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DEPARTMENT OF
WATER RESOURCES

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,	Filed pursuant to I.R.C.P 5(e)(1) on July 24, 2009 at 3:05 P.M. John Melanson, Dist. Judge
UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,	
Petitioners,	
vs.	**Case No. 2008-0000551**
	ORDER ON PETITION FOR JUDICIAL REVIEW
IDAHO DAIRYMEN'S ASSOCIATION, INC.	
Cross-Petitioner,	
vs.	
GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,[1] and THE DEPARTMENT OF WATER RESOURCES,	

[1] Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

Respondents.	)
	)
	)
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	)

Ruling:

1) Director did not exceed authority by waiting until following season to adjust material injury to carry-over storage but exceeded his authority by not making process contingent on guarantee of replacement water in event of shortfall; 2) Director exceeded authority by categorically denying reasonable carry-over for multiple-years; 3) Director did not exceed authority or abuse discretion by combining natural flow and storage rights in making a material injury analysis or by using a "baseline" different from the decreed or licensed quantity, subject to certain conditions; 4) Director did not err or abuse discretion by using 10% trim-line in applying ground water model; 5) Director exceeded authority and abused discretion by not following procedural steps for mitigation plans as set forth in the Rules for Conjunctive Management; 6) Director exceeded his authority by determining that full headgate delivery for Twin Falls Canal Company as issue is currently pending in the SRBA; 7) Director exceeded authority by issuing separate "Final Orders"; 8) Based on foregoing actions, Director's actions did not constitute timely administration of junior rights to protect senior rights.

Appearances:

C. Thomas Arkoosh, of Capitol Law Group, PLLC, Gooding, Idaho, attorney for American Falls Reservoir District #2.

W. Kent Fletcher, of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

John A. Rosholt, John K. Simpson, and Travis L. Thompson, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation

District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

John C. Cruden, Acting Assistant Attorney General, and David Gehlert, of the United States Department of Justice, Denver, Colorado, attorneys for the United States Bureau of Reclamation.

Randall C. Budge, Candice M. McHugh, and Scott J. Smith, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators.

A. Dean Tranmer, of the City of Pocatello Attorney's Office, Pocatello, Idaho, attorney for the City of Pocatello.

Sarah A. Klahn of White and Jankowski, LLP, Denver, Colorado, attorney for the City of Pocatello.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

I.
STATEMENT OF THE CASE

A. Nature of the case

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR" or "Department") issued in response to a delivery call filed by Petitioner Surface Water Coalition ("SWC") on January 14, 2005. The delivery call was filed as a result of a reduction in reach gains and spring flows discharging from the Eastern Snake Plan Aquifer ("ESPA"). The SWC is made up of seven irrigation districts and canal companies below American Falls Reservoir that divert natural flow water from the Snake River and who hold storage water rights in various Bureau of Reclamation ("BOR") reservoirs. The members of SWC are: A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD #2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka

Irrigation District ("MID"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC"). The September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call ("Final Order")*, from which judicial review is sought, ordered curtailment of junior ground water rights or alternatively a replacement water plan in lieu of curtailment. Petitioners contend the Department erred in response to the delivery call and seek judicial review pursuant to the Idaho Administrative Procedures Act, Title 57, Chapter 52, Idaho Code.

B. Course of Proceedings

1. The Delivery Call

SWC delivered a letter to the Director of IDWR on January 14, 2005, requesting the Director to commence conjunctive administration of their water rights. Hearing Record (R.) Volume (Vol.) 1 at 1. SWC asserts in the letter that their senior water rights were being materially injured "[b]y reason of the diversion of junior ground water rights located within Water District No. 120 and elsewhere throughout the ESPA," including the American Falls Ground Water Management Area, and areas of the ESPA not within an organized water district or ground water management area. *Id.* at 4. Also on January 14, 2005, SWC filed a *Petition for Water Rights Administration and Designation of the Eastern Snake River Plain Aquifer as a Ground Water Management Area.* R. Vol. 1 at 53.

On February 14, 2005, Director Dreher issued an order ("*February 14, 2005 Order*") in response to SWC's requests. The Director found that because water districts were expected to be created in the ESPA by the irrigation season of 2006, there was no need for the creation of a ground water management area encompassing the entire ESPA. R. Vol. 2 at 214. The Director was unable to determine injury to the senior priority rights held by SWC until the commencement of the 2005 irrigation season and until the BOR and the United States Army Corps of Engineers released inflow forecasts. *Id.* at 226. The Director requested more information from SWC in order to make a determination of injury "as soon after April 1 [the start of the irrigation season] as practicable." *Id.* at 227, 230.

On May 2, 2005, Director Dreher issued an *Amended Order* ("*May 2, 2005 Amended Order*"). The Director found that junior ground water diversions from the ESPA were materially injuring senior SWC natural flow and storage rights. Vol. 8 at 1384-85, 1402. The amount of material injury to the seniors was determined to be 27,700 acre feet of water. *Id.* at 1402. Applying the amount of water used by SWC water users in 1995, the Director determined the "minimum full supply" needed for full deliveries, and then subtracted the predicted 2005 supply, in order to calculate a total shortage of 133,400 acre feet. *Id.* at 1384. Built into this calculation was the assumption that SWC members use all of their carryover storage from 2004. Further, the Director found that "[m]embers of the Surface Water Coalition are entitled to maintain a reasonable amount of carryover storage to minimize storages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rule (IDAPA 37.03.11.042.g)." *Id.* at 1385. The Director determined the amount of reasonable carryover due to SWC by averaging the amounts of carryover storage based on flow and storage accruals from 2002 and 2004. *Id.* Finally, the Director ordered that replacement water be provided over time to SWC and that the amount of replacement water for 2005 not be less than 27,700 acre feet. *Id.* at 1404. The Director determined that if all of the replacement water is not provided to the senior users as required, the amount remaining would be added to the ground water users' obligations for future years. However, the Director also ordered that the ground water users may be curtailed if at any time mitigation is not provided. *Id.*

Thereafter, the Director issued a series of supplemental orders, which reviewed IDWR action, made additional findings, and modified or revised previous findings. R. Vol. 37 at 7067-7071. For instance, on June 29, 2006, the Director entered his *Third Supplemental Order* ("*June 29, 2006 Supplemental Order*"), determining that the remainder of the replacement water that IGWA was to supply in 2005 was to be supplied at the beginning of the 2006 irrigation season, and not as 2005 carryover storage. R. Vol. 20 at 3756. Subsequent supplemental orders amended or approved replacement water plans for 2006, 2007, and 2008. R. Vol. 37 at 7068-7071, Vol. 38 at 7198.

2. IGWA

On February 3, 2004, IGWA filed two petitions to intervene in the request for administration in Water District 120 and the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area, and designation of the ESPA as a Ground Water Management Area. R. Vol. 2 at 197, 204. IGWA is a non-profit corporation that represents ground water users who pump water from the ESPA and irrigate over 700,000 acres of land from the aquifer. R. Vol. 37 at 7058. IGWA represents water users with ground water rights junior to SWC's rights, which are subject to curtailment under the Director's *Final Order*.

In a February 14, 2005 *Order*, the Director granted IGWA's petition to intervene in the matter of water right administration in Water District 120 and in the American Falls Ground Water Management Area.[2] *Id.* at 228.

IGWA has filed petitions for reconsideration of each of the *Director's Orders* and is a respondent in the petition for judicial review currently before this Court. ("IGWA or Ground Water Users").

3. The City of Pocatello

On April 26, 2005, the City of Pocatello filed a petition to intervene in the SWC delivery call. R. Vol. 7 at 1254. The City of Pocatello holds a ground water right that is junior to rights held by SWC and is subject to curtailment under the Director's *Final Order*. R. Vol. 37 at 7060.

On May 16, 2005, the City of Pocatello filed a petition for reconsideration of the Director's *May 2, 2005 Order*, and also filed petitions for reconsideration for later *Supplemental Orders*. R. Vol. 9 at 1669, Vol. 23 at 4376, Vol. 25 at 4745. The City of Pocatello is a respondent in the petition for judicial review currently before this Court.

[2] The Idaho Dairymen's Association, the City of Pocatello, the United States Bureau of Reclamation, and the State Agency Ground Water Users were also granted intervention in the proceedings before Director Dreher. *See* R. Vol. 39 at 7381.

4. Hearing on the SWC Delivery Call, Hearing Officer Schroeder's Recommended Order and the Director's Final Order

On August 1, 2007, Director David Tuthill issued an *Order Approving Stipulation and Rescheduled Hearing*, and an *Order Appointing Hearing Officer*, setting a hearing on the SWC delivery call and appointing Hon. Gerald F. Schroeder ("Hearing Officer") to preside over the hearing. R. Vol. 25 at 4770, 4775. The hearing began on January 18, 2008, and concluded on February 5, 2008. R. Vol. 37 at 7048. On April 29, 2008, the Hearing Officer entered his *Opinion Constituting Findings of fact, Conclusions of Law and Recommendation* ("*Recommended Order*"). *Id.*

In sum, the Hearing Officer concluded that: 1) the Director's assignment of a 10% uncertainty to the ESPA model and the use of a "trim-line" was reasonable, *Id.* at 7080; 2) the Director's consideration of the public interest criteria was proper, *Id.* at 7086; 3) the Director's application of a "minimum full supply" was reasonable when subject to adjustment as conditions change, but was unacceptable as a fixed amount, *Id.* at 7091, 7095, 7098-7099; 4) the existing facilities utilized by SWC were reasonable, *Id.* at 7101-7102; 5) the members of SWC were employing reasonable conservation practices, *Id.* at 7103-7104; 6) the Director's determination to provide carryover storage for one year (not multiple years) was reasonable, *Id.* at 7109; 7) the process utilized by the Director to determine a reasonable amount of carryover storage due to SWC was proper; 8) the Director's order of replacement water plans as a form of mitigation was proper, *Id.* at 7112-7113; and 9) replacement water must be approved in accordance with the procedures of the Conjunctive Management Rules, and provided at the time of material injury, *Id.* at 7112.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call*. R. Vol. 39 at 7381. The *Final Order* adopted the findings of fact and conclusions of law of the previous Director's orders issued in the delivery call, and the recommended orders of the Hearing Officer except as specifically modified. *Id.* at 7387. In particular, the Director held that 1) the Director properly exercised his discretion in authorizing replacement water as an interim measure for mitigation to senior water users before conducting a hearing to determine material injury, *Id.* at 7383, 7388; 2) it was appropriate to find that replacement water for predicted

shortages to reasonable carryover be provided in the season in which water can be put to beneficial use, not the season before, *Id.* at 7386, 7391; and 3) the term "reasonable in-season demand" will replace the use of the term "minimum full supply", *Id.* at 7386.

5. Petitions for Judicial Review

Petition for judicial review of the *Final Order* was timely filed by the SWC on September 11, 2008. On September 25, 2008, the United States Bureau of Reclamation filed a *Petition for Reconsideration* of the Director's *Final Order*. Thereafter, the Director issued an *Order Denying USBR Petition for Reconsideration and Pocatello's Response*. BOR then timely filed a petition for judicial review on November 7, 2008. This case was assigned to this Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication, on September 12, 2008.

C. Relevant Facts

1. The Water Rights at Issue

a) The A&B Irrigation District

A & B holds natural flow right number 01-00014 for 267 cfs with a priority date of April 1, 1939, and storage water rights in American Falls Reservoir for 46,826 acre feet with a priority date of March 30, 1921, and 90,800 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 137,626 acre feet. R. Vol. 37 at 7055.

b) The American Falls Reservoir District #2

AFRD #2 holds natural flow right number 01-006 for 1,700 cfs with a priority date of March 30, 1921, and storage water rights in American Falls Reservoir for 393,550 acre feet with a priority date of March 30, 1921. R. Vol. 37 at 7055.

c) The Burley Irrigation District

BID holds natural flow right number 01-00211B for 655.88 cfs with a priority date of March 26, 1903, and natural flow right number 01-00214B for 380 cfs with a priority date of August 6, 1908, and natural flow right number 01-00008 for 163.4 cfs with a priority date of April 1, 1939. BID also has a storage rights in Lake Walcott for 31,892 acre feet with a priority date of December 14, 1909; 2,672 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 155,395 acre feet in American Falls Reservoir with a priority date of March 30, 1921; 36,528 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 226,487 acre feet. R. Vol. 37 at 7055.

d) The Milner Irrigation District

Milner holds natural flow right number 01-00017 for 135 cfs with a priority date of November 14, 1916, and natural flow right 01-00009 for 121 cfs with a priority date of April 1, 1939, and natural flow right number 01-02050 for 37 cfs with a priority date of July 11, 1968. Milner has storage rights of 44,951 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 45,640 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 90,591 acre feet. R. Vol. 37 at 7055.

e) The Minidoka Irrigation District

MID holds natural flow rights number 01-00211A for 1,070 cfs with a priority date of March 26, 1903, right number 01-00214A for 620 cfs with a priority date of August 6, 1908, and right number 01-00008 for 266.6 acre feet with a priority date of April 1, 1939. MID has storage rights of 127,040 acre feet in Jackson Lake with a priority date of August 23, 1906; 58,990 acre feet in Jackson Lake with a priority date of August 18, 1910, 63,308 acre feet in Lake Walcott with a priority date of December 14, 1909; 5,328 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 82,216 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 29,672, acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 336,554 acre feet. R. Vol. 37 at 7056.

f) The North Side Canal Company

NSCC holds natural flow rights 01-00210 for 400 cfs with a priority date of October 11, 1900, right number 01-00212 for 2,250 cfs with a priority date of October 7, 1905; right number 01-00213 for 890 cfs with a priority date of June 16, 1908; right number 01-00005 for 300 cfs with a priority date of December 23, 1915; and right number 01-00016 for 1,260 cfs with a priority date of August 6, 1920. NSCC has storage rights for 312,007 acre feet in Jackson Lake with a priority date of May 24, 1913; 9,248 acre feet in American Falls Reservoir with a priority date of March 29, 1921; 116,600 acre feet in Palisades Reservoir with a priority date of March 29, 1921; and 422,043 acre feet in American Falls Reservoir with a priority date of March 30, 1921. R. Vol. 37 at 7056.

g) The Twin Falls Canal Company

TFCC holds natural flow rights 01-00209 for 3,000 cfs with a priority date of October 11, 1900, right number 01-00004 for 600 cfs with a priority date of December 22, 1915, and right 01-00010 for 180 cfs with a priority date of April 1, 1939. TFCC has storage rights of 97,183 acre feet in Jackson Lake with a priority date of May 24, 1913, and 147,582 acre feet in American Falls Reservoir with a priority date of March 29, 1921, for combined storage rights of 244,765 acre feet. Twin Falls Canal Company has claimed in the SRBA and the Director has recommended irrigation rights totaling 196,162 acres. TFCC delivers water to 202,690 shares. R. Vol. 37 at 7056.

2. Eastern Snake Plain Aquifer (ESPA)

The ESPA is an unconfined aquifer underlying a geographic area of approximately 10,800 square miles of southern and southeast Idaho. R. Vol. 37 at 7050. The ESPA connects with the Snake River and its tributaries along a number of reaches resulting in either gains or losses to the River depending on the level of the aquifer in relation to the River. *Id.* The ESPA consists primarily of fractured basalt ranging in a saturated thickness of several thousand feet in the central part of the Eastern Snake River

Plain, to a few hundred feet in the Thousand Springs area where the water is discharged through a complex of springs. Water flow through the ESPA is not uniform. Water travels through the system at rates ranging from 0.1 feet per day to 100,000 feet per day depending on subterranean geology, elevation and pressure differentials. *Id.* The ESPA receives approximately 7.5 million acre-feet per year from the following sources: irrigation related incidental recharge (3.4 million acre-feet), precipitation (2.2 million acre-feet) flow from tributary basins (0.9 million acre-feet) and losses from the Snake River and its tributaries (1.0 million acre-feet). R. Vol 2 at 198. On average between May 1980 and April 2002, the ESPA discharged approximately 7.5 million acre-feet on an annual basis through spring complexes located in the Thousand Springs area and near the American Falls Reservoir and through the discharge of approximately 2.0 million acre-feet per year through depletions from ground water withdrawals. *Id.* The ESPA is estimated to contain as much as one billion acre-feet of water. R. Vol. 37 at 7050.

The early 1950's marked the beginning of the use of deep well pumps on the ESPA. Spring flows then began to decline as a result of conversion from flood irrigation to sprinkler irrigation as well as depletions caused by ground water pumping. R. Vol. 37 at 7052. As a result, spring discharges and ESPA ground water levels have been declining in the last 50 years. A moratorium on new ground water permits was issued in 1992. R. Vol. 37 at 7058.

3. ESPA Model

A calibrated ground water model was used by the Director to predict the effects of curtailment of junior ground water rights. R. Vol. 2 at 199. The model has strengths and weaknesses. The model was designed to simulate gains and losses in various reaches of the Snake River including the reach from Shelley, Idaho to Minidoka Dam, which includes the American Falls Reservoir. *Id.* at 200. The model divides the ESPA into individual one mile by one mile cells. R. Vol. 37 at 7079. Despite the lack of homogeneity in the ESPA the model treats all cells as homogenous. The model was developed with input from a number of stakeholders with competing interests. *Id.*

4. The Bureau of Reclamation

The United States Bureau of Reclamation operates four main reservoir facilities on the Snake River: Jackson Lake Reservoir ("Jackson"), American Falls Reservoir ("American Falls"), Lake Walcott or Minidoka Dam ("Minidoka"), and Palisades Reservoir ("Palisades"). R. Vol. 37 at 7060-7061. This reservoir system was originally constructed with the intent to provide storage water to irrigators to insure against water shortages in times of drought. *Id.* More recently, the system also allows for flood control and hydropower production, while continuing to provide irrigation districts with the certainty that water will be available in future years. R. Vol. 37 at 7060-7061, 7107-7108. The BOR has contracts with members of SWC and the City of Pocatello for water held in storage in this reservoir system, including contracts for carryover water for irrigation. *Id.* at 7060-7061. *See also* United States' *Opening Brief*, at 3-4. As a result, the BOR has an interest in how the water rights at issue in this delivery call are administered. *See also U.S. V. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (holding legal title is held by the BOR with equitable title being held by landowners within the service area of SWC).

5. Interim Administration and Formation of Water District

On January 8, 2002, pursuant to I.C. § 42-1417, the SRBA District Court ordered Interim Administration of water rights located in all or portions of Basins 35, 36, 41 and 43, which included the water rights at issue in this matter. R. Vol. 2 at 200. On February 19, 2002, the Director of IDWR issued orders creating Water District Nos. 120 and 130. On November 19, 2002, the SRBA District Court ordered interim administration of a portion of Basin 37, which includes water rights at issue in this matter. *Id.* Thereafter, the Director issued an order revising the boundaries of Water District 130 to include this portion of Basin 37. *Id.* On October 29, 2003, the SRBA District Court issued an order authorizing Interim Administration of water rights located in portions of Basin 29, which includes water rights at issue here. *Id.* Again, the Director thereafter issued an order revising the boundary of Water District No. 120 to include this portion of Basin 29. *Id.* at

201. The water rights at issue in this case are included in Water District nos. 120 and 130, and such water districts have been created in order to provide for administration of water rights to protect prior surface and ground water rights. R. Vol. 37 at 7064. As a precondition for interim administration Idaho Code § 42-1417 requires that water rights either be reported in a director's report or partially decreed. I.C. § 42-1417 (a) and (b).

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held May 26, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or May 27, 2009.

III.
APPLICABLE STANDARD OF REVIEW

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

(a) in violation of constitutional or statutory provisions;

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

(c) made upon unlawful procedure;

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

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

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

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

The Idaho Supreme Court has summarized these points as follows:

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

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

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of*

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

Utah Hosp. v. Board of Comm'rs of Ada Co., 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

IV.
ISSUES PRESENTED FOR JUDICIAL REVIEW

A. Issues Raised by SWC

In its brief, SWC raised a number of issues. The Court has summarized these issues as follows:

1. Whether the Director failed to provide timely and lawful conjunctive administration of junior ground water rights?

2. Whether the Director gave proper weight and deference to the SWC's decreed senior water rights?

3. Whether the Director exceeded his statutory authority through the implementation of replacement water plans?

4. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary, capricious, and contrary to law?

5. Whether the Director's application of the Conjunctive Management Rules is consistent with Idaho law?

6. Whether the Director's use of a 10% "trim-line" resulting in the exclusion of certain junior priority ground water rights from administration was arbitrary, capricious, and contrary to law?

7. Whether the Director's determinations regarding carryover storage is arbitrary, capricious, and contrary to law?

B. Issues Raised by the Bureau of Reclamation

1. Whether the Director abused his discretion by failing to allow reasonable carryover storage for use in multiple years?

2. Whether the Director abused his discretion by failing to require mitigation of the material injury to reasonable carryover storage in the season the injury occurs?

V.
ANALYSIS AND DISCUSSION

A. The Director abused discretion by failing to require mitigation of material injury to reasonable carry-over storage in the season in which the injury occurs.

The SWC and BOR argue that Director Tuthill acted outside the scope of his authority and abused discretion by waiting until the following irrigation season before making a final determination of material injury to carry-over storage. Instead of making a final determination of injury, the Director adopted at "wait and see" approach to see if the storage reservoirs were predicted to fill the following year. The Director would not make a final determination until after the issuance of the "joint forecast" for the inflow for the Upper Snake River Basin which is issued annually after April 1st by the BOR and the United States Army Corps of Engineers. The Director reasoned as follows:

> The former Director [Dreher] found that shortfalls to reasonable carryover should be provided the season before the water can be put to beneficial use. as evidenced in 2006 and 2008, if the reservoir system mostly fills and had IGWA been required to provide reasonable carryover shortfalls to injured members of the SWC, the secured water would have been in excess of the amount needed for beneficial use by members of the SWC in the season of need.
>
> As found by the Hearing Officer, the reservoir system fills two-thirds of the time, and storage water has been historically available for rental or lease even during times of drought. *Recommended Order* at 6, 15. To order reasonable carryover the year prior to the season of need would result in waste of the State's water resources. *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 422, 319 P.2d 995, 968 (1957); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900). It is appropriate to notify the parties in the fall prior to the upcoming irrigation season of predicted carryover shortfalls for planning purposes. *But it is not appropriate to require junior ground water users to provide predicted shortfalls until the spring when the water can be put to beneficial use*

> *during the season of need*: '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 applied in *AFRD#2*.'

Final Order, R. Vol. 39 at 7391 (emphasis added). The Director concluded that if the reservoirs filled in the following year any shortfall to carry-over storage from the preceding year would be cancelled. This Court concludes that this issue is addressed by the express language and framework of the CMR.

1. Surface Storage Rights Include Reasonable Carry-Over Storage.

The storage rights held by the BOR and SWC include the right to reasonable carry-over. CMR 042 expressly acknowledges material injury to carry-over storage.

> **Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:
>
> . . .
>
> g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface 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, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

CMR 042.01.g. In *American Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD #2*"), the Idaho Supreme Court upheld the constitutionality of the reasonable carry-over provisions of the CMR.

> 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. *For*

> *purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task.* ***This Court upholds the reasonable carryover provisions in the CM Rules.***

AFRD #2 at 880, 154 P.3d at 451 (emphasis added). Clearly, based on the foregoing, absent conditions or other limitations included in the partial decree, a surface storage right includes with it the right to reasonable carry-over.

2. The Director's "wait and see" determination of material injury to carry-over storage is only authorized pursuant to a mitigation plan.

The CMR state that in determining a reasonable amount of carry-over storage "the Director shall consider the average annual rate of fill of storage reservoirs and the average carry-over for prior comparable water conditions and the projected water supply for the system." CMR 042.01.g. Of significance is that the "material injury" provisions of the CMR with respect to the reasonable carry-over provisions of storage water do not authorize a "wait and see" approach for purposes of determining material injury to carry-over storage. *See generally* CMR 042 ("Determining Material Injury and Reasonableness of Water Diversions"). Rather, a "wait and see" type approach is expressly authorized under the mitigation provisions of the CMR. CMR 043 provides:

> 03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan *will prevent injury to senior rights* include, but are not limited to, the following:
>
> c. ... A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply.

CMR 043.03.c. (emphasis added). However, the provision goes on to provide: "***The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable.***" *Id.* (emphasis added). This language is unambiguous.

A court must construe a statute as a whole and consider all of its sections together. *Davaz v. Priest River Glass Co., Inc.* 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). As such, the court must adopt a construction that will harmonize and reconcile all of the provisions of a statute. *State v. Horejs*, 143 Idaho 260, 266, 141 P.3d 1129, 1135 (Ct. App. 2006).

In this regard, although the Director adopted a "wait and see" approach, the Director did not require any protection to assure senior right holders that junior ground water users could secure replacement water. The Hearing Officer found that to date during extended drought periods there has always been water available somewhere at a price. Although the water may be expensive and/or difficult to obtain. R. Vol. 37 at 7053. While water may be available somewhere, the failure to require any protections for seniors is contrary to the express provisions and framework of the CMR. This does not mean that juniors must transfer replacement water in the season of injury, however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example.[4] Seniors can therefore plan for the future the same as if they have the water in their respective accounts and juniors may avoid the threat of curtailment. The BOR and SWC argue that in the event the reservoirs do not fill in times of shortage, the risk of junior ground pumpers not being able to obtain replacement water to mitigate for injury to carry-over storage is unconstitutionally borne by the senior. This Court agrees.

Under the CMR the ordering of replacement water or other mitigation is in lieu of curtailment. CMR 040.01 provides in relevant part that "upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director through the water master, shall: a. regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included in the district . . . or b. Allow out of priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director." CMR 040.01.a. and b. The Hearing Officer also acknowledged: "The theory underlying predicting material injury and allowing replacement water as mitigation instead of

[4] An option for water or some other mechanism for securing water pursuant to a long term mitigation plan where the cost would be less than actually transferring or leasing water.

requiring curtailment is that replacement water will be provided in time and in place in stages comparable to what would occur if curtailment were ordered." R. Vol. 37 at 7113. In the event replacement water could not be obtained in the following irrigation season or was determined too costly to obtain, ordering curtailment after the irrigation season has already begun or is about to begin presents new issues and problems. Both senior and juniors will have already planted crops. At that point curtailment may not timely remediate for the carry-over shortfall. The seniors are therefore forced to assume losses and adjust their cropping plans based on not having the anticipated quantity of carry-over storage. The Director is also faced with the issue as to whether or not to curtail junior ground water users based either on futile call as to the instant irrigation season or considerations regarding lessening the impact of economic injury. The Hearing Officer aptly pointed to this dilemma: "Curtailment of the ground water users 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 economy." R. Vol. 37 at 7090. Ultimately, the prior appropriation doctrine is turned upside down. Therefore, unless assurances are in place that carry-over shortfalls will be replaced if the reservoirs do not fill, the risk of shortage ultimately falls on the senior. As such, the very purpose of the carry-over component of the storage right -- insurance against risk of future shortage -- is effectively defeated.

Accordingly, the Court concludes that the Director abused discretion in failing either to order curtailment in the season of injury or alternatively require a contingency provision to assure protection of senior right in the event the reservoirs do not fill.

3. The Director abused discretion by categorically denying reasonable carry-over for storage for more than one year.

The BOR and SWC argue that the Director acted outside of his authority and/or abused discretion by failing to require juniors to provide carry-over water for use beyond the one irrigation season. The Hearing Officer essentially recommended a categorical

rule with respect to carry-over storage beyond one irrigation season (as opposed to a case-by-case determination):

> The multiple functions of BOR and the desire of SWC for long term insurance against adverse weather conditions are legitimate and consistent with the language of CM Rule 42.01.g which refers to dry years. Nonetheless, 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 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 hoarding, warned against by the Supreme Court in AFRD #2. . . 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. The Director adopted this reasoning in the *Final Order*. R. Vol. 39 at 7385. The problem with such a determination is that it is inconsistent with the plain language and framework of the CMR as well as the Idaho Supreme Court's ruling in AFRD #2. There is not a statute that specifically authorizes, defines or limits carry-over storage. However, carry-over storage is specifically included in the "**Determining Material Injury and Reasonableness of Water Diversions**" section of the CMR.[5] CMR 042.01.g provides "the holder of a surface storage right *shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years*. (emphasis added). IDWR argues in its brief that "[t]here 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." *Respondent's Brief* at 14. The problem with IDWR's argument is that the carry-over storage provisions are specifically included in the material injury section of the CMR as opposed to being just a provision that authorizes carry-over storage. Once material injury is established (absent defenses raised by juniors), then the Director must

either regulate the diversion and use of rights in accordance with priority or allow out-of –priority diversion pursuant to an approved mitigation plan. CMR 040. 01. a. and b. Accordingly, the CMR clearly contemplate that juniors can be curtailed to enhance carry-over storage beyond one year.

This exact provision withstood a facial constitutional challenge in *AFRD#2*. The Idaho Supreme Court rejected the argument that storage rights holders should be permitted to fill their entire storage right regardless of whether there was any indication that it was necessary to fulfill current or future needs. *Id.* at 880,154 P.3d at 451 (2007). The Supreme Court also rejected the argument of ground water users that the purpose of the reasonable carry-over provision is to meet actual needs as opposed to "routinely permitting water to be wasted through storage and non-use." The Court acknowledged that it is "permissible . . . to hold water over from one year to the next absent abuse." *Id.* at 880, 154 P.3d at 451 (citing *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945)). But "[t]o permit excessive carryover of stored water without regard to the need for it would in itself be unconstitutional." *Id.* Ultimately, the Court concluded that the CMR were facially constitutional in permitting some discretion in the Director to determine whether carryover water is reasonably necessary for future needs." *Id.*

Based upon this holding, this Court concludes that the Director exceeded his authority by concluding that permitting carry-over for more than just the next season is categorically unreasonable and results in the unconstitutional hording of water. Such a determination contravenes the express language and framework of the CMR. The Director, however, in the exercise of discretion, can significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances of a particular delivery call. Ultimately, the end result may well be the same. Finally, as discussed above, the securing of water through an option or similar method pursuant to or in conjunction with a long term mitigation plan would eliminate any concerns regarding hoarding water or other abuses.

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[5] In referring to 'framework" the Court means that the reasonable carry-over provision is specifically located in the material injury and reasonableness of diversion section of the CMR.

B. The Director did not err in combining the natural flow rights and storage rights for purposes of determining material injury.

The SWC argues that the Director abused discretion and/or exceeded his authority by combining the supply of natural flow rights and storage rights for purposes of making a material injury determination. This Court disagrees. The irrigation water requirements of the members of the SWC are satisfied through a combination of decreed natural flow and storage rights. Storage is supplemental to natural flow to meet water requirements. However, the extent to which individual members of the SWC rely on storage to supplement natural flow in order to satisfy irrigation season demands varies. As a result of differing priority dates, some SWC members do not have sufficient natural flow rights to irrigate through an entire season and must rely heavily on storage rights to meet irrigation season demands. For others with earlier natural flow priority dates, less reliance on storage rights to meet seasonal demands is required. However, because one of the purposes of a storage right includes carry-over for future use, the combined full decreed quantities of natural flow and storage rights can exceed the quantity necessary to satisfy the water requirements for a single irrigation season. In the context of a material injury analysis, the issue is then at what point does material injury occur to a senior storage right such that curtailment of junior ground pumpers or mitigation in lieu of curtailment is required? Former Director Dreher discussed this issue in his testimony:

> 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 storage, the reduced storage supplies that are available to the senior right holders?

Tr. at 42-43.

Although the storage rights are decreed separately from the natural flow rights, the purpose of use of the storage rights is that the stored water will be released and used to supplement the natural flow rights for irrigating the same lands.[6] Therefore, it would be error for the Director not to consider natural flow and storage rights in conjunction with each other. This was confirmed by the Idaho Supreme Court in *AFRD#2,* where the

[6] The storage use is not an *in situ* use such as recreation, aesthetic etc.

Idaho Supreme Court specifically rejected the argument that senior surface storage right holders were entitled to seek curtailment up to the decreed quantity of the storage right regardless of whether there was any indication that it was necessary to fulfill current or future irrigation needs. The Court held that storage right holders were entitled to protection for reasonable carry-over:

> Clearly American Falls has decreed storage rights. Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. 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 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 right without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or lost. Somewhere between the absolute right to use a decreed water right and the 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 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. For purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task. This Court upholds the reasonable carry-over provisions.

AFRD#2 at 880, 154 P.2d at 451. The Director's actions must be evaluated against the back drop of this holding. Additionally, one of the factors the Director is to consider in determining material injury under CMR 042 is "the extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing water supplies . . . ." CMR 042.01.g. Accordingly, because:

1) a combination of both natural flow and storage rights are used for the purpose of meeting the same irrigation purpose of use; and

2) the decreed quantity of natural flow rights and the decreed quantity of storage rights can exceed irrigation demands for a single irrigation season; and

3) regulation of juniors for carry-over storage is limited to reasonable carry-over as opposed to the full quantity of the storage right; and

4) a material injury analysis requires that the Director consider the extent to which the requirements of a senior water right holder can be met with existing water supplies;

the Director's material injury determination necessarily requires evaluating natural flow and storage rights in conjunction with each other, as opposed to independently from each other. Accordingly, the Director did not abuse discretion or act outside his authority in considering natural flow rights and storage rights together for purposes of making a material injury determination.

1. The Director did not abuse discretion or act outside his authority in utilizing a "minimum full supply" or "reasonable in-season demand" baseline for determining material injury.

In determining material injury to senior rights the Director considered a "baseline" quantity independent of the decreed or licensed quantity. The baseline quantity represented the amount of water predicted from natural flow and storage needed to meet in-season irrigation requirements and reasonable-carryover. The Director then determined material injury based on shortfalls to the predicted baseline as opposed to the decreed or licensed quantities. Former Director Dreher labeled the baseline "minimum full supply." Director Tuthill in the *Final Order* replaced "minimum full supply" with the term "reasonable in-season demand." R. Vol. 39 at 7386. The SWC argues that the Director abused discretion and acted contrary to law by using a baseline quantity, as opposed to the decreed or licensed quantity. This Court disagrees.

On first impression it would appear that the use of such a baseline constitutes a re-adjudication of a decreed or licensed water right. As stated by the Hearing Officer "[t]he

logic of SWC in objecting to the Director's use of a minimum full supply is difficult to avoid." R. Vol.37 at 7090. However, on closer examination the use of baseline is a necessary result of the Director implementing the conditions imposed by the CMR with respect to regulating junior rights to protect senior storage rights. Put differently, senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR 042. Rule 042 of the CMR lists a number of factors the Director is to consider in determining material injury to senior rights. CMR 042.01 a-h. As this Court concluded previously, the total combined decreed quantity of the natural flow and storage rights can exceed the amount of water necessary to satisfy in-season demands plus reasonable carry-over. Simply put, pursuant to these factors a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right. Although the CMR do not expressly provide for the use of a "baseline" or other methodology, the Hearing Officer concluded that: "Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at base and works up according to need, the end result should be the same." R. Vol 37 at 7091. Ultimately the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable provided the baseline was adjustable to account for weather variations and that the process satisfied certain other enumerated conditions. R. Vol. 37 at 7086- 7100. This Court affirms the reasoning of the Hearing Officer on this issue.

C. The Director did not err in using the 10 % margin of error for the ESPA Model or in using as a "trim-line" for juniors located with the margin of error.

The Court addressed this issue at length in the *Order on Petition for Judicial Review* recently issued in Gooding County Case No. 2008-000444, which involves many of the same parties to this action. *See* Gooding County Case No. 2008-000444 ***Order on***

Petition for Judicial Review (June 19, 2009) at 25-28. The Court's analysis and holding in that decision is incorporated herein by reference.

D. The Director Abused Discretion by ordering a "replacement water plan" in lieu of following the procedures set forth in the CMR.

In response to the January 2005, request for administration filed by the SWC, the Ground Water Users filed an *Application for Approval of Mitigation Plan* pursuant to CMR 043. R. Vol. 1 at 126. A hearing was originally scheduled on the *Application* but was ultimately continued. R. Vol. 1 at 186; R. Vol. 2 at 454. On May 2, 2005, the Director issued an *Amended Order*, which made findings of fact and conclusions of law relative to material injury predictions and ultimately ordered replacement water as "mitigation" in lieu of curtailment. *See e.g. Amended Order*, R. Vol. 8 at 1403-1405 ¶¶ 1-14. The *Amended Order* also provided:

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

Amended Order, R. Vol. 8 at 1405-05, ¶ 9. In response, the SWC filed a *Protest, Objection, and Motion to Dismiss 'Replacement Water Plans,'* on the grounds that the Director failed to follow the procedures set forth in the CMR. R. Vol. 8 at 1507.

> Conjunctive Management Rule 43 clearly sets forth the method for submitting mitigation plans, requires notice and hearing, requires that the

> plan be considered under the procedural provisions of Idaho Code § 42-222 in the same manner as applications to transfer water rights, and sets forth specific factors that may be considered by the Director of the Department in determining whether a proposed mitigation plan will prevent injury to senior rights.
>
> The department has no legal right or ability to unilaterally create new conjunctive management rules nor do those proposing mitigation have any legal authority to proceed other than set forth in the Conjunctive Management Rules. Should the Director or the Department desire to create new rules, the provisions of the Idaho Administrative procedure Act must be followed. See Idaho Code § 67-5201 *et seq.*

R. Vol. 8 at 1511. On May 6, 2005, without conducting a hearing, the Director issued an *Order Approving IGWA's Replacement Water Plan for 2005.* R. Vol. 12 at 2174. Thereafter the Director issued a series of supplemental orders amending the replacement water requirements.[7] A limited hearing was granted on IGWA's 2007 Replacement Plan. R. Vol. 23 at 4396. The hearing was limited as follows:

> The hearing on the 2007 Replacement Plan is limited in scope to presentation of information regarding the implementation of the Plan by IGWA to demonstrate that timely, in-season replacement water and reasonable carryover water can be provided to members of the Surface water Coalition.
>
> The hearing on IGWA's 2007 Replacement Plan will not include argument or presentation of evidence on any other orders issued by the Director, or the Director's method and computation of material injury.

Id. at 4397. Ultimately, a hearing was held before the Hearing Officer on January 16, 2008. The Hearing Officer determined that: "[t]he replacement water plan approved by

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[7] *Supplemental Order Amending Replacement Water Requirements* (July 22, 2005), R. Vol. 13 at 2424; *Second Supplemental Order Amending Replacement Water Requirements* (Dec. 27, 2005), R. Vol. 16 at 2994; *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* (June 29, 2006), R. Vol. 20 at 3735; *Fourth Supplemental Order Amending Replacement Water Requirements* (July 17, 2006), R. Vol. 21 at 3944; *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* (May 23, 2007), R. Vol. 23 at 4286; *Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan* (July 11, 2007), R. Vol. 25 at 4714; *Seventh Supplemental Order Amending Replacement Water Requirements* (December 20, 2007), Ex. 4600; *Eighth Supplemental Order Amending Replacement Water Requirements Final 2007 & Estimated 2008* (May 23, 2008), R. Vol. 38 at 7198.

the former Director in the May 2, 2005, Order and Supplemental Orders is in effect a mitigation plan. However, it does not appear that the procedural steps for approving a mitigation plan were followed." R. Vol. 37 at 7112.

This Court agrees. This is not a situation where the replacement water ordered is consistent with the timing and in the quantities authorized under the decreed or licensed rights, leaving no room for disagreement. Rather this is situation where the Director has extensively applied the provisions of the CMR for purposes of making a material injury analysis ultimately resulting in adjustments in the timing of delivery and in the quantities of water authorized under the decrees or licenses. The Court sees no distinction between the "replacement water plans" ordered in this case and a mitigation plan. Mitigation plans under the CMR are defined as:

> A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law.

CMR 010.15. governed by CMR 43:

> **043. MITIGATION PLANS (RULE 43).**
> **02.** Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222, which provides in relevant part:

> Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. *Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the*

> *receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.*

(emphasis added). The Director did not follow this process. IDWR argues that "[a]uthorizing replacement plans is akin to a court issuing a preliminary injunction in a civil matter to preserve the status quo, pending final judgment." While this may be true the Court is aware of no circumstance under the civil rules where a preliminary injunction is issued without the opportunity for a hearing. Next, the Director's preliminary relief extended over a period of multiple irrigation seasons in effect becoming an unauthorized substitute for a mitigation plan. Finally, Director concluded in his *Final Order*:

> Once a record is developed through the hearing process on the delivery call, a formal mitigation plan should be submitted by junior ground water users to mitigate material injury to the senior. Since a Rule 43 mitigation plan serves as a long term solution to material injury to senior water users, it is necessary for junior ground water users to have a proper record upon which to develop the plan because the amount of water sought by the senior in its delivery call may not be the amount attributable to junior ground water depletions.

R. Vol. 39 at 7384. However, the methodology employed by the Director in conjunction with the replacement plan can result in junior ground water users never being required to file a mitigation plan. For example, if and when the reservoirs ultimately fill and no future injury is predicted the filing of a mitigation plan is not required under the CMR. If the next time a shortfall occurs and the Director responds with the replacement plan process, the replacement plan has by default effectively circumvented and replaced the mitigation plan requirement. Thus, the process may never reach the point where a mitigation plan is filed.

While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users.

E. The Director exceeded his authority in determining that full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 of an inch instead of 3/4 of an inch per acre.

In response to information requests to SWC members made by former Director Dreher, Twin Falls Canal Company responded that 3/4 of an inch per acre constituted full headgate delivery. The Hearing Officer concluded:

> The former Director [Dreher] accepted Twin Falls Canal Company's response that 3/4 inch constituted full headgate deliver [sic], and TFCC continued to assert that position at hearing. This is contradicted by the internal memoranda and information given to 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 conclusions based on full headgate delivery should utilize 5/8 inch.

R. Vol. 37 at 7100. Director Tuthill accepted the recommendation in his *Final Order*. R. Vol. 39 at 7392. TFCC's water right is still pending in the SRBA. The *Director's Report* recommended the water right at the delivery of 3/4 of an inch. Ex. 4001A. IGWA filed a SRBA *Standard Form 1 Objection* to the recommendation asserting *inter alia*, "The quantity should not exceed 5/8" per acre consistent with the rights of other surface water coalition rightholders." Ex. 9729. Proceedings on the *Objection* are currently pending in the SRBA. The Hearing Officer's recommendation appears to be based on a determination that TFCC's water right only entitles it to 5/8 of an inch per acre. The SRBA Court is vested with exclusive jurisdiction for determining the elements of a water right. Furthermore, the Director's determination is inconsistent with his recommendation for the claim in the SRBA. The SRBA Court ordered interim administration of the water rights at issue in this proceeding pursuant to Idaho Code § 42-1417. Idaho Code § 42-1417 provides: "The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code . . . in accordance with the director's report or as modified by the court's order . . . [or] . . . in accordance with applicable partial decree(s) for water rights acquired under state law. . . ." I.C. § 42-1417(1) (a) and (b). At this stage of the proceedings the *Director's Report* recommends 3/4 of an inch per acre. The Director can file an amended director's report in the SRBA, however, the

interim administration process is not a substitute for litigating the substantive elements of a water right. *See e.g. Walker v. Big Lost Irr. District*, 124 Idaho 78, 856 P.2d 868 (1993). The Director exceeded his authority in making this determination.

F. The Director abused his discretion by issuing two "*Final Orders*" in response to the Hearing Officer's *Recommended Order.*

In the September 5, 2008, *Final Order*, the Director stated his decision to issue an additional *Final Order* at a later date in response to the Hearing Officer's *Recommended Order*:

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

The SWC argues that the failure to address this issue in the *Final Order* was an abuse of discretion. This Court agrees.

In the *Recommended Order*, the Hearing Officer found that adjustments should be made to the methodologies for determining material injury and reasonable carryover for future years. R. Vol. 37 at 7090. The Director adopted this conclusion, but did not address a new method in his September 5, 2008 *Final Order*. R. Vol. 39 at 7382. The process for determining material injury and reasonable carryover is an integral part of the Hearing Officer's *Recommended Order*, and the issues raised in the delivery call. The Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*. Styling the *Final Order* as two orders issued months apart runs contrary to the Idaho Administrative Procedures Act and IDWR's Administrative Rules. *See* I.C. §§ 67-5244, 67-5246, 67-5248 and IDWR Administrative Rules 720 and 740. In addition, the issuance of separate "Final Orders" undermines the efficacy of the entire delivery call process, including the process of judicial review. Such a process requires certainty and definiteness as to the *Final Order* issued, so that any review of the *Final Order* can be complete and timely.[8]

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[8] The Court notes that on June 30, 2009, the Director issued an *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover.* The *Order* is not part of the record in this matter.

G. Timeliness of the Director's Response to Delivery Calls.

The SWC also raises the issue that the Director failed to provide timely and lawful administration of junior priority rights to satisfy senior rights. This argument was addressed in the context of the Director's failure to provide mitigation in the season of injury and the Director's use of a replacement plan in lieu of following the procedural requirements for mitigation plans as set forth in the CMR.

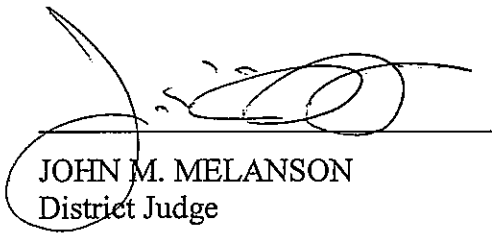
VI.

CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the actions taken by the Director in this matter are affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision.

IT IS SO ORDERED.

Dated: July 24, 2009



JOHN M. MELANSON
District Judge

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 24 of July, 2009, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petition for Judicial Review to the parties listed below via the U.S. Postal Service, postage prepaid:

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Dated: July 27, 2009

Cynthia R. Eagle-Ervin, Deputy Clerk

Notice of Orders
Certificate of Mailing
IRCP 77(d)