IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and **MINIDOKA IRRIGATION DISTRICT,**	)	**CASE NO. CV-2010-3075**
Petitioners,	)	
vs.	)	
GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES**,	)	
Respondents.	)	

SURFACE WATER COALITION'S JOINT OPENING BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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STATEMENT OF THE CASE

This case involves the Director's conditional approval of the Idaho Ground Water Appropriators, Inc.'s ("IGWA's") November 9, 2010 *Mitigation Plan for the Surface Water Coalition Delivery Call* (the "mitigation plan" or "Plan"). R. Vol. II at 202. Through the Plan, IGWA proposes to provide storage water to mitigate for injury caused by out-of-priority groundwater pumping. IGWA's sole supply of storage water consists of terminable one-year lease agreements that can be reduced by the lessors prior to the irrigation season. Absent this leased storage water, IGWA's Plan contains no further mitigation actions.

Contrary to the criteria in Rule 43 of the Rules for the Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11 *et seq.*) ("CMR"), and the evidence in the record, the Director approved IGWA's plan contingent upon compliance with future determinations and procedures set forth in the "Methodology Order". *See* R. Vol. II at 274. However, the Director failed to require that IGWA comply with his new terms and failed to complete the analysis required by the CMRs. Consequently, the Director wrongfully approved a mitigation plan for an indefinite term based upon an unknown water supply. The conditioned approval is simply an attempt to resurrect the unlawful "replacement water plan" concept previously struck down by the Gooding County District Court. In sum, the Director's order violates the CMR and Idaho's APA and should be reversed.

STATEMENT OF ISSUES

The following issues are presented on appeal:

1. Whether the Director erred in approving a mitigation plan for an indefinite term based upon an uncertain water supply.

2. Whether the Director erred in finding that IGWA met its burden in seeking approval of a mitigation plan under Rule 43.

3. Whether the Director erred in approving IGWA's mitigation plan despite non-compliance with his ordered conditions in 2010.

4. Whether the Director's *Order* violates the District Court's prohibition of the use of "replacement water plans".

5. Whether the Director erred in authorizing the use of storage water for mitigation without considering whether or not the storage water will "offset the depletive effect of ground water withdrawal on the water availability?"

6. Whether the Director's *Order* violates Idaho Code § 67-5248.

STATEMENT OF FACTS

In 2005, the Surface Water Coalition requested conjunctive administration of hydraulically connected junior ground water rights that were injuring the Coalition's senior surface water rights. The Director issued an initial order on May 2, 2005. After an extensive contested case and administrative hearing, he issued a final order on September 5, 2008.[1] *See* R. Vol. I at 1, 67 & 140. From 2005 through 2009, the Director failed to require IGWA to file a Rule 43 mitigation plan, and instead relied upon a "replacement water plan" concept not provided for in the conjunctive management rules to avoid curtailing any junior ground water rights. R. Vol. II at 274-75. IGWA finally filed the present Plan over four years after the Coalition first requested administration of junior priority ground water rights. R. Vol. II at 191.

IGWA describes the purposes of the mitigation plan as follows:

> Because future obligations for mitigation cannot be determined in advance, this Mitigation Plan is intended to secure advance approval of the mitigation

[1] The Director's September 5, 2008 was subject to a judicial review action before the Gooding County District Court. *A&B Irr. Dist. et al. v. IDWR et al.*, Fifth Jud. Dist., Case No. CV-2008-551.

> methods and practices that junior groundwater users can rely upon and implement in order to avoid curtailment. It is the desire and intent of the Ground Water users by this mitigation plan to have a permanent and ongoing mitigation plan in place that can be implemented on a year-to-year basis as necessary to avoid or reduce curtailment.

Id. at 203-04. In its Plan IGWA asserts that the "storage water supply for use under this Mitigation Plan is secured by agreements . . . entered into between IGWA and storage space holders in the Upper Snake Reservoir System." *Id.* at 204. According to IGWA, "through these existing agreements, IGWA has a reliable supply of up to 68,000 acre feet of storage water that will be available on an annual basis for delivery to SWC." *Id.*

According to the mitigation plan, IGWA would "mitigate any and all material injury by guaranteeing and underwriting" the Coalition's senior water supply by making storage water available for "direct delivery." *Id.* at 204-05. In the event that there is not sufficient storage water, IGWA proposed a payment to "reimburse … for any actual seasonal water supply shortfall at the Water District 1 Rental Pool rate." *Id.* at 207.

The Coalition protested the mitigation plan. R. Vol. II at 220.[2] A hearing was held before the Director on May 25-26, 2010. On June 3, 2010, the Director issued his *Order Approving Mitigation Plan* ("*Order*"). R. Vol. II at 274. The Coalition then filed the present petition for judicial review with this Court on July 1, 2010.

STANDARD OR REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to

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[2] The Bureau of Reclamation also filed a protest to the plan but later "withdrew its protest on the record" at the hearing on IGWA's Plan. R. Vol. II at 275.

an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.*

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure, " (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." *Chisholm*, 142 Idaho at 162 (citing Idaho Code § 67-5279(3)).

An agency's decision must be supported by "substantial evidence". *Id.* at 164 ("Substantial evidence … need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder"); *Mercy Medical Center, supra* (agency decision must be "supported by substantial and competent evidence"). The "reviewing courts should evaluate whether 'the evidence supporting [the agency's] decision is substantial." *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 261 (1985). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

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

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

supported by substantial and competent evidence"). The Director's *Final Order* in this case fails the above standard of review and therefore should be set aside.

GOVERNING LEGAL PRINCIPLES

Adopted in 1994, the CMR provide the regulatory foundation for conjunctive management of Idaho's surface and ground water resources. Rule 001. The CMR require that the holders of junior ground water rights causing material injury to senior water rights be curtailed unless a mitigation plan has been approved by the Director. Rule 40.01. Rule 43 provides the requirements for a mitigation plan, the necessary procedure, as well as the factors the Director considers in reviewing a mitigation plan for approval.

The underlying principle of water right administration – whether a junior right is curtailed or authorized to divert pursuant to an approved mitigation plan – is that senior rights must be protected from injury. *See* Rule 40.01. Idaho has long adhered to the principle that "first in time is first in right." *See, e.g.*, IDAHO CONST. art. XV § 3; Idaho Code § 42-106; *Joyce Livestock Co. v. United States*, 144 Idaho 1, 8 (2007). Furthermore, while there "may be some post-adjudication factors" that bear on administration, the "presumption under Idaho law is that the senior is entitled to his decreed water right." *American Falls Reservoir Dist. #2, et al. v. Idaho Dept. of Water Resources, et al.*, 143 Idaho 862, 878 (2007).

Based on this legal foundation, the Director concluded that a mitigation plan cannot place "an unreasonable burden upon the SWC" – the senior water right holders in this case. R. Vol. II at 289. The senior water right holder must "have an assurance at the beginning of the irrigation season that water can be provided when the water is needed." *Id*. Indeed, the "junior water users … cannot shift the risk of uncertainty upon the" holder of the senior water rights. *Id*. Despite these statements, the Director approved an uncertain, temporary mitigation plan contrary to law.

In addition, the facts show that IGWA did not even comply with the conditional approval of its plan in 2010. As a result, this Court should reverse the Director's decision.

ARGUMENT

I. The Director Arbitrarily Approved IGWA's Plan for an Indefinite Term Based upon a Temporary and Indefinite Water Supply.

The first fault in the Director's order approving IGWA's mitigation plan is the failure to specify a term and analyze the limitations on the availability of the water proposed in the mitigation plan. Although IGWA requested approval of a "permanent" mitigation plan, it is undisputed that the plan does not have a "permanent" or even long-term supply of water. R. Vol. II at 193. Instead, IGWA's plan only includes temporary one year leases that can be reduced or terminated by the lessor prior to every irrigation season. Although IGWA claims to have "a reliable supply of up to 68,000 acre-feet of storage water ***that will be available*** on an annual basis," the plain terms of the leases show that less or even no water may be provided. R. Vol. II at 193 (emphasis added). The temporary and unknown nature of the leases represents a "circumstance[ ] or limitation[ ] on the availability of such supplies" that was ignored by the Director. Rule 43.01.c. Accordingly, the Director arbitrarily approved the plan for an indefinite term contrary to the CMR.

IGWA produced copies of seven storage water leases with various irrigation entities. Ex. 7. Since it does not own any storage, these leases represent the only water that IGWA has to supply under its mitigation plan. *As Applied Order* Tr. Vol. II, pp. 338-39; Tr. Vol. II, pp. 287-88.

The leases contain the following provision regarding the term of the lease:

> 2. Term. The term of this Lease shall be for a term of one (1) year, commencing April 1, 2009, and terminating on March 31, 2010. Thereafter, this Lease will be automatically renewed and extended for successive

> additional one (1) year terms, unless and until terminated by either party upon written notice given on or before April15 of any year to the address reflected in this Lease Agreement.

Ex. 7 (Enterprise Canal Company Lease at 1).

Although renewable for successive one-year terms, the leases can be terminated by either party prior to the irrigation season every year.[3] Accordingly, IGWA does not have a "permanent" or long-term supply of water to support a mitigation plan beyond one year, in this case 2010. At hearing, IGWA's witnesses admitted the leases were year-to-year and that they did not have a permanent supply of water for mitigation:

> Q. [MR. FLETCHER]: And all of the leases can be terminated every year?
>
> A. [MR. DEEG]: Yes.
>
> Q. And they can be terminated by you or they can be terminated by the lessor?
>
> A. That's correct.

Tr. Vol. II, p. 282, lns. 12-17.

> Q. [BY MR. SIMPSON]: Okay. But to date, you don't have any of those, quote, "longer term leases" available?
>
> A. [BY MR. DEEG]: We do not.

Id., p. 331 ln. 25 – p. 332, ln. 2.

Despite the temporary nature of the leases, the Director approved IGWA's mitigation plan without identifying a specific term. R. Vol. II at 283. Rule 43.03.h requires the Director to consider the "reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan." Rather than just approving the plan for 2010, as required by the CMR, the Director left the term indefinite. Based upon the evidence in the record it is

[3] The evidence shows that at least one lessor notified IGWA of its intent not to supply water in 2010 under the terms of the lease. Tr. Vol. II, p. 252. The lessor later provided IGWA water due to changing water conditions.

clear that IGWA does not have a long-term or permanent supply of water to support its mitigation plan beyond a one-year approval. The Director's approval of a mitigation plan for an indefinite term without identifying a supply of water to match that term is arbitrary and capricious and not supported by substantial evidence. *See Galli*, 146 Idaho at 159; *American Lung. Assoc. of Idaho/Nevada*, 142 Idaho at 547. The Court should reverse the Director's decision.

In addition to temporary term of the leases, the amount of water available to IGWA is also subject to change every year. For example, the lease with New Sweden Irrigation District allows the lessor to reduce the amount leased from 20,000 acre-feet down to 5,000 acre-feet. Ex. 7 (New Sweden Lease at 1). In 2010, New Sweden originally notified IGWA that it did not intend to provide any storage water based upon forecasted water conditions predicted in early April:

> Q. [BY MS. MCHUGH]: And how often has one of the leasing entities cancelled their lease with IGWA?
>
> A. [BY MR. DEEG]: Just once. At the beginning of this year we had one party that decided not to lease water to IGWA, didn't cancel the lease, but just decided to make the quantity zero.

Tr. Vol. II, p. 252, lns. 9-14.

Although New Sweden later provided IGWA some water at a greater cost, the facts show that the leases can be, and actually have been, terminated or reduced prior to the irrigation season. Accordingly, despite IGWA's claim in its mitigation plan that it has a "reliable supply of up to 68,000 acre-feet", the leases' terms, assuming they are renewed in future years, demonstrate that the minimum quantity obligated is only 27,500 acre-feet, or less than half the amount IGWA touts in its plan. Ex. 8 (Summary of Leases).

Finally, the Director wholly ignored the limitations on IGWA's leased storage water set forth in the Water District 01 Rental Pool Rules. As private leases, the water supplied to IGWA assumes a "last to fill" priority in the following storage season. Accordingly, if the reservoir system does not fill the following year, the storage water provided to IGWA through the private leases becomes the most junior storage in the reservoir system. IGWA's witness recognized this limitation at hearing:

> Q. [BY MR. SIMPSON]: Okay. Is it your understanding, then, that the American Falls space, 5,000 acre-feet of the American Falls space, would then be last to fill next year?
>
> A. [BY MR. DEEG]: Yes.

Tr. Vol. II, p. 325, lns. 14-18.

Consequently, this "junior" priority is a "limitation" on the availability of the storage water the following year. Although IGWA admitted the same at hearing, the Director performed no analysis regarding this limitation of the mitigation plan in his order. In addition, except for the lease with New Sweden Irrigation District, none of the other six lease agreements identify a specific priority of storage space from which the leased water is to be provided. Therefore, the Director cannot evaluate the "availability" of the storage water in those leases based upon priority fill of reservoir space in the Upper Snake River reservoirs. For example, if the reservoir system does not fill in a particular year, the Director has no information to judge whether IGWA's leases will provide water or not, since the storage priority is unknown.

IGWA admitted at hearing that it did not have knowledge as to the priority of the storage water provided under those leases:

> Q. [BY MR. SIMPSON]: And with respect to the other contracts that are represented under Exhibit No. 7 – for example, the second lease agreement is with Enterprise Canal Company in the packet. . . .That does not identify a particular storage water contract does it not?

A. [BY MR. DEEG]: It does not at this point.

Q. With respect to that lease, do you have an understanding of where that water is within the storage system that the ground water districts are leasing?

A. I do not.

Tr. Vol. II, p. 325, ln. 1 – p. 326, ln. 16.

Despite the lack of information from IGWA's leases and the lack of analysis by the Director, the Coalition's expert, David Shaw, provided the only testimony on this limitation on the water to be provided through the mitigation plan:

Q. [BY MR. THOMPSON]: What is your opinion as to the expected reliability of fill of storage provided under private leases, such as those submitted in this case, if that water becomes last to fill the following year?

A. [BY MR. SHAW]: Well, I think the purpose of last to fill is to minimize the impacts on other users, but it reduces the reliability of that space used for private leases in the following year.

Q. Are you aware of the water conditions we experienced in the Upper Snake over this past winter, 2009/2010?

A. Generally, yes.

Q. And if we experienced a similar year or even an average year next year and the reservoir system doesn't fill, what's your opinion on the availability of water to, I guess, fill those last-to-fill storage space in the Upper Snake system?

A. Well, as I understand last to fill, if the system doesn't fill, those spaces that are last to fill will not accrue any storage.

T. Vol. II, pp. 529-30. Mr. Shaw concluded:

Q. Okay. In your opinion – I guess what is your opinion, Mr. Shaw, as to the use of storage water as the only means to mitigate for ground water pumping and whether that may contribute to injury to other storage or natural-flow water rights?

A. ***I think that any additional demand placed on the storage in the system increases the risk of shortages in subsequent years***.

Id. at 531 (emphasis added).

Despite the evidence in the record about the uncertain amount of water available every year, including the lack of an identified storage priority, the Director approved the mitigation plan. R. Vol. II at 283. Since IGWA's only supply of water is from temporary leases for an unknown quantity, the Director's approval was erroneous. Under Idaho law the Director's decisions must be supported by "substantial evidence". *Chisolm*, 142 Idaho at 164. The evidence must be such "that reasonable minds could reach the same conclusions as the fact finder." *Id*. The Director's failure to recognize and analyze the "circumstances and limitations" on the availability of the storage water under the plan is arbitrary and capricious and not supported by substantial evidence in the record. The Court should therefore reverse the Director's order.

II. The Evidence Shows IGWA Did Not Satisfy the Director's Conditioned Approval of the Plan in 2010.

The Director approved IGWA's mitigation plan subject to a number of conditions. R. Vol. II at 283. First, the order states that "IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order." *Id*. The order further requires IGWA to "provide proof of rental or an option to rent storage water and of a commitment of the storage water to the SWC within the deadlines provided by the Methodology Order". *Id*. (emphasis added). Finally, the Director conditioned the approval upon IGWA providing "fully executed and irrevocable contracts with holders of Snake River storage (fully disclosed in the contracts)". *Id*. (emphasis added).

Assuming for argument's sake that the Director's conditional approval is allowed, the record shows that IGWA's plan did not satisfy the conditions as ordered in 2010.[4] Therefore, the Director's failure to require IGWA to comply with his "conditions" constitutes arbitrary and capricious agency action and should be reversed.

First, contrary to the Director's order, IGWA has not entered into any "irrevocable" contracts for storage water. The term "irrevocable" means "that which cannot be revoked or recalled." BLACK'S LAW DICTIONARY 576 (6th ed. 1991). All of IGWA's leases are terminable one-year arrangements. *See* Ex. 7. Since the lessors can "revoke" or terminate the lease prior to the irrigation season, IGWA has no water supply to comply with the "irrevocable" agreement condition. As demonstrated by the facts in 2010, at least one lessor initially "revoked" the storage water supply previously pledged to IGWA. Without a certain, "irrevocable" water supply, IGWA's plan fails to satisfy the condition set forth in the Director's order.

Next, the Director set forth his new methodology for conjunctive administration in his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand & Reasonable Carryover* ("Methodology Order") dated April 7, 2010.[5] In general, the Methodology Order establishes a 10-step process for determining material injury and establishing curtailment and/or mitigation obligations. Methodology Order at 33-36. The process begins "by April 1" and runs through November 30. *Id*. In addition, there are several

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[4] As set forth in Part I, *supra* , the Coalition disputes the "conditional" approval and the Director's authority to approve the plan based upon compliance with unknown future determinations and procedures not subject to the procedures in Rule 43.

[5] The parties challenged the Director's Methodology Order and requested an administrative hearing in early 2010. For purposes of this appeal the relevant order is the Director's initial April 7, 2010 Methodology Order, since it was the order in place at the time the Director issued his decision conditionally approving IGWA's mitigation plan. Following the hearing on the original Methodology Order, the Director issued a *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand & Reasonable Carryover* on June 23,2010. That final order was appealed to district court. *See generally*, *IGWA et al. v. Spackman et al.*, Fifth Jud. Dist., Consolidated Cases CV-2010-382.

steps requiring the Director to review its material injury determination throughout the irrigation season.

Relevant to this proceeding, under Steps 3 and 4 of the *Methodology Order*, the Director reviews the "USBR and USACE … Joint Forecast that predicts an unregulated inflow volume" and determines potential material injury for the upcoming irrigation season. *Id*. at 33-34.[6] At that time IGWA is required to "establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water or to conduct other approved mitigation activities" by "May 1, or within fourteen (14) days from issuance of the" order addressing steps 3 & 4. *Id*. at 34.

In the order approving IGWA's mitigation plan, the Director held that IGWA must provide these assurances early in the irrigation season in order to avoid placing "an unreasonable burden upon the SWC senior water rights holders" and to ensure "that the water supply will be available at the time of need." R. Vol. II at 289 ("The SWC must have an assurance at the beginning of the irrigation season that water can be provided when the water is needed"). Despite the order's conditions, including meeting the deadlines identified in the Methodology and Steps 3 & 4 Orders, the facts demonstrate that IGWA did not meet these requirements in 2010. Accordingly, the approval of IGWA's mitigation plan was arbitrary, capricious, and not supported by substantial evidence in the record and therefore should be reversed. *See Galli*, 146 Idaho at 159; *American Lung. Assoc. of Idaho/Nevada*, 142 Idaho at 547.

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[6] The Director issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3&4)* ("Steps 3 & 4 Order") on April 29, 2010. The decision was challenged and subject to a hearing and additional final order. *See Final Order Regarding April 2010 Forecast Supply (Methodology Order Steps 3 & 4); Order on Reconsideration* (dated June 24, 2010). Similar to the original Methodology Order, for purposes of this appeal the relevant Steps 3 & 4 Order is the decision issued April 29, 2010, or the decision in place when the Director conditionally approved IGWA's mitigation plan.

In the Steps 3 & 4 Order issued on April 29, 2010, the Director predicted an in-season injury of 84,300 acre-feet to members of the Surface Water Coalition. *See* Steps 3 & 4 Order at 2. Pursuant to the process set forth in the Methodology Order the Director required the following from IGWA:

> 2. No later than May 13, 2010 (fourteen days from issuance of this order), junior ground water users must establish, to the satisfaction of the Director, that they have secured 84,300 acre-feet.

Id. at 3.

Since the approval of IGWA's mitigation plan is "tiered" to compliance with the Methodology Order, the Director required IGWA's leased storage water to be "committed" for mitigation to the Surface Water Coalition. R. Vol. II at 283. Despite these requirements, IGWA did not acquire 84,300 acre-feet by May 13, 2010 to commit to mitigation for the SWC's predicted material injury. At hearing, IGWA's witness admitted the following:

> Q. [BY MR. BUDGE]: And at the time you made that submission on [May] 13th, did IGWA have the full 84,300 acre-feet under lease and available to meet the obligation of the Surface Water Coalition in Water District 120?
>
> A. [BY MR. DEEG]: No.

Tr. Vol. II, p. 141, lns. 17-22.

> Q. [BY MR. SIMPSON]: And so isn't it correct also that you've identified that in 2010, operating under these leases that have been identified under Exhibit 7, that IGWA was unable to procure or obtain the requisite amount of storage water, mitigation water owed under the Director's order?
>
> A. [BY MR. DEEG]: Under these particular leases?
>
> Q. Under these leases were you able to obtain 84,000 acre-feet of water?
>
> A. These leases didn't supply 84,000 acre-feet of water.
>
> Q. You were unable to obtain 84,000 acre-feet; correct?

> A. Correct.

Tr. Vol. II, p. 329, lns. 3-16.

Accordingly, IGWA's mitigation plan did not provide sufficient water to mitigate the predicted injury to the SWC in 2010 pursuant to the terms of the Director's orders. Nonetheless, despite IGWA's non-compliance, the Director approved the mitigation plan on June 3rd and authorized IGWA to pump out-of-priority for the 2010 irrigation season. Although the predicted injury may change from year to year, the facts from 2010 plainly show that IGWA's plan was deficient on its face since it did not comply with the Director's ordered conditions set forth in the Methodology and Steps 3 & 4 Orders.

Moreover, IGWA did not even have 68,000 acre-feet available to "commit" to mitigate injury suffered by the Surface Water Coalition due to its obligations for other delivery calls in Water District 130. Both at hearing, and in an affidavit to the Jerome County District Court, Mr. Deeg represented that approximately 27,000 acre-feet was needed to supply to converted acres to satisfy a separate water delivery call. In an attempt to enjoin the Director's administration in 2010, Mr. Deeg represented the following to the District Court:

> 4. I understand the Director has ordered the junior groundwater users to provide him evidence that we have secured 84,300 acre-feet in storage water to mitigate for the predicted shortfall to Twin Falls Canal Company and American Falls Reservoir District No. 2 for the upcoming 2010 irrigation season. This is in addition to the amount of water we need to meet our obligations to Clear Springs which is roughly 27,000 acre-feet bringing the total amount of water IGWA needs to secure for 2010 to 110,000 acre-feet.

Ex. 4010 (*Deeg Affidavit* at 2).

At hearing Mr. Deeg confirmed that 27,000 acre-feet of the water under lease in 2010 was committed to the Spring Users' call:

> Q. [BY MR. FLETCHER]: Okay. And how much do you deem your obligation to be in the spring users call?

A. [BY MR. DEEG]: For 2010 it is 27,000 acre-feet of water.

Tr. Vol. II, p. 275, lns. 9-12.

Q. [BY MR. ARKOOSH]: And what was filed on the 14th was a provision based upon your leases for 68,000 acre-feet; is that correct?

A. [BY MR. DEEG]: Yes.

Q. Okay. And of that 68,000 acre-feet you had to rely on those same leases for the 27,000 obligated to 130, the spring call; is that correct?

A. Yes.

Q. And actually, 10,000 from the Aberdeen-Springfield lease had been delivered for conversions about that time; is that correct?

A. Yes.

* * *

Q. If one removes the 27,000 acre-feet from the 68,000 acre-feet, you have approximately 41,000 acre-feet by May 14th; is that correct?

A. If one elected to do that mathematical calculation, yes, that's correct.

Tr. Vol. II, p. 296, lns. 9-20; p. 297, ln. 23 – p. 298, ln. 2.

The record shows that IGWA did not comply with the terms of the Director's conditional approval in 2010 since it did not acquire sufficient water by ordered deadline and had committed part of its leased water to mitigate for a separate water delivery call. Moreover, it is undisputed that IGWA did not obtain an "irrevocable" supply of water for its mitigation plan. Although the Director conditionally approved IGWA's Plan to meet requirements set forth in his Methodology and Steps 3 & 4 Orders, the record shows the conditions were not met. Even if the approval was for one year only, IGWA failed to meet the deadlines and conditions imposed.

The Director has no authority to make up rules for approving deficient mitigation plans and then not require compliance with his own conditions. Since IGWA did not have sufficient

water to meet the mitigation requirements the Director should have denied IGWA's mitigation plan. The failure to require compliance with his ordered conditions was arbitrary, capricious, and not supported by substantial evidence. The Court should reverse the Director's order.

III. The Director's Conditioned Approval Constitutes an Unlawful "Replacement Water Plan" Previously Struck Down by the Gooding County District Court.

The Director approved IGWA's mitigation plan subject to a number of conditions. R. Vol. II at 283. Rather than review the Plan's terms and approve or deny the Plan accordingly, the Director unilaterally modified the Plan through his conditions. As a result, the Director apparently seeks to "bootstrap" the current approval of IGWA's plan into future years as a means to resurrect a "replacement water plan" concept previously declared unlawful by the District Court.

First, the order states that "IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order." R. Vol. II at 283. In addition, the Director further requires IGWA to "provide proof of rental or an option to rent storage water and of a commitment of the storage water to the SWC within the deadlines provided by the Methodology Order". *Id*. The Plan is facially deficient since it cannot be approved on the basis of its own terms. Rather, the Plan is only approved if IGWA complies with the obligations and deadlines set forth in the Methodology Order (whatever those may be in future irrigation seasons).

The "conditional" approval allows the Director to avoid the necessary procedures under Rule 43 by precluding any future hearings on IGWA's Plan as it pertains to future irrigation seasons, and whether or not the plan actually complies with the Director's requirements at that time. Although the Director followed the CMR and held a hearing on IGWA's Plan as filed, the conditional approval for an indefinite term creates a process similar to the "replacement water plan" concept already struck down by the Honorable John M. Melanson. *See Order on Petition*

for Judicial Review at 30 (*A&B Irr. Dist. et al. v. IDWR et al.*, Gooding County Dist. Ct., 5th Jud. Dist.).

Consequently, the Surface Water Coalition, the senior water right holders, are denied due process and left without any certainty as to the mitigation supplies in future years. Like the failed "replacement water plan" concept, the Director's conditional approval unlawfully forces the Coalition to accept the terms of a plan to be unilaterally determined by the Director in the future. The Director's decision violates Idaho law and should be reversed accordingly.

IV. The Record Does not Support the Conditions Regarding Water Rented by the SWC or Alleged "Waste" and Therefore the Conditions Should be Set Aside.

IGWA identified several of its own "conditions" for mitigation. R. Vol. II at 206-07. No evidence or testimony was provided regarding these "conditions", yet the Director proceeded to review them in his order. R. Vol. II at 279-81. The Director's condition regarding water rented by the SWC was not even at issue in this proceeding and therefore should be set aside. R. Vol. II at 283. In addition, the Director's condition regarding "waste" is not supported by the record in this proceeding and therefore set aside as well. *See Chisholm*, 142 Idaho at 162.

With respect to the alleged "waste" condition, the Director stated he "reserved the right to re-examine measurement of spill." R. Vol. II at 280. The condition is contrary to the Director's prior decision in the context of the Surface Water Coalition delivery call. Following an extensive contested case and administrative hearing concerning, the Director found the Coalition's diversion and water delivery methods to be efficient and reasonable under the CMR. R. Vol. I at 120-21 ("The existing facilities utilized by Surface Water Coalition Members are reasonable. … The evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency"). In fact, "there is no evidence of decayed

or damaged systems that are allowed to continue or practices that cause water to be wasted in transit." *Id*. at 121. There was no evidence of waste by any Coalition member in that proceeding. To the contrary, the Hearing Officer specifically found:

> **3. The members of the Surface Water Coalition are employing reasonable conservation practices.** There is evidence the members of SWC monitor the use of water closely. It is very clear that during the drought period they did not apply the full extent of their water rights throughout the irrigation season. They withheld water and rationed it according to conditions. Had they not used the water reasonably they likely would have suffered catastrophic losses.

Id. at 122-23 (emphasis in original).

These conclusions in the delivery call case were not appealed and are, therefore, final determinations binding on the parties. Importantly, there is no assertion that any of facts supporting these conclusions has changed. There is no claim that the Coalition's conveyance systems are no longer reasonable or that the Coalition is using wasteful practices. Indeed, any "waste" by the Coalition was not even at issue in IGWA's mitigation plan proceeding.

Notwithstanding the lack of any evidence, the Director conditioned the mitigation plan, concluding that "waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member." R. Vol. II at 283. He further concluded that, if, at some future date, it becomes "possible to measure spill at the end of the SWC's conveyance systems," then the Director would "reserve the right to reexamine the measurement of spill." *Id*. at 280.

The issue of potential storage rentals by the SWC is not at issue in this proceeding. Moreover, there is no evidence to support any claim of waste by the Coalition members. Just the opposite, the Director previously determined that the Coalition water delivery systems are reasonable and efficient. Therefore, the Director's conditions regarding storage rentals and waste are not supported by substantial evidence, are arbitrary and capricious, and should be

rejected. *See Galli*, 146 Idaho at 159; *American Lung. Assoc. of Idaho/Nevada*, 142 Idaho at 547.

V. Director Wrongly Approved IGWA's Plan That Contains No Contingencies to Protect the Coalition's Senior Rights.

Rule 43.03.c provides that the "mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." (Emphasis added). The language in the Rule is mandatory. Contrary to the rule's requirement, there is no such contingency provision included in IGWA's mitigation plan. In addition, the Director failed to require IGWA to provide such a contingency. Instead, the Director relies upon curtailment, or water right administration, as the contingency plan. Administration required under Idaho law is not a "contingency" or "back up" plan sufficient to approve a Rule 43 mitigation plan. Rather, a water user causing injury must be curtailed unless there is an approved mitigation plan. IGWA's mitigation plan is an attempt to avoid early season curtailment by relying on uncertain water supplies and "hoping" for the best later. The Director's approval gives IGWA the green light for this process, even though no certain water supply has been provided.

Rule 43's contingency provision assures senior water right holders that mitigation will be provided in the event an applicant's first option fails. In this case, if the lessors terminate their leases with IGWA, or sufficient water is not acquired, there is no "back-up" or contingency plan to prevent injury to the Coalition's senior water rights. The Director cannot approve such a one-dimensional plan under the express requirements of Rule 43. Accordingly, the Director's decision approving IGWA's "storage only" plan is erroneous and should be reversed.

VI. The Use of Storage Water for Mitigation Stands to Further Deplete the Coalition's Water Supplies and Injure Their Senior Water Rights.

In response to the Coalition water delivery call, the Director found that diversions under junior priority ground water rights are causing material injury to the Coalition's senior surface and storage water rights. *See generally* R. Vol. I (containing the administrative orders relating to the Coalition Call); *see also* R. Vol. II at 157 (decision from this Court on judicial review of IDWR's orders). In other words, ground water diversions hinder the ability of the Snake River reservoirs to fill. Ex. 102. In its mitigation plan, however, IGWA proposes, and the Director accepts, the delivery of storage water as the sole option to provide mitigation. R. Vol. II at 274. In other words, even though the storage supplies are already depleted by junior ground water diversions, the Director approved the use of <u>even more</u> storage water for mitigation purposes.

The Rule 43 factors include a consideration of whether or not the mitigation plan will provide replacement water "sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source." Rule 43.03.b. Yet, here, the mitigation plan does not account for the double impact that will result on the storage water supplies, including future reservoir fill. Instead, the Director concluded, without any supporting analysis, that the "rental of storage water by IGWA will not diminish the supply of water available to the SWC." R. Vol. II at 282.

Contrary to this finding, the Coalition's expert, David Shaw, testified at hearing that the use of storage water will "have an impact on water availability out of the reservoir." T. Vol. II, p. 528, lns. 18-25. As to the use of storage water for mitigation, he concluded:

> It affects storage unless the system fills. If the system fills, then everything's full. But, if the system doesn't fill, then additional use of storage reduces carryover.

Id., p. 535, lns. 19-23. Importantly, the Director specifically found that this testimony was relevant to these proceedings. IGWA did not challenge this testimony and failed to present any evidence or testimony to rebut Mr. Shaw's opinion. *See Id.* at 532-35. Yet, the Director did not even analyze the issue in his *Order* approving IGWA's mitigation plan. Instead, the Director concluded that "the Snake River reservoirs fill in many years despite ground water pumping." R. Vol. II at 279. Although storage water may be available for IGWA to acquire, the Director failed to analyze the impact of using storage for mitigation on future water supplies.

The use of storage water for mitigation stands to further deplete the Coalition's water supplies in years when the reservoir system does not fill. This is an increased risk that is borne solely by the Coalition's senior water rights. The law does not allow the Director to shift the risk into the holder of the senior water right in this manner. Further, the Director failed to analyze the effect of using storage as the only mitigation tool on the Coalition's water supplies. Accordingly, the Director's decision is arbitrary and capricious and should be reversed.

VII. The Director's Order Fails to Provide Sufficient Findings of Fact in Violation Idaho Code § 67-5248(1).

In addition to failing pass judicial review under the standards in Idaho's APA, the *Order* also violates I.C. § 67-5248 because of several findings that fail to provide any "reasoned statement in support of the decision." Idaho's APA requires that:

> (1) An order must be in writing and shall include:
>
> (a) A ***reasoned statement in support of the decision***. Findings of fact, if set forth in statutory language, shall be accompanied by a ***concise and explicit statement of the underlying facts*** of record supporting the findings.

I.C. § 67-5248 (emphasis added). In *Mills v. Holliday*, 94 Idaho 17, 19 (1971), the Court reversed an agency decision that did not have sufficient findings of fact.

> ***Absent findings of fact, this Court has nothing upon which to base a determination of whether the conclusions of law of the administrative agency are justified***. The case at bar offers a prime example of this difficulty. We cannot determine from the findings and conclusions of the Department whether the Department found that appellant was fully cognizant of what he was doing when he voiced his refusal to submit to the chemical test for alcohol content of his blood, or found that the voiced refusal was sufficient within the terms of the applicable statute without consideration of the state of consciousness of the appellant. The latter conclusion, of course, is a question of law fully reviewable by this Court. ***It is the general rule that an agency order not supported by findings of fact where such findings are required will be set aside***. That general rule is implemented in Idaho by I.C. § 67-5212, which is drafted in mandatory terms. Were a remand for findings of fact not required, the requirement of that statutory section that a final decision 'shall include findings of fact' would be meaningless.

Id. at 19-20 (emphasis added).

Here, the Court is faced with an agency decision that does not comply with the law. The Director makes several findings without providing any reasoned statements based upon facts in the record.

For example, the Director concludes that he "has sufficient information to evaluate factors set forth in Rule 43.03" and that the "plan contains sufficient information, as augmented by the information presented in the contested case for the delivery call and the hearing on the mitigation plan." R. Vol. II at 276 & 282. Yet, there is no explanation or specific reference to this "information" relied upon by the Director. With respect to data or information in the SWC delivery call record, no such information was presented in the contested case on IGWA's mitigation plan. Indeed, the "contested case for the delivery call" contains over 40 volumes in the agency record none of which was incorporated or offered in the mitigation plan proceeding. Accordingly, without specific findings of fact or reasoned statements in support of his decision, the Director cannot approve IGWA's Plan on the basis of a vague reference to "information" included in a separate agency proceeding.

The Director further states that the "rental of storage by IGWA will not diminish the supply of water available to SWC" but that the "plan will provide replacement water at the time and place required by the senior priority right." R. Vol. II at 283. The Director concludes that "During many years, there will be sufficient storage water to offset the depletive effect of ground water withdrawal on the water available in the Snake River" and that storage is a reliable source of replacement water." *Id*. at 283. These conclusions are not supported by any factual analysis or evidence in the record. There is no citation to the record and it is unclear how the Director reached these conclusions. In fact, the only testimony in the record demonstrates that the use of storage water will likely further deplete the Coalition's storage water supplies in years when the system does not fill. *See supra* at Part VI.

The Director cannot rest his decision on broad and imprecise conclusions without any evidentiary support. Indeed, the Court must have sufficient information "upon which to base a determination of whether the conclusions of law of the administrative agency are justified." *Mills, supra*. Such information is missing in the Director's order.

This Court recently addressed the requirements of section 67-5248, in *A&B Irr. Dist. v. IDWR et al.* (Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2009-647). In that case, A&B argued that the Director's final order violated section 67-5248. The Court, at page 48 of its May 4, 2010 *Memorandum Decision & Order on Petition for Judicial Review*, concluded that the final order complied with the law because it "expressly incorporates" the Director's previous findings of fact and conclusions of law. Here, the Director did not incorporate any findings or conclusions from orders issued in the other proceedings. Moreover, the Director's *Order* does not even attempt to tier to any other decision.

Rather, the order approving IGWA's plan contains several conclusions without any evidentiary support or analysis contained in this record. Accordingly, the *Order* should be reversed.

CONCLUSION

Although IGWA proposed to mitigate injury to the Coalitions' senior water rights, the mitigation plan offered is insufficient and does not meet the criteria of Rule 43. The Director wrongly approved the plan for an indefinite term based upon an uncertain water supply. In addition, the Director failed to require IGWA to comply with the conditions contained in his order. Since the approval is subject to future determinations without hearing, the Coalition is denied due process and the Director has effectively resurrected the "replacement water plan" concept that was previously declared unlawful. In sum, the Director's conditional approval of the plan is arbitrary, capricious, and not supported by substantial evidence. The Court should reverse the Director's decision accordingly.

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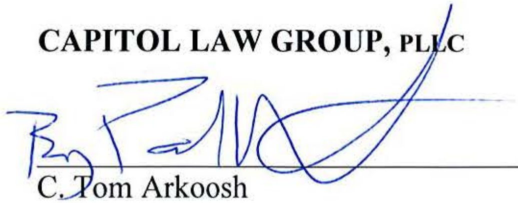
DATED this 25th day of October, 2010.

CAPITOL LAW GROUP, PLLC



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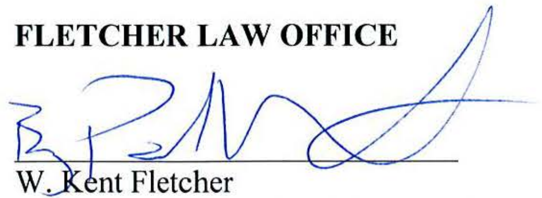

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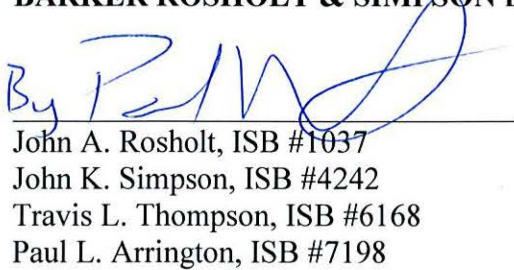

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2010, I served true and correct copies of the *Surface Water Coalition's Opening Brief* upon the following by the method indicated:

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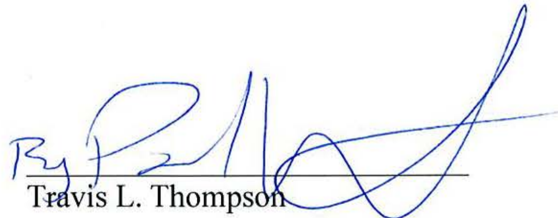

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