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, Petitioners, 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.	**CASE NO. CV-2008-551**

GROUND WATER USERS' BRIEF IN RESPONSE TO SURFACE WATER COALITION'S JOINT OPENING BRIEF

Appeal from the Idaho Department of Water Resources

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is an appeal from the *Final Order Regarding the Surface Water Coalition Delivery Call* ("Final Order") of the Idaho Department of Water Resources ("IDWR" or "Department") dated September 5, 2008. The Final Order was issued in response to a Delivery Call submitted in 2005 by seven senior surface water entities commonly known as the Surface Water Coalition ("Surface Water Coalition" or "SWC"). The Surface Water Coalition is made up of American Falls Reservoir Dist. #2 ("AFRD#2"), A&B Irrigation District ("A&B"), Burley Irrigation District ("BID"), Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company ("NSCC"), and the Twin Falls Canal Company ("TFCC"). The Surface Water Coalition entities are located in southern Idaho below American Falls Reservoir. The Delivery Call requested the curtailment of junior ground water users diverting and using water from the Eastern Snake Plain Aquifer ("ESPA").

The Final Order adopted in part and rejected in part a number of findings and conclusions contained in an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* dated April 29, 2008 ("Recommendation"), which was issued by an independent Hearing Officer, Honorable Gerald F. Schroeder, following a three-week hearing. Notably, the Recommendation adopted in large part the findings of fact and conclusions of law contained in an earlier document known as the *Amended Order* dated May 2, 2005 ("Amended Order"), which was issued by the IDWR Director soon after the SWC's Delivery Call was submitted. The Amended Order was the document in which IDWR first made the initial material injury determination with regard to the SWC's Delivery Call. Hence, this appeal primarily

involves a review of the Final Order dated September 5, 2008, the Recommendation dated April 29, 2008, and the Amended Order dated May 2, 2005.

The SWC argues that, because the IDWR Director ("Director") attempted to determine the amount of water its members actually needed for the beneficial use of irrigation, he did not "honor" their decree. *See* SWC's Joint Opening Brief at 29-31. Further, the SWC argues that IDWR should not be allowed to consider the water held in storage for the benefit of the SWC. Under the SWC's proposed administrative scheme, the Director must only look at the senior's natural flow water right and not examine the senior's available storage water supply. *See* SWC's Joint Opening Brief at 30. In other words, by suggesting that the Director ignore their storage supplies, the SWC blatantly ignores the Idaho Supreme Court's holding in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources ("AFRD2")*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007), which flatly rejected this same argument by the SWC.

The SWC also argues that the decreed quantity element of a water right defines a guaranteed minimum entitlement to be demanded at all times rather than an authorized maximum quantity that may be diverted subject to need, beneficial use, reasonable use, availability, and other relevant considerations. *See* SWC's Joint Opening Brief at 25-31. This misguided position ignores the well-established rule of law that beneficial use defines the extent, limit, and measure of a water right in Idaho. *See AFRD2*, 143 Idaho at 876, 154 P.3d at 447; *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007). Further, the SWC's position is entirely without support in the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 *et seq*. (hereinafter "CM Rules") and has been soundly rejected by the Idaho Supreme Court in *AFRD2.* In addition, it has

also been rejected by the former Director Dreher, present Director Tuthill, and the Hearing Officer. *See* R. Vol. 37, pp. 7073-75.

The arguments raised by the SWC on appeal should be rejected and the Final Order issued by IDWR should be affirmed.

B. COURSE OF PROCEEDINGS

On January 14, 2005, the SWC filed a letter and petition ("Delivery Call") with the Director of the Department. R. Vol. 1 at 1-52. The Delivery Call sought administration and curtailment of junior ground water users who divert ground water from the ESPA. R. Vol. 1 at 2 ¶ 1. On February 15, 2005, the Director issued an Order as an initial response to the Delivery Call. R. Vol. 2 at 197-240. On April 19, 2005, the Director issued a second Order in response to the Delivery Call. R. Vol. 7 at 1157-1219. Finally, on May 2, 2005, the Director issued the Amended Order. R. Vol. 8 at 1359-1424.

The SWC filed an objection to the Amended Order and demanded a hearing. R. Vol. 8 at 1507-16. Several parties intervened, including the Idaho Ground Water Appropriators ("IGWA" or "Ground Water Districts"), Idaho Dairymen's Association ("Dairymen"), the City of Pocatello ("Pocatello"), the United States Bureau of Reclamation ("Bureau" or "BOR"), and the State Agency Ground Water Users. Pre-Hearing Tr. Vol. 1, pp. 1-4.

The SWC and Bureau represented the interests of the surface and storage water users. IGWA, Pocatello and the Dairymen represented the interests of the ground water users.

C. STATEMENT OF THE FACTS

1. The Parties and Their Respective Water Rights

The SWC entities divert water from the Snake River under water rights that range in priority dates from 1900 to 1939. R. Vol. 1 at 8; Ex. 4001A and 4001. The SWC entities also

hold contracts for storage water in the Upper Snake Reservoirs that are owned and operated by the Bureau. R. Vol. 37, p. 7055, 7060-61. The storage water is stored pursuant to water rights owned by the Bureau under priority dates ranging from 1906 to 1957. Exhibits 4001A and 4000. The water rights claimed by the SWC and the Bureau have not yet been partially decreed in the Snake River Basin Adjudication and all have pending, unresolved objections. Ex. 4615, 9723-9729. In addition to their Snake River water rights and their storage contracts, nearly 75,000 acres claimed by SWC entities have supplemental ground water rights. Ex. 4127, 4128, 4129, 4130, 4131, 4132, 4133 and 4100 at 16.

Amongst the SWC entities, Twin Falls Canal Company has the largest and most senior surface water right (Water Right No. 1-209) and it relies primarily on natural flow of the Snake River to satisfy its irrigation needs. Ex. 4001 and 8001. TFCC's water right bears a priority date of October 11, 1900. R. Vol. 23, p. 7056. North Side Canal Company owns a small 400 cfs water right (Water Right No. 1-210) with the same priority date. *Id*. All other SWC entities primarily rely upon storage water to meet their irrigation needs. *Id*.

Not all of the acres claimed by the SWC entities' water rights are irrigated every year. R. Vol. 37, p. 7100, R. Vol. 39, p. 7392. As pointed out specifically for TFCC, Minidoka, and BID, numerous acres are actually "hardened" and will likely never be irrigated because these acres are now roads, parking lots, subdivisions, commercial structures or have otherwise been developed so as to no longer need irrigation. Ex. 4310. For TFCC alone, there were a minimum of 6,600 "hardened" acres which equaled 3.3% of TFCC's total claimed acres listed in its water right. R. Vol. 37, p. 7100, R. Vol. 39, p. 7392, Ex. 4310, Ex. 8190 at 14, Tr. Vol. 11, p. 2247, L. 10-14. The SWC's expert, Charles Brockway, admitted that non-irrigated acres should not be considered in calculating irrigation water supply needs and that TFCC had 6,600 "hardened"

acres that are not irrigated. Tr. Vol. 11, p. 2247, L. 2-4. Ex. 8190 at 14. This conclusion was properly adopted by the Recommendation and Final Order and has not been challenged on appeal to this Court. R. Vol. 37, p. 7100, R. Vol. 39, p. 7392.

IGWA represents ground water users who pump water from the ESPA and irrigate over 800,000 acres of land from the aquifer. R. Vol. 37, p. 7058. The vast majority of the ground water users own water rights that are junior in priority to the water rights held by the Surface Water Coalition and the Bureau. R. Vol. 1, p. 119. Ground water development began in earnest in the late 1950's and continued through the early 1980's with the advent of cheap electrical power and with the encouragement of State policy. R. Vol. 28, p. 5174. Ground water development leveled off in the late 1980's and came to a halt in 1992 after a moratorium on all new ground water developed was imposed. Ex. 4100, 4109 at 5-6; Dreher, Tr. Vol. 2, p. 376, L. 6-21. The effect of ground water pumping on the Snake River is mostly realized within 20 years, although it can take up to 100 years for "steady state" conditions to be fully realized. Dreher, Tr. Vol. 1, p. 36, L. 14 – p. 37, L. 375- L. 20; McGrane, Tr. Vol. 7, p. 1497, L. 6-10. The ESPA is currently at or near equilibrium because there have been no new wells since the moratorium and most irrigation has already been converted to sprinklers. *Id.*

2. The Snake River and the ESPA

The Surface Water Coalition diverts both surface and storage water rights from the Snake River from points of diversion that are below American Falls Reservoir. R. Vol. 31, p. 5892. After the SWC's water rights were established in the early 1900's and flood irrigation on the Eastern Snake Plain had been occurring for decades, ground water levels in the ESPA were enhanced due to incidental recharge. Carlson Direct R. Vol. 28, p. 5166-5204; Ex. 4100 at 5. By 1952, an estimated 24 million acre-feet of water had been added to the ESPA as a result of

incidental recharge from surface water irrigation waste. Ex. 4100 at 6. The enhanced levels of the ESPA increased the historical water supplies of the SWC entities. Carlson Direct R. Vol. 28, p. 5173-74; Ex. 4100 at 6. Ground water levels in the ESPA have declined since the mid-1950's due to a number of factors, including the conversion from flood to sprinkler irrigation, reduced canal diversions, winter water savings agreements, elimination of winter water in canals in favor of storage resulting from the Palisade's project, ground water pumping, and to a lesser extent drought. R. Dreher, Tr. Vol. 2, p. 322, L 8-14, p. 379, L 18-25, p. 380, L 1-7; Koreny, Tr. Vol. 10, p. 2161, L 22-25, p. 2162, L 1-2. However, the amount of water that is pumped from the aquifer annually (approximately 2.2 M/AF) is significantly less than the amount of water currently entering the ESPA (approximately 8 M/AF) and thus the ESPA is not being mined. R. Vol. 27, p. 5069. There is no dispute and the SWC experts admitted that junior ground water users are only responsible for the depletions to the aquifer caused by junior ground water pumping and are not responsible for the reductions in the aquifer or hydraulically connected portions of the Snake River that are caused by changes in irrigation practices, changes in incidental recharge, winter water storage or drought. Brockway Tr. Vol. 11, p. 2255, L. 1-8.

TFCC and NSCC divert water from Milner Dam, the lowest point of diversion in Water District 01. R. Vol. 28, p. 5170, p. 5177 and p. 5186. TFCC and NSCC have the most senior water rights below Blackfoot and these water rights total 3000 cfs and 400 cfs, respectively. R. Vol. 28, p. 5177. Below Blackfoot, there is insufficient natural flow after June or July in most years to fill the SWC's water rights which then begin using storage water. R. Vol. 28, p. 5179; Dreher, Tr. Vol. 2, p. 366, L. 34 – p. 368, L. 16. The Snake River gains water from Blackfoot to Minidoka during the normal irrigation season of approximately 3000-3400 cfs. Dreher, Tr. Vol. 2, p. 372, L. 10-18; R. Vol. 27, p. 5079-83. The reach of the Snake River between the near

Blackfoot gage and the Neeley gage is important because it contains numerous springs that provide the bulk of the gains to the Snake River flows and provide an important part of the water supply of the SWC. Ex. 8013. The senior 1900 priority water rights of TFCC and NSCC command the entire river natural flow below Blackfoot leaving the rest of the SWC entities to rely primarily on their storage supplies after the spring runoff period. R. Vol. 28, p. 5191-92, ; Dreher, Tr. Vol. 2, p. 372, L. 10-18; R. Vol. 27, p. 5072-73.

The annual reach gain between the Blackfoot gage and the Neeley gage shows no statistically significant trend over the 93 year period of record which demonstrates that ground water pumping has not detrimentally impacted the SWC surface water rights. Ex. 4112, 4113, 4100 at 7-8, Dreher, Tr. Vol. 1, p. 34 L. 8 – p. 46 L. 4, p. 1258 L. 17-22 and R. Vol. 8, p. 1415. In fact, former Director Dreher testified regarding Attachment I to the Amended Order (R. Vol. 8, p. 1415):

> If this decline was the result of ground water depletions, one would have expected to see it manifested earlier in the record, and it just is not there. There simply is no declining trend until this latter period of time.

Dreher, Tr. Vol. 1, p. 37, L. 2-6.

> Now, secondly, members of the SWC attributed this decline, this latter decline, beginning in about 1999, to groundwater depletions. And that was not consistent with what we understood the facts to be based upon simulations using the reformulated, recalibrated groundwater model. The decline is real. The fact that it's the result of groundwater depletions, I would say, is very uncertain and unlikely.

Dreher, Tr. Vol. 1, p. 37, L. 14-23. These declines are more likely due to drought or changed irrigation practices. Dreher, Tr. Vol. 2, p. 379, L. 12 – p. 380, L. 7.; R. Vol. 27, p. 5073 -5077 and Ex. 4149-4152 and cf. Ex. 4153 w/ Ex. 4112. Since the year 2000, the Upper Snake River Basin has experienced the worst consecutive period of drought on record and that drought has caused reduction in reach gains. Dreher Tr. Vol.2, p. 237, L. 15-23. In fact, the drought would

be expected to be repeated only one time in every 500 years. Ex. 4105, 4106, Dreher, Tr. Vol. 2, p. 237, L. 15-23. Yet, the SWC's diversions were greater or substantially similar in this recent drought to their diversions in the drought of the 1930s. R. Vol. 27, p. 5078; R. Vol. 35, p. 6635-36 discussing Ex. 4154A, 4155A, 4156A, 4156A and 4154B.

The ESPA is hydraulically connected to portions of the Snake River but the degree of connection varies. R. Vol. 8, p. 1363; Ex. 4100 at 5-6. Being hydraulically connected means that ground water can become surface water and surface water can become ground water. R. Vol. 8, p. 1364. Because of the varying levels of connection, curtailment of junior ground water users does not necessarily result in usable water by the SWC. The Department investigated the usability of reach gains using the ESPA model in conjunction with the Department's planning model Ex. 4100 at 22-23; Ex. 4141. This analysis looked at the steady state gains accruing between Shelley and Milner, in the area that covers the locations on the Snake River from which the SWC entities divert or store water. The analysis looked at curtailing junior water rights back to January 1, 1961, which would dry up 664,300 acres. The result was that 95% of the increased reach gains would actually flow past Milner Dam during the non-irrigation season and that only 42 cfs out of 888 cfs steady state reach gain could be diverted for irrigation or stored for the benefit of the SWC. *Id.* This is due in part to the fact that the water curtailed will accrue in a place or at a time when the gains cannot be diverted or stored by the SWC entities or when there is insufficient reservoir space. Wylie, Tr. Vol. 3, p. 593, L. 10-19. This same basic problem was recognized in the 1946 Planning Report for the Palisades Project. Ex. 4100 at 22, Ex. 4162 at 11.

3. The Storage Reservoirs

The Snake River above Milner dam[1] has four primary storage water reservoirs;[2] starting highest up on the Snake River is Jackson Lake in Wyoming, Palisades in Idaho near the Wyoming border, American Falls southwest of Blackfoot, and Minidoka or Lake Walcott just east of Milner dam. Ex. 3002. The SWC has contracts for storage in Jackson Lake, Palisades, and American Falls. Ex. 9704 and Ex. 4100 at 13. The Bureau built the reservoirs in order to support irrigation projects in the west so that irrigated agriculture could develop in southern and southeastern Idaho. The storage water in the reservoirs was intended to supplement natural flow supplies from the Snake River. Swank, Tr. Vol. 4, p. 807, L. 17-21. Studies completed by the Bureau based upon pre-ground water development study periods indicate that the then existing reservoirs at Jackson Lake and American Falls would have been empty during the 1932 to 1935 drought period. Ex. 7001, Report of the Regional Director at 11-14. The Palisades Planning Report in 1945 that preceded construction shows that Palisades was not expected to fill every year and that during drought years it would be empty. Ex. 7001 at 154-55. The drought experienced since 2000 is similar or greater in severity to the 1930's drought period. Ex. 4157. Yet, the combined active storage in the three reservoirs at the end of 2004 was 476,000 acre-feet as compared with the combined carry-over storage of the SWC of 288,300 acre-feet. Ex. 4100 at 14. Significantly, the storage reservoirs were expected to fill 2/3 of the time and in fact have filled 2/3 of the time. McGrane, Tr. Vol. 7, p. 1407, L. 22 – p. 1408, L. 4. The storage reservoirs have never run out of water. Swank, Tr. Vol. 5, p. 992, L. 12-18.

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[1] The Snake River above Milner Dam is commonly referred to as the "Upper Snake River."

[2] There are also reservoirs at Island Park on the Henry's Fork, Grassy Lake in Wyoming and Ririe Reservoir on Willow Creek but water rights for those reservoirs are not involved in these cases. They are important, however, because they affect the operation and priority fill of the Upper Snake River reservoirs. McGrane Tr. Vol. 7, p. 1512 - L. 4 – p. 1513, L. 15.

4. Water District 01

The Snake River above Milner Dam is part of Water District 01 ("WD01") which encompasses the delivery of all natural flow and storage water from the Idaho/Wyoming border down to Milner Dam. R. Vol. 28, p. 5170. The direct testimony of Ronald D. Carlson, the Watermaster for WD01 for nearly 30 years, describes the operation of WD01. R. Vol. 28, p. 5166. Since 1978, WD01 has used a computerized accounting program that allocates natural flow and storage water to water rights that divert from the Snake River. Ex. 4201 through 4210 demonstrate how water rights are distributed in WD01. R. Vol, 28, p. 5182-85.

It is not until February or March of the year <u>following</u> the irrigation season, however, when the final accounting is completed and storage accounts reconciled and carry-over is allocated. Swank, Tr. Vol. 4, p. 826, L. 3-7. Notably, the SWC entities have never had their water deliveries restricted during the irrigation season since they are entitled to divert whatever water they need so long as they have a positive storage account balance. Burrell, Tr. Vol. 4, p. 713, L. 2-4; Swank Tr. Vol. 5, p. 977, L. 14 – p. 978 L. 5.

Hence, the repeated claim by the SWC in its Joint Opening Brief that its members had no water during the irrigation season is patently false. *See, e.g.,* SWC's Joint Opening Brief at 6 (suggesting that administration has left "the Coalition without any water while the ground water users continued to pump their full rights out-of-priority"). The impression left by the SWC's Joint Opening Brief is that their canal beds lay dry and cracked with their fields scorched; but, nothing can be further from the truth. The fact is that the SWC failed to offer even a single witness who could testify to land left fallow nor any dried up crops due to lack of water at any time in any year of their century of operation. At best, the eight lay witnesses offered by the SWC testified to unsubstantiated beliefs they may have experienced unsubstantiated yield

reductions and were unable to link their alleged cropping pattern changes to reduced water supplies. *See* Blick Testimony R. Vol. 34, p. 6361-66, Coiner Testimony R. Vol. 33, p. 6269-72, O'Connor Testimony R. Vol. 33, p. 6333-39, Shewmaker Testimony R. Vol. 40, p. 7546-48, Breeding Testimony R. Vol. 33, p. 6286-88, George Testimony R. Vol. 33, p. 6279-80, Lockwood Testimony R. Vol. 33, p. 6260-62, Kostka Testimony R. Vol. 33, p. 6342-44. TFCC's long-time manager, Vince Alberdi testified:

> Q. There's no examples of fallowing based on water shortage?
> A. No.
> Q. And no examples of fallowing you can point to based on -- I'm sorry -- crop loss that you can point to based on water shortage; correct?
> A. No.

Alberdi Tr. Vol. 8, p. 1788, L. 16-23. This is consistent with the testimony of long-time NSCC manager Ted Diehl that cropping patterns were about the same as they had been in the past and that in fact, more of water consumptive corn and hay crops had been planted in recent years due to the growth of the dairy industry in the area. Tr. Vol. 9, p. 1873, L. 18 – p. 1874, L. 22, p. 1889, L. 3, p. 1890, L. 5. Furthermore, the SWC's expert witnesses also acknowledge that despite variations in surface and storage water supplies, they had no information indicating that SWC member dried up any acres or had documented reductions to crop yields dues to water supply shortages. Tr. Vol. 1, p. 28, L 18 – p. 29, L 7.

The fact is that the SWC entities were able to divert as much water as they needed during 2005 and 2007 despite the Director's prediction of material injury to SWC in those years.[3] Current WD01 Watermaster Lyle Swank testified:

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[3] There was no material injury predicted for 2006 as 2006 was a wet year. R. Vol. 20, p. 3756 and R. Vol. 23, p. 4300-01.

Q. The question I asked, the accounting program would allocate natural flow to the right holders based on priority; correct? And if their demand or diversion exceeded what was available on a particular day in natural flow, the difference would be simply debited to their storage account?
A. That's correct.
Q. So as long as a right holder has available a balance in their storage account, they would not be restricted on delivery?
A. That's correct. Yes.

Swank, Tr. Vol. 5, p. 979 L. 1- 12. In addition, the evidence clearly shows that there was more than enough water in carry-over storage to satisfy the needs of all the SWC entities in 2005 and 2007. R. Vol. 23, p. 4298. In addition, Swank testified that the reservoir system has never gone dry and there has always been water available to storage contract holders.

Q. What I was saying is, I didn't see any records that you could go to the end of the year, and then see that there was the total of all the water available in the storage accounts was a zero. There always is some carry-over balance; would that be correct?
A. Yes.

Swank, Tr. Vol. 5, p. 992, L. 12-18. Finally, even if there ever occurred a time when there was no water available (which has never happened), the contracts held by the BOR with its space holders allow the BOR to provide the water from their storage for the contracted holder to borrow against next year's fill. Swank, Tr. Vol. 5, p.. 990, L. 22 – p. 991, L. 6. The SWC's contention that they were not provided water sufficient to meet their needs in 2005 and 2007 when material injury was predicted is entirely without a supporting basis based upon the actual storage and delivery needs. Ex. 1035.

Once the Water District 01 account is reconciled, if a SWC entity runs out of storage water, which happens very rarely, they are assigned "excess use" (overdraft) by debit to their account. Swank, Tr. Vol. 5, p. 979, L. 1-8. As a result, in the rare event a storage holder has excess use then they are required to lease the shortfall from other storage space holders with a surplus. Swank, Tr. Vol. 5, p. 979, L. 1-8. This is a well-established practice with a pre-

determined procedure and an established neutral price pursuant to the WD01 Rental Pool Rules. Ex. 1076. The reservoirs have never run completely dry and there has been water to lease from other spaceholders when necessary. Swank, Tr. Vol. 5, p. 992, L. 12-18.

As part of its mitigation and replacement water plan in 2007, IGWA underwrote TFCC's predicted material injury by guaranteeing TFCC's water supply. Ex. 4502A. In other words, IGWA committed to and in fact delivered rented water which was transferred into TFCC's carry-over storage account in the year TFCC would use the water in the full amount that the Director determined they would be short after the year end final accounting. In order to fulfill this replacement water plan, IGWA simply leased storage from other contract space holders and authorized the transfer by the water master to TFCC's account as soon as the Director determined the amount. Ex. 4502A at 10; R. Vol. 34, p. 6431. Thus, TFCC was free to divert as much water as it needed during the 2007 irrigation season, knowing that IGWA would transfer water into their storage account in the amount of the injury once the final accounting for 2007 was completed. The SWC has failed to produce anything in the record to show that this delivery was untimely or did not fully meet with all of IGWA's obligations or requirements of the Director's order.

The final accounting for WD01 for 2007 occurred in 2008. The Director's Order dated May 28, 2008 concluded that "based on the unique circumstances of the differences of Water District 01's preliminary versus its final accounting and the change in methodology used to calculate the Minidoka return flow credit, IGWA must provide 7,466 acre-feet of replacement water to TFCC to compensate it for its 2007 material injury." R. Vol. 38, p. 7208. IGWA had timely leases in place and had previously provided TFCC water in its storage water account. As soon as the Director requested IGWA to provide additional water to TFCC so that it could be

used when needed, IGWA provided the water. Thus, the required supply of water was in TFCC's account well before it was needed later in the 2008 irrigation season. Because the reservoirs filled in 2008, any carry-over obligation was canceled because there was no room in the reservoir system for it.

Had IGWA been required to delivery any carry-over storage in the prior year before the final accounting was completed and before the reservoir refill was determined, as the SWC urges, then in any year the reservoirs filled the water delivered early would simply be spilled. Such not only would result in water being wasted but would have also unnecessarily have caused IGWA to pay for leased water without a need or beneficial use. Swank Tr. Vol. 5, p. 1041, L. 15 – p. 1042, L. 1; Carlson Tr. Vol. 12, p. 2528, L. 4 – p. 2530, L. 3; R. Vol. 38, p.p. 7202, 7204 and 7206-08.

ISSUES PRESENTED ON APPEAL

The issues presented by the Surface Water Coalition's Joint Opening Brief can properly be summarized as followed:

1. Whether the Director is empowered to restrict SWC's diversion to a level of "actual need" to raise full crops when responding to a delivery call even if the amount is less than the authorized maximum amounts in SWC's decreed water rights.
2. Whether the Director properly exercised his authority and discretion in requiring temporary "replacement water plans" and whether the Director's response to the SWC's Delivery Call was timely and in accordance with Idaho law.
3. Whether the Director properly concluded in accordance with Idaho law that reasonable carry-over should be provided "in the season in which the water can be put to beneficial use, not the season before."
4. Whether the Director properly concluded in accordance with Idaho law that Twin Falls Canal Company's fully supply should be based upon 5/8 inch per acre for purposes of calculating the mitigation obligation so ground water users under the CM Rules.
5. Whether the Director use of the 10% trim line for purposes of curtailing junior water right users was in accordance with Idaho law and a proper exercise of the Director's discretion.[4]

[4] In addition to the listed issues, the Ground Water Users understand that IDWR has in their Response Brief addressed the arguments of the SWC and Bureau concerning the fact that the Director did not issue a final order on his method for determining material injury. Thus, the Ground Water Users have not addressed that matter separately in this brief but instead refer the

ATTORNEY FEES ON APPEAL

The Ground Water Users request attorney fees on appeal pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1). As more fully discussed below, the SWC is in the instant appeal again raising numerous arguments that have already been wholly rejected by the Idaho Supreme Court in the *AFRD2* decision. The SWC's refusal to accept and abide by the Idaho Supreme Court's holdings in the *AFRD2* decision and its pursuit of this action is therefore unreasonable, frivolous, and without merit. Therefore, the Ground Water Users respectfully requests attorney fees on appeal pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1).

Court to IDWR's brief. *See* I.A.P. 35(g). In addition, the Ground Water Users understand that Pocatello has in its Response Brief addressed the SWC's arguments relating to the process the Director used to respond to their delivery call and the SWC's complaints about replacement water plans and the case of *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003). In supplement of the arguments contained within this brief, the Ground Water Users incorporate Pocatello's arguments addressing these matters. *Id.*

STANDARD OF REVIEW

The Idaho Administrative Procedures Act governs this Court's review of the Final Order. I.C. § 67-5240; *see also* I.C. § 42-5270; IDAPA 37.01.01.791. The Court must affirm the Final Order unless it is found to be: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). "In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005)(citation omitted). The party attacking the agency decision must first illustrate that the agency erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The SWC and the Bureau erroneously attempt to characterize the Director's application of the CM Rules to the facts of this case and the proper exercise of his discretion as "errors of law" or "issue[s] of law" over which the Court enjoys "free review." SWC's Joint Opening Brief at 10; United State's Opening Brief at 11. Contrary to the SWC's arguments, it is not a question of law but instead an exercise of sound discretion in applying the CM Rules when the Director determines the amount of water actually needed by the senior to raise full crops, allows juniors to mitigate depletions through replacement water plans to eliminate any material injury,

determines the timing of when carry-over storage water should be provided, determines carry-over storage shortfalls based on known facts and not speculation, and thereby manages the resource to optimize beneficial use while preventing waste. These are questions of fact as supported by competent and substantial evidence in the record are not subject to re-determination by this Court in its appellate capacity. The Court in this case must follow the standard set forth in I.C. § 67-5279 and "not substitute its judgment for that of the agency." I.C. § 67-5279(1); see also *Urrutia*, 134 Idaho at 357, 2 P.3d at 742.

ARGUMENT

I. The Director is Authorized by Idaho Law to Restrict the SWC's Water Diversion to a Level of "Actual Need" to raise Full Crops when responding to a Delivery Call even if the Amount is less than the Authorized Maximum Amounts in the SWC's Decreed Water Rights.

In its Joint Opening Brief, the SWC argues that the Director abused his discretion in determining for purposes of their delivery call that the SWC was entitled to an amount of water less than the full amount decreed in their water rights. *See* SWC's Joint Opening Brief at 25. The SWC contends that, in doing so, the Director "effects an unlawful administrative re-adjudication of water rights." *See* SWC's Joint Opening Brief at 29.

This is the very same argument made by the SWC and rejected by the Idaho Supreme Court in the *AFRD2* case. In rejecting this argument, the Idaho Supreme Court held the following:

> CM Rule 42 lists factors "the Directory may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste…" IDAPA 37.03.11.42.01. Such factors include the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion. *Id.* …
>
> Clearly … the Director may consider factors such as those listed above in water rights administration. … If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only those using the water. Additionally, the water rights adjudication neither address, nor answer, the questions presented in delivery calls; thus, **responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication**. For example … reasonableness is not an element of a water right; thus, **evaluation of whether a diversion is reasonable in the administrative context should not be deemed a re-adjudication**. Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source….
>
> Conjunctive administration "requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources"…. That is precisely the reason for the CM Rules and the need for analysis and administration by the Director. In that same vein,

> **determining whether waste is taking place is not a re-adjudication** because clearly that too, is not a decreed element of the right.
>
> …The presumption under Idaho law is that the senior is entitled to his decreed water right, but **there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed**.

AFRD2, 143 Idaho at 876-78, 154 P.3d at 447-49 (emphasis added).

Thus, the Idaho Supreme Court made it perfectly clear that the Director is authorized to consider a senior water right call in light of all factors set forth in CM Rule 42 and is further authorized to deliver only that amount of water that is found to be "actually needed" even if it is less than the authorized maximum amount decreed in the senior water right.[5] The SWC's arguments to the contrary are frivolous and ignores the well-established fact that a water right quantity is an authorized maximum amount that can be diverted if it is available, not a guaranteed amount.[6] *Id*.; *Briggs v. Golden Valley Land & Cattle Co*., 97 Idaho 427, 435 n5, 546 P.2d 382, 340 n5 (1976)(an appropriator is authorized to use the quantity of water needed, "regardless of the amount of [the] decreed right."); *Contant v. Jones*, 3 Idaho 606, 613 (1893) (an appropriator is only entitled to the water from year to year that he puts to beneficial use); *Glavin v. Salmon River Canal Co*., 44 Idaho 583, 589 (1927) (an appropriator's right to use water ceases when his needs are supplied).

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[5] The Director, when looking to his duty to administer ground water rights, is to not just look at the priority date of the senior user, rather, the Director must equally guard all the various interests involved because "[w]ater [is] essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depend[s] upon its just apportionment to, and economical use by, those making a beneficial application of the same [thus], its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved." I.C. § 42-101 (underline added).

[6] To the contrary, if a decreed quantity was a guaranteed amount a late priority surface water right exists yet is rarely available except for a very short time during early spring runoff of the wettest years could be used to call out junior ground water users demanding a full supply for the full irrigation season. This would result in a water supply greater in quantity and certainty than had ever existed when the right was established.

Actual beneficial use is the legal limit to the amount of water an appropriator is entitled, regardless of the decreed or licensed quantity: "neither such license nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied." I.C. § 42-220. Idaho case law also supports the notion that a senior cannot demand the maximum quantity of water under his water right at all times.

> It is against the public policy of this state, as well as against express enactments, for a water user to take more of the water to which he is entitled than is necessary for the beneficial use for which he has appropriated it . . . Public policy demands that, whatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them.

Glavin, 44 Idaho at 589, 258 p. at 538. A water user is "only entitled to such water, from year to year, as he puts to a beneficial use." *Conant*, 3 Idaho at 613, 32 p. at 257. These principles, when considered with Idaho's Ground Water Act, I.C. § 42-226 *et. seq*. that mandates that the doctrine of "first in time first in right" be administered in a manner that does not block full economic development of the state's ground water resources, makes it obvious that the law in Idaho allows the Director to determine how much water is needed by a calling senior water user to raise full crops and to not just blindly curtail junior users to fulfill a "paper" maximum.[7]

In response to the SWC's delivery call, the Director properly understood that it was his responsibility, as the person responsible for the "proper distribution of the waters of the state" when applying the CM Rules to determine how much water was actually needed by the SWC for irrigation to grow full crops. In so doing, the Director determined "the amount necessary to meet water needs independent of the licensed, decreed or contracted rights" and referred to that

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[7] If this were not so, the TFCC which has a number of hydro-power rights along its canal systems could demand full delivery of its senior irrigation rights early and late in the irrigation season when unneeded to meet irrigation needs simply to increase power production. This may be fine, except in dry years when junior ground water users are subject to curtailment and mitigation obligations are calculated.

determined amount as the "minimum full supply." R. Vol. 37 at 7087 (the minimum full supply "is an attempt to predict the minimum amount of water the surface water users need to meet their crop requirements, below which curtailment is necessary if the minimum is not met as a consequence of junior ground water depletions").

The SWC's contention that "the Director unilaterally created the 'minimum full supply' process without any statutory or regulatory authority" is simply without merit. *See* SWC's Joint Opening Brief at 28. As mentioned, the CM Rules and the *AFRD2* case mandate that the Director determine the amount "actually needed" by the SWC. Despite the SWC's arguments to the contrary, the CM Rules and the *AFRD2* case dictate that the amount "actually needed" by the SWC is the amount of water to raise crops to maturity when making a delivery call. *See* SWC's Joint Opening Brief at 28. Simply put, it is crop irrigation requirements that set the obligation of junior right holders to supply mitigation, not an authorized maximum quantity set out in the decree. While the SWC would like to disregard the principles of reasonable use, beneficial use without waste, that is not the law in Idaho. *See* Idaho Constitution Art. XV, Sections 5 and 7; I.C. § 42-226; CM Rule 20; *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568, 572 (1997).

The SWC challenges the Director's *methodology* for determining the amount "actually needed" on only a *single* basis. The SWC argues that the Director abused his discretion in considering the SWC's surface rights and storage rights together when determining the amount "actually needed" by the SWC. *See* SWC's Joint Opening Brief at 30. The SWC contend that this "results in senior water right holders being forced to exhaust nearly all of their storage water supplies in order for the Director to find 'material injury.'" *Id*. The SWC argues that its "storage

water rights represent vested property right interests and once the water is stored it becomes private water no longer subject to diversions and appropriation." *Id*. at 31.

This argument concerning storage water (just like the SWC's argument concerning the so-called re-adjudication of decreed water rights) has already been addressed by the Idaho Supreme Court in the *AFRD2* case. The Idaho Supreme Court explained as follows:

> At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, **regardless of whether there was any indication that it was necessary to fulfill current or future needs** and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. **This is simply not the law of Idaho**. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost.

AFRD2, 143 Idaho at 880, 154 P.3d at 451 (emphasis added). Thus, the Idaho Supreme Court made it clear that it was appropriate under Idaho law for the Director to consider whether stored water "was necessary to fulfill current … needs" which are generally satisfied first from surface rights. In other words, Idaho law authorizes the Director to jointly consider the SWC's surface rights and storage rights when determining material injury under the CM Rules.

Lastly, it must be pointed out that the SWC does not raise any other challenge on appeal to the Director's *methodology* for determining "actual use" for purposes of their delivery call. This is not particularly surprising given that the Director has concluded that:

> [b]ecause 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 carry-over for the 2009 irrigation season. An opportunity for hearing on the order will be provided.

R.. Vol. 39, p. 7386. Because the Director will no longer be utilizing the so-called "minimum full supply" methodology for determining "actual use" for the purposes of the SWC's delivery call, the issue is essentially moot.

II. The Director properly exercised his Authority and Discretion in accepting Temporary "Replacement Water Plans" and the Director's Response to the SWC's Delivery Call must be affirmed as Timely and in accordance with Idaho Law.

In its Joint Opening Brief, the SWC argues that the Director's use of "replacement water plans" violates the Conjunctive Management Rules and is also unconstitutional. The SWC contends that the Director "created a 'new' procedure, without any authority under existing law." SWC's Joint Opening Brief at 32. The SWC also argues that the Director's use of "replacement water plans" is unconstitutional because it constitutes a taking without due process of law. *Id.* at 39-40. The SWC has in effect argued that temporary replacement water plans are improper and that the Director should immediately curtail all junior ground water users until such time as a evidentiary hearing is held and the Director enters a final order determining whether or not the curtailment should remain in effect and whether or not an adequate mitigation plan has been approved. Pending such a hearing and final order, this would result in dire and irreversible economic consequences, minimize beneficial use, and potentially deprive junior water users of their vested property rights without due process. The SWC's arguments are contrary to the procedures in the CM Rules that allow junior uses to provide "replacement water or other appropriate compensation" to prevent any material injury to the calling senior water use. CM Rule 43. Furthermore, CM Rule 5 provides that "Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law." Allowing replacement water plans that provides relief to seniors and

does not irreparably harm junior users certainly is allowed under Idaho Law and not precluded by the CM Rules.

A. Idaho Law and Policy Allow for the Replacement Water Plans

The CM Rules expressly authorize the Director to consider plans for replacement water. CM Rule 43.03.b authorizes the Director to consider whether "*replacement water supplies*" will be provided "*at a time or place required* by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal." (Emphasis added). CM Rule 43.03.c authorizes the Director to consider whether "*replacement water supplies*" will be provided "to the senior-priority water right *when needed* during a time of shortage." (Emphasis added). Thus, it is clear that replacement water plans are an acceptable means of mitigation.

The Director found that the use of replacement water plans was authorized under Idaho law and that the procedure is a necessary administrative tool. R. Vol. 39, p. 7390-91. Idaho law requires that the Director guard all interests equally and consider principles of reasonable use and full economic development in water rights administration. *Id.*; I.C. § 42-101. The Director's consideration and approval of replacement plans in this case falls within the realm of discretion afforded by the CM Rules, the Ground Water Act, I.C. § 42-226 *et. seq*. as well as his duties to distribute water under Idaho Code Title 42, Chapter 6. Not only are they authorized under Idaho law, there are very significant public policy reasons supporting the implementation of replacement water plans in the context of this very complex water case under Idaho Code Title 42, Chapter 6. The policy of the state of Idaho is to secure the maximum beneficial use of the state's water resources. *Poole v. Olaveson***,** 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). The legislature intended that the use of ground water rights be developed to their full economic potential. I.C. § 42-226. Allowing ground water users to provide replacement water to senior

users through replacement water plans adheres to these sound state's policies and provides for the immediate delivery of mitigation water thus preventing material injury. Why the SWC would find fault in a process that immediately results in the delivery of replacement water and prevents any water shortage or injury is puzzling.

Lastly, the authority of the Director to allow junior ground water users to continue diverting water after the SWC made their delivery call and before a full record was developed upon which to base a mitigation plan is rooted in the well established 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. The Director's inherent authority under I.C. § 42-607 allows him to administer the state's water resources in a constitutional manner which includes optimizing the resource in the public interest. As former Director Dreher succinctly summarized in his testimony, allowing junior users to offset their depletion or injury in a delivery just makes sense:

> Q. And the replacement water plan concept isn't described in the rules, is it?
>
> A. It is not. But again it's rooted in the common application of prior appropriation in the west. I mean, you don't -- this situation may be somewhat unique, but it's not the only situation where replacement water is used to offset depletion so that out of priority diversions be continued because there's no injury. I mean, that's a fundamental component of water rights administration.
>
> Q. Yeah. I understand your logic behind it. I just would -- I just would like you to, for the record, state the legal basis for you to establish a replacement water plan.
>
> A. I'd say the legal basis is rooted in the statutory authority to distribute water in accordance with the law of Idaho. The law certainly doesn't preclude this.
>
> Q. And as far as a replacement water plan concept goes from a due process standpoint, I believe you testified that it should be lumped together in the hearing process for the call itself. It's part of the call process.

A. That -- that's the process that I had in mind. Now, certainly people could have said hey, this needs to be bifurcated or separated in some way. I don't recall that any motion along those lines was filed, but it could have been.

Q. And when you determine a replacement water plan is acceptable or not, for that matter, it's your opinion that -- well, of course, let me use a more specific example. If the ground water folks submit a replacement water plan that the surface water folks don't like, the senior water rights don't like, it's your opinion you can go ahead and implement that replacement water plan against the will of the senior water right holder?

A. Well, that's putting it more bluntly probably than I would -- than I would characterize it. Against the will. I mean, the idea -- the idea was to reme-- -- to attempt to remedy the injury. And then there was opportunity to debate whether the remedy was adequate. And if it wasn't, to make adjustments. That was the process I had in mind. To me, that was -- that was superior to saying we're not going to do anything but curtail until there's a -- until there's an agreed-upon plan for mitigation. I -- I didn't think that -- that was a -- an appropriate way to pursue this, but that was my determination.

Q. And to get back to my question, it's your opinion you could implement that – maybe "the will" is not a good term, but over the objection of the senior water right holder?

A. Well, again, over the objection. I mean, it was my -- my opinion that that could be -- that that remedy could be implemented while the objection was addressed.

Dreher, Tr. Vol. 1, p. 232, L. 13 – p. 234, L. 23.

Furthermore, it is important to understand that the Ground Water Users have filed replacement water plans with the Director every year since curtailment was first ordered in 2005. R. Vol. 7, p. 1283; Ex. 4501, 4502A; R. Vol. 33, p. 6162-63. Not only have the Ground Water Users spent millions of dollars to mitigate the SWC's delivery calls, they have also spent millions of dollars to mitigate in response to the Spring Users' delivery call. R. Vol. 33, p. 6166-67. The expense to the Ground Water Users to provide this replacement water has been astronomical, amounting to nearly fourteen million dollars to date to revert irrigated lands from

ground water back to surface water, buy storage water to deliver to the SWC, dry up irrigated acres, perform managed recharge of the ESPA, and purchase spring flows.[8] R. Vol. 33, p.6162-63. The cost of providing replacement water has imposed an enormous and unreasonable burden on the Ground Water Users, who have had no choice but to bear the cost to forestall the ruination of their businesses and livelihoods while awaiting a final order from the Director. R. Vol. 33, p. 6166-67 (testimony of Mr. Deeg, chairman of IGWA, that in 2007 the ground water users spent $1.2 million dollars and in 2005 $2.9 million dollars to provide replacement water to senior users). The SWC's allegation that the Ground Water Users have not provided any water and have not complied with the replacement water plans approved by the Director is absolutely false and entirely contrary to the record.

If the Director had not authorized replacement water plans but had instead required the filing of a mitigation plan, junior ground water users would have been completely curtailed beginning in 2005. By the time a full record could be fully developed in this case for purposes of considering a mitigation plan, it likely would be too late to do any good for many junior ground water users. In contrast, the benefit of curtailment to the SWC prior to approval of a mitigation plan would have been limited because curtailment in a conjunctive management call does not provide immediate and complete relief. Ex. 4504 and 4506. By authorizing replacement water plans, the Director ensured that the SWC would receive adequate water during the pendency of the administrative proceeding while affording the junior ground water users a hearing prior to

[8] The Ground Water Districts purchased Pristine Springs in 2008 along with the State of Idaho and the City of Twin Falls to resolve the Blue Lakes Delivery Call. The Ground Water Districts' portion of the sale was $11 million, plus rent. Although not part of this record, the Pristine Springs purchase is a matter of public record.

involuntary curtailment.[9] The Director's interpretation of the CM Rules and applicable statutes is entitled to deference under the facts of this case. *See J.R. Simplot Co., Inc., v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991).

It is difficult to comprehend the SWC's concern with the Director's use of the "replacement water plans" when those plans are approved and designed as a means of providing water to them when needed during times of shortage. Certainly, no substantial right of the SWC has been impaired by requiring the ground water users to provide water to the SWC. Replacement water plans just make good policy and common sense. Former Director Dreher summed it up nicely:

> A junior can always replace his depletions to the system and not face curtailment. Why? Because if he actually replaces his depletion, there is no injury. He doesn't cause injury if he's replaced his depletion. And yet, that's a form of mitigation, but it's not the kind of a mitigation plan that's envisioned under the rules. And so what we were devising here in this May 2d order was along the lines of this most general type of mitigation rather than a formal mitigation plan that's called for under the rules.

Dreher, Tr. P. 161, l. 16- P. 162, l. 3.

B. The Replacement Water Plan "Process" Does Not Violate the SWC's Right to Due Process

It appears that the SWC's complaint is not necessarily with the replacement water plans as approved[10] but with the administrative procedure by which they were approved. Thus, the

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[9] In effect, the Director was taking appropriate measures to maintain the status quo until a final order could be entered and prevented any material injury to the SWC, thus insuring a minimum full supply. This is analogous to a preliminary injunction in a civil matter pending final judgment.

[10] The SWC does allege that they never received water as required by the replacement water plans implemented in 2005, 2006, and 2007. That allegation is completely inaccurate as discussed in this brief.

focus is on the administrative procedure and not on the contents of the replacement water plans themselves.

The SWC repeatedly argues in their Joint Opening Brief that the Director's use of "replacement water plans" violated the CM Rules, because they were allegedly denied a hearing on a replacement water plan prior to the Director's approval of the replacement water plan. *See* SWC's Joint Opening Brief at 25-31. CM Rule 43.02 provides a hearing before the approval of a mitigation plan when protests are filed. The SWC contends that this is the only method through which a plan for replacement water can be approved and that any avoidance of a hearing by the Director would violate the CM Rules.

The SWC further alleges that "To date, more than four years after the initial request for administration, the Department has not held a hearing." SWC's Joint Opening Brief at 32 (underline in original). This statement however is exceptionally misleading. It is undisputed that an evidentiary hearing on IGWA's replacement water plan was in fact held on June 22, 2007. *See* SWC's Joint Opening Brief at 35. It is also undisputed that the delay in holding the hearing was a direct result of the SWC's own procedural maneuvering. This was made perfectly clear by the Idaho Supreme Court in the *AFRD2* case, as follows:

> American Falls submitted its Delivery Call to the Director in January of 2005 … IDWR received the inflow forecast in April of 2005 and the Director issued a Relief Order less than two weeks later. The Director made the Order effective immediately pursuant to I.C. § 67-5247 (Emergency Proceedings), ordering juniors to provide "replacement" water in sufficient quantities to offset depletions in American Fall's water supplies. Thus, American Falls was provided timely relief in response to the Delivery Call in the form of the Relief Order …
>
> Incident to the Relief Order, the parties were entitled to a hearing. A hearing was initially set by the Director for August, 2005 … Although both IGWA and American Falls exercised their right to a hearing and one was set, American Falls filed this action with the district court on August 15, 2005, before the hearing could be held. Subsequently, American Falls requested stays and continuance in the hearing schedule … **It appears that American Falls preferred to have the case heard outside of the administrative process and**

> **went to great lengths … to delay the hearing.** … [T]he district court acknowledged that it was "led to believe" that the parties had stipulated to delay the administration resolution of the case…

AFRD2, 143 Idaho at 875, 154 P.3d at 446 (emphasis added). The underlying administrative proceeding remained stayed pending the filing of the *AFRD2* decision by the Idaho Supreme Court on March 5, 2007. On May 8, 2007, IGWA submitted the *Ground Water District's Replacement Plan for 2007*. R. Vol. 23 at 4237. On May 21, 2007, the SWC filed a protest. R. Vol. 32 at 4262. Thereafter, in full compliance with the CM Rules and unencumbered by the SWC's procedural maneuvering, a hearing was held on June 22, 2007.

Given that the replacement water plan hearing was delayed in 2005 and 2006 solely by the SWC's own procedural maneuvering, the SWC does not have a basis for arguing that the hearing's delay in 2005 and 2006 violated the CM Rules. Had the SWC coalition not pursued the matter in district court and not taken the other steps to delay the administrative proceedings, there would have been a hearing on the 2005 Amended Order in August 2005 as noted by the Idaho Supreme Court in the *AFRD2* Decision. *See AFRD2*, 143 Idaho at 875, 154 P.3d at 446. Just as the SWC cannot complain that there were no hearings in 2005 and 2006, the SWC cannot complain about 2007 because a hearing was timely held with regard to IGWA's proposed 2007 replacement water plan. Despite its inaccurate representations to the contrary, the SWC admits in the end that the hearing was in fact held on June 22, 2007. *See* SWC's Joint Opening Brief at 35.

The SWC's only remaining complaint is that the Director limited the scope of the June 22, 2007, hearing to evidence concerning the adequacy and implementation of IGWA's proposed 2007 replacement water plan. However, it is within the Director's discretion to limit or exclude evidence presented at hearings. *See* I.C. § 67-5251; IDAPA 37.01.01.600. The Idaho Supreme

Court addressed this rule in *Chisholm v. State Dep't of Water Res. (In re Transfer No. 5639)*, 142 Idaho 159, 163, 125 P.3d 515, 519 (2005). In reference to a presiding officer's decision concerning the admissibility of evidence, the Supreme Court held that "[a] strong presumption of validity favors an agency's actions." *Id.* The Supreme Court further held that the presiding officer's decision will only be reversed on appeal "when there has been an abuse of discretion; however, the Court reviews questions of relevancy de novo." *Id*. In addition, the appellants bear the burden of showing error on appeal. *Id.*; *see also* I.C. § 67-5279(4). In *Chisholm*, the Supreme Court held that the appellants failed to satisfy this burden because they failed to "articulate the relevance of the proffered exhibits" to either the presiding officer or on appeal and because they failed to articulate an argument suggesting that the exclusion of the evidence was in error." *Chisholm*, 142 Idaho at 163, 125 P.3d at 519. Consequently, the Supreme Court held the following:

> Lacking such a showing by the Appellants, no error by the hearing officer can be found. Therefore, since the Appellants have failed to show error and a presumption in favor of the validity of an agency action exists, this Court affirms the decision of the hearing officer regarding the exclusion of these proffered exhibits.

Id.

Just like the appellants in *Chisholm*, the SWC bears the burden of showing on appeal to the District Court that the Director erred in excluding evidence from the 2007 hearing on IGWA's proposed replacement water plan. The SWC however has failed to satisfy this burden. First, the SWC has utterly failed on appeal to even identify the evidence that it believes the Director improperly excluded from the hearing. Second, the SWC has failed on appeal to articulate the relevance of the unidentified evidence. Third, the SWC has failed to articulate on appeal any suggestion that the exclusion of the unidentified evidence was in error. Because the

SWC has failed to make such a showing, no error by the Director can be found on appeal. Since the SWC has failed to show error and a presumption in favor of the validity of the Director's action exists, the decision of the Director to exclude evidence at the hearing must be affirmed on appeal to this District Court.[11] *See Chisholm*, 142 Idaho at 163, 125 P.3d at 519.

In summary, the SWC's argument that replacement water plans are not authorized under Idaho law and the CM Rules must be rejected. In addition, the SWC's argument that they were not provided a timely hearing must also be rejected because a hearing was held in 2007 and it was the SWC's own actions that prevented it from being held at any earlier time. The SWC's argument that that the Director improperly excluded evidence at the 2007 hearing must likewise be rejected because the SWC failed to satisfy their burden on appeal with regard to that argument. Lastly, the Director's actions in authorizing replacement water plans should be affirmed based upon the CM Rules and public policy as discussed above. In light of the foregoing, immediate curtailment is not required in response to a delivery call. The following holding from the Idaho Supreme Court from the *AFRD2* decision is significant:

> While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframe on this process. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a time frame might be imposed across the board. <u>It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts</u>.

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[11] The SWC claims that this limitation of the scope of the evidence presented at the hearing shows that the Director had already made up his mind to approve the 2007 replacement water plan before the hearing was even held. *See* SWC's Joint Opening Brief at 35. However, that claim is based on pure speculation, unsupported by any factual evidence in the records, and must be disregarded by the Court. Indeed, it is rather revealing that the SWC has resorted to personally impugning the Director in such a manner rather than making arguments based upon actual facts or law.

AFRD2, 143 Idaho at 875, 154 P.3d at 446 (emphasis added). It would therefore be improper for the Director to curtail before having the necessary information to make a reasoned and informed decision. The Director is authorized to approve and implement plans for replacement water. The SWC's arguments to the contrary must be rejected on appeal. Consequently, the SWC has failed in all respects to show on appeal that the administrative process implemented by the Director with regard to the replacement water plans violated the CM Rules.

III. The Director properly concluded in accordance with Idaho Law that Reasonable Carry-over should be provided "in the season in which the water can be put to beneficial use, not the season before."

The SWC and the Bureau argue that the Director's finding that does not require "water to be provided at time when it can actually be 'carried over'" is in error. *See* SWC's Joint Opening Brief at 47. The Bureau argues that the Director's decision deprives the Bureau "of the ability to store and retain in its reservoirs the very water the Director has found Reclamation is entitled." United States' Opening Brief at 14. This argument from the SWC and the Bureau gives the impression that the reservoirs are empty and that no water is being carried over.

However, this argument is meritless and entirely without factual support. The fact is that at the end of every irrigation season there has always remained unused water in storage which in turn always gets carried over and becomes part of the following years available supply. The exact amounts assigned to a specific space holder's account at the time of the year-end accounting in Water District 01 is accomplished as described above. What the argument made by the SWC and Bureau boils down to is an argument that ignores historical fact, would change the historic operation of WD01, would result in a waste of water in the majority of years, and when the reservoirs fill (which they do 2/3 of the time) and carry-over storage obligation of ground water users supplied prematurely would be unnecessary and wasted. For that reason any

obligation to supply reasonable carry-over is determined after the final accounting when the next year's supply is known, with any shortfall obligations erased if the reservoirs fill. Otherwise, extra water spilled in flood control would go completely unused by the SWC in violation of Idaho law. Swank, Tr. Vol. 4, p. 822, L. 15-21. Thus, the Director, who must manage one of the state's most valuable resources, water, concluded:

> With the amount of fill of the reservoir system, if replacement water for reasonable carry-over shortages was provided in 2005 and 2007 for the 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 carry-over should be provided in the season in which the water can be put to beneficial use, not the season before.

R. Vol. 39, p. 7386. This conclusion is based on substantial and competent evidence and sound policy which this Court should not overturn. The rationale for the Director's conclusion is set forth in his order:

> The difficulty in requiring predicted carry-over 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.

R. Vol. 39, p. 7385 ¶ 18.. The Director then cites to the fact that the reservoirs were built to fill approximately two-thirds of the time, and have historically filled two-thirds of the time. *Id*. at 5, ¶ 19; McGrane, Tr. Vol. 7, p. 1407, L. 22 – p. 1408, L. 4.

CM Rule 42 grants the Director the discretion to consider certain factors in determining whether a senior water right user is suffering material injuring. One of the factors to be considered states in pertinent part the following: "…the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies to future dry years." CM Rule 42.01.g. In the *AFRD2* case, the Idaho Supreme Court has

recently had an opportunity to consider this very same language from the CM Rules in the context of surface water to groundwater administration. Notably, the SWC were parties to that case. In that case, the SWC argued "that they should be permitted to fill their entire storage water right, **regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to their original rights.**" *AFRD2*, 143 Idaho at 880, 154 P.3d at 451 (emphasis added).

The Idaho Supreme Court readily and wholly rejected this argument, holding that "it was permissible for the canal company to hold water over from one year to the next **absent abuse**." *Id*. (emphasis added). The Supreme Court further identified certain circumstances which undeniably constitute this type of "abuse" as follows: (1) where a water right user "does not require the full use of his allocation, but he carries it over to the detriment of others" (*Id*. at 879, 154 P.3d at 450); (2) "when one is allowed to carry-over water despite detriment to others" (*Id*. at 880, 154 P.3d at 451); (3) when carry-over of storage water is permitted "without regard to the need for it." (*Id*.); (4) "where stored carry-over water was, at the time of the litigation, being wasted by storing away excessive amounts in time of shortage." (*Id*.); and (5) when "irrigation districts and individual water right holders … waste water or unnecessarily hoard it without putting it to some beneficial use" (*Id*.). The Idaho Supreme Court explained that whenever such circumstances exist, the SWC is not permitted to hold water over from year to year. *Id.* As explained by the Idaho Supreme Court, "the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost" even in the context of storage water carry-over. *Id*.; *see also* I.C. § 42-104.

Given the holding of the Idaho Supreme Court in the *AFRD2*, a decision concerning reasonable carry-over storage under CM Rule 42 cannot be made without considering (1) whether the water carried over is necessary to fulfill current or future needs; (2) whether the storage holders routinely sell or lease the carry-over water for uses unrelated to their original rights; (3) whether the carry-over water will be put to a beneficial use recognized by the laws of Idaho; *and* (4) whether the storage of water will have a detrimental impact upon other water users. The evidence clearly reveals that the SWC members routinely sell or lease their carry-over water to the Bureau of Reclamation for flow augmentation purposes which are purposes wholly unrelated to the SWC members' original water rights.[12] Swank Tr. Vol. 5, p. 1076, L. 7-22. Moreover, it is undisputed that flow augmentation is not recognized as a beneficial use under Idaho law. *See* I.C. § 42-1763(B)(4).

The SWC members and the Bureau argue that they should be entitled to carry-over water as "insurance" against future shortages in multiple dry years without having to prove that a shortage will exist in the future. *See, e.g.,* United State's Opening Brief at 2-3. In other words, they contend that they are entitled to the carry-over water regardless of actual future need. As mentioned above, the Idaho Supreme Court flatly rejected that argument in the *AFRD2* case. There must be proof that the carry-over water is necessary for future needs. However, no such evidence exists. Indeed, the SWC failed to provide any expert testimony as to what would constitute reasonable carry-over. In fact, even the alleged storage experts from BOR did not

[12] It is undisputed that flow augmentation is not a decreed water right. As such, the use of the carry-over water for flow augmentation does not enjoy the same priority date as the SWC members' water rights which form the basis of the current delivery call. This is particularly true in light of the fact that the leasing of carry-over water for flow augmentation purposes did not being until 1990's. Therefore, it is an abuse of the Director's discretion to treat the use of the carry-over water as a decreed water right with a senior priority date.

have any opinion on the amount of carry-over that may be reasonable. McGrane Tr. Vol. 7, p. 1422, L. 21- p. 1423, L. 7; Raff Tr. Vol. 7, p. 1522, L. 9 – p.1523, L. 11. All evidence pertaining to possible future needs is uncertain and speculative. Because of the significant variability of weather patterns from year to year, it is impossible to predict with any certainty what future carry-over needs may or may not be from year to year.

Hence, the Hearing Officer concluded that "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." R. Vol. 37 p. 7109-10. The Director agreed and did not alter that finding. R. Vol. 39, p. 7381. While the Director found that injury to carry-over storage for the next year can occur, he determined that carry-over for future years would not be possible, and decided that in order to not waste the resource that the junior user is not required to provide the water over a year in advance because "the water acquired by IGWA would not have been required for use by members of the SWC." R. Vol. 38, p. 7326. Hence, the likelihood of wasting the water and the water not being put to irrigation use was simply too great. *Id.* In balancing these issues, the Director required as part of any required mitigation plan that junior users remedy any shortfalls to carry-over when those shortfalls are determined during WD01's final accounting process. In other words, if the final accounting process reveals that the SWC entities used an amount of storage water during the irrigation season such that it materially injured the amount they would have been entitled to carry-over, the junior ground water users would be required to purchase allocated storage water from other parties and have it transferred on-the-books to the SWC entities. This process is simply a matter of re-allocating storage water on the WD01 records.

The point of this is that water has always been carried over in the reservoirs. The WD01 accounting process simply allocates that water between contracted entities following the irrigations seasons. The SWC apparently does not like waiting until after the irrigation season like everyone else to see how much of the remaining carry-over water will be allocated to them. They would instead prefer that junior ground water users be required to place new water in the reservoir system during the irrigation season and before the year-end accounting process and then simply waste that water by allowing it to run downstream if in the end it is not necessary to their actual reasonable carry-over needs. While the SWC and the Bureau might prefer that process, it is contrary to Idaho law and unnecessarily prejudices junior ground water users.

It is important to recognize that the SWC's predicted irrigation needs, the supply of surface and storage water to meet their irrigation requirements, together with the irrigation obligations of ground water users is predicted in advance of the irrigation season. Forecasting temperature, precipitation, wind and snow melt for a 7-month long irrigation season is fraught with difficulty and uncertainty. Given the fact that the evidence at trial showed that the SWC members had ample carry-over storage even in the driest of years, the Director's choice of requiring that water be provided when it is "actually needed" in the season in which the water can be put to beneficial use rather than provided at an earlier time honors Idaho law and indicates practical, common sense. CM Rule 5 allows the Director the take "alternative or additional actions relating to the management of water resources as provided by Idaho law" and he is required to do so in a manner that optimizes the use of the resources. See *Poole* 82 Idaho at 502. Neither the Bureau nor the SWC could demonstrate to the Hearing Officer or the Director that allowing the ground water users to provide carry-over storage in the season of need affects any substantial interest as required by I.C. § 67-5279(4) since their actual needs would be met.

See also Barron, 135 Idaho at 417, 18 P.3d at 222. The arguments made by the SWC and the Bureau to the contrary must be rejected.

IV. The Director properly concluded in accordance with Idaho Law and the Evidence presented in this Case that Twin Falls Canal Company's Full Supply should be based upon 5/8 inch per acre for Purposes of Calculating any Mitigation Requirement of Ground Water Users under the CM Rules.

The SWC argues that because a prior decree is "binding" that the Department is required to mandate the water right quantity as "guaranteed" rather than "authorized" without any regard to the amount of water actually needed or beneficially use to raise full crops. Joint Opening Brief at 52. This argument has been rejected by the Supreme Court, the Director and the Hearing Officer and should be rejected by this Court as well. As discussed above, the Idaho Supreme Court in the *AFRD2* Decision clearly held that a water right owner's "actual need" for water is not dictated by the decreed elements of his water rights. Rather, the Director is not only authorized but statutorily required to investigate the water right owner's "actual need" and to limit his diversions for purposes of a delivery call to that amount even if it is less than the decreed elements of his water rights. *Id.*; s*ee also Glavin,* 44 Idaho at 589, 258 P. at 538 (an appropriator's right is dependent upon his "necessities") and *Conant,* 3 Idaho at 613, 32 P. at 257 (an appropriator is only entitled from year to year to the amount he puts to beneficial use).

In fact, the Director's recommendation in the SRBA reduces the number of acres under TFCC's water right and there are numerous pending objections to the quantity element that request that the amount of water be reduced to actual irrigated acres and actual crop requirements and actual amounts delivered based upon historic records. Ex. 9729 at p. 133 of 177. However, notwithstanding the status of TFCC's water rights in the SRBA, in an administrative delivery call, IDWR is not bound to merely read a senior's decreed water right and apply a rote

authorized maximum quantity under the right to fill the amount without a thorough examination of irrigation requirements and beneficial use.

The Hearing Officer in his Opinion and the Director in the Final Order made a factual determination that "any conclusions based on full headgate delivery should utilize 5/8 inch" because TFCC's claim to 3/4 inch is

> contradicted by internal memoranda and information given to shareholders in the irrigation district. It is contrary to a prior judicial determination that TFCC's right is 5/8 and not ¾ inches per acre. It is inconsistent with some of the structural facilities and exceeds similar SWC members with no defined reason.

R. Vol. 37, p. 7100. This conclusion is based on substantial and competent evidence submitted at the hearing and this Court is required to give deference to the trier-of-fact's factual finding. I.C. § 67-5279(1); see also *Urrutia*, 134 Idaho at 357, 2 P.3d at 742. Although the SWC on behalf of TFCC argues that there is other evidence that contradicts the finding, this court must not substitute its judgment for the trier-of-fact. *Id*.

The records of TFCC clearly establish that 3/4 inch per acre is the maximum capacity of its system and the maximum quantity delivered to its shareholder under the best water conditions. Ex. 4610 (1997 Ditch Rider). TFCC's long-time manager, Vince Alberdi testified that to deliver 3/4 of an inch to the shareholders actually requires TFCC to divert 3,800 cfs (more than its 1900 water right) at Milner Dam. Tr. Vol. 8, p. 1671, L. 13-24; p. 1672, L. 9-12. TFCC's Water Management Plan dated November 1999 states that "TFCC has always operated on the premise that the Company must deliver 5/8 inch per acre constant flow so long as that supply is available." Ex. 4166 and 4166A. Similarly, TFCC's Operating Policy dated December 10, 1997, provides that "[t]he TFCC water right is 5/8ths of an inch per share." Ex. 4167 at 3. This includes an obligation to deliver 1/80th of a cubic foot of water per second for each share of

stock when the water is available." *Id*. Nowhere in the Operating Policy is any amount other than 5/8 inch ever discussed.

Even though 2007 has been uniformly characterized as an extremely dry year, TFCC finished the year with carry-over storage, dried up no land, and harvested full crops despite the 5/8 inch delivery. Alberdi Tr. Vol. 8, p. 1703, L. 22 – p. 1704, L. 5; p. 1702, L. 16-21; p. 1715, L. 8-11; p. 1718, L. 15-22. In addition, the 2005 and 1997 issues of TFCC's publication, "Ditch Writer" sent to its shareholders clearly admits that 5/8 inch is the normal delivery. Ex. 4610. In the 2005 Issue of the Ditch Writer publication, Alberdi told his shareholders that while he would not promise them all the water they "want" he would delivery all the water they "need to grow their crops." *Id*. Similarly in the Manager's Report of the Minutes of the January 13, 2004, Shareholder meeting, Mr. Alberdi informed the shareholders that they could "have a good year even with a 5/8 inch supply." Ex. 4608 at 5. In fact, in the Spring 1997 issue of the TFCC Ditch Writer publication, a huge water year with major flooding on the Snake River, Alberdi responded to shareholders' requests for additional water by stating that the "canal system becomes taxed if we deliver over 3/4 of a miner's inch per share. To try to deliver more than that…would put the canal system in jeopardy and dramatically raise both the potential from breaks and catastrophic property damage." Ex. 4610. On cross examination Mr. Alberdi finally admitted that the 3/4 inch was the maximum amount TFCC could delivery in a good water year and that in a bad water year 5/8 inch or less was normally delivered. Tr. Vol. 8, p. 1680, L. 1-6.

All of this is completely consistent with the reported Idaho Supreme Court case in 1911 and Federal District Court case in 1935 in which TFCC was a party, where 5/8 inch is repeatedly referenced as TFCC's water supply and no mention is ever made of 3/4 inch. *See State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 p. 1039 (1911); *Twin Falls Land & Water Co., v. Twin Falls*

Canal Co., 79 F.2d 431 (1935). The conclusion that 5/8 inch per acre is what is needed to grow crops for TFCC and the other SWC entities should be confirmed. It is supported by the overwhelming weight of the evidence. TFCC's 3/4 inch claim is supported merely by argument and not by its own records.

V. Whether the Director's use of the 10% Trim Line for Purposes of Curtailing Junior Water Right Users was in accordance with Idaho Law and a Proper Exercise of Discretion.

The SWC argues that the Director's use of the 10% trim line "allow[s] injurious diversions to continue" as arbitrary and capricious and in violation of the law and should be rejected. *See* SWC's Joint Opening Brief at 57. They offer no analysis of the evidence nor any facts to show that the Director's use of the trim line is not supported.

Yet, model uncertainty is undeniably greater than 10%. Ex. 1075 (Wylie, Tr. p. 78, L. 15-19). The Director used the uncertainty in stream gauge calibration without quantifying any amount for numerous other assumptions and uncertainties associated with the ESPAM which all experts acknowledge exist. Ex. 1075 (Wylie, Tr. p. 74, L. 10-25, p. 75, L. 1-10, p. 76, L. 17, p 79 L. 1-17), Ex. TR460. The trim line should account not only for the 10% gauge uncertainty but should be increased so as to not curtail more junior users than necessary. Idaho Code § 42-607 authorizes the Director to curtail junior users when it "is necessary to do so in order to supply the prior rights of others. . . ." Curtailment of ground water diversions that have no effect on reach gains that may supply the SWC's water rights would result in a waste of water and would be in violation of the Director's authority and statutory duty. Thus, any curtailment based on ESPAM simulations must account for uncertainty in the simulations, yet the Director's trim line fails to account for a multitude of other model uncertainties and the error factor should be increased and the trim line constricted. *See also* Cross Petr. Ground Water Users' Opening Brief

at 47-49, 65-69 filed in Clear Springs Foods, Inc v. Tuthill, Civil Case No. 2008-444 (January 9, 2009) and Cross Petr. Ground Water Users' Reply Brief at 23-31 in Clear Springs Foods, Inc. v.Tuthill Civil Case No. 2008-444 (March 9, 2009). Portions of these briefs are attached hereto for the Court's convenience as Exhibits A and B respectively and are incorporated herein by reference as if fully set forth.

CONCLUSION

This Court in its appellate capacity must reject the SWC's arguments and affirm IDWR's Final Order. First, the Director is authorized by Idaho law to restrict the SWC's water diversion to a level of "actual need" to raise full crops when responding to a delivery call even if the amount is less than the authorized maximum amounts in the SWC's decreed water rights. Second, the Director properly exercised his authority and discretion in accepting temporary "replacement water plans." Third, the Director's response to the SWC's delivery call was timely and in accordance with Idaho law and the Director's replacement water plan "process" did not violate the SWC's right to due process given that a hearing was held in 2007 and prior hearings were not held because of the SWC's own delay tactics. Fourth, the Director properly concluded in accordance with Idaho law that reasonable carry-over should be provided "in the season in which the water can be put to beneficial use, not the season before." Fifth, the Director properly concluded in accordance with Idaho law and the evidence presented in this case that TFCC's full supply should be based upon 5/8 inch per acre for purposes of calculating any mitigation requirement of Ground Water Users under the CM Rules. Sixth, the Director's use of the 10% trim line for purposes of curtailing junior water right users was in accordance with Idaho law and a proper exercise of discretion in this case. Lastly, the Ground Water Users request an award of attorney fees on the basis that the SWC unreasonably and frivolously pursued this appeal with

full knowledge that the Idaho Supreme Court has already rejected many of their current arguments in the *AFRD2* decision.

DATED this 30th day of April, 2009.

RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2009, I served two true and correct copy of the above and foregoing document to the following person(s) as follows:

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Exhibit A

Selected pages from Ground Water Users' Opening Brief

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

RANGEN, INC.,

Cross-Petitioner,

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.

Case No. CV-2008-0000444

GROUND WATER USERS' OPENING BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

GROUND WATER USERS' OPENING BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

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Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, District Judge, Presiding

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water resources in a way that complies with the legislative directive. The projected net economic loss of more than seven and one-half billion dollars powerfully demonstrates that the curtailment is overbroad and unreasonably interferes with full economic development of the ESPA.

F. The scope of curtailment should be narrowed so that a significant portion of the quantity curtailed will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

The solution to reasonable water use in this case lies in reigning in the scope of curtailment so that a significant portion of the curtailed water use will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights. This can be accomplished via constriction of the trim line: "a point of departure beyond which curtailment [is] not ordered." (Recommended Order, R. Vol. 16, p. 3706.) The lesser the distance between a curtailed ground water right and the target spring outlets, the greater the percentile return on curtailment and the less time it takes for the effects of curtailed to be realized. (Harmon, Tr. p. 931, L. 19-24; Dreher, Tr. p. 1414, L. 4-17; Brendecke, R. Supp. Vol. 3, p. 4455, L. 23-p. 4456, L. 5, p. 4456 L. 15-p. 4457, L. 18.)

Obviously, the implementation of a trim line has the effect of excluding some junior-priority water rights from curtailment. But that is precisely the purpose of the legislative instruction that "a reasonable exercise of the [prior appropriation doctrine] shall not block full economic development of underground water resources." I.C. § 42-226. The language of that statute is unambiguous; therefore, "the clearly expressed intent of the legislative body must be given effect." *Friends of Farm to Market v. Valley County, Idaho Bd. of Commissioners*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). As explained by the Idaho Supreme Court, "when private

property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interest must recognize that the ultimate goal is the promotion of the welfare of all our citizens." *Baker*, 95 Idaho at 584, 513 P.2d at 636. The Court unequivocally affirmed its position on this issue in its recent *AFRD2* decision, stating that "[w]hile the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception." 143 Idaho at 880, 154 P.3d at 451.

It is indisputable that the curtailment of tens of thousands of irrigated acres greatly interferes with full economic development of the ESPA. The unreasonableness of the curtailment is plainly manifest by the fact that that it will take nearly a century for just 3.2 percent of the quantity curtailed to reach Blue Lakes and for less than 1 percent of the quantity curtailed to reach Clear Springs. The monopolistic effect of curtailment, the massive amount of water sacrificed, and the severe economic harm from curtailment all further demonstrate that the scope of curtailment is overbroad. When the Ground Water Users argued that these considerations demand that the scope of curtailment be narrowed, the Director refused because there was no "empirical basis." (Response Order, Vol. 16, p. 3840-41.) Yet an empirical basis is not prerequisite to the determination of reasonableness, which inherently requires "some exercise of discretion by the Director." *AFRD2*, 143 Idaho at 875, 154 P.3d at 446. Ultimately the Director refused to exercise that discretion.

The facts are undisputed that the Curtailment Orders eliminate 100 percent of the beneficial water use of curtailed ground water users while at most, and only then at steady state

conditions achieved after nearly 100 years, will a mere 3 percent of the quantity curtailed reach Blue Lakes and less than 1 percent of the quantity curtailed reach Clear Springs. The disparity between the amount of water curtailed and the anticipated benefit to Blue Lakes and Clear Springs is outlandish. Not surprisingly, the economic impact of curtailment is immediate, severe and potentially irreversible and could cause the permanent net loss of nearly 3,500 jobs, decrease the area's personal annual income in the near term of at least $160,000,000, and result in the loss of millions of dollars in annual property tax revenue. These facts unavoidably demonstrate that the scope of curtailment is overbroad and unreasonably interferes with full economic development of the ESPA. Such broad scope of curtailment exceeds the Director's statutory authority and/or is arbitrary, capricious and an abuse of discretion. The Ground Water Users therefore ask this Court to substantially narrow the scope of curtailment via constriction of the trim line so that a significant portion of the water curtailed will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

III. THE RECORD IS DEVOID OF EVIDENCE THAT THE WATER THAT MAY ACCRUE TO BLUE LAKES AND CLEAR SPRINGS FROM CURTAILMENT WILL ENABLE THEM TO PRODUCE MORE OR LARGER OR HEALTHIER FISH AND DOES NOT TO SUBSTANTIALLY SUPPORT THE DIRECTOR'S FINDINGS OF MATERIAL INJURY.

Conspicuously absent from the record is evidence that Blue Lakes or Clear Springs will be able to produce more, larger, or healthier fish as a result of the curtailment. The record does not substantiate the categorical conclusion that "depletion of the water supply … is material injury when the business is the production of fish." (Response Order, R. Vol. 16, p. at 3840.) Nor does the record show that the amount of water that would be deliverable to Blue Lakes and

VI. THE DIRECTOR ERRED BY CURTAILING GROUND WATER RIGHTS WITHOUT REASONABLE CERTAINTY THAT ADDITIONAL WATER WILL ACCRUE TO THE SPRINGS THAT SUPPLY THE BLUE LAKES' AND CLEAR SPRINGS' WATER RIGHTS.

A fundamental promise of due process is that one's property will not be deprived arbitrarily. Applied to the administration of water rights, this means that one's water right will not be curtailed arbitrarily. Under Idaho law, an "appropriation must be for some useful and beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." I.C. § 42-104. Accordingly, an appropriator, though junior in priority, will not be deprived of his water right unless the calling senior water user can put to beneficial use the water resulting from the junior's curtailment. *See Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1223 (1976). As a pre-condition of curtailment, there must be reasonable certainty that the water that would have been used by the junior-priority water user, or at least a significant portion of it, will be put to beneficial use by the calling senior-priority water user. In this case the scope of curtailment goes beyond that threshold and encompasses ground water rights without reasonable certainty that Blue Lakes or Clear Springs will receive additional water as a result of their curtailment.

The rule against arbitrary curtailment has unique relevance when, as in this case, a scientific model is used as the basis for curtailment. Here, the ESPA Model was used to predict the degree of hydraulic connection between ground water rights and the respective reaches of the Snake River where Blue Lakes and Clear Springs are located. Those predictions are no more reliable than the degree of uncertainty that is built into (or not worked out of) the ESPA Model. (Ex. 460; Wylie, Tr. p. 850, L. 7p. 851, L. 2; Tr. p. 847, L. 10p. 848, L. 10.) Of course, the level

of uncertainty is more critical to some Model applications than others. For instance, uncertainly is less important when the Model to guide general water policy decisions. In contrast, it is vitally important that the level of uncertainty in the Model be understood and accounted for if it is to be used as the basis to deprive private property rights via curtailment. The reliability of the linear analysis that was used to allocate reach gains to various spring outlets must also be accounted for. (Wylie, Tr. p. 860, L. 5-17.)

The record in this case establishes that the ESPA Model is the best science currently available to the Department to predict the hydrologic relationship between surface and ground water rights. (Final Order at 9.) That does not mean, however, that the Model perfectly predicts the effects of curtailment or that the Director should apply the Model irrespective of its short-comings. (Recommended Order at 13.) Given the State policy for full economic development of ground water resources, the scope of curtailment must be confined to those ground water rights that the Model and other analyses can predict with a reasonable degree of certainty will benefit Blue Lakes and Clear Springs.

The degree of uncertainty in the ESPA Model is a product of the accuracy of its inputs and assumptions. Director Dreher accounted for only one element of uncertainty—stream gauge error—in issuing the Curtailment Orders. (Recommended Order at 14.) Because there is a ten percent margin of error in the Snake River gauges that are used in the ESPA Model, the Director assigned an uncertainty factor of 10 percent to the Model. *Id*. (Wylie, Tr. p. 850, L. 7-p. 851 L. 2; Tr. p. 847, L. 10-p. 848, L. 10, p. 888, L. 16-24, p. 819, L. 22-p. 820, L. 2; Dreher, Tr. p. 1166, L. 7-p. 1167, L. 8; p. 1227, L. 21-p. 1228, L. 4.) The zone of curtailment (a/k/a trim line)

was then confined to junior-priority ground water rights for which at least ten percent of the quantity curtailed was predicted to return to the reaches of the Snake River where Blue Lakes and Clear Springs are located. (Recommended Order, R. Vol, 16, p. 3703.) Director Dreher did not account for sources of uncertainty other than stream gauge error in defining the location of the trim line. (Blue Lakes Order, R. Vol. 1, p. 49, ¶ 16, p. 59, ¶ 67; Ex. 109; Wylie, Tr. p. 817, L. 12-p. 818, L. 9.)

At the hearing, all experts, including Dr. Brockway for Clear Springs and Dr. Wylie for the Department, agreed that the degree of uncertainty in the ESPA Model must be accounted for and does not result from stream gauge error alone. Expert testimony established that Model uncertainty also derives from the non-uniform geology of the ESPA, variations within the Model cells, the assumption that well impacts are isotropic, the assumption that all data was accurate and reliable, the use of complex mathematics, unaccounted for impacts of surface water diversions, precipitation recharge, and tributary underflow. (Recommended Order, R. Vol. 16, p. 3703; Wylie Testimony, Tr. p. 842 L. 25-p. 843, L. 3; p. 847 L. 10-p. 848 L. 10; p. 888 L. 20-24; Dreher Testimony, Tr. p. 1166 L. 1-p. 1167 L. 8; Land Testimony, Tr. p. 1561 L. 22-p. 1566 L. 5; p. 1566 L. 6-12; Brockway, Tr. p. 1647 L.18-p. 1650 L.17.) Each of these variables contributes a degree of uncertainty to Model predictions. (Recommended Order, R. Vol. 16, p. 3703.) Consequently, Dr. Brendecke, who participated in developing the ESPA Model, estimated that actual Model uncertainty is likely between twenty to thirty percent. (Brendecke Testimony Tr. p. 1900 L. 26 - p. 1901 L. 25.) In hindsight, Director Dreher agreed that ten percent is the minimum possible degree of Model uncertainty, and that the actual degree of

uncertainty is likely higher than ten percent. (Dreher Testimony Tr. p. 1227 L. 21 - p. 1228 L. 4.) Dr. Brendecke's opinion that Model uncertainty is twenty to thirty percent went unchallenged.

In addition to uncertainty in the ESPA Model, a degree of error must be attributed to the linear analysis used to predict ESPA discharges from discrete spring outlets. The record unequivocally established that the Model is incapable of predicting the effect of curtailment on discrete spring flows; it can only predict reach gains: "It's not good at figuring out what the flow would be at one individual spring given any administrative action." (Wylie, Tr., p. 812, L. 10-16; p. 857 L. 25-p. 858 L. 4; Brockway R. Supp. Amend. Vol. 16 p. 4871 at 11.) As a result, the Director utilized a linear analysis in an attempt to allocate reach gains between different springs. *Id*. The analysis has not been tested or verified and Dr. Wylie, who developed the analysis, testified that he is not confident in its application. (Wylie Testimony Tr. p. 856 L. 2-7; p. 860 L. 5-17; p. 867 L.2-16; Ex. 6; Brockway, Tr. p. 1658 L.19 - p. 1659 L.3; Land, Tr. p. 1565 L.19 - p. 1566 L. 5; p. 1566 L. 17 to p. 1567 L. 9; p. 1567 L. 24-11.) Notwithstanding, the Hearing Officer accepted Director Dreher's use of the linear analysis on the basis that "there was no credible evidence of a better result." (Response Order, Vol. 16, p.3844.) However, non-evidence of a better methodology does not make the linear analysis sufficiently reliable to justify its use to deprive property rights. There is a point at which even the best available methodology would still be so unreliable as to preclude its use for there must be an accounting for the degree of uncertainty in its predictions before it can be relied upon to deprive ground water users of their property rights.

Given the unanimous expert testimony that uncertainty in the ESPA Model is greater than ten percent and the unreliability of the linear analysis, all evidence indicates that the actual degree of uncertainty in the curtailment predictions must exceed ten percent. The Hearing Officer refused to assign any level of uncertainty to factors other than stream gauge error because the other contributing factors of uncertainty "were not assigned a percentile of error that could be tested and peer reviewed," and for lack of an "empirical basis" to verify Dr. Brendecke's opinion. (Response Order, R. Vol. 16, p. 3840-41.) That ruling is compromised by the emergency assignment of ten percent uncertainty which also has not been tested but was made solely on the Director's "best judgment" at the time the Curtailment Orders were issued in 2005. The subsequent hearing revealed additional factors of uncertainty that were not initially considered, but that all experts at the hearing agreed contributed a degree of uncertainty to the curtailment scenarios beyond the ten percent figure that was used. The Director has an obligation to exercise his best judgment to account for all known factors of uncertainty. It is one thing to conclude that these known factors do not add uncertainty to curtailment predictions, but quite another to disregard them altogether in deference of an assignment that was made on an emergency basis without the evidence presented at the hearing. (*Cf.* Recommended Order at 14.) The Director's failure to attribute a degree of uncertainty to known factors of uncertainty in the ESPA Model and the linear analysis is an abuse of discretion.

Prudent administration of Idaho's water resources consistent with the directive for full economic development of ground water resources cannot tolerate the curtailment of beneficial water use without reasonable certainty that Blue Lakes and Clear Springs will benefit therefrom.

The unchallenged testimony of Dr. Brendecke that Model uncertainty is realistically twenty to thirty percent provides the only conclusion substantially supported by the record. And that figure does not account for the questionable nature of the linear analysis, which casts serious doubt on the amount of additional water, if any, that will accrue to the target spring outlets. Therefore, the Ground Water Users ask this Court to reverse the Final Order on these points and remand this matter to the Director to account for and incorporate in his decision all undisputed contributing factors of Model uncertainty, to assign a degree of uncertainty to the linear analysis, and to re-define area of curtailment accordingly.

VII. THE DIRECTOR EXCEEDED HIS AUTHORITY BY ISSUING THE CURTAILMENT ORDERS ON AN EMERGENCY BASIS WITHOUT A PRIOR HEARING.

A fundamental constitutional protection is the promise that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. It is well established in Idaho that "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Due process guarantees all citizens "an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations." *Lowder v. Minidoka County Joint Sch. Dist. No. 331*, 132 Idaho 834, 840 (1999) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). A pre-deprivation notice and hearing is required except in "extraordinary circumstances" where some valid governmental interest justifies the postponement of the notice and hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Nettleton*, 98 Idaho 90.

Exhibit B

Selected pages from Ground Water Users' Reply Brief

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

RANGEN, INC.,

Cross-Petitioner,

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.

Case No. CV-2008-0000444

GROUND WATER USERS' REPLY BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

GROUND WATER USERS' REPLY BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, District Judge, Presiding

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source to support his appropriation contrary to the public policy of reasonable use…." The Idaho Supreme Court's recent confirmation that these CM Rules are facially constitutional, together with the Court's declaration that the Director does have authority to "make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development," *AFRD2*, 143 Idaho at 876, leaves no doubt that laws of reasonable use and full economic development impose practical limitation on the exercise of priority in the conjunctive management. Contrary to the Spring Users' argument, Idaho law requires the Director to deny administration by strict priority where doing so will unreasonably interfere with full economic development of the ESPA.

III. THE RESPONDENT'S BRIEF REINFORCES THE DIRECTOR'S FAILURE TO INDEPENDENTLY CONSIDER WHETHER THE DOCTRINE OF FULL ECONOMIC DEVELOPMENT WARRANTS A NARROWING OF THE SCOPE OF CURTAILMENT.

The Department acknowledges the Director's duty to consider the public interest in water administration, including consideration of full economic development. (Respondents' Br. at 60, quoting I.C. 42-226.) Notwithstanding, the record in this case shows that the Director failed to meet that duty by not independently considering whether the scope of curtailment should be narrowed to assure that the Spring Users' delivery calls do not unreasonably interfere with full economic development of the ESPA. The Director's failure in this regard constitutes an abuse of discretion that substantially prejudices the rights of junior-priority ground water users and the public generally.

In 2005, the Director ordered the curtailment of junior-priority ground water rights for which at least ten percent of the quantity curtailed is expected to accrue to the reaches of the

Snake River where Blue Lakes' and Clear Springs' are located. (Blue Lakes Order, R. Vol. 1, p. 61, ¶78; Clear Springs Order, R. Vol. 3, p. 501, ¶66.). This was accomplished via implementation of a "trim line," a point beyond which junior-priority diversions would not be curtailed. (Blue Lakes Order, R. Vol. 1, p. 49, ¶16, p. 59, ¶67; Clear Springs Order, R. Vol. 3, p. 491, ¶17, pp. 508-09, ¶96.). The location of the trim line was decided solely as the product of the Director's attribution of ten percent uncertainty in the ESPA Model. (Blue Lakes Order, R. Vol. 1, p. 63, ¶6; Clear Lakes Order, Vol. 3, p. 513, ¶12.) There are no findings of fact or conclusions of law to indicate that the Director directly considered whether the scope of curtailment should be further narrowed consistent with doctrine of full economic development as set forth in Idaho Code § 42-226.

The Director's failure to directly and thoroughly consider whether to limit the scope of curtailment consistent with the doctrine of full economic development appears to stem from a mistaken belief that he has little if any authority to deny the exercise of priority. The Hearing Officer explained his refusal to narrow the scope of curtailment this way: "It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. … Curtailment is proper." (Respondent's Br. at 14, quoting R. Vol. 16 at 3714.) This explanation reflects the Director's belief that his discretion under Idaho Code § 42-226 is limited to the acceptance of mitigation in lieu of curtailment and the allowance of phased-in curtailment. This is most clearly stated in the Director's latest curtailment notice, wherein the Director concludes that "[a] senior may not block the full economic development of the State's water resources <u>if junior ground water users can mitigate</u>

their depletions in-time and in-place." (Final Order Accepting Ground Water Districts' Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan in Part; and Notice of Curtailment at 9, ¶ 11.)[10] Stated conversely, the Director believes that a senior can block full economic development of the ESPA if junior ground water users cannot mitigate their depletions in-time and in-place. This is not the administrative paradigm that the Legislature adopted in the Ground Water Act.

The Legislature limited the exercise of priority under the Ground Water Act precisely because it anticipated declining aquifer levels. The Act does not provide for the maintenance of peak aquifer levels for the benefit of a few, but instead required the maintenance of sustainable aquifer levels for the benefit of many, while still preserving the right of priority as necessary to maintain sustainable aquifer levels. In contrast, the Director's requirement that ground water users provide mitigation to avoid curtailment demonstrates management of the ESPA to sustain historic (rather than reasonable) aquifer levels in direct contradiction of the purpose of the Act.

Indeed, the Act's protection of reasonable pumping levels would be meaningless if a senior ground water user could demand that junior users be curtailed unless they provide mitigation to maintain historic aquifer levels. The Idaho Supreme Court rejected that idea in *Baker*, holding that "[a] senior appropriator is not absolutely protected in either his historic water levels or his historic means of diversion," but is "only entitled to be protected to the extent of 'reasonable pumping levels'…." 95 Idaho at 584. Nevertheless, the Director is now, by

[10] This order is essentially an extension of the Final Order in this case. As stated in the order, "Conclusions of Law set forth in the July 2005 Order, the Recommended Order, and the Final Order, as well as subsequent orders related thereto, as applicable, are incorporated into this order by reference." A copy of this order is attached hereto as Exhibit B.

absolutely refusing to allow junior diversions without mitigation, applying the Act in a way that requires the maintenance of historic spring flows (i.e. historic aquifer levels), thereby entitling the Spring Users to do what no other senior-priority ground water users could do.

Contrary to the plain language of the Ground Water Act and its application by the Idaho Supreme Court in *Baker*, the Director has now undertaken management of the ESPA for historic levels. This is the very thing that the Legislature attempted to avert by limiting the exercise of priority in the event it unreasonably interferes with full economic development of the ESPA. In fact, the Legislature created a special administrative body called a "local ground water board" to assure that its provision for reasonable limitations on the exercise of priority was given proper effect. I.C. § 42-237d. The involvement of local residents in ground water administration underscores the Legislature's intent that meaningful consideration be given the effect of curtailment on the community of ground water users.

The Legislature's intention that the Director not manage the ESPA for peak levels, but rather for sustainable levels, is not only clear in the language of the Act and subsequent Idaho Supreme Court decisions, but also in Idaho State Water Plans that state specifically the effect of the Act on aquaculture water users in the Thousand Springs area. The 1976, 1982, and 1986 State Water Plans consistently explain that

> [a]quaculture is encouraged to continue to expand when and where supplies are available and <u>where such uses do not conflict with other public benefits</u>. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, <u>aquaculture interests may need to construct different water diversion facilities than presently exist</u>.

Ex. 438 at 118, Ex. 439 at 44, Ex. 440 at 38 (emphasis facilities).[11] These Plans reflect the practical effect of the policy of full economic development as provided in Idaho Code § 42-226.

Thousands of ground water appropriators have invested and developed the ESPA in reliance on the State of Idaho's assurance that they would not be held hostage by the few water users in the Thousand Springs area who might get the idea of curtailing ground water pumping in an effort to increase spring flows. In keeping with that policy, the Department encouraged and issued thousands of ground water rights which, coupled with cheap electricity incentives by Idaho Power Company, enabled Idaho farmers to make the desert bloom. Spring flows declined as expected, though they remain well-above natural levels. (Ex. 406.) Rather than continue these policies, however, the Final Order initiates a reversal of state ground water policy that is destined to return thousands of irrigated acres back into sagebrush.

In voluntarily restricting his authority under the Ground Water Act, it seems the Director has inadvertently conflated the separate doctrines of futile call and full economic development. The purpose of providing mitigation is to render a delivery call satisfied, since mitigation eliminates the injury being complained of. In contrast, the purpose of full economic development is to protect the public's interest in maximizing beneficial use of finite resources, even if the senior's right is not fully satisfied. Whereas the focus of the mitigation analysis is personal to the calling senior, the focus of the full economic development analysis is communal. In short, the Ground Water Act does not condition the exercise of priority upon whether the

[11] The reference to "adequate water" reflects the Plans' incorporation of "a zero Minimum flow at the Milner gauging station" which "means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low water years," and that "[t]he Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system." Ex. 440 at 35.

junior can fully mitigate its depletion, but upon whether the curtailment will interfere with full economic development of the resource. In factual circumstances where mitigation is impossible, unfeasible or would not provide any meaningful benefit within a reasonable time to the calling senior, the Director has a reasonable basis to refuse priority administration under the doctrine of full economic development.

The Director's incomplete analysis of the doctrine of full economic development is further manifest by his failure to consider or apply CM Rule 42.01.h, which specifically identifies certain mechanisms available to the Director to assure that the reasonable exercise of priority does not interfere with full economic development of the ESPA. CM Rule 42.01.h advises the Director to consider

> [t]he extent to which the requirements of the senior surface water rights could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to use and divert water from the area having a common ground water supply under the petitioner's surface water right priority.

The Hearing Officer refused to consider this factor because he believed that "treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees." (R. Vol. 14 at 3236-3237.) The Department similarly justifies the Director's failure to consider this material injury factor, claiming that "[i]f the Director were required to compel Blue Lakes and Clear Springs to change the source listed on its partial

decrees from surface water to ground water, that would constitute a readjudication." (Respondents' Br. at 62.)[12]

The Director's belief that he has no authority to apply CM Rule 42.01.h runs contrary to the Idaho Supreme Court's affirmative conclusion that the Director can apply the factors of CM Rule 42 without causing a re-adjudication of the senior water right. In addition, it defies the general provision in the SRBA that all water sources are deemed inter-connected unless proven otherwise. The very fact that the Spring Users are allowed to curtail water rights whose SRBA decrees list the source as "ground water" gives credence to the Director's authority to require a conversion from one hydraulically connected source to another as necessary to assure that the exercise of priority does not unreasonably interfere with full economic development of the ESPA. It also contradicts and reverses the historic policy outlined in State Water Plans that the Spring Users' water supplies and means of diversion are not absolutely protected, as explained above.

On reconsideration, the Director acknowledged that Idaho Code § 42-226 may in fact justify a narrowing of the scope of curtailment in the public interest, but still failed to independently consider the extent to which it does. Instead, full economic development was nebulously cited to support of the Director's decision to limit curtailment based on Model

[12] What the Department is really saying is that the Director has no authority under any circumstance to compel a surface water right to convert to a ground water source. Since every water right license and decree defines a source, the application of CM Rule 42.01.h would require a change from the defined surface source to a ground water source in every instance. The rule becomes entirely useless under the Director's claim that its application constitutes a re-adjudication. Surely, however, the Director must be afforded the opportunity to apply CM Rule 42.01.h and administer the water right based on the extent of interconnection between its source and that of junior water users, which is not defined in the Spring Users' SRBA decrees. And in this case it is undisputed in this case that the Spring Users' spring flows consist entirely of ground water emanating from the ESPA. (Dreher, Tr. p. 1113, L. 18-p. 1114, L. 2; Wylie, Tr. p. 889, L. 11-17, P. 891, L. 23-P. 892, L. 5.)

uncertainty. (R. Vol. 16, p. 3703-04, 3706, 3711-13.) The Director's accounting for Model uncertainty, however, is not and should not be the same analysis undertaken to consider full economic development.

Moreover, the lack of a fresh and independent reconsideration of whether the trim line should be constricted in accordance with Idaho Code § 42-226 underscores the problem with ordering large-scale, permanent curtailment without a prior hearing. It is no secret that the Ground Water Users are soured by the curtailment of their water rights on an emergency basis without a full evidentiary record and without hearing argument on important legal defenses to the Spring Users' delivery calls. Compounding this injustice is the defensive, appellate-type review that was given to the 2005 Curtailment Orders. Had the facts and legal defenses raised by the Ground Water Users been heard and thoroughly considered before ordering curtailment, the law of full economic development would have been given thorough and independent consideration, which the Ground Water Users believe would have resulted in a much narrower scope of curtailment from the beginning.

In this case, it is extraordinarily difficult to mitigate for the small quantity demanded for Clear Springs' Snake River Farm facility due to its location, as was explained by Lynn Carlquist and Dean Stevenson. (Carlquist, R. Supp. Vol. 7, p. 4837, L. 10-19, p. 4840, L. 6-11; Stevenson R. 2nd Supp. Vol. 1, p. 5549, L. 14-23, p. 5552, L. 1015.) Dr. Wylie of the Department also agreed that efforts to mitigate with water to Snake River Farms would be difficult given its location:

A. The Buhl to Thousand Springs reach is much shorter. This is over 20 miles

> long, and the Buhl to Thousand Springs reach is 10 miles long. So you get - you don't get as much impact as that impact spreads out radially from a well on this much shorter reach.

(Tr., p. 825, L. 9-13.) The result is that it is not practically possible to fully mitigate for impacts to Clear Springs, which the Director views as leaving himself no option but curtailment by strict priority.

In conclusion, the law of full economic development as set forth in the Ground Water Act expressly requires the Director to directly consider and make specific findings of fact about whether the exercise of priority must be limited to assure that it does not unreasonably interfere with full economic development of the ESPA. This is an independent analysis and just a backup to support Director's accounting for uncertainty in the ESPA Model. However, the Director's testimony that the trim line is solely the product of model uncertainty, the lack of any analysis of full economic development within the orders, and the lack of any findings of fact addressing the economic effects of the ordered curtailment collectively demonstrates that the Director did not independently consider, at least not in a meaningful or adequate way, whether the location of the trim line should be constricted in accordance with the legislative mandate for full economic development of the ESPA. The Director's failure in this regard was arbitrary and capricious and constitutes an abuse of discretion that violates substantial rights of the Ground Water Users.

If the law of full economic development is going to have any meaning in ground water administration, it must be addressed by making specific findings, yet the Director was entirely silent on this issue. As explained above and in the Ground Water Users' Opening Brief, the scope of curtailment in this case is so broad that 52,470 acres (more than 145 square miles) of

productive irrigated farmland are being retired to provide just 481 acres worth of water to Clear Springs—an anticipated return to Clear Springs of less than one percent at steady state, meaning this small benefit will only inure gradually and only be fully realized after decades. As acknowledged by the Hearing Officer, "[t]he vast majority of the water curtailed will not go to the Blue Lakes or Snake River Farms facilities. Perhaps it will go to beneficial use in Idaho, perhaps not." (R. Vol. 16, p.3711.)

Thus, the ultimate question before this Court is whether or not the Director's curtailment unreasonably interfere with full economic development of the ESPA when it retires 52,470 acres of productive irrigated farmland to provide just 2.66 c.f.s. to Clear Springs over the next several decades, retires 57,220 irrigated acres to provide 10.05 c.f.s. to Blue Lakes. One can hardly imagine a scenario that more persuasively demands some limitation on the exercise of priority. Accordingly, the Ground Water Users ask this Court to narrow the scope of curtailment so that priority is reasonably exercised as against only those ground water rights for which curtailment will provide a significant return within a reasonable time to the springs that supply Clear Springs' and Blue Lakes' water rights. This is the condition upon which the Legislature subjected ground water rights to delivery calls by surface water rights under Idaho Code § 42-226. Alternatively, the Ground Water Users ask this Court to remand this case to the Director to make that determination.