Id.* at 583, 661 P.2d at 749. On appeal, this Court reversed that holding, *id.* at 586, 661 P.2d at 752, and remanded the case for consideration of affirmative defenses raised by the defendants, *id.* at 590, 661 P.2d at 756. "Idaho Power responded by filing a second lawsuit naming as defendants the State of Idaho and approximately 7500 persons claiming water rights in the Snake River basin." *In re Snake River Basin Water System*, 115 Idaho 1, 3, 764 P.2d 78, 80 (1988).

Idaho Power had secured a federal court decree which, together with state water licenses, granted it water rights at Swan Falls of 9,450 c.f.s. with priority dates ranging from 1900 to 1919. *Idaho Power Co. v. Dept. of Water Resources*, 104 Idaho at 578, 661 P.2d at 744. It was undisputed that the power plant's capacity was 8,400 c.f.s., which would be the limit of its water rights. *Id.* In order to resolve the lawsuits, Idaho Power and the State entered into the Swan Falls Agreement executed on October 25, 1984. In that agreement, Idaho Power agreed, among other things, to "an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls." Pursuant to the agreement, those flows are not subject to depletion. The State agreed, among other things, to propose and support legislation providing funding for a general adjudication of the Snake River Basin.

In response, the legislature enacted legislation to commence an adjudication of the water rights of the Snake River basin. Ch. 18, § 1, 1985 Idaho Sess. Laws 27, 28. The legislation stated, "Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from the system be determined." *Id.* On June 17, 1987, R. Keith Higginson, as Director of the Idaho Department of Water Resources (Department), filed

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a petition in the name of the State to begin the Snake River Basin Adjudication (SRBA), and on November 19, 1987, the court ordered that the adjudication was commenced.

In 1994, an interim legislative committee charged with reviewing the progress of the SRBA issued a committee report in which it stated, "Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River. To conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface water rights is necessary." *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). The committee also "noted the pendency of studies on conjunctive management investigating the effect of ground water pumping on natural springs that flowed directly into the Snake River." *Id.* With respect to the SRBA, the committee stated that the adjudication was commenced "in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam." *Id.*

In 1994, the Department adopted rules concerning conjunctive management of ground water and surface water for the entire **77 *796 state. IDAPA 37.03.11.000 to 37.03.11.050. The Department has also developed a calibrated ground water model to determine the effects on the Aquifer and hydraulically-connected reaches of the Snake River and its tributaries from pumping a single well in the Aquifer, from pumping selected groups of wells, and from surface water uses on lands above the Aquifer. In 2004, the Department, working in collaboration with other entities, completed reformulation of that model.

On March 22, 2005, Blue Lakes delivered a letter to the Department demanding that then-Director Karl J. Dreher require the local watermaster to administer water rights as required by Idaho Code § 42–607 in order to supply Blue Lakes with water under its senior rights. On May 2, 2005, Clear Springs delivered letters to the Director making a similar demand. The Director considered the letters to be delivery calls. Without holding a hearing, on May 19, 2005, he issued findings of fact, conclusions of law, and an order requiring curtailment of specific groundwater users with water rights junior to those of Blue Lakes. On July 8, 2005, he issued a similar order with respect to specific groundwater users with rights junior to those of Clear Springs. Several entities, including the Groundwater Users, moved to intervene, and both they and the Spring Users moved for reconsideration and a hearing.

On August 1, 2007, then-Director David R. Tuthill, Jr., appointed a hearing officer to preside over an evidentiary hearing regarding the Spring Users' delivery calls. The hearing began on November 28, 2007, and continued for about twelve days. On January 11, 2008, the hearing officer issued his findings of fact, conclusions of law, and recommendation. After considering objections submitted by the parties, the Director issued a final order on July 11, 2008. Except as modified in the final order, he adopted the former Director's findings of fact and conclusions of law, the hearing officer's recommendations, and the curtailment orders.

Clear Springs filed a petition for judicial review, and Blue Lakes and the Groundwater Users filed cross petitions for judicial review. The district court affirmed most of the final order. The parties moved for reconsideration, and the district court made one modification and issued its final decision. The Groundwater Users appealed, and the Spring Users cross appealed.

II. ISSUES ON APPEAL

Issues Raised by Groundwater Users

A. Did the district court err in holding that the curtailment orders do not violate the Swan Falls Agreement?

B. Did the district court err in holding that the curtailment orders do not violate the full economic development provision of Idaho Code § 42–226?

C. Did the district court err in upholding the Director's determination that the ground water depletions caused material injury to the Spring Users' water rights?

D. Did the district court err in upholding the Director's determination that the Spring Users' delivery calls were not futile?

E. Did the district court err in upholding the Director's findings based upon the ground water model?

F. Did the district court err in failing to set aside the

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curtailment orders because the Director did not give the Groundwater Users a hearing before issuing the curtailment orders?

Issues Raised by Spring Users

G. Did the district court err in failing to order the Director to curtail more ground water pumping?

III. ANALYSIS

[1] [2] [3] When reviewing agency action on a petition for judicial review, the district court must affirm the agency unless it 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." ****78** Idaho Code § 67–5279(3). ***797** "Review on appeal is limited to those issues raised before the administrative tribunal," *Johnson v. Blaine County*, 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009), with the exception of "an issue the administrative tribunal lacked the authority to decide," *id.* at n. 2. The district court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67–5279(1). On an appeal from the district court, we review the decision of the district court to determine whether it correctly decided the issues presented to it. *Wright v. Board of Psychological Examiners*, 148 Idaho 542, 544–45, 224 P.3d 1131, 1133–34 (2010). "This Court will not consider issues that were not raised before the district court even if those issues had been raised in the administrative proceeding." *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 208, 159 P.3d 840, 845 (2007).

A. Did the District Court Err in Holding that the Director Did Not Fail to Administer the Aquifer in Accordance with the Comprehensive Plan Established by the Swan Falls Agreement?

In 1984, the State of Idaho and the Idaho Power Company entered into an agreement to resolve litigation regarding Idaho Power's water rights for hydropower generation at its Swan Falls plant. Idaho Power agreed to subordinate its rights from 8,400 c.f.s. down to an average daily flow (measured at the Murphy gauging station) of 3,900 c.f.s. from April 1 to October 31 and 5,600 c.f.s. from November 1 to March 31. "The purpose of the agreement concerning subordination was to make available more water for future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River." *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989).

On October 9, 2007, the Groundwater Users moved for a partial summary judgment in the agency proceedings. One of the issues they asserted was, "Appropriators of spring waters in the Thousand Springs region are precluded from making a delivery call against appropriators of ground water from the East Snake Plain Aquifer so long as minimum Snake River flows are maintained at the Murphy Gauge in accordance with the Swan Falls Agreement." The hearing officer rejected that argument on the grounds that the Spring Users were not parties to the Swan Falls Agreement and the Agreement does not expressly address the issue. The Groundwater Users filed objections to that ruling with the Director, who considered but rejected them.

[4] In the district court proceedings, the Groundwater Users asserted that the Director's curtailment orders violated the obligation to manage the Aquifer in accordance with the minimum flows prescribed by the Swan Falls Agreement. The district court rejected that argument on the ground that the Agreement did not establish minimum flows for specific sub-reaches of the Snake River or spring complexes. "Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory." *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003).

[5] [6] [7] [8] [9] By the Swan Falls Agreement, the Idaho Power Company agreed to the subordination of part of its water rights for generating hydroelectric power at the Swan Falls Dam to "subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate [the unsubordinated rights set forth in the Agreement]." There is nothing in the Agreement indicating that the State purported to subordinate any third party's surface water rights to junior ground water rights. Indeed, the State could not have done so without paying just compensation to the owners of the senior water rights. "In Idaho, water rights are real property." *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); Idaho Code § 55–101. "When one has

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legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor." *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). "Priority in time is an essential part ***798 **79** of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). When there is insufficient water to satisfy both the senior appropriator's and the junior appropriator's water rights, giving the junior appropriator a preference to the use of the water constitutes a taking for which compensation must be paid. *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 219, 113 P. 741, 743 (1911); Idaho Const. Art. XV, § 3. Thus, the Swan Falls Agreement could not have subordinated the Spring Users' water rights to other appropriators unless the Spring Users had been paid just compensation for such taking.

The Groundwater Users assert that the Agreement "protects all water rights with a priority date prior to October 1, 1984." That is not accurate. Idaho Power subordinated its water rights at the Swan Falls Dam "to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985." Although Idaho Power subordinated its water rights to such persons, there is no wording in the Agreement purporting to subordinate any other appropriator's water rights to them. Likewise, there is nothing in the Agreement stating that an appropriator with a priority date before October 1, 1984, would never be subject to a delivery call from an appropriator with a senior water right.

The Groundwater Users also state: "[T]he Agreement required that the minimum flow at Murphy Gauge be increased by 600 cfs, from 3,300 cfs to 3,900 cfs. This secured a greater water supply for Idaho Power as well as spring users in the Thousand Springs area." Again, this is inaccurate.

In 1964, Article XV, § 7, was added to the Idaho Constitution. *Idaho Water Resource Bd. v. Kramer*, 97 Idaho 535, 541, 548 P.2d 35, 41 (1976). That amendment provided, "There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest...." Pursuant to that amendment, the legislature created the Idaho Water Resource Board as the Water Resource Agency. Idaho Code §§ 42–1732 & 42–1734(1).

In 1976, the Idaho Water Resource Board adopted a State Water Plan which established minimum flows at three points along the Snake River. Idaho Water Resource Bd., The State Water Plan—Part Two 116 (1976). "A flow of 3300 cfs on the Snake River at the Murphy gaging station was established." *Idaho Power Co. v. State, Dept. of Water Resources*, 104 Idaho 575, 590, 661 P.2d 741, 756 (1983).[3] The State Water Plan did not reduce Idaho Power's water rights at Swan Falls to 3,300 c.f.s. As we held: "There is no requirement contained therein that the Snake River be depleted to 3300 cfs at Swan Falls.... Since we have held that Idaho Power's water rights at Swan Falls are vested, the State Water Plan is not to be construed as affecting those water rights." *Id.* Thus, because Idaho Power's water rights had not been not reduced to 3,300 c.f.s. by the State Water Plan, the Swan Falls Agreement did not increase them to 3,900 c.f.s. In actuality, "the agreement provided for the subordination of certain water rights claimed by Idaho Power to those of subsequent upstream users," *Miles v. Idaho Power Co.*, 116 Idaho 635, 636, 778 P.2d 757, 758 (1989), thereby reducing, not increasing, the amount of water that Idaho Power was entitled to have at its Swan Falls Dam.

Quoting from a portion of the Swan Falls Agreement, the Groundwater Users argue that it "initiated the Snake River Basin Adjudication (SRBA) and defined 'a sound comprehensive ****80 *799** plan for the management of the Snake River watershed ... a plan best adapted to develop, conserve, and utilize the resources of the region in the public interest.' " That comprehensive plan is apparently to permit all ground water pumping that does not threaten the minimum river flows at the Murphy gauging station agreed to between the State and Idaho Power. In making this argument, the Groundwater Users left out a significant portion of the provision from the Swan Falls Agreement that they quoted. It actually states:

> State and Company agree that the *resolution of Company's water rights* and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement,

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> State and Company will present the Idaho State Water Plan and this Agreement to FERC [Federal Energy Regulatory Commission] as a comprehensive plan for the management of the Snake River Watershed. (Emphasis added.)

It is only the resolution of Idaho Power's water rights that was at issue in the Swan Falls Agreement. The reference to "a comprehensive plan" was to meet the requirements of section 10 of the Federal Water Power Act with respect to hydropower licensing, codified at 16 U.S.C. § 803. When the Agreement was executed, section 10(a) provided:

> That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a *comprehensive plan* for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

49 Stat. 842 (emphasis added). The comprehensive plan had nothing to do with allocating water among the various appropriators upstream from the Swan Falls Dam or determining the priorities of their water rights. It was only to meet a federal licensing requirement of the Company's power projects.

The hearing officer noted that the 1986 Idaho State Water Plan commented that "minimum stream flows for the Murphy Gauging Station should provide an adequate supply of water for aquaculture." The Groundwater Users also point to prognostications that the Spring Users would have sufficient water if the river flow at the Murphy gauging station was maintained in accordance with the minimum flows set forth in the Swan Falls Agreement. Prior to that agreement, the Water Resource Board had established a zero minimum flow at Milner Dam. Idaho Water Resource Bd., The State Water Plan—Part Two 116 (1976). The purpose of allowing a zero river flow at Milner Dam was to maximize the amount of water available for development above the dam, including groundwater development in the Aquifer. One of the statutes enacted to implement the Swan Falls Agreement sought to separate water administration above and below the dam.[3] In its 1996 State Water Plan, the Water Resource Board recognized that "[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." Idaho Water Resource Bd., The State Water Plan 17 (1996). "During portions of low-water years, river flows downstream from Milner Dam to the Murphy gaging station consist almost entirely of ground-water discharge from the Thousand Springs reach." *Id.* at 19. The assumption was that if there was enough spring discharge to have ***800 **81** 3,900 c.f.s. downstream at the Swan Falls Dam, there would be enough spring discharge to satisfy the Spring Users' water rights. Such predictions have no legal effect.

The State Water Plans recognized that such assumptions may not be correct. The first plan stated, "Future management and development of the Snake River aquifer *may reduce* the present flow of springs tributary to the Snake River. *If that situation occurs,* adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist." Idaho Water Resource Bd., The State Water Plan—Part Two 118 (1976) (emphases added). Likewise, the second plan acknowledged with respect to aquaculture that "future management and development of the Snake River Plain aquifer *may reduce* the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities." Idaho Water Resource Bd., The State Water Plan 38 (1986) (emphasis added). Finally, the current water plan recognized the "continued spring flow decline in the Thousand Springs area since the late 1950s." Idaho Water Resource Bd., The State Water Plan 18 (1996). It also commented: "Spring discharge in the American Falls and Thousand Springs reaches of the Snake River are vital to the Snake River Basin and Idaho economy.... In the Thousand Springs reach, spring flow is the only practical source of water for many of the state's aquaculture facilities." *Id.* at 19. It declared, "Maintaining these discharges should be a goal of water managers." *Id.*

[10] "It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right

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between those using the water." *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944); Idaho Const. Art. XV, § 3. Conjecture that a junior appropriator's use of water will not adversely impact a senior appropriator's water right does not change the doctrine of prior appropriation. For example, in *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Department of Water Resources granted a permit for an irrigation well, but when a pump test was performed on the well, it lowered the water table to the extent that an existing domestic well ceased to produce water. We noted, "In this very case the record demonstrates that the Department issued the water permit to Wallentine [junior appropriator] because its experts did not expect that the Wallentine well would have a significant impact on the Parker domestic well. This later proved to be incorrect." *Id.* at 510, 650 P.2d at 652. We upheld the prior appropriator's water right, holding that the trial court properly enjoined the use of the subsequent appropriator's irrigation well. *Id.* at 513, 650 P.2d at 655. However, we stated that the junior appropriator could have the injunction vacated if he paid the expense of changing the prior appropriator's method or means of diversion (e.g., by digging him a deeper well) so that they both could be supplied with water. *Id.* at 514, 650 P.2d at 656.

The issue in this case is not the hoped-for benefits that would come from Idaho Power partially subordinating its water rights at the Swan Falls Dam. Rather, it is whether in this instance the Groundwater Users who have water rights junior to those of the Spring Users are causing material injury to the latter's water rights. When the Swan Falls Agreement was executed, the parties knew that there needed to be a better understanding of the hydrology of the Aquifer and its hydraulic connection with the Snake River and its tributaries. The Agreement included a provision stating that the parties would support legislation to obtain a $200,000 appropriation "to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin." Since then, such knowledge has significantly increased, and the Department now uses a calibrated ground water model that was reformulated in 2004. The district court did not err in holding that the curtailment orders do not violate the Swan Falls Agreement.

B.1. Did the District Court Err in Holding that the Curtailment Orders Do Not Violate the Full Economic Development Provision of Idaho Code § 42–226?

Idaho Code § 42–226 provides with respect to groundwater resources that the reasonable ***801 **82** exercise of the rights of a prior ground water appropriator "shall not block full economic development of underground water resources." Based upon this provision in the statute, the Groundwater Users asserted in the agency proceedings that any economic benefit to the Spring Users resulting from the curtailment orders would be more than offset by the severe economic damage to others caused by the curtailment of the Groundwater Users' water rights. They raised the same argument in the district court, which held that this provision of the statute applied to the means of diversion and that the Director did not abuse his discretion by failing to order the Spring Users to change their means of diversion by drilling wells. Relying upon section 42–226, the Groundwater Users contend on appeal that "[i]f curtailment will result in substantial economic harm, the senior's water delivery call must be rejected." That argument misinterprets the statute.

The Idaho Constitution confirmed the doctrine of prior appropriation with respect to surface waters. Section 3 provides: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.... Priority of appropriation shall give the better right as between those using the water...." However, the Constitution makes no mention of ground water rights. In 1899, the legislature provided a statutory basis for the appropriation of "subterranean waters" in addition to the waters of "rivers, streams, lakes, [and] springs." Sec. 2, 1899 Idaho Sess. Laws 380, 380. We later held that the prior appropriation doctrine applies to ground water. *Bower v. Moorman*, 27 Idaho 162, 181, 147 P. 496, 502 (1915).

In *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), we held, with respect to ground water rights, that the prior appropriation doctrine protected the senior appropriator's means of diversion. The prior appropriators had two wells, and the subsequent appropriators drilled a well into the same aquifer, but at a deeper level. When they commenced pumping, it lowered the water level in the aquifer to such an extent that the prior appropriators' wells went dry. We ruled that the prior appropriator's rights included the right to divert water in their historical manner and that they were not required to bear the cost of drilling a deeper well so that a subsequent appropriator could also obtain ground water. If they were required to lower their wells to obtain water, "it would result ultimately in a race for the bottom of the artesian belt." *Id.* at 656, 26 P.2d at 1114. "If subsequent appropriators desire to engage in such a contest the financial burden must rest on them and with no injury to

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the prior appropriators or loss of their water." *Id.* at 657, 26 P.2d at 1114.

In 1951, the legislature enacted the Ground Water Act. Ch. 200, §§ 1–16, 1951 Idaho Sess. Laws 423, 423–29. The section of that Act that was codified as Idaho Code § 42–226 provided:

> 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.

Ch. 200, § 1, 1951 Idaho Sess. Laws 423, 423–24.

In 1953, the legislature amended section 42–226 by adding the following language at the end of the first sentence:

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

Ch. 182, § 1, 1953 Idaho Sess. Laws 277, 278. The 1953 amendment modified the doctrine ***802 **83** of first in time is first in right for ground water appropriators only with respect to their pumping levels. It " established the reasonable pumping level limitation on the doctrine of first in time is first in right." *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982).

[11] The reference to "full economic development of underground water resources" does not mean that the ground water appropriator who is producing the greater economic benefit or would suffer the greater economic loss is entitled to the use of the ground water when there is insufficient water for both the senior and junior appropriators. If that were the basis for allocating water in times of shortage, then water would be allocated among farmers based upon the market prices of their respective crops and their expected yields. Rather, the purpose of the 1953 amendment was to change the holding in *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), that a prior appropriator of ground water was protected in his historic pumping level.

As we explained in *Baker v. Ore–Ida Foods, Inc.*, 95 Idaho 575, 581–82, 513 P.2d 627, 633–34 (1973): "*Noh* suggests that a senior appropriator of ground water is forever protected from any interference with his method of diversion.... Apparently our Ground Water Act was intended to eliminate the harsh doctrine of *Noh*." The 1953 amendment recognized that in order for there to be full economic development of underground water resources, a senior appropriator with a shallow well should not be able to block subsequent appropriators of groundwater. To prevent that from occurring, the senior appropriator is protected only "in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer." Idaho Code § 42–226. First in time and first in right, full economic development, and reasonable pumping levels are not three separate factors that can determine the allocation of ground water among competing appropriators. Rather, with respect to ground water pumping, the prior appropriation doctrine was modified so that it only protects senior ground water appropriators in the maintenance of reasonable pumping levels in order to obtain full economic development of ground water resources. *Compare* "*Noh* was inconsistent with the full economic development of our ground water resources," *Baker* at 581–82, 513 P.2d at 633–34, *with* "We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest," *id.* at 583, 513 P.2d at 635. Likewise, we equated "optimum development" with "full economic development" when we stated: "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Full economic development of Idaho's ground water resources can and will benefit all of our citizens." *Id.* at 584, 513 P.2d at 636 (citation omitted).

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In summarizing the effect of the 1953 amendment to Idaho Code § 42–226, we stated: "A senior appropriator is only entitled to be protected to the extent of the 'reasonable ground water pumping levels' as established by the IDWA [Idaho Department of Water Administration, now Idaho Department of Water Resources]. I.C. § 42–226. A senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion." *Id.* at 584, 513 P.2d at 636. We then stated, "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." *Id.* The only right modified concerned the prior appropriator's pumping level. The prior appropriator was protected to a reasonable pumping level, not his historic pumping level. We concluded by stating:

> We conclude that our legislature attempted to protect historic water rights while at the same time promoting full 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 appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.

**84 *803 *Id.* (emphasis added). Thus, the reference to "full economic development of underground water resources" refers to promoting full development of ground water by not permitting a ground water appropriator with an unreasonably shallow well to block further use of the aquifer.

A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm. Such a holding would be contrary to the provision in Idaho Code § 42–233a (emphases added), stating:

> The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical ground water 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.

In this case, it would also be contrary to Article XV, § 3, of the Idaho Constitution, which states, "Priority of appropriation shall give the better right as between those using the water...." Likewise, the Groundwater Users' arguments are not consistent with the definition of "Full Economic Development of Underground Water Resources" in the Conjunctive Management Rules.

> The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.

IDAPA 37.03.11.010.07.

The Groundwater Users' argument is also contrary to the State Water Plan. The Idaho Water Resource Board is to "progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest." Idaho Code § 42–1734A. One of the requirements of the Plan is that "[e]xisting rights, established duties, and the relative priorities of water established in article XV, section 3, of the constitution of the state of Idaho, shall be protected and preserved." Idaho Code § 42–1734A(a).

The Groundwater Users contend that they are protected

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from delivery calls as long as they are maintaining reasonable ground water pumping levels. The reference to reasonable pumping levels only applies to the senior appropriator, not to junior appropriators. It is the "prior appropriators" of underground water who are protected "in the maintenance of reasonable ground water pumping levels," Idaho Code § 42–226, and in context it is only when there is a conflict between senior and junior ground water appropriators. There is nothing in the language of the statute that purports to permit a junior ground water appropriator to cause material injury to the water rights of a senior appropriator as long as the junior appropriator is maintaining a reasonable pumping level. This is shown by Idaho Code § 42–237a, which provides, in part, "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* ...." (Emphasis added).

Relying upon Idaho Code § 42–237a, the Groundwater Users claim, "The Act enables groundwater development to expand so long as it does not 'result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge' (i.e. so long as withdrawals do not outpace inputs)." They assert, "Simply stated, if hydraulic conditions can sustain the existing diversions from the aquifer, the Act precludes curtailment." Again, the Groundwater Users are simply misreading the statute.

The relevant portion of the statute provides:

> 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 ***804 **85** 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.

The statute merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) cause material injury to any prior surface or ground water right or (b) result in withdrawals from the aquifer exceeding recharge. There is absolutely nothing in the statute that could be interpreted as providing that ground water users are exempt from the doctrine of prior appropriation as long as they are not mining the aquifer. Likewise, there is nothing in the statute regarding the administration of surface water rights. It empowers the director to take certain actions "in the effectuation of the policy of this state to conserve its ground water resources." Idaho Code § 42–237a. One of those listed powers is "[t]o supervise and control the exercise and administration of all rights to the use of ground waters," which can include initiating "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." *Id.*

The Groundwater Users also argue that the curtailment orders violate Idaho Code § 42–226 because "[t]he orders do not address administration of the [Aquifer] based on reasonable aquifer levels at all." In essence, they argue that the Spring Users' priority rights should be protected only in the maintenance of a reasonable aquifer level. If that level does not result in sufficient water discharge from the springs, the Spring Users are not entitled to curtailment orders. There is nothing in the statute addressing reasonable aquifer levels. It only mentions reasonable pumping levels. By its terms, section 42–226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water, which is defined as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving," Idaho Code § 42–230(a). They are appropriators of surface water flowing from springs. The district court did not err in holding that the curtailment orders do not violate Idaho Code §§ 42–226 and 42–237a.

B.2. Full Economic Development.

The Groundwater Users also contend that "the district court acknowledged that both the CM [Conjunctive Management] Rules and Idaho Code § 42–226 require analysis of full economic development, but the court refused to reverse the curtailment orders...." They assert that full economic development requires that they be permitted to withdraw as much water from the Aquifer as they need (as long as total annual withdrawals do not exceed annual recharge), even if doing so deprives senior surface water users of water. They state, "Former Director Ken Dunn testified that because of the Act's directive for full economic development of groundwater resources, 'the Department would not have permitted spring users in the thousand springs reach to curtail ground water

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pumping on the Eastern Snake River Plain.' " They argue:

> The ultimate criterion of groundwater administration is "how best to utilize the annual supply without over-drafting the stock which maintains the aquifer's water level."
>
> That is not to say that the directive for full economic development does away with the right of priority. To the extent necessary to prevent over-drafting of the aquifer, priority of right still determines which water rights get shut off to maintain a stable water table. (Citations omitted.)

[12] Thus, they contend that as long as the Aquifer is not being over-drafted, priority of water rights as between surface and ground water users is not to be considered. They assert that the director must simply determine a reasonable aquifer level and manage the Aquifer based upon that determination. They state, "The central premise of the [Ground Water] Act is that the [Aquifer] and other aquifers will be administered to achieve full economic development by protecting the use of groundwater provided reasonable, sustainable aquifer levels are maintained." According to the Groundwater ***805 **86** Users, the curtailment orders "do not address administration of the [Aquifer] based on reasonable aquifer levels at all" and that curtailment was ordered "without any meaningful analysis of the most defining statutory criteria for administering groundwater rights in response to delivery calls made by surface water rights." In support of their argument, they cite Conjunctive Management Rule 20.03, and they assert that the district court "mistakenly assumed the Director actually made a determination of reasonable aquifer levels."

We begin our analysis of these arguments with Conjunctive Management Rule 20.03, which provides:

> These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

IDAPA 37.03.11.020.03.

On its face, the rule does not state that priority of right as between a senior surface water user and junior ground water users is to be disregarded as long as the Aquifer is not being overdrawn by ground water users. Likewise, the authorities cited in the Rule do not so state.

The rule cites Article XV, § 5, of the Idaho Constitution, which states:

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Section 5 refers to the preceding section, Section 4, which

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provides:

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

In *Mellen v. Great Western Beet Sugar Co.*, 21 Idaho 353, 122 P. 30 (1912), we stated, "The two sections must therefore be read and construed together." *Id.* at 359, 122 P. at 32. Neither section applies to conjunctive management, and neither applies in this case.

First, neither section applies to the water user who has appropriated water directly from the water source. Section 4 applies to waters that "have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof." Section 5 applies to any person(s) who have "settled upon, or improved land with the view ***806 **87** of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section [section 4] provided." Both sections apply where the water was appropriated, used, or intended to be used "under a sale, rental, or distribution thereof." As we stated in *Mellen*, "The framers of our Constitution evidently meant to distinguish settlers who procure a water right under a sale, rental, or distribution, from that class of water users who procure their water right by appropriation and diversion directly from the natural stream." *Id.* at 359, 122 P. at 31. In *Mellen*, we quoted Mr. Claggett's explanations during the Constitutional Convention, who we stated "seemed to have a very clear understanding of the provisions." *Id.* at 360, 122 P. at 32. We also noted that Mr. Claggett "was the only one who spoke in favor of their [sections 4 and 5] adoption, and his discussion and explanation seems to have been accepted by the majority of the convention as they voted down the amendments presented by Gray, Hampton, and Poe, and adopted the provisions as they now stand." *Id.* As Mr. Claggett explained with respect to these two sections: "Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental or distribution.' " *Id.* at 361, 122 P. at 32. Sections 4 and 5 were added to make it clear that water rights held by canal companies remained subject to state regulation and use by those who relied upon such water for agricultural purposes. As Mr. Claggett stated with respect to these sections:

> This thing has got to be regulated by statute, and the constitution proposes simply to point out the line of the principles within which legislation must be carried on; that is to say, to recognize the right of priority in the order of time of settlement or improvement, as the case may be; and then when the water runs short or anything of that kind, it has got to be regulated from time to time and from year to year as the legislatures meet, and as experience shall suggest, in such manner as to promote the greatest good to the greatest number, bearing in mind constantly the fact of the prior right of the first man as well as the necessities of the second, and you cannot get it any closer than that.

II Proceedings and Debates of the Constitutional Convention of Idaho 1889, 1181 (I.W. Hart ed., Caxton Printers, Ltd., 1912). Similarly, Section 1 declared to be a public use, "subject to the regulations and control of the state in the manner prescribed by law," the use of water appropriated "for sale, rental or distribution" and water

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appropriated for private use but later "sold, rented, or distributed." Idaho Const. Art. XV, § 1. Because the Spring Users have directly appropriated water from their respective water sources, these sections do not apply to them.

Second, both sections only apply to water that was intended to be used or was used for agricultural purposes. Section 4 begins, "Whenever any waters have been, or shall be, appropriated or used for agricultural purposes...." Section 5 begins, "Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes...." Again, as Mr. Claggett explained, because people would locate farms along the line of the canal owner's proposed ditches upon the promise that water would be available for agricultural purposes, "the water should not be allowed to be diverted from that purpose and applied to the running of manufactories or anything else of that sort." *Id.* at 361, 122 P. at 32. Mr. Claggett further explained, "The first section [section 4] protects the person who comes in, by making it 'an exclusive dedication' to agricultural uses after it has been so appropriated and so used." *Id.* In *Mellen,* we stated that the clear intent of these two sections was that "whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental, or distribution, it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes." *Id.* at 359, 122 P. at 31–32. The Spring Users' water rights at issue in this case were not appropriated or being used for agricultural purposes.

****88 *807** Third, both sections only apply where the water is distributed by a ditch or canal owner for use by others. As we stated in *Mellen:*

> The constitutional convention, accordingly, inserted sections 4 and 5, in article 15, of the Constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used "under a sale, rental or distribution," and to point out the respective rights and priorities of the users of such waters.

Id. at 359, 122 P. at 31. We added, "[S]ection 4 is dealing chiefly with the ditch or canal owner, while section 5 is dealing chiefly with the subject of priorities as between water users and consumers who have settled under these ditches and canals and who expect to receive the water under a 'sale, rental or distribution thereof.' " *Id.* at 359, 122 P. at 32. Neither circumstance applies in this case.

Finally, neither section governs conjunctive management. They only govern the distribution of certain surface waters.

Conjunctive Management Rule 20.03 also mentions Article XV, § 7, of the Constitution which provides:

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

This section includes a provision stating that "the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest." It also states that "[t]he Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law." This latter provision was added in 1984 after this Court in 1983 had ruled in

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Idaho Power Co. v. State Department of Water Resources, 104 Idaho 570, 661 P.2d 736 (1983), that the legislature lacked that authority.

There is nothing in the wording of Article XV, § 7, that indicates that it grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV, § 3, which states, "Priority of appropriation shall give the better right as between those using the water [of any natural stream]...."[4] The current State Water Plan does not purport to do so. It provides, "The goal of conjunctive management is to protect the holders of prior water rights while allowing for the optimum development and use of the state's water resources." Idaho Water Resource Board, The State Water Plan 6 (1996).

Conjunctive Management Rule 20.03 also refers to "full economic development as defined by Idaho law." The words "full economic development" only appear in Idaho Code § 42–226 and the cases discussing that statute. *See* *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 867, 154 P.3d 433, 438 (2007); *Parker v. Wallentine*, 103 Idaho 506, 509–10, 650 P.2d 648, 651–52 (1982); *Baker v. Ore-* ****89** *Ida* ***808** *Foods, Inc.*, 95 Idaho 575, 576, 513 P.2d 627, 628 (1973); and *State ex rel. Tappan v. Smith*, 92 Idaho 451, 455, 444 P.2d 412, 416 (1968). As explained above, Idaho Code § 42–226 has no application to this case. It only modifies the rights of ground water users with respect to being protected in their historical pumping levels.

The Groundwater Users' argument that full economic development means that priority of right is taken into consideration in managing the Aquifer only as necessary to prevent over-drafting of the Aquifer is not consistent with Idaho law. It would, in essence, preclude conjunctive management of the Aquifer. Conflicts between senior surface water users and junior ground water users would be ignored as long as withdrawals from the Aquifer and recharge were in balance. That argument is contrary to the current State Water Plan, which provides, "It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection." Idaho Water Resource Board, The State Water Plan 6 (1996). As we held in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), hydrologically connected surface and ground waters must be managed conjunctively.

In *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900), we said:

> It is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state, and every act on the part of any individual claimant that tends to waste water is to be discouraged rather than encouraged.

The following year, the legislature enacted what is now codified as Idaho Code § 42–101 and which provides in part:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.

In *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909), we stated, "The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty." In *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909), we phrased it, "Economy must be required and demanded in the use and application of water." In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept by stating, "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."

The Idaho Water Resource Board and the Idaho legislature have the power to formulate and implement a state water plan for "optimum development of water resources in the public interest." Idaho Const. Art. XV, § 7. There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. Likewise, there is no

material difference between "full economic development" and the "optimum development of water resources in the public interest." They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest. As we stated in *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982), "[I]t is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution." When discussing the Ground Water Act and particularly Idaho Code § 42–226, we stated, "The Ground Water Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources." *Id.* at 512, 650 P.2d at 654. The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

****90 *809** Over one hundred years ago, we held that a senior appropriator was not protected in an unreasonable means of appropriation. In *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907), the senior appropriator dammed a creek so that the water would back up, raising the water table to subirrigate his lands. This Court held that although he could divert water from the stream to fill his water right, he could not dam or impede the flow of the remaining water in order to cause a subirrigation of his meadows. We stated:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Id. at 208, 89 P. at 754.

Conjunctive Management Rule 20.03 states, "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water...." That is consistent with our holding in *Van Camp*. The senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion. As we stated, "Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right over the plaintiff, the judgment should so decree, but beyond that he cannot go under any other pretext or claims for the natural condition of the stream." *Id.*

The Groundwater Users also argue that the curtailment orders violate *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1912). In *Schodde*, the senior appropriator had constructed water wheels along the banks of the Snake River. As the river current turned the wheels, they lifted water out of the river in attached buckets and emptied the water into flumes for distribution through ditches to irrigate the senior appropriator's lands. The junior appropriator constructed a dam downstream from the water wheels. The dam backed up the river to a point upstream from the wheels, and as a result there was no longer any river current to operate them. The senior appropriator sued for damages in federal district court, and it dismissed the complaint. It held that "there was no right under the Constitution and laws of the state of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses." *Id.* at 117, 32 S.Ct. at 471, 56 L.Ed. at 690. The district court held that the use of the river current to operate the water wheels was not an appropriation because it was not reasonable. The court stated, "As before suggested, there is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation;-it is not reasonable." *Id.* at 118, 32 S.Ct. at 472, 56 L.Ed. at 690. The federal court of appeals affirmed the dismissal, holding that "the extent of beneficial use was an inherent and necessary limitation upon the right to appropriate." *Id.* at 120, 32 S.Ct. at 472, 56 L.Ed. at 691. The court of appeals also stated that if the prior appropriator was permitted to own the current of the river in order to operate his means of diversion, it would prevent upstream appropriations that would lower the river level. "It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated." *Id.*

The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights. Thus, in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007), we cited *Schodde* for the proposition that "evaluation of whether a

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diversion is reasonable in the administration context should not be deemed a re-adjudication [of a water right]."

Under the law, the Groundwater Users' arguments regarding reasonable aquifer levels and full economic development must challenge the Spring Users' means of diversion. The factors that the Director may consider in determining whether the holder of a water ***810 **91** right is suffering material injury and using water efficiently and without waste include "[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion ..., including the construction of 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.h. Based upon a field investigation of the Spring Users' facilities by a registered professional civil engineer, the Director found that they were employing reasonable diversions, conveyance efficiency, and conservation practices, with the exception of one pipeline at the Clear Springs's facility that was found to be in disrepair and leaking water. The Director also found that there were no alternate reasonable means of diversion or alternate points of diversion that the Spring Users should be required to implement.

[13] In their petition for judicial review before the district court, the Groundwater Users raised as an issue, "Whether the Director erred by failing to exercise his authority under the Conjunctive Management Rules to compel Blue Lakes and Clear Springs to convert to a ground water source." "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). The district court noted that Director Dreher had determined that the Spring Users were employing reasonable diversion, conveyance efficiency, and conservation practices and that it would not be reasonable to require them to drill horizontal wells in order to obtain water. The district court determined, "While there may be significant disagreement over the Director's determination of reasonableness and the result ultimately reached, no concrete evidence was presented of viable reasonable alternatives." The court held that the Director had not abused his discretion or acted arbitrarily or capriciously in his determination. The Groundwater Users have not appealed that holding by the district court. Therefore, whether the Director should have required that the Spring Users change their means of diversion to an underground water source is not an issue on this appeal.

C. Did the District Court Err in Upholding the Director's Determination that the Ground Water Depletions Caused Material Injury to the Spring Users' Water Rights?

Prior to the administrative hearing, the Groundwater Users sent the Spring Users discovery requests for information that included fish production records. The Spring Users sought a protective order from the hearing officer, and he ruled that such information was not discoverable based upon prior authority from the SRBA. He also ruled, "However, if that information is not produced in discovery Blue Lakes and Blue Springs may not introduce information from the records to support any position they assert, e.g. more water allows the production of more or larger healthy fish."

After the hearing officer issued his proposed findings of fact and conclusions of law, the Groundwater Users filed objections with the Director in which they argued that there was no evidence showing that the Spring Users could grow more fish if they had more water or that any increased production of fish could be marketed at a profit. Absent such evidence, they contended that there was no evidence of material injury to the Spring Users' water rights. The Director did not accept that argument. The Groundwater Users also argued to the district court the finding of material injury is not supported by the evidence without a showing that "additional water accruing from curtailment of junior ground pumpers would enable Spring Users to increase fish production."

The Groundwater Users contend that a decreased water supply is not sufficient to show material injury. Rather, they argue ***811 **92** that there must be evidence showing that with more water the Spring Users could produce more fish and profitably sell them.

[14] [15] [16] [17] "The first appropriator of water for useful or beneficial purposes has the prior right thereto, and the right, once vested, will be protected and upheld, unless abandoned." *Bower v. Moorman*, 27 Idaho 162, 181, 147 P. 496, 502 (1915). The right to appropriate water is for "beneficial uses," Idaho Const. Art XV, § 3, not merely for profitable businesses. Beneficial use is not defined in the Constitution, nor has it been comprehensively defined by statute or by this Court. *State, Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974). However, a

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beneficial use is not limited to a use that generates a profit, or even income. For example, the Constitution lists using water for "domestic purposes" as a beneficial use. Idaho Const. Art XV, § 3. We have held that "firefighting" is a beneficial use of water. *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568, 572 (1997). Likewise, the legislature has declared as beneficial uses "drinking water," Idaho Code § 39–102(2), "the watering of domestic livestock," Idaho Code § 42–114, using low temperature geothermal resources "primarily for heat value," Idaho Code § 42–233, using instream water "for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality," Idaho Code § 42–1501, and using water in lakes and water discharging from springs for "scenic beauty." Idaho Code §§ 67–4301, 67–4304, & 67–4307 through 67–4311.

"Material injury" is defined by the Conjunctive Management Rules as "[h]indrance to or impact upon *the exercise of a water right* caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." IDAPA 37.03.11.010.14 (emphasis added). The Rule requires impact upon the exercise of a water right. It does not require showing an impact on the profitability of the senior appropriator's business. Such a holding would conflict with Article XV, § 3, of the Idaho Constitution, which states that "[p]riority of appropriation shall give the better right as between those using the water." It would also require the Director or watermaster to examine the businesses of the senior and junior appropriators to determine which one could make the greater profit from the use of the water when there is a shortage. If business profitability was the basis for appropriation, decreed water rights would become meaningless. The issue would be which appropriator at the time could make the greater profit by using the water.

[18] The amounts of the Spring Users' water rights had already been decreed based upon the amounts of water that they had diverted and applied to the beneficial use of fish propagation. Subject to the rights of senior appropriators, they are entitled the full amount of water they have been decreed for that use. As we have stated, "Any *interference with a vested right to the use of water*, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference." *Bower*, 27 Idaho at 181, 147 P. at 502 (emphasis added). The district court did not err in holding that there was substantial evidence supporting the finding of material injury to the Spring Users' water rights.

D. Did the District Court Err in Upholding the Director's Determination that the Spring Users' Delivery Calls Were Not Futile Absent Evidence that Spring Users Needed Additional Water to Produce More, Larger Fish?

[19] The Groundwater Users asserted prior to the agency hearing that the Spring Users' delivery calls were futile because the evidence "will show that there is little to no expectation that the shortages suffered by the spring users in this case will ever be restored." In his proposed findings of fact and conclusions of law, the hearing officer noted the challenge of applying the futile call rule when the junior appropriator is withdrawing ground water.

> [C]urtailing ground water pumping does not provide the immediacy of delivery to the senior user that would be present in ***812 **93** the curtailment of surface water. Surface water travels in a channel from one source that may be seen to a destination that can be seen. It can be routed to a particular point. Ground water does not fall into this model. Its route is determined by the contours of fractured basalt interspersed at times with soil of a different composition. Part of the water curtailed may travel one direction, part another. The effects of curtailment may be years to be realized. The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile. In effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated.

The hearing officer concluded that "the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks."

The Groundwater Users filed objections with the Director, arguing that the futile call rule should bar the curtailment. They asserted that it would take an unreasonable amount of time for the Spring Users to realize the additional water resulting from the curtailed pumping, that changing circumstances during that time could either negate the need for or supply the additional water, and that only a portion of the water not withdrawn from the Aquifer pursuant to the curtailment orders will ultimately reach the Spring Users. The Director rejected those arguments.

In the district court, the Groundwater Users argued that it would take an unreasonable amount of time to realize the anticipated benefits from the curtailment orders and during that time other factors could nullify the Spring Users' need for the water or ability to use it. The district court upheld the Director's decision, noting that the conjunctive management rules acknowledge that relief from curtailment will not be immediate.[6]

On appeal, the Groundwater Users contend that the delivery calls were futile because there "is no substantial evidence in the record that the additional 10 cfs that is expected to accrue to Blue Lakes over time, and the additional 2.67 cfs that is expected to accrue Clear Springs from curtailment over time, will enable either of them to produce more, larger or healthier fish." The Groundwater Users made this argument in the district court as showing a lack of evidence showing material injury, but there is no indication that they asserted it as showing the delivery calls were futile. This Court will not consider issues raised for the first time on appeal. *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746, 152 P.3d 614, 617 (2007).

E. Did the District Court Err in Upholding the Director's Findings Based Upon the Ground Water Model?

[20] Former–Director Dreher relied upon the Department's ground water model in issuing the curtailment orders. However, he found that the model had an uncertainty of up to ten percent due to the margin of error in stream gauges used in developing the model. Based upon that level of possible uncertainty, he limited the junior water rights curtailed.

The hearing officer also relied upon the model when making his recommended findings. ****94 *813** He reasoned: "There is no better science available. Decisions had to be made and will have to be made. The limitations of the model are identifiable and important but they do not preclude reliance upon it. It has an acceptable level of reliability based on peer reviewed science."

In their objections submitted to the Director, the Groundwater Users urged the Director to consider other uncertainties in the model. They argued that the Director should "assign a more accurate level of predictive uncertainty between 20 and 30%, and to constrict the trim line accordingly." The Director declined to do so. He held that the "ground water model represents the best available science for determining the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically-connected reaches of the Snake River and its tributaries" and that there "is no other technical basis as reliable as the simulations from the ESPA ground water model that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries." The Director also found that "the degree of uncertainty associated with application of the [Aquifer] ground water model is 10 percent."

The Groundwater Users asserted to the district court that the Director erred by failing to take into account known uncertainties in the model. The district court noted that "[t]here was testimony presented that the margin of error was probably much higher than 10% but that it had yet to be quantified by any scientific methodology." The court held that the evidence, although conflicting, "supports the use of the 10% margin of error as a minimum and is not arbitrary or capricious." The court added: "That is all that is available. No evidence was presented to establish a higher margin of error or to controvert that the margin of error is less than 10%."

On appeal, the Groundwater Users contend that the district court erred because "[t]he curtailment orders should be set aside because the Director failed to account for all known limitations of the [Aquifer] Model, resulting in a broader zone of curtailment than should have occurred." They argue that in addition to possible error from the stream gauges, "Model uncertainty also derives from non-uniform geology of the [Aquifer], variations within the Model cells, the assumption that well impacts are isotropic [the same in every direction], the assumption that all data was accurate and reliable, and the unaccounted for impacts of surface water diversions,

precipitation recharge, and tributary underflow." They conclude by "ask[ing] the Court to set aside the curtailment orders and remand them to the Director with instructions to exercise his judgment in accounting for all contributing factors of Model uncertainty, and to re-define the area of curtailment accordingly."

The Groundwater Users do not specify which subsection of Idaho Code § 67–5279(3) permits their challenge to the Director's reliance upon the model. Because they argue that "[w]ith respect to limitations in the Model, the Director did not exercise his best judgment," we assume they contend that the Director abused his discretion in relying upon the ground water model. Idaho Code § 67–5279(3)(e). In determining whether an agency abused its discretion under that statute, we "must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason." *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006).

There have been numerous studies of the geology of the Aquifer and ground water resources of the eastern Snake River Plain dating from 1902 to 1982, but none of them provide an adequate basis for the conjunctive management of water rights from surface and ground water sources. As a result, the Department contracted with the University of Idaho Water Resources Research Institute to develop a model. The model was calibrated to a twenty-two-year set of data from 1980 through 2002.

The hearing officer found that "[t]he limitations of the model are identifiable and important but they do not preclude reliance upon it. It has an acceptable level of reliability ****95 *814** based on peer reviewed science." The Director adopted those findings, and found that the model " represents the best available science for determining the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically-connected reaches of the Snake River and its tributaries." He also found, " There currently is no other technical basis as reliable as the simulations from the [Aquifer] ground water model that can be used to determine the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically connected reaches of the Snake River and its tributaries." Those findings are not challenged on appeal. In fact, the Groundwater Users state, " The Model is the best science available for administering hydraulically connected surface and groundwater rights on the [Aquifer], but the Model is not perfect." They have failed to show that the Director abused his discretion in relying upon the model. He perceived the issue of utilizing the model as discretionary, he acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and he reached his decision through an exercise of reason. The district court did not err in upholding the Director's reliance upon the model.

F. Did the District Court Err in Failing to Set Aside the Curtailment Orders Because the Director Did Not Give the Groundwater Users a Hearing Before Issuing the Curtailment Orders?

Former–Director Dreher issued the curtailment orders without first giving the affected Groundwater Users a hearing. They raised that issue in the district court, and it did not directly address this issue.[7] It instead held that "the Director has abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing and failing to order curtailment after finding the mitigation plans inadequate...." However, the court concluded that "there is no practical remedy at this point in these proceedings."

[21] [22] [23] The Groundwater Users ask that the curtailment orders be set aside for the failure to grant them a hearing before the orders were issued. They argue, "Due process entitles property owners to 'an opportunity for a hearing before he is deprived of any significant property interest.' " (Quoting from *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S.Ct. 1983, 1995, 32 L.Ed.2d 556, 571 (1972).) Under Idaho law, a water right is real property, *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); Idaho Code § 55–101, and the owner of a water right must be afforded due process of law before the right can be taken by the State, *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). However, due process does not necessarily require a hearing before property is taken. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610–11, 94 S.Ct. 1895, 1901–02, 40 L.Ed.2d 406, 415–16 (1974); *Nettleton v. Higginson*, 98 Idaho 87, 92, 558 P.2d 1048, 1053 (1977). Even *Fuentes* acknowledged that there are circumstances that justify postponing notice and an opportunity for a hearing. It described three requirements that, if met, permit a prehearing seizure of property. They are as follows:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

407 U.S. at 91, 92 S.Ct. at 2000, 32 L.Ed.2d at 576.

**96 *815 [24] [25] [26] The first requirement is that "the seizure has been directly necessary to secure an important governmental or general public interest." A water right "does not constitute ownership of the water," *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). All waters within the state when flowing in their natural channels and all ground waters are property of the State. Idaho Code §§ 42–101 & 42–226. The state has the duty to supervise their appropriation and allotment to those diverting such waters for any beneficial purpose. *Id.* "It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water. As between appropriators, the first in time is the first in right." *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944). "The doctrine of prior appropriation grew out of the sense of justice of the miners who came to the west in search of gold and other precious metals." *Joyce Livestock*, 144 Idaho at 11, 156 P.3d at 512. "Eventually, the state, territorial, and federal governments recognized that the only way the arid lands of the west could be settled and turned to agricultural use was to officially recognize the law of appropriation as the law of the land." *Pocatello v. State*, 145 Idaho 497, 502, 180 P.3d 1048, 1053 (2008). Just apportionment to, and economical use by, those who have appropriated water for a beneficial use furthers the important governmental interest of securing the maximum use and benefit of Idaho's scarce water resources. *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) ("[T]he entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.").

The second requirement is that there has been a special need for very prompt action. In times of water shortage, someone is not going to receive water. When a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action. "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). Deprivation of water for the time it would take for a hearing may cause serious economic or other harm to the senior appropriator. In addition, very prompt action may be necessary to prevent attempts at self help and possibly even violence.

The third requirement is that the person initiating the seizure is a government official responsible for determining that seizure without a prior hearing was necessary and justified in the particular instance. That determination must be made under narrowly drawn standards. The State has the duty to supervise the appropriation and allotment of both surface and ground waters to those diverting such waters for any beneficial purpose. Idaho Code §§ 42–101 & 42–226. The State uses the Department and watermasters to allot the water among appropriators and to curtail junior appropriators who are interfering with the water rights of senior appropriators. They do so according to narrowly drawn standards.

Whether or not curtailment of water use can be ordered without prior notice or an opportunity for a hearing depends upon whether the three requirements are met under the circumstances of a particular delivery call or curtailment. *See Nettleton v. Higginson*, 98 Idaho 87, 92, 558 P.2d 1048, 1053 (1977) ("We find the above three requirements to be met in the *present case* ...."). (Emphasis added.) In the instant case, the record does not show that there was a special need for very prompt action without notice and an opportunity for a hearing. The groundwater pumping did not cause a sudden loss of water discharge from the springs. The flow from the springs at issue had been gradually declining over a number of years. Curtailment would not quickly restore the spring flows. The Director found that "[t]he effects of curtailment may be years to be realized." Under these circumstances, the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.

However, that does not invalidate the curtailment orders that are the subject of this *816 **97 appeal. The Groundwater Users were given notice and a hearing before the Director issued his final order, and it is that order which is the subject of this appeal. That they may have initially been denied due process with respect to the

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curtailment orders issued in May and July 2005 does not invalidate the final order issued in July 2008 after the hearing.

G. Did the District Court Err in Failing to Order the Director to Curtail More Ground Water Pumping?

[27] After the hearing officer issued his recommendations, the Ground Water users filed objections with the Director contending, among other things, that the 10% margin of error should be disregarded because it was based upon the fact that the water gauges have a margin of error of plus or minus 10% and there is no way to know whether the error is high or low. Thus, they argued that all water users of hydraulically connected water sources must be administered based upon priority. The Director did not accept that argument.

The Spring Users also raised the issue on their appeal to the district court. The court noted that former–Director Dreher's decision to exclude from administration water rights within margin of error was based in part upon the "full economic development" language in Idaho Code § 42–226. It also noted that the hearing officer upheld the prior Director's decision based upon the "public interest" considerations in Conjunctive Management Rule 020.03. In his final order, former-Director Tuthill adopted the findings of fact and conclusions of law of both Director Dreher and the hearing officer.

Director Dreher wrote as a conclusion of law, " '[W]hile the doctrine of "first in time is first in right" is recognized [and applies to ground water rights], a reasonable exercise of this right shall not block full economic development of underground water resources.' Idaho Code § 42–226." As explained above, that statute has no application to this case. The reference to "full economic development" in the statute refers to promoting full economic development of *underground* water resources by protecting a senior ground water appropriator only in the maintenance of reasonable pumping levels so that a senior appropriator with a shallow well could not block subsequent ground water appropriation. The Spring Users are surface water appropriators, not ground water appropriators.

The hearing officer upheld the prior Director's decision based upon the "public interest" considerations in Conjunctive Management Rule 020.03, and Director Tuthill accepted that analysis in his final order. That Rule includes the statement:

> The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law.

IDAPA 37.03.11.020.03.

The district court did not affirm the final order based upon the above-quoted statements regarding Idaho Code § 42–226 and Conjunctive Management Rule 020.03. The district court held that "the Court concludes that the use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model." The court stated, "The evidence also supports the position that the model must have a factor for uncertainty as it is only a simulation or prediction of reality.... Given the function and purpose of a model it would be inappropriate to apply the results independent of the assigned margin of error." The court concluded, "Accordingly, the Director did not abuse discretion by applying the 10% margin of error 'trim line.' " The issue is whether the district court erred in upholding the Director on the ground that he did not abuse his discretion in not curtailing ground water appropriators who are within the model's margin of error.

The Spring Users contend that the Director abused his discretion for several reasons. First, because the error in the stream gauges is plus or minus 10%, there is no way to know when administering water rights in a particular case whether the error is high or low. Second, the Director has described the groundwater model itself as the best available technology for determining the impact ***817 **98** of junior ground water diversions on spring supplies. Third, there is no statute or administrative rule requiring 100% accuracy in measuring devices or in determining material injury, nor is there evidence showing that such level of accuracy could be achieved.

The Director concluded that there was up to a 10% margin of error in the groundwater model due to the margin of error in the stream gauges, and he decided not to curtail appropriators who were within that margin of error when deciding whether they were causing material

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injury to the Spring Users' water rights. The Director perceived the issue as discretionary, he acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and he reached his decision through an exercise of reason. The district court did not err in upholding the Director's decision in this regard.

[28] In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007), we stated, "Once the initial determination is made that material injury is occurring or will occur, the junior [appropriator] 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." The Spring Users argue that the Director's decision not to curtail appropriator's within the margin of error results in a shifting of the burden of proof from the junior appropriator to the senior appropriator. The Spring Users have not pointed to anything in the record indicating that this argument was raised in the district court, so we will not consider it on appeal. *Houston v. Whittier*, 147 Idaho 900, 911, 216 P.3d 1272, 1283 (2009).

IV. CONCLUSION

We affirm the judgment of the district court. Because all parties have prevailed in part, we do not award costs on appeal.

Justices BURDICK, J. JONES, HORTON and J. Pro Tem KIDWELL concur.

All Citations

150 Idaho 790, 252 P.3d 71

Footnotes

1 In *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997), we stated with respect to conjunctive management:

> Conjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and from ground water sources. Proper management in this system requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.

2 In the case cited (*Idaho Power v. Water Resources I*), the Court was addressing Idaho Code § 42–1736A, which was the legislative adoption of a modified version of the state water plan adopted by the Water Resource Board. This Court later held in *Idaho Power Co. v. State, Dept. of Water Resources*, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983) (*Idaho Power v. Water Resources II*) that the legislature did not have the authority to modify a state water plan. *Id.* at 574, 661 P.2d at 740. The quotation from *Idaho Power v. Water Resources I* is still accurate because "the state water plan, H.C.R. No. 48, and I.C. § 42–1736A all provide for the same minimum stream flows at the Murphy gauging station." *Id.*

3 Idaho Code § 40–203B(2) was amended by the addition of a provision stating as follows:

> For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

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Ch. 117, § 1, 1986 Idaho Sess. Laws 308, 309.

4 By "priority of appropriation," we are not referring to being protected in an unreasonable means of diversion.

5 In *Parker v. Wallentine*, 103 Idaho 506, 514, 650 P.2d 648, 656 (1982), we held, "The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator ... so that [the senior appropriator] will not suffer any monetary loss."

6 The district court quoted from IDAPA 37.03.11.020.04, which provides in part:

> The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

7 In this case, the Groundwater Users included in the record on appeal the briefs that they had submitted to the district court. Absent those briefs, the record would not show that they had submitted this issue to the district court, and we would not consider it on appeal. In addition, the record on appeal includes the agency record, which contains the briefs submitted by the Groundwater Users to the hearing officer and the Director.

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153 Idaho 500

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

Supreme Court of Idaho,
Boise, February 2012 Term.

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.
A & B IRRIGATION DISTRICT,
Petitioner–Appellant,
v.
IDAHO DEPARTMENT OF WATER RESOURCES and Gary Spackman, in his official capacity as Interim Director of the Idaho Department of Water Resources, Defendants–Respondents,
and
The Idaho Ground Water Appropriators, Inc.; The City of Pocatello; Fremont Madison Irrigation District; Robert & Sue Huskinson; Sun–Glo Industries; Val Schwendiman Farms, Inc.; David Schwendiman Farms, Inc.; Darrell C. Neville; Scott C. Neville; Stan D. Neville,
Cross–Appellants.

Nos. 38403, 38421, 38422.
|
Aug. 2, 2012.

Synopsis
Background: Senior water right holder sought review of Director of Idaho Department of Water Resource's denial of senior water right holder's petition for delivery call. The District Court, Minidoka County, Eric J. Wildman, J., affirmed in part and remanded. Senior water right holder and city and association of ground water users who had participated in proceedings appealed.

Holdings: The Supreme Court, Burdick, C.J., held that:

[1] Ground Water Act (GWA) applied in water delivery call action;

[2] Director was not required to establish reasonable ground water pumping level to support finding that senior water right holder had not been required to pump water beyond a reasonable ground water pumping level;

[3] Director's conclusion that senior water right holder had not exceeded reasonable pumping levels was based on substantial and competent evidence;

[4] Director's decision to analyze water right on a system-wide basis in senior water right holder's irrigation district was not arbitrary and capricious;

[5] Director's finding that senior water right holder was required to take reasonable steps to maximize use of interconnection of wells to move water within irrigation district before senior water right holder could seek administration of junior priority ground water rights was not arbitrary or contrary to law; and

[6] clear and convincing evidence standard applied to Director's finding as to whether senior water right holder had been materially injured.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (26)

[1] **Administrative Law and Procedure**⊶Trial or review de novo

In appeal from decision of a district court acting in its appellate capacity under Idaho Administrative Procedure Act, Supreme Court reviews the agency record independently of district court's decision.

8 Cases that cite this headnote

[2] **Administrative Law and Procedure**⊶Clear error; "clearly erroneous" standard
Administrative Law and Procedure⊶Sufficiency of Evidence
Administrative Law and Procedure⊶Substantial evidence

In reviewing decision of administrative agency, Supreme Court defers to agency's findings of fact unless they are clearly erroneous; in other

words, agency's factual determinations are binding on reviewing court, even where there is conflicting evidence before the agency, so long as agency's determinations are supported by substantial competent evidence in the record. West's I.C.A. § 67–5279(1).

9 Cases that cite this headnote

[3] **Statutes**⇐Literal, precise, or strict meaning; letter of the law
Statutes⇐Statute as a Whole; Relation of Parts to Whole and to One Another

The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole.

1 Cases that cite this headnote

[4] **Statutes**⇐Giving effect to statute or language; construction as written

If a statute is not ambiguous, court does not construe it, but simply follows the law as written.

[5] **Statutes**⇐Extrinsic Aids to Construction
Statutes⇐Plain, literal, or clear meaning; ambiguity

Where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature.

[6] **Constitutional Law**⇐Judicial rewriting or revision
Constitutional Law⇐Invalidation, annulment, or repeal of statutes

Court does not have authority to revise or void an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written.

[7] **Statutes**⇐Amendatory statutes

Amendment to an existing statute will not be held to be retroactive in application absent an express legislative statement to the contrary.

3 Cases that cite this headnote

[8] **Water Law**⇐Constitutional and statutory provisions
Water Law⇐Delivery call petition by senior user

Ground Water Act (GWA) applied in water delivery call action brought by senior water right holder, even though that water right preexisted enactment of GWA, where GWA expressly applied to administration of all rights to use of ground water whenever acquired unless specifically excepted by statute and water right did not fall into any statutory exception. West's I.C.A. § 42–226 et seq.

2 Cases that cite this headnote

[9] **Statutes**⇐General and specific statutes

When interpreting two statutes that pertain to a single topic, the more specific statute generally controls.

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[10] **Water Law**⚖Delivery call petition by senior user

Director of Idaho Department of Water Resources was not required to establish reasonable ground water pumping level to support finding in senior water right holder's water delivery call action that senior water right holder had not been required to pump water beyond a reasonable ground water pumping level, as Ground Water Act (GWA) gave Director discretion whether to establish such level in connection with delivery call. West's I.C.A. § 42–237a(g).

[11] **Administrative Law and Procedure**⚖Review for arbitrary, capricious, unreasonable, or illegal actions in general

An administrative agency's action is capricious if it was done without a rational basis. West's I.C.A. § 67–5279(3).

[12] **Administrative Law and Procedure**⚖Review for arbitrary, capricious, unreasonable, or illegal actions in general

An administrative agency's action is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles. West's I.C.A. § 67–5279(3).

[13] **Water Law**⚖Delivery call petition by senior user
Water Law⚖Evidence

Conclusion by Director of Idaho Department of Water Resources in senior water right holder's water delivery call action that senior water right holder had not exceeded reasonable pumping levels was based on substantial and competent evidence; conclusion was based on senior water right holder's water use, geologic conditions in area, and Director's related factual finding that more water was entering area than was being removed by groundwater pumping.

[14] **Water Law**⚖Delivery call petition by senior user

Decision by Director of Idaho Department of Water Resources to analyze water right of senior water right holder on a system-wide basis in senior water right holder's irrigation district rather than analyzing individual wells within district in senior water right holder's water delivery call action was not arbitrary and capricious; partial decree underlying water right did not define or limit place of use within irrigation district for any individual point of diversion, and irrigation district was designed to work as integrated system of wells.

1 Cases that cite this headnote

[15] **Water Law**⚖First in time, first in right

Priority in time is an essential part of western water law, and to diminish one's priority works an undeniable injury to that water right holder.

[16] **Water Law**⚖Determination

A provision is to be included in a water rights decree if it is necessary to define or for the efficient administration of a water right, and it is

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not necessary that the provision apply to all water rights.

1 Cases that cite this headnote

[17] **Water Law**⇐Delivery call petition by senior user
Water Law⇐Findings

Finding by Director of Idaho Department of Water Resources in senior water right holder's water delivery call action that senior water right holder was required to take reasonable steps to maximize use of interconnection of wells to move water within senior water right holder's irrigation district before senior water right holder could seek administration of junior priority ground water rights was not arbitrary or contrary to law, as applicable rule provided Director with discretion to make such a finding. IDAPA 37.03.11.042.01(g).

1 Cases that cite this headnote

[18] **Appeal and Error**⇐Plenary, free, or independent review

Supreme Court has free review over questions of law.

[19] **Water Law**⇐Evidence

A subsequent appropriator attempting to justify his diversion of water has the burden of proving that it will not injure prior appropriations.

[20] **Water Law**⇐Evidence

Burden of establishing senior water right holder's waste is on junior appropriator.

[21] **Water Law**⇐Proceedings to determine rights

Forfeiture or abandonment of a water right must be established by clear and convincing evidence.

1 Cases that cite this headnote

[22] **Water Law**⇐Evidence

Clear and convincing evidence standard is used when establishing prescriptive title to the water right of another.

[23] **Water Law**⇐Determination

Court applies the same rules of interpretation to a water rights decree that court applies to contracts.

3 Cases that cite this headnote

[24] **Water Law**⇐Evidence

In an action to enforce a water right, the plaintiff need not show injury.

[25] **Water Law**⇐Evidence

Clear and convincing evidence standard applied

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to determination by Director of Idaho Department of Water Resources as to whether senior water right holder had been materially injured in senior water right holder's water delivery call action, as such a standard was necessary to accord appropriate presumptive weight to decree underlying rights of senior water right holder.

1 Cases that cite this headnote

[26] **Water Law**⇐Evidence

Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

1 Cases that cite this headnote

Attorneys and Law Firms

**227 Barker, Rosholt & Simpson, LLP, Twin Falls, for appellants. Travis L. Thompson argued.

Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent Idaho Department of Water Resources. Christopher M. Bromley, Deputy Attorney General argued.

Racine Olson Nye Budge Bailey, Pocatello, for respondent Idaho Ground Water Appropriators, Inc. Candice M. McHugh argued.

White & Jankowski, LLP, Denver, CO, for respondent City of Pocatello. Sarah A. Klahn argued.

Opinion

BURDICK, Chief Justice.

*502 This case involves the Director (Director) of the Idaho Department of Water Resources' (IDWR) application of the Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules), IDAPA 37.03.11, in response to a ground water to ground water delivery call filed by the A & B Irrigation District (A & B). The Director's Final Order found that A & B was not materially injured and was affirmed by the district court on nearly all points. A & B now appeals to this Court, contending that the Director and the district court erred in their analyses. Cross-appeals by the City of Pocatello (Pocatello) and the Idaho Ground Water Appropriators, Inc. (IGWA) allege that the district court erred by requiring that the Director's finding of no material injury must *503 **228 be supported by clear and convincing evidence, rather than a preponderance of the evidence. We affirm the decision of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

1. *Introduction and History*

The A & B Irrigation District is located in south-central Idaho near the town of Rupert. Underlying the A & B project is the Eastern Snake Plain Aquifer (ESPA), which serves as the project's water source.[1] As described by the district court, the ESPA is predominately composed of fractured quaternary basalt that, at some locations, may have an aggregate thickness that exceeds several thousand feet, decreasing to shallower depths in the Thousand Springs area. The northern two-thirds of the project are dominated by basalt while the southern third is composed of basalt layered with sediment. "Snake River basalt is the principal water-bearing formation, and it yields water copiously to wells." The United States Bureau of Reclamation (USBR) describes the southern third as an area "[w]here the flow sheets are made up of dense, and massive basalt and/or is covered, penetrated, or innerbedded with fine sediment, the water yield is small to moderate. One such area is in the southwest part of Unit B located mostly in T9S/R22E where several low yielding wells are found."

With this understanding of the hydrogeologic environment, the USBR constructed the North Side Pumping Division of the Minidoka Project. The project was begun in the early 1950s with the intention of developing arable land in Jerome and Minidoka Counties. At this time aquifer levels had peaked, and by the time the project was completed in 1963 the levels began to decline. As a result, roughly half of the project's wells had been redrilled by 1965.

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Originally, the project had an open discharge design where water was pumped from the ground into surface ponds and delivered through open lateral systems to the user. This system experienced a conveyance loss estimated at eight percent. In the 1980s, A & B began converting its gravity flow system to sprinkler irrigation, which reduced conveyance losses to five percent.

2. A & B's Senior Water Right 36–2080.

A & B's delivery call is based on its senior water right, 36–2080. This water right was licensed by IDWR in 1965 and authorized the diversion of 1,100 cfs from 177 individual points of diversion in order to irrigate 62,604.3 acres. A & B also irrigates roughly 4,000 additional "enlargement acres" under this water right. Water right 36–2080 did not identify a specific place of use with each diversion point.[2]

In 2003, the Snake River Basin Adjudication (SRBA) partially decreed the water right in a decree that is substantially similar to the 1965 license. One difference between the partial decree and the license is that the decree states that A & B, pursuant to transfer, is authorized to divert water from 188 points of diversion. Of those 188 authorized points of diversion, 177 of A & B's wells are currently in active production. These individual wells comprise over 130 separate "well systems."

3. A & B's 1994A & B's 1994 Delivery Call and Subsequent Procedure

On July 26, 1994, A & B filed a petition for delivery call, which sought both an administration of junior-priority ground water rights from the ESPA and a designation of the ESPA as a ground water management area ***504 **229** (GWMA).[3] Among other things, the petition alleged that junior priority groundwater pumping from the ESPA had, since 1959, lowered the water table an average of twenty feet and up to forty feet in some areas, which resulted in a 126 cfs reduction of A & B's diversion rate. On May 1, 1995, A & B, IDWR, and others entered into an agreement that stayed the petition for delivery call until a Motion to Proceed was filed with the Director. That Motion to Proceed was filed electronically by A & B on March 16, 2007, and sought the same outcome as in the original delivery call. At a September 20, 2007 status conference the Director notified the parties that the stay was lifted from the 1994 delivery call and that retired Chief Justice Gerald Schroeder (Hearing Officer) was appointed to oversee a hearing " and issue a recommendation pursuant to [redacted] IDAPA Rule 37.01.01.410, [redacted] .413...." Those sections of the administrative code are IDWR's Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules).

Shortly after the stay was lifted, the Director, in accordance with Rule 42, issued an Order Requesting Information that asked A & B to provide IDWR with information that the Director deemed relevant in making a determination of injury. On January 29, 2008, the Director issued a final order (January 2008 Final Order) finding that A & B was not materially injured and denying A & B's request to designate the ESPA as a GWMA. A & B then filed a petition for rehearing.

A & B's petition was granted, and after some preliminary matters a hearing commenced on December 3, 2008. At the hearing, evidence and testimony was presented by IDWR, A & B, IGWA, and Pocatello. On March 27, 2009, the Hearing Officer issued an Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations (Recommendations). Among the Hearing Officer's pertinent findings:

> [T]he Idaho Ground Water Act is applicable to the administration of water rights involved in this case, including those rights that preexisted the adoption of the Ground Water Act in 1951, and are subject to administration consistent with the subsequent amendments to the Act.
>
> ....
>
> It is proper to consider the system as a whole.
>
> ....
>
> [T]here is an obligation of A & B to take reasonable steps to maximize the use of [interconnection] to move water within the system before it can seek curtailment or compensation from juniors.
>
> ....
>
> Crops may be grown to full maturity on less water than demanded by A & B in this delivery call.
>
> ....
>
> The conditions in the southwest area that make the

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recovery of water from the wells difficult do not justify curtailment or other mitigation.

....

That A & B has not been required to exceed reasonable pumping levels.[4]

**230 *505 The recommendations of the Hearing Officer were accepted by the Director in a Final Order Regarding the A & B Irrigation District Delivery Call (Final Order) issued on June 30, 2009. In response, A & B filed a Petition for Review with the district court.

The district court issued an order and accompanying memorandum on May 4, 2010.[5] This order affirmed the Director's Final Order on all pertinent substantive issues, but found that the Director erred by applying an improper evidentiary standard when analyzing whether A & B was materially injured. The district court remanded for the purpose of applying the clear and convincing evidence standard. After receipt of petitions for rehearing, the district court issued a memorandum decision and order affirming its prior ruling. On November 23, 2010, the district court filed a judgment pursuant to its May 4, 2010 Memorandum Decision and Order on Petition for Judicial Review. A & B timely filed a Notice of Appeal to this Court on December 29, 2010. Pocatello timely filed a Notice of Appeal to this Court on December 30, 2010, and IGWA timely filed a Notice of Appeal on January 4, 2011.

II. ISSUES ON APPEAL

1. Whether the Director erred in concluding that A & B's 1948Whether the Director erred in concluding that A & B's 1948 water right is subject to the provisions of the 1951 Idaho Ground Water Act (I.C. §§ 42–226 to 42–239) and its subsequent amendments.

2. 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 the Director failed to identify a specific pumping level.

3. Whether the Director erred in failing to analyze water availability at the 177 individual wells or points of diversion for purposes of an injury analysis to A & B's senior water right; and whether the Director unconstitutionally applied the CM Rules by finding that A & B must interconnect individual wells or well systems across the project before a delivery call can be filed.

4. Whether the district court erred in imposing the "clear and convincing" evidence standard on the Director's determination of material injury in a delivery call.

III. STANDARD OF REVIEW

Judicial review of a final decision or order of the Director is governed by the Idaho Administrative Procedure Act (IDAPA), title 67, chapter 52 of the Idaho Code. I.C. § 42–1701A(4).

[1] [2] In an appeal from the decision of a district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). This Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67–5279(1). This Court "instead defers ***506 **231** 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 competent evidence in the record." *Urrutia v. Blaine Cnty.*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (internal citations omitted).

> When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action 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.

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> 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). Even if one of these conditions is met, this Court will still affirm the agency action "unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4); *see also Barron*, 135 Idaho at 417, 18 P.3d at 222.

IV. ANALYSIS

A. The Director did not err in concluding that A & B's 1948A. The Director did not err in concluding that A & B's 1948 water right is subject to the provisions of the 1951 Idaho Ground Water Act (I.C. §§ 42–226 to 42–239) and its subsequent amendments.

A & B argues that the district court erred when it concluded that the Idaho Ground Water Act (GWA), I.C. §§ 42–226 to 42–239, applies to A & B's water right 36–2080. More specifically, that a plain reading of I.C. § 42–226 precludes the Director from applying the 1951 Ground Water Act to A & B's 1948 water right.[6]

1. *Standard of Review*

[3] [4] [5] [6] "The interpretation of a statute 'must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.' " *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). "We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Id.* (quoting *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)).

> [W]e have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so. 'The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced.'

Id. at 896, 265 P.3d at 509 (quoting *State v. Village of Garden City*, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953)).

2. *Analysis*

As currently written, I.C. § 42–226 states, *inter alia*, that "[t]his act shall not affect the rights to the use of ground water in this state acquired before its enactment." A & B argues that the statute unambiguously does not apply to their water right, which has a priority date of 1948. IDWR responds that a lone ***507 **232** sentence does not have the ability to exempt water right 36–2080 from the provisions of the GWA.

The district court held that A & B's reasoning would lead to an absurd result and must be rejected. When read in isolation, the above line from I.C. § 42–226 appears to exempt water right 36–2080 from the provisions of the GWA. But as the district court held, "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.' " To analyze whether the district court erred, the starting point is the original language of the Ground Water Act.

a. 1951 Ground Water Act

As originally written, the Ground Water Act was divided into sections, two of which are pertinent to this issue. Section 1 of the 1951 Ground Water Act states that:

> 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 *508 date of this act are hereby in all respects validated and confirmed.***

1951 Idaho Sess. Laws, ch. 200, § 1, pp. 423–24 (approved March 19, 1951) (emphasis added).

In its original form, Section 4 of the 1951 Ground Water Act[3] provided that:

> The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation 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 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 however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.***
>
> 1951 Idaho Sess. Laws, ch. 200, p. 424 (emphasis added).

The emphasized language from Section 4 is still present in the statute despite numerous opportunities for the Legislature to remove it. The Ground Water Act was first amended in 1953, with the most notable change being the addition of language to Section 1, italicized in the following:

> 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 *and, while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.* 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 **233 date of this act are hereby in all respects validated and confirmed.

1953 Idaho Sess. Laws, ch. 182, § 1, p. 278 (approved March 12, 1953). The issue of a "reasonable ground water pumping level" is the focus of Part IV.B, but the issue of this provision's applicability to A & B's first argument will be dealt with here.

[7] A & B argues that the 1953 amendment to the GWA does not apply to any pre–1953 water rights. Idaho Code section 73–101 states that "[n]o part of these compiled laws is retroactive, unless expressly so declared." This tenet of statutory construction extends to statutory amendments. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987) (holding that it is a long standing rule of this jurisdiction that an amendment to an existing statute will not be held to be retroactive in application absent an express legislative statement to the contrary).

[8] However, the circumstances in *Nebeker* are distinguishable from the instant case. That case dealt with the retroactive application of a 1984 amendment to I.C. § 5–311, Idaho's wrongful death statute. *Id.* at 612, 747

P.2d at 21. Unlike the wrongful death statute, the Ground Water Act, when interpreted in its entirety, was made retroactive by the express language in Section 4 of the original act. "[T]he administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act." 1951 Idaho Sess. Laws, ch. 200, p. 424. Unless a ground water right was "specifically excepted" from the requirements of Section 4, a ground water right would be subject to the provisions of the act. Since water right 36–2080 was not specifically excepted, it should be administered in accordance with the Ground Water Act.

b. Baker v. Ore–Ida Foods, Inc.

As noted above, A & B argues in part that the "reasonable ground water pumping level" provision of the GWA does not apply to water rights that pre-date the enactment of the act. This issue was discussed in *Baker v. Ore–Ida Foods, Inc.*, where this Court interpreted for the first time the application of the GWA as it relates to withdrawals of water from an underground aquifer in excess of the recharge rate. 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). In *Baker*, senior ground water users brought an action to enjoin junior users from pumping out of a common aquifer. *Id.* at 576–77, 513 P.2d at 628–29. The trial court granted the injunction, holding that the aquifer was being "mined" by over-pumping. *Id.* On appeal, the junior users argued that they were entitled to a pro rata share of the aquifer, and that I.C. § 42–226 superseded the common law. *Id.* This Court affirmed the trial court, but weighed in on the bounds of senior water users under the GWA.

> A senior appropriator is only entitled to be protected to the extent of the 'reasonable ground water pumping levels' as established by the [IDWR]. 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 [o]rder to achieve the goal of full economic development.
>
> ...
>
> We conclude that our legislature attempted to protect historic water rights while at the same time promoting full 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 appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.

Id. at 584, 513 P.2d at 636 (internal citation omitted). The language from *Baker* lends credence to the notion that the "reasonable ground water pumping level" provision found in the 1953 amendment applies to all water rights, since the phrase "[p]riority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels" is unequivocal.

****234 *509** *c. Parker v. Wallentine*

A & B argues that this Court's decision in *Parker v. Wallentine* confirms that the 1953 amendment's reasonable ground water pumping level provision does not apply to its 36–2080 water right. 103 Idaho 506, 650 P.2d 648 (1982). In *Parker*, the holder of a domestic well drilled in 1964 had his well dry up when an irrigation well drilled in 1976 was pumped. *Id.* at 507, 650 P.2d at 649. At issue was whether the 1978 amendment to the GWA protected the domestic user up to the user's historic pumping level or only up to a reasonable pumping level. *Id.* at 511–12, 650 P.2d at 653–54. The 1978 Amendment to the GWA is not pertinent to the instant case, but it exempted domestic wells from the permit requirements of I.C. § 42–229. 1978 Idaho Sess. Laws, ch. 324, § 1, p. 819 (approved March 29, 1978). A & B points to this Court's language in *Parker* that "[n]othing in the 1978 amendment or the circumstances of its enactment indicates that the legislature intended this amendment to have retroactive effect." 103 Idaho at 511 n. 7, 650 P.2d at 653 n. 7.

However, the holding in *Parker* is distinguishable from the present case since *Parker* deals with excepted domestic water rights while the present case deals with non-excepted water rights. In the context of the GWA, this is a fundamental difference. The retroactive language in the original Section 4, currently codified as I.C. § 42–229, states that the "administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act."

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d. Musser v. Higginson

A & B also relies on this Court's decision in *Musser v. Higginson* to bolster the argument that the GWA does not apply to pre–1951 water rights. 125 Idaho 392, 871 P.2d 809 (1994) (abrogated on other grounds by *Rincover v. State, Dept. of Finance*, 132 Idaho 547, 976 P.2d 473 (1999)). In reference to I.C. § 42–226, this Court stated that "[b]oth 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." *Id.* at 396, 871 P.2d at 813. However, this pronouncement is dicta when viewed in context.

In *Musser*, the plaintiff sought a writ of mandamus to compel the Director to respond to a delivery call and administer a water right. *Id.* at 394, 871 P.2d at 811. The trial court issued the writ and IDWR appealed to this Court arguing that while the Director had a statutory duty to administer water within a water district, I.C. § 42–226 gave the Director discretion on whether to respond to delivery calls. *Id.* at 396, 871 P.2d at 813. The *Musser* opinion's treatment of I.C. § 42–226 was only in response to one of the defenses raised by the Director. The thrust of the opinion dealt with the Director's duties under I.C. § 42–602 and the principles of mandamus. Additionally, an interpretation of the GWA in *Musser* is immaterial after this Court's opinion in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). In *Clear Springs*, this Court held that I.C. § 42 226 has no application in delivery calls between senior spring users and junior ground users. *Id.* at 808, 252 P.3d at 89.

e. The 1987 Amendment to the GWA

In 1987, the Legislature amended the GWA into its current form. 1987 Idaho Sess. Laws, ch. 347, § 3, p. 744 (approved April 6, 1987). The amendments generally concerned the use of low temperature geothermal ground water sources, which were to be governed under the newly created I.C. § 42–233. *Id.* The amendment also changed the last sentence of Section 1 of the original act to read:

> ~~All~~ *This act shall not affect the* 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~~ *its enactment.*

1987 Idaho Sess. Laws, ch. 347, § 1, at 743. This language is contained in the currently titled I.C. § 42–226.

A & B argues that a plain reading of this new phrase precludes the Director from applying the GWA to water right 36–2080, since it was acquired before the act was enacted. ***510 **235** IDWR responds that these changes have no effect on non-excepted ground water rights.

[9] In its treatment of the issue, the district court looked at the intent behind the statutes. However, since the statutory language is plain, such an analysis by this Court would be improper. The current GWA states that the "administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act." *See* I.C. § 42–229. Since a delivery call is an administration of a water right, *see American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 876–77, 154 P.3d 433, 447–48 (2007), a plain reading of the statute would reveal that the GWA governs delivery calls unless a water right is specifically excepted. The 1987 amendment added that "[t]his act shall not affect the rights to the use of ground water in this state acquired before its enactment." I.C. § 42–226. Given the language used in the 1987 amendment, it appears that it pertains to the use of water, not to the administration of a water right. Generally, the more specific statute controls. *See Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009) (abrogated on other grounds by *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho at 895, 265 P.3d at 508 (2011)). The retroactive language in I.C. § 42–229 specifically deals with the administration of water rights, while a plain interpretation of the 1987 amendment to the GWA shows the amendment to be an acknowledgement that some ground water rights were acquired in this state before enactment of the amendment.

This Court finds that a plain reading of the GWA, I.C. §§ 42–226 to 42–239, shows that the act applies to the administration of all ground water rights in the state; therefore it applies to A & B's water right 36–2080.

B. The Director did not err in finding that A & B has not been required to pump water beyond a "reasonable ground water pumping level" even though the Director failed to identify a specific pumping level.

Idaho Code section 42–226 states, in part, that "[p]rior 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." In his Final Order, the Director accepted the Hearing Officer's conclusions of law, but declined to establish a "reasonable ground water pumping level." On judicial review, the district court held that the GWA gives the Director discretion whether to establish ground water levels in conjunction with a delivery call. Additionally, the district court held that 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." A & B argues that the failure to identify a "reasonable ground water pumping level" violated the Director's duty to administer water rights pursuant to Idaho law, and that the Director's failure to disclose the factual basis for this finding violated the IDAPA.

1. *Whether the Director's decision not to identify a reasonable groundwater pumping level violated Idaho law.*

A & B argues that the district court wrongly relied on language in I.C. § 42–237a(g) to hold that the Director has discretion whether or not to set a reasonable pumping level. Idaho Code section 42–237a(g) states in pertinent part that:

> 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 ***511 **236** 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, 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.

A & B argues that this statute does not trump the Idaho Constitution, which states that "[p]riority of appropriation shall give the better right as between those using the water." Idaho Const. art. XV § 3. Nor would it trump the duties imposed on the Director by I.C. § 42–607, which requires the Director to distribute water in a water district by priority. IDWR responds that the Director must administer water rights, but that he is not mandated to curtail junior ground water users simply because there is a delivery call.

[10] In this regard IDWR is correct. A plain reading of the duties of the Director reveals that he has a duty to respond to a delivery call and determine whether the right holder is injured, but that he is not obligated to establish a reasonable ground water pumping level.

2. *Whether the Director's decision was supported by substantial and competent evidence.*

[11] [12] In his Final Order, the Director concluded that "[t]here is no indication that ground water levels in the ESPA exceed reasonable pumping levels required to be protected under the provisions of Idaho Code § 42–226." A & B argues that the Director's failure to identify a "reasonable ground water pumping level" was erroneous, arbitrary, and capricious. An action is capricious if it was done without a rational basis. *Am. Lung Ass'n of Idaho/Nevada v. State, Dept. of Agric.*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006) (citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 536 P.2d 729 (1975)). It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles. *Id.*

As a starting point, A & B argues that the Director's finding is not supported by the record. Principally, that the Hearing Officer urged the Director to establish a standard to ensure predictability regarding pumping levels:

> A process to establish reasonable pumping levels should be undertaken. The level of

> knowledge concerning the hydrology of the aquifer, the costs of deepening wells, the costs of pumping from deeper levels, and the likelihood of success in that pursuit has increased dramatically since the beginning of Unit B. Flow patterns and the effects of withdrawals from one area on another are understood at a much higher level. There should be some predictability as to how far down a pumper must go and when the protection of reasonable pumping levels has been reached.

A & B argues that the Director acted arbitrarily when he concluded that "[t]here is no indication that ground water levels in the ESPA exceed reasonable pumping levels required to be protected under the provisions of Idaho Code § 42–226." However, the above excerpt from the Hearing Officer does not state that the Director needs to set a reasonable pumping level, just that the process of finding such a level should be started.

The Director ultimately declined to establish a reasonable groundwater pumping level. ***512 **237** A & B argues that this failure to set a reasonable pumping level makes it impossible for the Director to determine if there is material injury, or for an appellate court to review the Director's conclusions. Additionally, A & B argues that the lack of a reasonable pumping level makes it impossible for IDWR to provide any factual argument that such a pumping level has not been reached.

A & B also argues that the Director's refusal to set a reasonable pumping level unlawfully forces A & B to self-mitigate for declining water levels, in contravention of its senior water right; "Based upon the Director's arbitrary finding, A & B must apparently continue to drill and pump from an unknown depth in the aquifer before he will administer junior water rights." An analysis of A & B's arguments begins with the Hearing Officer's findings.

a. Hearing Officer's Findings

The Director's Final Order accepted the factual findings of the Hearing Officer's Recommendations. Among them: that the aquifer is not being "mined," since more water enters the aquifer than is being removed by groundwater pumping; that A & B currently operates 177 wells but is authorized to operate 188 if needed; that initial drillings were often inadequate; and that A & B has problems with certain well systems in the southern portion of the project where sedimentary deposits and thick layers of basalt are present. Most significantly, the Hearing Officer found that A & B has not been required to exceed reasonable pumping levels:

> A & B has not been required to exceed reasonable pumping levels. The condition of water in the aquifer is not such that A & B can say its need to pursue the water further is over. If deepening wells is necessary to produce the amount of water A & B is entitled to under the water right, that burden remains with A & B until it is established that it is unreasonable to drill deeper. Its efforts at rectification have been largely successful, indicating that there is water available if the proper efforts to secure it are pursued. However, A & B and other pumpers need standards to know when further efforts remain their responsibility and when that additional cost and effort passes to junior users.

[13] Based on the factual record before him, it seems that the Director determined by logical inference that the pumping level has not exceeded a reasonable level. Since the Director has discretion on whether or not to set a reasonable pumping level, this conclusion is within his authority.

Therefore, this Court finds that the Director based his decision that A & B did not exceed reasonable pumping levels on substantial and competent evidence regarding A & B's water use, the unique geologic conditions in the area, and the finding that the aquifer is not being mined.

C. The Director did not err in failing to analyze water availability at the 177 individual wells for purposes of an injury analysis to A & B's senior

water right. As a corollary, the Director properly applied the CM Rules by finding that A & B must interconnect individual wells or well systems across the project before a delivery call can be filed.

The district court found that the Director did not err by failing to separately consider each well individually to determine a material injury under the 36–2080 water right, because the system must be considered as a whole based on the way in which the water right is decreed. A & B argues that this finding is arbitrary and capricious, because it failed to consider A & B's actual diversions and water use. Specifically, that "A & B has never—at any point in its history—had the ability to pump water at one well or well system and deliver that water to any acre throughout the project. Just the opposite, each of the well systems delivers water to specific acres and specific water users."

1. *Whether the Director erred in analyzing water right 36–2080 as a whole system as opposed to 177 individual wells.*

According to A & B, the project's individual well systems cannot provide water to all ***513 **238** acres throughout the project.[9] The Hearing Officer addressed some of the potential limitations on interconnection in his Recommendations:

> Consideration of the system as a whole must also account for the effect upon individual systems when the number of short systems would constitute a failure of the project. The geography of the land within Unit B, the design of the system, and the practices in utilizing the system prior to entry of the partial decree indicate that the water right adjudicated is not satisfied by showing that the combined total of water that can be pumped from all the wells is equal to the amount necessary to avoid material injury if the water were equally distributed. It is proper to consider the entire system, but that consideration must account for the fact that water from one pump is not accessible to the entire acreage. Pumping water from wells in excess of what can be beneficially used on the property to which the water can be delivered would be waste, so counting excess water that cannot be utilized towards the water right would be improper. The theoretical right to apply the water from any pump to any land must be tempered by the reality of the system as it was designed and utilized and partially decreed. If the entire well system could be interconnected economically the issue of material injury would be gauged by the total capacity of the system to produce water.

The Hearing Officer went on to note that there is uncertainty as to whether large portions of the project can be interconnected, and that A & B would not be required to connect every point of diversion. However, the Hearing Officer also found that these issues would not relieve A & B of certain obligations:

> 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 junior users.

****239 *514** It seems clear that the Hearing Officer's findings conclude that A & B does not have to interconnect the entire system, but must take reasonable steps to divert some water throughout the project before junior members are impacted. Those reasonable steps are, again, a finding of fact for the Director. This is consistent with the way water right 36–2080 was decreed by the SRBA. [10]

a. SRBA Decree of A & B's water right 36–2080

The district court found that 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 individual point of diversion. Rather, the partial decree lists the place of use as "within the boundary of A & B irrigation district service area, pursuant to section 43–323, Idaho Code. This right is limited to the irrigation of 62,604.3 acres within the A & B irrigation district boundary in a single

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irrigation season." The district court held that the legal effect of the SRBA partial decree "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." As mentioned above, this arrangement was intentional. In a response to IDWR regarding the original permitting for the project, USBR stated that "[w]e emphasize that the project is one integrated system, physically, operationally, and financially.... Therefore it is impractical and undesirable to designate precise land areas within the project served by each of the specific wells on the list." Additionally, the SRBA partial decree notes the total quantity of the right, 1,100 cubic feet per second (cfs) with a limitation of 250,417.20 acre feet per year (afy), but it does not provide any specific rates of diversion from any of the individual wells.

[14] A plain reading of the SRBA partial decree in conjunction with the Hearing Officer's findings provides ample support to the Director's Final Order. Therefore, we find that the Director's decision to analyze A & B's water right on a system-wide basis was not arbitrary and capricious, but rather it was based on a reasoned analysis of water right 36–2080 as it was permitted and partially decreed.

2. *Whether the Director unconstitutionally applied the CM Rules by finding that A & B must interconnect individual wells or well systems across the project before a delivery call can be filed.*

In his recommendations, the Hearing Officer found that "there is an obligation of A & B to take reasonable steps to maximize the use of [interconnection] to move water within the system before it can seek curtailment or compensation from juniors." The Director accepted this finding in his Final Order. A & B argues that Idaho law does not require A & B to interconnect its separate points of diversion as a condition to administer junior priority ground water rights.

The argument advanced by A & B has four parts. First, that a mandate of interconnection as a prerequisite of administration is an unconstitutional application of the CM Rules. Second, that the actions of the Director contradict the plain language of A & B's water right decree from the SRBA. Third, that there is no mention in the Idaho Code or in the CM Rules of a senior right holder's need to interconnect as a condition of administration with juniors. And fourth, that the act of interconnection of the A & B project will not address the problem of diminishing groundwater supply.

a. A & B's argument that a mandate of interconnection is unlawful.

[15] A & B argues that Idaho is a prior appropriation state, and that the denial of its delivery call on the basis of a new condition to administration unlawfully diminishes A & B's priority. *See* Idaho Const. art. XV, § 3 ("Priority of appropriation shall give the better right as between those using the water...."). "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). This argument has two sub-parts.

****240 *515** *i. A & B's argument that the actions of the Director contradict the SRBA partial decree.*

[16] In this argument, A & B claims that the Director violated the plain terms of the SRBA partial decree by reading into the decree a condition that is not spelled out. A decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system. I.C. § 42–1420(1).

> [A] provision is to be included in a decree if it is necessary to define or for the efficient administration of a water right, and it is not necessary that the provision apply to all water rights. Therefore, if the provision is necessary for the efficient administration of a water right, we hold that the provision should be included in the decree, and remand for further factual findings as to the necessity of this provision either to the definition or the administration of these water rights.

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) (internal citation omitted). A & B argues that absent a limitation or condition on the decree, the Director had no authority to deny A & B's request for administration on the basis of interconnection.

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Ultimately the answer to this argument is the same as the answer in the following subpart ii. That is, whether the Director's discretion includes the ability to require reasonable methods of diversion and application by a senior right holder.

[17] The CM Rules provide a list of the factors that the Director may consider in his determination of a senior right holder's material injury.[9] The most pertinent provision is IDAPA Rule 37.03.11.042.01(g) which allows the Director to consider "[t]he 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." This Court's holding in *American Falls* touched on this very topic. The CM Rules "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].' " *American Falls*, 143 Idaho at 878, 154 P.3d at 449 (quoting *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)). The Director did not impose a new condition, but rather he used his discretion to ***516 **241** analyze A & B's delivery call using his statutory authority in the manner governed by the CM Rules.

ii. A & B's argument that there is no mention in Idaho law of a senior right holder's need to interconnect as a condition of administration.

A & B argues that there is no language in I.C. §§ 42–602, 607, or CM Rule 40 that would require A & B to interconnect its system as a condition to administration. A & B believes that this precondition to administration shifts a burden onto A & B in violation of this Court's opinion in *American Falls*. *See* 143 Idaho at 877–78, 154 P.3d at 448–49 ("The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has.").

The answer here is the same as that in the subsection directly above. Idaho law does not explicitly state that interconnection is a condition of administration, but the CM Rules allow the Director to consider reasonable diversion in his determinations.

b. A & B's argument that interconnection of their water system will not address the issue of diminishing groundwater supply.

Finally, A & B argues that interconnection will not solve the ultimate problem of diminishing water supply and would negatively impact the district's landowners: "Attempting to move water from one well system to another ... would only further reduce the amount of water available for delivery to all landowners served by those wells." In the Hearing Officer's findings presented above, it appears that there is no issue of diminishing ground water supply, as there was a specific finding that the aquifer is not being mined. Absent findings that A & B has exceeded a reasonable pumping level, there does not appear to be any evidence to support A & B's argument. Additionally, IDWR points out that A & B seeks to curtail junior users while it simultaneously irrigates junior and enlargement acres. If water supply was an issue for A & B, it seems unlikely that they would continue this practice.

Given the language in the CM Rules, we find that the Director did not act arbitrarily or violate Idaho law when he found that A & B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed, and we affirm the district court's finding in this regard.

D. The district court did not err in imposing the "clear and convincing" evidence standard on the Director's determination of material injury in a delivery call.

In its Memorandum and Order on Petition for Judicial Review, the district court held that "clear and convincing" was the proper evidentiary standard to determine material injury in a delivery call. Pocatello and IGWA both appeal, arguing that the application of a higher evidentiary standard is not supported by Idaho law. As Pocatello argues, the clear and convincing evidence standard has only been applied in the context of adjudications or re-adjudications which serve to permanently deprive a water right holder of a decreed property right.

[18] [19] [20] This Court has free review over questions of law. *Rahas v. Ver Mett*, 141 Idaho 412, 414, 111 P.3d 97, 99 (2005). In *State v. Kimball*, this Court held that "[c]lear and convincing evidence is generally understood to be 'evidence indicating that the thing to be proved is highly probable or reasonably certain.' " 145 Idaho

542, 546, 181 P.3d 468, 472 (2008) (quoting *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006)). In Idaho, "[a] subsequent appropriator attempting to justify his diversion has the burden of providing that it will not injure prior appropriations." *Cantlin v. Carter*, 88 Idaho 179, 186, 397 P.2d 761, 765–66 (1964) (superseded by statute, I.C. § 42–103 (1971)). Idaho law also 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). Pocatello argues that no evidentiary standard, "no matter how strict or relaxed," can change the allocation of burden of persuasion in administrative law, since the burdens are defined in the rules. IDAPA Rule 37.03.11.042, which is stated in its entirety in Part IV.C.2 above, ***517 **242** governs the Director's determination of material injury and reasonableness of water diversions.

1. *Analysis of the District Court*

The district court stated that the clear and convincing evidence standard applied to a finding of injury "based on the way in which the right is structured and in giving proper legal effect to the decree...." Such a standard, according to the district court, gives the "proper presumptive weight to a decree." In assigning an evidentiary standard, the district court focused on the presumptions and burdens of proof found in the CM Rules and applicable case law.

The reasoning behind the district court's decision can be summed up in the following excerpt:

> 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.... [I]f 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 uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

[21] [22] The district court also noted several opinions from this Court that use the clear and convincing standard in connection with water rights. Forfeiture or abandonment of a water right must be established by clear and convincing evidence. *See Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984). That same standard is used when establishing prescriptive title to the water right of another. *See Gilbert*, 97 Idaho at 739, 552 P.2d at 1224. Significantly, these cases deal with the actual modification of a water right. In its decision, the district court held that the futile delivery call defense was similar and "requires a showing of clear and convincing evidence that diversions by a junior appropriator will not injure the rights of a senior appropriator." Additionally, the district court held that 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."

2. *Analysis of Applicable Case Law.*

a. American Falls Reservoir District No. 2 v. Idaho Department of Water Resources

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Although mainly focused on issues of burden shifting, this Court's decision in *American Falls* touched on the issue of evidentiary standards. In *American Falls*, the American Falls Reservoir District and others sought a declaratory judgment that the CM Rules were unconstitutional. 143 Idaho at 867–68, 154 P.3d at 438–39. This Court ultimately concluded that the CM Rules were facially constitutional. *Id.* at 881, 154 P.3d at 452. To reach that conclusion, this Court touched on the topic of applicable evidentiary standards. *Id.* at 876–77, 154 P.3d at 447–48. However, this Court did not rule on whether the CM Rules were constitutional "as applied," since administrative remedies were not exhausted. *Id.* at 870–71, 154 P.3d at 441–42. Thus, *American Falls* did not provide any exact insight into the proper evidentiary standards for the CM Rules, although the opinion noted that "[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.

****243 *518** As part of this analysis in *American Falls*, this Court also pointed out an important distinction:

> [T]he water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.

Id. at 876–77, 154 P.3d at 447–48 (internal citations omitted). Additionally, this Court held that the CM Rules cannot be read as burden shifting provisions that would require the senior right holder to re-adjudicate his right. *Id.* at 877–78, 154 P.3d at 448–49. The distinction between the adjudication of a water right and an administration of that water right is a critical element in this analysis.

b. Previous Case Law

As noted in *American Falls*, this Court has previously stated the appropriate evidentiary standard to be used under the CM Rules. In *Moe v. Harger*, this Court dealt with a conflict between senior and junior appropriators of surface water from the Big Lost River. 10 Idaho 302, 77 P. 645 (1904). In *Moe*, the junior appropriators sought to divert water from the river before the water reached Moe, the senior appropriator. *Id.* at 307, 77 P. at 646. This Court stated the issue as follows, "Appellants complain of the action of the trial court in incorporating in the decree in this case an order perpetually enjoining them from in any manner interfering with or diverting or using the waters of Lost river, except in accordance with the terms of the decree." *Id.* at 306, 77 P. at 647. In upholding the injunction, this Court stated as follows:

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

Id. at 307, 77 P. at 647 (emphasis added). In weighing the evidence, this Court determined that clear and convincing evidence was necessary for the junior appropriators to prevail:

> This court has uniformly adhered to

> the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts.

Id. at 307, 77 P. at 646–47.

This Court next addressed the standard of proof in *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908). One of the issues in that case was the right to water from a spring and a lake located in a valley through which a creek flowed. *Id.* at 147, 96 P. at 571. The trial court held that the spring was not tributary to the creek and that all waters used by the plaintiff-respondent from the lake flowed back into the creek, without lessening or diminishing the flow in the creek. *Id.* at 148, 96 P. at 571. It therefore held that the plaintiff was entitled to use the water from the spring and the lake. *Id.* We held that because the case had to be retried on other issues, "we think it best to also order a new trial as to the volume and flow of water from this spring and lake, and also on the issue as to whether these are in fact tributary and feeders to the waters of Seaman's creek." *Id.* We then held that where a junior appropriator seeks to divert water from tributaries ***519 **244** to the main stream, the junior appropriator must prove by clear and convincing evidence that it does not diminish the volume of water in the main stream. We stated:

> It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Ida. 305 [302], 77 Pac. 645, produce "*clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion.*" The burden is on him to show such facts.

Id. at 149, 96 P. at 571-72 (emphasis added).

Subsequently, this Court's opinion in *Hill v. Green*, "involve[d] the right to the use of certain of the waters of Indian Creek, a tributary of Medicine Lodge Creek, in Clark county." 47 Idaho 157, 158, 274 P. 110, 110 (1928). After the spring runoff, "a great part of Indian Creek becomes wholly lost by percolation into its [porous] bed before its juncture with Medicine Lodge Creek." *Id.* at 159, 274 P. at 110. The junior appropriators and their predecessors in interest constructed irrigation works to divert water from Indian Creek, and the senior appropriators, who had prior rights in Medicine Lodge Creek, contended that the junior appropriators were taking water that would eventually flow into Medicine Lodge Creek. The district court found that the junior appropriators were not taking any water that would ultimately be available for use by the senior appropriators. It found that "the water table in this vicinity is such that no water lost by percolation ever finds its way back into the bed of Indian Creek or into Medicine Lodge Creek, nor is there any subterranean flow supporting the surface flow." *Id.* The senior appropriators appealed, stating that the two issues on appeal were:

> First, whether or not respondents, as a matter of law, can gain a superior right over prior appropriators from Medicine Lodge Creek by salvaging the waters as in their complaint alleged; and, second, if such a superior right can be so acquired, is the evidence of that *clear and convincing kind required to justify the court in awarding them such a superior right.*

Id. at 160, 274 P. at 110 (emphasis added). This Court affirmed the district court, stating:

> There is no question but that the burden of proof rested upon respondents to show by competent evidence that the water salvaged by them had not theretofore been appropriated or used by others with prior rights. It being shown, however, that the water salvaged

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> would not, if undisturbed, reach the point of diversion of prior appropriators, their supply would not be decreased, and they have therefore, no cause for complaint.

Id. at 160, 274 P. at 111.

In *Silkey v. Tiegs*, we again addressed the standard of proof, this time in administering water rights between or among groundwater users. 54 Idaho 126, 28 P.2d 1037 (1934). The users' respective water rights had been previously adjudicated, and the court retained jurisdiction for two years to determine whether there was sufficient subterranean water for the junior appropriators to take any water from their wells. *Id.* at 127, 28 P.2d at 1037. Prior to the expiration of that two-year period, the junior appropriators filed a motion contending that the prior appropriator had never been able to obtain more than 21 inches of the 40 inches of water she had been decreed, that there were at least 140 inches of water available in the aquifer, and that they should be permitted to withdraw at least 60 inches of water because it would not harm the senior appropriator. *Id.* at 128, 28 P.2d at 1037–38. The trial court denied their motion, and the junior appropriators appealed. We affirmed the standard of proof that they were required to show by clear and convincing evidence that their withdrawal of the water would not harm the senior appropriator.

> The trial court by denying appellants' motion herein indicated he was not satisfied the provisional tests entitled them to more water, without interference with respondent's prior right. The burden was on appellants herein to sustain their motion ***520 **245** by direct and convincing testimony, this language in *Moe v. Harger*, 10 Idaho 302, 77 P. 645, being particularly apt:
>
> "This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; and it would take more than a theory, and, in fact, *clear and convincing evidence*, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts. Theories neither create nor produce water, and when the volume of a stream is diverted and seventy-five per cent of it never returns to the stream, it is pretty clear that not exceeding twenty-five per cent of it will ever reach the settler and appropriator down the stream and below the point of diversion by the prior user."

Id. at 128–29, 28 P.2d at 1038 (citation omitted) (emphasis added).

We again affirmed the clear and convincing standard of proof in *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964). There, the appellant had obtained a permit to appropriate water from what he described as a swamp. *Id.* at 182, 397 P.2d at 762. Prior appropriators of water from a ditch objected on the ground that the water sought to be appropriated was seepage water from the ditch which they used. *Id.* The State Reclamation Engineer canceled the permit, and the matter was appealed. *Id.* at 182, 397 P.2d at 762–63. We affirmed, and in doing so reaffirmed the clear and convincing standard of proof stated in *Moe v. Harger*, *Josslyn v. Daly*, and *Silkey v. Tiegs*:

> A subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations. *Moe v. Harger*, 10 Idaho 302, 77 P. 645; *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568; *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 [(1921)]; *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037. In *Josslyn v. Daly*, supra, at 15 Idaho [at] 149, 96 P. at 571, this court stated:
>
> > '* * * It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in *Moe v. Horger*, 10 Idaho 305 [302], 77 Pac. 645, produce '*clear and convincing evidence* showing that the prior appropriator would not be injured or affected by the diversion.' The burden is on him to show such facts.'

Id. at 186–87, 397 P.2d at 765–66.

c. Nebraska v. Wyoming

In support of their argument for a preponderance standard, Pocatello and IGWA cite to the United States Supreme Court opinion in *Nebraska v. Wyoming (Nebraska II)*, 507 U.S. 584, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993). In *Nebraska II*, the Court dealt with

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an ongoing interstate dispute between Nebraska, Wyoming, and Colorado over water rights to the North Platte River. *Id.* at 584, 113 S.Ct. at 1691, 123 L.Ed.2d at 317. In 1945, the Court entered a decree that imposed storage and diversion restrictions on the upstream states, Colorado and Wyoming, and apportioned the natural flow of the water between Wyoming and Nebraska. *Id.* In 1986, Nebraska petitioned the Court for an enforcement order seeking injunctive relief and alleging that Wyoming was violating the 1945 decree. Wyoming countered, arguing that Nebraska had circumvented the decree by diverting waters for uses not recognized by the decree. *Id.* at 589, 113 S.Ct. at 1693–94, 123 L.Ed.2d at 328.

As a starting point, the Supreme Court found the proper legal standards by which it could resolve the interstate dispute.

> The disagreement in this case centers on the applicable legal standards. The question is whether these proceedings involve an application for *enforcement* of rights already recognized in the decree, or whether Nebraska seeks a *modification* of the decree. According to Wyoming, although the Court has jurisdiction to modify the ***521 **246** decree under Paragraph XIII, Nebraska obtained leave to file its petition on the assurance that the case would involve only enforcement of existing rights. In Wyoming's view, Nebraska subsequently, and improperly, transformed the case into a request for recognition of new rights—in essence, into a request for another equitable apportionment. If Nebraska is allowed to argue for modification of the decree, Wyoming and *amicus* Basin maintain, the same high evidentiary threshold applicable to claims for new apportionments applies. Under that standard, Nebraska can prevail only upon proof 'by clear and convincing evidence' of 'some real and substantial injury or damage.'
>
> ...
>
> [W]e find merit in Wyoming's contention that, to the extent Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies. The two types of proceeding are markedly different. In an enforcement action, the plaintiff need not show injury. See, *e.g.*, *Wyoming v. Colorado*, 309 U.S. 572, 581 [60 S.Ct. 765, 768–69, 84 L.Ed. 954, 959] (1940). When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree. To be sure, the right need not be stated explicitly in the decree. As the Master recognized, when the decree is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue. See, *e.g.*, *Wyoming v. Colorado*, 286 U.S. 494, 506–508 [52 S.Ct. 621, 625–27, 76 L.Ed. 1245, 1250–52] (1932). The parties' course of conduct under the decree also may be relevant. But the underlying issue primarily remains one of interpretation. In a modification proceeding, by contrast, there is by definition no pre-existing right to interpret or enforce. At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment.

Id. at 590–92, 113 S.Ct. at 1694–95, 123 L.Ed.2d at 329–30 (internal citations omitted) (emphasis in original).

The Supreme Court held that in interstate water disputes which invoke the Court's original jurisdiction, differing standards of proof should apply, depending upon whether the proceeding is to enforce a decree or to modify a decree, with the higher standard applying to the modification of a decree. *Id.* at 592, 113 S.Ct. at 1695–96, 123 L.Ed.2d at 330. The Court's use of the word "enforcement" is not synonymous with "administration." Trying to equate enforcement, as it is used by the Supreme Court, with administration of water rights by the Idaho Department of Water Resources is comparing apples to oranges.

There was no federal water district encompassing the states involved in the litigation in which the federal government administers water rights. The Court simply determines the amount of water the upstream state may divert. It may be based upon a percentage of the river's flow, like in *Nebraska v. Wyoming*, 325 U.S. 589, 646, 65 S.Ct. 1332, 1363, 89 L.Ed. 1815, 1846–47 (1945) (*Nebraska I*) ("Accordingly, we conclude that the flat percentage method recommended by the Special Master is the most equitable method of apportionment."), or a specific quantity of water, *Wyoming v. Colorado*, 309 U.S. 572, 581, 60 S.Ct. 765, 768, 84 L.Ed. 954, 959 (1940) (*Wyoming II*) ("We conclude that the decree is not violated in any substantial sense so long as Colorado does not divert from the Laramie river and its tributaries more than 39,750 acre feet per annum."). When the Court adjudicated water rights between Wyoming and Colorado in the Laramie River, it realized that awarding Colorado a specific quantity of water would harm Wyoming in years of low water. The Court stated:

> The water to satisfy the Colorado appropriations is, and in the nature of things must be, diverted in Colorado at the head of the stream, and because of this those appropriations will not be affected by any variation in the yearly flow, but will receive their full measure of water in all years. On the other hand, the Wyoming appropriations will receive the water only ***522 **247** after it passes down into that state, and must bear whatever of risk is incident to the variation in the natural flow. Of course, this affords no reason for underestimating the available supply, but it does show that to overestimate it will work particular injury to Wyoming.

Wyoming v. Colorado, 259 U.S. 419, 485, 42 S.Ct. 552, 564, 66 L.Ed. 999, 1021 (1922) (*Wyoming I*). That type of harm to the downstream state would occur because once the decree was issued, the water rights would not be administered based upon the doctrine of prior appropriation.

Enforcement as that term was used by the Supreme Court in *Nebraska II* simply meant interpreting the decree and, if one state was diverting more water than it was decreed, enjoining that violation. As the Court stated:

> In an enforcement action, the plaintiff need not show injury. When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree. To be sure, the right need not be stated explicitly in the decree. As the Master recognized, when the decree is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue. The parties' course of conduct under the decree also may be relevant. *But the underlying issue primarily remains one of interpretation.*

507 U.S. at 592, 113 S.Ct. at 1695, 123 L.Ed.2d at 330 (citations omitted) (emphasis added).

That is illustrated by the Court's decision in *Nebraska II*. The Court stated "that the Inland Lakes question is fairly characterized as an enforcement issue." *Id.* "The Inland Lakes are four off-channel reservoirs in Nebraska served by the Interstate Canal, which diverts from the North Platte at Whalen, Wyoming." *Id.* at 593, 113 S.Ct. at 1696, 123 L.Ed.2d at 331. The Lakes and the Canal were part of an irrigation project operated by the United States Bureau of Reclamation (Bureau). *Id.* "Since 1913, the Bureau has diverted water through the Interstate Canal for storage in the Inland Lakes during nonirrigation months for release to Nebraska users during the irrigation season." *Id.* at 593–94, 113 S.Ct. at 1696, 123 L.Ed.2d at 331. Wyoming contended that the decree did not grant storage rights in the Inland Lakes nor did it establish a priority date. The Court held that although the decree did not explicitly establish the storage rights, it was based upon their existence and Wyoming could not now challenge the 1904 priority date, which was based upon the priority date of the original components of the project. The Court wrote:

> The decree did not explicitly establish the Inland Lakes' priority. But it is undisputed that the Court recognized a right to store 46,000 acre-feet of water in the Inland Lakes and, at Wyoming's suggestion, counted that amount to reduce Nebraska's requirement of natural flows in the pivotal reach. The Master therefore concluded that the Inland Lakes' priority was a necessary predicate of the apportionment and should not be disturbed. He also suggested that Wyoming's postdecree acquiescence in the Bureau's administration of the Inland Lakes should prevent Wyoming from challenging the 1904 priority date now.
>
> We think the evidence from the prior litigation supports the conclusion that the Inland Lakes' priority was settled there. And even if the issue was not previously determined, we would agree with the Special Master that Wyoming's arguments are foreclosed by its postdecree acquiescence. Accordingly, we clarify today that the Inland Lakes share a December 6, 1904, priority date with other original components of the North Platte Project. Pursuant to that priority, the Bureau has a right to divert 46,000 acre-feet of water during the nonirrigation season months of October,

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November, and April for storage in the Inland Lakes.

Id. at 594–95, 113 S.Ct. at 1696, 123 L.Ed.2d at 332 (citations omitted).

[23] Thus, the enforcement issue addressed by the Court was simply an interpretation of the decree. It did not involve a determination of whether a diversion by a ***523** ****248** junior appropriator interfered with the water rights of a senior appropriator. There is no problem with applying a preponderance of the evidence standard to the interpretation of a decree. We apply the same rules of interpretation to a decree that we apply to contracts. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986).

[24] Another difference between an enforcement proceeding before the United States Supreme Court and the administration of water rights under Idaho water law is that in the enforcement proceeding, injury to another appropriator is irrelevant. As the Court stated, "In an enforcement action, the plaintiff need not show injury." *Nebraska II*, 507 U.S. at 592, 113 S.Ct. at 1695, 123 L.Ed.2d at 330.

In interstate water disputes filed in the United States Supreme Court under its original jurisdiction, injury is relevant in order to determine whether there is a justiciable controversy for entering a decree. The lack of injury, in the sense of failing to show that there is inequitable apportionment of the water between the states, will result in dismissal of the petition. *Kansas v. Colorado*, 206 U.S. 46, 117, 27 S.Ct. 655, 675–76, 51 L.Ed. 956, 983 (1907). Conversely, if the claims of two or more states to the water in a watercourse exceed the water available, then there is injury sufficient for judicial determination because the states will be unable to obtain the water they each claim. *Nebraska I*, 325 U.S. at 610–11, 65 S.Ct. at 1347–48, 89 L.Ed. at 1827–28.

After the Supreme Court determined in *Wyoming I* the quantity of water that Colorado could divert from the Laramie River, Colorado later sought to have Wyoming held in contempt for diverting more than the 39,750 acre feet it was decreed, and Colorado asserted as a defense that Wyoming had not been injured. The Court held that lack of injury to the downstream appropriator entitled to the water was not a defense. The Court stated:

> But such a defense is not admissible. After great consideration, this Court fixed the amount of water from the Laramie river and its tributaries to which Colorado was entitled. Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights.

Wyoming II, 309 U.S. at 581, 60 S.Ct. at 769, 84 L.Ed. at 959. The only consideration regarding enforcement is whether the upstream state took more water than was permitted under the decree, and the only defense is whether the downstream state acquiesced in the upstream state doing so. *Id.* "That is the sole available defense." *Id.*

The reason injury is irrelevant with respect to the interstate decree in *Nebraska II* is that the federal government did not administer water rights in times of shortage based upon priority of appropriation. The Supreme Court adjudicated the initial decree in *Nebraska I*. The watercourse at issue was the North Platte River that originated in northern Colorado, flowed in a northerly direction into Wyoming, and then eventually turned east across the Great Plains into Nebraska. *Nebraska I*, 325 U.S. at 592–93, 65 S.Ct. at 1338–39, 89 L.Ed. at 1818–19. When it did so, it applied the standard of equitable apportionment. Because the states involved were priority states, the Court was guided by the rule of first in time, first in right, but it was not bound by that rule. *Id.* at 617–18, 65 S.Ct. at 1350–51, 89 L.Ed. at 1831–32. "[I]f an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible." *Id.* at 618, 65 S.Ct. at 1350–51, 89 L.Ed. at 1831. The factors that the Court considered in making an equitable apportionment included the following:

> Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to

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> upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former-these are all relevant factors.

Id.

In its equitable apportionment between the states, the Court was not concerned with the ***524 **249** harm that may be suffered by an individual appropriator. As the Court stated, "The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State." *Id.* at 627, 65 S.Ct. at 1355, 89 L.Ed. at 1836. Once the Supreme Court enters a decree equitably apportioning the water between or among states, the priority dates of the individual appropriators in those states are irrelevant with respect to the enforcement of that decree. The apportionment of water among the appropriators in each state was left to that state. The Court rejected fixing the rights of each appropriator based upon strict priority for the reasons "(1) that it would deprive each State of full freedom of intrastate administration of her share of the water and (2) that it would burden the decree with administrative detail beyond what is necessary to an equitable apportionment." *Id.* at 643, 65 S.Ct. at 1362, 89 L.Ed. at 1845.

An enforcement proceeding under federal interstate water law would be equivalent to the administration under Idaho water law only if there was enough water for all appropriators in Idaho to receive their decreed amounts. Then, administration would simply be interpreting the decrees to determine what amounts had been decreed for each appropriator and measuring their diversions to make sure that the appropriators only took their decreed amounts. However, that is not reality.

The difficult issue in administering water rights under Idaho law has always been changing conditions that result in there being insufficient water to provide the full amount that each appropriator is entitled under the appropriator's decree or license. Thus, an enforcement proceeding before the Supreme Court does not involve issues that are involved in administration such as whether the appropriator making the call is suffering material injury, the reasonableness of the appropriator's diversion, the appropriator's conveyance efficiency, whether the appropriator is putting the water to beneficial use, whether the appropriator is wasting water, and hydrology. *American Falls*, 143 Idaho at 876–77, 154 P.3d at 447–48.

In this respect, the administration of water rights under Idaho law is more akin to modification proceedings in the Supreme Court than to enforcement proceedings. In *Nebraska I*, the Court stated that "the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions." 325 U.S. at 620, 65 S.Ct. at 1351–52, 89 L.Ed. at 1833. As the Court reiterated in *Nebraska II*, the modification of a decree can require the Court to "answer unresolved questions and to accommodate 'change[s] in conditions'-a phrase sufficiently broad to encompass not only changes in water supply, but also new development that threatens a party's interests." 507 U.S. at 591, 113 S.Ct. at 1695, 123 L.Ed.2d at 330. "At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment." *Id.* at 592, 113 S.Ct. at 1695, 123 L.Ed.2d at 330 (citations omitted).

Thus, the issues considered in modifying a decree based upon changes in conditions, such as decreasing or increasing water supply and the impact of new development, are more akin to the issues involved in administering federal water rights than the issues involved in federal enforcement. To the extent that *Nebraska II* sheds light on the appropriate standard of proof, it would support the higher standard of clear and convincing evidence for administering water rights when a water source is over appropriated or during low-water years.

[25] [26] It is Idaho's longstanding rule that proof of "no injury" by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

V. CONCLUSION

We find that the Ground Water Act applies to the administration of A & B's water right ***525 **250** 36–2080. We also find that the Director had substantial and competent evidence to support his decision not to set a reasonable groundwater pumping level and to analyze

the water right on a system-wide as opposed to a well-by-well basis. In addition, we find that the district court did not err in imposing a clear and convincing evidence standard on the Director's determination of material injury in a delivery call. We therefore affirm the decision of the district court.

Justices EISMANN, J. JONES, HORTON and TROUT, Pro Tem concur.

All Citations

153 Idaho 500, 284 P.3d 225

Footnotes

1 "The ESPA is defined as the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report 'Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho,' U.S. Geological Survey Professional Paper 1408–F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian."

2 This was intentionally sought by the USBR: "We emphasize that the project is one integrated system, physically, operationally, and financially.... Therefore it is impractical and undesirable to designate precise land areas within the project served by each of the specific wells on the list."

3 A " '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." I.C. § 42–233b.

> 'Critical ground water area' is defined as any 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.

I.C. § 42–233a.

4 "Reasonable Ground Water Pumping Level" is a term defined by IDAPA 37.03.11.010.18 as:

> A level established by the Director pursuant to Sections 42–226, and 42–237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting the holders of senior priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law.

5 The Memorandum Decision and Order on Petition for Judicial Review had several conclusions that are at issue in this appeal.

> 1. The decision of the Director that the 1951 GWA applies to the administration of pre-enactment water

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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 36–2080A & 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 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 distinction is important, as the Ground Water Act only protects a senior water right to a "reasonable pumping level," I.C. § 42–226. The now-superseded common law protected senior pumpers to their historic pumping levels. *See* *Noh v. Stoner*, 53 Idaho 651, 653, 26 P.2d 1112, 1114 (1933) (suggesting that the diversion of a senior right holder is forever protected from interference by junior right holders).

[7] Now codified as I.C. § 42–229.

[8] According to the district court:

> [T]he more plausible justification behind the amendment and its choice of language was to avoid confusion with 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, the 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.

[9] A & B cites the hearing testimony of Tim Luke, IDWR's Water Distribution Section Manager, who testified that water cannot be pumped from any well and delivered to any acre on the project. However, this testimony demonstrates that interconnection is possible.

> Q. And you recognize, I guess, based upon your knowledge of the A & B project that certain lands in A & B are served by certain wells?
>
> A. True.
>
> Q. And that—you would agree that any acre under the project cannot be physically served with water from any

well? Depends on where you're at?

A. Any well owned by A & B?

Q. Correct.

A. I'm aware that there are specific wells—A & B wells that serve certain lands in A & B. And that's generally where—well, I guess just that.

Q. Well, Mr. Bromley talked to you about the water right and the fact that the water right doesn't describe particular lands to particular points of diversion.

A. Correct.

Q. And that under the water right you could divert water from any well and apply it to any acre. My question to you, is that your understanding of how the A & B project operates as it exists today?

A. Yeah. There's 177 wells and 62,000 acres. I realize that certain areas of the project are irrigated by certain wells. It's not to say you can't add a well or move water from one well that was formerly serving or is serving lands that I would describe as Area A couldn't be moved to lands in Area B within the district.

Q. Physically that could happen. But as the project exists, do you understand that any acre under the project can be irrigated by water from any well as the project exists?

A. Yeah, it could.

Q. How is that?

A. It's within your water right to do that.

...

Q. So it's your testimony that you think any acre under the project could be irrigated with any well as the project exists today? I'm not talking about theoretical or what could happen if—

A. Not necessarily any acre, but some acres have been irrigated by different wells over time.

10 IDAPA Rule 37.03.11.042 states in pertinent part:

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

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

b. The effort or expense of the holder of the water right to divert 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 and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of 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 the water 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; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

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.

End of Document

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160 Idaho 119
Supreme Court of Idaho,
Boise, December 2015 Term.

In the Matter of the fourth mitigation plan filed by the IDAHO GROUND WATER appropriators for the distribution of water to water right nos. 36–02551 & 36–07694 in the name of **Rangen**, Inc., IDWR Docket no. CM-MP-2014-006, " Magic Springs Project".
Rangen, Inc., Petitioner–Appellant,
v.
IDAHO DEPARTMENT OF WATER Resources, and Gary Spackman, in his capacity as Director of the Idaho Department of Water Resources,
Respondents–Respondents,
and
Idaho Ground Water Appropriators, Inc.,
Intervenor–Respondent.

Nos. 42775, 42836

March 23, 2016.

Rehearing Denied May 9, 2016.

Synopsis
Background: Senior water rights holder and ground water appropriator petitioned for judicial review of decision of Director of Department of Water Rights issuing curtailment order in senior rights holder's delivery call. The District Court, Fifth Judicial District, Twin Falls County, Eric J. Wildman, J., upheld Director's decision in significant part but vacated director's application of trim line. Rights holder, appropriator, and city appealed.

Holdings: The Supreme Court, J. Jones, C.J., held that:

[1] evidence supported Director's finding that excavated conduit was a surface water source;

[2] Director acted within his discretion in implementing trim line at volcanic rift zone based on doctrine of beneficial use;

[3] Director adequately accounted for potential model error; and

[4] Director provided adequate reasoning to support curtailment order.

Affirmed in part and reversed in part.

Eismann, J., concurred in part and concurred in result in part and filed opinion in which Horton, J., joined.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] **Administrative Law and Procedure**⇐Trial or review de novo

In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act (IDAPA), the appellate court reviews the decision of the district court to determine whether it correctly decided the issues presented to it; however, the appellate court reviews the agency record independently of the district court's decision. West's I.C.A. § 67–5201 et seq.

[2] **Administrative Law and Procedure**⇐Clear error; "clearly erroneous" standard
Administrative Law and Procedure⇐Sufficiency of Evidence
Administrative Law and Procedure⇐Substantial evidence

A reviewing court defers to the agency's findings of fact unless they are clearly erroneous, and the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.

[3] **Administrative Law and**

Procedure⇐Conclusions of law in general

An appellate court freely reviews questions of law in an appeal from the decision of an administrative agency.

[4] **Administrative Law and Procedure**⇐Discretion of agency; abuse of discretion

Discretionary decisions of an agency shall be affirmed if the agency (1) perceived the issue in question as discretionary, (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and (3) reached its own decision through an exercise of reason. West's I.C.A. § 67–5279.

[5] **Water Law**⇐Delivery call petition by senior user
Water Law⇐Conclusiveness and Effect

Evidence in delivery call supported finding of Director of Department of Water Resources that excavated conduit was a surface water source and was thus not subject to provisions of Ground Water Act; partial water decrees issued in general river basin adjudication had identified water source and its tributary and followed naming convention for surface water sources, and those decrees could not be collaterally attacked in delivery call. West's I.C.A. §§ 42–230(a), 42–1412; IDAPA 37.03.01.060.02(c)(i).

[6] **Water Law**⇐Nature and Character of Water and Water Rights

Finality in water rights is essential.

5 Cases that cite this headnote

[7] **Water Law**⇐Limits imposed by beneficial use requirement
Water Law⇐Effect of senior riparian rights

Director of Department of Water Resources acted within his discretion in delivery call in implementing trim line based on doctrine of beneficial use; trim line did not reduce decreed quantities of senior water right, and trim line represented Director's reasoned refusal to curtail irrigation to hundreds of thousands of acres so that senior rights holder might get another 1.5 cubic feet per second of water. Const. Art. 25, §§ 5, 7; IDAPA 37.03.11.020.02, 37.03.11.020.03.

[8] **Water Law**⇐First in time, first in right

While the prior appropriation doctrine gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. IDAPA 37.03.11.020.02.

3 Cases that cite this headnote

[9] **Water Law**⇐Actual use of water and application to beneficial use
Water Law⇐Waste

The Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Const. Art. 25, §§ 5, 7; West's I.C.A. § 42–101 et seq.

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[10] Water Law⇐Effect of senior riparian rights

Director of Department of Water Resources acted within his discretion by implementing trim line at volcanic rift zone; Director determined point at which benefit that would accrue to senior rights holder from curtailment was so small in comparison to acreage that would have to be curtailed so as to no longer justify curtailment.

[11] Water Law⇐Delivery call petition by senior user

Director of Department of Water Rights adequately accounted for potential model error in implementing trim line; Director considered which model was the best available scientific tool for predicting effects of ground water pumping on discharge at cell, and Director rejected arguments that model was biased toward overpredicting impacts.

[12] Administrative Law and Procedure⇐Report or opinion; reasons for decision

An agency order should identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, that underlie its decision; such an explanation is essential to meaningful judicial review. West's I.C.A. § 67–5248(a).

[13] Water Law⇐Delivery call petition by senior user
Water Law⇐Effect of senior riparian rights

Director of Department of Water Resources provided adequate reasoning to support curtailment order, even though he did not make a determination of how much water senior rights holder could command without using; Director determined that expanding curtailment order to ground water pumping on one side of volcanic rift zone would be unreasonable and against policy of maximum use and benefit of state's water resources, and Director provided statements from record to support his findings and identified which findings supported his conclusions of law. West's I.C.A. § 67–5248(a).

Attorneys and Law Firms

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Opinion

J. JONES, Chief Justice.

***121** The Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello filed separate appeals from a district court order, affirming in part and vacating in part an order issued by the Director of the Idaho Department of Water Resources ("IDWR") that curtailed junior ground water pumping in the Eastern Snake Plains Aquifer ("ESPA"). On December 13, 2011, **Rangen**, Inc. petitioned for a delivery call, alleging that junior ground water pumping in the ESPA was materially injuring its water rights sourced from the Martin–Curren Tunnel. The Director held an evidentiary hearing from May 1 to May 16, 2013. As relevant to these appeals, the Director concluded that the Martin–Curren Tunnel was a surface water source and, therefore, not subject to the Ground Water Act. Additionally, the Director found that ground water pumping in the ESPA was materially injuring **Rangen's** water rights and that a curtailment order was appropriate. However, the Director concluded that the benefits of curtailment diminished significantly if the order extended to pumping east of a volcanic rift zone in the ESPA known as the Great Rift. The Director ***122 **900** issued a curtailment order on January 24, 2014, mandating that ground water users located west of the Great Rift, with water rights junior to **Rangen's**, refrain from diverting water from the ESPA.

Rangen and IGWA petitioned for judicial review of the Director's decision. The district court upheld the Director's decision in significant part but vacated the Director's application of a trim line at the Great Rift, concluding that the Director did not have a legal basis to apply a trim line in this case. **Rangen**, IGWA, and Pocatello each timely appealed. Pocatello appeals the district court's order vacating the Director's application of the Great Rift trim line, alleging that the trim line should be upheld. IGWA appeals the district court's affirmance of the Director's ruling that **Rangen's** water source should be administered as surface water. Additionally, IGWA alleges that the district court should have vacated the Director's application of the Great Rift trim line on the basis that the curtailment area was overly broad and ordered the Director to set a smaller curtailment area. IGWA also argues that the Director erred by not providing a reasoned statement to support the curtailment order.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Rangen's Water Rights and the Eastern Snake Plain Aquifer

Rangen owns and operates a fish research and propagation facility at the head of Billingsley Creek in the Thousand Springs area near Hagerman, Idaho. **Rangen** holds five water rights for the **Rangen** facility that were decreed through the Snake River Basin Adjudication ("SRBA"). **Rangen's** petition for delivery call alleged injury only to water right nos. 36–02551 and 36–07694. Water right no. 36–02551 authorizes a diversion of 48.54 cfs for fish propagation and has a priority date of July, 13, 1962. Water right no. 36–07694 authorizes a diversion of 26 cfs for fish propagation and has a priority date of April 12, 1977. The source element for water rights nos. 36–02551 and 36–07694 is the Martin–Curren Tunnel, tributary Billingsley Creek. The Martin–Curren Tunnel, also commonly referred to as the Curren Tunnel, is a large, excavated conduit constructed high on the canyon rim that extends 300 feet into the canyon wall. Water running through the Curren Tunnel is fed by the ESPA.

The ESPA is the aquifer underlying the Eastern Snake Plain. The ESPA is about 170 miles long and 60 miles wide, and is defined as an area having a common ground water supply. IDAPA 37.03.11.050. The ground water in the ESPA is hydraulically connected to the Snake River and tributary springs, including the Thousand Springs area where the Curren Tunnel is located. The ESPA is highly productive and is composed predominantly of fractured quaternary basalt, which is generally characterized by high hydraulic conductivity. The amount of water that discharges from the aquifer to hydraulically connected surface water sources is largely dependent on ground water elevations and hydraulic conductance. From October 1980 through September 2008, average annual discharge from the ESPA exceeded average annual recharge by 270,000 acre feet, which resulted in declining aquifer water levels and declining discharge to the Snake River and tributary springs. **Rangen** claims that the discharge from the Curren Tunnel has declined significantly due to ground water pumping in the ESPA. **Rangen** brought this delivery call seeking to have junior priority ground water pumping in the ESPA curtailed in order to increase discharge to the Curren Tunnel.

B. Development of ESPAM

The Enhanced Snake Plain Aquifer Model ("ESPAM") is a calibrated regional ground water model representing the

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ESPA, meant to simulate the effects of ground water pumping from the ESPA on the Snake River and tributary springs. ESPAM 1.0 was developed by IDWR and the Eastern Snake Hydrologic Modeling Committee ("ESHMC"). **Rangen** had filed its first petition for delivery call in September 2003. A curtailment order was issued in February 2004, but it was withdrawn after ESPAM version 1.0 was released. Based on projections ***123 **901** from ESPAM 1.0, former Director Karl Dreher found that **Rangen's** delivery call was futile because curtailment of junior ground water rights in the ESPA would not result in a meaningful increase in the quantity of water discharging near the **Rangen** Facility. Following **Rangen's** prior delivery call, ESPAM 1.0 was superseded by ESPAM 1.1, which was used in the delivery call proceedings instituted by Clear Springs Foods and Blue Lakes Trout Farm, Inc. to estimate the effects of ground water pumping on springs in the Thousand Springs area.

ESPAM 1.0 and 1.1 were able to predict water flows only within a particular spring reach, rather than a particular source. In delivery calls that used these versions of ESPAM, the present and former Directors had set a "trim line" to limit the area of curtailment to areas in which at least 10% of the water accrued from curtailment would accrue to the spring reach where the caller's point of diversion was located. Much of the water accumulated to the particular spring reach would accrue at locations other than the caller's point of diversion. For example, in the Clear Springs Foods delivery call, the trim line limited curtailment to areas in which at least 10% of the water accrued from curtailment would accrue to the Buhl to Thousand Springs reach. It was estimated that Clear Springs Foods would receive 6.9% percent of the benefit accruing to that reach. Therefore, with the application of the trim line, Clear Springs Foods was predicted to receive 0.69% of the water accrued as a result of the curtailment. Similarly, in the Blue Lakes delivery call, the Director limited the curtailment order to areas where at least 10% of the water accrued from curtailment would accrue to the Devil's Washbowl to Buhl reach. It was predicted that Blue Lakes Trout Farm would receive 20% of the benefit accruing to that reach. Therefore, with the application of the trim line, Blue Lakes was predicted to receive 2% of the water accrued as a result of the curtailment.

In 2005, ESHMC and IDWR began developing ESPAM 2.0. This version was more refined and was calibrated using monthly water levels and flow targets, including measured spring discharges within fourteen specific model grid cells. The springs captured and used by **Rangen** were measured throughout the model calibration period and the monthly spring discharge in the model cell where spring flows are captured by **Rangen** was a target for model calibration. This revision to ESPAM was in progress in 2011 when **Rangen** filed its instant petition, and the parties agreed to wait until the model was updated before going to hearing.

During the development of ESPAM 2.0 it was discovered that the values used to measure the discharge for Thousand Springs for calibration of ESPAM 1.0 were inaccurate, and the values were corrected in the calibration targets for ESPAM 2.0. These corrections resulted in a significant increase in spring discharge targets in the Billingsley Creek Area, and, based on this new information, **Rangen** challenged the previous determination of a futile call under ESPAM 1.0. The model was re-calibrated in November 2012, resulting in the release and adoption of ESPAM 2.1, which was subsequently used in this proceeding to simulate the effects of ground water pumping in the ESPA on flows available at the **Rangen** Facility.

C. Rangen's Delivery Call

On December 13, 2011, **Rangen**, Inc. filed a petition for delivery call alleging that junior priority ground water pumping in the ESPA was materially injuring its water rights and requested that the Director distribute water in the ESPA and curtail junior priority pumping. IGWA intervened in the proceedings, while Pocatello and Fremont–Madison Irrigation District were brought in as respondents. Additionally, A & B Irrigation District, American Falls Reservoir District # 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, the "Surface Water Coalition") intervened in the action to address the application of ESPAM 2.1 in the delivery call.

Prior to the hearing on the delivery call, **Rangen** filed a motion for partial summary judgment. As relevant to this appeal, **Rangen** asked the Director to rule that the source for its water rights, the Martin–Curren ***124 **902** Tunnel, should be administered as surface water not ground water. The Director agreed with **Rangen** and ruled that the Curren Tunnel was a surface water source and, therefore, was not subject to the provisions of the Ground Water Act. The Director presided over the evidentiary hearing on **Rangen's** delivery call, which was held from May 1 through May 16, 2013. The Director then issued an order on January 29, 2014, mandating curtailment of ground water rights bearing priority dates

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later than July 13, 1962, with points of diversion located both within the area of common ground water supply and west of the Great Rift.

D. The Curtailment Order

The Director concluded that several factors contributed to the decline in water flow to the **Rangen** facility, including ground water pumping in the ESPA, and that ground water pumping in the ESPA was materially injuring **Rangen's** senior water rights. In determining what effect curtailment of ground water pumping would have on discharge to the Curren Tunnel, the Director relied on ESPAM 2.1. The Director concluded that ESPAM 2.1 was the best available scientific tool for predicting the effects of ground water pumping on discharge at the **Rangen** spring cell. Unlike ESPAM 1.0 and 1.1, ESPAM 2.1 was able to predict the effect of ground water pumping on springs located within a specific model cell rather than the larger spring reach. The Director concluded that 63% of the water that accrued to the **Rangen** model cell accrued to the Curren Tunnel.

ESPAM 2.1 predicted that the curtailment of all junior ground water pumping in the ESPA, within the area of common ground water supply, would accrue 16.9 cfs of reach gains to the **Rangen** cell. The benefits of curtailment with respect to the number of acres curtailed diminished significantly where the benefit to the **Rangen** cell approached 14.3 to 14.6 cfs. As the Director found that 63% percent of the flow into the **Rangen** cell would accrue to the Curren Tunnel, the Director found that the benefit of curtailment with respect to the number of acres curtailed diminished significantly where the benefit to the Curren Tunnel approached 9.0 to 9.2 cfs. Relying on an analysis by IDWR staff, the Director found that this point of diminishing benefits corresponded with the location of the Great Rift. The Great Rift is a volcanic rift zone within the aquifer that extends north to south across the plain from the Craters of the Moon to just west of American Falls Reservoir. The basalts in this area have low permeability and, therefore, relatively low hydraulic conductivity which can impede the transmission of water through the aquifer.

The Director found that

> Curtailment of junior ground water irrigation west of the Great Rift would curtail irrigation of approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Curren Tunnel. Curtailment of junior ground water irrigation east of the Great Rift would curtail irrigation of approximately 322,000 additional acres, resulting in curtailment of irrigation of approximately 204,000 acres per cfs of predicted benefit to the Curren Tunnel.

The Director determined that, although there was no way to quantify the margin of error associated with ESPAM 2.1, the model should not be abandoned. Rather, its use should be tempered with the fact that it is a simulation or prediction of reality and uncertainty in the model should be taken into consideration when setting a trim line. The Director found that the uncertainty in the model was higher east of the Great Rift. Additionally, the Director found that ESPAM 2.1 established that the benefits of curtailment diminished significantly east of the Great Rift.

The Director determined that it was within his discretion to apply a trim line and limit curtailment to ground water pumping west of the Great Rift because a senior right holder's demand should be viewed in light of reasonableness and optimum development of water resources in the public interest. Additionally, the Director determined that the uncertainty in ESPAM 2.1 east of the Great Rift also provided a basis for implementing the trim line at that location. Based on these conclusions, the Director implemented a trim ***125 **903** line and limited the curtailment order to junior ground water pumping west of the Great Rift. This limited curtailment to an area where the **Rangen** model cell was predicted to receive at least 1% of the benefits of curtailment and the Curren Tunnel was predicted to receive at least 0.63% of the benefits.

E. Proceedings on Judicial Review

IGWA, **Rangen**, and Pocatello sought reconsideration of the Director's order, including the Director's implementation of the Great Rift trim line. The Director issued an Order on Reconsideration wherein he affirmed the application of the trim line. **Rangen** and IGWA filed petitions for judicial review of the Director's order. The

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district court granted motions to intervene filed by Pocatello, Fremont–Madison Irrigation District, and the Surface Water Coalition and the petitions were consolidated. The district court affirmed the Director's order in substantial part, but vacated the Director's application of the Great Rift trim line and remanded for further proceedings. The district court found that the Director did not have a basis to apply a trim line and limit the area of curtailment. IGWA, **Rangen**, and Pocatello each timely appealed, and the records for the appeals were consolidated. This opinion addresses the appeals of both IGWA and Pocatello, as they both relate to the Director's application of the Great Rift trim line.

II.

ISSUES ON APPEAL

A. IGWA's Issues on Appeal

1. Whether the Director erred in concluding on summary judgment that the Martin–Curren Tunnel is a surface water source.

2. Whether the Director's implementation of the Great Rift trim line was an abuse of discretion because it results in an overly broad curtailment area.

   a. Whether the Director failed to recognize the issue of whether to implement a trim line as one of discretion.

   b. Whether the Director's application of the Great Rift trim line results in a waste of water.

   c. Whether the Director failed to account for model error when implementing the trim line.

3. Whether the Director failed to provide a reasoned statement to support the curtailment order.

B. City of Pocatello's Issue on Appeal

1. Whether the district court erred in setting aside the Great Rift trim line.

III.

STANDARD OF REVIEW

[1] [2] [3] In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), "we review the decision of the district court to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011) [hereinafter "*Clear Springs* "]. However, we review the agency record independently of the district court's decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). "This Court freely reviews questions of law." *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011).

The district court must affirm the agency action unless it 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;

****904 *126** (d) not supported by substantial evidence on the record as a whole; or

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

I.C. § 67–5279(3); *Clear Springs*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4).

[4] Discretionary decisions of an agency shall be affirmed

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if the agency (1) perceived the issue in question as discretionary, (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and (3) reached its own decision through an exercise of reason. *Haw v. Idaho State Bd. of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006). "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).

IV.

ANALYSIS

A. The district court did not err in affirming the Director's conclusion that the Martin–Curren Tunnel was a surface water source.

[5] Prior to the evidentiary hearing, the Director granted in part **Rangen's** Motion for Partial Summary Judgment, concluding that the Curren Tunnel was a surface water source. The Director found that water right nos. 36–2551 and 36–7694 were decreed in the SRBA to be from a surface water source and that the SRBA court's finding was conclusive in the delivery call proceeding. The district court affirmed the Director's conclusion on review. IGWA contends that the district court erred in affirming the Director's conclusion because the Curren Tunnel meets the definition of a ground water source under the Ground Water Act and the partial decrees are not conclusive as to whether the Curren Tunnel should be administered as surface or ground water.

In *Clear Springs*, we held that the provisions of the Ground Water Act are not applicable to holders of surface water rights because the Ground Water Act specifically applies only to "appropriators of ground water." 150 Idaho at 804, 252 P.3d at 85. However, we have not previously addressed whether a partial decree issued in the SRBA is conclusive in a delivery call as to whether the senior right holder's source should be administered as surface or ground water.

Chapter 14, title 42, Idaho Code modified the laws and procedures for adjudicating water rights. I.C. § 42–1401. One of the purposes of this modification was "to establish, through an adjudication a uniform description for surface water rights, ground water rights and water rights." I.C. § 42–1427(1)(a). The Legislature found that prior to the enactment of Chapter 14 "existing water rights [were] not uniformly described," and "it is important that the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply." *Id.*

Idaho Code sections 42–1409 and 42–1411 provide that a notice of claim to a water right and the Director's report on the water system must include the "source of water." I.C. §§ 42–1409(1)(b), –1411(2)(b). Although there is no requirement within the statute that the notice or report specifically address whether the source is surface or ground water, IDWR's Adjudication Rule 60 does expressly address this issue.

> For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle map. If no official name has been given, the name in local common usage should be listed. If there is no official or common name, the source should be described as "unnamed stream" or "spring." The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as "ground water."
>
> IDAPA 37.03.01.060.02(c)(i).

Here, the partial water decrees at issue identify the water source as Martin–Curren Tunnel and the tributary as Billingsley ***127 **905** Creek. The Director found that because the decrees followed the naming conventions in Adjudication Rule 60 for surface water sources, a plain reading of the decrees shows that the Martin–Curren Tunnel is unambiguously surface water. The district court affirmed this conclusion, reasoning that if the source of **Rangen's** senior rights was ground water, the SRBA Court would have decreed the source as "ground water," the same as every other ground water right in the SRBA. The district court then concluded that if IGWA disagreed with the Department's recommendations, it should have timely file objections to the recommendations in the SRBA rather than collaterally attacking the partial decrees in this delivery call proceeding.

IGWA argues that the Director erred in relying on Adjudication Rule 60 because the rule was merely meant to facilitate uniformity in naming water sources and the name of the senior's source is not conclusive of how water rights will be administered in response to a delivery call. In support of this argument, IGWA relies on *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007) [hereinafter "*AFRD2*"]. There, the Court held that the SRBA court's issuance of partial decrees did not prevent the Director from considering the material injury factors in the Conjunctive Management Rules during a delivery call because the SRBA did not address these factors. *Id.* at 876, 154 P.3d at 447. The Court reasoned that

> the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do [sic] not constitute a re-adjudication. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42–1411(2)(a)–(j). However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication.

Id. at 876–77, 154 P.3d at 447–48 (case citation omitted). However, unlike the material injury factors discussed in *AFRD2*, the issue of whether the Curren Tunnel is a ground water or surface water source directly deals with the nature of **Rangen's** water right, which was addressed in the SRBA. Except for certain enumerated exceptions inapplicable here, "[t]he decree entered in a general adjudication shall be conclusive as to the *nature* and extent of all water rights in the adjudicated water system." I.C. § 42–1420 (emphasis added). Where the partial decrees indicate that **Rangen's** rights are surface water rights, that finding is conclusive in **Rangen's** delivery call.

IGWA alternatively argues that the Director erred in relying on Adjudication Rule 60 because the Curren Tunnel fits within the definition of ground water under the Ground Water Act and applying Rule 60 would conflict with the express terms of the Act. Under the Ground Water Act, ground water is defined as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving." I.C. § 42–230(a). According to IGWA, Adjudication Rule 60 cannot be construed in a manner that forces the Director to fallaciously administer a ground water source as if it is surface water, contrary to the plain language of the Act.

IGWA couches its argument as a conflict between the application of Adjudication Rule 60 and the definition of ground water in Idaho Code section 42–230(a). However, Adjudication Rule 60 does not address the definition of ground water or how the Director was to determine whether a specific source is ground water or surface water. Adjudication Rule 60 provides the naming conventions to be used once that determination is made. IDWR had authority to promulgate the Adjudication Rules under Idaho Code sections 42–1414 and 42–1805(8). IDAPA 37.03.01.000. Adjudication Rule 60's naming conventions provide a uniform system for the identification of surface and ground water sources which corresponds with the Legislature's intent for initiating the SRBA.

> Conjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication.... To ***128 **906** conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface water rights is necessary.
>
> Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, they generally relate to two classic elements of a water right—its source and priority. The SRBA should determine the ultimate source of the ground and surface water rights being adjudicated.... If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another generation of ground and surface water users will be uncertain regarding their relationship to each other.

A & B Irrigation Dist. v. Idaho Conservation League, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997) (quoting INTERIM LEG. COMM. REP. ON THE SNAKE RIVER BASIN ADJUDICATION 36–37 (1994)). Adjudication Rule 60 provides a uniform standard for recording surface and ground water rights, which is essential for conjunctive management of those rights in the Snake

River Basin.

[6] IGWA is essentially arguing that the Curren Tunnel was miscategorized as a surface water source in the SRBA. However, **Rangen's** delivery call is not the appropriate place to challenge that determination. If IGWA wanted to challenge the partial decrees of **Rangen's** water rights it should have filed objections in the SRBA under Idaho Code section 42–1412. Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process. As this Court has previously stated, "[f]inality in water rights is essential." *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). The partial decrees indicate that the Curren Tunnel is a surface water source and the decrees are conclusive on that issue. Therefore, **Rangen's** water rights are not subject to the provisions of the Ground Water Act.

We hold that the district court did not err in affirming the Director's conclusion that the Curren Tunnel was a surface water source and, therefore, not subject to the Ground Water Act.

B. The District Court erred in vacating the Director's application of the Great Rift trim line.

At the district court, both **Rangen** and IGWA challenged the Director's implementation of the Great Rift trim line. IGWA argued that the curtailment area under the application of the Great Rift trim line was overly broad because it resulted in a waste of water and did not adequately account for model error. IGWA asked the district court to vacate the trim line and order the Director to adopt a smaller curtailment area. **Rangen** argued that the trim line should be vacated because the Director did not have discretion to apply a trim line at all in this case and the curtailment order should include all junior ground water pumping in the ESPA within the area of common ground water supply. The district court agreed with **Rangen** and vacated the trim line, concluding that the Director did not have discretion to apply a trim line on policy grounds and that applying the trim line based on model error impermissibly shifted the burden of proof on material injury from the junior appropriators to **Rangen**. On appeal, Pocatello challenges the district court's order vacating the trim line, arguing that the application of the Great Rift trim line was within the Director's discretion. **Rangen** and the Surface Water Coalition contend that the district court's decision should be upheld. IGWA argues that the district court should have ordered the Director to set a smaller curtailment area.

Here, the first issue is whether the Director had discretion to implement a trim line in this case. If the Director did have discretion, the next issue is whether the Director abused his discretion by implementing a trim line at the Great Rift.

1. The Director had discretion to implement a trim line based on the doctrine of beneficial use.

[7] Relying on the Court's decision in *AFRD2*, the Director concluded that, given the nature of the decisions which must be ***129 **907** made in determining how to respond to a delivery call, the Director must have discretion to impose a trim line if justified. *See AFRD2*, 143 Idaho at 880, 154 P.3d at 451. The Director then concluded that a trim line was justified in this case on two bases: (1) to ensure maximum and beneficial use of the State's water resources and (2) to account for uncertainty in ESPAM 2.1. We find that the Director had discretion to implement the trim line based on the policy of beneficial use. Therefore, we need not address whether the trim line was also justified to account for model uncertainty and whether implementing a trim line on that basis impermissibly shifted the burden of proof on material injury.

The Director concluded that in determining whether to implement a trim line, he must consider the diminishing benefits of curtailment beyond the Great Rift. The Director found that low transmissivity at the Great Rift impedes the transmission of water through the aquifer. Additionally, focusing on the results of ESPAM 2.1, the Director found that

> curtailment of junior ground water irrigation west of the Great Rift would curtail irrigation of approximately 157,000 acres, resulting in curtailment of irrigation of approximately 17,000 acres per cfs of predicted benefit to the Curren Tunnel. Curtailment of junior ground water irrigation east of the Great Rift would curtail irrigation of approximately 322,000 additional acres, resulting in curtailment of approximately 204,000 acres per cfs of predicted

benefit to the Curren Tunnel.

In concluding that he must consider the diminishing benefits of curtailment, the Director relied on the policy considerations articulated in CMR 20.03, which provides that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." IDAPA 37.03.11.020.03. Additionally, the Director relied on the policy of promoting the optimum development of the State's water resources enunciated in Article XV, section 7 of the Idaho Constitution and this Court's decision in *Clear Springs*, where we stated that "[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *See* Idaho Const. art. XV, § 7; *Clear Springs*, 150 Idaho at 808, 252 P.3d at 89. Based on these considerations, the Director concluded that

> curtailment of ground water diversions on the east side of the Great Rift is not justified. To curtail junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's water resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources.

IGWA, **Rangen**, and Pocatello each sought reconsideration on various aspects of the Director's final order. On reconsideration, the Director upheld the application of the Great Rift trim line, reiterating the same policy considerations outlined above. Additionally, the Director concluded that the use of the Great Rift to define a trim line is justified based on the evidence presented in this proceeding and that the application of the trim line results in benefits to the calling party that are consistent with those resulting from trim lines applied in previous proceedings. The Director also concluded that in determining whether to implement a trim line he had to consider to what extent the prior appropriation doctrine, as established under Idaho law, allows a senior surface water user to call upon an aquifer to satisfy a senior water right. The Director found that the Great Rift trim line struck an appropriate balance.

On judicial review, the district court set aside the trim line, rejecting the Director's conclusions as to both the policy and model uncertainty grounds. The court observed that although the disparity between curtailed acreage and realized water accruing to the Martin–Curren Tunnel is large, the very nature of conjunctive management involves a large disparity between the number of acres curtailed and the accrued benefit to a senior right. The district court then found that under this Court's holding in *Clear Springs*, the Director could not rely on CMR 20.03 or ****908 *130** Article XV, section 7 of the Idaho Constitution to implement a trim line and administer less than the full amount of water of which **Rangen** was entitled. The district court interpreted *Clear Springs* as holding that Idaho law does not

> provide the Director the discretion to reduce the decreed quantity of a water right to which a senior appropriator is entitled based on the disparity between the impact to junior ground water pumpers resulting from curtailment and the quantity of water that would benefit the senior right, provided the water is put to beneficial use.

On appeal, Pocatello argues that the Director had sufficient justification to implement the trim line in order to promote principles of optimum use, consistent with Idaho law. It argues that the disparity between the number of acres curtailed east of the Great Rift and the amount of water received by **Rangen** was large where the curtailment of an additional 322,000 acres was only predicted to accrue an additional 1.5 cfs of water to the Curren Tunnel. Pocatello also argues that the Director must have some amount of discretion to administer water in conjunctive management situations and that setting aside the trim line in this case would essentially leave him with none.

The Director's arguments on appeal mirror the reasoning in his agency orders. In particular, the Director argues that

> in some circumstances, conjunctive management delivery calls can require idling hundreds of thousands of acres of productive agricultural land to deliver small increments of water to a senior water right holder. In such scenarios, the senior water right holder's private

> interest in receiving additional water may directly conflict with the public's interest in the optimum development of the State's water resources. Certain "bedrock" principles of Idaho's prior appropriation doctrine are launched into "tension." Here, the bedrock principles that are in tension are a water right holder's private proprietary interest in seeking curtailment of junior uses of water and the public's interest in the optimum development of the State's water resources. The Director has the statutory duty, authority, and discretion to resolve this tension.
>
> In this case, the Director resolved the tension through recognition of the Great Rift trim line.... [T]he Director concluded there is a point where **Rangen's** delivery call would require curtailment of vastly more acreage to produce a very small increment of additional water, and that at this point, **Rangen's** right to seek additional curtailment must give way to the public's interest in optimum development of the State's water resources. The Director also concluded that this point is the Great Rift.

The Surface Water Coalition and **Rangen** argue chiefly that Idaho's prior appropriation doctrine precludes the Director from imposing a trim line that takes water that would otherwise be put to beneficial use by a senior water right. They assert that the Director has no discretion to impose a trim line in this case because doing so would violate the prior appropriation doctrine and allow unmitigated injury to **Rangen's** senior water right. They further argue that the prior appropriation doctrine requires administration of all rights contributing to the material injury, subject only to a showing by the juniors that the call would be futile or otherwise unfounded.

The Court has previously held that hydrologically connected surface and ground waters must be managed conjunctively. *See* *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In 1994, IDWR promulgated the Conjunctive Management Rules ("CMRs") [IDAPA 37.03.11.000 to 37.03.11.050] to provide the procedures for responding to delivery calls "made by the holder of a senior-priority surface or ground water right against the holder of a junior priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001. The CMRs integrate "all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02 (CMR 20.02). The CMRs also integrate

> administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy ***131 **909** of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law.

IDAPA 37.03.11.020.03 (CMR 20.03). Under these principles, "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." *Id.* CMR 40.03 provides that, in a delivery call, "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 and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42." IDAPA 37.03.11.040.03.

[8] [9] "While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception ... the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451. In *AFRD2*, this Court concluded that the Director must have some discretion to balance these countervailing considerations in a delivery call.

> Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly

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> not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, the Court can determine whether that exercise of discretion is being properly carried out.

Id.

Idaho Code section 42–101 provides:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.

As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho.

> In *Nicay v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909), we stated, "The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty." In *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909), we phrased it, "Economy must be required and demanded in the use and application of water." In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept by stating, "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."

Clear Springs, 150 Idaho at 808, 252 P.3d at 89. This policy limits the prior appropriation doctrine by excluding from its purview water that is not being put to beneficial use. *AFRD2*, 143 Idaho at 876, 154 P.3d at 447. The policy of beneficial use serving as a limit on the prior appropriation doctrine dovetails with the prescription in CMR 20.03 that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." IDAPA 37.03.11.020.03.

****910 *132** Although ground water in the ESPA is hydraulically connected to water in the spring tributaries, the impact of ground water pumping in the ESPA on discharge in the springs is attenuated. *See* Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63, 80–81 (1987). Necessarily, not all of the water collected due to the curtailment will accrue to the senior water right holder; some will remain in the aquifer and some will flow to other tributary springs. This complexity can make it very difficult to balance a senior right holder's interest in receiving additional water against the State's interest in securing the maximum use and benefit, and least wasteful use, of its water resources. In light of this challenging balancing requirement, it is necessary that the Director have some discretion to determine in a delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller. As discussed, Idaho law contemplates a balance between the "bedrock principles" of priority of right and beneficial use. *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013). The Director is authorized to undertake this balancing act, subject, as he acknowledged here, to the limitations of Idaho law.[7]

The district court erred by rejecting the Director's reliance on CM Rule 20.03 and Idaho Constitution Article XV, section 7 as a basis to implement a trim line. The Director did not treat either source as directly granting him discretion to apply a trim line. Instead, the Director recognized, correctly, that each source merely restated a broader understanding of Idaho law: The prior appropriation doctrine sanctifies priority of right, but subject to limitations imposed by beneficial use.[8] The Director's interpretation of the law was correct and it was error for the district court to reject it.

The district court held that the Director does not have discretion to reduce the decreed quantity of water to which a senior appropriator is entitled based on the disparity between the number of acres curtailed and the quantity of water that would benefit the senior. First, the trim line here does not reduce the decreed quantities of

Rangen's water rights. **Rangen** remains entitled to the full measure of its rights, subject to availability of water and beneficial use limitations. Rather, the trim line represents the Director's reasoned refusal to curtail irrigation to hundreds of thousands of acres so that **Rangen** might get another 1.5 cfs of water. Second, it is not the disparity per se between the impact to the juniors and the benefit to **Rangen** that justifies the trim line. Indeed, as the district court accurately and aptly noted, the very nature of conjunctive management involves a large disparity between the number of acres curtailed and the accrued benefit to a senior surface right. Nonetheless, the Director may consider any such disparity when seeking to balance priority of right with beneficial use requirements.

Holding that the Director has discretion to impose a trim line by applying the policy of beneficial use is consistent with Idaho law. In *Schodde v. Twin Falls Land & Water Co.*, a senior water right holder had erected water wheels to lift appropriated water out of a river so that he could divert it over his land. ****911 *133** 224 U.S. 107, 114–115, 32 S.Ct. 470, 471, 56 L.Ed. 686, 689 (1912). A junior right holder had subsequently constructed a dam downstream, which backed up the river and reduced the current flow to the extent that the senior's water wheels could not operate. *Id.* at 115–116, 32 S.Ct. at 471–72, 56 L.Ed. at 689–90. The senior sued the junior in federal court, where the trial court dismissed the action and both the Ninth Circuit and the U.S. Supreme Court affirmed the dismissal. *Id.* at 114, 32 S.Ct. at 470, 56 L.Ed. at 689. The Supreme Court noted that

> [t]he trial court recognized fully the right of the plaintiff to the volume of water actually appropriated for a beneficial purpose. It nevertheless dismissed the complaint on the ground that there was no right under the Constitution and laws of the state of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses. The Court ... held that to uphold as an appropriation the use of the current of the river to the extent required to work the defendant's wheels would amount to saying that a limited taking of water from the river by appropriation for a limited beneficial use justified the appropriation of all the water in the river as incident to the limited benefit resulting from the use of the water actually appropriated.[4]

Id. at 117, 32 S.Ct. at 471, 56 L.Ed. at 689. "The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate." *Id.* at 120, 32 S.Ct. at 472, 56 L.Ed. at 689–90. The Court acknowledged "the disastrous results which would follow" if the prior appropriation doctrine were not limited by beneficial use:

> If the plaintiff were permitted to own the current of the stream as appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he would control and own. There might be a great surplus of water in the stream at and above plaintiff's premises, and an urgent demand for a portion of this surplus for beneficial uses, but if an appropriator above should divert a sufficient quantity to lower the current under plaintiff's water wheels so that they would not revolve, the plaintiff would have a cause of action to prevent such an appropriation. It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated.

Id. It must be noted that *Schodde* dealt with the reasonableness of the senior appropriator's "means of diversion, not in his priority of water rights" (*Clear Springs*, 150 Idaho at 809, 252 P.3d at 90), but the principles stated in *Schodde* apply equally in this water management case where the senior appropriator seeks to assert control over practically the entire aquifer, regardless of the minimal benefit to the senior and the great detriment to the juniors.

Another Idaho case is also instructive here. In *Van Camp v. Emery*, a senior appropriator had allegedly erected a dam to flood irrigate his lands, thereby depriving a junior appropriator of his water. 13 Idaho 202, 208, 89 P. 752, 754 (1907). The Court held:

> [i]n this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Id. Here, it will not do to say that access to an entire aquifer may be foreclosed so as to cause 1.5 cfs to accrue to a single tunnel at a loss of enough water to irrigate 322,000 acres.

**912 *134 In this case, the Director acted within the scope of his limited discretionary authority—"between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity" (*AFRD2*, 143 Idaho at 880, 154 P.3d at 451)—to impose the trim line at the Great Rift. We therefore hold that the district court erred in concluding that the Director did not have discretion to implement a trim line based on policy considerations and in vacating the trim line on that basis.

2. The Director did not abuse his discretion by implementing a trim line at the Great Rift.

IGWA argues that the Director abused his discretion by implementing the Great Rift trim line because the implementation of the Great Rift trim line results in a waste of water and the trim line fails to adequately account for model error.

a. The application of the Great Rift trim line does not result in a waste of water.

[10] IGWA contends that the Director abused his discretion by setting a trim line that allows **Rangen** to "hoard" water in violation of the principle of beneficial use because **Rangen** is commanding one hundred times more water than it will use. IGWA believes that the Director's beneficial use and reasonable appropriation analysis were insufficient because the Director did not decide how much water **Rangen** can reasonably command without diverting it. Additionally, IGWA contends that the Director arbitrarily implemented the Great Rift trim line because it is inconsistent with the 10% trim line adopted in *Clear Springs*. Ultimately, IGWA wants the Court to set a minimum bar on how much water use can be curtailed without the benefit accruing to the senior water right holder and to find that a curtailment area where only 0.63% of the benefits would accrue to the senior right holder is unreasonable.

As discussed above, the Director specifically considered the beneficial use doctrine in determining whether to implement a trim line at the Great Rift. The Director concluded that to curtail the junior ground water users east of the Great Rift would be counter to the optimum development of Idaho's resources in the public interest and the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources. With the implementation of the Great Rift trim line, curtailment was limited to an area where the **Rangen** cell was predicted to receive at least 1% and the Martin–Curren Tunnel was predicted to receive 0.63% of the benefits of the curtailment.

The Director did not set a minimum bar as to how much water can reasonably be curtailed in any delivery call but, rather, determined the point in this specific case where the benefit that would accrue to **Rangen** was so small in comparison to the acreage that would have to be curtailed so as to no longer justify curtailment. Concepts like beneficial use, waste, reasonable means of diversion and full economic development require a highly fact driven analysis. *AFRD2*, 143 Idaho at 869, 154 P.3d at 440. The circumstances that would justify a trim line and the point at which to implement it necessarily depend on the specific circumstances in each case. Setting a bright line rule dictating a minimum bar of what will be considered a reasonable curtailment area in future delivery calls would, therefore, not be appropriate.

Although **Rangen** would only receive 0.63% of the water accrued from the curtailment, that does not necessarily mean that the curtailment results in waste. Necessarily, not all of the water collected due to the curtailment will accrue to the senior water right holder, as some will remain in the aquifer or flow to other tributary springs. As discussed above, this is why it is necessary that the Director have some discretion to determine whether and at what point a delivery call would require curtailment of an unreasonably vast amount of acreage to produce a very small amount of water, and, therefore, not be justified. The Director's determination that this point was the Great Rift was reached through reason and supported by evidence on the record.

913 *135 IDWR staff's analysis of ESPAM 2.1 results showed that the benefit of curtailment with respect to the number of acres curtailed diminished significantly where the benefit to the Martin–Curren Tunnel approached approximately 9.0 to 9.2 cfs. IDWR staff found that this point of diminishing benefits corresponded with the location of the Great Rift, where low transmissivity impedes the transmission of water through the aquifer. The Director concluded that curtailment of junior ground water irrigation west of the Great Rift would result in curtailment of 17,000 acres per cfs predicted to benefit **Rangen, while curtailment east of the Great Rift would result in curtailment of 204,000 acres per cfs predicted to benefit **Rangen**. The evidence on the record shows that there is a stark reduction in the benefit of the curtailment east of the Great Rift, compared to west of the Great Rift. If ground water pumping east of the Great Rift were included in the curtailment order, an additional 322,000 acres would be curtailed with only an additional 1.5 cfs predicted to accrue to the Curren Tunnel. Given the Director's discretion and these uncontested findings of fact, the Director's application of the Great Rift trim line was proper. It was not an abuse of discretion and it was supported by substantial evidence.

IGWA further contends that the Director should have adopted a 10% trim line because a 10% trim line was adopted in the Clear Springs Foods and Blue Lake Trout Farm delivery calls. There, the former Director found that the margin of error associated with ESPAM 1.1 was 10% and he excluded areas within that margin of error from the curtailment order. *Clear Springs*, 150 Idaho at 812–13, 252 P.3d at 93–94. Here, the Director specifically rejected IGWA's argument that he should impose a 10% trim line. Unlike ESPAM 1.1, ESPAM 2.1 is able to predict the impacts of curtailment on a single model cell rather than a multi-cell reach. As the Director found,

> [b]ecause the 10% trim line applied in Clear Springs delivery call was based on model predictions of impacts to a multi-cell reach containing several springs, applying a 10% trim line based on model predictions of impacts to a single model cell ... would result in a significantly different standard than was applied in the Clear Springs delivery call.

IDWR staff found that if a 10% trim line were applied in the present case, the benefit that would accrue to the **Rangen** cell would be a negligible 0.01 cfs. Additionally, the trim line in Clear Springs was based on the Director's factual finding that the margin of error in ESPAM 1.1 was 10%. *Clear Springs*, 150 Idaho at 816, 252 P.3d at 97. Here, the Director was unable to quantify the margin of error in ESPAM 2.1. It does not make sense to impose a 10% trim line in this case because the margin of error in previous models was 10%. We find that a 10% trim line would not be reasonable when applied to the facts of this case.

Additionally, the Director specifically found that the benefit that would accrue to **Rangen** with the imposition of the Great Rift trim line was in line with prior delivery calls. It was predicted that **Rangen** would receive 0.63% of the water accrued as a result of the curtailment order. The Director concluded that this was similar to the trim lines applied in the Clear Springs and Blue Lakes delivery calls, where the calling parties were predicted to receive 0.69% and 2% of the curtailed benefits, respectively. The Director's implementation of the Great Rift trim line was, therefore, not arbitrary.

We hold that the Director had substantial evidence to support his decision to implement the trim line at the Great Rift and that his decision to implement a trim line at that point does not result in a waste of water.

b. The Director did not fail to account for model error.

[11] IGWA contends that the Director abused his discretion by not considering localized model error when implementing a trim line. Additionally, IGWA argues that the Director erred in failing to account for the fact that ESPAM 2.1 overpredicts impacts to the **Rangen** cell. IGWA contends that the Director should have set a margin of error based on the above issues with the model and excluded all junior pumping within ***136 **914** that margin of error from the curtailment order.

The Director found that ESPAM 2.1 was the best available scientific tool for predicting the effects of ground water pumping on discharge at the **Rangen** spring cell, although it was an imperfect approximation of a complex physical system. All of the parties agree that ESPAM 2.1 was the best scientific tool available. The Director addressed IGWA's arguments that the model did not account for localized error and was biased toward overpredicting impacts in the curtailment order. The Director found that IDWR staff disagreed that ESPAM

2.1 is biased towards overpredicting impacts.

> [A]rguments that the model is biased to over-predict impacts are based largely on comparison of model results with well and spring discharge data collected only after the year 2000. Ignoring data collected before 2000 compromises their interpretation.... Contrary to IGWA's arguments, evaluation of ESPAM 2.1's calibration results, which under-predict the difference between flows in the 1980s and the 2000s, suggests that the model would be more likely to under-predict the impacts of ground water pumping on springs flows in the **Rangen** cell.

Here, the Director did not fail to address bias in the model, but specifically rejected IGWA's argument that such bias existed. It seems that IGWA is asking the Court to reweigh the evidence of model bias and find that the Director lacked substantial evidence to support his finding that the model was not biased toward overprediction of flow. Although IGWA presented conflicting evidence, the findings of IDWR staff relied on by the Director provided substantial evidence on the record to support the Director's finding that the model was not biased toward overpredicting water flow to the **Rangen** cell.

Additionally, the Director relied on an IDWR staff memorandum in concluding that although ESPAM 2.1 is a regional model, the discharge data for the **Rangen** cell reflects both local and regional geological controls on hydrologic responses to ground water pumping and other aquifer stresses. Also, based on findings from the IDWR staff, the Director concluded that it was appropriate to use a regional rather than a local model because the effect of junior ground water pumping in the ESPA on discharge in the spring reaches is a regional-scale question that cannot be addressed with a small-scale, local model. The Director rejected the application of alternative models suggested by IGWA's expert that "accounted for localized error," concluding that the calibration methods in those models did not follow proper procedures. The Director ultimately concluded that ESPAM 2.1 was the best available model because it incorporates much more information about the aquifer than can be considered in other predictive methods available to the Department, and it incorporates data that specifically reflect how spring discharge in the **Rangen** cell has responded to regional aquifer stresses in the past. The IDWR staff memorandum relied on by the Director provided substantial and competent evidence to support the Director's conclusion that ESPAM 2.1 was a more appropriate tool than the models that accounted for localized error and that it did account for local geological controls on hydrologic responses.

IGWA also argues that the Director erred in not setting a margin of error for ESPAM 2.1. Although the Director found that the model had some uncertainty, he found that because of the complexity of the model, the margin of error associated with the model predictions cannot be quantified. Both the ESHMC and IDWR staff had found that a predictive uncertainty analysis to determine a quantifiable margin of error could not be conducted in a reasonable timeframe. There was also expert testimony on the record stating that it would not be feasible in terms of resources or time to do the type of analysis necessary to come up with a reliable margin of error. Based on the foregoing, the Director had substantial evidence to support his finding that the uncertainty in ESPAM 2.1 could not be quantified, and he did not abuse his discretion by refraining from setting a numeric margin of error.

Accordingly, the Director did not abuse his discretion by failing to account for model error when implementing the Great Rift trim line.

****915 *137 C. The District Court did not err in concluding that the Director provided a reasoned statement to support the curtailment order under Idaho Code section 67–5248(a).**

[12] Idaho Code section 67–5248 provides that an agency order shall include "a reasoned statement in support of the decision" and "shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings." I.C. § 67–5248(a). The order should "identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision. Such an explanation is essential to meaningful judicial review." *Woodfield v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 127 Idaho 738, 747, 905 P.2d 1047, 1056 (Ct.App.1995).

[13] IGWA alleges that the Director did not include a reasoned statement to support the curtailment order

because the Director failed to make a determination of how much water **Rangen** can command without using. As discussed above, the Director did determine that expanding the curtailment order to ground water pumping east of the Great Rift would be unreasonable, and against the policy of maximum use and benefit of Idaho's water resources. The Director provided statements from the record to support his findings and identified which findings supported his conclusions of law. This is sufficient to meet the requirements of Idaho Code section 67–5248(a).

V.

CONCLUSION

We affirm the decision of the district court, save and except for the district court's vacation of the Great Rift trim line, which we reverse. We decline to award costs on appeal.

Justice BURDICK and Justice Pro Tem WALTERS concur.

Justice EISMANN, concurring in the result with respect to Part B.

I concur in the majority opinion, but concur in the result with respect to Part B.

The majority states, "The Director then concluded that a trim line was justified in this case on two bases: (1) to ensure maximum and beneficial use of the State's water resources and (2) to account for uncertainty in ESPAM 2.1." The majority then states, "We find that the Director had discretion to implement the trim line based on the policy of beneficial use. Therefore, we need not address whether the trim line was also justified to account for model uncertainty...." Thus, the majority holds that the distribution of water when there is a shortage can be based entirely upon the Director's discretion "to ensure maximum and beneficial use of the State's water resources."

I do not read the Director's order as being based upon alternative grounds. Rather, it is clear that the director based his decision upon the inaccuracy of ESPAM 2.1 combined with the large number of acres that would be dried up if the software's prediction was incorrect. Before addressing why I concur in the result, I will address why I do not concur in Part B.

A. The majority abandons the constitutional requirement of prior appropriation.

The majority opinion in Part B abandons the constitutional requirement of first in time, first in right and states that the Director can apportion water in a manner "to ensure maximum and beneficial use of the State's water resources." "Under the provisions of section 3, art. 15, of the Constitution of this state, priority of appropriation gives the better right as between those using water." *Brose v. Bd. of Dirs. of Nampa & Meridian Irr. Dist.*, 20 Idaho 281, 285, 118 P. 504, 505 (1911). "This provision of the Constitution has been strictly adhered to in the many decisions this court has rendered construing the same, and this court has universally recognized the rule thus announced, that first in time of appropriation gives the first right to the use of water." *Id.*

The relevant part of Article XV, section 3, states: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied ***138 **916** except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water...." As we stated in *In RE distribution oF water tO variouS wateR rightS helD by oR foR benefit oF A & B Irrigation District*, 155 Idaho 640, 315 P.3d 828 (2013), we stated, "The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use." *Id.* at 650, 315 P.3d at 838.

The water rights of **Rangen**, Inc. ("**Rangen**"), at issue are surface water rights, which "shall never be denied" under the Constitution. "However, the Constitution makes no mention of ground water rights." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 801, 252 P.3d 71, 82 (2011). Thus, it is **Rangen's** water rights that are protected by the Constitution, not the competing water rights of ground water appropriators. There is no contention that **Rangen** is not applying the water it diverts to a beneficial use.

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We have held that a water user can be required to change the water user's manner of diversion if it is unreasonable, *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907), as did the Supreme Court in *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1912). There is no contention that **Rangen's** manner of diversion is unreasonable.

The majority stretches these two cases to hold that the Director has authority to distribute water not based upon priority, but based solely upon the Director's understanding of "the maximum and beneficial use of the State's water resources." The Director does not have the discretion to ignore the Constitution, nor does the majority. Under the majority opinion, water need no longer be distributed according to priority, which means that no one's water rights are secure. "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

B. The majority changes the meaning of the words "beneficial use."

In order to eliminate the doctrine of prior appropriation, the majority changes the meaning of the words "beneficial use" so that it becomes a discretionary determination by the Director comparing the relative financial benefits of the senior appropriator using his decreed water versus the loss sustained by the junior appropriators. That is not the meaning of "beneficial use" as that term is used with respect to water rights.

We have previously explained that "beneficial use" does not mean the equitable distribution of water. As we stated in *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890):

> ["]No distinction is made in those states and territories, by the custom of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." In this case it is said: "The right of the first appropriator, exercised within reasonable limits, is respected;" that it "is not unrestricted. It must be exercised with reference to the general condition of the country, and the necessities of the people." *This language has been seized upon as justifying the equitable, if not equal, division of the water among all desiring or needing it, regardless of the claim of the prior appropriator. Such a construction is not justified,* and would make the decision inconsistent with itself, as well as with the other decisions of the same court.

Id. at 756, 23 P. at 543 (emphasis added).

It is clear that "beneficial use" refers to how the appropriator uses the water, not whether other uses would be more beneficial. When the water is diverted from a watercourse, beneficial use means how the appropriator uses it *after* diverting the water. Article XV, section 3, begins, "The right to *divert and appropriate* the unappropriated waters of any natural stream *to beneficial uses,* shall never be denied...." The diversion came first and then the application of the water to a beneficial use. As we explained in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007):

> ****917 *139** In Idaho it is "a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law." Under the constitutional method of appropriation, appropriation is completed upon application of the water to the beneficial use for which the water is appropriated. When following the constitutional method, one "must depend upon actual appropriation, that is to say, *actual diversion and application to beneficial use.*" Under the statutory method of appropriation, the appropriation is not complete and a license will not issue *until there is proof of application to beneficial use for the purpose for which it was originally intended.* I.C. §§ 42–217, 42–219. Under either the constitutional or statutory method of appropriation, *the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho.*

144 Idaho at 110, 157 P.3d at 604 (emphases added). To reiterate, "Under either the constitutional or statutory method of appropriation, the appropriator must *apply* the water to a beneficial use in order to have a valid water right in Idaho." *Id.* (Emphasis added).

We discussed what constituted "beneficial use" in *Clear Springs Foods:*

> The right to appropriate water is for "beneficial uses," not merely for profitable businesses. Beneficial use is not defined in the Constitution, nor has it been comprehensively defined by statute or by this Court. However, a beneficial use is not limited to a use that generates a profit, or even income. For example, the

> Constitution lists using water for "domestic purposes" as a beneficial use. We have held that "firefighting" is a beneficial use of water. Likewise, the legislature has declared as beneficial uses "drinking water," "the watering of domestic livestock," using low temperature geothermal resources "primarily for heat value," using instream water "for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality," and using water in lakes and water discharging from springs for "scenic beauty."

Clear Springs Foods, 150 Idaho at 811, 252 P.3d at 92 (citations omitted). All of these beneficial uses were the manner in which the appropriator used the water appropriated. It was not comparing the benefit to the senior appropriator and the harm to the junior appropriator from applying the constitutional provision of priority of appropriation.

The framers of our Constitution understood that the most beneficial use of water required distributing water in accordance with the priority of water rights—first in time, first in right. As this Court stated in *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 76 P. 331 (1904):

> It is certainly unnecessary for us to suggest that it was the evident intent of the framers of the Constitution to so husband the water of the state as *to secure the most beneficial use thereof;* that is, that it should always be so used as to benefit the greatest number of inhabitants of the state. *They were careful to provide who should be entitled to the preference right to the use of the waters flowing in our natural streams.*
>
> Nearly every session of our Legislature has attempted to improve upon its predecessor by so legislating as to improve the former use of water, and an inspection of the various acts plainly shows that the guiding star has always been to so legislate as to *protect all users of water in the most useful, beneficial way—keeping in view the rule existing all over the arid region: "First in time first in right."*

Id. at 594, 76 P. at 332 (emphases added). The maximum beneficial use of water requires certainty as to water rights, not, as the majority holds, the right of the Director to distribute water according to his discretion. Indeed, the majority does not even give any guidelines as to how the discretion it grants to the Director is to be exercised.

There is no contention that **Rangen** is not applying the water it diverts to a beneficial use and cannot apply water to the extent of its water right to a beneficial use. Thus, the doctrine of beneficial use cannot be used to determine the amount of water it is entitled ***140 **918** to receive. Whether a particular appropriator is applying water to a beneficial use is based entirely upon what the appropriator is doing with the water. What others may do with it has no bearing.

Rangen's right to obtain the amount of water that has been decreed cannot be based upon comparing the harm to junior appropriators and the benefit to **Rangen**. As we held in *Clear Springs Foods*, "A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm." 150 Idaho at 803, 252 P.3d at 84.

Such a comparison in this case would stack the deck against **Rangen**. There is no evidence that the water the junior appropriators would be unable to divert would be wasted. If we were to institute the balancing test advocated by the majority, we must compare the juniors against all of those holding senior water rights who are not obtaining all the water to which they are entitled based upon the juniors' diversions. **Rangen** sought to introduce that evidence in the administrative proceeding, but the Director held it as irrelevant. If the Court is going to engage in that balancing test under the rubric of "beneficial use," then the balancing should include all of the seniors who are not receiving their appropriated water.

C. The conjunctive management rules cannot alter the Constitution.

The majority relies upon conjunctive management rules to support its abandonment of the prior appropriation doctrine. Administrative rules cannot modify the Constitution. The majority relies upon Conjunctive Management Rule 20.03, which states, "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water...." That rule must be construed in a manner that upholds its constitutionality. *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). As we stated in *Clear Springs*, that can only apply to the means of diversion.

Conjunctive Management Rule 20.03 states, "An

> appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water...." That is consistent with our holding in *Van Camp*. The senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion. As we stated, "Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right over the plaintiff, the judgment should so decree, but beyond that he cannot go under any other pretext or claims for the natural condition of the stream." *Id.*

Clear Springs Foods, 150 Idaho at 809, 252 P.3d at 90.

As we also stated in *Clear Springs Foods*:

> A delivery call cannot be denied on the ground that curtailment of junior appropriators would result in substantial economic harm. Such a holding would be contrary to the provision in Idaho Code § 42–233a (emphases added), stating:The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical ground water 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.
>
> In this case, it would also be contrary to Article XV, § 3, of the Idaho Constitution, which states, "Priority of appropriation shall give the better right as between those using the water...."

Id. at 803, 252 P.3d at 84.

D. Following the Constitution is not wasting water.

"We have long recognized that an appropriator may not waste water, but must permit others to use the water when the appropriator is not applying it to a beneficial use." ****919 *141** *Joyce Livestock Co. v. United States*, 144 Idaho 1, 15, 156 P.3d 502, 516 (2007). However, the policy against waste does not permit a junior appropriator to take water before it would reach the senior appropriator.

In *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966), we addressed the issue of whether an upstream junior appropriator could deprive a senior appropriator of irrigation water due to significant conveyance losses in spring water reaching the creek from which the senior diverted water. The creek flowed through a swampy area that was fed by springs on both sides, and the junior appropriator constructed a ditch between the creek and the springs on one side of the creek to catch the water. *Id.* at 216, 419 P.2d at 471. The ditch was the junior's only diversion. *Id.* There was a dispute as to how much water from the springs would actually reach the creek, and the district court found that "only a portion of the flow of the springs reaches Spring Creek," although it did not quantify what that portion was. *Id.* at 216–17, 419 P.2d at 471–72. However, the court did find that the "best use of the water flowing from the springs and the swampy area around the [junior's] ditch is the collection of said water in the [junior's] ditch for irrigation of the property served by said ditch." *Id.* at 217, 419 P.2d at 472. We reversed the district court, stating:

> Under the facts involved in this case, the court's conclusion that the best use of the water was the use made of it by defendant, is immaterial and lends no support to the judgment. The policy of the law against the waste of irrigation water cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator. So long as the water from the springs and swamps, flowing in its natural channels, *would reach Spring Creek in usable quantities, plaintiffs are entitled to enjoin defendant's interference therewith. The fact that some of the water would be lost by evaporation or percolation would not afford this defendant any right to divert it.*

Id. at 219, 419 P.2d at 474 (emphasis added). As we stated in *Martiny*, the junior appropriator cannot take the water as long as the water would reach the senior appropriator "in usable quanties." *Id.*

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We reiterated that holding in *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976), wherein we stated:

> As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator *so long as the water flowing in its natural channels would reach the point of downstream diversion.*

Id. at 739, 552 P.2d at 1224 (emphasis added). We added that a junior appropriator could take the water only if "due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use." *Id.*

There is no contention that **Rangen** is wasting the water it is diverting. The only issue is whether water being taken by junior appropriators would reach **Rangen's** point of diversion in sufficient quantity for him to apply it to beneficial use.

E. I concur in the result with respect to Part B of the majority opinion.

As I stated above, it is clear that the Director based his decision upon the inaccuracy of ESPAM 2.1 combined with the large number of acres that would be dried up if the software's prediction was incorrect.

The Director found that ESPAM 2.1 is "an imperfect approximation of a complex physical system," but it was the best scientific tool currently available for predicting the effects of groundwater pumping on the discharge at the **Rangen** model cell. That cell is not simply the Curren Tunnel from which **Rangen** obtains water, but the Director found that 63% of the curtailment benefits accruing to the model cell would accrue to the tunnel. In reaching his decision, the Director took into consideration the inaccuracy of ESPAM 2.1 in predicting the water that would flow to ***142 **920** the Curren Tunnel if pumping east of the Great Rift were curtailed. The Director stated:

> There is generally higher predictive uncertainty on the eastern side of the Great Rift, however impacts from several pumping locations evaluated on the eastern side of the Great Rift had negligible impacts on the spring cell evaluated in the Department's predictive uncertainty analysis. Uncertainty in the model justifies use of a trim line.

We held in *Clear Springs Foods* that the Director has the discretion to establish a trim line based upon uncertainty in the computer model. We stated:

> The Director concluded that there was up to a 10% margin of error in the groundwater model due to the margin of error in the stream gauges, and he decided not to curtail appropriators who were within that margin of error when deciding whether they were causing material injury to the Spring Users' water rights. The Director perceived the issue as discretionary, he acted within the outer limits of his discretion and consistently with the legal standards applicable to the available choices, and he reached his decision through an exercise of reason. The district court did not err in upholding the Director's decision in this regard.

150 Idaho at 817, 252 P.3d at 98.

In this case, the Director set the trim line at the Great Rift. Model uncertainty is the only constitutional basis for doing so.

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Justice HORTON concurs.

160 Idaho 119, 369 P.3d 897

All Citations

Footnotes

1 CMR 42 sets forth several factors for the Director to consider when determining whether holders of water rights are suffering injury and using water efficiently and without waste. *See* IDAPA 37.03.11.042.01(a)–(h).

2 In determining whether to implement a trim line, the Director stated that he perceived the issue "as one of limited discretion." IGWA contends that the Director's use of the word "limited" indicates that the Director improperly limited his ability to evaluate whether **Rangen's** means of appropriation is reasonable and to prevent hoarding of water. However, as argued by IDWR, the Director's recognition that his discretion is limited is in line with the Court's holding in *AFRD2* that the Director's discretion in this area is "not unfettered." 143 Idaho at 880, 154 P.3d at 451. The Director's recognition that his discretion was limited does not mean that the director failed to recognize the issue as one of discretion, only that the Director recognized that he needed to express legal and factual support for his decision. This is not a situation where the Director failed to exercise any discretion.

3 In *Clear Springs,* we held that "[t]here is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest." *Clear Springs,* 150 Idaho at 808, 252 P.3d at 89.

4 The *Schodde* quotes herein were originally stated by the trial court rather than the U.S. Supreme Court. However, the Supreme Court stated

> [w]e have freely excerpted from the opinions of the courts below because, in our judgment, they so clearly portray the situation, and correctly apply the law to that situation as resulting from the Constitution and statutes of Idaho and the reiterated decisions of the court of last resort of that state ... that we might place our decree of affirmance upon the reasons which controlled the courts below.

Schodde, 224 U.S. at 121–122, 32 S.Ct. at 473, 56 L.Ed. at 691–92.

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170 Idaho 251
Supreme Court of Idaho,
Boise, February 2022 Term.

3G AG LLC, an Idaho limited liability company, Petitioner-Appellant,
v.
IDAHO DEPARTMENT OF WATER RESOURCES, Respondent,
and
A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, Intervenors-Respondents.
In the Matter of Application for Transfer No. 83160 in the Name of Jeffrey and Chana Duffin.

Docket No. 48769

Opinion filed: May 18, 2022

Synopsis

Background: Property owners sought review of decision by Department of Water Resources denying their application to unstack ground and surface water rights and transfer licensed ground water right to different parcel of land. Objectors to application were permitted to intervene. The Seventh Judicial District Court, Bingham County, Eric J. Wildman, J., affirmed. Property owners appealed, and following sale of subject property, purchaser was substituted as appellant.

Holdings: The Supreme Court, Stegner, J., held that:

[1] transfer was prohibited on ground that it would result in enlargement of water rights;

[2] as matter of first impression, Department's examination of interrelationship between stacked water rights was not impermissible collateral attack on licensed ground water right;

[3] Department's memorandum interpreting statute governing transfer of water rights supported denial of application;

[4] transfer was prohibited on ground that it would per se injure other existing water rights; and

[5] reasonableness of a challenge to an agency's conclusions of law, when considering attorney fees under statute authorizing attorney fees to prevailing party in any proceeding involving state agency, does not turn on whether arguments were merely repeated or repackaged from below, abrogating *Rangen, Inc. v. Idaho Department of Water Resources*, 159 Idaho 798, 367 P.3d 193.

Affirmed.

Procedural Posture(s): On Appeal; Review of Administrative Decision; Motion for Attorney's Fees.

West Headnotes (22)

[1] **Administrative Law and Procedure**—Scope and Standards of Further Review

In an appeal from the decision of a district court acting in its appellate capacity under the Idaho Administrative Procedure Act (IDAPA), the Supreme Court reviews the agency record independently of the district court's decision. Idaho Code Ann. § 42-1701A(4).

[2] **Administrative Law and Procedure**—Trial or review de novo

The Supreme Court exercises de novo review over questions of law in an appeal from the decision of a district court acting in its appellate capacity under the Idaho Administrative Procedure Act (IDAPA). Idaho Code Ann. § 42-1701A(4).

[3] **Water Law**—Quantity; enlargement or additional appropriation

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There are two types of enlargement of a water right within the meaning of the statutes prohibiting transfers of and changes to the point of diversion or place of use of water rights from constituting an enlargement of the right: (1) an increase in the number of acres irrigated, and (2) an increase in the rate of diversion or duration of diversion. Idaho Code Ann. §§ 42-222(1), 42-1425(2).

[4] **Water Law**⇐Quantity; enlargement or additional appropriation

Unstacking ground and surface water rights to transfer licensed ground water right to different parcel of land would result in enlargement of water rights, and thus, transfer was prohibited on such basis by statute governing transfer of water rights, where current ground and surface water rights allowed irrigation of 53.9 acres at one location, and transfer would double number of irrigated acres by allowing irrigation of 53.9 acres at each of two separate locations. Idaho Code Ann. § 42-222(1).

[5] **Water Law**⇐Quantity; enlargement or additional appropriation

The statute governing the transfer of water rights requires the Department of Water Resources to examine the relationship between stacked water rights that provide beneficial use to the same place of existing use when deciding whether transferring one of the stacked rights will result in a prohibited enlargement in consumptive use. Idaho Code Ann. § 42-222(1).

[6] **Appeal and Error**⇐Statutory or legislative law

The Supreme Court exercises free review over statutory interpretation because it is a question of law.

[7] **Statutes**⇐Intent

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act.

[8] **Statutes**⇐Literal, precise, or strict meaning; letter of the law

Statutory interpretation begins with the literal language of the statute.

[9] **Statutes**⇐Context

Statutory provisions should not be read in isolation, but must be interpreted in the context of the entire act.

[10] **Statutes**⇐Plain Language; Plain, Ordinary, or Common Meaning
Statutes⇐Statute as a Whole; Relation of Parts to Whole and to One Another

A statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings.

[11] **Statutes**⇐Superfluousness

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A court must give effect to all the words and provisions of a statute so that none will be void, superfluous, or redundant.

[12] Statutes⇐Purpose and intent; unambiguously expressed intent

When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the court need not consider rules of statutory construction.

[13] Water Law⇐Waste

Individual water right holders cannot waste or unnecessarily hoard water without putting it to beneficial use. Idaho Const. art. 15, § 3.

[14] Water Law⇐Proceedings on application to amend permit or decree, or to transfer rights

Examination by Department of Water Resources of interrelationship between stacked ground and surface water rights, in denying transfer of licensed ground water right to different parcel of land, did not constitute impermissible collateral attack on previously licensed ground water right, even though Department imposed a "single combined beneficial use" limit to describe overlapping water rights, since such limit on water rights was byproduct of evaluating relationship between overlapping water rights, as required by statute governing transfer of water rights, not additional element to licensed ground water right or condition on existing element of ground water right. Idaho Code Ann. § 42-222(1).

[15] Water Law⇐Review

Even if memorandum by Department of Water Resources (DWR) interpreting statute governing transfer of water rights was not given considerable weight by trial court, on review of decision by DWR, as agency interpretation of statute, weight given memorandum was immaterial, as memorandum supported decision denying application to unstack ground and surface water rights to transfer licensed ground water right to different parcel of land; memorandum's guidance on how to evaluate a transfer application that proposed to change place of use for a stacked water right included presumption that unstacking overlapping water rights would result in prohibited enlargement in consumptive use, and subject transfer application would result in a doubling in number of irrigated acres. Idaho Code Ann. § 42-222(1).

[16] Water Law⇐Quantity; enlargement or additional appropriation

Unstacking ground and surface water rights to transfer licensed ground water right to different parcel of land would per se injure other existing water rights, and thus, transfer was prohibited on such basis by statute governing transfer of water rights, since transfer would result in enlargement of water rights by doubling number of irrigated acres. Idaho Code Ann. § 42-222(1).

[17] Water Law⇐Quantity; enlargement or additional appropriation

There is a per se injury to junior water rights holders anytime an enlargement of a water right receives priority.

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193, Idaho Code Ann. § 12-117(1).

1 Cases that cite this headnote

[18] Water Law⇐Priorities

Priority in time is an essential part of water law and to diminish one's priority works an undeniable injury to that water right holder.

[19] Water Law⇐Review

Department of Water Resources and objectors to property owner's application to unstack ground and surface water rights to transfer licensed ground water right to different parcel of land were not entitled to award of attorney fees under statute authorizing attorney fees to the prevailing party in any proceeding involving as adverse parties a state agency and a person, even though Department and objectors were prevailing parties on property owner's appeal from district court decision affirming Department's denial of application, since it was reasonable for property owner to argue that Department's action of imputing a "single combined beneficial use" limit against fully licensed water right during a transfer evaluation was impermissible collateral attack on a fully licensed water right. Idaho Code Ann. § 12-117(1).

[20] States⇐Costs

The reasonableness of a challenge to an agency's conclusions of law, when considering attorney fees on appeal under the statute authorizing attorney fees to the prevailing party in any proceeding involving as adverse parties a state agency and a person, turns on the substance of the nonprevailing party's legal arguments—not on whether the arguments were merely repeated or repackaged from below; abrogating *Rangen, Inc. v. Idaho Department of Water Resources*, 159 Idaho 798, 367 P.3d

[21] Water Law⇐Review

Objectors to property owner's application to unstack ground and surface water rights to transfer licensed ground water right to different parcel of land were not entitled to award of attorney fees under statute authorizing attorney fees to a prevailing party in any civil action, even though objectors were prevailing party on property owner's appeal from district court decision affirming denial of application by Department of Water Resources, where appeal originated from property owner's petition for judicial review of Department's final order denying transfer application, not from a complaint. Idaho Code Ann. § 12-121.

[22] Administrative Law and Procedure⇐Attorney fees
Costs, Fees, and Sanctions⇐Particular Subjects of Litigation

Attorney fees under the statute authorizing attorney fees to a prevailing party in any civil action are available in civil actions where a complaint is filed—not in proceedings initiated by a petition for judicial review of an agency's final order. Idaho Code Ann. § 12-121.

***1183** Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bingham County. Eric J. Wildman, District Judge.

The judgment of the district court is affirmed.

Attorneys and Law Firms

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Holden Kidwell Hahn & Crapo, P.L.L.C. Idaho Falls, for Appellants. Robert L. Harris argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for Respondent Idaho Department of Water Resources. Michael C. Orr argued, and Garrick L. Baxter appeared.

Baker Rosholt & Simpson, LLP, Twin Falls, for Intervenors A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

Fletcher Law Office, Burley, for Intervenors American Falls Reservoir District #2 and Minidoka Irrigation District. William Kent Fletcher argued.

Opinion

STEGNER, Justice.

This appeal concerns the denial of an application to transfer a ground water right that currently benefits 53.9 acres which also has an entitlement to surface water rights. The transfer application sought to unstack these two overlapping rights by transferring the ground water right to irrigate a different property, which would double the number of acres being irrigated. The Idaho Department of Water Resources ("IDWR") denied the transfer because, among other reasons, approving it would cause an "enlargement" in the use of water as proscribed by Idaho Code section 42-222(1). On judicial review, the district court agreed with the denial and affirmed. We affirm the decision of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal centers around IDWR's denial of Application 83160, brought by Jeffrey and Chana Duffin ("Duffin"), to transfer the licensed ground water right 35-7667 (the "ground water right" or "35-7667") to a different parcel of land. During the appeal of this case, 3G AG LLC ("the LLC") "purchased from Duffin the property where water *1184 right 35-7667—the water right subject to Transfer No. 8316 which is the subject of this appeal—is located." As a result of the transfer of ownership, the LLC sought to substitute itself for Duffin. Because there was no objection to the substitution, it was allowed. The material facts leading up to the denial are undisputed.

In 1977, IDWR granted a ground water permit for 35-7667 to irrigate the existing place of use in this appeal (i.e., the 53.9 acres). The application for the permit reported that there were no other water "rights" used for the "same purposes" at this place of use. IDWR's analysis of the application reached the same conclusion. The then owner of the 53.9 acres eventually submitted proof of beneficial use for the ground water permit on June 11, 1992. That date became the priority date, and four years later, IDWR examined whether the permit for 35-7667 should be processed into a licensed ground water right. During this time, IDWR's field exam notes explained that the same place of use for 35-7667 (the 53.9 acres) was also benefited by a surface water entitlement through 60 shares in the Aberdeen-Springfield Canal Company (the "surface water entitlement"). Nevertheless, IDWR's field report later documented that there were no overlapping water "rights" benefiting the 53.9 acres.

In 1993, IDWR ordered a moratorium on processing applications for new surface or ground water diversions in the Eastern Snake River Basin—the same area where the 53.9 acres is located. The moratorium, which is still in effect today, explains that

> [g]round water aquifers have become stressed by the reduction in natural recharge due to changes in diversion and use of surface waters throughout the basin and by the increased volume of pumping occurring to augment scarce surface water supplies during the drought period. The lowered water levels in the aquifers across much of the Snake River Basin in southern Idaho have resulted in numerous wells, often those used for domestic and municipal water supply purposes becoming unusable. Lowered ground water levels also reduce spring and base flow discharge needed to maintain stream and river flows.

In 2001, IDWR granted a license for the ground water right. The license stated, among other things, that it had a maximum diversion rate of 1.1 cubic feet per second; it had a maximum diversion volume of 220-acre feet; the source was ground water; and the beneficial use was irrigation. The license also contained a condition that "[t]his right when combined with all other rights shall provide no more than 0.02 [cubic-feet per second] per

acre nor more than 4.0 [acre-feet annually] per acre at the field headgate for irrigation of the lands above."

Seven years later, in 2008, the Idaho Legislature adopted IDWR's comprehensive management plan for the Eastern Snake Plain Aquifer ("the ESPA"). This plan was prepared by IDWR in response to "declining aquifer levels and spring discharges and changing Snake River flows that resulted in insufficient water supplies to satisfy existing beneficial uses." One objective of the plan is to "reduce the withdrawals" from the ESPA. Another objective is to "increase recharge" to the ESPA. Most of the recharge water comes through the Snake River, or its tributaries. This includes surface water recharge through the Aberdeen-Springfield Canal Company's water entitlements. In sum, the plan governs roughly 2.1 million irrigated acres on top of the ESPA. Of these acres, approximately 871,000 acres are irrigated from surface water, 889,000 acres are irrigated from ground water, and 348,000 acres are irrigated from both sources.

One year after implementing the plan, IDWR issued a guidance document for processing water right transfers under Idaho Code section 42-222(1) (the "Transfer Memo"). The Transfer Memo explains that a transfer application, under section 42-222(1), is required whenever a water right holder desires to change one, or multiple, water right "elements" on a licensed or decreed right. This includes changes to the point of diversion or place of use. The Transfer Memo ***1185** goes on to explain the requirements for an acceptable transfer application. It also elaborates upon what may constitute "enlargement" in use of a water right. Part of its guidance as to whether approving a transfer will enlarge the use of a water right addresses "stacked" or overlapping water rights benefiting the same place of use.

In 2012, Duffin acquired ownership of the property to which the ground water right and surface water entitlement attached. Three years later, in 2015, IDWR approved Duffin's application to divide the ground water right so that the place of use was identified as the 53.9 acres that the right presently benefits. The license was amended to reflect this change, but otherwise remained the same. Five years after that, in 2017, Duffin ceased using the ground water right to irrigate the 53.9 acres and instead began exclusively using the surface water entitlement.

Two years later, in 2019, Duffin submitted Transfer Application 83160 to change the point of diversion and place of use for the ground water right to benefit a different property. In the application, Duffin reported that the existing place of use (the 53.9 acres) would still be irrigated with the surface water entitlement if the transfer were approved. The local watermaster did not oppose the proposed transfer. However, a notice of protest to the transfer was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively "the Coalition"). The Coalition objected to the transfer, arguing that approving it would cause an enlargement in use of the ground water right and injure existing water rights.

After numerous status conferences, Duffin and the Coalition agreed that an evidentiary hearing was not needed because the material facts were not in dispute. Subsequently, the parties filed a statement of stipulated facts. From this, the hearing officer requested briefing on how to resolve the sole legal question: whether Duffin's application satisfied the transfer criteria set forth in Idaho Code section 42-222(1) such that the transfer must be approved. After the parties submitted their briefing, the hearing officer issued a preliminary order denying Duffin's application to transfer the ground water right.

Duffin petitioned for reconsideration. The hearing officer granted the petition in part and issued an amended preliminary order. However, this order still denied Duffin's transfer application. In August of 2020, the amended preliminary order became final after it was adopted in whole by the director of IDWR (the "Final Order"). The Final Order made the following findings, among others, based on the stipulated facts: the ground water right has been exclusively used to irrigate the existing place of use (the 53.9 acres) since at least April 1, 1980; the same place of use is also benefited by a surface water entitlement that has been appurtenant to it since at least 1970; the two rights have never been used together in the same year to irrigate the existing place of use; the ground water right has been used to irrigate the existing place of use up to 2017; and from 2017 to the present day, the surface water entitlement has been used to irrigate the place of existing use.

The Final Order applied these facts to this Court's discussion of the term "enlargement" in *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001). *Barron* dealt with a transfer application proposing to unstack overlapping ground and surface water rights. As discussed below, the Final Order reasoned that, under *Barron*, approving the transfer would cause an enlargement in use of the ground water right and injury to other water rights. In addition, approval was not consistent with the conservation of water resources in Idaho or the local public interest. From this, the Final

Order concluded that the transfer must be denied because the criteria in Idaho Code section 42-222(1) had not been met.

Roughly one month later, in September 2020, Duffin petitioned the district court for judicial review of the Final Order. Pursuant to a December 9, 2009, administrative order from this Court, the matter was assigned to the district judge presiding over the Snake River Basin Adjudication. The district court permitted the Coalition to intervene in Duffin's petition, and in February of 2021, the ***1186** court held oral argument. Approximately two weeks later, the district court issued a memorandum decision affirming the Final Order and IDWR's decision to deny Duffin's transfer application. The district court, among other things, agreed with the Final Order's reliance on *Barron* as dispositive and found that approval of the transfer would cause an "enlargement" in use of the ground water right and injury to other water rights. Thus, the district court concluded that Duffin's application for transfer under Idaho Code section 42-222(1) was appropriately denied by IDWR.

Duffin timely filed a notice of appeal.

II. STANDARD OF REVIEW

Judicial review of a final decision or order from the director of IDWR is authorized by Idaho Code section 42-1701A(4) and governed by the provisions and standards under the Idaho Administrative Procedure Act ("IDAPA"). *See* I.C. §§ 67-5201 to -5292.

[1] [2]In an appeal from the decision of a district court acting in its appellate capacity under IDAPA, we review the agency record independently of the district court's decision. *A & B Irr. Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012). We will not "substitute [our] judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). However, we exercise *de novo* review over questions of law. *In Re SRBA Case No. 39576 Subase No. 37-00864*, 164 Idaho 241, 248, 429 P.3d 129, 136 (2018).

When an agency is required by the provisions of IDAPA, or by other provisions of law, to issue an order, a reviewing court shall affirm the agency action 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.

I.C. § 67-5279(3).

If the reviewing court does not affirm the agency action, "it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." *Id.* However, even if one of the conditions in section 67-5279(3)(a)-(e) is met, a reviewing court should still affirm the agency action "unless substantial rights of the appellant have been prejudiced." *A & B Irr. Dist.*, 153 Idaho at 505–06, 284 P.3d at 230–31 (quoting I.C. § 67-5279(4)).

III. ANALYSIS

This appeal hinges on the interpretation of "enlargement" under Idaho Code section 42-222(1) as it relates to a transfer application proposing to unstack overlapping ground and surface water rights. The LLC, which substituted for Duffin, maintains that IDWR's decision to deny the transfer application violates applicable statutory provisions and is in excess of its statutory authority. *See* I.C. § 67-5279(3)(a), (b). All material facts are undisputed. Accordingly, the LLC's challenge to the denial of its transfer application presents a pure question of law.

A. Approving the transfer application would cause an "enlargement in use" of the ground water right under Idaho Code section 42-222(1) and *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).

Idaho Code section 42-222(1) sets forth the criteria used by IDWR to evaluate applications to transfer water rights whenever a right holder desires to change a water right's "point of diversion, place of use, period of use[,] or nature of use[.]" IDWR must furnish the form required to complete a transfer application. I.C. § 42-222(1). When evaluating an application, the statute instructs IDWR to, among other things, examine "all the evidence and available information" and to approve the application *unless* approval would: (1) injure other water rights; (2)

constitute an "enlargement in use of the original right"; (3) be contrary to the conservation of water ***1187** resources within the state of Idaho; or (4) be contrary to the "local public interest[.]" *Id.*; *see also* I.C. § 42-202B(3) (defining "local public interest"). IDWR may consider "consumptive use" as one factor in its "enlargement" evaluation. I.C. § 42-222(1); *see also* I.C. § 42-202B(1) (defining "consumptive use").

In this case, IDWR, in its Final Order, denied the application to transfer the ground water right after concluding approval of the transfer would: (1) constitute an enlargement in use of the ground water right; (2) injure other water rights in either the Upper Snake River system or the ESPA; (3) be contrary to the conservation of water resources in the state of Idaho; and (4) be contrary to the local public interest as the proposed point of diversion is within the 1993 moratorium aimed at recharging the ESPA and concomitantly reducing withdrawals. The linchpin of IDWR's decision is that approval of the transfer would constitute an "enlargement" under this Court's enlargement and unstacking analysis in *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).

On appeal, the LLC rejects the theory of enlargement in *Barron* as *dicta* and advances its own theory of what an "enlargement" analysis should look like under Idaho Code section 42-222(1). Under the LLC's theory, the plain language of section 42-222(1) limits IDWR to examining the four corners of the license or decree of the water right to be transferred (the "original right") when determining whether approving the transfer will cause a prohibited enlargement. The LLC maintains that IDWR erred by examining all relevant water rights or entitlements implicated by the transfer, and imputing limitations or conditions on the right to be transferred that do not appear on the face of its license.

The LLC points out that the license for the ground water right does not contain any express limitations on its beneficial use apart from a limitation memorializing the "duty of water" under Idaho Code section 42-220. From this, the LLC maintains that IDWR improperly added a "single combined beneficial use" limit to the ground water right, in its relationship to the surface water entitlement, that does not exist within the four-corners of the ground water right's license. If this "error" is corrected, the LLC argues that unstacking the ground water right and transferring it to a new parcel will not cause an "enlargement" under section 42-222(1). This is because the ground water right, without any limitations on its face to combine it with the surface water entitlement, is a stand-alone right that can be freely transferred.

In other words, the LLC maintains that whether the ground and surface water rights are *in fact* stacked and benefit the same 53.9 acres is not relevant to the "enlargement" analysis under section 42-222(1) because the license for the ground water right does not provide that this overlap limits the ground water right in any way. The LLC claims that holding otherwise would collaterally add limits to a previously licensed water right. In addition, the LLC points to the Transfer Memo as supporting its theory of enlargement and argues the Transfer Memo was improperly denied "considerable weight" as an agency interpretation of Idaho Code section 41-222(1).

In response, IDWR and the Coalition advance essentially the same position they did below: that *Barron* provides the correct "enlargement" analysis in this context, and that it was properly applied. For the reasons discussed below, we reject the LLC's new theory of enlargement as contrary to the plain language of Idaho Code section 42-222(1) and our decision in *Barron*. Accordingly, we affirm the district court's decision that the Final Order correctly denied the proposed transfer.

To begin, the meaning of "enlargement" under Idaho Code section 42-222(1) is not defined by statute or rule. *See* I.C. §§ 42-201 to -250; IDAPA 37.01.01.000–.999. In *Fremont-Madison Irrigation District & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, we defined "enlargement" in the context of water right transfers under Idaho Code section 42-1425(2). 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). "Section 42-1425(2) of the Idaho Code provides for a transfer of an existing water right for any ***1188** change made prior to the date of commencement of the [Snake River Basin Adjudication], regardless of compliance with sections 42-108 and 42-222, 'provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.' " *Id.*

[3]In *Fremont-Madison*, we noted that section 42-1425(2) did not define the term "enlargement." *Id.* Nevertheless, we said "enlargement" is understood "to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means." *Id.* (citing I.C. § 42-1426(1)(a)). An "enlargement" can also include an "increase in the volume of water diverted" as a result of the transfer. *Fremont-Madison Irr. Dist. & Mitigation Grp.*, 129 Idaho at 458, 926 P.2d at 1305. Thus, there are

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two types of enlargement: (1) "an increase in the number of acres irrigated"; and (2) "an increase in the rate of diversion or duration of diversion." *Id.* Although *Fremont-Madison* dealt with "enlargement" in the context of transferring water rights under section 42-1425(2) and not section 42-222(1), there is no language in either statute that suggests the Idaho Legislature intended "enlargement" to mean something different as between these two transfer statutes.

In *Barron*, we specifically addressed both types of "enlargement" in the context of a transfer under section 42-222(1). 135 Idaho at 419–20, 18 P.3d at 224–25. In that case, Barron proposed to transfer a surface water right by unstacking it from an overlapping ground water right at the existing place of use, and then establishing two new points of diversion—one fifteen miles upstream and the other eighty miles downstream. *Id.* at 415, 18 P.3d at 220. At the place of existing use, the surface water right overlapped with, and benefited, the same 311 acres as the ground water right. *Id.* The two "enlargement" issues in *Barron* were whether: (1) the transfer would cause an increase in the rate or duration of diversion at the two proposed points of diversion; and (2) whether unstacking the overlapping surface and ground water rights would cause an increase in the total number of acres irrigated, i.e., an increase in overall beneficial use. *Id.* at 419–420, 18 P.3d at 224–25. Under the first issue, we affirmed the decisions below that Barron failed to provide any meaningful evidence regarding the period of use, amount of water to be diverted or consumed, or whether and to what extend the ground water right was used to supplement the surface water right. *Id.* at 419, 18 P.3d at 224. Thus, *one* reason for the denial was because Barron did not carry his burden to show that approving the transfer would not cause an increase in the rate of, or duration of, overall diversion. *Id.*

Under the second issue, which is relevant to this case, we also affirmed the decisions below that, as a matter of law, unstacking the overlapping water rights would cause an "enlargement" if the result is that the two rights would irrigate more acres than are benefited at the existing place of use. *Id.* at 420, 18 P.3d at 225. Barron did not challenge this theory of "enlargement" under Idaho Code section 42-222(1). *See id.* Instead, Barron contended that he provided sufficient evidence that the surface water right was a "stand alone" right and that the existing place of use, the 311 acres, would be "farmed as dry land" to prevent any enlargement once the surface water right was transferred to the proposed place of use. *Id.* However, we rejected this argument because Barron did not own or exercise control over the existing place of use he claimed would be relegated to dry farming after the transfer. *Id.* Barron's proposal was "in reality an attempt to shift the burden of preventing enlargement to [ ] IDWR, yet it is Barron and not [IDWR] who bears this burden." *Id.*

Due to the relationship of the stacked rights, *Barron* held that the surface water right was subject to the overlapping ground water right's "utilization." *Id.* We concluded Barron did not provide sufficient evidence to show unstacking these rights would not cause an enlargement through an increase in total acres irrigated. *Id.* From this, we affirmed the denial of Barron's transfer application after reaching the merits of *both* enlargement issues under Idaho Code section 42-222(1). *Id.* Accordingly, IDWR and district court were correct to conclude *Barron* provides precedent for a transfer application ***1189** seeking to unstack overlapping water rights. Contrary to the LLC's arguments, *Barron*'s theory of enlargement under section 42-222(1) in the context of unstacking is not *dicta*. Even if it were, we conclude that it is a correct statement of law.

In applying *Barron* to the transfer application in this case, the Final Order concluded that the proposed change to the ground water right would result in "an increase in the number of acres irrigated, which is an enlargement" because the ground water right and surface water right would provide irrigation for 107.8 acres, which would double the number of acres currently being irrigated with the "stacked" rights:

> The proposed change to water right 35-7667 [ground water right] will result in an increase in the number of acres irrigated, which is an enlargement, as noted above. Currently, water right 35-7667 [ground water right] and the ASCC shares [surface water entitlement] authorize the irrigation of the same 53.9 acres. *These two water rights, in combination, represent a single beneficial use of water at the existing place of use—the irrigation of 53.9 acres.* If these two rights were separated or unstacked, the beneficial use associated with the water rights would double, because the acres being irrigated under the water rights would double. Water right 35-7667 [ground water right] and the ASCC shares [surface water entitlement] represent a single beneficial use of water (the

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> irrigation of 53.9 acres) regardless of whether the acres have been irrigated with ground water, surface water, or both in the same irrigation season. The changes proposed in Application 83160 would result in an enlargement of water right 35-7667 [ground water right] and must be denied pursuant to Idaho Code § 42-222(1).

(Italics added.)

The Final Order also concluded that the dispute over whether the ground water right should be considered a "primary" or "supplemental" water right (i.e., secondary to the surface water right) does not need to be resolved because the "enlargement analysis would be identical in either case." This is because the ground water right and the surface water right "each represented a full water supply for the irrigation of the existing 53.9-acre place of use, but the total combined beneficial use for the two sources has always been no more than 53.9 irrigated acres." If the transfer application is approved, the LLC would be authorized to exercise its "water rights in a way that will result in 107.8 acres being irrigated for the full irrigation season, instead of the 53.9 acres which are currently irrigated under the rights." Because the transfer application did not propose to divide the existing beneficial use between the ground water right and surface water entitlement, IDWR concluded "there is no need for an analysis of the historical primary or supplemental use under the rights."

On judicial review, the district court agreed, reiterating IDWR's position that approving the transfer would necessarily result in doubling the existing beneficial use as authorized between the stacked rights:

> Simply stated, the transfer would permit the Duffins to do what they cannot do now—use the full water supply under each overlapping water right at the same time for purposes of irrigation. The ability to use the full amount authorized under the ground water right for irrigation *even if* they are also irrigating the original place of use with their ASCC shares is an enlargement of the ground water right. Without the transfer, the Duffins would be precluded from using the ground water right in this fashion due to (1) the duty of water limit, and (2) the right's conditional remark. With the transfer, these limitations are removed, with the result that each right may be used simultaneously to irrigate 107.8 total acres as opposed to 53.9. Irrigating additional acres in this fashion would necessarily result in an increase in consumptive use and reduce return flows to the system. Therefore, the [c]ourt finds [IDWR] correctly concluded the proposed transfer would result in an enlargement in use of the ground water right. It follows the [Final Order] must be affirmed.

(Italics in original.)

[4]We agree with the analysis and conclusion of the district court. The *Barron* theory of enlargement under section 42-222(1) ***1190** controls and the district court correctly applied *Barron* in denying the transfer application. In this case, approving the transfer application would permit concurrent use of the ground water right with the surface water right, allowing irrigation of 53.9 acres at two separate locations. Currently, the two rights may only irrigate 53.9 acres at one location. After transfer, the rights would double the number of irrigated acres. Accordingly, there would be an increase in total irrigated acres if the transfer were approved. This would result in an "enlargement" under Idaho Code section 42-222(1) and *Barron*. Thus, the transfer application was appropriately denied. The LLC's arguments to the contrary are unpersuasive.

1. The plain language of Idaho Code section 42-222(1) requires IDWR to examine the relationship between stacked water rights before authorizing a transfer.

[5]The LLC's new theory of enlargement is contrary to the plain language of Idaho Code section 42-222(1). The plain language of section 42-222(1) requires IDWR to examine the *relationship* between stacked water rights that provide beneficial use to the same place of existing use when deciding whether transferring one of the stacked

rights will result in an enlargement.

[6] [7] [8] [9] [10] [11] [12]This Court exercises free review over statutory interpretation because it is a question of law. *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). The standard for statutory interpretation is well-settled:

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Melton v. Alt, 163 Idaho 158, 162–63, 408 P.3d 913, 917–18 (2018) (quoting *Dunlap*, 155 Idaho at 361–62, 313 P.3d at 17–18).

Here, the LLC disputes *Barron*'s theory of "enlargement" by proposing a new interpretation of Idaho Code section 42-222(1). The statute provides in relevant part:

> Any person .... who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change .... The director of the department of water resources *shall examine all the evidence and available information* and shall approve the change in whole, or in part, or upon conditions, provided [1] no other water rights are injured thereby, [2] *the change does not constitute an enlargement in use of the original right*, [3] the change is consistent with the conservation of water resources within the state of Idaho and [4] is in the local public interest as defined in section 42-202B .... The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

I.C. § 42-222(1) (italics added).

The LLC's interpretation suggests the statute's "original right" language limits IDWR's examination to only the language within the four corners of the license to be transferred when determining if approving a transfer will cause an enlargement. On the other hand, IDWR and the Coalition argue the LLC's interpretation fails to give effect to *all* the words in the statute and is contrary to the plain language of the statute. We agree with IDWR and the Coalition.

[13]The transfer statute begins with an overarching requirement that IDWR "shall" examine or consider "all the evidence and available information" relevant to a transfer application. I.C. § 42-222(1). Indeed, IDWR is tasked with providing the transfer form that requests such relevant evidence and information ***1191** from an applicant. *See id.* We cannot read the "original right" language in isolation as the LLC suggests. *See Melton*, 163 Idaho at 162–63, 408 P.3d at 917–18. Read as a whole, section 42-222(1) requires IDWR to consider whether transferring the "original right" will cause an enlargement "*in use*" of that right when considering "*all the evidence* and available information[.]" I.C. § 42-222(1) (italics added). This broad mandate is supported by Idaho's longstanding principle that individual water right holders cannot "waste" or "unnecessarily hoard" water without putting it to beneficial use. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). Consistent with Article XV, section 3, of the Idaho Constitution, it is well-settled that

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> no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration.

Wash. State Sugar Co. v. Goodrich, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915); *see also* IDAHO CONST. art. XV, § 3.

Moreover, "all ground water pumpers impact all hydraulically connected surface water users in the same aquifer and [ ] all users of hydraulically connected surface water are hydraulically impacted by all ground water users." Gary S. Johnson, *Hydrologic Complications of Conjunctive Management*, 47 IDAHO L. REV. 205, 215 (2011). Thus, in examining "all the evidence" in a transfer application, IDWR must stay mindful of its duty to conjunctively manage the waters of the Upper Snake River system and the ESPA. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011). Indeed, "[c]onjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication." *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).

From this, it follows that examining the relationship, if any, between the right to be transferred and any overlapping or stacked water rights is crucial to determining whether enlargement in consumptive use would occur as a result of a transfer (e.g., increase in total acres irrigated than before the transfer). This necessarily requires IDWR, consistent with *Barron*, to examine the relationship of the right to be transferred with other stacked rights before approving or denying a transfer application under Idaho Code section 42-222(1). The LLC's argument would tie IDWR's hands and prohibit the analysis that section 42-222(1) requires.

2. IDWR's transfer evaluation under Idaho Code section 42-222(1) did not collaterally attack the previously licensed ground water right.

[14]The LLC next argues that allowing IDWR to read in new limits or conditions on a previously licensed water right during a transfer evaluation is an impermissible collateral attack on that licensed right. We disagree. In examining the interrelationship between the ground and surface water rights, the Final Order does impose a "single combined beneficial use" limit to describe the overlapping rights. However, this is not analogous to an impermissible collateral attack on a previously adjudicated or licensed water right.

In *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, we explained that imposing new conditions or limits when evaluating the relationship between water rights at issue in a delivery call is not a collateral "re-adjudication" of the water rights themselves. 143 Idaho at 876–77, 154 P.3d at 447–48. Adjudicating a water right determines, among other things, the water source, quantity, priority date, point of diversion, place, and period and purpose of use. *Id.* (citing I.C. § 42-1411(2)(a)–(j)). Conversely, the question presented in a delivery call, namely the "reasonableness" of a diversion in the administration of water rights, is not a re-adjudication of these elements because the "reasonableness" limit or condition is not one of the previously determined elements. ***1192** *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 876–77, 154 P.3d at 447–48. We explained that a partial decree "need not contain information on how *each water right* on a source physically interacts or affects *other rights on that same source*." *Id.* (Italics added.)

Here, the same reasoning applies. When IDWR imposes relationship-based conditions or limits on water rights in denying a transfer application, this is not a collateral re-adjudication of the water rights themselves. Like the unique question presented in a delivery call, the question presented in an enlargement evaluation cannot always be easily answered by, and is not necessarily part of, the elements of a water right as licensed or decreed. Thus, when IDWR reads in a "single combined beneficial use" limit on overlapping or stacked water rights in denying a transfer application—that is not a re-adjudication of the water right's elements. Such a limit is not an "element" of a water right as enumerated under Idaho Code section 42-1411(2)(a)–(j).

To be sure, sub-sections 42-1411(2)(i) and (j) indicate that "conditions" on the "exercise of any water right" or "remarks and other matters as are necessary for the definition of the right" should be included together with the water right elements listed in subsections (2)(a) through (h). However, such "conditions" typically relate to those elements already expressed on the license or decree. As in *American Falls*, a decree or license is

not required to enumerate every possible condition or limitation as to how that water right does or does not interact with other water rights involving a subsequent transfer application. The LLC's four-corners theory of enlargement would essentially require IDWR to prophetically answer every question of enlargement on every license or decree before it is issued.

In support of its "four corners" theory and collateral attack argument, the LLC relies heavily on our decision in *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017). However, the LLC's reliance is misplaced. In *City of Blackfoot*, the city applied to appropriate a new diversion of groundwater. *Id.* at 304, 396 P.3d at 1186. To offset injury to other water rights holders resulting from a new appropriation, the city proposed to use mitigation credit resulting from seepage under its surface water right. *Id.* at 305, 396 P.3d at 1187. However, IDWR determined, and we agreed, that the city's decreed surface water right could not be used for mitigation credit because the decree did not list "recharge" as one of the right's purposes of use. *Id.* at 307, 396 P.3d at 1189. "[P]urpose of use" is a water right element listed under Idaho Code section 42-1411(2)(f) that must appear on the face of a decreed water right. *Id.* at 306–07, 396 P.3d at 1188–89. Changing this element, for example by adding a new purpose of use, requires a transfer application under Idaho Code section 42-222(1). *Id.* at 308, 396 P.3d at 1190. Accordingly, in *City of Blackfoot*, we held that if the city wanted to use its surface water right for "recharge" in support of its appropriation application, the city had to first apply to change the right's purpose of use under section 42-222(1). *Id.* The city's attempt to add a new purpose of use element without this application, and without an appeal from the right at the time it was decreed, was an impermissible collateral attack on a conclusively decreed water right. *Id.*

In this case, as explained above, the "single combined beneficial use" limit imposed on stacked surface and ground water rights is not adding an "element" to the licensed ground water right. The limit is neither an element, nor a condition on an element under Idaho Code section 42-1411(2). Instead, the limit is the byproduct of evaluating the *relationship* between the overlapping ground and surface water rights during the transfer request process—a question that a four-corners analysis of *one* license or decree necessarily cannot answer. Accordingly, our holding in *City of Blackfoot* does not apply under these facts.

3. Contrary to the LLC's argument, the Transfer Memo is consistent with our interpretation of enlargement set out in *Barron* and supports the denial of the LLC's transfer application.

[15]Finally, the LLC argues that the Transfer Memo was not given "considerable weight" as an agency interpretation of ***1193** section 42-222(1). IDWR responds that the LLC's argument is foundationally flawed because the Transfer Memo is *consistent* with the theory of enlargement under *Barron*. Therefore, whether the Transfer Memo was not given "considerable weight" is immaterial because it does not support the LLC's "four-corners" theory of enlargement.

An agency interpretation may be afforded a particular level of deference based on our jurisprudence. *See Duncan v. State Bd. of Acct.*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010); *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998); *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862–63, 820 P.2d 1206, 1219–20 (1991). "Considerable weight" is one level of deference. *See J.R. Simplot Co.*, 120 Idaho at 862–63, 820 P.2d at 1219–20. However, here, even if the Transfer Memo is granted considerable weight, such weight militates in favor of denying the transfer application consistent with *Barron*.

The Transfer Memo contains an "Enlargement of Use" section providing guidance on how to evaluate a transfer application that proposes to change the place of use for a water right that is stacked with other water rights:

> (3) Stacked Water Rights. Water rights are "stacked" when two or more water rights, generally of different priorities and often from different sources, are used for the same use and overlie the same place of use. Water rights for irrigating a permissible place of use are not necessarily stacked when the water rights in total provide for irrigating up to the maximum acreage authorized within a permissible place of use. *An application for transfer proposing to "unstack" one or more water rights used for irrigation or other*

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> *use, without changing all the rights for the same use, is presumed to enlarge the water right.* However, the place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies. In other words, use of the supplemental right at the proposed place of use cannot materially exceed use of the supplemental right at the current place of use.

(Italics added.)

The Transfer Memo's presumption that unstacking overlapping water rights will result in an enlargement under section 42-222(1) is consistent with the enlargement theory we set out in *Barron*. Here, it is undisputed that the transfer application will result in a *doubling* in the number of irrigated acres. Consequently, like the analysis in *Barron*, and set out in the Transfer Memo, approving the transfer would result in an enlargement. The other sections in the Transfer Memo that the LLC points to do nothing to change this result or analysis. Accordingly, we agree with IDWR that whether the Transfer Memo was given "considerable weight" is immaterial because it does not support the LLC's "four-corners" theory of enlargement.

B. Approving the transfer application would cause injury to other water rights holders.

[16]After the enlargement issue, the district court only reached, and affirmed, the conclusions in the Final Order that (1) the proposed transfer would result in injury to other water rights holders; and (2) denying the transfer would not prejudice Duffin's substantial rights. (Duffin was still the real party in interest when the district court affirmed the Final Order.) We affirm.

[17] [18]First, "there is a *per se* injury to junior water rights holders anytime an enlargement receives priority." *A&B Irrigation Dist. v. Aberdeen–American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005). "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (quoting *Jenkins v. Idaho Dep't of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982)). Here, as explained above, transferring the ground water right would ***1194** cause an enlargement. Thus, the district court correctly affirmed the conclusion in the Final Order that approving the transfer application would *per se* injure other existing water rights.

Second, to prevail on judicial review of an agency action, a party must establish that the agency erred for one of the reasons provided under Idaho Code section 67-5279(3), *and* that such error(s) resulted in at least one of the complaining party's "substantial rights" being prejudiced. *See* I.C. § 67-5279(4). The use of "and" in the statute means that this test is conjunctive. *See Hungate v. Bonner Cnty.*, 166 Idaho 388, 393–94, 458 P.3d 966, 971–72 (2020). Here, the LLC did not show IDWR acted in violation of any statutory provisions or in excess of its statutory authority under Idaho Code section 67-5279(3). The LLC failed to show the transfer would not result in an enlargement or injury to other water rights, and IDWR was within its statutory authority to deny the LLC's application under Idaho Code section 42-222(1). Accordingly, we need not reach whether the denial prejudices the LLC's substantial rights. *See* *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 812, 367 P.3d 193, 207 (2016) (affirming the district court's decision that IDWR did not err under section 67-5279(3) without ever reaching whether Rangen's substantial rights were prejudiced).

C. IDWR and the Coalition are entitled to costs as prevailing parties on appeal, but not their attorney fees.

Both IDWR and the Coalition request attorney fees as the prevailing parties on appeal under Idaho Code section 12-117(1). The Coalition also requests attorney fees under Idaho Code section 12-121. For the reasons set forth below, we grant IDWR and the Coalition their costs, but we deny them attorney fees on appeal.

Section 12-117(1) provides in relevant part:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency ... and a person, ... the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees ... if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1).

[19]IDWR argues it is entitled to fees under section 12-117(1) because the LLC has not raised an issue of first impression; has not made a facially plausible legal argument; and has no reasonable basis to doubt *Barron*'s interpretation of "enlargement" under Idaho Code section 42-222(1). The Coalition, relying on *Rangen, Inc. v. Idaho Department of Water Resources*, 159 Idaho 798, 367 P.3d 193 (2016), maintains that attorney fees are appropriate because the LLC has "advanced ostensibly the same, failed arguments at every turn." The LLC responds that fees are not appropriate because they have presented a "legitimate question for this Court to address." In particular, the LLC points out that this is the first time IDWR has been challenged on its practice of imputing a "single combined beneficial use" limit against stacked water rights during a transfer evaluation—an issue that is not dictated by statute or explained by rule.

In *Rangen*, this Court set out a standard for granting fees to the prevailing party under Idaho Code section 12-117(1). 159 Idaho at 812, 367 P.3d at 207. Quoting our decision in *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005), *Rangen* explained that fees are appropriate when the nonprevailing party "continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision." 159 Idaho at 812, 367 P.3d at 207. Applying this standard, and without examining whether the substance of Rangen's arguments were unreasonable, we awarded fees because Rangen "asserted substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its argument." *Id.* In other words, repeating the same arguments on appeal, regardless of their basis in law or fact, was enough to conclude Rangen was acting without any "reasonable basis in fact or law." *Id.* We now distinguish the *Rangen* standard because it is inconsistent with the plain language ***1195** set out in Idaho Code section 12-117(1).

Section 12-117(1) permits an award of fees only if the nonprevailing party "acted without a reasonable basis in fact or law." Determining whether the nonprevailing party had a "reasonable" argument in law requires, at a minimum, examining the legal arguments made, i.e., the *substance* of the nonprevailing party's arguments. When it comes to questions of law, like the one presented in this case, an argument is not "unreasonable" under section 12-117(1) simply because it was repeated on appeal after being rejected by the agency and district court below. Moreover, even if the nonprevailing party does not provide new authority in support of its repeated legal argument—this has no connection to whether the argument has a "reasonable" basis in law.

Holding otherwise, and continuing the *Rangen* standard, places a higher burden on litigants seeking to challenge questions of law—which this Court reviews *de novo*—than the language of section 12-117(1) supports. The *Rangen* standard incorrectly renders every nonprevailing legal argument *per se* unreasonable, regardless of its merits, if it is repeated from the agency level through to this Court. Moreover, the *Rangen* standard discourages litigants from challenging conclusions of law made by agencies because doing so *would* require litigants to repeat the same legal argument until they receive a final answer from this Court. Discouraging litigants from challenging the legal conclusions of an executive agency necessarily stunts our power to effectuate *de novo* review and determine what the law is with finality. *See* *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* *Mead v. Arnell*, 117 Idaho 660, 669, 791 P.2d 410, 419 (1990) ("The Constitution gives both the power and a clear directive to this Court to interpret the law and to determine what administrative rules 'do or do not conflict with statutory law.' ").

[20]The reason for awarding attorney fees under section 12-117(1) in *Castrigno*, on which *Rangen* relies, was that the nonprevailing party failed to follow well-defined "statutory procedures" for appealing separate appraisals. *See* 141 Idaho at 98, 106 P.3d at 424. Although we noted in *Castrigno* that the nonprevailing party repeated the same arguments on

appeal as made below, this merely buttressed our decision to award fees. Instead, our decision focused on the substance of the nonprevailing arguments to conclude they had no "reasonable basis" in law because statutory procedure *clearly* dictated the result of the case and supported the district court's decision. *See id.* We return to the standard used in *Castringo* as consistent with the preconditions for awarding fees under section 12-117(1). The reasonableness of a challenge to an agency's conclusions of law, when considering fees under section 12-117(1), turns on the substance of the nonprevailing party's legal arguments—not on whether the arguments were merely repeated or repackaged from below.

In this case, there is no definition of "enlargement" by statute or administrative rule. Moreover, IDWR has not promulgated any rules setting out how it will deal with transfer applications under Idaho Code section 42-222(1) that seek to unstack overlapping water rights. IDWR has issued a Transfer Memo describing a presumption of "enlargement" when unstacking water rights, but this is a non-binding interpretation of section 42-222(1). It does not have the "force of law" on the issue of unstacking and enlargement like the procedure provided by statute in *Castringo*. *See Asarco Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139 (2003) ("[A]n agency action characterized as a rule must be promulgated according to statutory directives for rulemaking in order to have the force and effect of law."). Although *Barron* provides the correct "enlargement" analysis, the LLC is correct that IDWR's action of imputing a "single combined beneficial use" limit against a fully licensed water right—that does not expressly contain such a limit—has never been specifically addressed by this Court. Although the LLC has not prevailed, it is reasonable to argue that imposing such a limit during a transfer evaluation is an impermissible collateral attack on a fully licensed ***1196** water right contrary to our decision in *City of Blackfoot*.

Legal challenges to the conclusions of law made by an agency, when not preordained by statute, case law, or rule, is a healthy impetus to motivating agencies into promulgating more helpful and gap-filling rules. As the LLC explains, "[t]he resolution of the issues raised in this appeal [is] important because it will provide clear answers for the regulated community and the attorneys and consultants that represent them." While the LLC's legal arguments did not prevail, the LLC still brought an appeal that had a reasonable basis in law. Accordingly, IDWR and the Coalition are not entitled to attorney fees under Idaho Code section 12-117(1).

[21] [22]Furthermore, we deny the Coalition's request for attorney fees under Idaho Code section 12-121. Attorney fees under section 12-121 are available in civil actions where a complaint is filed—not in proceedings initiated by a petition for judicial review of an agency's final order. I.C. § 12-121; *Travelers Ins. Co. v. Ultimate Logistics (In re Idaho Workers Comp. Board), LLC*, 167 Idaho 13, 24, 467 P.3d 377, 388 (2020). Here, the LLC's appeal originates from Duffin's petition for judicial review of a final order from IDWR denying Duffin's transfer application. A complaint did not initiate this case. Thus, the Coalition is not entitled to attorney fees under section 12-121.

IV. CONCLUSION

We affirm the district court's judgment that IDWR was within its statutory authority, and did not violate any statutory provisions, when it denied Transfer Application 83160. As IDWR and the Coalition are the prevailing parties on appeal, they are entitled to costs as a matter of course under Idaho Appellate Rule 40.

Chief Justice BEVAN, Justices MOELLER, ZAHN, and HORTON, J. Pro Tem concur.

All Citations

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Footnotes

: Pursuant to our authority under Idaho Appellate Rule 6 to amend the caption of an appeal, we have amended the caption in this case to reflect the substitution of Duffin by the LLC.

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