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,	
UNITED STATES OF AMERICA BUREAU OF RECLAMATION,	
Petitioners,	**Case No. 2008-000551**
vs.	**AMENDED ORDER ON PETITIONS FOR REHEARING; ORDER DENYING SURFACE WATER COALITION'S MOTION FOR CLARIFICATION**
IDAHO DAIRYMEN'S ASSOCIATION, INC.,	
Cross-Petitioner,	
vs.	
GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,[1] and THE DEPARTMENT OF WATER RESOURCES,	
Respondents.	
IN THE MATTER OF DISTRIBUTION	

[1] Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director, I.R.C.P. 25 (d) and (e).

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, MINDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.	)

Appearances:

C. Thomas Arkoosh, of Capitol Law Group, PLLC, Gooding, Idaho, attorney for American Falls Reservoir District #2.

W. Kent Fletcher, of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

John A. Rosholt, John K. Simpson, and Travis L. Thompson, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

John C. Cruden, Acting Assistant Attorney General, and David Gehlert, of the United States Department of Justice, Denver, Colorado, attorneys for the United States Bureau of Reclamation.

Randall C. Budge, Candice M. McHugh, Thomas J. Budge, and Scott J. Smith, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators, Inc.

A. Dean Tranmer, of the City of Pocatello Attorney's Office, Pocatello, Idaho, attorney for the City of Pocatello.

Sarah A. Klahn, of White and Jankowski, LLP, Denver, Colorado, attorney for the City of Pocatello.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

I.
PROCEDURAL BACKGROUND AND FACTS

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR," or "Department") issued in response to a delivery call filed by the Petitioner Surface Water Coalition ("SWC") on January 14, 2005. This Court issued its ***Order on Petition for Judicial Review*** in this matter on July 24, 2009 ("July 24, 2009 ***Order***"). In the ***Order***, this Court held, among other things, that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover, that the Director exceeded authority by failing to follow procedural steps for mitigation plans as set forth in the Rules for Conjunctive Management ("CMR"), and that the Director exceeded authority by determining that full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 of an inch per acre. In the ***Order***, this Court remanded this matter to the Director so that he may determine the methodology for reasonable in-season demand and carryover.

On August 13, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "Ground Water Users") timely filed a *Petition for Rehearing*. On August 14, 2009, the City of Pocatello also timely filed a *Petition for Rehearing*.

On August 23, 2010, this Court issued its initial ***Order on Petitions for Rehearing*** ("***Rehearing Order***"). On August 26, 2010, IDWR filed a *Motion to Clarify or Motion For Reconsideration of Order on Petitions for Rehearing* ("*Motion to Clarify or Reconsider*"). On September 2, 2010, the SWC filed a *Motion for Clarification*.

The facts and procedural history of this case are explained in detail in the Court's July 24, 2009 ***Order***. The nature of the case, course of proceedings, and relevant facts are therefore incorporated herein by reference.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held February 22, 2010. The parties did not request the opportunity to submit additional briefing and the

Court does not require any additional briefing in this matter. Therefore, the matter was initially deemed fully submitted for decision on the next business day, or February 23, 2010.

However, pursuant to I.A.R. 13(b)(14), this Court issued an ***Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*** in this matter on March 4, 2010. In the ***Order***, this Court ordered a stay of the decision on rehearing until the Director issued a final order determining the methodology for determining material injury to reasonable in-season demand and reasonable carryover, and the time period for filing motions for reconsideration and petitions for judicial review of the order on remand had expired.

On June 23, 2010, the Director issued a *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order*").[2] On June 24, 2010, the Director issued a *Final Order Regarding April 2010 Forecast Supply Methodology Steps 3 & 4 and Order on Reconsideration* ("*As-Applied Order*"). Parties to this matter have filed petitions for judicial review of these two orders. As such, this Court lifted the stay of the issuance of this ***Order on Petitions for Rehearing*** on August 6, 2010. Therefore, the matter is deemed fully submitted for decision on the next business day, or August 9, 2010.

III.

APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code §42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code §67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code §67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(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.

Idaho Code §67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code §67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code §67-5279(4); *Barron v. IDWR,* 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[3] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. 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 evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

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[3] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934,939 (1993).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

IV.
ISSUES PRESENTED

A. Issues Raised by the Ground Water Users

The Ground Water Users raise a number of issues on rehearing. The Court characterizes those issues as follows:

1. Whether the Court should clarify that the Director must decide the issue on the methodology for determining material injury and reasonable carryover based exclusively upon facts and evidence contained in the current record without holding any additional hearings on this issue?

2. Whether the Court should clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full recommended amount?

3. Whether due process allows for junior groundwater users to be physically curtailed while the hearing process is proceeding under a proposed mitigation plan and before a final order has been entered?

B. Issues Raised by the City of Pocatello

1. Whether the Court should clarify that any remaining hearings on mitigation plans presented by the Ground Water Users should not revisit the determination of injury made by Hearing Officer Schroeder in 2008?

V.
ANALYSIS AND DECISION

A. Hearing Prior to the Director's Methodology Decision

In its July 24, 2009 ***Order***, this Court held that the Director abused discretion by issuing two *Final Orders* in response to the Hearing Officer's *Recommended Order*. The Hearing Officer found that adjustments should be made to the methodology for determining material injury to reasonable in-season demand and reasonable carryover. However, the Director did not make such adjustments in the *Final Order* of September 5, 2008. Rather, the Director issued a separate *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* on June 30, 2009, well after the proceedings on this petition for judicial review had commenced. Therefore, this Court remanded this matter to the Director to issue a final methodology order.

In their petition for rehearing, the Ground Water Users urged this Court to clarify whether the Director may hold additional hearings prior to the issuance of a final methodology order on remand. This Court did not contemplate that the Director would take additional evidence prior to issuing the *Methodology Order* on remand. Further, the Director issued the *Methodology Order* without conducting a hearing. The Director properly relied upon the facts contained in the record in order to formulate the methodology for determining reasonable in-season demand and reasonable carryover. As such, this issue has been resolved by the proceedings on remand.

B. Director's Authority to Determine Beneficial Use of Recommended Right in the Context of a Delivery Call Proceeding

The Ground Water Users urge this Court to clarify its holding in the July 24, 2009 ***Order*** that the Director abused his authority in determining that full headgate delivery for Twin Falls Canal Company ("TFCC") should be calculated at 5/8 of an inch, instead of 3/4 of an inch per acre. As a result, this Court will take this opportunity to clarify its conclusion that the Director abused his authority in this regard.

An in-depth analysis addressing the Director's ability to make the determination, in the context of a delivery call proceeding, that the quantity decreed in the senior user's water right exceeds that the quantity being put to beneficial use by the senior user at the time of the delivery was recently set forth in a ***Memorandum Decision and Order on Petition For Judicial Review*** issued by Judge Wildman in Minidoka County Case No. CV 2009-000647 on May 4, 2010 ("***Memorandum Decision***"). In that case, the Court held that, in order to give the 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 user must be supported by clear and convincing evidence. Rather than repeat the analysis of this issue, this *Order* expressly incorporates herein by reference the ***Memorandum's Decision's*** analysis, located on pages 24-38.

In this case, this Court held in its July 24, 2009 ***Order*** that the Director exceeded his authority in determining that full headgate delivery for TFCC should be calculated at 5/8 of an inch instead of 3/4 of an inch per acre. Of significance to this Court's decision was that TFCC's water right was recommended by the Director in the SRBA with a quantity element based on 3/4 inch per acre. The Ground Water Users objected to the recommendation, asserting that the quantity should be based on 5/8 inch per acre. While the objection was still pending, the SRBA District Court ordered interim administration for the basin, which included TFCC's water right.[4] However, in the delivery call proceeding, the Director concluded that TFCC had failed to establish that it was entitled to the 3/4 inch per acre headgate delivery (the quantity recommended by the Director in the SRBA) because conflicting evidence demonstrated that TFCC could only put 5/8 of an inch per acre to beneficial use. The Director exceeded his authority in this respect because he did not apply the proper evidentiary standard or burdens of proof when

[4] Idaho Code Section 42-1417 provides for interim administration based on a director's recommendation. The concern expressed in the prior decision stems from the Court ordering interim administration based on a Director's Report, as opposed to a partial decree, where there are pending objections to the Director's recommendation. As a result, the parties litigate substantive elements (such as quantity) in the administration proceedings as opposed to in the SRBA. On rehearing, the Court acknowledges that, for purposes of interim administration, the recommendation should be treated the same as a partial decree. Accordingly, once interim administration is ordered, the same principles that apply to responding to a delivery call made by a holder of a decreed right apply equally to a delivery call made by the holder of a recommended right. Therefore, a discussion of those principles is necessary.

determining that TFCC was entitled to an amount of water less than what was recommended in the SRBA.

In *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007) ("*AFRD #2*"), the Idaho Supreme Court held that the CMR incorporate the proper presumptions, burdens of proof, evidentiary standards, and time parameters of the prior appropriation doctrine as established by Idaho law. The Court directed that the CMR could not "be read as containing a burden-shifting provision to make the petitioner reprove or re-adjudicate the right which he already has." *Id.* at 877–78, 154 P.3d at 448–49. It further directed that "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." *Id.* at 878, 154 P.3d at 449.

The Ground Water Users are correct that a decreed or recommended amount is not conclusive evidence of the quantity of water that the senior is putting to beneficial use at the time of the delivery call. *See e.g. State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997) (providing that, in the context of the SRBA, the Director was not obligated to accept a prior decree as conclusive proof of a water right because water rights can be lost or reduced, based on evidence that the water right has been forfeited). This Court recognizes that there may be instances where a senior is not putting the full recommended or decreed quantity to beneficial use at the time of the delivery call. In such instances, the Director has the ability under the CMR (particularly CMR 42), to examine a number of factors to determine whether the delivery of the full recommended or decreed quantity of water to the senior user would result in the failure of the senior to put the full recommended or decreed quantity to beneficial use. Yet, in each of these instances, pursuant to the well-established burdens of proof and evidentiary standards, the Director shall not require the senior to re-prove his right. *AFRD #2*, 143 Idaho at 877–78, 154 P.3d at 448–49. As explained by Judge Wildman in the ***Memorandum Decision***, if the Director determines in the context of a delivery call proceeding that a decreed (or recommended) amount exceeds the amount being put to beneficial use by the senior at the time of the delivery call, that decision must be made

based upon a standard of clear and convincing evidence.[5] *See* ***Memorandum Decision***, p. 35; *Cantlin v. Carter* 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904).

In this case, the Director, in the context of the delivery call proceeding, concluded, based on conflicting evidence, that TFCC was entitled to less than the recommended quantity. No reference was made, however, to the evidentiary standard applied. Therefore, the Director erred by failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the recommended quantity. However, in its August 26, 2010 *Motion to Clarify*, IDWR represented that, upon remand, the Director applied the 3/4 inch per acre for TFCC. *See also Methodology Order* at 11. As such, this issue has been resolved by the proceedings on remand.

C. Due Process and Curtailment Prior to Approval of Mitigation Plan

The Ground Water Users assert that due process requires that junior ground water users not be physically curtailed until after a hearing on a proposed mitigation plan. At the hearing on the petitions for rehearing, the SWC argued that the Director must immediately curtail junior water users, upon a determination of material injury, and only allow out-of-priority diversions once a mitigation plan is approved. The SWC asserts that nothing in CMR 43 allows the Director to suspend curtailment while considering the approval of a submitted mitigation plan. In essence, the SWC argues that the burden of a delay in holding a hearing to approve a mitigation plan should be placed on the junior water users, not the seniors.

The CMR provide an opportunity for junior water users to submit a mitigation plan after a determination of material injury, in order to prevent further injury and/or

[5] Otherwise, the risk of underestimating the quantity required by the senior, if less than the decreed or recommended quantity, impermissibly rests with the senior. For purposes of applying the respective burdens and presumptions, this Court has difficulty distinguishing between a circumstance where a senior's water right is permanently reduced, based on a determination of partial forfeiture as a result of waste or non-use, or temporarily reduced within the confines of an irrigation season incident to a delivery call based on essentially the same reasons. The property interest in a water right is more than what is simply reflected on paper; rather, it's the right to have the water delivered if available. Accordingly, whether the right is reduced on a permanent basis or on a temporary basis incident to a delivery call, the property interest is nonetheless reduced. Accordingly, the same burdens and presumptions should apply, prior to reducing a senior's right below the quantity supplied in the decree or recommendation.

compensate a senior user. Further, CMR 43 provides an opportunity for the Director to hold a hearing on that mitigation plan as determined necessary. A reasonable interpretation of the CMR reveals that curtailment of junior water rights should not occur until after the Director has an opportunity to review any mitigation plan submitted and conduct a hearing on such a plan if necessary, in accordance with the procedures set out in CMR 43. Curtailing junior water users pending the outcome of such a hearing circumvents the purpose of issuing mitigation plans in the first place.

In its July 24, 2009 ***Order***, this Court held that the Director abused discretion by not holding a proper mitigation hearing, or issuing a proper order on material injury to reasonable in-season demand and reasonable carryover. This Court recognizes that the CMR are being applied for the first time in recent delivery calls, which has resulted in much delay for all of the parties involved. However, in the future, mitigation plan hearings should occur within a reasonable time after the submission of a mitigation plan and should not result in the type of delay experienced in this case. *See AFRD #2*, 143 Idaho at 874, 154 P.3d at 445 ("a timely response is required when a delivery call is made and water is necessary to respond to that call").

Finally, the City of Pocatello urges this Court to declare that the matter of material injury shall not be addressed in future mitigation plan hearings in this case. As stated in the July 24, 2009 ***Order***, pursuant to CMR 43, once the Director makes a finding of material injury and upon receipt of a mitigation plan, the Director may hold a hearing on such a mitigation plan in order to determine whether the proposed plan in fact mitigates the senior user's injury. The City of Pocatello is concerned that future mitigation plan hearings will be a venue for parties to dispute the initial material injury determination. In future delivery calls, it may be practical for the Director to hold a hearing on the determination of material injury in conjunction with a mitigation plan hearing, in order to eliminate delay and further injury to senior users.[6] However, in this case, a hearing on material injury was held in 2008. As such, it is unnecessary for the Director to revisit the issue of material injury in future mitigation plan hearings.

[6] *See* Gooding County Case No. 2008-444 ***Order on Petitions for Rehearing*** (December 4, 2009) at 11-12.

VI.
CONCLUSION

The Court has reviewed its July 24, 2009 ***Order***, its August 23, 2010 ***Rehearing Order***, IDWR's *Motion to Clarify or Reconsider*, and the SWC's *Motion for Clarification*, and concludes as follows:

1. The Director abused discretion by failing to determine a methodology for determining material injury to reasonable in-season demand and reasonable carryover. However, the Director has complied with this Court's order on remand, and has since issued a *Methodology Order*. The time period for filing petitions for judicial review of the Director's *Methodology Order* on remand has expired. As a result, during a status conference on August 6, 2010, this Court announced its intention to lift the ***Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*** issued by this Court on March 4, 2010. As such, IT IS HEREBY ORDERED that the above-mentioned stay is hereby lifted.

2. While the Court has ruled that the Director abused his discretion and exceeded his authority by failing to follow procedural steps for mitigation plans as set forth in the CMR, and for failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the quantity recommended, there is no practical remedy to cure those errors at this point in the proceedings, and the Director has, upon remand, calculated 3/4 inch per acre as TFCC's full headgate delivery.

3. Consistent with this Court's July 24, 2009 ***Order***, in all other respects, the Director's September 5, 2008 *Order* is **affirmed.**

4. The SWC's *Motion for Clarification* requested that this Court clarify whether the presumptions and burdens set forth in the Court's ***Rehearing Order*** applied to all SWC rights (other than TFCC). In addition, the SWC requested that this Court clarify whether such presumptions and burdens apply to the Director's "minimum full supply" or

"baseline" analysis. However, these issues were not raised by any party on rehearing. As such, this Court will not address them further. Therefore, the SWC's *Motion for Clarification* is **denied**.

IT IS SO ORDERED.

Dated: Sept. 9, 2010

John M. Melanson
District Judge, *Pro Tem*

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 9th of September, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Amended Order on Petitions for Rehearing to the parties listed below via the U.S. Postal Service, postage prepaid:

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Dated: Sept. 9. 2010

Cynthia R. Eagle-Ervin, Deputy Clerk

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Certificate of Mailing
IRCP 77(d)