

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

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-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. )

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**IDWR RESPONDENTS' BRIEF**

On Appeal from the Idaho Department of Water Resources  
Gary Spackman, Interim Director

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Honorable Eric. J. Wildman, Presiding

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## I. STATEMENT OF THE CASE

The Surface Water Coalition (“SWC”) seeks judicial review of the Director of the Idaho Department of Water Resources’ (“Director” or “Department”) Final Order approving the Idaho Ground Water Appropriators, Inc.’s (“IGWA”) mitigation plan. IDAPA 37.03.11.043 (“CM Rule 43”). The Final Order authorizes IGWA to provide members of the SWC with a volume of storage water to mitigate for material injury found by the Director to reasonable in-season demand and reasonable carryover.

## II. FACTUAL AND PROCEDURAL BACKGROUND

This matter arises from the SWC’s 2005 delivery call in which it sought “administration and curtailment” of junior-priority water rights that pump ground water from the Eastern Snake Plain Aquifer. R. at 1 (“May 2005 Order”). On May 2, 2005, then-Director Karl J. Dreher issued a final order in response to the delivery call. *Id.* The former Director found material injury to certain members of the SWC and authorized IGWA to provide a volume of replacement water to mitigate the material injury. R. at 45-48. In 2008, an extensive administrative hearing was held before hearing officer Gerald F. Schroeder (“Hearing Officer”), which resulted in the issuance of his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (“Recommended Order”). R. at 67. The Recommended Order agreed with the Director’s finding of material injury and approved the use of storage water to mitigate for material injury to members of the SWC. R. at 100-102. The Hearing Officer found, however, that any plan for replacing depletions must go through the procedural requirements of CM Rule 43. R. at 130-132. On September 5, 2008, a final order was entered by then-Director David R. Tuthill, Jr. R. at 140 (“2008 Final Order”). On judicial review of the 2008 Final Order, the Honorable John M.

Melanson agreed with the injury determination and held that the procedural requirements of CM Rule 43 must be followed if junior ground water users were to mitigate for material injury. R. at 183. Judge Melanson remanded the proceeding to the Director for purposes of setting forth his methodology for determining material injury to reasonable in-season demand and reasonable carryover. R. at 189; *see also Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* at 2 (June 23, 2010) (“Methodology Order”).<sup>1</sup>

On November 9, 2009, the Department received IGWA’s *Mitigation Plan for the Surface Water Coalition Delivery Call, Water District 120* (“Plan”). R. at 191. The Plan was filed pursuant to CM Rule 43 and sought the Director’s approval to mitigate for material injury to the SWC: “This Mitigation Plan will fully mitigate and compensate the senior water user for material injury by making [storage] water available for direct delivery of replacement water . . . .” R. at 193-94. In accordance with CM Rule 43.02 and Idaho Code § 42-222, the Plan was published by the Department. R. at 213, 215, 216, and 218. Protests were subsequently filed by the SWC and the United States Bureau of Reclamation (“USBR”). R. at 220, 223.

On May 25-26, 2010, the Director held a hearing on the Methodology Order, its application to the 2010 irrigation season, and the Plan. At hearing on the Plan, the USBR withdrew its protest. R. at 275; Tr. Vol. I, p. 7, lns. 9-25; p. 8, lns. 1-12. During the hearing, evidence and testimony was presented by IGWA and the SWC. Following the hearing, the Director entered a Final Order approving the Plan, subject to conditions. R. at 274.

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<sup>1</sup> On October 15, 2010, the Court granted the SWC’s *Motion to Augment Record* with the Methodology Order and other orders issued by the Director in 2010. The Methodology Order may be found on the Department’s website at [http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2010/06Jun/20100623\\_AmendedFinalOrder.pdf](http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2010/06Jun/20100623_AmendedFinalOrder.pdf).

### III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act (“IAPA”), chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under IAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. “Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.” *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998).

### IV. ARGUMENT

#### 1. The Director Properly Approved the Use of Storage Water as Mitigation

The SWC contends that the Director abused his discretion in approving the use of storage water as mitigation. This extreme position is contrary to the record and in direct contravention to

the full economic development of the State's water resources. Idaho Const. Art. XV, § 7; Idaho Code § 42-226; CM Rule 20.03.

**a. The Record Establishes that Storage Water is an Appropriate and Historically Reliable Source of Mitigation**

The SWC holds a combination of natural flow and storage rights to accomplish the beneficial use of irrigation. R. at 11-16 (May 2005 Order). Above Milner dam, the USBR holds 4,900,000 acre-feet of storage water. R. at 15, ¶ 68. The SWC controls 47% of all storage water in USBR projects, or 2,320,636 acre-feet. R. at 15-16, ¶ 70. "There was an expectation when the reservoirs were built that they would fill approximately two-thirds of the time, and historically they have filled roughly two-thirds of the time." R. at 81 (Recommended Order). Since 1995, space held by the SWC in USBR projects fills, on average, 94 percent of the time. Methodology Order at 24 (Average annual rate of fill by entity: A&B, 83%; AFRD2, 99%; BID, 97%; Milner, 90%; Minidoka 95%; NSCC, 96%; TFCC 95%).

As observed by the Hearing Officer, "IGWA holds no storage rights in the reservoirs managed by the Bureau of Reclamation. Consequently at the present time there is no dedicated body of water IGWA can use for mitigation. It must contract with those holding rights to obtain replacement water in lieu of curtailment." R. at 77. Nevertheless, "During the last prolonged drought period there was water available somewhere at a price." R. at 72.

Clearly, the record supports the Director's conclusion in the Final Order that, "Storage in the Snake River reservoirs is a reliable source of replacement water." R. at 282. Furthermore, there can be no doubt that storage water is an appropriate source of mitigation since Snake River water is a primary source water supply used by the SWC for irrigation.<sup>2</sup>

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<sup>2</sup> In 2007, Twin Falls Canal Company self-mitigated by acquiring 40,000 acre-feet of Snake River storage water. R. at 125.



**b. The Director's Approval of Storage Water is Consistent with the Prior Appropriation Doctrine as Established by Idaho Law**

Seeking to prevent the Director from approving the use of storage water as mitigation, the SWC alleges that “the use of storage water will ‘have an impact on water availability out of the reservoir.’” *SWC Opening Brief* at 21. “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.” *Id.* at 22. The argument is directly counter to Idaho law.

While the SWC may choose not to enter into private storage water agreements with junior ground water users, the SWC may not prevent willing lessors from entering into agreements for storage water with junior ground water users. Because of the last to fill rule in the Water District 01 rental pool,<sup>3</sup> no impact will occur to the SWC’s storage water rights by authorizing ground water users to enter into private lease agreements with third parties. The only risk in this scenario is on the third party whose space becomes last to fill.

If the SWC’s argument were to succeed, it would result in monopolization of the State’s water resources by allowing the SWC to control in excess of 4,900,000 acre-feet of storage water in the Snake River Basin. The SWC would serve as arbiter of the water market, allowing transactions between willing buyers and willing sellers unless the agreement was for mitigation purposes. “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 . . . .” CM Rule 20.03. The argument was considered by the Director and should be rejected by this Court on review. *See R.* at 279 (Final Order) (“the SWC argued

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<sup>3</sup> Additional discussion of the last to fill rule can be found below in Part IV.2.b.

that storage water rented from willing lessors . . . should not be a source of mitigation water . . .”).

The SWC’s argument would also stifle full economic development of the State’s water resources. If the Director were to find material injury under the SWC’s theory, junior ground water rights would be immediately curtailed (either voluntarily or involuntarily) upon a finding of material injury, despite available storage water to mitigate for material injury. Again, this argument was presented to the Director and should be rejected by the Court on review. *See* R. at 279. (“When there is sufficient water in the reservoirs to provide the demand shortfall to the SWC members caused by ground water pumping, the ground water users should not be prohibited from supplying the mitigation water to the SWC from rented storage water.”); R. at 283 (“The mitigation plan will maximize the beneficial use of water in the State of Idaho and promote conservation of water resources. Use of storage water for mitigation is in the public interest and will not injure other water rights.”).

**2. Based on the Nature of IGWA’s Storage Water Leases, the Director Properly Conditioned the Plan to Protect the SWC**

The SWC argues that, due to the transient nature of the private leases held by IGWA and the last to fill rule for private leases in the Water District 01 rental pool, the Director erred in approving the Plan’s use of storage water “for an indefinite term . . .” *SWC Opening Brief* at 6. Understanding the arguments made by the parties in the contested proceeding, the Director imposed reasonable conditions in the Final Order to protect the SWC’s senior water rights.

**a. The Director Properly Approved the Indefinite Use of Storage Water**

As stated above, storage water is historically available and reliable. It was therefore proper for the Director to authorize the indefinite use of storage water to mitigate for material

injury to the SWC. The SWC was provided an opportunity to contest the use of storage water as mitigation during proceedings on the Plan. The SWC's argument was considered by the Director, R. at 278-79, and should be rejected by the Court on review. As will be discussed below in Part IV.4, the Director will review and allow hearing on the specific leases proffered by IGWA in response to a finding of material injury.

**b. The Director Properly Conditioned the Plan and Accounted for the Last to Fill Rule**

While storage water is historically available and reliable, IGWA does not hold storage space or have agreements with storage holders that can be relied upon for more than one year. Ex. 2005 (one year, renewable water rights lease agreements held by IGWA). Until IGWA holds multi-year, irrevocable agreements, the SWC is correct when it states, "The temporary and unknown nature of the leases represents a circumstance[] or limitation[] on the availability of such supplies . . . ." *SWC Opening Brief* at 6 (internal quotations removed).

Recognizing these limitations, the Director imposed reasonable conditions on the Plan in the Final Order to protect the SWC's senior water rights: (1) IGWA's mitigation obligation is defined pursuant to the Methodology Order and its timelines; (2) when the obligations for reasonable in-season demand and reasonable carryover are established, IGWA must provide proof of "fully executed and irrevocable contracts with holders of Snake River storage";<sup>4</sup> and (3) the secured water may not be used by the lessor or lessee for any purpose other than SWC mitigation. R. at 283. If infirmities are discovered or IGWA fails to comply with the terms, "ground water rights . . . will be curtailed . . . to provide water to the SWC." R. at 284 (emphasis

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<sup>4</sup> In some years, due to climatic conditions and the water supply, there will be no forecasted material injury. In those years, there will be no requirement for the Director to examine storage leases held by IGWA. When material injury is predicted, the amount of injury will vary.

added). Therefore, if mitigation water cannot be timely secured, the SWC is protected by priority administration.

A final shortcoming assigned by the SWC is that, “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.” *SWC Opening Brief* at 9. The last to fill rule was testified to at hearing on the Plan. Tr. Vol. II, p. 325, lns. 14-18. The last to fill rule was also discussed by the Hearing Officer in his Recommended Order. R. 101. Again, the Director reasonably conditioned the Plan to require that IGWA provide “fully executed and irrevocable contracts with holders of Snake River storage (fully disclosed in the contracts).” R. at 283 (emphasis added). With this information, the Director can evaluate the priority of the storage rights, the location of the storage rights, the impact of the last to fill rule on the rights, and whether the secured storage water can be made available to the SWC at the time of need. If the Director finds that the proffered water cannot be made available at the time of need, junior ground water rights “will be curtailed.” R. at 284 (emphasis added).

In the absence of mitigation, curtailment is the greatest relief available to the SWC under the prior appropriation doctrine. Because the Methodology Order requires proof that junior ground water users have secured the necessary volume of storage water in April or early May to mitigate for material injury to reasonable in-season demand, *Methodology Order* at 35, and by November or December for reasonable carryover in the subsequent year, *id.* at 37-38, the SWC’s senior rights are protected from out-of-priority diversions. Therefore, the Final Order established reasonable conditions to protect the SWC’s senior water rights and should be affirmed by this Court on review.

### 3. Compliance with the Final Order Occurred in 2010

The SWC argues that the Court should reverse the Final Order because the Director did not comply with its terms in 2010. The SWC first alleges that the Director failed to comply with the Final Order when he did not approve “‘irrevocable’ contracts for storage water.” *SWC Opening Brief* at 12. The SWC opines that junior ground water users must have perpetual agreements in place for the Director to approve their use. The SWC misses the point. Because the secured water may not be used by the lessor or lessee for any purpose other than SWC mitigation, the one year, terminable leases are irrevocable for the season in which they were approved.<sup>5</sup> If a mitigation obligation is predicted in the subsequent year, IGWA must again prove to the Director that it has an irrevocable volume of storage water to mitigate for material injury in that season. Failure to establish this will result in curtailment.

The SWC next argues that the Director did not require IGWA to secure 84,300 acre-feet of storage water to mitigate for material injury during the 2010 irrigation season. This is correct. The Director did, however, require IGWA to prove it had secured the required volume of storage water (56,600 acre-feet) when the mitigation obligation was established.

On April 29, 2010, the Director’s initial prediction of material injury was 84,300 acre-feet. *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* at 2 (“April Forecast Supply Order”).<sup>6</sup> Within 14 days, or by May 13, 2010, IGWA was required to provide proof that it had secured the required volume of water or face full or partial curtailment. *Id.* at 4. On Thursday, May 13, 2010, IGWA provided notice to the Director of its secured water and

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<sup>5</sup> The SWC states, “at least one lessor initially ‘revoked’ the storage water supply previously pledged to IGWA.” *SWC Opening Brief* at 12. While the renewable lease was initially cancelled, New Sweden later agreed to lease water to IGWA. Tr. Vol. II, p. 134 lns. 20-25; p. 135, lns. 1-8.

<sup>6</sup> On October 15, 2010, the Court granted the SWC’s *Motion to Augment Record* with the April Forecast Supply Order. The April Forecast Supply Order may be found on the Department’s website at: [http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2010/06Jun/20100624\\_Final-Order.pdf](http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2010/06Jun/20100624_Final-Order.pdf).

sought a stay of the obligation until the hearing on its Plan was completed in late May. *Id.* On Friday, May 14, 2010, the Director informed IGWA that its filing was deficient because IGWA “did not state how much of [its] secured water was pledged to the SWC delivery call. Nor did the Notice include contracts, agreements, or options for the Director to evaluate the secured water.” *Id.* The Director informed IGWA on May 14, 2010 that it would have until the end of the May 14<sup>th</sup> business day “to provide the requested information.” *Id.* On May 14, 2010, IGWA provided the requested information to the Director and pledged 53,000 acre-feet to the SWC delivery call. *Id.*

On Monday, May 17, 2010, the Director accepted IGWA’s pledge of 53,000 acre-feet to the SWC delivery call. *Order Regarding IGWA Mitigation Obligation* at 6, ¶ 6 (“Mitigation Obligation Order”).<sup>7</sup> In addition, the Director revised the mitigation obligation from 84,300 acre-feet to 68,400 acre-feet to account for actual diversions by American Falls Reservoir District No. 2 (“AFRD2”) that exceeded predicted diversions. *Id.* at 3. Because IGWA had not secured the required volume of storage water, the Director informed IGWA that ground water rights junior to April 12, 1994 would be curtailed to meet the shortfall. *Id.* at 5. The Director, however, stayed curtailment pending the outcome of the hearings on the Methodology Order, April Forecast Supply Order, and the Plan. *Id.* at 7 (“The Director agrees with the reasoning articulated by the Honorable John M. Melanson in his June 19, 2009 *Order on Petition for Judicial Review* (Case No. 2008-444) regarding the procedure to follow when a finding of material injury has been made and a mitigation plan has been filed. The Director will therefore stay curtailment pending the outcome of proceedings on IGWA’s mitigation plan.”).

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<sup>7</sup> On October 15, 2010, the Court granted the SWC’s *Motion to Augment Record* with the Mitigation Obligation Order. The Mitigation Obligation Order may be found on the Department’s website at: [http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2010/05May/20100517\\_Order.pdf](http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2010/05May/20100517_Order.pdf).

Additional diversions by AFRD2 during the pendency of the hearings resulted in the Director revising the mitigation obligation from 68,400 acre-feet to 56,600 acre-feet. *April Forecast Supply Order* at 9. At that time, the only entity predicted to experience material injury was the Twin Falls Canal Company.<sup>8</sup> *Id.* The record establishes that, at the time of hearing, IGWA had 77,000 acre-feet of storage water secured in 2010 for its mitigation obligations. *Tr. Vol. II*, p. 258, Ins. 1-2.<sup>9</sup> Upon review of the evidence and testimony at the hearings, the Director ordered that 57,000 acre-feet of specific storage leases would be “dedicated solely for mitigation to the SWC . . . .” *April Forecast Supply Order* at 10. The Director further ordered “that the Watermaster for Water District 01 shall not deliver water rented under the . . . contracts to any entity other than the SWC, including the lessor, until further notice by the Director.” *Id.* at 10. As a result, the required volume of water was dedicated to the SWC for the 2010 irrigation season to mitigate for predicted injury. As will be explained below, the Final Order provides an orderly process moving forward to ensure the SWC that the required volume of storage water will be secured by late April or early May; if not, junior ground water users will be curtailed to make up any difference.

#### **4. The Director Complied with CM Rule 43 and Idaho Code § 42-222**

As stated above in the Factual and Procedural Background, IGWA filed its Plan in accordance with CM Rule 43. The Plan was published and protested as provided by CM Rule 43.02 and Idaho Code § 42-222. The parties were provided an opportunity to be heard and an opportunity for reconsideration after the Final Order was issued. While the SWC disagrees with

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<sup>8</sup> The Director initially predicted that AFRD2 would receive 1,256 acre-feet in natural flow and would have a total shortfall of 27,400 acre-feet. *April Forecast Supply Order* at 2. “Due to the cool and wet spring,” and during the pendency of the proceeding, AFRD2 received natural flow in excess of the Director’s initial projection and was no longer materially injured. *Id.* at 5.

<sup>9</sup> “On June 4, 2010, IGWA supplemented the lease summaries presented at hearing, adding another 5,000 acre-feet, for a total of 82,000 acre-feet leased for 2010.” *April Forecast Supply Order* at 7.

the conditions imposed by the Director, it cannot argue that the Director failed to follow the requirements of CM Rule 43.02 and Idaho Code § 42-222. The Court should therefore affirm the Director's compliance with Idaho law.

The SWC also argues incorrectly that the Final Order “allows the Director to avoid the necessary procedures under Rule 43 by precluding any future hearing 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.” *SWC Opening Brief* at 17. As stated previously, the Director stayed IGWA’s mitigation obligation during the pendency of the hearing on the Plan. However, in the Final Order, the Director stated as follows:

IT IS FURTHER ORDERED that IGWA’s obligation for mitigation shall be determined as set forth in the Methodology Order. When the obligations . . . are established, the determination of obligation shall be subject to a hearing but the obligation will not be stayed during the pendency of hearing preparation and response by the Director to the request for hearing.

IT IS FURTHER ORDERED that, if IGWA does not provide proof of acquisition of storage water and commitment of storage water as set forth above, ground water rights pumping from the Eastern Snake Plain Aquifer will be curtailed . . . to provide water to the SWC.

R. at 284-84 (emphasis added).

Clearly, the Final Order provides for a hearing on storage supplies proffered by IGWA in order to ensure compliance. If sufficient water is not secured, the Director will curtail junior ground water rights “to provide water to the SWC.” *Id.* Moreover, now that a hearing on the Plan has occurred, the Director will not stay the mitigation requirement. Junior ground water users will therefore be required to demonstrate, as set forth in the Final Order, that they have secured the necessary volume of storage water. The SWC will be able to contest the proffered storage, but that election will not delay the process.



**5. The Director Properly Conditioned the Plan to Account for Water Rented by the SWC and Waste**

The SWC argues the Director improperly imposed conditions that would reduce IGWA's mitigation obligation if the SWC rents storage water, or if waste occurs. Each condition is based on the record and supported by the prior appropriation doctrine as established by Idaho law.

In the Final Order, the Director examined and rejected numerous conditions advanced by IGWA. R. at 279-81. The Director did, however, conclude that water rented or used for flow augmentation by the SWC "will be subtracted from the storage water mitigation requirement for the SWC member." R. at 283. This conclusion follows the reasoning of the Hearing Officer in his Recommended Order, which was not disturbed by Judge Melanson. R. at 127, ¶ 9 ("The 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. If the water is sold to another irrigator who has priority over the ground water users and is applied to a beneficial purpose within the licensed or adjudicated right, the ground water users would be liable for remediation to one surface water holder or the other if the necessity for rental arose out of ground water depletions.").

The Director also stated, "Waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member." R. at 283. The SWC is correct that the Recommended Order found the SWC's water use and diversions were reasonable. Conditions, however, may change. "Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. This is a continuing obligation." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (emphasis added). Wasting of water is not permitted in Idaho. *Id.* If it is determined in the future that waste is occurring, it would not be lawful for the Director to order junior ground water users to

replace water that has been wasted. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007) (“priority over water be extended only to those using the water.”); *Knutson v. Huggins*, 62 Idaho 662, 663, 115 P.2d 421, 424 (1941) (“At such times as an appropriator is not using the water under his appropriation, and is not applying the water to a beneficial use, such water must be considered and treated as unappropriated public water of the state, and for such period of time is subject to appropriation and use by others.”).

**6. The Director’s Approval of the Plan is Contingent upon Early Acquisition of Storage Water to Mitigate for Material Injury**

The SWC argues that the Director erred by approving the Plan without contingencies as required by CM Rule 43.03.c. CM Rule 43.03 provides as follows:

**03. Factors to Be Considered.** Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

...

c. Whether the mitigation plan provides for replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. 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.

In the 2008 Final Order, former Director Tuthill adopted, what Judge Melanson referred to as, a “wait and see approach” to mitigation. R. 175. Because junior ground water users were not required to provide early assurances that storage water was secured for mitigation, Judge

Melanson found that the 2008 Final Order failed to comply with the contingency requirement in CM Rule 43.03.c. R. at 176. Judge Melanson concluded that allowing junior ground water users to divert out-of-priority without a secured volume of storage water shifted the risk to the SWC in the event that storage water could not be obtained. *Id.*

Here, junior ground water users are required to: (1) provide the Director with proof by April or early May of a secured volume of storage if material injury is predicted to reasonable in-season demand; and (2) provide the Director with proof of a secured volume of storage water in November or December if material injury to predicted to reasonable carryover in the subsequent year. R. at 283 (Final Order); *Methodology Order* at 35 (Steps 3 & 4), 37-38 (Step 9). These early requirements assure the SWC that storage water has been secured or timely curtailment will result; thus, the SWC is assured protection “in the event” storage water “becomes unavailable.” CM Rule 43.03.c. Because water must be secured early, curtailment is a proper contingency, R. at 282, and this Court should affirm the Final Order.

#### **7. The Final Order Complies with Idaho Code § 67-5248(1)**

As its last argument, the SWC asserts that the Final Order should be reversed because it does not comply with Idaho Code § 67-5248(1). Idaho Code § 67-5248(1)(a) requires a “reasoned statement in support of the decision. Findings of fact . . . shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.” In support of its position, the SWC cites the Court to *Mills v. Holliday*, 94 Idaho 17, 480 P.2d 611 (1971).

In *Mills*, the Idaho Supreme Court was asked to review a single finding made by the Department of Law Enforcement that resulted in suspension of a driver’s license. The finding stated in full that, “Pursuant to Section 49-352, Idaho Code, you have refused to take a chemical

test of your breath or blood, to determine the alcoholic content to your blood.” *Mills* at 19, 480 P.2d at 613. A year earlier, the Supreme Court reviewed a substantially similar finding made by the Department of Law Enforcement, holding it “was not a finding of fact at all, but rather a conclusion of law.” *Id.* citing *Mills v. Swanson*, 93 Idaho 279, 460 P.2d 704, 705 (1969). Consistent with its previous decision, the Court held that the Department of Law Enforcement failed to make any findings, thereby violating the equivalent of Idaho Code § 67-5248(1). *Id.* The Court remanded the case to the agency “to make specific findings of fact and conclusions of law as provided by statute.” *Mills* at 19, 480 P.2d at 613.

Unlike *Mills*, the eleven-page Final Order contains numerous factual findings and reasoned conclusions. R. at 274-84. Additionally, the Final Order specifically references the May 2005 Order, the Recommended Order, the 2008 Final Order, Judge Melanson’s decision on judicial review in CV-2008-551, and the Methodology Order. *Id.* Each party to this proceeding has been involved in these actions. As required by Idaho Code § 67-5248(2), all findings are supported by the record in this proceeding, as augmented by the SWC.<sup>10</sup> Therefore, there is no basis for the SWC to assert that the Final Order does not comply with Idaho Code § 67-5248(1) or is akin to *Mills*.

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<sup>10</sup> The augmented record includes the Methodology Order, the April Forecast Supply Order, the Mitigation Obligation Order, and the transcripts from the Methodology and April Forecast Supply hearings.


## V. CONCLUSION

In this case, the Final Order approving the Plan was consistent with constitutional and statutory provisions, was supported by the record, was made upon lawful procedure, and was within the Director's discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order. Idaho Code § 67-5279(3).

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of November, 2010.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 19<sup>th</sup> day of November, 2010.

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