BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	)	Docket No. CM-DC-2010-001 **FINAL ORDER ESTABLISHING 2016 REASONABLE CARRYOVER** ***(METHODOLOGY STEP 9)***

FINDINGS OF FACT

1. On April 19, 2016, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued his *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). The Methodology Order established nine steps for determining material injury to members of the Surface Water Coalition ("SWC"). This order applies step nine, the final step of the Methodology Order for the 2016 water year.

2. The Methodology Order describes step 9 as follows:

> Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual CWN for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future BLY, and for the refinement and continuing improvement of the method for future use.
>
> On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on, but not limited to, the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover shortfall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

Methodology Order at 38-39.

3. Mitigation plans filed by the Idaho Ground Water Appropriators, Inc. ("IGWA"); A&B Irrigation District ("A&B"); Southwest Irrigation District and Goose Creek Irrigation District (collectively, "SWID"); and the City of Pocatello, City of Idaho Falls, and Coalition of Cities[1] (collectively, "Cities") are currently approved for the SWC delivery call to mitigate for material injury to in-season demand and reasonable carryover. *Final Order Approving Mitigation Credits Regarding SWC Delivery Call,* CM-MP-2009-006 (July 19, 2010); *Order Approving Mitigation Plan,* CM-MP-2009-007 (June 3, 2010)[2]; *Final Order Approving Mitigation Plan*, CM-MP-2015-003 (Dec. 16, 2015); *Final Order Approving Mitigation Plan for 2016*, CM-MP-2010-001 (Mar. 29, 2016)[3]; *Final Order Approving Mitigation Plan for 2016*, CM-2016-002 (Apr. 27, 2016)[4]; *Final Order Approving Stipulated Mitigation Plan*, CM-MP-2016-001 (May 2, 2016).

4. The following table summarizes the 2016 irrigation season diversions and crop water need volumes for each SWC entity. All values are reported in acre-feet ("AF").These values are used to determine entity-specific season ending reasonable in-season demand ("RISD") values.

Entity	Demand[5]	Crop Water Need
A&B	60,409	38,410
AFRD2	438,945	139,802
BID	240,338	109,110
Milner	56,549	28,483
Minidoka	360,143	194,727
NSCC	983,725	333,038
TFCC	1,045,566	415,928

[1] The cities participating as the Coalition of Cities in this mitigation plan are Bliss, Carey, Delco, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell. In addition to the Cities, the following cities are participating in Cities' mitigation plan at the approval of the Cities: Aberdeen, Ammon, Blackfoot, Chubbuck, Iona, Rigby, Ririe, Roberts, and Sugar City. *See Third Notice of Cities' Participation*, CM-2016-002 (Oct. 7, 2016).

[2] These final orders were affirmed on judicial review. *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV 2010-3822 (Fifth Jud. Dist. April 22, 2011) (affirming the Director's *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*); *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV 2010-3075 (Fifth Jud. Dist. Jan. 25, 2011) (affirming the Director's *Order Approving Mitigation Plan*).

[3] The *Final Order Approving Mitigation Plan for 2016* for SWID ordered the mitigation plan is only effective through December 31, 2016.

[4] The *Final Order Approving Mitigation Plan for 2016* for the Cities ordered the mitigation plan is only effective through December 31, 2016.

[5] The "Demand" for each SWC entity is equal to each entity's 2016 April – October diversions.

5. The following table summarizes the final calculated 2016 in-season demand shortfall values in AF, if any, for each member of the SWC. The values in this table are different from those in the *Final Order Regarding April 2016 Forecast Supply (Methodology Steps 1-3)* (Apr. 19, 2016) ("April Forecast Supply Order") and *Order Revising April 2016 Forecast Supply and Amending Curtailment Order (Methodology Step 6)* (July 22, 2016) ("July Order"). The differences are due to changes in total supply and RISD that reflect diversion and ET data not available at the time the previous orders were issued. In the April Forecast Supply Order, the Director predicted a material injury of 44,200 AF to the members of the SWC. *April Forecast Supply Order* at 4. In the July Order, the Director predicted a material injury of 21,300 AF. *July Order* at 8. For the 2016 irrigation year, in-season storage adjustments included application of the Minidoka Credit.[6] The natural flow adjustments include natural flow delivered for recharge[7] and natural flow delivered to SWID. *See* "Attachment A" attached hereto for further information. Water supplied to SWC members for mitigation is not included in the adjustments. Completed application of the methodology determines a final net in-season demand shortfall volume of 6,700 AF to TFCC for the 2016 irrigation season.[8] No other members of the SWC have an in-season demand shortfall.

Entity	Natural Flow Diverted through 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	In-Season Storage Adjustment	Total Supply	RISD	Demand Shortfall
A&B	8,014	-	134,288	-	142,303	61,376	-
AFRD2	104,611	(1,408)	384,006	1,000	488,209	378,361	-
BID	105,147	(3,624)	220,994	5,130	327,648	256,870	-
Milner	15,861	(2,199)	87,282	-	100,944	46,996	-
Minidoka	151,872	-	324,780	8,370	485,022	438,195	-
NSCC	422,467	(1,530)	839,044	(7,750)	1,252,231	901,687	-
TFCC	798,786	(711)	239,966	(6,750)	1,031,291	1,038,033	6,700

[6] The Minidoka Credit is a long existing exchange of stored water among AFRD2, BID, MID, NSCC, and TFCC that has been incorporated into an agreement of those entities and accepted by the SRBA district court.

[7] Natural flow recharge values represent accomplished recharge through the Idaho Water Resource Board's recharge water rights as of October 31, 2016.

[8] The 6,700 AF in-season demand shortfall has been mitigated by junior ground water users through implementation of approved mitigation plans cited in Finding of Fact 3, or by curtailment of all water use authorized by junior-priority water rights during the 2016 irrigation season not protected by an approved mitigation plan. No additional mitigation is required to address in-season demand shortfall for the 2016 irrigation season.

6. The following table summarizes the end of season reasonable carryover shortfall calculation for 2016. All values are reported in AF. The second column of the summary table contains the carryover volumes reported from the October 31, 2016, Water District 01 season's end water rights accounting report.[9] The third column summarizes the water supplied to each SWC member for mitigation. Adjusting the October 31, 2016, carryover volumes by deducting storage water delivered to SWC members for mitigation ensures that junior ground water users not participating in approved mitigation plans do not benefit from implementation of those mitigation plans. The fourth column summarizes adjustments for storage water leased by a SWC member to the rental pool via a private lease. The adjustments for storage water leased by a SWC member ensure that the leases, which are voluntary reductions in storage supplies, do not increase the reasonable carryover shortfall obligation of junior ground water users. The fifth column contains the actual carryover volumes as defined by the Methodology Order (*Methodology Order* at 38) and is calculated by summing columns two, three, and four. The sixth column contains the reasonable carryover volumes established in the Methodology Order. (*Methodology Order* at 28). The reasonable carryover shortfall in the last column is the difference between reasonable carryover and the actual carryover volume for each member of the SWC at the end of the irrigation season. Completed application of the Methodology determines a final net shortfall to TFCC's reasonable carryover of 39,500 AF. No other members of the SWC have a reasonable carryover shortfall.

Entity	Oct. 31, 2016, Carryover	Adjustments for Mitigation[10]	Adjustments for Storage Water Lease	Actual Carryover	Reasonable Carryover	Reasonable Carryover Shortfall
A&B	89,982	(8,088)	0	81,894	18,500	0
AFRD2	50,817	(833)	0	49,984	11,500	0
BID	88,086	0	0	88,086	0	0
Milner	46,593	0	0	46,593	4,800	0
Minidoka	102,526	0	25,200	127,726	0	0
NSCC	281,171	(12,666)	0	268,505	65,500	0
TFCC	23,401	(37,678)	0	-14,277	25,200	39,500

[9] The season's end water right accounting report for the 2016 irrigation season was published to the Water District 01 webpage on November 1, 2016: http://www.waterdistrict1.com/SNKWRA.htm

The carryover volumes can be found in the report's summary Diversion table under the "AF RMNG" column. The "AF RMNG" for Minidoka and BID were summed and then prorated 59.1% to Minidoka and 40.9% to BID. Because final accounting for 2016 is not yet complete for Water District 01, the proportions were estimated using an average of the previous five years.

[10] Additional mitigation water may have been provided by North Snake Ground Water District and Magic Valley Ground Water District to AFRD2, BID, and NSCC; however it is unclear if the water was used for mitigation or other purposes. The leases list other purposes and do not quantify the proportion of the leased water delivered solely for mitigation.

7. The above determinations are based on water diversion and storage data from Water District 01. Although these preliminary numbers are subject to revision by Water District 01 during final accounting for 2016, revisions will not become available until after issuance of this order. For this reason, these estimates establish the final obligation of junior ground water users in supplying water to the SWC for reasonable carryover shortfall. The above determination of reasonable carryover shortfall is carried forward from the Methodology Order and takes into account the best available water diversion and storage data, comparative water years, and RISD. *Methodology Order* at 38-39.

8. Details of adjustments to quantities in the above tables are set forth in "Attachment A" attached to this order.

CONCLUSIONS OF LAW

1. The Methodology Order states that, on or before November 30, the Director will estimate the SWC's reasonable carryover shortfall, if any, for 2016. *Methodology Order* at 38-39 (Step 9). If a reasonable carryover shortfall is established, junior-priority ground water users shall have fourteen days to demonstrate, to the satisfaction of the Director, "their ability to provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC." *Id.* at 39.

2. The evidentiary standard to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012).

3. "Clear and convincing evidence refers to a degree of proof greater than a mere preponderance." *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). "Clear and convincing evidence is generally understood to be '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); *see also Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

4. Consistent with Finding of Fact 6, the Director concludes by clear and convincing evidence that there is a 39,500 AF volume of material injury to TFCC's reasonable carryover. No other members of the SWC have a reasonable carryover shortfall.

5. Because not all junior ground water users are participants in an approved mitigation plan, the Director must determine a priority date for curtailment that will result in an accumulation of water at steady state, to the reaches of the Snake River from which the SWC members divert, in amount equal to the established reasonable carryover shortfall. Using the Enhanced Snake Plain Aquifer Model ("ESPAM") 2.1, the Director determines the curtailment date to produce a steady state volume of at least 39,500 AF in the near Blackfoot to Minidoka reach is junior or equal to June 20, 1989.[11]

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[11] The Director must utilize the best available technology for determining the impact of junior ground water diversions. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 816, 252 P.3d 71, 97 (2011). ESPAM 1.1

6. According to the Methodology Order, fourteen days following issuance of this order, which establishes the reasonable carryover shortfall obligation, junior ground water users must "establish, to the satisfaction of the Director, their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC." *Methodology Order* at 39. Otherwise, "the Director will issue an order curtailing junior ground water rights." *Id.*

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that, junior ground water users holding consumptive ground water rights within the Eastern Snake Plain Aquifer area of common ground water supply bearing priority dates junior to June 20, 1989, must mitigate for their proportionate share of the reasonable carryover shortfall of 39,500 AF in accordance with an approved mitigation plan. [12] If, within fourteen days following issuance of this order, junior ground water users fail to establish, to the satisfaction of the Director, their ability to mitigate for their proportionate share of the reasonable carryover shortfall of 39,500 AF in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water use.

IT IS FURTHER ORDERED that this final order concludes the application of the Methodology Order to the climatic, hydrologic, and agronomic facts of the 2016 irrigation season.

Dated this 29th day of November 2016.

Gary Spackman

GARY SPACKMAN
Director

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was the model version utilized in SWC delivery call proceedings. ESPAM 2.1 is the latest version of the ESPAM model and superseded ESPAM 1.1. The Director has determined that ESPAM 2.1 is the best available scientific tool for predicting the effects of ground water pumping. *See In re Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.) IDWR Docket CM-DC-2011-004*, No. 42775, 2016 WL 1130276, at *4 (Idaho Mar. 23, 2016). Because no trim line has been determined utilizing ESPAM 2.1 in the SWC delivery call matter, in an exercise of discretion, the Director did not apply a trim line in determining the June 20, 1989, priority date. Files from the model simulations will be posted to the website for this matter at https://idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/.

[12] As noted in Finding of Fact 3, mitigation plans filed by IGWA, A&B, SWID, and the Cities are currently approved for the SWC delivery call to mitigate for material injury to reasonable carryover. Participants in the mitigation plans approved for IGWA, SWID, and the Cities do not need to establish their ability to mitigate for their proportionate share of the reasonable carryover shortfall. However, due to the nature of A&B's mitigation plan, A&B must establish to the satisfaction of the Director its ability to mitigate for its proportionate share of the reasonable carryover shortfall, which is 2,122 AF. *See Order Designating April 2016 Forecast Supply Order Final as Modified*, CM-DC-2010-001 (Sept. 2, 2016).

Attachment A
2016 SWC Adjustments

Entitiy	Volume (AF)	Description	Natural Flow Adjustment	In-Season Storage Adjustment	Adjustments of Mitgation	Adjustments for Storage Water Lease
A&B	7000	IGWA			Yes	
	1088	Water Mitigation Coalition			Yes	
		Total A&B	**0**	**0**	**(8,088)**	**0**
AFRD2	6500	NSGWD				
	5,000.0	MVGWD				
	1,000.0	Minidoka Credit		Yes		
	753.5	LLWU				
	400.0	Robert Meyers				
	833.0	Water Mitigation Coalition (Minidoka)			Yes	
	(1408.0)	Recharge (10/28to10/31)	Yes			
		Total AFRD	**(1,408)**	**1,000**	**(833)**	**0**
BID	8,000.0	SWID (Falls Irrigation)				
	400.0	Magic Valley GWD				
	637.5	Water Mitigation Coalition				
	5,130.0	Minidoka Credit		Yes		
	-3,624.0	SWID Natural Flow	Yes			
		Total BID	**(3,624)**	**5,130**	**0**	**0**
Milner	170.0	Water Mitigation Coalition				
	7500.0	SWID				
	1145.7	Artesian				
	(2199.0)	SWID Natural Flow	Yes			
		Total Milner	**(2,199)**	**0**	**0**	**0**
MID	(10000.0)	NSGWD				Yes
	(200.0)	Wickel Farms				Yes
	200.0	Wickel Farms				
	(10000.0)	Water Mitigation Coalition				Yes
	(5000.0)	SWID (SWID Pumps)				Yes
	8370.0	Minidoka Credit		Yes		
		Total MID	**0**	**8,370**	**0**	**(25,200)**
NSCC	18500.0	NSGWD				
	100.0	Arther Henry Farms				
	(7750.0)	Minidoka Credit		Yes		
	2065.5	Water Mitigation Coalition (Minidoka)			Yes	
	1500.0	Water Mitigation Coalition (Minidoka)				
	10600.0	IGWA			Yes	
	(1530.0)	Recharge (10/27 to 10/31)	yes			
		Total NSCC	**(1,530)**	**(7,750)**	**(12,666)**	**0**
TFCC	2677.5	Water Mitigation Coalition (Minidoka)			Yes	
	1325.0	PWUI			Yes	
	32400.0	IGWA (Fort Hall Michaud)			Yes	
	5000.0	SWID				
	70.0	City of Iona			Yes	
	21.0	City of Sugar City			Yes	
	148.0	City of Rigby			Yes	
	196.0	City of Ammon			Yes	
	275.0	City of Chubbuck			Yes	
	22.0	City of Ririe			Yes	
	543.0	City of Pocatello			Yes	
	1629.5	Artesian			No	
	(6750.0)	Minidoka Credit		Yes		
	(711.1)	Recharge (10/26 - 10/31)	Yes			
		Total TFCC	**(711)**	**(6,750)**	**(37,678)**	**0**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of November 2016, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Deborah J. Gibson

Deborah Gibson
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.