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BEFORE THE DEPARTMENT OF WATER RESOURCES

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)
_____)

**SURFACE WATER COALITION'S
PRE-HEARING MEMORANDUM**

COME NOW, 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 Company (collectively hereafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through counsel of record, and hereby submit their *Pre-Hearing Memorandum* in this matter pursuant to the August 1, 2007 *Scheduling Order*.

INTRODUCTION

This proceeding results from the 2005 request, or call, by the Surface Water Coalition to the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) that water rights on the Eastern Snake River Plain Aquifer (“ESPA”) be administered in priority after witnessing continued declines in Snake River reach gains and the lowest reservoir carryover on record. The Coalition sought the administration of hydraulically connected junior priority ground water rights in order to prevent injury to their senior surface water rights.

In response, the Director issued the *May 2, 2005 Amended Order* (hereinafter “*May 2 Order*”), which not only declined to administer water rights in priority as required by law, but which placed decrees and licenses in clear jeopardy of evisceration. From that point, the matter has proceeded through various implementing and “supplemental” orders, to the District Court of the Fifth Judicial District on appeal, to the Idaho Supreme Court on appeal and, now, on *remittitur* back before the Department for exhaustion of administrative remedies.

The fundamental matter at issue before this tribunal is the means of conjunctive administration of junior ground water rights in deference to senior surface water rights. Although administration of junior and senior surface water rights has been described by the former Director of IDWR as “perfunctory” because of the 150-year history of development of surface water rights in Idaho, and the evident above-ground effects of surface rights upon each other, ground water administration is still perceived through a glass darkly. Ground water administration should, however, be transparent. Yet, it is reduced to translucence by self-interest

and intentional obfuscation. The superficial differences between ground and surface water arise from the inability to “see” ground water as it flows underground, and from the time effects of interruption of ground water on surface water streams. The groundwater users have promoted several issues in defense against administration pursuant to the constitutional doctrine of “first in time, is first in right”. Each of these will be addressed in this memorandum.

ADMINISTRATION

The relationship between water right decrees, such as those resulting from prior adjudications as well as the Snake River Basin Adjudication (“SRBA”), and administration of water by IDWR is examined in the *Order Granting in Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*, entered on November 14, 2007, in the Blue Lakes and Clear Springs Delivery Calls proceeding (“*Blue Lakes Order*”). In summary, the decree, “will serve as the authority for the administration of water in times of shortage when not all rights can be fully honored. A primary purpose of the adjudication is to provide certainty in times of shortage so those with early priority dates will know what they will receive and those with later priority dates will know the likelihood of curtailment.” *Blue Lakes Order* at 3. Decrees are final, conclusive, and *res judicata*. *Blue Lakes Order* at 5. “It is clear that the Director cannot go behind the partial decrees on those matters decided in the decrees.” *Blue Lakes Order* at 6. Decrees must be administered in priority, i.e., “as between appropriators, the first in time is first in right;” and groundwater rights and surface water rights must be administered together, or conjunctively. *Blue Lakes Order* at 3.

The decree gives rise to a presumption under Idaho law that the senior holder is entitled to his water right, but there may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. *AFRD #2 v. IDWR*, 143 Idaho 862, 154

P.3d 233 (2007). A scan of both *AFRD #2* and the *Blue Lakes Order* provides an orderly catalog of post-adjudication defenses:

1. Whether the senior has forfeited or abandoned the water right.
2. Whether the senior will put water received to beneficial use; or, conversely, will the senior waste the water. An express subset of this issue is whether the senior's means of diversion is reasonable.
3. Whether sufficient connection exists between a junior and the calling senior such that curtailment of depletions by the junior will provide the senior usable water; or, conversely, is the call against that junior futile; and, is the amount of curtailment necessary.

ALLEGED DEFENSES TO THE SWC CALL

In the Idaho Ground Water Appropriator's ("IGWA") *Summary of Positions on Director's Orders Related to the Surface Water Coalition Delivery Call*, Exhibit 4000, ("*IGWA Summary*"), IGWA identifies the following four affirmative defenses, and six key issues for determination.

Affirmative defenses:

1. Local Ground Water Boards: IGWA argues that a local ground water board and not the Director, is the only appropriate body to assess a call. This issue was addressed, and disposed of unfavorably to IGWA in *Blue Lakes Order*, pages 12-13. The same legal reasoning identified in that decision applies in this case.

2. Historical water supply: IGWA argues that senior water holders are not entitled to a water supply that is greater in quantity and certainty than existed when their rights were established. This appears to be a direct attack upon the quantity element of the decrees, and is barred, as a matter of law, by *res judicata*. See *supra*. In addition, little or no ground water pumping on the ESPA occurred when the SWC acquired their water rights (priorities for their natural flow and storage water rights all pre-date 1940). Therefore, curtailment of junior priority

ground water rights does not represent a prohibited “enhancement” of what the SWC has historically diverted and used under its senior water rights.

3. Futile call: This is a question of fact upon which the junior bears the burden of proof.

4. Denial of Due Process: IGWA argues that issuance of a curtailment order without a prior hearing is a denial of due process, and therefore a taking. This argument misconstrues that the nature of the protected property right is merely to use the water so long as the use does not impede senior users. A junior priority water right is limited by its priority element and curtailment to satisfy a senior is an inherent condition of that right. Curtailment of water rights without a hearing occurs on a daily basis throughout surface water districts across the state. This action is not unconstitutional and a water right to ground water does not provide any different protection or immunity from administration and curtailment. *See Nettleton v. Higginson*, 98 Idaho 87, 91-92 (1977) (“The requirement of due process is satisfied by the statutory scheme of Title 42 of the Idaho Code”).

Key Issues:

1. Material Injury: IGWA argues, “what constitutes material injury is in dispute and must be determined,” and then proceeds to argue that injury to the quantity element of the decree is measured against historical use instead of the decree itself. This argument is difficult to distinguish from the affirmative defense number 2, historical water supply, and has been rejected by both the *Blue Lakes Order* and the *AFRD #2* decision. Moreover, a “decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use.” *Crow v. Carlson*, 107 Idaho 461, 465 (1984).

2. Extent of beneficial use: SWC agrees that water must not be wasted. SWC perceives, however, that either a water user is applying the water to a beneficial use, or the water is being

wasted. There is no third intermediate and undefined category in which the water is being applied to the beneficial use of irrigation, not being wasted, but is somehow limited to some subjective re-adjudication of need or a “minimum full supply.” Such an argument is simply another guise to attack the *res judicata* effect of a decree. The failure to recognize a water right and its decreed quantity, as was done through the Director’s created concept of a historical “minimum full supply,” will be discussed further in this brief.

3. Full water supply: This, again, is an effort to effect a “minimum full supply” re-adjudication. Quantity is set by the decree. To the extent a decreed quantity will be applied to the beneficial use, it must be provided and junior water right holders have no right to interfere with that amount.

4. Storage: Storage need is a factual question. In *AFRD #2* the Supreme Court confirmed that a storage right is a property right and that water in storage is the property of the appropriators. *AFRD #2, supra*, at 450. With regard to waste versus beneficial use, however, the Court stated the question as, “[t]hus, the question is: are the holders of storage water rights also entitled to insist on all available water to carryover for future years in order to assure that their full storage water right is met (regardless of need).” *Id.* This is no more than application of the waste defense to application of the priority doctrine, or, as the Court characterized it, one of the “other requirements of the prior appropriation doctrine.” *Id.* The *AFRD #2* Court spoke variously in terms of “when the senior does not need additional water to achieve the authorized beneficial use;” “wasted through storage and non-use;” “absent abuse;” “wasted by storing away excessive amounts in times of shortage;” “obligation to put that water to beneficial use;” “excessive carryover of stored water without regard to the need for it;” “reasonably necessary for future needs;” “waste water or unnecessarily hoard it without putting it to some beneficial use;”

and, “do not permit waste and require water to be put to beneficial use or be lost.” *Id.* at 450-51. Thus, and admittedly so, senior storage right holders cannot waste water and the junior user is entitled to seek to prove what water carried over pursuant to a storage right will, in fact, be wasted.

5. ESPA Ground Water Model: The accuracy of the ground water model is an issue raised by the junior users in this matter even though their own experts acknowledge it is the best available tool to predict the effects of administration. Because the junior user carries the burden of proving the defenses of futile call and waste, castigation of the singular tool to accomplish this proof may be a dangerous game.

6. Mitigation Plans: Mitigation plans as carefully described by Rule 43 of the CMRs appear workable because the rule has standards that are applied to such plans, it appears to give all involved a fair opportunity for input, and it requires such plans to be approved and effectively operating before junior ground water rights holders are authorized to divert and use water out-of-priority. “Replacement water plans,” however, are anomalies created by the Director without support in either statute or rule which have the fundamental flaw of not providing any input from the party most affected, the senior water right holder, and water is not ordered to be provided when it is most needed, during the irrigation season.

BURDENS OF PROOF

A water call is serious business. When a call is made, swift and authoritative action is required on the part of the Department to shut off those juniors that prevent a senior from exercising its priority right to the use of decreed water. This is, of course, because the ability to make beneficial use of the same is necessarily limited by a single growing season and complicated even further by the inherent and continual need for water in a high desert climate. In *AFRD #2*, the Idaho Supreme Court reiterated the speed through which a call must be

adjudicated noting that “the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right,” and that “a timely response is required when a delivery call is made and water is necessary to respond to that call.” 154 P.3d at 445.

While often criticized as harsh and unforgiving, the speed through which a call must be answered is to the advantage of both juniors and seniors. On one side, a senior is allowed the full measure of the water that it has been decreed to apply to beneficial use without suffering injury and on the other side a junior is made aware of the limitation of its right to the degree that it does not overextend its cropping *in saecula saeculorum*¹ in subsequent seasons to the detriment of a curtailment after it has become used to relying on the same. The question, then, is what burden of proof is established on the senior to prove up a call that is made? This was extensively addressed by Judge Wood in the district court order, by the Supreme Court in *AFRD #2*, and by Hearing Officer Schroeder in the *Blue Lakes Order*.

In entering into the above discussion, it is imperative to note that the burden is never upon a senior to reprove an already adjudicated right. The *AFRD #2* Court made this very clear stating that “[t]he Rules should not be read as containing a burden-shifting provision make the petitioner re-prove or re-adjudicate the right which he already has.” *Id* at 448-49. Whenever a call has been made, the presumption is that the senior is entitled to the full amount of his decreed water right. *Id*. As the *AFRD #2* Court noted, however, there are “some post-adjudication factors which are relevant to the determination of how much water is actually needed.” *Id*. at 449. The first and most important tool that Director has is the right to elicit facts which determine “how the various ground and surface water sources are interconnected, and how, when and where and to what extent the diversion and use of water from one source impacts [others]” in order to determine material injury. *Id*. Once this is done, however, the junior is left in the

¹ To all eternity.

position of having to prove that the call would be futile or to challenge, in another constitutionally permissible way (i.e. waste, forfeiture or inability to apply the same to beneficial use), the senior's call. *Id.*; see also *Jackson v. Cowan*, 33 Idaho 525, 528 (1921) (holding that where there was evidence that water sank into a bed of a creek some distance above a reservoir and evidence existed that it was hydrologically connected to the reservoir, the burden of proving it did not reach the reservoir was upon the junior right holders).

With regard to other post-adjudication factors that the Director may consider (waste and abandonment), it is axiomatic that they must be proven by the rigid standard of clear and convincing evidence. See *Gilbert v. Smith*, 97 Idaho 735, 739 (1976). As a further limitation of when the doctrine of waste may be invoked, notwithstanding, the policy of the State of Idaho to prohibit wasting of water, the policy is not to be construed "so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of its downstream diversion." *Id.* This means that the doctrine of waste is not a sword to strike away portions of decreed water rights in line with highest and best economic use provisions as determined by the Department. Rather, waste is a shield designed to protect juniors from seniors who fail to beneficially use the full measure of their right in the manner in which it has been decreed. This was understood in *Martiny v. Wells*, 91 Idaho 215, 219 (1966), where the Court stated that "[t]he policy of the law against 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."

Therefore, it is not appropriate to consider a decreed water right abandoned or wasted once the Director determines that ground and surface water rights are interconnected and that calling the rights of certain groundwater users would allow the full measure of the senior

stakeholders' rights to be exercised and applied to full beneficial use (absent a clear and convincing showing of abandonment as per statutory dictates).

ECONOMICS

The Director's *May 2 Order* and "supplemental" orders suggest that the priority doctrine may be eroded through the application of ill defined "economic" considerations and that the Director may reduce the measure of a water user's decree to "needed water." Ostensibly, the water right that is not needed is waste under this idea (which is disputed by the SWC).

The reference to "optimum use" in the Idaho Constitution, Art. XV, Sec. 7 refers to the Idaho Water Resource Board's authority to "formulate and implement a state water plan for optimum development of water resources in the public interest." The Board's statutory authority is limited to formulating and implementing a comprehensive state water plan for "conservation, development, management and optimum use of all **unappropriated** water resources and waterways of [the] state in the public interest." *Id.* (emphasis added). Contrary to any other assertions, neither the Idaho Water Resource Board, nor the Director, retain the power to re-allocate appropriated water in line with "optimal use" or "economic" considerations. Rather, the Board is limited in its economic investigations to only unappropriated waters. *See* Idaho Code § 42-1734A. To the extent that the prohibition on reallocation of water rights has already been discussed, *infra*, it is worthy to note that the Supreme Court already decided against the idea of wielding the doctrine of waste to realign water rights in a manner of perceived highest and best economic use in *Martiny v. Wells*, 91 Idaho 215 (1966).

In *Martiny*, the Court noted that the district court's "conclusion that the best use of the water was made of it by the defendant [junior appropriator], is immaterial and lends no support to the judgment. The policy of law against waste or 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.” *Id.* at 219.

With the above in mind, administration of vested water rights does not concern “unappropriated water.” Accordingly, the reference to “optimum use” of water in the constitution and statutes does not provide authority to the Director and watermasters to decide whether or not to administer junior priority ground water rights under the auspices that distribution to a senior surface water right would not represent “optimum use” of the water.

The groundwater users have consistently pointed to *Schodde v. Twin Falls*, 224 U.S. 107; 32 S.Ct. 470; 56 L.Ed. 686 (1912), to support the proposition that an administrator may inquire into the economics of which water user may apply water to the best, or “optimal” use, and favor that water user notwithstanding the ownership of the water or the priority of the water right. *Schodde* was a senior (1889 and 1895) user on the Snake River having a 1,250 miner’s inch water right. Between 1903 and 1905, the Twin Falls Land and Water Company built a dam (Milner Dam) downstream that raised the water in the river some 40 feet. This rendered the upstream water wheels inoperable by flooding the steep channel which had previously driven the water wheels. The trial court found the prior appropriation doctrine did not allow a senior to tie up the entire river and prevent subsequent appropriation by adopting an unreasonable means of appropriation. The Court of Appeals affirmed, writing that, “the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.” It is to this second sentence the junior

users in this case point to bolster their claim that a reasonableness determination outside of the decree, must be made in a call. The first sentence, requiring the decree be respected and enforced, is conveniently ignored.

The Idaho Supreme Court has, subsequent to *Schodde*, made clear that the investigation of reasonableness in *Schodde*, was limited to the means of diversion and not to the amount of water specified in the decree. In *Arkoosh v. Big Wood Canal Company*, 48 Idaho 383, 283 P.2d 522 (1929), Big Wood Canal Company built a dam (Magic Dam) that accumulated silt that originally had filled the river bed. Each spring this allowed a rush of water down through the river channel that washed out the silt remaining in the river bed. The consequence was that the river losses between the dam and the senior's downstream place of use increased dramatically, and the winter stock water would simply dissipate into the river bed rather than flow to the seniors as it had before. The seniors sued to require Big Wood to rectify what they had done so that the water would flow down to the seniors. Big Wood argued that *Schodde* excused Big Wood as a junior user from regarding the downstream senior's water right, much as the junior ground water users in this present proceeding argue that *Schodde* excuses their depletions to the water supplies and injuries they are causing to the SWC senior surface water rights. The Idaho Supreme Court made clear that this is a misreading of *Schodde*:

Schodde v. Twin Falls, 224 U.S. 107; 32 S.Ct. 470; 56 L.Ed. 686 is clearly distinguishable because therein the interference was not with the water right but with the current. In other words, the same amount of water went to *Schodde*'s place as before. Here it is charged that the waters to which the respondents are entitled are not available and have been entirely lost and diverted and the court so found.

48 Idaho at 397.

Thus, the appropriate inquiry here is not whether the seniors in this call have a reasonable amount of water compared to juniors. Instead, the hearing officer must determine whether the

seniors have access to all the water provided for in their rights that absent interference by the juniors can be diverted and put to beneficial use.

ESPA GROUND WATER MODEL

The Department's Ground Water Model (ESPAM or "Model") represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. *SWC Order* at 7, ¶ 33. The Model simulation results are suitable for making factual determinations on which to base conjunctive administration. *SWC Order* at 7, ¶ 32; *SWC Rebuttal to Brendecke* at 28-33.

Simulations using the Model show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause depletions to the flow of the Snake River in the form of reduced reach gains or increased reach losses in various reaches of the Snake River including the reach extending from Shelley, Idaho to Minidoka Dam, which includes the American Falls Reservoir. *SWC Order* at 7, ¶ 31; *SWC Expert Report* 11-1, 11-3.²

Director's Use of Ground Water Model in SWC Order

The Director used the Model to simulate the effects of curtailment of certain ground water rights junior to the surface water rights held by the SWC. *SWC Order* at 27-30, ¶¶ 123-131. The Director used the Model to simulate the effects of curtailment of all ground water diversions in Water District 120 and 130, which demonstrated that reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage would increase over time by a total amount of 624,800 acre-feet. *Id.* at 27-28, ¶ 123. As demonstrated in the *SWC Report*, this

² *Surface Water Coalition Expert Report* (Vols. I – IV), prepared by Brockway Engineering, Inc., ERO Resources Corp., and HDR Engineering, Inc. and filed in this matter on September 26, 2007 (hereinafter referred to as "*SWC Report*").

water would be diverted and used by SWC senior priority surface water rights, as well as other senior natural flow and storage water rights in Water District 1. *SWC Report* at 11-4 to 11-8.

The Director further used the Model to simulate the effects of curtailment of ground water rights having priority dates of February 27, 1979 and junior in Water Districts 120 and 130, which demonstrated that reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage would increase by 101,000 acre-feet over time. *Id.* at 28, ¶ 126. The Department's simulation demonstrated that by the end of the fourth year, approximately 60% of the water not pumped from the aquifer would return to the river. *Id.* at 29, ¶ 128. Although the Director "backed-into" a priority date for purposes of administration by using his impermissible "total water supply" and "minimum full supply" approach, it nonetheless demonstrates that curtailment of junior priority ground water rights would produce water that could be diverted and used pursuant to the SWC senior surface water rights, and that most of the depletion would accrue to the reach within four years.

The "Curtailment Scenario" was a similar Model run performed by IWWRI. *SWC Report* at 11-1. The results of this analysis were used to estimate that ground water pumping under all rights junior to the SWC surface water rights currently causes depletions in the Near Blackfoot to Minidoka reach of the Snake River between 960 and 1,100 cfs. *Id.* Based on this analysis, about 30% of the increase in reach gains occurs within the first year after curtailment and about 50% occurs within the first five years (in the Near Blackfoot to Minidoka reach). *Id.* at 11-3. For the Near Blackfoot to Minidoka reach, the model indicates that reach gain accrual after 1, 2, 3, 4, and 20 years from curtailment of ground water pumping in the ESPA is about 340 cfs, 460 cfs, 540 cfs, 600 cfs, and 960 cfs respectively. *Id.* SWC senior natural flow and storage

water rights would benefit due to increased reach gains from the curtailment of junior ground water pumping. *Id.* at 11-4 to 11-8.

ISSUES

The SWC raises the following issues with the Director May 2nd *Order* and subsequent orders implementing that Order.

Issue #1: Snake River Reach Gains in the Blackfoot to Milner (American Falls) Reach Have Declined Due to Ground Water Pumping Which Has Reduced Water Availability to Satisfy the SWC Senior Surface Water Rights.

May 2 Order
p. 17, ¶¶ 79-80
p. 18, ¶ 82

Ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. *May 2 Order* at 5, ¶ 23. One of the locations at which a direct hydraulic connection exists between the ESPA and the Snake River and its tributaries is in the American Falls area. *Id.*; *SWC Report* at 7-5 to 7-6, 7-15 to 7-16.

The Director recognized that since “1999, there has been a significant decrease in the reach gains” in the Near Blackfoot to Neeley reach. *May 2 Order* at 17, ¶ 79. While the Director erroneously attributed this decrease in recent years to “drought” effects, he did acknowledge that depletions from ground water pumping “reduces the amount of natural flow” and “can also reduce the amount of water in the Snake River that would otherwise be available for diversion to storage in American Falls Reservoir.” *May 2 Order* at 18, ¶¶ 82-83.

The SWC members rely upon Snake River reach gains in the Near Blackfoot to Milner reach of the Snake River. The data for this entire reach (not just Blackfoot to Neeley) demonstrate a declining trend in reach gains for the irrigation season which is most pronounced

during the critical months of July and August. *SWC Report* at 7-18; *Rebuttal to Brendecke* at 3-5. The July monthly reach gain decline from the 1950-60 average to the low reach gains observed during the 1990s and 2000s is about 107,000 acre-ft/month for the Blackfoot to Milner reach. *Id.* The analysis further shows that the Minidoka to Milner reach of the river is now a “losing reach” during the middle and later parts of the irrigation season.

These calculated declines correlate with the declines observed in TFCC’s natural flow diversions during this period, as well as with declines observed in ESPA ground water levels. *Id.* at 7-19, 7-20; Appendix AO. As ground water levels declined in the ESPA beginning in the 1960s, water was induced from the Snake River losing reaches and discharge to the river from the aquifer was captured from the gaining reaches. *SWC Report* at 7-25. Declines in ground water levels are not the result of single or multi-year drought periods. *Id.* at 7-14. Ground water pumping is a major cause of ground water level declines across the ESPA. *Id.*

Further, the “Curtailement Scenario” model run by IWRRRI demonstrates that ground water pumping is a major cause for decreased Snake River reach gains, including a decline of about 960 to 1,100 cfs in the Blackfoot to Minidoka reach. *SWC Report* at 7-20. Although decreases in incidental recharge have impacted reach gains, ground water pumping for irrigation is the largest source of depletion to the common water supply in the ESPA and is causing severe declines in ground water levels and Snake River natural flow. *Id.* at 7-27. Consequently, the reduced reach gains in the American Falls reach have impacted the water availability for the SWC senior natural flow and storage water rights. *Id.* at 7-16 to 7-23; Exhibit B.

Issue #2: Out-of-Priority Diversions by Hydraulically Connected Junior Priority Ground Water Rights Injure SWC Senior Surface Water Rights.

May 2 Order

p. 19, ¶ 88

p. 43, ¶¶ 45, 48

Ground water pumping under hydraulically connected junior priority rights in the ESPA has impacted the Coalition members' senior natural flow and storage water rights to the Snake River in two ways. First, since ground water pumping increases losses of natural flow in the losing reach above Blackfoot, less water is available to flow past Blackfoot for the Coalition members' water rights. *SWC Report* at 7-22. Second, reduced reach gains in the Blackfoot to Milner reach reduce water availability for the Coalition members' senior storage and natural flow rights. *Id.* at 7-22, 23. The reduction in water supply diminishes and injures the SWC senior water rights. Exhibit B, *see also, SWC Report* at 8-1 to 8-21.

Idaho's constitution and water distribution statutes require senior water rights to be satisfied prior to junior water rights. *See* Art. XV, § 3 Idaho Const.; I.C. § 42-602, 607. Idaho's Ground Water Act further authorizes the Director to deem ground water unavailable to fill ground water rights "if 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." I.C. § 42-237a.g (emphasis added). Finally, the Department's CMRs require administration of junior ground water rights that injure senior surface water rights. Rule 40.

The CMRs define material injury as the "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." Rule 10.14 (emphasis added). Reducing the amount of water that would otherwise be diverted and used pursuant to a senior water right is a "hindrance to or impact upon the exercise" of that water right.

The Idaho Supreme Court has plainly held that “to diminish one’s priority works an undeniable injury to that water right holder.” *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982). Moreover, in *AFRD #2* the Court further held that the “presumption under Idaho law is that the senior is entitled to his decreed water right”. 154 P.3d at 449. Therefore, junior water right holders (surface or ground) have no right to take water that would otherwise be used under a senior right, unless they can prove by “clear and convincing evidence” that their diversion would not “injure” the senior right. *Moe v. Harger*, 10 Idaho 302, 303-04 (1904); *Jossllyn v. Daly*, 15 Idaho 137, 149; *Cantlin v. Carter*, 88 Idaho 179, 186 (1964); *AFRD #2*, 154 P.3d at 449.

Contrary to the Director’s statements and implications in the order, injury to a water right is not conditioned upon water “shortage” to a particular field. *May 2 Order* at 25, ¶¶ 115-116. In other words, a senior water right holder does not have to wait and watch his field burn up before he can make a call or before an injury to his water right occurs. Such an “after-the fact” determination runs counter to Idaho’s prior appropriation doctrine and would usurp the purpose of timely administration. Diverting water out-of-priority, to the detriment of a senior right that could have otherwise diverted and used that water, is the “injury” that the Director and watermasters are obligated to prevent under the law.

In this matter the Director failed to recognize the “injury” to SWC members caused by hydraulically connected junior priority ground water rights. As explained in detail below, the Director’s use of a “total water supply”, “full headgate delivery”, and “minimum full supply” criteria failed to distribute water according the SWC water rights. The result is that the ongoing “injury” caused by junior priority ground water pumping was essentially disregarded.

As explained in the *SWC Report*, ground water pumping reduces reach gains in the American Falls reach, the water supply for the SWC senior natural flow and storage water rights. *SWC Report* at 7-20 to 7-23. This reduction in water supply reduces the amount of water that could otherwise be diverted and used, hence it “diminishes” the priority, or injures the SWC senior surface water rights. But for these reduced reach gains, such as in 2007, the SWC could have diverted and used that water under their senior surface water rights. Exhibit B. The following are some additional examples of the injury to the SWC’s senior water rights.

First, junior priority ground water pumping reduces the water available, particularly in the critical months of July to September, that could be diverted and used under TFCC’s (3,000 cfs) and NSCC’s (400 cfs) 1900 water rights. Over the last two decades TFCC daily natural flow diversions have decreased by almost 1,000 cfs in July and August dropping as low as 1,300 to 1,400 cfs in 2004. *SWC Report* at 8-8. Other daily flow graphs show that sharp declines in TFCC natural flow diversions are occurring during most years since 1992. *SWC Report* at Appendix AT. Consequently, TFCC is forced to use storage water earlier and in greater amounts to make up for the lack of natural flow. TFCC was also forced to reduce deliveries to its shareholders during the irrigation season, such as in 1992, 1994, 1996, 2001 to 2005, and 2007. *SWC Report* at 8-9; Exhibit A; and *Affidavit of Vince Alberdi* (at Exhibit B).

NSCC’s natural flow diversions have similarly declined due to decreased reach gains. *SWC Report* at 8-10 to 8-12. NSCC’s mid-season (July and August) total and natural flow diversions have declined from the 1960s and 1970s to the last two decades. *Id.* at 8-12. The number of days per year during dry conditions when NSCC is able to meet irrigation requirements using only its natural flow rights has declined by an average of 15 days based on a comparison of similar years. *Id.* With a less reliable natural flow supply, NSCC is forced to use

more reservoir storage earlier in the season leaving less storage available later in the year and less carryover storage for future dry years. *Id.* The Director's use of a "total water supply" approach allowed him to ignore the injury to NSCC's individual water rights, including its 400 cfs (1900) water right, since NSCC is forced to make up the injury to this water right every year with its storage water.

Similar to NSCC's earlier and increased use of storage water due to reduced reach gains, other SWC members are also suffering reduced natural flow diversions under their water rights. Data for AFRD #2, BID, and MID demonstrate that all three entities have suffered fewer days per year when natural flow diversions are sufficient to meet irrigation demands without using storage water. *SWC Report* at 8-15 to 8-18. In addition, natural flow diversions for these entities have decreased in average and dry years post-1990 compared to similar years prior to 1962. *Id.* Milner's natural flow diversions have also declined, up to 50%. *Id.* at 8-19. Finally, A&B's natural flow diversions have declined by up to 30%. *Id.* at 8-20. Reduced storage fill in American Falls Reservoir has also injured these members' storage water rights. *Id.* at 8-3 to 8-4.

The reduced reach gains and natural flow diversions have forced the SWC to increase their use of storage supplies, which in turn reduces carryover and the ability of those storage rights to fill the next year. *See Exhibit B; SWC Report* at ES-13; 7-21 to 7-23; 11-4 to 11-8. The depleted natural flow conditions force SWC members to "self-mitigate" by exhausting storage supplies to make up for the injury to their natural flow rights. In turn, this reduces reliability in water supplies for the SWC in future years, especially under drought conditions. The SWC did not acquire storage water rights to mitigate for injuries caused by pumping under junior priority ground water rights.

Finally, due to the injury to their senior water rights, SWC members are forced to reduce deliveries to their shareholders and landowners and rent additional water from the Water District 1 rental pool, as was done in 2007. *See* Exhibit B (*Affidavits of Lynn Harmon, Ted Diehl, and Vince Alberdi*). For example, in 2007, AFRD #2, NSCC, and TFCC were all forced to reduce deliveries to their landowners and shareholders. *Id.* Deliveries have also been reduced in prior years as well. Exhibit A. TFCC also rented 40,000 acre-feet from the Water District 1 in 2007 because it had no assurance that any mitigation water would be provided during the irrigation season (which in fact turned out to be the case as established by the process created under the *May 2 Order*). The Director's failure to recognize injury to the Coalition's senior water rights unlawfully forces the SWC to bear the risk of uncertainty when the future water supply and demand is unknown. Therefore, the SWC must acquire additional supplies and cut back on deliveries to operate conservatively in the face of this uncertainty. Accordingly, the SWC has suffered and will continue to suffer injury to their senior surface water rights by reason of junior priority ground water pumping.

Although "shortage" is not the defined standard for injury to a water right in Idaho, the SWC have further demonstrated "water shortages" due to a lack of conjunctive administration the past three years. The information provided to the Director in 2005 and the affidavits of the managers submitted in June 2007 plainly demonstrate that SWC landowners and shareholders have endured water shortages on their projects. Exhibits A, B. In addition, Chapter 10 of the *SWC Report* provides a comprehensive review of water shortages based upon the calculated irrigation diversion requirement for each SWC member project. *See SWC Report* at 10-1 to 10-12. Finally, the *2007 Water Supply Assessment* provides analysis into the predicted shortages for the SWC in 2007. Exhibit C.

Issue #3: Storage Water Rights are Independent Property Rights and Represent Primary Sources of Water Supply for SWC Entities.

May 2 Order

p. 14, ¶ 67

p. 16, ¶ 72

p. 34, ¶ 16

The Director's characterization of storage water rights as "supplemental" water rights for all Coalition members fails to recognize that for some entities storage water provides a "primary" source of water supply, particularly in dry years. For SWC members with more junior priority natural flow water rights, such as AFRD #2, A&B, BID, MID, Milner, and NSCC, storage water represents a primary supply of water for their projects, particularly in dry water years, and can even consist of 100% of the water supply in certain years. *See* Exhibit A (diversion data 1990-2004 submitted to Director in this proceeding in early 2005, note Milner did not divert any natural flow under its senior surface water rights in 2004)³.

Idaho's water distribution statutes and CMRs do not allow the Director or watermaster to treat storage rights any differently from natural flow water rights for purposes of administration. Importantly, Section 42-607 does not distinguish storage water rights from natural flow rights. The CMRs define a water right as "the legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law." Rule 10.25. No distinction is made between natural flow and storage water rights. All of the storage water rights held by the SWC have been previously decreed or licensed (nominal legal title in the name of the USBR). *May 2 Order* at 15, ¶ 68.

³ Information in Exhibit A was extracted from the *Petitioners' Joint Response to Director's February 14, 2005 Request for Information* filed on March 15, 2005 and as amended on March 18, 2005.

Whereas junior water right holders cannot take water from senior natural flow water rights, the same applies to senior storage water rights. That is, storage water rights are independent vested property rights entitled to recognition and protection in water right administration. Accordingly, the SWC storage water rights, as separate water rights, are entitled to protection from interference by junior priority ground water rights. Although the Director recognizes the fact that ground water depletions can reduce the amount of water that would otherwise be available to fill storage water rights (p. 18, ¶ 83), he failed to analyze the storage water rights separately for purposes of conjunctive administration.

Whereas pumping under junior priority ground water rights reduces Snake River reach gains, it also reduces the amount of water that is tributary to and that fills senior storage water rights, including the SWC storage rights at American Falls Reservoir. The consequences for failing to recognize storage water rights for administration, coupled with reduced reach gains caused by ground water pumping under junior rights, injures those rights and reduces the reliability of fill in the storage water system in Water District 1. *SWC Report* at 7-21, 11-1 to 11-8; Exhibit B.

Since the Director did not analyze storage water rights separately for purposes of conjunctive administration his order and application of the CMRs is erroneous and unlawful.

Issue #4: The Director Wrongly Determined Injury Based Upon a Total Water Supply Analysis (“Full Headgate Delivery” and “Minimum Full Supply” criteria) Instead of Administering Pursuant to the SWC’s Water Rights as Required by Idaho Law.

May 2 Order
p. 19, ¶¶ 88, 89
p. 20, ¶¶ 91
p. 43, ¶¶ 45, 48

Under Idaho law, watermasters distribute water to and administer water rights:

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

Idaho Code § 42-607 (emphasis added).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right . . . and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . .

...

02. Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code . . .

...

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

CMR Rule 40 (emphasis added).

In the *May 2 Order*, the Director failed to properly distribute water to the Coalition's members decreed senior water rights as required by the law. Instead, the Director used criteria other than the water rights to determine how to administer hydraulically connected junior priority ground water rights. This unauthorized approach to administration finds no support in the statutes or rules governing water distribution and should be rejected.

a. “Total Water Supply” Approach

First, the Director analyzed the Coalition members’ “total water supply” to determine whether or not administration of junior priority water rights was necessary. The Director attempted to justify his approach as follows:

45. Based upon the Idaho Constitution, Idaho Code, the Conjunctive Management Rules, and decisions by Idaho courts, in conjunction with the reasoning established by the Colorado Supreme Court in *Fellhauer*, it is clear that injury to senior priority surface water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use.

...

48. Whether the senior priority water rights held by or for the benefit of members of the Surface Water Coalition are injured depends in large part on the total supply of water needed for the beneficial uses authorized under the water rights held by members of the Surface Water Coalition and available from both natural flow and reservoir storage combined. . . .

May 2 Order at 42-43, ¶¶ 45, 48 (emphasis added).

Nothing in Idaho’s constitution, water code, or CMRs allows the Director to arbitrarily combine a senior’s water rights for purposes of administration. Idaho Code § 42-607 does not condition water distribution based upon a senior’s “total water supply”, it requires administration pursuant to individual water rights. If the Director’s “total water supply” approach was legal, junior surface water right holders would be able to demand that seniors with storage water use that storage at any time so that natural flow could be made available for use under the junior’s natural flow rights. Such an approach is not used in surface water right administration and there is no legal justification to apply it in conjunctive administration of hydraulically connected ground water rights. Since the “combined total supply” method fails to give effect to the individual water rights held by the SWC it must be rejected.

The Director further created a false example to justify his action by claiming that treating the SWC's natural flow and storage rights separately would lead to the curtailment of junior ground water rights anytime a senior's natural flow rights were curtailed but the reservoirs were full or when the reservoir space did not fill but the senior's natural flow rights were completely satisfied. *Id.* at 43, ¶ 48. If a senior's natural flow right is not satisfied due to low runoff conditions, drought, or diversions by upstream seniors, that does not automatically mean junior priority ground water rights are subject to curtailment. In addition, if the storage water rights due not fill by reason of a low snow-pack or irrigation demand by upstream senior natural flow rights, that does not automatically mean junior ground water rights are subject to curtailment. Accordingly, the Director's attempted justification fails.

The Director then explained that either outcome under this false example would run counter to the "full economic development of underground water resources in Idaho Code § 42-226". *Id.* Contrary to the Director's insinuation, Idaho's Ground Water Act does not apply to any water rights, including surface water rights, acquired prior to 1951. I.C. § 42-226 ("This act shall not affect the rights to the use of ground water in this state acquired before its enactment."); *Musser v. Higginson*, 125 Idaho 392, 396 (1994) (holding Act did not apply to senior surface water rights in Water District 36-A).⁴ The Department, through the CMRs, has no authority to "bootstrap" provisions of the Ground Water Act into applying to pre-1951 water rights. *See Roeder Holding LLC v. Board of Equalization of Ada County*, 136 Idaho 809, 813-14 (2001) ("an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative power powers to modify, alter, enlarge or

⁴ *See also*, SRBA Court's decision in *Order on Cross Motions for Summary Judgment* (Fifth Jud. Dist., Twin Falls County District Court, In Re: SRBA: Subcase No. 91-00005, July 2, 2001) ("*Basin-Wide 5 Order*") at 27 ("Idaho's groundwater management statutes, I.C. § 42-226 *et seq.*, do not apply to water rights with priorities earlier than 1951.").

diminish provisions of a legislative act that is being administered”). Accordingly, the “full economic development of underground resources” provision in the Ground Water Act cannot be used to limit or condition administration of the SWC pre-1951 surface water rights, such as in the manner suggested by the Director in the *May 2 Order*.

Junior priority ground water rights are subject to curtailment when their diversion interferes with and depletes water that would otherwise satisfy a senior natural flow or storage water right. If diversions by junior ground water rights deplete reach gains that would otherwise be diverted and used pursuant to the SWC’s senior natural flow rights, that results in injury to those natural flow rights. If diversions by junior ground water rights reduce the fill of senior storage water rights, that too results in injury to those storage water rights.

Each water right, no matter if it is a natural flow or storage right, is entitled to protection from injury caused by junior priority ground water rights. The Director’s “total water supply” concept eviscerates any proper analysis regarding the effect junior ground water rights have on the Coalition members’ individual water rights. Consequently, SWC members are forced to “self-mitigate” for the injuries to their natural flow rights by using more storage water, renting additional water, or reducing deliveries to their shareholders and landowners.

Notably, the Director never recognizes the injury caused to NSCC’s 400 cfs 1900 natural flow right. Pumping under junior ground water rights reduces Snake River reach gains during the middle of the irrigation season injuring NSCC’s 400 cfs natural flow right. Although NSCC could divert and use 400 cfs during the irrigation season, it is instead forced to use storage water to make up for that injury to its natural flow right by using additional storage water. The Director’s “combined use” theory forces SWC members like NSCC to “self-mitigate” under such

circumstances. Idaho law does not require a senior to mitigate for injuries caused by juniors, yet the Director's "total water supply" approach has just that effect on senior water right holders.

To the extent Rule 42.g was used to create or justify the "total water supply" approach, the Director's application of the rule was unconstitutional and contrary to Idaho's water distribution statutes.

b. "Full Headgate Delivery"

Apart from the "total water supply" approach, the Director also created a "full headgate delivery" criteria to determine whether or not the Coalition members were being injured by junior priority ground water rights. Again, nothing in the Idaho's water distribution statutes or the CMRs provide for administration to an entity's "full headgate delivery". The Director analyzed prior diversion data to determine when the Coalition members made "full headgate deliveries" under each member's combined "natural flow water rights and storage releases." *Order* at 19, ¶ 89. This method continued the erroneous "total combined water supply" under the senior natural flow and storage rights for purposes of administration and failed to recognize the individual water rights held by the SWC. The criteria further improperly assumes that if a Coalition member can deliver a "full headgate delivery" to its landowners or shareholders then there is no injury to the senior surface water right. In other words, if a senior water right holder is forced to exhaust all storage water supplies due to reduced natural flow in the river but can still make a "full headgate delivery" then no injury occurs. This example illustrates the errors in the Director's method.

If junior priority ground water right holders can reduce and injure a senior's natural flow water right, that "injury" is ignored provided the senior can make a "full headgate delivery" using his own storage water (or rented water). As stated above, Section 42-607 and the CMRs

require the Director to determine whether junior priority ground water rights are injuring senior surface water rights, not some newly created definition that disregards the water rights and looks to a “total combined water supply” or “full headgate delivery” definition.

While the Director created a “full headgate delivery” standard in the *May 2 Order*, the Director subsequently failed to enforce it against junior priority ground water rights. For example, in 2007, AFRD #2, NSCC, and TFCC were forced to deliver less than the Director’s defined “full headgate delivery”. Exhibit B (*Affidavits of Harmon, Diehl, and Alberdi*). Accordingly, these entities were injured, even under the Director’s created criteria. Despite the reduced deliveries to those landowners and shareholders, the Director did not order any curtailment of junior priority ground water rights in 2007 and no mitigation water was ordered to be provided during the irrigation season either. Consequently, the “full headgate delivery” criteria was not honored.

c. “Minimum Full Supply”

Finally, the Director erroneously used the “total water supply” and “full headgate delivery” criteria to arrive at the least amount of water each Coalition member was entitled to divert for purposes of conjunctive administration, or what is coined the “minimum full supply”. Again, similar to the above criteria, the “minimum full supply” is not a term or analysis provided for anywhere in statutes or the CMRs. The Director’s “minimum full supply” does not represent what the Coalition members can divert and beneficially use under their water rights. Instead, the “minimum full supply” represents the “minimum amount of combined natural flow and storage releases diverted recently that provided for full headgate deliveries, recognizing that climatic growing conditions do affect the minimum amount of water needed and such effects can be significant.” *Order* at 20, ¶ 91. This approach unlawfully limited senior surface water rights to a

“minimum” use, but at the same time authorized junior priority ground water rights to divert and use their full water rights. The prior appropriation doctrine does not allow juniors to pump their maximum right while seniors are cut to a bare minimum.

The “minimum full supply” is significantly lower than historical diversions and does not even provide the historical average amount that the SWC has diverted and used under its water rights. *SWC Report* at 8-6, 8-22 (Table 8-1). For example, SWC total diversions have exceeded the Director’s “minimum full supply” for 40 of the last 45 years of record. *Id.* Water has been consistently distributed to the SWC’s natural flow and storage water rights by the Water District 1 Watermaster during this time. In addition to failing to provide sufficient water to meet the SWC water rights, the “minimum full supply” does not provide for the actual irrigation requirements of the SWC projects either. *SWC Report* at 8-4; 9-1 to 9-2, Exhibits B, C.

The Director later recognized that the “minimum full supply” was not the maximum amount of water that could be diverted and used by the SWC:

The Director determined that 1995 was the most recent year that the members of Surface Water Coalition received a water supply sufficient for the beneficial uses made under the respective rights, and based on available information, used the amounts of water diverted during the 1995 irrigation season as measures of the quantities of water needed for current conditions (herein termed “minimum full water supply”), while recognizing that amounts of water up to the maximum quantities authorized by the water rights held by or for the benefit of the Coalition could be demanded upon a showing of need. To date, the Surface Water Coalition has not shown such need.

See 5th Supp. Order at 6, n. 3 (May 23, 2007).

A well-established history of diversion data in Water District 1 plainly establishes that the SWC has “needed” and used water up to the quantities stated on their decreed senior surface water rights. *SWC Report* at 8-1 through 8-21; Exhibit B. While the irrigation diversion requirement varies by month and year, the comprehensive analysis provided in the *SWC Report*

further demonstrates that the SWC’s “needs” are more than the “minimum full supply” set forth in the *May 2 Order*. See *SWC Report* at 9-1 through 9-9; Exhibit C (2007 Water Supply Assessment at 16-20). Moreover, since the Director’s “minimum full supply” for the SWC (2.893 MAF) was determined by using the year (1995) with the lowest total irrigation diversion requirement in the last 17, the number vastly underestimates SWC water requirements during all other years, particularly during hot and dry years like 2007. *Id.* at 9-8.

For example, using the Director’s “minimum full supply” for a high diversion requirement year like 2001 (3.565 MAF) would result in an under prediction of the SWC’s water “needs” by almost 670,000 acre-feet. *Id.* The difference between irrigation diversion requirements for hot and dry years and the 1995 cool wet year is up to 30 percent for individual SWC members. *Id.* at 9-9, 9-13 through 9-19. Information submitted to the Director in April and June of this year plainly demonstrated that 1995 was not representative of 2007 water supply conditions, which was forecasted and turned out to be a hot and dry year. Exhibits B, C. Indeed, the SWC managers testified that water demands on their projects were likely to be high in 2007 due to high temperatures and low precipitation. *Id.* Weekly water reports from Water District 1 further demonstrated that as of mid-June, 2007 was tracking 2001, another hot and dry year. Exhibit B (see Exhibit C to *Alberdi Affidavit*).

Accordingly, the Director’s “minimum full supply” criteria does not represent what can be diverted and used under the SWC water rights and does not represent irrigation diversion requirements for all years and all conditions. Consequently, the Director improperly reduced the Coalition members’ water rights to an arbitrary “minimum” of a combined diversion of natural flow and storage releases for purposes of conjunctive administration. Idaho law does not

authorize the Director's unprecedented approach to water right administration, therefore it should be rejected.

Issue #5: **The Director Improperly Used Diversions From A Single Year (1995) (the lowest consumptive use year in the last 17) to Determine the SWC's "minimum full supply".**

May 2 Order

p. 20, ¶¶ 91, 92

p. 25, ¶ 115

p. 44, ¶ 50

The Director arbitrarily used total diversion data from one year (1995) to define the Coalition members' "minimum full supply" for purposes of conjunctive administration in any year. Although the Director acknowledged that "climatic growing conditions do affect the minimum amount of water needed and such effects can be significant", he disregarded the actual climatic conditions in 1995, which was one of the coldest and wettest years on record in the last 17 years. *See SWC Report* at Appendix V (annual precipitation data at various gages in the Snake River Basin).

The result is the Director consciously used the year in which the Coalition members had the lowest irrigation diversion requirement in the past 17 years. *See SWC Report* at 9-12 through 9-19; *see also*, Table 5 of Spronk Water Engineers Expert Report (identifying 1995 as the minimum annual weighted average crop irrigation requirements for all SWC members for the years 1990 to 2006). Stated another way, 1995 was the year with the least demand for water across the SWC irrigation projects.

Consequently, this "minimum" number is not representative of what the Coalition is authorized to divert and beneficially use under its water rights and does not even represent the Coalition's average, or maximum irrigation diversion requirements. *See SWC Report* 9-13 to 9-19; Exhibit C. By using the year with the lowest irrigation diversion requirement since 1990, the

Director's "minimum full supply" drastically underestimates the Coalition's irrigation diversion requirements, particularly in years when it is hot and dry, such as 2007. Contrary to Idaho law, the senior water right holder is then left to shoulder the burden of the Director's error and endure injury while juniors receive the benefit and are authorized to divert their full or maximum water right.

Chapter 9 of the *SWC Report* provides a comprehensive analysis of the Coalition members' irrigation diversion requirements. *SWC Report* at 9-1 through 9-9. An additional analysis was prepared and provided to the Director in April, 2007. Exhibit C. The Director failed to account for variability between different months and years across the irrigation seasons when irrigation diversion requirements are higher than 1995. *Id.* at 9-1. The Director did not estimate actual crop ET, effective precipitation during the irrigation season and field and conveyance losses on a month-by-month and annual basis. *Id.* Consequently, the Director's method is not reflective of commonly-recognized procedures and standards for determining irrigation diversion requirements, is contrary to IDWR's own guidelines on the subject, and does not address the related provisions in Rule 42.1.d. *Id.* at 9-2, 3.

Importantly, the Director's use of 1995 as a measure of the "minimum full supply", completely ignored prior Department practice and guidelines used to estimate irrigation diversion requirements. *Id.* at 9-5 to 9-6. The Director's approach disregarded actual crop ET and conveyance and farm distribution losses. *Id.* Consequently, in years like 2007 with high water demands, the 1995 "minimum full supply" is not reflective of the SWC irrigation diversion requirements. For example, although the total 2007 diversions for AFRD #2 and NSCC exceeded their designated "minimum full supply" set by the Director, both entities reduced deliveries to their water users this year. Exhibit B. AFRD #2 and NSCC did not have full water

supplies to meet their “full headgate delivery” criteria, yet they still exceeded the “minimum full supply” because of high water demand in the hot and dry conditions. Accordingly, 1995’s diversion data had no application to what was needed and what could have been diverted and used under the SWC’s senior surface water rights in 2007.

The Director’s use of “1995” as the signature year for purposes of conjunctive management is not supported and forces the senior to suffer injury for the error in subsequent years. The Coalition’s irrigation diversion requirements vary based upon a number of conditions that should be taken into account. *SWC Report* at 9-1 to 9-9, Exhibit C. Since the Director’s approach is not justified by either the law or the standards used to determine irrigation diversion requirements, it should be rejected.

Issue #6: The ESPA is Not in “Dynamic Equilibrium”.

May 2 Order
p. 17, 18, ¶ 80

In seeking to justify continued depletions to ESPA aquifer levels and Snake River reach gains, the Director erroneously relied upon the “Base Case Scenario” to claim the ESPA is in “dynamic equilibrium” and that “ground water depletions are not the cause of the declines in measured reach gains between the Near Blackfoot and the Neeley Gage since 1999.” *May 2 Order* at 17-18, ¶ 80.

As described in the *SWC Report*, the “Base Case Scenario” overestimated the state of continued recharge to the aquifer as well as underestimated the remaining effect of ground water depletions on the Snake River reaches, particularly in the Blackfoot to Minidoka reach. *SWC Report* at 7-23, 24. Ground water level data plainly demonstrates that declining trends in aquifer levels are becoming stronger over the last two decades and continued on past 2002. *Id.* at 7-54 to

7-57. Reach gain data also demonstrates a declining trend continuing past 2002. *Id.* at 7-77 to 7-78.

The *SWC Report* provides an additional model run that demonstrates additional declines in ground water levels and reach gains are likely to occur in the future if ground water pumping continues at current rates and incidental recharge continues to decline. *SWC Report* at 7-24, Appendix AP. Moreover, a report completed by R.D. Schmidt in 2005 further demonstrates that the effect of ground water pumping under junior rights and additional reductions in Snake River reach gains has yet to be fully realized. Appendix AQ

Issue #7: The Director Wrongly Determined the SWC Entities’ “Reasonable Carryover” Storage Amounts.

May 2 Order
p. 26, ¶ 119

“Reasonable carryover storage”, a concept created by the CMRs, is part of the Rule 42 factors the Director considers in determining whether a senior water right holder is “suffering material injury”. *See* Rule 42.g. That rule states in part as follows:

[T]he holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

Rule 42.g. This subjective determination by the Director as to what constitutes a “reasonable carryover storage” places in jeopardy the SWC’s vested property right interest in its stored water. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007); *see also AFRD#2*, 154 P.3d at 449 (“One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right) (citing I.C. § 42-202).

The Idaho Supreme Court has long held that once water is stored, it is a property right of the party entitled to store it. *See Salmon River Canal Co. v. District Court of the Eleventh Judicial District in and for Twin Falls County, et. al.*, 38 Idaho 377, 386, 221 P. 135, 138 (1923). In *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945), the Court recognized the right to carryover storage:

The right to carry or hold over water for distribution in succeeding seasons according to the quantities contributed, i.e., portions of live storage individual irrigation organizations were entitled to in any given year but not drawn out by them for their members, has twice been approved by this Court.

66 Idaho at 203-04 & 206, 157 P.2d at 78 & 79 (emphasis added).

In fact, the Court recognized that it is in times of shortage that this carryover water is most needed and that the “economy” of the storage right holder will increase the future benefit he may be able to receive. *Id.* (“it is in the years the reservoirs do not fill that the held-over water is most needed, those contributing reap the advantage of their previous economy”).

Finally, the *Rayl* Court emphasized the nature of a storage water right:

There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may be diverted by the other appropriators, because otherwise it flows on and is dissipated. But the very purpose of storage is to retain and hold for subsequent use, direct or augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.... ***Stored water having been diverted from and taken out of the natural streams is no longer public water.***

Id. at 208, 157 P.2d at 80 (emphasis added).

The uncertainties that water users face from one irrigation season to the next, particularly in an arid state like Idaho, demand that irrigation entities, such as the SWC, guard against potential, and likely, shortages in succeeding years.

Water decrees adjudicating the extent of appropriators' rights would be of no effect, and ... would be an idle thing; ***for what the farmer needs this year for***

the proper irrigation of his crops may be too much or too little for the coming year. A contract for a specific amount no more warrants or encourages wasteful use than does a judicial decree or State Engineer's permit. *The possibility that the settler may not at all times be able to use the maximum of his available right, whether such right be acquired by appropriation or by contract, is without significance.* ... If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average, or when, through accidents to the system, there is partial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. ... 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, and no reason is apparent why one who contracts to receive water from another should be limited to such needs.* Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. **Economy of use is not synonymous with minimum use.**

Caldwell v. Twin Falls Salmon River Land & Water Co., 225 F. 584, 595-96 (D. Idaho 1915)

(emphasis added). This, in addition to inadequate supplies, is the very reason that the SWC and other storage right holders across the state acquired storage rights in the first place.

Storage water rights play a vital role in the workings of agriculture in southern Idaho. Many water users throughout the state, including the SWC, rely on storage water for their irrigation needs when there is insufficient water for their natural flow rights. These storage water rights, and in particular the right to carryover storage water, is even more critically important to those irrigators, including several Coalition members, who rely upon their storage water rights as the *primary supply of water*, particularly in years where little natural flow is available to satisfy their natural flow rights.

Although some storage may not be used in the same year it is stored, it is critical for that water to be available for future use to protect against drought and future dry years. The ability to store water for future use is a fundamental component of storage holders' water rights and their ability to manage their water resources for the benefit of shareholders or landowners. If water is

stored and not used that irrigation season, the spaceholder is entitled to carry that water over in its space for future use as part of its storage supply in subsequent irrigation seasons. Since senior storage water rights must be filled prior to junior storage water rights, and before junior natural flow rights can divert, having more water in the reservoir system at the end of the irrigation season benefits all rights that divert in Water District 1. When water is carried over from one year to the next, less “new” water is needed to fill the senior storage water rights. Accordingly, junior priority natural flow and storage rights have a better chance of filling. *SWC Rebuttal to Gregory Sullivan* at 10.

Due to the annual curtailment of their junior priority natural flow water rights, several SWC members’ storage water rights play a critical role for ensuring an adequate water supply for their irrigation projects. Consequently, the SWC strives to conserve as much of their storage water as possible and carry it over to guard against future shortages. Given their reliance upon storage water, carryover water is ***always needed*** in the event of low snowpack and poor flow conditions the following year. Water is saved with the idea that the worst can, and will, happen. The below normal snowpack and extremely hot and dry conditions throughout 2007 demonstrate why carryover from the previous year is absolutely necessary to meet an irrigation project’s demands, as well as provide for the best opportunity to fill all storage water rights in a reservoir system, including senior and junior rights. For example, the reservoir system did not fill in 2007. Water carried over from 2006 was diverted and used by SWC members this year and it is obvious that additional water could have been used. Exhibits B, C.

For example, AFRD #2 holds a storage right for 393,550 acre-feet in American Falls Reservoir. AFRD #2 had 107,681 acre-feet in carryover from 2006, but its space only filled to 383,201 acre-feet for 2007 (about 10,000 acre-feet less than its full right). AFRD #2 was

provided 8,500 acre-feet through a mitigation agreement between the SWC and the Water Mitigation Coalition. Even with the additional water AFRD #2 still reduced deliveries to its landowners in 2007 and was only left with 3,495 acre-feet in carryover at the end of the 2007 irrigation season. In other words, had AFRD #2 been able to carry over more water from 2006 it could have been diverted and used in 2007.

TFCC carried over 78,562 acre-feet from 2006 to 2007. TFCC's storage water rights only accrued 230,956 acre-feet in 2007. Given the prediction for a hot dry year in 2007, the lack of natural flow due to reduced reach gains in the Snake River, particularly in July and August, and the Director's failure to provide mitigation water during the irrigation season, TFCC was forced to rent 40,000 acre-feet at the beginning of the irrigation season. Even though TFCC reduced deliveries to its shareholders in 2007 it still used approximately 248,311 acre-feet in storage, leaving 22,655 acre-feet in carryover. Had TFCC not rented the additional 40,000 acre-feet it would have no carryover this year. Accordingly any additional water that would have been available to carry over from 2006 would have been diverted and used in 2007.

In the *May 2 Order*, the Director determined the "reasonable carryover" amount by averaging the amount of carryover storage required for Coalition members to have "full supplies of water in 2006" by looking at two years, 2004 and 2002, and the divertible natural flow and storage accrual that occurred in those years. *Order* at 26, ¶119. Stated another way, the Director calculated the number by averaging the total natural flow diversions and storage accrual from 2002 and 2004 to determine what would be available in 2006. The "reasonable carryover" number represented what would be necessary to carryover from 2005 to 2006 in order for each Coalition member to have a "full supply" (i.e. "minimum full supply") in 2006.

Importantly, this “reasonable carryover” does not represent what the Coalition members are entitled to carry over for future years (the amount of storage space they own), nor does it represent what they have historically carried over (on average), based upon prior years. The following table illustrates the disparity in the average carryover supply (from 1960-2004) with the Director’s determination:

<u>SWC Entity</u>	<u>Director’s “Carryover” (af)</u>	<u>Avg. Carryover Since 1960</u>	<u>Difference (short)</u>
TFCC	38,400	92,162	(53,762)
NSCC	83,300	300,635	(217,335)
AFRD2	51,200	92,930	(41,730)
MID	0	156,579	(159,579)
BID	0	96,497	(96,497)
MIL	7,200	44,127	(36,927)
A&B	8,500	75,633	(67,133)

SWC Report at 8-22.

In other words, the Director’s “reasonable carryover” determination is about 670,000 acre-feet less than the average SWC carryover since 1960. In fact, the Director’s “reasonable carryover” levels are lower than the historical carryover quantities for 37 of the past 45 years. *Id.* at 8-6. Indeed, “more carryover storage has always been available than the ‘reasonable carryover’ storage in the [May 2nd] Order since Palisades Reservoir began operations (even during severe droughts) until the last two decades when the depleted reach gains and natural flow have become so significant.” *Id.* Such determinations undercut and undermine the SWC’s ability to protect its viability from year to year, while forcing the SWC to suffer material injury with no hope of full mitigation. *See Id.* at 8-6 through 8-7 (“By using the lowest recorded historic diversions for the ‘minimum full supply’ and the lowest carryover for the ‘reasonable carryover,’ the Order essentially reduces the SWC supply and carryover to the minimum supply

and carryover currently available with depleted natural flow and declining reach gains and offers no remedy for the long-term depleted reach gains”).

The Director’s “reasonable carryover” determination is inextricably linked with his flawed “minimum full supply” criteria and only examines two years (2002 and 2004) to estimate the water supply for 2006. Consequently, the Director’s determination is significantly less than what the Coalition members have historically been able to carry over to protect against future dry years. This detrimentally affects the reliability of the SWC’s storage water supplies. For example, the Director determined that a “reasonable carryover” for BID and MID is “0 acre-feet.” *May 2 Order* at 26, ¶ 1119.⁵ In other words, regardless of the water year and regardless of how short BID or MID may be in their water supplies, *anytime* they carryover *any water* the Director will not recognize any injury to their senior water rights. Accordingly, even though junior priority ground water rights may take water away from BID’s and MID’s natural flow and storage rights, so long as BID and MID carryover *some water*, there is no injury their senior water rights. This approach plainly violates Idaho law and the CMRs. A comprehensive review of the Coalition members’ historical water supplies and carryover is provided in the *SWC Report* at 8-7 through 8-21.

In summary, the Coalition members, when possible, strive to carryover as much storage water as they can for use in future years. The Director’s subjective determination as to what constitutes “reasonable carryover” prevents the SWC from preparing and safeguarding for future water use. Any “reasonable carryover” amount that is not reflective of what could be carried

⁵ The Director’s “reasonable carryover” determination of 0 acre-feet for MID and BID is unsupported by the history of the districts’ operations. Both districts have “had more carryover *in every year* except two since 1930.” *SWC Report* at 8-17 & 8-18 (emphasis added). Indeed, MID’s “average post-1960 carryover is 157,000 AF/yr.” *Id.* at 8-17. BID’s “average historical carryover is 96,000 AF/yr.” *Id.* at 8-18. Similarly, Milner’s average carryover since 1960 (44,127 a/f) is about six-times the “reasonable carryover” determined by the Director (7,200 a/f). *Id.* at 8-19 through 8-20. A&B’s average carryover since 1960 (75,633 a/f) is about nine-times the “reasonable carryover” determined by the Director (8,500a/f). *Id.* at 8-20 through 8-21.

over under the Coalition members' storage water rights, or even what they have historically carried over on average, places an arbitrary limit on how junior priority ground water right holders will be administered as against senior storage water rights. The Director's method is not supported by Idaho law or the CMRs and should be rejected.

Issue #8: The Director's "Replacement Plan Process" Violates the CMRs and Constituted Unlawful Rulemaking Contrary to Idaho's APA.

May 2 Order
p. 45

In responding to the SWC call, the Director created a new "replacement water plan" procedure to unlawfully authorize ground water rights to divert out-of-priority. The new process is prohibited for two reasons. First, it is not supported by any statute or rule and did not comport with the procedures required in Rule 43 regarding "mitigation plans". Second, the Director's "replacement water plan" process constitutes unlawful rulemaking and plainly violates Idaho's Administrative Procedures Act.

The Director's *May 2 Order* stated that "entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices no later than 5:00 o'clock p.m. on April 29, 2005 . . . The plan will be disallowed, approved or approved with conditions by May 6, 2005". *May 2 Order* at 46, ¶ 9. No provision was made for objections, protests, or comments on the "replacement water plan". In addition, there was no provision made for notice or hearing, and the order failed to set forth the factors to be considered by the Department in determining whether the replacement water plans would prevent injury to the SWC senior rights. Effectively, the procedure set forth in the order eliminated the right of the SWC to address the "replacement water plans" in any meaningful manner without a hearing and without following the procedures

required for Rule 43 mitigation plans. The Director ultimately issued Orders approving replacement water plans, both in 2005 and 2007. *See Orders*.

No statute or rule allows the Department to create a new mitigation procedure or to consider something other than the mitigation plan requirements described in Rule 43. The Rules clearly contemplate that an approved and effective mitigation plan must be in place before the Director or a watermaster may permit the diversion and use of junior out-of-priority ground water rights. *See* Rules 40.02, 40.04, 40.05, and *SWC Report* at 4-25. Approval of mitigation plans must follow the procedure described in Rule 43 requiring, among other things, notice, a right to hearing and consideration of the plan under the procedural provisions of Idaho Code § 42-222, in the same manner as applications to transfer water rights. Rule 43, *SWC Report* at 4-25. As there were no “mitigation plans” approved for 2005 or 2007, the Director, through the use of the “replacement water plan” concept, unlawfully allowed junior ground water rights to divert out-of-priority.

In addition to failing to comply with the CMRs, the Director’s “replacement water plan” process constituted unlawful rulemaking. Idaho’s APA requires administrative agencies to follow specific procedures when promulgating new rules, including: 1) published notice of proposed rulemaking; 2) opportunity for public comment; 3) legislative review; and 4) published text of the pending rule. *See* I.C. §§ 67-5220 to 5230. Agency rules that are not promulgated in compliance with the Idaho APA’s requirements are “voidable” pursuant to I.C. § 67-5231(1).

The Idaho Supreme Court set forth the following standard to determine whether or not an agency action, such as the Director’s action in creating a “replacement water plan” procedure in the *May 2 Order*, qualifies as a “rule” subject to the APA’s rulemaking procedures:

- (1) wide coverage,
- (2) applied generally and uniformly,

- (3) operates only in future cases,
- (4) prescribes a legal standard or directive not otherwise provided by the enabling statute,
- (5) expresses agency policy not previously expressed, and
- (6) is an interpretation of law or general policy.

Asarco, Inc. v. State of Idaho, 138 Idaho 719, 723 (2003).⁶

Similar to agency action in *Asarco*, here the Director’s action creating a “replacement water plan” qualifies as a rule since it meets the standard expressed by the Idaho Supreme Court. First, the “replacement water plan” process has “wide coverage” since the Director applied it to the SWC request for administration, as well as to other requests for administration made by senior water right holders in the Thousand Springs area. *See Consolidated Hearing on Blue Lakes’ and Clear Springs’ calls*.

Second, the Director has applied the “replacement water plan” process generally to the various requests for administration made by other senior water right holders, enabling junior ground water right holders to avoid “in-season” administration by filing such plans with the Director. Next, the process operates prospectively and does not adjudicate any past actions by any water right holder. The “replacement water plan” policy also prescribes a legal standard allowing juniors to avoid curtailment that is not provided by any statute or even the Department’s own Rules.

Finally, the process expresses new Department policy and is the Director’s interpretation of the directives contained in Idaho’s water distribution statutes. Whereas the Director’s new “replacement water plan” process qualifies as a “rule” and the Department did not follow the formal rulemaking requirements set forth by the APA, the process is “void” pursuant to Idaho administrative law. Given the Director’s new process precluded administration of junior ground

⁶ The Court in *Asarco* held that the Department of Environmental Quality’s adopted TMDL for the Coeur d’Alene River Basin constituted a rule that required rulemaking in order to be valid. 138 Idaho 725.

water rights for 2005 and 2007, there is no question it violated the Administrative Procedures Act. *Cf. Intermountain Gas Co. v. Idaho Public Utilities Commission*, 98 Idaho 718, 724 (1977) (agency orders that dispense with rule-making procedures, promulgate a rule in the midst of an adjudicatory process, and then apply the rule retroactively to the party whose rights are being adjudicated are void and must be set aside). The Director’s “replacement water plan” policy was created without any statutory authority, has been applied to the SWC request for water right administration the past three years, and did not follow the Idaho APA’s rulemaking procedures. Clearly, this new “rule” is void and should be declared unlawful.

Issue #9: **The Director’s Process for Administration is Untimely and Does Not Distribute Water to the SWC’s Senior Water Rights During the Irrigation Season and the Created “Debit / Credit” System Perpetuates this Error.**

May 2 Order
p. 27, ¶ 122
p. 46, 47

In the three years since the *May 2 Order* was issued, the Director has issued seven supplemental orders. That notwithstanding, ***no mitigation water has been actually delivered to the SWC during any irrigation season.*** Instead, water that was ordered to be provided in 2005 was not delivered until the middle of July, 2006. *See 4th Supp. Order* at 5-6, ¶¶ 2-3. In 2006, the Director failed to make an “injury” determination until June 29th – more than three-months after the irrigation season began – at which time he *preliminarily* found no injury to any member of the SWC. *3rd Supp. Order* at 21, ¶ 8. Although the Director committed to continue to monitor water supply and climatic conditions in 2006, no further analysis was performed until May of 2007 when the Director made a final decision that no injury was suffered in 2006, nearly seven months after the end of the 2006 irrigation season. *5th Supp. Order* at 8, ¶¶ 11-12, and 16, ¶ 2. For the 2007 irrigation season, the Director made a preliminary injury finding of 58,914 acre-feet

for TFCC – with no injury being suffered by any other member of the SWC – yet again no water was ordered to be provided during the irrigation season. *Id.* at 17, ¶ 3. Indeed, the Director forced TFCC to mitigate for its own injury in season, declaring that IGWA would be required to underwrite TFCC’s activities to the extent of the Director’s final material injury determination for 2007. *6th Supp. Order* at 7 ¶ 23. Consequently, no mitigation water was provided during the 2007 irrigation season, even though TFCC rented additional water, cut back on deliveries to its shareholders, and exhausted all of its storage water (but for the balance of the rented 40,000 acre-feet that was not used).

The continued scheme of “administration by mitigation” essentially guarantees that no water will ever be provided when it is actually needed, during the irrigation season. This scheme is contrary to Idaho’s constitution, the water distribution statutes, and the recent Supreme Court mandate set forth in *AFRD #2*:

We agree with the district court’s exhaustive analysis of Idaho’s Constitutional Convention and 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. ***Clearly a timely response is required when a delivery call is made and water is necessary to respond to that call.***

Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water.

AFRD #2 v. IDWR, 154 P.3d 433, 445 & 446 (2007) (emphasis added); *see also* Judge Wood’s district court order on summary judgment at 93 (“any delay occasioned by the process impermissibly shifts the burden to the senior right, thus diminishing the right. ***The concept of time being of the essence for a water supply for irrigation rights is one of the primary basis for the preference system in § 3 of Article XV of the Constitution.***”) (emphasis added).

Notwithstanding the Director’s material injury determinations, the Department has completely failed to require that any mitigation water be provided in a “timely” manner during

the irrigation season. The fault for this failure in administration lies in the method and approach initiated in the Director's *May 2 Order* – namely, the “replacement water plan” scheme and the various conditions created by the Director without any statutory or regulatory support. As is seen through the Director's seven supplemental orders, the “replacement water plan” scheme apparently allows the Director to delay making any final “material injury” determination until long after the water is actually needed (i.e. the irrigation season), and then that water can be counted to offset material injury in future years. This failed process forces senior surface water right holders to either endure ongoing injury to their water rights or to self-mitigate for injuries caused by ground water depletions.

The injury caused by this untimely procedure is further exacerbated by the “debit and credit” system created by the Director. In the *May 2 Order* the Director, without any legal support, ordered the following:

11. The Director will make a final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2005 is complete. To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2006 and be added to any new mitigation determined to be required for 2006. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2006 and be subtracted from any new mitigation determined to be required for 2006.

...

13. Mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with the USBR fills. At that time, any remaining debits and credits will cancel.

May 2nd Order at 47. This scheme, which fails to require that any mitigation water be provided during the irrigation season in which it is ordered, is admittedly untimely. The Director's process further allows “debits” to build up until a time when the reservoir system fills, at which time all prior obligations are canceled. Idaho law does not allow a junior to injure a senior water

right one year and then be relieved from the responsibility to mitigate for that injury merely because a reservoir is filled at some uncertain future date.

In the *May 2 Order*, the Director found that the SWC “will be materially injured in 2005 by ground water depletions in Water Districts No. 120 and 130” to the sum of 133,400 acre feet (both in-season shortages and storage carryover shortfalls).⁷ *May 2 Order* at 27 & 44. Of this injury, 27,700 acre-feet was required for mitigation in 2005, which according to the Director’s calculations would inure to the benefit of the A&B, AFRD#2, and TFCC. *Id.* at 26 & 46. The Director also initially appeared to require in-season mitigation. In the order, he stated that the holders of certain groundwater rights “are required to either curtail the diversion and use of groundwater for the remainder of 2005, provide replacement water to the members of the Surface Water Coalition as mitigation, or a combination of both.” *Id.* at 44. The Director even ordered that Notices of Curtailment be sent to the groundwater districts addressing these options and stated that failure to comply with the Order would result in *immediate curtailment*, to the extent mitigation has not been provided. *Id.* at 45-46. The SWC protested this process throughout, and even advised the Director of his failure to follow his own orders. *See* SWC Repeated Protests, Petitions re: Director’s 2005 Orders filed May 5, 16, July 6, and August 8, 2005, and January 11, 2006.

Following issuance of the *May 2 Order*, the Director issued several subsequent orders, purportedly providing that replacement water would be delivered to members of the Surface Water Coalition. However, an examination of the record and those orders will show that despite the finding of material injury to and storage shortages by the SWC, *there has been no*

⁷ The director determined that the injury would be suffered by all SWC members other than Burley Irrigation District and Minidoka Irrigation District. *May 2 Order* at 27.

curtailment of junior priority water rights or in-season delivery of water since entry of the *May 2 Order*.

Order Regarding IGWA Replacement Water Plan (May 6, 2005) & Order Approving IGWA's Replacement Water Plan for 2005 (July 22, 2005)

The *May 2 Order* completely ignores the procedural requirements described in CMR 43, the designated rule for "mitigation plans", and invites junior groundwater users to file a plan for providing replacement water to mitigate for injuries to senior water rights. In response to this invitation, the IGWA filed a replacement water plan.

On May 6, 2005, the Director issued an order addressing IGWA's replacement water plan. Notably, the Order was issued without a hearing and without the ability of the SWC to meaningfully participate in the result. In that *May 6th Order*, the Director evaluated IGWA's replacement water plan and found that the plan would provide the necessary reach gains during the 2005 irrigation season. This was done, even though the Director found that IGWA had failed to submit the appropriate documentation and information in order to support its plan.

IGWA finally submitted the information and the Director entered an Order dated June 24, 2005 approving the replacement water plan, ordering that natural flow resulting from certain leases be delivered to SWC members when the natural flow water rights were not otherwise filled in 2005 and further ordering IGWA to assign storage water that it rented to the Department for allocation to the SWC. Despite these Orders, *there were no in-season delivery of water to any SWC member during the 2005 irrigation season*.

Supplemental Order Amending Replacement Water Requirements (July 22, 2005)

After analyzing the final storage allocation for 2005 irrigation season and the then-existing water situation as it pertained to the SWC, the Director recalculated the material injury determinations in the *May 2nd Order*. On July 22, 2005, the Director issued the first in a series of

supplemental orders. This supplemental order, like the five supplemental orders which followed, each carried forward the unlawful provisions of the *May 2nd Order*, *see supra* (identifying issues with the Director's failure to recognize SWC water rights, the created "minimum full supply" criteria, erroneous "reasonable carryover" determinations, etc.), and continued to apply these provisions to the detriment of the SWC. In particular, the order determined that the total predicted material injury would be 69,800 acre feet, but that that injury would only accrue to AFRD#2 and TFCC. *Supp. Order* at 8, ¶ 17. However, the Director only required 27,700 acre feet of replacement water for 2005. *id.* at 9, ¶ 5, and indicated that any additional replacement water would be determined *after the irrigation season*, *id.* at 10, ¶ 3. However, as with other Orders issued by the Director, no provision was made for the method in which replacement water would be delivered following the irrigation season.

Second Supplemental Order Amending Replacement Water Requirements (Dec. 27, 2005).

Following an irrigation season with no delivery of any in-season mitigation water to any member of the SWC, the Director issued its *Second Supplemental Order Amending Replacement Water Requirements*, on December 27, 2005. Once again, the Director revised his material injury findings. This time, however, he determined that only TFCC suffered shortage and material injury during 2005. *2nd Supp. Order* at 9-10, ¶ 17. The Director found that the preliminary total shortage and material injury to TFCC was 152,200 acre feet, fourteen percent (14%) more than that predicted in the *May 2nd Order*. *Id.* The Director recognized that the in-season injury was due to "reduced reach gains" during July and August. *Id.*

The Director ordered that the required replacement water would be provided over time on an annual basis in amounts and generally at times at least equal to the increase in reach gains in the Snake River between near Blackfoot gauge and Minidoka gauge that would result from the

curtailment of the affected groundwater rights based upon the groundwater model. *2nd Supp. Order* at 15, ¶ 3. The Director proceeded to order that IGWA provide the remainder of the 27,700 acre feet of minimum replacement water plus an additional 18,340 acre feet at the beginning of the irrigation season in 2006. *Id.* at 16, ¶¶ 4-5. This requirement, however was made subject to the final determination of 2005 material injury. *Id.* at ¶ 5. Again, ***no in-season water was provided to any SWC member during 2005***. No water was delivered despite the recognized injury to TFCC of 152,200 acre-feet since “reach gains to the Snake River . . . between the near Blackfoot Gage and the Neeley Gage declined dramatically beginning in about the second week of July.” *Id.* at 9, ¶ 19.

Indeed, this process, whereby the Director relies on after-the-fact accounting and adjustments to supersede prior Orders, effectively insured that the SWC would not be provided replacement water during the irrigation season.

Third Supplemental Order Amending Replacement Water Requirements; Final 2005 & Estimated 2006 (June 29, 2006)

On June 29, 2006, the Director, once again, revised the material injury determination for 2005, in the *Third Supplemental Order Amending Replacement Water Requirements; Final 2005 & Estimated 2006*. After reviewing the final water accounting numbers for 2005, the Director again determined that only TFCC suffered material injury, this time in the amount of 127,900 acre feet. *3rd Supp. Order* at 9-10, ¶ 15. The Director ordered IGWA to provide TFCC with the remainder of the 27,700 acre feet of minimum replacement water (now 27,006 acre feet after adjustment). *Id.* at 21, ¶ 5. In addition, the Director determined that, because storage held by members of the SWC filled in 2006, no additional replacement water or curtailment should be required in 2006 to mitigate for the material injury that occurred in 2005, and that there was “no reasonably likely material injury” in 2006. *Id.* at ¶¶ 7 & 8.

Finally, the Director determined that the 27,006 acre feet of replacement water from IGWA would reduce the likelihood of material injury occurring to Twin Falls Canal Company during 2006. *Id.* at 22 ¶ 9. In other words, IGWA was to receive “double-credit” for mitigation water due in 2005, but not delivered, in 2006. Whereas the 27,006 acre-feet was determined by the Director to be “final” mitigation for the 2005 season, it was also counted to “reduce the likelihood of material injury occurring during the 2006 irrigation season”. *Id.* Once again, water was not delivered in-season, and this time mitigation provided for the previous year’s injury was even counted to off-set injury from the current year.

The 3rd *Supp. Order* effectively forced the SWC to accept the water earmarked to mitigate for material injury in 2005 as mitigation for material injury in 2006. *Id.* There is no support in the law for such an action.

Fourth Supplemental Order Amending Replacement Water Requirements for 2005 (July 17, 2006).

On July 10, 2006, IGWA sent a letter to the Director arguing that TFCC did not suffer any injury in 2005. In response, the Director issued his *Fourth Supplemental Order on Replacement Water Requirements for 2005*, on July 17, 2006. In the 4th *Supp. Order*, the Director considered IGWA’s requests and, once again, adjustments to his previous findings. The Director reduced the total amount of replacement water to be provided to TFCC to 25,873 acre feet, the reduction resulting from a lease of water by IGWA. 4th *Supp. Order* at 3, ¶ 9. The 4th *Supp. Order* further directed the water master for Water District No. 1 to immediately transfer 5,000 acre feet of storage water rented by IGWA to the TFCC storage account, ordered IGWA to place a minimum of 19,046 acre feet of storage water into the water district rental pool and ordered the watermaster to provide that water to TFCC. *Id.* at 5-6, Order ¶¶ 2-3. Finally, the Director once again stated that if the replacement water was not provided as ordered then

“groundwater rights in Water District No. 120 and No. 130 shall be curtailed the extent necessary, beginning with the latest priority, to provide the remaining replacement water.” *Id.* at Order, ¶ 4.

The Director thereafter failed to continue to monitor the water supplies and climatic conditions during 2006 or provide any administration during the irrigation season.

Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007 (May 23, 2007).

On May 23, 2007, the Director issued the *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*. In that Order, the Director found that none of the Surface Water Coalition suffered material injury during 2006. *5th Supp. Order* at 7-8, ¶¶ 10-12 & Order ¶ 2. This finding was made in spite of the fact that TFCC diverted less water than the Director had determined to be its minimum full supply. *Id.* at 8 ¶ 12. Apparently, since Twin Falls carried over more water in storage than the amount the Director determined to be its reasonable carry over storage supply, the Director determined that TFCC was not injured. *Id.*

As to 2007, the Director determined that only TFCC would suffer in-season material injury and that only AFRD#2 and TFCC would suffer storage carryover injury. *Id.* at 12-13, ¶¶ 23-26. The Director further stated that the IGWA’s 2007 replacement water plan would “mitigate for the predicted material injury” and “conditionally approved” the plan, “pending ongoing review by the Director of natural flow quantifications and timely replacement water acquisitions.” *Id.* at 17 ¶ 3. The Director provides no indication as to what the conditions of approval may be and does not explicitly state which portions of the replacement water plan were approved. *Id.* Again, the Director relies upon an “after-the-fact” accounting procedure to determine the amounts of mitigation that will be required for injury occurring in 2007. *Id.* at ¶ 9.

The order further indicates that, to the extent insufficient mitigation is provided, the requirement will carry forward into the 2008 season. *Id.*

There is no provision in the CMRs or otherwise allowing the Director to conditionally approve a replacement water plan while the senior water users to suffer material injury at the hand of out-of-priority junior diverters.

Sixth Supplemental Order Amending Replacement Water Requirements & Order Approving IGWA's 2007 Replacement Water Plan (July 18, 2007).

The SWC moved to dismiss IGWA's 2007 replacement water plan and sought an update on the 2007 material injury determination on June 21, 2007 due to hot and dry conditions being experienced in the basin. The Director responded by issuing the *Sixth Supplemental Order Amending Replacement Water Plan Requirements & Order Approving IGWA's 2007 Replacement Water Plan*, on July 18, 2007. In the *6th Supp. Order*, the Director found that the predicted material injury for 2007 to TFCC was 46,929 acre feet and that predicted carry over storage shortfall to the SWC (only AFRD#2 and TFCC) was 67,791 acre feet. *6th Supp. Order* at 6, ¶¶ 14-16.

IGWA misrepresented to the Director that it had 65,145.8 acre feet of water available for mitigation to the SWC. *Id.* at 7, ¶ 19, *see also 7th Supp. Order* at 8, ¶ 5 (identifying the water IGWA represented it had for mitigation for SWC was provided to mitigate calls in the Thousand Springs Area). However, the Director discovered that 20,000 acre feet of that water had already been used by IGWA for mitigation purposes in delivery calls in the Thousand Springs area of the Snake River. *Id.* at 8 ¶ 24. This reduced the amount of water under lease by IGWA that could be used as a replacement supply to 45,145.8 acre feet. *Id.* The Director found that IGWA could enter into leases with anonymous irrigation entities for up to an additional 30,000 acre feet of storage. *Id.*

At the beginning of the 2007 irrigation season, due to projected shortages, TFCC leased 40,000 acre feet of storage water from the Water District No. 1 rental pool. *Id.* at 7, ¶ 23. Given the lack of water procured by IGWA for mitigation by mid-June in 2007, it was obvious that TFCC's decision to rent water to deliver to its shareholders was warranted. Further, the Director found that IGWA agreed to underwrite TFCC's lease. *Id.*

Once again, as with the previous five supplement order and the *May 2 Order*, and notwithstanding the Director's promise to "continue to monitor water supplies and climatic conditions ... [during the] irrigation season and issue additional orders regarding replacement water needs," *id.* at 9, no in-season water was supplied to any member of the SWC during 2007. Apparently, the SWC should be comforted by the Director's oft-repeated assurances that mitigation debits and credits will be carried over from year to year until all storage fills. Unfortunately, providing mitigation water after-the-fact does not alleviate the injury in the time and place it is suffered.

As troubling, the effect of this Order, however, is that TFCC was forced to bare the expense of mitigation at the beginning of the irrigation season for projected and actual depletions caused to its water supply by the members of IGWA. IGWA, on the other hand, was allowed to continue depleting the water supply and wait until the after-the-fact accounting of the irrigation season before a determination would be made as to what amount, if any, of the replacement water IGWA would need to supply. As of the date of the filing of this *Pre-Hearing Memorandum*, IGWA's "underwriting" of TFCC's 2007 rental water, as characterized by the Director, has produce no replacement water.

This process of after-the-fact administration, mitigation debits and credits, and replacement water plans has not worked. Rather than receiving timely administration, the SWC

has been forced to provide its own in-season mitigation, reduce deliveries to its shareholders and landowners, and to watch as the Director reviews and revises the material injury determination every time he issues an order, with the promise that past injuries will be forgiven once the storage system fills.

Seventh Supplemental Order Amending Replacement Water Requirements (Dec. 20, 2007).

The Director's latest order continues the deficient system of administration that began on May 2, 2005. In this order the Director reviewed the total 2007 diversions of the SWC and determined that only TFCC suffered an injury of 17,345 acre-feet during the irrigation season. *7th Supp. Order* at 6, ¶ 12. The Director essentially ignores the fact that TFCC rented 40,000 acre-feet to mitigate for injuries caused by junior ground water rights. Stated another way, had TFCC not rented 40,000 acre-feet, it would have run out of water during the irrigation season and would have no carryover heading into 2008.

The Director further faults TFCC for diverting less than its "minimum full supply" by claiming that "TFCC can presumably only require the 1,045,506 acre-feet of water diverted in 2007 to furnish a full irrigation supply for the crop water requirement." *7th Supp. Order* at 6, ¶ 12. TFCC reduced deliveries to its shareholders in 2007. Exhibit B. There was insufficient water to divert even the Director's "minimum full supply" as calculated using 1995 information. Moreover, the water TFCC diverted and used did not represent the irrigation diversion requirement for 2007. Exhibit C. The Director's finding manipulates what actually occurred in 2007, self-mitigation employed by TFCC, in order to benefit junior priority ground water rights.

The Director further found no injury to AFRD #2 or NSCC for 2007, despite the fact those entities reduced deliveries to their landowners and shareholders, and ended up with less carryover than what the Director ordered they were entitled to as "reasonable carryover".

Exhibit B; 7th *Supp. Order* at 5-6, ¶ 11. For example AFRD #2 only has 3,495 acre-feet of carryover after the 2007 irrigation season, approximately 47,000 acre-feet less than the Director's "reasonable carryover" amount of 51,200 acre-feet for AFRD #2. *Id.* However, because AFRD #2 diverted more than its "minimum full supply", the Director punishes AFRD #2 and reduces its carryover shortfall to only 19,891 acre-feet. *Id.* at 6, ¶ 13. Apparently, in the Director's opinion AFRD #2 should have reduced deliveries to its landowners even more than it did in 2007.

NSCC is in the same position since it carried over about 23,000 acre-feet less than its "reasonable carryover" amount even though its diversions exceeded the "minimum full supply". 7th *Supp. Order* at 5-6, ¶ 11. Despite this shortfall by the Director's own terms, he finds no injury for NSCC because its total diversions and actual carryover exceed the combined "minimum full supply" and "reasonable carryover" amount. *Id.* Again, even though NSCC reduced deliveries to its shareholders throughout most of the irrigation season (Exhibit B), apparently it is the Director's position that further reductions should have been made so that additional water could be carried over.

The fact that AFRD #2 and NSCC diverted more water than their set "minimum full supplies" while reducing deliveries to their landowners and shareholders plainly exposes the error in the Director's use of 1995 as the benchmark for administration. These entities clearly needed to use more water in this hot and dry year and had they not reduced deliveries they would have run out of water. Exhibit B. The Director fails to recognize this injury, even when their carryover supplies are reduced below the Director's "reasonable carryover" amounts heading into 2008.

The Director ends 2007 without ordering any mitigation water be provided to the SWC “in-season”, but instead only asks IGWA to provide proof that it has acquired 14,345 acre-feet by January 7, 2007 (3,000 acre-feet less than the Director’s own determination of 17,345 acre-feet of injury). 7th *Supp. Order* at 9. Coincidentally, IGWA represented at the October 1st status conference with the Director that it still had approximately 14,000 acre-feet of water from its 2007 leases. The Director further fails to order “carryover” shortages to be provided, but instead states that the water will not be required until after the April 1st forecast is issued and even then the water will only be required “at such time as it is needed” in his subjective opinion. *Id.* Finally, the mitigation debit and credit system is continued until the reservoir system fills.

At the end of this litany of “supplemental” orders the SWC still has no assurance that mitigation water will ever be provided during the irrigation season. Even after providing the Director with information about 2007 water demands on their projects (Exhibits B, C), the Director refused to recognize the hot and dry conditions this year, and continued to use the 1995 “minimum full supply” as the basis for administration. The Director’s methodology in this latest order effectively converts his previous determination of “minimum full supply” to a “maximum full supply” by subtracting diversions exceeding the “minimum full supply” in one year from the “minimum full supply” requirements for the following year. This is the only way the Director was able to find that entities such as AFRD #2 and NSCC that reduced deliveries during the year and ended up with reduced carryover supplies for 2008 were not injured in 2007.

The paper-chase continues while the Director waits to “finalize” 2007 injury determinations, and no water was provided to mitigate in-season 2007 “injury”. Despite the injuries and lack of mitigation to the SWC’s senior surface water rights, junior ground water right holders continue to pump full supplies the entire year with the Director’s blessing. This is

not the water right administration required under Idaho law, yet this is the process created and implemented under the *May 2 Order*.

CONCLUSION

Administration of hydraulically junior priority ground water rights in the ESPA is necessary to prevent injury to the SWC senior natural flow and storage water rights to the Snake River. Collected water data plainly indicate that ground water levels and Snake River reach gains have declined in recent years, and that ground water pumping is a major cause for this decline. Absent administration, water supplies for senior surface water right holders like the SWC will continue to be impacted by out-of-priority ground water depletions.

While the Director's *May 2 Order* attempted to initiate conjunctive administration, it failed in a variety of ways. First and foremost, the Director refused to recognize and distribute water to the SWC's water rights. Idaho's constitution, water distribution statutes, and even the CMRs require the Director and watermasters to adhere to and honor decreed water rights. Accordingly, the Director's "total water supply", "full headgate delivery", and "minimum full supply" criteria are not supported by the law and were employed as a means to reduce the predicted injury to the SWC senior water rights. The Director's "reasonable carryover" determination further ignored the Coalition's storage water rights and set an amount that was not reflective of historical average amounts or what is necessary to protect against future dry years. The Director's system unlawfully forces SWC members to self-mitigate for these injuries by exhausting storage supplies, reducing water deliveries, and renting additional water. This approach violates Idaho's prior appropriation doctrine and must be corrected.

Next, the Director's use of 1995 as representing all years and all water conditions vastly underestimates the amount of water the Coalition members can divert and use under their water

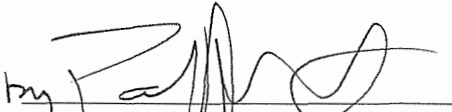
rights to meet their projects' irrigation diversion requirements, particularly under hot and dry conditions like 2007. The Director even ignored the Department's own guidelines and publications and failed to use a standard irrigation diversion requirement on the SWC projects. As such, the "minimum full supply" concept and the use of one's year diversion data to represent all years for conjunctive administration should be rejected.

Finally, the Director's "replacement water plan" scheme resulted in a never-ending series of supplemental orders that failed to produce mitigation water to the SWC during the irrigation season. Even after the Supreme Court's decision in *AFRD #2* last March, the Director ignored the law's directive and continued on with a program that refused to provide water to senior rights in a timely and meaningful manner. Whereas pumping under junior priority ground water rights takes water away from the Snake River during the irrigation season, the Director's process ensures that the SWC does not receive any mitigation at the time and place when it is needed. The Director further perpetuated this error by creating a "debit/credit" system to allow past injuries to senior rights to be forgiven based upon indefinite future fill of the reservoirs. Again, this system finds no support in Idaho law and allows junior ground water rights to benefit from uncertain water conditions in any particular year.

As witnessed the past three years, junior ground water rights have been authorized to divert out-of-priority without having to provide in-season mitigation. While the SWC members have reduced deliveries, exhausted storage supplies, and rented additional water, their senior surface water rights have been injured by interfering junior ground water rights. Seniors have suffered the burden of injured water rights. Seniors have shouldered the burden of risk and uncertainty in administration. Idaho law demands otherwise and requires the Department to

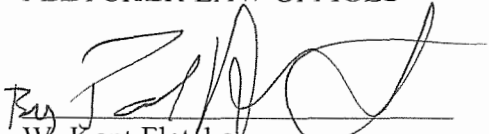
respect senior rights and prevent injury by juniors. The vehicle to achieve that end is proper conjunctive administration.

DATED this 21st day of December, 2007.


Roger D. Ling

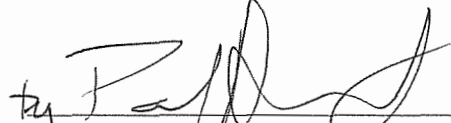
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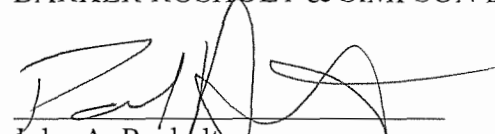
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I hereby certify that on this 21st day of December, 2007, I served a true and correct copy of the foregoing *Surface Water Coalition's Pre-Hearing Memorandum* on the following by the method indicated:

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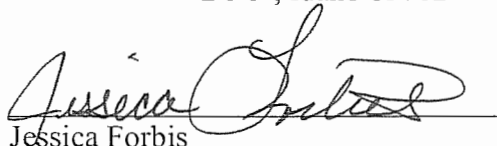
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