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, 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.	**CASE NO. CV-2010-3075**

SURFACE WATER COALITION'S JOINT REPLY BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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INTRODUCTION

In responding to the Surface Water Coalition's *Opening Brief*, the Idaho Department of Water Resources ("IDWR") and Idaho Ground Water Appropriators, Inc. ("IGWA") fail to justify the Director's arbitrary and capricious actions. Rather than approve a detailed and acceptable mitigation plan required under the Conjunctive Management Rules (CM Rule 43), the Director wrongly approved a "concept" only, i.e. the use of storage water for mitigation. Contrary to the Respondents' theories, the Director's approval of a "concept," tiered to future administrative processes, does not satisfy Idaho's APA and CM Rule 43. Since the record in this case does not support the Director's approval of an indefinite and undefined mitigation plan, the Court should reverse and set aside the Final Order.

The Coalition's appeal does not seek prohibition of the use of storage water for mitigation in all cases, or curtailment as the only alternative. The Coalition seeks exactly what the Director promised: "The SWC must have an assurance at the beginning of the irrigation season that water can be provided when the water is needed." R. Vol. II at 279. Notwithstanding the Director's promise, here the Director wrongly approved an undefined and indefinite mitigation plan that does not meet the criteria of CM Rule 43. It is undisputed that IGWA's leases do not provide a secure water supply since the lessors can unilaterally terminate and/or reduce the leases. In fact, the quantity of leased water can even be unilaterally reduced after the deadline for supplying the leases to the IDWR at the beginning of the irrigation season. The Respondents ask the Court to overlook these critical details in favor of a "wait and see" approach that can be cured by future administrative processes. That is not the standard for judicial review of agency action in Idaho.

IDWR responds to the Coalition's appeal by arguing that there will be a new hearing every year to determine whether the storage that IGWA may (or may not) provide will actually mitigate the anticipated material injury that year. Yet, such a promise for future hearings – at great cost of time and money to all parties and IDWR – does not validate the otherwise unlawful mitigation plan that was approved in this case. Moreover, the promise of future administrative processes makes the Coalition's point on appeal, the Director's order approves a "concept," not a detailed mitigation plan that meets the criteria of CM Rule 43.

In sum, the Director arbitrarily approved an undefined and indefinite mitigation plan. The record further shows IGWA did not comply with the Director's ordered conditions in 2010. Therefore, the Court should reverse and set aside the Director's Final Order in this case.

ARGUMENT

The issue in this case is the acceptability of IGWA's mitigation plan under CM Rule 43. In order to give meaning to the CM Rules the Director must evaluate mitigation plans against the stated criteria and provide a reasoned analysis to support his decision. The Director failed to do either in this case.

The Director cannot refuse to follow the CM Rules and tier approval of a mitigation plan to future findings and undetermined administrative processes. Such an argument avoids meaningful judicial review and throws the parties into a state of continued litigation. Moreover, the Director's discretion cannot be used as a shield to hide behind a decision that is not supported by the law or evidence in the record. *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"). Accordingly, the Court should reverse and set aside the Director's Final Order.

I. Both IDWR and IGWA Misconstrue the Coalition's Argument.

Much of IDWR's and IGWA's responses address a "strawman" argument that the Coalition did not make. IDWR accuses the Coalition of "seeking to prevent the Director from approving the use of storage water as mitigation." *IDWR Br.* at 5. IDWR claims that the "SWC contends that the Director abused his discretion in approving the use of storage water as mitigation." *Id.* at 3. Without any support, IDWR further accuses the Coalition of trying to "prevent willing lessors from entering into agreements for storage water with junior ground water users." *Id.* at 5. Finally, IDWR argues that this "extreme position" "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," and would transform the SWC into the "arbiter of the water market." *Id.* at 3, 5.[1]

IGWA asserts that this is "precisely" the Coalition's "position in this appeal." *IGWA Br.* at 15. Without referencing any facts in support, IGWA argues the "real goal of the SWC is to force curtailment rather than allow mitigation." *Id.* at 16. IGWA concludes that:

> Without the ability to utilize storage water for mitigation, IGWA will be without any ability to mitigate material injury not only to the SWC, but to others as well. There will be no source of supply for recharge or conversions. All of IGWA's mitigation activities will be jeopardized and widespread curtailment will be the only answer.

Id. at 16.

[1] To further their misstatement of the Coalition's position on appeal, IDWR claims that the Director "considered" and "rejected" the argument that storage water cannot be used as mitigation. *IDWR Br.* at 5. This incorrect conclusion is based on a truncated quotation from the *Final Order*. *Id.* at 5-6. In its entirety, the selected provision of the *Final Order* provides:

> In contrast, the SWC argued that storage water rented from willing lessors through the Idaho Water Resources Board's Upper Snake River Rental Pool should not be a source of mitigation water for IGWA because IGWA is proposing to use the same source of water for mitigation that ground water pumping is depleting, causing a double negative impact to surface water supplies. (R. Vol. II at 279).

In other words, the Coalition objects to the approval of a mitigation plan that will further exhaust the storage water resource already being depleted by ground water withdrawals. This matter was discussed in the Coalition's *Opening Brief*, at Part VI, and is further discussed herein, *infra* at Part II.B.

These arguments are surprising since the Coalition made its point clear during the hearing that it is *not* the position of the Coalition that storage cannot be used for mitigation in any circumstance. Tr. P. 574 at 7-13. Indeed, this appeal is not a challenge to the "concept" of the use of storage water for mitigation. Rather, it is a challenge to the Director's approval of a CM Rule 43 mitigation plan: (i) without a defined term, (ii) without a secure water supply, (iii) without contingencies to protect the senior rights should IGWA fail to comply with the terms of the mitigation plan or should the storage water prove inadequate to mitigate for the material injury, and finally, (iv) without considering and accounting for the additional depletions that will result to the Coalition's water supplies due to the perpetual use of storage water as the sole mitigation action. Each of these issues was discussed in the Coalition's *Opening Brief*.[2] IDWR's and IGWA's attempt to convert this appeal into something that it is not should be rejected.

II. The Director's Approval of IGWA's Mitigation Plan is Arbitrary and Capricious.

This Court has been asked to review whether or not the Director's approval of IGWA's mitigation plan complies with Idaho law. Through his approval of IGWA's mitigation plan, the Director has determined that only the "concept" of using storage water for mitigation is acceptable and can substitute for the required criteria and analysis set forth in CM Rule 43. However, the approved mitigation plan has no defined term. It has no defined water supply. Further, the Director failed to give any meaningful consideration to the Coalition's concerns about "double impacts" on its storage water supplies. In the end, the Director relies upon future administrative hearings to cure the lack of details and analysis that is noticeably absent from

[2] In light of the real issues before the Court, the Director's discussion of the historical reliability of storage to support it conclusion that storage can be used as mitigation is not relevant to these proceedings. *IDRW Br.* at 4. The alleged reliability of storage supplies "in general," does not validate the Director's arbitrary and capricious actions and failure to provide any analysis as to the details of IGWA's mitigation plan and its sources of mitigation water.

IGWA's mitigation plan and the Final Order. Such an action is arbitrary and capricious under Idaho law.

A. Approval of the Plan with an Indefinite Term and Indefinite Water Supply was Arbitrary and Capricious.

IDWR's only response to the Coalition's concerns over the indefinite period is that, since the Director "considered" the argument, it should be rejected by the Court. *IDWR Br.* at 6-7. Yet, the cited provisions of the *Final Order* do not address the Coalition's concerns over an indefinite term or an indefinite water supply. *See* R. at 278-79. IGWA admits that the approved mitigation plan only confirms that IGWA can use "storage water to mitigate injury." *IGWA Br.* at 10. Yet, as stated above, that matter was not the issue before the Director or this Court on appeal. The Conjunctive Management Rules do not allow applicants to simply file skeleton "concept only" mitigation plans, have those plans approved, and then fill in the details later at some future date. Yet, that is exactly the position IDWR and IGWA advocate in this case.

IGWA further admits that the Mitigation Plan fails to provide a definite term or water supply. *IGWA Br.* at 10. In fact, the leases can be terminated at will by the lessors. Ex. 7. IGWA asserts that, since any termination must take place on or before April 15, 2010, there is no risk to the Coalition. *IGWA Br.* at 10. ("since the leases must be submitted annually, and cannot be terminated after April 15th, the fact that a lease may be terminated before the next irrigation season poses no risk to the SWC").

Yet, the agreements demonstrate that there is no security in the water supply at that time. In fact, while the leases provide for the storage of as much as 68,000 acre-feet, they allow the lessors to unilaterally reduce that amount. Exs. 7 & 8. Importantly, a majority of the leases allow the lessor to reduce the lease amount at any time up until May 15, Ex. 7 – more than two weeks after the May 1st deadline established in the Director's methodology order. *See*

Methodology Order at 34. In other words, even though IGWA is required to provide assurance of "a volume of storage water" sufficient for mitigation by "May 1, or within fourteen (14) days from issuance of the" order addressing steps 3 and 4, *id.*, the leases allow for the unilateral reduction in quantity up to 15 days later, Ex. 7. IGWA wholly ignores the express terms of its leases and the Director never addressed this issue in his review of the mitigation plan. Clearly, there is no security in the water supply if the leases are meant to support approval of a plan beyond one year (in this case 2010).

Notwithstanding the lessor's ability to unilaterally reduce the storage amount as late as May 15, IGWA contends that the water supply is secure. *IGWA Br.* at 11-12. In fact, IGWA claims that it had even more water available based on ongoing "negotiations" for 30,000 acre-feet and applications to "lease 50,000 acre-feet." *Id.* Importantly, neither of the later sources of water was secured prior to the required deadline. IGWA cannot justify a failure to comply with the Director's ordered conditions with "after-the-fact" theories or alleged "negotiations." The facts in the record are undisputed, IGWA did not acquire 84,300 acre-feet by the May 13, 2010 deadline set forth in the Director's order.

Despite the lack of details in its mitigation plan, and its failure to comply with the Director's ordered conditions, IGWA claims that the Director may approve indefinite mitigation plans pursuant to Idaho's Ground Water Act (I.C. § 42-237A(g)). IGWA misreads the statute and wrongly relies upon a provision that does not address mitigation plans under the conjunctive management rules. The statute allows the Director to authorize groundwater "withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria: A "program exists or likely will exist ***which will increase recharge or decrease withdrawals*** within a time period acceptable to

the director to bring withdrawals into balance with recharge." I.C. § 42-237A(g) (emphasis added). IGWA conveniently deletes the emphasized phrase from its quotation and ignores the context of the authority, i.e. approving a general plan when groundwater withdrawals exceed the anticipated rate of future natural recharge, not a mitigation plan to address injury to specific senior surface water rights. Despite IGWA's claim, nothing in the mitigation plan is designed to "increase recharge or decrease withdrawals" from the aquifer. Just the opposite, under its "plan," IGWA would continue to deplete the aquifer under its junior priority ground water rights even though the plan does not provide any assurance of mitigation water or identify any reduction in groundwater withdrawal from the aquifer. As such, section 42-237A(g) does not apply and does not support the Director's arbitrary actions in this case.

IDWR admits that IGWA did not comply with the Director's order in this case. *IDWR Br.* at 9. Yet, IDWR attempts to justify IGWA's non-compliance because the Director revised the mitigation obligation "after-the-fact" on May 17, 2010.[3] *Id.* at 10. Even at that point, IGWA did not have sufficient storage water to meet the Director's requirement. Nonetheless, the Director stayed curtailment "pending the outcome of the hearings." *Id.* The record shows that IGWA did not comply with the ordered conditions and the Director used the "administrative process" as a reason to avoid curtailment and allow IGWA an additional month to secure water that it did not have at the time the Director required compliance with his order. In reality, the Director's so-called "conditions" were only "voluntary" in this case.[4]

[3] The Director did not comply with his "Methodology Order" in revising IGWA's mitigation obligation on May 17, 2010. Changing the process "after-the-fact" is no legal justification for not requiring compliance with order as stated. Despite this non-compliance, IDWR argues that it will be followed in the future. The record in this case does not support IDWR's position.

[4] IDWR's promise that "now that a hearing on the Plan has occurred, the Director will not stay the mitigation requirement" is little solace to the Coalition based upon the experiences of the past five years. Moreover, the promise to ensure compliance with the ordered conditions in the future does not justify the Director's arbitrary actions in this case.

In summary, the record demonstrates that, as of May 13, 2010, when IGWA was required to provide assurances of a secured supply of water, there was only a certainty of 27,500 acre-feet (plus approximately 5,000 acre-feet from palisades Water Users, Tr. 259) – far less than the 84,300 acre feet required to be available by the Director. Accordingly, the Director's approval of the plan, despite non-compliance with his own ordered conditions, was arbitrary and capricious.

B. The Director Failed to Adequately Consider the Double Impacts on the Reservoir System and the Last to Fill Rule.

The Coalition is concerned that using storage water as the sole supply of mitigation water will result in a "double impact" to the water supply. Both IDWR and IGWA dismiss this argument with no justified response. IGWA asserts that any risk is born wholly by the lessor – not the Coalition. *IGWA Br.* at 15. This is wrong.

During the hearing, David Shaw, an engineer with ERO Resources, testified that water released from the reservoir for mitigation will increase the impact of depletions on the water supply. T. Vol II at 528, lns. 18-25. Importantly, no evidence was submitted to contradict this testimony. IGWA did not provide any information to contradict these findings. Yet, the Director rejected this argument without any discussion or analysis in the Final Order. R. Vol. II at 282. Similarly, IDWR wholly ignored the argument in its response brief. This is not a matter, therefore, "where conflicting evidence is presented" and the Director's decision "is supported by substantial and competent evidence." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727 (1998) (quoted by *IDWR Br.* at 3). Indeed, no conflicting evidence was ever presented and the Director did not identify any evidence in the record to support his position.

The evidence is clear, in years that the system does not fill the use of storage water for mitigation stands to further deplete the Coalition's water supplies. IGWA implies, without any support in the record, that a "spaceholder leasing storage water to IGWA instead of using it

himself has no bearing on the use of storage by the SWC." *IGWA Br.* at 15. Contrary to IGWA's position, such water is only leased by spaceholders who would otherwise not use the water (therefore leaving it in the reservoir to assist with the carryover and fill on the entire reservoir for the next storage season). The point is that if the use of storage water for mitigation reduces carryover in the reservoir system as a whole, and further impacts future refill of the SWC's storage water rights, then the impact of junior priority groundwater use will be exacerbated.

Likewise, the Director's failure to consider the last to fill rule is arbitrary and capricious. The Director alleges that he accounted for this last to fill rule by requiring "fully executed and irrevocable contracts with holders of Snake River storage." *IDWR Br.* at 8. IDWR proposes to undertake a "future" review on an annual basis so that 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." *Id.* That is exactly the type of analysis required for IGWA's mitigation plan that the Director failed to undertake in this case.

If the plan is a "one" year plan, then the information provided for 2010 could have be judged accordingly. However, by not defining the term, the Director cannot "pre-approve" IGWA's plan for future years without having the necessary information he needs for a proper analysis as to the availability of the storage water pledged by IGWA in the mitigation plan. Based upon the plan as filed, and the express terms of the leases, there is no information to support what water IGWA has available for 2011 or beyond.

Moreover, as discussed above, IGWA's present leases allowed the reduction of storage after the deadline and they fail to identify which storage water each lessor is making available.

Ex. 7. Indeed, there is nothing in the leases or the Director's Final Order that would prevent a lessor from using its "last to fill" space to satisfy its obligations under the leases and in the event the reservoir system does not fill provide a reduced amount of water to IGWA. As such, the claim that the Director's argument that he will perform some "future" review will not protect the Coalition's senior water rights, particularly if that water is not available the following season under a "last to fill" requirement.

IDWR also states that "[b]ecause of the last to fill rule in the Water District 01 rental pool, 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." *IDWR Br.* at 5. Apparently, IDWR is now using the last to fill rule as a condition to approve IGWA's mitigation plan, yet no condition to that effect was included in the Director's Final Order. Moreover, IDWR does not address what happens to IGWA's mitigation plan in the event the last to fill rule is changed by the local advisory committee for the Water District 01 rental pool, as is advocated by one of IGWA's lessors. *See* Attachment A. Accordingly, the Director's finding that "rental of storage water by IGWA will not diminish the supply of water available to SWC" does not state whether that finding is predicated upon the current Water District 01 rental pool rules continuing the "last to fill" provision or not.

In sum, the Director arbitrarily approved the mitigation plan without sufficient analysis concerning the limitations on the storage water offered in IGWA's mitigation plan.

C. The Record Shows that IGWA Did Not Satisfy the Director's Conditional Approval in 2010.

Both IDWR and IGWA claim that IGWA complied with the Director's order in 2010. *IDWR Br.* at 9-11; *IGWA Br.* at 21-23. This argument is not supported by the record. First, the Director required "irrevocable contracts" by a date certain. R. Vol. II at 283. Yet, as discussed

above, the contracts can be unilaterally terminated and/or reduced by the lessor. IDWR now offers the interpretation that the Director's use of the term "irrevocable" means "irrevocable for the season in which they were approved." *IDWR Br.* at 9. Admittedly, IGWA's leases cannot be approved for future years because IDWR does not know whether they will be revoked or not. That is the very point of the Coalition's appeal and the problem with the Director's final approval of a Mitigation Plan that cannot survive beyond this year.

IGWA claims that, since the leases cannot be terminated after April 15, there is no risk to the Coalition. *IGWA Br.* at 10. Yet, this argument ignores the fact that the lessors can unilaterally reduce the leased quantity of water after the deadline for submitting the so-called irrevocable has passed. *Supra.* Both IDWR and IGWA disregard this limitation on the offered mitigation water.

Furthermore, IGWA relied on water still being negotiated and applied for – not irrevocably committed – to meet its mitigation obligations as of May 13, 2010. *IGWA Br.* at 13. Such "negotiations" and "applications" cannot be considered an "irrevocable" supply of water, particularly since there was no evidence of that water being available by the date ordered by the Director in this case. It is undisputed that IGWA could not show evidence of sufficient water to meet the mitigation obligations pursuant to the deadline set in the Director's order. *Opening Br.* at 14-16 (quoting testimony from Mr. Deeg that IGWA did not have a sufficient supply of water for its mitigation obligations). IGWA's only response is that it was placed in a "precarious situation" in early 2010 to supply more mitigation water than it anticipated and that it had acquired additional water "by the time the hearing was held" at the end of May.[5] *Id.* at 12-13.

[5] IGWA wrongly insinuates that it did not have notice of the Director's intended application of the Methodology Order until April 29, 2010 when the "As Applied Order" was issued. On April 14, 2010, the Director sent the parties a letter identifying the required mitigation obligations. *See* Attachment B. Accordingly, IGWA had a month to obtain the necessary amount of mitigation water to meet the May 13, 2010 ordered deadline, which it failed to do.

Despite the non-compliance, the Director wrongly approved the mitigation plan based upon "after-the-fact" reasons and changed circumstances leading up to the hearing on the mitigation plan. *See IDWR Br.* at 10-11. The lack of ordered compliance in 2010 will apparently be cured by "an orderly process moving forward." However, a promise of a better tomorrow does not justify the Director's errors in this case.

Likewise, contrary to the Respondents' arguments, IGWA did not commit the leases for mitigation to the Coalition. In its brief, IGWA argues that the delivery of storage provides timely relief when the Water District 01 procedures are followed. *IGWA Br.* at 17-18. They quote the Water District 01 watermaster as assuring that mitigation will be timely "if we have the lease in hand and along with the proper fees." *Id.* Despite this claim, no storage water was ever assigned to the Water District for the "sole" purpose to provide mitigation to the SWC. Without a secure supply of water that is committed for mitigation to the Coalition early in the irrigation season, it is impossible to demonstrate compliance with the Director's ordered conditions.

D. The Director's Conditions are Unsupported by the Record.

There is nothing in the record to support a conclusion that the Coalition is wasting water. Indeed, the record plainly shows that the Coalition's "exhibit facilities ... are reasonable." R. Vol. I at 120-23. IGWA twists the Coalition's arguments and accuses the Coalition of arguing that it "should be free to waste water or lease their storage water to others and then pass the bill onto IGWA for reimbursement." *IGWA Br.* at 20. Not true.

The Coalition does not advocate it can "waste" water. Rather, the Coalition objects to the Director's unilateral condition on issues not presented at the hearing on the mitigation plan, and which is contrary to the underlying record in the delivery call case. Although a water user is not allowed to "waste" water, there is no basis to condition a mitigation plan and reduce future

mitigation obligations on a present finding that the Coalition's practices "may" be wasteful based upon some undefined determination and process in the future. That is the point of the Coalition's appeal on this condition. The Director's limitation does not appear to be a matter of reciting the law, as IDWR and IGWA suggest. *IDWR Br.* at 13-14; *IGWA Br.* at 20. Rather, it is an attempt to circumvent the undisputed findings in this matter and allow the Director to unilaterally change those findings without any process or evidence at a later date. If the Director reduces a mitigation obligation in the future on the theory of "waste" by the Coalition, there must be some evidence or future process to support that finding, not simply a reference to this "condition" in this order approving IGWA's mitigation plan.

Since there is no evidence of waste by the Coalition, *supra*, there is no basis for such a condition on IGWA's mitigation plan. If the Director believes the Coalition is wasting water at some future date, and proposes to reduce IGWA's mitigation obligation on that basis, the issues should be taken up through the appropriate process at that time, not simply by reference to a condition in an order approving the present mitigation plan.

E. The Director Failed to include Contingencies to Protect the Coalition.

The CM Rules require "contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." CM Rule 43.03.c. Administration under Rule 40, or curtailment of out-of-priority water rights, is not a "contingency" to back up approval of a mitigation plan. IDWR argues that "early assurances" and curtailment satisfy this requirement. *IDWR Br.* at 15. IGWA misapprehends the argument by accusing the Coalition of seeking "mitigation from two sources, or twice the amount of mitigation" – i.e. "double mitigation." *IGWA Br.* at 13-14. These arguments do not justify the Director's actions.

First, as discussed above, the "early assurances" in this case are hollow because the lessors can unilaterally reduce the quantity of leased water after they leases are required to be provided to IDWR. Ex. 7. In times of shortage – when the Coalition's injury in enhanced – there is an increased likelihood of reductions under the leases as witnessed in the record in this case when one of IGWA's lessors revoked its lease based upon poor water supply conditions predicted in early April 2010. IGWA assures that it can enter subsequent leases if there is insufficient water or make application to the rental pool. *IGWA Br.* at 14. An undefined lease and a hope of renting water from the rental pool are not approvable contingencies.[6] Moreover, such leases, assuming they are ever executed, will not provide any assurances if they contain the same ability to reduce lease quantities after they must be provided to IDWR.

The water supply provided by the leases is tenuous at best. As such, there must be a defined contingency in place "to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." CM Rule 43.03.c. IGWA has failed to identify other mitigation actions to support approval of its plan. By failing to consider this condition, the Director arbitrarily approved the mitigation plan.

III. The Director's *Final Order* Violated Idaho Code § 675248(2)

IDWR argues the Director complied with Idaho's APA because the "eleven-page Final Order contains numerous factual findings and reasoned conclusions." *IDWR Br.* at 16. Of those "eleven pages," the Director's findings of fact and conclusions of law span a few lines beyond a single page. While length of the analysis is not dispositive, substance is. The Director fails to identify the specific information or facts to support his conclusory findings of fact. For example, the Director provides no analysis to support his findings that the "rental of storage water by

[6] Pursuant to Water District 01 Rental Pool Rules, IGWA's application to lease water from the 50,000 acre-feet "common pool" assumes a "fourth priority." In years when the applications exceed the amount of water available, IGWA's application would fall out of priority and would not receive any water.

IGWA will not diminish the supply of water available to the SWC" or injure other water rights. Further, despite the limitations and conditions on IGWA's leases, the Director provides no analysis or supporting facts to show that IGWA's mitigation supply is a "reliable source of replacement water" for an indefinite term.

IDWR claims that references to other orders cure these failures. *IDWR Br.* at 16. Apparently the Coalition and the Court must presume that there is "some" evidence in the record to support the Director's findings even though it cannot be cited or specifically identified. The vague findings do not satisfy the "reasoned statement" and "explicit statement of the underlying facts" required by Idaho's APA. *See* I.C. § 67-5248(1). Since the order violates the law and precludes meaningful judicial review it should be reversed and set aside.

CONCLUSION

The Director's approval of a mitigation plan without a secure water supply and without any term is not in accordance with the law. Such conditional approval is arbitrary, capricious and not supported by substantial evidence. As such, the Court should reverse and set aside the Director's Final Order in this case.

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DATED this 10th day of December, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of December, 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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Attachment A

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RECEIVED
AUG 11 2010
Department of Water Resources
Eastern Region

July 26, 2010

Committee of Nine
c/o Ed Clark, Chairman
900 N. Skyline Drive, Suite A
Idaho Falls, Idaho 83402

Re: Rental Pool Procedures – Proposed Amendment of Rule 7.6 Impacts

Dear Committee of Nine Members:

Aberdeen-Springfield Canal Company ("ASCC") respectfully requests that the Committee of Nine amend Rule 7.6 of the Rental Pool Procedures (commonly known as the "Last To Fill" rule) by eliminating any private lease caused impacts and storage adjustments, except for rentals of storage below Milner. The proposed amended rule with additional language underlined would read as follows:

> **7.6 Impacts to Spaceholders due to Private Leases.** If the lease of storage pursuant to a private lease <u>for delivery of water below Milner</u> caused impacts, as determined by the Watermaster, the Lessor's storage allocation shall be reduced by an amount equal to such impacts, not to exceed the quantity of storage leased by the Lessor, and reallocated to mitigate impacts to affected spaceholders. This reallocation will only occur in the year following the lease of storage.

As clearly established in the Idaho Constitution, statutes enacted by the legislature and adopted policies of the Idaho Water Resource Board, it has long been the well established policy of the State of Idaho to maximize the beneficial use of the State's water resources to achieve full economic development. The State Water Plan embodies these fundamental principles while also adopting the policy of "zero minimum flow" at Milner dam to protect and preserve water use above Milner for irrigation purposes in the upper Snake. The stated purpose of the Rental Pool under Rule 3.0 is consistent with these principles:

> **"RULE 3.0 PURPOSES**
> "3.1 The primary purpose of the Rental Pool is to provide irrigation water to space holders District and to maintain a Rental Pool with sufficient incentives such that space holders supply, on a voluntary basis, an adequate quantity of storage for rental or lease pursuant to procedures established by the Committee."

The Last To Fill rule was initially developed and implemented to create a disincentive to lease water for delivery below Milner which could impair the ability of junior priority storage space holders to accrue water. Subsequently the rule was improperly extended and made to apply to above Milner leases. It is ASCC's strong opinion that reallocation of storage water under Rule 7.6 should be retained for purposes of all leases for delivery of water below Milner, but eliminated for purposes of all leases above Milner. Several reasons support the proposed amendment:

1. The current impact rule 7.6 provides an unjustifiable storage water penalty in addition to the monetary Impact Payments.

2. Water leased for use above Milner encourages the efficient use of water and provides a revenue source to fund system improvements and reduce O&M expenses to shareholders.

3. Impact payments create an unfair penalty to space holders who choose to lease their water and unjust enrichment to those who choose not to.

4. The current impact payments effectively deprive space holders of full control, use and enjoyment of their private property rights. Delivering a space holder's water through the head gate of another has the same impact as delivering the same water through the space holder's own headgate.

5. The current rule inflates the price of rental water.

6. The failure to restrict rule 7.6 impacts to leases below Milner may cause some space holders to limit or cease their participation in the Common Pool.

7. The current rule creates a dysfunctional institutional structure that impairs water marketing above Milner necessary to preserve the beneficial use of water and promote full economic development in Eastern Idaho.

For these reasons ASCC respectfully requests the Committee consider amending Rule 7.6 to eliminate the Impact Penalty for leases above Milner for agricultural purposes and present this proposed amendment to the full Committee at a regular meeting for decision following a full discussion. To facilitate an informed discussion of this proposed amendment, ASCC also requests that the Committee of Nine and Water District No. 1 make a full disclosure and accounting of all water and monetary impacts assessed under Rule 7.0 and the manner in which these impacts are re-allocated over the last 5 years.

Sincerely,

Val Wahlen, president

Attachment
B

State of Idaho
DEPARTMENT OF WATER RESOURCES
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C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

April 14, 2010

Re: Surface Water Coalition Delivery Call

Dear Interested Party:

On April 7, 2010, the interim director issued a *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*. In the next few days, the Department intends to issue an "as-applied" final order applying the methodology described in the April 7, 2010 order to hydrologic facts and predictions for the upcoming irrigation season.

The parties are meeting on April 15, 2010 for a status conference and other discussions. The Department does not have time to issue the "as-applied" final order prior to the April 15, 2010 meetings. The purpose of this letter is to provide some preliminary information for discussion.

By applying the methodology of the April 7, 2010 order, the Department predicts a 2010 demand shortfall of 27,400 acre-feet for American Falls Reservoir District No. 2 and 56,900 acre-feet for Twin Falls Canal Company, for a total combined demand shortfall of 84,300 acre-feet. According to the April 7, 2010 order, junior ground water users must establish, to the satisfaction of the Director, their ability to secure this volume of water. Attached is a table summarizing the demand shortfall analysis for each of the surface water coalition members.

	Predicted Natural Flow Supply	Predicted Storage Allocation	Total Supply	BLY 2006/2008	Shortfall
A&B		135,371	135,371	58,492	-
AFRD2	1,256	387,102	388,358	415,730	27,400
BID	102,634	223,401	326,035	250,977	-
Milner		89,107	89,107	46,332	-
Minidoka	56,542	358,626	415,168	362,884	-
NSCC	233,145	843,169	1,076,314	965,536	-
TFCC	747,391	241,078	988,469	1,045,382	56,900
				Total	84,300

I hope the above information will promote meaningful discussions about the respective positions of the parties. I look forward to participating in these discussions tomorrow.

Sincerely,

Gary Spackman
Interim Director