

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

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

CASE NO. CV-2008-000551

Petitioners, )

vs. )

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

IDAHO GROUND WATER APPROPRIATORS, )  
INC.; CITY OF POCA TELLO; and IDAHO )  
DAIRYMEN'S ASSOCIATION, INC., )

Respondents. )

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**RESPONDENT POCA TELLO'S BRIEF**  
On Appeal from the Idaho Department of Water Resources

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Honorable John M. Melanson, Presiding

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## TABLE OF CONTENTS

STATEMENT OF THE CASE.....	1
ISSUES PRESENTED ON APPEAL.....	3
<i>STATEMENT OF FACTS AND PRIOR PROCEEDINGS</i> .....	4
Proceedings.....	4
Injury to SWC water rights .....	6
Curtailment as a remedy for injury .....	9
ARGUMENT.....	10
<i>STANDARD OF REVIEW</i> .....	10
<i>THE CONCEPTS OF “PUBLIC INTEREST” AND “REASONABLE USE” PROVIDE     THE LEGAL FRAMEWORK FOR THE DIRECTOR’S PROCEDURES IN     RESPONSE TO A DELIVERY CALL</i> .....	11
Constitutional concepts provide the framework for the Director’s discretion .....	12
The Director’s procedures were consistent with the statutory and constitutional framework described above .....	14
The factual determinations in the Director’s Final Order are consistent with the statutory and constitutional framework described above.....	15
<i>REPLACEMENT PLANS ARE AN APPROPRIATE METHOD TO MITIGATE     INJURY TO SENIORS DURING THE PENDENCY OF A HEARING</i> .....	16
The Director’s Final Order properly affirmed the practice of allowing replacement plans during the pendency of a delivery call hearing .....	16
<i>Simpson v. Bijou Irrigation Co.</i> does not support the SWC’s arguments due to fundamental differences in the facts and law underpinning that decision .....	17
<i>THE DIRECTOR’S FINAL ORDER REGARDING THE TIMING OF CARRY-OVER     STORAGE IS CONSISTENT WITH THE CMR AND IDAHO LAW</i> .....	19
Due to the constitutional framework which circumscribes its authority, IDWR has discretion to order reasonable carry-over in the season of need .....	19
The BOR’s position is inconsistent with Idaho law, although it would be beneficial to the BOR’s flow augmentation program.....	20
Providing storage water in the year of use is consistent with allocation of “risk” under Idaho law.....	22
CONCLUSION .....	24

## TABLE OF AUTHORITIES

### Cases

<i>American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources</i> , 154 P.3d 433 (ID. 2007) .....	2, 5, 12, 16
<i>Empire Lodge Homeowners' Ass'n v. Moyer</i> , 39 P.3d 1139 (Colo. 2001).....	18
<i>Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson</i> , 990 P.2d 46 (Colo. 1999) .....	18
<i>Simpson v. Bijou Irrigation Co.</i> , 69 P.3d 50 (Colo. 2003) .....	17, 18
<i>Sons &amp; Daughters of Idaho, Inc. v. Idaho Lottery Comm'n</i> , 156 P.3d 524 (2007) .....	10, 11
<i>Vance v. Wolfe</i> , 2009 WL 1039887 (Colo. Apr. 20, 2009).....	18

### Statutes

Colorado Revised Statute 37-90-137(2)(b)(I) .....	18
Colorado Revised Statute 37-92-308 .....	18
Idaho Code 42-101.....	13
Idaho Code 42-1763(B)(4).....	22
Idaho Code 42-602.....	13
Idaho Code 67-5279(3) .....	10

### Rules

Conjunctive Management Rules IDAPA 37.03.11 .....	2
Rule 20.03 .....	13
Rule 42 .....	10, 16

### Constitutional Provisions

Idaho Constitution, Article XV, Section 5 .....	15
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## **STATEMENT OF THE CASE**

This case involves an appeal from the Director's Final Order Regarding the Surface Water Coalition Delivery Call entered September 5, 2008 ("Final Order"), R. Vol. 39, p. 7381. The SWC initiated its delivery call on January 14, 2005 by filing a letter with the Director alleging injury because it was not receiving the amounts of water on the face of its licenses and decrees, and requesting curtailment of junior ground water rights. R. Vol. 1, p. 1. The Director's initial order in this matter, issued May 2, 2005, found, *inter alia*, that senior water rights were not entitled to delivery of the amounts on the face of their decrees unless it could be established that those were the amounts required for beneficial uses (R. Vol. 8, p. 1378, ¶ 91, pp. 1399, 1401, Conclusions of Law ("COL") ¶¶ 40, 48); it also found that, in Idaho, depletions to the stream from ground water pumping do not all translate into injury to seniors (*Id.* at 1401, COL ¶ 47); finally, the May 2 Order found that the evaluation of injury should include consideration of total water supplies, and that carry-over storage, while an entitlement under the rules, was also based on an evaluation of total water supplies. (*Id.* at 1401, COL ¶ 48). The May 2 Order also required ground water rights junior to February 27, 1979, to provide replacement water in the amounts specified in the Order or face curtailment. (*Id.* at 1403, Order ¶ 1). Although the Director made adjustments to the amount of injury in subsequent orders, based on changing climatic and water supply conditions, these foundational elements remained constant; further, the Hearing Officer affirmed the Director's reliance on these foundational elements of answering a delivery call in the Recommendations.

Immediate challenges to the May 2 Order were made by the SWC, City of Pocatello ("Pocatello"), Bureau of Reclamation ("BOR" or "Bureau"), Idaho Ground Water Appropriators

(“IGWA”) and others to the May 2 Order. The case considered apace until August of 2005 when the SWC asked the Gooding County District Court to find the Conjunctive Management Rules (“CMR”), relied upon by the Director in his May 2 Order, to be facially unconstitutional. In early 2007, the Idaho Supreme Court found that the rules were not facially unconstitutional. *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) (“*AFRD #2 v. IDWR*”) provided important context for the remainder of the proceedings in this matter, although as the briefing on appeal demonstrates, the parties differ widely about the holdings of the Court in *AFRD #2 v. IDWR*.

This case, along with the Thousand Springs and A&B Irrigation District delivery calls, present issues of first impression. Although SWC and BOR would like to cast this as simply another example of the administration of water rights, analogous to surface water delivery in WD01 and requiring that the junior ground water users “shut and fasten” their wells, that is not conjunctive administration in Idaho. *AFRD #2 v. IDWR*, 143 Idaho at 877, 154 P.3d at 448. Nonetheless, Idaho law does provide important guidance for evaluating the framework of the decision-making in this matter. The constitutional precepts of “reasonable use” and administration giving due regard to the “public interest”, upon which the Director relied in part in the May 2 Order and subsequent interim orders, create the framework in which the Director must make his determinations. The substance of the Final Order is consistent with those constitutional principles, as well as the statutory and case law authorities that apply herein, including *AFRD #2 v. IDWR*. Furthermore, substantial evidence supports the findings of fact in this matter. Within this legal and factual context, the Final Order in this matter should be affirmed.

### **ISSUES PRESENTED ON APPEAL**

The SWC raises twelve issues on appeal related to decisions and actions taken by the Department in the context of the Surface Water Coalition delivery call, alleging the following bases: 1) that the Department's actions violated constitutional or statutory authority; 2) that the Department's actions overstepped the authority of the agency; 3) actions based on unlawful procedures; 4) actions or decisions unsupported by substantial evidence; and/or 5) actions that were arbitrary, capricious or an abuse of discretion. The BOR for its part raises only the question of whether the Director's Order has deprived Reclamation and its contractors of carry-over storage.

Response to the SWC's issues on appeal is complicated by the fact that there are twelve issues based on 5 grounds each—or as many as sixty issues total on appeal. However, Pocatello presumes that the bases for each issue raised in the SWC's appeal are limited by the scope of the argument presented in the substance of its brief and responds accordingly.

To avoid duplication, Pocatello's response is limited to the following issues raised in the SWC's Opening Brief:

1. Whether the Director failed to provide timely and lawful administration of junior ground water rights to satisfy seniors.
2. Whether the Director's application of the Conjunctive Management Rules violated Idaho law.
3. Whether the Director's Final Order failed to recognize and give deference to SWC's decreed water rights.
4. Whether the Director's reliance on replacement plans is unauthorized by Idaho law.
5. Whether the Director's determinations regarding the provision of carry-over storage are adequate as a matter of Idaho law.

The first three issues are treated together in part II, Issue #4 is addressed in Part III and Issue #5 is addressed in Part IV in the argument portion of Pocatello's brief. To the extent that Respondents IDWR or Idaho Ground Water Appropriators ("IGWA") address the same or additional issues in their briefs, Pocatello adopts and incorporates those arguments by reference.

## **I. STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

### **A. Proceedings**

This matter began on January 14, 2005 when the SWC sent a letter to Director Karl Dreher making a delivery call. R. Vol. 1, p. 1. In the January 14, 2005 communication, the Surface Water Coalition claimed that their water rights were suffering material injury from the impacts of ground water pumping because they had not received the amounts on the face of their licenses and decrees. *Id.* at p. 2. BOR did not join in the delivery call, although it also holds licenses for certain of the reservoir rights that were the subject of the SWC's call.

On February 14, 2005, the Director requested that the SWC provide information to support the allegations of injury. R. Vol. 2, p. 227, COL ¶ 38. The information provided is contained in Petitioners' Joint Response to Director's February 14, 2005 Request for Information. R. Vol. 2, p. 372. Based on that information, as well as some investigation conducted by the Department regarding generalized impacts to crop yields in the vicinity of the SWC lands the Director issued his May 2, 2005 Order, finding injury to certain of the SWC members natural flow and carry-over storage rights. R. Vol. 8, pp. 1382-1383, Findings of Fact 108-114. To reach the conclusions in the Order, the Director applied the CMR and Idaho law. R. Vol. 8, pp. 1389-1401 (COL).

Various parties, including Pocatello, appealed the May 2, 2005 Order, discovery ensued and a hearing was set for early 2006. On February 1, the Director granted the joint motion of SWC, IGWA and Pocatello for a stay of the schedule in order to investigate settlement. The hearing date was subsequently delayed and then vacated.<sup>1</sup> In June of 2006 the Gooding County Court held that the rules were facially unconstitutional, as summarized by the Idaho Supreme Court:

The district court rejected American Falls' position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis. . .

.. It was the failure of the CM Rules to "also integrate the concomitant tenets and procedures related to a delivery call, which have historically been held to be necessary to give effect to the constitutional protections pertaining to senior water rights" with which the district court found fault . . . .

*AFRD #2 v. IDWR*, 143 Idaho at 870, 154 P.3d at 441.

IDWR determined it would appeal the decision to the Idaho Supreme Court, and stayed the remainder of the SWC's delivery call proceedings until a decision could be rendered by that Court on the constitutionality of the CMR.

*AFRD #2 v. IDWR* was announced in early 2007. After remand to the Gooding County District Court, the IDWR held a status conference on June 5, 2007 (R. Vol. 23, p. 4314); the parties negotiated a discovery and hearing schedule, submitted to the Director on July 26, 2007 (R. Vol. 25, p. 4759). The parties agreed to a three week hearing commencing on January 16, 2008.

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<sup>1</sup> The Director's June 14, 2006, "Order Regarding Pocatello's Motion for Stay and Fourth Amended Scheduling Order" summarizes the nature and reasons for the various changes in schedule until mid-2006. R. Vol. 20, p. 3653.



The Hearing Officer issued the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation (“Hearing Officer’s Recommendations”) on April 29, 2008 (R. Vol. 37, p. 7048), and the Director issued the Final Order (R. Vol. 39, p. 7381).

**B. Injury to SWC water rights.**

The Director issued a series of interim orders relevant in this proceeding from May 2, 2005 through late 2007. These orders determined injury to the natural flow and storage rights of the SWC in amounts based on climatic conditions. These interim orders reflect the Director’s “adaptive management” process which allows for adjustment of amounts of material injury—and replacement water obligations—based on changing climatic conditions, water supply conditions and user demand. *See generally*, R. Vol. 37, page 7064 and discussion that follows within the Final Order.

In the May 2 Order, the Director developed the “minimum full supply” concept to support the injury determination. R. Vol. 8, pp. 1383-1384, 1377-1382, ¶¶ 88-107, p. 1402, COL ¶ 50. In order to determine if the seniors were injured, he compared the “minimum full supply” to the amounts projected to be available at the Heise Gage and found that any shortages to those amounts were injurious. He made a similar evaluation of carry-over storage using reservoir storage projections against the amount of “minimum full supply” required. *Id.* at 1402, COL ¶¶ 49-53. Based on the minimum full supply analysis, the Director then ordered the ground water users either to curtail or provide mitigation water to avoid injury to the SWC water rights. *Id.* at 1403, Order ¶ 1. He also re-evaluated the adequacy of the “minimum full supply” over the course of the irrigation season and adjusted the “minimum full supply” up or down depending on climatic conditions. *See, e.g.*, R. Vol. 13, p. 2424.

The Hearing Officer found that these procedures were not erroneous. R. Vol. 37, pp. 7048, 7090-7091; the Hearing Officer's Recommendations go on to suggest modifications to the procedure if it is to be used in the future. *Id.* at 7092-7095. The Recommendations affirmed the prior determinations of injury (or, as found in certain interim orders, non-injury), and specifically couch the findings regarding injury and procedure in the context of a detailed legal analysis of the constitutional concepts of "reasonable use" and administration consistent with the "public interest". *Id.* at 7081-7086. Significantly, after review of the law and the applicable facts, the Recommendations did not include a finding that the amounts of injury calculated through the Director's interim orders over the course of the proceedings were erroneous.

Substantial evidence in the record supports the factual finding that the Director's determinations of injury (and non-injury) should be affirmed:

- There is no evidence in the record of injury to water rights in 2005 and 2006; Mr. Vince Alberdi, TFCC's manager, testified that TFCC was not injured in 2005 or 2006. Transcript, Jan. 28, 2008, p. 1793:11-24.
- None of the SWC expert reports or pre-filed testimony included opinions that the SWC members water rights had been injured. R. Vol. 27, pp. 4988, 5008, 5015, 5216, Exhibit 8000.
- However, the report did calculate shortages of water for various SWC members in nearly every year of the study period. Exhibit 8000, Vol. 1, ch. 4.
- Mr. Alberdi was unable to explain why the SWC experts had found a shortage for TFCC during 2005 and 2006, when it was his testimony that TFCC had not been injured during 2005 and 2006. Transcript, Jan. 28, 2008, pp. 1793:11-1794:15.

- Incredibly, although SWC had alleged injury to its water rights beginning in January 2005, and although the May 2, 2005 Order contained the Department's own evaluation of injury to irrigation water rights based on minimal investigations conducted with Farm Services Agents, Mr. Alberdi testified the SWC never undertook any studies of crop loss, land fallowing, or yield reductions as a result of its alleged water shortages. He agreed that this type of information might have been helpful to the Director. Transcript, Jan. 28, 2008, pp. 1787:8-1788:8.
- The SWC submitted pre-filed testimony of farmer lay witnesses. R. Vol. 32, pp. 6103, 6143; R. Vol. 33, pp. 6257, 6266, 6276, 6282, 6334, 6340, 6345; R. Vol. 34, pp. 6352, 6357. IGWA and Pocatello moved to strike the testimony as containing information that had been sought in discovery over two years previously, and because the testimony to the extent it went beyond qualitative recitations of impacts from available water supplies, was without foundation. Transcript, Jan. 18, 2008, pp. 521:12-542:4. After argument, the Hearing Officer declined to strike the testimony but also said that he would not rely on the testimony that was without foundation. Transcript, Jan. 18, 2008, pp. 544:5-545:18. In fact, in his Final Recommendations he did not rely at all on the lay witness testimony; instead he relied on the investigations conducted by the Department regarding available water supplies for lands in the vicinity of the SWC lands. R. Vol. 37, p. 7077.

- Pocatello's expert Greg Sullivan opined that the AFRD #2 water rights were injured during the 2004 irrigation season, consistent with the findings in the Director's May 2 Order. Exhibit 3028.

**C. Curtailment as a remedy for injury**

The Director ordered either curtailment or mitigation water to satisfy the amounts of injury identified in the interim orders. SWC's arguments in their Opening Brief imply and BOR's Opening Brief flatly asserts that curtailment would have been preferable to ordering replacement water. However, the Director's decision to avoid curtailment was borne out at the hearing. As the evidence showed, curtailment is a remarkably inefficient means of avoiding injury to senior water rights.

- Mr. Dave Shaw submitted an analysis of the gains to the stream as "if ground water pumping had never occurred." Transcript, Jan. 29, 2008, p. 1936:17-21. This analysis is speculative and irrelevant to determining whether curtailment would be an adequate means to satisfy senior water rights.
- Mr. Greg Sullivan, for the City of Pocatello, reviewed the modeling scenarios from the ESPAM to assess the efficiency of curtailment as a means of administration in a delivery call. He determined that the ratio was 8:1—in other words, to obtain 1 af of water for use by SWC on its fields, it would require the ground water users to curtail 8 af of ground water use. Exhibit 3007A, pp. 29-30. For the 2005 shortage calculated in the May 2, 2005 Order, this would require curtailment of 1.1 million acres of ground water in order to obtain the 127,000 af calculated by the Department as shortage that

year.<sup>2</sup> He further noted that curtailment would result in gains to the river at times of the year when no water is needed by the SWC, and when water cannot be stored in the reservoirs. Exhibit 3007A, pp. 29-30.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Under the Idaho Administrative Procedure Act, 67-5200 *et seq.*, an agency's order must be upheld by the reviewing court unless:

its decision (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion. § I.C. § 67-5279(3). The court defers to the agency's findings of fact unless they are clearly erroneous and does not substitute its judgment for that of the agency as to the weight of the evidence.

*Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n*, 144 Idaho 23, 26, 156 P.3d 524, 527 (2007) (citations omitted). Contrary to the assertion made by the BOR in its Opening Brief at page 11, the findings of fact—including the findings made by the Hearing Officer and/or Director under Rule 42 of the CMR—are reviewed by reference to the “substantial evidence” test, rather than as questions of law as BOR asserts. If there are factual bases for the determinations made under Rule 42, and those are consistent with the Final Order (or Hearing Officer's Recommendations, to the extent those were adopted) then the review turns to whether the procedures used to implement Rule 42 are an abuse of discretion or otherwise inconsistent with Idaho statutes, constitutional provisions, or case law.

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<sup>2</sup> Mr. Pat McGrane, for the Bureau of Reclamation, relied on a report by Robert D. Schmidt. R. Vol. 26, p. 4967. Transcript, Jan. 25, 2008, pp. 1443:19-1446:12, 1454:24-1456:1. Although Mr. McGrane's testimony examined curtailment as a means to achieve carry-over storage, the length of time to allow for appreciable gains from ground water curtailment, and the ratio of ground water use curtailed to achieve 1 af is consistent with Mr. Sullivan's testimony—both used similar IWRRI-ESPAM scenarios.

The Department's procedures in answering the SWC delivery call, about which both the SWC and the BOR focus nearly all their briefing, are entitled to some deference as they arise under the CMR. The *Sons & Daughters* Court stated the rule this way:

On questions of law the court generally exercises free review, although agencies are sometimes entitled to deference on questions of statutory construction. Because the [Lottery] Commission has been entrusted with administration of the bingo statutes, the Court may defer to its interpretation of the statutes so long as that interpretation is reasonable and not contrary to the express language of the statute. Nevertheless, "the ultimate responsibility to construe legislative language to determine the law" rests with the judiciary, and the underlying consideration whether or not such deference is granted is to ascertain and give effect to legislative intent. *Accordingly, the Commission's reasonable construction of the bingo statutes is entitled to deference, but only to the extent the rationales supporting such deference are applicable under the circumstances.*

144 Idaho at 26, 156 P.3d at 527 (citations omitted) (emphasis added).

Like the Lottery Commission, the Director of IDWR is charged with administering delivery calls pursuant to the CMR; in addition, the CMR were promulgated by the Department of Water Resources nearly 15 years ago. If the Director's application of procedures under the CMR is "reasonable" such application is entitled to deference.

## **II. THE CONCEPTS OF "PUBLIC INTEREST" AND "REASONABLE USE" PROVIDE THE LEGAL FRAMEWORK FOR THE DIRECTOR'S PROCEDURES IN RESPONSE TO A DELIVERY CALL.**

The Director's Final Order must be reviewed using two categories of inquiry: first, to determine if the procedures were inconsistent with statutes, constitutional provisions or otherwise an abuse of discretion;<sup>3</sup> and second, to the extent those procedures were the result of an exercise of discretion, did the procedure result in injury to SWC's water rights based on

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<sup>3</sup> *Sons & Daughters*, 144 Idaho at 26, 156 P.3d at 527.

substantial evidence in the record.<sup>4</sup> If, for example, the Director's determinations regarding procedures under which juniors were required to provide replacement water could be shown—by reference to the record—to have resulted in shortages that were determined to be injurious, that would be grounds for remand of the decision. However, review of the procedures by reference to applicable principles of law demonstrates that the procedures were not unlawful; review of the procedures by reference to facts in the record shows the same.

**A. Constitutional concepts provide the framework for the Director's discretion.**

Several constitutional concepts form the framework for evaluation of the Director's Final Order, and this legal framework forms the basis for review of the Director's procedures and findings to the SWC delivery call. While the concept of "first in time is first in right" forms the foundation of the prior appropriation system in Idaho, the state constitution characterizes that right by reference to the "public interest" and "reasonable use". *AFRD #2 v. IDWR*, 143 Idaho at 878, 154 P.3d at 449. As the Hearing Officer said in his Recommendations (R. Vol. 37, p. 7084) "the [*Schodde*] case reflects that the public interest is a factor to be considered in a water rights litigation that impacts the public."

Consistent with the authority vested in it by the Idaho constitution, article XV, section 5, the legislature incorporated considerations of public interest into the administration of water rights in Idaho Code section 42-101:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, *its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved.*

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<sup>4</sup> *Sons & Daughters*, 144 Idaho at 26, 156 P.3d at 527.

Idaho Code § 42-101 (emphasis added). The Director's authority to administer water rights—including conjunctively administering ground and surface water sources—is provided for in Idaho Code section 42-602. That authority must be read as qualified by the obligations of the state, as specified in Idaho Code section 42-101, to protect the public interest.

Further, in CMR Rule 20.03, the IDWR has affirmatively acknowledged its obligation to administer conjunctive sources by reference to these constitutional provisions:

**Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

To the extent that the Director found injury, his interim orders and the Final Order in this matter are consistent with the considerations found in Rule 20.03, as well as the statutory and constitutional provisions underlying the rule.

In addition to the discussion of these constitutional provisions, the Hearing Officer's Recommendations in this matter also found that the Director's discretion included the obligation to investigate the SWC's allegations of injury and formulate orders in response, rather than simply delivering the amounts on the face of SWC's decree. R. Vol. 37, 7074-7075 (regardless of the *AFRD* #2 decision "the Director had the authority and the responsibility to develop the facts upon which a well-informed decision [regarding injury to SWC's water rights] could be made . . . . To do otherwise would be irresponsible to the public interest . . .").



**B. The Director's procedures were consistent with the statutory and constitutional framework described above.**

Without distinguishing (or even describing) these constitutional and statutory provisions qualifying the Director's authority to administer water rights, the SWC flatly asserts that the Director's obligation upon receiving its allegations of injury was to deliver the amount of water on the face of the SWC licenses and decrees:

The above statute [referring to Idaho Code 42-607] governs a watermaster's duties in "clear and unambiguous terms." the Idaho Supreme court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." In times of shortage, watermasters must distribute water according to the elements and priority dates of an "adjudication or decree."<sup>5</sup>

SWC's Opening Brief, p. 26 (citations omitted). Assume for the moment the SWC is right: how can the Director, in the face of the constitutional imprecations of "reasonable use" and "public interest", simply deliver the amount on the face of the licenses and/or decrees without regard to the impacts on other water rights?

As discussed in Section I.C. above, the evidence in this case showed that simply to deliver the 127,000 af of water that the Director found Twin Falls was owed under the May 2 Order, would have required curtailment of 1.1 million acres of agricultural ground reliant upon junior ground water rights. By extension, the only way the Director could have ensured delivery of *all* of the water on the face of the SWC's water licenses and decrees, as the SWC demands,

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<sup>5</sup> The SWC goes on to suggest (at page 27 of the Opening Brief), "Justice Schroeder plainly recognized the right a senior has for purposes of administration as against junior water rights." However, the Recommendations portion referred to actually establishes the framework for examining the standards for delivery of an amount of water—not the decreed amount. The entire quote is: "At some point a determination has been made that a licensed or adjudicated water right holder has an entitlement in priority to a certain amount of water if that water can be applied to a beneficial use. That right is not absolute. Nature may change the course of a river. Water may not be available through no cause related to junior users. However, to the extent water is available within the amount of the water right but is diminished by junior users, the presumption favors the senior users' rights to the water. That right may be limited or lost by consideration of the factors in 42.01." R. Vol. 37, p. 7078 (emphasis added).

would have been to permanently curtail ground water pumping that supplied irrigation water to over 1 million acres of agricultural land and drinking water for tens of thousands of Idaho citizens. Under the circumstances, the Director's rejection of the SWC's demand is not surprising—it would not have withstood scrutiny under the “public interest” and “reasonable use” provisions of the Idaho Constitution, statutes and CMR.

**C. The factual determinations in the Director's Final Order are consistent with the statutory and constitutional framework described above.**

SWC spends many pages in its Opening Brief arguing that the Director's procedures for administering the delivery call were inadequate. However, SWC's delivery call was about injury to its senior water rights and although the SWC alludes to the fact that the Director's procedures resulted in injury to its members, it does not allege that the findings of injury, when they were made in the various interim orders, were erroneous or otherwise refer to evidence in the record that supports the factual allegation of injury. In a sense, the SWC argument has not changed since it filed its Motion for Partial Summary Judgment on January 23, 2006.

In the Director's words, the SWC was asking for a finding that: “under the prior appropriation doctrine its members are automatically entitled to the full amounts of their water rights as a matter of law . . . .” R. Vol. 19, p. 3615. The Director went on to deny the Motion, finding that:

The Surface Water Coalition, therefore, is mistaken to the extent it argues that the Director must, as a matter of law, distribute the full amounts of water set forth in its members' water rights licenses and decrees without any consideration of its members' actual beneficial uses and needs. Rather, the Director must make a factual determination of whether the full amounts of the water rights are necessary for the authorized beneficial uses at the time the delivery call is made. If so, the Director will distribute the full amount of the right. If not, the Director will order the distribution of such amount as is necessary to achieve the authorized beneficial use. This determination, which is subject to judicial review, is not a

readjudication of rights but rather reflects the application of the background principles of water law, which are set forth in the conjunctive management rules, based upon the hydrologic conditions existing at the time of the delivery call. As with all water distribution, the amount of need will vary over time.

R. Vol. 19, pp. 3626-3627. The Idaho Supreme Court subsequently agreed, (upholding the Gooding County District Court):

[c]ontrary to the assertion of [American Falls], depletion does not equate to material injury. **Material injury is a highly fact specific inquiry** that must be determined in accordance with IDAPA conjunctive management rule 42.

*AFRD #2 v. IDWR*, 143 Idaho at 868, 154 P.3d at 439 (emphasis added).

The Hearing Officer affirmed the Director's determinations regarding injury for 2005-2007, based on evidence in the record. SWC has not alleged any factual basis for a different determination. Given the legal framework that informs the Director's discretion in responding to delivery calls, there is no basis for finding the Director's determinations on injury or non-injury in the May 2 Order and subsequent interim orders to be contrary to Idaho law.

### **III. REPLACEMENT PLANS ARE AN APPROPRIATE METHOD TO MITIGATE INJURY TO SENIORS DURING THE PENDENCY OF A HEARING.**

#### **A. The Director's Final Order properly affirmed the practice of allowing replacement plans during the pendency of a delivery call hearing.**

One ground of the SWC's appeal is that the Director's replacement plan methodology to supply replacement water prior to a delivery call hearing is unlawful. However, the Director's authority to develop such pre-hearing relief is consistent with the constitutional and statutory principles described above. As the Director noted in the Final Order:

If the Director had not authorized replacement water plans but instead required the filing of a Rule 43 mitigation plan, junior ground water users could have been curtailed from the time the May 2005 Order was issued until a plan was filed and an order on the plan issued. If junior ground water rights had been curtailed, the SWC would have realized some benefit from increased reach gains

in the Snake River. However, unlike curtailment in a surface water to surface water delivery call, curtailment in a conjunctive management call would not provide immediate and complete relief. . . . “Curtailment of the ground water user may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous farm economy.”

R. Vol 39, p. 7390, COL ¶ 12 (citations omitted).<sup>6</sup> The SWC in its brief does not deal with the consequences to ground water users of requiring a Rule 43 mitigation plan to be filed on the heels of the Director’s initial finding of injury, before discovery can be had, facts can be developed, and a record is developed based on a hearing. But like the SWC’s arguments that the senior’s sworn oath of injury to its water right is a sufficient basis for IDWR to curtail the entire ESPA to deliver to the SWC seniors the decreed amount on the face of the licenses and decrees, in effect the only way a junior could file a Rule 43 mitigation plan without the benefit of a hearing on the allegations of injury is to settle for curtailment during the pendency of the mitigation plan. On its face, this draconian result is inconsistent with the Idaho constitutional principles of public interest and reasonable use, and must be rejected out of hand.

**B. *Simpson v. Bijou Irrigation Co.* does not support the SWC’s arguments due to fundamental differences in the facts and law underpinning that decision.**

The SWC’s reliance on a Colorado Supreme Court decision, *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003) is misplaced. Under the 1969 Act, the Water Court is the authority for all decisions related to adjudication of water rights, including deciding the terms and conditions necessary to provide administration without injury. Further, in most basins in Colorado, ground water users in Colorado *may not* pump unless and until they receive an

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<sup>6</sup> This is consistent with testimony in the case from IGWA’s president, Tim Deeg, who testified that replacement plans were critical because curtailment would result in “immediate and irreparable harm” to junior water users. R. Vol. 33, p. 6167.

augmentation plan from the water court<sup>7</sup>—indeed, ground water users may not even obtain a well permit from the State Engineer until the water court enters a decree augmentation plan.<sup>8</sup>

Unlike the Idaho Director of Water Resources, the Colorado State Engineer has no authority to determine injury to water rights—that is the sole province of the Water Court. *See, e.g., Santa Fe Trail Ranches Prop. Owners Ass’n v. Simpson*, 990 P.2d 46 (Colo. 1999).

Historically, whenever the Colorado SEO attempts to exercise such authority<sup>9</sup>, a lawsuit results.

*See, e.g., Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139 (Colo. 2001), *Simpson v.*

*Bijou Irrigation Co.*, *Vance v. Wolfe*, 2009 WL 1039887 (Colo. Apr. 20, 2009). Under Colorado

law, the Water Court determines what is injurious to senior water rights, spells it out in the water right decree, and the State Engineer administers by reference to the decree. Augmentation plans,

by contrast, require the junior ground water user to demonstrate his well pumping will be non-

injurious, and to suggest terms and conditions (identify the source, timing, and location of replacement water) to avoid any injury. These are also decreed by the Water Court and the

Colorado State Engineer also uses such decrees for administration.

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<sup>7</sup> However, upon filing for an augmentation plan, ground water users may obtain a “substitute water supply plan” which allows the Colorado State Engineer to administratively approve replacement plans during the pendency of the augmentation plan litigation. *See, e.g., C.R.S. 37-92-308.*

<sup>8</sup> This is because statute requires the Colorado State Engineer to determine whether there is water available for appropriation (C.R.S. 37-90-137(2)(b)(I)—as most basins are over-appropriated no well permits issue without an augmentation plan decree. Some basins are not considered to be over-appropriated—for example, it is still possible to get a well permit for non-domestic uses in the Upper Yampa Basin without first obtaining an augmentation plan decree from the Water Court.

<sup>9</sup> Note, however, that in the Arkansas River basin the Colorado State Engineer does have authority to approve Rule 14 replacement plans under the Arkansas River Rules—the result of rulemaking during the interstate litigation between Kansas and Colorado over the Arkansas River Compact. The exercise of the Colorado State Engineer authority in this context is questionable, but has been distinguished by the Colorado Supreme Court on the basis that the rules assist the Colorado State Engineer in administering the lengthy and complicated decree that arose out of more than 30 years of litigation in the United States Supreme Court between Colorado and Kansas. *Simpson v. Bijou Irrigation Co.* at 68-69.

By contrast, the Director of IDWR is not only authorized, he is obligated to answer delivery calls and determine injury to senior water rights. It is authority he has exercised for the last four years in the context of the SWC delivery call and others. He has authority under Rule 43 to decide mitigation plans after a record is created; he also has authority, as described in the Final Order, to determine interim “replacement plans”. To allow for replacement plans is a reasonable way to interpret agency rules: to require mitigation plans at the outset would offend the constitutional principles of “public interest” and “reasonable use” because the only mechanism to administer in the face of a delivery call would be curtailment. And, as described above, curtailment is a singularly inefficient means of administering conjunctive sources of ground water and surface water.

#### **IV. THE DIRECTOR’S FINAL ORDER REGARDING THE TIMING OF CARRY-OVER STORAGE IS CONSISTENT WITH THE CMR AND IDAHO LAW**

##### **A. Due to the constitutional framework which circumscribes its authority, IDWR has discretion to order reasonable carry-over in the season of need.**

The SWC and the BOR suggest that the Director’s Final Order is arbitrary and capricious because it requires the provision of carry-over storage in the season in which the water would be put to use. The appellants go on to suggest that the “injury” occurs in the prior year, if juniors are not required to obtain contracts for carry-over storage water in the prior year.

The rubric of the Director’s shortage determinations relies on “adaptive management”. Although the SWC disputes this and demands delivery of the amounts on the face of its licenses and decrees, under Idaho law, adaptive management is consistent with the constitutional requirements of “reasonable use” and administration in the “public interest”. In the same vein, determining injury to reasonable carry-over in the prior season but not requiring replacement

until the season of need is “adaptive”—the junior bear the risk that they will not be able to obtain sufficient storage water to satisfy the carry-over amounts. Just as juniors bear the risk that there won’t be adequate water available in season to rent to satisfy natural flow amounts. This “risk” is appropriate—without being punitive. By contrast, requiring that the juniors obtain storage water prior to the season of need is unreasonably punitive.

**B. The BOR’s position is inconsistent with Idaho law, although it would be beneficial to the BOR’s flow augmentation program.**

Under the CMR, adverse impacts to carry-over storage are considered injury to water rights. R. Vol. 37, 7076-7077. However, the basis of the dispute over carry-over storage is not whether there should be an injury-to-carry-over determination, but when that amount should be supplied. It is not accurate to say that the “injury” to carry-over occurs during the prior year—“carry-over” storage is for purposes of beneficial use in a season of need. The injury occurs in the subsequent year if the amounts are not available for use.

Neither the SWC nor the BOR takes issue with the amount of water to be provided—other than asserting, as both do elsewhere, that they are entitled to full reservoirs (*see, e.g.*, BOR’s Opening Brief, p. 11, n.3.) We are down to arguing about whether any replacement water to satisfy a carry-over storage obligation must be supplied in the year prior to or the year in which the water would be used.

The Hearing Officer’s Recommendations note that, as BOR points out in its Opening Brief, the reservoir system was developed to facilitate storage of water during periods of shortage. R. Vol. 37, p. 7107. The Hearing Officer further found that the carry-over storage injury determination need only be made for the following year:

**There is no precise amount of reasonable carry-over storage, but the amount should be sufficient to assure that if the following year is a year of water shortage there will be sufficient water in storage in addition to whatever natural flow right exist to fully meet crop needs. . . .** As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in *AFRD* #2.

*Id.* at 7109-7110, ¶ 12. The Recommendations also included this limitation on curtailment for carryover storage:

[C]urtailment cannot be utilized to make up storage water that is disposed of [through sale or lease] . . . [and] [t]he ground water users have no obligation to make up for water that will not be applied to its licensed or adjudicated purpose, e.g. the sale of water for flow augmentation.

*Id.* at 7108, ¶ 9. ¶

It would be highly beneficial to BOR if the SWC could obtain curtailment of junior ground water rights to fill Bureau reservoirs—the more water in the reservoirs, the more likely that flow augmentation water (the “fish flush” water the Bureau is required to provide to satisfy the Nez Perce Agreement) will be available. Mr. Jerrold Gregg, Area Manager for the BOR’s Snake River Area Office testified that the Bureau was concerned if it didn’t satisfy its flow augmentation amounts the situation would be “similar to the Klamath” in which the Bureau was required to release water from Klamath Lake to satisfy the Endangered Species Act and was then foreclosed from making deliveries to its contract holders. However, he acknowledged that if the Bureau successfully obtained curtailment of junior ground water users in order to fill its reservoirs it would merely be shifting the curtailment of deliveries from its contractors to the junior ground water users. *See generally*, Mr. Gregg’s testimony on January 24, 2008.

The Hearing Officer’s limitation on carry-over storage to exclude flow augmentation water amounts is warranted. Flow augmentation water is not a beneficial use associated with the



SWC's reservoir storage rights at issue herein. Indeed, it is not currently a recognized beneficial use at all in Idaho (Idaho Code 42-1763(B)(4)), although if it were a beneficial use, it would be junior to most of the ground water users since flow augmentation was not begun until the early 1990s.

**C. Providing storage water in the year of use is consistent with allocation of "risk" under Idaho law.**

The Bureau suggests that the Final Order is erroneous under Idaho law because it misapplies the risks associated with water administration. No citation to legal authority regarding the concept of "risk" is described. The Bureau's assumption seems to be that, because the prior appropriation system is based on scarcity, only the juniors bear the risk of scarcity.

In the context of questions regarding curtailment to satisfy seniors, former Director Karl Dreher testified regarding the appropriate "risk" to be placed in response to questioning by AFRD #2's counsel that the senior water right had never received their decreed amounts, and that administration of juniors should not be the means to develop a more reliable water supply:

Q [by Mr. Arkoosh] Let me finish the question and we'll move on. There would be less risk for the senior [if the "minimum full supply" value in the May 2 Order was replaced with the decreed amount] and more risk for the junior; is that correct?

A. I guess that's potentially correct, but two problems with it. No. 1 -- I mean, I don't care which of the entities you want to use. Take their natural flow right as a maximum diversion rate in cfs. What quantity would you have me use in this column? How many days do I assume they diverted to full quantity of the water right? They don't do it now in the surface water system. They divert what they need.

And it can be less and often is less than the maximum quantity authorized under the water right and yet, apparently, you would have me treat ground water folks differently and assume that I should administer to the maximum quantity authorized, whether it's needed or not. That is not how it's done in the surface water system, and yet that apparently is what you think I should be doing here.

Secondly, to do as you suggest would result in waste, because a significant amount of the resource that could be used, wouldn't be used in the interest of trying to -- what shall we say -- zero the risk on the senior. And the senior is always going to have risk that there won't be enough water. The presumption in the west under the prior appropriation system is there will be times when there is insufficient water to fill all rights.

Transcript, Jan. 16, 2008, pp. 188:13-189:18. As Mr. Dreher's testimony suggests, there is more to the prior appropriation system in Idaho than simply the priority date. As the curtailment testimony referred to in Section I.C. above suggests, curtailment is fraught with problems of inefficiency and waste.

The same problems apply to the timing of providing carry-over storage. As Mr. Sullivan's report (discussed in Section I.C. above) shows, curtailment leads to accretions to the stream that are perpetual and year-round. As Mr. McGrane, one of the Bureau's witnesses, confirmed during cross-examination that the Upper Snake reservoirs (including reservoirs not the subject of the delivery call) would have been insufficient to store all available water if curtailment of all ground water rights junior to 1949 had ensued during a period of wet years, such as 1995-1997. Further, this would have resulted in increased reservoir spills. Transcript, Jan. 25, 2008, p. 1443:5-24.

In comparison, if the junior well owners are required to purchase carry-over storage in the fall of the year for use during the following irrigation season and the reservoirs fill, they have either wasted their money or over-mitigated the injury to the seniors. And, to look at the other means of mitigation—curtailment—evidence in the case showed that curtailment in September of the preceding year versus curtailment in the spring of the year the carry-over water would be used will not provide any appreciable difference in the amount of storage water provided. Under these circumstances, and in light of the constitutional precepts that guide his decision-making,

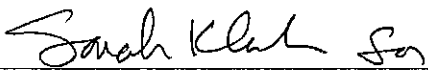
for the Director to have ordered carry-over in a season prior to the season of use would have been arbitrary.

**CONCLUSION**

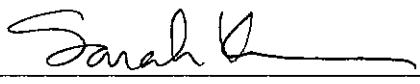
For the reasons described herein, Pocatello respectfully requests that the Final Order in this matter be affirmed.

Dated this 29<sup>th</sup> day of April, 2009.

CITY OF POCATELLO ATTORNEY'S OFFICE

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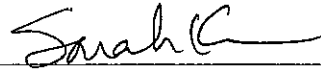
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## CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of April, 2009, I caused to be served a true and correct copy of the foregoing **Respondent Pocatello's Brief on Appeal from the Idaho Department of Water Resources** for Case No. CV-2008-0000551 upon the following by the method indicated:



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