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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	**SURFACE WATER COALITION'S PETITION FOR RECONSIDERATION AND CLARIFICATION OF APRIL 7, 2010 *FINAL ORDER***

COME NOW, 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 Company (collectively hereafter referred to as the "Surface Water

Coalition", "Coalition", or "SWC"), by and through counsel of record, and hereby submit their *Petition for Reconsideration and Clarification* of the Interim Director's April 7, 2010 *Final Order* pursuant to Idaho's Administrative Procedures Act, I.C. § 67-5201 *et seq.*, and the Department's Rules of Procedure (IDAPA 37.01.01. *et seq.*).

INITIAL ISSUES

As discussed at the April 15, 2010 status conference on IGWA's *Mitigation Plan*, reviewing and comprehensively understanding the Director's April 7, 2010 *Final Order* has been difficult, if not impossible, due to the fact that the data and spreadsheets utilized by the Department have not been disclosed. This is particularly true for the new methods and equations utilized in the *Final Order*. Although the *Order* sets out various calculations and general references to information in the administrative record, it does not include the actual spreadsheets that were used to generate the stated conclusions and results. Consequently, the Coalition requested copies of that information and, without it, has been unable to complete a petition for reconsideration given this lack of understanding. Recently, counsel for IDWR informed counsel for the SWC that the Department would make the requested information available on Wednesday April 21, 2010, the due date for this petition. Accordingly, the Coalition reserves the right to supplement this petition after further review of the information to be provided by the Department.

ARGUMENT

Interim Director Gary Spackman ("Director") issued a *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Final Order*" or "*Order*") on April 7, 2010. The *Order* contains the Department's purported methodology for purposes of conjunctive administration in response to the Surface

Water Coalition's 2005 delivery call. Importantly, the Director was required to follow Judge Melanson's *Order on Petition for Judicial Review* issued on July 24, 2009 in issuing a new final order.

The Coalition petitions the Director to reconsider the *Final Order* pursuant to Idaho Code § 67-5246 and Rule 740 of the Department's Rules of Procedure. As explained in detail below, the *Final Order* does not comply with Idaho law, the Department's CM Rules, and Judge Melanson's July 24, 2009 decision. In addition, the *Order* contains numerous calculations and methods that are not adequately explained and should be further clarified if any are to be retained. In summary the Director should reconsider and clarify the *Final Order* accordingly.

I. The Director's "Material Injury" Methodology Fails to Comply with the CM Rules and Judge Melanson's July 24, 2009 *Order on Petition for Judicial Review.*

A. BLY Stated Purpose

The Director's use of a "Reasonable In-Season Demand" (RISD) begins by selecting what is termed a "Baseline Year" (BLY). *Order* at 5, ¶ 14. The Director described a BLY as follows:

> 14. A BLY is a year(s) that represents demands and supplies that can be used as a benchmark to predict need in the current year of irrigation at the start of an irrigation season. The purpose in predicting need is to project an upper limit of material injury at the start of the season.

Id. (emphasis added).

The Coalition agrees that since the Director is not administering to the Coalition's water rights, projecting a conservative irrigation "need" is necessary at the start of the irrigation season.[1] However, the Director's stated purpose to use a BLY to project "an upper limit of material injury" is incorrect and does not comply with Idaho law. Unless the Department

[1] SWC still asserts that beginning delivering water to the quantity stated on the water right is the only method to assure that an entity's irrigation need will be met.

administers to the quantities set forth in the Coalition's water rights, the Director cannot set an "upper limit" of material injury in April for purposes of administration throughout the entire irrigation season. For example, if the Director underestimates projected "material injury" in April, that number cannot be used to establish an "upper limit" of water to which the Coalition is entitled to receive throughout the year since that would constitute a re-adjudication of the Coalition's senior water rights. Notably, this very method was used by former Director Tuthill in 2007, and specifically rejected by the Hearing Officer in his *Recommended Order*. **R. Vol. 37 at 7093-95.**

The Director highlights the problem with his proposed method: "If a year(s) exactly representing average conditions is used for predicting demand shortfall at the start of the season, which turns out to be a high demand season, demand shortfall will be under estimated at the start of the season." *Order* at 5, ¶ 16. While recognizing the danger in underestimating material injury in early April, the Director's *Order* does not include a procedure to adjust a mitigation requirement upward as required by Idaho law and Judge Melanson's decision. Importantly, Judge Melanson held the following with respect to the use of a "baseline" for purposes of conjunctive administration:

> Although the CMR do not expressly provide for the use of a "baseline" or other methodology, the Hearing Officer concluded that: "Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at the base and works up according to need, the end result should be the same." R. Vol 37 at 7091. Ultimately the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable ***provided the baseline was adjustable to account for weather variations and that the process satisfied certain other enumerated conditions***. R. Vol. 37 at 7086-7100. This Court affirms the reasoning of the Hearing Officer on this issue.

Order on Petition for Judicial Review at 26 (emphasis added).

Judge Melanson affirmed the concept of a "baseline" provided it was adjustable, both upwards and downwards depending upon need. The methodology set forth in the Director's *Final Order* unlawfully "caps" the material injury by setting an "upper limit" in April:

> If it is determined that at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment.

Order at 31, ¶ 18.

The Director's decision to not adjust a junior's mitigation obligation upward in the event he under-predicts material injury to the senior water right holder in April is unconstitutional as it forces the senior to suffer shortage caused by the Director's mistake while the junior pumps out-of-priority throughout the irrigation season. Moreover, the method to base mitigation requirements upon an "upper limit" while at the same time using averages for water supplies, consumptive use, project efficiencies and other factors that underestimate the "upper limit" impermissibly places of the risk of inadequate water supplies squarely upon senior water right holders. Given this unlawful procedure and the shortage that a senior is faced to suffer as a result of out-of-priority ground water diversions, the Director's stated purpose and methodology in applying a BLY for purposes of conjunctive administration must be reconsidered.

B. Climate

In FF 18, and the graphs showing "growing season precipitation", the Director refers to the National Weather Service's Twin Falls weather station. *Order* at 6-7. However, footnote 3 in the *Order* references Agrimet data. *Id.* The actual source of the data presented relative to climate should be clarified and referenced consistently since it is unclear whether the Director retrieved data from the National Weather Service's Twin Falls station (Ex. 3024) or the Agrimet station. Moreover, although footnote 3 references "examples" of the use of Agrimet

precipitation data in the record, it is not clear where the Director actually retrieved the "raw Agrimet precipitation data" that is presented in the *Order*. This finding and the graphs associated with it should be clarified by the Director accordingly.

C. Available Water Supply

The Director wrongly concludes that the predictions made in the April 1 through July 31 Heise forecasted supply issued by USBR and USACE "are a good indicator of the total available irrigation water supply for a season".[2] *Order* at 10, ¶ 22. Contrary to the Director's citation to the record (R. Vol. 37 at 7070), the Hearing Officer found that the April 1 forecast for Heise was not sufficient for predicting an irrigation water supply for the entire irrigation season and that the former Director's use of other information later in the irrigation season was proper:

> **c. The Director properly departed from the earlier practice of utilizing only the Heise Gage to predict natural flow for the irrigation season.** . . . "In order to predict natural flow supplies for TFCC for the remainder of the irrigation season, it is no longer appropriate to use data from the Heise Gage, as virtually all reach gains to the Snake River that are available to TFCC are a result of return flows and not flow into the system from springtime runoff." This change was appropriate, since the Heise Gage would provide no useful information at that state of the irrigation season. The Heise Gage is a sufficiently reliable predictor of springtime runoff to utilize early in the process, but once weather conditions and the state of storage are known the process should be expanded to incorporate whatever sources will provide the most current information.

R. Vol. 37 at 7070-71.

The Director's *Order* apparently fails to take this recommendation into account since it does not purport to predict available water supply for the entire irrigation season other than according to the April 1 Heise forecast. As recommended by the Hearing Officer, and as set

[2] With respect to predicted available water supply for BID and MID, the Director should review the 1903 water right and the percentage split used to determine what amount is used by each entity. For example, the Director's April 15, 2010 letter projection for 2010 wrongly projects that BID will receive twice as much natural flow as MID, although MID takes approximately 62% of the water available under the 1903 water right and BID takes about 38%. Therefore, BID's projected natural flow supply should be lower than MID's.

forth in the SWC Expert Report, other methods to evaluate monthly water supply, including evaluation of spring flows and reach gains, should be utilized to predict available water supply later in the irrigation season, including during July and subsequent months. *See* **Ex. 8000 at 7-15 to 7-27; 8-1 to 8-21**. In addition, evaluating annual diversion numbers does not tell the complete story of higher irrigation demands that occur every year in June, July, and August, or the variability in that demand that can occur. The Director's *Final Order* does not take this factor into account and should be reconsidered accordingly.

D. BLY Irrigation Practices

The Director states that to "capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999." *Order* at 5, ¶ 15. By only reviewing water supplies and diversions after 1999, the Director uses a period of record that arbitrarily discriminates against the Coalition and the actual average use of its senior water rights. Stated another way, the Director cannot simply choose a single year or a couple years from the period 2000-2008 to identify a year that "represents demands and supplies that can be used as a benchmark to predict need in the current year of irrigation at the start of the irrigation season."

For instance, for the time period 2000-2008, the unregulated flow volume at Heise was well below the 30-year average in 7 out of the 9 years. *Id.* at 11. Therefore, just looking at actual diversions in those years does not accurately portray the Coalition's demands since the diversions were limited by water supply. Moreover, the multiple dry-year period between 2000 and 2005 does not accurately depict demands since the Surface Water Coalition was forced to curtail water deliveries to its landowners and shareholders in those years. **R. Vol. 2 at 405-410, Vol 36 at 6852-55**. Although the SWC curtailed its own landowners and shareholders in those years, those "efficiencies" or efforst to "self-mitigate", did not reduce irrigation demand.

Consequently, the Director's range of years to pick a BLY year from is artificially limited to 2006 and 2008. The limited time period is not justified, particularly since it varies from other time periods used to evaluate other factors in the *Final Order*.

Although irrigation practices within the various Coalition projects have changed over time, including conversion from gravity to sprinkler irrigation, that does not justify eliminating the use of pre-2000 diversion data for purposes of identifying an "average demand" to use with a BLY. Again, the elimination of pre-2000 diversion data arbitrarily omits a number of years in the late 1990s when available surface water exceeded the 30-year average. *Order* at 11. In addition, the decision arbitrarily omits the early 1990s, which included years with below average runoff. The 1990-2008 timeframe provides a wide range of hydrologic and climatic conditions, including higher reach gains in the 1990s, which provides a better data set to arrive at an "average" diversion year. The SWC average diversions based upon those years is as follows:

1990-2008 Average (acre-feet)

A&B	56,006
AFRD #2	426,029
BID	250,057
MID	355,163
Milner	57,840
NSCC	1,022,737
TFCC	1,071,323

Since the Director's BLY concept does not prevent injury to the senior SWC members as set forth in Attachment A to the *Order* (i.e. year 1 examples shows unmitigated shortages to A&B, AFRD #2, and NSCC of at least 42,000 acre-feet), alternatively the Director could change the BLY methodology to one similar to that to forecast supply. The above averages from 1990-2008 could be used for a predicted "average" year, and the Director could then add 1 standard deviation to provide sufficient water for a drier and hotter year. This would eliminate the search

for 1 or 2 years that meets some changing criteria and would put in place a procedure with a consistent period of record with other periods used by the Director (i.e. 1990-2008).

Accordingly, although using a 2000-2008 timeframe only includes 2 years with "average" or "above-average" surface water supplies, using 1990-2008 would include a wide range of hydrologic conditions to better represent the Coalition's "average diversion" within that time period.

The Director misquotes the Hearing Officer's order in stating that a "BLY must be recent enough to represent current irrigation practices". *Order* at 11, ¶ 23. Although the Hearing Officer recommended that changes in facilities and irrigation practices should be considered he stated that this "must be considered with caution to avoid rewriting a water right through the process of determining a baseline water need for predictions of material injury" and that there "may be legitimate reasons to revert to gravity flow in the future or change other practices". **R. Vol. 37 at 7099.** The Director's *Order* appears to disregard this directive in an effort to justify looking at SWC actual diversions after 1999 only. In addition, each SWC member has implemented efficiency and conservation measures on different timetables, so looking at one limited time period may not be representative for all members. Again, since this time period consists mostly of years of reduced water supplies, including conditions that witnessed the effects of junior ground water pumping on reach gains and spring flows, the post-2000 data set does not accurately portray the Coalition's "average diversions" or "average demands".

Moreover, although the Coalition projects have all generally increased conversions to sprinklers over time, it is inaccurate to state that "Sprinkler systems are currently the predominant application system" as applied to individual Coalition entities. For example, information in the record shows that Twin Falls Canal Company is irrigated about 75% by

gravity "flood/furrow" method. **R. Vol. 3 at 418.** Accordingly, the Director's generalization about sprinkler conversions is overstated and should be reconsidered, particularly since it appears to be the primary, if not sole factor, for excluding the use of diversion data prior to 2000 for purposes of establishing a BLY.

E. Selection of Initial BLY Year

The Director mischaracterizes the Hearing Officer's decision as recommending IDWR should select a single year to establish a BLY. *Order* at 11, ¶ 26. Contrary to the Director's interpretation, the Hearing Officer did not advocate selecting a single year BLY based upon climate, available water supply, and irrigation practices. *Id.* at 5, ¶ 15. Instead, the Hearing Officer recommended the following in establishing a BLY:

> It is appropriate to use historical information when crops were adequately irrigated and to test that information to determine if the usage involved waste. . . . If 1995 could be considered an average irrigation year in all the factors to be considered in establishing a baseline average it would be acceptable in the absence of compelling reasons to accept either the ground water users' conclusions or SWC's conclusions. The isolation of a year when there are known facts as to the supply and use may be reasonable if it is subjected to the type of analysis applied by both the surface and ground water users. ***However, focusing on a single year can only be a starting point, not sufficient without material adjustments.***

R. Vol. 37 at 7098-99 (emphasis added).

Clearly, the Hearing Officer did not recommend selecting a single year as a BLY without subjecting that year to further review, including analyzing monthly precipitation, temperature, and available surface water supply. As for the last factor, just looking at the Heise runoff is insufficient for purposes of evaluating available natural flow to the SWC, which relies heavily upon reach gains and spring flows in the Near Blackfoot to Minidoka reach. Moreover, the Hearing Officer does not suggest that a single BLY can be selected for all members of the SWC. Importantly, the Hearing Officer recommended the following:

> **8. The sources of information for reevaluating the water conditions should be expanded, as occurred in the sixth supplemental order when the Heise Gage was no longer a valid measure of natural flow.** Initial use of the Heise Gage unregulated flow is reasonable as a starting point in predicting the water supply, but as the year progresses and adjustments become necessary other sources utilized by the irrigation districts to monitor and predict their water supplies should be included.

R. Vol. 37 at 100 (emphasis in original).

At a minimum, the Director must look at available spring flows and reach gains in an average year to set an appropriate BLY that does not rely upon a year where spring flows and reach gains are not significantly reduced by ground water depletions, such as post-2000. In other words, the Director cannot simply pick a post-2000 water year and hold it up as a BLY since reach gains and spring flows in those years were severely impacted by historical and present ground water pumping. **Ex. 8000 at 8-1 to 8-21.**

Next, FF 27-29 conflict with FF 16 since the 2000-2008 timeframe represents years of "below average" diversions for the SWC members. In addition, the Director fails to explain the criteria used to determine that 2006 and 2008 "were years in which diversions were not limited by available water supply."[3] *Order* at 12, ¶ 28. Admittedly, the Director did not evaluate each SWC member individually in considering a BLY. Given the different water rights and the different reliance upon storage, and the fact water years vary including available natural flow and storage, the Director should not limit a BLY analysis to a single year for all SWC entities.

In addition, the Director wrongly states that "2006 is an appropriate BLY" based upon "total annual SWC diversion volumes". *Order* at 11, ¶ 26. First, by using 2006, the Director contradicts other statements in the *Order* where he explains that "a BLY should represent year(s) of above average diversion, and to avoid years of below average diversions." *Order* at 5, ¶ 16

[3] The Hearing Officer recommended that soil conditions may be considered in evaluating RISD and determining a BLY, however, it does not appear the Director performed any evaluation of this factor. **R. Vol. 37 at 7099.**

(emphasis added). Since all Coalition members have different water rights and delivery practices, the Director should not lump all "annual diversions" together for all members for purposes of establishing a BLY. Again, this further misses the point about monthly needs and how water rights and available supplies differ throughout the irrigation season according to water rights. Moreover, by comparing 2006 diversions only to the annual diversions from 2000-2008, it sets the average diversion year too low since 2000-2005 and 2007 were all drought years with below average surface water supplies. Stated another way, the Director's data set is arbitrarily skewed to low diversion years by only using post-2000 diversion records. More water could have been diverted and beneficially used by the SWC members in all years but for the lack of water. Therefore, the "average" annual diversion from 2000-2008 is not accurate based upon a more comprehensive data set that included years with above-average surface water supply, like those witnessed in the late 1990s.

Moreover, even selecting a single year to use for all SWC entities is not accurate as recognized by the Director where 2006 was a below average diversion year for Milner, MID, and TFCC. *Order* at 12, ¶ 27. Therefore, 2006 does not meet the Director's criteria for selecting BLY as it underestimates average diversions for Milner, MID, and TFCC. Importantly, a 4% reduction in diversions for TFCC, as was the case in 2006, equates to approximately 40,000 acre-feet.

Similar to the inherent problems in selecting a single year (2006) to represent a BLY, the Director's use of an average of 2006 and 2008 does not accurately reflect "average diversions" or an average irrigation demand year for all members of the Surface Water Coalition. First, the Director's finding that the "06/08 average has below average precipitation" is not correct. In reality, the more representative "average" growing season precipitation is not 5 inches as

identified in the Director's graph on page 7 of the *Order*. Setting aside the three years of extraordinary precipitation events in 1995, 1998, and 2005, where the growing season precipitation nearly doubled the "average" of 5 inches, it is clear that the real "average" precipitation is closer to 3 inches, not 5. Accordingly, while the average of 06/08 is somewhere near 4 inches, it is inaccurate to portray that number as "below average" since between 1990 and 2008, 12 out of the 19 years witnessed a growing season precipitation of 5 inches or less. Moreover of the 7 years where precipitation was above 5 inches, 4 of those years witnessed a growing season precipitation of less than 6 inches. This evaluation reveals that the 3 years of extraordinary precipitation have skewed the average precipitation dramatically upward. Therefore, the Director's statement that the 06/08 precipitation number is "below average" is not accurate and does reflect normal conditions, let alone conditions that must be anticipated for purposes of irrigation planning. Stated another way, the Director should plan for a below average year for purposes of protecting the SWC's senior water rights.

Next, the Director's finding that the "06/08 average has . . . near average ET" is also incorrect. *Order* at 12, ¶ 28. Clearly, 2008 had below average ET. *Id.* at 9. While 2006 witnessed slightly above average ET, the resulting average of 06/08 is below average ET. The Director should plan for a high ET year in order to adequately protect the Coalition's senior surface water rights and accurately portray expected irrigation demand.

With respect to temperature, the Director wrongly concludes that the "06/08 average has . . . above average growing degree days". *Order* at 12, ¶ 28. First, reviewing the period of record between 1991 and 2008, it is obvious that 12 out of the 18 years witnessed growing degree days of 100% or more of average. Only 1991, 1993, 1995, 1999, 2005, and 2008 were below 100%. Accordingly, based upon this data, the Director should expect a number greater than 100% of

average for purposes of irrigation planning. While 2006 had 107% of average for growing degree days, 2008 was only 98%. Although the average of 06/08 may be greater than 100% based upon the record from 1991-2008, that average is skewed downward based upon 2008 data. Moreover, based upon the period of 2000 to 2008, the average is higher than that using the entire record from 1991 to 2008. Of the years witnessing greater than 102% growing days, 5 out of 7 occurred in the 2000 to 2008 time period. Accordingly, the Director should plan for greater than average growing days without using a year like 2008 that is the sixth lowest in the 19 year record.

Finally, the Director wrongly concludes that the "06/08 average . . . were years in which diversions were not limited by availability of water supply." *Order* at 12, ¶ 28. Although that statement may be true with respect to storage fill, and the April – July Heise runoff in those years about matched the 30-year average, it does not reflect how diversions were affected by reduced spring flows and reach gains. This shows the shortcomings in the Director's analysis by not considering other multiple-season factors affecting mid-season modification of the RISD. Decreases in spring flows and reach gains within a given season are responses caused by prior year(s) depeletions or decreases in recharge and resultant water level declines in the ESPA. These effects are not taken into account in the Director's *Order*. Accordingly, whereas groundwater pumping depleted spring flows and reach gains in the Near Blackfoot to Minidoka reach, diversions were limited by those available water supplies later in the irrigation season. The Director's *Order* provides no analysis as to reach gains and spring flows in these years.

Again, the Director's use of 2000-2008 annual diversions to compare the average of 06/08 is not reflective of true average diversions when reviewing a more comprehensive record. Indeed, the Director wrongly states that "When compared to a period of record spanning from

1990-2008, the 06/08 diversions were above average". *Order* at 12, ¶ 28. This is not true based upon a review of each SWC member's recorded diversions.

For example, when reviewing TFCC's annual diversions from 2000-2008 it is apparent that timeframe includes 5 of the lowest total diversion years on record for TFCC, dating back to 1930. Moreover, when reviewing TFCC's annual diversions from 1990-2008, it is apparent that the years after 2000 show substantially lower diversions than prior to that time. **Ex. 8000, Vol. IV, Appdx. AS-1**. Indeed, the 06/08 annual diversion for TFCC, identified as 1,045,382 acre-feet, is well below the average annual diversion recorded between 1990-1999, which equals approximately 1,105,100 acre-feet. **Ex. 8000, Vol. IV, Appdx. AS-1**. Accordingly, by eliminating the years 1990-99 from the calculated "average" diversion, the Director arbitrarily reduces TFCC's annual "average" diversion for purposes of comparing his 06/08 diversion. The same analysis is true for other members of the Coalition. Indeed, the disparity is even worse for Milner Irrigation District since the 06/08 diversions are 91% of the 2000-2008 average. The selection of 06/08 for Milner does not meet any of the Director's own criteria for selection of a BLY and arbitrarily penalizes Milner by not providing even an average water supply.

The lower diversions in the 2000-2008 timeframe reflect a reduced water supply due to drought years and the effects of junior groundwater pumping reducing reach gains and spring flows. **Ex. 8000 at 8-1 to 8-21**. Accordingly, for purposes of establishing a BLY, the Director should not simply rely upon years of reduced or limited water supplies to establish an "average" year of diversion, which for the 2000-2008 timeframe, is a majority of those years. Instead, the Director should use a more comprehensive record for his analysis to determine "average" diversions, which as set forth in his review of "growing season precipitation" (*Order* at 7), "actual April through October reference ET" (*Id.* at 9), "growing degree days" (*Order* at 10), and

"Heise April through July Runoff" (*Id.* at 11) is the time period 1990-2008. By eliminating actual SWC diversions from 1990-1999, but including those years for other components or criteria in his analysis, the Director wrongly reduces the "average" SWC member's total annual diversion.

Finally, the Director indicates that the 06/08 average natural flow at Heise is "near the long-term average" in apparent further support for the use of 06/08 as BLY. However, the 06/08 average is higher than the long-term average during the critical water use period in July. This shows that when the water is available during the peak of the irrigation season the SWC needed and diverted the water. Looking at all other years that were below average it is clear the water supply was not available but the demand was still present. The Director has failed to explain why the long-term average (1990-2008) was not used for purposes of projecting available natural flow and seasonal adjustment of the Reasonable In-Season Demand (RISD).

Again, the use of varied time periods is not justified for purposes of the Director's evaluation and selection of a BLY for all members of the Surface Water Coalition.

II. The Calculation of Reasonable In-Season Demand (RISD) Does Not Comply with the CM Rules and Idaho Law.

The Director fails to explain how RISD, or "the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity" complies with the framework for conjunctive administration set forth in the CM Rules. *Order* at 13, ¶ 31.

First, the CM Rules define "material injury" and "water right" as follows:

> **14. Material Injury.** 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.
>
> * * *

> **25. Water Right.** The legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law.

CM Rules 10.14, 10.25 (emphasis in original).

The Director's definition of RISD, although it apparently attempts to address certain Rule 42 factors, does not comply with the CM Rules' definitions and further conflicts with the Director's and Watermaster's duty to "regulate the diversion and use of water ***in accordance with the priorities of rights of the various surface or ground water users*** whose rights are included within the district" or "[a]llow out-of-priority diversion of water . . . pursuant to a mitigation plan" upon a finding of material injury. CM Rule 40.01 (emphasis added). Instead, the Director's creation of a RISD unreasonably shifts the burden of water right administration to senior water right holders by an evaluation of water use that is not performed on junior water right holders. This unequal treatment results in the SWC members being forced to accept reduced water supplies, less than their decreed water rights, while junior ground water users are free to exercise their full rights, without a determination as to whether or not their use exceeds a calculated RISD.

Accordingly, the Director should reconsider the foundation for his RISD analysis and explain why the same evaluation was not performed for junior ground water users that materially injure the Coalition's senior surface water rights. *See* CM Rule 20.05 ("These rules provide the basis for determining the reasonableness of the diversion and use of water by . . . the holder of a junior-priority water right against whom the call is made."). The Director cannot simply conclude that because a water user pumps groundwater that his diversion and use is "reasonable", or that it complies with RISD. The Director should reconsider this determination and apply it equally to junior priority ground water rights for purposes of his final material injury

methodology.

In addition, the Director's methodology does not comply with the factors addressed in CM Rule 43. For example, the methodology does not account for the multi-year effects of junior ground water pumping by providing "replacement water or other appropriate compensation to the senior-priority right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after the pumping is curtailed." Rule 43.03.c. Instead, the *Order* sets forth a paradigm likely to continue administrative and judicial challenges each and every year into the foreseeable future.

A. Supplemental Ground Water Use

The Director states that a "reduction in the diversion requirement for supplemental ground water used within SWC service areas" will be considered for purpose of RISD shortfalls. *Order* at 14, ¶ 33. This finding contradicts the evidence in the record and stands to continue rather than prevent material injury to the Coalition's senior surface water rights. After all, forcing private supplemental ground water use, or counting it against the Coalition's RISD shortfallm, would only cause more injury to the SWC as that groundwater use further reduces reach gains and spring flows that supply the SWC's senior surface water rights. In addition, the finding essentially elevates the status of a "supplemental" ground water right into a "primary" ground water right contrary to law and the conditions on those water rights. The Director further fails to acknowledge the priorities for these rights and whether or not they would be subject to curtailment in the first place.

Next, the finding does not comply with the Rule 42 factors. First, Rule 42.01.g states the Director may consider "the extent to which the requirements of the holder of a senior-priority water right could be met with the ***user's existing facilities and water supplies*** . . ." The plain

language of the Rule applies to the SWC's facilities and water supplies, not a private landowner's supplies. Next, Rule 42.01.h provides the Director may consider "the extent to which requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, . . . under the petitioner's surface water right priority." Again, this factor considers the SWC's water rights, not a private "supplemental" ground water right held by a landowner or shareholder within one of the canal projects. Accordingly, under the plain language of the CM Rules, the Director cannot transmute the ownership and use of a private ground water right into that of an SWC entity under its available water rights and water supplies.

The evidence at hearing further showed that the Coalition entities do not keep information on and have no authority or responsibility with regards to private "supplemental" ground water rights owned by a few of their landowners or shareholders. **R. Vol. 37 at 6966**. In addition, these private "supplemental" ground water rights are not available to the SWC entities as whole, as if that water could be delivered anywhere within the respective projects to allow a reduction in surface water use at the headgate at the river. Furthermore, the SWC entities have no authority to regulate or reduce a landowner's surface water use just because he owns a supplemental ground water right.

For example, if Landowner A within AFRD #2 owns 40 acres entitled to surface water, and he pays the assessment for operation and maintenance that year, AFRD #2 is required to deliver him surface water for the 40 acres. The fact Landowner A may own a "supplemental" ground water right for 15 acres does not mean AFRD #2 can reduce its delivery to him by 15 acres. Yet, that is what the Director's *Order* implies must be done by stating that a reduction in RISD shortfall will be made. Stated another way, the Director "excuses" injury to the surface

water right because a few landowners procured "supplemental" ground water rights, which are some of the same ground water rights that contribute to the injury to the senior surface water rights in the first place! Moreover, the Director's finding would unlawfully force Landowner A to pump his "supplemental" ground water right and personally pay for the increased power costs every year, even though he is legally entitled, and required, to use his available surface water first. In sum, the Director's finding with respect to "supplemental" ground water rights is erroneous pursuant to Idaho law and should be reconsidered. *See* I.C. §§ 42-204, 219 (where Director has conditioned supplemental ground water right permits and licenses); *see e.g.* I.C. § 67-6537 (policy of the State encouraging the use of surface water as primary source for irrigation).

The Director should administer to the SWC's senior surface water rights and presume that "supplemental" ground water use will not occur if the SWC is able to deliver a full surface water supply to its landowners and shareholders. Contrary to the Director's implication, "supplemental ground water" use cannot be used to reduce a Coalition entity's RISD shortfall for purposes of delivering surface water within the various projects.

Apart from this legal error, the Director also quoted former Director Dreher's explanation and refers to the Final ESPAM Report regarding supplemental ground water use.[4] *Id.*, n. 7. The Director's generated fractions for each SWC entity appear to be based upon an outdated procedure and further they are not adequately explained in the *Order*. For the reasons set forth above, this finding should be reconsidered and removed, particularly to the extent it stands for the proposition that the Director will reduce RISD shortfalls based upon assumed, or forced,

[4] The procedure to assign an entity-wide split of the ground water fraction to the surface fraction as used in the development of the ESPAM Version 1.1 has since been completely revised in the Model recalibration performed by IWRRI and reviewed by the ESHMC. Accordingly, the Director has no basis to rely upon an outdated procedure that is no longer used.

private "supplemental" ground water use.

B. Project Efficiency / Crop Water Need / Effective Precipitation

In comparing the irrigation requirements analyses presented by SWC and the Ground Water Users at hearing, the Hearing Officer did not recommend either evaluation on the basis that the "parties' analyses are too far apart to reconcile." **R. Vol. 37 at 7096**. However, the Hearing Officer did recognize that the Ground Water Users' calculations for NSCC and TFCC "make it highly unlikely that North Side [and TFCC] could raise crops to full maturity with the number of cuttings otherwise possible with the smaller amount of water." ***Id.* at 7097**. Further, the Hearing Officer did state that the "conclusions in the SWC's expert testimony are closer to being acceptable". ***Id.***

The Director states that "system operational losses (return flows)" is a factor to be considered in determining project efficiency. *Order* at 15, ¶ 41. However, it is unclear whether the Director considers "operational spill" in the same category as "in-season recharge" and water diverted on behalf of another irrigation entity. *Id.* at 16, ¶ 43. The expert witnesses for the SWC assumed that "operational spill" is part of the water requirement for an open channel water delivery system, such as that used by all members of the SWC. As such there is no basis to remove that water diverted as necessary to deliver water within the SWC projects.

To the extent this finding suggests that operational spill or return flows must be eliminated or will be an adjustment to the SWC's water diversion data for purposes of conjunctive administration, that finding must be reconsidered and removed. After all, the Hearing Officer found that the SWC employ reasonable means of diversion and have all improved their conveyance practices over time. **R. Vol. 37 at 7101**. The Hearing Officer noted NSCC's long canal system (755 miles) and the fact that it takes considerable time to move water

through the project. ***Id.* at 7102.** Moreover, the Hearing Officer concluded that "the evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency." ***Id.*** The Director accepted this recommendation and there is no basis to conclude that some "operational spill" or "return flow" is not necessary for purposes of operating long open channel surface water projects.

With respect to the Director's equation for "project efficiency" several questions exist requiring clarification. First, what is the source and definition of CWN and Q_D (irrigation entity diversion of water specifically put to beneficial use for the growing of crops within the irrigation entity) in FF 42? Next, in calculating the adjusted efficiencies for in-season calculation of RISD, how will calculated extreme values be handled? Without clarifying information or supporting data, the SWC cannot adequately understand the "project efficiencies" table created in FF 44. *Order* at 16, ¶ 44. Consequently, this paragraph and the equation should be clarified by the Director.

In FF 48 the Director states that he will rely upon USDA National Agricultural Statistics Service ("NASS") reports for annual crop mix or irrigated and harvested acres. *Order* at 18, ¶ 48. Clearly, these numbers will not be available for the current irrigation season until after-the-fact. The Director has no basis to assume that prior years' NASS averages which are reported on a "county basis" will be representative of the crop mix for any of the SWC members, particularly when some SWC members' projects' cross various counties (i.e. NSCC, Jerome, Gooding, and Elmore Counties). Further, the SWC should not be penalized for acres kept out of production due to a lack of water. Using NASS acres for irrigated and harvested acres only, particularly on a "county basis", is too limiting since acres abandoned due to a lack of water must also be considered. Moreover, the Director does not explain the basis for NASS and whether or not it is

comparable to the crop mix presented by the SWC.

At a minimum, IDWR should identify all sources of crop data and should consult with the SWC managers to better understand crop distribution and expected cropping patterns on a yearly basis. For example, in 2007 the managers provided information on expected cropping patterns to IDWR that the Hearing Officer found was wrongfully ignored by the Director. *See* **R. Vol. 24 at 4432-4495, 4502-4537; Vol. 37 at 7095**. This type of information should be reviewed by the Director on an annual basis. Finally, SWC managers must be prepared to deliver sufficient water to all landowners and shareholders regardless of cropping decisions. The SWC cannot dictate the type of crops a water user grows and cannot deliver less water based upon cropping decisions. IDWR must follow the same standard when forecasting predicted water supply and need for the SWC entities.

The Director does not adequately explain the basis to include "effective precipitation" in his "crop water need" equation. Indeed for evaluation of individual SWC projects, the use of precipitation from Agrimet to determine CWN is inadequate. First, meaningful adjustment to water deliveries to systems to the size of the SWC entities (i.e. NSCC 755 miles of canals and lateral, TFCC is a 200,000 acre project spanning from Milner to Castleford, delivery of storage water from Jackson Lake to Milner Dam) does not allow for quick reaction to weather changes. Moreover, the availability of water within the SWC projects must be responsive to the demands of individual water users in the field and cannot be controlled by the SWC at the river headgate. Finally, precipitation can vary even within the boundaries of a single SWC project. For NSCC, although rain may occur in Hazelton it could be dry in Bliss. Such an example highlights the fallacy in just relying upon the data from the Rupert and Twin Falls Agrimet stations where those stations may not accurately portray effective precipitation across all parts of all SWC projects.

A. RISD Calculation

With respect to FF 53-56, the Director's equation and the factors for RISD are not adequately explained. *Order* at 19. First, in FF 54-56 it is unclear whether "PE" stands for the factor "EP" included in the equation in FF 53. If not, the acronym "PE" is undefined and the SWC is without sufficient information to understand what the term references. *Order* at 19.

Next, the Director's calculated adjustments for April and October RISD is not adequately explained. For instance, the Director has failed to provide any data or information to show the magnitude of adjustments for each SWC entity. Based upon FF 44 it appears that some of these adjustments are significant. However, the SWC is without sufficient information or references in the record to fully understand the Director's statements and calculations in these findings.

B. Adjustment of Forecast Supply

With respect to FF 58, it is unclear how the Director can calculate RISD in April since neither effective precipitation (We) nor evapotranspiration (ET) will be known. In addition, it is unlikely the crop mix will be known at this time unless the Director uses a historic average. The Director has failed to explain why BD for the BLY(s) is not used in April. If BD will not be used in April then what is the purpose of BLY(s)? With regards to the Heise unregulated natural flow, although the Director references using the 1990-2008 data for purposes of the regression equation, he fails to explain why the 1971-2000 time period was used in FF 22. Although FF 59 states that the storage allocation for the SWC will be estimated following the Joint Forecast it is not clear whether the Director plans to adjust the storage allocation in-season as well.

It appears that the Director's FF 60 conflicts with FF 53. First, RISD is calculated in FF 53 based upon CWN, but in FF 60 the Director states that values from the accounting program will be used in early to mid-July. *Order* at 20, ¶ 60. The Director does not explain why this

calculation is performed. The graph associated with FF 60 does not provide any insight into the Director's finding as it only charts reach gains in the Blackfoot to Milner reach for various years between 1992 and 2004. *Id.* at 21. The Director fails to explain how the adjusted Forecast Supply will accurately project available natural flows for the remainder of the irrigation season as of early to mid-July. In addition, the Director has failed to disclose the criteria for selecting a "historical year with similar gains in the Blackfoot – Milner reach". Moreover, the adjustment does not take into account weather conditions if the climate is hot and dry or forecasted to be hot and dry for the remainder of the irrigation season.

The Director's definition of "Time of Need" is not well defined and conflicts with Idaho law for purposes of delivering mitigation water to the SWC when needed during the irrigation season. First, waiting until the end of July or August to actually provide mitigation water to the SWC entities is too late based upon the projects' water delivery planning and storage use. This timeframe does not make water available at a time when the SWC managers must make management decisions to ensure water will be available for delivery for the rest of the irrigation season. The Director indicates that the "July procedure will be repeated shortly before the Time of Need with the updated water rights accounting data" without identifying a date certain as to when water will be provided. *Order* at 20, ¶ 61. The Director then states that the "calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover, or the difference between 06/08 average demand and the 02/04 supply." *Id.*, n. 9. Notably, the Director fails to adequately explain the basis for this timing and the significance of 02/04 supply. If the Director is just referring to the day when storage will equal reasonable carryover, it is clear that day is too late. Indeed, for entities like BID and MID, the Director arbitrarily set that number at "0", so effectively those

entities have to exhaust all of their storage supplies before mitigation water would ever be delivered to them during the irrigation season. Moreover, for TFCC, it appears that no mitigation water will be provided until TFCC runs its storage account down to 29,000 acre-feet, which could be well after the peak of the irrigation season when water is needed most. TFCC and the rest of the SWC cannot deliver water in June and July, and predict deliveries for the rest of the season, without the certainty of receiving mitigation water by a date certain. Moreover, the decision to rent available water from the Water District 01 Rental Pool will be too late if the Director delays providing water at the "Time of Need" into some time well into August or September, which includes a time when some crops have already been or are in the process of being harvested. At a minimum, the Director must reconsider the "Time of Need" in order to timely deliver mitigation water to the SWC so that it can be effectively delivered and available for use during the irrigation season.

In summary, the Director's "Time of Need" does not comply with the CM Rules and the Idaho Supreme Court's decision in *AFRD #2 v. IDWR*, 143 Idaho 862, 874 (2007) wherein the Court held that there must be "no unnecessary delays in the delivery of water pursuant to a valid water right." *See also, Order on Judicial Review* at 33 (Case No. 08-551).

C. Calculated Demand Shortfall

The Director's equation and the method to predict "Demand Shortfall" in FF 62 conflicts with FF 60-61 since RISD is used instead of the accounting data as described in those latter findings. *Order* at 21, ¶ 62. In addition, FF 63 is not consistent with FF 14 if mid-season Demand Shortfall is larger than April's predicted Demand Shortfall. Moreover, the Director has failed to adequately define and explain what it means to have water "available for delivery to the members of the SWC found to be materially injured." *Id.* at 21, ¶ 63.

III. The Director's Methodology for Determining "Reasonable Carryover" Does Not Comply with the CM Rules and Judge Melanson's July 24, 2009 *Order on Petition for Judicial Review* and Is Not Supported by Evidence in the Record.

A. Issues

1) Whether the *Order* must provide for enhancement of carryover storage beyond one year, or alternatively, curtailment, but has failed to do so.

2) Whether there exists any basis in this record to reject carryover for multiple years.

3) In the event that it is appropriate to consider a single year of carryover, whether the *Order* adopts an appropriate "average annual carryover for prior comparable water conditions" as required by CM Rule 42.01.g.

4) Whether the failure to require that the replacement water for carryover deficiencies be made available at the commencement of the irrigation season, but instead be made available at the conclusion of the irrigation season, inappropriately shifts the risk of not having an appropriate supply of carryover water from the junior water right holder to the senior water right holder in contravention of Idaho law and the Gooding County District Court's *Order on Petition for Judicial Review.*

B. "Reasonable Carryover" Methodology

In his July 24, 2009 Order, Judge Melanson found that the Director had abused his discretion in considering carryover for a single year:

> **3. The Director abused discretion by categorically denying reasonable carry-over for storage for more than one year.**
>
> The BOR and SWC argue that the Director acted outside of his authority and/or abused discretion by failing to require juniors to provide carry-over water for use beyond the one irrigation system. The Hearing Officer essentially recommended a categorical rule with respect to carry-over storage beyond one irrigation season (as opposed to a case-by-case determination):

> The multiple functions of BOR and the desire of SWC for long term insurance against adverse weather conditions are legitimate and consistent with the language of CM Rule 42.01.g which refers to dry years. Nonetheless, attempting to curtail or to require replacement water sufficient to insure storage for periods of years rather than the forthcoming year presents too many problems and too great likelihood for the waste of water to be acceptable. Curtailing to hold water for longer than a year runs a serious risk of being classified as hoarding, warned against by the Supreme Court in AFRD #2... Ordering curtailment to meet storage needs beyond the next year is almost certain to require ground water pumpers to give up valuable property rights or incur substantial financial obligations when no need would develop enough times to warrant such action.

R. Vol. 37 at 7109. The Director adopted this reasoning in the *Final Order.* R. Vol. 29 at 7385. The problem with such a determination is that it is inconsistent with the plain language and framework of the CMR as well as the Idaho Supreme Court's ruling in AFRD #2. There is not a statute that specifically authorizes, defines or limits carry-over storage. However, carry-over storage is specifically included in the **"Determining Material Injury and Reasonableness of Water Diversions"** section of the CMR.[5] CMR 042.01.g provides "the holder of a surface storage right *shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.* (emphasis added). IDWR argues in its brief that "[t]here appears to be a misconception in the opening briefs filed by SWC and USBR that the Director has limited those entities' ability to hold carryover storage. Nothing in the Final Order limits the right to hold carryover storage. Rather, the issue is whether junior ground water users are subject to curtailment for the purpose of providing water to enhance carryover storage beyond one year." *Respondent's Brief* at 14. The problem with IDWR's argument is that the carry-over storage provisions are specifically included in the material injury section of the CMR as opposed to being just a provision that authorizes carry-over storage. Once material injury is established (absent defenses raised by juniors), then the Director must either regulate the diversion and use of rights in accordance with priority or allow out-of-priority diversion pursuant to an approved mitigation plan. CMR 040.01. a and b. Accordingly, the CMR clearly contemplate that juniors can be curtailed to enhance carry-over storage beyond one year.

This exact provision withstood a facial constitutional challenge in *AFRD#2.* The Idaho Supreme Court rejected the argument that storage rights holders should be permitted to fill their entire storage right regardless of whether there was any indication that it was necessary to fulfill current or future needs. *Id.* At 880, 154 P.3d at 451 (2007). The Supreme Court also rejected the argument of ground water users that the purpose of the reasonable carry-over provision is to meet actual needs as opposed to "routinely permitting water to be wasted through storage and non-use." The Court acknowledged that it is "permissible...to hold water over from one year to the next absent abuse." *Id.* At 880, 154 P.3d at 451

> (citing *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945)). But "[t]o permit excessive carryover of stored water without regard to the need for it would in itself be unconstitutional." *Id.* Ultimately, the Court concluded that the CMR were facially constitutional in permitting some discretion in the Director to determine whether carryover water is reasonably necessary for future needs." *Id.*
>
> Based upon this holding, this Court concludes that the Director exceeded his authority by concluding that permitting carry-over for more than just the next season is categorically unreasonable and results in the unconstitutional hording of water. Such a determination contravenes the express language and framework of the CMR. The Director, however, in the exercise of discretion, can significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances of a particular delivery call. Ultimately, the end result may well be the same. Finally, as discussed above, the securing of water through an option or similar method pursuant to or in conjunction with a long term mitigation plan would eliminate any concerns regarding hoarding water or other abuses.

Order on Petition for Judicial Review at 20-22.

In response to Judge Melanson's decision, the Director's April 7, 2010 *Final Order* provided the senior water user a carryover calculated as the baseline year demand less the supply that would be available in the 2002/2004 dry or drought year. *See Order* at 22-27. This calculation appears to contemplate the amount of water that would be needed to provide an average, or base line, water supply in the event the subsequent year was, indeed, a dry year. Very clearly, this is a provision for just one subsequent season, not future dry "years."

Surprisingly, in the event that the carryover storage water is needed by the senior user in the subsequent spring, it will not be provided. Instead, the *Final Order* contemplates a run of the ESPA model to determine "transient" impacts of a hypothetical curtailment, and junior users would be required to provide only that water that would have arrived in the reaches in the first year dry year, a substantially lesser amount than the actual shortage suffered by the seniors. Then, the junior users would be required to provide the water that would have arrived in the reaches during those subsequent years if the system has not subsequently filled. At conclusion of law 27, the Director concludes that providing water that was needed in year one in future years,

instead of providing the entire carryover deficit the first year, allows the Director "to account for reasonable carryover for 'future dry years.'" *Order* at 32, ¶ 27. This method plainly violates Idaho law, including the CM Rules and Judge Melanson's *Order on Petition for Judicial Review* and should be reconsidered.

A further deficiency with the carryover calculation in the Director's *Final Order* is that it commences the calculation by failing to abide by CM Rule 42.01.g, which requires that the Director "shall consider the...average annual carryover for prior comparable water conditions...." Although the *Final Order* commences its analysis with what is represented to be an average annual year, the 2006/2008 Baseline Year[5], the methodology used by the Director to calculate carryover then subtracts from that average annual water supply the entirety of the expected water supply in a drought year. In this way, instead of providing for the carryover from a year with average water supply, the *Final Order* commences with the average water supply, but then reduces it significantly by subtracting out a dry year water supply. The empirical proof that this method is deficient is evident in the materials presented in the *Final Order* itself. Notably, at pages 24 and 25, the *Final Order* sets out in table form expected carryovers in very dry, dry, average, and wet years. By comparing the average year carryover to the carryovers actually provided by the Director in FF 67, one can see that the carryovers provided are woefully deficient compared to the "average year", which CM Rule 42.01.g requires the Director to use for purposes of conjunctive administration.

Using American Falls Reservoir District #2 and North Side Canal Company as examples, the reasonable carryovers provided in the *Final Order*, as compared to the average carryovers provided, limiting the calculation to the 2006 period of record are as follows:

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[5] *See* Part I, *infra*, for a discussion regarding the fact that the 2006/2008 average provided a water supply less than the average annual year for the SWC entities.

AFRD #2	2006 Carry-Over	2006/2008 Carry-Over
Very Dry <3000 KAF	8,587	8,587
Dry 3000-4000 KAF	59,942	59,942
Average 4000-5000 KAF	137,566	125,962
Wet >4500 KAF	131,299	131,299

NSCC	2006 Carry-Over	2006/2008 Carry-Over
Very Dry <3000 KAF	86,086	86,086
Dry 3000-4000 KAF	285,256	285,256
Average 4000-5000 KAF	403,701	406,936
Wet >4500 KAF	471,627	471,627

Thus, the carryover provided by the *Final Order* for AFRD #2 of 50,700 or 56,000 acre feet, and for NSCC of either 54,700 or 57,200 acre feet, is grossly deficient when compared to the average year, or what is required by the CM Rules.

While the Director's calculation of reasonable carryover clearly contemplates providing water to the senior user in only one subsequent dry year, rather than dry ***years***, the *Order* does seek to address future dry years by modeling the impacts of curtailments and dividing the carryover water for the one subsequent dry year into portions that are then provided into future

dry years. Ironically, by dividing the water that would be necessary in the spring of the first subsequent dry year into portions that would arrive at the reaches in future dry years, and thereby reducing the amount that would have been provided in the spring of the first dry year, the carryover contemplated for the subsequent dry year is inadequate, even for the first dry year. Consequently, the new process of calculating carryover in the *Final Order* has retrenched from providing water for even one dry year, but instead provides only a partial water supply from carryover for one dry year.

The process has now followed an absurd path from the calculation of carryover for one dry year to the District Court's requirement that the carryover be calculated for future dry years to a retrenchment of a carryover that will only partially provide water for the first dry year. Clearly, the methodology proposed by the Director does not comply with Judge Melanson's July 24, 2009 *Order on Petition for Judicial Review.*

Finally, the *Final Order* impermissibly and unconstitutionally shifts the risk of shortage of water to the senior user by allowing the junior user to pump irrigation water out-of-priority all summer without first assuring that the junior has made provision to provide the necessary carryover water to the senior during the irrigation season.

The senior's water supply consists both of its natural flow, and of its storage. Injury to either requires that mitigation water be made available by the junior in order to receive consent from the Department to engage in out-of-priority ground water diversions. The amount of mitigation water that the junior must necessarily provide in order to engage in out of priority diversions must be both liberally calculated and be prospectively provided prior to the commencement of the out-of-priority pumping in order to place the risk of shortage with the junior, not the senior. Former Director Dreher explained this process in detail in his testimony at

the administrative hearing in this matter. The detail of his explanation requires some extensive quoting:

> Q. [MR. BROMLEY]: And that was a balancing decision that you made?
>
> A. [MR. DREHER]: Well, it brings in another factor that we haven't talked about, but it might help to see this.
>
> The outcome of this May 2, 2005, order was essentially ordered curtailment, recognizing that in the prior appropriation system of water rights administration, curtailment can be avoided by supplying replacement water. But if we were going to -- if we were going to allow the holders of the junior-priority ground water rights to supply replacement water and then – so that they could continue to divert out of priority, it was important that we not underestimate the amount of replacement water, because that would unfairly shift the burden or the risk onto the holders of the senior right, that they may not have sufficient water supply.
>
> So by using this more conservative projection of natural flow that would be available, that one was safeguard that we were not unnecessarily shifting the risk onto the holders of the senior rights that they wouldn't have an adequate water supply.
>
> Now, does that mean that the holders of the junior-priority ground water rights might have to provide more water as replacement water than was actually needed? Yes. But I think that's an appropriate burden for out-of-priority diversions to continue. They ought to have the higher burden, in my opinion.

Tr. Vol. I, p. 67, ln. 23 – p. 69, ln. 4.

> Q. Mr. Dreher, I'd like you to turn now to the fourth point in the June 2006 order and discuss how you arrived at your prediction of injury for members of the coalition in 2005.
>
> A. Well, we made the determination for each member of the Surface Water Coalition, what the minimum full supply would be. And, again, it was not intended to be the actual supply needed in 2005. It was intended to represent what's the minimum amount that might be, recognizing that climate conditions could cause a variation from that amount, either more or less. But to start with, start with the minimum full supply that was needed, and from that subtract the predicted total water supply that would be available for each member of the coalition.
>
> Q. And again, the total water supply is natural flow plus reservoir storage; is that correct?
>
> A. Correct. The water supply available was made up of both projected natural flow and projected storage. And if that number was positive,

then that meant that the – if that number was positive, then that meant that the projected supply would be less than the minimum amount needed. And if that number was negative, then it would mean that the projected supply would be greater than that amount needed.

But then to those numbers we would add the amount of carryover storage that would be reasonably needed, assuming in 2006 a drought similar to an average of 2002 to 2004, would occur. And so if there were already shortages, then adding this reasonable carryover storage would increase the level of injury that we determined in most instances.

Now, in a couple of entities, notably the Burley Irrigation District and the Minidoka Irrigation District –

Q. Are you looking at Finding of Fact 119?

A. I'm looking at Finding of Fact 119 in the amended order of May 2d. We made a determination that – or I made the determination that in the case of those two entities, there was no amount of carryover storage that was reasonable. And I'm sure that that was upsetting to those particular entities, because I think it could easily be misconstrued as saying that they're not entitled to have carryover storage. That wasn't the case.

What the zeros meant is that it was not necessary to curtail junior-priority ground water users to provide carryover storage for those two entities because their storage space was senior, and their senior space always filled. And so it wasn't necessary – because it always filled, it wasn't necessary to have carryover storage. But that certainly is not the same as saying that they're not entitled to carryover storage. It's not the same thing at all.

Q. So even in bad drought years their storage space was going to fill because it was close in priority to the –

A. Historically it had always filled.

Q. And that's why we see a difference, I guess, in the zeros and the other amount that you calculate for reasonable carryover storage. Does that have anything to do with the priority of the space that they hold or the location in which they irrigate?

A. Indirectly it does.

Q. So, Mr. Dreher, in looking at Finding of Fact 116, the third column, that was what you were discussing as your predicted shortages for natural – natural flow plus storage; is that correct?

A. That's correct. It's the predicted shortages to natural flow plus storage.

Q. And then Finding of Fact 120 takes the amount in the left column, plus the amount in the right column, which is predicted carryover and it arrives at a total projected storage; is that right?

A. A total projected storage of – which was adopted as the injury of 133,400 acre-feet.

Q. And then a prediction in the right column of how much water would be carried over?

A. Correct. That's correct.

Tr. Vol. I, p. 74, ln. 7 – p. 77, ln. 19.

Q. [MR. BROMLEY]: And, Mr. Dreher, these calculations for reasonable carryover storage, were they static or were they subject to change based upon climatic variability?

A. [MR. DREHER]: They were subject to change based upon climatic variability as well as subject to change based upon information that I had expected to be brought forward in the hearing process.

Q. Could changes in irrigation practices increase or decrease the amount of reasonable carryover?

A. Well, certainly if for some reason, let's say portions of the land served by these various entities, if for some reason portions of those were not irrigated because they were put into some sort of a crop-set-aside program or something like that, that could reduce the amount of carryover storage that would be needed, because you don't have the same amount of lands that you need to serve the following year.

Certainly, if a canal company institutes some level of additional efficiency, for whatever reason they had, that could reduce the total amount of water needed and then that could result in an increase in the amount of carryover storage that's derived because they didn't use all the water that they had.

So, sure, these – you know, these physical factors can affect how much carryover actually occurs and how much carryover would be deemed to be reasonable, again, for the purposes of curtailing junior-priority ground water users.

Tr. Vol. I, p. 79, ln. 20 – p. 81, ln. 1.

Again, the first year in implementing this it didn't work as well as I would have liked. But that was the process I was trying to get to. Replacement water up front in an amount sufficient to give certainty to the holders of the senior rights as to how much they would have and it would be adequate. Not necessarily all that

they wanted but adequate.

Q. And for purposes of reasonable carryover, what, under your methods, were you envisioning that to be owed or due?

A. Certainly, during the irrigation prior to the subsequent year. So in 2005 the amount for reasonable carryover would have been due during that irrigation season so that both sides, the ground water folks and the surface water folks, would know going into 2006 what they had.

And at least my intent was that if the amount necessary to provide reasonable carryover was not provided in 2005, that there would be some level of curtailment in 2006. And I couldn't have made that determination unless the replacement water was provided up front.

Tr. Vol. I, p. 103, lns. 3-25.

Thus, the failure of the *Final Order* to require the junior diverter to provide proof of the availability of the carryover water with which it will meet its obligation prior to allowing out-of-priority diversion of water by the junior during the irrigation season impermissibly shifts the risk of shortage to the senior, and cannot be allowed. Stated another way, the junior must show adequate mitigation for carryover shortages at the commencement of the irrigation season, or be denied the privilege of out of priority diversion of irrigation water during the irrigation season. Otherwise, juniors will pump unabated in violation of Idaho's prior appropriation doctrine while seniors unlawfully shoulder the risk that no water will be available or provided for carryover storage for use in subsequent years.

It is respectfully submitted that the carryover be in an amount reasonably considering the "average annual carryover for prior comparable water conditions" as required by the Department's CM Rules. Secondly, that the carryover is calculated for future dry *years*, rather than only contemplating that just the next year will be a dry year. Thirdly, that in giving consideration to multiple future dry years, rather than just the next irrigation season, the methodology employed does not reduce the amount needed for one dry year such that even the

first dry year will be inadequate. Finally, as a condition precedent to allowing a junior to divert water out of priority, the junior must show the availability of adequate carryover water at the commencement of the irrigation season, not the conclusion of the irrigation season after the out of priority pumping has already occurred.

IV. The Director's *Final Order* Fails to Comply with Idaho's APA and Judge Melanson's July 24, 2009 *Order on Petition for Judicial Review.*

The Director's *Final Order* dated September 5, 2008 did not resolve all issues that were presented at the administrative hearing in this action. Rather, the Director elected to effectively bifurcate orders, making multiple factual findings and resolving all legal issues other than setting forth his approach toward predicting material injury:

> 25. Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing on the order will be provided.[6]

The SWC objected to this procedure and on judicial review argued that the Idaho Administrative Procedures Act, Idaho Code §§ 67-5244 and 67-5246, along with Department Procedural Rules 720 and 740 (IDAPA 37.01.01.720 & .740), each provide that, following the issuance of a *Recommended Order*, the Director must issue a *Final Order* within certain specifically defined time frames. "The statutes and rules do not allow the Director to only decide some issues and then delay a decision on other issues until some, undefined, future date."[7]

Judge Melanson agreed with the position taken by the SWC. In the *Order on Petition for Judicial Review*, he wrote:

> The process for determining material injury and reasonable carryover is an integral part of the Hearing Officer's *Recommended Order*, and the issues raised in the delivery call. The Director abused his discretion by not addressing and

[6] **R. Vol. 39 at 7386.**
[7] *Surface Water Coalition's Joint Opening Brief* at page 57.

> including all of the issues raised in this matter in **one** *Final Order*. Styling the *Final Order* as two orders issued months apart runs contrary to the Idaho Administrative Procedures Act and IDWR's Administrative Rules. In addition, the issuance of separate "Final Orders" undermines the efficacy of the entire delivery call process, including the process of judicial review. Such a process requires certainty and definiteness as to the *Final Order* issued, so that any review of the *Final Order* can be complete and timely.[8]

Order at 32.

After making this finding, Judge Melanson ordered: "The case is remanded for further proceedings consistent with this decision."[9] Following a hearing on petitions for rehearing, Judge Melanson issued an *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* dated March 4, 2010. In that *Order*, Judge Melanson ordered, among other things:

> 1. The Director of IDWR shall issue a *Final Order* determining material injury to reasonable in-season demand and reasonable carryover by March 31, 2010.[10]

The decision of Judge Melanson in the *Order on Petition for Judicial Review* seems to conflict with the direction contained in the *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*. Even though he expressly found that one *Final Order* should be issued, the remand dated March 4, 2010 apparently directs the Director to issue a *Final Order* pertaining only to the issues of material injury to reasonable in-season demand and reasonable carryover.

On April 7, 2010, the Director issued the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-season Demand and Reasonable Carryover*. This *Final Order* did not address all issues raised at the hearing or that were decided in the *Final Order* dated September 5, 2008. Rather, the *Final Order* dated April 7, 2010 amends parts of the

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[8] *Order on Petition for Judicial Review* at page 32, emphasis added.
[9] *Order on Petition for Judicial Review* at page 33.
[10] *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at page 3.

Final Order dated September 5, 2008, sets forth a methodology for the prediction of material injury to reasonable in-season demand and reasonable carryover, but does not address many of the other issues addressed in the *Final Order* dated September 5, 2008.

The result of this is that the procedure being utilized for the issuance of Final Orders is the same procedure used by the Director in the *Final Order* dated September 5, 2008, which was determined by Judge Melanson to be an abuse of discretion and in violation of Idaho law and the Idaho Administrative Rules. Although apparently well intentioned, the parties are still dealing with two orders styled as Final Orders issued first months, now years, apart. This creates confusion concerning the procedural status of the two *Orders* and does not provide the certainty and definiteness that should result from one *Final Order*.

Unless the parties can agree on a procedure to combine the *Final Order* of September 5, 2008 with the *Final Order* dated April 7, 2010, it is the position of the SWC that Idaho law and the Department's Rules of Procedure require the Director to issue one complete *Final Order* addressing all of the issues resulting from the hearing in this action.

V. The Director's Order Must be Based on "Substantial and Competent Evidence" and Additional Proceedings are Provided for By Idaho Law, if Necessary.

The law is clear. The Director's decision must be "supported by substantial and competent evidence." *Mercy Medical Center v. Ada Cty.*, 146 Idaho 226, 192 P.3d 1050, 1053 (2008). The "reviewing courts should evaluate whether 'the evidence supporting [the agency's] decision is substantial." *Idaho State Insurance Fund v. Hunnicutt*, 110 Idaho 257, 261 (1986). Unless supported by "substantial evidence," the decision cannot stand. *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005) (citing Idaho Code § 67-5279(3)).

In his *Order on Petition for Judicial Review*, at page 33, Judge Melanson remanded the case to the Department for "further proceedings consistent with this decision." Idaho law

requires that agency actions not affirmed must be "remanded for further proceedings as necessary." Idaho Code § 67-5279(2); *see also Hardy v. Higginson*, 123 Idaho 485, 492 (1993) (Court may remand matter to IDWR for further proceedings in the record is insufficient to support its decision). Under the law, therefore, the Director's decision must be supported by substantial evidence or it will be "remanded for further proceedings."

Based on the new methods and equations employed in the *Final Order* and the Director's comments at the 4/15 status conference on IGWA's Mitigation Plan requesting the parties to file petitions for reconsideration, it is obvious that there is additional information that may be necessary for the Director's final material injury analysis. For example, the Director's new "Project Efficiency Calculation" (*Order* at 16) includes a new factor "Q_D" that has not been disclosed or adequately explained. With respect to CWN (*Order* at 17), there are adjustments made to this method that rely upon Agrimet effective precipitation and county-wide crop reporting that were not presented before. Finally, the methods to calculate RISD, Demand Shortfall, and the Reasonable Carryover method all present new methods or calculations that have not been disclosed prior to the issuance of the *Order*.

Stated another way, given the outstanding questions raised by the *Final Order* and the Director's effort to employ a procedure recommended by the Hearing Officer (that was admittedly not completely answered by the Hearing Officer due to the lack of information or resolution of certain issues), the Director can request the parties to submit additional information or hold a limited hearing on issues that have not been resolved by the Department. Moreover, it is apparent that the Director continues to have questions regarding the creation and application of the new material injury analysis and has failed to clarify or adequately define terms and methods used in the April 7, 2010 *Final Order* based upon the questions raised at the April 15, 2010

status conference.

The Director's *Order* cannot be confined to the existing record if that record does not contain sufficient information to make a legally enforceable decision. Absent such information, "further proceedings [are] necessary." *See* Idaho Code § 67-5279(2).

Holding further proceedings, including a new hearing if necessary, does not require a rehearing on all issues already decided before the Department. The Director could simply limit the scope of any "further proceedings" to address the specific information needed to draft and implement a legally enforceable method to determine material injury and reasonable carryover consistent with Judge Melanson's July 24, 2009 decision. Although the Director previously represented that all the information needed to comply with Judge Melanson's decision is included in the agency record (*see IDWR Response Brief on Rehearing* at 3), it is apparent the Director has the ability to conduct "further proceedings" to ensure there is sufficient information to establish, support, and administer a lawful material injury procedure. Absent sufficient information, the Director's *Final Order* will not be legally enforceable.

CONCLUSION

For the above reasons the Director should reconsider and clarify the April 7, 2010 *Final Order*.

DATED this 21st day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2010, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition for Reconsideration and Clarification of April 7, 2010 Final Order* on the following by the method indicated:

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