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 DEPARTMENT OF WATER RESOURCES,

Respondents,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor.

IN THE MATTER OF THE IDAHO GROUND WATER APPROPRIATORS, INC.'S MITIGATION PLAN IN RESPONSE TO THE SURFACE WATER COALITION'S DELIVERY CALL

Case No. CV-2010-3075

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

Ruling: The Director's *Order Approving Mitigation Plan* is **affirmed**.

Appearances:

Travis L. Thompson of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

W. Kent Fletcher of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

Chris M. Bromley and Garrick Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

Candice M. McHugh of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for the Idaho Ground Water Appropriators, Inc.

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case originated when Petitioners 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 (collectively, "Surface Water Coalition" or "SWC") filed a *Petition for Judicial Review* in the above-entitled district court seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department").[1] The final order under review is the *Order Approving Mitigation Plan* issued on June 3, 2010 by Interim Director Gary Spackman in IDWR Docket No. CM-MP-2009-007. The *Order* approved a mitigation plan submitted by the Idaho Ground Water Appropriators, Inc. ("IGWA") in response to a delivery call made by the Surface Water Coalition. The Surface Water Coalition asserts in its *Petition for Judicial Review* that the *Order*

[1] The case was reassigned by the clerk of the court to this Court on July 12, 2010, pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights.*

Approving Mitigation Plan is contrary to law in several respects and requests that this Court reverse the same.

B. Course of Proceedings and Statement of Facts.

At issue in this matter is one order (i.e., *Order Approving Mitigation Plan*) of a series of orders issued by the Director in response to a delivery call filed by the SWC in 2005. While the filing of the delivery call has resulted in numerous administrative proceedings before the Director and resulting orders not all of which are at issue here, context requires a brief review of the entirety of the delivery call commencing with its origin. Thus, a brief background of the delivery call will be provided followed by a recitation of the relevant facts and proceedings at issue in the SWC's *Petition for Judicial Review*.

1. Delivery Call Background.

The underlying administrative proceeding at issue here had its origin in 2005 when the SWC filed a delivery call with the Department requesting administration and curtailment of certain hydraulically connected junior ground water rights located in the Eastern Snake Plain Aquifer ("ESPA"). On May 2, 2005, former Director Karl J. Dreher issued an *Amended Order of May 2, 2005* in response to the delivery call, wherein he found that certain junior ground water diversions from the ESPA were materially injuring senior SWC natural flow and storage rights. R. Vol. I, pp. 1–66. The May 2, 2005 *Order* required IGWA to provide 27,700 acre-feet of replacement water in the form of a "replacement water plan" to the injured members of the SWC in lieu of curtailment. R. Vol. I, pp. 45–48.

During the 2005, 2006 and 2007 irrigation seasons, the Director issued a series of supplemental orders regarding material injury which likewise permitted IGWA to mitigate for material injury to the SWC with replacement water plans. Following a hearing before Hearing Officer Gerald F. Schroeder, and the Hearing Officer's issuance of his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, former Director David R. Tuthill issued a *Final Order Regarding the Surface Water Coalition Delivery Call* on September 5, 2008. R. Vol. I, pp. 140–156. Among other

things, the *Final Order* permitted IGWA to mitigate for material injury to the SWC with a replacement water plan. R. Vol. I, pp. 142–143. However, the *Final Order* did not rule on or set forth the methodology for determining material injury to the SWC's reasonable in-season demand and reasonable carryover.

Petitions for Judicial Review of the *Final Order Regarding the Surface Water Coalition Delivery Call* were timely filed in Gooding County Case CV 2008-551 and the case was assigned to District Judge John M. Melanson. One of the issues raised was the validity under the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CMR") of the "replacement water plan" authorized by the Director in his *Final Order*. Another issued raised was whether the Director erred by failing to set forth the methodology for determining material injury to the SWC's reasonable in-season demand and reasonable carryover (for storage) in his *Final Order*. On July 24, 2009, Judge Melanson issued his *Order on Petition for Judicial Review* affirming in part and reversing in part Director Tuthill's decision. R. Vol. II, pp. 157–190. For reasons that will be discussed further in this *Memorandum Decision*, Judge Melanson determined that the replacement water plans previously approved by Director Tuthill did not satisfy the requirements of Rule 43 of the CMR. R. Vol. II, pp. 183–186. Judge Melanson also held that Director Tuthill erred in failing to set forth the methodology for determining material injury to the SWC's reasonable in-season demand and reasonable carryover in his *Final Order*. R. Vol. II, p. 188. Judge Melanson remanded the case to the Department for further proceedings on the methodology for determining material injury to the SWC's reasonable in-season demand and reasonable carryover. R. Vol. II, p. 189.

On April 7, 2010, Interim Director Gary Spackman ("Director") issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*. On June 23, 2010, the Director issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order*"). In the *Methodology Order* the Director set forth the procedures, including a 10 step process, for determining material injury to the SWC's reasonable in-season demand and reasonable carryover. On June 24, 2010, the Director issued his *Final Order Regarding*

April 2010 Forecast Supply (Methodology Steps 3&4); *Order on Reconsideration* ("*As-Applied Order*"). The *As-Applied Order* is the codification of the Director's application of the *Methodology Order* for the 2010 irrigation season. It should be noted that neither the *Methodology Order* nor the *As-Applied Order* are at issue in this proceeding, although *Petitions for Judicial Review* seeking judicial review of both *Orders* have been filed and are currently pending before this Court in Gooding County Case CV 2010-382.[2]

2. Facts and Proceedings at Issue in the *Petition for Judicial Review.*

At issue in this proceeding is the Director's approval of IGWA's *Mitigation Plan for the Surface Water Coalition Delivery Call, Water District 120* ("*Mitigation Plan*"). The *Mitigation Plan* was submitted by IGWA to the Department in accordance with Rule 43 of the CMR on November 9, 2009. R. Vol. II, pp. 202–211. By its terms, the *Mitigation Plan* proposed to benefit "senior surface water rights diverting from the Snake River or its tributaries and administered by the Watermaster of Water District 01 that the Director has previously found or may in the future find to have been materially injured by the use of groundwater under junior groundwater rights." R. Vol. II, p. 203.

The proposed *Mitigation Plan* was subsequently published by the Department in *The Times-News*, *The Post Register*, *The Idaho Statesman*, and *The Idaho State Journal*. R. Vol. II, pp. 213–219. Protests to the proposed *Mitigation Plan* were timely filed by the U.S. Department of Interior, Bureau of Reclamation, and the SWC.[3] R. Vol. II, pp. 223–228. A hearing on the proposed *Mitigation Plan* was held before the Director on May 25-26, 2010. On June 3, 2010, the Director issued his *Order Approving Mitigation Plan*, wherein the Director approved the *Mitigation Plan* subject to certain specified conditions. R. Vol. II, pp. 274–286.

On July 1, 2010, the SWC filed a *Petition for Judicial Review* asserting that the *Order Approving Mitigation Plan* is contrary to law in several respects and requests that this Court reverse the same. The parties briefed the issues contained in the *Petition for*

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[2] In conjunction with an opposed *Motion to Consolidate* the Court determined that although related, the issues in this case could proceed independently of the issues raised in proceedings pertaining to the *Methodology Order* and the *As-Applied Order*. *See Order Denying Motion for Consolidation* (Oct. 15, 2010).

[3] The U.S. Bureau of Reclamation subsequently withdrew its protest and as such it is not at issue here.

Judicial Review and a hearing on the same was held before this Court on December 13, 2010.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held on December 13, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or December 14, 2010.

III.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), Chapter 52, Title 67, I.C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that 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.

I.C. § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the court shall not overturn an agency's decision

that is based on substantial competent evidence in the record.[4] *Id.* The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs*, 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record . . . . The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.,* 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

IV.
ANALYSIS

A. The approved *Mitigation Plan* complies with the requirements of the CMR.

The SWC argues the Director's approval of the *Mitigation Plan* for an indefinite period without requiring the specific identification of a replacement supply of water is arbitrary, capricious and not supported by the evidence. The SWC asserts that the Director's conditioning the approval of the *Mitigation Plan* on the showing of a

[4] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

committed replacement water supply on an as-needed annual basis in effect makes the *Plan* indistinguishable from the "replacement water plan" that was previously rejected by the Gooding County District Court. The SWC further asserts the *Mitigation Plan* does not comply with the requirements of the CMR because it does not provide a contingency plan in the event replacement water is unavailable. For the reasons explained below, this Court holds that the approved *Mitigation Plan* complies with the requirements of Rule 43 of the CMR and therefore the Director did not act arbitrarily or capriciously in approving the *Plan*.

1. CMR procedures for responding to a delivery call.

The CMR govern the procedures the Director must follow in responding to a delivery call made by the holder of a senior priority surface or ground water right against the holder of a junior priority ground water right in an area having a common ground water supply. CMR Rule 40 provides:

> [U]pon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:
>
> a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . . or
>
> b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a *mitigation plan* that has been approved by the Director.

IDAPA 37.03.11.040.01.a. and b (emphasis added). CMR Rule 010.15 defines *mitigation plan* as:

> A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

IDAPA 37.03.11.010.15. Rule 43 of the CMR sets forth the requirements for a mitigation plan, the necessary procedures and the factors the Director may consider in reviewing a proposed mitigation plan for approval. The Rule provides in pertinent part:

> **043. MITIGATION PLANS (RULE 43).**
>
> **01. Submission of Mitigation Plans**. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information:
>
> **a.** The name and mailing address of the person or persons submitting the plan.
>
> **b.** Identification of the water rights for which benefit the mitigation plan is proposed.
>
> **c.** A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.
>
> **d.** Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03.
>
> **02. Notice and Hearing**. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.
>
> **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:
>
> **a.** Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
>
> **b.** *Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source.* Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at

times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. *Whether the mitigation plan provides 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.*

. . .

h. *The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.*

. . .

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

IDAPA 37.03.11.043.01 *et. seq.* (emphasis added).

2. The proposed *Mitigation Plan* approved by the Director.

On November 9, 2009, IGWA submitted the proposed *Mitigation Plan* to the Director. The *Mitigation Plan* was intended to be an on-going plan for an indefinite term that could be implemented on a year-to-year basis as necessary to avoid or reduce curtailment of ground water rights. IGWA described the purpose 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 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.

R. Vol. II, p. 191.

Generally speaking the *Mitigation Plan* proposed that, subject to certain conditions, IGWA would secure storage water located in Upper Snake Reservoir System by entering into agreements with various storage space holders in the system making water available for delivery to SWC members should it become necessary to mitigate for material injury.

On June 3, 2010, following a hearing on protests to the *Mitigation Plan*, the Director entered his *Order Approving Mitigation Plan*, wherein he approved the *Mitigation Plan* subject to certain conditions. The Director concluded that IGWA's proposal of securing storage water in the Upper Snake Reservoir System and delivering it to the members of the SWC under the terms of the *Plan,* together with the imposed conditions, complied with Idaho law, would maximize the beneficial use of water in the state and promote conservation of water resources, and was in the public interest. R. Vol. II, pp. 282–283. Among other things, the *Order* requires a "pre-irrigation season commitment of rented storage water to the SWC," that must by proven by "executed contract documents and obligation to the Upper Snake River Rental Pool of the storage for mitigation." R. Vol. II, p. 282. If a pre-irrigation season commitment is not proven by IGWA to the satisfaction of the Director, the *Order* contemplates curtailment:

> A contingency of the mitigation plan approval is that, if insufficient water is committed to assure protection of the senior-priority water rights, junior-priority ground water rights will be curtailed.

R. Vol. II, p. 282.

With respect to the procedures for determining IGWA's obligation for mitigation in a given year, as well as the deadlines by which IGWA has to prove its pre-irrigation season commitment to the Director, the *Order* incorporates those procedures and deadlines set forth in the *Methodology Order*. In the *Methodology Order*, the Director set forth 10 steps to be taken annually governing the determination of material injury to the SWC in a given year and IGWA's obligation to mitigate. The first four steps are pertinent here, and provide in pertinent part as follows:

> **Step 1**: By April 1, members of the SWC will provide electronic shape files to the Department delineating the total irrigated acres within their

water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5% . . . .

Step 2: Starting at the beginning of April, the Department will calculate the cumulative CWN [crop water need] volume for all land irrigated with surface water within the boundaries of each member of the SWC. . . .

Step 3: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within 14 days after the issuance of the Joint Forecast, the Director will predict and issue an April Forecast Supply for the water year and will compare the April Forecast Supply to the baseline demand ("BD") to determine if a demand shortfall ("DS") is anticipated for the upcoming irrigation season. . . .

Step 4: If the April DS is greater than the reasonable carryover shortfall from the previous year, junior water ground water users will be 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 that will provide water to the injured members of the SWC equal to the difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users fail or refuse to provide this information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users. . . .

R. Augmented, pp. 33-34. Although the *Methodology Order* is the subject of a separate petition for judicial review, for purposes of this decision, the validity of the *Methodology Order* is assumed.

3. Gooding County Case No. 2008-551.

This case arose following remand in Gooding County Case No. 2008-551 where judicial review was sought, among other things, on the Director's implementation of a "replacement water plan" process in lieu of following the procedures set forth in the CMR in responding to the same SWC delivery call. *See Order on Petition for Judicial Review*, Case No. 2008-551, Gooding County (July 24, 2009); R. Vol. II., p. 157. The Director justified the use of a replacement water plan as a short term form of relief akin

to a court issuing a preliminary injunction pending the approval of a longer term mitigation plan. The District Court rejected the process holding that the use of a replacement plan in effect becomes an unauthorized substitute for a mitigation plan thereby allowing the Director to circumvent the requirements of the CMR. *Order on Petition for Judicial Review* at 27-33. The Court held that in responding to a call the Director must follow the procedural framework set forth in the CMR. *Id.*

Relevant to the issues in this case was the Director's approval of allowing shortfalls to reasonable in-season demand and reasonable carryover to accrue and be carried forward into the following irrigation season as a debit owed to SWC storage supplies. In the event the reservoir system filled to capacity the following year, any accrued shortfall owed the SWC would then be cancelled. Conversely, if the reservoir system did not fill and a future shortfall was predicted, junior ground pumpers would then be required to acquire and provide actual replacement water in time of need in order to avoid curtailment. *Id.* at 19. The Director's reasoning in support of this approach was to allow junior ground pumpers to avoid the cost associated with securing the actual replacement water (as opposed to a "paper" accounting of water owed) which may ultimately become unnecessary should the reservoir system fill to capacity. *Id.* The approval was based on the finding that during drought periods replacement water has always been available somewhere at a price. *Id.*

The District Court characterized the process as a "wait and see" approach and held that while Rule 43 of the CMR expressly authorized such an approach, the Rule unambiguously required a "contingency plan" in the event actual replacement water could not be obtained. The Court reasoned that unlike administration as between surface rights, curtailment of ground water rights in the midst of the irrigation season was unlikely to provide timely relief to senior rights. Ultimately the risk of not being able to obtain replacement water would then unconstitutionally be borne by the senior right holders. *Id.* The Court explained the potential consequences as follows:

> In the event replacement water could not be obtained in the following irrigation season or was determined too costly to obtain, ordering curtailment after the irrigation season has already begun or is about to begin presents new issues and problems. Both senior and juniors will have already planted crops. At that point curtailment may not timely remediate for the carry-over shortfall. The seniors are therefore forced to

> assume losses and adjust their cropping plans based on not having the anticipated quantity of carry-over storage. The Director is also faced with the issue of as to whether or not to curtail junior ground water users based on futile call as to the instant irrigation season or considerations regarding lessening the impact of economic injury. The Hearing Officer aptly pointed out this dilemma: 'Curtailment of the ground water users may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous economy.' Ultimately, the prior appropriation doctrine is turned upside down. Therefore, unless assurances are in place that carry-over shortfalls will be replaced if the reservoirs do not fill, the risk of shortage ultimately falls on the senior. As such, the very purpose of the carry-over component of the storage right – insurance against risk of future shortage – is effectively defeated.

Id. at 20. The District Court ultimately concluded: "While water may be available somewhere, the failure to require any protections for seniors is contrary to the express provisions and framework of the CMR." *Id.* at 19. The Court did however suggest how the process could be remedied in compliance with the CMR:

> This does not mean that juniors must transfer replacement water in the season of injury, however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example.
>
> [FN] An option for water or some other mechanism for securing water pursuant to a long term mitigation plan where the cost would be less than actually transferring or leasing water.

Id. Following remand, IGWA submitted, and the Director approved with conditions, the subject *Mitigation Plan* now at issue.

4. The *Mitigation Plan* complies with the requirements of the CMR and satisfies the concerns addressed by the District Court in the Gooding County case.

One of the issues that has overshadowed the application of the CMR with respect to mitigation plans is ensuring a timely meaningful response to a delivery call so as to avoid injury to senior rights, while at the same time allowing holders of junior ground water rights the meaningful opportunity to submit and seek approval of a mitigation plan so as to avoid curtailment. The issue is complicated because the Director must make

predictions regarding water supplies; climatic conditions can vary significantly and unpredictably within an irrigation season; and mitigation to remediate for the depletive effects of ground water withdrawals can be provided in a number of different ways and combinations. The less certainty associated with a particular mitigation plan leaves more room for disagreement and ultimately a longer approval process as well as uncertainty as to the outcome. Consequently, a preferable mitigation plan is one that applies to more than just the instant irrigation season. However, even a long term plan would not entirely eliminate uncertainty or reevaluation by the Director because the Director must still make predictions regarding the water supply as well as determinations regarding the replacement water obligations. Nonetheless, under a long term plan the scope and complexity of the issues that the Director would be required to address would be significantly less than if a completely different mitigation plan were submitted for approval every year. Ultimately under a long term plan the result is less delay and more certainty and predictability for both senior and junior right holders.

a. Rule 43 expressly authorizes the implementation of a long term mitigation plan.

The SWC argues the Director abused his discretion by approving the *Mitigation Plan* for an indefinite term. This Court disagrees. Rule 43 does not preclude the Director from approving a mitigation plan on a long term basis, provided the plan meets certain criteria. Rule 43 expressly contemplates the use of replacement water as mitigation extending over multiple seasons. Rule 43.03.c provides that: "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." Provided that the plan includes "contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable." Clearly this provision expressly authorizes the approval of a mitigation plan on a long term basis and does not impose any limitations as to a particular term. This is also consistent with the District Court's holding in the Gooding County case.

b. Curtailment can be a "contingency provision" if curtailment will prevent injury to senior rights.

The SWC argues the *Mitigation Plan* does not provide a contingency plan as required by Rule 43. This Court disagrees to the extent the *Methodology Order* is determined to be valid. Curtailment can be a contingency plan provided it will prevent injury to senior rights. One reason the Gooding County District Court rejected the "replacement water plan" was because the process did not require an actual commitment of water going into the irrigation season. As such, the risk of IGWA not being able to obtain replacement water fell squarely on the SWC. The approved *Mitigation Plan* eliminates that risk by requiring the actual commitment of water as soon as the demand shortfall is calculated, otherwise curtailment is ordered at the outset of the irrigation season. The conundrum addressed in the Gooding County case is avoided because actual water is committed. The Director is not faced with the decision of curtailing ground water pumpers with crops in the ground when curtailment may not provide timely relief to senior rights. Tr. Vol. I, p. 44. Junior groundwater pumpers are on notice going into the irrigation season that any cropping decisions are contingent on the quantity of replacement water committed at the beginning of the season. They are further aware that they will not be allowed to pump out of priority if that replacement water is not timely secured. In sum, curtailment under the *Mitigation Plan* can be a contingency provision if ordered at the beginning of the irrigation season consistent with the deadlines in the *Methodology Order* and assuming the validity of the *Methodology Order*.[5]

c. The Director did not act arbitrarily or capriciously or abuse his discretion by allowing IGWA to secure replacement water on an annual basis as opposed to the full term of the *Mitigation Plan*.

The *Mitigation Plan* requires that IGWA demonstrate committed replacement water consistent with the deadlines set forth in the *Methodology Order*. In 2010, IGWA

[5] The caveot is that curtailment may not be sufficient if the amount of replacement water secured at the beginning of the season turns out to be short. The *Methodology Order* provides that in such a circumstance ground pumpers will not be required to provide additional water nor will they be curtailed. *Methodology Order* at 35. The Court makes no ruling on the validity of that determination as issues pertaining to the *Methodology Order* are addressed in a separate proceeding. Again this ruling assumes the validity of the *Methodology Order*.

provided replacement water through a series of renewable one-year term leases. The SWC argues the Director abused discretion by approving the *Mitigation Plan* for replacement water without requiring a showing of a secured definite water supply for the full term of the *Plan*. This Court disagrees.

The obligation, if any, of replacement water varies annually. The *Order Approving Mitigation Plan* requires that:

> IGWA must 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 and any order of the Director implementing the Methodology Order for a given year. Proof of rental or an option to rent storage water shall consist of fully executed and irrevocable contracts with holders of the Snake River storage (fully disclosed in the contracts). Storage shall be committed to the SWC by IGWA submitting the storage rental or storage option contracts to the Upper Snake River Rental Pool and the Director with a written instruction to the Watermaster of Water District 01 that the underlying storage water is committed solely for mitigation to the SWC and that the contracts or options may only be released back to IGWA or the storage water lessors by directive to the Watermaster by the Director of the Department.
>
> . . .
>
> IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order. *When the obligations for reasonable in-season demand and reasonable carryover 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.*

R. Vol. II, pp.283–284 (emphasis added).

As discussed previously, the CMR authorize a long term mitigation plan. The *Mitigation Plan* provides replacement water at the time and place required by the senior priority water right holder to avoid injury. The replacement water is secured with a contract for the commitment of water at the beginning of the irrigation season as opposed to merely an accounting of the shortfall owed. The failure to provide proof of such commitment results in curtailment or partial curtailment at the outset of the irrigation season pursuant to a firm deadline. Curtailment in accordance with the deadlines at the outset of the irrigation season will satisfy the contingency requirement in the event

replacement water is not secured. The Director conducted a hearing on the proposed *Mitigation Plan* in accordance with Rule 43.02. The only variable left to an annual determination is the obligation (quantity) of replacement water which necessarily includes a review of the reliability of the source of the quantity pledged, if any.[6] The Director's approval of the *Mitigation Plan* includes the opportunity for a hearing on this limited determination. Further, the *Plan* provides that the obligation determination will not be stayed during the pendency of the hearing. Therefore, no delays in administration occur despite the opportunity for a hearing.

Recognizing that the obligation will vary year-to-year, in addition to other factors, if a mitigation plan is to be approved on a long term basis, this Court fails to find a meaningful distinction between requiring a showing of commitment of replacement water for the entire length of the long term mitigation plan or requiring a showing of commitment on an annual basis prior to the commencement of any irrigating. Assuming for the sake of discussion the *Mitigation Plan* was for a definite long term period and IGWA secured a quantity of replacement water for the entire term of the plan. The quantity secured represents the maximum secured but not necessarily the quantity of water owed in the event of a shortfall. The quantity will vary. As such, a long term plan for a definite period would still require that the Director determine the replacement water obligation on a periodic basis. Any shortfall exceeding the maximum would result in a partial curtailment or the securing of more replacement water. Senior surface users could also change the number of irrigated acres in excess of the five percent from the previous year as addressed in Step 1 of the *Methodology Order* requiring a reevaluation of the obligation. Finally, even under a long term plan the reliability of the replacement source would still have to be reevaluated on an annual basis given the "last to fill priority" rule discussed elsewhere in this opinion.

Given that the water obligation will vary, as well as other factors, a periodic review of the water obligation is inescapable irrespective of the term of a mitigation plan. Therefore even if the *Mitigation Plan* were for a long term definite period, the same or similar conditions would still need to be imposed. Accordingly, the Court cannot find

[6] The Department acknowledged in its responsive briefing and at oral argument that a hearing on the mitigation obligation would necessarily include the opportunity to be heard on the reliability of the replacement source.

that the Director acted arbitrarily, capriciously, or abused his discretion in approving the *Mitigation Plan* for an indefinite term provided the conditions are met and the deadlines are strictly enforced should curtailment or partial curtailment become necessary. Recognizing that water supplies vary significantly it would appear that one way to achieve a mitigation plan that protects senior rights but does not require that juniors provide more water than may be necessary is to adopt a plan that sets forth a framework which incorporates a process for addressing those limited issues that that will vary annually provided that there has been preapproval of the process consistent with the procedures set forth in the CMR. The *Mitigation Plan* meets the requirements of the CMR and satisfies the concerns addressed in the Gooding County 551 case. Therefore the Court cannot find that the Director abused his discretion in approving a plan that requires the commitment of replacement water on an annual basis prior to the irrigation season.

d. The SWC's argument that the *Order Approving Mitigation Plan* fails to consider the reliability of the source is unsupported by the record.

The SWC argues the Director's approval of the *Mitigation Plan* also fails to take into consideration the reliability of the source of the replacement water. One of the factors that may be considered under Rule 43 in determining whether the proposed mitigation plan will prevent injury to senior rights is the "reliability of the source of the replacement water over the term in which it is proposed to be used under the mitigation plan." IDAPA 37.03.11.043.03.h. The SWC argues that pursuant to the Water District 01 Rental Pool Rules in the event storage water is provided to IGWA through private leases and the reservoir system does not fill the following year, the storage space held by the lessors assumes a "last to fill priority" and therefore becomes the most junior storage in the reservoir system. The SWC argues this is a limitation on the reliability of the replacement source. The SWC asserts that the Director erred by failing to take into account this limitation in approving the *Plan*. Further, that because the evidence in the record supports this limitation, the Director's approval of the replacement source was not supported by substantial evidence.

This Court disagrees that the finding is not supported by the evidence as to the 2010 irrigation season as the reservoir system apparently filled and the last to fill rule was not an issue. However, for purposes of prospective application of the *Mitigation Plan*, the last to fill rule factors significantly in any determination pertaining to the reliability of the source of the replacement water. Tr. Vol. II. p. 295, lns. 7-10, *see also* Tr. Vol II, p. 529 (storage under private leases is a reliable source for one year but depending on reservoir fill may not be available in subsequent years). Indeed the priority of the source affects its availability and reliability and should be considered in determining whether or not a particular replacement source will in fact mitigate for injury. The Hearing Officer expressly acknowledged that "for purposes of refilling in subsequent years the space that has been used for a private lease becomes the most junior space in the reservoir system." R. Vol. I, p. 101.

However, the evidence in the record establishes that the Director concluded in the *Order Approving Mitigation Plan* that the *Plan* "will provide replacement water at the time and place required by the senior-priority water right." R. Vol. II, p. 281. It further states that IGWA's obligation for mitigation will be determined as set forth in the *Methodology Order*, which provides that if shortfall exists, "junior ground water users will be 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 that will provide *water* to the injured members of the SWC . . . ." R. Augmented, p. 122 (emphasis added). The *Order Approving Mitigation Plan* requires that IGWA provide proof of rental or an option to rent storage *water* and a commitment of storage *water* as opposed to the mere pledging of a *water right*, which may or may not provide actual water depending on fill conditions. R. Vol. II, p. 282. In addition, the *Order* provides further that a contingency of the approval is that if insufficient *water* is committed to assure protection of senior-priority rights then curtailment will be ordered.

While the SWC is correct in its assertion that the Director should take into account the reliability of the source of the replacement water, in this case storage water provided under secured leases, there is no indication that the Director will fail to do so in his annual review of the proof submitted by IGWA of the rental of storage water. Simply put, pursuant to the *Order Approving Mitigation Plan* in reviewing the contracts the

Director must ensure that the contracts secured by IGWA will provide actual *water* so as to mitigate for any material injury.[7] *Id.* On review this Court must conclude that the Director will act in accordance with the directives and contingencies set forth in his *Order*.

5. The *Mitigation Plan* is not the same as the "replacement water plan" rejected in the Gooding County 551 Case.

The SWC argues the approved *Mitigation Plan* is indistinguishable from the "replacement water plan" previously rejected by the District Court in the Gooding County 551 case. This Court disagrees. Replacement water is an authorized form of mitigation under the CMR but not a substitute for circumventing the application of the CMR. For the reasons previously discussed, unlike the "replacement water plan," the Director followed the notice and procedural requirements, as well as applied the factors, set forth in Rule 43.

B. The Director did not act arbitrarily or capriciously or abuse his discretion in approving storage water as the source of replacement water for mitigation.

The SWC asserts that because the Director found that the diversions under junior priority ground water rights cause material injury to senior surface and *storage* rights, the approval of the use of *storage* water for mitigation from the same system results in essentially a double negative impact to the supply of *storage* water. The SWC argues the Director erroneously concluded without any supporting analysis that the rental of storage water by IGWA will not diminish the supply of water available to the SWC. In support, the SWC refers to the uncontradicted testimony of its expert:

> Q. Mr. Shaw, in your opinion, does using storage as the only mitigation source or the only source of water to provide mitigation magnify the effect of pumping on the storage reservoirs?

[7] The Department acknowledges as much in its briefing; that as part of the hearing on the obligation the Director will review and allow hearing on the specific leases offered as replacement water. *IDWR Respondent's Brief* at 7.

> A. I think any additional use of storage out of system affects carryover. And at some point that will have an impact on water availability out of the reservoirs.

Tr. Vol. II, p.528; see also Tr. Vol. II, p. 535.

In the *Order Approving Mitigation Plan* the Director concluded:

> The SWC argument fails because the Snake River reservoirs fill in many years despite ground water pumping. *When there is sufficient water in the reservoirs to provide the demand shortfall* to SWC members caused by ground water pumping, the ground water users should not be prohibited from supplying mitigation water to the SWC from rented storage water.

R. Vol. II, p. 279 (emphasis added).

The Director's approval of the use of storage water is limited to the circumstance when there is sufficient water in the reservoir to cover the demand shortfall. While it may be uncontradicted that the use of storage for mitigation reduces the overall supply of storage water if the reservoir system does not fill, the SWC controls only 47% of the storage water in the system. R. Vol. I, p. 15-16. The carryover storage that is potentially affected is that of the lessors not the SWC. Subject to the "last to fill priority" rule, Water District 01 Rental Pool Rules authorize the lease of storage water to third parties. Other than the "last to fill priority" rule no further restrictions or prohibitions on the purpose for which the water can be leased, or to whom the water can be leased, have been presented to the Court. Accordingly, there is no legal basis for this Court to place restrictions on to whom storage water can be leased. Therefore, the Court cannot conclude that the Director abused his discretion in approving storage water as the sole source of mitigation, recognizing however, that the source pledged may not be available in subsequent years if the reservoir system does not fill. Towards that end, a factor that the Director must evaluate in conjunction with the annual mitigation obligation includes the reliability of the source pledged and allow the opportunity for a hearing thereon.

C. No substantial right of the SWC or its members was prejudiced with respect to the implementation of the *Mitigation Plan* for the 2010 irrigation season.

The SWC argues the Court should reverse the *Order Approving Mitigation Plan* on the basis that IGWA failed to comply with, and the Director failed to enforce, the

terms of the *Methodology Order* on which the *Order Approving Mitigation Plan* is conditioned during the 2010 irrigation season.

For context, the following events took place leading up to the approval of the *Mitigation Plan.* IGWA filed the *Mitigation Plan* on November 12, 2009. Ex. 1. On March 4, 2010, the District Court in the Gooding County 2008-551 case entered an *Order Staying Decision on Petition for Rehearing Pending Issuance of Final Revised Order*, which among other things, ordered that the Director enter an order by March 31, 2010, addressing the methodology for determining injury to reasonable in-season demand and reasonable carryover. On March 10, 2010, the Director entered a scheduling order setting a hearing on the *Mitigation Plan* for May 24-26, 2010.

The Director issued the *Methodology Order* on April 7, 2010. R. Augmented, p. 1. The *Methodology Order* provides in relevant part that "[w]ithin 14 days after the issuance of the Joint Forecast, the Director will predict and issue an April Forecast Supply for the water year." *Methodology Order* at 34. The Joint Forecast was announced April 8, 2010. Petitions for reconsideration to the *Methodology Order* were filed April 21, 2010.

On April 29, 2010, the Director issued the *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* ("*April Forecast Supply Order*" or "*As-Applied Order*") predicting a cumulative shortfall to the SWC of 84,300 acre-feet. *April Forecast Supply Order* at 2, R. Augmented, p. 45. According to the Director the issuance of the *As-Applied Order* was delayed beyond the 14 days specified in the *Methodology Order* in order to review the petitions for reconsideration to the *Methodology Order*. *As-Applied Order* at 1; R. Augmented, p. 44.

In accordance with the deadline set forth in the *Methodology Order*[8], the *April Forecast Supply Order* required that by May 13, 2010 (14 days from issuance of order), IGWA establish to the satisfaction of the Director that it has secured 84,300 acre-feet to mitigate for the predicted material injury or curtailment would be ordered. *As-Applied*

[8] The *Methodology Order* requires that if a demand shortfall is projected, junior ground pumpers are required to establish to the satisfaction of the Director their ability to secure water to mitigate for the shortfall by May 1 or within fourteen days from the issuance of the *As-Applied Order*, whichever is later in time. *Methodology Order* at 34.

Order at 4. Petitions for reconsideration to the *As-Applied Order* were also filed and a hearing was scheduled for May 24, 2010.

On May 13, 2010, IGWA filed a *Notice of Water Secured and Renewed Request for Stay*. The *Notice* also sought a stay pending the conclusion of the hearing on the *Mitigation Plan*. In response, the Director filed an *Order Regarding Filing Deficiency of IGWA's Notice of Secured Water* requiring IGWA to provide copies of the executed contracts, agreements or options securing the water and the quantity specifically pledged to the SWC delivery call by the close of business May 14, 2010. On May 14, 2010, IGWA filed a *Supplement to Notice of Secured Water* stating IGWA had pledged 53,000 acre-feet to the SWC delivery call, together with copies of executed written agreements for the commitment of water. Ex. 4001. The agreements are in the form of leases with cutoff dates for providing for automatic renewals and cutoff dates for reductions in the quantity leased. The latest renewal date for some of the leases is April 15 and the latest date to exercise a reduction in quantity is May 15. Prior to that date the cumulative minimum guaranteed under the leases is 27,500 acre-feet.[9]

On May 17, 2010, the Director issued an *Order Regarding IGWA Mitigation Obligation*, which revised the shortfall from 84,000 acre-feet to 62,232 acre-feet due to an unusually wet spring. R. Augmented, p. 63. The *Order Regarding IGWA Mitigation Obligation* found that IGWA had secured 58,707 acre-feet[10] resulting in a shortfall of 3,525 acre-feet, which in turn would result in the curtailment of 13,208 acres. *Id.*

[9] SUMMARY OF RENEWABLE IGWA WATER LEASES:

Entity	Quantity Minimum	Quantity Maximum	Renewal Date	Reduce Date
Aberdeen-Springfield Canal Company	10,000	20,00	02/01	05/01
Enterprise Canal Company	3,000	10,000	04/15	05/15
Palisades Water Users	500	1,000	04/15	05/15
Idaho Irrigation District	1,000	3,000	04/15	05/15
New Sweden	5,000	20,000	04/15	05/15
Snake River Valley Irrigation District	5,000	10,000	04/15	05/15
People's Canal Company	3,000	5,000	04/15	05/15
TOTAL	**27,500**	**69,000**		

[10] In addition to the 53,000 acre-feet IGWA, received credit for 5,707 acre-feet for conversion, CREP and recharge, under a separate mitigation plan.

However, based on the District Court's Order in Gooding County 2008-444 case,[11] a case also involving the application of the CMR and which held that the Director was required to conduct a hearing on a proposed mitigation plan prior to ordering curtailment, the Director stayed curtailment pending the hearings on the *As-Applied Order*, the *Methodology Order* and the *Mitigation Plan* scheduled to begin May 24, 2010. R. Vol. II, p. 256.

Some of the objections to the Director's overall approval of the *Mitigation Plan* stem from what specifically occurred in 2010. However, the issues that arose in 2010 result in part from the delay in the issuance of the *Methodology Order,* which sets forth the entire process for determining material injury and establishing the mitigation obligation as well as the relevant deadlines. The *Mitigation Plan* was filed in November 2009 but the *Methodology Order* was not issued until April 7, 2010. This left little time for a hearing on the *Methodology Order,* the *As-Applied Order,* which applied the provisions of the *Methodology Order,* or on the *Mitigation Plan* in advance of the irrigation season. As such, junior ground pumpers had already made preparations for the forthcoming irrigation season. Curtailment at that point would have resulted in injury to junior pumpers with crops already in the ground. *See e.g. Aff.* of *Tim Deeg*, Ex. 4003. Although not free of uncertainty and risk to junior ground pumpers, the expectation under the deadlines and procedures set forth in the *Methodology Order* is that junior ground pumpers have some indication going into the season regarding water supplies and adjust cropping decisions accordingly. The Director therefore opted to allow parties to be heard on the series of orders before administering rights.

Although no unmitigated injury resulted to the SWC in 2010, the delay in the issuance of the *Methodology Order*, the deadlines of which the entire *Mitigation Plan* is conditioned, ultimately delayed final approval the *Methodology Order* which in turn delayed final approval of the *As-Applied Order* and ultimately the *Mitigation Plan.* However, the delay only has relevance with respect to the 2010 irrigation as the Director has now issued final approval of all orders. Prospectively, the deadlines established in the *Methodology Order* will control and should be strictly applied.

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[11] *Order on Petition for Judicial Review*, Gooding County Case No. 2008-444 (June 19, 2009)(Clear Springs Foods Inc. and Blue Lakes Trout Farm, Inc. delivery call proceedings).

In addition, the argument was raised that the Director approved the replacement water sources prior to the expiration of the water quantity reduction deadline under the leases. Simply put, lessors could still reduce the quantity leased after the Director approved the leases. This Court agrees that as of the deadline for demonstrating the commitment of pledged water, all renewal and reduction deadlines for contingencies should have expired in order to eliminate any uncertainty as to the quantity pledged. On May 13, 2010, when the proof of commitments were initially filed and extended to the 14th, the quantity reduction deadline had not yet expired for most of the leases and would not expire until the May 15. Although the *Order Regarding Mitigation Obligation* was issued on May 17, 2010, the *Order* did not specifically address whether the Director confirmed that the quantity pledged had not been reduced. However, the Director at his ordering was provided with copies of the leases for review to ensure the commitment of pledged water. For purposes of review this Court can only assume that the Director acted in accordance with his directive. Nonetheless, as concerns any subsequent approval regarding mitigation obligations it must be unequivocal that any contingencies regarding replacement water have expired. Accordingly, for purposes of prospective application this will require that IGWA modify its leases with respect to the quantity reduction deadlines in order to meet the May 1 deadline set forth in the *Methodology Order*. The current May 15 deadline will not work with the deadlines in the *Methodology Order*.

Despite what occurred in 2010, no substantial right of the SWC was prejudiced with respect to the 2010 irrigation season. However, strict adherence to the deadlines set forth in the *Methodology Order* as set forth in the *Order Approving Mitigation Plan* is necessary so as to effectively promote certainty and predictability.

D. The Director did not err by ordering that water rented to another water user by the SWC should be subtracted from the mitigation obligation.

In the *Order Approving Mitigation Plan* the Director concluded:

> Water rented to another water user by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member. In addition, water placed in the rental pool by a SWC member and used for

> any purpose, including hydropower and flow augmentation below Milner Dam, shall be subtracted from IGWA's obligation to the SWC member.

R. Vol. II, p. 283. The SWC argues that the issue of potential storage rentals was not at issue in the proceeding and therefore should be rejected. This Court disagrees. The Director's order on this issue is the application of a legal ruling on that particular issue previously decided and from which no review was sought in the Gooding County 2008-551 case. In the *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, the Hearing Officer concluded:

> In AFRD #2 the Supreme Court made it clear that there are standards of reasonableness that may limit the absolute right to fill storage rights completely if curtailment is required to do so. The Court specifically noted that some irrigation districts sell or lease storage water rights for purposes unrelated to the original right. The thrust of the Court's comment is that curtailment cannot be utilized to make up storage water that is disposed of in that process. Consequently in determining the amount of carryover storage to which the irrigation districts are entitled when curtailment is ordered, the amount of water sold or leased for purposes outside the licensed or adjudicated right must not be considered in calculating a shortage. 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 a 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.

R. Vol. I, p. 127 (internal citations omitted). The Hearing Officer also addressed the following exception:

> Also, a different question as to the requirement of the ground water users to provide flow augmentation would be presented if the requirement for augmentation were to arise from a mandate without compensation to the surface water users. Were that the case the ground water users would be subject to a contribution for their depletion to the river.

Id. These findings and conclusions were adopted by former Director Tuthill in the *Final Order Regarding the Surface Water Coalition Delivery Call,* R. Vol. I, p. 151. Accordingly, the Director did not err by addressing this limitation in the approval of the mitigation plan.

E. The Director did not abuse his discretion by including a provision in the *Order Approving Mitigation Plan* addressing waste.

The *Order Approving Mitigation Plan* also provides: "Waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member." R. Vol. II, p. 283. The SWC argues that the condition is contrary to the Director's prior decision in the context of the SWC delivery call.

The SWC is correct that any re-examination of its already approved irrigation practices or infrastructure is outside the scope of the delivery call on which the *Mitigation Plan* is predicated. Indeed, a determination has already been made as part of the underlying delivery call proceedings that the existing facilities utilized by the SWC members are reasonable, and that the SWC members are not wasting water. As was the situation pertaining to water rented by the SWC, the Hearing Officer specifically addressed the issue:

> **If the means of diversion utilizing existing facilities, the methods of conveyance, or the conservation practices are not reasonable the water wasted does not constitute material injury attributable to junior ground water pumpers, even if the diversion is within the amount of the water right.** Curtailment will not be invoked to make up for water lost through the use of unreasonable diversion or conveyance practices or unreasonable use of the water.

R. Vol. I, p. 120. However, the Hearing Officer went on to conclude:

> **The existing facilities utilized by the Surface Water Coalition members are reasonable**.... The evidence does not show substandard facilities for diversion or conveyance.... There is no evidence of decayed or damaged systems that are allowed to continue or practices that cause water to be wasted in transit. The evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency.

Id. at 120-21.

As a result, any re-examination of the SWC's already approved irrigation practices or infrastructure is outside the scope of the delivery call on which the *Mitigation Plan* is predicated. Otherwise the "mitigation plan" becomes little more than a process for self–initiating delivery call proceedings every time a demand shortfall is predicted

whereby a number of the core issues originally litigated are "back on the table." At this point the goals of certainty and predictability sought to be achieved through the implementation of a long term mitigation plan start to collapse, particularly if under the plan the SWC is required to re-defend it use under the plan. This is not to say that the SWC is insulated from a subsequent determination of waste, only that any such determination should be pursuant to a separate proceeding and in accordance with the attendant burdens and legal standards and should not result in delaying adherence to the deadlines set forth in the *Methodology Order*.

That being said, there is no evidence in the record that the Director will re-evaluate the issue of waste annually as part of his mitigation obligation determination. Any such argument is speculation. The statement in the *Order Approving Mitigation Plan* that "Waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member" is simply a restatement of the law that there is no obligation to mitigate for waste. Moreover, the subject provision can be interpreted consistently with the law. If, for instance, a separate proceeding is commenced in accordance with the attendant burdens and legal standards applicable to a waste proceeding and a determination of waste is made, the Director can, consistent with the subject provision, subtract that waste from the storage water mitigation requirement for the SWC member. The Director did not abuse his discretion by including a provision in the *Order Approving Mitigation Plan* stating that waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member.

F. The *Order Approving Mitigation Plan* complies with the requirements of Idaho Code § 67-5248.

The SWC argues the *Order Approving Mitigation Plan* should be reversed because the Director did not comply with the requirements of Idaho Code § 67-5248, which requires among other things 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 . . . and must be based exclusively on the evidence in the record of the contested case and on matter officially noticed in that proceeding." I.C. § 67-5248. This Court disagrees.

The *Order Approving Mitigation Plan* is not devoid of findings of fact. Further, the *Mitigation Plan* (although approved to apply beyond the instant delivery call), like the *Methodology Order* and the *As-Applied Order* all stem from the SWC delivery call proceedings involving the same parties. Some of the various issues raised in the SWC delivery call were resolved through a series of final orders, subject to independent review. Nonetheless, the issues and facts interrelate, and the *Order Approving Mitigation Plan* refers to the findings, conclusions and decisions rendered in related actions. For example, the *Order* provides for the procedural background and cites to the various orders that culminated in the proceedings on the mitigation plan. R. Vol. II, pp. 274-75. The *Order* provides further:

> The mitigation plan did not specifically identify "the water rights for which benefit the mitigation proposed." Nonetheless, the mitigation plan is filed to address a specific petition for delivery call that identifies the senior water rights (natural flow and storage) that may be injured by depletions to Snake River flows caused by ground water pumping. **The rights have been expressly identified in the previous litigation in the larger contested case and need not be expressly repeated in the mitigation plan.** ***See May 2005 Order at 11-16.***
>
> Finally, information about Snake River reservoirs was also presented in the larger contested case. The volume capacity of the reservoirs and the frequency of fill need not be repeated in the mitigation plan. *See Recommended Order at 13-17, 34-36.*
>
> The Director has sufficient information to evaluate the factors set form (sic) in CM Rule 43.03.

Id. at 276. The Findings of Fact provides:

> The mitigation 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, to allow the interim director to evaluate the mitigation plan to determine its adequacy.

Id. at 282. It is abundantly clear based on the multiple references to the various orders and proceedings that the *Order Approving Mitigation Plan* is tiered to those other orders and proceedings. Simply put, the *Order Approving Mitigation Plan* was not decided in a vacuum.

V.

CONCLUSION

Based on the foregoing, the Director's *Order Approving Mitigation Plan* is **affirmed.** As stated above, the Court's ruling in this matter assumes the validity of the *Methodology Order*, pursuant to which the *Order Approving Mitigation Plan* was issued. A challenge to the validity of the *Methodology Order* is presently pending before this Court in Gooding County Case CV-2010-382 ("2010-382 Case"). The Court notes that while this ruling has no effect on the outcome of the 2010-382 Case, the same cannot necessarily be said of the reverse situation. If, for instance, the *Methodology Order* is found to be unlawful in whole or in part in the 2010-382 case, such a determination may affect the validity of the *Order Approving Mitigation Plan* and render parts of this opinion moot. Again, such a result is possible because this *Memorandum Decision* assumes the validity of the *Methodology Order*, an assumption that is challenged by various parties in the 2010-382 Case.

Dated January 25, 2011

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW was mailed on January 25, 2011, with sufficient first-class postage to the following:

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