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INTRODUCTION

In this proceeding the Surface Water Coalition (“SWC”) demands the curtailment of groundwater rights by continuing to push their insular view that water right “administration” means nothing more than a rote “shut and fasten” of all junior water rights any time the maximum quantity authorized under a senior right is unavailable.¹ The SWC contends that the quantity element of a water right defines a guaranteed minimum entitlement to be demanded at all times rather than an authorized maximum quantity that may be diverted subject to need, beneficial use, reasonable use, availability, and other relevant considerations. The misguided SWC position ignores the well-established rule of law that beneficial use defines the extent, limit and measure of a water right in Idaho. *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources* (“AFRD No. 2”), 143 Idaho 862, 876, 154 P2d 433, 447 (2007); *United States v. Pioneer Irrigation Dist.*, 157 P.3d 600, 604 (2007). Further, the SWC position is entirely without support of the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”) and has been soundly rejected by the Idaho Supreme Court as well as former Director Dreher, present Director Tuthill, and this Hearing Officer. See IDAPA 37.03.11 et seq.; *AFRD No. 2*, 143 Idaho 862; *Blue Lakes and Clear Springs Delivery Call, Opinion Constituting Findings of Fact and Conclusions of Law and Recommendation* at 10 (January 11, 2008); *Blue Lakes and Clear Springs Delivery Call, Order Granting In Part and Denying In Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*, November 14, 2007, at 13; *A&B Delivery Call Order* dated January 29, 2007 at 38.

This renewed attempt by the SWC seeks to prevent the Director from considering such things as need, beneficial use, duty of water, and reasonable use reflects an ongoing effort to

¹ None of the water rights of the SWC entities have been partially decreed in the SRBA. They remain merely as claims, many of which have been disallowed by the director’s report, with all subject to multiple pending objections involving issues about source, quantity and number of irrigated acres. See Exhibits 4001A, 9723-9729.

secure a supply of surface water and storage water that is greater in both quantity and certainty than existed when the SWC's water rights were historically established. The SWC seeks to ignore the effects of annual and seasonal variations in their water supplies, and particularly the impacts of the worst drought of record from 2000 to 2007. Through extensive and complicated analysis of data selected from a myriad of short time periods, the SWC purports to demonstrate excessive impacts from groundwater pumping, all the while ignoring the undisputed fact that aquifer levels and corresponding spring flows and reach gains increased dramatically through the first half of the 20th century due to flood irrigation practices and have declined since to current levels which still remain above the levels that existed at the time of the SWC entities' appropriations.

The decline in aquifer levels resulted from a substantial decrease in incidental recharge due primarily to large-scale conversions from flood to sprinkler irrigation and decreased diversions into vast and leaky distribution systems utilized by the SWC and other entities. These reductions in incidental recharge were exacerbated by the SWC entities themselves when they entered into winter water savings agreements with the Bureau of Reclamation ("Reclamation") which converted winter canal flows into storage water in Palisades Reservoir. It is surface water irrigation practices that were the primary cause of both the increase and the decrease in aquifer levels, which decreasing levels the SWC cites as the basis for their alleged injury. Further compromising the SWC's claimed injury are their regular business decisions to reduce their own storage water supplies by renting water to Reclamation for flow augmentation, to Idaho Power Company for power generation, and to other water users.

The SWC now seeks in this proceeding to curtail ground water users to enhance their water supplies, to enhance power production revenue at hydro facilities on their system and at Milner Dam, and to replace water they chose to lease from storage for flow augmentation.²

POST HEARING BRIEF

For purposes of this Post Hearing Brief, the groundwater users will set forth below in outline form the issues to be presented for decision in this case. For each issue, the groundwater users' statement of position will be set forth followed by proposed findings of fact based upon the evidence presented at the hearing, together with proposed conclusions of law with supporting authority.

I. DID ANY SWC ENTITY SUFFER MATERIAL INJURY IN 2005, 2006 OR 2007?

Statement of Position: No entity of the SWC suffered any material injury in 2005, 2006 or 2007 because they had sufficient water to meet their crop needs and thus could meet the beneficial use anticipated under their water rights. Material injury did not exist because the SWC entities making the call received a supply of water greater than or equal to the quantity available when their respective rights were established. The SWC entities are not entitled to a supply of water that is greater in quantity or certainty than historically existed taking into consideration annual and seasonal variations including low-flow periods during extended drought periods.

Because the reservoir system filled and spilled in 2006, the Director properly determined that the SWC did not suffer any injury. However, the Director incorrectly determined that material injury existed in 2005 and 2007; and, if injury existed the quantity determined and the resulting replacement water requirement from IGWA to avoid curtailment was overstated.

² Flow augmentation was authorized by the Legislature (although it is not a beneficial use of water in Idaho) long after the priority date of the ground water rights which the SWC seeks to curtail and the moratorium on new ground water right enacted in 1992. See Exhibit 9715, the rental pool rules, Exhibit 1076, and I.C. § 42-1763B.

A. DEFINITION OF MATERIAL INJURY

Material Injury is defined as the “hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42. IDAPA 37.03.11.10.14.³ (CM Rule 10.14) CM Rule 42 is titled: “Determining Material Injury and Reasonableness of Water Diversions” and is followed by “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:” Thus, the threshold question in this case, “Did any SWC entity suffer material injury in 2005, 2006 or 2007” must be first determined before any additional analysis is needed.

“The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). Idaho Code § 42-101 recognizes that water is “essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending on its just apportionment to, and economical use by, those making a beneficial application of the same” and the state “in providing for its use, shall equally guard all the various interests involved.” (Emphasis added). Thus, determination of whether the curtailment of over 75,000 acres is required must consider all aspects of the prior appropriation doctrine and carefully consider state law and policy.

B. A WATER RIGHT QUANTITY IS AN AUTHORIZED AMOUNT NOT A GUARANTEED ENTITLEMENT

³ For ease of citation, IDAPA 37.03.11 will be referred to as CM Rule.

Statement of Position: The Hearing Officer should confirm that for purposes of administration, the water right quantity a senior right is entitled to receive is an authorized maximum, not a guaranteed amount available at all times.

“If administration of these junior-priority rights is going to be based upon the maximum quantity authorized under these surface water rights, there will be no groundwater irrigation in Idaho. It’s not possible. . . there will be a whole lot of water that goes down the Snake River in flood control releases and out of the state without being beneficially used . . . look at the flood control releases that occur with groundwater depletions.” (Dreher Testimony Tr. 170:19- 171:13)

CM Rule 42.01.a permits an evaluation of the “amount of water available in the source from which the water right is diverted” and CM Rule 42.01.e allows for the examination of the “amount of water being diverted and used compared to the water rights.” These rules presume that the quantity on the face of the license or decree is not a guaranteed entitlement. Further, the Supreme Court stated in *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 143 Idaho 862, 154 P.3d 433, 447 (2007):

“...even with decreed water rights the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development...”

“...water rights adjudications neither address, nor answer, the questions presented in delivery calls...”

Similarly, this Hearing Officer found that: “The partial decrees define the amount of water that a water user is entitled to when available and can be applied to a beneficial use. It is a maximum amount, not a guaranteed amount.” *Blue Lakes and Clear Springs Delivery Call, Order Granting In Part and Denying In Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*, November 14, 2007, at 13.

These same principles were most recently recognized in the Director’s Conclusions of Law set forth in the Order of January 29, 2008 in the Delivery Call of A&B as follows:

9. ...Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer material injury. Thus, a senior water right holder cannot demand that junior groundwater right holders...be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.

21....Material injury is a highly fact specific inquiry that must be determined in accordance with CM Rule 42; therefore, the establishment of injury is a threshold determination that must be established by prima facie evidence.

Finding of Fact:

FF: The prior decrees and licenses upon which the SWC base their delivery call contain the elements of their water rights. However, in administering those water rights, the quantity element is not a guaranteed entitlement. Rather, the water right is defined by the extent of beneficial use and the amount of water needed to meet that beneficial use.

Conclusions of Law:

CL: “[W]ater rights adjudications neither address, nor answer, the questions presented in delivery calls....” *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 154 P.3d 433, 447 (2007).

CL: “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

CL Conclusions of Law No. 20, 22, 23, 38, 39, 40, 41, 42, 43, 44, 45 and 47 are correct statements of the law and are reaffirmed and restated.

C. SWC ENTITY WATER SUPPLIES MUST BE BASED UPON SUPPLIES EXISTING HISTORICALLY WHEN THEIR RIGHTS WERE ESTABLISHED

Statement of Position: The starting point for determining any injury to the SWC entities is an examination of their respective historical water supplies that existed when their water rights were first established. Those historical supplies formed the basis of their established rights as well as their expected supplies. SWC entities cannot base their claim of injury on supplies that were subsequently enhanced due to temporary increases in incidental recharge prior to the 1950s

without similarly considering diminished supplies when incidental recharge declined after the 1950s.

CM Rule 42.01.a provides that the amount of water available in the source must be considered and requires a look at the amount of water available in the source when the water rights were first established. The water right is defined by the beneficial use for which it was originally appropriated and it would not be appropriate to enhance the use of the water right, beyond what was historically established. In addition, CM Rule 42.01.c allows consideration of whether or not groundwater pumping affects the timing of when water is available and allows consideration of multi-year impacts. In order to determine whether or not there is an effect on timing of water available to the SWC entities from single or multi-year impact of pumping, examining historical water conditions, prior to groundwater development and after is necessary in order to determine when the SWC entities historically needed and used water. See also CM Rule 42.01.e. and g. (the Director shall consider . . . annual carry-over for prior comparable water conditions) Furthermore, CM Rule 43.03.b provides that “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.”

1. Source of Supply for Each Entity

Statement of Position: All water supply sources of each SWC entity must be separately identified and considered, including surface water, storage water and supplemental groundwater. The source of the natural flow rights historically available to SWC entities consists of two components: (a) natural flow of the Snake River that passes Blackfoot during spring runoff periods (aka “flood flow”) and (b) reach gain that accrues to the river below Blackfoot and above

Milner. Although the reach gain may be subject to depletion by groundwater development, flood flow is not, because it consists of spring runoff which flows directly into the river from surrounding mountains unaffected by groundwater depletions. Other than the October 1900 rights of the Twin Falls Canal Company (“TFCC”) and the North Side Canal Company (“NSCC”) and sometimes a small fraction of the March 1903 right of the Minidoka Project, which fully consume all reach gains below Blackfoot during the normal irrigation season, there is simply no natural flow available to supply the later priority surface water rights of all other SWC entities. Only during brief periods of flood flows early in the irrigation season may some of the later priority water rights be “in priority”. These post-1903 rights of the SWC entities have no legal basis to curtail groundwater rights to enhance reach gains that have never been their source of supply or relied upon. These other entities rely almost exclusively upon storage water which is why they participated to a greater extent in the construction of the reservoir system.

Proposed Findings of Fact:

- FF: None of the water rights of the SWC entities have been issued “Partial Decrees” in the SRBA. All remain as pending claims subject to multiple pending objections, including objections to source, quantity and number of irrigated acres. Exhibits 4615, 9723-9729.
- FF: During the normal irrigation season and after spring runoff the amount of natural flow that is reliably available to the SWC consists only of that amount of water resulting from reach gains below Blackfoot to Minidoka.
- FF: During the normal irrigation season reach gains below Blackfoot to Minidoka total less than the 3400 cfs of 1900 priority senior water rights of Twin Falls Canal Company and North Side Canal Company. (Dreher Testimony Tr. p. 372: ln 10-18).
- FF: Even if the reach gains between Blackfoot and Neeley were increased as a result of curtailment, the increased natural flows would first be allocated to the more senior water rights of Twin Falls Canal Company and North Side Canal Company. (Direct Testimony of Brendecke, at 20-24).

- FF: A&B Irrigation District is composed of a small surface water right and a large groundwater right. Part A uses surface storage to irrigate approximately 14,660 acres. Part B uses groundwater pumping to supply water to about 50,000 acres. All of A& B's 1939 priority natural flow right is considered to be a "high water right" and only receives water during the spring runoff period after American Falls Reservoir has filled. Historically, the 1939 and 1916 high water rights owned by A&B and other SWC entities and thus there is no need for distribution based on priority. (Carlson Direct, at 21-22).
- FF: American Falls Reservoir District #2 (AFRD #2) has very junior surface water rights that are only filled early in the spring. AFRD #2 relies almost entirely on storage in American Falls Reservoir which is implied by the fact that it is organized as a Reservoir District. When high water is available to fill the natural flow right of AFRD #2 it simply has a slightly larger supply than the one anticipated based upon the amount of storage space it accrued in American Falls. Early planning documents of AFRD#2 show that it was dependent on storage with the assumption that it would receive zero natural flow in many years. Exhibit 4161. Because AFRD #2 water rights are supplied entirely from spring runoff, its water rights are not injured by groundwater pumping. (Carlson Direct, at 23).
- FF: Burley Irrigation District serves about 48,000 acres and typically delivers an average of 5.5 acre-feet per acre from storage. Burley holds a contract for 194,595 acre-feet of storage space in American Falls and Palisades. Reservoir storage represents about 4/5 of a full water supply for Burley Irrigation District. However, Burley Irrigation District operates cooperatively with the Minidoka Irrigation District. Burley Irrigation District and Minidoka Irrigation District have canals that hold a water right for 1,726 cfs with a priority of March 26, 1903. This right and their 1908 right for 1,000 cfs generally will provide up to half of the annual water supply for the Burley and Minidoka Irrigation Districts. Since this water supply is considered to be 100% dependent upon spring runoff, the annual snow pack is the major determinant of the amount of storage Burley will have to use in a given year. During average water years Burley and Minidoka Irrigation Districts would generally carry over up to half of their storage allocation. The Director's Orders properly determined that neither Burley or Minidoka Irrigation Districts have suffered any material injury as a result of groundwater pumping. (Carlson Direct, at 23-24).
- FF: Minidoka Irrigation District provides water to approximately 77,000 acres. The division of storage used between the two districts is computed by the Bureau of Reclamation each year, but as a general rule 40% goes to Burley and 60% goes to Minidoka. The natural flow is divided between the north-side and south-side Minidoka canals and is delivered without respect to the entity receiving the natural flow. If the storage supplies for Minidoka Irrigation District and Burley Irrigation District are added together they have approximately 619,000 acre-feet of storage for 125,000 acres of land, which is just under the maximum of 5 acre-feet per acre. I.C. 42- When their space has filled, Burley Irrigation District and Minidoka Irrigation District have a full water supply from storage even if they receive no natural flow. The Director's Orders correctly determined that Burley and Minidoka Irrigation Districts have not been injured by groundwater pumping. (May 2, 2005 Order Findings of Fact No.116 and 120). (Carlson Direct, at 25-26).

- FF: The Minidoka Irrigation District shares the second most senior right on the river below Blackfoot with Burley Irrigation District. Since the natural flow preferentially goes to Twin Fall Canal Company, Burley and Minidoka Irrigation Districts have relatively larger storage supplies. Minidoka Irrigation District holds a contract for 186,030 acre-feet in the most senior storage rights on Jackson Reservoir. In addition, they hold 82,216 acre-feet in American Falls Reservoir and 35,000 acre-feet in Palisades Reservoir. Burley Irrigation District and Minidoka Irrigation District share 97,000 acre-feet of space in Lake Walcott.
- FF: Milner Irrigation District might be classified as one of the juniors of the juniors. Milner Irrigation District in many ways is nearly identical to the A portion of the A&B Irrigation District. Milner Irrigation District is generally entitled to divert very little natural flow under its April 1, 1939 water right for 121 cfs. However, it is somewhat better off than A&B because it has a slightly earlier high water right with a November 14, 1916 priority date for 135 cfs. The availability of water between a 1916 and 1939 priority date water right is measured in days; but more significantly, the 1916 water right might come on in a low water year while there may never be water for a 1939 right because of the priority date on the American Falls Reservoir storage water right. Milner Irrigation District holds a contract with the Bureau of Reclamation for 89,450 acre-feet of storage space split almost equally between Palisades and American Falls. Milner Irrigation District has sufficient storage to provide 3.3 acre-feet per acre to 13,640 acres for two years if that were their only water supply. (Carlson Direct, at 24-25).
- FF: North Side Canal Company is another of the junior users among the group of junior users that make up the SWC. While North Side Canal Company shares the earliest natural flow right with Twin Falls Canal Company, its share of the 3,400 cfs is only 400 cfs. North Side Canal Company's next natural flow right fills after the 1903 right of the Minidoka canals. This is a 2,250 cfs water right bearing a priority date of October 7, 1905, which could never have reasonably relied on reach gains because reach gains were only 1830 cfs in August of 1905. Exhibit 4100 p. 7; . Consequently, North Side Canal Company depends on storage as a source of supply. The 819,000 acre feet of space North Side Canal Company holds contracts for represents nearly 20% of the storage space in the entire system. During recent drought years, North Side Canal Company has diverted up to three quarters of its available storage for use on its lands. (Carlson Direct, at 26).
- FF: North Side Canal Company first diverted 1 MAF of water in 1925. There is no declining trend in their natural flow diversion. There is no 24-year period since 1948 in which North Side Canal Company's average natural flow diversion was less than the average natural flow diversion during the prior period from 1925 to 1948. This reveals that North Side Canal Company natural flow supply is as good today as it was before groundwater development began within the Eastern Snake River Plain. (Exhibit 4100 at 11).
- FF: Twin Falls Canal Company's natural flow water rights are the largest and most senior of the SWC members. By virtue of their 3,000 cfs October 11, 1900 water right they are entitled to all of the reach gain in the river that occurs between Blackfoot and Milner

during the irrigation season. Because of this fact, they are relatively less dependent upon storage than the other members of the SWC. Twin Falls Canal Co. holds a federal contract for 97,183 acre-feet of space in Jackson and 148,748 acre feet in American Falls. Their American Falls storage right fills before all other American Falls Reservoir space holders. Consequently that portion of their storage supply is certain unless they rent it out to third parties. (Carlson Direct, at 26-27).

- FF: There is no 19-year period in the record for the period from 1930 to 2004 in which Twin Falls Canal Company ever had an average natural flow diversion less than what they diverted during the period from 1930 to 1948. This reveals that Twin Falls Canal Company natural flow supply is as good today as it was before groundwater development began within the Eastern Snake River Plain. (Exhibit 4100 at 10-11).
- CL: Spring runoff is the sole source of any natural flow supplies available to any SWC entity other than TFCC and NSCC. Groundwater pumping has no impact upon spring runoff which is based upon snowmelt and is not the cause of any natural flow shortages to these other SWC entities.
- CL: Reach gains in the Blackfoot to Neeley reach only supply the natural flow rights of TFCC and NSCC.
- CL: The natural flow supplies of TFCC and NSCC during 2005 were greater than or equal to supplies available in similar pre-pumping years of lesser or equal drought. Accordingly, groundwater pumping is not the cause of any natural flow shortages to any SWC entity.

2. Shortages existed at time SWC water rights were established.

Statement of Position: Most of the water rights owned by the SWC entities have priority dates between 1900 and 1921 (Exhibits 4120, 8001). When these water rights are compared to records showing the daily flow of the Snake River at Montgomery Ferry in 1905, (Exhibit 4120) it is evident that the more junior SWC entities would have had access to natural flow rights for only a few days in 1905 and that by mid-July only the senior water rights with priority dates of 1900 would have been in priority although even they would not have been able to divert natural flow at their full decreed amounts. This shows that the SWC entities holding more junior natural flow rights would have anticipated even before groundwater development began that those junior natural flow rights would have little or no yield in dry years and that in such years even the most senior natural flow rights would be unable to divert at their decreed amounts. Therefore, even

before the advent of groundwater development, the SWC could never have expected their natural flow rights to be satisfied from reach gains in the Snake River arising below Blackfoot. (Exhibit 4100 at 10). It is unreasonable for the SWC to try and do so now.

Proposed Findings of Fact:

- FF: Historical data going back to the late 19th century should be considered and shows that shortages existed before groundwater pumping began and that the natural flow water rights of the SWC entities were not satisfied from reach gains in the Snake River arising below Blackfoot. (Exhibit 4100 (Exhibit 4100 at 24).
- FF: Early settlers in the area below Neeley realized that natural flow alone would not provide a reliable water supply for large scale irrigation in the Eastern Snake River Plain and that reservoirs would be needed to supply storage water to supplement natural flow supplies. (Exhibit 4100 at 11).

Conclusions of Law:

- CL: The historical water supplies available to fill the SWC natural flow water rights may be considered when determining material injury. See CM Rule 42.03.a, c, e, g and 43.01.b.
- CL: During 2005 and 2007 the water supplies available to the SWC were unaffected by groundwater pumping.

3. Shortages were Anticipated in Palisades Planning Documents Even with the Reservoir System Fully Operational.

Statement of Position: Palisades Reservoir was constructed in large part because the SWC entities' natural flow supplies and storage then available in Jackson and American Falls reservoirs were inadequate to supply their irrigation needs in times of drought. The relevant Palisades planning documents support the conclusion that water supplies available to the SWC would continue to be inadequate in times of severe drought, even after the construction of Palisades. Exhibit 7001 Report at 16 stated however, that "the present water users would incur the cost of an additional 433,000 acre-feet of storage which they might not use oftener than once in every 100 years." Hence decision was made, to allow the development of additional lands, knowing that in severe drought years, natural flow plus supplemental storage may not be enough

in severe dry years. (Exhibit 7001, Substantiating Report at 11). Thus, shortfalls resulting from the 2000 drought period, anticipated to only occur once in 500 years, were expected and anticipated before groundwater pumping existed.

Findings of Fact:

- FF: Exhibit 4108 shows the dates on which each reservoir began operation.
- FF: During 1946, in conjunction with the planning process for the Palisades Reservoir, the USBR published a particularly important report. (Exhibits 4162 and 7001 “the 1946 Palisades Study”). In the report, the combined operation of the Jackson Lake, American Falls Reservoir, and Palisades Reservoir were simulated over a 1919-1942 hydrologic study period. Notably, this study period was before the development of groundwater within the Eastern Snake River Plain. This report indicated that the SWC members would have suffered water shortages of 803,000 AF in 1934 and 157,000 AF in 1935 but that “Neither of these shortages would have caused serious crop loss.” The report further predicted that such a shortage would likely occur at least once in every 50 years but that development of land based upon the reservoir system should still take place. This report shows that, in 1946, well before any significant groundwater development on the Eastern Snake River Plain, the SWC members who rely upon Jackson Lake, Palisades Reservoir, and American Falls Reservoir anticipated that they would suffer shortages as high as 20% in very dry years even with all three reservoirs fully operational.
- FF: Notably, the 1946 Palisades Study (Exhibits 4162, 7001) projected water delivery to diversions below Neeley – with the Palisades Project in place and operating – to be 2,847,000 AF with no adverse effects to crop production. This compares to the combined minimum diversion requirement of 3,105,000 AF from the May 2005 order. In other words, the minimum requirement from the May 2005 order is 258,000 AF greater than the 1934 supply anticipated in the operations study even though the 2000-2004 drought was more severe than the drought of the 1930’s. Notably, in the Second Supplement Order Amending Replacement Water Requirements issued on December 27, 2005, the Director found (in Finding 17) that the SWC members had diverted a total of 2,837,000 AF during the 2005 irrigation season. This is essentially the same as the drought year irrigation seasons diversion anticipated 60 years ago in the 1946 study. (Exhibit 4100 at 27).
- FF: In 1955, the USBR issued another report updating the previous 1946 report. (Exhibit 4163). The 1955 report utilized a study period of 1918-1947. This updated report found that the American Falls Reservoir would not have filled in any year of the 1932-1935 periods and that A&B Irrigation District would have suffered shortages of 25% in 1935. In 1969, the USBR carried out a new study, (Exhibit 4164), of the reservoir system which ultimately showed that the existing reservoir system consisting of Jackson Lake, Palisades Reservoir and American Falls Reservoir were projected to be empty at the end of the irrigation season in both 1934 and 1935. (Exhibit 4100 at 12-13).

FF: The Bureau of Reclamation's Expert, Patrick McGrane testified that the BOR did not expect their entire reservoir system to fill every year. (McGrane Testimony Tr. p. 1407: 22 – 1408: 4). Rather, the reservoir system was expected to fill roughly 66% of the time and in fact has filled roughly 66% of the time since all of the major reservoirs have been built. Id.

FF: These historical studies make it clear that the present system of reservoirs relied upon by the SWC entities was never designed nor expected to fill or prevent water shortages in very dry years or in back-to-back dry years. It is, therefore, reasonable to conclude that shortages in an extremely dry period, such as the period from 2000-2004, were expected by the SWC regardless of any potential impact of future groundwater development. (Exhibit 4100 at 13).

Conclusions of Law:

CL: These historical studies pertaining to the planning of Palisades Reservoir make it clear that the present system of reservoirs relied upon by the SWC entities was never designed nor expected to fill or prevent water shortages in very dry years or in back-to-back dry years. Therefore, the shortages that occurred in 2005 and 2007, following extended extremely dry periods, were expected by the SWC regardless of any potential impact of future groundwater development. (Exhibit 4100 at 13).

CL: The water supplies available to the SWC entities in 2005 and 2007 were greater than or equal to supplies available in lesser drought years that preceded groundwater pumping by reason of which any shortages were drought, not pumping related.

4. Heise Gage is the Best Indicator of Water Supplies Both Historically and Currently.

Statement of Position: The Heise Gage should be determined to be the only accurate and reliable indicator of available water supplies in the Upper Snake River basin available to the SWC entities. It is now and always has been relied upon by IDWR for water right administration purposes, by Water District 1 for accounting and rental pool operation purposes, by Reclamation for reservoir operation purposes, by the Army Corp for flood control purposes and all SWC entities for purposes of water leases to the Bureau for Endangered Species Act flow augmentation. The SWC's efforts to calculate unregulated inflow to American Falls should be rejected as an unnecessary, unreliable and unproven experiment to project water supplies.

Findings of Fact:

- FF: Heise has been used historically to determine the basin water supply and has been quite reliable to determine the amount of natural flow available to the various entities. (Dreher Testimony, Tr. pg. 29: ln 20 - pg. 30: ln 8; pg. 30: ln 22 - pg. 31: ln 3; pg. 57: ln 1-5; p. 57: 21 - pg. 58: ln 16; pg. 59: ln 2-10; pg. 285: ln 9-18; pg. 286: ln 2-6; pg. 295: ln 5-7, 24-25 - pg. 296: ln 1-4; pg. 429: ln 18 - pg. 430: ln 10)
- FF: The natural flow supply available to the SWC is best determined by using the natural flow at the Heise Gauge. (Dreher Testimony, Tr. pg. 29: ln 20 - p. 30: ln 8; pg. 57: ln 21 - pg. 58: ln 16) The Heise Gauge has been historically relied upon by the Bureau of Reclamation, the Idaho Department of Water Resources, Natural Resources Conservation Service and many other public agencies to determine the Snake River Basin water supply. (Dreher Testimony, Tr. p. 29: 34-3; McGrane Testimony Tr. pg. 1539: ln 23 - pg. 1540: ln 12). The Heise Gauge requires less adjustments than the inflow to American Falls, for example, and is less influenced by man's subsequent development. (Dreher Tr. p.30: 4-8). Thus, the Heise Gauge is the most reliable predictor of the water supply available to the SWC and provides the best method to compare prior years to current water supply and drought conditions.
- FF: The SWC's efforts to calculate unregulated inflow to American Falls is an unnecessary, unreliable and unproven experiment to project water supplies.

Conclusions of Law:

- CL: Altering the method for determining basin water supplies would change the administrative mechanisms developed and relied on for years within WD01 unnecessarily.
- CL: The Heise Gage is the only accurate indicator of water supplies in the Upper Snake River and should be exclusively relied upon in determining water available water supplies.

5. 2000 Drought Worse Than 1930s Drought.

Statement of Position: The impacts of drought are relevant to water supply determinations and must be considered. Groundwater Users are not responsible for water shortages that are caused by drought or any factor other than groundwater depletions. The SWC members have experienced at least two extended periods of severe drought. One occurred in the 1930s and other began in 2000. Evidence clearly and convincingly established that the 2000 drought period was more severe than the 1930s drought. The drought of the 1930s occurred prior to any

groundwater development on the Eastern Snake River Plain. Thus, it is appropriate to compare water supplies in the 1930s, before groundwater pumping was developed, with water supplies in the 2000-2005 drought. Since current supplies in a worse drought were greater than available supplies in previous lesser droughts the conclusion is inescapable that drought conditions, not groundwater pumping is the cause of any current shortages to the SWC. This same conclusion can be drawn, even if it is determined that the drought of the 1930s and the drought of 2000-2007 are of the same or similar severity. The Director's conclusion in Finding of Fact No. 80 of the May 2005 Order that "groundwater depletions are not the cause of the declines in measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999" should be confirmed.

Findings of Fact:

- FF: The drought starting in the year 2000 would be expected to be repeated only one time in every 500 years. (Dreher Testimony Tr. pg. 327: ln15-23).
- FF: The evidence shows that these two drought periods are of comparable severity – however, the 2000 drought period was somewhat more severe at least in terms of Heise natural flow deficit than the 1930 drought. (Dreher Testimony Tr. pg. 28: ln 24- pg. 29: ln 10). Yet, the total natural flow diverted by the SWC members from reach gains during the 2000's drought period is about the same as what they diverted in the 1930's drought period. (Brendecke Direct Testimony at 17-20, Brendecke Corrected Testimony at 3-4, Exhibits 4154A, 4155A, 4156A and 4154B). If groundwater development were materially depleting the natural flow supplies of the SWC members, the natural flow diversions in the 2000's drought would have been uniformly less than those of the 1930's drought. However, they were not. Therefore, it can only be concluded that groundwater development has not materially reduced the natural flow supplies of the SWC members that which was available to them even under prior comparable drought periods.
- FF: The analysis of historical natural flow diversions show that the natural flow supplies of the SWC members are as good or better now than they were before groundwater pumping began. (Exhibits 4112, 4113, 4114, 4154A, 4155A, 4156A and 4154B, Attachment H to May 2005 Order).
- FF: Based on monthly trends in summer reach gains, the Blackfoot to Neeley reach gain is almost 90,000 acre-feet greater at the end of the 1950-2006 period than it was at the beginning of the 1912-1949 period which occurred prior to groundwater development.

This further shows that the summer season reach gain is greater now than it was in 1912. In other words, the summer reach gains have increased from what they were at the time of the initial natural flow appropriations of the Twin Falls Canal Company and the North Side Canal Company. (Direct Testimony of Brendecke, at 13-14). In this light, the SWC delivery call should be viewed as a demand for enhancement of the originally available water supply, or at least for protection of an enhancement that arose after that original appropriation. Yet the SWC entities seek curtailment of pumping to increase their natural flow supplies.

FF: It is reasonable to conclude that because the drought in the 1930s is similar or less severe than the drought in the 2000s, and the water supply in the 1930s was not influenced by groundwater pumping, that if the water supply in 2000s was the same or better than in the 1930s then drought must be causing the decline in reach gains.

Conclusions of Law:

CL: Groundwater users are only responsible for the amount of material injury, if any, that their depletions cause to a senior water right. Groundwater users are not responsible for water supply shortages that are the result of drought, reduced reach gains due to changes in irrigation practices or are the result of inefficient and improper applications of water to meet the beneficial use for which the water rights were originally appropriated (i.e. the amount of water that the crops require.)

CL: The Director's conclusion in Finding of Fact No. 80 of the May 2005 Order that "groundwater depletions are not the cause of the declines in measured reach gains between the Near Blackfoot Gage and at the Neeley Gage since 1999" is confirmed.

6. 1992 Moratorium New Groundwater Rights.

Statement of Position: There have been no new groundwater rights since the moratorium was imposed in 1992 and practically no new rights since the 1984 Swan Falls Agreement, nearly all the impacts of groundwater pumping would now be fully realized. Thus, any aquifer declines must be attributable to factors other than groundwater depletions.

Findings of Fact:

FF: Groundwater development leveled off in the 1980's and a moratorium on all new groundwater development was imposed in 1992. (Exhibit 4109, 4100 at 5-6; Dreher testimony Tr. P. 376: 6-21).

FF: Any aquifer or reach gain declines since 2000 are attributable to factors other than groundwater depletions. Attachment H, Dreher Testimony Tr. pg. 129: ln 6-10, pg. 378: ln 21- pg. 379: ln 5 and 12- pg. 380: ln 7).

7. The Aquifer is now at or near equilibrium.

Statement of Position: The Director's 2005 Order, Finding of Fact No. 80 that "the Snake River Plain aquifer is close to dynamic equilibrium" based upon the groundwater model (the "Base Case Scenario") is supported by substantial and competent evidence and should be confirmed. This further supports the conclusion that drought and impacts other than groundwater pumping are responsible for recent declines in water supplies available to the SWC.

Findings of Fact:

FF: The ESPA is at or near dynamic equilibrium. (Dreher Testimony Tr. p. 36: 14- p. 37: 1; p. 375: 20- p. 376: 5; McGrane Testimony Tr. p. 1497: 6-10, 2005 Order, Finding of Fact No. 80)

FF: Therefore, groundwater depletions are not the cause of the declines in measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999. (2005 Order, Finding of Fact No. 80)

8. Any SWC Shortfalls are Drought Related and Not Caused by Pumping.

Statement of Position: Rule 42.01(d) of the CMR's requires a consideration of the *historical annual volume of water diverted* by the senior water right owner making a delivery call. Rule 43.03(b) of the CM Rules in evaluating mitigation plans requires that consideration "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.*" (Emphasis Added) This provision demonstrates that junior groundwater users should not be subject to curtailment or to provide mitigation or replacement water that would exceed or enhance the amount and timing of water that was historically available to the SWC. The evidence shows that the amount of natural flow diverted by the SWC entities in the drought of the 2000s meets or exceeds the amount of natural

flow diverted and used by the SWC entities during the drought of the 1930s. (Exhibits 4112, 4113, 4114, Attachment H). The amount of water available for diversion and use during the 1930s was not influenced by groundwater pumping because groundwater pumping did not begin until the late 1940s and early 1950s. Thus, any decrease in the amount of natural flow available to the SWC in the 2000s cannot be caused by pumping, but is rather a result from the extended period of drought for which Groundwater Users bear no responsibility.

Findings of Fact:

FF: Groundwater development on the Eastern Snake River Plain has not reduced the amount of natural flow historically available to SWC. (Exhibit 4100, *Brendecke Report 12/30/2005*) at 11, Exhibits 4112, 4113, 4114).

Conclusions of Law:

CL: Rule 42.01(d) of the CMR's requires a consideration of the historical annual volume of water diverted by the senior water right owner making a delivery call.

CL: Rule 43.03(b) of the CMR's requires the following:
"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.*" (Emphasis Added)

CL: The SWC members have received and are anticipated to receive a water supply equivalent or greater than their historical full water supply.

D. ALL WATER SUPPLIES AVAILABLE TO SWC ENTITIES MUST BE CONSIDERED (CM Rule 42.01.a, d, g, h).

1. SWC Supplies Include Natural Flow, Storage Water and Supplemental Groundwater Rights.

Statement of Position: The total water supplies available to each SWC entity must be evaluated in making a determination of material injury. Total supplies consist of water available under natural flow rights, storage rights and supplemental water supplies of each entity and

shareholder-water users. (CM Rule 42.01 a, May 2005 Order ¶ 88). Other facts to be considered include “the acreage of land served”(CM Rule 42.01.d),

“the amount of water being diverted and used compared to the water rights” (CM Rule 42.01 e) and the “use of existing wells” providing supplemental groundwater. (CM Rule 42.01.h). The Director failed to consider the SWC’s supplemental groundwater supplies primarily because the SWC failed to timely provide this information. Similarly, the SWC did not provide current information on actual irrigated acres which is critically important in making any calculation of necessary water supplies and material injury. Direction should be given for the director to consider supplemental water supplies and actual irrigated acres in making the determination of material injury.

Findings of Fact:

- FF: The total water supply available to satisfy the SWC includes natural flow water rights and contracts for reservoir storage space, and supplemental groundwater rights. All sources of water available to supply the lands within irrigated by the SWC entities must be considered when determining whether there is material injury.
- FF: Nearly 75,000 acres claimed by the SWC members in the SRBA have supplemental groundwater rights. Exhibits 4127 (A&B Irr. Dist.), 4128 (AFRD#2), 4129 (Burley Irr. Dist.), 4130 (Milner Irr. Dist.), 4131 (Minidoka Irr. Dist.), 4132 (NSCC), 4133 (TFCC). See also, Exhibit 4100 at 16. The groundwater rights for these 75,000 acres could represent a substantial alternative water supply.
- FF: The Director did not consider supplemental groundwater supplies available to the SWC members because that information was not timely provided to him as requested. (Exhibit 3045 and Dreher Testimony Tr. p. 447: 21-25).

Conclusions of Law:

- CL: The CM Rules require that the all supplies of water available to supply the acreage under the calling water right must be examined. (CM Rule 41.01.a,c, d, e, g, h)
- CL: The CM Rules provide that the availability of wells and supplemental water supplies are relevant and must be considered in making a determination of material injury. (CM Rule 42.01.h)

E. THE MINIMUM FULL SUPPLY IS THAT AMOUNT NEEDED TO RAISE A CROP (CM Rule 41.01.d, e)

1. CM Rule 42.01.d, e

Statement of Position: The CM Rules require that the amount of water that may be called for is only that amount that can be applied to beneficial use, by using water efficiently and without waste. (CM Rule 42.01). To make these determinations, requires an examination of what the crop needs. CM Rule 42.01.e states that if the calling water right is for irrigation, then, “the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application” may be considered in determining whether the senior water right has been materially injured. The Director should be instructed to evaluate the actual water needs to raise crops.

Conclusion of Law:

CL: CM Rule 42.01 provides that the Director consider whether the holders of water rights claiming to suffer material injury are using water efficiently and without waste.

CL: CM Rule 42.01.d states: If for irrigation the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

2. TFCC 5/8v. 3/4 Miner’s Inch Headgate Delivery:

Statement of Position: In evaluating material injury the Director predicted a “minimum” full headgate supply for each SWC entity based on predicted water supply available (natural flow + storage water) and predicted demand or needs to grow a crop. To predict the crop demand the Director relied solely upon representations of the SWC managers to provide the average rates of diversion at the shareholder headgates during each month of the irrigation season. (2005 Order, Findings of Fact No. 88, 89, 91) All SWC entities provided the Director with the quantity of 5/8 miner’s inch per acre, except for TFCC which provided ¾ inch per acre. The records of TFCC

clearly and convincingly establish that $\frac{3}{4}$ inch per acre is the maximum capacity of its system and maximum quantity delivered to its shareholder under the best water conditions, with $\frac{5}{8}$ " per acre the normal headgate delivery. TFCC's Water Management Plan dated November 1999, Exhibit 4166 and 4166A, states at p. 4 that "TFCC has always operated on the premise that the Company must deliver $\frac{5}{8}$ inch per acre constant flow so long as that supply is available." Similarly, TFCC's Operating Policy dated December 10, 1997 (Exhibit 4167) at p. 3 provides that "The TFCC water right is $\frac{5}{8}$ ths of an inch per share. This includes an obligation to deliver $\frac{1}{80}$ th of a cubic foot of water per second for each share of stock when the water is available." No where in the Operating Policy is any amount other than $\frac{5}{8}$ inch ever discussed. TFCC Manager Ted Diehl admits in his pre-filed testimony at p. 4 stating that "We deliver $\frac{5}{8}$ inch per share continuously," and on cross examination (Tr. pg. 1680, ln. 12-24). Even though 2007 has been uniformly characterized as an extremely dry year, TFCC finished the year with carry-over storage, dried up no land and harvested full crops despite the $\frac{5}{8}$ inch delivery as admitted to by Mr. Alberdi (Tr. pg. 1703, ln 22 – pg. 1704, ln. 5; pg. 1702, ln. 16-21; pg 1715, in. 8-11; pg. 1718, ln. 15-22) .

The 2005 and 1997 issues of TFCC's "Ditch Writer" publication to its shareholders, Mr. Alberdi makes statements clearly admitting that $\frac{5}{8}$ inch is the normal delivery and the $\frac{3}{4}$ inch is the maximum capacity of their delivery system. (Exhibits 4610).

What Mr. Alberdi told the Director that $\frac{3}{4}$ inch was the minimum amount needed in 2005 to raise crops conflicted with statements made to TFCC shareholders in the TFCC Ditch Writer, Spring 2005 issue (Exhibit 4610 at pg. 5) that the "game plan is to start at $\frac{5}{8}$ inch and then drop to $\frac{1}{2}$ inch". In that same issue he told his shareholders that while he would not promise them all the water they "want" he would delivery all the water they "need to grow their crops." Similarly,

in the Manager's Report at p. 5 of the Minutes of the January 13, 2004 Shareholder meeting, Mr. Alberdi informed the shareholders that they could "have a good year even with a 5/8 inch supply." (Exhibit, 4607 and 4608) In fact, in the Spring 1997 issue of the TFCC Ditch Writer (Exhibit 4610), a huge water year with major flooding on the Snake River, Mr. Alberdi responded to shareholders' requests for additional water by stating on p.1 that "The canal system becomes taxed if we deliver over $\frac{3}{4}$ of a miner's inch per share. To try to deliver more than that...would put the canal system in jeopardy and dramatically raise both the potential from breaks and catastrophic property damage." Quite obviously the $\frac{3}{4}$ inch figure Mr. Alberdi provided the Director in 2005 was the maximum supply, not the minimum.

On cross examination Mr. Alberti finally admitted that the $\frac{3}{4}$ inch was the maximum amount TFCC could delivery in a good water year and that in a bad water year 5/8 inch or less was normally delivered (Tr. Pg. 1680, ln 1-6). All of this is completely consistent with the reported Idaho Supreme Court case in 1911 and Federal District Court case in 1935 in which TFCC was a party, to where 5/8 inch is repeatedly referenced as TFCC's water supply and no mention is ever made of $\frac{3}{4}$ inch. *State v. Twin Falls Canal Co.*, 21 Idaho 410 (1911), *Twin Falls Land & Water Co., v. Twin Falls Canal Co.*, 79 F.2 431 (1935). Using $\frac{3}{4}$ inch the Director calculates TFCC predicted minimum full supply based upon 1,075,000 AF. The fact that TFCC actually diverted only 912,968 AF in 2005 and 1,046,000 AF in 2007, raising full crops in extremely dry years, convincingly establishes that the use of $\frac{3}{4}$ inch per share delivery was clearly erroneous. (Seventh Supplemental Order dated December 20, 2007; Third Supplemental Order dated June 29, 2006).

Based on the forgoing, the minimum full supply for TFCC should have been determined based up 5/8 inch, not ¾ inch headgate delivery and the Director should be instructed accordingly.

Findings of Fact:

- FF: The term “head-gate delivery” refers generally to the amount of water made available by a canal company or irrigation district at the turnouts to shareholders. (Exhibit 4100 at 16).
- FF: With respect to the full head-gate delivery requirement, the Director relied entirely on representations by American Falls Reservoir District #2 and the North Side Canal Company that 5/8 of a miners inch per acre represented a minimum full supply of water and also the representation by TFCC that 3/4 of a miners inch per acre represented its’ minimum full supply (2005 Order, Finding of Fact 89, 91).
- FF: None of the other four members of the SWC ever indicated in their submittals to the Director what they considered to be full deliveries to their users. (Exhibit 4100 at 25).
- FF: The Twin Falls Canal Company Operation Policy (1998) states that the company’s water right is 5/8 of a miners inch per share. (Exhibit 4167). In its 1999 Water Management Plan, the company states that the system was planned and constructed to deliver 5/8 of a miner’s inch per acre. (Exhibits 4166 and 4166A). Further, TFCC’s publications to its shareholder also support that 5/8 of a miners inch is the proper amount to provide a minimum full supply. (Exhibit 4610).
- FF: A review of the 1990-2004 delivery information submitted by TFCC reveals that headgate deliveries of 5/8 of a miner’s inch occurred in 1994, 2002 and 2003. The minimum diversion among these three years was 2002 in which the total headgate delivery was only 1,009,100 AF. This compares to the threshold of 1,075,900 AF in the Director’s May 2005 order. Thus, if the minimum amount recently diverted for full head-gate delivery is the appropriate standard and had been consistently applied to the 1990-2004 data provided by TFCC, the season injury threshold would have been 66,800 AF smaller than what was adopted in the Director’s May 2005 order. (Exhibit 4100 at 25; Carlson Direct, at 30).
- FF: In 2005, TFCC actually diverted 912,968 AF of water. This is significantly less than the 1,075,000 AF minimum full supply the Director found in his May 2005 order. The difference between the Director’s minimum full supply and what TFCC actually diverted for their needs was 157,889 AF. Of the 912,968 AF diverted, 177,500 AF was storage. Nevertheless, TFCC had a full water supply because they actually did not even use all of their available water supply and in fact carried over about 60,000 AF of storage at the end of the year. (Third Supplemental Order dated June 29, 2006; Carlson Direct, at 28).

FF: Also, adopting the 2002 diversion as the injury threshold for TFCC would put it in a similar shortage-frequency class as the other SWC entities. The seasonal injury thresholds for the other six SWC members all fall in the 10th to 30th percentile range of their historical diversions. In contrast, the seasonal injury threshold for TFCC as adopted by the May 2005 order is in the 50th percentile of their historical diversions. Using the 2002 diversion to define the threshold would place Twin Falls Canal Company's season injury threshold in 18th percentile of historical diversions, which is an outcome more consistent with the protections provided by other SWC members in the May 2005 order and more representative of Twin Falls Canal Company's historical experience in drought periods before substantial groundwater development. (Exhibit 4100 at 25).

FF: Assuming that the standard of "minimum amount recently diverted for full head-gate delivery" adopted in the May 2005 order is appropriate for determining a threshold injury value, the threshold for TFCC was not properly determined. (Direct Testimony of Brendecke, at 30).

Conclusion of Law:

CL: The beneficial use of a water right is the extent, measure and limit of a water right. [cite] The SWC cannot demand more water than they need to raise their crops.

CL: The minimum full supply of TFCC should be determined based upon a full headgate delivery of 5/8 of a miner's inch per share, not 3/4 inch per share. (Exhibits 4166, 4167, 4610, *State v. Twin Falls Canal Co.*, 21 Idaho 410 (1911), *Twin Falls Land & Water Co., v. Twin Falls Canal Co.*, 79 F.2 431 (1935).

3. Relies Primarily on its Natural Flow Water Right; the Other SWC Entities Rely Primarily on their Storage Contract Space.

Statement of Position: With a 1900 priority right for 3,000 cfs, TFCC has the largest and most senior surface water right of the SWC entities. It relies primarily upon natural flow to satisfy its irrigation needs and holds only a small storage right.. NSCC also has a small 1900 priority right for 400 cfs, but otherwise relies upon storage water. It is undisputed that all other SWC entities primarily rely upon storage water to meet their irrigation requirements. Their respective water rights are identified in the May 2005 Order, Findings of Fact No. 55 through 70 and Exhibits 4001A and 8001. None have been partially decreed in the SRBA and remain as pending claims subject to a multitude of objections. (Exhibits 4100A and 9723-9729). Therefore, only the

natural flow rights TFCC and NSCC could potentially be injured by groundwater depletions effecting spring flows in the Near Blackfoot to Neeley reach.

Findings of Fact:

FF: Twin Falls Canal Company has a 3,000 cfs water right with a priority date of October 11, 1900 under water right no. 1-209. North Side Canal Company has a 400 cfs water right with the same October 11, 1900 priority date under water right no. 1-210. Both rights are diverted at Milner Dam into their respective canal systems and command the entire reach gain arising below Blackfoot. As a result, the other members of the SWC primarily rely upon storage because their surface water rights are junior in priority to the 1900 priority rights of Twin Falls Canal Company and North Side Canal Company. (*Carlson Direct*, at 12; Dreher testimony Tr. pg. 372, ln 10-18).

4. No supply shortages:

Statement of Position: CM Rule 42 sets forth the factors for the Director to consider in making a determination of material injury. These include “the amount of water available” and the “acreage of land served.” CM Rule 42.01 a, d. At the time the May 2005 Order was issued, the Director relied only upon the irrigated acreage claimed by SWC entities in the SRBA, which was purportedly the irrigated acres as of 1987 when the adjudication began. The evidence presented at the hearing established that the number of acres claimed by each SWC entity has since reduced. In *AFRD No. 2*, the Supreme Court held that “the presumption under Idaho law is that the senior is entitled to his decreed water right . . .” Further, evidence was presented establishing that, in particular, TFCC has “hardened” acres in the claimed place of use. The Hearing Officer must either make a finding regarding the actual irrigated acres to be considered for purposes of making a determination of material injury; or, instruct the Director to do so. There can be no injury to hardened acres no longer irrigated due to development or for other reasons. Similarly, Groundwater Users cannot be curtailed or required to provide mitigation water to acres no longer irrigated. Further, the reduction in irrigated acres within the SWC entities’ places of use, should

be considered when evaluating water supply availability and reliability as well as the need for carryover storage and the crop requirements.

a) The Actual Irrigated Acreage has Decreased (42.01.d)

Statement of Position: IGWA expert Scott King identified in his report, Exhibit 4300, acres in the claimed places of use of three SWC entities that in fact had been hardened and thus no longer irrigated. His supplemental report (Exhibit 4310) focused on TFCC and confirmed based upon actual inspection at least 15,043 acres that were not actually irrigated. Dr. Brockway's rebuttal report, Exhibit 8190 at p. 14, admitted that up to 6,600 of these acres were in fact non-irrigated. (Tr. pg.2247, ln 2-4) This undisputed amount equaled 3.3% of TFCC's 198,632 irrigated acres reported as of 1987. (Tr. pg. 2247, ln 10-14). Dr. Brockway's report also indicated on p. 14 that TFCC uses 5.4 acre fee per acre. Based on that rate, TFCC in effect received an additional 35,648 acre feet of water for non-irrigated lands at the expense of Groundwater Users. (Tr. pg. 2248, ln 1-24) Dr. Brockway further admitted in his deposition (pg. 290, ln 1-4) and on cross examination at the hearing that Groundwater Users are only responsible for their depletions which cause injury, not for depletions caused by other factors such as drought and changes in incidental recharge. (Tr. pg. 2255, ln 1-8) Dr. Brockway further admitted that non-irrigated acres should not be considered in calculating irrigation water supply requirements. (Tr. pg. 2247, ln 2-4) The Hearing Officer must weigh the evidence (or instruct the Director to do so) and make a finding concerning the actual number of irrigated acres in making any determination of material injury and corresponding mitigation requirements.

Findings of Fact:

FF: TFCC has approximately 202,690 shares outstanding and claims a place of use in the SRBA as of 1987 of 196,192 irrigated acres. (Alberdi, Tr. pg. 1662 ln 6-10, p. 1; pg. 659 ln 8-12 , Brockway, Tr. pg. 2242 ln 15 – pg. 2243 ln 10)

- FF: TFCC originally claimed approximately 201,000 irrigated acres in the SRBA and that was recently reduced to 196,192 acres. (Alberdi, Tr. pg. 1660 ln 6-19)
- FF: TFCC amount of irrigated acres is less than the number of shares that it delivers water to. Mapping and imagery analysis shows that development has hardened acres within the TFCC service area. Mr. King testified that based upon field investigation and imagery interpretation reveals that at least 15,043 of these acres were actually not irrigated. This represents 7.6% of the total amount claimed by Twin Falls canal Company. The amount of water associated with these non-irrigated unreported acres is 111,459 AF based upon a diversion of $\frac{3}{4}$ inch or 101,905 AF based upon a diversion of $\frac{5}{8}$ inch. (Exhibit 4310 at 19). Mr. Brockway admits that TFCC may have up to 6,600 acres that are no longer irrigated under TFCC's canals. (Exhibit 8190 at p. 14, Tr. pg.2247, ln 2-4) Although there is conflicting evidence, it is clear that not all of the lands originally served by TFCC's water rights are still irrigated and thus, their irrigation demands should be reduced accordingly.
- FF: Minidoka Irrigation District originally claimed 77,490 acres as its place of use for its irrigation water rights. However, mapping files agreed upon by Minidoka Irrigation District showed that they were claiming 75,152 acres. An analysis based upon imagery interpretation based upon imagery from 1987 and 2004 reveals that at least 5,008 of these acres were actually not irrigated. This represents 6.7% of the total amount claimed by Minidoka Irrigation District. (Exhibit 4300 at 3, 10).
- FF: Burley Irrigation District originally claimed 47,818 acres as its place of use for its irrigation water rights. However, mapping files agreed upon by Burley Irrigation District showed that they were claiming 47,622 acres. An analysis based upon imagery interpretation based upon imagery from 1987 and 2004 reveals that at least 2907 of these acres were actually not irrigated. This represents 6.1% of the total amount claimed by Burley Irrigation District. (Exhibit 4300 at 3, 10).
- FF: Non-irrigated acres must not be used to determine irrigation water supply requirements. (King Direct, at 10, Brockway, Tr. pg. 2247, ln 2-4).

Conclusions of Law:

- CL: In making any determination of material injury, the Director should determine and exclude non-irrigated acres for purposes of calculating water supply requirements. (See *AFRD #2*, 143 Idaho at 878; 154 P. 3d at 449).
- CL: For purposes of determining the water supply requirements of TFCC, non-irrigated acres should be excluded. The testimony of Scott King is accepted and the irrigated acres of TFCC should be reduced by 15,043 acres for purposes of any material injury calculation.

b) No Dried-Up Acres or Unharvested Crops From 2000 to Date by any Shareholders Within the SWC Entities Due to Lack of Water (42.01.g)

Statement of Position: The evidence is undisputed that no SWC shareholder was unable to plant or harvest normal crops from 2000 to date, despite the worst drought of record. Furthermore, during this time period there was never a year that any SWC entity ended the year without carry-over water in storage. These compelling facts demonstrate that no material injury existed and that the delivery calls should have been denied.

Findings of Fact:

- FF: Presumably, the SWC chose to include testimony from those farmers within their service areas that would have suffered the greatest losses to crops and demonstrate material injury, yet, the testimony reveals that these farmers have been able to adjust and adapt to changing water supplies and have not dried up acres or suffered material loss of yields due to lack of water. Mr. Blick, Mr. Coiner, Mr. O'Connor, Mr. Shewmaker, Mr. Breeding, Mr. George, Mr. Lockwood, Mr. Kostka in their pre-filed direct testimony presented no testimony whatsoever that they have dried up acres or left any crops unharvested due to lack of water. At best they may have changed crop rotation or cropping patterns and may have experienced some reduced crop yields, but there is no convincing evidence and it is unclear if any changed cropping patterns or reduced yields are due only to reduced water supplies. Furthermore, Mr. Diehl of North Side Canal Company indicated that cropping patterns were the same as they had been in the past in his district and generally the lay testimony indicated that more water consumptive crops have been planted in response to dairies moving into the area, but that even with these more water consumptive crops, reduced yields have not been prevalent.
- FF: The lay testimony was further bolstered by the SWC experts that despite variations in surface water and storage available, the testimony of all SWC experts readily acknowledges SWC members have not been required to dry up acres nor have any reductions in crop yields been documented as a result of water supply shortages.
- FF: SWC members cannot have suffered material injury because there is no evidence suggesting that the SWC members have had to dry up acreage or have suffered any loss of crop yields.
- FF: The evidence presented supports Finding of Fact 109 in the 2005 Order:
“None of the members of the SWC have identified lands that are entitled to receive surface water but have not been irrigated or where crops could not be harvested because of shortages in the surface water supplies available to members of the Coalition under the members’ various rights.”

Conclusions of Law:

- CL: The Director's May 2005 order acknowledges that actual irrigation requirements vary from year to year based upon climate, crop selection, irrigated acreage and other factors. However, the thresholds adopted in the Order are not based on a determination of crop irrigation requirements and consider neither the actual nor the claimed irrigated acreage within the SWC service areas. (Exhibit 4100 at 27).
- CL: The beneficial use is the extent and measure of a water right. *United States v. Pioneer Irrigation Dist. et al.*, 157 P.3d 600 at 606 (2007) ("beneficial use shall be the basis, the measure, and the limit of the right." Consideration of areas within the SWC member's service areas that are not irrigated and how such areas would affect the diversions necessary to provide full deliveries to the irrigated areas is required.
- CL: CM Rule 42.01.d instructs the Director, when determining material injury with regard to a water call for irrigation water, to consider the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
- CL: Furthermore, the thresholds adopted by the Director in his May 2005 Order are not based on a determination of crop irrigation requirements and consider neither the actual nor the claimed irrigated acreage within the SWC service areas.
- CL: Because no SWC entity shareholders/members were able to plan and harvest normal crops in each year from 2000 to date no material injury existed.

c) Irrigation Efficiencies (CM Rule 42.01.d, g).

Statement of Position: Actual crop requirements are relevant and should be considered by the Director in making any determination of material injury. IGWA's case focused on the historical water supplies available, drought conditions and upon headgate delivery requirements necessary for the SWC and particularly TFCC to have a minimum full supply of water to raise crops based on historic water supply availability. The City of Pocatello's case focused on irrigation efficiencies and requirements for each of the SWC entities. IGWA supports and adopts the testimony and positions of the City of Pocatello with respect to the proper methodologies for calculating irrigation efficiencies and crop requirements of the SWC.

Findings of Fact:

FF: IGWA supports the Findings of Fact contained in Pocatello's *Proposed Findings of Fact, Conclusions of Law and Ruling* regarding irrigation diversion requirements and the analysis necessary to predict minimum full supply.

Conclusions of Law:

CL: Conjunctive Management Rule 42.01 factors apply as follows:

Factor 01.a, requires the Director to determine the amount of water available "in the source from which the water is diverted." The source in this case is two-fold: the natural or pre-development supply; and, the subsequently artificially enhanced flows resulting from incidental recharge due to waste water seepage into the ESPA.

Factor 01.b, the "effort" or "expense" of the water right holder to divert water from the source. In this case, the "effort" by the senior water right holder to divert water from the ESPA is none. There is no evidence in this case that the effort or expense of diverting water under the SWC water rights have ever been increased as a result of any alleged water shortage. Rather, any change in the effort or expense in diverting water under these water rights has been the product of economic facts unrelated to water. (See Church Direct)

Factor 01.c, concerns whether the exercise of the junior-priority groundwater user affects the quantity and timing of when water is available to the senior. The evidence establishes that groundwater pumping has not impacted the amount of water that SWC was historically able to divert under its water rights.

Factor 01.d requires consideration of the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. The Director utterly failed to consider the "acreage of land served" by the SWC members and failed to establish historical rates of diversion as a base line for determining any shortage.

Factor 01.e concerns the amount of water being diverted and used compared to the water rights. Again, the Director failed to consider the proper historical amount of water diverted under the SWC water rights.

Factor 01.g allows for reasonable carry-over storage water but instructs that the Director "shall" consider average annual rate of fill of the storage reservoirs, the average annual carry-over for prior comparable water rights and system's projected water supply. The evidence establishes that the reservoir systems fill at least 66% of the time physically and more often "on paper" (McGrane Testimony tr. pg.1407: ln 22 – pg.1408: ln 4). Further for prior comparable water years, it was anticipated that carry-over storage could be reduced to zero. (Exhibit 7001 at 154-155). And finally, the system's projected water supply must be considered which necessarily requires that the timing of when carryover storage (if any) should be supplied should be prior to the year in which it will be used after the final accounting for the prior year in order to not waste the resource.

Factor 01.h, the extent to which the senior water right could be met “using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells.” There has been consideration of whether construction of wells would be a reasonable alternate means of diversion in this case.

II. TO THE EXTENT ANY SWC ENTITY SUFFERED MATERIAL INJURY IN THE YEARS 2005, 2006 OR 2007, TO WHAT EXTENT IS GROUNDWATER PUMPING RESPONSIBLE?

A. PRIMARY CAUSES OF DECLINE TO SWC

Statement of Position: It is undisputed that Groundwater Users are only responsible for their own depletions which cause material injury to senior rights. It is undisputed and readily admitted by the SWC lead expert Dr. Brockway that Groundwater Users do not bear the responsibility of reduced water supplies due to drought conditions and changes in incidental recharge that impact reach gains. Consistent with his prior deposition Dr. Brockway readily admitted that “groundwater pumping should only be responsible for deletions, which they cause, and not for reductions in reach gains attributable to other factors, such as changes in incidental recharge, drought and the like.” (Tr. pg.2255: ln 1-8)

1. Drought

Statement of Position: The evidence presented at the hearing substantiates the Directors Findings of Fact No. 78, 79, 80 in the May 2005 Order that “since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record;” that “Since 1999, there has been a significant decrease in the reach gains...which correspond to the consecutive years of drought...;” that based on the model and a water budget analysis “...as of May 2002, the Snake River Plain aquifer is at or close to equilibrium;” and “Therefore, groundwater depletions are not the cause of the declines in measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999.” Accordingly, it must be concluded that

material injury, if any, to SWC entities is caused by drought or other factors for which Groundwater Users have no responsibility.

Finding of Fact:

FF: The drought period starting in 2000 has been the worst consecutive period of drought on record. This drought would be expected to be repeated only one time in every 500 years. (May 2005 Order Findings of Fact 77-80, Brendecke Testimony and Exhibits 4100, 4105, 4106; Dreher Testimony tr. pg. 327: ln 15-23)

FF: Substantial evidence presented at the hearing confirms and supports the Directors Findings of Fact No. 78, 79, 80 in the May 2005 Order that “since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record;” that “Since 1999, there has been a significant decrease in the reach gains...which correspond to the consecutive years of drought...;” that based on the model and a water budget analysis “...as of May 2002, the Snake River Plain aquifer is close to dynamic equilibrium;” and “Therefore, groundwater depletions are not the cause of the declines in measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999.” Accordingly, it must be concluded that material injury, if any, to SWC entities is caused by drought or other factors for which Groundwater Users have no responsibility. (Brendecke Testimony and Exhibits 4100, 4105, 4106, 4112, 4113, 4114, 4115, 4116, 4117, 4118, 4119.)

Conclusions of Law:

CL: Material injury, if any, to SWC entities in 2005 and 2007 was caused by drought or other factors for which Groundwater Users have no responsibility.

2. Changes in Irrigation Practices

Statement of Position: See II. A above. Groundwater Users have no responsibility for reach gains that diminished as a result of changes in irrigation practices. The historical water supplies available to the SWC at the time their rights were established were subsequently enhanced until the 1950s as a result of increased incidental recharge resulting from the expansion of inefficient irrigation practices; and, there after declined as a result of diminished incidental recharge resulting from irrigation efficiencies. These changes in incidental recharge over time were proximately caused by the SWC entities and other surface water users.

Findings of Fact:

- FF: Development of water resources within the Eastern Snake River Plain began in the late 19th century with the diversion of surface water rights. The development began in the Henry's Fork and upper reaches of the Snake River mainstream. Several large surface water irrigation projects were constructed in the early part of the 20th century which was concentrated further down river in between Neeley and Milner. (Exhibit 4100 (Brendecke 12/30/2005 Report) at 5).
- FF: On the Eastern Snake Plain flood irrigation of surface water rights started after the Civil War, was well under way by the turn of the century and continued to expand to the 1950s, at which time there were approximately 1.83 million irrigated acres. Nearly all of this was flood-irrigated by surface water, although the conversion to sprinkler irrigation was just beginning. (Carlson Direct, at 7).
- FF: On the Eastern Snake Plain flood irrigation of surface water rights started after the Civil War, was well under way by the turn of the century and continued to expand to the 1950s, at which time there were approximately 1.83 million irrigated acres. Nearly all of this was flood-irrigated by surface water, although the conversion to sprinkler irrigation was just beginning. (Carlson Direct, at 7).
- FF: The diversion of surface water for irrigation within the Eastern Snake River Plain resulted in substantial incidental recharge of water to the aquifer. This occurred as a result of seepage and percolation of the surface waters from leaky canals and flood irrigation on farm fields. In other words, the ESPA was being filled with considerable amounts of water from surface water diversions. (Exhibit 4100 Brendecke 12/30/2005 Report at 5; Carlson Direct, at 8).
- FF: Flood irrigation practices were very inefficient, resulting in several millions of acre feet of water being stored in the ESPA. (Carlson Direct, at 8-9).
- FF: Although it is recognized that excess water from surface water irrigation is not the only source of recharge to the ESPA, incidental recharge from surface water irrigation is the primary source of aquifer recharge.
- FF: By 1952, it is estimated that more than 24 million acre feet (MAF) of water had been added to the aquifer as a result of incidental recharge from surface water irrigation waste water. (Exhibit 4100 at 6).
- FF: Beginning in the 1960 to 1970 time period, surface water supplies have declined as a direct result of the conversion from inefficient gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities such as the members of the SWC. (Exhibit 3009 Director's May 2005 Order at Para. 90; Carlson Direct).

Conclusions of Law:

CL: Material injury, if any, to SWC entities in 2005 and 2007 was caused by changes in incidental recharge, drought or other factors for which Groundwater Users have no responsibility.

CL: Groundwater Users have no responsibility for any material injury caused by changes in incidental recharge or any factor other than groundwater depletions.

3. Pumping Depletions

Statement of Position: Groundwater Users are only responsible for pumping depletions that cause material injury to SWC entities at those times when they can beneficially use the water. IDWR investigated the issue of usability of reach gains using the ESPAM in conjunction with the Department's Planning Model. The reach gains used in this analysis were the steady state gains accruing between Shelley and Milner from curtailment of groundwater irrigation rights junior to January 1, 1961, calculated using v1.0 of the ESPAM. The steady state value of this reach gain was 888 cfs. Curtailment to January 1, 1961 would dry up 664,300 acres of groundwater irrigated land. The long-term average increase in flow passing Milner Dam from the additional reach gain was determined to be 846 cfs, which is 95% of the 888 cfs steady state reach gain. In other words, 95% of the reach gain from curtailment would pass Milner Dam unused because it could not be diverted or stored. Significantly, this same basic problem was recognized in the 1946 Planning Report for the Palisades Project. (Exhibit 4100 at 22). Concurrent with the right to use water in Idaho "first in time," is the obligation to put that water to beneficial use. *American Falls Reservoir Dist. No. 2* at 880, 451. In *Pioneer* the court also held that in Idaho it is "a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law." *Id. Pioneer* 157 P. 3d at 604 (quoting *Alrethesen v. Wood River Land Co.*, 40 Idaho 49, 60, 231 P.418, 422 (1924)). Further, under either the constitutional or statutory

method of appropriation, the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho. *Id.* at 604. Finally, the Court reiterated the rule stated in *Ickes*: “the right to the use of water acquired under the provisions of [the Reclamation] Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.” *Id.* at 606 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 614, 65 S. Ct. 1332, 1349 (1945)). Yet, in this case, curtailment of junior groundwater users may result in a waste of the water resource because the timing and location of when water may arise from the curtailment will go unused which directly violates the requirement that the water must be put to beneficial use.

The usability of any reach gain accruals resulting from curtailment of groundwater pumpers is particularly relevant and should be considered so as to insure such water can be applied to beneficial use and not wasted. The vast majority of reach gains in the Near Blackfoot to Neeley reach resulting from the curtailment of groundwater pumpers could not be beneficially used and would be wasted because they would accrue: (1) accrue during the non-irrigation season, (2) below Milner, and/or (3) during the irrigation season at times when American Falls Reservoir would fill resulting in spill.

Findings of Fact:

FF: The reach between the near Blackfoot gage and the Neeley gage on the Snake River are particularly important because it contains numerous springs which provide the bulk of gains to river flows between Blackfoot and Milner and form an important part of the water supply to the SWC.

FF: The reach gain between the near Blackfoot gage and the Neeley gage on the Snake River was measured in 1905 to be 1,830 cfs. The annual reach gain over the 1912-1927 period averaged 2,480 cfs. The annual reach gain over the 1928-2004 period averaged 2,680 cfs. The annual reach gain between the near Blackfoot gage and the Neeley gage on the Snake River shows no statistically significant trend over the 93 year period of record and no statistically significant trend between the beginning of groundwater development and

the year 2000. (Exhibit 4100 at 7; Exhibit 4112, 4113, Attachment H to May 2005 Order; Dreher testimony, tr. pg. 34: ln 8 – pg. 36: ln 4, pg. 1258: ln 17-22)

- FF: The fact this annual reach gain has not experienced a declining trend since the beginning of groundwater development indicates that there is no basis for the SWCs' allegation that groundwater development had detrimentally impacted their surface water rights. (Exhibit 4100 at 6-7).
- FF: A double mass plot of the combined flow of the Snake River at the near Blackfoot gage and the flow of the Portneuf River versus the flow at the near Minidoka gage reveals no apparent change in slope over the 1950-1990 period of groundwater development. This is further evidence that ground pumping has not materially reduced reach gains in the near Blackfoot to Neeley reach. (Exhibit 4100 at 7-8).
- FF: Not all of the amount of water curtailed will accrue in a place or at a time where the gains can be used by the SWC entities. (Wylie testimony, tr. pg. 593: ln 10-19).
- FF: For example, reach gains accruing to the river below Neeley during the winter months would simply pass Milner Dam and leave the upper basin unused. Similarly, any winter gains that accrue above Neeley after American Falls Reservoir has filled would simply flow past Milner unused.
- FF: The IDWR investigated the issue of usability of reach gains using the ESPAM in conjunction with the Department's Planning Model. The reach gains used in this analysis were the steady state gains accruing between Shelley and Milner from curtailment of groundwater irrigation rights junior to January 1, 1961, calculated using v1.0 of the ESPAM. The steady state value of this reach gain was 888 cfs. Curtailment to this priority date would dry up 664,300 acres of groundwater irrigated land (IWRRI, 2004). The long-term average increase in flow passing Milner Dam from the additional reach gain was determined to be 846 cfs, which is 95% of the 888 cfs steady state reach gain. In other words, 95% of the reach gain from curtailment would pass Milner Dam unused because it could not be diverted or stored. Significantly, this same basic problem was recognized in the 1946 Planning Report for the Palisades Project. (Exhibit 4100 at 22).
- FF: Exhibit 8000 Appendix AB-1 shows that Palisades, the most junior of the reservoirs, almost always fills and only in a series of severe drought years has there ever been space available for additional accruals that would result for curtailed groundwater pumping. The space available is far less than the accruals.
- FF: The analysis above demonstrates that most of the reach gains that could be generated by curtailment of groundwater pumping would be unusable by the SWC entities because the majority of them would arise in other reaches (above Blackfoot or below Milner) where they would not be accessible and because a substantial portion of those that would arise between Blackfoot and Milner would do so when there was no demand and no place to store them.

- FF: The IDWR analysis found that the average amount of reach gain not spilled past Milner would be 42 cfs, or approximately 33,600 AF per year. At a typical diversion rate of 6 AF per acre, this is sufficient to provide a surface water supply to about 5600 acres, or less than 1% of the area dried up by the curtailment. (Exhibit 4100 at 23).
- FF: Therefore it would make far more sense, in terms of efficiency of water use, to mitigate any material injury caused by groundwater pumping by making targeted deliveries of storage water to the SWC entities in the occasional dry year. (Exhibit 4100 at 23).
- FF: The model clearly over-predicts the impact of pumping on reach gains in the Near Blackfoot to Neeley reach. These modeled impacts are contrary to actual flow data as depicted in Attachment H to the 2005 Order and Exhibits 4112, 4113. (Brendecke Report Exhibit 4100).

Conclusions of Law:

- CL: Near Blackfoot to Neeley reach gains have been adversely affected by drought conditions since 2000, but not groundwater pumping.

B. USE OF ESPA MODEL: (ATTACHMENTS H & I, Exhibit 4113)

1. Model Overestimates the Impact of Groundwater Pumping in the Near Blackfoot to Neeley Reach

Statement of Position: The ESPA Model does not accurately predict the impact of groundwater pumping in the Near Blackfoot to Neeley Reach. The modeled results cannot be validated and are contrary to the actual flow data shown in Attachments H & I to the 2005 Order and Exhibit 4113. The testimony of former Director Dreher and Dr. Brendecke support and substantiate Finding of Fact No. 80 in the 2005 Order that “groundwater depletions are not the cause of the declines in the measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999.” While the model may represent the best available science, it cannot be used as a basis for curtailing groundwater users in 2005 and 2007 since the modeled results can not be validated by actual flow records.

Findings of Fact:

- FF: IDWR has developed several groundwater models of the ESPA over the last 30 years, each one representing an improvement over its predecessor. The most recent model is referred to as the Eastern Snake Plain Aquifer Model (ESPAM). (Exhibit 4100 at 18-20).
- FF: Near Blackfoot to Neeley reach gains have declined since 1999. However, Attachment H to the May 2, 2005 Order and Attachment I (which is an update to Attachment H) does not show an annual decline due to groundwater pumping. (Dreher, Brendecke, Koreny, Exhibit 4113) Former Director Dreher testified “If this decline was the result of groundwater depletions, one would have expected to see it manifested earlier in the record, and it just is not there. There simply is no decline in trend until this latter period of time.” (Dreher Testimony Tr. pg. 37: ln 2-6). He further testified “Now, secondly, members of the SWC attributed this decline, this latter decline, beginning in about 1999, to groundwater depletions. And that was not consistent with what we understood the facts to be based upon simulations using the reformulated, recalibrated groundwater model. The decline is real. The fact that it's the result of groundwater depletions, I would say, is very uncertain and unlikely.” (Dreher Testimony Tr. pg. 37: ln 14-23).
- FF: The testimony of Director Dreher and Dr. Brendecke support and substantiate Finding of Fact No. 80 in the 2005 Order that “groundwater depletions are not the cause of the declines in the measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999.
- FF: There is conflicting evidence whether or not groundwater pumping causes reach gains to decline during the months of July and August on a regular and consistent basis. (Brendecke and Koreny) However, if the reach gains decline in July and August, they must be increasing through other parts of the year. The increasing reach gains would contribute water to storage one in every three years during the non-irrigation season when there is storage space available. (McGrane and Raff, Koreny).
- FF: IDWR utilized ESPAM to run a Curtailment Scenario which simulated the hypothetical curtailment of groundwater irrigation rights junior to January 1st of the following years: 1870, 1949, 1961, 1973, and 1985. The 1870 curtailment date effectively represents complete curtailment of all groundwater irrigation except that occurring under tribal rights and agreements (and thus considered exempt from curtailment). The other dates were selected for representative purposes and do not reflect the priority of any specific water right that might exert a delivery call. The principal aim of the scenarios was to illustrate the amounts and timing of reach gain effects that would stem from curtailment of groundwater pumping. (Exhibit 4100 at 21).
- FF: Based on results from the original Curtailment Scenarios using v1.0 of the ESPAM (IWRRI, 2004), the complete curtailment of groundwater pumping for irrigation would dry up 1.1 million acres of farm land and reduce consumptive use of groundwater by 2.1 MAF per year (or about 2900 cfs on average). The reach gain effects of curtailment would be distributed both spatially and temporally. Scenario results indicate that reach

gains would increase in all connected river reaches and springs, though the effect would vary greatly from place to place. Reach gains would increase slowly over time, approaching steady state conditions only after decades of curtailment. (Exhibit 4100 at 21).

- FF: At steady-state, after decades of curtailment of all groundwater pumping on the Eastern Snake River Plain, only 38% of the increased reach gain from this curtailment would appear in the near Blackfoot to Neeley reach. More than half of this steady-state reach gain would accrue above Blackfoot or below Milner Dam. In the first irrigation season, only 5% of the foregone groundwater consumption would accrue to the near Blackfoot to Neeley reach. In the first year of curtailment, only 11% would accrue to the reach. (Exhibit 4100 at 21-22).
- FF: The ESPAM has been shown to over-predict the impacts of groundwater pumping on the reach gains below Blackfoot. Since the model over-predicts the benefit (in terms of reach gains) of curtailment, the amount of reach gain increase from curtailment would be even smaller than predicted by the model. (Direct Testimony of Brendecke, at 28-30).

Conclusions of Law:

- CL: Idaho jurisprudence lacks any finite definition of the point at which the waste of water becomes unreasonable. The typical example offered provides that a water use that results in 90% waste would be so unreasonable as to not be tolerated. The Montana Supreme Court has gone further in stating that “an appropriator has no right to ... cause the loss of two-thirds of a stream simply because he is following the lines of least resistance. Such a method of diversion would not be an economical use of the water....” *State ex rel. Crowley v. District Court*, 108 Mont. 89, 103, 88 P.2d 23, 30 (1939).
- CL: The CM Rules define a futile call as: “A delivery call made by the holder of a senior-priority surface or groundwater right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority groundwater right or that would result in waste of the water resource.” CM Rule 10.08.
- CL: The doctrine of “futile call” prevents the curtailment of a junior right on the same source if curtailment would not provide water to the senior in sufficient quantity to apply to beneficial use. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1223 (1976); citing *Albion - Idaho Land Co v. NAF Irrigation Co.*, 97 F. 2d 439, 444 (10th cir. 1938); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). To justify curtailment there must be a relationship between the use by the junior water right holder of water and a shortage by the senior water right holder of water that could be put to a beneficial use.
- CL: Under the facts of this case, it is estimated that as much as 95% of the reach gain from curtailment will pass Milner unused and that the water from this reach gain that can be

used would be sufficient to irrigate only 1% of the acreage dried up by the proposed curtailment.

CL: Conjunctive Management Rule 20.04 – to be material, the injury must be measurable and the limitation contained in CM Rule 20.04 that allows an immeasurable material injury would allow curtailment of junior users who may not be causing material injury and to that extent is without legal authority and contrary to the doctrine of futile call.

2. Model Uncertainty Includes More Than Just Gage Uncertainty and thus, the 10% Clip Should be Larger.

Statement of Position: Model uncertainty of 10% was used to establish a “trim line” for curtailment purposes in this case. The 10% model uncertainty was based only upon stream gauge calibration uncertainty without quantifying any amount for numerous other assumptions and uncertainties associated with the Model which all experts acknowledge exist. The Hearing Officer should modify the 10% uncertainty by establishing a level that accounts for all other factors, or instruct the Director to do so and establish a revised and more constrained trim line accordingly.

Findings of Fact:

FF: The 2005 Curtailment Orders are based upon curtailment simulations generated by the Eastern Snake Plain Groundwater Model (the “Model”) Version 1.0. An error was subsequently discovered and the model was corrected to the current Version 1.1. (Wylie, 12/3/07, 10:27 am)

FF: The Model was developed by the Idaho Water Resource Research Institute (“IWRRI”) through an incremental collaborative process. Development of the model was described by Wylie. There was no dispute regarding the assumptions and uncertainties associated with the Model simulations described in the following findings of fact.

FF: The Model has primarily been utilized in an attempt to simulate the effects of drought, recharge, and curtailment of groundwater pumping from the ESPA. Exhibit TR461, commonly referred to as the “Curtailment Scenario,” was developed to simulate the affects of groundwater pumping on the ESPA.

FF: Model uncertainty must be factored into Model simulations when the Model is used as a basis for administration of water rights. Although the model is well-calibrated, its uncertainty has not been rigorously tested or defined. (TSP Order at 14, Exhibit 1075)

Wylie testimony, tr. pg. 78: ln 15-19) The actual uncertainty of the model is unknown but can be no less than 10%.

- FF: The 2005 Curtailment Orders assume Model uncertainty of 10% and incorporate a 10% “trim line” based upon Model uncertainty of 10%. The trim line subjects groundwater rights to curtailment if the Model simulation predicts that at least 10% of the quantity curtailed will arise in the Thousand Springs reach of the Snake River.
- FF: Based on the 10% trim line, the May 2, 2005 Order commands the curtailment of over 75,000 acres. Were there no trim line, the pool of curtailed junior-priority groundwater rights would increase exponentially.
- FF: The 10% trim line in the 2005 Curtailment Orders accounted for Model uncertainty attributable only to USGS stream gauge calibration, which is accurate to within 10%. The 2005 Curtailment Orders did not factor uncertainty in the Model simulations resulting from multiple other layers of uncertainty. (Exhibit 1075, Wylie Testimony p. 74: 10-25, p. 75: 1-10, p. 76: 1-17 p.79: 1-17; Exhibit TR 460).
- FF: Uncertainty related to the physical characteristics of the ESPA should be factored into Model simulations. The Model relies on a porous media paradigm that does not accurately reflect the geological characteristics of the ESPA. The Model assumes that the impact from each well is isotropic, meaning the same in every direction, when in fact it is anisotropic. (Exhibit 1075, Wylie Testimony p. 75: 5-23). In other words, the Model assumes an idealized, homogenous description of the physical characteristics of the ESPA. However, the ESPA is non-homogenous and the details of the water conducting characteristics of the ESPA are poorly understood. There are also structural uncertainties pertaining to the actual geometry and flow barriers simulated by the Model. (Exhibit 1075, Wylie Testimony p. 75: 21 – p. 76: 17).
- FF: The model clearly over-predicts the impact of pumping on reach gains in the Near Blackfoot to Neeley reach. These modeled impacts are contrary to actual flow data as depicted in Attachment H to the 2005 Order and Exhibits 4112, 4113. (Brendecke Report Exhibit 4100).

Conclusions of Law

- CL: Idaho Code § 42-607 authorizes curtailment only where “it is necessary to do so in order to supply the prior of others....” The Model must not be utilized in a manner that does not curtail groundwater diversions which have no effect on reach gains which may supply water to senior water rights. Therefore, any curtailment based upon Model simulations must account for uncertainty in the simulation.
- CL: The use of trim line excluding certain pumpers from curtailment is proper and an error factor must be assigned.

CL: The Director's 10% trim line is proper consideration to gauge uncertainties existing in the model calibration process. However, the 10% trim line fails to account for a multitude of other model uncertainties. Accounting for additional Model uncertainties described by Dr. Wylie the Hearing Officer finds that an uncertainty level of 30% is a reasonable level of uncertainty to attribute to the results of the Curtailment Scenario.

CL: Because the Model over predicts the effect of groundwater pumping on the Near Blackfoot the Neeley reach of the Snake River, the Model alone should not define the curtailment to supply the SWC water rights. (Exhibit 4165, Brendecke direct pg. 28: ln 3- pg. 30: ln 3). Although the model may be the best tool available to determine the impact of curtailment on a regional scale, it doesn't give the correct answer when applied to the Near Blackfoot to Neeley reach of the Snake River. (Exhibit 4165, Brendecke direct pg. 28: ln 3- pg. 30: ln 3).

C. CARRYOVER STORAGE

1. Junior Groundwater Rights Cannot Be Curtailed to Provide an Uncertain and Speculative Future Need of the SWC.

Statement of Position CM Rule 42 grants the Director the discretion to consider certain factors in determining whether a senior water right user is suffering material injuring. One of the factors to be considered states in pertinent part the following: "...the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies to future dry years." CM Rule 42.01.g. The Idaho Supreme Court has recently had an opportunity in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), to consider this very same language from the CM Rules in the context of surface water to groundwater administration. Notably, the SWC were parties to that case. In that case, the SWC argued "that they should be permitted to fill their entire storage water right, **regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to their original rights.**" *Id.* at 880, 154 P.3d at 451 (emphasis added).

However, the Idaho Supreme Court readily and wholly rejected this argument. Rather, the Supreme Court held that “it was permissible for the canal company to hold water over from one year to the next **absent abuse.**” *Id.* (emphasis added). The Supreme Court further identified certain circumstances which undeniably constitute this type of “abuse” as follows: (1) where a water right user “does not require the full use of his allocation, but he carries it over to the detriment of others” (*Id.* at 879, 154 P.3d at 450); (2) “when one is allowed to carryover water despite detriment to others” (*Id.* at 880, 154 P.3d at 451); (3) when carryover of storage water is permitted “without regard to the need for it.” (*Id.*); (4) “where stored carryover water was, at the time of the litigation, being wasted by storing away excessive amounts in time of shortage.” (*Id.*); and (5) when “irrigation districts and individual water right holders ... waste water or unnecessarily hoard it without putting it to some beneficial use” (*Id.*). The Idaho Supreme Court explained that whenever such circumstances exist, the SWC is not permitted to hold water over from year to year. *Id.* As explained by the Idaho Supreme Court, “the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost” even in the context of storage water carryover. *Id.*; *see also* I.C. § 42-104.

Given the holding of the Idaho Supreme Court in the *AFRD No. 2*, a decision concerning reasonable carry-over storage under CM 42 cannot be made without considering (1) whether the water carried over is necessary to fulfill current or future needs; (2) whether the storage holders routinely sell or lease the carry-over water for uses unrelated to their original rights; (3) whether the carry-over water will be put to a beneficial use recognized by the laws of Idaho; *and* (4) whether the storage of water will have a detrimental impact upon other water users. To curtail junior groundwater pumpers as a means of replacing carry-over water leased by the SWC members to the Bureau of Reclamation would constitute an abuse of discretion, contrary to Idaho

law. It is undisputed that the SWC members routinely sell or lease their carry-over water to the Bureau of Reclamation for flow augmentation purposes which are purposes wholly unrelated to the SWC members' original water rights.⁴ (Swank testimony Tr. pg. 1076: ln 7-22). This fact conclusively establishes that the carry-over water is not needed by the SWC members at any time, whether now or in the future.⁵ Because that amount of carry-over water represented by these leases is undeniably not needed by the SWC members, it is an abuse of the Director's discretion to curtail junior groundwater pumpers to replace this unneeded amount of water.

Moreover, it is undisputed that flow augmentation is not recognized as a beneficial use under Idaho law. *See* I.C. § 42-1763(B)(4). Because it is not a beneficial use of water recognized under Idaho law, the SWC members are not entitled to curtailment to replace the carry-over water leased to the Bureau of Reclamation.

The next question is whether the remaining carry-over water (that portion not subject to the aforementioned leases) will be reasonably necessary for future needs. The SWC members have argued and continue to argue that they should be entitled to carry-over water as "insurance"

⁴ It is undisputed that flow augmentation is not a decreed water right. As such, the use of the carry-over water for flow augmentation does not enjoy the same priority date as the SWC members' water rights which form the basis of the current delivery call. This is particularly true in light of the fact that the leasing of carry-over water for flow augmentation purposes did not begin until 1990's. Therefore, it is an abuse of the Director's discretion to treat the use of the carry-over water as a decreed water right with a senior priority date.

⁵ See IDAPA 37.03.01.05.f.ii. which states that a claim for storage "shall be broken down into component purposes, with the ultimate use(s) of the stored water indicated" which indicates that storage must have an ultimate beneficial use. Carryover storage is not a beneficial use of water, to add such a use to the water rights would be to allow irrigation entities to hold water for use sometime in the future. This privilege is reserved only for municipalities who can hold water rights for "reasonably anticipated future needs." I.C. § 42-202B(8). Nothing in Idaho law allows a water right for a "future need or use" for entities such as the SWC. A much more reasonable conclusion of what is allowed under CM Rule 42.01.g is that surface water storage contract holders shall be allowed to carryover storage, at their discretion. However, curtailing groundwater users to guarantee any unknown future need impermissibly expands the SWC's contract right to the detriment of other water users.

against future shortages without having to prove that a shortage will exist in the future. In other words, the SWC members contend that they are entitled to the carry-over water regardless of actual future need. As mentioned above, the Idaho Supreme Court flatly rejected that argument in the *AFRD No. 2* case. There must be proof that the carry-over water is necessary for future needs. However, no such evidence exists. No SWC expert gave an opinion on the amount of carryover that may be reasonable. In fact, even the alleged storage experts from BOR did not have any opinion on the amount of carryover that may be reasonable. (McGrane testimony, tr. pg. 1422: ln 21- pg. 1423: ln 7; Raff testimony, tr. pg. 1522: ln 9 – pg. 1523: ln 11) All evidence pertaining to possible future needs is uncertain and speculative. Because of the significant variability of weather patterns from year to year, it is impossible to predict with any certainty what future carry-over needs may or may not be from year to year. To require junior groundwater users to acquire and provide an amount of replacement storage water to remedy a shortage that has not even been forecast would violate Idaho law. This is particularly true in light of the evidence at trial that the SWC members had ample carry-over storage even in the driest of years. Junior groundwater appropriators cannot lawfully be curtailed to replace what are admittedly uncertain and speculative needs of the SWC members.

Lastly, there must be a consideration of whether the storage of water will have a detrimental impact upon other water users. In the *AFRD No. 2* case, the Idaho Supreme Court gave considerable discretion to the Director to determine reasonable carryover and this includes the authority to significantly reduce if not eliminate carryover during a time of drought in light of the detrimental impact of the carry-over upon other water users. (See *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862 at 880-881 (2007)). This is consistent with the Idaho legal principle of full economic development of the State's water and

the constitutional concepts of “maximum utilization” and “optimum use”. A curtailment of junior groundwater pumpers for purposes of mitigating carry-over water will have significant detrimental economic and sociological impacts upon those pumpers as well as the economy of the State of Idaho. Suffice it to say that, in light of the degree and severity of these impacts to curtail junior groundwater pumpers to facilitate carry-over storage, particularly when it is impossible to know how much and when the carry-over storage may be beneficially used is contrary to law and policy of the state of Idaho that requires full economic development and optimum use of its water resources.

Findings of Fact:

- FF: Studies completed by the USBR based upon pre-groundwater development study periods indicate that the three reservoirs – Jackson Lake, Palisades and American Falls – would have been empty in 1934 and would have failed to fill any of the four years from 1932 to 1935. Exhibit 7001 Substantiating Report p. 11. In stark contrast, the combined active storage in the three reservoirs at the end of 2004 was 476,600 AF and the combined carryover storage of the SWC members was 288,300 AF. (Exhibit 4100 at 14).
- FF: The yield of Jackson Lake and Palisades storage rights cannot be directly affected by groundwater development because they fill from basins outside the Eastern Snake River Plain. (Dreher Testimony tr. pg. 871: ln 15-16) Their yields could however be affected by whether or not the more senior storage rights downstream in American Falls Reservoir have filled and the Snake River flows below Heise that are tributary to American Falls Reservoir are potentially affected by groundwater development. However, because the system of storage reservoirs did not reach its current capacity until after groundwater development began, it is difficult to directly assess how such development has affected the yield of storage rights held by the SWC. (Exhibit 4100 at 14-15).
- FF: There are no significant declining trends in the initial storage allocations of the SWC such as might be expected if groundwater development had as alleged significantly affected storage supplies. (Exhibit 4112, 4113, 4114, Attachments H, F). Indeed, the initial storage allocations of the SWC members have been relatively steady and quite reliable since 1960, though not invariable through the entire 1960-2004 period. (Exhibit 4124 and 4100 at 15). This is precisely what was anticipated in the 1946 Palisades Study mentioned above. (Exhibit 4162, 711 and Exhibit 4100 at 15).
- FF: Records reveal that, since 1960, the initial storage allocations of the SWC members have averaged 89% of their contracted space and that the contracted space has filled in most years. (Exhibit 4100 at 15, Exhibit 4125, IDWR Exhibit 8000 at AB-1).

- FF: The lack of declining trends in storage allocations is consistent with the lack of statistical evidence of groundwater impact on observed reach gains in the near Blackfoot to Neeley reach that encompass American Falls Reservoir as discussed above. (Exhibit 4100 at 15)
- FF: As mentioned above, the reservoir system was intended from its inception to provide supplemental water to already existent natural flow rights. It is unconscionable to allow the SWC to monetarily benefit from these water leases and then seek to assess any shortage in natural flow or carry over against junior priority groundwater users.
- FF: Carryover reflects a surplus water supply. Its existence indicates there was more water available for water users to use than was needed in a given year for irrigation purposes. As long as a water user has a full supply of water in the current irrigation season there can be no material injury in that year. (Carlson Direct, at 31).
- FF: Although the CM Rules allow for storage space holders to carry over a reasonable amount of carry over from year to year, curtailing junior-priority groundwater rights to provide carry over storage was not contemplated.
- FF: Zero carryover is a reasonable amount of carryover under the facts of this case. (See Section 2 below).
- FF: Historical documents, including the Palisades Planning Report, Exhibit 7001, contemplated that the reservoir system could be used for holdover or “insurance” water but it was equally contemplated that Palisades would not fill every year and that in drought years it would be emptied. (Exhibit 7001 (Substantiating Report) at 155). Thus, providing any level of “reasonable carry over” from year to year to year would enhance the SWC’s water supply beyond what was historically contemplated or established under their storage contracts and related water rights.
- FF: Whether a contractor’s space for carryover storage fills depends on the priority of the contract right. To the extent that a contract holder has senior storage space, they do not need any carryover. To the extent that a contract holder has a junior storage space, they are allowed to carryover water, but they are not entitled to curtail junior priority groundwater users to guarantee an amount of carryover. (Carlson testimony tr. pg. 2513: ln 14-23).
- FF: Storage water supplies are supplemental water supplies that provide an additional source of supply for the SWC entities. Each of the SWC entities’ reliance on their storage supply is fact specific, however, each of the entities’ storage supplies are supplemental, meaning that they use all of the natural flow supply first and then rely on storage to meet their needs throughout the remaining irrigation season. (Dreher testimony tr. pg. 372: ln 10-18).

Conclusions of Law:

- CL: The Conjunctive Management Rules require consideration of supplies available under prior comparable water conditions in determining material injury and mitigation requirements. (CM Rule 42.01.a, e, g; CM Rule 43.03.b).
- CL: The Idaho Supreme Court has rejected the concept that SWC members (or anyone else) is entitled to keep their reservoirs full at all times just in case of a dry year. (*AFRD#2 v. IDWR*, 143 Idaho 862, 880, 154 P.3d 433, 451 (1997)).
- CL: “Concurrent with the right to use water ‘first in time’ in Idaho, is the obligation to put the water to beneficial use. To permit excessive carryover of stored water without regard to the need for it would be in itself unconstitutional.” (*AFRD#2 v. IDWR*, 143 Idaho 862, 880, 154 P.3d 433, 451 (1997)).
- CL: The Idaho Supreme Court has held in the *AFRD No. 2* case that all decisions concerning carry-over storage under CM Rule 42 requires consideration of (1) whether the water carried over is necessary to fulfill current or future needs; (2) whether the irrigation districts routinely sell or lease the carry-over water for uses unrelated to their original rights; (3) whether the carry-over water will be put to a beneficial use recognized by the laws of Idaho; *and* (4) whether the storage of water will have a detrimental impact upon other water users.
- CL: The leases to the Bureau of Reclamation for flow augmentation purposes are wholly unrelated to the SWC members’ original water rights and constitute an admission that the carryover-water leased to the Bureau of Reclamation is not necessary for the SWC members’ needs. Moreover, flow augmentation is not a recognized beneficial use under Idaho law. *See* I.C. § 42-1763(B)(4). Because the water represented by the carry-over leases are necessary and because flow augmentation is not a recognized beneficial use under Idaho law, any call made by the SWC members for such water must be denied. Any curtailment based upon a consideration of the carry-over water represented by these leases was an abuse of discretion by the Director.
- CL: The possible future needs of water by the SWC members is uncertain and speculative. To require junior groundwater users to acquire and provide an amount of replacement storage water to remedy a shortage that has not be forecast with any certainty would violate Idaho law. Because the alleged future needs of SWC members are uncertain and speculative, it is an abuse of discretion to curtail junior groundwater pumpers based in response to their delivery call for carry-over storage.
- CL: In light of the degree and severity of the economic and sociological impacts upon junior groundwater pumpers and the State of Idaho to curtail junior groundwater pumpers for the purpose of allowing SWC members carry-over storage during this undisputed drought is contrary to Idaho law of optimum use and full economic development of the State’s groundwater resources. Ignoring the detrimental impacts of such a decision upon other groundwater users violates the Idaho legal principle of full economic development and the CM concepts of maximum utilization and optimum use.

2. Zero carryover is reasonable in this case.

Statement of Position: The 1946 Palisades Study, it is clear that the Bureau and its clients, the SWC members, could never have anticipated or expected that the present reservoir system would eliminate water shortages in severe drought years and could never have expected to have any carryover storage left in such years. (Exhibit 7001 (Substantiating Report) at 154). Direct Testimony of Brendecke at 24-25. For additional argument on this subject, please see the preceding section.

Findings of Fact:

- FF: Carryover of storage water can and often is lost and wasted if the reservoir system fills over the following winter and spills in the spring. The risk of storage water being spilled and lost is one that should be borne by the right holder who wishes to speculate – in that case that is the SWC and not junior groundwater users. To shut off a junior groundwater user or require mitigation to provide storage carry-over water would be imposing an obligation in a future year that bears no reasonable relationship to what is needed for the beneficial use of the water right this year: to grow crops in the present irrigation season. This often would result water being wasted and lost from the basin during flood. (Carlson Direct, at 31-32).
- FF: The 1946 Palisades Study, Exhibit 7001, discussed above also predicted that there would be no carryover storage at the end of 1934 and 1935 in the four system reservoirs relied upon by the SWC members. (Exhibit 4100 at 27; Direct Testimony of Brendecke at 26).
- FF: The 1946 Palisades Study anticipated zero carryover in sequences of dry years. (Exhibit 7001 at 154).
- FF: The 1946 Palisades Study shows that the A&B Irrigation District in particular would have had zero carryover storage by the end of the 1935 year. Therefore, A&B Irrigation District could never have anticipated having any natural flow or carryover storage in severe drought periods. Nor could it have anticipated a full water supply from storage in such periods. (Direct Testimony of Brendecke at 25).
- FF: For additional findings of fact pertaining to this subject, please see the preceding section.

Conclusions of Law:

- CL: The facts show that water supplies available to the SWC during 1930's drought would have resulted in shortages and that the SWC would have had zero carryover storage. So,

SWC cannot now demand in the recent and comparable drought that groundwater users provide them with full storage supplies and carryover storage.

CL: It is not reasonable to allow any carryover storage when none was expected or anticipated by the SWC during severe drought conditions. To do so would be to give the SWC an unexpected and unreasonable windfall.

CL: Therefore, under the facts of this case, the Director should have determined that in severe drought conditions the SWC are entitled to carryover storage of zero, in accordance with their historical development of their supplemental storage contract rights.

CL: For additional conclusions of law pertaining to this subject, please see the preceding section.

III. OTHER POLICY CONSIDERATIONS

A. FULL ECONOMIC DEVELOPMENT and OPTIMUM USE

Statement of Position: The Idaho Constitution and state statutes provide that all waters in the state are the “property of the state,” and are dedicated to “public use.” I.C. § 42-101 et seq.; Idaho Const., Art. 15, §§ 1, 3 and 7. The state is charged with the responsibility to control the allocation of water and “in providing for its use shall equally guard all the various interests involved.” I.C. § 42-101. Because the water resources of this state are dedicated to public use, the right of appropriation “is not an unrestricted right, but must be exercised with some regard to the rights of the public.” *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120 (1911). As between appropriators, priority in time gives superiority in right, except that the right of prior appropriation is tempered by such reasonable limitations as are necessary to achieve “optimum development of water resources in the public interest.” *Id.* at §§ 5 and 7; I.C. §§ 42-1734A(1)(b). The Idaho Constitution declares that “[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.” *Id.* Const. Art. 15, § 3. Therefore, “It is the policy of the state of Idaho to promote and encourage the optimum development ... of the water resources of this state.” I.C. § 42-234; *Schodde v. Twin*

Falls Water Co., 224 U.S. 107 (1911); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). The law of optimum development of water resources includes a legislative mandate that “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of undergroundwater resources.” I.C. § 42-226. The policy of full economic development is grounded in the legislature’s constitutional authority to place reasonable limitations on priority of right, and “is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest.” *Baker*, 513 P.2d at 636; Idaho Const., Art. 15, § 7.

Findings of Fact:

- FF: A curtailment of a large number of ESPA junior groundwater right holders beginning spring 2005 would have a near-immediate economic impact this year, and follow-on impacts in future years. To the extent that such a curtailment actually puts farms or other enterprises out of business permanently, the near-term impact also would become a long term impact. (Exhibit 4400 (Affidavit of Church 3/22/05) at 10).
- FF: The economic changes that would be realized by the surface water users are predicted to accumulate over time. It will take months or years (depending on the location) for the shut-off of groundwater pumping to result insubstantially increased surface water availability and spring water flows. Such increases, when they are felt, will begin with relatively small amounts in year one and, provided the wells remain shut off, increase toward a steady-state over a relatively long time period (i.e., thirty years or more).
- FF: The initial benefits to the SWC will be much less than the amount predicted because the prediction does not take into account the time it will take for the SWC to realize benefit from a curtailment. The first few years of either the 1949 and 1961 curtailment scenarios do not bring significant economic gains to the surface water users. The economic benefits in the form of gross sales to all SWC members and spring users are estimated to be only \$0.9 million in the first year of curtailment. (Exhibit 4400 (Affidavit of Church 3/22/05) at 12, 16).
- FF: The total value of output impact on groundwater right holders remains constant at negative (-) \$211 million. Therefore, in the first year of curtailment, the relative net economic impact is estimated to be in excess of negative (-) \$210 million. (Exhibit 4400 (Affidavit of Church 3/22/05) at 12).
- FF: A significant portion of the cumulative loss to the Idaho GSP will occur regardless of whether the curtailment is imposed for one year or multiple years since most groundwater

irrigated farm operations would not be able to remain in business following the first year of full curtailment. (Exhibit 4400 (Affidavit of Church 3/22/05) at 18).

FF: A review of Idaho farmer's responses the U.S Department of Agriculture's 2003 Farm and Ranch Irrigation Survey reveals other motives for the installation of sprinkler equipment. Out of the 5,135 Idaho farms (representing 1.85 million acres of irrigated land) that had implemented irrigation system improvements in the previous 5 years 62.3 percent of them found that it reduced water requirements. But, 57.6 percent found that the improvements improved crop yield - a measure that would improve the surface water users profitability; 34.3 percent found that irrigation system improvements reduced labor costs - another measure that would improve the surface water users profitability; 34.6 percent found that irrigation system improvements reduced energy costs - another measure that improves profitability; and 15.8 percent found that irrigation system improvements reduced fertilizer and pesticide losses another measure that would improve profitability. In other words, the actual facts available on this subject suggests that surface irrigators for many years have been acting in an economically rational way to make their operations more efficient for a variety of familiar reasons related to profitability. None of the responses indicate that these farmers have been responding in any measurable way to alleged concerns about groundwater pumping. (Exhibit 4400 (Affidavit of Church 3/22/05) at 19-20).

FF: A groundwater curtailment program implemented today would not result in a turnaround in the availability of surface or spring waters tomorrow, or next year. However, the turn-off of groundwater irrigation sources will result in a nearly-immediate, and largely permanent net loss of annual economic output in southern Idaho, including a loss of nearly 3,500 jobs, at least a \$160 million near-term decrease in the area's annual personal income, and a loss of between \$4.4 to 7.0 million in annual local property tax revenues. Furthermore, it will impose an economic cost on the rest of Idaho. (Exhibit 4400 (Affidavit of Church 3/22/05) at 20-21).

FF: Curtailment of junior groundwater rights to produce relatively small short-term benefits to senior surface water supplies will unavoidably put groundwater irrigators out of the irrigated farming business. Capital equipment will be idled. Given such a curtailment and the likelihood that it would be continued or repeated, it is unlikely that these idled farms would ever return to production. The most likely result will be that such a curtailment will spell the end of much of the agricultural economy dependent upon ESPA groundwater. (Exhibit 4400 (Affidavit of Church 3/22/05) at 21).

Conclusions of Law:

CL: The Groundwater Act states "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of undergroundwater resources."

CL: Rule 20.03 of CMR's provides as follows: These rules integrate the administration and use of surface and groundwater in a manner consistent with the traditional policy of

reasonable use of both surface and groundwater. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or groundwater source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

CL: A water right “must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.” *Schodde*, 224 U.S. at 120 (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)).

CL: The Idaho Supreme Court recently confirmed that “the reasonableness of use and full economic development” are essential to the lawful administration of Idaho’s water resources. (*American Falls Reservoir District No. 2* at 143 Idaho 862,876, 154 P.3d 433, 447 (2007)).

CL: The law of optimum development provides that “[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or groundwater source to support his appropriation contrary to the public policy of reasonable use....” IDAPA 37.03.11.010.08; *Schodde*, 224 U.S. 118-121. Under Idaho law, a senior appropriator “is not absolutely protected in either his historic water level or his historic means of diversion. Our Groundwater Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.” *Baker*, 95 Idaho at 584. “[W]hen private property rights clash with the public interest regarding our limited groundwater supplies, in some instances at least, the private interests must recognize that the ultimate goal is promotion of the welfare of all our citizens.” *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

CL: The delivery call made by the SWC members unreasonably interferes with optimum and full economic development of the ESPA in contravention with Idaho law. Therefore, their call must be denied.

B. FLOW AUGMENTATION

Statement of Position: To the extent that flow augmentation water is available and flows past Milner Dam, it cannot be used to negatively affect carryover storage of the BOR contract holders unless the contract holders so agree. If flow augmentation water does affect carry over storage, the amount of carry over storage cannot be required to be made up the groundwater users.

Findings of Fact:

FF: Flow augmentation water by the terms of the statute and the Nez Perce Agreement requires that “all flow augmentation from waters of the State of Idaho pursuant to Idaho Code § 42-1763B shall be done in compliance with Idaho state law and regulations. . . . Except as otherwise provided, nothing in this component shall be construed or interpreted as affecting or in any way interfering with the law of the State of Idaho relating to the control, appropriation, use, or distribution of water or any vested rights created there under” (Exhibit 9715 Mediator’s Term Sheet p.19).

FF: The Rental Pool Rules and the “Rainbow Chart” attached thereto favor the use of water for flow augmentation, rather than mitigation use by groundwater users.

Conclusion of Law:

CL: Flow augmentation is not a beneficial use of water under the laws of the state of Idaho, however, the legislature allows such use under I.C. 42-1763B to the extent it does not injure other water rights. Groundwater users’ right to acquire and provide mitigation water cannot be impaired by the rental or use of water for flow augmentation purposes because that would have the direct affect of impacting the groundwater users’ water rights since they would be curtailed, but for the opportunity to provide replacement or mitigation water.

C. POWER PRODUCTION

Statement of Position: TFCC and NSCC (as well as Reclamation) have a financial incentive to curtail groundwater pumpers to provide increased water supplies to run through their respective power plants. TFCC and NSCC each have multiple hydropower plants on their canal systems and jointly operate a power plant at Milner dam. Their early priority natural flow rights cannot be utilized to call out junior groundwater rights to provide an enhanced water supply for their power production water rights which are junior or subordinate to groundwater rights.

Findings of Fact:

FF: Power plants operated by TFCC and NSCC provide a source of revenue to these Companies. For example, TFCC received revenues from Idaho Power Co. of \$500,000 in 2003 and \$570,000 in 2004. (Tr. pg 1725: ln18-23; Exhibit 4607)) Twin Falls Energy Company is a wholly-owned subsidiary of TFCC and hydro plant revenues from Milner Dam power plant are used to offset operating expenses of TFCC and NSCC. (Tr. pg. 1726: ln 22-25; pg. 1722: ln 19 – pg. 1724: ln 10, Exhibit 4607).

- FF: SWC Exhibit 8079 reflects “TFCC Diversion Requirements and Diversions Average Years” and indicates that early and late in the irrigation season TFCC diverts more water than is required to meet their irrigation needs. This indicates that power production is not simply incidental to irrigation requirements. (Tr. pg. 1730: ln 8-18).
- FF: The water rights of TFCC and NSCC which allow power production are junior to most if not all groundwater rights which they seek to curtail. Their early priority natural flow rights for irrigation purposes cannot be utilized to call out junior groundwater rights to provide an enhanced water supply for their power production water rights which are junior to most if not all groundwater rights.
- FF: TFCC and NSCC cannot divert more water under their senior irrigation rights at the beginning or end of the irrigation season beyond irrigation requirements in order to supply source of water for power generation by curtailment of groundwater users that would not otherwise be available under their more junior power production water rights.

D. ZERO FLOW AT MILNER

Statement of Position: The State Water Plan provides of a “zero” flow past Milner Dam. The Idaho Water Resource Board has been recommended under Water Right No. 2-200 a water right for zero flow at Milner Dam in the SRBA. The purpose is to preserve and protect water in the Upper Snake. Accordingly, by law and state water policy, water can only flow past Milner when the Upper Snake Reservoir system is being evacuated for flood control purposes, or when specifically authorized by Statute as in the case of flow augmentation leased by Reclamation. Beginning in the Fall of 2006 and for several months in early 2007 Reclamation evacuated over 500,000 AF of storage from the Upper Snake, even though they were not operating within their own flood control curves. (Exhibit 4211, 4112, 4113, Carlson rebuttal testimony pg. 5 – 8, McGrane testimony, tr. pg. 1412; ln 24 - pg. 1413: ln 12) This prevented the reservoir system from filling, reduced storage water available to the SWC, increased dramatically the quantity and cost of IGWA’s 2007 Replacement Water Plan. It should be determined that Reclamation must comply with the zero flow at Milner and the State of Idaho and the Department must be instructed to strictly enforce the zero flow at Milner in accordance with State law.

Findings of Fact:

- FF: It is the policy of the State of Idaho as set forth in State Water Plans (Exhibits 3041, 3042) and as recommended by IDWR to the SRBA District Court in water right no. 2-200 and General Provisions for Basin 02 to maintain a zero flow at Milner Dam. (Dreher Testimony, Tr. pg. 417: ln 15-23 and pg. 418: ln 4-11). Retaining water in the upper Snake River is to the benefit of both surface and groundwater users.
- FF: It is contrary to the policy of the State of Idaho for Reclamation to evacuate storage when they are outside their flood rule curve because that would result in a waste of the water resource and violates maximum and optimum use of the state's water resources. (Dreher Testimony, Tr. pg. 420: ln 12-24).
- FF: Releases past Milner dam due to mismanagement of the reservoir system, cannot inure to the detriment of the groundwater users.

Conclusions of Law:

- CL: Maintaining zero flow at Milner dam is part of the state administrative law and policy. (Carlson Direct Testimony, pp. 21-22).
- CL: Reclamation is required to follow state water law and policy. (Gregg Testimony Tr. pg. 1194: ln 13-24, Exhibit 7001 p. 85).

IV. IGWA'S 2005 AND 2007 REPLACEMENT WATER PLANS FULLY MITIGATED ANY SWC ENTITY MATERIAL INJURY DETERMINATIONS

A. Groundwater Users are Entitled to Mitigation to Avoid Curtailment and this Includes Providing Replacement Water that Eliminates any Material Injury (CM Rule 43)

Statement of Position:

Notwithstanding IGWA's assertion that the SWC suffered no material injury and that the calculated quantity of mitigation water was excessive, with respect to IGWA's 2005 and 2007 Replacement Water Plans, the Hearing Officer should enter a finding that the Director properly approved the Replacement Water Plans in each year and that each plan was fully performed and satisfied by IGWA, all in compliance with CM Rule 43.

Findings of Fact:

- FF: The Director's May 2005 Order determined that curtailment of all groundwater irrigation in the ESPA junior to February 27, 1979 would over time generate 133,900 AF of increased reach gain in the near Blackfoot to Minidoka reach of the Snake River and that curtailment in Water Districts 120 and 130 would generate 101,000 AF of this increase. The Director ordered holders of these potentially curtailed groundwater rights to provide mitigation in the form of replacement water or face curtailment. The Director ordered that the water replacement plan deliver at a minimum 27,000 AF within the 2005 irrigation season – which the Director believed represented an amount equal to the predicted irrigation season shortfall of the SWC members in 2005. The Director amended these requirements in subsequent orders. (Exhibit 4100 at 28).
- FF: In April 2005, IGWA submitted a Replacement Water Plan which was approved by the Director. This plan provided substantially more water than the 27,000 AF ordered by the Director. (Brendecke Report 12/30/2005 at 28-29).
- FF: The Director however failed to recognize any replacement credit for mitigation activities undertaken in Water District 130 – primarily voluntary curtailments by groundwater users – even though groundwater use in Water District 130 was held in the May 2005 order to have materially injured SWC members. (Exhibit 4100 at 29).
- FF: Department witnesses Mr. Burrell and Mr. Swank each testified that IGWA provided replacement water in full compliance with its 2005 Replacement Water Plan, satisfying all material injury determinations and obligations under the Director's May 2005 Order. (Tr. pg. 716: ln 6-12; Tr. pg. 1042: ln 2-8)
- FF: Because all storage space of SWC entities filled in 2006, there was no shortfall or injury to any SWC entity and no replacement water required by IGWA. (Third Supplemental Order dated June 29, 2006, Tr. pg. 720: ln 15-25)
- FF: The Director's Fifth Supplemental Order of May 23, 2007, predicted in Finding of Fact No. 16 and Conclusion of Law No. 14 material injury to TFCC of 46,929 AF during the 2007 irrigation season. In so doing, Director Tuthill used the same methodologies to determine minimum full supply, material injury and reasonable carryover, as did Director Dreher in his May 2, 2005 Order. (Tr. pg. 707: ln. 19 – pg. 708: ln 15) In response IGWA filed its Amended Joint 2007 Replacement Water Plan (Exhibit 4502) which was approved by the Director's Sixth Supplemental Order dated July 11, 2007 (Tr. pg. 720: ln 4-10)
- FF: IGWA's 2007 Replacement Water Plan guaranteed Twin Falls Canal Company a minimum full supply of 1,075,900 AF of water for that year as required by the Director's order. In so doing, IGWA renewed its objection to the 1,075,900 AF amount based upon three-fourth's inch per share headgate delivery, rather than five-eighths inch per share headgate delivery. (Exhibit 4205A) The 2007 Plan also provided "in determining the 2007 water supply available to TFCC and any actual shortage to be made up by the Groundwater Districts, the Water Master shall apply appropriate accounting procedures . . . including but not limited to the following:

(2) If TFCC does not divert 1,075,900 AF, no mitigation requirement shall exist if TFCC has carryover storage remaining when the final 2007 Water District 01 water accounting is complete. . . .

(10) In no event will any actual shortage to be made up by the Groundwater Districts as determined by the Water Master exceed the actual 2007 shortfall to TFCC as determined by the Director of the Department.

- FF: The Director determined in Finding of Fact 12 of the Seventh Order that TFCC actually diverted 1,045,506 AF of water which constituted a “full irrigation supply for the crop water requirement.” Since TFCC actually used 1,045,506 AF of water diverted in 2007, which the Director determined constituted a fully irrigation supply for the crop water requirement, TFCC suffered no material injury and IGWA should have no obligation to supply any mitigation water pursuant to its 2007 Replacement Water Plan, paragraphs (2) and (10) cited above. (Exhibits 4502A, 4600, 4602)
- FF: On December 20, 2007, the Director entered a Seventh Supplemental Order Amending Replacement Water Requirements, Exhibit 4600, indicating that TFCC diverted a full supply of 1,045,506 AF and had a year-end carryover storage balance of 22,655 AF. (Exhibit 4600, Tr. pg. 728: ln 6-12 and pg. 729: ln 6-21)
- FF: The Seventh Supplemental Order, Exhibit 4600, reflected in Conclusion of Law 5 that IGWA had leased a total of 65,145.8 AF from private leases (Tr. pg. 1030-1031) and in Conclusion of Law 6 updated the preliminary calculation of material injury to TFCC to 17,345 AF, subject to the final accounting. This was the first time IGWA knew that additional water was required under its 2007 Replacement Water Plan. (Tr. pg. 1034: ln 1-23)
- FF: The Seventh Supplemental Order also reflected that all SWC entities had a carryover storage balance at the end of the year despite the fact that the reservoir system did not fill and the year was extremely hot and dry. (Exhibit 4600, FF 10, Tr. pg. 716: ln 6-16)
- FF: Because all SWC entities had storage carryover balances at the end of the year 2007, each was able to divert whatever quantity of water was desired without restriction during the 2007 irrigation season. (Tr. pg. 716: ln 6-23)
- FF: At all times during all years 2005 through 2007, all SWC entities had positive balances in their storage water accounts. The Water Masters for the SWC entities determine the amount of water they divert into their headgates and were able to divert whatever they desire and need so long as they have a positive storage balance according to the testimony of Department employees, Mr. Burrell and Mr. Swank, who is also the Water District 01 Water Master and Rental Pool Manager. (Tr. pg. 992:ln 12-18, Tr. pg. 713: ln 2-24)

- FF: In an effort to comply in good faith with the Director's Seventh Supplemental Order of December 20, 2007, IGWA leased an additional 14,345 AF and assigned and transferred to the Director all leased water, authorizing the Director to assign storage water to the account of TFCC in the amount of 17,345 AF to fully compensate for the predicted material injury to have occurred in 2007 as set forth in the Director's Seventh Supplemental Order. This fully mitigated any injury to TFCC. (Exhibit 4603, Tr. pg. 1042: ln. 2-8, Tr. pg. 733: ln 15 - pg. 734, ln 1)
- FF: Adding to TFCC's 2007 carryover balance of 22,655 AF, the additional water assigned by IGWA in the amount of 17,345 AF per the Director's Seventh Supplemental Order and Exhibit 4603, resulted in a carryover storage balance in TFCC's account of 40,000 AF. This amount exceeds the minimum reasonable carryover amount of 38,400 AF established for TFCC in the May 2, 2005 Order. (Exhibit 3009, FF 119; Tr. pg. 739: ln 15-23)

Conclusions of Law:

- CL: If material injury is found, a junior-priority groundwater user is entitled to provide a replacement water to offset that injury and avoid curtailment. (CM Rule 43)
- CL: Because the Director determined that the 1,045,506 AF of water diverted and actually used by TFCC in 2007 constituted a full irrigation supply for crop water requirements, TFCC suffered no material injury and IGWA should have had no obligation to supply any mitigation water to TFCC pursuant to IGWA's 2007 Replacement Water Plan, paragraphs (2) and (10) cited above. Accordingly, the Director's 2007 predicted material injury of 17,345 AF set forth in FF 12 and CL 2 of the Seventh Order is clearly erroneous.
- CL: If IGWA's Mitigation Plan requirement is not zero as determined in the foregoing FF; then, alternatively, IGWA's mitigation obligation for 2007 to TFCC is at most 7,739 AF, calculated as follows in acre feet:

TFCC Minimum Full Supply -	1,075,900
TFCC actual use	(1,045,506)
Less 2007 carryover storage	<u>(22,655)</u>
2007 Predicted Material Injury:	7,739

- CL: Because the reservoir system filled and spilled in 2006, the Director properly determined that there was no material injury to any SWC entity and no replacement water is required by IGWA.
- CL: IGWA's 2005 and 2007 Replacement Water Plans were properly approved, fully performed and mitigated any and all material injury to SWC entities. (CM Rule 43)

B. Timing of Replacement Water

Statement of Position: While IGWA disputes that any carryover storage should be required and asserts that the reasonable carryover amount is “zero”, to the extent the Director determines a carryover amount, IGWA agrees with and supports the “credit end debit” accounting mechanism as described in the Seventh Supplemental Order. Since the “predicted material injury” determination is made prior to the irrigation season based upon predicted supply and predicted demand which may thereafter vary substantially based on temperature, precipitation and other factors; and, since the exact amount of material injury and mitigation obligation cannot be accurately determined until the final Water District 01 accounting completed in February or March of the following year, it is reasonable and prudent that any shortfalls in reasonable carryover storage to SWC entities for which Groundwater Users are responsible should not be required until after the April 1 Joint Operating Forecast has been issued. This is because there would be no shortfall and therefore no carryover storage obligation if in fact the reservoir systems filled. Furthermore, the delay poses no risks to SWC entities since any shortfall to be supplied would be available for SWC use during the following irrigation season in any event.

Requiring the Groundwater Users to supply carryover storage prior to the April 1 forecast serves no purpose and would only result in waste and loss if the reservoir system filled and spilled. This might be different in a year that SWC entities actually run out of storage water during the irrigation season. However, this is highly unlikely and has never occurred since 2000, the worst drought period of record.

Findings of Fact:

FF: In Water District 01 the final accounting completed early in the year following an irrigation season can provide results that are substantially different than predictions made prior to the irrigation season due to variations in precipitation, temperature and gauge measurements. (Tr. pg. 710: ln 15-19)

FF: The Seventh Supplemental Order describes a “credit and debit” accounting mechanism as follows:

Finding 16: IGWA should not be required to provide any shortfalls in reasonable carryover storage to members of the Coalition until after the Joint Operating Forecast has been issued, which the Director will then use to predict shortfalls in reasonable carryover storage. IGWA should be required to provide reasonable carryover storage water to members of the Coalition when it is needed.

Conclusion of Law 7: IGWA will not be required to provide reasonable carryover water to members of the Coalition until the USBR and USACE Joint Operating Forecast is issued and at such time as it is needed by members of the Coalition.

Order, paragraph 3: It is further ordered that the Director will make a final determination of the amounts of mitigation water and actually provided after the final accounting for surface water diversions from the Snake River for 2007 is complete. To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2008 and be added to any new mitigation determination to be required for 2008. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2008 and be subtracted from any new mitigation determined to be required in 2008.

Order, paragraph 5: After the Joint Operating Forecast is issued, IGWA shall be required to provide water for reasonable carryover to members of the Coalition at such time as it is needed. Mitigation debits and credits resulting from a year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Coalition under contract with the United States Bureau of Reclamation fills. At that time any remaining debits and credits will cancel.

FF: According to witness Burrell, the debit and credit accounting system set forth in the Seventh Supplemental Order as described in the foregoing Finding of Fact reduces risks to Groundwater Users providing mitigation while not adversely affecting the SWC. (Tr. pg. 741: ln 20 – pg. 743: ln 24)

FF: As described by Water District 01 Manager Swank, excess water in storage will be lost and wasted if the storage system fills and spills. (Tr. pg. 1041: ln 15-21)

Conclusions of Law:

CL: The timing of replacement water, together with the debit and credit system as outlined in the Director’s Seventh Supplemental Order dated December 20, 2007, is reasonable, lawful and approved.

C. WD01 Accounting

Statement of Position: All final determinations of material injury and mitigation obligations should be determined based upon the Water District 01 final accounting. The Water District 01 final accounting has been long recognized by the Department and Surface Water Users as being reliable and accurate.

Findings of Fact:

- FF: Predicted water supply and demand prior to and during the irrigation season can vary substantially from final results due to temperature, precipitation and other variable factors. (Tr. pg. 710: ln 15-19)
- FF: The Water District 01 final accounting which occurs in February or March of the year following an irrigation season is the most accurate and reliable means for determining actual material injury and any mitigation obligation.
- FF: According to Department witnesses Burrell and Water Master Swank, all SWC entities had positive balances in their storage water accounts at all times in years 2005 through 2007. (tr. pg. 992: ln 12-18; tr. pg. 712: ln 5-14)
- FF: SWC entities do not have their water deliveries restricted and are entitled to divert whatever they need so long as they have positive storage account balances. (Burnell testimony tr. pg. 713: ln 2-4; Swank testimony tr. pg. 977: ln 14 – pg. 978: ln 5)
- FF: Should a SWC entity run out of storage water in their account, the excess use is simply debited to their account and they are required to lease the shortfall from other storage space holders. (Swank testimony tr. pg. 979: ln 1-8)
- FF: The amount of carryover storage at the end of the year is a business decision of the SWC entity. (Swank testimony tr. pg. 981: ln 5-12)
- FF: Exhibit 4602 consists of Figure 3 from the Water District 01 final accounting for various years reflecting how natural flow and storage water is used under varying water supply conditions as described by Water Master Swank. (Tr. pg. 983 – 986)

Conclusions of Law:

- CL: Water District 01 final accounting is accurate and reliable and should be utilized for the purpose of making final determinations of material injury and mitigation requirements.

V. OTHER ISSUES TO BE DECIDED

A. The Idaho Groundwater Act

Statement of Position: The declared policy of the Groundwater Act is to achieve full economic development of the State's underground water resources. The Supreme Court has determined that the policy of the Groundwater Act is consistent with the policy enunciated in Article 15, § 7 of the Idaho Constitution of "promoting the optimum development of water resources in the public interest." To eliminate the use of groundwater on over 75,000 acres is contrary to these statutory and constitutional requirements.

B. Local Groundwater Board (IC 42-237b)

Statement of Position: To ensure that the policies of full economic and optimum development of the water resources "in the public interest" would be achieved, the Legislature adopted a very specific remedy for senior water users who claimed that junior priority groundwater users were adversely affecting their water right. That remedy mandates that the Director of IDWR convene and participate in a local groundwater board made up of local people. Only the groundwater board, after a hearing, has the authority to determine whether or not junior groundwater users shall be curtailed to supply senior water rights. I.C. 42-237a-e.

Findings of Fact:

FF: Idaho Code § 42-607, entitled "Distribution of Water," states:

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply....

FF: Idaho Code § 42-237a, entitled "Powers of the Director of the Department of Water Resources," states:

The administration of water rights within water districts created or enlarged pursuant to this Act shall be carried out in accordance with the provisions of Title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of

groundwater rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular groundwater right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with groundwater, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

FF: Idaho Code § 42-237b, entitled “Administrative Determination of Adverse Claims,” states:

Whenever any person owning or claiming the right to the use of any surface or groundwater right believes that the use of such right is being adversely affected by one or more user[s] of groundwater rights of later priority ... such person ... may make a written statement under oath of such claim to the Director of the Department of Water Resources.

...Upon receipt of such statement, if the Director of the Department deems the statement sufficient and meets the above requirements, the Director of the Department of Resources shall issue a notice setting the matter for hearing before a local groundwater board ...

FF: Idaho Code § 42-237c, entitled “Hearing and Order,” states:

Upon such hearing the board shall have authority to determine the existence and nature of the respective water rights claimed by the parties and whether the use of the junior right affects, contrary to the declared policy of this act, the use of the senior right. If the board finds that the use of any junior right or rights so affect the use of senior rights, it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine. Any person violating such an order made hereunder shall be guilty of a misdemeanor.

FF: Idaho Code § 42-237d, entitled “Local Groundwater Boards,” states,

Whenever a written statement of claim as provided in Section 42-237 is filed with the Director then said Director of the Department of Water Resources shall forthwith proceed to form a local groundwater board for the purpose of hearing such claim. The said local groundwater board shall consist of the director of the department of water resources, and a person who is a qualified engineer or geologist, appointed by the district judge of the judicial district which includes the county in which the well of respondent, or one of the respondents if there be more than one, is located, and a third member to be appointed by the other two, who shall be a resident irrigation farmer of the county in which the well of respondent, or one of the respondents if there be more than one, is located. (Underline and emphasis added).

FF: The Director of the IDWR (“Director”) responded to the SWC delivery call by ordering the curtailment of junior-priority groundwater rights via its order dated May 2, 2005.

FF: IDWR did not convene a local groundwater board prior or subsequent to issuing the Curtailment Orders.

Conclusions of Law:

CL: Idaho Code § 42-602, entitled “Director of the department of water resources to supervise water distribution within water districts,” states,

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

CL: The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

CL: The SWC and the junior-priority groundwater users against whom the SWC was made are all within a designated water district.

CL: Idaho Code § 42-602 empowers the Director to “have direction and control of distribution of water from all natural water sources within a water district” and further states that “the provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.” By using the term “all natural water sources,” it would appear on the face of this statute that it is the Director who possesses the authority and obligation to direct and control all surface and groundwater sources within a water district.

CL: Idaho Code §§ 42-237a, 42-237b, 42-237c and 42-237d (“Idaho Code §§ 42-237a-d”) unambiguously mandate that the Director “shall” convene a local groundwater board for the purpose of hearing a claim for curtailment against junior-priority groundwater rights and that the local groundwater board is the entity authorized to determine whether the junior-priority groundwater users should be curtailed and in what amount.

CL: Idaho Code § 42-602 and Idaho Code §§ 42-237a-d both would appear to apply within water districts. Idaho Code § 42-602 expressly states that it applies within water districts. Idaho Code §§ 42-237a-d apply to “any surface or groundwater right” and therefore apply to all such rights wherever located within the State, including without limitation water districts.

CL: As a result, Idaho Code § 42-602 and Idaho Code §§ 42-237a-d appear to be in conflict and do not appear to be reconcilable on their face. Idaho Code § 42-602 appears to give the Director the authority to respond to a delivery call against junior-priority groundwater users and Idaho Code §§ 42-237a-d appear to give that same authority to a local groundwater board convened by the Director.

CL: The Idaho Court of Appeals recently reiterated Idaho Supreme Court precedent concerning the following legal principles with regard to conflicting statutes:

The principle that when statutes are in conflict and cannot be reconciled, a more recent or more specific statute controls over an earlier or more general statute was applied in *Paterson*, 128 Idaho 494, 915 P.2d 724, where an award of punitive damages had been made against the state of Idaho for violation of the Idaho Human Rights Act (IHRA), I.C. § 67-5901, et seq. The state appealed, arguing that it could not be liable for punitive damages because such damages were barred under the Tort Claims Act, I.C. § 6-918. The court noted that “[a] basic tenet of statutory construction is that when two statutes conflict, the more specific statute controls over the more general,” and held that in the absence of language in the IHRA limiting the state’s liability, “the more specific imposition of liability under IHRA controls over the more general immunity grant contained in I.C. § 6-918.” *Id.* at 502, 915 P.2d at 732. Similarly, in *Johnson*, 138 Idaho at 335, 63 P.3d at 461, the Supreme Court held that a lawsuit contesting a school district levy election was governed by I.C. § 34-2001A--a statute governing bond election and mill levy contests--rather than I.C. § 33-408--which applies to contests of “an election concerning any proposition” submitted to school district voters--because the former statute was the more recent and the more specifically applicable. See also *Mickelsen*, 101 Idaho at 307, 612 P.2d at 544; *H-K Contractors, Inc. v. City of Firth*, 101 Idaho 224, 611 P.2d 1009 (1979). We therefore hold that the FERPA, as the more recent enactment and the one specifically addressing vindication of the fundamental right of religious exercise, governs this action and precludes application of I.C. § 6-610 to prevent an indigent inmate from pursuing a FERPA action. *Hyde v. Fisher*, 143 Idaho 782, 786-787 (Ct. App. 2007).

CL: Idaho Code § 42-602 is a very general statute which on its face governs all water delivery calls.

CL: Idaho Code §§ 42-237a-d are considerably more specific in that they are limited to only those water delivery calls which are made against junior-priority groundwater users.

CL: The first paragraph of Idaho Code § 42-602 was initially enacted in 1915 and the second paragraph thereof was initially enacted in 1903.

CL: Idaho Code §§ 42-237a-d were enacted in 1951.

CL: Based upon the Idaho Supreme Court precedent discussed above, Idaho Code §§ 42-237a-d must control under the facts of this case because they were more recently enacted and because they more specifically address delivery calls made against junior-priority groundwater users.

CL: There is no legal precedent for the proposition that conflicting statutes may simply be treated as alternative choices within the discretion of the Director, particularly when no statute or law grants the Director such discretion.

- CL: Idaho Code §§ 42-237a-d mandate that a local groundwater board be convened by the Director to determine whether the use of a junior-priority groundwater right adversely affects a senior-priority water right such that the junior right must be curtailed in order to increase the supply of water available to the senior right.
- CL: The Director's failure to convene a local groundwater board was a violation of Idaho Code §§ 42-237a-d.
- CL: Until such time as the local groundwater board makes a determination of adverse impact as set forth in Idaho Code §§ 42-237a-d and further defined in the CM Rules and Idaho law, neither the Director nor this hearing officer has the authority to issue a curtailment order in this case.
- CL: The Director's order dated May 2, 2005 and all subsequent amendments thereto in this case are hereby vacated and the Director is instructed to convene a local groundwater board as mandated by Idaho Code §§ 42-237a-d.

VI. CONCLUSION

The importance of this case cannot be overstated. At stake is the future of irrigation and the agricultural economy in Southern Idaho established over the last 60 years as in reliance upon lawfully issued ground water rights issued and utilized based upon State's policy set forth in the Idaho Constitution and the Ground Water Act which provided for and promoted optimum use and full economic development of Idaho's ground water resources. This case derives from an inherent conflict between the prior appropriation doctrine and the doctrines of optimum beneficial use and full economic development each of which are fundamental elements of Idaho water law that have been developed and applied over the past 100 years. The CM Rules were enacted in an effort to integrate these well-established yet competing policies after surface water and ground water sources were deemed interconnected. The painful result of integrating these competing policies has been exacerbated by the worst drought period of record, coupled with many years of progressive irrigation efficiencies which reduced incidental recharge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of February, 2008, the above and foregoing document was served in the following manner:

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_____/s/_____
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