5-11-2011

A & B Irrigation v. Spackman Clerk's Record v. 2 Dckt. 38191

38191 (Consolidated)

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

A&B IRRIGATION, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTHSIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, Petitioners-Respondents,	
And IDAHO DAIRYMEN'S ASSOCIATION, INC. Cross-Petitioner-Respondent,	____ *and*
v. GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents-Respondents on Appeal,	
And IDAHO GROUND WATER APPROPRIATORS, INC., Intervenor-Appellant,	
And THE CITY OF POCATELLO, Intervenor-Respondent.	____ *and*

Appealed from the District Court of the 5th *Judicial District for the State of Idaho, in and for* Gooding *County*

Hon. John Melanson *District Judge*

Randall Budge – Candice McHugh – RACINE OLSON

Sarah Klahn – WHITE JANKOWSKI – Dean Tranmer

Attorney for Appellant

Garrick Baxter/Chris Bromley - IDAHO ATTORNEY GENERAL'S OFFICE

JohnSimpson/Travis Thompson/Paul Arrington – BARKER ROSHOLT SIMPSON

Attorney for Respondent

Filed this ____ *day of* ____, *19*____

____ *Clerk*

By ____ *Deputy*

S, CALDWELL, IDAHO 152454

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * * * * * * * * *

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTSIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY,

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A&B IRRIGATION, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTHSIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,

Petitioners-Respondents,

And

IDAHO DAIRYMEN'S ASSOCIATION, INC.
Cross-Petitioner-Respondent,

v.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents-Respondents on Appeal,

And

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

And

THE CITY OF POCATELLO,
Intervenor-Respondent.

Supreme Court No. #38191-92-93-94-2010
Clerk's Certificate of Appeal

VOLUME 2

Appeal from the District Court of the 5th Judicial District of the State of Idaho, in and for the County of Gooding

****

HONORABLE JOHN MELANSON DISTRICT JUDGE

****

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	APER	CYNTHIA	Plaintiff: American Falls Reservoir Appearance C. Tom Arkoosh	Barry Wood
	APER	CYNTHIA	Defendant: Tuthill, David Appearance Phillip J Rassier	Barry Wood
	APER	CYNTHIA	Defendant: Idaho Department Of Water Resources Appearance Phillip J Rassier	Barry Wood
		CYNTHIA	Filing: R2 Appeal or petiton for judical review, or cross-appeal or cross-petition, from Commission Board/ or body to the District Court Paid by: Arkoosh, C. Tom (attorney for American Falls Reservoir) Receipt number: 0003795 Dated: 9/11/2008 Amount: $88.00 (Check) For: A & B Irrigation District (plaintiff)	Barry Wood
	APER	CYNTHIA	Plaintiff: Burley Irrigation District, Appearance John A Rosholt	Barry Wood
	APER	CYNTHIA	Plaintiff: Milner Irrigation District, Appearance John A Rosholt	Barry Wood
	APER	CYNTHIA	Plaintiff: Minidoka Irrigation District, Appearance W Kent Fletcher	Barry Wood
	APER	CYNTHIA	Plaintiff: North Side Canal Company,ltd Appearance John A Rosholt	Barry Wood
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9/25/2008	MISC	CYNTHIA	Petitioners Statement of Initial Issues	John Melanson
9/26/2008	NOTC	CYNTHIA	Notice of Petition for Reconsideration	John Melanson
	NOAP	CYNTHIA	Notice Of Appearance	John Melanson
9/30/2008		CYNTHIA	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than $300, Not more than $1000 Paid by: City Of Pocatello, (other party) Receipt number: 0004082 Dated: 10/1/2008 Amount: $58.00 (Check) For: City Of Pocatello, (other party)	John Melanson
10/1/2008	APER	CYNTHIA	Other party: City Of Pocatello, Appearance A. Dean Tranmer	John Melanson
10/2/2008	APER	CYNTHIA	Other party: Idaho Dairymen's Association, Inc Appearance Michael C Creamer	John Melanson

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ROA Report

Case: CV-2008-0000551 Current Judge: John Melanson

A _B Irrigation District, etal. vs. David Tuthill, etal.

Date	Code	User		Judge
10/2/2008		CYNTHIA	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than $300, Not more than $1000 Paid by: Creamer, Michael C (attorney for Idaho Dairymen's Association, Inc) Receipt number: 0004094 Dated: 10/2/2008 Amount: $58.00 (Check) For: Idaho Dairymen's Association, Inc (other party)	John Melanson
10/10/2008	ORDR	CYNTHIA	Order Staying Petition until Further order of the Court	John Melanson
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11/7/2008		AMYA	Filing: R2 Appeal or petiton for judical review, or cross-appeal or cross-petition, from Commission Board/ or body to the District Court Paid by: Capital Law Receipt number: 0004571 Dated: 11/7/2008 Amount: $88.00 (Check) For: A & B Irrigation District (plaintiff)	John Melanson
11/12/2008	APER	CYNTHIA	Plaintiff: United States Department Of Natural Resources Appearance David W Gehlert	John Melanson
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	CMIN	CYNTHIA	Court Minutes Hearing type: Hearing Scheduled Hearing date: 11/24/2008 Time: 1:30 pm Court reporter: Maureen Newton Audio tape number: DC 08-12	John Melanson
	CONT	CYNTHIA	Continued (Oral Argument on Appeal 05/26/2009 01:30 PM)	John Melanson
	HRHD	CYNTHIA	Hearing result for Hearing Scheduled held on 11/24/2008 01:30 PM: Hearing Held scheduling conference	John Melanson
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1/23/2009	MOTN	CYNTHIA	Motionfor Extension of time to Lodge Transcript and Record with Clerk	John Melanson
1/26/2009	MISC	CYNTHIA	US Unopposed Motion to Reset Briefing Schedule	John Melanson

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ROA Report

Case: CV-2008-0000551 Current Judge: John Melanson

A_B Irrigation District, etal. vs. David Tuthill, etal.

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1/27/2009	ORDR	CYNTHIA	Second Amended Scheduling Order	John Melanson
2/6/2009	NOTC	CYNTHIA	Notice of Lodging of Agency Record with District Court	John Melanson
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4/3/2009	MISC	CYNTHIA	Petitioner US Opening Brief	John Melanson
	MISC	CYNTHIA	Surface Water Coalition's Joint Opening Brief	John Melanson
4/30/2009	MISC	CYNTHIA	Volume II begins	John Melanson
5/1/2009	MISC	CYNTHIA	IDWR Respondent's Brief	John Melanson
	MISC	CYNTHIA	Respondent Pocatello's Brief	John Melanson
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5/20/2009	MISC	CYNTHIA	Petitioner US Reply Brief	John Melanson
	MISC	CYNTHIA	Surface Water Coalitions Joint Reply Brief	John Melanson
5/21/2009	MISC	CYNTHIA	Volume III Begins	John Melanson
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	DPHR	CYNTHIA	Disposition With Hearing	John Melanson
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	MISC	ROSA	Ground Water user's Petition for Re-Hearing	John Melanson
8/25/2009	ORDR	CYNTHIA	Scheduling Order on Petitions for Rehearing	John Melanson
10/9/2009	MISC	CYNTHIA	City of Pocatello's Opening Brief in Support of Petition for Rehearing	John Melanson
10/13/2009	MISC	CYNTHIA	Ground Water Users Opening Brief on Rehearing	John Melanson
10/23/2009	ORDR	CYNTHIA	Supreme Court Order Assigning Judge Melanson	John Melanson
11/6/2009	MISC	CYNTHIA	Surface Water Coalitions Response to IGWA's and City of Pocatello Petition for Rehearing	John Melanson
11/9/2009	MISC	CYNTHIA	IDWR Response Brief on Rehearing	John Melanson
11/30/2009	REPL	CYNTHIA	Ground Water Users Reply on Rehearing	John Melanson
	REPL	CYNTHIA	City of Pocatello's Reply Brief in Support of Petition for Rehearing	John Melanson
12/15/2009	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 02/02/2010 01:30 PM) TO BE HELD AT SRBA - TWIN FALLS (telephone okay)	John Melanson
	ORDR	CYNTHIA	Order Setting Oral Argument on Petition for Rehearing	John Melanson
1/25/2010	CONT	CYNTHIA	Continued (Hearing Scheduled 02/22/2010 01:30 PM) TO BE HELD AT SRBA - TWIN FALLS (telephone okay)	John Melanson

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Date	Code	User		Judge
2/22/2010	HRHD	CYNTHIA	Hearing result for Hearing Scheduled held on 02/22/2010 01:30 PM: Hearing Held TO BE HELD AT SRBA - TWIN FALLS (telephone okay)	John Melanson
3/4/2010	ORDR	CYNTHIA	Order Staying Decision on Petition for rehearing Pending Issuance of Revised Final Order	John Melanson
3/11/2010	MISC	CYNTHIA	Surface Water Coalitions Objection to ORder staying decision	John Melanson
3/17/2010	MISC	CYNTHIA	Ground Water Users/Pocatello's Response to SWC Objection to Order Staying Decision	John Melanson
3/25/2010	ORDR	CYNTHIA	Order Overruling Objection to Order Staying Decision	John Melanson
3/29/2010	MOTN	CYNTHIA	Unopposed Motion for Extension of Time to File Order on Remand	John Melanson
4/19/2010	NOTC	CYNTHIA	Notice of Substitution of Counsel	John Melanson
	APER	CYNTHIA	Defendant: Tuthill, David Appearance Garrick Baxter	John Melanson
	APER	CYNTHIA	Defendant: Idaho Department Of Water Resources Appearance Garrick Baxter	John Melanson
5/13/2010	MOTN	CYNTHIA	City of Pocatello and Ground Water Users motion for Stay and to Augment Record	John Melanson
	MEMO	CYNTHIA	City of Pocatello and Ground Water Users Memorandum in Support of Motion for Stay...	John Melanson
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5/19/2010	RESP	CYNTHIA	IDWR Response To IGWA and Pocatello Motion for Stay	John Melanson
	AFFD	CYNTHIA	Affidavit of Chris Bromley	John Melanson
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	AFFD	CYNTHIA	Affidavit of Sarah Klahn	John Melanson
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6/23/2010	ORDR	CYNTHIA	Order Denying Motion for Stay and to Augment Record	John Melanson
7/23/2010	NOTC	CYNTHIA	Notice of Status Conference	John Melanson
	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 08/06/2010 10:00 AM) Video teleconference from Idaho Water Ctr - Boise	John Melanson

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ROA Report

Case: CV-2008-0000551 Current Judge: John Melanson

A_B Irrigation District, etal. vs. David Tuthill, etal.

Date	Code	User		Judge
8/6/2010	CMIN	CYNTHIA	Court Minutes - via video conferencing @ IDWR - Boise, Idaho Virginia Bailey - Reporter Julie Murphy - Clerk Status Conference 10:00 a.m.	John Melanson
	ADVS	CYNTHIA	Matter Taken Under Advisement	John Melanson
8/9/2010	HRHD	CYNTHIA	Hearing result for Hearing Scheduled held on 08/06/2010 10:00 AM: Hearing Held Video teleconference from Idaho Water Ctr - Boise	John Melanson
8/23/2010	ORDR	CYNTHIA	Order on Petitions for Rehearing	John Melanson
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10/21/2010	APSC	CYNTHIA	Appealed To The Supreme Court (IDWR) Document sealed	John Melanson
	STAT	CYNTHIA	STATUS CHANGED: Inactive	John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Baxter, Garrick (attorney for Idaho Department Of Water Resources) Receipt number: 0003849 Dated: 10/21/2010 Amount: $.00 (Cash) For: Idaho Department Of Water Resources (defendant)	John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (Surface Water Coalition)	John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Arkoosh, C. Tom (attorney for American Falls Reservoir) Receipt number: 0003860 Dated: 10/21/2010 Amount: $101.00 (Check) For: A & B Irrigation District (plaintiff), American Falls Reservoir (plaintiff) and Burley Irrigation District, (plaintiff)	John Melanson
		CYNTHIA	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: A & B Irrigation District Receipt number: 0003861 Dated: 10/21/2010 Amount: $200.00 (Check)	John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: City of Pocatello Receipt number: 0003863 Dated: 10/21/2010 Amount: $.00 (Cash) For: City Of Pocatello, (other party)	John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (City of Pocatello)	John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (IGWA)	John Melanson
10/22/2010	APER	CYNTHIA	Other party: Idaho Ground Water Users, Appearance Randall C. Budge	John Melanson

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ROA Report

Case: CV-2008-0000551 Current Judge: John Melanson

A_B Irrigation District, etal. vs. David Tuthill, etal.

Date	Code	User		Judge
10/22/2010		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Budge, Randall C. (attorney for Idaho Ground Water Users,) Receipt number: 0003875 Dated: 10/22/2010 Amount: $101.00 (Check) For: Idaho Ground Water Users, (other party)	John Melanson
		CYNTHIA	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Racine Olson Receipt number: 0003876 Dated: 10/22/2010 Amount: $200.00 (Check)	John Melanson
11/4/2010	ORDR	CYNTHIA	Supreme Court Order Consolidating Appeals	John Melanson
11/22/2010	ORDR	CYNTHIA	OrderSuspending Appeal (Clerk of the Court)	John Melanson
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11/30/2010	JDMT	ROSA	Judgment Nunc Pro Tunc	John Melanson
	ORDR	ROSA	Order Amending Caption	John Melanson
	STAT	ROSA	STATUS CHANGED: Closed	John Melanson
12/2/2010	STAT	CYNTHIA	STATUS CHANGED: inactive	John Melanson
12/20/2010	MISC	JULIE	Idaho Ground Water's Amended Notice of Appeal	John Melanson
	MISC	CYNTHIA	City of Pocatello Amended Notice of Appeal	John Melanson
12/23/2010	ORDR	CYNTHIA	Supreme Court ORder Adopting District Court Order (re: Caption)	John Melanson
1/27/2011	NOTC	CYNTHIA	IGWA Second Amended Notice of Appeal	John Melanson

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY,	Case No. CV-2008-0000551
UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, Petitioners, vs. DAVID R. TUTHILL, JR., in his official capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES, IDAHO GROUND WATER APPROPRIATORS, INC.; CITY OF POCATELLO; AND IDAHO DAIRYMEN'S ASSOCIATION, INC. Respondents.	**IDWR RESPONDENTS' BRIEF**
IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF 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	

IDWR RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
David R. Tuthill, Jr., Director

Honorable John M. Melanson, Presiding

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WHITE JANKOWSKI
Attorneys for Respondent City of Pocatello

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I. STATEMENT OF THE CASE

This is a proceeding for judicial review of a final agency order issued on September 5, 2008, by David R. Tuthill, Jr., Director of the Idaho Department of Water Resources (collectively referred to herein as "Department"). Petitioners, the Surface Water Coalition ("SWC")[1] and the United States Bureau of Reclamation ("USBR"), contend that the Department erred in its response to the delivery call filed by the SWC.

II. ISSUES PRESENTED ON JUDICIAL REVIEW

In this brief, the Department will respond to the issues on review raised by the SWC and USBR. The issues are identified in the respective opening briefs.

III. FACTUAL AND PROCEDURAL BACKGROUND

1. SWC Delivery Call

This matter was initiated on January 14, 2005 when the SWC filed a letter and petition with then-Director Karl J. Dreher ("Director Dreher") seeking the administration and curtailment of ground water rights within Water District No. 120, the American Falls Ground Water Management Area, and areas of the Eastern Snake Plain Aquifer not within an organized water district or ground water management area, that are junior in priority to water rights held by or for the benefit of members of the SWC. Ex. 3009 at 1. The petition also sought the designation of the Eastern Snake Plain Aquifer ("ESPA") as a Ground Water Management Area ("GWMA").

[1] The SWC is made up of the 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. R. Vol. 1 at 1.

Id. The petition for creation of a GWMA was denied by Director Dreher on February 14, 2005. R. Vol. 2 at 230, ¶ 3.[2]

2. The Department's Response

On February 14, 2005, one month after the delivery call was filed, Director Dreher issued a preliminary order in response to the call. R. Vol. 2 at 197. The February 14 order was superseded by an order issued on April 19, 2005, R. Vol. 7 at 1157, which was amended by Director Dreher on May 2, 2005, Ex. 3009 ("May 2005 Order"). In the May 2005 Order, Director Dreher established the framework by which he arrived at his determination that certain members of the SWC would be materially injured by junior ground water diversions. *See generally* Ex. 3009 (*May 2005 Order*). Much of the framework established in the May 2005 Order was carried forward through subsequent years to determine material injury, if any. R. Vol. 37 at 7066-7071. In the years in which material injury was predicted, the Director ordered junior ground water users to provide replacement water to injured members of the SWC.

3. January 2008 Hearing on SWC Delivery Call

On August 1, 2007, Gerald F. Schroeder was appointed by Director Tuthill to preside as an independent hearing officer ("Hearing Officer") in the hearing on the SWC delivery call. R. Vol. 25 at 4770. The Director "maintain[ed] jurisdiction over the ongoing administration of water rights related to this matter." *Id.* Because of requests by the parties for schedule changes, and matters unrelated to the administrative proceeding before the Department, *see American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446

[2] This decision has not been challenged by the SWC in their Opening Brief and is therefore waived. *Blaine County Title Associates v. One Hundred Bldg. Corp., Inc.*, 138 Idaho 517, 520, 66 P.3d 221, 224 (2002).

(2007), it was not until the summer of 2007 that the parties agreed to a hearing schedule and the appointment of the Hearing Officer. R. Vol. 39 at 7382.

On January 18, 2008, the hearing on the SWC delivery call commenced. R. Vol. 37 at 7048. Participating in the hearing were the SWC, the Department, the Idaho Dairymen's Association ("IDA"), Idaho Ground Water Appropriators, Inc. ("IGWA"), the City of Pocatello ("Pocatello"), and the USBR. The hearing ran for a period of fourteen days in which testimony and evidence were presented by the participating parties. The Department provided witnesses to explain the background of the Department's action and the administrative record relied upon by the Director in entering the orders at issue and to assist the parties and the Hearing Officer.

4. The Hearing Officer's Recommended Order and the Director's Final Order

On April 29, 2008, the Hearing Officer issued his *Opinion Constituting Findings of Fact and Conclusions of Law* ("Recommended Order"). R. Vol. 37 at 7048. The Hearing Officer determined, among other things, that the Director responded timely to the SWC's delivery call; that the Director properly exercised his discretion in conducting his own, independent analysis of the call to make a decision based on the best information available; that the Director properly found material injury and ordered curtailment of junior ground water rights; that the Director properly used the ESPA Model and applied 10% uncertainty; that the Director properly examined the SWC's natural flow and storage water rights to determine its total water supply and material injury; that the Director's review of the SWC's water rights did not constitute a readjudication of its rights; and that the Director properly determined that junior ground water users should not be curtailed to provide more than a reasonable amount of carryover storage water.

Petitions for reconsideration of the Recommended Order were filed by the SWC and USBR. R. Vol. 38 at 7252. The Hearing Officer denied the petitions for reconsideration, except for minor rewording suggested by the USBR that did "not change any recommendation in the Recommended Order." *Id.* at 7252-7253.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call* ("Final Order"). R. Vol. 37 at 7381. In the Final Order, the Director accepted virtually all of the Hearing Officer's recommendations, but did not determine that reasonable carryover water should be provided the season before it can be put to beneficial use. The Director did accept the Hearing Officer's recommendation that the framework for predicting material injury and carryover storage could be improved with information that was discussed during the hearing and the Director's analysis. The Director has retained those issues and will issue a separate administrative order detailing his approach for predicting and quantifying material injury based on the best information available. *Id.* at 7386.

IV. STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). "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 County, ex rel. Bd. of Comm's,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron* at 417, 18 P.3d at 222.

V. ARGUMENT

In this case, the Court is called upon to review the Director's exercise of his authority to administer hydraulically connected surface and ground water rights in the Eastern Snake Plain. Pursuant to I.C. § 42-602, "The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . in accordance with the prior appropriation doctrine." At the heart of this case is a dispute over whether the Director has properly applied the prior appropriation doctrine in the context of the delivery call filed by the SWC.

The prior appropriation doctrine as established by Idaho law serves two core objectives: to provide security of right and to ensure the full utilization of the resource. Most of the time these objectives are compatible and the issue of administration is easily resolved based upon seniority of right. Occasionally, however, these core objectives come into tension with one another, as shown in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911). In that case the senior surface water user sought to preclude junior surface water users from damming the Snake River in order to protect the current of the river. Because enforcement of seniority would have

resulted in the senior monopolizing the resource, the United States Supreme Court refused to enforce the senior priority. *See also Basey v. Gallagher*, 87 U.S. 670, 683 (1874).[3]

In the facial challenge to the conjunctive management rules, the Idaho Supreme Court recognized this tension and stated, "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls* at 875, 154 P.3d at 446.

In surface water administration, the Director's exercise of his authority is less contentious, due in large part to the fact that the impacts of administration are visible. In contrast, the movement of ground water in the unconfined and geologically heterogeneous ESPA is much more complex. Importantly, junior ground water pumping is not the only action that impacts surface water resources. Drought and conversion from flood/furrow irrigation to sprinkler, as well as other irrigation efficiencies, have reduced surface water supplies. While impact to the resource may be the result of a combination of these factors, the Director can only administer junior ground water rights to the extent that their impacts have injured senior right holders.

Because it is simply not possible to know with precision the effect of curtailment of any particular water right on an individual reach of the river, let alone the impact on a specific senior water right, I.C. § 42-226 provides that "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." Under I.C. § 42-602, the Director is charged with the duty to

[3] "Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual."

administer surface and ground water rights in accordance with the prior appropriation doctrine as established by Idaho law, which includes the directive in I.C. § 42-226. Because of the complex nature of the hydraulic connection between surface and ground water, the Director must use his best professional judgment and the best information available to determine the nature and scope of material injury to senior right holders caused by junior ground water diversions.

1. In Responding To The SWC Delivery Call, The Director Properly Examined The SWC's Total Water Supply

In responding to the delivery call, Director Dreher examined the SWC's natural flow and storage water rights to determine whether each member's "total water supply" (natural flow + storage) was reasonable to meet the user's needs and whether diversions by junior ground water users constituted material injury. Ex. 3009 at 19, ¶ 88. Consistent with the SWC letter initiating its delivery call, the SWC states in its Opening Brief that its members are entitled to full delivery of both their natural flow and storage water rights, regardless of whether the full amount of each right is required to produce a crop. This opinion was presented at the hearing and rejected by the Hearing Officer. R. Vol. 37 at 7113-7114. On appeal the USBR concedes that "a senior storage right holder may not insist on all available water, regardless of the need for that water," *USBR Opening Brief* at 6, nonetheless the SWC continues to assert that they are entitled to the entity of their rights regardless of reasonable need. The SWC's position ignores the historical relationship between surface and storage water rights and is inconsistent with the prior appropriation doctrine as established by Idaho law.

Members of the SWC hold natural flow water rights from the Snake River with various priority dates. Ex. 3009 at 12-14. Because the natural flows of the Snake River were not sufficient to provide for the full irrigation of all lands in the Upper Snake River Basin, the USBR

built dams to capture and store water from the Snake River to supplement existing water rights for natural flow. *Id.* at 14, ¶ 67. The storage reservoirs developed by the USBR include "Jackson Lake, Ririe Reservoir, Lake Walcott, American Falls Reservoir, and Palisades Reservoir." *Id.* The SWC entered into contracts with the USBR for the use of storage water to supplement their existing natural flow rights. *Id.* at 15-16, ¶ 70. Legal title to the storage water is held by the USBR, but beneficial use is made by the landowners within the service areas of the SWC. *Id.* at 16, ¶ 71; *see also U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). "All SWC members rely upon a combination of natural flow and storage water to meet their needs." R. Vol. 37 at 7113, ¶ 2. This fact is well documented in the legislative history for each of the dams.

At the hearing, Director Dreher explained his rationale in examining the SWC's total water supply to determine the nature and extent of material injury:

> Q. If you could please start with a general explanation of what you were striving for in developing a framework for determining injury.
>
> A. Well, we started with the decrees. I mean, the decrees represent what a court has determined the extent of the rights are. So we knew that -- we start with that because there can't be injury if the holder of the senior right has the full quantity of water that they're entitled to under their water rights, so you start there. But as I've already described, that maximum amount that's authorized under the decree, is not necessarily representative of what's actually needed. And so even though we started with the decrees, the next step in the process was to solicit information, specifically the information that was listed under Finding of Fact No. 7, to try to get a handle on the amount of water that was needed.
>
> The next thing that we did was to look at the combination of water that was likely to be available in the form of natural flow and storage. And, again, storage has always been supplemental to natural flow. Storage was necessary in order to have a full supply of water. And so we combined the natural flow that was expected to be available with the amount of storage that was expected to be available, and we -- and then we did one more thing.
>
> We looked at the concept of this storage use and -- both as a practical matter, as well as pursuant to the Conjunctive Management Rules. Surface water

rightholders are not required to exhaust all of their storage before they can claim that they're being injured. And, again, this system -- this water supply that's available is made up of this natural flow component and a storage component. That's not always the case, but it is the case here on the Snake River.

So if the -- if the holders of the senior-priority surface water rights are not required to exhaust all of their storage before they can claim injury, how much storage are they -- how much storage are they entitled to? Now, I want to look at that question for just a moment.

Their contracts with the Bureau of Reclamation authorize an amount of storage that they're entitled to. So when I'm using the word "entitled" in the context of conjunctive administration, the issue really is at what point do you curtail junior-priority ground water users to provide storage for surface water users? Do you curtail junior-priority ground water use to provide full reservoirs? Half-full reservoirs? At what point do you curtail junior-priority ground water use because of the storage, the reduced storage supplies, that are available to the senior rightholders?

Tr. p. 40, lns. 20-25; p. 41, lns. 1-25; p. 42, lns. 1-25; p. 43, lns. 1-4.

The SWC states that "Idaho law does not permit watermasters to take two water rights with differing priorities and 'combine' them into one 'supply' for purposes of water right administration." *SWC Opening Brief* at 31. The argument ignores CM Rule 42.01.g, which allows the Director to examine "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 . . . ." The Idaho Supreme Court has affirmed that this rule is facially valid. The unreasonableness of the SWC's position, as applied, is borne out in the record.

In 2005, the unregulated inflow into the Upper Snake River Basin at the Heise Gage, as predicted in the joint operating forecast ("Joint Forecast") prepared by the USBR and United States Army Corps of Engineers ("USACE"), was 2,340,000 acre-feet.[4] Ex. 3009 at 21, ¶ 100.

[4] The Joint Forecast has been used by directors Dreher and Tuthill in 2005, 2006, and 2007 to project the water supply that will be available to the SWC in a given irrigation season. Ex. 3009 at 21-22; 3012 at 16-17; 3014 at 9-10. The Joint Forecast is also used by Water District 01 to project supply for the irrigation season, Tr. p. 710, lns. 4-14. The use of the Joint Forecast was approved by the Hearing Officer for determining inflow into the system. R. Vol. 37 at 7071, ¶ 12.

In 2006, the unregulated inflow was 3,950,000 acre-feet. Ex. 3012 at 16, ¶ 43. In 2007, the unregulated inflow was 2,370,000 acre-feet. Ex. 3014 at 9, ¶ 15. In contrast, at the hearing, it was established that the total water supply calculated by the Director for all members of the SWC, for one irrigation season, was 3,105,000 acre-feet, while the SWC advocated a total supply of 3,274,948 acre-feet. R. Vol. 37 at 7096, ¶ 3. The SWC's decreed natural flow rights total approximately 6,804,325 acre-feet. Ex. 3009 at 12-14, ¶¶ 55-65. The sum of the SWC's decreed storage rights is approximately 2,320,636 acre-feet. *Id.* at 15-16, ¶ 70. Thus, the SWC's total authorized water supply (natural flow + storage) is approximately 9,124,961 acre-feet—nearly three times the total supply advocated by the SWC at hearing for one irrigation season; and nearly three times the forecasted inflow into the Upper Snake in 2006, a year in which the SWC had a full water supply.

The effect of the SWC's argument is that all junior ground water diversions must be curtailed to satisfy its natural flow and storage rights. This argument is strikingly similar to an argument that was rejected by the Idaho Supreme Court in *American Falls*:

> At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. 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. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. 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 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, this Court can determine whether that exercise of discretion is being properly carried out.

American Falls at 880, 154 P.3d at 451.

Article XV, § 3 of the Idaho Constitution states that "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . ." This principle has always been tempered, however, by the requirement that the exercise of the right be reasonable and for a beneficial use. *Schodde*, 224 U.S. 107; *Basey*, 87 U.S. 670; *Washington State Sugar v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915). Therefore, even when an appropriator has a right to divert water onto his or her land, the appropriator cannot prevent the state from regulating inappropriate use of that water. Idaho Const. Art. XV, § 1. For example, Idaho law prohibits an appropriator from committing waste or applying water in a non-beneficial manner. *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957); *Washington State Sugar*, 27 Idaho 26, 147 P. 1073.

Article XV, § 7 provides for "optimum development of water resources in the public interest," which carries forward the common law limitation that an appropriator does not have the right to monopolize the resource. CM Rule 20.03, which was deemed constitutional on its face by the Court in *American Falls*, specifically incorporates Article XV, § 7 into the CM Rules:

> These rules integrate the administration and use of surface and ground water in a manner consistent with the *traditional policy of reasonable use* . . . [and] includes the concepts of priority in time and superiority in right in being subject to conditions of reasonable use . . . as provided in Article XV, Section 5, . . . optimum development of water resources in the public interest prescribed in Article XV, Section 7, . . . and *full economic development as defined by Idaho law*.

Emphasis added.

Likewise, I.C. § 42-226 provides that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development

of underground water resources." *See also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("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, § 7."); *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (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.").

Idaho Code § 42-602 states that "The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine." Because the Director is mandated under I.C. § 42-602 to "distribute water . . . in accordance with the prior appropriation doctrine[,]" and CM Rule 20.02 "acknowledge[s] all elements of the prior appropriation doctrine as established by Idaho law," every facet of the prior appropriation doctrine must be considered during administration. Moreover, CM Rule 5, entitled "Other Authorities Remain Applicable[,]" states that "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."

The SWC reads I.C. § 42-602 with Article XV, § 3 to mean that the Director is obligated to distribute water based solely on priority of right. *SWC Opening Brief* at 31. This argument, however, was presented to the Hearing Officer and rejected: "It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is also clear that the Legislature did not intend to sum up water law in a single sentence of the Director's authority." R. Vol. 37 at 7085.

By examining the SWC's total water supply, the Director was able to ensure that the SWC's right to make beneficial use of the water was protected while at the same time ensuring

that the SWC's water rights were exercised in a way that did not unreasonably preclude the optimum development of the State's water resources and thereby lead to the monopolization of the resource. *See* Idaho Const. Art. XV, §§ 5, 7; I.C. §§ 42-101, -226, -602; CM Rule 20.03; *Schodde*, 224 U.S. 107. If the Director had not taken the total water supply into account and instead treated each source separately, it would have resulted in curtailment of junior ground water users when there was insufficient natural flow to satisfy the reasonable needs of the SWC, even though the SWC's storage accounts were full; or curtailment of junior ground water users when there was insufficient reservoir storage to meet the reasonable needs of the SWC, but the SWC's natural flow rights were completely satisfied. Either outcome would have been wholly inconsistent with the prior appropriation doctrine; leading to the monopolization of the resource and thereby preventing optimum development and resulting in waste of the resource. The Director's analysis of the SWC's total water supply, which was approved by the Hearing Officer, was therefore consistent with the prior appropriation doctrine as established by Idaho law and should be upheld by this Court on review.

2. The Director Properly Recognized The Right To Carryover Storage

The SWC and the USBR argue that the Director erred by failing to recognize their rights to carryover storage. The argument can be broken into two parts: (1) the amount of carryover to be provided by curtailment; and (2) when reasonable carryover should be provided by junior ground water users to members of the SWC that have been found to be materially injured.

A. The Director properly limited the amount of carryover storage that is to be provided through curtailment to a period not to exceed one year

There appears to be a misconception in the opening briefs filed by the SWC and USBR that the Director has limited those entities' ability to hold carryover storage. Nothing in the Final

Order limits the right to hold carryover storage. Rather, the issue is whether junior ground water users are subject to curtailment for the purpose of providing water to enhance carryover storage beyond one year.

The right to carryover storage is recognized in CM Rule 42.01.g. The Idaho Supreme Court in *American Falls* upheld the rule against a facial challenge. The Court, however, noted that the right to carryover storage is not unfettered: "the Court foresaw abuses that could occur when one is allowed to carryover water despite detriment to others. Concurrent with the right to use water in Idaho 'first in time,' is the obligation to put that water to beneficial use. To permit excessive carryover of stored water without regard to the need for it, would be in itself unconstitutional." *American Falls* at 880, 154 P.3d at 451.

As understood by the Hearing Officer, a purpose of the May 2005 Order was to define the amount of carryover that could be obtained by curtailment of junior ground water users:

> SWC members are entitled to carryover the entire amount of their contracted storage rights when there is sufficient water and curtailment is not sought. There has been some confusion caused by the Director's perceived limitation on carryover storage. The Director did not rewrite the contracts the irrigation districts have with BOR or interfere with the right to carryover storage water when available. The limitation only applies to an amount to be obtained from curtailment or mitigation water from the ground water users. If the irrigation district's needs for carryover can be met without curtailment, there will be zero carryover storage provided by curtailment or replacement. There is still a right to as much carryover as water supplies will provide within the limits of the contract. The perception that the Director determined some irrigation districts were not entitled to carryover storage is in error.

R. Vol. 37 at 7105, ¶ 4.

The Final Order agreed with this recommendation. R. Vol. 39 at 7392.

In reviewing the evidence presented at hearing, the Hearing Officer determined that "Curtailment or mitigation to provide sufficient carryover storage for one year is reasonable." R. Vol. 37 at 7109, ¶ 11. The Hearing Officer's recommendation was accepted by the Director in

his Final Order. R. Vol. 39 at 7392. The SWC and USBR argue that this determination is in error, citing to the provision of CM Rule 42.01.g that states "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*." *SWC Opening Brief* at 43; *USBR Opening Brief* at 13 (emphasis added).

CM Rule 42.01 provides a list of non-exclusive factors that "the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste . . . ." One factor, contained in CM Rule 42.01.g,[5] concerns "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 . . . ." CM Rule 42.01.g. The ability for the Director to examine the senior's total water supply is limited, however, by the requirement that "the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years." *Id.*

The Director agrees with the SWC and USBR that CM Rule 42.01.g authorizes the holders of storage water rights to carry water over for future dry years, provided that the water can be put to "beneficial use" and the amount is not "excessive . . . without regard to the need for it . . . ." *American Falls* at 880, 154 P.3d at 451. Nothing in the May 2005 Order or the Final Order has infringed on the rights of the SWC or USBR to plan for future needs by carrying storage water over for future dry years. Ex. 3009 at 44, ¶ 51 ("The members of the Surface Water Coalition should not be required to exhaust their available storage water prior to being

[5] CM Rule 42.01.g states in full: "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 fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system."

able to make a delivery call against the holders of junior priority ground water rights. The members of the Coalition are entitled to maintain a reasonable amount of carryover storage water to minimize shortages in future dry years pursuant to Rule 42.01.g . . . .").

At the hearing, Director Dreher explained his rationale on curtailment of junior ground water users to provide some degree of reasonable carryover for members of the SWC:

> The Conjunctive Management Rules address this with a concept and a term called "reasonable carryover storage." And I think it's a valid principle. Unfortunately, the rules do not prescribe a method for determining what is a reasonable amount of carryover storage.
>
> Now, we talked about the character of storage being supplemental, a supplemental water supply to natural flow, but it's actually more than that. It provides a supplemental source of supply, but it also provides the holders of the senior surface water rights some level of insurance against future dry years. It's not just about this year. It's about what happens next year. And certainly carryover -- having carryover storage to -- as insurance for supplemental water supplies in future years is valid.
>
> But, again, the question is how much. How much are these surface water rightholders entitled to before you'd have to curtail junior-priority ground water use? As I said, there's no methodology, there's no definition of that in the Conjunctive Management Rules, and so I made an attempt to reasonably quantify how much carryover storage was reasonable before ground water use was curtailed.

Tr. p. 43, lns. 5-25; p. 44, lns. 1-25; p. 45, lns. 1-18.

The SWC would have the Director manage the system under a worst case scenario every year, even though the Hearing Officer found that there has always been water available in the system to meet the reasonable needs of irrigators. R. Vol. 37 at 7053, ¶ 8b. The prior appropriation doctrine was not conceived to eliminate risk; but rather to provide reasonable certainty to senior right holders while allowing development. As stated by Director Dreher during cross-examination by an attorney for the SWC, "to do as you suggest would result in waste, because a significant amount of the resource that could be used, wouldn't be used in the

interest of trying to -- what shall we say -- zero the risk on the senior. And the senior is always going to have risk that there won't be enough water. The presumption in the west under the prior appropriation system is there will be times when there is insufficient water to fill all rights." Tr. p. 189, lns. 9-18.

In construing the facts presented, the Hearing Officer found that "attempting to curtail or to require replacement water sufficient to insure storage for periods of years rather than the forthcoming year presents too many problems and too great a likelihood for the waste of water to be acceptable. *Curtailing to hold water for longer than a year runs a serious risk of being classified as hording, warned against by the Supreme Court in AFRD#2.*" R. Vol. 37 at 7109, ¶ 11 (emphasis added). The Final Order accepted this recommendation and is supported by the record in this case.

B. The Director properly concluded that carryover storage should be provided in the season in which it can be put to beneficial use

In an effort to maximize a limited resource and prevent waste, the Director stated in the Final Order that junior ground water users should provide reasonable carryover in the season in which the water can be put to beneficial use, not the season before. R. Vol. 39 at 7391, ¶ 16. At the hearing, Director Dreher stated that reasonable carryover should be provided by junior ground water users to injured members of the SWC the season before it could be used—some six to twelve months in advance. Tr. p. 103 at 11-25. In briefing, the SWC and USBR argue that definition of the term necessitates having an amount of water that can be carried over from one season to the next. The facts and the findings of the Hearing Officer, however, support the orders issued by directors Dreher and Tuthill that have not required carryover to be provided the season before it can be put to beneficial use.

Fundamental in this analysis is the requirement in the May 2005 Order that if reservoir space held by members of the SWC fills, any debt from the previous irrigation season is erased. Ex. 3009 at 46, ¶ 6. At hearing, Director Dreher explained his rationale for concluding that a debt from a preceding year would be cancelled when storage space held by members of the SWC filled:

> Q. And could you please explain the phrase "until such time as the storage space held by members of the Surface Water Coalition under contract with the USBR fills"?
>
> A. Well, the reason for that is that -- you know, essentially, when the reservoir system fills, everybody's contracted space has water in it, and there is no more carryover water. It's essentially erased and you start with full reservoirs, and you start the process all over again.
>
> It would not work to have some, let's say, carryover debit into that system because there's no place to put the water. And similarly, it's hard to say that there would be a continuing debt owed when the reservoir system is full. So under this scenario, you know, there were two things going on here.
>
> If water supply conditions continued to be insufficient and injury continued, the burden on the junior-priority ground water users was only going to grow. It was going to get bigger and bigger and bigger. And in my view, curtailment could not have been avoided until water conditions improved in the end.
>
> But once water conditions improved, it was hard for me to see how the Surface Water Coalition could claim that they were being injured, at least if you looked at their water supply in total, made up of natural flow and storage, if the reservoirs were full.
>
> So at that point, again, with this idea of balancing protection of the senior rightholders with the maximum utilization of the resource, to me the junior-priority ground water users should be allowed to resume diversion and use of ground water until such time as injury occurred again. So I envisioned this dynamic system of administration, certainly more complex than what occurs in just a surface-to-surface water system of administration. But one that would become simpler as time went on. And we'll see what the future brings.

Tr. p. 106, lns. 3-25; p. 107, lns. 1-20.

When the delivery call was filed in January 2005, Director Dreher responded to the call on February 14, 2005 by stating that "injury to the senior priority rights held by or for the benefit of the members of the Surface Water Coalition is likely during the 2005 irrigation season." R. Vol. 2 at 226, ¶ 36. Director Dreher stated, however, that he would not issue an order finding injury until he could review the USBR and USACE Joint Forecast: "the extent of injury is not reasonably determinable at this time because . . . a reasonable projection of the amount of fill in the reservoirs . . . and a reasonably likely projection of the total amount of water that may be available to the [SWC] . . . can not be determined with reasonable accuracy . . . ." *Id.* Because snowpack in the Upper Snake River Basin generally peaks in April, the Joint Forecast issued soon after April 1 "is generally *as accurate a forecast as is possible using current data gathering and forecasting techniques.*" *Id.* at 212, ¶ 69 (emphasis added). Therefore, Director Dreher would not curtail junior ground water rights without first reviewing the best available information to allow him to determine the SWC's reasonable needs with reasonable certainty.

After the Joint Forecast was issued, it was determined that the SWC's total water supply would be insufficient to meet their reasonable needs, which led Director Dreher to order curtailment of junior ground water users unless they could provide replacement water at least equal to the in-season shortage to the total water supply (27,700 acre-feet). Ex. 3009 at 46, ¶ 5. Junior ground water users were not required to provide reasonable carryover to members of the SWC in 2005.

Responding to "dynamic changes in water supply conditions" during May and June of 2005,[6] Ex. 3010 at 8, ¶ 2, Director Dreher reviewed his in-season injury determination to the

[6] "In May of 2005, widespread areas in the Upper Snake River Basin reportedly received near or above 150 percent of the long-term average precipitation for May; with several locations reportedly receiving near or above 200 percent of average, and one location, just 46 miles west of Idaho Falls, reportedly receiving more than 275 percent of average. In June of 2005, widespread areas in the Upper Snake River Basin reportedly received well above 150

SWC's total water supply, *Id.* at 9, ¶ 5, but again reiterated his position on providing reasonable carryover:

> Because there may or may not be actual shortages in the amounts of carry-over storage determined by the Director to be reasonably needed for the individual members of the Surface Water Coalition at the end of the 2005 irrigation season, and because IGWA is providing replacement water in lieu of curtailment, the Director should wait until after the 2005 irrigation season to determine the amount of additional replacement water required to be provided by IGWA beyond 27,700 acre-feet that is necessary to mitigate for material injury determined by the Director in 2005.

Id. at 9, ¶ 6.

On June 29, 2006, Director Dreher finalized his material injury predictions for 2005.[7] Ex. 3012. Despite acknowledging that TFCC experienced a carryover shortfall, the Director did not require IGWA to provide replacement water for that shortfall because TFCC's storage account filled, thereby erasing any debt owed by junior ground water users. Ex. 3012 at 21, ¶ 7.

In 2006, no injury was predicted by Director Dreher based on the fact that storage space held by members of the SWC filled and that inflow into the system, as predicted by the USBR and USACE in the Joint Forecast, was sufficient to meet the SWC's reasonable needs. Ex. 3012 at 20, ¶ 56. Because the SWC had a full water supply, no carryover shortfalls were predicted in 2006 for the 2007 irrigation season.

A climatic pattern similar to 2005 emerged in 2007, whereby TFCC's total water supply was predicted by Director Tuthill to be insufficient to meet its reasonable in-season needs. Ex. 3014 at 12, ¶ 24. Shortfalls to reasonable carryover held by American Falls Reservoir District No. 2 ("AFRD2") and TFCC were calculated by the Director. *Id.* at 13, ¶ 26. Junior ground

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percent of the long-term average precipitation for June; with several locations reportedly receiving near or above 250 percent of average, and one location, Ashton, reportedly receiving just above 400 percent of average." Ex. 3011 at 4, ¶ 3.

[7] For a discussion of why diversion data is not finalized until the subsequent irrigation season, *see* Part 4.B., *infra*.

water users were required to replace the in-season injury to TFCC during the 2007 irrigation season; but were not required to replace carryover shortfall to AFRD2 or TFCC until after issuance of the 2008 Joint Forecast. Ex. 4600 at 9. In 2008, reservoir storage space held by members of the SWC "mostly filled." Ex. Vol. 39 at 7386, ¶ 20. The reason for using the term "mostly filled" in the Final Order was to account for the fact that storage space held by Minidoka Irrigation District did not completely fill, but rather filled to approximately 90 percent.[8] The space held by all other members of the SWC, including AFRD2 and TFCC, filled in 2008; thereby obviating any requirement for junior ground water users to provide reasonable carryover to AFRD2 or TFCC. In 2009, the Joint Forecast predicted that the unregulated inflow into the Upper Snake River Basin would be 3,520,000 acre-feet; similar to the 2006 Joint Forecast's prediction of 3,950,000 acre-feet. Reservoir storage space held by members of the SWC is projected to fill in 2009.

The consequence of requiring carryover shortfalls to be provided to the SWC the fall before the water can be put to beneficial use—some six to twelve months in advance—is directly evidenced in the above-discussion of 2005 and 2007. Had carryover shortfalls been required to be provided in the fall of 2005 or 2007, that carryover could never have been beneficially used by TFCC in 2006 or TFCC and AFRD2 in 2008 because their storage space filled. While the SWC and USBR are authorized to hold water in reservoirs to guard against future dry years, that right is not absolute and is subject to the principles of reasonable use, monopolization, and waste. *American Falls* at 880, 154 P.3d at 451.

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[8] In the May 2005 Order, Director Dreher assigned zero reasonable carryover to Minidoka Irrigation District because, as a holder of senior storage rights, it does not require curtailment to meet its reasonable carryover needs. Ex. 3009 at 26, ¶ 119. Director Dreher was cross-examined on this finding by an attorney for the SWC. Tr. p. 215, lns. 23-25; p. 216, lns. 1-25; p. 217, lns. 1-16. The finding was specifically approved by the Hearing Officer: "If the irrigation district's needs for carryover can be met without curtailment, there will be zero carryover storage provided by curtailment or replacement. . . . The perception that the Director determined some irrigation districts were not entitled to carryover storage is in error." R. Vol. 37 at 7105, ¶ 4.

The SWC and USBR argue that allowing junior ground water users to provide carryover shortfalls in the season of need shifts the risk of shortage to the holder of the senior right. As found by the Hearing Officer, "There was an expectation when the reservoirs were built that they would fill approximately two-thirds of the time, and historically they have filled roughly two-thirds of the time." R. Vol. 37 at 7062, ¶ 3. The USBR's statement on page 17 of its Opening Brief on reservoirs not filling "one-third of the years" ignores the fact that even with the advent and widespread permitting of ground water pumping, conversion from gravity to sprinkler irrigation, development of other irrigation efficiencies, and drought, the reservoir system has still served its targeted purpose of filling two-thirds of the time. Construction of the reservoir system was never intended to eliminate risk. This concept was explained by Director Dreher during cross-examination by an attorney for the SWC:

> Now, does -- is it possible that a senior will be exposed to some additional amount of risk in order for the resource to be used optimally or maximally? Possibly. But that is the basis of the prior appropriation system.
>
> Our constitution -- and you know this but, for the record, our constitution says the right to appropriate unappropriated water shall never be denied. And to me what that means is if there is water in the system that can be appropriated subject to prior rights and put to beneficial use, that's what we do.
>
> Now, if the system was all about minimizing risk to the senior right, if that's what this was designed around, then there would be a point at which we would not allow junior appropriators to appropriate the unappropriated water because the senior might need it. Not because the senior does need it. Because he might need it at some point in the future.
>
> And that's the difference between I think what you're implying I should have done versus what I attempted to do in recognizing the preference afforded to the prior surface water rights, recognizing that, trying to protect that, and at the same time providing for full economic development, maximum utilization, optimal utilization, however you want to characterize it.

Tr. p. 193, lns. 1-25; p. 194, lns. 1-3.

Indeed, USBR's own actions belie its contention. If USBR's contention were true, it should have never sought development of the ground water rights used on the A&B Irrigation Project because such rights under its theory are shifting the risk to its own spaceholders. In the Final Order, Director Tuthill stated that the parties would be notified in the fall of potential carryover shortfalls for planning purposes. R. Vol. 39 at 7391, ¶ 16. Since the reservoir system is fulfilling its design, risk falls squarely on junior ground water users who are burdened with curtailment if carryover shortfalls cannot be provided during the season of need.

Requiring reasonable carryover shortfalls to be provided the season before the water can be put to beneficial use would ignore Director Dreher's scientific approach in the February 14, 2005 order in which he was unwilling to curtail junior ground water users before issuance of the Joint Forecast. R. Vol. 2 at 226, ¶ 36. As found by the Hearing Officer,

> The climate is sometimes generous and sometimes stingy with precipitation, neither of which under the current state of science is predictable and anything more than relatively short terms. Anticipating more than the next season of need is closer to faith than science. Ordering curtailment to meet storage needs beyond the next year is almost certain to require ground water pumpers to give up valuable property rights or incur substantial financial obligations when no need would develop enough times to warrant such action.

R. Vol. 37 at 7109, ¶ 11.

The Joint Forecast is the best available tool for predicting shortages in the Upper Snake River Basin. As stated by Director Dreher, "in the West where water is a scarce resource . . . you don't curtail junior uses to provide water that isn't needed by the senior." Tr. p. 24 at lns. 10-13. Requiring the Director to order reasonable carryover shortfalls the season before the water can be put to beneficial use removes the requirement that the Director determine the SWC's reasonable needs before ordering curtailment. Indeed, the USBR recognized the necessity of need in its Opening Brief: "the Director has some discretion in determining whether the carry-over storage

sought by a senior is reasonably necessary for future needs." *USBR Opening Brief* at 6 (internal quotations omitted). Furthermore, requiring junior ground water users to provide reasonable carryover shortfalls prior to the issuance of the Joint Forecast could result in curtailment of junior ground water rights when reservoirs may otherwise fill (as evidenced in 2006 and 2008). If after the Joint Forecast is issued it is determined that the SWC's storage accounts have not filled and there are carryover shortfalls, the Hearing Officer found that, even in this period of extreme drought,[9] "the [reservoir] system has not run out of water, and it appears there will be water available somewhere to meet irrigators' needs." R. Vol. 37 at 7053, ¶ 8b. In balancing the two core objectives of the prior appropriation doctrine—security of right and full utilization of the resource—it is appropriate to require junior ground water users to provide reasonable carryover shortfalls after issuance of the Joint Forecast. This approach places the risk on junior ground water users while avoiding unnecessary curtailment.

3. The Director Properly Exercised His Authority In Authorizing The Filing Of Replacement Water Plans

In their Opening Brief, the SWC argues that "The purpose of administration is to distribute water by priority to senior water rights. . . . Importantly, any hindrance to either a natural flow or a storage water right (including the right to carryover storage) constitutes 'material injury' that must be mitigated either through curtailment or an approved Rule 43 mitigation plan. . . . [T]he senior water right enjoys a presumption that it is entitled to the amount of water shown in its decreed or license . . . ." *SWC Opening Brief* at 9-10. Therefore,

[9] Director Dreher found in the May 2005 Order that "since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record." Ex. 3009 at 17, ¶ 78. The drought during this time period was determined by Director Dreher to have a "probability of recurrence of something in excess of 500 years . . . ." Tr. p. 327, lns. 20-21. The Hearing Officer observed: "There is debate over whether the extended drought in the 1930's was less or more severe than the extended drought in the first half of the decade, sometimes described as a five hundred year event." R. Vol. 37 at 7061, ¶ 2. These factual findings underscore the Hearing Officer's determinations that the system has not run out of water and that water has always been available.

"administration" to the SWC is meaningless unless accompanied by curtailment. Under the SWC's purview, if a delivery call is filed under the CM Rules, the Director, in administering water rights, must first curtail junior ground water users. Curtailment must occur prior to any determination of the SWC's reasonable needs because of their belief that they are entitled to the maximum extent of their natural flow and storage rights. For the SWC, replacement water plans are not permissible because it is not ministerial administration with resulting curtailment. This argument was rejected by the Idaho Supreme Court in *American Falls*[10] and by the Hearing Officer in his Recommended Order.[11] Even the USBR in its Opening Brief eschews such an extreme view.[12]

In order to comply with the May 2005 Order, junior ground water users were afforded the option of curtailing or providing replacement water equal to the amount of material injury predicted by the Director to have occurred to injured members of the SWC. Ex. 3009 at 45, ¶ 1. CM Rule 10.15 defines the term "Mitigation Plan" as follows: "A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in

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[10] "American Falls argues . . . the Director is 'required to deliver the *full quantity* of decreed senior water rights according to their priority' rather than partake in this re-evaluation. (emphasis in original brief). . . . If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, 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 not constitute a re-adjudication." *American Falls* at 876-77, 154 P.3d at 447-48. "At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho." *Id.* at 880, 154 P.3d at 451.

[11] "The Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in the license or decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of actual need for the water and the consequences to the State, its communities and citizens. Application of the water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies management of the water right." R. Vol. 37 at 7086.

[12] "[A] senior storage right holder may not insist on all available water, regardless of the need for that water." *USBR Opening Brief* at 6.

Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversions and use of water by the holders of junior-priority ground water rights within an area of common ground water supply."

CM Rule 43 lists the necessary requirements for a mitigation plan. One factor that the Director may consider in his review of the plan is "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*." CM Rule 43.03.b (emphasis added).

The authority of the Director to allow junior ground water users to continue diverting after the delivery call was filed by the SWC and before a record was developed upon which to base a mitigation plan is rooted in the principle that if a senior water user can be made whole during the pendency of the proceeding, curtailment of the junior, which would result in irreparable harm prior to a hearing, should not be ordered. This concept was explained by Director Dreher at hearing during cross-examination by an attorney for the SWC:

> Q. Exactly. So a replacement water provision is merely a subset of a kind of mitigation plan?
>
> A. Yes. To some extent. But -- and I believe we talked about this in my deposition as well. There's some, I guess, confusion over the use of the word "mitigation plan" in the rules, versus the more general use of the word mitigation.
>
> A junior can always replace his depletions to the system and not face curtailment. Why? Because if he actually replaces his depletion, there is no injury. He doesn't cause injury if he's replaced his depletion. And yet, that's a form of mitigation, but it's not the kind of a mitigation plan that's envisioned under the rules.
>
> And so what we were devising here in this May 2d order was along the lines of this most general type of mitigation rather than a formal mitigation plan that's called for under the rules.

Q. Well, if I understood correctly, from what you told me in the deposition, that there's a couple of general propositions. A junior rightholder in a prior appropriation state has a right it recognizes that in times of scarcity the right may be curtailed?

A. Correct.

Q. Okay. And then if replacement water is not provided up front, then they'll have to curtail, or if there's not a mitigation plan they'll have to curtail; isn't that correct?

A. Yes, that's correct.

Q. Then you've accepted replacement water plans, but those had to be submitted for director approval or there would be the remedy of curtailment subsequent to the order; is that correct?

A. That was for the purpose of ensuring that the senior surface rightholders were, in fact, going to receive what it is I thought they needed to receive in order for the out-of-priority diversion to continue.

Q. But those subsets -- oh, excuse me. I'll rephrase this.

Those replacement water plans, even though they require director approval, in your view, were not mitigation plans that required the due process divisions that are in Rule 43, I believe.

A. Correct. Because the due process under the approach that I had outlined came in a subsequent hearing.

Q. And the mitigation water for 2005 didn't show up in 2005. It showed up in 2006; is that accurate?

A. Part of it showed up in 2006; that's correct. And as I explained, that wasn't the intent. It was the first year that we were doing this. It was new to the ground water folks, and it didn't come off without some glitches.

Q. But isn't the purpose of all of these processes to gauge the effectiveness of a mitigation plan is to try the realisticness of the plan in the crucible of an adversary proceeding?

A. Not necessarily.

Q. What is the purpose in your view?

A. For the mitigation plan that's called for under the rules?

Q. For the mitigation processes for the approval of the rule.

A. Well, again, the statutory responsibility for distributing water falls on the person that was in the position as the director of the Department of Water Resources, me at the time. That's where the responsibility fell. It doesn't fall on an adversarial process between two parties. It falls on the director of the Department of Water Resources.

And the due process is provided for. I mean, you're arguing it from your side, and I appreciate that. But the ground water folks could just as easily come forward and say, wait a minute, we're not going to provide any mitigation water, any replacement water until we've had due process. I don't think that works.

Tr. p. 161, lns. 7-25; p. 162, lns. 1-25; p. 163, lns. 1-25; p. 164, lns. 1-19.

As stated in *American Falls*, "Typically the integration of priorities means limiting groundwater use for the benefit of surface water appropriators because surface water generally was developed before groundwater. The physical complexities of integrating priorities often have parallels in the administration of solely surface water priorities. The complications are just more frequent and dramatic when groundwater is involved." *American Falls* at 877, 154 P.3d at 448 (citing Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 73 (1987)).

If the Director had not authorized replacement water plans but instead required the filing of a CM Rule 43 mitigation plan, junior ground water users would have been completely curtailed from the time of the May 2005 Order until an order on the plan issued. This is the narrow solution advocated by the SWC. *SWC Opening Brief* at 9-10. The impact on most ground water users likely would have been permanent. In contrast, the benefit of curtailment to the SWC would have been limited.

Unlike curtailment in a surface water to surface water delivery call, curtailment in a conjunctive management call does not provide immediate and complete relief. "When water is

diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower." *Id.* (citing Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 74 (1987)).

Here, the Director explained that the reason it was possible to order replacement water was "because all of the members of the Surface Water Coalition had storage accounts. They all had rights to use storage. And so the replacement water could be directly provided through leasing storage water and providing it directly to those entities that were being injured." Tr. p. 89, ln. 25; p. 90, lns. 1-5.

By authorizing replacement water plans, an appropriate remedy was devised by the Director that required junior ground water users to keep the SWC whole during the season of need, while affording junior users an opportunity for a hearing prior to involuntary curtailment. If, however, junior ground water users had not filed an acceptable replacement water plan, involuntary curtailment would have been carried out by the Director, as stated in the May 2005 Order.

In calculating the amount of replacement water required from junior ground water users, the Director took a conservative approach, which favored the SWC. As explained during the hearing, Director Dreher purposefully underestimated the SWC's natural flow supply by one standard error of estimate in order to provide additional security to the senior:

> A: And by "conservative" I should add that, you know, the tendency was to not overpredict the amount of natural flow that would have been available to any member of the . . . Surface Water Coalition.

Q. By not overpredicting, that would necessarily put slightly more burden on the junior ground water users to provide water?

A. It would tend to increase the magnitude of the injury that was being determined from the junior-priority depletions.

Q. And that was a balancing decision that you made?

A. Well, it brings in another factor that we haven't talked about, but it might help to see this.

The outcome of this May 2, 2005, order was essentially ordered curtailment, recognizing that in the prior appropriation system of water rights administration, curtailment can be avoided by supplying replacement water. But if we were going to -- if we were going to allow the holders of the junior-priority ground water rights to supply replacement water and then -- so that they could continue to divert out of priority, it was important that we not underestimate the amount of replacement water, because that would unfairly shift the burden or the risk onto the holders of the senior right, that they may not have sufficient water supply.

So by using this more conservative projection of natural flow that would be available, that was one safeguard that we were not unnecessarily shifting the risk onto the holders of the senior rights that they wouldn't have an adequate water supply.

Now, does that mean that the holders of the junior-priority ground water rights might have to provide more water as replacement water than was actually needed? Yes. But I think that's an appropriate burden for out-of-priority diversions to continue. They ought to have the higher burden, in my opinion.

Tr. p. 67, lns. 12-25; p. 68, lns. 1-25; p. 69, lns. 1-4.

Authorizing replacement water plans is akin to a court issuing a preliminary injunction in a civil matter to preserve the status quo, pending final judgment. *Farm Service, Inc. v. U. S. Steel Corp.*, 90 Idaho 570, 586, 414 P.2d 898, 907 (1966). Here, the status quo was the SWC receiving the water it would have received from immediate curtailment for irrigation. *See Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 492 P.2d 123, 124 (Nev. 1972) ("Status quo in this case was the growing lawn, plants and trees and that could only have been accomplished by restoring the water to the land. Unless the water was restored to

the land it would lie barren and the injury to the respondent and its lessees would continue."). The replacement water plans authorized junior ground water users to replace the whole of their depletions, in lieu of involuntary curtailment, until a hearing could be held and a final order issued. Just as senior rights, junior rights are valuable real property rights and the holders of those rights are entitled to protections of due process. I.C. § 55-101(1). "It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his county." *Hill v. Standard Mining Co.*, 12 Idaho 223, 239, 85 P. 907, 911-12 (1906).

The Department's interpretation of its rules, regulations, and statutes are entitled to deference: "[T]he courts are not alone in their responsibility to interpret and apply the law. As the need for responsive government has increased, numerous executive agencies have been created to help administer the law. To carry out their responsibility, administrative agencies are generally clothed with power to construe [the law] as a necessary precedent to administrative action." *Simplot* at 854, 820 P.2d at 1211. Under *Simplot*, a four-prong test has been developed for agency deference. The first prong asks whether the agency has been entrusted with the responsibility to administer the statute at issue. *Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002). Here, the first-prong is met as the Director is entrusted with the responsibility to administer the State's water resources in accordance with the prior appropriation doctrine, as established by Idaho law. I.C. § 42-602; CM Rule 0.

The second prong asks whether the agency's statutory construction is reasonable. *Pearl* at 113, 44 P.3d at 1168. The second-prong is satisfied as the Director's interpretation and

application of the prior appropriation doctrine and CM Rules was tailored to preserve and protect the due process rights of all water right holders.

The third prong asks for the court to determine that the statutory language at issue does not treat the precise issue. *Pearl* at 113, 44 P.3d at 1168. The third-prong is met as the CM Rules do not specifically speak to the use of replacement water plans, but certainly authorize the Director to use his discretion in accepting CM Rule 43 mitigation plans that "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 . . . ." Emphasis added. Moreover, CM Rule 5 states that "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."

Finally, the fourth prong asks whether any of the rationales underlying the rule of deference are present. *Pearl* at 113, 44 P.3d at 1168. The rationales to be considered include:

> (1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.
>
> . . . .
>
> If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation.

Canty v. Idaho State Tax Comm'n, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002).

In this case, the first, second, third, and fifth rationales are met: (1) the authorization of replacement water plans was a practical interpretation of the CM Rules to allow junior ground water users to make the SWC whole during the pendency of the proceedings; (2) the Legislature has not acted to alter or amend any portion of the CM Rules since their adoption; (3) the Director is steeped with expertise in his authority and ability to administer the State's water resources;

and (5) the interpretation advanced by the Director was contemporaneous with the first orders issued in response to delivery calls initiated under the CM Rules. Therefore, the Court "should afford considerable weight" to the Director's statutory interpretation of the CM Rules. *Id.*

Acceptance of the SWC's narrow position would result in ministerial curtailment, prior to any hearing, based solely on priority without consideration of the SWC's reasonable needs. "Conjunctive administration 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. That is precisely the reason for the CM Rules and the need for analysis and administration by the Director." *American Falls* at 877, 154 P.3d at 448 (internal citation omitted).

4. The Director's Properly Responded To The SWC Delivery Call And Timely Administered Ground Water Rights

The SWC argues that the Director's administration of junior ground water rights was untimely. *See SWC Opening Brief* at 11-24. The SWC's argument ignores context, choosing instead to focus on selective facts. By focusing its argument in this manner, the SWC ignores the actions of the parties during 2005 through 2007, including its own, as well as the practicalities and challenges faced by the Director in conjunctively administering surface and ground water rights for the first time in Idaho's history.

A. In 2005, Director Dreher required junior ground water users to replace their depletions to Twin Falls Canal Company

Based on his finding of material injury in the May 2005 Order, Director Dreher ordered curtailment of junior ground water rights, unless replacement water equal to the amount of

predicted injury was provided. Ex. 3009 at 45. IGWA subsequently submitted a replacement water plan, pledging 27,700 acre-feet of leased storage water to mitigate injury. R. Vol. 12 at 2180, ¶ 5. The replacement water plan was approved by Director Dreher on June 24, 2005. *Id.* IGWA was ordered to assign the replacement water "to the Department for allocation to the Surface Water Coalition . . . ." *Id.* at 2181.

On July 22, 2005, in response to unusually high precipitation and cool temperatures in May and June of 2005 (*see, supra*, footnote 6), Director Dreher revised his injury assessment, confirming that IGWA should provide 27,700 acre-feet to the SWC, but that "the Director should wait until after the 2005 irrigation season to determine the amount of additional replacement water required to be provided by IGWA beyond 27,700 acre-feet that is necessary to mitigate for material injury determined by the Director in 2005." Ex. 3010 at 9, ¶ 6 (*Supplemental Order Amending Replacement Water Requirements*). Director Dreher's order of July 22, 2005 was in response to the best scientific information available at the time and accepted by the Hearing Officer. R. Vol. 37 at 7071, ¶ 12.

On August 15, 2005, the SWC filed a *Complaint* before the Honorable Barry Wood of the Fifth Judicial District regarding "the validity and constitutionality" of the Department's Rules for Conjunctive Management of Ground and Surface Water Resources, IDAPA 37.03.11 *et seq.* ("CM Rules"). R. Vol. 17 at 3067.

On November 30, 2005, the Director held a status conference regarding the timing of IGWA providing its replacement water obligation. Ex. 3012 at 14, ¶ 30. As this was the first time Idaho had conjunctively administered surface water and ground water in this manner, "IGWA was uncertain of the process for assignment" from Director Dreher's June 24, 2005 order. *Id.* At an informal meeting with the Director on December 8, 2005, "it was agreed that

IGWA would provide the [replacement water to TFCC] . . . at the beginning of the 2006 irrigation season (March 15) rather than as reservoir carryover storage in 2005 in the event the reservoir storage space held by T[FCC] . . . would fill in 2006 . . . ." *Id.* at 14-15, ¶ 31. As explained previously, if reservoir storage filled in 2006—which it did—water that IGWA provided to TFCC late in 2005 could not have been used. The determination by Director Dreher to allow IGWA to provide its replacement water to TFCC in 2006 provided TFCC with flexibility.

B. In 2006, the Director acted timely because no material injury was found

On January 23, 2006, the SWC filed a *Motion for Stay*, seeking to suspend the scheduled proceedings until its challenge to the CM Rules before Judge Wood could be resolved. R. Vol. 17 at 3063. On January 25, 2006, the parties, including the SWC, filed a joint *Stipulated Motion for Entrance of Protective Order*, seeking a stay in the proceedings "for a period of sixty (60) days from the date of this Order for purposes of allowing the parties to investigate settlement." Ex. 3012 at 4. On February 10, 2006, Director Dreher stayed the proceedings, including a stay of IGWA's obligation to provide the 27,700 acre-feet of replacement water to TFCC. *Id.* at 4-5. "*The parties agreed* that the stay should apply to IGWA's replacement water requirement." *Id.* at 15, ¶ 34 (emphasis added).

In its Opening Brief, the SWC appears surprised that the Director would have waited until 2006 to finalize material injury for 2005, and argues that his actions are not supportable. *SWC Opening Brief* at 14-15. As explained during the hearing and understood by the Hearing Officer, Water District 01, the entity charged with monitoring water use in the Upper Snake River Basin, does not finalize its accounting report of natural flow and storage diversions until the spring of the following irrigation season. Tr. p. 110, lns. 2-21. The timing of the report was

explained by Lyle Swank, watermaster for Water District 01: "*We wait until we get the best available data.* That usually requires us to wait until the USGS data has been reviewed and we've input those numbers along with the most accurate numbers we have for canal diversions, pumps, all the data that goes into the water right accounting program." Tr. p. 802, lns. 10-15 (emphasis added). For the 2005 irrigation season, Water District 01's final accounting report was not published until March 22, 2006. Ex. 3012 at 7, ¶ 10. The timing of the final report is consistent with Water District 01's accounting practices.

On June 29, 2006, shortly after the February 10, 2006 stay had expired, and after receipt of Water District 01's final accounting, Director Dreher issued his *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* ("Third Supplemental Order"), requiring IGWA to provide replacement water to TFCC no later than July 9, 2006. Ex. 3012 at 22, ¶ 2. On Monday, July 10, 2006, IGWA assigned the replacement water to the Director to distribute to TFCC. Ex. 3013 at 2, ¶¶ 3, 4.

The SWC argues that the Third Supplemental Order was untimely because it was made "about halfway into the irrigation season." *SWC Opening Brief* at 15. Again, the facts support the timing of the decision.

As previously stated, the SWC's natural flow and storage water rights are derived from run-off in the Upper Snake River Basin. For 2005, the Joint Forecast predicted "an unregulated inflow of 2,340,000 acre-feet." Ex. 3009 at 21, ¶ 100. Since it was clear from the 2005 Joint Forecast that inflow into the system would not be sufficient to satisfy the SWC's reasonable needs, the Director issued the May 2005 Order finding material injury. Ex. 3009 at 45. In 2006, the Joint Forecast predicted "an unregulated inflow of 3,950,000 acre-feet"—59 percent more water than in 2005. Ex. 3012 at 16, ¶ 43. The resulting inflow was sufficient to fill the Upper

Snake reservoir system to nearly 100 percent, even taking into consideration USBR flood control releases. *Id.* at 18, ¶ 49. "[A]ll storage space held by members of the Surface Water Coalition" filled in 2006. *Id.* at 16, ¶ 36. Unlike the 2005 Joint Forecast, it was clear from the 2006 Joint Forecast that members of the SWC would have a reasonable supply by which to irrigate and would not be materially injured. *Id.* at 20, ¶ 56. Since there was no material injury in 2006, the exigency that existed in 2005 was not present; therefore, the practicalities of administration did not necessitate that the Third Supplemental Order be issued in April or May.

Shortly after the issuance of the Third Supplemental Order, Judge Wood, on July 11, 2006, certified his decision that the CM Rules were unconstitutional. R. Vol. 21 at 3939. On July 14, 2006, Director Dreher entered an *Interim Order Suspending Hearing Schedule*, based on Judge Wood's certification. *Id.* at 3940. "Suspension of the hearing schedule will not affect the Director's orders requiring that IGWA provide the remaining replacement water required to mitigate material injury in 2005 . . . or requirements for additional replacement water to mitigate material injury that may occur during the 2006 irrigation season." *Id.* On July 17, 2006, the Director formally requested that the watermaster for Water District 01 transfer the replacement water leased by IGWA to the TFCC storage account. Ex. 3013 at 5, ¶ 2; 6, ¶ 3.

C. In 2007, the Director acted timely

On March 5, 2007, the Idaho Supreme Court issued its decision in *American Falls*, finding that the CM Rules were facially constitutional. In addition, the Court took no exception with the timing of the Director's actions in 2005 and 2006:

> It appears that American Falls preferred to have its case heard outside of the administrative process and went to great lengths, first to remove the case from the administrative process and second, to delay the hearing. While the district court acknowledged it was "led to believe" that the parties had stipulated to delay the administrative resolution of the case pending the district court's decision, the

> court nevertheless also appeared to hold that delay against the Director and the CM Rules by finding there had been an unacceptable delay in responding to the Delivery Call.

American Falls at 446, 154 P.3d at 875.

Following the Court's decision in *American Falls*, Director Tuthill and the parties participated in numerous informal discussions regarding resolution of predicted natural flow and reasonable carryover shortages for 2007. Ex. 3014 at 4. On or about April 5, 2007, TFCC rented 40,000 acre-feet of water from the Water District 01 rental pool. Tr. p. 1631, lns. 1-14. On May 8, 2007, the Department received IGWA's *Joint Replacement Water Plan for 2007* ("2007 Replacement Plan"). Ex. 3014 at 4. IGWA's 2007 Replacement Plan proposed to "mitigate any and all material injury by guaranteeing and underwriting Twin Falls Canal Company's irrigation season supply . . . up to 1,009,100 acre-feet . . . ." R. Vol. 23 at 4242.

On June 15, 2007, the parties stipulated that a hearing in the SWC delivery call would commence on November 28, 2007. R. Vol. 24 at 4496-4497.

Similar to the 2005 Joint Forecast (2,340,000 acre-feet), the 2007 Joint Forecast predicted "an unregulated inflow of 2,370,000 acre-feet." Ex. 3014 at 9, ¶ 15. Like 2005, the Director issued an order in May regarding injury to members of the SWC. Ex. 3014 (*Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*). The Director predicted that TFCC would be materially injured in the amount of 58,914 acre-feet to its in-season supply; and that AFRD2 and TFCC would experience carryover shortfalls for the 2008 irrigation season in the amount of 43,017 acre-feet and 38,400 acre-feet, respectively. Ex. 3014 at 12, ¶ 24, 26.

On July 11, 2007, the Director revised his material injury determination based on updated water supply information from Water District 01 that took USBR's actual flood control releases

into consideration and examined preliminary diversion data by members of the SWC. Ex. 3015 at 3-5 (*Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan*) ("Sixth Supplemental Order"). "According to the Department's water rights' accounting, as of July 8, 2007, no members of the Surface Water Coalition other than North Side Canal Company . . . and T[FCC] . . . are currently diverting natural flow." *Id.* at 4-5, ¶ 9. Because reach gains to the Snake River in the summer are no longer driven by run-off into the Upper Snake River Basin, the Director determined it was no longer appropriate to use the Heise Gage as a predictor for remaining natural flow. *Id.* at 5, ¶¶ 11-12. The departure from using the Heise Gage during the middle of the irrigation season was approved by the Hearing Officer. R. Vol. 37 at 7071. Using the best scientific information available to him at the time, the Director revised his in-season material injury prediction, finding that only TFCC would be injured in the amount of 46,929 acre-feet. Ex. 3015 at 6, ¶ 16.

In the Sixth Supplemental Order, the Director approved IGWA's 2007 Replacement Plan, which was the subject of a June 22, 2007 hearing. It was established at hearing that IGWA had secured "45,145.8 acre-feet" of replacement water by lease that could be used to mitigate material injury to TFCC. *Id.* at 8, ¶ 3. The Director found it was "appropriate that IGWA be allowed to underwrite the lease entered into by TFCC to assist in mitigation of TFCC's predicted material injury of 46,929 acre-feet." *Id.* at 8, ¶ 5.

On August 1, 2007, the Hearing Officer was appointed by Director Tuthill to preside at the hearing on the SWC delivery call. R. Vol. 25 at 4770. Also on August 1, 2007, Director Tuthill approved the parties' stipulated request to commence the hearing on January 16, 2008, as opposed to the previously stipulated date of November 28, 2007. R. Vol. 25 at 4774-4775.

In its Opening Brief, the SWC states that "Given the Director's history of not providing water during the course of the 2005 and 2006 irrigation seasons, TFCC was forced to rent 40,000 acre-feet of water from the Water District 01 Rental Pool." *SWC Opening Brief* at 18-19. As stated above, administration in 2005 and 2006 was timely. As evidenced by the Sixth Supplemental Order, IGWA agreed to underwrite TFCC's rental of 40,000 acre-feet, as well as securing replacement water through private leases to provide directly to TFCC. While replacement water in the amount of 14,345 acre-feet was not provided to TFCC until the hearing on the SWC's delivery call, R. Vol. 37 at 7071, IGWA was positioned during the season of need to mitigate TFCC's injury.

5. Twin Falls Canal Company's Deliveries Were Properly Determined At 5/8 Of A Miner's Inch

In determining an in-season supply for TFCC, Director Dreher relied upon the SWC's assertion that full headgate delivery for TFCC was 3/4 of a miner's inch. R. Vol. 1 at 404-410; R. Vol. 37 at 7102, ¶ 4. As indicated by Director Dreher during testimony, the purpose of the hearing was to address legal and factual issues that were in dispute. Tr. p. 51, ln. 25; p. 52, lns. 1-8. One of the many issues that was probed at the hearing was whether a full headgate delivery for TFCC was 3/4 or 5/8 of a miner's inch. The SWC argues that 3/4 is the correct delivery rate to use. *SWC Opening Brief* at 51.

On the subject of 3/4 or 5/8, the Hearing Officer found as follows:

> The former Director accepted Twin Falls Canal Company's response that 3/4 inch constituted full headgate deliver[y], and TFCC continued to assert that position at hearing. This is contradicted by the internal memoranda and information given to the shareholders in the irrigation district. It is contrary to a prior judicial determination. It is inconsistent with some of the structural facilities and exceeds similar SWC members with no defined reason. Any conclusion based on full headgate delivery should utilize 5/8 inch.

R. Vol. 37 at 7102, ¶ 4.

The Hearing Officer's recommendation was accepted by the Director in his Final Order and is supported by the record. R. Vol. 39 at 7392.

6. The ESPA Model Is The Best Science Available And The Director's Application of 10% Uncertainty Is Supported By The Record

Citing to nothing in the record before this Court, the SWC states that "the Director's use of a 10% trim line to allow injurious diversions to continue is arbitrary and capricious and in violation of the law, and should be rejected." *SWC Opening Brief* at 57. The issue has therefore been waived by the SWC and should not be considered by this Court on review. "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Blaine County Title Associates v. One Hundred Bldg. Corp., Inc.*, 138 Idaho 517, 520, 66 P.3d 221, 224 (2002) (internal citation omitted).

Consistent with its application in the delivery calls in the Thousand Springs area, the ESPA ground water model ("ESPA Model") was used to determine the date of curtailment, not to predict injury. Tr. p. 87, lns. 21-25; p. 88, lns. 1-15. Due to scientific uncertainty in the calibration process, results of the ESPA Model were assigned a margin of error of 10%—meaning that junior ground water rights that were found to contribute 10% or less to the affected reach of the Snake River were not ordered curtailed because of lack of certainty that curtailment of those rights would benefit any member of the SWC. R. Vol. 8 at 1386, ¶ 124. The application of 10% model uncertainty in this proceeding was consistent with its application in the Thousand Springs delivery calls. Tr. p. 89, lns. 1-9. The Hearing Officer found that the Model was properly used and that 10% uncertainty was supported by the record. "No party offered credible evidence of a better margin of error." R. Vol. 37 at 7080, ¶ 7. The Director accepted

the Hearing Officer's recommendation. R. Vol. 39 at 7387, ¶ 26. The Model "represents the best science available for purposes of conjunctive administration." *Id.*

7. The Final Order Complies With Idaho Code §§ 67-5244 and 67-5246

During the hearing, the SWC, IGWA, and Pocatello submitted evidence and provided testimony on Director Dreher's methodology for determining injury to in-season demand and reasonable carryover. In his Recommended Order, the Hearing Officer discussed the competing proposals and provided his own guidance on a structure for determining injury. R. Vol. 37 at 7086-7100; 7104-7111. In the Final Order, the Director stated his intent "to issue a separate, final order before the end of the 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing will be provided on the order."

The SWC states that the Final Order "did not resolve all issues in dispute." *SWC Opening Brief* at 57. Citing I.C. §§ 67-5244 and 67-5246, along with IDAPA 37.01.01.720 and 37.01.01.740, the SWC argues that "The statutes and rules do not allow the Director to only decide some issues and then delay a decision on other issues until some, undefined, future date." *Id.* The undecided issue with which the SWC takes exception is the Director's decision not to issue a Final Order outlining his future methodology for determining material injury.

While the SWC disagrees with the Director's approach, there is nothing in I.C. §§ 67-5244 or 67-5246 that requires an agency head to issue a final order that decides every contested issue. It was discussed by Director Dreher during the hearing and stated by the Hearing Officer in his Recommended Order that the determination of material injury should be based on the best information available. Director Tuthill's decision to issue a separate order detailing his approach for determining material injury is consistent with that approach.

VI. CONCLUSION

In this case, the actions taken by the Director in responding to the conjunctive administration delivery call filed by the SWC were consistent with constitutional and statutory provisions, were supported by the record, were made upon lawful procedure, and were within the Director's discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order. I.C. § 67-5279(3).

RESPECTFULLY SUBMITTED this 30th day of April 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 30th day of April 2009.

Document Served: **IDWR RESPONDENTS' BRIEF**

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Petitioners, vs. DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, IDAHO GROUND WATER APPROPRIATORS, INC.; CITY OF POCATELLO; and IDAHO DAIRYMEN'S ASSOCIATION, INC., Respondents.	CASE NO. CV-2008-000551

RESPONDENT POCATELLO'S BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

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STATEMENT OF THE CASE

This case involves an appeal from the Director's Final Order Regarding the Surface Water Coalition Delivery Call entered September 5, 2008 ("Final Order"), R. Vol. 39, p. 7381. The SWC initiated its delivery call on January 14, 2005 by filing a letter with the Director alleging injury because it was not receiving the amounts of water on the face of its licenses and decrees, and requesting curtailment of junior ground water rights. R. Vol. 1, p. 1. The Director's initial order in this matter, issued May 2, 2005, found, *inter alia*, that senior water rights were not entitled to delivery of the amounts on the face of their decrees unless it could be established that those were the amounts required for beneficial uses (R. Vol. 8, p. 1378, ¶ 91, pp. 1399, 1401, Conclusions of Law ("COL") ¶¶ 40, 48); it also found that, in Idaho, depletions to the stream from ground water pumping do not all translate into injury to seniors (*Id.* at 1401, COL ¶ 47); finally, the May 2 Order found that the evaluation of injury should include consideration of total water supplies, and that carry-over storage, while an entitlement under the rules, was also based on an evaluation of total water supplies. (*Id.* at 1401, COL ¶ 48). The May 2 Order also required ground water rights junior to February 27, 1979, to provide replacement water in the amounts specified in the Order or face curtailment. (*Id.* at 1403, Order ¶ 1). Although the Director made adjustments to the amount of injury in subsequent orders, based on changing climatic and water supply conditions, these foundational elements remained constant; further, the Hearing Officer affirmed the Director's reliance on these foundational elements of answering a delivery call in the Recommendations.

Immediate challenges to the May 2 Order were made by the SWC, City of Pocatello ("Pocatello"), Bureau of Reclamation ("BOR" or "Bureau"), Idaho Ground Water Appropriators

("IGWA") and others to the May 2 Order. The case considered apace until August of 2005 when the SWC asked the Gooding County District Court to find the Conjunctive Management Rules ("CMR"), relied upon by the Director in his May 2 Order, to be facially unconstitutional. In early 2007, the Idaho Supreme Court found that the rules were not facially unconstitutional. *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD #2 v. IDWR*") provided important context for the remainder of the proceedings in this matter, although as the briefing on appeal demonstrates, the parties differ widely about the holdings of the Court in *AFRD #2 v. IDWR*.

This case, along with the Thousand Springs and A&B Irrigation District delivery calls, present issues of first impression. Although SWC and BOR would like to cast this as simply another example of the administration of water rights, analogous to surface water delivery in WD01 and requiring that the junior ground water users "shut and fasten" their wells, that is not conjunctive administration in Idaho. *AFRD #2 v. IDWR*, 143 Idaho at 877, 154 P.3d at 448. Nonetheless, Idaho law does provide important guidance for evaluating the framework of the decision-making in this matter. The constitutional precepts of "reasonable use" and administration giving due regard to the "pubic interest", upon which the Director relied in part in the May 2 Order and subsequent interim orders, create the framework in which the Director must make his determinations. The substance of the Final Order is consistent with those constitutional principles, as well as the statutory and case law authorities that apply herein, including *AFRD #2 v. IDWR*. Furthermore, substantial evidence supports the findings of fact in this matter. Within this legal and factual context, the Final Order in this matter should be affirmed.

ISSUES PRESENTED ON APPEAL

The SWC raises twelve issues on appeal related to decisions and actions taken by the Department in the context of the Surface Water Coalition delivery call, alleging the following bases: 1) that the Department's actions violated constitutional or statutory authority; 2) that the Department's actions overstepped the authority of the agency; 3) actions based on unlawful procedures; 4) actions or decisions unsupported by substantial evidence; and/or 5) actions that were arbitrary, capricious or an abuse of discretion. The BOR for its part raises only the question of whether the Director's Order has deprived Reclamation and its contractors of carry-over storage.

Response to the SWC's issues on appeal is complicated by the fact that there are twelve issues based on 5 grounds each—or as many as sixty issues total on appeal. However, Pocatello presumes that the bases for each issue raised in the SWC's appeal are limited by the scope of the argument presented in the substance of its brief and responds accordingly.

To avoid duplication, Pocatello's response is limited to the following issues raised in the SWC's Opening Brief:

1. Whether the Director failed to provide timely and lawful administration of junior ground water rights to satisfy seniors.
2. Whether the Director's application of the Conjunctive Management Rules violated Idaho law.
3. Whether the Director's Final Order failed to recognize and give deference to SWC's decreed water rights.
4. Whether the Director's reliance on replacement plans is unauthorized by Idaho law.
5. Whether the Director's determinations regarding the provision of carry-over storage are adequate as a matter of Idaho law.

The first three issues are treated together in part II, Issue #4 is addressed in Part III and Issue #5 is addressed in Part IV in the argument portion of Pocatello's brief. To the extent that Respondents IDWR or Idaho Ground Water Appropriators ("IGWA") address the same or additional issues in their briefs, Pocatello adopts and incorporates those arguments by reference.

I. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A. Proceedings

This matter began on January 14, 2005 when the SWC sent a letter to Director Karl Dreher making a delivery call. R. Vol. 1, p. 1. In the January 14, 2005 communication, the Surface Water Coalition claimed that their water rights were suffering material injury from the impacts of ground water pumping because they had not received the amounts on the face of their licenses and decrees. *Id.* at p. 2. BOR did not join in the delivery call, although it also holds licenses for certain of the reservoir rights that were the subject of the SWC's call.

On February 14, 2005, the Director requested that the SWC provide information to support the allegations of injury. R. Vol. 2, p. 227, COL ¶ 38. The information provided is contained in Petitioners' Joint Response to Director's February 14, 2005 Request for Information. R. Vol. 2, p. 372. Based on that information, as well as some investigation conducted by the Department regarding generalized impacts to crop yields in the vicinity of the SWC lands the Director issued his May 2, 2005 Order, finding injury to certain of the SWC members natural flow and carry-over storage rights. R. Vol. 8, pp. 1382-1383, Findings of Fact 108-114. To reach the conclusions in the Order, the Director applied the CMR and Idaho law. R. Vol. 8, pp. 1389-1401 (COL).

Various parties, including Pocatello, appealed the May 2, 2005 Order, discovery ensured and a hearing was set for early 2006. On February 1, the Director granted the joint motion of SWC, IGWA and Pocatello for a stay of the schedule in order to investigate settlement. The hearing date was subsequently delayed and then vacated.[1] In June of 2006 the Gooding County Court held that the rules were facially unconstitutional, as summarized by the Idaho Supreme Court:

> The district court rejected American Falls' position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis. . . .
>
> It was the failure of the CM Rules to "also integrate the concomitant tenets and procedures related to a delivery call, which have historically been held to be necessary to give effect to the constitutional protections pertaining to senior water rights" with which the district court found fault . . . .

AFRD #2 v. IDWR, 143 Idaho at 870, 154 P.3d at 441.

IDWR determined it would appeal the decision to the Idaho Supreme Court, and stayed the remainder of the SWC's delivery call proceedings until a decision could be rendered by that Court on the constitutionality of the CMR.

AFRD #2 v. IDWR was announced in early 2007. After remand to the Gooding County District Court, the IDWR held a status conference on June 5, 2007 (R. Vol. 23, p. 4314); the parties negotiated a discovery and hearing schedule, submitted to the Director on July 26, 2007 (R. Vol. 25, p. 4759). The parties agreed to a three week hearing commencing on January 16, 2008.

[1] The Director's June 14, 2006, "Order Regarding Pocatello's Motion for Stay and Fourth Amended Scheduling Order" summarizes the nature and reasons for the various changes in schedule until mid-2006. R. Vol. 20, p. 3653.

The Hearing Officer issued the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation ("Hearing Officer's Recommendations") on April 29, 2008 (R. Vol. 37, p. 7048), and the Director issued the Final Order (R. Vol. 39, p. 7381).

B. Injury to SWC water rights.

The Director issued a series of interim orders relevant in this proceeding from May 2, 2005 through late 2007. These orders determined injury to the natural flow and storage rights of the SWC in amounts based on climatic conditions. These interim orders reflect the Director's "adaptive management" process which allows for adjustment of amounts of material injury—and replacement water obligations—based on changing climatic conditions, water supply conditions and user demand. *See generally*, R. Vol. 37, page 7064 and discussion that follows within the Final Order.

In the May 2 Order, the Director developed the "minimum full supply" concept to support the injury determination. R. Vol. 8, pp. 1383-1384, 1377-1382, ¶¶ 88-107, p. 1402, COL ¶ 50. In order to determine if the seniors were injured, he compared the "minimum full supply" to the amounts projected to be available at the Heise Gage and found that any shortages to those amounts were injurious. He made a similar evaluation of carry-over storage using reservoir storage projections against the amount of "minimum full supply" required. *Id.* at 1402, COL ¶¶ 49-53. Based on the minimum full supply analysis, the Director then ordered the ground water users either to curtail or provide mitigation water to avoid injury to the SWC water rights. *Id.* at 1403, Order ¶ 1. He also re-evaluated the adequacy of the "minimum full supply" over the course of the irrigation season and adjusted the "minimum full supply" up or down depending on climatic conditions. *See, e.g.*, R. Vol. 13, p. 2424.

The Hearing Officer found that these procedures were not erroneous. R. Vol. 37, pp. 7048, 7090-7091; the Hearing Officer's Recommendations go on to suggest modifications to the procedure if it is to be used in the future. *Id.* at 7092-7095. The Recommendations affirmed the prior determinations of injury (or, as found in certain interim orders, non-injury), and specifically couch the findings regarding injury and procedure in the context of a detailed legal analysis of the constitutional concepts of "reasonable use" and administration consistent with the "public interest". *Id.* at 7081-7086. Significantly, after review of the law and the applicable facts, the Recommendations *did not* include a finding that the amounts of injury calculated through the Director's interim orders over the course of the proceedings were erroneous.

Substantial evidence in the record supports the factual finding that the Director's determinations of injury (and non-injury) should be affirmed:

- There is no evidence in the record of injury to water rights in 2005 and 2006; Mr. Vince Alberdi, TFCC's manager, testified that TFCC was ***not*** injured in 2005 or 2006. Transcript, Jan. 28, 2008, p. 1793:11-24.
- None of the SWC expert reports or pre-filed testimony included opinions that the SWC members water rights had been injured. R. Vol. 27, pp. 4988, 5008, 5015, 5216, Exhibit 8000.
- However, the report did calculate shortages of water for various SWC members in nearly every year of the study period. Exhibit 8000, Vol. 1, ch. 4.
- Mr. Alberdi was unable to explain why the SWC experts had found a shortage for TFCC during 2005 and 2006, when it was his testimony that TFCC had not been injured during 2005 and 2006. Transcript, Jan. 28, 2008, pp. 1793:11-1794:15.

- Incredibly, although SWC had alleged injury to its water rights beginning in January 2005, and although the May 2, 2005 Order contained the Department's own evaluation of injury to irrigation water rights based on minimal investigations conducted with Farm Services Agents, Mr. Alberdi testified the SWC never undertook any studies of crop loss, land fallowing, or yield reductions as a result of its alleged water shortages. He agreed that this type of information might have been helpful to the Director. Transcript, Jan. 28, 2008, pp. 1787:8-1788:8.
- The SWC submitted pre-filed testimony of farmer lay witnesses. R. Vol. 32, pp. 6103, 6143; R. Vol. 33, pp. 6257, 6266, 6276, 6282, 6334, 6340, 6345; R. Vol. 34, pp. 6352, 6357. IGWA and Pocatello moved to strike the testimony as containing information that had been sought in discovery over two years previously, and because the testimony to the extent it went beyond qualitative recitations of impacts from available water supplies, was without foundation. Transcript, Jan. 18, 2008, pp. 521:12-542:4. After argument, the Hearing Officer declined to strike the testimony but also said that he would not rely on the testimony that was without foundation. Transcript, Jan. 18, 2008, pp. 544:5-545:18. In fact, in his Final Recommendations he did not rely at all on the lay witness testimony; instead he relied on the investigations conducted by the Department regarding available water supplies for lands in the vicinity of the SWC lands. R. Vol. 37, p. 7077.

- Pocatello's expert Greg Sullivan opined that the AFRD #2 water rights were injured during the 2004 irrigation season, consistent with the findings in the Director's May 2 Order. Exhibit 3028.

C. Curtailment as a remedy for injury

The Director ordered either curtailment or mitigation water to satisfy the amounts of injury identified in the interim orders. SWC's arguments in their Opening Brief imply and BOR's Opening Brief flatly asserts that curtailment would have been preferable to ordering replacement water. However, the Director's decision to avoid curtailment was borne out at the hearing. As the evidence showed, curtailment is a remarkably inefficient means of avoiding injury to senior water rights.

- Mr. Dave Shaw submitted an analysis of the gains to the stream as "if ground water pumping had never occurred." Transcript, Jan. 29, 2008, p. 1936:17-21. This analysis is speculative and irrelevant to determining whether curtailment would be an adequate means to satisfy senior water rights.
- Mr. Greg Sullivan, for the City of Pocatello, reviewed the modeling scenarios from the ESPAM to assess the efficiency of curtailment as a means of administration in a delivery call. He determined that the ratio was 8:1—in other words, to obtain 1 af of water for use by SWC on its fields, it would require the ground water users to curtail 8 af of ground water use. Exhibit 3007A, pp. 29-30. For the 2005 shortage calculated in the May 2, 2005 Order, this would require curtailment of 1.1 million acres of ground water in order to obtain the 127,000 af calculated by the Department as shortage that

year.[2] He further noted that curtailment would result in gains to the river at times of the year when no water is needed by the SWC, and when water cannot be stored in the reservoirs. Exhibit 3007A, pp. 29-30.

ARGUMENT

I. STANDARD OF REVIEW

Under the Idaho Administrative Procedure Act, 67-5200 *et seq.*, an agency's order must be upheld by the reviewing court unless:

> its decision (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion. § I.C. § 67-5279(3). The court defers to the agency's findings of fact unless they are clearly erroneous and does not substitute its judgment for that of the agency as to the weight of the evidence.

Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 144 Idaho 23, 26, 156 P.3d 524, 527 (2007) (citations omitted). Contrary to the assertion made by the BOR in its Opening Brief at page 11, the findings of fact—including the findings made by the Hearing Officer and/or Director under Rule 42 of the CMR—are reviewed by reference to the "substantial evidence" test, rather than as questions of law as BOR asserts. If there are factual bases for the determinations made under Rule 42, and those are consistent with the Final Order (or Hearing Officer's Recommendations, to the extent those were adopted) then the review turns to whether the procedures used to implement Rule 42 are an abuse of discretion or otherwise inconsistent with Idaho statutes, constitutional provisions, or case law.

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[2] Mr. Pat McGrane, for the Bureau of Reclamation, relied on a report by Robert D. Schmidt. R. Vol. 26, p. 4967. Transcript, Jan. 25, 2008, pp. 1443:19-1446:12, 1454:24-1456:1. Although Mr. McGrane's testimony examined curtailment as a means to achieve carry-over storage, the length of time to allow for appreciable gains from ground water curtailment, and the ratio of ground water use curtailed to achieve 1 af is consistent with Mr. Sullivan's testimony—both used similar IWRRI-ESPAM scenarios.

The Department's procedures in answering the SWC delivery call, about which both the SWC and the BOR focus nearly all their briefing, are entitled to some deference as they arise under the CMR. The *Sons & Daughters* Court stated the rule this way:

> On questions of law the court generally exercises free review, although agencies are sometimes entitled to deference on questions of statutory construction. Because the [Lottery] Commission has been entrusted with administration of the bingo statutes, the Court may defer to its interpretation of the statutes so long as that interpretation is reasonable and not contrary to the express language of the statute. Nevertheless, "the ultimate responsibility to construe legislative language to determine the law" rests with the judiciary, and the underlying consideration whether or not such deference is granted is to ascertain and give effect to legislative intent. *Accordingly, the Commission's reasonable construction of the bingo statutes is entitled to deference, but only to the extent the rationales supporting such deference are applicable under the circumstances.*

144 Idaho at 26, 156 P.3d at 527 (citations omitted) (emphasis added).

Like the Lottery Commission, the Director of IDWR is charged with administering delivery calls pursuant to the CMR; in addition, the CMR were promulgated by the Department of Water Resources nearly 15 years ago. If the Director's application of procedures under the CMR is "reasonable" such application is entitled to deference.

II. THE CONCEPTS OF "PUBLIC INTEREST" AND "REASONABLE USE" PROVIDE THE LEGAL FRAMEWORK FOR THE DIRECTOR'S PROCEDURES IN RESPONSE TO A DELIVERY CALL.

The Director's Final Order must be reviewed using two categories of inquiry: first, to determine if the procedures were inconsistent with statutes, constitutional provisions or otherwise an abuse of discretion;[3] and second, to the extent those procedures were the result of an exercise of discretion, did the procedure result in injury to SWC's water rights based on

[3] *Sons & Daughters*, 144 Idaho at 26, 156 P.3d at 527.

substantial evidence in the record.[4] If, for example, the Director's determinations regarding procedures under which juniors were required to provide replacement water could be shown—by reference to the record—to have resulted in shortages that were determined to be injurious, that would be grounds for remand of the decision. However, review of the procedures by reference to applicable principles of law demonstrates that the procedures were not unlawful; review of the procedures by reference to facts in the record shows the same.

A. Constitutional concepts provide the framework for the Director's discretion.

Several constitutional concepts form the framework for evaluation of the Director's Final Order, and this legal framework forms the basis for review of the Director's procedures and findings to the SWC delivery call. While the concept of "first in time is first in right" forms the foundation of the prior appropriation system in Idaho, the state constitution characterizes that right by reference to the "public interest" and "reasonable use". *AFRD #2 v. IDWR*, 143 Idaho at 878, 154 P.3d at 449. As the Hearing Officer said in his Recommendations (R. Vol. 37, p. 7084) "the [*Schodde*] case reflects that the public interest is a factor to be considered in a water rights litigation that impacts the public."

Consistent with the authority vested in it by the Idaho constitution, article XV, section 5, the legislature incorporated considerations of public interest into the administration of water rights in Idaho Code section 42-101:

> 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.*

[4] *Sons & Daughters*, 144 Idaho at 26, 156 P.3d at 527.

Idaho Code § 42-101 (emphasis added). The Director's authority to administer water rights—including conjunctively administering ground and surface water sources—is provided for in Idaho Code section 42-602. That authority must be read as qualified by the obligations of the state, as specified in Idaho Code section 42-101, to protect the public interest.

Further, in CMR Rule 20.03, the IDWR has affirmatively acknowledged its obligation to administer conjunctive sources by reference to these constitutional provisions:

> **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.

To the extent that the Director found injury, his interim orders and the Final Order in this matter are consistent with the considerations found in Rule 20.03, as well as the statutory and constitutional provisions underlying the rule.

In addition to the discussion of these constitutional provisions, the Hearing Officer's Recommendations in this matter also found that the Director's discretion included the obligation to investigate the SWC's allegations of injury and formulate orders in response, rather than simply delivering the amounts on the face of SWC's decree. R. Vol. 37, 7074-7075 (regardless of the *AFRD #2* decision "the Director had the authority and the responsibility to develop the facts upon which a well-informed decision [regarding injury to SWC's water rights] could be made . . . . To do otherwise would be irresponsible to the public interest . . . .").

B. The Director's procedures were consistent with the statutory and constitutional framework described above.

Without distinguishing (or even describing) these constitutional and statutory provisions qualifying the Director's authority to administer water rights, the SWC flatly asserts that the Director's obligation upon receiving its allegations of injury was to deliver the amount of water on the face of the SWC licenses and decrees:

> The above statute [referring to Idaho Code 42-607] governs a watermaster's duties in "clear and unambiguous terms." the Idaho Supreme court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." In times of shortage, watermasters must distribute water according to the elements and priority dates of an "adjudication or decree."[5]

SWC's Opening Brief, p. 26 (citations omitted). Assume for the moment the SWC is right: how can the Director, in the face of the constitutional imprecations of "reasonable use" and "public interest", simply deliver the amount on the face of the licenses and/or decrees without regard to the impacts on other water rights?

As discussed in Section I.C. above, the evidence in this case showed that simply to deliver the 127,000 af of water that the Director found Twin Falls was owed under the May 2 Order, would have required curtailment of 1.1 million acres of agricultural ground reliant upon junior ground water rights. By extension, the only way the Director could have ensured delivery of *all* of the water on the face of the SWC's water licenses and decrees, as the SWC demands,

[5] The SWC goes on to suggest (at page 27 of the Opening Brief), "Justice Schroeder plainly recognized the right a senior has for purposes of administration as against junior water rights." However, the Recommendations portion referred to actually establishes the framework for examining the standards for delivery of an amount of water—not the decreed amount. The entire quote is: "At some point a determination has been made that a licensed or adjudicated water right holder has an entitlement in priority to a certain amount of water if that water can be applied to a beneficial use. **That right is not absolute**. Nature may change the course of a river. Water may not be available through no cause related to junior users. However, to the extent water is available within the amount of the water right but is diminished by junior users, the presumption favors the senior users' rights to the water. **That right may be limited or lost by consideration of the factors in 42.01**." R. Vol. 37, p. 7078 (emphasis added).

would have been to permanently curtail ground water pumping that supplied irrigation water to over 1 million acres of agricultural land and drinking water for tens of thousands of Idaho citizens. Under the circumstances, the Director's rejection of the SWC's demand is not surprising—it would not have withstood scrutiny under the "public interest" and "reasonable use" provisions of the Idaho Constitution, statutes and CMR.

C. The factual determinations in the Director's Final Order are consistent with the statutory and constitutional framework described above.

SWC spends many pages in its Opening Brief arguing that the Director's procedures for administering the delivery call were inadequate. However, SWC's delivery call was about injury to its senior water rights and although the SWC alludes to the fact that the Director's procedures resulted in injury to its members, it does not allege that the findings of injury, when they were made in the various interim orders, were erroneous or otherwise refer to evidence in the record that supports the factual allegation of injury. In a sense, the SWC argument has not changed since it filed its Motion for Partial Summary Judgment on January 23, 2006.

In the Director's words, the SWC was asking for a finding that: "under the prior appropriation doctrine its members are automatically entitled to the full amounts of their water rights as a matter of law . . . ." R. Vol. 19, p. 3615. The Director went on to deny the Motion, finding that:

> The Surface Water Coalition, therefore, is mistaken to the extent it argues that the Director must, as a matter of law, distribute the full amounts of water set forth in its members' water rights licenses and decrees without any consideration of its members' actual beneficial uses and needs. Rather, the Director must make a factual determination of whether the full amounts of the water rights are necessary for the authorized beneficial uses at the time the delivery call is made. If so, the Director will distribute the full amount of the right. If not, the Director will order the distribution of such amount as is necessary to achieve the authorized beneficial use. This determination, which is subject to judicial review, is not a

> readjudication of rights but rather reflects the application of the background principles of water law, which are set forth in the conjunctive management rules, based upon the hydrologic conditions existing at the time of the delivery call. As with all water distribution, the amount of need will vary over time.

R. Vol. 19, pp. 3626-3627. The Idaho Supreme Court subsequently agreed, (upholding the Gooding County District Court):

> [c]ontrary to the assertion of [American Falls], depletion does not equate to material injury. **Material injury is a highly fact specific inquiry** that must be determined in accordance with IDAPA conjunctive management rule 42.

AFRD #2 v. IDWR, 143 Idaho at 868, 154 P.3d at 439 (emphasis added).

The Hearing Officer affirmed the Director's determinations regarding injury for 2005-2007, based on evidence in the record. SWC has not alleged any factual basis for a different determination. Given the legal framework that informs the Director's discretion in responding to delivery calls, there is no basis for finding the Director's determinations on injury or non-injury in the May 2 Order and subsequent interim orders to be contrary to Idaho law.

III. REPLACEMENT PLANS ARE AN APPROPRIATE METHOD TO MITIGATE INJURY TO SENIORS DURING THE PENDENCY OF A HEARING.

A. The Director's Final Order properly affirmed the practice of allowing replacement plans during the pendency of a delivery call hearing.

One ground of the SWC's appeal is that the Director's replacement plan methodology to supply replacement water prior to a delivery call hearing is unlawful. However, the Director's authority to develop such pre-hearing relief is consistent with the constitutional and statutory principles described above. As the Director noted in the Final Order:

> If the Director had not authorized replacement water plans but instead required the filing of a Rule 43 mitigation plan, junior ground water users could have been curtailed from the time the May 2005 Order was issued until a plan was filed and an order on the plan issued. If junior ground water rights had been curtailed, the SWC would have realized some benefit from increased reach gains

> in the Snake River. However, unlike curtailment in a surface water to surface water delivery call, curtailment in a conjunctive management call would not provide immediate and complete relief. . . . . "Curtailment of the ground water user may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous farm economy."

R. Vol 39, p. 7390, COL ¶ 12 (citations omitted).[6] The SWC in its brief does not deal with the consequences to ground water users of requiring a Rule 43 mitigation plan to be filed on the heels of the Director's initial finding of injury, before discovery can be had, facts can be developed, and a record is developed based on a hearing. But like the SWC's arguments that the senior's sworn oath of injury to its water right is a sufficient basis for IDWR to curtail the entire ESPA to deliver to the SWC seniors the decreed amount on the face of the licenses and decrees, in effect the only way a junior could file a Rule 43 mitigation plan without the benefit of a hearing on the allegations of injury is to settle for curtailment during the pendency of the mitigation plan. On its face, this draconian result is inconsistent with the Idaho constitutional principles of public interest and reasonable use, and must be rejected out of hand.

B. *Simpson v. Bijou Irrigation Co.* does not support the SWC's arguments due to fundamental differences in the facts and law underpinning that decision.

The SWC's reliance on a Colorado Supreme Court decision, *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003) is misplaced. Under the 1969 Act, the Water Court is the authority for all decisions related to adjudication of water rights, including deciding the terms and conditions necessary to provide administration without injury. Further, in most basins in Colorado, ground water users in Colorado *may not* pump unless and until they receive an

[6] This is consistent with testimony in the case from IGWA's president, Tim Deeg, who testified that replacement plans were critical because curtailment would result in "immediate and irreparable harm" to junior water users. R. Vol. 33, p. 6167.

augmentation plan from the water court[7]—indeed, ground water users may not even obtain a well permit from the State Engineer until the water court enters a decree augmentation plan.[8]

Unlike the Idaho Director of Water Resources, the Colorado State Engineer has no authority to determine injury to water rights—that is the sole province of the Water Court. *See, e.g., Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46 (Colo. 1999). Historically, whenever the Colorado SEO attempts to exercise such authority[9], a lawsuit results. *See, e.g., Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001), *Simpson v. Bijou Irrigation Co.*, *Vance v. Wolfe*, 2009 WL 1039887 (Colo. Apr. 20, 2009). Under Colorado law, the Water Court determines what is injurious to senior water rights, spells it out in the water right decree, and the State Engineer administers by reference to the decree. Augmentation plans, by contrast, require the junior ground water user to demonstrate his well pumping will be non-injurious, and to suggest terms and conditions (identify the source, timing, and location of replacement water) to avoid any injury. These are also decreed by the Water Court and the Colorado State Engineer also uses such decrees for administration.

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[7] However, upon filing for an augmentation plan, ground water users may obtain a "substitute water supply plan" which allows the Colorado State Engineer to administratively approve replacement plans during the pendency of the augmentation plan litigation. *See, e.g.,* C.R.S. 37-92-308.

[8] This is because statute requires the Colorado State Engineer to determine whether there is water available for appropriation (C.R.S. 37-90-137(2)(b)(I)—as most basins are over-appropriated no well permits issue without an augmentation plan decree. Some basins are not considered to be over-appropriated—for example, it is still possible to get a well permit for non-domestic uses in the Upper Yampa Basin without first obtaining an augmentation plan decree from the Water Court.

[9] Note, however, that in the Arkansas River basin the Colorado State Engineer does have authority to approve Rule 14 replacement plans under the Arkansas River Rules—the result of rulemaking during the interstate litigation between Kansas and Colorado over the Arkansas River Compact. The exercise of the Colorado State Engineer authority in this context if questionable, but has been distinguished by the Colorado Supreme Court on the basis that the rules assist the Colorado State Engineer in administering the lengthy and complicated decree that arose out of more than 30 years of litigation in the United States Supreme Court between Colorado and Kansas. *Simpson v. Bijou Irrigation Co.* at 68-69.

By contrast, the Director of IDWR is not only authorized, he is obligated to answer delivery calls and determine injury to senior water rights. It is authority he has exercised for the last four years in the context of the SWC delivery call and others. He has authority under Rule 43 to decide mitigation plans after a record is created; he also has authority, as described in the Final Order, to determine interim "replacement plans". To allow for replacement plans is a reasonable way to interpret agency rules: to require mitigation plans at the outset would offend the constitutional principles of "public interest" and "reasonable use" because the only mechanism to administer in the face of a delivery call would be curtailment. And, as described above, curtailment is a singularly inefficient means of administering conjunctive sources of ground water and surface water.

IV. THE DIRECTOR'S FINAL ORDER REGARDING THE TIMING OF CARRY-OVER STORAGE IS CONSISTENT WITH THE CMR AND IDAHO LAW

A. Due to the constitutional framework which circumscribes its authority, IDWR has discretion to order reasonable carry-over in the season of need.

The SWC and the BOR suggest that the Director's Final Order is arbitrary and capricious because it requires the provision of carry-over storage in the season in which the water would be put to use. The appellants go on to suggest that the "injury" occurs in the prior year, if juniors are not required to obtain contracts for carry-over storage water in the prior year.

The rubric of the Director's shortage determinations relies on "adaptive management". Although the SWC disputes this and demands delivery of the amounts on the face of its licenses and decrees, under Idaho law, adaptive management is consistent with the constitutional requirements of "reasonable use" and administration in the "public interest". In the same vein, determining injury to reasonable carry-over in the prior season but not requiring replacement

until the season of need is "adaptive"—the junior bear the risk that they will not be able to obtain sufficient storage water to satisfy the carry-over amounts. Just as juniors bear the risk that there won't be adequate water available in season to rent to satisfy natural flow amounts. This "risk" is appropriate—without being punitive. By contrast, requiring that the juniors obtain storage water prior to the season of need is unreasonably punitive.

B. The BOR's position is inconsistent with Idaho law, although it would be beneficial to the BOR's flow augmentation program.

Under the CMR, adverse impacts to carry-over storage are considered injury to water rights. R. Vol. 37, 7076-7077. However, the basis of the dispute over carry-over storage is not whether there should be an injury-to-carry-over determination, but when that amount should be supplied. It is not accurate to say that the "injury" to carry-over occurs during the prior year—"carry-over" storage is for purposes of beneficial use in a season of need. The injury occurs in the subsequent year if the amounts are not available for use.

Neither the SWC nor the BOR takes issue with the amount of water to be provided—other than asserting, as both do elsewhere, that they are entitled to full reservoirs (*see, e.g.*, BOR's Opening Brief, p. 11, n.3.) We are down to arguing about whether any replacement water to satisfy a carry-over storage obligation must be supplied in the year prior to or the year in which the water would be used.

The Hearing Officer's Recommendations note that, as BOR points out in its Opening Brief, the reservoir system was developed to facilitate storage of water during periods of shortage. R. Vol. 37, p. 7107. The Hearing Officer further found that the carry-over storage injury determination need only be made for the following year:

> **There is no precise amount of reasonable carry-over storage, but the amount should be sufficient to assure that if the following year is a year of water shortage there will be sufficient water in storage in addition to whatever natural flow right sexist to fully meet crop needs.** . . . . As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in *AFRD #2.*

Id. at 7109-7110, ¶ 12. The Recommendations also included this limitation on curtailment for carryover storage:

> [C]urtailment cannot be utilized to make up storage water that is disposed of [through sale or lease] . . . . [and] [t]he ground water users have no obligation to make up for water that will not be applied to its licensed or adjudicated purpose, e.g. the sale of water for flow augmentation.

Id. at 7108, ¶ 9. ¶

It would be highly beneficial to BOR if the SWC could obtain curtailment of junior ground water rights to fill Bureau reservoirs—the more water in the reservoirs, the more likely that flow augmentation water (the "fish flush" water the Bureau is required to provide to satisfy the Nez Perce Agreement) will be available. Mr. Jerrold Gregg, Area Manager for the BOR's Snake River Area Office testified that the Bureau was concerned if it didn't satisfy its flow augmentation amounts the situation would be "similar to the Klamath" in which the Bureau was required to release water from Klamath Lake to satisfy the Endangered Species Act and was then foreclosed from making deliveries to its contract holders. However, he acknowledged that if the Bureau successfully obtained curtailment of junior ground water users in order to fill its reservoirs it would merely be shifting the curtailment of deliveries from its contractors to the junior ground water users. *See generally*, Mr. Gregg's testimony on January 24, 2008.

The Hearing Officer's limitation on carry-over storage to exclude flow augmentation water amounts is warranted. Flow augmentation water is not a beneficial use associated with the

SWC's reservoir storage rights at issue herein. Indeed, it is not currently a recognized beneficial use at all in Idaho (Idaho Code 42-1763(B)(4)), although if it were a beneficial use, it would be junior to most of the ground water users since flow augmentation was not begun until the early 1990s.

C. Providing storage water in the year of use is consistent with allocation of "risk" under Idaho law.

The Bureau suggests that the Final Order is erroneous under Idaho law because it misapplies the risks associated with water administration. No citation to legal authority regarding the concept of "risk" is described. The Bureau's assumption seems to be that, because the prior appropriation system is based on scarcity, only the juniors bear the risk of scarcity.

In the context of questions regarding curtailment to satisfy seniors, former Director Karl Dreher testified regarding the appropriate "risk" to be placed in response to questioning by AFRD #2's counsel that the senior water right had never received their decreed amounts, and that administration of juniors should not be the means to develop a more reliable water supply:

> Q [by Mr. Arkoosh] Let me finish the question and we'll move on. There would be less risk for the senior [if the "minimum full supply" value in the May 2 Order was replaced with the decreed amount] and more risk for the junior; is that correct?
>
> A. I guess that's potentially correct, but two problems with it. No. 1 -- I mean, I don't care which of the entities you want to use. Take their natural flow right as a maximum diversion rate in cfs. What quantity would you have me use in this column? How many days do I assume they diverted to full quantity of the water right? They don't do it now in the surface water system. They divert what they need.
>
> And it can be less and often is less than the maximum quantity authorized under the water right and yet, apparently, you would have me treat ground water folks differently and assume that I should administer to the maximum quantity authorized, whether it's needed or not. That is not how it's done in the surface water system, and yet that apparently is what you think I should be doing here.

> Secondly, to do as you suggest would result in waste, because a significant amount of the resource that could be used, wouldn't be used in the interest of trying to -- what shall we say -- zero the risk on the senior. And the senior is always going to have risk that there won't be enough water. The presumption in the west under the prior appropriation system is there will be times when there is insufficient water to fill all rights.

Transcript, Jan. 16, 2008, pp. 188:13-189:18. As Mr. Dreher's testimony suggests, there is more to the prior appropriation system in Idaho than simply the priority date. As the curtailment testimony referred to in Section I.C. above suggests, curtailment is fraught with problems of inefficiency and waste.

The same problems apply to the timing of providing carry-over storage. As Mr. Sullivan's report (discussed in Section I.C. above) shows, curtailment leads to accretions to the stream that are perpetual and year-round. As Mr. McGrane, one of the Bureau's witnesses, confirmed during cross-examination that the Upper Snake reservoirs (including reservoirs not the subject of the delivery call) would have been insufficient to store all available water if curtailment of all ground water rights junior to 1949 had ensued during a period of wet years, such as 1995-1997. Further, this would have resulted in increased reservoir spills. Transcript, Jan. 25, 2008, p. 1443:5-24.

In comparison, if the junior well owners are required to purchase carry-over storage in the fall of the year for use during the following irrigation season and the reservoirs fill, they have either wasted their money or over-mitigated the injury to the seniors. And, to look at the other means of mitigation—curtailment—evidence in the case showed that curtailment in September of the preceding year versus curtailment in the spring of the year the carry-over water would be used will not provide any appreciable difference in the amount of storage water provided. Under these circumstances, and in light of the constitutional precepts that guide his decision-making,

for the Director to have ordered carry-over in a season prior to the season of use would have been arbitrary.

CONCLUSION

For the reasons described herein, Pocatello respectfully requests that the Final Order in this matter be affirmed.

Dated this 29th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2009, I caused to be served a true and correct copy of the foregoing **Respondent Pocatello's Brief on Appeal from the Idaho Department of Water Resources** for **Case No. CV-2008-0000551** upon the following by the method indicated:

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

ORIGINAL

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY,

Petitioners,

vs.

DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,**

Respondents.

CASE NO. CV-2008-551

GROUND WATER USERS' BRIEF IN RESPONSE TO SURFACE WATER COALITION'S JOINT OPENING BRIEF

Appeal from the Idaho Department of Water Resources

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is an appeal from the *Final Order Regarding the Surface Water Coalition Delivery Call* ("Final Order") of the Idaho Department of Water Resources ("IDWR" or "Department") dated September 5, 2008. The Final Order was issued in response to a Delivery Call submitted in 2005 by seven senior surface water entities commonly known as the Surface Water Coalition ("Surface Water Coalition" or "SWC"). The Surface Water Coalition is made up of American Falls Reservoir Dist. #2 ("AFRD#2"), A&B Irrigation District ("A&B"), Burley Irrigation District ("BID"), Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company ("NSCC"), and the Twin Falls Canal Company ("TFCC"). The Surface Water Coalition entities are located in southern Idaho below American Falls Reservoir. The Delivery Call requested the curtailment of junior ground water users diverting and using water from the Eastern Snake Plain Aquifer ("ESPA").

The Final Order adopted in part and rejected in part a number of findings and conclusions contained in an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* dated April 29, 2008 ("Recommendation"), which was issued by an independent Hearing Officer, Honorable Gerald F. Schroeder, following a three-week hearing. Notably, the Recommendation adopted in large part the findings of fact and conclusions of law contained in an earlier document known as the *Amended Order* dated May 2, 2005 ("Amended Order"), which was issued by the IDWR Director soon after the SWC's Delivery Call was submitted. The Amended Order was the document in which IDWR first made the initial material injury determination with regard to the SWC's Delivery Call. Hence, this appeal primarily

involves a review of the Final Order dated September 5, 2008, the Recommendation dated April 29, 2008, and the Amended Order dated May 2, 2005.

The SWC argues that, because the IDWR Director ("Director") attempted to determine the amount of water its members actually needed for the beneficial use of irrigation, he did not "honor" their decree. *See* SWC's Joint Opening Brief at 29-31. Further, the SWC argues that IDWR should not be allowed to consider the water held in storage for the benefit of the SWC. Under the SWC's proposed administrative scheme, the Director must only look at the senior's natural flow water right and not examine the senior's available storage water supply. *See* SWC's Joint Opening Brief at 30. In other words, by suggesting that the Director ignore their storage supplies, the SWC blatantly ignores the Idaho Supreme Court's holding in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources ("AFRD2")*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007), which flatly rejected this same argument by the SWC.

The SWC also argues that the decreed quantity element of a water right defines a guaranteed minimum entitlement to be demanded at all times rather than an authorized maximum quantity that may be diverted subject to need, beneficial use, reasonable use, availability, and other relevant considerations. *See* SWC's Joint Opening Brief at 25-31. This misguided position ignores the well-established rule of law that beneficial use defines the extent, limit, and measure of a water right in Idaho. *See AFRD2*, 143 Idaho at 876, 154 P.3d at 447; *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007). Further, the SWC's position is entirely without support in the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 *et seq.* (hereinafter "CM Rules") and has been soundly rejected by the Idaho Supreme Court in *AFRD2.* In addition, it has

also been rejected by the former Director Dreher, present Director Tuthill, and the Hearing Officer. *See* R. Vol. 37, pp. 7073-75.

The arguments raised by the SWC on appeal should be rejected and the Final Order issued by IDWR should be affirmed.

B. COURSE OF PROCEEDINGS

On January 14, 2005, the SWC filed a letter and petition ("Delivery Call") with the Director of the Department. R. Vol. 1 at 1-52. The Delivery Call sought administration and curtailment of junior ground water users who divert ground water from the ESPA. R. Vol. 1 at 2 ¶ 1. On February 15, 2005, the Director issued an Order as an initial response to the Delivery Call. R. Vol. 2 at 197-240. On April 19, 2005, the Director issued a second Order in response to the Delivery Call. R. Vol. 7 at 1157-1219. Finally, on May 2, 2005, the Director issued the Amended Order. R. Vol. 8 at 1359-1424.

The SWC filed an objection to the Amended Order and demanded a hearing. R. Vol. 8 at 1507-16. Several parties intervened, including the Idaho Ground Water Appropriators ("IGWA" or "Ground Water Districts"), Idaho Dairymen's Association ("Dairymen"), the City of Pocatello ("Pocatello"), the United States Bureau of Reclamation ("Bureau" or "BOR"), and the State Agency Ground Water Users. Pre-Hearing Tr. Vol. 1, pp. 1-4.

The SWC and Bureau represented the interests of the surface and storage water users. IGWA, Pocatello and the Dairymen represented the interests of the ground water users.

C. STATEMENT OF THE FACTS

1. The Parties and Their Respective Water Rights

The SWC entities divert water from the Snake River under water rights that range in priority dates from 1900 to 1939. R. Vol. 1 at 8; Ex. 4001A and 4001. The SWC entities also

hold contracts for storage water in the Upper Snake Reservoirs that are owned and operated by the Bureau. R. Vol. 37, p. 7055, 7060-61. The storage water is stored pursuant to water rights owned by the Bureau under priority dates ranging from 1906 to 1957. Exhibits 4001A and 4000. The water rights claimed by the SWC and the Bureau have not yet been partially decreed in the Snake River Basin Adjudication and all have pending, unresolved objections. Ex. 4615, 9723-9729. In addition to their Snake River water rights and their storage contracts, nearly 75,000 acres claimed by SWC entities have supplemental ground water rights. Ex. 4127, 4128, 4129, 4130, 4131, 4132, 4133 and 4100 at 16.

Amongst the SWC entities, Twin Falls Canal Company has the largest and most senior surface water right (Water Right No. 1-209) and it relies primarily on natural flow of the Snake River to satisfy its irrigation needs. Ex. 4001 and 8001. TFCC's water right bears a priority date of October 11, 1900. R. Vol. 23, p. 7056. North Side Canal Company owns a small 400 cfs water right (Water Right No. 1-210) with the same priority date. *Id.* All other SWC entities primarily rely upon storage water to meet their irrigation needs. *Id.*

Not all of the acres claimed by the SWC entities' water rights are irrigated every year. R. Vol. 37, p. 7100, R. Vol. 39, p. 7392. As pointed out specifically for TFCC, Minidoka, and BID, numerous acres are actually "hardened" and will likely never be irrigated because these acres are now roads, parking lots, subdivisions, commercial structures or have otherwise been developed so as to no longer need irrigation. Ex. 4310. For TFCC alone, there were a minimum of 6,600 "hardened" acres which equaled 3.3% of TFCC's total claimed acres listed in its water right. R. Vol. 37, p. 7100, R. Vol. 39, p. 7392, Ex. 4310, Ex. 8190 at 14, Tr. Vol. 11, p. 2247, L. 10-14. The SWC's expert, Charles Brockway, admitted that non-irrigated acres should not be considered in calculating irrigation water supply needs and that TFCC had 6,600 "hardened"

acres that are not irrigated. Tr. Vol. 11, p. 2247, L. 2-4. Ex. 8190 at 14. This conclusion was properly adopted by the Recommendation and Final Order and has not been challenged on appeal to this Court. R. Vol. 37, p. 7100, R. Vol. 39, p. 7392.

IGWA represents ground water users who pump water from the ESPA and irrigate over 800,000 acres of land from the aquifer. R. Vol. 37, p. 7058. The vast majority of the ground water users own water rights that are junior in priority to the water rights held by the Surface Water Coalition and the Bureau. R. Vol. 1, p. 119. Ground water development began in earnest in the late 1950's and continued through the early 1980's with the advent of cheap electrical power and with the encouragement of State policy. R. Vol. 28, p. 5174. Ground water development leveled off in the late 1980's and came to a halt in 1992 after a moratorium on all new ground water developed was imposed. Ex. 4100, 4109 at 5-6; Dreher, Tr. Vol. 2, p. 376, L. 6-21. The effect of ground water pumping on the Snake River is mostly realized within 20 years, although it can take up to 100 years for "steady state" conditions to be fully realized. Dreher, Tr. Vol. 1, p. 36, L. 14 – p. 37, L. 375- L. 20; McGrane, Tr. Vol. 7, p. 1497, L. 6-10. The ESPA is currently at or near equilibrium because there have been no new wells since the moratorium and most irrigation has already been converted to sprinklers. *Id.*

2. The Snake River and the ESPA

The Surface Water Coalition diverts both surface and storage water rights from the Snake River from points of diversion that are below American Falls Reservoir. R. Vol. 31, p. 5892. After the SWC's water rights were established in the early 1900's and flood irrigation on the Eastern Snake Plain had been occurring for decades, ground water levels in the ESPA were enhanced due to incidental recharge. Carlson Direct R. Vol. 28, p. 5166-5204; Ex. 4100 at 5. By 1952, an estimated 24 million acre-feet of water had been added to the ESPA as a result of

incidental recharge from surface water irrigation waste. Ex. 4100 at 6. The enhanced levels of the ESPA increased the historical water supplies of the SWC entities. Carlson Direct R. Vol. 28, p. 5173-74; Ex. 4100 at 6. Ground water levels in the ESPA have declined since the mid-1950's due to a number of factors, including the conversion from flood to sprinkler irrigation, reduced canal diversions, winter water savings agreements, elimination of winter water in canals in favor of storage resulting from the Palisade's project, ground water pumping, and to a lesser extent drought. R. Dreher, Tr. Vol. 2, p. 322, L 8-14, p. 379, L 18-25, p. 380, L 1-7; Koreny, Tr. Vol. 10, p. 2161, L 22-25, p. 2162, L 1-2. However, the amount of water that is pumped from the aquifer annually (approximately 2.2 M/AF) is significantly less than the amount of water currently entering the ESPA (approximately 8 M/AF) and thus the ESPA is not being mined. R. Vol. 27, p. 5069. There is no dispute and the SWC experts admitted that junior ground water users are only responsible for the depletions to the aquifer caused by junior ground water pumping and are not responsible for the reductions in the aquifer or hydraulically connected portions of the Snake River that are caused by changes in irrigation practices, changes in incidental recharge, winter water storage or drought. Brockway Tr. Vol. 11, p. 2255, L. 1-8.

TFCC and NSCC divert water from Milner Dam, the lowest point of diversion in Water District 01. R. Vol. 28, p. 5170, p. 5177 and p. 5186. TFCC and NSCC have the most senior water rights below Blackfoot and these water rights total 3000 cfs and 400 cfs, respectively. R. Vol. 28, p. 5177. Below Blackfoot, there is insufficient natural flow after June or July in most years to fill the SWC's water rights which then begin using storage water. R. Vol. 28, p. 5179; Dreher, Tr. Vol. 2, p. 366, L. 34 – p. 368, L. 16. The Snake River gains water from Blackfoot to Minidoka during the normal irrigation season of approximately 3000-3400 cfs. Dreher, Tr. Vol. 2, p. 372, L. 10-18; R. Vol. 27, p. 5079-83. The reach of the Snake River between the near

Blackfoot gage and the Neeley gage is important because it contains numerous springs that provide the bulk of the gains to the Snake River flows and provide an important part of the water supply of the SWC. Ex. 8013. The senior 1900 priority water rights of TFCC and NSCC command the entire river natural flow below Blackfoot leaving the rest of the SWC entities to rely primarily on their storage supplies after the spring runoff period. R. Vol. 28, p. 5191-92, ; Dreher, Tr. Vol. 2, p. 372, L. 10-18; R. Vol. 27, p. 5072-73.

The annual reach gain between the Blackfoot gage and the Neeley gage shows no statistically significant trend over the 93 year period of record which demonstrates that ground water pumping has not detrimentally impacted the SWC surface water rights. Ex. 4112, 4113, 4100 at 7-8, Dreher, Tr. Vol. 1, p. 34 L. 8 – p. 46 L. 4, p. 1258 L. 17-22 and R. Vol. 8, p. 1415. In fact, former Director Dreher testified regarding Attachment I to the Amended Order (R. Vol. 8, p. 1415):

> If this decline was the result of ground water depletions, one would have expected to see it manifested earlier in the record, and it just is not there. There simply is no declining trend until this latter period of time.

Dreher, Tr. Vol. 1, p. 37, L. 2-6.

> Now, secondly, members of the SWC attributed this decline, this latter decline, beginning in about 1999, to groundwater depletions. And that was not consistent with what we understood the facts to be based upon simulations using the reformulated, recalibrated groundwater model. The decline is real. The fact that it's the result of groundwater depletions, I would say, is very uncertain and unlikely.

Dreher, Tr. Vol. 1, p. 37, L. 14-23. These declines are more likely due to drought or changed irrigation practices. Dreher, Tr. Vol. 2, p. 379, L. 12 – p. 380, L. 7.; R. Vol. 27, p. 5073 -5077 and Ex. 4149-4152 and cf. Ex. 4153 w/ Ex. 4112. Since the year 2000, the Upper Snake River Basin has experienced the worst consecutive period of drought on record and that drought has caused reduction in reach gains. Dreher Tr. Vol.2, p. 237, L. 15-23. In fact, the drought would

be expected to be repeated only one time in every 500 years. Ex. 4105, 4106, Dreher, Tr. Vol. 2, p. 237, L. 15-23. Yet, the SWC's diversions were greater or substantially similar in this recent drought to their diversions in the drought of the 1930s. R. Vol. 27, p. 5078; R. Vol. 35, p. 6635-36 discussing Ex. 4154A, 4155A, 4156A, 4156A and 4154B.

The ESPA is hydraulically connected to portions of the Snake River but the degree of connection varies. R. Vol. 8, p. 1363; Ex. 4100 at 5-6. Being hydraulically connected means that ground water can become surface water and surface water can become ground water. R. Vol. 8, p. 1364. Because of the varying levels of connection, curtailment of junior ground water users does not necessarily result in usable water by the SWC. The Department investigated the usability of reach gains using the ESPA model in conjunction with the Department's planning model Ex. 4100 at 22-23; Ex. 4141. This analysis looked at the steady state gains accruing between Shelley and Milner, in the area that covers the locations on the Snake River from which the SWC entities divert or store water. The analysis looked at curtailing junior water rights back to January 1, 1961, which would dry up 664,300 acres. The result was that 95% of the increased reach gains would actually flow past Milner Dam during the non-irrigation season and that only 42 cfs out of 888 cfs steady state reach gain could be diverted for irrigation or stored for the benefit of the SWC. *Id.* This is due in part to the fact that the water curtailed will accrue in a place or at a time when the gains cannot be diverted or stored by the SWC entities or when there is insufficient reservoir space. Wylie, Tr. Vol. 3, p. 593, L. 10-19. This same basic problem was recognized in the 1946 Planning Report for the Palisades Project. Ex. 4100 at 22, Ex. 4162 at 11.

3. The Storage Reservoirs

The Snake River above Milner dam[1] has four primary storage water reservoirs;[2] starting highest up on the Snake River is Jackson Lake in Wyoming, Palisades in Idaho near the Wyoming border, American Falls southwest of Blackfoot, and Minidoka or Lake Walcott just east of Milner dam. Ex. 3002. The SWC has contracts for storage in Jackson Lake, Palisades, and American Falls. Ex. 9704 and Ex. 4100 at 13. The Bureau built the reservoirs in order to support irrigation projects in the west so that irrigated agriculture could develop in southern and southeastern Idaho. The storage water in the reservoirs was intended to supplement natural flow supplies from the Snake River. Swank, Tr. Vol. 4, p. 807, L. 17-21. Studies completed by the Bureau based upon pre-ground water development study periods indicate that the then existing reservoirs at Jackson Lake and American Falls would have been empty during the 1932 to 1935 drought period. Ex. 7001, Report of the Regional Director at 11-14. The Palisades Planning Report in 1945 that preceded construction shows that Palisades was not expected to fill every year and that during drought years it would be empty. Ex. 7001 at 154-55. The drought experienced since 2000 is similar or greater in severity to the 1930's drought period. Ex. 4157. Yet, the combined active storage in the three reservoirs at the end of 2004 was 476,000 acre-feet as compared with the combined carry-over storage of the SWC of 288,300 acre-feet. Ex. 4100 at 14. Significantly, the storage reservoirs were expected to fill 2/3 of the time and in fact have filled 2/3 of the time. McGrane, Tr. Vol. 7, p. 1407, L. 22 – p. 1408, L. 4. The storage reservoirs have never run out of water. Swank, Tr. Vol. 5, p. 992, L. 12-18.

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[1] The Snake River above Milner Dam is commonly referred to as the "Upper Snake River."

[2] There are also reservoirs at Island Park on the Henry's Fork, Grassy Lake in Wyoming and Ririe Reservoir on Willow Creek but water rights for those reservoirs are not involved in these cases. They are important, however, because they affect the operation and priority fill of the Upper Snake River reservoirs. McGrane Tr. Vol. 7, p. 1512 - L. 4 – p. 1513, L. 15.

4. Water District 01

The Snake River above Milner Dam is part of Water District 01 ("WD01") which encompasses the delivery of all natural flow and storage water from the Idaho/Wyoming border down to Milner Dam. R. Vol. 28, p. 5170. The direct testimony of Ronald D. Carlson, the Watermaster for WD01 for nearly 30 years, describes the operation of WD01. R. Vol. 28, p. 5166. Since 1978, WD01 has used a computerized accounting program that allocates natural flow and storage water to water rights that divert from the Snake River. Ex. 4201 through 4210 demonstrate how water rights are distributed in WD01. R. Vol, 28, p. 5182-85.

It is not until February or March of the year following the irrigation season, however, when the final accounting is completed and storage accounts reconciled and carry-over is allocated. Swank, Tr. Vol. 4, p. 826, L. 3-7. Notably, the SWC entities have never had their water deliveries restricted during the irrigation season since they are entitled to divert whatever water they need so long as they have a positive storage account balance. Burrell, Tr. Vol. 4, p. 713, L. 2-4; Swank Tr. Vol. 5, p. 977, L. 14 – p. 978 L. 5.

Hence, the repeated claim by the SWC in its Joint Opening Brief that its members had no water during the irrigation season is patently false. *See, e.g.,* SWC's Joint Opening Brief at 6 (suggesting that administration has left "the Coalition without any water while the ground water users continued to pump their full rights out-of-priority"). The impression left by the SWC's Joint Opening Brief is that their canal beds lay dry and cracked with their fields scorched; but, nothing can be further from the truth. The fact is that the SWC failed to offer even a single witness who could testify to land left fallow nor any dried up crops due to lack of water at any time in any year of their century of operation. At best, the eight lay witnesses offered by the SWC testified to unsubstantiated beliefs they may have experienced unsubstantiated yield

reductions and were unable to link their alleged cropping pattern changes to reduced water supplies. *See* Blick Testimony R. Vol. 34, p. 6361-66, Coiner Testimony R. Vol. 33, p. 6269-72, O'Connor Testimony R. Vol. 33, p. 6333-39, Shewmaker Testimony R. Vol. 40, p. 7546-48, Breeding Testimony R. Vol. 33, p. 6286-88, George Testimony R. Vol. 33, p. 6279-80, Lockwood Testimony R. Vol. 33, p. 6260-62, Kostka Testimony R. Vol. 33, p. 6342-44. TFCC's long-time manager, Vince Alberdi testified:

> Q. There's no examples of fallowing based on water shortage?
> A. No.
> Q. And no examples of fallowing you can point to based on -- I'm sorry -- crop loss that you can point to based on water shortage; correct?
> A. No.

Alberdi Tr. Vol. 8, p. 1788, L. 16-23. This is consistent with the testimony of long-time NSCC manager Ted Diehl that cropping patterns were about the same as they had been in the past and that in fact, more of water consumptive corn and hay crops had been planted in recent years due to the growth of the dairy industry in the area. Tr. Vol. 9, p. 1873, L. 18 – p. 1874, L. 22, p. 1889, L. 3, p. 1890, L. 5. Furthermore, the SWC's expert witnesses also acknowledge that despite variations in surface and storage water supplies, they had no information indicating that SWC member dried up any acres or had documented reductions to crop yields dues to water supply shortages. Tr. Vol. 1, p. 28, L 18 – p. 29, L 7.

The fact is that the SWC entities were able to divert as much water as they needed during 2005 and 2007 despite the Director's prediction of material injury to SWC in those years.[3] Current WD01 Watermaster Lyle Swank testified:

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[3] There was no material injury predicted for 2006 as 2006 was a wet year. R. Vol. 20, p. 3756 and R. Vol. 23, p. 4300-01.

Q. The question I asked, the accounting program would allocate natural flow to the right holders based on priority; correct? And if their demand or diversion exceeded what was available on a particular day in natural flow, the difference would be simply debited to their storage account?
A. That's correct.
Q. So as long as a right holder has available a balance in their storage account, they would not be restricted on delivery?
A. That's correct. Yes.

Swank, Tr. Vol. 5, p. 979 L. 1- 12. In addition, the evidence clearly shows that there was more than enough water in carry-over storage to satisfy the needs of all the SWC entities in 2005 and 2007. R. Vol. 23, p. 4298. In addition, Swank testified that the reservoir system has never gone dry and there has always been water available to storage contract holders.

Q. What I was saying is, I didn't see any records that you could go to the end of the year, and then see that there was the total of all the water available in the storage accounts was a zero. There always is some carry-over balance; would that be correct?
A. Yes.

Swank, Tr. Vol. 5, p. 992, L. 12-18. Finally, even if there ever occurred a time when there was no water available (which has never happened), the contracts held by the BOR with its space holders allow the BOR to provide the water from their storage for the contracted holder to borrow against next year's fill. Swank, Tr. Vol. 5, p.. 990, L. 22 – p. 991, L. 6. The SWC's contention that they were not provided water sufficient to meet their needs in 2005 and 2007 when material injury was predicted is entirely without a supporting basis based upon the actual storage and delivery needs. Ex. 1035.

Once the Water District 01 account is reconciled, if a SWC entity runs out of storage water, which happens very rarely, they are assigned "excess use" (overdraft) by debit to their account. Swank, Tr. Vol. 5, p. 979, L. 1-8. As a result, in the rare event a storage holder has excess use then they are required to lease the shortfall from other storage space holders with a surplus. Swank, Tr. Vol. 5, p. 979, L. 1-8. This is a well-established practice with a pre-

determined procedure and an established neutral price pursuant to the WD01 Rental Pool Rules. Ex. 1076. The reservoirs have never run completely dry and there has been water to lease from other spaceholders when necessary. Swank, Tr. Vol. 5, p. 992, L. 12-18.

As part of its mitigation and replacement water plan in 2007, IGWA underwrote TFCC's predicted material injury by guaranteeing TFCC's water supply. Ex. 4502A. In other words, IGWA committed to and in fact delivered rented water which was transferred into TFCC's carry-over storage account in the year TFCC would use the water in the full amount that the Director determined they would be short after the year end final accounting. In order to fulfill this replacement water plan, IGWA simply leased storage from other contract space holders and authorized the transfer by the water master to TFCC's account as soon as the Director determined the amount. Ex. 4502A at 10; R. Vol. 34, p. 6431. Thus, TFCC was free to divert as much water as it needed during the 2007 irrigation season, knowing that IGWA would transfer water into their storage account in the amount of the injury once the final accounting for 2007 was completed. The SWC has failed to produce anything in the record to show that this delivery was untimely or did not fully meet with all of IGWA's obligations or requirements of the Director's order.

The final accounting for WD01 for 2007 occurred in 2008. The Director's Order dated May 28, 2008 concluded that "based on the unique circumstances of the differences of Water District 01's preliminary versus its final accounting and the change in methodology used to calculate the Minidoka return flow credit, IGWA must provide 7,466 acre-feet of replacement water to TFCC to compensate it for its 2007 material injury." R. Vol. 38, p. 7208. IGWA had timely leases in place and had previously provided TFCC water in its storage water account. As soon as the Director requested IGWA to provide additional water to TFCC so that it could be

used when needed, IGWA provided the water. Thus, the required supply of water was in TFCC's account well before it was needed later in the 2008 irrigation season. Because the reservoirs filled in 2008, any carry-over obligation was canceled because there was no room in the reservoir system for it.

Had IGWA been required to delivery any carry-over storage in the prior year before the final accounting was completed and before the reservoir refill was determined, as the SWC urges, then in any year the reservoirs filled the water delivered early would simply be spilled. Such not only would result in water being wasted but would have also unnecessarily have caused IGWA to pay for leased water without a need or beneficial use. Swank Tr. Vol. 5, p. 1041, L. 15 – p. 1042, L. 1; Carlson Tr. Vol. 12, p. 2528, L. 4 – p. 2530, L. 3; R. Vol. 38, p.p. 7202, 7204 and 7206-08.

ISSUES PRESENTED ON APPEAL

The issues presented by the Surface Water Coalition's Joint Opening Brief can properly be summarized as followed:

1. Whether the Director is empowered to restrict SWC's diversion to a level of "actual need" to raise full crops when responding to a delivery call even if the amount is less than the authorized maximum amounts in SWC's decreed water rights.
2. Whether the Director properly exercised his authority and discretion in requiring temporary "replacement water plans" and whether the Director's response to the SWC's Delivery Call was timely and in accordance with Idaho law.
3. Whether the Director properly concluded in accordance with Idaho law that reasonable carry-over should be provided "in the season in which the water can be put to beneficial use, not the season before."
4. Whether the Director properly concluded in accordance with Idaho law that Twin Falls Canal Company's fully supply should be based upon 5/8 inch per acre for purposes of calculating the mitigation obligation so ground water users under the CM Rules.
5. Whether the Director use of the 10% trim line for purposes of curtailing junior water right users was in accordance with Idaho law and a proper exercise of the Director's discretion.[4]

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[4] In addition to the listed issues, the Ground Water Users understand that IDWR has in their Response Brief addressed the arguments of the SWC and Bureau concerning the fact that the Director did not issue a final order on his method for determining material injury. Thus, the Ground Water Users have not addressed that matter separately in this brief but instead refer the

ATTORNEY FEES ON APPEAL

The Ground Water Users request attorney fees on appeal pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1). As more fully discussed below, the SWC is in the instant appeal again raising numerous arguments that have already been wholly rejected by the Idaho Supreme Court in the *AFRD2* decision. The SWC's refusal to accept and abide by the Idaho Supreme Court's holdings in the *AFRD2* decision and its pursuit of this action is therefore unreasonable, frivolous, and without merit. Therefore, the Ground Water Users respectfully requests attorney fees on appeal pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1).

Court to IDWR's brief. *See* I.A.P. 35(g). In addition, the Ground Water Users understand that Pocatello has in its Response Brief addressed the SWC's arguments relating to the process the Director used to respond to their delivery call and the SWC's complaints about replacement water plans and the case of *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003). In supplement of the arguments contained within this brief, the Ground Water Users incorporate Pocatello's arguments addressing these matters. *Id.*

STANDARD OF REVIEW

The Idaho Administrative Procedures Act governs this Court's review of the Final Order. I.C. § 67-5240; *see also* I.C. § 42-5270; IDAPA 37.01.01.791. The Court must affirm the Final Order unless it is found to be: "(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). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). "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." *Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005)(citation omitted). The party attacking the agency decision must first illustrate that the agency erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The SWC and the Bureau erroneously attempt to characterize the Director's application of the CM Rules to the facts of this case and the proper exercise of his discretion as "errors of law" or "issue[s] of law" over which the Court enjoys "free review." SWC's Joint Opening Brief at 10; United State's Opening Brief at 11. Contrary to the SWC's arguments, it is not a question of law but instead an exercise of sound discretion in applying the CM Rules when the Director determines the amount of water actually needed by the senior to raise full crops, allows juniors to mitigate depletions through replacement water plans to eliminate any material injury,

determines the timing of when carry-over storage water should be provided, determines carry-over storage shortfalls based on known facts and not speculation, and thereby manages the resource to optimize beneficial use while preventing waste. These are questions of fact as supported by competent and substantial evidence in the record are not subject to re-determination by this Court in its appellate capacity. The Court in this case must follow the standard set forth in I.C. § 67-5279 and "not substitute its judgment for that of the agency." I.C. § 67-5279(1); see also *Urrutia*, 134 Idaho at 357, 2 P.3d at 742.

ARGUMENT

I. The Director is Authorized by Idaho Law to Restrict the SWC's Water Diversion to a Level of "Actual Need" to raise Full Crops when responding to a Delivery Call even if the Amount is less than the Authorized Maximum Amounts in the SWC's Decreed Water Rights.

In its Joint Opening Brief, the SWC argues that the Director abused his discretion in determining for purposes of their delivery call that the SWC was entitled to an amount of water less than the full amount decreed in their water rights. *See* SWC's Joint Opening Brief at 25. The SWC contends that, in doing so, the Director "effects an unlawful administrative re-adjudication of water rights." *See* SWC's Joint Opening Brief at 29.

This is the very same argument made by the SWC and rejected by the Idaho Supreme Court in the *AFRD2* case. In rejecting this argument, the Idaho Supreme Court held the following:

> CM Rule 42 lists factors "the Directory may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste..." IDAPA 37.03.11.42.01. Such factors include the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion. *Id.* ...
>
> Clearly ... the Director may consider factors such as those listed above in water rights administration. ... If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only those using the water. Additionally, the water rights adjudication 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 ... reasonableness is not an element of a water right; thus, **evaluation of whether a diversion is reasonable in the administrative 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....
>
> Conjunctive administration "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".... That is precisely the reason for the CM Rules and the need for analysis and administration by the Director. In that same vein,

> **determining whether waste is taking place is not a re-adjudication** because clearly that too, is not a decreed element of the right.
>
> ...The presumption under Idaho law is that the senior is entitled to his decreed water right, but **there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed.**

AFRD2, 143 Idaho at 876-78, 154 P.3d at 447-49 (emphasis added).

Thus, the Idaho Supreme Court made it perfectly clear that the Director is authorized to consider a senior water right call in light of all factors set forth in CM Rule 42 and is further authorized to deliver only that amount of water that is found to be "actually needed" even if it is less than the authorized maximum amount decreed in the senior water right.[5] The SWC's arguments to the contrary are frivolous and ignores the well-established fact that a water right quantity is an authorized maximum amount that can be diverted if it is available, not a guaranteed amount.[6] *Id.*; *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n5, 546 P.2d 382, 340 n5 (1976)(an appropriator is authorized to use the quantity of water needed, "regardless of the amount of [the] decreed right."); *Contant v. Jones*, 3 Idaho 606, 613 (1893) (an appropriator is only entitled to the water from year to year that he puts to beneficial use); *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 589 (1927) (an appropriator's right to use water ceases when his needs are supplied).

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[5] The Director, when looking to his duty to administer ground water rights, is to not just look at the priority date of the senior user, rather, the Director must equally guard all the various interests involved because "[w]ater [is] essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depend[s] upon its just apportionment to, and economical use by, those making a beneficial application of the same [thus], its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved." I.C. § 42-101 (underline added).

[6] To the contrary, if a decreed quantity was a guaranteed amount a late priority surface water right exists yet is rarely available except for a very short time during early spring runoff of the wettest years could be used to call out junior ground water users demanding a full supply for the full irrigation season. This would result in a water supply greater in quantity and certainty than had ever existed when the right was established.

Actual beneficial use is the legal limit to the amount of water an appropriator is entitled, regardless of the decreed or licensed quantity: "neither such license nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied." I.C. § 42-220. Idaho case law also supports the notion that a senior cannot demand the maximum quantity of water under his water right at all times.

> It is against the public policy of this state, as well as against express enactments, for a water user to take more of the water to which he is entitled than is necessary for the beneficial use for which he has appropriated it . . . Public policy demands that, whatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them.

Glavin, 44 Idaho at 589, 258 p. at 538. A water user is "only entitled to such water, from year to year, as he puts to a beneficial use." *Conant*, 3 Idaho at 613, 32 p. at 257. These principles, when considered with Idaho's Ground Water Act, I.C. § 42-226 *et. seq.* that mandates that the doctrine of "first in time first in right" be administered in a manner that does not block full economic development of the state's ground water resources, makes it obvious that the law in Idaho allows the Director to determine how much water is needed by a calling senior water user to raise full crops and to not just blindly curtail junior users to fulfill a "paper" maximum.[7]

In response to the SWC's delivery call, the Director properly understood that it was his responsibility, as the person responsible for the "proper distribution of the waters of the state" when applying the CM Rules to determine how much water was actually needed by the SWC for irrigation to grow full crops. In so doing, the Director determined "the amount necessary to meet water needs independent of the licensed, decreed or contracted rights" and referred to that

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[7] If this were not so, the TFCC which has a number of hydro-power rights along its canal systems could demand full delivery of its senior irrigation rights early and late in the irrigation season when unneeded to meet irrigation needs simply to increase power production. This may be fine, except in dry years when junior ground water users are subject to curtailment and mitigation obligations are calculated.

determined amount as the "minimum full supply." R. Vol. 37 at 7087 (the minimum full supply "is an attempt to predict the minimum amount of water the surface water users need to meet their crop requirements, below which curtailment is necessary if the minimum is not met as a consequence of junior ground water depletions").

The SWC's contention that "the Director unilaterally created the 'minimum full supply' process without any statutory or regulatory authority" is simply without merit. *See* SWC's Joint Opening Brief at 28. As mentioned, the CM Rules and the *AFRD2* case mandate that the Director determine the amount "actually needed" by the SWC. Despite the SWC's arguments to the contrary, the CM Rules and the *AFRD2* case dictate that the amount "actually needed" by the SWC is the amount of water to raise crops to maturity when making a delivery call. *See* SWC's Joint Opening Brief at 28. Simply put, it is crop irrigation requirements that set the obligation of junior right holders to supply mitigation, not an authorized maximum quantity set out in the decree. While the SWC would like to disregard the principles of reasonable use, beneficial use without waste, that is not the law in Idaho. *See* Idaho Constitution Art. XV, Sections 5 and 7; I.C. § 42-226; CM Rule 20; *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568, 572 (1997).

The SWC challenges the Director's *methodology* for determining the amount "actually needed" on only a *single* basis. The SWC argues that the Director abused his discretion in considering the SWC's surface rights and storage rights together when determining the amount "actually needed" by the SWC. *See* SWC's Joint Opening Brief at 30. The SWC contend that this "results in senior water right holders being forced to exhaust nearly all of their storage water supplies in order for the Director to find 'material injury.'" *Id.* The SWC argues that its "storage

water rights represent vested property right interests and once the water is stored it becomes private water no longer subject to diversions and appropriation." *Id.* at 31.

This argument concerning storage water (just like the SWC's argument concerning the so-called re-adjudication of decreed water rights) has already been addressed by the Idaho Supreme Court in the *AFRD2* case. The Idaho Supreme Court explained as follows:

> At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, **regardless of whether there was any indication that it was necessary to fulfill current or future needs** and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. **This is simply not the law of Idaho.** 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. As previously discussed, 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 (emphasis added). Thus, the Idaho Supreme Court made it clear that it was appropriate under Idaho law for the Director to consider whether stored water "was necessary to fulfill current ... needs" which are generally satisfied first from surface rights. In other words, Idaho law authorizes the Director to jointly consider the SWC's surface rights and storage rights when determining material injury under the CM Rules.

Lastly, it must be pointed out that the SWC does not raise any other challenge on appeal to the Director's *methodology* for determining "actual use" for purposes of their delivery call. This is not particularly surprising given that the Director has concluded that:

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

R.. Vol. 39, p. 7386. Because the Director will no longer be utilizing the so-called "minimum full supply" methodology for determining "actual use" for the purposes of the SWC's delivery call, the issue is essentially moot.

II. The Director properly exercised his Authority and Discretion in accepting Temporary "Replacement Water Plans" and the Director's Response to the SWC's Delivery Call must be affirmed as Timely and in accordance with Idaho Law.

In its Joint Opening Brief, the SWC argues that the Director's use of "replacement water plans" violates the Conjunctive Management Rules and is also unconstitutional. The SWC contends that the Director "created a 'new' procedure, without any authority under existing law." SWC's Joint Opening Brief at 32. The SWC also argues that the Director's use of "replacement water plans" is unconstitutional because it constitutes a taking without due process of law. *Id.* at 39-40. The SWC has in effect argued that temporary replacement water plans are improper and that the Director should immediately curtail all junior ground water users until such time as a evidentiary hearing is held and the Director enters a final order determining whether or not the curtailment should remain in effect and whether or not an adequate mitigation plan has been approved. Pending such a hearing and final order, this would result in dire and irreversible economic consequences, minimize beneficial use, and potentially deprive junior water users of their vested property rights without due process. The SWC's arguments are contrary to the procedures in the CM Rules that allow junior uses to provide "replacement water or other appropriate compensation" to prevent any material injury to the calling senior water use. CM Rule 43. Furthermore, CM Rule 5 provides that "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." Allowing replacement water plans that provides relief to seniors and

does not irreparably harm junior users certainly is allowed under Idaho Law and not precluded by the CM Rules.

A. Idaho Law and Policy Allow for the Replacement Water Plans

The CM Rules expressly authorize the Director to consider plans for replacement water. CM Rule 43.03.b authorizes the Director to consider whether "*replacement water supplies*" will be provided "*at a time or place required* by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal." (Emphasis added). CM Rule 43.03.c authorizes the Director to consider whether "*replacement water supplies*" will be provided "to the senior-priority water right *when needed* during a time of shortage." (Emphasis added). Thus, it is clear that replacement water plans are an acceptable means of mitigation.

The Director found that the use of replacement water plans was authorized under Idaho law and that the procedure is a necessary administrative tool. R. Vol. 39, p. 7390-91. Idaho law requires that the Director guard all interests equally and consider principles of reasonable use and full economic development in water rights administration. *Id.*; I.C. § 42-101. The Director's consideration and approval of replacement plans in this case falls within the realm of discretion afforded by the CM Rules, the Ground Water Act, I.C. § 42-226 *et. seq.* as well as his duties to distribute water under Idaho Code Title 42, Chapter 6. Not only are they authorized under Idaho law, there are very significant public policy reasons supporting the implementation of replacement water plans in the context of this very complex water case under Idaho Code Title 42, Chapter 6. The policy of the state of Idaho is to secure the maximum beneficial use of the state's water resources. *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). The legislature intended that the use of ground water rights be developed to their full economic potential. I.C. § 42-226. Allowing ground water users to provide replacement water to senior

users through replacement water plans adheres to these sound state's policies and provides for the immediate delivery of mitigation water thus preventing material injury. Why the SWC would find fault in a process that immediately results in the delivery of replacement water and prevents any water shortage or injury is puzzling.

Lastly, the authority of the Director to allow junior ground water users to continue diverting water after the SWC made their delivery call and before a full record was developed upon which to base a mitigation plan is rooted in the well established principle that if a senior water user can be made whole during the pendency of the proceeding, curtailment of the junior, which would result in irreparable harm prior to a hearing, should not be ordered. The Director's inherent authority under I.C. § 42-607 allows him to administer the state's water resources in a constitutional manner which includes optimizing the resource in the public interest. As former Director Dreher succinctly summarized in his testimony, allowing junior users to offset their depletion or injury in a delivery just makes sense:

> Q. And the replacement water plan concept isn't described in the rules, is it?
>
> A. It is not. But again it's rooted in the common application of prior appropriation in the west. I mean, you don't -- this situation may be somewhat unique, but it's not the only situation where replacement water is used to offset depletion so that out of priority diversions be continued because there's no injury. I mean, that's a fundamental component of water rights administration.
>
> Q. Yeah. I understand your logic behind it. I just would -- I just would like you to, for the record, state the legal basis for you to establish a replacement water plan.
>
> A. I'd say the legal basis is rooted in the statutory authority to distribute water in accordance with the law of Idaho. The law certainly doesn't preclude this.
>
> Q. And as far as a replacement water plan concept goes from a due process standpoint, I believe you testified that it should be lumped together in the hearing process for the call itself. It's part of the call process.

A. That -- that's the process that I had in mind. Now, certainly people could have said hey, this needs to be bifurcated or separated in some way. I don't recall that any motion along those lines was filed, but it could have been.

Q. And when you determine a replacement water plan is acceptable or not, for that matter, it's your opinion that -- well, of course, let me use a more specific example. If the ground water folks submit a replacement water plan that the surface water folks don't like, the senior water rights don't like, it's your opinion you can go ahead and implement that replacement water plan against the will of the senior water right holder?

A. Well, that's putting it more bluntly probably than I would -- than I would characterize it. Against the will. I mean, the idea -- the idea was to reme-- -- to attempt to remedy the injury. And then there was opportunity to debate whether the remedy was adequate. And if it wasn't, to make adjustments. That was the process I had in mind. To me, that was -- that was superior to saying we're not going to do anything but curtail until there's a -- until there's an agreed-upon plan for mitigation. I -- I didn't think that -- that was a -- an appropriate way to pursue this, but that was my determination.

Q. And to get back to my question, it's your opinion you could implement that – maybe "the will" is not a good term, but over the objection of the senior water right holder?

A. Well, again, over the objection. I mean, it was my -- my opinion that that could be -- that that remedy could be implemented while the objection was addressed.

Dreher, Tr. Vol. 1, p. 232, L. 13 – p. 234, L. 23.

Furthermore, it is important to understand that the Ground Water Users have filed replacement water plans with the Director every year since curtailment was first ordered in 2005. R. Vol. 7, p. 1283; Ex. 4501, 4502A; R. Vol. 33, p. 6162-63. Not only have the Ground Water Users spent millions of dollars to mitigate the SWC's delivery calls, they have also spent millions of dollars to mitigate in response to the Spring Users' delivery call. R. Vol. 33, p. 6166-67. The expense to the Ground Water Users to provide this replacement water has been astronomical, amounting to nearly fourteen million dollars to date to revert irrigated lands from

ground water back to surface water, buy storage water to deliver to the SWC, dry up irrigated acres, perform managed recharge of the ESPA, and purchase spring flows.[8] R. Vol. 33, p.6162-63. The cost of providing replacement water has imposed an enormous and unreasonable burden on the Ground Water Users, who have had no choice but to bear the cost to forestall the ruination of their businesses and livelihoods while awaiting a final order from the Director. R. Vol. 33, p. 6166-67 (testimony of Mr. Deeg, chairman of IGWA, that in 2007 the ground water users spent $1.2 million dollars and in 2005 $2.9 million dollars to provide replacement water to senior users). The SWC's allegation that the Ground Water Users have not provided any water and have not complied with the replacement water plans approved by the Director is absolutely false and entirely contrary to the record.

If the Director had not authorized replacement water plans but had instead required the filing of a mitigation plan, junior ground water users would have been completely curtailed beginning in 2005. By the time a full record could be fully developed in this case for purposes of considering a mitigation plan, it likely would be too late to do any good for many junior ground water users. In contrast, the benefit of curtailment to the SWC prior to approval of a mitigation plan would have been limited because curtailment in a conjunctive management call does not provide immediate and complete relief. Ex. 4504 and 4506. By authorizing replacement water plans, the Director ensured that the SWC would receive adequate water during the pendency of the administrative proceeding while affording the junior ground water users a hearing prior to

[8] The Ground Water Districts purchased Pristine Springs in 2008 along with the State of Idaho and the City of Twin Falls to resolve the Blue Lakes Delivery Call. The Ground Water Districts' portion of the sale was $11 million, plus rent. Although not part of this record, the Pristine Springs purchase is a matter of public record.

involuntary curtailment.[9] The Director's interpretation of the CM Rules and applicable statutes is entitled to deference under the facts of this case. *See J.R. Simplot Co., Inc., v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991).

It is difficult to comprehend the SWC's concern with the Director's use of the "replacement water plans" when those plans are approved and designed as a means of providing water to them when needed during times of shortage. Certainly, no substantial right of the SWC has been impaired by requiring the ground water users to provide water to the SWC. Replacement water plans just make good policy and common sense. Former Director Dreher summed it up nicely:

> A junior can always replace his depletions to the system and not face curtailment. Why? Because if he actually replaces his depletion, there is no injury. He doesn't cause injury if he's replaced his depletion. And yet, that's a form of mitigation, but it's not the kind of a mitigation plan that's envisioned under the rules. And so what we were devising here in this May 2d order was along the lines of this most general type of mitigation rather than a formal mitigation plan that's called for under the rules.

Dreher, Tr. P. 161, l. 16- P. 162, l. 3.

B. The Replacement Water Plan "Process" Does Not Violate the SWC's Right to Due Process

It appears that the SWC's complaint is not necessarily with the replacement water plans as approved[10] but with the administrative procedure by which they were approved. Thus, the

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[9] In effect, the Director was taking appropriate measures to maintain the status quo until a final order could be entered and prevented any material injury to the SWC, thus insuring a minimum full supply. This is analogous to a preliminary injunction in a civil matter pending final judgment.

[10] The SWC does allege that they never received water as required by the replacement water plans implemented in 2005, 2006, and 2007. That allegation is completely inaccurate as discussed in this brief.

focus is on the administrative procedure and not on the contents of the replacement water plans themselves.

The SWC repeatedly argues in their Joint Opening Brief that the Director's use of "replacement water plans" violated the CM Rules, because they were allegedly denied a hearing on a replacement water plan prior to the Director's approval of the replacement water plan. *See* SWC's Joint Opening Brief at 25-31. CM Rule 43.02 provides a hearing before the approval of a mitigation plan when protests are filed. The SWC contends that this is the only method through which a plan for replacement water can be approved and that any avoidance of a hearing by the Director would violate the CM Rules.

The SWC further alleges that "To date, more than four years after the initial request for administration, the Department has not held a hearing." SWC's Joint Opening Brief at 32 (underline in original). This statement however is exceptionally misleading. It is undisputed that an evidentiary hearing on IGWA's replacement water plan was in fact held on June 22, 2007. *See* SWC's Joint Opening Brief at 35. It is also undisputed that the delay in holding the hearing was a direct result of the SWC's own procedural maneuvering. This was made perfectly clear by the Idaho Supreme Court in the *AFRD2* case, as follows:

> American Falls submitted its Delivery Call to the Director in January of 2005 ... IDWR received the inflow forecast in April of 2005 and the Director issued a Relief Order less than two weeks later. The Director made the Order effective immediately pursuant to I.C. § 67-5247 (Emergency Proceedings), ordering juniors to provide "replacement" water in sufficient quantities to offset depletions in American Fall's water supplies. Thus, American Falls was provided timely relief in response to the Delivery Call in the form of the Relief Order ...
>
> Incident to the Relief Order, the parties were entitled to a hearing. A hearing was initially set by the Director for August, 2005 ... Although both IGWA and American Falls exercised their right to a hearing and one was set, American Falls filed this action with the district court on August 15, 2005, before the hearing could be held. Subsequently, American Falls requested stays and continuance in the hearing schedule ... **It appears that American Falls preferred to have the case heard outside of the administrative process and**

> **went to great lengths ... to delay the hearing.** ... [T]he district court acknowledged that it was "led to believe" that the parties had stipulated to delay the administration resolution of the case...

AFRD2, 143 Idaho at 875, 154 P.3d at 446 (emphasis added). The underlying administrative proceeding remained stayed pending the filing of the *AFRD2* decision by the Idaho Supreme Court on March 5, 2007. On May 8, 2007, IGWA submitted the *Ground Water District's Replacement Plan for 2007*. R. Vol. 23 at 4237. On May 21, 2007, the SWC filed a protest. R. Vol. 32 at 4262. Thereafter, in full compliance with the CM Rules and unencumbered by the SWC's procedural maneuvering, a hearing was held on June 22, 2007.

Given that the replacement water plan hearing was delayed in 2005 and 2006 solely by the SWC's own procedural maneuvering, the SWC does not have a basis for arguing that the hearing's delay in 2005 and 2006 violated the CM Rules. Had the SWC coalition not pursued the matter in district court and not taken the other steps to delay the administrative proceedings, there would have been a hearing on the 2005 Amended Order in August 2005 as noted by the Idaho Supreme Court in the *AFRD2* Decision. *See AFRD2*, 143 Idaho at 875, 154 P.3d at 446. Just as the SWC cannot complain that there were no hearings in 2005 and 2006, the SWC cannot complain about 2007 because a hearing was timely held with regard to IGWA's proposed 2007 replacement water plan. Despite its inaccurate representations to the contrary, the SWC admits in the end that the hearing was in fact held on June 22, 2007. *See* SWC's Joint Opening Brief at 35.

The SWC's only remaining complaint is that the Director limited the scope of the June 22, 2007, hearing to evidence concerning the adequacy and implementation of IGWA's proposed 2007 replacement water plan. However, it is within the Director's discretion to limit or exclude evidence presented at hearings. *See* I.C. § 67-5251; IDAPA 37.01.01.600. The Idaho Supreme

Court addressed this rule in *Chisholm v. State Dep't of Water Res. (In re Transfer No. 5639)*, 142 Idaho 159, 163, 125 P.3d 515, 519 (2005). In reference to a presiding officer's decision concerning the admissibility of evidence, the Supreme Court held that "[a] strong presumption of validity favors an agency's actions." *Id.* The Supreme Court further held that the presiding officer's decision will only be reversed on appeal "when there has been an abuse of discretion; however, the Court reviews questions of relevancy de novo." *Id.* In addition, the appellants bear the burden of showing error on appeal. *Id.*; *see also* I.C. § 67-5279(4). In *Chisholm*, the Supreme Court held that the appellants failed to satisfy this burden because they failed to "articulate the relevance of the proffered exhibits" to either the presiding officer or on appeal and because they failed to articulate an argument suggesting that the exclusion of the evidence was in error." *Chisholm*, 142 Idaho at 163, 125 P.3d at 519. Consequently, the Supreme Court held the following:

> Lacking such a showing by the Appellants, no error by the hearing officer can be found. Therefore, since the Appellants have failed to show error and a presumption in favor of the validity of an agency action exists, this Court affirms the decision of the hearing officer regarding the exclusion of these proffered exhibits.

Id.

Just like the appellants in *Chisholm*, the SWC bears the burden of showing on appeal to the District Court that the Director erred in excluding evidence from the 2007 hearing on IGWA's proposed replacement water plan. The SWC however has failed to satisfy this burden. First, the SWC has utterly failed on appeal to even identify the evidence that it believes the Director improperly excluded from the hearing. Second, the SWC has failed on appeal to articulate the relevance of the unidentified evidence. Third, the SWC has failed to articulate on appeal any suggestion that the exclusion of the unidentified evidence was in error. Because the

SWC has failed to make such a showing, no error by the Director can be found on appeal. Since the SWC has failed to show error and a presumption in favor of the validity of the Director's action exists, the decision of the Director to exclude evidence at the hearing must be affirmed on appeal to this District Court.[11] *See Chisholm*, 142 Idaho at 163, 125 P.3d at 519.

In summary, the SWC's argument that replacement water plans are not authorized under Idaho law and the CM Rules must be rejected. In addition, the SWC's argument that they were not provided a timely hearing must also be rejected because a hearing was held in 2007 and it was the SWC's own actions that prevented it from being held at any earlier time. The SWC's argument that that the Director improperly excluded evidence at the 2007 hearing must likewise be rejected because the SWC failed to satisfy their burden on appeal with regard to that argument. Lastly, the Director's actions in authorizing replacement water plans should be affirmed based upon the CM Rules and public policy as discussed above. In light of the foregoing, immediate curtailment is not required in response to a delivery call. The following holding from the Idaho Supreme Court from the *AFRD2* decision is significant:

> While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframe on this process. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a time frame might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

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[11] The SWC claims that this limitation of the scope of the evidence presented at the hearing shows that the Director had already made up his mind to approve the 2007 replacement water plan before the hearing was even held. *See* SWC's Joint Opening Brief at 35. However, that claim is based on pure speculation, unsupported by any factual evidence in the records, and must be disregarded by the Court. Indeed, it is rather revealing that the SWC has resorted to personally impugning the Director in such a manner rather than making arguments based upon actual facts or law.

AFRD2, 143 Idaho at 875, 154 P.3d at 446 (emphasis added). It would therefore be improper for the Director to curtail before having the necessary information to make a reasoned and informed decision. The Director is authorized to approve and implement plans for replacement water. The SWC's arguments to the contrary must be rejected on appeal. Consequently, the SWC has failed in all respects to show on appeal that the administrative process implemented by the Director with regard to the replacement water plans violated the CM Rules.

III. The Director properly concluded in accordance with Idaho Law that Reasonable Carry-over should be provided "in the season in which the water can be put to beneficial use, not the season before."

The SWC and the Bureau argue that the Director's finding that does not require "water to be provided at time when it can actually be 'carried over'" is in error. *See* SWC's Joint Opening Brief at 47. The Bureau argues that the Director's decision deprives the Bureau "of the ability to store and retain in its reservoirs the very water the Director has found Reclamation is entitled." United States' Opening Brief at 14. This argument from the SWC and the Bureau gives the impression that the reservoirs are empty and that no water is being carried over.

However, this argument is meritless and entirely without factual support. The fact is that at the end of every irrigation season there has always remained unused water in storage which in turn always gets carried over and becomes part of the following years available supply. The exact amounts assigned to a specific space holder's account at the time of the year-end accounting in Water District 01 is accomplished as described above. What the argument made by the SWC and Bureau boils down to is an argument that ignores historical fact, would change the historic operation of WD01, would result in a waste of water in the majority of years, and when the reservoirs fill (which they do 2/3 of the time) and carry-over storage obligation of ground water users supplied prematurely would be unnecessary and wasted. For that reason any

obligation to supply reasonable carry-over is determined after the final accounting when the next year's supply is known, with any shortfall obligations erased if the reservoirs fill. Otherwise, extra water spilled in flood control would go completely unused by the SWC in violation of Idaho law. Swank, Tr. Vol. 4, p. 822, L. 15-21. Thus, the Director, who must manage one of the state's most valuable resources, water, concluded:

> With the amount of fill of the reservoir system, if replacement water for reasonable carry-over shortages was provided in 2005 and 2007 for the predicted shortages in 2006 and 2008, the water acquired by IGWA would not have been required for use by members of the SWC. It is appropriate to find that replacement water for predicted shortages to reasonable carry-over should be provided in the season in which the water can be put to beneficial use, not the season before.

R. Vol. 39, p. 7386. This conclusion is based on substantial and competent evidence and sound policy which this Court should not overturn. The rationale for the Director's conclusion is set forth in his order:

> The difficulty in requiring predicted carry-over shortfalls be provided in the irrigation season before the water can be put to beneficial use – some six to twelve months in advance – lies in historical information regarding the reservoir system in the Upper Snake River and has been further emphasized in each year since the SWC filed its delivery call in 2005.

R. Vol. 39, p. 7385 ¶ 18.. The Director then cites to the fact that the reservoirs were built to fill approximately two-thirds of the time, and have historically filled two-thirds of the time. *Id.* at 5, ¶ 19; McGrane, Tr. Vol. 7, p. 1407, L. 22 – p. 1408, L. 4.

CM Rule 42 grants the Director the discretion to consider certain factors in determining whether a senior water right user is suffering material injuring. One of the factors to be considered states in pertinent part the following: "...the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies to future dry years." CM Rule 42.01.g. In the *AFRD2* case, the Idaho Supreme Court has

recently had an opportunity to consider this very same language from the CM Rules in the context of surface water to groundwater administration. Notably, the SWC were parties to that case. In that case, the SWC argued "that they should be permitted to fill their entire storage water right, **regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to their original rights.**" *AFRD2*, 143 Idaho at 880, 154 P.3d at 451 (emphasis added).

The Idaho Supreme Court readily and wholly rejected this argument, holding that "it was permissible for the canal company to hold water over from one year to the next **absent abuse.**" *Id.* (emphasis added). The Supreme Court further identified certain circumstances which undeniably constitute this type of "abuse" as follows: (1) where a water right user "does not require the full use of his allocation, but he carries it over to the detriment of others" (*Id.* at 879, 154 P.3d at 450); (2) "when one is allowed to carry-over water despite detriment to others" (*Id.* at 880, 154 P.3d at 451); (3) when carry-over of storage water is permitted "without regard to the need for it." (*Id.*); (4) "where stored carry-over water was, at the time of the litigation, being wasted by storing away excessive amounts in time of shortage." (*Id.*); and (5) when "irrigation districts and individual water right holders ... waste water or unnecessarily hoard it without putting it to some beneficial use" (*Id.*). The Idaho Supreme Court explained that whenever such circumstances exist, the SWC is not permitted to hold water over from year to year. *Id.* As explained by the Idaho Supreme Court, "the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost" even in the context of storage water carry-over. *Id.*; *see also* I.C. § 42-104.

Given the holding of the Idaho Supreme Court in the *AFRD2*, a decision concerning reasonable carry-over storage under CM Rule 42 cannot be made without considering (1) whether the water carried over is necessary to fulfill current or future needs; (2) whether the storage holders routinely sell or lease the carry-over water for uses unrelated to their original rights; (3) whether the carry-over water will be put to a beneficial use recognized by the laws of Idaho; *and* (4) whether the storage of water will have a detrimental impact upon other water users. The evidence clearly reveals that the SWC members routinely sell or lease their carry-over water to the Bureau of Reclamation for flow augmentation purposes which are purposes wholly unrelated to the SWC members' original water rights.[12] Swank Tr. Vol. 5, p. 1076, L. 7-22. Moreover, it is undisputed that flow augmentation is not recognized as a beneficial use under Idaho law. *See* I.C. § 42-1763(B)(4).

The SWC members and the Bureau argue that they should be entitled to carry-over water as "insurance" against future shortages in multiple dry years without having to prove that a shortage will exist in the future. *See, e.g.,* United State's Opening Brief at 2-3. In other words, they contend that they are entitled to the carry-over water regardless of actual future need. As mentioned above, the Idaho Supreme Court flatly rejected that argument in the *AFRD2* case. There must be proof that the carry-over water is necessary for future needs. However, no such evidence exists. Indeed, the SWC failed to provide any expert testimony as to what would constitute reasonable carry-over. In fact, even the alleged storage experts from BOR did not

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[12] It is undisputed that flow augmentation is not a decreed water right. As such, the use of the carry-over water for flow augmentation does not enjoy the same priority date as the SWC members' water rights which form the basis of the current delivery call. This is particularly true in light of the fact that the leasing of carry-over water for flow augmentation purposes did not being until 1990's. Therefore, it is an abuse of the Director's discretion to treat the use of the carry-over water as a decreed water right with a senior priority date.

have any opinion on the amount of carry-over that may be reasonable. McGrane Tr. Vol. 7, p. 1422, L. 21- p. 1423, L. 7; Raff Tr. Vol. 7, p. 1522, L. 9 – p.1523, L. 11. All evidence pertaining to possible future needs is uncertain and speculative. Because of the significant variability of weather patterns from year to year, it is impossible to predict with any certainty what future carry-over needs may or may not be from year to year.

Hence, the Hearing Officer concluded that "requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in AFRD#2." R. Vol. 37 p. 7109-10. The Director agreed and did not alter that finding. R. Vol. 39, p. 7381. While the Director found that injury to carry-over storage for the next year can occur, he determined that carry-over for future years would not be possible, and decided that in order to not waste the resource that the junior user is not required to provide the water over a year in advance because "the water acquired by IGWA would not have been required for use by members of the SWC." R. Vol. 38, p. 7326. Hence, the likelihood of wasting the water and the water not being put to irrigation use was simply too great. *Id.* In balancing these issues, the Director required as part of any required mitigation plan that junior users remedy any shortfalls to carry-over when those shortfalls are determined during WD01's final accounting process. In other words, if the final accounting process reveals that the SWC entities used an amount of storage water during the irrigation season such that it materially injured the amount they would have been entitled to carry-over, the junior ground water users would be required to purchase allocated storage water from other parties and have it transferred on-the-books to the SWC entities. This process is simply a matter of re-allocating storage water on the WD01 records.

The point of this is that water has always been carried over in the reservoirs. The WD01 accounting process simply allocates that water between contracted entities following the irrigations seasons. The SWC apparently does not like waiting until after the irrigation season like everyone else to see how much of the remaining carry-over water will be allocated to them. They would instead prefer that junior ground water users be required to place new water in the reservoir system during the irrigation season and before the year-end accounting process and then simply waste that water by allowing it to run downstream if in the end it is not necessary to their actual reasonable carry-over needs. While the SWC and the Bureau might prefer that process, it is contrary to Idaho law and unnecessarily prejudices junior ground water users.

It is important to recognize that the SWC's predicted irrigation needs, the supply of surface and storage water to meet their irrigation requirements, together with the irrigation obligations of ground water users is predicted in advance of the irrigation season. Forecasting temperature, precipitation, wind and snow melt for a 7-month long irrigation season is fraught with difficulty and uncertainty. Given the fact that the evidence at trial showed that the SWC members had ample carry-over storage even in the driest of years, the Director's choice of requiring that water be provided when it is "actually needed" in the season in which the water can be put to beneficial use rather than provided at an earlier time honors Idaho law and indicates practical, common sense. CM Rule 5 allows the Director the take "alternative or additional actions relating to the management of water resources as provided by Idaho law" and he is required to do so in a manner that optimizes the use of the resources. See *Poole* 82 Idaho at 502. Neither the Bureau nor the SWC could demonstrate to the Hearing Officer or the Director that allowing the ground water users to provide carry-over storage in the season of need affects any substantial interest as required by I.C. § 67-5279(4) since their actual needs would be met.

See also Barron, 135 Idaho at 417, 18 P.3d at 222. The arguments made by the SWC and the Bureau to the contrary must be rejected.

IV. The Director properly concluded in accordance with Idaho Law and the Evidence presented in this Case that Twin Falls Canal Company's Full Supply should be based upon 5/8 inch per acre for Purposes of Calculating any Mitigation Requirement of Ground Water Users under the CM Rules.

The SWC argues that because a prior decree is "binding" that the Department is required to mandate the water right quantity as "guaranteed" rather than "authorized" without any regard to the amount of water actually needed or beneficially use to raise full crops. Joint Opening Brief at 52. This argument has been rejected by the Supreme Court, the Director and the Hearing Officer and should be rejected by this Court as well. As discussed above, the Idaho Supreme Court in the *AFRD2* Decision clearly held that a water right owner's "actual need" for water is not dictated by the decreed elements of his water rights. Rather, the Director is not only authorized but statutorily required to investigate the water right owner's "actual need" and to limit his diversions for purposes of a delivery call to that amount even if it is less than the decreed elements of his water rights. *Id.*; *see also Glavin,* 44 Idaho at 589, 258 P. at 538 (an appropriator's right is dependent upon his "necessities") and *Conant*, 3 Idaho at 613, 32 P. at 257 (an appropriator is only entitled from year to year to the amount he puts to beneficial use).

In fact, the Director's recommendation in the SRBA reduces the number of acres under TFCC's water right and there are numerous pending objections to the quantity element that request that the amount of water be reduced to actual irrigated acres and actual crop requirements and actual amounts delivered based upon historic records. Ex. 9729 at p. 133 of 177. However, notwithstanding the status of TFCC's water rights in the SRBA, in an administrative delivery call, IDWR is not bound to merely read a senior's decreed water right and apply a rote

authorized maximum quantity under the right to fill the amount without a thorough examination of irrigation requirements and beneficial use.

The Hearing Officer in his Opinion and the Director in the Final Order made a factual determination that "any conclusions based on full headgate delivery should utilize 5/8 inch" because TFCC's claim to 3/4 inch is

> contradicted by internal memoranda and information given to shareholders in the irrigation district. It is contrary to a prior judicial determination that TFCC's right is 5/8 and not ¾ inches per acre. It is inconsistent with some of the structural facilities and exceeds similar SWC members with no defined reason.

R. Vol. 37, p. 7100. This conclusion is based on substantial and competent evidence submitted at the hearing and this Court is required to give deference to the trier-of-fact's factual finding. I.C. § 67-5279(1); see also *Urrutia*, 134 Idaho at 357, 2 P.3d at 742. Although the SWC on behalf of TFCC argues that there is other evidence that contradicts the finding, this court must not substitute its judgment for the trier-of-fact. *Id.*

The records of TFCC clearly establish that 3/4 inch per acre is the maximum capacity of its system and the maximum quantity delivered to its shareholder under the best water conditions. Ex. 4610 (1997 Ditch Rider). TFCC's long-time manager, Vince Alberdi testified that to deliver 3/4 of an inch to the shareholders actually requires TFCC to divert 3,800 cfs (more than its 1900 water right) at Milner Dam. Tr. Vol. 8, p. 1671, L. 13-24; p. 1672, L. 9-12. TFCC's Water Management Plan dated November 1999 states that "TFCC has always operated on the premise that the Company must deliver 5/8 inch per acre constant flow so long as that supply is available." Ex. 4166 and 4166A. Similarly, TFCC's Operating Policy dated December 10, 1997, provides that "[t]he TFCC water right is 5/8ths of an inch per share." Ex. 4167 at 3. This includes an obligation to deliver 1/80th of a cubic foot of water per second for each share of

stock when the water is available." *Id.* Nowhere in the Operating Policy is any amount other than 5/8 inch ever discussed.

Even though 2007 has been uniformly characterized as an extremely dry year, TFCC finished the year with carry-over storage, dried up no land, and harvested full crops despite the 5/8 inch delivery. Alberdi Tr. Vol. 8, p. 1703, L. 22 – p. 1704, L. 5; p. 1702, L. 16-21; p. 1715, L. 8-11; p. 1718, L. 15-22. In addition, the 2005 and 1997 issues of TFCC's publication, "Ditch Writer" sent to its shareholders clearly admits that 5/8 inch is the normal delivery. Ex. 4610. In the 2005 Issue of the Ditch Writer publication, Alberdi told his shareholders that while he would not promise them all the water they "want" he would delivery all the water they "need to grow their crops." *Id.* Similarly in the Manager's Report of the Minutes of the January 13, 2004, Shareholder meeting, Mr. Alberdi informed the shareholders that they could "have a good year even with a 5/8 inch supply." Ex. 4608 at 5. In fact, in the Spring 1997 issue of the TFCC Ditch Writer publication, a huge water year with major flooding on the Snake River, Alberdi responded to shareholders' requests for additional water by stating that the "canal system becomes taxed if we deliver over 3/4 of a miner's inch per share. To try to deliver more than that...would put the canal system in jeopardy and dramatically raise both the potential from breaks and catastrophic property damage." Ex. 4610. On cross examination Mr. Alberdi finally admitted that the 3/4 inch was the maximum amount TFCC could delivery in a good water year and that in a bad water year 5/8 inch or less was normally delivered. Tr. Vol. 8, p. 1680, L. 1-6.

All of this is completely consistent with the reported Idaho Supreme Court case in 1911 and Federal District Court case in 1935 in which TFCC was a party, where 5/8 inch is repeatedly referenced as TFCC's water supply and no mention is ever made of 3/4 inch. *See State v. Twin Falls Canal Co.,* 21 Idaho 410, 121 p. 1039 (1911); *Twin Falls Land & Water Co., v. Twin Falls*

Canal Co., 79 F.2d 431 (1935). The conclusion that 5/8 inch per acre is what is needed to grow crops for TFCC and the other SWC entities should be confirmed. It is supported by the overwhelming weight of the evidence. TFCC's 3/4 inch claim is supported merely by argument and not by its own records.

V. Whether the Director's use of the 10% Trim Line for Purposes of Curtailing Junior Water Right Users was in accordance with Idaho Law and a Proper Exercise of Discretion.

The SWC argues that the Director's use of the 10% trim line "allow[s] injurious diversions to continue" as arbitrary and capricious and in violation of the law and should be rejected. *See* SWC's Joint Opening Brief at 57. They offer no analysis of the evidence nor any facts to show that the Director's use of the trim line is not supported.

Yet, model uncertainty is undeniably greater than 10%. Ex. 1075 (Wylie, Tr. p. 78, L. 15-19). The Director used the uncertainty in stream gauge calibration without quantifying any amount for numerous other assumptions and uncertainties associated with the ESPAM which all experts acknowledge exist. Ex. 1075 (Wylie, Tr. p. 74, L. 10-25, p. 75, L. 1-10, p. 76, L. 17, p 79 L. 1-17), Ex. TR460. The trim line should account not only for the 10% gauge uncertainty but should be increased so as to not curtail more junior users than necessary. Idaho Code § 42-607 authorizes the Director to curtail junior users when it "is necessary to do so in order to supply the prior rights of others. . . ." Curtailment of ground water diversions that have no effect on reach gains that may supply the SWC's water rights would result in a waste of water and would be in violation of the Director's authority and statutory duty. Thus, any curtailment based on ESPAM simulations must account for uncertainty in the simulations, yet the Director's trim line fails to account for a multitude of other model uncertainties and the error factor should be increased and the trim line constricted. *See also* Cross Petr. Ground Water Users' Opening Brief

at 47-49, 65-69 filed in Clear Springs Foods, Inc v. Tuthill, Civil Case No. 2008-444 (January 9, 2009) and Cross Petr. Ground Water Users' Reply Brief at 23-31 in Clear Springs Foods, Inc. v.Tuthill Civil Case No. 2008-444 (March 9, 2009). Portions of these briefs are attached hereto for the Court's convenience as Exhibits A and B respectively and are incorporated herein by reference as if fully set forth.

CONCLUSION

This Court in its appellate capacity must reject the SWC's arguments and affirm IDWR's Final Order. First, the Director is authorized by Idaho law to restrict the SWC's water diversion to a level of "actual need" to raise full crops when responding to a delivery call even if the amount is less than the authorized maximum amounts in the SWC's decreed water rights. Second, the Director properly exercised his authority and discretion in accepting temporary "replacement water plans." Third, the Director's response to the SWC's delivery call was timely and in accordance with Idaho law and the Director's replacement water plan "process" did not violate the SWC's right to due process given that a hearing was held in 2007 and prior hearings were not held because of the SWC's own delay tactics. Fourth, the Director properly concluded in accordance with Idaho law that reasonable carry-over should be provided "in the season in which the water can be put to beneficial use, not the season before." Fifth, the Director properly concluded in accordance with Idaho law and the evidence presented in this case that TFCC's full supply should be based upon 5/8 inch per acre for purposes of calculating any mitigation requirement of Ground Water Users under the CM Rules. Sixth, the Director's use of the 10% trim line for purposes of curtailing junior water right users was in accordance with Idaho law and a proper exercise of discretion in this case. Lastly, the Ground Water Users request an award of attorney fees on the basis that the SWC unreasonably and frivolously pursued this appeal with

full knowledge that the Idaho Supreme Court has already rejected many of their current arguments in the *AFRD2* decision.

DATED this 30th day of April, 2009.

Candice McHugh for
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2009, I served two true and correct copy of the above and foregoing document to the following person(s) as follows:

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Exhibit A

Selected pages from Ground Water Users' Opening Brief

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

RANGEN, INC.,

Cross-Petitioner,

vs.

DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV-2008-0000444

GROUND WATER USERS' OPENING BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

GROUND WATER USERS' OPENING BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

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Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, District Judge, Presiding

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water resources in a way that complies with the legislative directive. The projected net economic loss of more than seven and one-half billion dollars powerfully demonstrates that the curtailment is overbroad and unreasonably interferes with full economic development of the ESPA.

F. The scope of curtailment should be narrowed so that a significant portion of the quantity curtailed will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

The solution to reasonable water use in this case lies in reigning in the scope of curtailment so that a significant portion of the curtailed water use will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights. This can be accomplished via constriction of the trim line: "a point of departure beyond which curtailment [is] not ordered." (Recommended Order, R. Vol. 16, p. 3706.) The lesser the distance between a curtailed ground water right and the target spring outlets, the greater the percentile return on curtailment and the less time it takes for the effects of curtailed to be realized. (Harmon, Tr. p. 931, L. 19-24; Dreher, Tr. p. 1414, L. 4-17; Brendecke, R. Supp. Vol. 3, p. 4455, L. 23-p. 4456, L. 5, p. 4456 L. 15-p. 4457, L. 18.)

Obviously, the implementation of a trim line has the effect of excluding some junior-priority water rights from curtailment. But that is precisely the purpose of the legislative instruction that "a reasonable exercise of the [prior appropriation doctrine] shall not block full economic development of underground water resources." I.C. § 42-226. The language of that statute is unambiguous; therefore, "the clearly expressed intent of the legislative body must be given effect." *Friends of Farm to Market v. Valley County, Idaho Bd. of Commissioners*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). As explained by the Idaho Supreme Court, "when private

property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interest must recognize that the ultimate goal is the promotion of the welfare of all our citizens." *Baker,* 95 Idaho at 584, 513 P.2d at 636. The Court unequivocally affirmed its position on this issue in its recent *AFRD2* decision, stating that "[w]hile 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." 143 Idaho at 880, 154 P.3d at 451.

It is indisputable that the curtailment of tens of thousands of irrigated acres greatly interferes with full economic development of the ESPA. The unreasonableness of the curtailment is plainly manifest by the fact that that it will take nearly a century for just 3.2 percent of the quantity curtailed to reach Blue Lakes and for less than 1 percent of the quantity curtailed to reach Clear Springs. The monopolistic effect of curtailment, the massive amount of water sacrificed, and the severe economic harm from curtailment all further demonstrate that the scope of curtailment is overbroad. When the Ground Water Users argued that these considerations demand that the scope of curtailment be narrowed, the Director refused because there was no "empirical basis." (Response Order, Vol. 16, p. 3840-41.) Yet an empirical basis is not prerequisite to the determination of reasonableness, which inherently requires "some exercise of discretion by the Director." *AFRD2*, 143 Idaho at 875, 154 P.3d at 446. Ultimately the Director refused to exercise that discretion.

The facts are undisputed that the Curtailment Orders eliminate 100 percent of the beneficial water use of curtailed ground water users while at most, and only then at steady state

conditions achieved after nearly 100 years, will a mere 3 percent of the quantity curtailed reach Blue Lakes and less than 1 percent of the quantity curtailed reach Clear Springs. The disparity between the amount of water curtailed and the anticipated benefit to Blue Lakes and Clear Springs is outlandish. Not surprisingly, the economic impact of curtailment is immediate, severe and potentially irreversible and could cause the permanent net loss of nearly 3,500 jobs, decrease the area's personal annual income in the near term of at least $160,000,000, and result in the loss of millions of dollars in annual property tax revenue. These facts unavoidably demonstrate that the scope of curtailment is overbroad and unreasonably interferes with full economic development of the ESPA. Such broad scope of curtailment exceeds the Director's statutory authority and/or is arbitrary, capricious and an abuse of discretion. The Ground Water Users therefore ask this Court to substantially narrow the scope of curtailment via constriction of the trim line so that a significant portion of the water curtailed will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

III. THE RECORD IS DEVOID OF EVIDENCE THAT THE WATER THAT MAY ACCRUE TO BLUE LAKES AND CLEAR SPRINGS FROM CURTAILMENT WILL ENABLE THEM TO PRODUCE MORE OR LARGER OR HEALTHIER FISH AND DOES NOT TO SUBSTANTIALLY SUPPORT THE DIRECTOR'S FINDINGS OF MATERIAL INJURY.

Conspicuously absent from the record is evidence that Blue Lakes or Clear Springs will be able to produce more, larger, or healthier fish as a result of the curtailment. The record does not substantiate the categorical conclusion that "depletion of the water supply ... is material injury when the business is the production of fish." (Response Order, R. Vol. 16, p. at 3840.) Nor does the record show that the amount of water that would be deliverable to Blue Lakes and

VI. THE DIRECTOR ERRED BY CURTAILING GROUND WATER RIGHTS WITHOUT REASONABLE CERTAINTY THAT ADDITIONAL WATER WILL ACCRUE TO THE SPRINGS THAT SUPPLY THE BLUE LAKES' AND CLEAR SPRINGS' WATER RIGHTS.

A fundamental promise of due process is that one's property will not be deprived arbitrarily. Applied to the administration of water rights, this means that one's water right will not be curtailed arbitrarily. Under Idaho law, an "appropriation must be for some useful and beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." I.C. § 42-104. Accordingly, an appropriator, though junior in priority, will not be deprived of his water right unless the calling senior water user can put to beneficial use the water resulting from the junior's curtailment. *See Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1223 (1976). As a pre-condition of curtailment, there must be reasonable certainty that the water that would have been used by the junior-priority water user, or at least a significant portion of it, will be put to beneficial use by the calling senior-priority water user. In this case the scope of curtailment goes beyond that threshold and encompasses ground water rights without reasonable certainty that Blue Lakes or Clear Springs will receive additional water as a result of their curtailment.

The rule against arbitrary curtailment has unique relevance when, as in this case, a scientific model is used as the basis for curtailment. Here, the ESPA Model was used to predict the degree of hydraulic connection between ground water rights and the respective reaches of the Snake River where Blue Lakes and Clear Springs are located. Those predictions are no more reliable than the degree of uncertainty that is built into (or not worked out of) the ESPA Model. (Ex. 460; Wylie, Tr. p. 850, L. 7p. 851, L. 2; Tr. p. 847, L. 10p. 848, L. 10.) Of course, the level

of uncertainty is more critical to some Model applications than others. For instance, uncertainly is less important when the Model to guide general water policy decisions. In contrast, it is vitally important that the level of uncertainty in the Model be understood and accounted for if it is to be used as the basis to deprive private property rights via curtailment. The reliability of the linear analysis that was used to allocate reach gains to various spring outlets must also be accounted for. (Wylie, Tr. p. 860, L. 5-17.)

The record in this case establishes that the ESPA Model is the best science currently available to the Department to predict the hydrologic relationship between surface and ground water rights. (Final Order at 9.) That does not mean, however, that the Model perfectly predicts the effects of curtailment or that the Director should apply the Model irrespective of its short-comings. (Recommended Order at 13.) Given the State policy for full economic development of ground water resources, the scope of curtailment must be confined to those ground water rights that the Model and other analyses can predict with a reasonable degree of certainty will benefit Blue Lakes and Clear Springs.

The degree of uncertainty in the ESPA Model is a product of the accuracy of its inputs and assumptions. Director Dreher accounted for only one element of uncertainty—stream gauge error—in issuing the Curtailment Orders. (Recommended Order at 14.) Because there is a ten percent margin of error in the Snake River gauges that are used in the ESPA Model, the Director assigned an uncertainty factor of 10 percent to the Model. *Id.* (Wylie, Tr. p. 850, L. 7-p. 851 L. 2; Tr. p. 847, L. 10-p. 848, L. 10, p. 888, L. 16-24, p. 819, L. 22-p. 820, L. 2; Dreher, Tr. p. 1166, L. 7-p. 1167, L. 8; p. 1227, L. 21-p. 1228, L. 4.) The zone of curtailment (a/k/a trim line)

was then confined to junior-priority ground water rights for which at least ten percent of the quantity curtailed was predicted to return to the reaches of the Snake River where Blue Lakes and Clear Springs are located. (Recommended Order, R. Vol. 16, p. 3703.) Director Dreher did not account for sources of uncertainty other than stream gauge error in defining the location of the trim line. (Blue Lakes Order, R. Vol. 1, p. 49, ¶ 16, p. 59, ¶ 67; Ex. 109; Wylie, Tr. p. 817, L. 12-p. 818, L. 9.)

At the hearing, all experts, including Dr. Brockway for Clear Springs and Dr. Wylie for the Department, agreed that the degree of uncertainty in the ESPA Model must be accounted for and does not result from stream gauge error alone. Expert testimony established that Model uncertainty also derives from the non-uniform geology of the ESPA, variations within the Model cells, the assumption that well impacts are isotropic, the assumption that all data was accurate and reliable, the use of complex mathematics, unaccounted for impacts of surface water diversions, precipitation recharge, and tributary underflow. (Recommended Order, R. Vol. 16, p. 3703; Wylie Testimony, Tr. p. 842 L. 25-p. 843, L. 3; p. 847 L. 10-p. 848 L. 10; p. 888 L. 20-24; Dreher Testimony, Tr. p. 1166 L. 1-p. 1167 L. 8; Land Testimony, Tr. p. 1561 L. 22-p. 1566 L. 5; p. 1566 L. 6-12; Brockway, Tr. p. 1647 L.18-p. 1650 L.17.) Each of these variables contributes a degree of uncertainty to Model predictions. (Recommended Order, R. Vol. 16, p. 3703.) Consequently, Dr. Brendecke, who participated in developing the ESPA Model, estimated that actual Model uncertainty is likely between twenty to thirty percent. (Brendecke Testimony Tr. p. 1900 L. 26 - p. 1901 L. 25.) In hindsight, Director Dreher agreed that ten percent is the minimum possible degree of Model uncertainty, and that the actual degree of

uncertainty is likely higher than ten percent. (Dreher Testimony Tr. p. 1227 L. 21 - p. 1228 L. 4.) Dr. Brendecke's opinion that Model uncertainty is twenty to thirty percent went unchallenged.

In addition to uncertainty in the ESPA Model, a degree of error must be attributed to the linear analysis used to predict ESPA discharges from discrete spring outlets. The record unequivocally established that the Model is incapable of predicting the effect of curtailment on discrete spring flows; it can only predict reach gains: "It's not good at figuring out what the flow would be at one individual spring given any administrative action." (Wylie, Tr., p. 812, L. 10-16; p. 857 L. 25-p. 858 L. 4; Brockway R. Supp. Amend. Vol. 16 p. 4871 at 11.) As a result, the Director utilized a linear analysis in an attempt to allocate reach gains between different springs. *Id.* The analysis has not been tested or verified and Dr. Wylie, who developed the analysis, testified that he is not confident in its application. (Wylie Testimony Tr. p. 856 L. 2-7; p. 860 L. 5-17; p. 867 L.2-16; Ex. 6; Brockway, Tr. p. 1658 L.19 - p. 1659 L.3; Land, Tr. p. 1565 L.19 - p. 1566 L. 5; p. 1566 L. 17 to p. 1567 L. 9; p. 1567 L. 24-11.) Notwithstanding, the Hearing Officer accepted Director Dreher's use of the linear analysis on the basis that "there was no credible evidence of a better result." (Response Order, Vol. 16, p.3844.) However, non-evidence of a better methodology does not make the linear analysis sufficiently reliable to justify its use to deprive property rights. There is a point at which even the best available methodology would still be so unreliable as to preclude its use for there must be an accounting for the degree of uncertainty in its predictions before it can be relied upon to deprive ground water users of their property rights.

Given the unanimous expert testimony that uncertainty in the ESPA Model is greater than ten percent and the unreliability of the linear analysis, all evidence indicates that the actual degree of uncertainty in the curtailment predictions must exceed ten percent. The Hearing Officer refused to assign any level of uncertainty to factors other than stream gauge error because the other contributing factors of uncertainty "were not assigned a percentile of error that could be tested and peer reviewed," and for lack of an "empirical basis" to verify Dr. Brendecke's opinion. (Response Order. R. Vol. 16. p. 3840-41.) That ruling is compromised by the emergency assignment of ten percent uncertainty which also has not been tested but was made solely on the Director's "best judgment" at the time the Curtailment Orders were issued in 2005. The subsequent hearing revealed additional factors of uncertainty that were not initially considered, but that all experts at the hearing agreed contributed a degree of uncertainty to the curtailment scenarios beyond the ten percent figure that was used. The Director has an obligation to exercise his best judgment to account for all known factors of uncertainty. It is one thing to conclude that these known factors do not add uncertainty to curtailment predictions, but quite another to disregard them altogether in deference of an assignment that was made on an emergency basis without the evidence presented at the hearing. (*Cf.* Recommended Order at 14.) The Director's failure to attribute a degree of uncertainty to known factors of uncertainty in the ESPA Model and the linear analysis is an abuse of discretion.

Prudent administration of Idaho's water resources consistent with the directive for full economic development of ground water resources cannot tolerate the curtailment of beneficial water use without reasonable certainty that Blue Lakes and Clear Springs will benefit therefrom.

The unchallenged testimony of Dr. Brendecke that Model uncertainty is realistically twenty to thirty percent provides the only conclusion substantially supported by the record. And that figure does not account for the questionable nature of the linear analysis, which casts serious doubt on the amount of additional water, if any, that will accrue to the target spring outlets. Therefore, the Ground Water Users ask this Court to reverse the Final Order on these points and remand this matter to the Director to account for and incorporate in his decision all undisputed contributing factors of Model uncertainty, to assign a degree of uncertainty to the linear analysis, and to re-define area of curtailment accordingly.

VII. THE DIRECTOR EXCEEDED HIS AUTHORITY BY ISSUING THE CURTAILMENT ORDERS ON AN EMERGENCY BASIS WITHOUT A PRIOR HEARING.

A fundamental constitutional protection is the promise that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. It is well established in Idaho that "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Due process guarantees all citizens "an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations." *Lowder v. Minidoka County Joint Sch. Dist. No. 331*, 132 Idaho 834, 840 (1999) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). A pre-deprivation notice and hearing is required except in "extraordinary circumstances" where some valid governmental interest justifies the postponement of the notice and hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Nettleton*, 98 Idaho 90.

Exhibit B

Selected pages from Ground Water Users' Reply Brief

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

RANGEN, INC.,

Cross-Petitioner,

vs.

DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV-2008-0000444

GROUND WATER USERS' REPLY BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

GROUND WATER USERS' REPLY BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, District Judge, Presiding

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source to support his appropriation contrary to the public policy of reasonable use...." The Idaho Supreme Court's recent confirmation that these CM Rules are facially constitutional, together with the Court's declaration that the Director does have authority to "make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development," *AFRD2*, 143 Idaho at 876, leaves no doubt that laws of reasonable use and full economic development impose practical limitation on the exercise of priority in the conjunctive management. Contrary to the Spring Users' argument, Idaho law requires the Director to deny administration by strict priority where doing so will unreasonably interfere with full economic development of the ESPA.

III. THE RESPONDENT'S BRIEF REINFORCES THE DIRECTOR'S FAILURE TO INDEPENDENTLY CONSIDER WHETHER THE DOCTRINE OF FULL ECONOMIC DEVELOPMENT WARRANTS A NARROWING OF THE SCOPE OF CURTAILMENT.

The Department acknowledges the Director's duty to consider the public interest in water administration, including consideration of full economic development. (Respondents' Br. at 60, quoting I.C. 42-226.) Notwithstanding, the record in this case shows that the Director failed to meet that duty by not independently considering whether the scope of curtailment should be narrowed to assure that the Spring Users' delivery calls do not unreasonably interfere with full economic development of the ESPA. The Director's failure in this regard constitutes an abuse of discretion that substantially prejudices the rights of junior-priority ground water users and the public generally.

In 2005, the Director ordered the curtailment of junior-priority ground water rights for which at least ten percent of the quantity curtailed is expected to accrue to the reaches of the

Snake River where Blue Lakes' and Clear Springs' are located. (Blue Lakes Order, R. Vol. 1, p. 61, ¶78; Clear Springs Order, R. Vol. 3, p. 501, ¶66.). This was accomplished via implementation of a "trim line," a point beyond which junior-priority diversions would not be curtailed. (Blue Lakes Order, R. Vol. 1, p. 49, ¶16, p. 59, ¶67; Clear Springs Order, R. Vol. 3, p. 491, ¶17, pp. 508-09, ¶96.). The location of the trim line was decided solely as the product of the Director's attribution of ten percent uncertainty in the ESPA Model. (Blue Lakes Order, R. Vol. 1, p. 63, ¶6; Clear Lakes Order, Vol. 3, p. 513, ¶12.) There are no findings of fact or conclusions of law to indicate that the Director directly considered whether the scope of curtailment should be further narrowed consistent with doctrine of full economic development as set forth in Idaho Code § 42-226.

The Director's failure to directly and thoroughly consider whether to limit the scope of curtailment consistent with the doctrine of full economic development appears to stem from a mistaken belief that he has little if any authority to deny the exercise of priority. The Hearing Officer explained his refusal to narrow the scope of curtailment this way: "It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. ... Curtailment is proper." (Respondent's Br. at 14, quoting R. Vol. 16 at 3714.) This explanation reflects the Director's belief that his discretion under Idaho Code § 42-226 is limited to the acceptance of mitigation in lieu of curtailment and the allowance of phased-in curtailment. This is most clearly stated in the Director's latest curtailment notice, wherein the Director concludes that "[a] senior may not block the full economic development of the State's water resources if junior ground water users can mitigate

their depletions in-time and in-place." (Final Order Accepting Ground Water Districts' Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan in Part; and Notice of Curtailment at 9, ¶ 11.)[10] Stated conversely, the Director believes that a senior can block full economic development of the ESPA if junior ground water users cannot mitigate their depletions in-time and in-place. This is not the administrative paradigm that the Legislature adopted in the Ground Water Act.

The Legislature limited the exercise of priority under the Ground Water Act precisely because it anticipated declining aquifer levels. The Act does not provide for the maintenance of peak aquifer levels for the benefit of a few, but instead required the maintenance of sustainable aquifer levels for the benefit of many, while still preserving the right of priority as necessary to maintain sustainable aquifer levels. In contrast, the Director's requirement that ground water users provide mitigation to avoid curtailment demonstrates management of the ESPA to sustain historic (rather than reasonable) aquifer levels in direct contradiction of the purpose of the Act.

Indeed, the Act's protection of reasonable pumping levels would be meaningless if a senior ground water user could demand that junior users be curtailed unless they provide mitigation to maintain historic aquifer levels. The Idaho Supreme Court rejected that idea in *Baker*, holding that "[a] senior appropriator is not absolutely protected in either his historic water levels or his historic means of diversion," but is "only entitled to be protected to the extent of 'reasonable pumping levels'...." 95 Idaho at 584. Nevertheless, the Director is now, by

[10] This order is essentially an extension of the Final Order in this case. As stated in the order, "Conclusions of Law set forth in the July 2005 Order, the Recommended Order, and the Final Order, as well as subsequent orders related thereto, as applicable, are incorporated into this order by reference." A copy of this order is attached hereto as Exhibit B.

absolutely refusing to allow junior diversions without mitigation, applying the Act in a way that requires the maintenance of historic spring flows (i.e. historic aquifer levels), thereby entitling the Spring Users to do what no other senior-priority ground water users could do.

Contrary to the plain language of the Ground Water Act and its application by the Idaho Supreme Court in *Baker*, the Director has now undertaken management of the ESPA for historic levels. This is the very thing that the Legislature attempted to avert by limiting the exercise of priority in the event it unreasonably interferes with full economic development of the ESPA. In fact, the Legislature created a special administrative body called a "local ground water board" to assure that its provision for reasonable limitations on the exercise of priority was given proper effect. I.C. § 42-237d. The involvement of local residents in ground water administration underscores the Legislature's intent that meaningful consideration be given the effect of curtailment on the community of ground water users.

The Legislature's intention that the Director not manage the ESPA for peak levels, but rather for sustainable levels, is not only clear in the language of the Act and subsequent Idaho Supreme Court decisions, but also in Idaho State Water Plans that state specifically the effect of the Act on aquaculture water users in the Thousand Springs area. The 1976, 1982, and 1986 State Water Plans consistently explain that

> [a]quaculture is encouraged to continue to expand when and where supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain 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.

Ex. 438 at 118, Ex. 439 at 44, Ex. 440 at 38 (emphasis facilities).[11] These Plans reflect the practical effect of the policy of full economic development as provided in Idaho Code § 42-226.

Thousands of ground water appropriators have invested and developed the ESPA in reliance on the State of Idaho's assurance that they would not be held hostage by the few water users in the Thousand Springs area who might get the idea of curtailing ground water pumping in an effort to increase spring flows. In keeping with that policy, the Department encouraged and issued thousands of ground water rights which, coupled with cheap electricity incentives by Idaho Power Company, enabled Idaho farmers to make the desert bloom. Spring flows declined as expected, though they remain well-above natural levels. (Ex. 406.) Rather than continue these policies, however, the Final Order initiates a reversal of state ground water policy that is destined to return thousands of irrigated acres back into sagebrush.

In voluntarily restricting his authority under the Ground Water Act, it seems the Director has inadvertently conflated the separate doctrines of futile call and full economic development. The purpose of providing mitigation is to render a delivery call satisfied, since mitigation eliminates the injury being complained of. In contrast, the purpose of full economic development is to protect the public's interest in maximizing beneficial use of finite resources, even if the senior's right is not fully satisfied. Whereas the focus of the mitigation analysis is personal to the calling senior, the focus of the full economic development analysis is communal. In short, the Ground Water Act does not condition the exercise of priority upon whether the

[11] The reference to "adequate water" reflects the Plans' incorporation of "a zero Minimum flow at the Milner gauging station" which "means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low water years," and that "[t]he Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system." Ex. 440 at 35.

junior can fully mitigate its depletion, but upon whether the curtailment will interfere with full economic development of the resource. In factual circumstances where mitigation is impossible, unfeasible or would not provide any meaningful benefit within a reasonable time to the calling senior, the Director has a reasonable basis to refuse priority administration under the doctrine of full economic development.

The Director's incomplete analysis of the doctrine of full economic development is further manifest by his failure to consider or apply CM Rule 42.01.h, which specifically identifies certain mechanisms available to the Director to assure that the reasonable exercise of priority does not interfere with full economic development of the ESPA. CM Rule 42.01.h advises the Director to consider

> [t]he extent to which the requirements of the senior surface water rights 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 use and divert water from the area having a common ground water supply under the petitioner's surface water right priority.

The Hearing Officer refused to consider this factor because he believed that "treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees." (R. Vol. 14 at 3236-3237.) The Department similarly justifies the Director's failure to consider this material injury factor, claiming that "[i]f the Director were required to compel Blue Lakes and Clear Springs to change the source listed on its partial

decrees from surface water to ground water, that would constitute a readjudication." (Respondents' Br. at 62.)[12]

The Director's belief that he has no authority to apply CM Rule 42.01.h runs contrary to the Idaho Supreme Court's affirmative conclusion that the Director can apply the factors of CM Rule 42 without causing a re-adjudication of the senior water right. In addition, it defies the general provision in the SRBA that all water sources are deemed inter-connected unless proven otherwise. The very fact that the Spring Users are allowed to curtail water rights whose SRBA decrees list the source as "ground water" gives credence to the Director's authority to require a conversion from one hydraulically connected source to another as necessary to assure that the exercise of priority does not unreasonably interfere with full economic development of the ESPA. It also contradicts and reverses the historic policy outlined in State Water Plans that the Spring Users' water supplies and means of diversion are not absolutely protected, as explained above.

On reconsideration, the Director acknowledged that Idaho Code § 42-226 may in fact justify a narrowing of the scope of curtailment in the public interest, but still failed to independently consider the extent to which it does. Instead, full economic development was nebulously cited to support of the Director's decision to limit curtailment based on Model

[12] What the Department is really saying is that the Director has no authority under any circumstance to compel a surface water right to convert to a ground water source. Since every water right license and decree defines a source, the application of CM Rule 42.01.h would require a change from the defined surface source to a ground water source in every instance. The rule becomes entirely useless under the Director's claim that its application constitutes a re-adjudication. Surely, however, the Director must be afforded the opportunity to apply CM Rule 42.01.h and administer the water right based on the extent of interconnection between its source and that of junior water users, which is not defined in the Spring Users' SRBA decrees. And in this case it is undisputed in this case that the Spring Users' spring flows consist entirely of ground water emanating from the ESPA. (Dreher, Tr. p. 1113, L. 18-p. 1114, L. 2; Wylie, Tr. p. 889, L. 11-17, P. 891, L. 23-P. 892, L. 5.)

uncertainty. (R. Vol. 16, p. 3703-04, 3706, 3711-13.) The Director's accounting for Model uncertainty, however, is not and should not be the same analysis undertaken to consider full economic development.

Moreover, the lack of a fresh and independent reconsideration of whether the trim line should be constricted in accordance with Idaho Code § 42-226 underscores the problem with ordering large-scale, permanent curtailment without a prior hearing. It is no secret that the Ground Water Users are soured by the curtailment of their water rights on an emergency basis without a full evidentiary record and without hearing argument on important legal defenses to the Spring Users' delivery calls. Compounding this injustice is the defensive, appellate-type review that was given to the 2005 Curtailment Orders. Had the facts and legal defenses raised by the Ground Water Users been heard and thoroughly considered before ordering curtailment, the law of full economic development would have been given thorough and independent consideration, which the Ground Water Users believe would have resulted in a much narrower scope of curtailment from the beginning.

In this case, it is extraordinarily difficult to mitigate for the small quantity demanded for Clear Springs' Snake River Farm facility due to its location, as was explained by Lynn Carlquist and Dean Stevenson. (Carlquist, R. Supp. Vol. 7, p. 4837, L. 10-19, p. 4840, L. 6-11; Stevenson R. 2nd Supp. Vol. 1, p. 5549, L. 14-23, p. 5552, L. 1015.) Dr. Wylie of the Department also agreed that efforts to mitigate with water to Snake River Farms would be difficult given its location:

A. The Buhl to Thousand Springs reach is much shorter. This is over 20 miles

> long, and the Buhl to Thousand Springs reach is 10 miles long. So you get - you don't get as much impact as that impact spreads out radially from a well on this much shorter reach.

(Tr., p. 825, L. 9-13.) The result is that it is not practically possible to fully mitigate for impacts to Clear Springs, which the Director views as leaving himself no option but curtailment by strict priority.

In conclusion, the law of full economic development as set forth in the Ground Water Act expressly requires the Director to directly consider and make specific findings of fact about whether the exercise of priority must be limited to assure that it does not unreasonably interfere with full economic development of the ESPA. This is an independent analysis and just a backup to support Director's accounting for uncertainty in the ESPA Model. However, the Director's testimony that the trim line is solely the product of model uncertainty, the lack of any analysis of full economic development within the orders, and the lack of any findings of fact addressing the economic effects of the ordered curtailment collectively demonstrates that the Director did not independently consider, at least not in a meaningful or adequate way, whether the location of the trim line should be constricted in accordance with the legislative mandate for full economic development of the ESPA. The Director's failure in this regard was arbitrary and capricious and constitutes an abuse of discretion that violates substantial rights of the Ground Water Users.

If the law of full economic development is going to have any meaning in ground water administration, it must be addressed by making specific findings, yet the Director was entirely silent on this issue. As explained above and in the Ground Water Users' Opening Brief, the scope of curtailment in this case is so broad that 52,470 acres (more than 145 square miles) of

productive irrigated farmland are being retired to provide just 481 acres worth of water to Clear Springs—an anticipated return to Clear Springs of less than one percent at steady state, meaning this small benefit will only inure gradually and only be fully realized after decades. As acknowledged by the Hearing Officer, "[t]he vast majority of the water curtailed will not go to the Blue Lakes or Snake River Farms facilities. Perhaps it will go to beneficial use in Idaho, perhaps not." (R. Vol. 16, p.3711.)

Thus, the ultimate question before this Court is whether or not the Director's curtailment unreasonably interfere with full economic development of the ESPA when it retires 52,470 acres of productive irrigated farmland to provide just 2.66 c.f.s. to Clear Springs over the next several decades, retires 57,220 irrigated acres to provide 10.05 c.f.s. to Blue Lakes. One can hardly imagine a scenario that more persuasively demands some limitation on the exercise of priority. Accordingly, the Ground Water Users ask this Court to narrow the scope of curtailment so that priority is reasonably exercised as against only those ground water rights for which curtailment will provide a significant return within a reasonable time to the springs that supply Clear Springs' and Blue Lakes' water rights. This is the condition upon which the Legislature subjected ground water rights to delivery calls by surface water rights under Idaho Code § 42-226. Alternatively, the Ground Water Users ask this Court to remand this case to the Director to make that determination.

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

A&B IRRIGATION DISTRICT AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, Petitioners, vs. DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	Case No CV 2008-0000551 **PETITIONER UNITED STATES' REPLY BRIEF**
IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MLNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	

PETITIONER UNITED STATES' REPLY BRIEF

Appeal from the Idaho Department of Water Resources
David R. Tuthill, Jr. presiding

Honorable John M. Melanson, District Judge, presiding

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Introduction

This case pits the interests of senior surface water users who must rely on a resource that is inherently variable, against those of junior ground water users who have the luxury of drawing from a water resource blessed with an essentially constant supply. One tool the surface water users employ to ameliorate the variability of their water supply is carry-over storage. As was showing in the United States' Opening Brief (U.S. Opn. Brf.), the Director's *Final Order* handicaps the use of that tool in two ways. First, contrary to the plain language of Conjunctive Management Rule 42 (CM Rule 42), the Director refused to allow for the possibility of using mitigation to protect carry-over storage intended to be used over multiple years. Second, the Director refused to require mitigation at the time of injury to the carry-over storage. By doing so the Director failed to give effect to the Idaho Supreme Court's instruction that carry-over storage is exactly what the name implies: actual water in a reservoir that is retained for use in subsequent years. Further, the Director violated Idaho water law by failing to treat the senior surface water users in a manner commensurate with their priority. The government has *not* argued that requires either full reservoirs or elimination of all risk for seniors. Rather, a system commensurate with priority simply requires that junior water users diverting out-of-priority bear a risk of shortage or additional expense that is greater than that borne by senior water users.

The Groundwater Users (IGWA) and the Idaho Department of Water Resources (Department) respond to the government's two points with the same basic premise: because no

one can predict future water supplies with any degree of certainty, neither mitigation for more than one year, nor mitigation at the time of injury, should be allowed because it *may* lead to "waste." That argument is a red herring. As IGWA explains in their brief, obtaining replacement water is merely an exercise in paper shuffling. Water already in a reservoir is simply shifted from the account of one party to that of another. Thus mitigation has no effect on the quantity of water in storage and cannot create "waste." Moreover, even in those subsequent years in which the reservoirs ultimately fill, money junior groundwater users spend on replacement water is not wasted. Rather it buys increased certainty for the senior surface water users – and for the groundwater users themselves.

Argument

I. RECLAMATION'S CHALLENGES TO THE FINAL ORDER RAISE LEGAL ISSUES OVER WHICH THIS COURT HAS FREE REVIEW.

The ground water users contend that Reclamation has "erroneously" tried to frame the issues raised by Reclamation as issues of law because the *Final Order* is an exercise of the Director's discretion. Ground Water Users' Brief in Response.... at 17-18 (IGWA Brf.). The mere need for some exercise of discretion and related fact finding does not preclude free review of legal issues such as those raised by Reclamation because the Director's discretion is bounded by law, in this case the plain language of the Rule and Idaho water law. Put another way, Reclamation is arguing that the Director has exceeded the discretion allowed by law. Idaho

appellate courts have long recognized that courts have free review over such questions. *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002) ("interpretation of a [rule], like construction of a statute is an issue of law" and therefore subject to free review); *see also State v. Nelson*, 119 Idaho 444, 446,8 07 P.2d 1282, 1284 (Id. App. 1991).

II. THE FINAL ORDER VIOLATES THE PLAIN LANGUAGE OF RULE 42 BY CATEGORICALLY PRECLUDING THE POSSIBILITY OF MITIGATION TO PROVIDE CARRY-OVER STORAGE FOR MULTIPLE YEARS, REGARDLESS OF FUTURE CIRCUMSTANCE.

By its plain terms, CM Rule 42.01.g authorizes the Director to protect carry-over storage for future dry years. Put another way, the Rule plainly recognizes that in at least some circumstances, mitigation for multiple years may be appropriate. The Director erred by refusing to give effect to the Rule's plain language and instead categorically deciding that junior groundwater users diverting out-of-priority diversions will *never* be required to mitigate to provide carry-over storage to be used over more than one year. U.S. Opn. Brf. at 13-14.

The Department agrees, as the plain language of the Rule compels it to, that the Rule protects carry-over storage for "future dry years." IDWR Respondents Brief at 15 (IDWR Brf.). The Department then seeks to evade that plain language on the grounds that the Idaho Supreme Court has instructed that water can be carried-over only when it can later be put to "beneficial use" and the amount is not "excessive . ... without regard to the need for it." *Id.* at 15 (quoting *American Falls Reservoir District No. 2. v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880, 154 P.3d 443, 451 (2007)) (*AFRD No. 2*). Those restrictions, however, do not

compel the Director's conclusion that he can *never* provide replacement water for use over multiple years. Instead, they necessarily imply an individualized determination based on the particular facts before the Director at that time.

IGWA and the Department attempt to support the Director's categorical conclusion through variations on the same theme: the variability of the weather and hydrology make it "impossible to predict with any certainty" how much water may be available or needed from year to year. IGWA Brf. at 38; IDWR Brf. at 17. Thus they seek to be excused from ever having to provide mitigation for multiple years (or, as is discussed below, at the time of injury) on the grounds that later years *might* be wet enough to fill the reservoirs. The very fact that the groundwater interests' arguments are phrased in terms of "might" only reiterates that the rules calls for an individualized determination based on particular circumstances, not an unyielding prohibition.

III. THE DIRECTOR ERRED BY NOT REQUIRING MITIGATION DURING THE SEASON OUT-OF-PRIORITY DIVERSIONS ARE REDUCING THE QUANTITY OF WATER AVAILABLE FOR CARRY-OVER STORAGE.

Both the groundwater users and the Department rely significantly on the testimony of former Director Dreher. The system of administration contemplated by Director Dreher differed from that proposed in the *Final Order* in one crucial respect: former Director Dreher would have required replacement water to be provided during the season the junior groundwater user's out-of-priority diversions injured the senior storage water right holder's right to reasonable carryover storage. As Reclamation explained in its Opening Memorandum, that

approach is well grounded in Idaho law. It would provide actual carry-over storage as defined by the Idaho Supreme Court in *AFRD No. 2* – water that is in the reservoirs at the end of the irrigation year and can be retained for use in subsequent years. It also avoids assigning risk to senior water users that Idaho water law requires juniors to bear. Idaho law has long provided that a junior's right to take water is subject to the rights of senior appropriators being satisfied. *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944). Here, the Director has a set up a system where the juniors get to divert out of priority to the detriment of the senior's right to reasonable carry-over and the seniors have to hope that there will be sufficient water available the following year to mitigate their injury.

The groundwater interests attempt to justify not mitigating the injury in the season that it occurs just as the *Final Order* did, by relying on the Hearing Officer's finding that mitigation water has always been available in the past. IGWA Brf. at 38; IDWR Brf. at 17. Their confidence that future years will continue to bring reliable supplies of mitigation water stands in stark contrast to their admission that forecasting surface water supply over the short, seven *month,* irrigation season "is fraught with difficulty and uncertainty."[1] IGWA Brf. at 39. Indeed, it was that uncertainty that led former Director Dreher to direct that mitigation water be

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[1] In addition, their ardent belief that water will always be available for mitigation in the year following the injury to carry-over storage belies their arguments that the *Final Order* assigns risk to the junior ground water users – the risk of being curtailed in the spring if there is no water available for mitigation. IDWR Brf. at 23; IGWA Brf. at 38-39. If their theory that mitigation water will always be available in the future holds, the "risk" they claim to carry is no risk at at all.

provided in the fall.[2] *See* Hearing Tr. Vol. II, p. 270 L 1-10. Under that system an inability to provide mitigation water in the fall would have been cause for curtailment the following spring. *Id.* at Vol. I p. 103 LL. 20-25.

The groundwater users rail against the former Director's approach on the grounds that it will lead to "waste." IGWA Brf. at 38. That argument fails as a matter of law, because "[t]he 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." *Martiny v. Wood*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966). That is just what has happened here: claims that water will be "wasted" have been used to justify unnecessary restrictions on the senior's right to carry-over storage.

As was noted above, the "waste" argument is a red herring.[3] It is true that a necessary consequence of a reservoir system is that in some wet years the system will not be able to capture all the available water and consequently some previously stored water will be released

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[2] The Department argues that requiring replacement water in the season of injury would ignore Director Dreher's "scientific approach in the February 14, 2005 order," which did not curtail junior groundwater users. IDWR at 23. In doing so, the Department ignores Director Dreher's later testimony that he was wrong not to have required replacement water in that order. *E.g.* Hearing Tr. Vol I at p. 167, LL 7-11.

[3] Equally invalid are the groundwater users' arguments that the government is insisting upon full reservoirs. To the contrary, Reclamation has not taken issue with former Director Dreher's conclusion that senior storage water right holders are entitled to the minimum amount of carry-over that would allow for an adequate supply of water. Hearing Tr. Vol. I at p. 81 LL. 2-8 (reasonable carry-over storage is "something short of full reservoirs;" it is the minimum level of insurance water needed in case the following year turns out to be a drought year).

downstream in the spring. That may be less than ideal, but it is a reality that must be lived with. More to the point, providing mitigation water in the fall is a paper exercise that neither increases nor decreases the quantity of water that is at risk of being released downstream.

Pocatello complains that if the junior groundwater users are required to provide replacement water in the fall and the reservoirs later fill, they will "have either wasted their money or over-mitigated the injury to the seniors." Pocatello Brf. at 23. Neither point has merit.

First, as former Director Dreher explained, the risk of "over-mitigation" is one junior water users should be expected to bear as the cost of continuing to be able to divert out-of-priority to the detriment of senior water users. Hearing Tr. Vol. I p. 68 L. 23 - p. 69 L. 3. That proposition flows naturally from the long established principles that juniors are only allowed to divert water only when they do not injure the rights of seniors. *Beecher*, 66 Idaho at 9, 154 P.2d at 510. Because the junior is diverting out-of-priority, they should bear risk greater than that of the senior, whether that risk be the risk of "over-mitigation," or of shortage. *See R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27, 752 P.2d 625, 629 (Idaho App. 1988) (a junior is obligated to remedy interference with a senior's right). As Reclamation explained in its opening brief, the *Final Order* imposes the risk of shortage on the senior water users. By delaying the junior's obligation to provide replacement water until the season after the injury occurs, the *Final Order* leaves open the possibility that replacement water will not be available and thus that the senior's injury will never be remedied. U.S. Opn. Brf. at 18-19.

Second, money spent on replacement water in the fall would not be "wasted,"

even if the reservoirs did fill. To the contrary, the juniors would have gained value in the form of increased certainty for both the senior surface water users – and for themselves. Crops are planted in the spring, but the planning and financing of those crops takes place over the winter. Hearing Tr. Vol. IX, p. 1870 LL 7-25, p. 1871 LL 1-21 (Diehl Testimony). If, as former Director Dreher had contemplated, groundwater users provided mitigation water in the fall, the senior surface water users would literally be able to bank on that water being available for their use the following year. Importantly, the groundwater users would benefit as well. Like the surface water users, they would be freed from the uncertainty over whether replacement water would be available the following year and would go into the planning season knowing exactly where they stand. Moreover, they would be free from the risk of having planted a full crop only to be curtailed during the irrigation season if they could not acquire replacement water.

In contrast, the *Final Order* calls for the provision of replacement water to wait until the following year. Should replacement water actually be available, the requisite paper shuffling can occur and all parties emerge whole. Former Director Dreher acted as he did because he realized that might not always be the case – the very uncertainty in weather the groundwater interests rely on leaves a risk that replacement water will not be available. Hearing Tr. Vol. II, p. 270, L 1-10. Should that happen, the delay called for in the *Final Order* has only compounded the potential for injury. Both surface water users and groundwater users will have planted a full crop on the expectation that the Director will be able to deliver on the promise made in the notice to be provided each fall, rather than having to resort to curtailment. Should

that water not be available, the senior surface water users crops will suffer from a water shortage, while the Director will face a Hobson's Choice - either curtail the junior groundwater users and impair their crops as well, or declare curtailment futile and watch the prior appropriation system be turned on its head -- junior water users continuing to pump water out-of-priority while the crops of seniors wither in the fields.

Conclusion

Neither the Department of Water Resources nor the groundwater users have shown that their concern over the prospect of "waste" is justification for either ignoring the plain language of Conjunctive Management Rule 42 or refusing to provide the senior storage water rights holders with what the carry-over storage they are entitled to under the rule – replacement water that can be stored in a reservoir and retained for use in subsequent years.

DATED this 19th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2009, a copy of the foregoing , **PETITIONER UNITED STATES' REPLY BRIEF**, Case No. 08-0000551, was served upon the following using the method indicated.

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