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U.S. Department of the Interior, Bureau of Reclamation

**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) RECLAMATION'S
FALLS RESERVOIR DISTRICT #2, BURLEY) TRIAL BRIEF
IRRIGATION DISTRICT, MILNER)
IRRIGATION DISTRICT, MINIDOKA)
IRRIGATION DISTRICT, NORTH SIDE)
CANAL COMPANY, and TWIN FALLS)
CANAL COMPANY)
_____)
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Pursuant to the *Order Approving Stipulation and Joint Motion for Rescheduled Hearing* issued on August 1, 2007, in the above-captioned matter, the Department of Interior, Bureau of Reclamation (Reclamation), through its counsel of record, Kathleen Marion Carr, Office of the Field Solicitor, hereby submits Reclamation's trial brief.

INTRODUCTION

This case contains numerous factual and legal issues. Many of those issues have already been framed and discussed, to some extent, in prior pleadings and in the voluminous expert reports filed in this case. After the evidentiary hearing is completed, Reclamation reserves the right to offer closing argument on all the issues raised. For purposes of this opening brief, however, Reclamation will limit its discussion to two

issues central to this case: reasonable carryover and the scope of conjunctive management.

The first issue is reasonable carryover. No one can seriously challenge the necessity of carrying storage water over for use in future dry years. The pivotal question is how much carryover is reasonable. In *AFRD2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 880 (2007), the Court held that the director had some discretion to determine the quantity of carryover reasonably necessary for future needs, but it left open the door for a subsequent as-applied challenge upon a properly developed record. The discussion in Part I, below, points to why the director's carryover determinations in this case are unreasonable.

Also, as discussed in Part I, the debate about carryover is not new in the upper Snake River basin. One of the central themes of the 1940's authorization of Palisades Reservoir was the need for more carryover storage as insurance for future drought. Constructed primarily as a "holdover" reservoir, Palisades represented a significant public and private investment to carry over water from wet years to dry years in the upper Snake River basin. With an active capacity of 1.2 million-acre-feet, Palisades Reservoir is second in size only to American Falls in the upper Snake River. Ultimately, Congress, with urging from state and local officials, authorized construction of the large carryover reservoir. Understanding the historical context and policies that gave rise to Palisades provides an essential backdrop for determining the importance of carryover in the upper Snake River basin.¹

¹ Reclamation included eleven exhibits (Ex. Nos. 7000, 7001, 7002, 7004, 7005, 7006, 7007, 7008, 7012, 7013, and 7014) pertaining to the history of Palisades Reservoir. The exhibits are arranged in chronological order, so the reader can follow more easily the series of discussions and events that ultimately led to development of Palisades. For completeness, no pages were omitted from the exhibits.

The second issue—the scope of conjunctive management—questions the director’s proposed paradigm for conjunctive management. The director’s interlocutory orders in this case set out a single-year approach to conjunctive administration. This limited approach does not address multiple-year impacts, even though ground water pumping produces effects well beyond a single year. As discussed in Part II, below, Idaho case law supports a broader view of conjunctive administration, which is more consistent with Idaho’s constitutionally sanctioned prior appropriation doctrine.

DISCUSSION

1. THE DIRECTOR’S LIMITATION ON CARRYOVER STORAGE IS UNREASONABLE.

Reasonable carryover is about future needs. That is how the Court framed it in *AFRD2*. The Court recognized there is a line between legitimate reasons to carry over storage water, *i.e.*, for “future needs” versus illegitimate purposes for carrying over water such as hoarding or waste without regard to future beneficial use of the water. *See e.g.*, *AFRD2*, 143 Idaho at 880. The task of drawing the line between future-needs storage water and excess carryover falls initially to the director. Pursuant to *AFRD2*, the director is given “some discretion . . . to determine whether carryover water is reasonably necessary for future needs.” *Id.* However, the director’s discretion in this area is “not unfettered . . . nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, [the] Court can determine whether that exercise of discretion is being properly carried out” *Id.* As discussed below, the director has unreasonably limited carryover in this case.

- (a) The Director’s Limitation on Carryover Violates the Conjunctive Management Rules.

The central purpose of carryover storage in the upper Snake River basin is of little dispute. It is intended to satisfy the future needs of storage contractors (primarily surface water irrigators) who would otherwise go without water during a shortage. It is akin to an insurance policy against future water shortages. One of the primary questions lurking in the background of this case is how many years of insurance protection is carryover storage good for? Is it good for only one dry year? Or, can an irrigator carry over sufficient storage to protect against two or three consecutive years of drought? The conjunctive management rules contemplate the latter:

. . . 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.

IDAPA 37.01.11.042g (emphasis added). Use of the plural “dry years” instead of the singular “dry year” leaves no room for doubt that the purpose of carryover storage, as contemplated by the rules, is to provide insurance water for multiple dry years. This interpretation of the rules is consistent not only with the unmistakably plain language of the rule, but also with the reality of multiple-year droughts that have gripped the upper Snake River basin over the last century. Following this view, it would seem that a storage holder would be entitled to carry over sufficient storage water to offset a future multiple-year drought. Consequently, a sufficient quantity of carryover storage to meet future multiple-year needs would be deemed “reasonable” under the conjunctive management rules.

The director, however, has advanced a more restrictive, single-year, view of carryover. In his view, carryover is limited to the quantity of water needed to get through the next year only, not multiple dry years. For example, in 2005, the director determined reasonable carryover for each Coalition entity. His determination was limited to the

amount of storage water each entity would need to carry over so as “to have full supplies of water in 2006.” *Amended Order, Finding of Fact 119* (May, 2, 2005). The director again applied this limited, single-year approach in his 2007 determination of material injury. *See e.g., Fifth Supplemental Order, Finding of Fact 25* (May 23, 2007).

The disparity between the requirements of the conjunctive management rules and the director’s approach is glaring, but understandable. It is, no doubt, tempting for the director to want to gamble when it comes to insurance water, *i.e.*, carryover storage. By reducing the amount of insurance coverage (*i.e.*, water) that carryover storage will provide from multiple years to one year, the director is able to reduce the amount of mitigation water payable by the junior ground water users today.

The unfairness with manipulating reasonable carryover for this purpose is that it is the surface water irrigators who shoulder the risk of future water shortages and concomitant financial loss. These are the same people who decades ago entered into contracts (*i.e.*, purchased insurance) with the Secretary of Interior for space in Reclamation reservoirs to carry over water and thereby reduce the risk of financial disaster associated with a prolonged drought.

In his earlier decision on the constitutionality of the conjunctive management rules, Judge Wood recognized the potential for storage to be misused as a slush fund to avoid curtailing junior ground water users. He cautioned against limiting carryover storage for this purpose because of the future impact to senior water users when their reservoir space ran dry:

The purposes of storage was never to serve as a slush fund in order to allow the Director to spread water and avoid administering junior ground water rights in priority; nor was it ever intended to cover shortages caused by junior diversions.

Simply put, whether it is this year, next year, or years from now, a senior cannot exercise his water right and ‘use’ the water in storage if the water represented by the right is not present in storage.

Order on Plaintiffs’ Motion for Summary Judgment, Case No. CV-2005-0000600 (5th Jud. Dist. of Idaho, June 2, 2006). While the Idaho Supreme Court in *AFRD2* ultimately disagreed with the outcome reached by Judge Wood, his concerns remain valid in this proceeding.

In fairness to the director, there is likely a fine line between gambling with carryover and making a wise decision today without unduly jeopardizing the livelihoods of the Coalition farmers. The director, no doubt, believes he is doing the right thing. But that is not the issue. The conjunctive management rules prevent the director from unreasonably limiting carryover storage. The quantity of water allocated for carryover must, at a minimum, include sufficient insurance to “assure water supplies for future dry years.” IDAPA 37.01.11.042g (emphasis added). Limiting carryover to one year, as the director has done in this case, ignores the language and intent of the conjunctive management rules, provides a windfall to the junior ground water users, and unfairly jeopardizes the future economic viability of the Coalition farmers.

- (b) A Limitation on Carryover Increases the Risk of Shortage and Shifts that Risk onto the Storage Users.

Carryover storage and risk are two sides of the same coin. They are inseparable. Increase carryover storage (by constructing a new reservoir) and the risk and severity of future water shortages decreases. Conversely, the risk and severity of future shortages increases, if carryover storage is reduced or limited. The reduction can be a physical change, *i.e.*, removal of a dam, or a legal limitation, such as the director’s reasonable carryover determination. This conclusion is highlighted by the expert testimony of

Reclamation's expert, David A. Raff, Ph.D. *See e.g., Pre-Filed Expert Testimony of David A. Raff, Ph.D., P.E.*

In his testimony, Dr. Raff uses a series of hypothetical examples, one building on the other, to carefully illustrate the relationship between carryover storage and risk of shortage. The backdrop is the variable hydrology of the upper Snake River. Over the 94-year period highlighted in Dr. Raff's testimony, the flows of the Snake River at the Heise gauge when plotted on a graph resemble a series of jagged peaks and valleys. *See e.g., Id. p. 2, Figure 1.* The peaks represent wet years and the valleys depict dry years. *Id.* A horizontal line, representing the annual water demand, intersects the series of peaks and valleys. For purposes of Dr. Raff's hypothetical example, the annual water demand is the same each year. What is important to note is that in every year, the water supply either exceeds the horizontal water-demand line (which represents excess water) or the water supply is below the water-demand line (which represents a water shortage). *See e.g., Id. p. 3, Figure 2.*

Because the Snake River has variable flows, future dry (valley) years are virtually inevitable. But carryover storage can provide some relief to dry years. Plotted on a graph, it has the effect of smoothing out the dry, jagged valley years. *See e.g., Id. p. 3, Figure 3.* In practice, it allows irrigators to capture some of the water in wet years, carry it over to dry years, and use it to eliminate or reduce the severity of a water shortage.

In addition to providing an extra supply of water in dry years, carryover storage serves a second, more immediate purpose. It reduces risk. Because of carryover storage, farmers who have contracts to use space in Reclamation reservoirs can plan their future affairs with more certainty that they can weather an extended drought. This investment in storage water provides them some sense of security that their farm and livelihood will

not be swept away by prolonged drought. Carryover storage reduces both the risk of a future shortage and the severity of any future shortage. *Id.* pp. 4-5.

Since carryover storage reduces risk, the opposite is equally true. Less carryover storage increases the risk of future water shortages and increases the severity of future water shortages. In his expert testimony, Dr. Raff illustrates the increased risk of shortage (and severity of shortage) in a couple of hypothetical examples. *Id.* pp. 6-8, *Figures 4 and 5*. The precise numbers in the illustrations are not important. What is important is that a limitation on carryover will necessarily increase the risk of future water shortage and its severity.

Understanding that carryover storage and risk are inextricably joined is important for this reason: It eliminates any possible misconception that limiting carryover has no consequences. It does. If carryover is limited or reduced, as proposed by the director, the commensurate increased risk of a future water shortage is necessarily thrust upon the shoulders of the Coalition farmers. The span of years between the cause (a legal limitation on carryover storage) and the effect (empty reservoir space in a future prolonged drought) may make the reasonable carryover limitation seem palatable today. But limiting carryover has the effect of benefiting the ground water users at the expense of the senior water right holders, who shoulder the resulting increased risk of loss and greater uncertainty.

Limiting carryover under the guise of a reasonable carryover determination is not a panacea. It amounts to reallocation of risk. It takes some of the risk of loss off of the junior ground water user (who would otherwise have to mitigate for depletive impacts to storage this year) and places that risk of loss, *i.e.*, future water shortages onto the senior

water right holders. The legal question, of course, is whether this form of risk-reallocation is repugnant to Idaho’s prior appropriation doctrine.

The second part of Dr. Raff’s testimony deals with the increased variability of flows in the upper Snake River over the last two decades. *Id. pp. 8-10*. Increased variability means the wet years have become wetter and the dry years have become drier. *Id. p. 9*. Plotted on a graph, the peaks are higher and the valleys are lower now than in the past. This change—*i.e.*, increased variability—is significant because it poses a greater risk of future water shortages in that the dry years are now drier. *Id.* The wetter years cannot compensate for the drier years because the upper Snake reservoir system has a fixed capacity; it cannot store more water just because the years are now wetter. *Id.*

In light of the increased risk of shortage (associated with the increased variability of flows in the upper Snake River), it is fair to question the reasonableness of limiting carryover storage. It would seem that prudent water management would seek to maximize carryover storage as a means to offset the heightened risk of future shortages associated with increased variability. Maximizing carryover translates into a real “future need” for the irrigators who depend upon storage water to survive extended droughts. Limiting carryover, as the director has proposed, in this climate of increased variability is unreasonable.

- (c) The Congressional Authorizations and Financial Commitment for Construction of Palisades Reservoir Underscore the Importance of Carryover Storage in the Upper Snake River.

The historical documents² relating to Palisades, which are quoted at some length below, underscore the importance of carryover storage in the upper Snake River basin. These documents offer up for consideration the historical events which prompted the

² These documents are included in the exhibits submitted by Reclamation in this case and are further identified in footnote 1, *supra*.

need for more carryover storage. It was a large public and private investment in a reservoir designed primarily to hold over storage for use in future dry years. These historical documents offer a glimpse of the upper Snake River through the eyes of those farmers, water administrators, and lawmakers who were not far removed from the financial loss and hardship endured during the recent 1930's drought. Several themes emerge from the history leading up to the construction of Palisades Reservoir: (1) that a primary objective of Palisades would be to "hold-over" storage water from wet years to dry years, (2) the need for "insurance water" for the upper Snake irrigators, and (3) the need to maximize hold-over storage through efficient operation of the upper Snake River reservoir system.

The Palisades Project Planning Report, prepared by the Bureau of Reclamation in 1946, provides a concise summary of the historical events that triggered the need for Palisades Reservoir:

The drought in 1919 and the ensuing concerted action by the water users resulted in the construction of American Falls Reservoir in 1927. Stream flow records up to that date indicated that the reservoir would fill during every year; and that, in combination with storage already available in Jackson Lake, three fourths of the capacity of the American Falls Reservoir would meet all the needs of existing projects. Accordingly, only three fourths of the American Falls storage space was assigned to existing irrigation projects. The remaining capacity was reserved for development of new land.

An unprecedented drought which began in 1929 caused serious water shortages on the existing projects and gave rise to the fear that even the augmented water supply [from American Falls Reservoir] was not adequate. All plans for development of new land were temporarily laid aside, and the reserved space in American Falls was leased to the existing projects in 1931. Even with full use of American Falls Reservoir, most of the existing projects suffered serious water shortages in 1931, 1934, and 1935. The present lease of reserved space [in American Falls Reservoir] remains in effect through October 31, 1946. It is expected that arrangements will be made to assure that a substantial portion of the reserved space will continue to be available for the use of the existing projects until another reservoir is constructed for their use.

In part because of the unpredictably low run-off, American Falls Reservoir failed to fill during any year from 1929 to 1935. In part, however, failure to fill was the result of heavy drafts made on inflow to the reservoir during the winter for purposes of producing power downstream and of supplying through the canal systems domestic and stock water to cities and farms. An insignificant proportion of the water diverted through the canals during the non-irrigation season can be utilized for the latter purposes. Hence, about 500,000 acre-feet of water which could otherwise have been stored for irrigation use, were drawn from the river every winter for power and domestic purposes. These practices, established long before the reservoir was built, are deep-rooted and difficult to alter.

Thus the problem confronting the valley today is finding ways and means of increasing the water supply to assure that irrigation needs can be met during periods of abnormally low run-off such as occurred during the years 1929-1937. Elimination of justifiable fears of water shortage on existing projects should precede any additional development of new land. The firm supply of irrigation water can be increased at least cost by a combination of additional storage space on the Snake River above Heise and elimination of the present wasteful diversions from the river during the non-irrigation season. Palisades Reservoir, which has multiple purposes among which costs can be allocated, offers the most promising opportunity for securing additional irrigation storage space at reasonable cost.

Exhibit No. 7001, Report of the Regional Director, pp. 5-6 (paragraph numbering in original omitted) (information in brackets added). The 1946 planning report also emphasized the urgent need for hold-over storage in light of the unprecedented drought of the 1930's:

With the completion of American Falls Reservoir in 1927, the hazard of irrigation water shortage was believed to have been removed. Subsequent to 1928, however, during an unprecedented series of dry years, American Falls Reservoir failed to fill. It immediately became apparent that the 433,000 acre-feet of space in the [American Falls] reservoir reserved for development of new land would be needed by existing irrigated land. Accordingly, reserved space was leased to water users on existing projects, and this arrangement has continued ever since. Even use of this reserved reservoir space failed to provide the water needed. As a result, serious crop losses were experienced. In 1931, the losses were approximately \$3,000,000; in 1934 there were about \$7,000,000, and in 1935, \$1,000,000.

Such serious losses revealed the urgent need for additional storage in order to hold over the excess water of wet years for use during years of low precipitation and for the elimination of wasteful water-use practices which are prevalent in the area.

*Exhibit No. 7001, Substantiating Report, p. 6.*³

The primary objective of Palisades to provide hold-over storage was made clear in early reports and correspondence. As noted in one report issued by the Bureau of Reclamation:

The primary objective of the project is to provide hold-over storage during years of average or above-average precipitation for release in ensuing dry years to lands of the Upper Snake River Valley—the area served by diversions from the river above Milner Dam.

Exhibit 7008, Palisades, Idaho Project History for 1951 and Prior Years Volume 1, p. 15.

The usefulness of Palisades as a hold-over supply, as opposed to a primary supply, was explained well in a 1954 letter from the Regional Director of the Bureau of Reclamation to the attorney for the Salmon River Canal Company:

Palisades was planned to provide an insurance supply of water to lands now irrigated. Our water supply studies have indicated that construction and operation of Palisades Reservoir will reduce prospective shortages during the critical period [referring to the extended drought of the 1930's] by 1 acre-foot for each 3 acre-feet of active space in the reservoir.

...

Many of the individuals who have made applications for Palisades space are undoubtedly under the same misconception regarding the yield of such space. If these individuals understood the hazards they face, they would probably not be interested in using Palisades space as a source of water for new land. Mr. Crandall and Mr. Newell, of course, were aware of this situation when they acted on the applications for Palisades space. That was undoubtedly one reason why unfavorable action was taken on the application of the Salmon River Canal Company.

...

It is because of the nature of the yield of Palisades space that we have encouraged its use as a supplemental supply for districts having Snake River rights and already having a full supply except during the period of critical flows. Under such a use we now have contracts with or reservations for districts representing 670,000 acres. In contrast, if Palisades were to be used as a source of water for new land, it would provide a dependable supply for only about 30,000 acres. For this reason, we believe the benefit from the use of Palisades as a supplemental

³ The Palisades planning report (Exhibit 7001) actually consists of two reports: the Report of the Regional Director and the Substantiating Report. To avoid confusion, citations to Exhibit 7001 will indicate whether it is to the Regional Director's report or the Substantiating Report.

supply is much greater than if used as a base supply. In the case of the Michaud Flats Project and the North Side Pumping Division, where we have proposed to use Palisades space for new land, we will combine it with the firm-yielding American Falls space. Used in this manner Palisades becomes an insurance supply to back up the American Falls space during the critical [drought] period.

Exhibit 7012, pp. 1, 2, 3-4.

The need for “insurance water” was expressed during the congressional hearings on Palisades. During the joint congressional subcommittee hearings held in August 1949, Lynn Crandall, testified that he served as the watermaster for the upper Snake River and had held that position since 1929. *Exhibit 7006, p. 77.* He testified about the insufficient reservoir capacity to supply adequate water in drought years and the need for insurance water:

The dry year of 1931, with crop losses of \$3,000,000 due to water shortage, demonstrated that the existing reservoirs on [sic] Snake River were of insufficient capacity to provide an adequate water supply in years of drought. Largely due to Senator Borah’s influence, Mr. Elwood Mead, then Commissioner of Reclamation, was induced in 1933 to begin the exploration of new reservoir sites on the stream. While these investigations were in progress, the extremely dry year of 1934 occurred, causing crop losses of over \$7,000,000, followed by losses in 1935 of \$1,000,000 due to water shortages. . . .

. . .

I do not know of a more feasible or meritorious or necessary project under consideration by the Bureau of Reclamation than this one proposed on the Snake River. It will pay the cost many times to the Nation during its useful life, which will last for centuries, due to the relatively small amount of silt carried by [sic] Snake River. It combines insurance water for the dry years for lands now under irrigation, flood protection, needed power generation, new lands for war veterans, recreation, and wildlife benefits of substantial magnitude.

Exhibit 7006, p. 77-78.

Maximizing the quantity of carryover storage was also emphasized in the reports. In a 1949 supplemental report on Palisades, the Bureau of Reclamation discussed how efficient operation of the three-reservoir-system (American Falls, Jackson Lake, and the-

proposed Palisades Reservoir) could maximize the quantity of storage water that could be carried over from wet cycles to dry cycles:

By coordinating the operation of Palisades Reservoir with the existing American Falls and Jackson Lake Reservoirs, the maximum volume of storage water can be carried over in all three reservoirs from wet cycles to dry cycles. The amount of that carry-over would be substantially greater than would be the case if Palisades were operated independently from the existing system. Through this coordination, Jackson Lake could be operated primarily as a holdover reservoir, and no irrigation water would be drawn from it until Palisades Reservoir had been emptied. The additional, usable return flow made available from application of this hold-over storage will augment further the supply of irrigation water during drought periods. An operation study of the three-reservoir system, taking account of these factors, shows that storage in Palisades Reservoir and the elimination of winter diversions in the upper half of the Valley would have made enough additional water available to eliminate all shortages on existing projects during the past 60 years, except those in the extremely dry years of 1934 and 1935. Even in those years, however, an appreciate reduction would have been made in the shortages.

Exhibit 7005, pp. 10-11.

As evident from the above history of Palisades, carryover has long been an important issue in the upper Snake River basin. The history of Palisades also serves as a reminder of the hazards that can befall the surface water irrigators if they are without sufficient holdover or insurance water. The fact that Palisades exists today underscores the need to maximize carryover storage in the upper Snake River.

- (d) Limiting Carryover is Inconsistent with the Idaho Legislature's 1973 Amendment of Idaho Code § 42-202.

Limiting carryover appears at odds with the Idaho Legislature's 1973 amendment of Idaho Code § 42-202. The origins of this legislation began two years earlier, when the then-IDWR director, Keith Higginson, struggled with licensing the storage permit for Palisades Reservoir. By order dated August 2, 1971, the director returned to Reclamation the Proof of Beneficial Use submitted for Palisades. *Exhibit no. 7016*. It was returned because it lacked "information from which a determination can be made as to the need

for water for irrigation of project lands in excess of the statutory and reasonable limits.”

Id. At the time, the director interpreted sections 42-202 and 42-220 of the Idaho Code as limiting the total diversion of water to 5 acre-feet per acre of irrigated land. *Id.* With this limitation, the director was unable to issue a water right license for the full 1.2 million acre-feet active capacity of Palisades.

In 1973, Senate Bill 1164 was introduced to deal with the problem of licensing storage in Palisades Reservoir in excess of the five-acre-foot-per-acre limitation. The bill would solve the problem by allowing an irrigator to divert “up to and including 1 cubic feet [sic] of water per second of normal flow for each 50 acres of land to be irrigated as well as 5 acre feet of stored water per annum for each acre of land to be so irrigated before an appropriator must show to the satisfaction of the Department of Water Administration that a greater amount is necessary.” *Exhibit 7015, Senate Journal pp.*

135-36. In his written testimony on the bill, Director Higginson expressed his position on the effect of the passage of S.B. 1164 upon the license for Palisades Reservoir:

. . . As I understand the amendment and the proposed ‘Letter of Intent’ to be spread on the Journal, the Legislature would indicate its intent that without regard to the amount of water an appropriator held by direct flow from wells, streams, or other sources, he could appropriate up to 5 acre-feet of stored water per acre for irrigation without being required to submit evidence of the need for that storage.

As we review the Palisades Reservoir filing, passage of this amendment would eliminate the necessity for a showing by the U. S. Bureau of Reclamation of need for the water provided total storage water for project lands does not exceed 5 acre-feet of water per project acre. The license would be issued by this office and I assume the plaintiff canal companies would withdraw their lawsuit.

Id. Senate Bill 1164 became law on March 16, 1973, and the director subsequently issued the Palisades water right license.

The legislative history and passage of S.B. 1164 further underscores the reasonableness of maximizing carryover in the upper Snake River storage system. As

discussed above, Palisades was built in large part to carry over water from wet years to offset the deleterious effects of an extended drought. The legislature, through passage of Senate Bill 1164, recognized the beneficial need for carryover storage by allocating an additional five acre-feet of water per acre in addition to the one miner's inch per acre already allotted from natural flow or other sources. While the Legislature's actions thirty years ago may not be dispositive of the director's reasonable carryover determination in this case, it shows that limiting carryover storage runs contrary to the state's historical support for maximizing carryover in the upper Snake River reservoir system.

- (e) The "Timing" for Mitigation of Reasonable Carryover is Arbitrary and Capricious.

Aside from quantity limitations, the second troubling aspect of the director's reasonable carryover determination is timing. By definition, carryover storage is storage water that is carried over from the end of the current year into the next year. The director's orders turn that definition of carryover on its head. For example, in 2007 the director predicted carryover shortfalls of 43,017 acre-feet for American Falls Reservoir District No. 2 and 38,400 acre-feet for the Twin Falls Canal Company (TFCC). *Fifth Supplemental Order, Conclusion of Law No. 5 (May 23, 2007)*. Rather than have the junior ground water users replace that storage water in the current year, the director postponed their mitigation obligation until 2008:

Providing this carryover water is an obligation that IGWA and its member ground water districts must meet in 2008. Therefore involuntary curtailment should not be required at this time to meet this obligation.

Id. By delaying the replacement of carryover storage shortages until the following year, the director has rendered mitigation of reasonable carryover shortages meaningless.

To illustrate this point consider what will happen, for example, to the 38,400 acre-feet of carryover storage credit owing to TFCC in 2008. Around May, the director will—

as he did in 2007—estimate the water supply for the 2008 irrigation season, compare it to the estimate water demand, and make a prediction of water shortage (material injury) for that irrigation season. *See e.g., Fifth Supplemental Order, Findings of Fact 13-26 (May 23, 2007)*. Assume, for purposes of this example, the director makes a finding that TFCC will be short 58,914 acre-feet during the 2008 irrigation season (this is the same amount the director initially predicted for the 2007 irrigation season). What happens to the 38,400 acre-feet of reasonable carryover storage owing to TFCC? Is it added to the predicted shortfall of 58,914 acre-feet for total a mitigation obligation of 97,314 acre-feet payable by the junior ground water users in 2008? No. As discussed in Part 1(a), above, the director has limited reasonable carryover to the quantity of storage needed to get through a single dry year, not multiple dry years. This means that the reasonable carryover shortfall of 38,400 acre-feet in 2007 gets merged into the irrigation-season shortfall of 58,914 acre-feet estimated for 2008, so the total mitigation owing in 2008 will not exceed 58,914 acre-feet. In short, TFCC receives no mitigation water for its reasonable carryover shortage.

The same result occurs even if we change the example. Assume that in May 2008 the director predicts TFCC will suffer no shortage during the irrigation season. What happens to the 38,400 acre-feet of carryover shortfall from the prior year? Under the director's orders, the carryover shortfall becomes a credit owing to TFCC (and a debit payable by IGWA) that is carried forward from year to year until the storage space for TFCC fills at which time all credits and debits are erased and the parties start over again with a clean slate:

Mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with USBR fills. At that time, any remaining debits or credits will cancel.

Fifth Supplemental Order, Conclusion of Law 5 (May 23, 2007).

If the director's orders are upheld, mitigation for reasonable carryover shortages will be limited to three options: (1) It is merged into the following year's material injury determination; (2) It is carried over as a debit/credit to the following year; or (3) It is cancelled because the affected reservoir space fills. Under any of these options, mitigation for reasonable carryover is never paid. It is entirely illusory. Rather than perpetuate a fiction created by the director's orders, it would be more transparent to outright deny the Coalition entities any right to receive mitigation for their reasonable carryover shortfalls. The effect would be the same.

The above example highlights the need for carryover to be provided in time. That means it must be provided in the year that a shortage in reasonable carryover is determined to have occurred. Irrigators cannot depend on winter precipitation and snow pack to fill the reservoirs sufficiently to meet the following year's irrigation needs and reasonable carryover requirements. Even the director, in an editorial opinion earlier this year, recognized the possibility that there might not be enough water for mitigation next year:

Most of the reservoirs in the upper Snake River basin have been drained by drought. Carryover water storage from a normal water year in 2006 barely supplied water users through this past spring and summer. As we head into the next growing season, there might not be water available for mitigation efforts, and large scale curtailments might be the only option to satisfy the water calls.

Exhibit 7017.

In the end, carryover is meaningful only if it is provided in the year of the carryover storage shortage. Delaying mitigation for carryover to the next year is of no value. It is a hollow promise to the farmers whose livelihoods depend upon adequate

carryover to pull through the type of prolonged droughts historically experienced in the upper Snake River basin.

2. CONJUNCTIVE MANAGEMENT SHOULD TAKE INTO ACCOUNT MULTIPLE YEAR IMPACTS FROM GROUNDWATER PUMPING.

The scope of conjunctive management on the ESPA is another central issue in this case. Does the state follow the single-year approach proposed by the director or will conjunctive management take into account multiple-year impacts from ground water pumping? Idaho statutes and case law support the latter. In Basin-Wide Issue 5, Judge Burdick issued a decision regarding the necessity of having a general provision on conjunctive management. *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits Subcase 91-00005 (Jul. 2, 2001)* (hereinafter “BWIS”). Judge Burdick pointed to the complexity created by the delayed impacts of junior wells in a conjunctive management regime. He questioned how far in advance of an anticipated impact on seniors could junior ground water rights be curtailed:

The delayed impact of junior well diversions on senior surface rights raises questions regarding the point in time that a junior right can be curtailed. Since curtailment of a junior right may not have an immediate affect on senior rights, legal and factual issues arise concerning how far in advance of an anticipated impact on the senior surface right a curtailment can occur.

BWIS at 31. While not answering the question directly, Judge Burdick hinted that multiple-year impacts would be considered in any type of conjunctive administration:

Further, any anticipated future impact would also need to factor into account the likelihood of intervening climatic conditions such as a wet year.

Id. By envisioning that the director would look at the likelihood of an intervening wet year or, possibly, dry year, it appears that Judge Burdick believed the director would consider impacts beyond a single year. Idaho Code § 42-237a(g) supports this broader

view. It provides that a junior ground water right cannot be exercised if it would affect either the “present or future use” of any senior water right:

Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right

Id. Anticipating future year or multiple-year impacts from junior ground water pumping is also consistent with well-established Idaho case law that a “junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under the conditions as they existed at the time the appropriation was made.” *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 9 (1944).

The director has opted for a more limited version of conjunctive management. Only impacts in the current year’s irrigation season—April through October—are considered.⁴ For example, in the *Fifth Supplemental Order (May 23, 2007)*, the director predicted material injury for only 2007. He estimated water supply for the current year based upon Heise flow forecasts and estimated storage accruals. *See e.g., Fifth Supp. Order at 8-11.* Then, in late May 2007, the director predicted material injury for the current year, after most crops had been planted and irrigators had invested in their agricultural enterprises.

The director made no attempt to predict impacts for the following year or otherwise account for multiple-year impacts of ground water pumping. As illustrated by the pre-filed expert testimony of Patrick McGrane, conjunctive management of junior ground water pumping through curtailment during the multiple-year drought of 2001 through 2005 would have increased winter storage in the upper Snake reservoirs by the following amounts: 94,647 acre-feet in 2002; 150,978 acre-feet in 2003; 192,524 acre-

feet in 2004; and 225,565 acre-feet in 2005. *Pre-Filed Expert Testimony of Patrick C. McGrane, P.E.*, pp. 12-13. In each of those years, the upper Snake reservoirs had ample space to capture the additional storage that would have accrued in the river through curtailment of junior ground water pumping. *Id. at p. 12, Table 3.* For instance, on April 1, 2004, American Falls Reservoir had 413,626 acre-feet of empty space. *Id.* In total, all seven of Reclamation's upper Snake reservoirs (which include American Falls) had 2,007,022 acre-feet of empty space as of April 1, 2004, more than adequate to capture and hold the estimated 192,524 acre-feet of additional storage water that would have accrued from the end of the previous irrigation season had there been curtailment of junior ground water pumpers. *Id.*

In summary, the director's single-year approach to conjunctive management does nothing to cure the multiple-year impacts to storage like those witnessed during the 2001-2005 drought period. Consistent with the Idaho Constitution, Idaho Code § 42-237a(g), and Judge Burdick's BWI5 decision, the scope of conjunctive management should be broadened to take into account multiple-year impacts of ground water pumping.

CONCLUSION

The key issues in this case can be traced back to risk or, more precisely, the reallocation of risk. Increased risk of future water shortages can be shifted to the senior surface water users either by limiting carryover storage, not requiring carryover shortages to be mitigated in the year they occur, or failing to account for the multiple-year impacts of ground water pumping. A central underlying question in this case is whether the prior appropriation doctrine allows risk of future water shortages to be shifted from the junior ground water users to the senior surface water users. If the answer is "no," the director's

⁴ As discussed in Part I, above, the director's allowance of reasonable carryover does nothing to protect against impacts in the following year.

reasonable carryover determinations and limited scope of conjunctive management must be deemed arbitrary and capricious.

DATED this 21st day of December 2007.

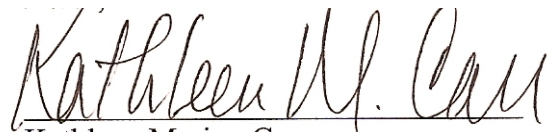

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CERTIFICATE OF SERVICE

I hereby certify on this 21st day of December 2007, I caused to be served a true and correct copy of the foregoing **Reclamation's Trial Brief** via email, and additional methods of service where specifically indicated, to the individuals listed below.

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