

**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,)	FINAL ORDER REGARDING
AMERICAN FALLS RESERVOIR DISTRICT #2,)	THE SURFACE WATER
BURLEY IRRIGATION DISTRICT, MILNER)	COALITION DELIVERY CALL
IRRIGATION DISTRICT, MINIDOKA IRRIGATION)	
DISTRICT, NORTH SIDE CANAL COMPANY,)	
AND TWIN FALLS CANAL COMPANY)	
_____)	

FINDINGS OF FACT

I. Procedural Background

1. This matter came before the Director of the Department of Water Resources (“Director” or “Department”) on January 14, 2005 with the filing of a letter (“Letter”) and petition (“Petition”) by members of the Surface Water Coalition (“SWC”).¹ The Letter and Petition sought administration and curtailment of junior ground water rights and the designation of the Eastern Snake Plain Aquifer (“ESPA”) as a Ground Water Management Area.²

2. Intervention in this matter was granted by order of the former Director, Karl J. Dreher, to the following parties: City of Pocatello (“Pocatello”), Idaho Dairymen’s Association (“IDA”), Idaho Ground Water Appropriators, Inc. (“IGWA”), State Agency Ground Water Users (“SAGWU”),³ and the United States Bureau of Reclamation (“USBR”).

3. On February 14, 2005, the former Director entered the first of a series of orders (“February 2005 Order”) in this matter, which provided an initial response to the Letter and Petition. The February 2005 Order was followed by an order issued on May 2, 2005 (“May 2005

¹ The Surface Water Coalition 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.

² The SWC’s request for designation of a Ground Water Management Area was denied by the Director in his initial February 14, 2005 Order (“February 2005 Order”). *February 2005 Order* at 34, ¶ 3. The Hearing Officer did not disturb this conclusion in his April 29, 2008 *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*.

³ SAGWU is made up of the departments of Fish & Game, Health & Welfare, Juvenile Corrections, and Transportation.

Order”), which superseded an order issued on April 19, 2005. Based on forecasting from the USBR and the United States Army Corp of Engineers (“USACE”) for the unregulated inflow into the Upper Snake River Basin at the Heise Gage, the May 2005 Order predicted that some members of the SWC would be materially injured by junior ground water pumping and ordered curtailment of junior users in lieu of acceptable replacement water being provided to mitigate for the depletions causing the injury. During the 2005, 2006, and 2007 irrigation seasons, the Director issued seven supplemental orders regarding material injury predictions to the SWC. The foundational findings made by the former Director in the May 2005 Order are the subject of much at issue in this proceeding.

4. 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 (2007), it was not until the summer of 2007 that the parties agreed to a hearing schedule and the appointment of an independent Hearing Officer. *See Order Approving Stipulation and Joint Motion for Rescheduled Hearing* (August 1, 2007).

5. On August 1, 2007, the Director appointed Gerald F. Schroeder to preside as independent hearing officer (“Hearing Officer”) in these matters for the purpose of developing a record and to prepare a recommended order for review by the Director. *Order Appointing Hearing Officer*. The Director “maintain[ed] jurisdiction over the ongoing administration of water rights related to this matter.” *Id.* at 1.

6. On January 16, 2008, a hearing was commenced before the Hearing Officer at the Department. Over the course of approximately fourteen days, evidence and testimony was presented to the Hearing Officer by the Department and participating parties: IGWA, Pocatello, SWC, and USBR. On April 29, 2008, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (“Recommended Order”). In his Recommended Order, the Hearing Officer stated that “Unless modified explicitly or by necessity from the recommendations in this opinion, the findings and conclusions of the Director’s in the various Orders are accepted.” *Recommended Order* at 24. Petitions for reconsideration were filed and considered by the Hearing Officer. *Order Regarding Objections to Recommended Order* (June 10, 2008) (“Response Order”).

II. Exceptions Filed with the Director

7. Exceptions to the Hearing Officer’s orders were filed with the Director by IGWA, Pocatello, SWC, and USBR. The exceptions filed by the parties have been reviewed and considered by the Director. The record developed at the hearing has been reviewed and considered by the Director.

8. Findings of Fact set forth in the Director’s orders in the above-captioned matter, unless expressly discussed and modified herein, are incorporated into this order by reference. Unless discussed, the recommendations of the Hearing Officer are accepted. If an exception is not discussed herein, the Findings of Fact entered previously by the Director and recommendations of the Hearing Officer govern.

III. The Hearing Officer's Recommended Order

A. Replacement Water Plans

9. In his Recommended Order, the Hearing Officer stated that replacement water plans should go through the procedural steps for approval of mitigation plans outlined in Rule 43 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CM Rules").

The replacement water plan approved by the former Director in the May 5 (sic), 2005 Order and Supplemental Orders is in effect a mitigation plan. However, it does not appear that the procedural steps for approving a mitigation plan were followed. The initial Order was entered in an emergency situation in which there was a call for administration in times of stress on the water supply. It was anticipated that there would be a protocol for the presentation of objections, but litigation over the validity of the Conjunctive Management Rules apparently sidetracked development of the process. At this stage of the proceedings there will be ongoing administration, and the procedural steps for a mitigation plan should be developed. In the absence of a pre-approved mitigation plan, after the Director has made a determination of material injury which would warrant curtailment, a mitigation plan for replacement water or other forms of mitigation may be considered in accordance with the procedural steps of CM Rule 43. If no plan is approved and there is a finding of material injury, curtailment must follow.

Recommended Order at 64-65.

10. The Director agrees with the Hearing Officer that IGWA should file a Rule 43 mitigation plan now that a record has been developed. But the Director also finds it necessary that replacement water plans be an available administrative tool if junior water users are able to provide water to seniors, during the season in which it is needed, in the amount that would have accrued to the senior if curtailment were ordered—thereby making the senior whole during the pendency of the proceedings while not causing irreparable harm to the junior prior to a hearing. Replacement water plans serve a necessary role in the interim period after a delivery call is filed by a senior water user and before a record is developed upon which juniors can base a mitigation plan.

11. In January 2005, the SWC filed its delivery call with the Director. By February, the Director issued his initial order responding to the call but could not predict material injury until the USBR and USACE issued its joint operating forecast. *February 2005 Order* at 33, ¶ 3. Approximately three months later, the Director issued the May 2005 Order. The May 2005 Order was issued prior to a hearing to allow the parties to present evidence and testimony. Based on the Director's review of the delivery call, the predicted forecast, and other information available to him at the time, the Director found that some members of the SWC would be materially injured by junior ground water diversions and ordered involuntary curtailment of junior users holding ground water rights with priorities of February 27, 1979 and later. *May 2005 Order* at 25, ¶ 116; 44, ¶ 53.

12. The Director's order provided, however, that junior ground water users could continue to divert if they provided water in the amount of predicted shortage to members of the SWC that were attributable to their depletions. *Id.* at 45-46, ¶¶ 1-7. To that end, the Director authorized the filing of replacement water plans for approval. *Id.* If a replacement water plan was not received, if the plan was not approved, or if the approved plan did not follow the terms of approval, junior ground water rights would be subject to immediate, involuntary curtailment. *Id.* at 46, ¶ 8. Replacement water plans were filed by IGWA and approved by the Director in each of the years that injury was predicted to members of the SWC.

13. As found by the Hearing Officer, "To date the [storage] system has not run out of water, and it appears there will be water available somewhere to meet irrigators' needs." *Recommended Order* at 6. In its replacement water plans, IGWA has utilized the storage system to provide replacement water to injured members of the SWC.

14. If the Director had required the approval of a Rule 43 mitigation plan as a condition for the junior ground water users to continue diverting after the May 2005 Order, junior ground water users could have been immediately curtailed without a hearing on the SWC delivery call. The curtailment could have been ongoing until IGWA had an understanding of the amount of water owing to members of the SWC under its delivery call, was able to formulate the necessary details for a mitigation plan, and was able to comply with the procedural requirements in Rule 43.

15. Once a record is developed through the hearing process on the delivery call, a formal mitigation plan should be submitted by junior ground water users to mitigate material injury to the senior. Since a Rule 43 mitigation plan serves as a long term solution to material injury to senior water users, it is necessary for junior ground water users to have a proper record upon which to develop the plan because the amount of water sought by the senior in its delivery call may not be the amount attributable to junior ground water depletions. Given the complexities associated with understanding the amount of depletion caused by junior ground water users that results in material injury, junior ground water users would be unable to formulate a Rule 43 mitigation plan that would properly address material injury to senior water users. In the period between the filing of the delivery call and a hearing on the call, the Director should have the discretion not to order curtailment in the absence of a Rule 43 mitigation plan if the Director can quantify material injury to the senior water user. If the junior ground water user is unable to secure and timely provide the predicted shortage in the season of need due to junior ground water depletions, curtailment could follow. Authorizing replacement water plans ensures that the senior water user making the delivery call is made whole during the pendency of the proceeding and the junior is not irreparably harmed prior to a hearing on the call.

B. Timing of Reasonable Carryover

16. In the May 2005 Order, the Director calculated an amount of reasonable carryover for members of the SWC and predicted shortages to that carryover for the 2006 irrigation season. *May 2005 Order* at 26-27, ¶ 118-120. As found by the Hearing Officer,

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 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.

Recommended Order at 58 (emphasis added).

17. During the hearing, the former Director stated that the predicted reasonable carryover shortfalls in the May 2005 Order for the 2006 irrigation season should have been supplied by IGWA in the 2005 irrigation season. In the Director's Fifth, Sixth, and Seventh supplemental orders issued in 2007, IGWA has been required to provide any predicted shortfalls to reasonable carryover in the season in which the water can be put to beneficial use.

18. The difficulty in requiring that predicted carryover shortfalls be provided in the irrigation season before the water can be put to beneficial use—some six to twelve months in advance—lies in historical information regarding the reservoir system in the Upper Snake River and has been further emphasized in each year since the SWC filed its delivery call in 2005.

19. 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." *Recommended Order* at 15. Moreover,

The climate is sometimes generous and sometimes stingy with precipitation, neither of which under the current state of science is predictable for 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.

....

As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in AFRD#2.

Id. at 62-63 (emphasis added).

20. In 2005, the Director predicted that certain members of the SWC would experience shortfalls in reasonable carryover in the 2006 irrigation season. *May 2005 Order* at 27, ¶ 120. In 2006, the reservoir space held by members of the SWC mostly filled, thereby obviating any predicted injury to 2006 reasonable carryover. *Third Supplemental Order* at 18-

20, ¶¶ 49, 54-56. No predictions were made as to carryover shortages in 2006 by the former Director for the 2007 irrigation season. In 2007, the Director predicted reasonable carryover shortfalls for 2008, but did not require replacement water to be provided until the 2008 irrigation season. *Fifth Supplemental Order* at 17-18, ¶ 10. In 2008, reservoir space held by members of the SWC again mostly filled.

21. With the amount of fill of the reservoir system, if replacement water for reasonable carryover shortages was provided in 2005 and 2007 for predicted shortages in 2006 and 2008, the water acquired by IGWA would not have been required for use by members of the SWC. It is appropriate to find that replacement water for predicted shortages to reasonable carryover should be provided in the season in which the water can be put to beneficial use, not the season before.

C. Prediction of Material Injury

22. According to the Hearing Officer, “The practicalities of hydrology justify a departure in ground water administration from surface to surface water administration in the interest of irrigators and the public.” *Recommended Order* at 43. The Hearing Officer approved of the former Director’s methodology of establishing a minimum full supply for members of the SWC from which to base his prediction of material injury. “Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at a base and works up according to need, the end result should be the same.” *Id.* at 44. The Hearing Officer was critical, however, of the former Director’s choice of 1995 as the year for establishing the minimum full supply because “1995 was in the top third of wet years. . . .” *Id.* at 45.

23. “[T]here should be adjustments if the process of establishing a base different from the licensed amount is to be utilized in future administration. These might well have been addressed but for the interruption of the process by challenges to the validity of the Conjunctive Management Rules and the consequent uncertainty in the process.” *Id.* at 44-45. Adjustments for climate variability are necessary in using the minimum full supply methodology. *Id.* at 45-46.

24. “The use of the term ‘minimum full supply’ has become a lightning rod of discontent for all parties.” *Id.* at 51. The Director agrees that the term minimum full supply should be changed. In order to be more consistent with the CM Rules, the term that will replace minimum full supply is reasonable in-season demand.

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

D. ESPA Ground Water Model

26. Once the Director calculated the amount of water predicted to not be available to the SWC, the Hearing Officer found that the Director properly used the ESPA ground water model to arrive at a priority date that would “remediate the material injury” in the impacted reach of the Snake River. *Recommended Order* at 32. Junior ground water users can only be responsible for replacing the amount of water that the ESPA ground water model predicts would accrue to a particular reach of the Snake River as a result of curtailment. *May 2005 Order* at 27-28, ¶¶ 123-124. The Hearing Officer also found that the ESPA ground water model represents the best science available for purposes of conjunctive administration and that the Director properly applied a ten percent margin of error to avoid curtailing junior ground water users “who might have no effect on enhancing reach gains.” *Id.* at 33.

27. Findings of Fact later determined to be Conclusions of Law are herein made as Conclusions of Law.

CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the Director’s orders in the above-captioned matter, unless expressly discussed and modified herein, are incorporated into this order by reference. Unless discussed, the recommendations of the Hearing Officer are accepted. If an exception is not discussed herein, the Conclusions of Law entered previously by the Director and recommendations of the Hearing Officer govern.

2. The independent Hearing Officer in this matter was appointed by the Director pursuant to IDAPA 37.01.01.410, -413, and the provisions of chapter 52, title 67, Idaho Code. According to IDAPA 37.01.01.720, “Recommended Orders,” “Recommended orders are orders issued by a person other than the agency head that will become a final order of the agency only after review of the agency head (or the agency head’s designee) pursuant to Section 67-5244, Idaho Code.

3. Idaho Code § 67-5244(3), “Review of recommended orders,” states that “The agency head on review of the recommended decision shall exercise all the decision-making power that he would have had if the agency head had presided over the hearing.”

4. “The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251; IDAPA 37.01.01.600.

5. Idaho Code § 42-602 states that “The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine.” According to the Hearing Officer, “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 clear also that the Legislature [in Idaho Code § 42-602] did not intend to sum up water law in a single sentence of the Director’s authority.” *Recommended Order* at

38. The Idaho Supreme Court has recently 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.

6. While replacement water plans are not listed in the CM Rules, the former Director appropriately exercised his discretion in authorizing the process as an interim measure for providing mitigation to senior water users before the Director could conduct a hearing to determine the extent of material injury. The CM Rules apply when a delivery call is made by a senior surface or ground water user against the holder of a junior ground water right. CM Rule 20.04. CM Rule 20.03 states:

These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

7. CM Rule 42 lists eight factors that may be considered by the Director in determining whether junior ground water rights are causing material injury to senior water rights. As affirmed by the Hearing Officer, “Contrary to the assertions of the Surface Water Coalition, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42.” *May 2005 Order* at 43, ¶ 47.

8. CM Rule 10.14 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 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.”

9. 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).

10. 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 illustrated by the former Director during cross-examination by an attorney for the Surface Water Coalition:

Q: 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 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 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 understand 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.

Transcript, Volume 1, pages 161-163.

11. 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)).

12. If the Director had not authorized replacement water plans but instead required the filing of a Rule 43 mitigation plan, junior ground water users could have been curtailed from the time the May 2005 Order was issued until a plan was filed and an order on the plan issued. If junior ground water rights had been curtailed, the SWC would have realized some benefit from increased reach gains in the Snake River. However, unlike curtailment in a surface water to surface water delivery call, curtailment in a conjunctive management call would 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)). “Curtailment of the ground water user may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous farm economy.” *Recommended Order* at 43.

13. By authorizing replacement water plans, injured members of the SWC were made whole during the season of need by IGWA securing surface water for use by the SWC. Because ground water does not return to the system as quickly as surface water, injured members of the SWC received more water during the season of need through the replacement plan process than they would have received through curtailment. Junior and senior water rights are valuable real property rights that are afforded the protections of due process. Idaho Code § 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). Had junior ground water users been involuntarily curtailed without the ability to provide replacement water, junior ground water users would have been irreparably harmed prior to a hearing on the delivery call filed by the SWC.

14. Now that a record has been developed, IGWA should file a Rule 43 mitigation plan to mitigate material injury to the SWC. But during the time between the filing of a delivery call by a senior water user and the development of a record, it was proper for the former

Director, in balancing the principles of the prior appropriation doctrine as established by Idaho law, with the necessities of due process, to authorize replacement water plans. Idaho Const. Art. 15, §§ 1, 3, and 7; Idaho Code §§ 42-101, -226, and -602; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 422, 319 P.2d 965, 968 (1957); *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1912). To require curtailment after a delivery call is filed but before a record is developed ignores the complexities of conjunctive administration, would not make the senior whole, and would cause irreparable harm to junior ground water users prior to a hearing on the delivery call.

15. The former Director found that shortfalls to reasonable carryover should be provided the season before the water can be put to beneficial use. As evidenced in 2006 and 2008, if the reservoir system mostly fills and had IGWA been required to provide reasonable carryover shortfalls to injured members of the SWC, the secured water would have been in excess of the amount needed for beneficial use by members of the SWC in the season of need.

16. As found by the Hearing Officer, the reservoir system fills two-thirds of the time, and storage water has been historically available for rental or lease even during times of drought. *Recommended Order* at 6, 15. To order reasonable carryover the year prior to the season of need would result in waste of the State's water resources. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 422, 319 P.2d 965, 968 (1957); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900). It is appropriate for the Director to notify the parties in the fall prior to the upcoming irrigation season of predicted carryover shortfalls for planning purposes. But it is not appropriate to require junior ground water users to provide predicted shortfalls until the spring when the water can be put to beneficial use during the season of need: "As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in AFRD#2." *Recommended Order* at 62-63.

17. As stated previously by the former Director and affirmed by the Hearing Officer, the ESPA ground water model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There currently is no other technical basis as reliable as the simulations from the ESPA ground water model that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.

18. As stated previously by the former Director and affirmed by the Hearing Officer, the degree of uncertainty associated with application of the ESPA ground water model is 10 percent.

ORDER


Based upon and consistent with the foregoing, the Director hereby orders as follows:

That the findings of fact and conclusions of law entered herein, and the findings of facts and conclusions of law entered by the former Director and the Hearing Officer in these matters, unless discussed and modified in this FINAL ORDER, are hereby accepted. All other requests for relief, unless specifically discussed herein are hereby denied.

That this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

DATED this 5th day of September 2008.


DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

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