Docket No. 38191-2010, 38192-2010 and 38193-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION; and
Petitioners-Respondents on Appeal,

IDAHO DAIRYMAN'S ASSOCIATION, INC.,
District Court Cross-Petitioner,

v.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES; and
Respondents-Respondents on Appeal,

IDAHO GROUND WATER APPROPRIATORS, INC.; and
Intervenor-Respondent-Cross Appellant

THE CITY OF POCATELLO,
Intervenor-Respondent-Cross Appellant.

SURFACE WATER COALITION'S OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District for Gooding County
Honorable John M. Melanson, District Judge, Presiding

ATTORNEYS FOR PETITIONERS-APPELLANTS

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls, ID 83303
(208) 733-0700 – Telephone
(208) 735-2444 – Facsimile
- *Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company*

C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP, PLLC
P.O. Box 32
Gooding, ID 83330
(208) 934-8872 - Telephone
(208) 934-8873 – Facsimile-
- *Attorneys for Am. Falls Reservoir District #2*

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
(208) 678-3250 - Telephone
(208) 878-2548 - Facsimile
- *Attorneys for Minidoka Irrigation District*

ATTORNEYS FOR RESPONDENTS-RESPONDENTS

Garrick Baxter
Chris M. Bromley
IDAHO DEPT. OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
(208) 287-4800 – Telephone
(208) 287-6700 – Facsimile
- *Attorneys for Interim Director and Idaho Department of Water Resources*

ATTORNEYS FOR INTERVENOR-RESPONDENT-CROSS APPELLANT

Randall C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE & BAILEY, CHTD
P.O.Box 1391
Pocatello, ID 83201
(208) 232-6101 – Telephone
(208) 232-6109 – Facsimile
- *Attorneys for Idaho Groundwater Appropriators, Inc., et al.*

A. Dean Tranmer
CITY OF POCATELLO
P.O. Box 4169
Pocatello, ID 83201
(208) 234-6149 – Telephone
(208) 234-6297 – Facsimile
- *Attorneys for City of Pocatello*

Sarah A. Klahn
Mitra M. Pemberton
WHITE & JANKOWSKI LLP
511 Sixteenth St., Suite 500
Denver, CO 80202
(303) 595-9441 – Telephone
(303) 825-5632 – Facsimile

(See Service Page for Remaining Counsel)

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Final Order Regarding the Surface Water Coalition Delivery Call* ("*Final Order*") issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on September 5, 2008.

II. Course of Proceedings

Seven canal companies and irrigation districts[1] filed a water delivery call with IDWR on January 14, 2005. R. Vol. 1 at 1. The call requested administration of hydraulically-connected junior ground water rights in the Eastern Snake Plain Aquifer ("ESPA"). *Id.* In response, the Director issued an Amended Order on May 2, 2005 ("*2005 Order*"), finding material injury to the senior surface water rights held by AFRD#2 and TFCC. R. Vol. 8 at 1359, 1382-85. Notwithstanding the finding of material injury, the Director allowed out-of-priority pumping to continue through the unlawful approval of "replacement water plans." R. Vol. 9 at 1557.[2]

Between 2005 and 2007, the Director issued seven supplemental orders.[3] Like the *2005 Order*, the supplemental orders failed to require curtailment or mitigation during the irrigation

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[1] A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD#2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka Irrigation District ("MID"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC") (collectively referred to as "Surface Water Coalition" or "Coalition").

[2] The Director approved these plans without any statutory authority, contrary to the CM Rule 43 mitigation plan process, and in violation of the Coalition's right to due process. The District Court determined the Director erred in approving the "replacement water plans". Clerk's R. Vol. 3 at 537-40. No party appealed the District Court's ruling on this issue.

[3] *See Supp. Order* (July 22, 2005), R. Vol. 13 at 2424; *Second Supp. Order* (December 27, 2005), R. Vol. 16 at 2994; *Third Supp. Order* (June 29, 2006), R. Vol. 20 at 3735; *Fourth Supp. Order* (July 17, 2006), R. Vol. 21 at 3944; *Fifth Supp. Order* (May 23, 2007), R. Vol. 23 at 4286; *Sixth Supp. Order and Order Approving IGWA's 2007 Replacement Water Plan* (July 11, 2007), R. Vol. 25 at 4714; *Seventh Supp. Order* (May 23, 2008), Ex. 4600.

season when injury was found. *See infra*, Argument Part I.C. Instead, the Director allowed the juniors' mitigation obligation to "carry forward" to the following irrigation season, and only required the juniors to provide water if the Coalition's storage water accounts "failed to fill." R. Vol. 8 at 1405 ¶¶ 11 & 13. The Director delayed his determination on mitigation obligations – sometimes months after the irrigation season ended. R. Vol. 20 at 3735.

Several parties, including the Coalition and the U.S. Bureau of Reclamation ("Reclamation"), challenged the *2005 Order* and requested an administrative hearing.[4] Simultaneously, litigation over the constitutionality of the Department's Rules for the Conjunctive Management of Surface Water and Ground Water Resources (IDAPA 37.03.11 *et seq.*) ("CM Rules") proceeded before the Gooding County District Court. This Court upheld the facial constitutionality of the CM Rules in that case. *AFRD#2, et al. v. IDWR, et al.*, 143 Idaho 862 (2007).

Following the *AFRD#2* decision, the parties continued with the administrative proceeding, which culminated in a hearing before the Honorable Gerald F. Schroeder in early 2008. The Hearing Officer issued a recommended order, R. Vol. 37 at 7048, and the Director issued his *Final Order* on September 5, 2008, R. Vol. 39 at 7381. Although termed a "final order," the Director failed to fully decide all of the issues contested at hearing. Instead, he left critical issues open to be decided in a separate final order. *Id.* at 7386. The Director also indicated that an additional administrative hearing on that future order would be required. *Id.*

[4] R. Vol. 9 at 1623, 1642, 1679, 1691, 1704.

The Surface Water Coalition and Reclamation filed petitions for judicial review with the Gooding County District Court. Clerk's R. Vol. 1 at 1; 24. The Honorable John M. Melanson issued an *Order on Petition for Judicial Review* on July 24, 2009. Clerk's R. Vol. 3 at 511. The District Court held, among other things, that: 1) the Director erred in refusing to require mitigation in the season in which the injury occurs, *id.* at 526; 2) the Director exceeded his authority by failing to follow procedural steps for mitigation plans set forth in the CM Rules, *id.* at 537; 3) the Director exceeded his authority by determining the full headgate delivery for TFCC should be reduced to 5/8 miner's inch per acre instead of its decreed 3/4 miner's inch per acre, *id.* at 541; and 4) the Director abused his discretion by issuing two final orders, *id.* at 542. The District Court remanded the case back to IDWR for further proceedings consistent with the court's decision. *Id.* at 543.

IGWA and the City of Pocatello filed petitions for rehearing. Clerk's R. Vol. 3 at 545, 551. The District Court heard oral argument on the petitions and then stayed a decision pending the Director's issuance of a separate order on remand. Clerk's R. Vol. 4 at 627. Judge Melanson issued his *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition's Motion for Clarification,* on September 9, 2010. Clerk's R. Vol. 7 at 1215.

The Surface Water Coalition, IGWA, Pocatello and IDWR each appealed the District Court's decision. *Id.* at 1254, 1259, 1345 & 1354(a). IDWR later withdrew its notice of appeal with permission of this Court. *See* IDWR's *Motion to Withdraw Notice of Appeal* (dated April 14, 2011); *Order Granting Motion to Withdraw Notice of Appeal* (dated May 11, 2011).

III. Statement of Facts

A. Surface Water Coalition

A&B Irrigation District delivers surface water to approximately 17,000 acres (Unit A) in Jerome and Minidoka Counties. A&B holds a later priority natural flow water right (1-14), R. Vol. 8 at 1370, and storage rights in American Falls and Palisades Reservoirs, *id.* at 1373. A&B operates a lift station to pump all of its water from the Snake River. Ex. 8000 at 3-2.

American Falls Reservoir District #2 delivers surface water to approximately 62,000 acres in Jerome, Lincoln, and Gooding Counties. AFRD #2 holds a later priority natural flow water right (1-6), *id.* at 1370, along with a storage right in American Falls Reservoir, *id.* at 1373. AFRD #2 delivers its water from the Snake River through the Milner-Gooding Canal located upstream of Milner Dam. Ex. 8000 at 3-6.

Burley Irrigation District delivers surface water to approximately 48,000 acres in Cassia County. BID holds various natural flow water rights with priorities ranging from 1903 to 1939 along with storage rights in American Falls, Lake Walcott, Palisades, and Jackson Lake Reservoirs. *Id.* at 1370, 1373. BID diverts its water on the south side of Minidoka Dam and uses three separate lift stations to deliver water to three main canals for distribution. Ex. 8000 at 3-8.

Milner Irrigation District delivers surface water to approximately 13,500 acres in Cassia and Twin Falls Counties. Milner holds various natural flow water rights with priorities ranging from 1916 to 1939, along with storage rights in American Falls and Palisades Reservoirs. *Id.* at

1370, 1373. Milner diverts its water near Milner Dam through a lift station to a main canal and a series of smaller laterals. Ex. 8000 at 3-10.

Minidoka Irrigation District delivers surface water to approximately 77,000 acres in Minidoka County. MID holds various natural flow water rights with priorities ranging from 1903 to 1939, *id.* at 1371, along with storage rights in American Falls, Lake Walcott, Palisades and Jackson Lake Reservoirs, *id.* at 1373. MID diverts its water on the north and south sides of Minidoka Dam. Ex. 8000 at 3-12.

North Side Canal Company delivers surface water to approximately 155,000 acres in Jerome, Gooding, and Elmore Counties. NSCC holds various natural flow water rights with priorities ranging from 1900 to 1920, *id.* at 1371, along with storage rights in American Falls, Palisades, and Jackson Lake Reservoirs, *id.* at 1374. NSCC diverts its water on the north side of Milner Dam. Ex. 8000 at 3-13.

Twin Falls Canal Company delivers surface water to approximately 200,000 acres in Twin Falls County. TFCC holds the largest natural flow right (3,000 cfs) with the most senior priority (1900) on the Snake River between American Falls and Milner Dam. *Id.* at 1372. TFCC also holds storage rights in American Falls and Jackson Lake Reservoirs. *Id.* at 1374. TFCC diverts its water on the south side of Milner Dam. Ex. 8000 at 3-15.

B. Storage Water Use / Carryover Storage

Although all Coalition members hold natural flow water rights, each entity also relies upon storage water to some extent for its annual irrigation supply. *Supra.* Some entities rely upon storage more than others due to the junior priority of their natural flow water rights.

For example, AFRD#2, MID, and NSCC typically use more storage than TFCC, which holds the largest, most senior natural flow water right below American Falls (October 11, 1900 priority). R. Vol. 37 at 7057.

Since the Snake River's natural flow could not support all irrigation projects, the Coalition, other irrigation entities, and Reclamation participated in the development of storage reservoirs in the Upper Snake River Basin to meet irrigation demands as well as protect against future dry years. Clerk's R. Vol. 1 at 44-47; R. Vol. 8 at 1372-74, Vol. 37 at 7104. Reclamation reports on the planning and operation of Palisades Reservoir detail the history of droughts in the early twentieth century and the need for additional water storage. Exs. 7000; 7005 at 9-14; 7008 at 15 ("the primary objective of the project is to provide hold-over storage during years of average or above-average precipitation for release in ensuing dry years"). Past Water District 01 watermasters also described the history of storage development in the Upper Snake and the increased need for additional storage water over time. Ex. 8000, Apps. M, N. Finally, the Hearing Officer aptly summed up the reason behind storage development:

> However, the element of storage as insurance against severely dry weather conditions remains a legitimate objective. SWC members have invested in major facilities to deliver water to irrigators based on an expectation that the storage system would achieve its purpose of providing water when needed when weather conditions are unkind.

R. Vol. 37 at 7110.

The Coalition's storage water rights were acquired with the ability to use "carryover storage" in subsequent irrigation seasons to protect against future dry years.[5] In some seasons, the carryover storage supply can be the difference between a successful irrigation season and a failure – it is the "hinge between one year and the next year." Tr. Vol. 8 at p. 1608, lns. 7-14. For NSCC, carryover storage is the lifeblood of its project "because it does not have senior natural flow rights to satisfy early season irrigation demand." R. Vol. 33 at 6307. For BID, carryover storage is "a vital part to an adequate water supply" that provides the district with "sure knowledge" that its water users will have "that much water ... to use in the future year." R. Vol. 34 at 6388; *see also*, R. Vol. 32 at 6138-39 (testimony of Lynn Harmon, AFRD#2 manager). For MID, carryover storage is a "critical" factor in its irrigation planning process. R. Vol. 32 at 6129.

Importantly, the amount of carryover storage needed in any particular season is dictated by "winter and spring weather." R. Vol. 33 at 6306. For example, while wet conditions in 2006 allowed NSCC to carry over 350,000 acre-feet into the 2007 irrigation season, the dry conditions in 2007 forced NSCC to use all of that storage carried over from the previous year.[6] *Id.* at 6306-07. Given the uncertainty of water supplies from one season to the next, the Coalition members

[5] This Court defined carryover as "the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *AFRD#2*, 143 Idaho at 878. The CM Rules recognize the right to carryover storage. CM Rule 42.01.g ("the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years"); *see also AFRD#2*, 143 Idaho at 880 ("This Court upholds the reasonable carryover provisions in the CM Rules").

[6] Even then, NSCC was still forced to cut its deliveries down to 1/2 inch per share in order to make it through the 2007 irrigation season with water to deliver to its shareholders. R. Vol. 33 at 6306-07.

seek to maximize their carryover storage to guard against future dry years.[7] *See* CM Rule 42.01.g (storage right holder entitled "to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.") (emphasis added).

C. The Eastern Snake Plain Aquifer & Snake River Reach Gains

Ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. R. Vol. 8 at 1363; *Clear Springs Foods, Inc. v. Spackman*, -- Idaho --, 252 P.3d 71, 75 (2011). One of the locations where there is a direct hydraulic connection is in the American Falls reach (i.e. Near Blackfoot to Milner). R. Vol. 8 at 1363. The Coalition relies upon these reach gains to fill both natural flow and storage water rights. R. Vol. 37 at 7057, 7076.

Reach gains in the Near Blackfoot to Milner reach are declining. R. Vol. 8 at 1375, ¶ 79; Vol. 37 at 7057 ("There has been a declining trend in reach gains for the irrigation season"). The declining trend is most pronounced during the peak of the irrigation season (i.e. July and August), the time when water is needed the most. Ex. 8000 at 7-18. The reach gain declines correlate with the declines in TFCC's natural flow diversions, as well as with declines observed in ESPA ground water levels.[8] *Id.* at 7-19 to 7-20, Ex. 8000 at 7-79, 7-80.

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[7] Exercising the right to carryover storage should not be viewed as an attempt to "hoard" water. Coalition members are good stewards of their water supplies and there has never been a claim in these proceedings that the Coalition members are "wasting" water. *See* R. Vol. 37 at 7101 (Hearing Officer finding the Coalition's diversions and facilities to be reasonable). As Ted Diehl, NSCC manager testified, NSCC tries to be conservative with its carryover, recognizing that "the more carryover the storage holders have the better for all Water District 1 water users since it helps all storage in the system." R. Vol. 33 at 6307. At times, this requires that NSCC "self-mitigate by cutting deliveries ... to provide carryover water for the next year." *Id.*

[8] ESPA ground water levels have declined between five and 60 feet throughout the aquifer. R. Vol. 37 at 7053.

Ground water pumping impacts Snake River reach gains reducing the water available to the Coalition's senior surface water rights. R. Vol. 37 at 7057, 7076 ("Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights."). Given the hydraulic connection between the aquifer and the river, conjunctive administration is required.

D. Reduced Water Supplies & Conjunctive Administration

The Hearing Officer summed up the status of the Coalition's water supplies and the need for conjunctive administration in his recommended order:

> Consumptive use from ground water pumping has resulted in a net reduction in aquifer recharge from approximately 1.6 to 3.0 million acre feet per year, averaging in the area of 2 to 2.2 million acre feet per year. Large scale ground water pumping has contributed to a decline in ground water levels ranging between five and 60 feet throughout the ESPA.
>
> ...
>
> Ground water pumping increased, incidental recharge diminished, and additional water rights were licensed. No doubt many people understood the connection between the water on the surface in the Snake River and its tributaries and the water below ground in the aquifer. Nonetheless, for a significant period of time the connection was ignored as the administration of surface water and ground water progressed independent of one another. Ultimately the connection was acknowledged and the need for conjunctive administration became apparent.
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> ...
>
> The SWC members rely upon Snake River reach gains in the Near Blackfoot to Milner reach of the Snake River. There has been a declining trend in reach gains for the irrigation season.
>
> ...
>
> The Water Districts were created to provide for the administration of water rights to protect prior surface and ground water rights.
>
> ...

> The Surface Water Coalition made the showing that its members had licensed or decreed water rights and that material injury was occurring. There was evidence submitted indicating that ground water reduces reach gains upon which SWC members are dependent and that there have been crop losses resulting from water shortages.
>
> ...
>
> Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights.

R. Vol. 37 at 7052-53, 7054, 7057, 7064, 7073 & 7076.

E. Director's Response to SWC Delivery Call

In 2005, after suffering the effects of reduced reach gains, years of drought and the American Falls Reservoir failing to fill, the Coalition requested that the Director administer junior priority ground water rights in the ESPA.[9] R. Vol. 1 at 1.

The Director responded with the *2005 Order* and a series of supplemental orders. Rather than recognize the decreed quantities of the Coalition's water rights, the Director established a baseline for each entity, termed the "minimum full supply", as the starting point for administration. R. Vol. 8 at 1382-85. The "minimum full supply" was based upon actual diversions from a single year (1995). R. Vol. 8 at 1383, ¶ 115. The Director then averaged actual carryover storage from two years (2002 and 2004) to set each entity's "reasonable carryover" amount. *Id.* at 1384.

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[9] Prior to 2005, water users had reached an interim agreement to address the declining water supplies and the juniors' mitigation obligations in lieu of conjunctive administration. That agreement expired in 2004. R. Vol. 1 at 1 ("the Interim Stipulated Agreement expired two weeks ago"); Vol. 1 at 934-35; *see e.g.*, *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117 (2005).

The Hearing Officer recognized that the "minimum full supply" concept was flawed because it "does not acknowledge the burdens anticipated by the Supreme Court in *AFRD #2* which was decided after the May 2, 2005, Order." R. Vol. 37 at 7074. Further,

> Use of the minimum full supply analysis ***starts at a different point*** from recognizing the right of a senior right holder to receive the full amount of the licensed or decreed right, attempting to make an advance judgment of need. Inherent in the application of the minimum full supply is the assumption that, if it accurately defines need, use of water above that amount would not be applied to a beneficial use and would constitute waste. ***This strains against the assumption that the senior users are entitled to the full extent of their rights licensed or decreed rights which at some point has been determined to be an amount they could beneficially use.***

R. Vol. 37 at 7091 (emphasis added).

Although the Hearing Officer acknowledged the problem with the Director's analysis he still accepted it in his recommendation, provided the quantity would be "adjusted" to reflect actual conditions. *Id.* at 7093. The Hearing Officer's recommended qualification does not cure the fundamental legal errors with the Director's concept.

The Director implemented his "minimum full supply" approach from 2005 to 2007. The "process" produced no mitigation water for the Coalition during the irrigation season *even though the Director found material injury*. *See infra*, Argument Part I.C. Instead, junior ground water users continued to pump their full rights without providing any mitigation at the time injury occurred. The Director's administration failed to provide any water "at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface [ ] water source." CM Rule 43.02.b.

In addition, the Director refused to adjust the baseline to match changed conditions, such as in 2007, a particularly hot and dry irrigation season:

> When conditions changed in 2007 the minimum full supply was not adjusted. The year 2007 created a vexing problem. The snowpack runoff that occurred in April, May, and June was below the long term average for the district, resulting in less natural flow in the river. This led to a greater demand on storage water. The summer turned into a hot, dry period for humans, beasts, and particularly crops. The increased temperature and lower precipitation also led to a greater demand on storage water. ... It was the type of situation envisioned in establishing the minimum full supply that would call for adjustments. However, as appealing as the concept of flexibility is, implementation is more difficult than the principle. ***Procedures for adjustment were not in place.***
>
> ...
>
> ***Using the minimum full supply as a fixed amount in effect readjudicates a water right outside the processes of the SRBA.*** Treating the minimum full supply as a cap reducing the right to mitigation in carryover storage has profound consequences. In practical effect it adjudicates a new amount of the water right outside the SRBA without a determination of specific factors warranting a reduction.

R. Vol. 37 at 7092, 7095 (emphasis added).

In summary, the Director's response resulted in years of "process" and delay. Untimely administration and a lack of mitigation water provided no relief to the injured Coalition members while junior ground water users continued to pump without constraint. Consequently, the Coalition was forced to turn to the judiciary to cure the agency's legal errors.

ISSUES PRESENTED

The Coalition presents the following issues on appeal:

1. Whether the Director erred in failing to apply the constitutionally protected presumptions and burdens of proof when he used a "minimum full supply" rather than the decreed quantity in determining material injury to the Coalition's senior surface water rights?

2. Whether the District Court erred by allowing the Director to bifurcate the final administrative order, despite ruling that the Director must issue one final order?

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.*

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure, " (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." I.C. § 67-5279(3); *Clear Springs Foods, Inc.*, 252 P.3d at 72.

An agency's decision must be supported by "substantial evidence". *Chisholm*, 142 Idaho at 164 ("Substantial evidence … need only be of such sufficient quantity and probative value that

reasonable minds could reach the same conclusions as the fact finder"). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id.*

Although the Court grants the Director discretion in his decision making, *supra*, the Director cannot use this discretion as a shield to hide behind a decision that is not supported by the law or facts. Such decisions are "clearly erroneous" and must be reversed. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008) ("A decision is clearly erroneous when it is not supported by substantial and competent evidence").

SUMMARY OF ARGUMENT

The Director's response to the Surface Water Coalition's delivery call violated Idaho law. Instead of starting with the Coalition's previously decreed water rights, the Director created a new standard of need by utilizing his own "minimum full supply" concept as the baseline for administration. Even then, the Director failed to implement his new approach and did not deliver any mitigation water to the Coalition during the irrigation seasons when injury was found. The failure to apply the proper presumptions ignored long standing judicial findings concerning the Coalition's water rights, resulting in a shifting of the burden of proof and an unconstitutional application of the CM Rules. *AFRD #2*, 143 Idaho at 878 ("In an 'as applied' challenge, it

would be possible to analyze on a fully developed factual record whether the Director has improperly applied the Rules to place too great a burden on the senior water rights holder.").

In addition, the Director violated Idaho's APA by bifurcating his final order. Idaho law requires administrative agencies to issue a single final order from which complete judicial review can be taken. *See* I.C. § 67-5270 *et seq.* Although the District Court agreed and found error in the Director's actions, the court failed to properly remand the case to require the Director to issue a single final order. Consequently, the Director's bifurcated order is currently subject to multiple appeals and the parties do not have a single central order for purposes of conjunctive administration.

The Coalition respectfully requests the Court to correct these errors of law accordingly.

ARGUMENT

I. The Director's Use of a "Minimum Full Supply" to Determine Material Injury Violates Idaho Law.

A. Idaho Law Defines the Burdens of Proof and Evidentiary Standards to Apply in Conjunctive Administration.

The law is clear with respect to the proper burdens of proof and evidentiary standards IDWR must apply in conjunctive administration. The principles are firmly rooted in Idaho's constitution, statutes, CM Rules, and case law.

Idaho follows the prior appropriation doctrine. *Clear Springs Foods, Inc.,* 252 P.3d at 81. The hallmark of this doctrine is that water rights will be administered in priority. Idaho's Constitution provides that "[p]riority of appropriations shall give the better right as between those using the water." IDAHO CONST. art. XV, § 3. Idaho's water distribution statutes and CM

Rules follow this same edict. Idaho Code §§ 42-602, 607; CM Rule 20.02, 40. To diminish a senior's priority by taking water that would otherwise be available for his diversion and use results in an "injury" to the senior's water right. *Clear Springs Foods, Inc.*, 252 P.3d at 78-79; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982). IDWR cannot take water from a senior and give it to a junior user. *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908).

Proper administration prevents material injury to a senior right. CM Rule 10.14 defines "material injury" as the "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." *See also* R. Vol. 37 at 7075-76; *Clear Springs Foods, Inc.*, 252 P.3d at 92 ("The Rule requires impact upon the ***exercise of a water right***. It does not require showing an impact on the profitability of the senior's business.") (emphasis added). Importantly, any hindrance to either a natural flow or to a storage water right (including the right to carryover storage) constitutes "material injury" that must be mitigated either through curtailment or an approved CM Rule 43 mitigation plan. CM Rule 40.1.

Conjunctive administration is initiated by filing a water delivery call with IDWR, under oath, alleging that by reason of the junior's diversion of water, the senior is suffering material injury (the "initial showing"). CM Rule 40.01; *AFRD#2, supra* at 877. Upon making this "initial showing," material injury is presumed. *Id.* at 878-79; R. Vol. 37 at 7072-73; Vol. 39 at 7392.

This Court recently confirmed the presumption afforded water right decrees in conjunctive administration:

> The amounts of the Spring Users' water rights had already been decreed based upon the amounts of water that they had diverted and applied to the beneficial use of fish propagation. Subject to the rights of senior appropriators, they are entitled to the full amount of water they have been decreed for that use.

Clear Springs Foods, Inc., 252 P.3d at 92. Importantly, the Director has no authority to force a water user to re-prove or re-adjudicate the senior right – nor can the rules or statutes be read to create that burden. *AFRD#2, supra* at 878.

Following the initial showing, the burden shifts to the junior water right holders to prove the call would be futile or to challenge it in some other constitutionally permissible way. *AFRD#2, supra*; R. Vol. 37 at 7074; *see* CM Rule 42.01 (factors to be considered in determining defenses to material injury and reasonableness of water diversions); R. Vol. 37 at 7078 ("the factors set forth in CM Rules 42.01 are in the nature of defenses to the claim of material injury"). For example, the junior water user may present evidence to show that the decreed amount of water will not be put to beneficial use or is not needed by the senior water user. *See* R. Vol. 37 at 7083-86. The requirement that water must be put to a beneficial use protects against unlawful waste and fulfills the goals of proper administration. *Id.* Thus, while the senior water right holder enjoys a presumption that it is entitled to the amount of water shown in its decree or license, the junior water user is protected by the ability to allege, and prove by clear and convincing evidence, any authorized defenses to a call.

The District Court properly adopted these principles in this case. Clerk's R. Vol. 7 at 1222 (incorporating by reference pages 24-38 of *Memorandum Decision and Order on Petition for Judicial Review* issued in *A&B Irr. Dist. v. IDWR*, Minidoka County Dist. Ct., Fifth Jud.

Dist., Case No. 2009-000647) ("*A&B Order*").[10] The Court described the significance of a water right decree and the standards the Director must follow in administration:

> Accordingly, both Idaho's licensure and adjudication statutory schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. ***In sum, the quantity specified in a decree of an adjudicated water right is a judicial determination of beneficial use consistent with the purpose of use for the water right.***
>
> ...
>
> If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence.
>
> ...
>
> The problem arises with the initial determination of "material injury." In *AFRD #2* the Supreme Court held once the initial determination is made that "material injury" is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call. *AFRD #2*, 143 Idaho at 878, 154 P.3d at 449. However, the Director's "threshold" material injury determination includes what would otherwise be a defense to a delivery call. The problem with this approach is that it circumvents the constitutionally inculcated presumptions and burdens of proof.
>
> ***Therefore, this Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence. Accordingly, this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. The case is remanded for this purpose.***

A&B Order at 30, 35, 37-38(emphasis added).

[10] Even thought the District Court adopted this portion of the *Memorandum Decision* from the *A&B* decision, it was inadvertently left out of the record in this appeal to the Supreme Court. The Coalition has filed, concurrently herewith, a Motion to Augment the record with the portion of the *A&B* decision incorporated by the District Court.

This burden applies in conjunctive administration and must be implemented by the Director in his decisions.

B. The Director's "Minimum Full Supply" Methodology Violates Idaho Law.

Rather than requiring junior ground water users to meet the required burden of proof, the Director unilaterally created a defense for their benefit. Through the "minimum full supply" concept, the Director disregarded the presumptive effect of the Coalition's water right decrees and created a new starting point for water right administration. Importantly, the ground water users never met their burden under Idaho law or proved a valid defense to the Coalition's water delivery call. R. Vol. 37 at 7073, 7076-78.

First, the "minimum full supply" theory violates the express terms of Idaho's statutes and rules that govern administration. The statutes are clear, the basis for water right administration is a "water right":

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, . . . ***according to the prior rights*** of each respectively, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do ***in order to supply the prior rights*** of others in such stream or water supply . . .

I.C. § 42-607 (emphasis added).

> Water in a well shall not be deemed available to fill a water right therein if the withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any ***prior surface or ground water right*** or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

I.C. § 42-237a.g (emphasis added).

The Idaho Supreme Court found that section 42-607 governs a watermaster's duties in "clear and unambiguous terms." *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). The Court has further defined the Director's obligation to administer water rights within a water district as a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994). In times of shortage, watermasters must distribute water according to the elements and priority dates of an "adjudication or decree." *State v. Nelson*, 131 Idaho 12, 16 (1998); *see also Crow v. Carlson*, 107 Idaho 461, 465 (1984) ("The [ ] decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use").[11] The diversion rates and annual volume amounts represent quantity elements that are entitled to protection in administration. The Hearing Officer recognized the senior's right in administration. R. Vol. 37 at 7078 ("to the extent water is available within the amount of the water right but is diminished by junior users, the presumption favors the senior users' rights to the water.") (emphasis added).

Proper administration provides certainty to water right holders and "protects and implements established rights." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972).

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[11] Ground water rights in the ESPA are presumed to be hydraulically connected to the Snake River for purposes of administration. The SRBA Court adopted the following general provision and findings relative to conjunctive administration:

> The Court concludes, as a matter of law, that a general provision on connected ground and surface sources is necessary to define the water rights decreed by the SRBA District Court by identifying hydraulically connected ground and surface sources for the purposes of administration and defining the legal relationship between the connected sources.
>
> ...
>
> Except as otherwise specified above, all other water rights within Basin __ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

See Basin-Wide Issue No. 5 Connected Sources General Provision (Conjunctive Management) Memorandum Decision and Order of Partial Decree at 5; Ex. A (Twin Falls County District Court, Fifth Jud. Dist., *In re SRBA* Case No. 39576, Subcase 91-0005, February 27, 2002).

Moreover, senior water right holders are "entitled to presume that the watermaster is delivering water to them in compliance with the governing decree." *Id.* In other words, the Director and watermaster have a clear legal duty to curtail junior rights to satisfy senior water rights in times of shortage.[12]

The CM Rules also require the Director to distribute water to a senior's water right. *See* CM Rule 10.14 (material injury is impact or hindrance to "water right"); 10.25 ("water right" defined as the "legal right to divert and use" water); 20.01 (CM Rules apply when there has been injury to "senior-priority water rights"); 40.01.a (upon a finding of material injury, the Director must regulate diversions "in accordance with the priorities of rights"); and 40.02 ("The Director, through the watermaster, shall regulate the use of water within the water district pursuant to Idaho law and the priorities of water rights").

The above statutes and rules are clear, the Director and watermasters must regulate and distribute water to water rights. Noticeably absent from the CM Rules is any definition or use of the term "minimum full supply". Similar to the "replacement water plan" concept that was struck down by the District Court, the Director's "minimum full supply" theory was derived without any statutory or regulatory authority. The Director has no authority to substitute an

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[12] The Director carried this mandate forward into the orders creating Water Districts 120 and 130:

> 10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
>
> ...
>
> d. Curtail out-of-priority diversions determined by the Director to be causing injury to ***senior priority water rights*** if not covered by a stipulated agreement or a mitigation plan approved by the Director.

Ex. 1020 (*Final Orders* creating Water Districts 120 & 130, each at 5 (February 19, 2002)) (emphasis added).

entity's so-called "minimum full supply" for the elements of a decreed water right in conjunctive administration. *See e.g.*, *Caldwell v. Twin Falls Salmon River Land & Water Co.*, 225 F. 584, 596 (D. Idaho 1915) ("So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs. ... Economy of use is not synonymous with minimum use").

From the outset the Director ignored the plain language of the statutes and rules and failed to apply the proper burdens of proof and evidentiary standards. The "minimum full supply" concept was not based on the Coalition's decreed diversion rates. Rather, it was based on actual diversions from a single cool, wet year. R. Vol. 8 at 1383 ¶ 115; 1402 ¶ 50; Vol. 37 at 7092 ("[1995] was a wetter than average year. This warps the determination of a base supply downward."). This is the case, even though the Director acknowledged "the amounts of water diverted in 1995 may be less than what is needed for a full supply in 2005." R. Vol. 8 at 1383 ¶ 115. Admittedly, the Director did not have clear and convincing evidence that the Coalition members would not beneficially use their decreed quantities during the 2005 irrigation season.

Moreover, the *2005 Order* makes no reference to any burden of proof or evidentiary standard used to arrive at the "minimum full supply."[13] The Hearing Officer confirmed this when he concluded that the Director's concept "starts at a different point" than the "full amount of the licensed or decreed right." R. Vol. 37 at 7091. He further explained the problems with

[13] The Director misinterpreted Idaho law to support his injury analysis. R. Vol. 8 at 1401 ¶ 48 ("Either outcome is wholly inconsistent with the provision for 'full economic development of underground water resources' in Idaho Code § 42-226 articulated as 'optim[al] development' in *Baker v. Ore-Ida Food, Inc.*, 95 Idaho 575, 584, 513, P.2d 627, 636 (1973)."). As set forth in this Court's recent *Clear Springs* decision, Idaho's Ground Water Act does not apply to surface water rights. *See* 252 P.3d at 85 ("By its terms, section 42-226 only applies to appropriators of ground water.").

this approach: "This [minimum full supply] strains against the assumption that the senior users are entitled to the full extent of their rights licensed or decreed rights which at some point has been determined to be an amount they could beneficially use." *Id.* The concept does not simply "strain" against the required presumption; it violates the Director's legal duty to honor water right decrees in administration.

Notwithstanding this Court's decision in *AFRD#2*, and the Hearing Officer's recognition of presumptive effect of a prior decree, the Director affirmed his flawed methodology in the *Final Order*. R. Vol. 39 at 7386.[14] Since the Director failed to administer consistent with governing statutes and rules, and failed to apply the proper burdens of proof and evidentiary standards to the Coalition's senior water rights, the entire basis for his decision in this case is flawed as a matter of law.

The Director simply has no authority to ignore the judiciary's determination of a water right in administration without following the proper procedures and applying the correct standards. The *Final Order* should be reversed and set aside accordingly.

C. The Agency's Inconsistent Application of the "Minimum Full Supply" Concept Further Exposes its Fundamental Legal Errors.

Although the legal error in the Director's "minimum full supply" methodology is self-evident, the examples of its failed application further magnify the Director's arbitrary actions in

[14] The Director improperly attempted to defer the specifics of his "new" minimum full supply methodology in the *Final Order*. R. Vol. 39 at 7386. Moreover, the Director simply re-named the same process that failed to apply the proper burdens of proof and evidentiary standards. *Id.* ("The Director agrees that the term minimum full supply should be changed. In order to be more consistent with the CM Rules, the term that will replace minimum full supply is reasonable in-season demand."). Changing the name of a flawed theory does not make it legal.

this case. At hearing the former Director explained his "minimum full supply" concept and how his injury analysis departed from an examination of the Coalition's actual water rights:

> You start with the water rights' decree in terms of what has the Court determined is the extent of the water right. But a water right is not a quantity entitlement.
> ...
>
> But as I've already described, that maximum amount that's authorized under the decree, is not necessarily representative of what's actually needed.
> ...
>
> So you compare the projected amount of natural flow and storage that is going to be available in 2005 against the amount that was determined to be a reasonable full supply, minimum full supply – not the maximum full supply but the minimum full supply – and you add to that the reasonable amount of carryover storage and you compare the two.
> ...
>
> It was the minimum amount that I determined was necessary under contemporary conditions, recognizing that under the conditions in 2005, more or less than the minimum supply could be needed.
> ...
>
> Now, 1995 was – you know, not all years are the same. And certainly, by using 1995 as an indication of what was necessary for a minimum full supply, that was not a projection of saying that 2005 was going to be the same as 1995. That simply was looking at, okay, when in the most recent past has there been a full supply, and what was the minimum amount that constituted that full supply, recognizing that more could be required. More could be needed in 2005 than that minimum amount, but it was a place to start.

Tr. Vol. 1 at p. 23-24; 41, lns. 5-8; p. 45, lns. 7-14; p. 46-47 & 49, lns. 7-18 (emphasis added).

Admittedly, the Director did not begin with the Coalition's water right decrees as the basis for administration. Contrary to Idaho law, he erroneously concluded that a "water right" is not a quantity entitlement in administration. *See Clear Springs Foods, Inc.*, 252 P.3d at 92

("Subject to the rights of prior appropriators, they are entitled to the full amount of water they have been decreed for that use."). Instead, the Director created a "minimum" amount of water that he believed was needed by the Coalition members for irrigation. The Director used this "minimum" amount as a limit on the quantity of water to be delivered. Importantly, the Director never determined that the Coalition would "waste" the decreed amounts of their water rights if that quantity was delivered. In addition to these fundamental flaws in the analysis, the Director's implementation of the "minimum full supply" concept resulted in no water provided to the Coalition during the irrigation seasons when injury was found.

i. 2005 Example

In 2005, the Director initially predicted that members of the SWC would be injured by 133,400 acre-feet. R. Vol. 8 at 1385. Accordingly, the Director ordered IGWA to supply 27,700 acre-feet to the Coalition members during the 2005 irrigation season. *Id.* at 1404 ¶ 5. Notwithstanding these orders, IGWA never provided any mitigation water in 2005.[15] The Director excused this non-compliance and failed to implement his orders. Despite the agency's failure to implement the orders, ground water rights continued to pump out-of-priority during the entire 2005 irrigation season.

ii. 2007 Example

In an order issued on May 23, 2007, the Director found TFCC would suffer an injury of 58,914 acre-feet. R. Vol. 23 at 4297. As in 2005, however, the Director failed to require IGWA

[15] IGWA eventually transferred mitigation storage water to TFCC in the spring of 2006, but not during the 2005 irrigation season when material injury was found to have occurred. The Director also found that IGWA's lease and non-use of a single industrial ground water right would have resulted in 694 acre-feet occurring in the American Falls reach during the 2005 irrigation season. R. Vol. 20 at 3748, ¶ 29.

to deliver any mitigation water to TFCC during the 2007 irrigation season. Moreover, the record shows that IGWA had no water to provide to TFCC during the irrigation season.[16] Yet, the Director continued to allow out-of-priority ground water diversions. The Director refused to take any final action until after the irrigation season. R. Vol. 23 at 4302 ("final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2007 is complete").

The Director even used the "minimum full supply" as an artificial "cap" on the amount of water the Coalition could expect through administration despite the actual conditions on the ground. The 2007 irrigation season was extremely hot and dry. Faced with inaction from the Director, the Coalition managers filed affidavits to explain their projects' increased water demands for that irrigation season. R. Vol. 24 at 4432 (Billy Thompson, MID), 4443 (Ted Diehl, NSCC), 4464 (Vince Alberdi, TFCC), 4502 (Dan Temple, A&B), 4510 (Lynn Harmon, AFRD#2), 4521 (Randy Bingham, BID) and 4529 (Walt Mullins, Milner). Notwithstanding the dire climatic conditions and the managers' testimony, the Director arbitrarily ignored this information and refused to administer to the Coalition's senior surface water rights. R. Vol. 37 at 7095 ("Affidavits that had been submitted by the canal company managers should have been considered.").

[16] Given the Director's history of not providing any mitigation water in 2005, TFCC was forced to rent 40,000 acre-feet of water from the Water District 01 Rental Pool. Since the Director had yet to order any storage water to be provided during the irrigation season, TFCC rented "wet" water for delivery to its shareholders. Tr. Vol. 8 at p. 1630, lns. 14-25 ("Realizing that the plight that we were in, we went to the water bank and rented 40,000 acre-feet of water").

Instead, the Director continued the "process" and issued more supplemental orders – turning a "blind-eye" to actual conditions on the ground. R. Vol. 25 at 4714, 4719.[17] In the *Sixth Supp. Order*, the Director even reduced the material injury determination for TFCC and allowed IGWA to "underwrite" the water TFCC had already rented (and paid for) that year from the Water District 01 Rental Pool. R. Vol. 23 at 4720-21.[18] Again, the Director failed to implement his order and require IGWA to deliver mitigation water during the irrigation season when injury was found. R. Vol. 37 at 7069-70 ("However, the Order also provided that 'The replacement water will be delivered to Twin Falls Canal Company as it is needed during the irrigation season ...,' quoting from IGWA's 2007 Replacement Water Plan. Conclusion of Law 4. ***That was not done***.") (emphasis added).

Several months after the end of the 2007 irrigation season, the Director issued the *Seventh Supp. Order* on December 20, 2007. Ex. 4600. The Director stated the purpose of the order was "to provide the parties with the most up-to-date water right accounting and obligations owed by the Idaho Ground Water Appropriators, Inc." *Id.* at 1. The Director again adjusted his injury calculation for TFCC downward – using the "minimum full supply" methodology as a "cap", and refusing to acknowledge the shortage TFCC had actually experienced. *Id.* at 6, ¶ 12.

Although TFCC carried over minimal storage water at the end of 2007, the Director used this fact against the company, and assumed because water was carried over in storage it was not

[17] The Hearing Officer concluded that the Director's non-responsiveness effectively trapped the projects with less water than needed; thus, unconstitutionally re-adjudicating the Coalition's senior water rights downward. R. Vol. 37 at 7092-94.

[18] Despite this allowed "underwriting", the Director never ordered IGWA to provide the water or pay for the water TFCC rented during the 2007 irrigation season.

required during the irrigation season. The Director's "after-the-fact" review failed to consider that TFCC was forced to reduce water deliveries to its shareholders during the irrigation season (from 3/4" to 5/8") and rent an additional 40,000 acre-feet from the Water District 01 Rental Pool (at a cost of over $800,000). Tr. Vol. 9 at p. 1601, lns. 14-15, p. 1631, lns. 19-20.

Like 2005, the Director's flawed logic benefitted junior priority ground water rights that continued to pump to their full extent throughout the 2007 irrigation season. No mitigation water was delivered to TFCC at a time when it was needed during the irrigation season. IGWA finally assigned 14,345 acre-feet of storage to TFCC on January 9, 2008 – months after the irrigation season ended. R. Vol. 34 at 6431-32. IGWA only acquired this water from the City of Pocatello on January 9, 2008. *Id.* at 6437-38. Accordingly, IGWA did not have the necessary water to provide for mitigation during the 2007 irrigation season.[19] The Hearing Officer accurately described the agency's repeated failure: "Following the pattern from 2005, rather than the water being provided in the year it was determined to be due, it was provided in the subsequent year." R. Vol. 37 at 7071.[20]

These examples demonstrate the inherent danger water right holders face when IDWR strays from honoring water right decrees in administration. Fortunately, the judiciary provides the "check" on such arbitrary agency action.

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[19] The Director's *Seventh Supp. Order* expressly recognized that IGWA did not have sufficient storage water during the 2007 irrigation season to back up its so-called "guarantee". Ex. 4600 at 8.

[20] In affirming the above finding the Director expressly recognized that no water has ever been provided to the Coalition during the irrigation season when injury was found from 2005 through 2007. R. Vol. 39 at 7382 ¶ 8.

D. Consequences of Unlawful Administration

In summary, the Director's entire process was flawed from the start. Although the law requires the Director to honor the Coalition's water right decrees, and the presumption that they are entitled to divert and use the stated quantities, the Director refused to do so without any legal basis. The Director's attempted use of the "minimum full supply" theory produced no "wet water" to injured Coalition members. The lack of timely and proper administration unlawfully diminished the Coalition's senior water rights. *See Jenkins*, 103 Idaho at 388; *AFRD #2*, 143 Idaho at 874 ("We agree with . . . the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right.").

Moreover, the "minimum full supply" concept created an artificial water need baseline for the Coalition without applying the required burdens of proof and evidentiary standards under Idaho law. The "minimum full supply" baseline essentially served as a defense to the Coalition's call without requiring the juniors to prove that defense by clear and convincing evidence. This process therefore violated Idaho law.

By beginning from the wrong starting line, the "minimum full supply," as opposed to the decreed water rights, the Director failed to apply the CM Rules consistent with Idaho's Constitution (Art. XV, § 3) and water distribution statutes (I.C. §§ 42-602, 607). Consequently, the Coalition members did not receive the conjunctive administration required by law and were forced to suffer material injury to their senior water rights without any mitigation. This Court should reverse and set aside the Director's decision accordingly.

E. The District Court's Approval of the Director's "Minimum Full Supply" Scheme is Contrary to the Court's Own Analysis.

The District Court affirmed the Director's use of a baseline approach to administration. Clerk's R. Vol. 3 at 536-37. Quoting the Hearing Officer, the District Court concluded that:

> Whether one starts a the full amount of the licensed or decreed right and works down when the full amount is no needed or starts at based and works up according to need, the end result should be the same.

Id. at 537.

This conclusion is directly contrary to the District Court's later holding that "in order to give proper presumptive weight to a decree, any finding by the Director in the context of a delivery call proceeding that the quantity decreed exceeds the amount being put to beneficial use by the senior must be supported by clear and convincing evidence." Clerk's R. Vol. 7 at 1247, 1249, n. 5.

The Director's "minimum full supply" concept created a new starting point for the material injury analysis – one that was not based upon the decreed diversion rates for the Coalition's senior water rights. The *2005 Order* did not identify the burden of proof or whether any clear and convincing evidence was provided to justify a starting point in the Director's analysis below the Coalition's decreed diversion rates.

Notwithstanding this clear legal error, the District Court failed to hold the Director to the standards provided by Idaho law (even though the Court acknowledged the proper standards to apply). Clerk's R. Vol. 7 at 1247. The District Court's conflicting conclusion about the use of a "minimum full supply" theory should similarly be corrected on appeal.

II. The District Court Erred by Instructing the Director to Bifurcate the Final Administrative Order, Despite Ruling that the Director Must Issue one Final Order Consistent with Idaho's APA.

On appeal to the District Court, the Coalition asserted that the Director erred when he bifurcated the final order. R. Vol. 39 at 7460. The District Court agreed – finding error in the Director's decision. Clerk's R. Vol. 3 at 542. Yet, notwithstanding this determination, the District Court failed to properly remand this order to allow the Director to issue a single final order in this case. Instead, the District Court allowed the Director to proceed and issue a separate final "methodology order". Clerk's R. Vol. 4 at 629.

As such, there are multiple final orders in this case – each on separate judicial review track.[21] This process violates the Idaho Administrative Procedures Act. *See* I.C. § 67-5201 *et seq.*

The District Court explained why the Director's actions violated the APA:

> The Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*. Styling the *Final Order* as two orders issued months apart runs contrary to the Idaho Administrative Procedures Act and IDWR's Administrative Rules. *See* I.C. §§ 67-5244, 67-5246, 67-5248 and IDWR Administrative Rules 720 and 740. In addition, the issuance of separate "Final Orders" undermines the efficacy of the entire delivery call process, including the process of judicial review. Such a process requires certainty and definiteness as to the *Final Order* issued, so that any review of the *Final Order* can be complete and timely.

Clerk's R. Vol. 3 at 542.

[21] Following the remand from the District Court, the Director issued his order establishing the methodology for determining material injury – the "Methodology Order." Clerk's R. Vol. 5 at 800. That order was appealed, and is currently pending before Judge Eric J. Wildman. *Twin Falls Canal Company, et al. v. IDWR, et al.* (Twin Falls County Dist. Ct., Fifth Jud. Dist., Cons. Case No. 2010-382). The Methodology Order judicial review proceedings have been stayed pending the outcome of this appeal.

The District Court's failure to properly remand this matter for the issuance of a single final order is therefore in error. Moreover, the multiple appeals have created inefficiencies and procedural problems for the parties. Rather than having a single final order to govern conjunctive administration, the parties are left with two separate administrative orders at different stages of the judicial review process. In essence the parties will have to "combine" the orders on their own to completely understand how the Director will proceed with administration. Finally, the parties will be required to undertake the time and expense of multiple appeals.[22]

The Coalition's water delivery call has been ongoing since 2005. The time and expense involved in these proceedings cannot be understated. Now, after nearly six years, an extensive administrative hearing, and judicial review before the District Court, the parties are left with two separate final orders at two different stages of appeal.[23] The District Court erred by failing to properly require the Director to issue a single final order in this matter. This Court should correct this error of law and instruct the agency to issue a single final order on remand consistent with the Court's opinion. Then, the parties will have a complete order to govern conjunctive administration.

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[22] Before the Director issued his order addressing the methodology for determining material injury, this Court issued an *Administrative Order*, dated December 9, 2009, requiring that all petitions for judicial review under section 42-1701A, must be heard by the SRBA District Court. As such, the District Court issued an order on July 29, 2010 consolidating the Methodology Order appeals before the SRBA District Court – separate from these proceedings which were pending before the Gooding County District Court.

[23] The entire problem could have been avoided had the Director followed the law when he issued his *Final Order*.

CONCLUSION

Idaho's constitution, water distribution statutes, and CM Rules all require the Director to administer to a senior's water right. The presumptions afforded a water right decree cannot be brushed aside by an agency officer. Here, it is undisputed that the Director erred by failing to honor the Coalition's water rights through use of a "minimum full supply" concept. The Director disregarded the stated amounts of the water rights without applying the proper burdens of proof and evidentiary standards required by Idaho law. Since there is no legal basis for the Director's action, it should be set aside and remanded.

In addition, the Director erred in issuing two separate final orders. Although the District Court recognized this action violated Idaho's APA, the Court failed to require the Director to issue a single final order. This error has left the parties with two orders for administration following two separate appeal tracks. The process violates Idaho law and should be reversed accordingly.

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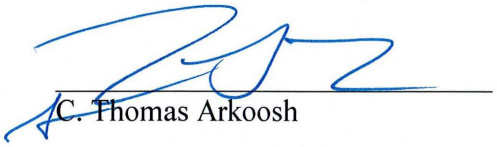
Respectfully submitted this 29th day of July, 2011.

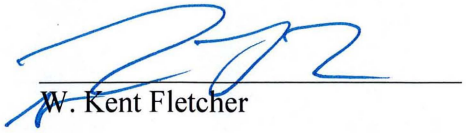
CAPITOL LAW GROUP, PLLC



C. Thomas Arkoosh

Attorneys for American Falls Reservoir District #2

FLETCHER LAW OFFICE



W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2011, I served true and correct copies of the **SURFACE WATER COALITION'S OPENING BRIEF ON APPEAL** upon the following by the method indicated:

Idaho Supreme Court Clerk of the Court P.O. Box 83720 451 W. State St. Boise, ID 83720	____ U.S. Mail, Postage Prepaid ✓ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Randy Budge Candice M. McHugh T.J. Budge RACINE OLSON P.O. Box 1391 Pocatello, Idaho 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI, LLP 511 16th St., Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Dean Tranmer CITY OF POCATELLO P.O. Box 4169 Pocatello, Idaho 83205 dtranmer@pocatello.us	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email

Kathryn E. Kovacs U.S. Dept. of Justice Env. & Nat. Res. Appellate Section P.O. Box 23795 Washington, D.C. 20026 kathryn.kovacs@usdoj.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Kathleen Marion Carr U.S. Department of the Interior P.O. Box 4169 Boise, Idaho 83706 kathleenmarion.carr@sol.doi.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
David W. Gehlert Natural Resources Section Environment & Natural Resources Division U.S. Department of Justice 1961 Stout ST. 8th Floor Denver, CO 80294 david.gehlert@usdoj.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Road Boise, Idaho 83706-1234 matt.howard@pn.usbr.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Mike Creamer Jeff Fereday GIVENS PURSLEY P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email

Travis L. Thompson