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 REPLY BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable Eric J. Wildman, Presiding

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INTRODUCTION

The Coalition appeals from a determination made by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") in the July 19, 2010 *Final order Approving Mitigation Credits Regarding SWC Delivery Call*, R. at 94 ("*Final Order*") that entities seeking mitigation credit are entitled to credit far exceeding contributions made to a mitigation program. In the *Final Order*, the Director held that, as it relates to the allocation of mitigation credits Conservation Reserve Enhancement Program ("CREP"), a crop set aside program funded primarily with federal and state money:

> 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.

R. at 98 ¶ 6. As applied in this case, the Director determined that the Idaho Ground Water Appropriators, Inc. ("IGWA") would receive 100% mitigation credit for CREP enrolled acres even though federal and state contributions to the program were 98.7% of the total cost of the program and IGWA's *total contribution* amounted to just 1.3% of the cost of the program. *Id.* This decision by the Director was arbitrary and capricious and should be reversed.

The Coalition does not challenge the use of the model in this case or the results of the modeling exercise. R. at 34. The Coalition does not challenge the use of CREP as a mitigation activity. Indeed, the Coalition did not protest IGWA's general mitigation plan concerning the request for some CREP mitigation credit. This case is about one issue: the Director's arbitrary and capricious allocation of mitigation credits far exceeding IGWA's contribution to the CREP program.

There are no legal or factual findings in the *Final Order* to justify the Director's creation of a new "policy," mitigation rule or the application of the new policy or rule in this case.

Further, there is no finding that the groundwater users enrolled in CREP agreed to allow IGWA the credit for their CREP activities. Finally, there is no finding that IGWA made its contributions to CREP conditioned upon receiving mitigation credit. Indeed, IGWA did not assert either position at the time of hearing. Neither IDWR nor IGWA cite any authority or precedence authorizing the Director to arbitrarily develop a new standard for the granting of mitigation credits. There is no legal authority supporting the granting of 100% mitigation credit based upon a 1.3% contribution to a mitigation program.

Notwithstanding the absence of any factual or legal support, both IDWR and IGWA conveniently accuse the Coalition of failing to provide any "substantial evidence" to support this appeal. The evidence in the case – the de minimus contribution of IGWA to the program and the lack of the Director's legal authority to make this type of determination – is uncontroverted. The lack of any evidence or law to support the Director's decision requires a reversal of the *Final Order*.

The Department tries to hide behind the Director's discretion as justification for the *Final Order*. The Director does not have unlimited discretion. The Director's decision must be supported by the evidence and the law and must not be arbitrary or capricious.

Accordingly, this Court should reverse the Director's *Final Order* and direct entry of an order requiring that IGWA's mitigation credit be based upon IGWA's contribution to the overall cost of the CREP program.

ARGUMENT

I. Since the Director's *Final Order* is Not Supported by any Evidence, it is Arbitrary and Capricious and Should be Reversed.

Idaho law provides that the Court is not required to affirm an agency decision where that agency's findings, inferences, conclusions, or decision are in violation of constitutional or

statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, not supported by substantial evidence on the record or are arbitrary, capricious or an abuse of discretion. I.C. § 67-5279(3). Here, there is no statutory authority authorizing the Director to determine that an entity is entitled to mitigation credit beyond the extent of the contribution of that entity, there is no procedure cited by IDWR or IGWA authorizing the Director to grant such a credit and there is no evidence in the record to support the granting of the credit. As such, the Director's finding is arbitrary, capricious and an abuse of discretion.

IGWA defends the Director's *Final Order*, arguing that it is "supported by substantial competent evidence." *IGWA Br.* at 12. However, the evidence in the case is uncontroverted and does not, in any manner, support the determination made by the Director. The maximum total cost of the CREP program over the life the program is $258,041,883. R. at 96 ¶ 13. The maximum total contribution of IGWA toward that cost is $3,375,000. *Id.* These facts are not refuted, and do not support the right of the Director to grant IGWA a 100% mitigation credit for CREP activities paid for by the state and federal governments.

Neither IDWR nor IGWA cite any evidence in the record that would support how one is entitled to a 100% credit for a 1.3% contribution. IDWR does not even try, merely asserting that the Court must affirm because the Director's decision is "entitled to deference." *IDWR Br.* at 5-8.

This appeal is not about the appropriateness of using CREP as a mitigation activity. *E.g. IDWR Br.* at 7. Nor is it about the use of the model to determine the benefits of a mitigation activity. *E.g. IGWA Br.* at 12; *IDWR Br.* at 1. Rather, the Coalition challenges the Director's unilaterally created "rule" that based the distribution of mitigation credits on who does not seek credit rather than on what is actually contributed to the mitigation effort. According to the

Director, IGWA received 100% mitigation credit simply because no one else asked for that credit. R. at 98. Taken to the extreme, based upon this new standard, any entity seeking mitigation credit could simply contribute $1 to a multimillion dollar aquifer revitalization project and receive 100% of the mitigation credit simply because no one else sought credit.

In addition to the lack of evidence supporting the distribution of credits, this "all for nothing" credit distribution system is not how the Director has treated other mitigation activities. For example, the Department refused to give credit for the Water Board's recharge programs even though the Water Board did not seek any credit for its actions. Tr. P. at 121-22.

Citing to the Director's assignment of credit for storage water *IGWA leased* from storage, the Department argues that the Director's actions have been consistent. *IDWR Br.* at 8-9. Not true. In that case, IGWA was given full credit because IGWA leased the water from storage. Here, IGWA was given full credit even though it only contributed 1.3% of the total cost. R. at 95.[1] The facts couldn't be more different.

Both IDWR and IGWA repeatedly assert that IGWA received credit for "the actions its members performed for recharge." *IGWA Br.* at 13; *see also id.* at 12; *IDWR Br.* at 7 & 10. Yet, neither can cite to anything in the record that supports this contention. There is no finding in the *Final Order* that the credit determination is based on IGWA's membership. R. at 95. Indeed, IGWA's Mitigation plan does not seek credit for its members' CREP activities. R. at 1. Rather, it merely states that "IGWA and its members have provided ***financial support*** to the CREP program in 2005 and anticipate continuing this support." R. at 6 (emphasis added).

Even if the ground water users are members of IGWA, there is no finding that these members have ever given IGWA authority to claim and receive credit for their individual

[1] Likewise, citation to A&B's mitigation plan is unpersuasive. After realizing that there would be no contributions, A&B withdrew the CREP element of its mitigation plan. In addition, unlike IGWA, the water right in that case is owned by A&B.

mitigation activities. Indeed, there is nothing in the record to support any conclusion that IGWA can receive credit for the Federal and State Governments' contributions.

IGWA claims that the credit is appropriate because the acres continue to be dried up even though they have received no credit and even though the Coalition members will continue to receive the benefits of CREP enrollment. *IGWA Br.* at 11. However, IGWA's argument fails to take into account that those enrolled in the CREP program received financial compensation for participation in the program, and will continue to receive compensation. The issue at hand is the extent to which IGWA is entitled to mitigation credit for the monetary value of its contributions to the program.

Citing *Pear v. Board of Prof. Discipline of Idaho State Bd. Of Medicine*, 137 Idaho 107 (2002), IDWR argues that the Director's decision should be afforded great deference. Much of this argument, however, is not relevant to these proceedings. For example, the Department discusses the impacts and benefits to the aquifer of the CREP program. *IDWR Br.* at 6-7. The Coalition does not dispute that programs which reduce the demand on the aquifer are beneficial to the water supplies. However, contrary to the Department's arguments, a policy determination that one party will receive full credit for mitigation activities simply because no one else sought that credit is not reasonable, but is arbitrary and capricious.

The Department claims that deference is warranted because the rules do not speak to whether or not CREP can be an appropriate mitigation activity. *IDWR Br.* at 7. Again, this argument misses the mark. There is no dispute that CREP can be an appropriate mitigation activity – the Coalition didn't protest the mitigation plan. The issue here is with the Director's determination that a party will receive 100% credit for 1.3% contribution. The Conjunctive Management Rules do not allow for such treatment of a mitigation plan. There is nothing in the

rules, and nothing is cited, that would give the Director the authority to unilaterally provide mitigation credit for the actions of third parties.[2]

Finally, the Department argues that the "rationales underlying the rule of deference are present." *IDWR Br.* at 8. Yet, the Director's interpretation of the CM Rules to allow full credit for a party's de minimus participation is not "practical." The fact that the legislature has not acted to change the CM Rules since the institution of CREP is not surprising, since there is no dispute that CREP may be an appropriate form of mitigation. Finally, the Director's creation of this policy in 2010 is "far from contemporaneous" to the implementation of the CM Rules in 1994. *Canty v. Idaho State Tax Com'n*, 138 Idaho 178, 184 (2002) (the fifth rationale requires an agency interpretation that is contemporaneous "with the passage of the legislation"). Accordingly, no deference is warranted.

IGWA accuses the Coalition of seeking an administrative regime wherein the Director ignores the impacts of mitigation activities and instead focuses on "the monetary value of their contribution." *IGWA Br.* at 13. Not true. The Coalition recognizes that activities such as CREP can help revitalize the aquifer. As such, parties should receive credit for their actions in participating in such programs to the extent they benefit the aquifer. Here, however, the Director gave credit for 100% of the action even though IGWA was only responsible for 1.3%.

Absent any basis in fact or law, the Director's *Final Order* is arbitrary and capricious and should be reversed.

[2] It could be argued that at a minimum, such credit must be contingent on an agreement to assign the credit. Indeed, the Director appeared to find as much in the *Final Order* when he stated that "if there is no private contribution, the Department will assign credit for mitigation ***as designated by the enrollee***." R. at 98 (emphasis added). However, there are no facts in the record to support even that argument.

II. This Matter is Ripe for Review and the Coalition Can Prevail.

The second main argument made by IGWA and IDWR is that substantial rights of the Coalition have not been prejudiced, a requirement set forth in Idaho Code § 67-5279(4). This is based upon the Director's subsequent injury orders that found, as a result of changing weather and water supply conditions, that the Coalition suffered no injury in 2010, and therefore no mitigation was required. Apparently, IGWA and IDWR are arguing that even if the Director was mistaken in his findings, the Court should not review those findings. Considering that the Director was interpreting an approved mitigation plan order, this argument is misplaced.

It is important to remember that the Director is setting precedent on how mitigation credits will be determined in the future based on IGWA's mitigation plan. All parties need guidance and certainty concerning the manner of mitigation credit calculation. *See State, Child Support Services v. Smith*, 136 Idaho 775, 778 (Ct. App. 2001) ("there is a well-recognized exception to mootness when issues of wide concern affect the public interest, are likely to recur in a similar manner, and, because of the brief time any one person is affected, would otherwise likely escape judicial review"); *State v. Hoyle*, 140 Idaho 679, 682 (2004) (same). Accordingly, the court heard a challenge to the Director's decision to reject the City of Pocatello's 2008 power lease even though "no party seriously disagrees that it is impossible to fashion any relief in this appeal which will assist the City regarding the 2008 water year." Memorandum Decision & Order, *City of Pocatello v. IDWR*, Sixth Dist. Case No. 09-3449 at 2-7 (Bannock County) (Jul. 22, 2010). According to the Court, review was appropriate because the issue would occur again and evade review and because the issue raised a matter of public interest. *Id.*

Here, the Department admits that this matter is capable of repetition and would escape judicial review. *IDWR Br.* at 4-5. Likewise, the method in which the Director apportions

mitigation credits in administering Idaho's water supplies is a matter of substantial public interest. Therefore, review is appropriate.

The argument that substantial rights of the Coalition have not been prejudiced rings hollow. *See IDWR Br.* at 10-11; *IGWA Br.* at 11-12. There is no dispute that the Coalition's water rights are substantial rights and that the right of the Coalition to receive delivery of its water rights, in priority, is a substantial right.

In this case, the Director has determined that the Coalition's senior surface water rights are being materially injured. As such, the CM Rules demand curtailment or an approved mitigation plan. CM Rule 40. If a mitigation plan is approved, the junior water right holder may continue to divert out of priority. *Id.* As such, the manner in which the Director determines the appropriate mitigation credit for junior users desiring to pump out of priority is a substantial right of the Coalition, both under the law and the Idaho Constitution.

It is disingenuous for IDWR and IGWA to now argue that because weather conditions improved water supplies, the Court should not examine how the Director applied mitigation credits. Particularly here, where the Director's findings resulted from his application of an approved mitigation plan. Once the Director's Order becomes a final order following review and appeal, the Director cannot arbitrarily change how he will calculate mitigation credits in the future. The Court's decision in this matter will provide guidance and certainty to all parties and IDWR for future mitigation calculations.

CONCLUSION

Since the *Final Order* is not supported by the law or facts, it is arbitrary and capricious and should be reversed.

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DATED this 8th day of March, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th 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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