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. **IN THE MATTER OF THE IDAHO GROUND WATER APPROPRIATORS, INC.'S MITIGATION PLAN FOR CONVERSIONS, DRY-UPS & RECHARGE**	**CASE NO. CV-2010-3822**

SURFACE WATER COALITION'S JOINT OPENING BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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STATEMENT OF THE CASE

This appeal challenges the Interim Director of the Idaho Department of Water Resources' ("IDWR" or "Department") July 19, 2010 *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*, R. at 94 ("*Final Order*"). The Director approved mitigation credits sought by the Idaho Ground Water Appropriators, Inc. ("IGWA's") for actions taken pursuant to a October 6, 2009 *Mitigation Plan for Conversions, Dry-Ups and Recharge* (the "mitigation plan" or "Plan"). R. at 1.

The issue here is simple: Should IGWA receive 100% of the credit for its 1.3% contribution to a particular federal crop set aside program? In this case the Interim Director gave IGWA 100% credit for a "one-time" sign up contribution to landowners participating in the Conservation Reserve Enhancement Program ("CREP") – a program nearly wholly funded by federal and state tax dollars. Even though IGWA only contributed 1.3% of the cost for the program, the Interim Director approved IGWA's request for "mitigation credit" as if IGWA was the sole contributor. Apparently, since neither the State nor Federal Government sough credit for their contribution of 98.7%, the Director gave 100% of the available credit to IGWA.

There is no basis in the law for the Director's actions. Indeed, this "mitigation credit" approval is inconsistent with the Director's approval of credit for other mitigation activities. For example, even though there have been recharge efforts conducted by IGWA, the Idaho Dairymen's Association ("IDA") and the State of Idaho, the Director only gave IGWA credit for its recharge efforts – not those of the IDA or the State.

Since the *Final Order*, is not supported by the law and the Director's 100% credit approval was arbitrary and capricious, the decision should be reversed.

STATEMENT OF ISSUES

The following issue is presented on appeal:

1. Whether the Director's granting of mitigation "credit" to IGWA for amounts paid by the State of Idaho and United States toward conservation programs is arbitrary, capricious, an abuse of discretion or contrary to law?

STATEMENT OF FACTS

In 2005, the Surface Water Coalition requested conjunctive administration of hydraulically connected junior ground water rights that were injuring the Coalition's senior surface water rights. The Director issued an initial order on May 2, 2005. After an extensive contested case and administrative hearing, he then issued a final order on September 5, 2008.[1]

On October 6, 2009, IGWA filed a mitigation plan, seeking:

> to provide for the ongoing use as needed of any or all of the following mitigation activities: 1) existing and future conversions of acres irrigated from groundwater to surface water irrigation; 2) dried up acres through the Conservation Reserve Enhancement Program (CREP), AWEP or other voluntary program resulting in the dry-ups of groundwater irrigated acres; and 3) groundwater recharge.

R. at 1-2. As to the "dry-ups," IGWA's plan provides:

> CREP acres are taken out of production and no longer supplied with groundwater. ... IGWA and its members have provided financial support to the CREP program since 2005 and anticipate continuing this support.

Id. at 6.

Since IGWA proposed to take "conservation actions" on the aquifer, the Coalition did not protest the mitigation plan. The Coalition did not oppose IGWA seeking "credit" for its contributions to those programs, including CREP. In an order dated May 14, 2010, the Director issued his *Order Approving Mitigation Plan.* R. at 29.

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

On May 12, 2010, IGWA submitted its *Request for Mitigation Credit*, "request[ing] credit for ***their actions*** that have resulted in an estimated 5,368 acre-feet of reach gain." R. at 25 (emphasis added). On May 17, 2010, the Director issued his *Order Approving Mitigation Credits Regarding SWC Delivery Call*, giving IGWA credit for 5,390 acre-feet related to the CREP program acres fallowed throughout the ESPA. R. at 34. IGWA requested 100% of the mitigation credit for the CREP actions even though IGWA was not responsible for 100% of the costs of the program. On May 28, 2010, the Coalition filed a petition for hearing on both the mitigation plan and mitigation credit orders. R. at 46.

The CREP program was described by the Director in the *Final Order*.

> CREP is a federal program that compensates landowners, ***primarily with federal dollars***, for discontinuing the cropping of farmland and growing a cover crop to protect the lands for conservation purposes. The program is "enhanced" when idling the lands will result in significant additional benefits that are identified by the U.S. Department of Agriculture. When lands are set aside under CREP, the owner of the lands receives compensation from the base purposes of the conservation reserved program and additional compensation for the "enhanced" purpose of the set aside. Lands within portions of the Eastern Snake River Basin are eligible for the enhanced compensation provided by CREP because of the ground water savings when the lands are no longer irrigation following enrolment.

R. at 95 ¶ 10. Generally, lands set aside under the CREP programs (referred to herein as "CREP acres"), are required to remain dried up for 15 years. Tr. P. at 12. The Idaho CREP program is eligible for up to 100,000 CREP acres. R. at 96 ¶ 12. However, to date, only approximately 17,000 acres are enrolled in the program. *Id.*

The total cost of CREP enrollment (over the 15 year term) in Idaho is $258,041,883. *Id.* at ¶ 13. Of that, $183,000,000, or 71% of the total cost, is from federal funds. *Id.* at ¶ 12. The State of Idaho and IGWA provided cash and in-kind services amounting to $75,041,883 – or 29% of the total cost. *Id.* Of this contribution, IGWA agreed to contribute a "one-time" "signing

bonus at a rate of $30 per acre" – for a total commitment of $3,000,000 if all 100,000 acres are enrolled in CREP – and $375,000 of "in-kind services in the form of water measurement." *Id.* IGWA's total contribution of $3,375,000, therefore, "is approximately 1.3% of the total cost of the CREP authorized budget." *Id.* at ¶ 13.

Notwithstanding the fact that IGWA only contributed 1.3% to the overall cost of the CREP program, and notwithstanding the fact that IGWA only sought credit for "their actions," the Director gave IGWA 100% of the anticipated impact from CREP activities within the trim line. Tr. P. at 12-13.

In the *Final Order*, the Director explained his decision as follows:

> 5. In various farm assistance programs, the federal government pays farmers to influence their behavior to accomplish a federal goal. The state may also pay farmers for activities that benefit a state goal. In the farm assistance programs, the participating farmer derives the entire monetary benefits from enrollment even though the farmer contributes a fractional share of the coast if there is a cost share at all.
>
> 6. CREP accomplished a goal of demand reduction in the Eastern Snake River Basin. The federal government and the State of Idaho are not requesting a proportionate share of the benefits derived from enrollment in CREP. The Department will assign credit for mitigation to the entity contributing privately to enrollment. If there is more than one private contributor, the credit will be assigned to each contributor based on the proportion of the private contributions. If there is no private contribution, the Department will assign credit for mitigation as designed by the enrollee, if the enrollee determines that credit should be assigned. A contributor may assign his or her credit.

R. at 98 ¶¶ 5-6. In other words, the Director determined that *all* credit would be given to those who requested it – regardless of their actual contributions relative to the program. As such, the Director gave IGWA 100% of the mitigation credit even though IGWA only contributed 1.3% of the total cost.

Moreover, the Director failed to consult either the United States or the State of Idaho to determine if either government held junior ground water rights that needed to be mitigated in the SWC delivery call proceedings. Apparently, the Director assumed that both the U.S. and State wanted to "mitigate" for private junior ground water rights through a program in which they paid nearly 99% of the costs.

A hearing on the Director's order approving IGWA's request for mitigation credits was held on June 29, 2010. R. at 66. The Director issued his *Final Order* on July 19, 2010. R. at 94. The Coalition timely filed a *Petition for Judicial Review* on August 16, 2010.

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.*

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

An agency's decision must be supported by "substantial evidence." *Id.* at 164 ("Substantial evidence … need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder"); *Mercy Medical Center,*

supra (agency decision must be "supported by substantial and competent evidence"). The "reviewing courts should evaluate whether 'the evidence supporting [the agency's] decision is substantial." *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 261 (1985). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id.* The Director's *Final Order* in this case fails the above standard of review and therefore should be set aside.

ARGUMENT

The Coalition supports efforts to rehabilitate the aquifer through governmental programs such as CREP,[2] and has no objection to the Director authorizing mitigation credits for actions paid for by IGWA. However, there is no basis in law or fact for the Director to give 100% mitigation credit to IGWA in return for only a 1.3% contribution. Importantly, neither the Director nor IGWA have ever provided any legal or factual basis for the Director's decision in this case. In addition, the Director failed to explain how the United States and State of Idaho agreed to give IGWA 100% credit for a program instituted and paid for by those governments. As such, the Director's decision is arbitrary and capricious and should be reversed.

[2] At the hearing, IGWA misrepresented the Coalition's position, asserting that the Coalition will only be satisfied with total curtailment. Tr. P. at 129-31. This familiar refrain accompanies all of IGWA's arguments before the Director and District Court. As always, however, this accusation is not true. Indeed, the Coalition welcomes efforts to rejuvenate an aquifer that have been depleted by junior ground water diversions to the point that the Coalition's senior surface water rights are being materially injured. The only issue in this case is whether or not IGWA should receive full credit for something to which it only contributed 1.3% of the costs.

The Conjunctive Management Rules ("CM Rules") provide the framework for conjunctive administration in Idaho. The rules give the Director authority to accept, review and approve mitigation plans submitted by the holders of junior ground water rights found to be causing material injury. *See* CM Rule 43. Unless the Director approves a mitigation plan, junior ground water rights causing material injury to a senior water right must be curtailed. CM Rule 40.01.

Nothing in the CM Rules allows the Director to approve a mitigation plan that includes actions taken or contributions made by someone other than the party filing the mitigation plan. Nothing allows the Director to give 100% of the mitigation credits to one party – especially when that party only contributed 1.3% of the total contribution. In this case there is no evidence that IGWA or the Director even consulted with the United States or State of Idaho regarding the "mitigation" credits to be given for the CREP program in the context of conjunctive administration.

That notwithstanding, the Director created a de-facto "rule" for the allocation of mitigation credits when some of the parties contributing to the activity do not seek credit for their actions. According to the Director, the private party seeking credit will receive full credit for all mitigation activities – regardless of that party's overall contribution to the program. As such, IGWA was given 100% of the mitigation credit for CREP enrollment – even though it only contributed 1.3%.

According to the Director, since the U.S. – which contributed 71% – and the State – which contributed 27.7% – did not seek credit for their contributions, all credit would be given to IGWA. R. at 98 ¶¶ 5-6. This decision is arbitrary and capricious, is not based upon any standard found in rule or law, and exceeds the Interim Director's authority, Indeed, the Interim Director

has no right to unilaterally establish new rules – he must follow the procedures of the Administrative Procedure Act. I.C. §§ 67-5201, *et seq.*

The record establishes that the Director does not treat all mitigation activities the same. Indeed, as it relates to recharge activities that were included in the same mitigation plan, the Director only gave IGWA mitigation credit for "their actions" – as requested in the mitigation plan. R. at26. Likewise, Dr. Allan Wylie, IDWR's ground water modeler, testified that the ground water district (i.e. IGWA) did not receive credit for recharge activities conducted by the "Water Board." Tr. P. at 42. According to Dr. Wylie, this is "because the ground water districts didn't pay for that water." *Id.* As such, the Director refused to give IGWA credit for "IDA's 2009 recharge" activities, R. at 98 ¶ 7, and did not give any credit for the Water Board's recharge programs, Tr. P. at 121-22. This is the case, even though the Water Board did not seek any credit for the recharge efforts.[3]

There is no basis in the record for the Director to refuse to give credit for one form of mitigation for activities that are not paid for by IGWA, but then give 100% credit for other activities even though IGWA's contribution only accounts for 1.3% of the total contribution. Again, such a decision is arbitrary and capricious and violates Idaho law.

During the hearing, IGWA attempted to justify the excessive credits given by asserting that they paid "100 percent of the private costs of funding CREP" and "20 percent of the State cash contributions." Tr. P. at 130. These arguments, however, do not justify the Director's decision. These arguments overlook the contributions of the Federal Government – 71% of the total cost. There is no basis in the record – including the CREP contracts – to bifurcate the contributions in this manner. As such, it is irrelevant that IGWA paid 100% of the private

[3] Although the Interim Director tried to dismiss Dr. Wylie's testimony because "he really doesn't have a role in that policy determination," Tr. P. at 64, this testimony is not about "policy," it's about the actions actually taken by the Director. As such, this testimony from Dr. Wylie should not be ignored.

contributions – particularly where those "private contributions" only equal 1.3% of the total costs of the program.

IGWA claims that "without IGWA's involvement we would not have had a CREP program." *Id.* There is no support for IGWA's attempt to anoint itself as the most important party to the CREP contract. Indeed, without the 71% contributions from the Federal Government and the 27.7% contributions from the State Government, IGWA's 1.3% contribution would have been meaningless. That does not mean, however, that any party to that Contract should receive more credit that they are due. In the end, all parties to the CREP contract were important and the fact IGWA contributed a "one-time" signing bonus does not mean that contribution was the catalyst for the entire CREP program. IGWA produced no evidence that its contribution was the sole factor for the 17,000 acres enrolling in the program. In this case, IGWA's total contribution is 1.3% and its credit should be likewise limited.

The Coalition's position has been clear:

> [T]hey [IGWA] should receive credit for what they do pay for. And if they pay 1 percent of the program, that's what their credit should be. If they pay for 50 percent, they should get credit for that. ... There no reason that the party that's injuring a senior user should get credit for all those State and Federal dollars.

Tr. P. at 132-33. Effectively, the Interim Director's rationale is that if IGWA contributed $1 to the CREP program, and was the sole "private" contributor, it should receive 100% credit for the mitigation benefits of the program. This rationale is unsupportable and should be rejected by the Court.

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CONCLUSION

There is no basis for the Interim Director to award IGWA 100% of the mitigation credit for CREP involvement when its total contribution is only 1.3% of the total cost of the program. Such actions are arbitrary and capricious and should be reversed.

DATED this 24th day of January, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of January, 2011, I served true and correct copies of the *Surface Water Coalition's Joint Opening Brief* upon the following by the method indicated:

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