IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

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

IDWR RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
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Honorable John M. Melanson, Presiding

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I. STATEMENT OF THE CASE

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

II. ISSUES PRESENTED ON JUDICIAL REVIEW

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

III. FACTUAL AND PROCEDURAL BACKGROUND

1. SWC Delivery Call

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

[1] The SWC is made up of the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. R. Vol. 1 at 1.

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

2. The Department's Response

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

3. January 2008 Hearing on SWC Delivery Call

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

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

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

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

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

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

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

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

IV. STANDARD OF REVIEW

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

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

V. ARGUMENT

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

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

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

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

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

Because it is simply not possible to know with precision the effect of curtailment of any particular water right on an individual reach of the river, let alone the impact on a specific senior water right, I.C. § 42-226 provides that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." Under I.C. § 42-602, the Director is charged with the duty to

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

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

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

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

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

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

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

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

> rightholders are not required to exhaust all of their storage before they can claim that they're being injured. And, again, this system -- this water supply that's available is made up of this natural flow component and a storage component. That's not always the case, but it is the case here on the Snake River.
>
> So if the -- if the holders of the senior-priority surface water rights are not required to exhaust all of their storage before they can claim injury, how much storage are they -- how much storage are they entitled to? Now, I want to look at that question for just a moment.
>
> Their contracts with the Bureau of Reclamation authorize an amount of storage that they're entitled to. So when I'm using the word "entitled" in the context of conjunctive administration, the issue really is at what point do you curtail junior-priority ground water users to provide storage for surface water users? Do you curtail junior-priority ground water use to provide full reservoirs? Half-full reservoirs? At what point do you curtail junior-priority ground water use because of the storage, the reduced storage supplies, that are available to the senior rightholders?

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

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

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

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

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

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

> At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out.

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

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

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

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

Emphasis added.

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

of underground water resources." *See also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7."); *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) ("[I]t is clearly state policy that water be put to its maximum use and benefit. . . . That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution.").

Idaho Code § 42-602 states that "The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine." Because the Director is mandated under I.C. § 42-602 to "distribute water . . . in accordance with the prior appropriation doctrine[,]" and CM Rule 20.02 "acknowledge[s] all elements of the prior appropriation doctrine as established by Idaho law," every facet of the prior appropriation doctrine must be considered during administration. Moreover, CM Rule 5, entitled "Other Authorities Remain Applicable[,]" states that "Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law."

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

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

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

2. The Director Properly Recognized The Right To Carryover Storage

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

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

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

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

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

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

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

R. Vol. 37 at 7105, ¶ 4.

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

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

his Final Order. R. Vol. 39 at 7392. The SWC and USBR argue that this determination is in error, citing to the provision of CM Rule 42.01.g that states "the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies *for future dry years*." *SWC Opening Brief* at 43; *USBR Opening Brief* at 13 (emphasis added).

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

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

[5] CM Rule 42.01.g states in full: "The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 9, ¶ 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R. Vol. 37 at 7109, ¶ 11.

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

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

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

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

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

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

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

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[10] "American Falls argues . . . the Director is 'required to deliver the *full quantity* of decreed senior water rights according to their priority' rather than partake in this re-evaluation. (emphasis in original brief). . . . If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." *American Falls* at 876-77, 154 P.3d at 447-48. "At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho." *Id.* at 880, 154 P.3d at 451.

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

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

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

CM Rule 43 lists the necessary requirements for a mitigation plan. One factor that the Director may consider in his review of the plan is "Whether the mitigation plan will provide *replacement water*, at the time and place required by the senior-priority water right, *sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source*." CM Rule 43.03.b (emphasis added).

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

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

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

A. Correct.

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

A. Yes, that's correct.

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

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

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

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

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

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

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

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

A. Not necessarily.

Q. What is the purpose in your view?

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

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

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

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

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

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

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

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

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

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

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

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

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

> Q. By not overpredicting, that would necessarily put slightly more burden on the junior ground water users to provide water?
>
> A. It would tend to increase the magnitude of the injury that was being determined from the junior-priority depletions.
>
> Q. And that was a balancing decision that you made?
>
> A. Well, it brings in another factor that we haven't talked about, but it might help to see this.
>
> The outcome of this May 2, 2005, order was essentially ordered curtailment, recognizing that in the prior appropriation system of water rights administration, curtailment can be avoided by supplying replacement water. But if we were going to -- if we were going to allow the holders of the junior-priority ground water rights to supply replacement water and then -- so that they could continue to divert out of priority, it was important that we not underestimate the amount of replacement water, because that would unfairly shift the burden or the risk onto the holders of the senior right, that they may not have sufficient water supply.
>
> So by using this more conservative projection of natural flow that would be available, that was one safeguard that we were not unnecessarily shifting the risk onto the holders of the senior rights that they wouldn't have an adequate water supply.
>
> Now, does that mean that the holders of the junior-priority ground water rights might have to provide more water as replacement water than was actually needed? Yes. But I think that's an appropriate burden for out-of-priority diversions to continue. They ought to have the higher burden, in my opinion.

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

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

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

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

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

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

The third prong asks for the court to determine that the statutory language at issue does not treat the precise issue. *Pearl* at 113, 44 P.3d at 1168. The third-prong is met as the CM Rules do not specifically speak to the use of replacement water plans, but certainly authorize the Director to use his discretion in accepting CM Rule 43 mitigation plans that "provide *replacement water*, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal . . . ." Emphasis added. Moreover, CM Rule 5 states that "Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law."

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

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

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

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

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

Acceptance of the SWC's narrow position would result in ministerial curtailment, prior to any hearing, based solely on priority without consideration of the SWC's reasonable needs. "Conjunctive administration requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources. That is precisely the reason for the CM Rules and the need for analysis and administration by the Director." *American Falls* at 877, 154 P.3d at 448 (internal citation omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. In 2007, the Director acted timely

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R. Vol. 37 at 7102, ¶ 4.

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 30th day of April 2009.

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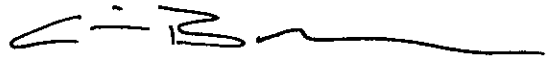

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CERTIFICATE OF SERVICE

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

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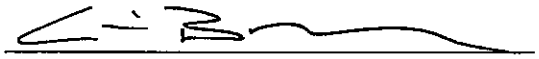

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