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DEPARTMENT OF WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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,

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,<sup>1</sup> and THE DEPARTMENT OF WATER RESOURCES,

Filed pursuant to I.R.C.P. 5(e)(1) on July 24, 2009 at 3:05 P.M. John Melanson, Dist. Judge

Case No. 2008-0000551

ORDER ON PETITION FOR JUDICIAL REVIEW

<sup>1</sup> Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

Respondents. )

IN THE MATTER OF DISTRIBUTION )  
OF WATER TO VARIOUS WATER )  
RIGHTS HELD BY OR FOR THE )  
BENEFIT OF 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 )

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**Ruling:**

1) Director did not exceed authority by waiting until following season to adjust material injury to carry-over storage but exceeded his authority by not making process contingent on guarantee of replacement water in event of shortfall; 2) Director exceeded authority by categorically denying reasonable carry-over for multiple-years; 3) Director did not exceed authority or abuse discretion by combining natural flow and storage rights in making a material injury analysis or by using a "baseline" different from the decreed or licensed quantity, subject to certain conditions; 4) Director did not err or abuse discretion by using 10% trim-line in applying ground water model; 5) Director exceeded authority and abused discretion by not following procedural steps for mitigation plans as set forth in the Rules for Conjunctive Management; 6) Director exceeded his authority by determining that full headgate delivery for Twin Falls Canal Company as issue is currently pending in the SRBA; 7) Director exceeded authority by issuing separate "Final Orders"; 8) Based on foregoing actions, Director's actions did not constitute timely administration of junior rights to protect senior rights.

**Appearances:**

C. Thomas Arkoosh, of Capitol Law Group, PLLC, Gooding, Idaho, attorney for American Falls Reservoir District #2.

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

John A. Rosholt, John K. Simpson, and 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.

Phillip J. Rassier, Chris M. Bromley, 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.

John C. Cruden, Acting Assistant Attorney General, and David Gehlert, of the United States Department of Justice, Denver, Colorado, attorneys for the United States Bureau of Reclamation.

Randall C. Budge, Candice M. McHugh, and Scott J. Smith, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators.

A. Dean Tranmer, of the City of Pocatello Attorney's Office, Pocatello, Idaho, attorney for the City of Pocatello.

Sarah A. Klahn of White and Jankowski, LLP, Denver, Colorado, attorney for the City of Pocatello.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

## I.

### STATEMENT OF THE CASE

#### A. Nature of the case

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR" or "Department") issued in response to a delivery call filed by Petitioner Surface Water Coalition ("SWC") on January 14, 2005. The delivery call was filed as a result of a reduction in reach gains and spring flows discharging from the Eastern Snake Plan Aquifer ("ESPA"). The SWC is made up of seven irrigation districts and canal companies below American Falls Reservoir that divert natural flow water from the Snake River and who hold storage water rights in various Bureau of Reclamation ("BOR") reservoirs. The members of SWC are: A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD #2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka

Irrigation District (“MID”), North Side Canal Company (“NSCC”), and Twin Falls Canal Company (“TFCC”). The September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call* (“*Final Order*”), from which judicial review is sought, ordered curtailment of junior ground water rights or alternatively a replacement water plan in lieu of curtailment. Petitioners contend the Department erred in response to the delivery call and seek judicial review pursuant to the Idaho Administrative Procedures Act, Title 57, Chapter 52, Idaho Code.

## **B. Course of Proceedings**

### **1. The Delivery Call**

SWC delivered a letter to the Director of IDWR on January 14, 2005, requesting the Director to commence conjunctive administration of their water rights. Hearing Record (R.) Volume (Vol.) 1 at 1. SWC asserts in the letter that their senior water rights were being materially injured “[b]y reason of the diversion of junior ground water rights located within Water District No. 120 and elsewhere throughout the ESPA,” including the American Falls Ground Water Management Area, and areas of the ESPA not within an organized water district or ground water management area. *Id.* at 4. Also on January 14, 2005, SWC filed a *Petition for Water Rights Administration and Designation of the Eastern Snake River Plain Aquifer as a Ground Water Management Area*. R. Vol. 1 at 53.

On February 14, 2005, Director Dreher issued an order (“*February 14, 2005 Order*”) in response to SWC’s requests. The Director found that because water districts were expected to be created in the ESPA by the irrigation season of 2006, there was no need for the creation of a ground water management area encompassing the entire ESPA. R. Vol. 2 at 214. The Director was unable to determine injury to the senior priority rights held by SWC until the commencement of the 2005 irrigation season and until the BOR and the United States Army Corps of Engineers released inflow forecasts. *Id.* at 226. The Director requested more information from SWC in order to make a determination of injury “as soon after April 1 [the start of the irrigation season] as practicable.” *Id.* at 227, 230.

On May 2, 2005, Director Dreher issued an *Amended Order* (“*May 2, 2005 Amended Order*”). The Director found that junior ground water diversions from the ESPA were materially injuring senior SWC natural flow and storage rights. Vol. 8 at 1384-85, 1402. The amount of material injury to the seniors was determined to be 27,700 acre feet of water. *Id.* at 1402. Applying the amount of water used by SWC water users in 1995, the Director determined the “minimum full supply” needed for full deliveries, and then subtracted the predicted 2005 supply, in order to calculate a total shortage of 133,400 acre feet. *Id.* at 1384. Built into this calculation was the assumption that SWC members use all of their carryover storage from 2004. Further, the Director found that “[m]embers of the Surface Water Coalition are entitled to maintain a reasonable amount of carryover storage to minimize storages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rule (IDAPA 37.03.11.042.g).” *Id.* at 1385. The Director determined the amount of reasonable carryover due to SWC by averaging the amounts of carryover storage based on flow and storage accruals from 2002 and 2004. *Id.* Finally, the Director ordered that replacement water be provided over time to SWC and that the amount of replacement water for 2005 not be less than 27,700 acre feet. *Id.* at 1404. The Director determined that if all of the replacement water is not provided to the senior users as required, the amount remaining would be added to the ground water users’ obligations for future years. However, the Director also ordered that the ground water users may be curtailed if at any time mitigation is not provided. *Id.*

Thereafter, the Director issued a series of supplemental orders, which reviewed IDWR action, made additional findings, and modified or revised previous findings. R. Vol. 37 at 7067-7071. For instance, on June 29, 2006, the Director entered his *Third Supplemental Order* (“*June 29, 2006 Supplemental Order*”), determining that the remainder of the replacement water that IGWA was to supply in 2005 was to be supplied at the beginning of the 2006 irrigation season, and not as 2005 carryover storage. R. Vol. 20 at 3756. Subsequent supplemental orders amended or approved replacement water plans for 2006, 2007, and 2008. R. Vol. 37 at 7068-7071, Vol. 38 at 7198.

## 2. IGWA

On February 3, 2004, IGWA filed two petitions to intervene in the request for administration in Water District 120 and the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area, and designation of the ESPA as a Ground Water Management Area. R. Vol. 2 at 197, 204. IGWA is a non-profit corporation that represents ground water users who pump water from the ESPA and irrigate over 700,000 acres of land from the aquifer. R. Vol. 37 at 7058. IGWA represents water users with ground water rights junior to SWC's rights, which are subject to curtailment under the Director's *Final Order*.

In a February 14, 2005 *Order*, the Director granted IGWA's petition to intervene in the matter of water right administration in Water District 120 and in the American Falls Ground Water Management Area.<sup>2</sup> *Id.* at 228.

IGWA has filed petitions for reconsideration of each of the *Director's Orders* and is a respondent in the petition for judicial review currently before this Court. ("IGWA or Ground Water Users").

## 3. The City of Pocatello

On April 26, 2005, the City of Pocatello filed a petition to intervene in the SWC delivery call. R. Vol. 7 at 1254. The City of Pocatello holds a ground water right that is junior to rights held by SWC and is subject to curtailment under the Director's *Final Order*. R. Vol. 37 at 7060.

On May 16, 2005, the City of Pocatello filed a petition for reconsideration of the Director's *May 2, 2005 Order*, and also filed petitions for reconsideration for later *Supplemental Orders*. R. Vol. 9 at 1669, Vol. 23 at 4376, Vol. 25 at 4745. The City of Pocatello is a respondent in the petition for judicial review currently before this Court.

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<sup>2</sup> The Idaho Dairymen's Association, the City of Pocatello, the United States Bureau of Reclamation, and the State Agency Ground Water Users were also granted intervention in the proceedings before Director Dreher. See R. Vol. 39 at 7381.

#### 4. Hearing on the SWC Delivery Call, Hearing Officer Schroeder's Recommended Order and the Director's Final Order

On August 1, 2007, Director David Tuthill issued an *Order Approving Stipulation and Rescheduled Hearing*, and an *Order Appointing Hearing Officer*, setting a hearing on the SWC delivery call and appointing Hon. Gerald F. Schroeder ("Hearing Officer") to preside over the hearing. R. Vol. 25 at 4770, 4775. The hearing began on January 18, 2008, and concluded on February 5, 2008. R. Vol. 37 at 7048. On April 29, 2008, the Hearing Officer entered his *Opinion Constituting Findings of fact, Conclusions of Law and Recommendation* ("*Recommended Order*"). *Id.*

In sum, the Hearing Officer concluded that: 1) the Director's assignment of a 10% uncertainty to the ESPA model and the use of a "trim-line" was reasonable, *Id.* at 7080; 2) the Director's consideration of the public interest criteria was proper, *Id.* at 7086; 3) the Director's application of a "minimum full supply" was reasonable when subject to adjustment as conditions change, but was unacceptable as a fixed amount, *Id.* at 7091, 7095, 7098-7099; 4) the existing facilities utilized by SWC were reasonable, *Id.* at 7101-7102; 5) the members of SWC were employing reasonable conservation practices, *Id.* at 7103-7104; 6) the Director's determination to provide carryover storage for one year (not multiple years) was reasonable, *Id.* at 7109; 7) the process utilized by the Director to determine a reasonable amount of carryover storage due to SWC was proper; 8) the Director's order of replacement water plans as a form of mitigation was proper, *Id.* at 7112-7113; and 9) replacement water must be approved in accordance with the procedures of the Conjunctive Management Rules, and provided at the time of material injury, *Id.* at 7112.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call*. R. Vol. 39 at 7381. The *Final Order* adopted the findings of fact and conclusions of law of the previous Director's orders issued in the delivery call, and the recommended orders of the Hearing Officer except as specifically modified. *Id.* at 7387. In particular, the Director held that 1) the Director properly exercised his discretion in authorizing replacement water as an interim measure for mitigation to senior water users before conducting a hearing to determine material injury, *Id.* at 7383, 7388; 2) it was appropriate to find that replacement water for predicted

shortages to reasonable carryover be provided in the season in which water can be put to beneficial use, not the season before, *Id.* at 7386, 7391; and 3) the term “reasonable in-season demand” will replace the use of the term “minimum full supply”, *Id.* at 7386.

## **5. Petitions for Judicial Review**

Petition for judicial review of the *Final Order* was timely filed by the SWC on September 11, 2008. On September 25, 2008, the United States Bureau of Reclamation filed a *Petition for Reconsideration* of the Director’s *Final Order*. Thereafter, the Director issued an *Order Denying USBR Petition for Reconsideration and Pocatello’s Response*. BOR then timely filed a petition for judicial review on November 7, 2008. This case was assigned to this Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication, on September 12, 2008.

## **C. Relevant Facts**

### **1. The Water Rights at Issue**

#### **a) The A&B Irrigation District**

A & B holds natural flow right number 01-00014 for 267 cfs with a priority date of April 1, 1939, and storage water rights in American Falls Reservoir for 46,826 acre feet with a priority date of March 30, 1921, and 90,800 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 137,626 acre feet. R. Vol. 37 at 7055.

#### **b) The American Falls Reservoir District #2**

AFRD #2 holds natural flow right number 01-006 for 1,700 cfs with a priority date of March 30, 1921, and storage water rights in American Falls Reservoir for 393,550 acre feet with a priority date of March 30, 1921. R. Vol. 37 at 7055.



**c) The Burley Irrigation District**

BID holds natural flow right number 01-00211B for 655.88 cfs with a priority date of March 26, 1903, and natural flow right number 01-00214B for 380 cfs with a priority date of August 6, 1908, and natural flow right number 01-00008 for 163.4 cfs with a priority date of April 1, 1939. BID also has a storage rights in Lake Walcott for 31,892 acre feet with a priority date of December 14, 1909; 2,672 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 155,395 acre feet in American Falls Reservoir with a priority date of March 30, 1921; 36,528 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 226,487 acre feet. R. Vol. 37 at 7055.

**d) The Milner Irrigation District**

Milner holds natural flow right number 01-00017 for 135 cfs with a priority date of November 14, 1916, and natural flow right 01-00009 for 121 cfs with a priority date of April 1, 1939, and natural flow right number 01-02050 for 37 cfs with a priority date of July 11, 1968. Milner has storage rights of 44,951 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 45,640 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 90,591 acre feet. R. Vol. 37 at 7055.

**e) The Minidoka Irrigation District**

MID holds natural flow rights number 01-00211A for 1,070 cfs with a priority date of March 26, 1903, right number 01-00214A for 620 cfs with a priority date of August 6, 1908, and right number 01-00008 for 266.6 acre feet with a priority date of April 1, 1939. MID has storage rights of 127,040 acre feet in Jackson Lake with a priority date of August 23, 1906; 58,990 acre feet in Jackson Lake with a priority date of August 18, 1910, 63,308 acre feet in Lake Walcott with a priority date of December 14, 1909; 5,328 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 82,216 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 29,672, acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 336,554 acre feet. R. Vol. 37 at 7056.

**f) The North Side Canal Company**

NSCC holds natural flow rights 01-00210 for 400 cfs with a priority date of October 11, 1900, right number 01-00212 for 2,250 cfs with a priority date of October 7, 1905; right number 01-00213 for 890 cfs with a priority date of June 16, 1908; right number 01-00005 for 300 cfs with a priority date of December 23, 1915; and right number 01-00016 for 1,260 cfs with a priority date of August 6, 1920. NSCC has storage rights for 312,007 acre feet in Jackson Lake with a priority date of May 24, 1913; 9,248 acre feet in American Falls Reservoir with a priority date of March 29, 1921; 116,600 acre feet in Palisades Reservoir with a priority date of March 29, 1921; and 422,043 acre feet in American Falls Reservoir with a priority date of March 30, 1921. R. Vol. 37 at 7056.

**g) The Twin Falls Canal Company**

TFCC holds natural flow rights 01-00209 for 3,000 cfs with a priority date of October 11, 1900, right number 01-00004 for 600 cfs with a priority date of December 22, 1915, and right 01-00010 for 180 cfs with a priority date of April 1, 1939. TFCC has storage rights of 97,183 acre feet in Jackson Lake with a priority date of May 24, 1913, and 147,582 acre feet in American Falls Reservoir with a priority date of March 29, 1921, for combined storage rights of 244,765 acre feet. Twin Falls Canal Company has claimed in the SRBA and the Director has recommended irrigation rights totaling 196,162 acres. TFCC delivers water to 202,690 shares. R. Vol. 37 at 7056.

**2. Eastern Snake Plain Aquifer (ESPA)**

The ESPA is an unconfined aquifer underlying a geographic area of approximately 10,800 square miles of southern and southeast Idaho. R. Vol. 37 at 7050. The ESPA connects with the Snake River and its tributaries along a number of reaches resulting in either gains or losses to the River depending on the level of the aquifer in relation to the River. *Id.* The ESPA consists primarily of fractured basalt ranging in a saturated thickness of several thousand feet in the central part of the Eastern Snake River

Plain, to a few hundred feet in the Thousand Springs area where the water is discharged through a complex of springs. Water flow through the ESPA is not uniform. Water travels through the system at rates ranging from 0.1 feet per day to 100,000 feet per day depending on subterranean geology, elevation and pressure differentials. *Id.* The ESPA receives approximately 7.5 million acre-feet per year from the following sources: irrigation related incidental recharge (3.4 million acre-feet), precipitation (2.2 million acre-feet) flow from tributary basins (0.9 million acre-feet) and losses from the Snake River and its tributaries (1.0 million acre-feet). R. Vol 2 at 198. On average between May 1980 and April 2002, the ESPA discharged approximately 7.5 million acre-feet on an annual basis through spring complexes located in the Thousand Springs area and near the American Falls Reservoir and through the discharge of approximately 2.0 million acre-feet per year through depletions from ground water withdrawals. *Id.* The ESPA is estimated to contain as much as one billion acre-feet of water. R. Vol. 37 at 7050.

The early 1950's marked the beginning of the use of deep well pumps on the ESPA. Spring flows then began to decline as a result of conversion from flood irrigation to sprinkler irrigation as well as depletions caused by ground water pumping. R. Vol. 37 at 7052. As a result, spring discharges and ESPA ground water levels have been declining in the last 50 years. A moratorium on new ground water permits was issued in 1992. R. Vol. 37 at 7058.

### **3. ESPA Model**

A calibrated ground water model was used by the Director to predict the effects of curtailment of junior ground water rights. R. Vol. 2 at 199. The model has strengths and weaknesses. The model was designed to simulate gains and losses in various reaches of the Snake River including the reach from Shelley, Idaho to Minidoka Dam, which includes the American Falls Reservoir. *Id.* at 200. The model divides the ESPA into individual one mile by one mile cells. R. Vol. 37 at 7079. Despite the lack of homogeneity in the ESPA the model treats all cells as homogenous. The model was developed with input from a number of stakeholders with competing interests. *Id.*

#### **4. The Bureau of Reclamation**

The United States Bureau of Reclamation operates four main reservoir facilities on the Snake River: Jackson Lake Reservoir (“Jackson”), American Falls Reservoir (“American Falls”), Lake Walcott or Minidoka Dam (“Minidoka”), and Palisades Reservoir (“Palisades”). R. Vol. 37 at 7060-7061. This reservoir system was originally constructed with the intent to provide storage water to irrigators to insure against water shortages in times of drought. *Id.* More recently, the system also allows for flood control and hydropower production, while continuing to provide irrigation districts with the certainty that water will be available in future years. R. Vol. 37 at 7060-7061, 7107-7108. The BOR has contracts with members of SWC and the City of Pocatello for water held in storage in this reservoir system, including contracts for carryover water for irrigation. *Id.* at 7060-7061. *See also* United States’ *Opening Brief*, at 3-4. As a result, the BOR has an interest in how the water rights at issue in this delivery call are administered. *See also U.S. V. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (holding legal title is held by the BOR with equitable title being held by landowners within the service area of SWC).

#### **5. Interim Administration and Formation of Water District**

On January 8, 2002, pursuant to I.C. § 42-1417, the SRBA District Court ordered Interim Administration of water rights located in all or portions of Basins 35, 36, 41 and 43, which included the water rights at issue in this matter. R. Vol. 2 at 200. On February 19, 2002, the Director of IDWR issued orders creating Water District Nos. 120 and 130. On November 19, 2002, the SRBA District Court ordered interim administration of a portion of Basin 37, which includes water rights at issue in this matter. *Id.* Thereafter, the Director issued an order revising the boundaries of Water District 130 to include this portion of Basin 37. *Id.* On October 29, 2003, the SRBA District Court issued an order authorizing Interim Administration of water rights located in portions of Basin 29, which includes water rights at issue here. *Id.* Again, the Director thereafter issued an order revising the boundary of Water District No. 120 to include this portion of Basin 29. *Id.* at

201. The water rights at issue in this case are included in Water District nos. 120 and 130, and such water districts have been created in order to provide for administration of water rights to protect prior surface and ground water rights. R. Vol. 37 at 7064. As a precondition for interim administration Idaho Code § 42-1417 requires that water rights either be reported in a director's report or partially decreed. I.C. § 42-1417 (a) and (b).

## II.

### **MATTER DEEMED FULLY SUBMITTED FOR DECISION**

Oral argument before the District Court in this matter was held May 26, 2009. 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 May 27, 2009.

## III.

### **APPLICABLE 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, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 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.

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

The petitioner or appellant 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. Idaho Code § 67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 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.<sup>3</sup> *Id.* The Petitioner (the party challenging the agency decision) 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 evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

*Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (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. Idaho Code § 67-5279(3); *University of*

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<sup>3</sup> 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).

*Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

#### IV.

#### ISSUES PRESENTED FOR JUDICIAL REVIEW

##### A. Issues Raised by SWC

In its brief, SWC raised a number of issues. The Court has summarized these issues as follows:

1. Whether the Director failed to provide timely and lawful conjunctive administration of junior ground water rights?
2. Whether the Director gave proper weight and deference to the SWC's decreed senior water rights?
3. Whether the Director exceeded his statutory authority through the implementation of replacement water plans?
4. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary, capricious, and contrary to law?
5. Whether the Director's application of the Conjunctive Management Rules is consistent with Idaho law?
6. Whether the Director's use of a 10% "trim-line" resulting in the exclusion of certain junior priority ground water rights from administration was arbitrary, capricious, and contrary to law?
7. Whether the Director's determinations regarding carryover storage is arbitrary, capricious, and contrary to law?

##### B. Issues Raised by the Bureau of Reclamation

1. Whether the Director abused his discretion by failing to allow reasonable carryover storage for use in multiple years?

2. Whether the Director abused his discretion by failing to require mitigation of the material injury to reasonable carryover storage in the season the injury occurs?

## V.

### ANALYSIS AND DISCUSSION

#### **A. The Director abused discretion by failing to require mitigation of material injury to reasonable carry-over storage in the season in which the injury occurs.**

The SWC and BOR argue that Director Tuthill acted outside the scope of his authority and abused discretion by waiting until the following irrigation season before making a final determination of material injury to carry-over storage. Instead of making a final determination of injury, the Director adopted a “wait and see” approach to see if the storage reservoirs were predicted to fill the following year. The Director would not make a final determination until after the issuance of the “joint forecast” for the inflow for the Upper Snake River Basin which is issued annually after April 1st by the BOR and the United States Army Corps of Engineers. The Director reasoned as follows:

The former Director [Dreher] found that shortfalls to reasonable carryover should be provided the season before the water can be put to beneficial use. as evidenced in 2006 and 2008, if the reservoir system mostly fills and had IGWA been required to provide reasonable carryover shortfalls to injured members of the SWC, the secured water would have been in excess of the amount needed for beneficial use by members of the SWC in the season of need.

As found by the Hearing Officer, the reservoir system fills two-thirds of the time, and storage water has been historically available for rental or lease even during times of drought. *Recommended Order* at 6, 15. To order reasonable carryover the year prior to the season of need would result in waste of the State’s water resources. *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 422, 319 P.2d 995, 968 (1957); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900). It is appropriate to notify the parties in the fall prior to the upcoming irrigation season of predicted carryover shortfalls for planning purposes. *But it is not appropriate to require junior ground water users to provide predicted shortfalls until the spring when the water can be put to beneficial use*



*during the season of need:* ‘As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards applied in *AFRD#2*.’

*Final Order*, R. Vol. 39 at 7391 (emphasis added). The Director concluded that if the reservoirs filled in the following year any shortfall to carry-over storage from the preceding year would be cancelled. This Court concludes that this issue is addressed by the express language and framework of the CMR.

**1. Surface Storage Rights Include Reasonable Carry-Over Storage.**

The storage rights held by the BOR and SWC include the right to reasonable carry-over. CMR 042 expressly acknowledges material injury to carry-over storage.

**Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

...  
g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user’s existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

CMR 042.01.g. In *American Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) (“*AFRD #2*”), the Idaho Supreme Court upheld the constitutionality of the reasonable carry-over provisions of the CMR.

Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out. *For*