BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF GROUND WATER DISTRICTS' APPLICATION FOR APPROVAL OF MITIGATION PLAN FOR THE AMERICAN FALLS REACH OF THE SNAKE RIVER	)	**ORDER REGARDING PROTESTS AND MOTIONS TO DISMISS MITIGATION PLAN, APPOINTMENT OF INDEPENDENT HEARING OFFICER, MOTION TO CONSOLIDATE MITIGATION PLAN PROCEEDING WITH DELIVERY CALL PROCEEDING, and MOTION TO AMEND MITIGATION PLAN**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of an *Application for Approval of Mitigation Plan for the American Falls Reach of the Snake River (AFR)*, submitted to the Director on February 8, 2005, by the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, South West Irrigation District, North Snake Ground Water District, and Magic Valley Ground Water District (collectively referred to as the "Districts"). On March 21, 2005, the Department received protests and motions to dismiss the Districts' Application for Mitigation Plan. Protests were submitted by the Surface Water Coalition,[1] Idaho Power Company ("Idaho Power"), the United States Bureau of Reclamation ("USBR"), the City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston. Motions to dismiss were submitted by the Surface Water Coalition, Idaho Power, and the USBR. Subsequently, on June 14, 2005, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed its *Motion to Amend Mitigation Plan and Consolidate it with Delivery Call Proceedings*.

Based upon the Director's consideration of this matter, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

[1] The Surface Water Coalition consists 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.

FINDINGS OF FACT

Background

The Delivery Call Proceeding

1. On January 14, 2005, the Surface Water Coalition submitted a letter and petition to the Director seeking 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 ("ESPA") 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 Surface Water Coalition. This matter will hereafter be referred to as the "Delivery Call proceeding."

2. On February 14, 2005, the Director issued an Order in the Delivery Call proceeding which provided an initial response to the letter and petition filed by the Surface Water Coalition. Based upon the Director's initial and further consideration of the letter and petition, the Director issued an Order on April 19, 2005, superseding the interlocutory portions of the Order of February 14, 2005, which was subsequently amended by the Order of May 2, 2005 ("May 2 Order"). In addition, the Director included Water District No. 130 within the purview of the Surface Water Coalition's delivery call.

3. A hearing in the Delivery Call proceeding, regarding the May 2 Order, has been scheduled to begin on January 30, 2006, in which the parties to the Delivery Call will present argument, evidence, and testimony to the Director. *See Scheduling Order* of July 22, 2005.

The Mitigation Plan Proceeding

4. Shortly before the Director issued his Order of February 14, 2005, the Districts, on February 8, 2005, filed their *Application for Approval of Mitigation Plan for the American Falls Reach of the Snake River (AFR)* ("Districts' Application for Mitigation Plan"). According to the Districts, the "Plan provides the legal and hydrologic basis for the continued diversion and beneficial use of ground water rights held by the Districts' members that otherwise might be subject to administrative curtailment based on allegations or determinations that the exercise of such ground water rights is causing material injury to senior surface water rights within the Near-Blackfoot to Minidoka reach of the Snake River (hereinafter 'American Falls Reach' or 'AFR')." *Districts' Application for Mitigation Plan* at p. 1. This matter will hereafter be referred to as the "Mitigation Plan proceeding."

5. On June 14, 2005, the Districts filed *Motion to Amend Mitigation Plan and Consolidate it with Deliver Call Proceedings.*

The Districts' Application for Mitigation Plan

6. The Districts' Application for Mitigation Plan, submitted pursuant to IDAPA 37.03.11, is made up of seven components. First, the Districts propose to provide up to 65,000

acre-feet of replacement water, identified by the Districts as "short-term mitigation," to mitigate injury in any one year from sources including but not limited to: (a) rental of storage water from the Water District No. 01 Rental Pool; (b) permanent or dry-year private leases or purchases of surface or ground water supplies; and (c) pumping of ground water via replacement supply wells operating under permits held by the Idaho Water Resource Board.

7. Second, to the extent that surface water available to the Districts for use as replacement water in any year is less than 65,000 acre feet and insufficient to fully mitigate remaining injury, the Districts propose to implement conditional curtailment of ground water use within their districts under any of the following measures: (a) the Districts' members would be directed to not withdraw ground water for irrigation during the first fifteen days and the last twenty-five days of the decreed period of use for their water right; (b) the Districts may implement dry-year leases of ground or surface water irrigated acres (as among the Districts, District-wide percentage reductions would not necessarily be the same, but would reflect the nature and extent of hydrologic connection between ground water rights in such districts and the Plan, and/or other mitigation actions being implemented by the Districts); (c) the Districts may require curtailment of ground water diversions servicing acres recognized as enlargement acres in water right decrees issued by the Snake River Basin Adjudication District Court; and (d) the Districts would impose District-wide percentage reductions in ground water diversions by their members, up to a maximum of ten percent of the total ground water irrigated acreage of their members.

8. Third, the Districts propose long-term reductions in ground water withdrawals through voluntary set-aside programs and conversion to surface water irrigation of acres irrigated using ground water. Furthermore, as opportunities arise, the Districts propose to facilitate enrollment of additional ground water-irrigated acres within their boundaries in other voluntary set-aside programs.

9. Fourth, the Districts propose to participate in state-managed, large-scale recharge of the ESPA. According to the Districts, the aquifer recharge program is designed to recharge an average of at least 170,000 acre-feet per year through the North Side Canal and the Milner-Gooding Canal. Additionally, the Districts propose to participate in a recharge program, in excess of the 170,000 acre-feet per year through the North Side Canal and the Milner-Gooding Canal that would have primary return flow benefits to the Snake River above Milner Dam.

10. Fifth, the Districts propose to participate in establishing an accounting system to accurately document the benefits of the proposed mitigation measures. Under the Plan, the accounting system would address: (a) credits for surface water acquired and provided as direct replacement water in any given year; (b) credits for curtailments of ground water diversions by District members; (c) credits for dry-year leases of surface water-irrigated acres; (d) credits for discrete aquifer recharge projects undertaken specifically by the Districts directly, contractually, or incidentally; (e) credits for replacement water provided via transfers, exchanges, substitute supplies, or other agreements; (f) carryover of any credits from implementing strategies that have multi-year water supply benefits, including long-term components of the Plan; and (g) allocation of transient and steady state impacts of mitigation actions over the term of the Plan.

11. Sixth, the Districts propose to participate in implementing appropriate monitoring of water use on the Eastern Snake River Plain. Under the Plan, the following monitoring actions would be undertaken: (a) the Districts, through District hydrographers, would measure and report ground water withdrawals within their boundaries; (b) the Districts, through District hydrographers, would cooperate with the Water District watermasters to identify unauthorized uses of ground water within their respective jurisdictions; (c) the Districts would cooperate with the Water District watermasters to measure and document all replacement water provided to surface water users and volumes delivered to converted acres or to aquifer recharge; and (d) the Districts would cooperate with the Department and surface water users in using the above-described measurements, the accounting system, and other records or data collected by the Department, the Water District watermasters, and District hydrographers to: (i) perform the technical data analyses necessary to ascertain the relationships between Plan actions and reach gains; and (ii) evaluate potential injury to senior surface water rights that may be resulting from ground water withdrawals by the District's members.

12. Finally, the Districts propose to participate in establishing an appropriate adaptive management process. According to the Districts, the Plan incorporates each of the following six steps: (a) problem assessment; (b) plan design; (c) plan implementation; (d) monitoring; (e) evaluation; and (f) plan adjustment.

13. In the Districts' Application for Mitigation Plan, the Districts requested expedited public notice and an expedited hearing schedule. However, on March 18, 2005, the Districts filed a *Motion for Continuance of Mitigation Plan Hearing* until at least fourteen days after the adjournment of the 2005 Legislature. The hearing was rescheduled to a "later date" by order of the Director on March 18, 2005. *Order Continuing Hearing* at p. 2.

Protests and Motions to Dismiss

14. On March 21, 2005, the Department received protests to the Districts' Application for Mitigation Plan by the Surface Water Coalition, Idaho Power Company ("Idaho Power"), United States Bureau of Reclamation ("USBR"), City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston. Motions to dismiss were also filed by the Surface Water Coalition, Idaho Power, and the USBR.

City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston

15. The protest filed by the City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston on March 21, 2005, was a collective *Notice of Protest*. The group did not file a motion to dismiss. According to the group, their protest would be resolved if "the proceedings and decisions related to the Ground Water Districts Mitigation Plan are based on the applicable factual and legal standards of the conjunctive management rules, the prior appropriation doctrine, and IDWR's authority under Idaho Code Title 42, Chapter 6, and other applicable law." *Notice of Protest* at p. 3.

The Surface Water Coalition

16. The Surface Water Coalition filed two documents with the Director on March 21, 2005: *Surface Water Coalition's Motion to Dismiss the Ground Water Districts' Application* ("SWC's Motion to Dismiss") and *Surface Water Coalition's Protest Against Approval of Proposed Mitigation Plan* ("SWC's Protest").

17. According to the Coalition's Motion to Dismiss, the Districts' Application for Mitigation Plan should be dismissed for various reasons. First, because the Director had not issued a finding of injury in response to the Coalition's water right delivery call, the Districts' Application for Mitigation Plan, under the Department's conjunctive management rules, is premature. Therefore, until a finding of injury is made, the Director is not in a position to judge whether the Districts' Application for Mitigation Plan "will effectively 'mitigate' for the depletive effects caused by junior ground water right diversions. . . ." *SWC's Motion to Dismiss* at p. 4. Furthermore, the Coalition argued that it cannot "formulate a complete response or protest to the [Districts' Application for Mitigation Plan]" without knowing the extent of injury. *Id.*

18. Second, the Coalition stated that the Districts' Application for Mitigation Plan fails to meet the minimum requirements of a mitigation plan under the conjunctive management rules. In support of its position, the Surface Water Coalition argued that the Districts failed to include " 'such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03.' The rule lists fifteen (15) factors to judge or evaluate a proposed plan." *Id.* at 5. According to the Coalition, "the . . . Districts' application fails to meet <u>any</u> of the requirements in Rule 43.03 . . . ." *Id.* at 8 (emphasis in original). As a result, the Coalition stated that the Districts' Application for Mitigation Plan is deficient and cannot be considered by the Director.

19. In addition to the arguments raised in its Motion to Dismiss, the Coalition requested in its Protest that the Department appoint an independent hearing officer to preside over all proceedings. *SWC's Protest* at p. 8.

Idaho Power Company

20. Idaho Power filed two documents with the Director on March 21, 2005: *Motion to Dismiss Petition and Brief in Support Thereof* ("Idaho Power's Motion to Dismiss") and *Protest and Request for Independent Hearing Officer* ("Idaho Power's Protest").

21. According to Idaho Power's Motion to Dismiss, the Districts' Application for Mitigation Plan should be dismissed for a number of reasons. First, Idaho Power argued that, under the prior appropriation doctrine, as established by the states of Idaho and Colorado, the burden is on the holder of a junior priority water right to establish that its diversion and use "is not causing injury to a senior." *Idaho Power's Motion to Dismiss* at p. 5. Because the Districts' Application for Mitigation Plan does not "prove that either [the Districts'] depletions are not causing injury to senior appropriators, or that [the Districts'] proposed Mitigation Plan prevents

such injury[,]" the Plan is "wholly deficient under Idaho's prior appropriation doctrine, and should be dismissed." *Id.* at p. 8.

22. Second, Idaho Power argued that the Districts' Application for Mitigation Plan should be dismissed because it does not meet the minimum requirements for a mitigation plan, as set forth in IDAPA 37.03.11.43. Idaho Power stated that the Districts failed to identify the water rights for which benefit of the mitigation plan is proposed, provide a description of the plan setting forth the water supplies proposed to be used for mitigation, and provide such information as will allow the Director to evaluate the factors to be considered in IDAPA 37.03.11.43.03(a)-(o).

23. Third, Idaho Power argued that without identification of the water that the Districts plan to use for replacement purposes, "it is impossible to determine that the Plan will operate in compliance with Idaho law." *Id.* at p. 11. Since water used by the Districts for replacement under the Districts' Application for Mitigation Plan would be changed from its previous use, Idaho Power stated that the Department's transfer procedures must be implicated. Because the Districts did not state that they own or control the proposed replacement water, the Department cannot make a determination of injury to other water rights. Therefore, Idaho Power argued the Districts have not met the requirements of a water right transfer; accordingly, the Director must dismiss the Plan.

24. In addition to the arguments raised in its Motion to Dismiss, Idaho Power requested in its Protest that the Department appoint an independent hearing officer to preside over all proceedings. *Idaho Power's Protest* at p. 5.

United States Bureau of Reclamation

25. The USBR filed two documents with the Director on March 21, 2005: *Reclamation's Motion to Dismiss Mitigation Application or in the Alternative to Request Hearing to be Reset* ("USBR's Motion to Dismiss") and *Reclamation's Protest* ("USBR's Protest").

26. According to the USBR's Motion to Dismiss, the Districts' Application for Mitigation Plan should be dismissed for various reasons.[2] First, the USBR stated that the Districts' Application for Mitigation Plan is substantively deficient and does not meet the requirements of the Department's conjunctive management rules. The USBR argued that the Plan failed to identify the water rights proposed to be used for mitigation, as required by IDAPA 37.03.43.01, or twelve of the fifteen enumerated factors in IDAPA 37.03.11.43.03. Therefore, if the Districts' Application for Mitigation Plan is approved by the Director, the USBR stated that it would "be denied both procedural and substantive due process rights to which it is entitled." *USBR's Motion to Dismiss* at p. 5.

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[2] Additionally, the USBR argued that, because the protest deadline was March 21, 2005, a hearing cannot occur until at least ten days after that date. While a hearing was originally scheduled for March 22-25, 2005, the Director, pursuant to order, dated March 18, 2005, continued all hearings in this matter to a later date.

27. Second, the USBR stated that, pursuant to the conjunctive management rules, material injury must be determined by the Director in the Coalition's delivery call before a mitigation plan may be approved. Because the Coalition filed its delivery call before the mitigation plan, "the Director has no discretion to consider the Mitigation Plan prior to deciding the Delivery Call."

28. In addition to the arguments raised in its Motion to Dismiss, the USBR requested in its Protest that the Department appoint an independent hearing officer to preside over all proceedings. *USBR's Protest* at p. 2.

The Districts' Response

29. On April 4, 2005, the Districts submitted their *Response to Motions to Dismiss*. First, relying on IDAPA 37.03.11.040.05, the Districts disagreed that a plan for mitigation cannot be approved until the Director makes his finding of material injury. "[W]hile a determination of material injury is necessary before a mitigation plan can be *implemented*--that is, before the junior right holders can be compelled to provide the mitigation--the Conjunctive Management Rules do not require the injury determination to be completed before a Mitigation Plan can be *submitted or approved*." *Response to Motions to Dismiss* at p. 7 (emphasis added). In the event that an approved mitigation plan failed to mitigate material injury, curtailment of out-of-priority use of ground water waters, or other appropriate actions may be undertaken by the Director to ensure protection of senior priority water rights. Therefore, because a mitigation plan that is approved before a finding of material injury is made can be adjusted or terminated at a later date if it does not mitigate material injury, the Districts believed it was appropriate for "the Director to consider and approve the Districts' mitigation plan, as presented, now." *Id.* at p. 5.

30. Second, even if a determination of material injury must occur before a mitigation plan is approved, the Districts stated that the Conjunctive Management Rules do not prohibit the Director from evaluating a plan for mitigation "before the material injury question has been determined." *Id.* at p. 3. The purpose of submitting the Plan before a determination of material injury has been made is to determine "whether the . . . Plan describes an appropriate framework for providing replacement supplies or reducing depletions in the event and to the extent material injury is shown." *Id.* at p. 4. Therefore, submission of the Plan for evaluation, before a finding of material injury has been made, was within the scope of the Rules: "The Districts should not be compelled to risk sweeping and economically-devastating curtailment on the assumption that the Movants would await enforcement of a curtailment order until a mitigation plan can be considered that is filed <u>after</u> the Director has determined material injury exists." *Id.* at p. 3 (emphasis in original).

31. Third, the Districts argued that the information presented in the Plan is not insufficient, and provides the Director adequate information upon which to base a decision. While the Coalition, Idaho Power, and the USBR contend that the Plan lacks certainty, the Districts contend "the rules [do not] require that all components of such a plan be in place where there has yet been no finding of material injury in the context of an actual delivery call. The Districts' Mitigation Plan affirmatively addresses each of the factors set out in the rules related to plan sufficiency and can be considered and approved as submitted." *Id.* at p. 7.

32. Finally, the Districts stated that Idaho Power misconstrues Idaho law when it stated in its Motion to Dismiss that the holder of a junior priority water right bears the burden of establishing its diversion and use of water is not causing injury to a senior priority water right. According to the Districts, Idaho law requires that anyone who asserts a claim that the diversion and use of ground water under junior priority rights adversely affects senior priority surface rights must establish that the use under junior ground water rights "not only adversely affect the senior's use, but also that the junior diversion is contrary to the declared policy of full economic development of underground water resources." *Id.* at p. 9. Furthermore, the Districts questioned Idaho Power's ability to protest its Plan since Idaho Power's "hydropower water rights in the Snake River are subordinated to the water rights of the ground water users who have proposed the Plan." *Id.* (emphasis in original).

IGWA's Motion to Consolidate and Amend

33. On June 14, 2005, on behalf of the Districts, the Department received *IGWA's Motion to Amend Mitigation Plan and Consolidate it with Delivery Call Proceedings* ("Motion to Consolidate and Amend"). Through the Motion to Consolidate and Amend, and in accordance with IDAPA 37.01.01.260.02, 37.01.01.305, and 37.01.01.556, IGWA sought thirty days in which to amend the Application for Mitigation Plan, as well as consolidate the Mitigation Plan proceeding with the Delivery Call proceeding. In addition, IGWA requested the eventual consolidation of the A&B Irrigation District's ("A&B") May 12, 2005, *Request for Approval of Mitigation Plan* with the above-mentioned proceedings.[3]

Opposition to IGWA's Motion to Consolidate and Amend

34. Shortly after IGWA filed its Motion to Consolidate and Amend, briefs in opposition were filed with the Department by the Surface Water Coalition, Idaho Power, the USBR, and A&B.

Surface Water Coalition

35. On June 29, 2005, the *Surface Water Coalition's Opposition to IGWA's Motion to Consolidate the Contested Case on the Director's May 2, 2005 Order with the Case on the Mitigation Plan* ("SWC Memorandum in Opposition") was filed with the Department. According to the Surface Water Coalition, which maintains that the Department's Conjunctive Management Rules "violate Idaho law, both on their face and as applied in the context of the Coalition's delivery call," "Rule 556 of the Department's Rules of Procedure provides that the Department 'may consolidate two (2) or more proceedings for hearing upon finding that they present issues that are related and the rights of the parties will not be prejudiced.' The standard requires the cases to contain 'related issues' and demands that no parties can be 'prejudiced' by a consolidation." *SWC Memorandum in Opposition* at p. 5.

[3] No objections have been filed in opposition to A&B's *Request for Approval of Mitigation Plan.*

36. In examining Rule 556, the Surface Water Coalition first argued that the Delivery Call proceeding and the Mitigation Plan proceeding do not involve the same parties. Therefore, "In essence, it would give parties who did not file timely protests to the Mitigation Plan an opportunity to participate and present their views on the plan. Similarly, a consolidation would inappropriately allow parties involved in the Mitigation Plan case an opportunity to participate and present their views on the Director's May 2, 2005 Amended Order despite failing to file a petition within the required statutory timeframe." *Id.* at p. 7.

37. Second, the Surface Water Coalition stated that the Delivery Call proceeding and the Mitigation Plan proceeding involve different procedures and issues. According to the Surface Water Coalition, the Delivery Call proceeding involves "whether or not the Director's order is consistent with the prior appropriation doctrine, and whether or not he correctly applied the concept of 'material injury' in responding to the Coalition's request for water right administration." *Id.* at p. 8. Whereas, the Mitigation Plan proceeding involves "the adequacy of the Ground Water Districts' plan and whether or not it meets the requirements of Rule 43 of the conjunctive management rules." *Id.* "The question for the Mitigation Plan proceeding is whether or not that plan is sufficient to offset the depletive effect caused by pumping under those junior ground water rights to avoid curtailment." *Id.* However, until the extent of material injury to members of the Surface Water Coalition by the exercise of junior priority ground water rights has been established through the Delivery Call proceeding, "it is impossible to determine the sufficiency of any particular mitigation plan." *Id.* at p. 9.

38. Finally, the Surface Water Coalition argued that consolidation of the two proceedings would prejudice the parties and unduly broaden the scope of each contested case. According to the Surface Water Coalition, it would be prejudiced by consolidation for various reasons. Given the Director's statement that a hearing in the Delivery Call proceeding will be held in January 2006, the parties who are not party to the Mitigation Plan proceeding would be disadvantaged in preparing for the upcoming hearing because the scope of the hearing would be unduly broadened.

> Moreover, as previously noted, it is also clear that a hearing on the Mitigation Plan would not be appropriate at this time, whether alone or in consolidation with other issues. It should also be pointed out that the Mitigation Plan sought to be approved by IGWA is a mitigation plan filed for and on behalf of certain named ground water districts, many of which are not within Water Districts 120 and 130, and are not presently bound by any delivery call, and are apparently not affected by the Director's May 2, 2005 Order. It would also be inappropriate to consolidate a hearing on any application for approval of the Mitigation Plan when there are pending Motions and Protests for Dismissal of the Plan based upon procedural deficiencies and the inadequacy of the Mitigation Plan, on its face. Only after those preliminary matters have been resolved, and the Application for Approval of the Mitigation Plan is still pending, should a hearing be held and that hearing should stand alone as a separate and distinct contested case involving parties that received notice and elected to participate in the hearing required by the conjunctive management rules.

Id. at pp. 10-11.

Idaho Power

39. On June 29, 2005, *Idaho Power Company's Opposition to IGWA's Motion to Consolidate the Contested Matter on the Director's May 2, 2005 Amended Order with the Contested Matter on the Mitigation Plan Approval* was filed with the Department. Citing Rule 556 of the Department's Rules of Procedure, Idaho Power argued that consolidation of the Delivery Call proceeding and the Mitigation Plan proceeding would prejudice itself, as well as parties to the proceedings. In addition, Idaho Power stated that consolidation was not appropriate because the proceedings do not involve related issues. Therefore, Idaho Power argued that IGWA's Motion to Consolidate be denied.

United States Bureau of Reclamation

40. *Reclamation's Opposition to IGWA's Motion to Consolidate* was filed by the USBR on June 29, 2005. Other than the Surface Water Coalition's position that the Conjunctive Management Rules are unconstitutional, the USBR stated it "opposes IGWA's Motion to Consolidate for the reasons set out in the *Surface Water Coalition's Opposition to IGWA's Motion to Consolidate the Contested Case on the Director's May 2, 2005 Order with the Case on the Mitigation Plan. . . .*"

A&B Irrigation District

41. On May 12, 2005, a *Request for Approval of Mitigation Plan of A&B Irrigation District* ("A&B's Application for Mitigation Plan") was filed with the Department. According to A&B's Application for Mitigation Plan, A&B stated that it owned ground water rights that were subject to curtailment under the May 2 Order. Therefore, the A&B's Application for Mitigation Plan was submitted "to prevent holders of senior-priority surface water rights or ground water rights from suffering material injury, regardless of the definition, caused by the diversion and use of water by A&B Irrigation District of ground water within an area having a common ground water supply." *Id.* at p. 6.

42. On June 27, 2005, A&B filed its *Objection to Motion to Consolidate Formal Proceedings on Amended Order of May 2, 2005 with Proceedings for Approval of Mitigation Plans* ("A&B Memorandum in Opposition"). According to A&B, consolidation of the Delivery Call proceeding with the Mitigation Plan proceeding would violate Rule 556 of the Department's Rules of Procedure because, for many of the same reasons cited by the Surface Water Coalition, Idaho Power, and the USBR, the issues are not related and the rights of parties will be prejudiced.

43. In addition, A&B stated that its Application for Mitigation Plan should "stand on its own, as there have been no protests to said Mitigation Plan and the determinations in regard to approval of the A&B Irrigation District Mitigation Plan will not affect IGWA nor the ground water districts that have applied for approval of a Mitigation Plan to address issues that do not exist in the A&B Irrigation District Mitigation Plan." *Id.* at p. 9.

44. Matters expressed herein as a Finding of Fact that are later deemed to be a Conclusion of Law are hereby made as a Conclusion of Law.

CONCLUSIONS OF LAW

Motions to Dismiss the Districts' Application for Mitigation Plan

1. In accordance with chapter 52, title 67, Idaho Code, rules regarding the conjunctive management of surface and ground water were adopted by the Department, effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

2. The Conjunctive Management Rules were submitted to the 1st Regular Session of the 53rd Idaho Legislature (1995 session), and during no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature. Therefore, the Conjunctive Management Rules are final and effective.

3. Rule 10 of the Conjunctive Management Rules, IDAPA 37.03.11.010, contains the following pertinent definitions:

> **01. Area Having A Common Ground Water Supply**. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.
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> **02. Artificial Ground Water Recharge**. A deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code, and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply.
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> **03. Conjunctive Management**. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply.
>
> **04. Delivery Call**. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.
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> **07. Full Economic Development Of Underground Water Resources**. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.

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

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

3. On March 21, 2005, protests and motions to dismiss the Districts' Application for Mitigation Plan were filed by the Surface Water Coalition, Idaho Power, and the USBR, contending that the Districts' Application for Mitigation Plan fails to provide sufficient information upon which the Director can base his approval. Protests were also filed on March 21, 2005, by City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston.

4. By the filing of protests in this contested case, the above-mentioned entities have party status in this matter.

5. According to the Surface Water Coalition, Idaho Power, and the USBR, the Districts' Application for Mitigation Plan is premature, and cannot be granted because the Director has not made a finding of material injury. On April 19, 2005, the Director issued his order in the Delivery Call Proceeding, which was amended by the May 2 Order. The May 2 Order specifically addressed the issue of material injury, finding that the water rights held by or for the benefit of members of the Coalition would likely be materially injured in 2005 by the diversion and use of ground water under junior priority rights.

6. Because a finding of material injury has been made, the issue of whether the Districts' Application for Mitigation Plan was timely and could, or could not, be considered by the Director is moot and will not be addressed. *Comm. for Rational Predator Mgmt. v. Dep't of Agric.*, 129 Idaho 670, 672, 931 P.2d 1188, 1190 (1997).

7. The Surface Water Coalition, Idaho Power, and the USBR contend that the Districts' Application for Mitigation Plan fails to provide the Director with necessary information, as required by IDAPA 37.03.11.043. By failing to provide necessary information, the Surface Water Coalition, Idaho Power, and the USBR argue that the Districts' Application for Mitigation Plan does not comply with the Conjunctive Management Rules. Since the Districts' Application for Mitigation Plan does not comply with the Conjunctive Management Rules, the Surface Water Coalition, Idaho Power, and the USBR assert that the Plan cannot be approved and should be summarily dismissed. *See SWC's Motion to Dismiss* at 5 ("The Ground Water Districts' application fails to provide 'such information' or meet any of the requirements listed in the fifteen factors [in IDAPA 37.03.11.43.03(a)-(o)]. In essence, the application is facially deficient and must be dismissed."); *Idaho Power's Motion to Dismiss* ("the Districts' Mitigation Plan meets none of these requirements, and therefore must be dismissed as incomplete."); *USBR's Motion to Dismiss* at p. 9 ("Since the Applicants have not provided the information required under either Rule 43.01 or 43.03, IDWR should not accept the [Plan] for

processing. . . . As a result, IDWR must dismiss the [Plan] because it is wholly inadequate for processing under Idaho's Conjunctive Management Rules and Idaho's due process requirements.").

8. While the Surface Water Coalition, Idaho Power, and the USBR have not cited a rule in support of their motions to dismiss, and the Department's Rules of Procedure do not provide a standard upon which to review motions to dismiss, their motions are best characterized as being analogous to motions to dismiss for failure to state a claim upon which relief can be granted under Idaho Rule of Civil Procedure 12(b)(6). "[T]he purpose of a Rule 12(b)(6) motion is *to test the formal sufficiency of the statement* of the claim for relief." *Harper v. Harper*, 122 Idaho 535, 538, 835 P.2d 1346, 1349 (Ct. App. 1992) (emphasis added). "The rule is procedural, not substantive." *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 907, 684 P.2d 307, 309 (Ct. App. 1984), overruled on other grounds *NBC Leasing Co. v. R&T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v. Suzuki Motor Co. Ltd.*, 776 F. Supp. 698, 701 (E.D.N.Y. 1991)).

9. A "Motion to Dismiss under I.R.C.P. 12(b)(6) . . . must be viewed in accordance with I.R.C.P. 1(a), which requires the rules to be liberally construed toward an ultimate goal of a just result." *Estate of Thompson v. Turner*, 107 Idaho 470, 471, 690 P.2d 925, 926 (1984).

> The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *See Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *See Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App. 1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *See Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989).

Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999).

11. Rule 43 of the Conjunctive Management Rules, IDAPA 37.03.11.043, sets forth procedures for submission and consideration of a mitigation plan:

> **01. Submission Of Mitigation Plans**. A proposed mitigation plan shall be submitted to the Director in writing and *shall contain the following information*:
>
> **a.** The name and mailing address of the person or persons submitting the plan.
>
> **b.** Identification of the water rights for which benefit the mitigation plan is proposed.

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03.

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.

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*:

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

IDAPA 37.03.11.43 (emphasis added).

12. The first page of the *Application for Approval of Mitigation Plan (AFR)*, as well as the first and second pages of the *Ground Water Districts' Mitigation Plan for American Falls Reach of the Snake River*, state the name, address, and telephone numbers of the applicants. Therefore, the Districts' Application for Mitigation Plan complies with IDAPA 37.03.11.043.01(a).

13. The Surface Water Coalition, Idaho Power, and the USBR argue that the Districts' Application for Mitigation Plan must list specific water right numbers in order to comply with IDAPA 37.03.11.043.01(b). *See SWC's Motion to Dismiss* at p. 6 ("Unless specific water rights are listed and described, it is impossible to determine who will actually benefit by the proposed plan."); *Idaho Power's Motion to Dismiss* at p. 9 ("Without a specific listing of water rights, the Mitigation Plan provides no basis for the Director to identify which rights benefit from the Plan and which rights do not."); *USBR's Motion to Dismiss* at p. 8 ("[I]f the

[Plan] describes no water rights, the Director cannot reasonably evaluate the submitted mitigation plan to determine what effects it will have as required by the rule.").

14. The plain language of IDAPA 37.03.11.043.01(b) does not require that the Districts list each water right number that will be benefited. Rather, IDAPA 37.03.11.043.01(b) requires "*[i]dentification* of the water rights for which benefit the mitigation plan is proposed." Emphasis added.

15. The Delivery Call proceeding was initiated by the Surface Water Coalition on January 14, 2005, as a result of a letter ("Letter") and petition ("Petition") seeking 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 Coalition.

16. The Letter and Petition list water right numbers of senior natural flow and storage rights that were alleged to have been materially injured by junior ground water diversions. *See Letter* at pp. 3-4; *Petition* at pp. 2-3. In the May 2 Order, the Director found that senior priority water rights held by or for the benefit of members of the Surface Water Coalition would likely be injured in 2005 by diversion and use of ground water under junior priority rights.

17. As written, the Districts' Application for Mitigation Plan identifies affected water rights, which were previously listed in the Surface Water Coalition's Letter and Petition, and proposes to mitigate injury to those rights. However, the Districts' Application for Mitigation Plan may not be limited to only those rights identified in the Letter and Petition. "The Districts will acquire storage and/or natural flow water that can be delivered as replacement water or exchanged with other surface water supplies during the periods *when senior surface water rights are deemed to be experiencing material injury* due to withdrawals of ground water under junior priority rights." *Application for Mitigation Plan* at p. 20-21 (emphasis added).

18. In liberally construing the pleadings toward an ultimate goal of a just result, *Estate of Thompson*, 107 Idaho at 471, 690 P.2d at 926, and in drawing all inferences from the record and pleadings in favor of the Districts, *Coghlan*, 133 Idaho at 398, 987 P.2d at 310, the Districts' Application for Mitigation Plan has substantially "identi[fied]" the water rights held by or for use by members of the Surface Water Coalition that will benefit under the proposed mitigation plan, and as a result, complies with IDAPA 37.03.11.043.01(b). While the Districts' Application for Mitigation Plan is sufficient to overcome a Rule 12(b)(6) challenge, and is acceptable for purposes of processing by the Department, water rights other than those held by or for use by members of the Coalition that will benefit under the proposed mitigation plan may not be sufficiently identified in the Districts' Application for Mitigation Plan as filed and the Director, by denying the motions to dismiss, makes no determination of approval of the Distrsicts' Application for Mitigation Plan. *Wing*, 106 Idaho at 907, 684 P.2d at 309 ("The rule is *procedural*, not substantive.") (emphasis added).

19. Next, the Surface Water Coalition, Idaho Power, and the USBR contend that, as required by IDAPA 37.03.11.043.01(c), the Districts' Application for Mitigation Plan fails to

describe the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. *See SWC's Motion to Dismiss* at p. 7 ("The Ground Water Districts' application lacks <u>any</u> identification of specific water supplies and hence fails to meet the requirements of the conjunctive management rules."); *Idaho Power's Motion to Dismiss* ("The proposed Mitigation Plan sets forth no such supplies, and thus provides no basis for the Director to assess the reliability of replacement supplies."); *USBR's Motion to Dismiss* at p. 6 ("The *AMP* does not identify . . . the water rights proposed to be used for mitigation.").

20. The plain language of IDAPA 37.03.11.043.01(c) does not require a listing of water rights that will be used for mitigation. Rather, IDAPA 37.03.11.043.01(c) requires a "*description* of the plan setting forth the water supplies *proposed* to be used for mitigation and any circumstances or limitations on the availability of such supplies." Emphasis added.

21. As written, the Districts' Application for Mitigation Plan describes the Districts' intent to secure replacement water for the benefit of senior natural flow and storage water users. One objective of the Plan states:

> The Districts will acquire storage and/or natural flow water that can be delivered as replacement water or exchanged with other surface water supplies during periods when senior surface water rights are deemed to be experiencing material injury due to withdrawals of ground water under junior priority rights. The Districts also will evaluate the development and use of large-volume ground water wells in the vicinity of the Snake River, and its tributaries and canals to provide replacement water.
>
> . . . .
>
> The primary strategy for the short-term component of this mitigation plan is the provision of up to 65,000 acre-feet of replacement water in any one year to mitigate injury remaining after the benefits of long-term actions are taken into account. This replacement water will be provided from a variety of sources including but not limited to: (1) rental of storage water from the Water District 01 Rental Pool; (2) permanent or dry-year private leases or purchases of surface or ground water supplies; and (3) pumping of ground water via replacement supply wells operating under Idaho Water Resource Board permits.

Districts' Application for Mitigation Plan at pp. 20-22.

22. Another objective of the Districts' Application for Mitigation Plan states:

> The Districts propose to participate with surface and spring users in funding and implementing a State-managed, large-scale, aquifer recharge program designed to recharge an average of at least 170,000 acre-feet per year through the North Side Canal and the Milner-Gooding Canal.
>
> The Districts propose to participate with Snake River surface water users in funding and implementing feasible, State-managed, large-scale, aquifer recharge to recharge water in excess of the above-referenced 170,000 acre-feet that would have primary return flow benefits to the Snake River above Milner Dam.

Districts' Application for Mitigation Plan at p. 23.

23. In addition to the Districts' description of its commitment to secure replacement water and participate in a recharge program, the Districts describe their intent to put land in the Conservation Reserve Enhancement Program, convert acres irrigated by ground water to surface water, and curtail and/or reduce ground water diversions. These actions, if implemented, could, together with replacement water, benefit senior natural flow and storage water rights.

24. In liberally construing the pleadings toward an ultimate goal of a just result, *Estate of Thompson*, 107 Idaho at 471, 690 P.2d at 926, and in drawing all inferences from the record and pleadings in favor of the Districts, *Coghlan*, 133 Idaho at 398, 987 P.2d at 310, the Districts' Application for Mitigation Plan has given a sufficient description of the water supplies proposed to be used for mitigation for purposes of processing the Districts' Application, and, as a result, substantially complies with IDAPA 37.03.11.043.01(c). While the Districts' Application for Mitigation Plan is sufficient to overcome a Rule 12(b)(6) challenge, and is acceptable for purposes of processing by the Department, the Director, by denying the motions to dismiss, makes no determination of approval of the Distrsicts' Application for Mitigation Plan. *Wing*, 106 Idaho at 907, 684 P.2d at 309 ("The rule is *procedural*, not substantive.") (emphasis added).

25. The Surface Water Coalition, Idaho Power, and the USBR assert that the Districts' Application for Mitigation Plan fails to provide the Director with sufficient information upon which to evaluate the factors set forth in IDAPA 37.03.11.043.03(a)-(o). *See SWC's Motion to Dismiss* at p. 8-14; *Idaho Power's Motion to Dismiss* at pp. 11-15; *USBR's Motion to Dismiss* at pp. 8-9.

26. IDAPA 37.03.11.043.01(d) requires submission of such information as shall allow the Director to evaluate the factors in IDAPA 37.03.11.043.03. In liberally construing the pleadings, *Estate of Thompson*, 107 Idaho at 471, 690 P.2d at 926, and in drawing all inferences from the record and pleadings in favor of the Districts, *Coghlan*, 133 Idaho at 398, 987 P.2d at 310, the Districts' Application for Mitigation Plan contains sufficient information regarding the non-exclusive factors described in IDAPA 37.03.11.043.03(a)-(o) to overcome a Rule 12(b)(6) challenge, and is acceptable for purposes of processing by the Department. *Wing*, 106 Idaho at 907, 684 P.2d at 309 ("The rule is *procedural*, not substantive.") (emphasis added).

27. The Districts' Application for Mitigation Plan relies on mitigation actions by others, limits the amount of replacement water to be provided in any one year to 65,000 acre-feet, and lacks specificity with regards to certain factors. The reliance on mitigation actions by others, the annual limitation on replacement water, and the lack of specificity are questionable, and the Districts' Application for Mitigation Plan may not be approvable as filed.

28. The Districts are seeking to amend the Application and until such amendment is made and considered, the Director cannot make a determination of whether the Application could be approved.

29. Idaho Power argues that the District's Application for Mitigation Plan should be dismissed because, under the prior appropriation doctrine, as established by the states of Idaho and Colorado, the burden is on the junior user to establish that his or her diversion "is not causing injury to a senior." *Idaho Power's Motion to Dismiss* at p., 5. This issue, the impact of Colorado and Idaho case law on a Mitigation Plan filed under the state of Idaho's Conjunctive Management Rules, is best characterized as substantive in nature and not proper in the context of a motion to dismiss under Idaho Rule of Civil Procedure 12(b)(6). *See Wing*, 106 Idaho at 907, 684 P.2d at 309 ("The rule is procedural, not substantive.").

30. Based on the information presented in the Districts' Application for Mitigation Plan, the Director should deny the Surface Water Coalition, Idaho Power, and the USBR's motions to dismiss. However, while the Districts' Application for Mitigation Plan is in substantial compliance for purposes of processing, and is sufficient to withstand a Rule 12(b)(6) challenge, the Director makes no determination of its sufficiency for approval.

Independent Hearing Officer

31. In their protests, the Surface Water Coalition, Idaho Power, and the USBR request that the Department appoint an independent hearing officer to preside over all proceedings. *SWC's Protest* at p. 8; *Idaho Power's Protest* at p. 5; *USBR's Protest* at p. 2.

32. After the Surface Water Coalition, Idaho Power, and the USBR filed their motions to dismiss the Districts' Application for Mitigation Plan, the Director denied the Surface Water Coalition and Idaho Power's requests for appointment of an independent hearing officer in the Delivery Call proceeding. *Order on Petitions for Reconsideration, Clarification, Stay, Request for Hearing, and Request for Independent Hearing Officer; and Setting Status Conference*, June 3, 2005.

33. On June 14, 2005, the Surface Water Coalition petitioned the Director to reconsider the Order of June 3, 2005. *Surface Water Coalition's Petition for Review of Director's June 3, 2005 Order Denying Requests to Appoint an Independent Hearing Officer*. In addition, the Surface Water Coalition, as well as Idaho Power, respectively, sought disqualification of the Director as a matter of right. *Surface Water Coalition's Disqualification of the Director as the Hearing Officer as a Matter of Right*; *Idaho Power Company's Disqualification of the Director as the Hearing Officer as a Matter of Right*.

34. On July 22, 2005, the Director denied the Surface Water Coalition's June 14, 2005 petition for reconsideration and request for disqualification. *Order Denying Request to Disqualify Director as Presiding Officer at Hearing*. The Director denied Idaho Power's June 14, 2005 request for disqualification because Idaho Power lacked party status in the Delivery Call proceeding.

35. Based on the rationale set forth in the Order of July 22, 2005, the Director should deny the Surface Water Coalition, Idaho Power, and the USBR's requests for appointment of an independent hearing officer.

Motion to Consolidate with Delivery Call Proceeding

36. Rule 556 of the Department's Rules of Procedure sets forth the standard for consolidation of proceedings:

> The agency ***may*** consolidate two (2) or more proceedings for hearing upon finding that they present issues that are related ***and*** that the rights of the parties will not be prejudiced. In consolidated hearings the presiding officer determines the order of the proceeding.

IDAPA 37.01.01.556 (emphasis added).

37. The Delivery Call proceeding and the Mitigation Plan proceeding represent two or more proceedings for purposes of Rule 556. However, in order for the Director to order consolidation, he must also determine that the proceedings present related issues and that the rights of the parties will not be prejudiced by consolidation. Whether consolidation is ordered is a matter of discretion with the Director.

38. At issue in the Delivery Call proceeding is the extent to which diversions by junior ground water users in Water District No. 120 and Water District No. 130 cause material injury to the Surface Water Coalition's senior natural flow and storage water rights. The Delivery Call proceeding is made up of the following parties: the Surface Water Coalition, the USBR, IGWA on behalf of the Districts, the Idaho Dairymen's Association ("IDA"), the State Agency Ground Water Users ("SAGWU"), and the City of Pocatello. Idaho Power has been denied party status in the Delivery Call proceeding by final order of the Director. *Order Denying Idaho Power's Petition for Hearing*, July 22, 2005, at p. 8, ¶ 1. However, Idaho Power is entitled to participate in the Delivery Call proceeding "as a public witness pursuant to the Department's Rule of Procedure 355." *Id.* at p. 8, ¶ 2.

39. At issue in the Mitigation Plan proceeding is whether the proposals identified in the Districts' Application for Mitigation Plan are sufficient to mitigate the material injury suffered by any "senior surface water rights within the Near-Blackfoot to Minidoka reach of the Snake River (hereinafter "American Falls Reach" or "AFR"). *Districts' Application for Mitigation Plan* at p. 1. The parties involved in the Mitigation Plan proceeding are: IGWA, on behalf of the Districts, the Surface Water Coalition, Idaho Power, the USBR, the City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston.

40. While IGWA, the Surface Water Coalition, the USBR, and the City of Pocatello are common parties to both proceedings, IDA, SAGWU, Basic American Foods, and ConAgra/Lamb Weston are only involved as parties in one proceeding. Therefore, in the judgment of the Director, if the Mitigation Plan proceeding were consolidated with the Delivery Call proceeding, IDA, SAGWU, Basic American Foods, and ConAgra/Lamb Weston could be disadvantaged relative to the parties who have chosen to be actively involved in both proceedings.

41. The Delivery Call and Mitigation Plan proceedings present unique issues and procedures that in the judgment of the Director should be resolved separately, rather than in a

consolidated action. The Mitigation Plan proceeding involves a spectrum of issues, identified by IDAPA 37.03.11.043.01-.03, that differ from the issues to be considered in the Delivery Call proceeding. As such, consolidation would unduly broaden the scope of each proceeding.

42. While the information presented in the Districts' Application for Mitigation Plan is sufficient to withstand a Rule 12(b)(6) challenge, *Wing*, 106 Idaho at 907, 684 P.2d at 309 ("[t]he rule is procedural, not substantive"), and is acceptable for purposes of processing, the information may not be adequate to allow for approval of the Mitigation Plan without first being amended as proposed by the Districts to change the nature and scope of potential mitigation measures .

43. Therefore, the Director should not order consolidation of the Delivery Call proceeding and Mitigation Plan proceeding because the rights of the parties would be prejudiced if consolidation were ordered. Additionally, the Director should not order consolidation of A&B's Application for Mitigation Plan with either the Delivery Call proceeding or the Mitigation Plan proceeding.

44. Because the Director has determined that the rights of the parties would be prejudiced by the broadened scope of issues if consolidation were ordered, it is not material that the two proceedings may involve related issues. IDAPA 37.01.01.556.

Motion to Amend the Districts' Application for Mitigation Plan

45. The Districts' originally filed their Application for Mitigation Plan with the Department on February 8, 2005. According to IGWA, since that time, "other developments in the Delivery Call occurring after IGWA's Mitigation Plan was filed, change the nature and scope of potential mitigation measures. Of course, even these are subject to further refinement or change, depending on the outcome of the Delivery Call Hearing. In any event, IGWA respectfully requests the opportunity to amend IGWA's Mitigation Plan to reflect these changes." *Motion to Consolidate and Amend* at p. 3.

46. According to Rule 305 of the Department's Rules of Procedure, "The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied." IDAPA 37.01.01.305.

47. Because the Department has received no opposition to IGWA's motion to amend the Districts' Application for Mitigation Plan, combined with the Director's conclusion that the Mitigation Plan should not be dismissed, the Director should allow IGWA the opportunity to amend the Mitigation Plan.

ORDER

The Director enters the following Order for the reasons stated in the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED as follows:

(1) The Surface Water Coalition, Idaho Power Company, United States Bureau of Reclamation, City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston have party status in the Ground Water Districts Districts *Application for Approval of Mitigation Plan for the American Falls Reach of the Snake River (AFR).*

(2) The Surface Water Coalition, the Idaho Power Company, and the United States Bureau of Reclamation's motions to dismiss the Districts' Application for Mitigation Plan are DENIED.

(3) The Surface Water Coalition, the Idaho Power Company, and the United States Bureau of Reclamation's requests to appoint an independent hearing officer are DENIED.

(4) The Idaho Ground Water Appropriators, Inc.'s Motion to Consolidate the Districts' Application for Mitigation Plan and A&B's Application for Mitigation Plan with the Delivery Call proceeding is DENIED.

(5) The Idaho Ground Water Appropriators, Inc.'s Motion to Amend the Districts' Application for Mitigation Plan is GRANTED.

DATED this 13th day of September 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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