

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

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

Case No CV 2008-0000551

UNITED STATES OF AMERICA,)
BUREAU OF RECLAMATION,)

Petitioners,)

**PETITIONER UNITED STATES'
REPLY BRIEF**

vs.)

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

Respondents.)

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

PETITIONER UNITED STATES' REPLY BRIEF

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

Honorable John M. Melanson, District Judge, presiding

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TABLE OF CONTENTS

Introduction 1

Argument 2

I. RECLAMATION’S CHALLENGES TO THE FINAL ORDER RAISE LEGAL ISSUES OVER WHICH THIS COURT HAS FREE REVIEW 2

II. THE FINAL ORDER VIOLATES THE PLAIN LANGUAGE OF RULE 42 BY CATEGORICALLY PRECLUDING THE POSSIBILITY OF MITIGATION TO PROVIDE CARRY-OVER STORAGE FOR MULTIPLE YEARS, REGARDLESS OF FUTURE CIRCUMSTANCE 3

III. THE DIRECTOR ERRED BY NOT REQUIRING MITIGATION DURING THE SEASON OUT-OF-PRIORITY DIVERSIONS ARE REDUCING THE QUANTITY OF WATER AVAILABLE FOR CARRY-OVER STORAGE 4

Conclusion 9

TABLE OF AUTHORITIES

CASES

American Falls Reservoir District No. 2. v. Idaho Dept. of Water Resources, 143 Idaho 862, 154 P.3d 443 (2007) 3

Beecher v. Cassia Creek Irrig. Co., 66 Idaho 1, 154 P.2d 507 (1944) 5, 7

Friends of Farm to Market v. Valley County, 137 Idaho 192, 46 P.3d 9 (2002) 3

Martiny v. Wood, 91 Idaho 215, 419 P.2d 470 (1966) 6

R.T. Nahas Co. v. Hulet, 114 Idaho 23, 752 P.2d 625 (Idaho App. 1988) 7

State v. Nelson, 119 Idaho 444, 807 P.2d 1282 (Id. App. 1991) 3

Introduction

This case pits the interests of senior surface water users who must rely on a resource that is inherently variable, against those of junior ground water users who have the luxury of drawing from a water resource blessed with an essentially constant supply. One tool the surface water users employ to ameliorate the variability of their water supply is carry-over storage. As was showing in the United States' Opening Brief (U.S. Opn. Brf.), the Director's *Final Order* handicaps the use of that tool in two ways. First, contrary to the plain language of Conjunctive Management Rule 42 (CM Rule 42), the Director refused to allow for the possibility of using mitigation to protect carry-over storage intended to be used over multiple years. Second, the Director refused to require mitigation at the time of injury to the carry-over storage. By doing so the Director failed to give effect to the Idaho Supreme Court's instruction that carry-over storage is exactly what the name implies: actual water in a reservoir that is retained for use in subsequent years. Further, the Director violated Idaho water law by failing to treat the senior surface water users in a manner commensurate with their priority. The government has *not* argued that requires either full reservoirs or elimination of all risk for seniors. Rather, a system commensurate with priority simply requires that junior water users diverting out-of-priority bear a risk of shortage or additional expense that is greater than that borne by senior water users.

The Groundwater Users (IGWA) and the Idaho Department of Water Resources (Department) respond to the government's two points with the same basic premise: because no

one can predict future water supplies with any degree of certainty, neither mitigation for more than one year, nor mitigation at the time of injury, should be allowed because it *may* lead to “waste.” That argument is a red herring. As IGWA explains in their brief, obtaining replacement water is merely an exercise in paper shuffling. Water already in a reservoir is simply shifted from the account of one party to that of another. Thus mitigation has no effect on the quantity of water in storage and cannot create “waste.” Moreover, even in those subsequent years in which the reservoirs ultimately fill, money junior groundwater users spend on replacement water is not wasted. Rather it buys increased certainty for the senior surface water users – and for the groundwater users themselves.

Argument

I. RECLAMATION’S CHALLENGES TO THE FINAL ORDER RAISE LEGAL ISSUES OVER WHICH THIS COURT HAS FREE REVIEW.

The ground water users contend that Reclamation has “erroneously” tried to frame the issues raised by Reclamation as issues of law because the *Final Order* is an exercise of the Director’s discretion. Ground Water Users’ Brief in Response.... at 17-18 (IGWA Brf.). The mere need for some exercise of discretion and related fact finding does not preclude free review of legal issues such as those raised by Reclamation because the Director’s discretion is bounded by law, in this case the plain language of the Rule and Idaho water law. Put another way, Reclamation is arguing that the Director has exceeded the discretion allowed by law. Idaho

appellate courts have long recognized that courts have free review over such questions. *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002) (“interpretation of a [rule], like construction of a statute is an issue of law” and therefore subject to free review); *see also State v. Nelson*, 119 Idaho 444, 446, 807 P.2d 1282, 1284 (Id. App. 1991).

II. THE FINAL ORDER VIOLATES THE PLAIN LANGUAGE OF RULE 42 BY CATEGORICALLY PRECLUDING THE POSSIBILITY OF MITIGATION TO PROVIDE CARRY-OVER STORAGE FOR MULTIPLE YEARS, REGARDLESS OF FUTURE CIRCUMSTANCE.

By its plain terms, CM Rule 42.01.g authorizes the Director to protect carry-over storage for future dry years. Put another way, the Rule plainly recognizes that in at least some circumstances, mitigation for multiple years may be appropriate. The Director erred by refusing to give effect to the Rule’s plain language and instead categorically deciding that junior groundwater users diverting out-of-priority diversions will *never* be required to mitigate to provide carry-over storage to be used over more than one year. U.S. Opn. Brf. at 13-14.

The Department agrees, as the plain language of the Rule compels it to, that the Rule protects carry-over storage for “future dry years.” IDWR Respondents Brief at 15 (IDWR Brf.). The Department then seeks to evade that plain language on the grounds that the Idaho Supreme Court has instructed that water can be carried-over only when it can later be put to “beneficial use” and the amount is not “excessive . . . without regard to the need for it.” *Id.* at 15 (quoting *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880, 154 P.3d 443, 451 (2007)) (*AFRD No. 2*). Those restrictions, however, do not

compel the Director's conclusion that he can *never* provide replacement water for use over multiple years. Instead, they necessarily imply an individualized determination based on the particular facts before the Director at that time.

IGWA and the Department attempt to support the Director's categorical conclusion through variations on the same theme: the variability of the weather and hydrology make it "impossible to predict with any certainty" how much water may be available or needed from year to year. IGWA Brf. at 38; IDWR Brf. at 17. Thus they seek to be excused from ever having to provide mitigation for multiple years (or, as is discussed below, at the time of injury) on the grounds that later years *might* be wet enough to fill the reservoirs. The very fact that the groundwater interests' arguments are phrased in terms of "might" only reiterates that the rules calls for an individualized determination based on particular circumstances, not an unyielding prohibition.

III. THE DIRECTOR ERRED BY NOT REQUIRING MITIGATION DURING THE SEASON OUT-OF-PRIORITY DIVERSIONS ARE REDUCING THE QUANTITY OF WATER AVAILABLE FOR CARRY-OVER STORAGE.

Both the groundwater users and the Department rely significantly on the testimony of former Director Dreher. The system of administration contemplated by Director Dreher differed from that proposed in the *Final Order* in one crucial respect: former Director Dreher would have required replacement water to be provided during the season the junior groundwater user's out-of-priority diversions injured the senior storage water right holder's right to reasonable carryover storage. As Reclamation explained in its Opening Memorandum, that

approach is well grounded in Idaho law. It would provide actual carry-over storage as defined by the Idaho Supreme Court in *AFRD No. 2* – water that is in the reservoirs at the end of the irrigation year and can be retained for use in subsequent years. It also avoids assigning risk to senior water users that Idaho water law requires juniors to bear. Idaho law has long provided that a junior’s right to take water is subject to the rights of senior appropriators being satisfied. *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944). Here, the Director has set up a system where the juniors get to divert out of priority to the detriment of the senior’s right to reasonable carry-over and the seniors have to hope that there will be sufficient water available the following year to mitigate their injury.

The groundwater interests attempt to justify not mitigating the injury in the season that it occurs just as the *Final Order* did, by relying on the Hearing Officer’s finding that mitigation water has always been available in the past. IGWA Brf. at 38; IDWR Brf. at 17. Their confidence that future years will continue to bring reliable supplies of mitigation water stands in stark contrast to their admission that forecasting surface water supply over the short, seven *month*, irrigation season “is fraught with difficulty and uncertainty.”¹ IGWA Brf. at 39. Indeed, it was that uncertainty that led former Director Dreher to direct that mitigation water be

¹ In addition, their ardent belief that water will always be available for mitigation in the year following the injury to carry-over storage belies their arguments that the *Final Order* assigns risk to the junior ground water users – the risk of being curtailed in the spring if there is no water available for mitigation. IDWR Brf. at 23; IGWA Brf. at 38-39. If their theory that mitigation water will always be available in the future holds, the “risk” they claim to carry is no risk at all.

provided in the fall.² See Hearing Tr. Vol. II, p. 270 L 1-10. Under that system an inability to provide mitigation water in the fall would have been cause for curtailment the following spring. *Id.* at Vol. I p. 103 LL. 20-25.

The groundwater users rail against the former Director's approach on the grounds that it will lead to "waste." IGWA Brf. at 38. That argument fails as a matter of law, because "[t]he policy of the law against the waste of irrigation water cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator." *Martiny v. Wood*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966). That is just what has happened here: claims that water will be "wasted" have been used to justify unnecessary restrictions on the senior's right to carry-over storage.

As was noted above, the "waste" argument is a red herring.³ It is true that a necessary consequence of a reservoir system is that in some wet years the system will not be able to capture all the available water and consequently some previously stored water will be released

² The Department argues that requiring replacement water in the season of injury would ignore Director Dreher's "scientific approach in the February 14, 2005 order," which did not curtail junior groundwater users. IDWR at 23. In doing so, the Department ignores Director Dreher's later testimony that he was wrong not to have required replacement water in that order. *E.g.* Hearing Tr. Vol I at p. 167, LL 7-11.

³ Equally invalid are the groundwater users' arguments that the government is insisting upon full reservoirs. To the contrary, Reclamation has not taken issue with former Director Dreher's conclusion that senior storage water right holders are entitled to the minimum amount of carry-over that would allow for an adequate supply of water. Hearing Tr. Vol. I at p. 81 LL. 2-8 (reasonable carry-over storage is "something short of full reservoirs;" it is the minimum level of insurance water needed in case the following year turns out to be a drought year).

downstream in the spring. That may be less than ideal, but it is a reality that must be lived with. More to the point, providing mitigation water in the fall is a paper exercise that neither increases nor decreases the quantity of water that is at risk of being released downstream.

Pocatello complains that if the junior groundwater users are required to provide replacement water in the fall and the reservoirs later fill, they will “have either wasted their money or over-mitigated the injury to the seniors.” Pocatello Brf. at 23. Neither point has merit.

First, as former Director Dreher explained, the risk of “over-mitigation” is one junior water users should be expected to bear as the cost of continuing to be able to divert out-of-priority to the detriment of senior water users. Hearing Tr. Vol. I p. 68 L. 23 - p. 69 L. 3. That proposition flows naturally from the long established principles that juniors are only allowed to divert water only when they do not injure the rights of seniors. *Beecher*, 66 Idaho at 9, 154 P.2d at 510. Because the junior is diverting out-of-priority, they should bear risk greater than that of the senior, whether that risk be the risk of “over-mitigation,” or of shortage. *See R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27, 752 P.2d 625, 629 (Idaho App. 1988) (a junior is obligated to remedy interference with a senior’s right). As Reclamation explained in its opening brief, the *Final Order* imposes the risk of shortage on the senior water users. By delaying the junior’s obligation to provide replacement water until the season after the injury occurs, the *Final Order* leaves open the possibility that replacement water will not be available and thus that the senior’s injury will never be remedied. U.S. Opn. Brf. at 18-19.

Second, money spent on replacement water in the fall would not be “wasted,”

even if the reservoirs did fill. To the contrary, the juniors would have gained value in the form of increased certainty for both the senior surface water users – and for themselves. Crops are planted in the spring, but the planning and financing of those crops takes place over the winter. Hearing Tr. Vol. IX, p. 1870 LL 7-25, p. 1871 LL 1-21 (Diehl Testimony). If, as former Director Dreher had contemplated, groundwater users provided mitigation water in the fall, the senior surface water users would literally be able to bank on that water being available for their use the following year. Importantly, the groundwater users would benefit as well. Like the surface water users, they would be freed from the uncertainty over whether replacement water would be available the following year and would go into the planning season knowing exactly where they stand. Moreover, they would be free from the risk of having planted a full crop only to be curtailed during the irrigation season if they could not acquire replacement water.

In contrast, the *Final Order* calls for the provision of replacement water to wait until the following year. Should replacement water actually be available, the requisite paper shuffling can occur and all parties emerge whole. Former Director Dreher acted as he did because he realized that might not always be the case – the very uncertainty in whether the groundwater interests rely on leaves a risk that replacement water will not be available. Hearing Tr. Vol. II, p. 270, L 1-10. Should that happen, the delay called for in the *Final Order* has only compounded the potential for injury. Both surface water users and groundwater users will have planted a full crop on the expectation that the Director will be able to deliver on the promise made in the notice to be provided each fall, rather than having to resort to curtailment. Should

that water not be available, the senior surface water users crops will suffer from a water shortage, while the Director will face a Hobson's Choice - either curtail the junior groundwater users and impair their crops as well, or declare curtailment futile and watch the prior appropriation system be turned on its head -- junior water users continuing to pump water out-of-priority while the crops of seniors wither in the fields.

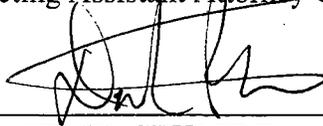
Conclusion

Neither the Department of Water Resources nor the groundwater users have shown that their concern over the prospect of "waste" is justification for either ignoring the plain language of Conjunctive Management Rule 42 or refusing to provide the senior storage water rights holders with what the carry-over storage they are entitled to under the rule – replacement water that can be stored in a reservoir and retained for use in subsequent years.

DATED this 19th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2009, a copy of the foregoing , **PETITIONER UNITED STATES' REPLY BRIEF**, Case No. 08-0000551, was served upon the following using the method indicated.

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