

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

A&B IRRIGATION DISTRICT)
AMERICAN FALLS RESERVOIR)
DISTRICT #2, BURLEY IRRIGATION)
DISTRICT, MILNER IRRIGATION)
DISTRICT, MINIDOKA IRRIGATION)
DISTRICT, NORTH SIDE CANAL)
COMPANY and TWIN FALLS CANAL)
COMPANY,)

Case No CV 2008-0000551

UNITED STATES OF AMERICA,)
BUREAU OF RECLAMATION,)
)
Petitioners,)

**PETITIONER UNITED STATES'
OPENING BRIEF**

vs.)

DAVID K. TUTHILL, JR., in his capacity)
as Director of the Idaho Department of)
Water Resources, and the IDAHO)
DEPARTMENT OF WATER)
RESOURCES,)
)
Respondents.)

IN THE MATTER OF DISTRIBUTION)
OF WATER TO VARIOUS WATER)
RIGHTS HELD BY OR FOR THE)
BENEFIT OF A&B IRRIGATION)
DISTRICT, AMERICAN FALLS)
RESERVOIR DISTRICT #2, BURLEY)
IRRIGATION DISTRICT, MLNER)
IRRIGATION DISTRICT, MINIDOKA)
IRRIGATION DISTRICT, NORTH SIDE)
CANAL COMPANY, AND TWIN FALLS)
CANAL COMPANY)

PETITIONER UNITED STATES' OPENING BRIEF

**Appeal from the Idaho Department of Water Resources
David R. Tuthill, Jr. presiding**

Honorable John M. Melanson, District Judge, presiding

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STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is an appeal from the Director of the Idaho Department of Water Resources' *Final Order Regarding the Surface Water Coalition Delivery Call* (Sept. 5, 2008) ("*Final Order*"), R. Vol. 39, p. 7381. The *Final Order* addressed a priority call made against junior groundwater users who have been diverting water out-of-priority and injuring a group of senior surface water users known as the Surface Water Coalition ("SWC"). The members of the SWC hold contracts that allow them to use water stored in the Bureau of Reclamation's ("Reclamation") reservoirs.¹ The United States intervened in this proceeding, and now appeals the Director's *Final Order*, pursuant to the Idaho Administrative Procedure Act, because the Director's order has deprived Reclamation and its contractors of carry-over storage they are entitled to under Conjunctive Management Rule 42, IDAPA 37.03.11.042.01.g.

II. STATEMENT OF FACTS AND PRIOR PROCEEDINGS.

A. The Reservoir System

Throughout the history of Reclamation's involvement with irrigation in the Upper Snake Basin runs a constant understanding: its reservoir system "would provide insurance against water shortage for a period of years." *See Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 62 ("*Rec. Order*"), R. Vol. 37, p. 7048, 7109. The system intended to achieve that end consists of four primary reservoirs on the Snake River,

¹ Those contracts are not at issue in this proceeding.

Jackson Lake Reservoir ("Jackson"), Palisades Reservoir ("Palisades"), American Falls Reservoir ("American Falls") and Lake Walcott ("Minidoka," because it was created by Minidoka Dam). These reservoirs, which together hold more than 3.8 million acre-feet of water, were constructed at great expense to the taxpayers and Reclamation's contractors. Jackson, the farthest upstream, and Minidoka, the farthest downstream, were built in the early part of the 20th Century. That century had barely reached its second decade when it became apparent that Jackson and Minidoka were inadequate to provide the reliable supply of water the Upper Snake River Valley's growing agricultural economy needed.

American Falls, the largest reservoir in the system with a capacity of 1.6 million acre-feet, was built in 1927 to solve that water supply problem. *See Rec. Order* at 14, R. Vol. 37, p. 7048, 7061. Initially, Reclamation's planners were so confident that American Falls would provide all the water needed that initially only three fourths of the reservoir's storage space was assigned to existing irrigation projects. The remaining capacity was reserved for development of new land. Exhibit 7001, Report of the Regional Director, p. 5 That confidence was shattered when the 1930s ushered in an extended period of drought.

That drought led Reclamation to assign all the space in American Falls to existing contractors in 1931. Even the use of the full capacity of American Falls could not prevent severe water shortages from hitting the project in 1931, 1934, and 1935. Those water shortages brought on extensive crop losses, millions of dollars of lost revenues and laid bare the reservoir system's greatest shortcoming: a lack of adequate carry-over storage. *See id.* at 5-6.

Carry-over storage is “the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low water.” *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (“*AFRD No. 2*”). Carry-over provides an assured quantity of water that will be available for use in subsequent years. That assurance brings two important benefits: it reduces the risk that there will be a shortage of water in subsequent dry years; and it allows Reclamation and its contractors to plan and invest with greater certainty.

Palisades was constructed to provide the needed carry-over storage. As Reclamation explained, “[t]he primary objective of the [Palisades Dam] 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. Put another way, “Palisades was planned to provide an insurance supply of water to lands now irrigated,” in the event of multiple dry years.² Exhibit 7012, Nov. 2, 1954 Letter at 1. Thus, Congress authorized Palisades, and Reclamation’s contractors paid for the share of the reservoir’s cost dedicated to irrigation purposes, in order to be able to store water in

^{2/} The Idaho Legislature ultimately endorsed this insurance function. Because Palisades was largely intended to provide water to already irrigated land, when Reclamation applied to license its storage water right for Palisades, it sought to store more than the limit of 5 acre-foot per acre of irrigated land then contained in I.C. §§ 42-202 and 42-220. Exhibit 7016, Order (Mar. 19, 1973), p. 1. The Idaho Legislature responded by amending I.C. § 42-220 to remove that limit so that the storage right could be licensed. Exhibit 7015, Senate Journal, pp. 135-36.

high runoff years for use in the inevitable and unpredictable future years of shortage.

The construction of Palisades brought in a significant increase in the system's capacity, and ushered in the integrated operation of the reservoirs as a system. No longer would each reservoir be operated independently; integrated operation allows for more efficient use of storage water, and in particular, allows Reclamation to maximize the quantity of storage water that would be carried over from wet cycles to dry cycles. Exhibit 7005, Supplemental Report on Palisades Dam and Reservoir Project, pp. 10-11. The end result was a reservoir system which allowed Reclamation's contractors to "invest substantially in the development and improvement of delivery systems and [engage in] crop planning knowing that water would be available." *Rec. Order* at 60, R. Vol. 37, p. 7048, 7107. Indeed, irrigation entities in the valley quickly demonstrated the value of the insurance water provided by Palisades storage by contracting for the right to use it.

The contractual rights to the water stored in Palisades had already been allocated by the time ground water pumping was recognized to have significant impact on the River. *Id.* at 61, R. Vol. 37 at 7108. From modest beginnings fifty years ago, ground water use has expanded to withdraw an average of approximately two million acre-feet from the aquifer a year. *Id.* at 12, R. Vol. 37 at 7059. That pumping has a direct and continuing impact on the amount of water present in the river because the river has not yet reached a "steady state." Groundwater pumping will drain an estimated 200,000 additional acre-feet of water from the river before that steady state is realized. *Id.*

B. Prior Proceedings.

The dawn of this century brought with it an extended period of drought. That drought, laid on top of the groundwater pumpers' inexorable pull of water from the river, led the SWC to ask the Director to curtail the junior groundwater users in 2005. The SWC's priority call required the Director to implement the Department's "Rules for Conjunctive Management of Surface and Ground Water Resources" ("CM Rules"). IDAPA §§ 37.03.11.000 - 37.03.11.050. Once the Director issued his first interlocutory order, the SWC challenged the constitutionality of the CM Rules. In *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD #2*), the Idaho Supreme Court held that the CM Rules are constitutional on their face.

1. *American Falls Reservoir District No. 2 v. IDWR.*

One of the CM Rules the Idaho Supreme Court directly addressed was Rule 42, the rule providing for reasonable carry-over storage. That rule establishes a number of factors the Director may rely on to determine whether the holders of senior water rights are suffering material injury. In particular, the Director must consider:

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

IDAPA 37.03.11.042.01.g. (emphasis added).

The significance of Rule 42 is that it recognizes that storage water right holders are "entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years." *Id.*; *AFRD No. 2*, 143 Idaho at 878. The rule's use of the term "reasonable" carry-over storage has two consequences. First, a senior storage right holder may not insist on all available water, regardless of the need for that water. *AFRD No. 2*, 143 Idaho at 879-880. Second, the Director has "some discretion" in determining whether the carry-over storage sought by a senior is "reasonably necessary for future needs." *Id.*

The Idaho Supreme Court emphasized that the Director's discretion in determining how much water is reasonably necessary for future needs is not unbounded:

Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight.

143 Idaho at 880. This case provides this Court the opportunity to provide the oversight envisioned by the Idaho Supreme Court and determine whether the Director has properly exercised his discretion in determining the senior storage water right holders' future needs for water.

2. Hearing Officer Schroeder's Opinion.

The resolution of *AFRD No. 2* allowed the proceedings before the Director to move forward. On August 1, 2007, the Director appointed former Idaho Supreme Court Justice

Gerald Schroeder as a Hearing Officer to develop the record and prepare a recommended order for the Director's review. Hearing Officer Schroeder entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* on April 29, 2008. R. Vol. 37, p. 7048.

As noted above, Hearing Officer Schroeder concluded that groundwater pumping was depriving the river of approximately 1.8 million acre-feet of water each year, and that an additional quantity of approximately 200,000 acre-feet would be lost before the river reached equilibrium. *Rec. Order* at 12, R. Vol. 37, p. 7048, 7059. He recognized that those depletions required storage to be used earlier and more extensively than it otherwise would have, limited the SWC's application of water during the irrigation season, and diminished the amount of carry-over storage to which Reclamation and its contractors are entitled. *Id.* at 29-30, R. Vol. 37 at 7076-77. Further, he concluded that the adverse impact to carry-over storage constituted material injury. *Id.*

Turning to how the material injury caused by junior groundwater users pumping out-of-priority would be addressed, Hearing Officer Schroeder began his analysis by noting that the rule "refers to dry years." *Id.* at 62, R. Vol. 37 at 7109 (emphasis in original). He further observed that "[t]he element of storage as insurance against severely dry weather conditions remains a legitimate objective." *Id.* at 63, R. Vol. 37 at 7110. Nonetheless, he held that junior users would not be required to provide carry-over water for use beyond the following irrigation season. *Id.* Although the Hearing Officer declined to require carry-over storage to be available to meet the needs of multiple years, he did direct that there should be sufficient carry-over

allowed to "assure that if the following year is a year of water shortage there will be sufficient water *in storage* in addition to whatever natural flow rights exist to fully meet crop needs." *Rec. Order* at 62, R. Vol. 37 at 7109 (emphasis added).

3. The Director's *Final Order*.

The Director's *Final Order* adopted Hearing Officer Schroeder's findings regarding carry-over and addressed a question the Hearing Officer had declined to address: whether a material injury to carry-over storage will be remedied in the season the injury occurs. The Director ruled that it would not be. *Final Order* at 11, Conclusion of Law 16, R. Vol. 39, p. 7381, 7391. Although the Director noted that Former Director Dreher had testified that carry-over water should be provided in the season the injury occurs, *Id.* at 5, Finding of Fact 17, R. Vol. 39 at 7385, he did not attempt to rebut the former Director's reasoning.

Instead, the Director looked at two recent years in which shortages had been predicted, 2006 and 2008, and observed that in those years the reservoir space held by members of the SWC "mostly filled." *Id.* at Finding of Fact 20, R. Vol. 39, at 7385. He found that in those years, water provided in the fall "would have been in excess of the amount needed for beneficial use by members of the SWC in the season of need." *Id.* at 11, Conclusion of Law 15, R. Vol. 39 at 7391. The Director apparently found the fortuity that the reservoirs had "mostly" filled in those two years to be supported by the Hearing Officer's finding that the reservoir system fills roughly two-thirds of the time because he concluded that "[t]o order reasonable carry-over in the year of the injury *would* result in waste of the State's water resources," *i.e.*, the

loss of irrigation water to irrigation use. *Id.* at Conclusion of Law 16, R. Vol. 39 at 7391 (emphasis added). Thus, on the basis of two years and a rough average of the historic record, the Director concluded that because requiring actual water to be provided in time to be physically carried over in a reservoir would sometimes result in a loss of irrigation water, it should be categorically prohibited.

ISSUES PRESENTED FOR JUDICIAL REVIEW

1. Whether the Director abused his discretion by failing to allow reasonable carry-over storage for use in multiple years?
2. Whether the Director abused his discretion by failing to require mitigation of the material injury to reasonable carry-over storage in the season the injury occurs?

ARGUMENT

I. STANDARD OF REVIEW.

Under the Idaho Administrative Procedure Act the *Final Order* must be remanded upon Reclamation's showing (1) that the *Final Order* either (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) was made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion; and (2) that the *Final Order* prejudices a substantial right of Reclamation's.³ I.C. § 67-5279(3) & (4).

In considering whether the Director has acted arbitrarily, this Court must bear in mind that the Director's interpretation of CM Rule 42 is an issue of law. *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002). Reviewing courts generally exercise *de novo* review on questions of law. *See Sons and Daughters of Idaho, Inc. v. Idaho Lottery Commission*, 144 Idaho 23, 26, 156 P.3d 524, 527 (2007). Moreover, even if this Court

^{3/} There is no question that Reclamation has suffered injury to a "substantial right." Reclamation's storage water rights are "substantial;" they are property rights entitled to constitutional protection. *AFRD No. 2*, 143 Idaho at 879; *see also Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977); *Murray v. Public Utilities Commission*, 27 Idaho 603, 620, 150 P. 47, 50 (1915). The Director's *Final Order* prejudices those rights by depriving Reclamation of water it would otherwise be entitled to store. *See Rec. Order* at 15, Vol. 37, p. 7048, 7062 (the reservoirs "could be filled earlier and more often if there were curtailment."); Apart from the lack of curtailment, the Order further lessens the quantity of water available to Reclamation by imposing a new single year limitation on carry-over and by allowing the junior groundwater users to avoid supplying Reclamation with "wet" water. This diminishment of the quantity of water available to Reclamation constitutes prejudice to a substantial right of Reclamation's. *See Jenkins v. State, Dep't Of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

were to find that the Director is entitled to some deference, that deference is appropriate only to the extent the Director's interpretation of the Rule is "reasonable and not contrary to the express language of the [Rule]." *Id.* (citing *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991)). Consequently, if the Director has acted contrary to the express language of the rule or based on an erroneous application of law, the *Final Order* must be vacated and remanded to the agency. *See Id.*; *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003).

II. THE FINAL ORDER'S INTERPRETATION OF THE REASONABLE CARRY-OVER STORAGE PROVISIONS OF THE CONJUNCTIVE MANAGEMENT RULES MUST BE SET ASIDE BECAUSE IT IS ARBITRARY AND CAPRICIOUS.

CM Rule 42 confirms a storage water right holder's entitlement "to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years." IDAPA 37.03.11.042.01.g. In *AFRD No. 2* the Idaho Supreme Court instructed that carry-over storage is "water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." 143 Idaho at 878, 154 P.3d at 449. Thus the Idaho Supreme Court provided four requirements for reasonable carry-over storage: carryover storage must be (1) actual water in the reservoir; (2) at the end of the irrigation year; (3) retained or stored and (4) available for future use in years of drought or low-water. *Id.* The Director's *Final Order* fails on all four counts and arbitrarily and capriciously deprives Reclamation and its contractors of reasonable carry-over storage they are entitled to under CM Rule 42.

A. The Final Order is Arbitrary and Capricious Because it Fails to Provide Carry-over for Use in Subsequent Years, Contrary to the Plain Language of the Rule.

As noted above, CM Rule 42 plainly entitles a storage water right holder to reasonable carry-over storage “to assure water supplies for future dry *years*.” IDAPA 37.03.11.042.01.g. (emphasis added). Under Idaho law, administrative rules and regulations have “the force and effect of law.” *Mason v. Donnelly Club*, 135 Idaho 581, 585 (2001). Thus, just as with a statute, this Court is obligated to give the language of the CM rules “its plain, obvious and rational meaning.” *Id.* at 586, 908 (citing *Thomas v. Worthington*, 132 Idaho 825, 829, 979 P.2d 1183, 187 (1999)). It cannot be disputed that “years” means more than one year. Indeed, the Idaho Supreme Court instructed that carry-over storage is to be retained for “use in *years* of drought or low water.” *AFRD No. 2*, 143 Idaho at 878, 154 P.3d at 449 (emphasis added).

By limiting reasonable carry-over storage to that necessary to supply water for a single dry year the Director acted arbitrarily by failing to give “years” its “plain, obvious and rational meaning” *Mason*, 135 Idaho at 586, 21 P.3d at 908; *Southern California Edison Co. v. Federal Energy Regulatory Commission*, 415 F.3d 17, 22-23 (D.C. Cir. 2005). More fundamentally, the Director lacks authority to contravene the plain language of the rule. *See Sons and Daughters of Idaho*, 144 Idaho at 26, 156 P.3d at 527; *J.R. Simplot*, 120 Idaho at 862, 820 P.2d at 1219. The rule plainly allows more than one year of carry-over. Accordingly, the Director has acted arbitrarily and the *Final Order* must be remanded to the Director with

instruction to allow "carry-over storage sufficient to assure water over a period of multiple dry years," as the rule requires.

B. The Director's Decision is Arbitrary and Capricious Because It Fails to Provide Curtailment or Replacement Water in the Season the Injury Occurs.

The Director's decision not to require mitigation of the material injury in the season the injury occurs is arbitrary and capricious because it fails to provide carry-over storage as defined by the Idaho Supreme Court: water in the reservoir, at the end of the irrigation year, that may be retained or stored for use in subsequent years. Moreover, even if the *Final Order* could be said to secure carry-over storage, it would have to be set aside because it is (1) not supported by substantial evidence and (2) contrary to law because it assigns risk to the senior surface water holders that Idaho law requires the junior groundwater users to bear.

1. The Director has effectively deprived Reclamation of its right to reasonable carry-over storage.

In *AFRD No. 2* the Idaho Supreme Court recognized that carry-over storage requires "water in a reservoir" which can be "retained or stored for future use in years of drought or low water." 143 Idaho at 878, 154 P.3d at 449. The Director's decision to allow a material injury to reasonable carry-over storage to be unresolved until the following spring has the obvious effect of depriving Reclamation of the ability to store and retain in its reservoirs the very water the Director has found Reclamation is entitled to under CM Rule 42. Rather than actual water, the Director offers Reclamation notice of the projected shortfall in carry-over. *Final Order* at 11, Conclusion of Law 16, R. Vol. 39, p. 7381, 7391. Thus, the Director has

transformed carry-over storage from actual water to the possibility of water in the future. The Rule, however, provides more. It entitles Reclamation and its contractors to a reasonable amount of carry-over storage: actual water in the reservoirs that can be retained for future use. *AFRD No. 2*, 143 Idaho at 878, 154 P.3d at 449. Accordingly the *Final Order* should be remanded to the Director with instruction to provide water that can be retained and stored consistent with CM Rule 42.

2. **The Director has arbitrarily assigned risk to the senior storage right holder that Idaho law requires be assigned to the junior groundwater users.**

One important function of the doctrine of prior appropriation is to allocate risk between senior water users and junior water users. *See People ex rel. Park Reservoir Co. v. Hinderlider*, 57 P.2d 894, 895 (Colo. 1936); *see also Drake v. Earhart*, 2 Idaho 750, ___, 23 P. 541, 542 (Id. Terr. 1890) (Idaho adopted the rule “first in time is first in right” out of necessity). That risk is a product of “the variability and unpredictability of weather.” *See Rec. Order* at 6, R. Vol. 37, p. 7048, 7053. The importance of this risk allocation has been magnified over the last twenty years as that variability has increased and brought with it even wetter wet years, and even drier dry years. *Id.* This increasing variability creates a greater risk of future water shortages⁴ and this risk is further exacerbated because of the Director’s order limiting carryover. Pre-Filed Expert Testimony of David A. Raff, Ph.D., p. 9, R. Vol. 26, p. 4926, 4937. The *Final Order*

⁴ Increased variability has the effect of creating a one way ratcheting effect – while dry years deprive all users of water, the fixed capacity of the reservoir system limits the ability to “get that water back” because in wet years not all excess precipitation can be stored. *Id.*

must be set aside because the record does not support the Director's allocation of that risk of future shortage between the senior surface water right holders and the junior groundwater users and because the Director has allocated that risk in a manner that is unsanctioned by Idaho law.

a. *The Director's decision is not supported by substantial evidence.*

The Director has recognized that he is obligated to remedy the material injury to Reclamation's entitlement to reasonable carry-over storage caused by junior groundwater users' out-of-priority diversion of water. However, he has declined to require water at the time of injury because he believes doing so would result in the loss of irrigation water to irrigation use. *Final Order* at 11, Conclusion of Law 16, R. Vol. 39, p. 7381, 7391. Instead, he has offered what amounts to a promise that the water Reclamation is entitled to under the rule will be provided later. When it comes time to deliver on that promise, there are three possible outcomes: (1) the reservoirs will have filled and the promise is cancelled because no replacement water is necessary; (2) the reservoirs have not filled, but the junior water users can acquire sufficient water to provide replacement water; or (3) the reservoirs have not filled and the junior water users cannot acquire sufficient water to provide the replacement water they are legally obligated to provide. Only the first of those arguably creates the "waste" preoccupying the Director; when the reservoirs do not fill, any water actually carried over from prior years remains in the reservoir and is not lost to irrigation use. The possibility of the third scenario concerns Reclamation because it would deprive Reclamation of water it is legally entitled to under the rule.

The Director apparently believes that third scenario will never occur. *See Final Order* at 4, Finding of Fact 13, R. Vol. 39, p. 7381, 7384 (noting the Hearing Officer's finding that "it appears there will be water available somewhere"). Indeed, he declares categorically that requiring mitigation at the time of the injury to carry-over storage "*would* result in waste of the State's water resources." *Id.* at 11, Conclusion of Law 16, R. Vol. 39 at 7391 (emphasis added).

The record does not provide substantial evidence to support the Director's sweeping conclusion. While the Director notes that in two recent years in which shortfalls were predicted the reservoirs "mostly filled," the Director offers no reason to conclude those years were anything but the product of random chance. *Cf. Id.* at 5, Conclusion of Law 20, R. Vol. 39, p. 7381, 7385. Similarly, while the Director notes that historically the reservoirs have filled two-thirds of the time, he does not even examine whether that percentage holds true after drought years. *Cf. Id.*, Conclusion of Law 19, R. Vol. 39 at 7385. Worse, he ignores the obvious flip side of relying on that statement: it is tantamount to saying that in *at least* one-third of the years, and possibly more often after drought years, the reservoirs would not fill and thus the carry-over storage water would be available – and potentially necessary – for irrigation use.

Apart from the lack of support for the Director's conclusion, the record provides two good reasons why it is unlikely that the historic record the Director relies on will be repeated in the future. First, the evidence demonstrates that the variability in the climate is increasing and will likely continue to increase, resulting in increasing frequencies of both very wet and very dry years. *E.g. Rec. Order* at 6, R. Vol. 37, p. 7048, 7053. Second, the evidence shows that the

effects of groundwater pumping that has already occurred has not yet been fully felt by the system and that in the future the system will be depleted by approximately an additional 200,000 acre-feet *per year*. *Id.* at 12, R. Vol. 37, p. 7048, 7059. In short, the *Final Order* must be remanded to the Director because his conclusion that providing replacement water in the season of injury will always result in less water being available for irrigation use is not supported by substantial evidence. *E.g., Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 284-85, 160 P.3d 438, 441-42 (2007).

b. *The Director's allocation of risk is contrary to law.*

Past Director Dreher testified to an obvious problem with allowing the out-of-priority juniors to continue diverting and hoping that replacement water will be available in the following year: there is a risk that no replacement water will be available. Hearing Tr. Vol. II, p. 270, L 1-10; *see also Rec. Order* at 6, R. Vol. 37, p. 7048, 7053. Current Director Tuthill recognizes that risk exists. *See Exhibit 7017, IDWR Press Release*, p. 2. Nonetheless, he elected to assign that risk to the senior water users and thus transferred the risk of shortage that would otherwise be borne by the out-of-priority junior groundwater users to the senior water rights holders. *See Rec. Order* at 63, Finding 13, R. Vol. 37, p. 7048, 7110 (increasing possibility that there will be a shortage of carry-over storage "shifts the risk from junior water users to senior users."). The *Final Order* must be remanded because Idaho water law does not allow that transfer of risk.

Former Director Dreher testified that junior water users should be required to provide mitigation in the season of injury because Idaho law assigns junior water users the risk of curtailment and requires that the risk seniors bear be consistent with the fact that they hold prior rights. Hearing Tr. Vol I, p. 169 LL. 1-3, and p. 186 LL. 14-18. The former Director's testimony is on sound legal footing. Idaho adopted the prior appropriation doctrine as a means to deal with the scarcity of water and to provide the certainty of water supply that is needed to support investment. *See Drake v. Earhart*, 2 Idaho 750, ___, 23 P. 541, 542 (Id. Terr. 1890). That certainty is provided by imposing limits on a junior's ability to divert. Junior appropriators are entitled to divert water only when the rights of previous appropriators have been satisfied. *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944).

There are two corollaries to the rule that a junior may only take water after seniors have been satisfied. First, a junior appropriator takes his water subject to the risk of having his supply diminished if there is an insufficient supply of water left after the seniors have taken their water. *Hinderlider*, 57 P.2d at 895. Indeed, the *Final Order* implicitly recognizes that Idaho law requires juniors bear the risk of curtailment. *See Final Order* at 9, R. Vol. 39, p. 7381, 7389 (in times of scarcity a junior may be curtailed). Second, a senior is entitled to remedies when a junior interferes with the senior's water use. *See R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27, 752 P.2d 625, 629 (Idaho App. 1988). Again, the *Final Order* implicitly acknowledges this principle. Indeed, the *Final Order* is intended to provide that remedy.

Nonetheless, the *Final Order* is contrary to Idaho law because it stands both these well-established legal propositions on their head. It allows out-of-priority junior water users to continue diverting to the detriment of senior water users, while forcing the senior to accept the risk of shortage. Moreover, that risk of shortage is effectively a risk that appropriate mitigation will never be provided.

Refusing to require replacement water at the time of injury shortchanges the storage system in exchange for an unsupported promise that water will be available next year, if needed, and effectively punishes the senior surface water users for making use of a water supply that is inherently variable. The Director essentially makes a leap of faith that water will always be available for mitigation if a drought continues. This high risk approach fails to recognize that if water for mitigation is hard to secure early in a drought, it will become increasingly more difficult to obtain later when supplies are tighter. Moreover, the Director's position is internally inconsistent. He argues that *because* of the vagaries of hydrologic conditions, it is unreasonable to require replacement water in the year of shortage (because it might be evacuated from the reservoir in the spring). Yet, *in spite of* those same vagaries, the Director makes the unsupported assertion that replacement water will always be available in the future.

In effect, by allowing the junior water users to forego prompt remediation of the injury caused by their out-of-priority pumping, the Director has created a system where out-of-priority juniors will be able to fully exercise their rights while the senior water right holders run the risk they will be left without water they are legally entitled to under both CM Rule 42 and the

prior appropriation doctrine. Idaho water law does not tolerate that anomalous result. To the contrary, it mandates that the juniors bear the risk of shortage and the consequences of their out-of-priority diversions. Accordingly, the *Final Order* is arbitrary and capricious and must be remanded to the Director with instruction that he proceed in a manner consistent with Idaho water law.

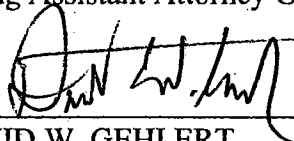
CONCLUSION

The Director's *Final Order* must be remanded because it ignores the plain language of CM Rule 42 and restricts reasonable carryover storage to that needed in one year, regardless of circumstance. Moreover, it arbitrarily allows junior ground water users to continue their out-of-priority diversions and escape having to mitigate the injury they have caused until the following year and possibly forever. That decision cannot be sustained because it is not supported by substantial evidence and is contrary to Idaho law.

DATED this 2nd day of April, 2009.

Respectfully submitted,

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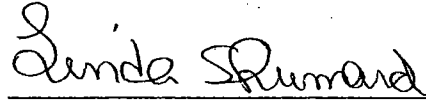


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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2009, a copy of the foregoing, **PETITIONER UNITED STATES' OPENING BRIEF**, Case No. 08-0000551, was served upon the following using the method indicated.



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