BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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 (Water Districts No. 120 and No. 130)	)	**ORDER DENYING SURFACE WATER COALITION'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Surface Water Coalition ("Coalition") moved for summary judgment on a variety of grounds in this contested case. The Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello") opposed the motion. In broad terms, the Coalition argued that under the prior appropriation doctrine its members are automatically entitled to the full amounts of their water rights as a matter of law, and also argued that there are no genuine disputes of material fact as to the Coalition's delivery call. IGWA and Pocatello argued that the prior appropriation doctrine requires the Director to consider other factors such as the extent of beneficial use, full economic development, and waste, in addition to priority of right in determining whether to enforce a delivery call.

As discussed herein, the Coalition misstates and misapplies the prior appropriation doctrine as implemented by Idaho law. While the prior appropriation doctrine entitles a prior appropriator to the full amount of his decreed right at those times during the authorized period of use when needed to achieve the beneficial use for which the water right was established, the prior appropriator's right is qualified by background principles of Idaho water law, which are set forth in the conjunctive management rules. Application of these background principles of prior appropriation laws in the administration of water rights does not constitute a re-adjudication of the prior rights, but rather ensures distribution of water "according to prior rights" as required by Idaho Code § 42-607. While the Director is prepared to distribute to the Coalition members the full amounts of their water rights, the prior appropriation doctrine imposes a duty on the prior appropriator "to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof." *Martiny v. Wells*, 91 Idaho 215, 218, 419 P.2d 470, 473 (1966); Idaho Code § 42-220. Because genuine disputes of material fact remain as to whether the full amounts of the Coalition members' water rights were necessary to fulfill their authorized beneficial uses under the hydrologic conditions that existed at the time of the call and that exist today, the Coalitions' motion for summary judgment is denied.

Procedural Background

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of the *Surface Water Coalition's Motion for Partial Summary Judgment and Supporting Legal Points and Authorities* ("Motion for Summary Judgment"), dated January 23, 2006. On February 10, 2006, the Director issued his *Order Staying Proceedings and Amended Scheduling Order* ("February 10 Order"), which stayed the proceedings for a period of sixty days from the date of the order for the purpose of allowing the parties to investigate potential settlement. *February 10 Order* at p. 2, ¶ 1. The sixty-day stay expired on April 11, 2006. The order further provided that once the sixty-day stay expired, the parties would have an additional twenty-one days to meet previously established filing dates, if not inconsistent with the amended schedule set forth in the February 10 Order. *Id.* at p. 2, ¶ 4. The twenty-one-day period following the sixty-day stay expired on May 2, 2006.

According to the February 10 Order, response briefs to any dispositive motion, such as the Surface Water Coalition's Motion for Summary Judgment, were to be filed no later than April 28, 2006. *Id.* at p. 2, ¶ 4a. Reply briefs to any dispositive motions were to be filed no later than May 5, 2006. *Id.* at p. 2, ¶ 4b.

On April 28, 2006, IGWA and Pocatello filed a *Joint Response to the Surface Water Coalition's Motion for Partial Summary Judgment* ("Joint Response").

On May 2, 2006, the Surface Water Coalition filed a *Request for Amended Briefing Schedule/Notice of Intent to Respond to Pocatello's Motion.* In its motion, the Surface Water Coalition asked for a two-week extension, until May 19, 2006, to file reply briefing to IGWA and Pocatello's Joint Response.

On May 2, 2006, the Director issued his *Order Inviting Responses to Motions for Changes in Scheduling Order* ("May 2006 Order"). Among other things, the May 2006 Order extended the deadline to file reply briefs to dispositive motions, such as the Surface Water Coalition's Motion for Summary Judgment, from May 5, 2006, to May 12, 2006. *May 2006 Order* at p. 2, ¶ 3.

On May 8, 2006, the Surface Water Coalition filed its *Amended Motion for Partial Summary Judgment and Request for Hearing* ("Amended Motion for Summary Judgment"). The Amended Motion for Summary Judgment sought a May 16, 2006, hearing on the Surface Water Coalition's Motion for Summary Judgment before the Director at the Department. *Amended Motion for Summary Judgment* at p. 2. On May 10, 2006, the Director denied the Surface Water Coalition's request for hearing. *Order Denying Surface Water Coalition's Requests for Hearing and Request for Status Conference.*

On May 12, 2006, the Surface Water Coalition filed its *Reply in Support of Motion for Partial Summary Judgment* ("Reply").

Surface Water Coalition's Motion for Summary Judgment

Citing to certain paragraphs in the Director's Order of May 2, 2005 ("May 2005 Order), the Surface Water Coalition states that it is entitled to judgment as a matter of law because it:

> ... has established the relevant facts above, i.e. the Director made certain findings in the May 2005 Order based upon various procedures and criteria for determining 'material injury.' As explained below, these 'procedures and criteria' violate Idaho law and are even contrary to the Department's own conjunctive management rules, IDAPA 37.03.11 *et seq.* Accordingly, the Coalition is entitled to an order declaring the Director's procedures and criteria for determining 'material injury' as set forth in the May 2005 Order, invalid as a matter of law.

Motion for Summary Judgment at 6.

The Surface Water Coalition first argues that the May 2005 Order violates Idaho law by not requiring watermasters in Water District Nos. 120 and 130 to administer water rights from all hydraulically-connected surface and ground water sources by priority. Citing Idaho Code § 42-607, the Surface Water Coalition states that watermasters are mandated by law to administer water rights in accordance with priority. The Surface Water Coalition argues that because the May 2005 Order "contains 'guidelines, direction, supervision' as well as 'injury determinations' that do not honor the constitution's and statute's directives to administer in accordance with the prior appropriation doctrine, those findings and procedures are invalid as a matter of law." *Id.* at 9.

The Surface Water Coalition next states that the Director has no authority to re-adjudicate previously decreed or licensed water rights through conjunctive administration. The Surface Water Coalition argues that the May 2005 Order:

> ... unlawfully ignores the 'conclusive' nature of the Coalition members' previously decreed and licensed water rights. Instead, the Director arbitrarily determined that their 'total' diversions of natural flow and storage water in 1995 represented their 'minimum full supply' entitled to protection in administration against junior priority ground water rights. ... In other words, the decreed and licensed quantity amounts of the Coalition's water rights were completely disregarded under the Director's 'material injury' analysis.

Id. at 11.

In support of the argument that a previously decreed or licensed water right should not be limited by beneficial use, the Surface Water Coalition cites to the Snake River Basin Adjudication ("SRBA") District Court's opinion in the Fish Facility Volume case, *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, 3 SRBA 18, 18.25 (December 29, 1999), as well as various decisions from the Idaho Supreme Court. The Surface Water Coalition concludes that: "Accordingly, the Director's 'minimum full supply' criteria, which purports to establish the amount of water that the Coalition members are entitled to have distributed to them by the watermaster in 2005, does not reflect the stated quantities of their decreed and licensed water rights, and as such is invalid as a matter of law." *Motion for Summary Judgment* at 14.

Citing to paragraph 48 of the May 2005 Order, the Surface Water Coalition argues that the Director had no authority to "'combine' natural flow and storage water rights for purposes of administration." *Id.* at 14. According to the Surface Water Coalition, "Nowhere in history have Idaho watermasters been permitted to take water rights with differing priority dates and combine them into one for purposes of administration." *Id.* at 15. Therefore, because the May 2005 Order "creates a scheme of administration that unlawfully 'combines' vested water rights for administration it must be set aside as a matter of law." *Id.*

Referring to the SRBA District Court's 2002 *Order Granting State of Idaho's Motion for Order of Interim Administration* ("SRBA Order Granting Interim Administration") in basins 35, 36, 41, and 43, the Surface Water Coalition argues that the Director is prohibited from administering water rights differently than they were recommended or partially decreed. The Surface Water Coalition further supports its argument by citing to the SRBA District Court's 2005 *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* ("SRBA Order Granting Motion to Enforce"), which, according to the Surface Water Coalition, states that the Director cannot "collaterally attack" or "re-examine the basis" of a water right as a condition of administration. *Motion for Summary Judgment* at 16. The Surface Water Coalition asserts that: "Since the Director is precluded by the Court's order and existing Idaho law, from 'looking behind' decreed water rights through an administrative 'material injury' analysis, there is no legal basis for the Director's 'minimum full supply' criteria which disregards the Coalition members' previously decreed and licensed rights." *Id.* at 16. Thus the Coalition concludes that: "Accordingly, the 'minimum full supply' procedure and criteria plainly violates the terms of the SRBA Court's interim administration orders and must be set aside as a matter of law." *Id.* at 17.

Next, the Surface Water Coalition cites the Department's definition of "material injury" in IDAPA 37.03.11.010.14, and the factors that the Director may consider in IDAPA 37.03.11.010.42 for determining material injury, for the proposition that the Director should not have considered criteria such as "minimum full supply," "total crop loss," "land fallowing," and "shortage" when he determined the extent of the Surface Water Coalition's material injury in the May 2005 Order. *Id.* The Coalition argues, "Since the Rules do not support the May 2005 Order's concept of 'material injury', the Director impermissibly creates new criteria and procedures that violate the plain terms of the rules themselves." *Id.* at 19.

<u>IGWA and Pocatello's Joint Response</u>

IGWA and Pocatello argue that the Surface Water Coalition's Motion for Summary Judgment should not be granted because there are genuine issues of material fact in dispute, and therefore judgment as a matter of law is inappropriate. IGWA and Pocatello "dispute the portion of the standard of review in which the Coalition asserts it has established the 'relevant' facts, that it has accurately stated the law pertaining to the issues presented, and that the issues presented by the Coalition present undisputed facts." *Joint Response* at 3.

First, IGWA and Pocatello respond that the Surface Water Coalition's legal arguments, as they pertain to the interpretation of Idaho water law, are incorrect. While the Surface Water Coalition correctly states that water rights are typically administered by priority, IGWA and Pocatello argue that the Surface Water Coalition has ignored the beneficial use standard contained in Article XV, Section 3 of the Idaho Constitution. According to IGWA and Pocatello:

> ... an Idaho water right is much more than an amount and a priority date. It is a right with inherent limitations--limitations based on principles of beneficial use, waste, efficient diversion, reasonableness, and maximum and optimum use. And the Director has discretion to administer the Surface Water Coalition's water rights relying on those principles and others, including application of the futile call doctrine.

Id. at 5.

IGWA and Pocatello state "each member of the Coalition has claimed that it has received less water than usual under its decrees, yet many have admitted they have not been injured by this." *Id.* at 5-6. IGWA and Pocatello assert that: "The Coalition's rights are limited by concepts of beneficial use and maximum utilization. Further, the Coalition's use of its rights is limited by the prohibition on waste and futile call. The legal foundation of the Coalition's motion is incorrect and as a result, its Motion should be denied." *Id.* at 10.

IGWA and Pocatello next respond that the administration of water rights is not, as the Surface Water Coalition claims, ministerial. IGWA and Pocatello argue:

> The Coalition's Motion hinges on the argument that the bare 'priority of appropriation' language in Section 3 [of the Idaho Constitution] describes the full scope not only of the prior appropriation doctrine as recognized in Idaho, but also the full scope of factors that the State may consider in exercising its constitutionally-derived regulatory authority over water resources.

Id. at 10-11.

According to IGWA and Pocatello, Chapter 6 of Title 42 of the Idaho Code vests the Director with discretionary authority to administer water rights. Based on that discretion, and since watermasters are "under the direction of the department of water resources," watermasters are not mandated to administer water rights in strict accordance with priority. *Id.* at 11 (citing Idaho Code § 42-607). IGWA and Pocatello argue that: "Far from mandating a rote curtailment scheme of strict priority administration, Chapter 6 authorizes the Director to base curtailment instead on considered facts. The Director's May 2 Order is based on these statutory directives and is consistent with it. The Coalition's arguments on these points are without basis." *Id.* at 13.

IGWA and Pocatello next respond to the Surface Water Coalition's argument that the Director's application of the concept of minimum full supply constitutes a re-adjudication of the Coalition's decreed and licensed water rights. According to IGWA and Pocatello:

> The Surface Water Coalition's primary argument can be summarized as follows: because the Director relied on the concept of 'minimum full supply' to arrive at certain conclusions concerning injury to their water rights in the May 2 Order, he effectively has 're-adjudicated' the Coalition members' decreed water rights. They argue that this 're-adjudication' occurs because the May 2 Order does not simply find that the Coalition members should receive all the water under their natural flow rights and storage contracts at all times.

Id. at 14.

IGWA and Pocatello state that the Surface Water Coalition's argument is incorrect because:

> ... beneficial use is a 'continuing obligation' that does not end with the entry of a decree. A water right only authorizes an appropriator to receive the amount of water necessary for beneficial use, 'regardless of the amount of their decreed right.' *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427 n.5, 546 P.2d 382, 390 n.5 (1976). Enforcing and giving full effect to the inherent beneficial use limitation through water rights administration is not a 're-adjudication.'

Id. at 16. "Furthermore," argue IGWA and Pocatello, "this inherent limitation and condition on all water rights exists for the benefit of the *junior* appropriators." *Id.* (emphasis in original).

According to IGWA and Pocatello, during the deposition of the manager of the Twin Falls Canal Company it was discussed that "conversion of irrigated acres to subdivisions is occurring at a 'dramatic' rate." *Id.* at 18. Thus, it is presumed that some acres that had been irrigated at the time past licenses or decrees were entered are no longer in production. IGWA and Pocatello maintain that:

> The TFCC situation illustrates the distinction between the decree limit for a water right and the limitation that delivery of that water right in times of shortage must be made by reference to the ability of the right holder to beneficially use the water. Without fact-finding of the kind conducted by the Director to determine actual need in accordance with beneficial use, the Director could have ordered delivery of water that could not be used by TFCC.

Id. at 18.

IGWA and Pocatello next respond to the Surface Water Coalition's argument that Idaho law prevents the Director from considering the Coalition's natural flow and storage water rights in determining material injury. According to IGWA and Pocatello:

> ... [the] theory ignores the fact that there never has been sufficient natural flow to satisfy even the most senior Surface Water Coalition natural flow rights throughout the irrigation season. ... Ground water users cannot now be administered in an attempt, presumably futile, to enhance river flows beyond those natural conditions and convert natural flow rights that historically have been unreliable at best into a dependable full supply.

Id. at 20-21.

IGWA and Pocatello state that the Director's decision to combine natural flow and storage water rights to determine a full supply is legally correct based on the principle that storage water rights, like other water rights, are bound by the principle of beneficial use. Therefore, IGWA and Pocatello argue that:

> ... the Director is legally obligated, as he has done, to consider Coalition storage contracts in conjunction with availability of natural flow in assessing potential material injury to Coalition water rights. If the Coalition's actual beneficial use requirements can be met with the total available combined supply, there can be no material injury. ... Failure to do so would result in unnecessary curtailments of junior rights and waste of water resources, and would prevent full economic development and use of the state's water resources. As a matter of law, and fact, the Coalition's arguments on this issue must be dismissed.

Id. at 22-23.

IGWA and Pocatello respond next to the Surface Water Coalition's arguments that the May 2005 Order violates the SRBA Order Granting Interim Administration and the SRBA Order Granting Motion to Enforce. According to IGWA and Pocatello, the May 2005 Order cannot violate the SRBA Order Granting Interim Administration because the May 2005 Order "does not rely on the Interim Administrative Order to respond to the SWC Delivery Call." *Id.* at 23. Furthermore, IGWA and Pocatello point out that "the Coalition has neither received partial decrees for its water rights in the SRBA nor has it received Director's reports for its water rights. In short, the Coalition's argument on this point, even assuming for purposes of argument that the Interim Administrative Order controls interim administration in Water District 1, is not ripe." *Id.*

IGWA and Pocatello likewise assert that the May 2005 Order does not violate the SRBA Order Granting Motion to Enforce. According to IGWA and Pocatello, the SRBA Order Granting Motion to Enforce must be examined in the context in which it was issued. IGWA and Pocatello state that Rangen, Inc., a water right holder in Water District No. 130, asked the Department, without making a delivery call under the conjunctive management rules, to enforce its partially decreed water rights from the SRBA. In responding to the request, the Director found that some of Rangen's partial decrees "were issued erroneously. Rangen sought a ruling from the SRBA Court that the Director's findings were inconsistent with Rangen's decrees and with the Interim Administrative Order." *Id.* at 24. According to the SRBA Order Granting Motion to Enforce, the Director could not "re-examine the basis for the water right as a condition for administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a re-examination of prior existing conditions in the context of applying a 'material injury' analysis through application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources." *Id.* (citing Order Granting Motion to Enforce at p. 8). However, IGWA and Pocatello state that the SRBA District Court went further in its analysis by stating that in the context of a delivery call under the Conjunctive Management Rules, the Department "could examine conditions, pre-existing or otherwise, that would make a delivery call futile. . . ." *Id.*

Lastly, IGWA and Pocatello state that the Surface Water Coalition's Motion for Summary Judgment should be denied because the May 2005 Order follows the Conjunctive Management Rules by arriving at the concept of minimum full supply. IGWA and Pocatello state that the "concept of minimum full supply is an amalgamation of these considerations [rules 42.d and 42.e] to provide a benchmark against which to determine injury for administration purposes. As such, it logically follows from the application of each element of the prior appropriation doctrine." *Id.* at 27. IGWA and Pocatello note that nowhere in the May 2005 Order are the terms "total crop loss" and "land fallowing" used or defined by the Director. *Id.* Therefore, because the Surface Water Coalition's Motion for Summary Judgment "is wrong on the law and raises disputed issues of fact, it should be denied. The Director must hold a hearing to determine facts as they pertain to the water use of the Coalition entities." *Id.* at 28.

Surface Water Coalition's Reply

The Surface Water Coalition replies that "IGWA admits the facts presented in the Coalition's *Motion*. . . . Unless IGWA claims that the Director's May 2005 Order does not contain the statements and findings cited by the Coalition, which it does not, there are no disputed facts and the Coalition's *Motion* can be decided as a matter of law." *Reply* at 2.

The Surface Water Coalition replies that IGWA and Pocatello are incorrect in their interpretation of Idaho law on the point that water administration is discretionary. Instead, the Surface Water Coalition states that:

> ... [Idaho Code § 42-607] is clearly 'self-executing' and places an affirmative duty on the watermaster to distribute water by priority in times of shortage. Nothing in the statute provides for delayed 'determinations' by the Director before water is distributed to senior rights. ... The statute is not open for the strained interpretation offered by IGWA. ... Indeed, under IGWA's theory the State has no need for watermasters since the open-ended decisions of water right administration must all be based on determinations made by the Director.

Id. at 3-4.

The Surface Water Coalition next replies that the concepts of "beneficial use," "optimum use," "reasonable use," and "waste" do not allow the Director to take water from senior surface water users for the benefit of junior ground water users. *Id.* at 5. The Surface Water Coalition first asserts that:

> IGWA wrongly claims that the concept of 'beneficial use' limits a senior's water right to quantities less than what was previously decreed or licensed. ... IGWA fails to recognize the distinction between a beneficial use determination at the time a water right is decreed and the effective re-adjudication of a water right through the administration provided under the Director's May 2005 Order.

Id. at 6.

Citing the Fish Facility Volume case, the Surface Water Coalition states that once a license is issued, "it is 'binding upon' the Department for purposes of administration." *Id.* (citing *Fish Facility Volume* at p. 15). "Similarly," the Surface Water Coalition argues, "when a court decrees a water right, such as the Coalition's rights, the Department is bound to accept the court's findings as to the quantity element that the right holder is entitled to divert and beneficially use." *Id.* Citing Idaho Code § 42-110, the Surface Water Coalition states "that irrigation entities, like the Coalition members, whose rights have been licensed or decreed, 'shall be entitled to such quantity' at their points of diversion, and once that water is lawfully diverted it is their private 'property.'" *Id.* at 8. "Fortunately, Idaho's constitution and water distribution statutes forbid the 'perceived-need' based system of administration set forth in the Director's May 2005 Order, and instead requires watermasters to honor the decrees and distribute water in accordance with their terms." *Id.* at 9.

Second, the Surface Water Coalition states that:

> Similar to the 'beneficial use' argument, IGWA wrongly claims that an 'optimum use' policy allows the Director to reduce senior surface water rights for the benefit of junior ground water rights. Such an argument is simply another way of claiming that the Director is authorized to 're-allocate' water rights based upon an 'economic utilization' policy.

Id.

The Surface Water Coalition further argues that: "Despite IGWA's strained interpretation of Idaho's water distribution statutes they cannot escape the plain and unambiguous language that requires a watermaster to supply senior water first in times of shortage." *Id.* at 10. The Surface Water Coalition asserts that because the Director in the May 2005 Order refused to deliver water based upon priority, as established by previously issued licenses and decrees, the Director exceeded his authority and violated the Idaho Constitution and Idaho Code. According to the Surface Water Coalition, "If the Director was free to re-determine a water right holder's 'beneficial use' at any time, or assert a 'maximum use' policy, and use that determination to reduce or limit senior water rights in favor of juniors, then there would be no need for Idaho's water right adjudications, including the SRBA." *Id.*

Third, the Surface Water Coalition states that "the rule against 'waste' does not authorize the Director to reduce previously decreed or licensed water rights through administration." *Id.* at 11. Citing *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966), the Surface Water Coalition states that "[t]he policy of the law against waste of irrigation water cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator." "Accordingly," argues the Surface Water Coalition "the Director cannot use the policy of waste as a justification to allow junior ground water rights to divert water that would otherwise be available for diversion and use by senior surface water rights." *Reply* at 11.

The Surface Water Coalition next replies that Idaho law requires each water right to be honored in administration, not combined for the benefit of junior ground water users. *Id.* at 12.

Again, the Surface Water Coalition states that the Director's "'combined' administration theory" is unfounded in Idaho law and the May 2005 Order should not have "invent[ed] a new system of water distribution that erroneously 'combines' a senior's water rights and reduces the vested elements of those rights." *Id.* Regarding storage water rights, the Surface Water Coalition states that those rights "represent vested property right interests, and once the water is stored it becomes private water no longer subject to diversion and appropriation." *Id.* at 13. "Accordingly," argues the Surface Water Coalition "the storage rights are not subject to re-allocation by the Director under any theory of administration, including the 'combined' and 'minimum full supply' criteria used in the May 2005 Order." *Id.* The Surface Water Coalition asserts that "... the law is clear and strictly prohibits the Director and watermasters from taking two separate water rights with differing priority dates and combining them into one for purposes of administration." *Id.* at 14.

Finally, the Surface Water Coalition replies that IGWA and Pocatello misrely on the concepts of "beneficial use," "maximum utilization," "futile call," and "waste" "to justify the Director's errors in the May 2005 Order wherein the Department's conjunctive management rules ("Rules") were violated." *Id.* at 15. According to the Surface Water Coalition, the Conjunctive Management Rules require the Director to apply the definition of material injury found in the Rules if junior ground water rights are hindering or interfering with senior surface water rights. The Surface Water Coalition argues that: "Depleting water that would otherwise be available for diversion and use under a senior right equates to an interference or impact on that right. Instead of following the Rule, the Director expressly rejected the same and stated that 'depletion does not equate to material injury.' May 2005 Order at 43, ¶ 47." *Id.* The Surface Water Coalition asserts that "... whereas Rule 42 contains various factors for the Director to consider, they do not alter the definition of 'material injury' or replace a defined water right for administration." *Id.*

In summary, the Surface Water Coalition asserts that because the May 2005 Order ignores the quantity elements of the Surface Water Coalition's previously decreed and licensed water rights and instead created a "minimum full supply" concept, the Order re-adjudicates the Coalition's water rights and is therefore violative of Idaho law. As a result, the Surface Water Coalition concludes that the Director should grant its Motion for Summary Judgment.

Discussion

The Surface Water Coalition argues that summary judgment is appropriate in this matter because findings regarding the uncontested, relevant facts were made by the Director in the May 2005 Order based on "various procedures and criteria for determining 'material injury.'" *Motion for Summary Judgment* at 6. The Surface Water Coalition further argues that "these 'procedures and criteria' violate Idaho law and are even contrary to the Department's own conjunctive management rules . . . ." *Id.* Accordingly, the Coalition argues that it is "entitled to an order declaring the Director's procedures and criteria for determining 'material injury' as set forth in the May 2005 Order, invalid as a matter of law." *Id.*

"Summary judgment is appropriate 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving part[y] is entitled to a judgment as a matter of law.'" *Foster v. Traul*, 141 Idaho 890, 892, 120 P.3d 278, 280 (2005) (citing Idaho Rule of Civil Procedure 56(c)). "In determining whether there are genuine issues of material fact the court reviews all evidence in the light most favorable to the non-moving party. If the evidence shows no disputed issues of material fact, what remains is a question of law. . . ." *Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 44, 122 P.3d 300, 303 (2005).

While the May 2005 Order was a final order of the Department, the Order was issued before an opportunity for a hearing.* Because of that, the May 2005 Order stated "[a]ny person aggrieved by the Order shall be entitled to a hearing before the Director to contest the action pursuant to Idaho Code § 42-1701A(3)." *May 2005 Order* at p. 31, ¶ 1.

On May 17, 2005, the Surface Water Coalition filed a *Petition Requesting Hearing on Director's May 2, 2005 Amended Order and Requesting Appointment of an Independent Hearing Officer* ("Petition Requesting Hearing"). In the style of answering a complaint, the Surface Water Coalition either admitted, denied, or commented on the findings of fact and conclusions of law contained in the May 2005 Order. In many instances, the Surface Water Coalition stated that the facts contained in the May 2005 Order were incorrect and sought "[a] hearing on all aspects of the Director's May 2, 2005 *Amended Order* as contested above or on other issues as may hereafter be discovered." *Petition Requesting Hearing* at 18.

On May 16, 2005, IGWA filed its *Petition for Reconsideration and/or Clarification of Director's May 2, 2005 Amended Order; Request for Hearing; Motion for Stay of Amended Order* ("Request for Hearing"). In its Request for Hearing, IGWA pointed out facts that it believed the Director should have given more weight, facts that should have been given less weight, and facts that should not have been considered in the May 2005 Order. Therefore, "having been aggrieved by the Director's Amended Order, IGWA requests that the Director convene a hearing regarding this matter." *Request for Hearing* at 12. *Compare with Reply* at 2 (Surface Water Coalition states, "IGWA admits the facts presented in the Coalition's *Motion*. ... Unless IGWA claims that the Director's May 2005 Order does not contain the statements and findings cited by the Coalition, which it does not, there are no disputed facts and the Coalition's *Motion* can be decided as a matter of law.").

After the filing of requests for hearing "to contest the action[,]" *May 2005 Order* at p. 31, ¶ 1, a status and scheduling conference was held on June 15, 2005. *Scheduling Order* of July 22, 2005 at p. 1 ("Scheduling Order"). During the status conference, the parties were ordered to submit proposals in regard to the establishment of a prehearing schedule. Additionally, the parties were instructed that if they wished to engage in discovery, that motions requesting

---

* Water delivery calls are inherently different than traditional administrative procedings. Because of the urgency for relief and because of the Director's duty to ensure distribution in accordance with the background principles of Idaho water law, the Director makes an initial determination of how distribution should occur, which decision is then subject to review in accordance with law. Thus, if either the senior or junior water right holder believes the Director has failed to appropriately apply the prior appropriation doctrine as implemented by Idaho law, he may seek review of the Director's determination.

discovery be filed in accordance with Department rules of procedure. Based upon the prehearing schedules submitted by the parties, the Director entered a prehearing schedule that established dates, among others, for initial disclosures of discovery, terms and duration for discovery, identification of lay and expert witnesses, and submission of expert witness reports.

Since the entry of the Scheduling Order, the parties have engaged in discovery and requested rulings from the Department on various issues. Therefore, since at least July 22, 2005, the parties have been actively involved in obtaining information that they deem important to contest the findings made in the May 2005 Order.

In its Joint Response, IGWA and Pocatello cite to the affidavit of Brad V. Sneed and a deposition of the manager for the Twin Falls Canal Company for the proposition that the Surface Water Coalition may not be experiencing material injury to the extent it has claimed. *See Joint Response* at 5-6 and 18. A primary issue in the May 2005 Order was the extent to which the Surface Water Coalition was experiencing material injury. As illustrated by the Department's Conjunctive Management Rules, a finding of material injury is based on numerous factors that are fact-specific. *See* IDAPA 37.03.11.042. The factual issues referenced by IGWA and Pocatello in the Joint Response are material to this case and are contested by the Surface Water Coalition.

Resolution of the factual issues relating to the existence of material injury is pivotal to addressing the legal arguments raised by the Surface Water Coalition and the ground water users in this case. For example, the Coalition argues that the Director's May 2005 Order results in a re-adjudication of previously decreed or licensed water rights because the order does not provide for the curtailment of junior priority ground water rights whenever water supplies are insufficient to allow for the senior surface water right holders to divert the maximum amount of water authorized to be diverted under their respective natural flow and storage water rights regardless of whether the water is required to satisfy the beneficial uses authorized under the water rights.

The May 2005 Order recognizes that under governing Idaho law the senior priority surface water right holders are entitled to protection for up to the maximum amount of water authorized to be diverted under their respective water rights if that amount is necessary to satisfy the authorized beneficial uses and the call is not futile. The May 2005 Order does not effect a re-adjudication of the licensed or decreed water rights held by the members of the Surface Water Coalition. Rather, the May 2005 Order merely recognizes that distribution of water under the prior appropriation doctrine as implemented by Idaho law requires the Director to distribute water in accordance with prior rights. Idaho Code § 42-607. It is notable that the statue does not say "according to decrees." As the United States Supreme Court noted in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992), property rights are limited by background principles of state nuisance and property law. Likewise, a decree resulting from a water rights adjudication or a state-issued water right license does not immunize a prior appropriator's right from background principles of water law.

Under Idaho water law, a senior appropriator, <u>regardless of the amount of their decreed right</u>, is not entitled to "the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed . . ." I.C. § 42-220. *Briggs v. Golden*

Valley Land & Cattle Co., 97 Idaho 427, 435 n.5, 546 P.2d 382, 390 n.5 (1976) (quoting Idaho Code § 42-220) (emphasis added). The Surface Water Coalition, therefore, is mistaken to the extent it argues that the Director must, as a matter of law, distribute the full amounts of water set forth in its members' water rights licenses and decrees without any consideration of its members' actual beneficial uses and needs. Rather, the Director must make a factual determination of whether the full amounts of the water rights are necessary for the authorized beneficial uses at the time the delivery call is made. If so, the Director will distribute the full amount of the right. If not, the Director will order the distribution of such amount as is necessary to achieve the authorized beneficial use. This determination, which is subject to judicial review, is not a re-adjudication of rights but rather reflects the application of the background principles of water law, which are set forth in the conjunctive management rules, based upon the hydrologic conditions existing at the time of the delivery call. As with all water distribution, the amount of need will vary over time.

Based upon available information, the Director determined that the maximum amount of water authorized to be diverted under the respective water rights of the Surface Water Coalition members was not necessary in 2005 to accomplish the beneficial uses authorized under the rights. The parties, including the Surface Water Coalition members, will have an opportunity to present evidence at the hearing scheduled for September 26, 2006, in this matter to demonstrate that the Director erred in his determination of the amount of water required to satisfy the authorized irrigation needs of the Surface Water Coalition members. The Director is prepared to order such curtailment of junior water rights as is necessary according to the facts established through the hearing.

Thus, in construing the Motion for Summary Judgment in the light most favorable to IGWA and Pocatello, *Spur Products*, 142 Idaho at 44, 122 P.3d at 303, it is clear that there are genuine issues of material fact in dispute. While the Surface Water Coalition states in its Motion for Summary Judgment that the undisputed facts are set forth in the May 2005 Order, *see Motion for Summary Judgment* at 6, the Surface Water Coalition has previously stated that it disputes many of the findings of fact and conclusions of law in the May 2005 Order, *see Petition Requesting Hearing*. Moreover, contrary to the assertion of the Surface Water Coalition, *Reply* at 2, IGWA has not agreed with the findings made in the May 2005 Order. Instead, IGWA has called the basis of the Order into question by filing its Request for Hearing. Even though the May 2005 Order was a final order of the Director, the timely filing of requests for hearing by the parties has called the Order into question and created genuine issues of material fact. Therefore, the Surface Water Coalition's Motion for Summary Judgment should be denied.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Surface Water Coalition's *Motion for Partial Summary Judgment and Supporting Legal Points and Authorities* is DENIED.

DATED this 31st day of May 2006.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2006, the above and foregoing, was served by the method indicated below, and addressed to the following:

TOM ARKOOSH ARKOOSH LAW OFFICES PO BOX 32 GOODING ID 83330 (208) 934-8873 alo@cableone.net	(x) U.S Mail, Postage Prepaid ( ) Facsimile (x) E-mail
W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY ID 83318-0248 (208) 878-2548 wkf@pmt.org	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
ROGER D. LING LING ROBINSON PO BOX 396 RUPERT ID 83350-0396 (208) 436-6804 lnrlaw@pmt.org	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN ROSHOLT TRAVIS THOMPSON BARKER ROSHOLT 113 MAIN AVE WEST STE 303 TWIN FALLS ID 83301-6167 (208) 735-2444 jar@idahowaters.com tlt@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JEFFREY C. FEREDAY MICHAEL C. CREAMER GIVENS PURSLEY LLP PO BOX 2720 BOISE ID 83701-2720 (208) 1300 cf@givenspursley.com mcc@givenspursley.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

SCOTT CAMPBELL MOFFATT THOMAS PO BOX 829 BOISE ID 83701 (208) 385-5384 slc@moffatt.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
KATHLEEN CARR U.S. DEPT INTERIOR 960 BROADWAY STE 400 BOISE ID 83706 (208) 334-1378	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
MATT HOWARD US BUREAU OF RECLAMATION 1150 N CURTIS ROAD BOISE ID 83706-1234 (208) 378-5003 mhoward@pn.usbr.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
LYLE SWANK IDWR 900 N SKYLINE DR IDAHO FALLS ID 83402-6105 (208) 525-7177 lyle.swank@idwr.idaho.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
ALLEN MERRITT CINDY YENTER IDWR 1341 FILLMORE ST STE 200 TWIN FALLS ID 83301-3033 (208) 736-3037 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOSEPHINE BEEMAN BEEMAN & ASSOC. 409 W JEFFERSON BOISE ID 83702 (208) 331-0954 jo.beeman@beemanlaw.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
MICHAEL GILMORE ATTORNEY GENERAL'S OFFC PO BOX 83720 BOISE ID 83720-0010 (208) 334-2830 mike.gilmore@ag.idaho.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

TERRY UHLING
JR SIMPLOT CO
999 MAIN STREET
BOISE ID 83702
tuhling@simplot.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

SARAH KLAHN
WILLIAM A HILLHOUSE II
AMY W BEATIE
WHITE JANKOWSKI
511 16TH ST STE 500
DENVER CO 80202
sarahk@white-jankowski.com
billh@white-jankowski.com
amyb@white-jankowski.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JAMES TUCKER
IDAHO POWER CO
1221 W IDAHO ST
BOISE ID 83702
jamestucker@idahopower.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JAMES LOCHHEAD
ADAM DEVOE
BROWNSTEIN HYATT
410 17TH ST 22ND FLOOR
DENVER CO 80202
jlochhead@bhf-law.com
adevoe@bhf-law.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources