

RECEIVED

OCT 19 2015

DEPARTMENT OF
WATER RESOURCES

Michael A. Kirkham (ISB #8939)
mkirkham@idahofallsidaho.gov
Assistant City Attorney
CITY OF IDAHO FALLS
P.O. Box 50220
Idaho Falls, ID 83405
Telephone: (208) 612-8177

Robert L. Harris, Esq. (ISB #7018)
rharris@holdenlegal.com
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for the City of Idaho Falls

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE CITY OF
IDAHO FALLS MITIGATION PLAN FOR
THE SURFACE WATER COALITION
CALL

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

MP-2015-005

Docket No. CM-~~DC~~ 2015-_____

**CITY OF IDAHO FALLS
CONJUNCTIVE MANAGEMENT RULE
(CMR) 43 MITIGATION PLAN**

The City of Idaho Falls (the “City”), an Idaho municipal corporation, by and through its above-identified counsel, hereby submits this *City of Idaho Falls Conjunctive Management Rule (CMR) 43 Mitigation Plan* (the “Plan”) in response to the Surface Water Coalition’s (the “SWC”) ¹ delivery call (hereinafter, the “SWC Call”). The SWC Call was initially filed in January of 2005 and is ongoing. The SWC Call has resulted in certain administrative orders from the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) necessary to quantify material injury to the SWC’s senior surface water rights resulting from junior ground water diversions from the Eastern Snake Plain Aquifer (“ESPA”). The methodology to determine and quantify material injury to each individual member of the SWC is now described in the Director’s April 16, 2015 *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (the “Methodology Order”) (a copy of which is included in the attached appendix). Based on the Methodology Order, the Director predicted an in-season demand shortfall to the SWC of 89,000 acre-feet (“AF”) in 2015. *Final Order Regarding April 2015 Forecast Supply (Methodology Steps 1-3)*, April 16, 2015, at 6 (the “As-Applied Order”) (a copy of which is included in the attached appendix).

The Plan is submitted pursuant to Rule 43 of the Idaho Department of Water Resources’ *Rules for Conjunctive Management of Surface and Ground Water Resources* found at IDAPA ² 37.03.11 (hereinafter, the “CM Rules”) (a copy of which is included in the attached appendix). Rule 43 of the CM Rules is hereafter referred to as “CMR 43.”

1 The SWC consists of the A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

2 “IDAPA” is an acronym for rules promulgated pursuant to the Idaho Administrative Procedure Act (Chapter 52 of Title 67 of the Idaho Code). The IDAPA administrative rules can be accessed at <http://adminrules.idaho.gov/rules/current/index.html>

The City is not a member of Idaho Ground Water Appropriators, Inc. (“IGWA”)³ or one of its member ground water districts. The City is fully aware of the fruitful negotiations that have occurred between the SWC and IGWA which have resulted in the *Settlement Agreement Entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* (hereinafter, the “SWC-IGWA Agreement”) (a copy of which is included in the attached appendix). See also *Water Wars—Is the End in Sight?*, Randall C. Budge, Idaho Water Users Association Summer Water Law and Resource Issues Seminar, June 22, 2015 (hereinafter, “Water Wars”) (a copy of which is included in the attached appendix). The *SWC-IGWA Agreement* provides for the following:

(1) Goals:

- Stabilize the decline in ESPA storage, and to restore ground water levels in the ESPA to protect and preserve water supplies for surface water users and groundwater users.
- Settle all present and future mitigation obligations of junior groundwater users to the SWC;
- Provide a “safe harbor” from curtailment and water supply certainty to participating junior groundwater users; and

(2) Near Term Practices for 2015:

- IGWA will lease 110,000 AF of storage for assignment to the SWC for 2015.
- IGWA will lease additional water for ongoing conversion projects, up to \$1.1 million.
- The Director’s 2015 *Methodology Order* is stayed and the *As-Applied Order* is rescinded.
- The above satisfies all 2015 mitigation obligations to the SWC.

3 References to IGWA herein incorporate its member ground water districts (North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, and Jefferson Clark Ground Water District).

- The parties will work to identify and pass necessary legislation and mitigation plans to implement the Term Sheet.

(3) Long Term Practices, Commencing 2016:

- 240,000 AF of average annual groundwater diversions reduction by ground water users.
- 250,000 AF average annual recharge by the State of Idaho.
- Each participating ground water district will be responsible to satisfy their share of the diversion reductions.
- 50,000 AF annually of storage water leased by IGWA and for delivery to the SWC as needed for irrigation requirements, with any excess used for recharge and conversions.
- Groundwater users will not irrigate sooner than April 1 or later than October 31.
- Measuring devices will be installed by the beginning of the 2018 irrigation season.
- End gun removal program funded by the National Resources Conservation Service (“NRCS”).
- Additional conversions from ground water irrigated acres to surface water irrigated acres above American Falls.

(4) Adaptive Management.

- Adaptive management plan for the ESPA to be developed.
- An ESPA level goal to be identified.
- Once the goal is achieved, groundwater diversion reductions will be reduced or removed.

(5) Safe Harbor. No groundwater user within participating districts will be subject to curtailment as long as the Term Sheet is being performed. Non-participants subject to administration.

(6) Term. The agreement is perpetual.

It will be the responsibility of each district to determine how their share of the 240,000 AF reduction in consumption will be achieved. Possible mechanisms include end gun removal programs, additional Conservation Reserve Enhancement Program (“CREP”) acres, additional conversion acres, rotation to less water intensive crops, fallowing land and private recharge.

The Idaho Water Resource Board (“IWRB”) and the Department will be

responsible to develop and implement recharge programs to achieve the average annual goal of 250,000 AF.

See, e.g., *Water Wars* at 11-13.

Unfortunately, there are no specific provisions in the *SWC-IGWA Agreement* that address issues specific to municipalities, municipal water use, the unique dual nature of municipal water rights possessing consumptive and non-consumptive components, the water use patterns of municipalities, the inherent growth that municipalities will face in the future, how future growth can occur under the settlement framework, and the relatively minor overall percentage of ground water use from municipalities as compared to ground water usage for irrigated agriculture. While the terms of the *SWC-IGWA Agreement* fit nicely into an agricultural-based framework, the terms do not fit as well for municipalities. After careful consideration, the City has elected at this point not to join IGWA or one of its member ground water districts, although it reserves the right to do so at a future time as the political and legal landscape on this issue is ever-changing, and is likely to change given the possibility that legislation may result from the *SWC-IGWA Agreement*. Furthermore, the City's decision to submit this Plan should not be interpreted or viewed as an indication or evidence of lack of support for the *SWC-IGWA Agreement* by the City or the concepts and principles contained therein. To the contrary, the City applauds the collaborative approach contained in the *SWC-IGWA Agreement* and the actions to be undertaken. Nevertheless, after a review of the City's water use and water resources in light of the terms of the *SWC-IGWA Agreement*, it has elected to submit this independent CMR 43 mitigation plan instead of joining the *SWC-IGWA Agreement* as a party or as a participant in one of its member ground water districts. Because non-participants in the SWC-IGWA Agreement are subject to conjunctive administration of their water rights pursuant to the *Methodology Order*, approval of the City's Plan by the Department is necessary to protect the City.

Submission of this Plan is further necessary because it cannot be based on IGWA's prior approved mitigation plan. See, e.g., *Letter from Gary Spackman to Robert E. Williams, Candice McHugh, and Chris Bromley*, June 2, 2015 (a copy of which is included in the attached appendix) ("If you want the mitigation activities proposed in the Notice to be approved for mitigation in the SWC delivery call, you must resubmit the Notice as a Conjunctive Management Rule 43 mitigation plan to be processed in accordance with the conjunctive management rules.").

None of the City's water rights are currently under a curtailment order as a result of the SWC Call, nor have any such rights been curtailed since the SWC Call was first filed in 2005. The City has been prepared to provide storage water for mitigation purposes in the event a specific determination of material injury based on the City's water use was made by the Department. As a practical matter, mitigation obligations resulting from the SWC Call since the beginning have been satisfied by IGWA's mitigation actions. The City, through its ownership of shares in Palisades Water Users, Inc. ("PWUI"), supported IGWA through leases of storage water from PWUI to IGWA in certain years to be used as replacement water delivered to the SWC.

This Plan is being submitted to avoid any disruption in the City's operations and to ensure that the necessary approvals are in place to mitigate—without procedural delay—for the SWC's senior water rights determined to be impacted by exercise of the City's ground water rights. Approval of this Plan will avoid material injury to the SWC's patrons and shareholders. Establishment of a mitigation framework for the City is necessary because of ever-changing water conditions, a reality previously recognized by the Department in its yearly calculation of material injury:

Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director's predictions of material injury to RISK and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director's professional judgment

as the manager of the State's water resources.

Methodology Order at 29 (Finding of Fact ¶17).

The City's intent is to be proactive and seek approval of this Plan in order to establish a framework for mitigating to the SWC. However, the measures set forth in the Plan are not intended to impose any mitigation obligation on the City unless and until material injury to the SWC is determined by the Department. Only then will the City implement its mitigation measures with an established and approved framework. It will then only be necessary for the Department or the City to calculate certain values, through modeling or other methods, to quantify the City's mitigation obligation, the benefits of mitigation activities, or the amount of water that should be directly delivered to the SWC.

By filing this Plan, the City is not waiving any defenses it may have, including (1) that all or a portion of the City's water rights are non-consumptive under Idaho law; (2) that the domestic use under the City's water rights should be treated equally to those of other domestic users and thereby be exempt from the SWC Call or any resulting curtailment, and (3) any other defenses provided for by law.

I. MITIGATION PLAN

CMR 43 is set forth in the appendix and describes the information that must be contained in a mitigation plan. In accordance with CMR 43, the City submits the following information.

A. Name and Mailing Address the Person or Persons Submitting the Plan.

The names and mailing address of those individuals who are submitting the Plan, and who are to receive correspondence in regards to this Plan, are as follows:

<p style="text-align: center;">Randall D. Fife City Attorney City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>	<p style="text-align: center;">Chris Fredericksen, P.E. Public Works Director City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>
<p style="text-align: center;">Rebecca Casper Mayor City of Idaho Falls 308 Constitution Way Idaho Falls, ID 83402</p>	<p style="text-align: center;">David R. Richards, P.E. Water Superintendent City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>
<p style="text-align: center;">Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC 1000 Riverwalk Dr. Suite 200 P.O. Box 50130 Idaho Falls, ID 83405</p>	<p style="text-align: center;">Kathy Hampton City Clerk City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>

B. Identification of the Water Rights for Which Benefit the Mitigation Plan is Proposed.

The City’s municipal water rights are set forth on **Exhibit 1**. The City also possesses other miscellaneous water rights described on **Exhibit 2**, most of which are for domestic uses that are not subject to the SWC Call. However, Water Right Nos. 25-7299 (the Sandcreek Golf Course supplemental ground water right) and 35-8934 (the dust abatement right for Noise Park, a motorcycle track located on the western edge of the City) do not appear to qualify as domestic uses, and are therefore included as City-owned water rights protected under the Plan.

C. A Description of the Plan Setting Forth the Water Supplies Proposed to Be Used For Mitigation and Any Circumstances or Limitations on the Availability of Such Supplies.

1. Rights to Use Water.

The City currently owns or possesses the following rights to use both ground water and surface water:

DESCRIPTION OF RIGHTS TO USE WATER	NOTES
Palisades Water Users, Inc.	The City possesses 1,180 shares of PWUI stock. Each share represents an acre-foot of space, which yields water to the City on a pro rata basis with all other PWUI stockholders once a determination of fill is made by Water District 1. There are no limitations on the City's use of water allocated to its PWUI shares if directly provided for irrigation use to the SWC. The City's use of water allocated to its PWUI shares for ground water recharge, however, may subject the City's allocation in the following year to any "last-to-fill" provision also applied to PWUI under the <i>Water District 1 Rental Pool Procedures</i> .
Rights to 1,249.6 acres of surface water from the Idaho Irrigation District, New Sweden Irrigation District, and Progressive Irrigation District. See map attached as Exhibit 3 .	Of these acres, 305.3 acres of New Sweden Irrigation District water and 491.6 acres of Idaho Irrigation District water—for a total of 796.9 acres—are not currently being irrigated. These values may increase over time as additional properties are annexed into the City. Provided consent of the irrigation district(s) is obtained, water allocated to these non-surface water irrigated lands may be utilized for mitigation.
Ground water	See attached summary of the City's ground water rights at Exhibits 1 and 2 .

2. Proposed Ground Water Recharge Activities and Its Resulting Benefits.

The City will continue to pursue ground water recharge projects, the details of which have not yet been prepared, but generally consist of obtaining water supplies for such recharge, investigating possible dedicated recharge sites, constructing dedicated recharge sites, proposing contracts with local irrigation districts and canal companies to participate in recharge activities through their canals during the non-irrigation season, and delivering water to Jensen's Grove near Blackfoot.⁴

⁴ The City has presented proposals to the IWRB for funding of these types of projects, but to date, the IWRB has refused to provide such funding. The City may or may not pursue funding further with the IWRB.

The City believes it is entitled to use the reach gain benefits to the Snake River from its ground water recharge activities as mitigation. It is anticipated that the Department or the City will use version 2.1 of the Eastern Snake Plain Aquifer Model (“ESPAM”) or its successor to model the benefits to the ESPA from the City’s recharge activities. Recognition of the City’s ground water recharge is consistent with the policy set forth by the Idaho Legislature to fully support such activities in order to “promote and encourage the optimum development and augmentation of the water resources of this state.” Idaho Code § 42-234. In addition, Policy 11 of the *Idaho State Water Plan* prepared by the Idaho Water Resource Board (a copy of which is included in the attached appendix) states that “[a]quifer recharge should be promoted and encouraged, consistent with state law” and that “[m]anaged recharge projects may be an appropriate means for enhancing ground and surface water supplies, providing mitigation for junior ground water depletions, or to help maintain desirable aquifer levels.” *Idaho State Water Plan* at 15.

IDWR has previously approved mitigation by way of ground water recharge and given mitigation credits for past recharge activities in both the SWC Call and certain spring water users’ delivery call proceedings. See *Order Approving in Part and Rejecting in Party IGWA’s Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order* (April 11, 2014), *IGWA’s Mitigation Plan for Conversions, Dry-Ups and Recharge* (“Mitigation Plan for Springs”) (October 6, 2009) (approved by the Director on May 14, 2010), and *IGWA’s Mitigation Plan for the Surface Water Coalition Delivery Call* (“Mitigation Plan for SWC Call”) (November 9, 2009) (approved by the Director on June 3, 2010) (copies of both documents are included in the attached appendix).

As explained in the above-cited authorities, IGWA filed its *Mitigation Plan for Springs* on October 6, 2009 to provide mitigation on behalf of its ground water district members and others, including non-member participants in their mitigation activities. Following notice publication, no protests were filed to the mitigation plan. IGWA proposed the mitigation plan “to provide IGWA and members with the right to obtain mitigation credit for the Mitigation Activities that will then be applied in response to a finding of material injury to senior water rights under the CM Rules.” *Mitigation Plan for Springs* at 2. The mitigation plan recognized that “in response to a delivery call or order from the Director, the exact amount of mitigation credit obtained from a specific Mitigation Activity would be subject to analysis and calculation by the Director based upon the ESPA Model or other methodologies determined by the Department or Courts.” *Id.* at 2-3.

The Director’s May 14, 2010 order of approval summarized the provisions of IGWA’s *Mitigation Plan for Springs* and reached the following conclusions supporting the plan’s approval:

[Conclusion No. 1 is a recitation of CMR 43].

2. The Plan, filed by IGWA, complies with CM Rule 43.01 by identifying the current conjunctive management delivery calls filed by Blue Lakes, Clear Springs, and the SWC. The Plan describes the water supplies for purposes of conversion and recharge. [fn. omitted] The Plan requests that the Director use the ESPA Model to determine mitigation credits. *See* CM Rule 43.03e. On its face, the Director is able to consider the factors in CM Rule 43.03.

3. Regarding CM Rule 43.02, the Plan was submitted, published, and no protests were filed. A hearing is not necessary on the Plan itself. In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.

Order Approving Mitigation Plan at 3-4 (a copy of which is included in the attached appendix).

Similarly, IGWA’s *Mitigation Plan for SWC Call* proposed ground water recharge. After this plan was protested by the SWC and a hearing was held, the Director issued an *Order Approving Mitigation Plan* on June 3, 2010, which approved the plan with conditions. The SWC

petitioned for judicial review of the Director's order arguing that it did not comply with the requirements of the CM Rules in several respects. The district court issued a *Memorandum Decision and Order on Petition for Judicial Review*, Twin Falls County Case No. CV-2010-3075 (*"Mem. Decision"*) (a copy of which is included in the attached appendix) on January 25, 2011, affirming the Director's order approving IGWA's plan. The district court concluded that IGWA's mitigation plan, as approved by the Director with conditions, satisfied the requirements of the CM Rules. Among the many issues addressed, the court found that CMR 43 expressly authorizes the implementation of a long-term mitigation plan "provided the plan includes 'contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.'" *Mem. Decision* at 15. The court relied on CMR 43.03.c providing that: "A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply." *Id.* No appeal was taken from the district court's decision.

The City requests that the Department recognize the benefits associated with the City's future groundwater recharge activities as part of a long term mitigation plan. The water delivered for recharge will be from one or more of the following sources: (1) water allocated to the City's PWUI shares, (2) storage water from various irrigation districts provided pursuant to a contractual agreement between the City and the irrigation districts, (3) water leased from the Water District 1 Rental Pool; and/or (4) water diverted under any other authorized ground water recharge rights pursuant to which the City has received authorization to divert under.

The water that will primarily be used for ground water recharge is storage water from the upper Snake River reservoir system, the same system from which the SWC derives its storage supply. This is a sufficiently reliable water supply which will not enlarge the elements of any

storage or natural flow water rights. See CMR 43.03.i and h. Use of any such storage water for ground water recharge may be subject to any applicable rules or procedures established by Water District 1 or the Department. There are no limitations from PWUI for use of water allocated to the City's shares which may be used for mitigation purposes by direct delivery of water for irrigation purposes to the SWC. Measuring devices will be installed to accurately measure the amount of recharge to the ESPA through the recharge system(s). CMR 43.03.k.

D. Mitigation Plan Factors Analysis (CM Rule 43.03).

The City's proposed mitigation alternatives are discussed below. Each is presented here on its own merits, without any order of preference, and the decision as to which mitigation activities will ultimately be implemented will be decided by the City once the City has received an order from the Director setting forth the acceptable mitigation activities after review and approval of such activities under the factors set forth in CM Rule 43.03. To the extent there is insufficient mitigation available from one of the following mitigation concepts, the City will make up the shortfall with mitigation under another of the following approved mitigation concepts:

1. Recognition of Discharge into the Snake River from City's Wastewater Treatment Facility.

The City currently discharges water into the Snake River from its wastewater treatment facility as an approved treatment method by the United States Environmental Protection Agency, a facility that recently received a \$21 million upgrade.⁵ The discharge represents the non-consumptive portion of the City's municipal water rights, which the City should receive credit for in the event the Department models the total diversion from the City's municipal water rights to generate modeled depletive impacts to the Snake River from such municipal diversions.

⁵ See <http://www.postregister.com/articles/featured-news/2014/05/09/21-million-sewer-plant-upgrade-track#>

Water District 1 already accounts for and assumes that the wastewater constitutes reach gains to the Snake River. To the extent such discharges are not already approved as mitigation for other water rights owned by the City,⁶ the City will measure and account for discharges to the Snake River and designate that such water—because it is still within the City’s control—is to be accounted for as mitigation. From October 1, 2014, up to the submission date of this Plan, the City has discharged an average of 9.548 million gallons of water every day through the City’s facility. This equates to approximately 14.8 cubic feet per second (“cfs”) per day of mitigation water. $(9,548,000 \text{ gpd} / 325,850 \text{ gallons per AF} / 1.9835 \text{ AF/day/cfs} = 14.77 \text{ cfs}$, or adjusted for rounding, 14.8 cfs). In years where mitigation is required, the City will provide discharge records for the prior twelve (12) months in order to provide an average monthly discharge to be credited to the City to meet its mitigation obligation during the months the City is obligated to mitigate to the SWC, including during the non-irrigation season for any determination of material injury to the SWC’s reasonable carryover storage water amounts.

2. Direct Delivery of Storage Water.

The City will assign storage water allocated to its 1,180 shares of PWUI stock, up to the mitigation amount required, to the Water District 1 storage water accounts of the injured SWC members. The Director has previously found that “[s]torage in the Snake River reservoirs is a reliable source of replacement water.” *Order Approving Mitigation Plan* at 9,

⁶ Diversion of water under the City’s Gem State hydroelectric project is authorized under two of the City’s hydropower water rights (Water Right Nos. 01-7018 and 01-7051) and has as a condition of the exercise of these rights a condition where 5 cubic feet per second (cfs) of treated effluent from the Anheuser-Busch Malting Plant is dedicated to replace losses “caused by this power facility.” The Anheuser-Busch Malting Plant water is treated by the City, and is not discharged directly from the plant. Therefore, the second portion of this mitigation condition requires that “[a]ny loss to the Snake River resulting from conveyance and use pursuant to this license not mitigated by treated malted plant effluent shall be mitigated with other replacement water.” Therefore, 5 cfs of the City’s 14.8 cfs discharge is already allocated for a mitigation purpose, which leaves 9.8 cfs available for mitigation based on a discharge of 9.548 million gallons per day. This number could vary depending on the discharge from the facility.

CM-MP-2008-007, June 3, 2010 (a copy of which is included in the attached appendix).⁷ Water District 1 records of fill allocation to PWUI reveal that, based on a five-year average, the City's shares will yield approximately 864.2 acre feet per year as described on the following chart:⁸

Year	Percent Fill to Palisades Space	Yield to City Shares (in AF) ⁹	Percentage Share of Evaporation ¹⁰	Evaporation Loss (in AF)	TOTAL YIELD TO CITY SHARES ¹¹
2015	100%	1180.0	2.4%	28.3	1151.7
2014	47%	551.1	2.7%	14.8	536.3
2013	45%	531.1	2.4%	12.6	518.5 ¹²
2012	82%	970.9	2.4%	23.8	947.2
2011	100%	1179.9	1.1%	12.5	1167.3 ¹³
Average	75%	882.6	2.2%	18.4	864.2

3. Recognition of Credits for Ground Water Recharge.

The Department or the City will use ESPAM version 2.1 or its successor to model the benefits to the ESPA from the City's proposed recharge activities. Injury is generally described as impact in the historical quantity, timing, and location of the amounts the water right holder has been historically entitled. See, e.g., *IDWR Mitigation Plan Evaluation Checklist*, available at http://www.idwr.idaho.gov/WaterManagement/WaterRights/WaterRightTransfers/PDFs_09/Mitigation_Plan_Eval_Checklist.pdf ("A mitigation plan must offset the depletion of water

⁷ See also the Hearing Officer's *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation at 13, IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF THE SURFACE WATER COALITION*, April 29, 2008: "Stored water is available to be used as a mitigation alternative to curtailment or sale to others to meet replacement water requirements."

⁸ The information contained in the chart was obtained directly from Water District 1.

⁹ PWUI allocates water to all of the company's shares in proportion to its percentage of fill every year.

¹⁰ Some numbers in this column have rounded percentages.

¹¹ Some numbers in this column were slightly rounded.

¹² PWUI rented approximately 4,000 AF from the Water District 1 Rental Pool in 2013, which increased its allocation for this year. If PWUI leases water similar to 2013, the City is entitled to its pro rata share of the leased amount as an increase to the City's initial allocation.

¹³ Of the total allocation amount to PWUI in 2011, PWUI did contribute 1193 AF to the Water District 1 Rental Pool. The amount contributed was internally allocated to certain shareholders. For purposes of this chart, the relevant information is the historical allocation amount in order to provide evidence of water available to the City for mitigation purposes.

associated with a new appropriation or transfer in quantity, time, location, and/or quality to protect senior water right holders.”). The City’s ground water recharge will be subject to analysis and calculation of credits by the Director based upon the current ESPA model or other methodologies determined by the Department or the courts. Credits for ground water recharge may be recognized if ground water recharge occurs under an approved CM Rule 43 mitigation plan. See *Final Order Denying Request for Mitigation Credits*, IN THE MATTER OF A REQUEST FOR RECOGNITION OF GROUND WATER RECHARGE CREDITS IN THE NAME OF THE EASTERN SNAKE PLAIN RECHARGE ALLIANCE, March 23, 2012 (a copy of which is included in the attached appendix). Calculations quantifying the benefits, or credits, from ground water recharge may be, and often are, performed by the Department. See *id.*, *Notice of Request for Staff Memorandum*, March 23, 2012 (a copy of which is included in the attached appendix).

Alternatively, the City will employ a consultant to generate modeling results from the current ESPAM showing the credits that have accrued by virtue of the City’s mitigation activities.

The modeling output of the City’s ground water recharge activities will come from acceptable values for the ESPA and is based upon reliable computer simulations to make these calculations. See CMR 43.03 e. and f. Within the confines of a mitigation plan submitted under Rule 43 of the CM Rules, ground water recharge can be used for mitigation.

4. Direct Delivery of Unused Irrigation District Water Allocated to City Property.

The City will assign unused water allocated to City-owned property by virtue of its membership in irrigation districts to the Water District 1 storage water accounts of the injured members of the SWC. The ability of the City to obtain and provide such water will be evidenced by a contract between the City and each individual irrigation district.

5. Rental of Water from the Idaho State Water Supply Bank or the Water District 1 Rental Pool.

In addition to the water allocated to shares of PWUI stock identified above, it may also be possible for the City to lease surface water from the Idaho Water Supply Bank or the Water District 1 Rental Pool for direct delivery to the injured members of the SWC. The lease will be subject to the rules or procedures implemented by the Idaho Water Supply Bank or the Water District 1 Rental Pool, and would also be limited by the water supply that may also be available for lease.

6. Petition to join the Bonneville-Jefferson Ground Water District and/or IGWA as a non-member participant.

The nearest ground water district to the City is the Bonneville-Jefferson Ground Water District. The City could participate as a non-member of the Bonneville-Jefferson Ground Water District to receive the benefits of an approved mitigation plan, if any, pursuant to Chapter 52 of Title 42 of the Idaho Code.

7. Enter into a private lease for either or both surface or ground water rights to be used for mitigation.

In the event water supplies are not available through the Idaho State Water Bank or the Water District 1 Rental Pool, the City proposes to enter into leases with private water right holders of either surface or ground water to be used for mitigation purposes. To the extent IDWR has any additional guidance of what reporting is necessary under this option, the City requests that such guidance be provided. In the absence of such guidance, the City will provide IDWR with the water right owner, the water right number, the authorized place of use, and assurances and/or evidence of non-irrigation for the relevant irrigation season(s).

Measurement and reporting under each proposal will occur under each of the approved


mitigation activities proposed as necessary to document the activity and effectiveness of the mitigation. CMR 43.03.k. The proposed mitigation activities under this Plan will not injure other water rights and fully complies with the state's policy to conserve and enhance its water resources. Further, the proposed mitigation activities have and will continue to promote the optimum development of the water resources in the public interest as set forth in Article XV, § 7, of the Idaho Constitution, and should be fully supported and encouraged.

II. REQUEST FOR RELIEF

The City hereby requests that IDWR process the Plan as follows:

1. IDWR advertise this Plan as required under the CM Rules;
2. IDWR determine that a hearing on the Plan is not necessary, or in the alternative, to the extent a hearing is necessary, that such a hearing be held;
3. The Director enter an order approving the Plan upon such terms and conditions as may be reasonable and necessary to comply with CMR 43 and forestalling curtailment of the City's water rights provided the City complies with the Plan;
4. The Director provide for such other and further relief as the Director may determine is reasonable and necessary to enable the City to mitigate for the City's determined material injury to the SWC.

DATED this 16th day of OCTOBER, 2015.



Michael A. Kirkham
CITY OF IDAHO FALLS



Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

City of Idaho Falls Water Rights

Municipal Rights

Water Right #	Well #	Year Built	Priority Date	Diversion Rate (cfs)	Volume Limitation (acre-ft)	Source	Partial Decree or Licensed?	Notes
25-02095	1	1926	February 25, 1927	5.2	3758.04	Groundwater	Partial Decree	Volume limitation calculated.
25-02142	2-8	1930-1959	April 8, 1963	50.2	20200*	Groundwater	Partial Decree	*A condition limits this right and 35-03020 to a combined annual diversion volume of 20,200 af and a combined diversion rate of 50.2 cfs. The combined diversion rate of this right, 25-07058, and 35-03020 is limited to 56.34 cfs.
35-03020	6	1954	April 8, 1963			Groundwater	Partial Decree	*A condition limits this right and 25-2142 to a combined annual diversion volume of 20,200 af and a combined diversion rate of 50.2 cfs. The combined diversion rate of this right, 25-2142, and 25-07058 is limited to 56.34 cfs.
25-02143	9,10	1962-65	November 22, 1963	17.1	12358.17	Groundwater	Partial Decree	Volume limitation calculated.
35-07001	11	1965	July 13, 1967	8.9	6432.03	Groundwater	Partial Decree	Volume limitation calculated.
25-07022	12	1970	January 18, 1972	7.35	5311.85	Groundwater	Partial Decree	Volume limitation calculated.
25-07058	13	1974	August 22, 1974	6.14	4437.38	Groundwater	Partial Decree	Water right for Well #13. This right combined with 25-2142 and 35-3020 is limited to a combined diversion rate of 56.34 cfs. Volume limitation calculated.
35-07841	14	1978	February 7, 1979	7.35	5311.845	Groundwater	Partial Decree	Volume limitation calculated.
25-07298	15	1983	December 23, 1982	3.35	3541.23	Groundwater	Partial Decree	Volume limitation calculated.
25-07398			January 11, 1985	1.55		Groundwater	Partial Decree	
25-07654	15-B	2003	September 3, 1997	4.93	3562.911	Groundwater	Licensed	Still in permit stage, waiting for field exam. Volume limitation calculated.
35-08682	16	1992	February 10, 1988	8.02	5796.05	Groundwater	Licensed	Volume limitation calculated.
25-07467	17	1994	September 9, 1988	8.02	5796.05	Groundwater	Licensed	Volume limitation calculated.
Totals				128.11	76505.557			

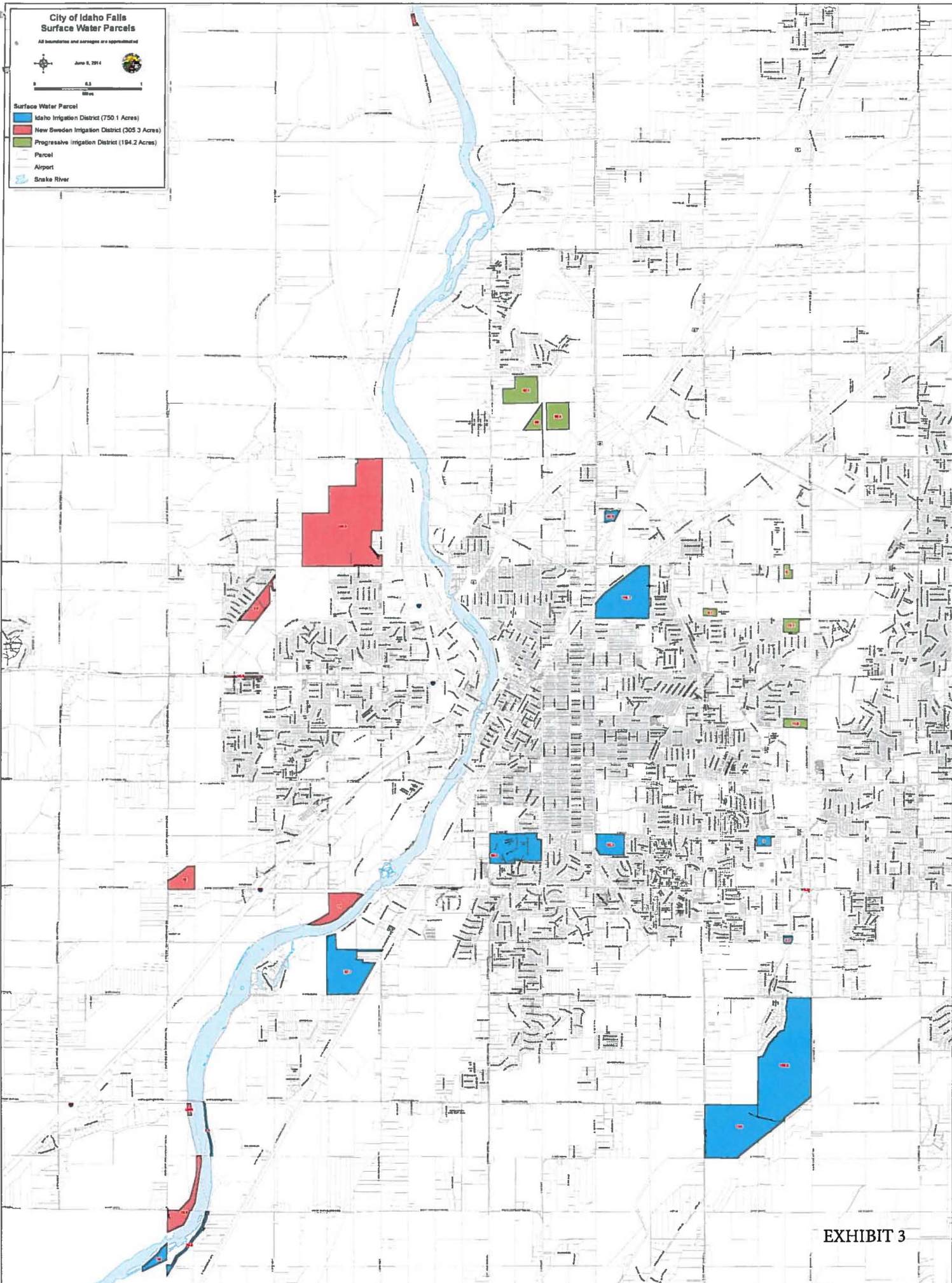


City of Idaho Falls Water Rights

Irrigation/Wildlife/Commercial/Stockwater/Domestic Rights

Water Right #	Priority Date	Diversion Rate (cfs)	Volume Limitation (acre-ft)	Source	Partial Decree or Licensed?	Notes
25-13067	February 11, 1947	0.04	28.91	Groundwater	Partial Decree	Domestic Use; Fielding Memorial Park shop and office facilities. Volume limitation calculated.
25-13068	June 1, 1947	0.04	28.91	Groundwater	Partial Decree	Domestic Use; Residence near sewage disposal facility (Koester Farm). Volume limitation calculated.
35-12568	June 4, 1959	0.04	28.91	Groundwater	Partial Decree	Water for City Animal Shelter. Volume limitation calculated.
25-13062	February 15, 1962	0.04	28.91	Groundwater	Partial Decree	Domestic Use; This right is for drinking fountains at Sandcreek. Volume limitation calculated.
25-13063	February 15, 1962	0.04	28.91	Groundwater	Partial Decree	Domestic Use; This right is for the SandCreek caretaker's residence. Volume limitation calculated.
25-13069	November 1, 1971	0.04	28.91	Groundwater	Partial Decree	Domestic Use; Residence near Heyrend Gravel Pits. Volume limitation calculated.
25-07044	January 23, 1974	0.14	1.2	Groundwater	Partial Decree	Domestic Use; Water right for Sandcreek Facilities. Volume limitation part of water right.
35-12567	July 15, 1975	0.04	28.91	Groundwater	Partial Decree	Domestic Use; Caretaker's residence at Noise Park. Volume limitation calculated.
25-13066	March 17, 1978	0.04	28.91	Groundwater	Partial Decree	Domestic Use; Lincoln Park drinking fountains, restrooms, etc. Volume limitation calculated.
25-07188	March 21, 1980	0.1	4.6	Groundwater	Partial Decree	Stockwater/Domestic Use Water Right Sandy Downs. Volume limitation part of water right.
25-07299	December 23, 1982	2.23	946	Groundwater	Partial Decree	Irrigation; Sandcreek Golf Course Irrigation. Volume limitation part of water right.
25-07415	February 23, 1987	0.04	0.6	Groundwater	Licensed	Domestic Use; Gem State Project power house. Volume limitation part of water right.
25-13064	April 1, 1988	0.04	28.91	Groundwater	Partial Decree	Domestic Use; Caretaker for Sandy Downs Race Track. Volume limitation calculated.
25-07500	April 21, 1989	0.02	6.6	Groundwater	Licensed	Domestic and Irrigation Uses; This right is for picnic area and shelters at Gem Lake Dam.
25-07501	April 21, 1989	0.02	1.2	Groundwater	Licensed	Domestic Use. Volume limitation part of water right.
35-08934	June 2, 1989	0.24	2.9	Groundwater	Licensed	This right is for dust abatement at Noise Park. Volume limitation is part of water right.
01-07104	September 22, 1989	10	7307	Snake River	Licensed	Irrigation/Wildlife Uses; Irrigation is for 20 acres. Volume limitation is part of water right.
25-07009	August 7, 1970	.23	166.22	Groundwater	Partial Decree	Water Right Sandy Downs.
Totals		13.15	8530.27			





**City of Idaho Falls
Surface Water Parcels**

All boundaries and acreages are approximate

June 9, 2014

0.5
Miles

Surface Water Parcel

- Idaho Irrigation District (750.1 Acres)
- New Sweden Irrigation District (305.3 Acres)
- Progressive Irrigation District (194.2 Acres)

Parcel

- Airport
- Snake River

RECEIVED
OCT 19 2015
DEPARTMENT OF
WATER RESOURCES

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) **THIRD AMENDED FINAL**
THE BENEFIT OF A&B IRRIGATION DISTRICT,) **ORDER REGARDING**
AMERICAN FALLS RESERVOIR DISTRICT #2,) **METHODOLOGY FOR**
BURLEY IRRIGATION DISTRICT, MILNER) **DETERMINING MATERIAL**
IRRIGATION DISTRICT, MINIDOKA IRRIGATION) **INJURY TO REASONABLE**
DISTRICT, NORTH SIDE CANAL COMPANY,) **IN-SEASON DEMAND AND**
AND TWIN FALLS CANAL COMPANY) **REASONABLE CARRYOVER**
_____)

BACKGROUND

On June 23, 2010, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order explained how the Director would determine material injury to storage and natural flow water rights of members of the Surface Water Coalition (“SWC”).¹ The SWC, the Idaho Ground Water Appropriators, Inc. (“IGWA”), and the City of Pocatello filed petitions seeking judicial review of the Methodology Order and its subsequent application. The petitions were consolidated with Gooding County Case No. CV-2010-382.²

On September 26, 2014, District Court Judge Eric Wildman issued his *Memorandum Decision and Order on Petitions for Judicial Review* (“Methodology Remand Order”) in Gooding County Consolidated Case No. CV-2010-382. The Court “affirmed in part and set aside in part” the Methodology Order. *Methodology Remand Order* at 48. The Court remanded the Methodology Order to the Director for further proceedings as necessary. *Id.* The Court identified six general topics on remand. Each of the six topics are margin headings in the following text and are discussed below.

¹ The SWC is comprised of A&B District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. Each entity holds separate senior surface natural flow water rights and have separate storage contracts for storage water space in the reservoirs.

² The following cases were consolidated with Gooding County Case No. CV-2010-382: Gooding County Cases CV-2010-383, CV-2010-384, CV-2010-387, CV-2010-388, Twin Falls County Cases CV-2010-3403, CV-2010-5520, CV-2010-5946, CV-2012-2096, CV-2013-2305, CV-2013-4417, and Lincoln County Case CV-2013-155.

Remedy for Material Injury to SWC Irrigation Season Natural Flow and Storage Water Rights

The Court held the Methodology Order failed to “provide a proper remedy for material injury to reasonable in-season demand when taking into account changing conditions.” *Methodology Remand Order* at 10. If material injury to the SWC’s irrigation season water rights is greater than originally determined by the Director in April, the injury must be remedied through either curtailment or mitigation at the time of the additional determination of injury. *Id.*

The Court went on to say that when taking into account changing conditions the Director must “apply his established procedure as written or further define and/or refine the procedure so that [SWC] members relying on the procedure know when to anticipate its application and are able to plan accordingly.” *Id.* at 40.

The Court held the Director may require use of reasonable carryover pursuant to a properly enacted mitigation plan that contains appropriate contingency provisions to protect senior rights.” *Id.* at 16. In conjunction with a mitigation plan, the Director can require the SWC “rely on its reasonable carryover provided that: 1) existing carryover storage allocations meet or exceed the additional shortfall to the revised reasonable in-season demand; and 2) junior users secure a commitment at that time for a volume of water equal to the shortfall to the revised reasonable in-season demand to be provided the following season if necessary.” *Id.*

Supplemental Ground Water Adjustment

The Court affirmed that supplemental ground water is a factor the Director has the authority to consider in the context of a delivery call. *Id.* at 18. However, administration “to less than the full amount of acres set forth on the face of the [SWC’s] Partial Decrees. . . must be supported by clear and convincing evidence.” *Id.* at 19. The Director’s “assignment of an entity wide split for each member of the [SWC] of the ground water fraction to the surface water fraction is not supported by substantial evidence in the record.” *Id.*

Predictors for Twin Falls Canal Company

The Court held the Joint Forecast prediction does not accurately predict water supply for the Twin Falls Canal Company (“TFCC”), and remanded the issue back to the Department for further proceedings as necessary. *Id.* at 20.

Crop Distribution Data

The Court affirmed the Director’s use of the U.S. Department of Agriculture’s 1990-2008 National Agricultural Statistics Service (“NASS”) data for determining crop distributions but also encouraged the Director to “take into account available data reflecting current cropping patterns.” *Id.* at 21.

ESPA Model Boundary

The Court concluded “the *Methodology Order* wrongly uses the ESPA Model boundary, instead of the boundary of the area of common water supply, to determine a curtailment priority date.” *Id.* at 24.

Mitigation for Reasonable Carryover Shortfall

Step 10 of the Methodology Order offered an alternative to providing the full volume of reasonable carryover shortfall established in Step 9. Under Step 10, junior ground water users could request that the Department model the transient impacts of the proposed curtailment. Junior water right holders could alternatively mitigate modeled transient depletions over a period of years. The Court remanded Step 10 to the Department, concluding that when the Director determines a shortfall to reasonable carryover and a corresponding mitigation obligation, the alternative of mitigating for transient future simulated reach gains resulting from modeled curtailment needs to be further justified. *Id.* at 28. The Court questioned the “viability of phased curtailment as a justification” for Step 10. *Id.*

SUMMARY

The purpose of this Third Amended Final Order is to establish the Director’s methodology for determining material injury to storage and natural flow water rights either held by or committed to members of the SWC consistent with the Court’s holding in the Methodology Remand Order.

FINDINGS OF FACT

I. Overview of the Methodology for Determining Material Injury to Water Rights by Determining Reasonable In-Season Demand and Reasonable Carryover

1. The methodology for determining material injury to water rights by determining reasonable in-season demand (“RISD”) and reasonable carryover should be based on updated data, the best available science, analytical methods, and the Director’s professional judgment as manager of the state’s water resources. In the future, climate may vary and conditions may change; therefore, the methodology may need to be adjusted to consider a different baseline year or baseline years.

2. In-season demand shortfall will be computed by subtracting RISD from the forecast supply (“FS”). In-season demand shortfall is computed using the following equation:

- $\text{In-Season Demand Shortfall} = \text{FS} - \text{RISD}$

3. If the FS is greater than the RISD, there is no demand shortfall. If the FS is less than the RISD, the negative difference is the demand shortfall. Initially, RISD will be equal to the historic demands associated with a baseline year or years (“BLY”) as selected by the

Director, but will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

4. Reasonable carryover shortfall will be computed by subtracting reasonable carryover from actual carryover, where reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply. Reasonable carryover shortfall will be computed using the following equation:

- Reasonable Carryover Shortfall = Actual Carryover – Reasonable Carryover

5. If actual carryover exceeds the reasonable carryover, there is no reasonable carryover shortfall. In contrast, if reasonable carryover exceeds the actual carryover, the negative difference is the reasonable carryover shortfall.

6. The concepts underlying the selection of the BLY, determination of in-season demand shortfall, and reasonable carryover shortfall will be discussed in detail below.

II. In-Season Demand Shortfall

A. Considerations for the Selection of a Baseline Year

7. A BLY is a year or average of years when irrigation demand represents conditions that can be used to predict need in the current year of irrigation at the start of the irrigation season. The purpose in predicting need is to project an upper limit of material injury at the start of the season.

8. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098.³ To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

9. The historic diversion volumes from the BLY, along with the predicted supply forecast at the start of the irrigation season, are used to predict the initial in-season demand shortfall, where demand shortfall is the difference between the BLY demand (“BD”) and the FS. Demand shortfall increases in magnitude as the difference between BD and FS increases. Demand shortfall increases with increases in BD, decreases in FS, or both. Assuming constant irrigation practices, crop distributions, and total irrigated acres, demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration (“ET”), and lower precipitation. If water demand data is averaged for several years and these averages are the basis to predict demand shortfall at the start of the season, in a high water demand year, these averages may often under-predict the demand shortfall. In a high water demand year, under-prediction of demand shortfall might be acceptable if the junior priority ground water right holders and the senior priority surface water right holders shared equally in the risk of water shortages. Equality

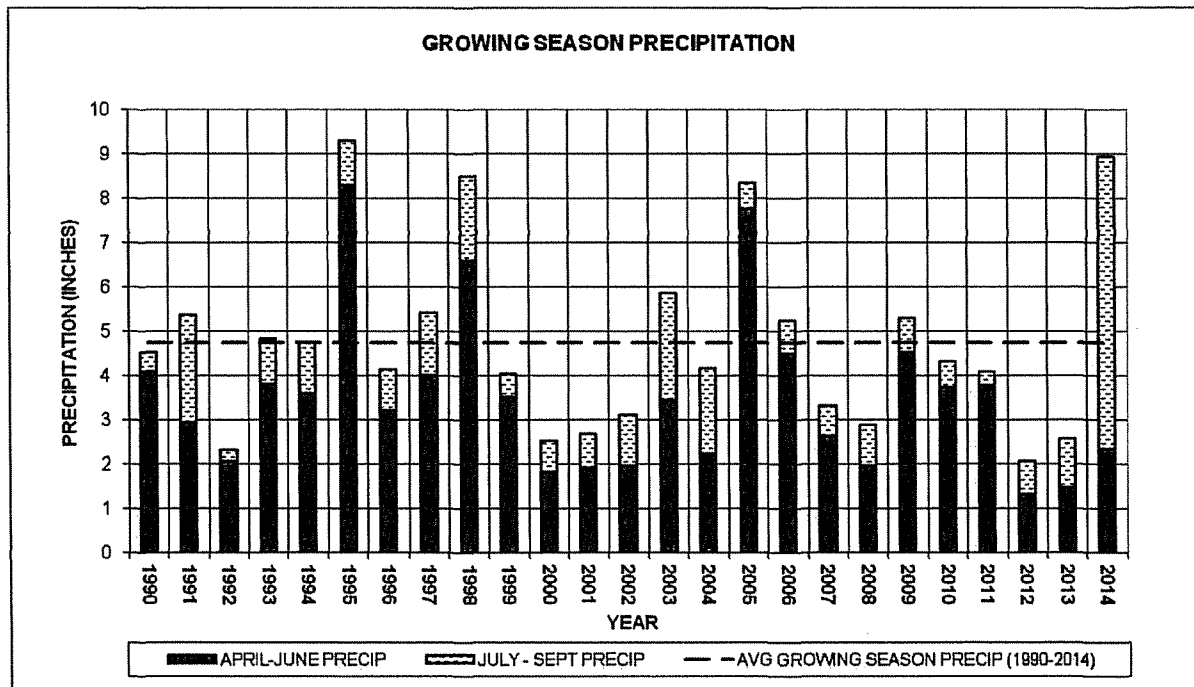
³ All citations in this Order are to material that was admitted during the original hearing and is part of the final agency record on appeal in Gooding County Case No. CV-2008-551, which was lodged with the Fifth Judicial District Court on February 6, 2009.

in sharing the risk will not adequately protect the senior priority surface water right holder from injury. Actual demand shortfalls to a senior surface water right holder resulting from predictions at the start of the irrigation season based on average data unreasonably shifts the risk of shortage to the senior surface water right holder. Therefore, a BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

i. Climate

10. For the methods outlined herein, climate is represented by precipitation, ET, and growing degree days.

11. Precipitation. Water, in all phases, introduced to Idaho from the atmosphere is termed precipitation. During the growing season, precipitation has a substantial influence on crop water need, both as a source of water to growing crops and as an influencing factor on ET. Ex. 3024 at 19. The figure below shows the precipitation recorded during the growing season at the National Weather Service’s Twin Falls weather station.



Growing Season Precipitation at National Weather Service’s Twin Falls Weather Station 1990–

2014.⁴

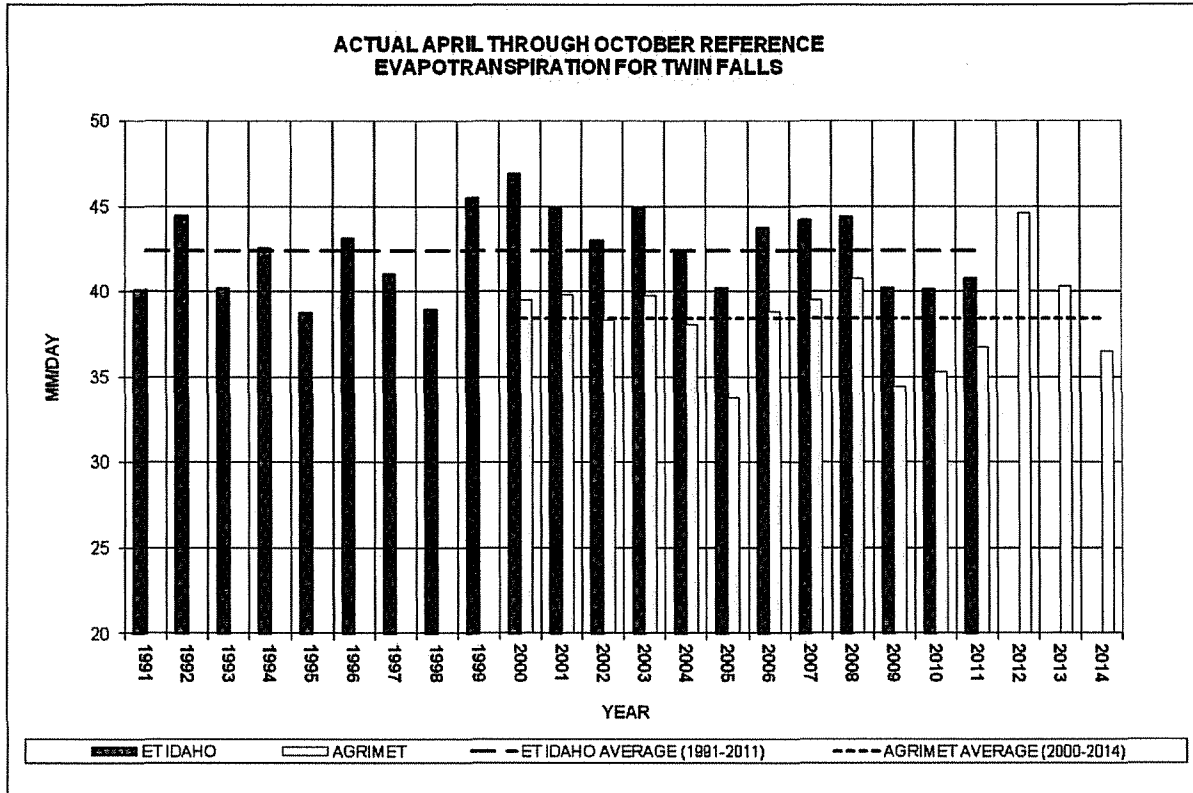
12. Evapotranspiration. ET is a combined variable representing the amount of water that transpires from vegetation and evaporates from the underlying soil. ET is an important factor for properly estimating RISD. In its water budget calculations, the SWC proposed the use of ET values from the USBR as part of their Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. II, Chap. 9; Ex. 8000, Vol. IV, Appdx. AU. The ground water users proposed the use of ET values from Richard G. Allen and Clarence W. Robison 2007, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, i.e. ETIdaho. Ex. 3007A at 21; Ex. 3024 at 1-58.

13. Reference ET is a standardized index that approximates the climatic demand for water vapor (i.e. ET) and is used here to identify potential BLY. Because there is not a single Reference ET data set that spans the entire period of analysis (1990-2014), two separate Reference ET data sets are considered. ETIdaho Reference ET data are currently available from 1990 through 2011. AgriMet Reference ET data are available from 2000 to 2014. Ideal candidate BLY are years in which Reference ET exceeds average Reference ET values. The individual year is compared using both AgriMet and ETIdaho Reference ET data for those years in which both data are available and only AgriMet data in those years where there is no ETIdaho data.

14. Years of above average values of Reference ET are appropriate BLY candidates.⁵ Total April through October Reference ET for the period of record from the Twin Falls (Kimberly) AgriMet site is shown below.

⁴ Chart created from raw NOAA National Weather Service total precipitation data obtained from the NCDC's Climatological Data Annual Summary Idaho report series for the Twin Falls 6 E and Twin Falls Sun Valley Regional Airport weather stations.

⁵ Values for Reference ET between ETIdaho and AgriMet do not match because they are derived differently. The relevant information for identifying a potential BLY is the relationship between the year under consideration and the average for the data sets.



Actual Reference ET for Twin Falls (Kimberly) with both AgriMet and ETIdaho data. 1991-2014.

15. Growing Degree Days. Growing degree days define the length and type of growing season. Growing degree days are an arithmetic accumulation of daily mean temperature above a certain base temperature. Ex. 3024 at 10; 117-21. These growth units are a simple method of relating plant growth and development to air temperatures. Different plant species have different base temperatures below which they do not grow. At temperatures above this base, the amount of plant growth is approximately proportional to the amount of heat or temperature accumulated. A higher annual growing degree day value correlates to a higher potential rate of plant growth. The table below shows growing degree days accumulated for April through September for the Twin Falls (Kimberly) AgriMet site.

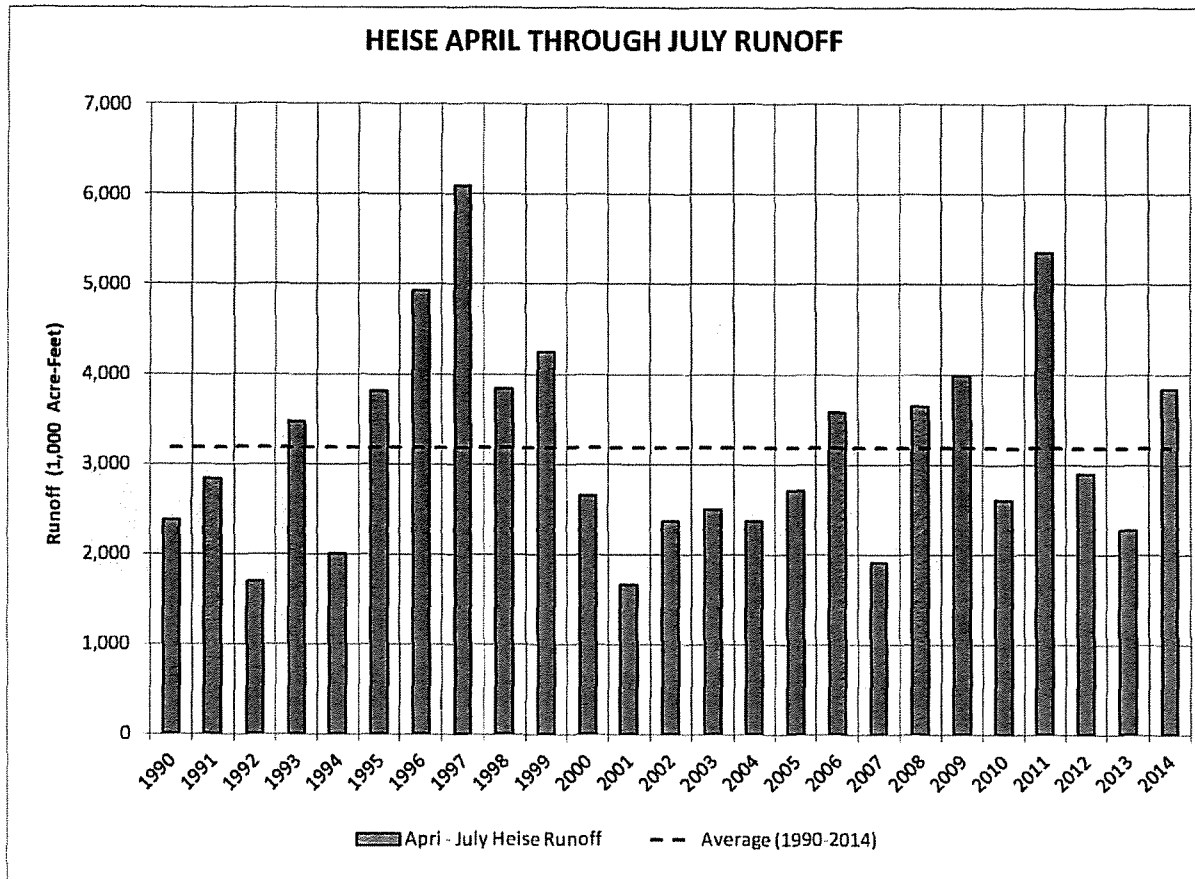
Year	GDD: April-Sept	% of Average	Year	GDD: April-Sept	% of Average
1991	2,095.4	86%	2003	2,585.4	106%
1992	2,610.7	107%	2004	2,428.9	99%
1993	2,004.7	82%	2005	2,320.1	95%
1994	2,516.8	103%	2006	2,601.9	106%
1995	2,257.8	92%	2007	2,657.7	109%
1996	2,418.6	99%	2008	2,382.9	97%
1997	2,478.4	101%	2009	2,469.7	101%
1998	2,422.2	99%	2010	2,215.0	91%
1999	2,294.9	94%	2011	2,314.6	95%
2000	2,591.3	106%	2012	2,735.3	112%
2001	2,600.8	106%	2013	2,672.8	109%
2002	2,465.6	101%	2014	2,553.0	104%

Average GDD (1991-2014): 2,445.6

Growing Degree Days (“GDD”) for Twin Falls (Kimberly) AgriMet Site 1991-2014.

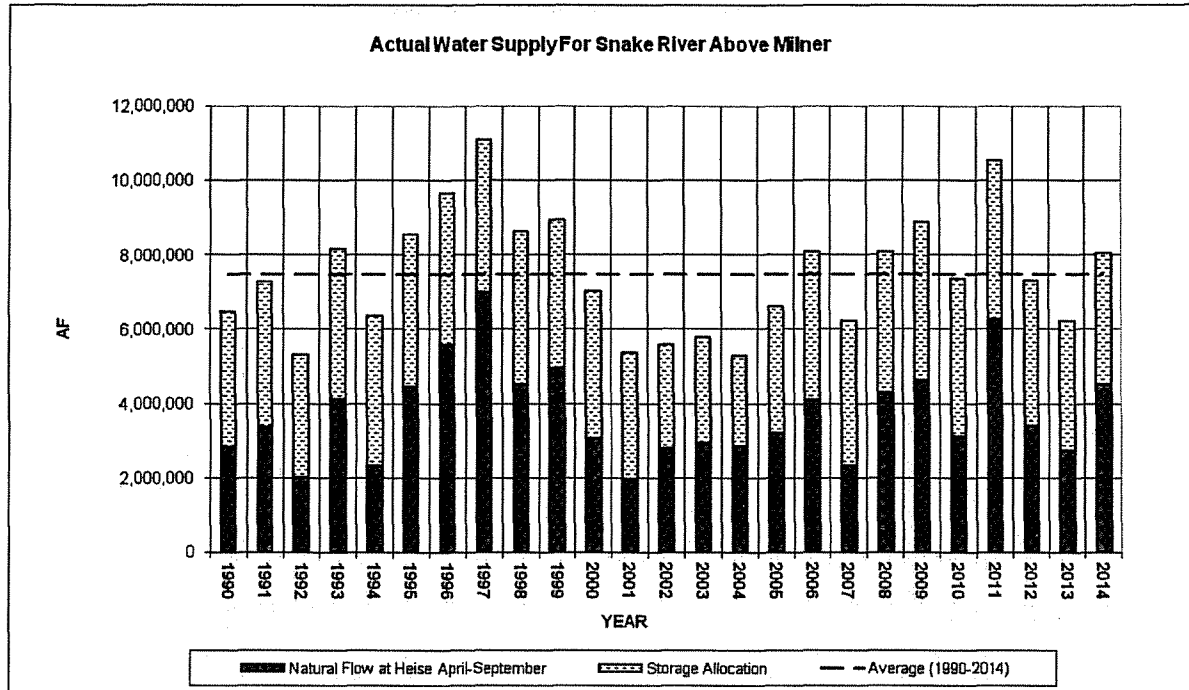
ii. Available Water Supply

16. The April through July Heise runoff volume represents the volume of water available for diversion into storage reservoirs and also serves as an indicator of natural flow supplies. The graph below shows actual unregulated flow volumes at Heise for 1990 through 2014. The 1990 to 2014 average (3,186,000 acre-feet) is indicated by the dashed line.



April through July Unregulated Flow Volume at Heise, 1990-2014.

17. The total actual supply of the Snake River is represented in the graph below as the sum of the Heise natural flow and reservoir storage allocations for years 1990-2014.



Actual water supply for the Snake River above Milner 1990-2014.

iii. Irrigation Practices

18. A BLY must be recent enough to represent current irrigation practices. R. Vol. 37 at 7099-7100. Conditions that should be consistent are: (a) the net area of the irrigated crops, (b) farm application methods (flood/furrow or sprinkler irrigation), and (c) the conveyance system from the river to the farm. The type of sprinkler systems should be similar between the BLY and the current year.

19. Sprinkler systems are currently the predominant application system. *Id.* at 7101-02. To ensure that current irrigation practices are captured, selection of a BLY for the SWC should be limited to years subsequent to 1999. *Id.* at 7096; 7099-7100.

20. Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acreage. R. Vol. 28, 5205-15; R. Vol. 37 at 7100. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated. R. Vol. 37 at 7100.

21. There are lands within the service areas of SWC entities that are irrigated with supplemental groundwater. Exhibit 3007. Supplemental groundwater is a factor the Director can consider in the context of a delivery call. *Methodology Remand Order* at 18-19.

B. Selection of the Initial Baseline Year

22. The selection of a single BLY for all entities is challenging, with individual years meeting some of the BLY requirements but not all. By selecting a BLY that is comprised of the average of multiple years, a BLY can be selected that better represents the required conditions for each and all entities. The years 2000-2014 were considered for the BLY selection.

23. When selecting the BLY the Director must evaluate the most recent data to determine whether the standards of selection of a BLY are satisfied.

24. In the Methodology Order the Director used an average of 2006 and 2008 (06/08) for the BLY. The 06/08 BLY no longer meets the BLY selection criteria. In particular, when compared to the average of the annual diversions from 2000-2014, the 06/08 diversions are no longer above average.

25. The Director reviewed the years since the issuance of the Methodology Order and finds that 2012 meets the selection criteria for a BLY. However, 2012 had the lowest growing season precipitation, highest ET, and most growing degree days during the BLY selection period (1991-2014). Because 2012 represents the maximum values for these criteria during the period of analysis, 2012 is not an appropriate single-year BLY candidate.

26. Individually no one year during the period of analysis met all the BLY requirements; 2006 had below average diversions, 2008 had below average growing degree days, and 2012 had record high ET, record high growing degree days, and record low precipitation. The Director finds that using the values from 2006, 2008, and 2012 (06/08/12) for an average BLY fits the selection criteria for the SWC. When compared to the period 1991-2014, the 06/08/12 average has below average growing season precipitation, above average ET, above average growing degree days, and represents years in which diversions were not limited by availability of water supply. The 06/08/12 average diversions are greater than the average of the combined annual diversions from 2000-2014.

	2000-2014 Avg. Diversions	06/08/12 Avg. Total Diversions	06/08/12 % of Avg.
A&B	57,906	59,993	104%
AFRD2	420,863	427,672	102%
BID	242,646	251,531	104%
Milner	50,430	47,135	94%
Minidoka	354,277	369,492	104%
NSSC	982,567	978,888	100%
TFCC	1,045,120	1,060,011	101%
			Average 101%

Average SWC Diversions for 2000-2014 and 2006/2008/2012 BLY.

27. The average total actual supply of the Snake River for the 06/08/12 BLY is 7,823,757 AF. The 1990-2014 average total actual supply of the Snake River is 7,478,899 AF as

depicted in Finding of Fact 17. Because the 06/08/12 BLY total actual supply exceeds the 1990-2014 total actual supply average, the BLY is not a year in which diversions were limited by water supply.

C. Calculation of Reasonable In-Season Demand

28. RISD is 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. Given that climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences. As stated by the Hearing Officer, “The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.” R. Vol. 37 at 7098.

i. Project Efficiency

29. Project efficiency (“ E_p ”) is the ratio of total volumetric crop water need within a project’s boundary and the total volume of water diverted by that project to satisfy crop needs. It is the same concept as system efficiency, which was presented at hearing. Ex. 3007 at 28-29. Implicit in this relationship are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows). By utilizing project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components can be captured and described without quantifying each of the components.

30. Project efficiency is calculated as set forth below:

$$E_p = \frac{CWN}{Q_D}$$

Where:

E_p = project efficiency,

CWN = crop water need, and

Q_D = irrigation entity diversion of water specifically put to beneficial use for the growing of crops within the irrigation entity.

31. Monthly irrigation entity diversions (“ Q_D ”) will be obtained from Water District 01’s diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity. Examples of adjustments include the removal of diversions associated with in-season recharge and diversion of irrigation water on the behalf of another irrigation entity. Adjustments, as they become known to the Department, will be applied during the mid-season updates and in the reasonable carryover shortfall calculation. Examples of adjustments that can only be accounted for later in the season include SWC water placed in the rental pool and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. Any natural flow or storage water deliveries to

entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume. Water that is purchased or leased by a SWC member may become part of IGWA’s shortfall obligation; to the extent that member has been found to have been materially injured. *See e.g.* R. Vol. 38 at 7201, fn. 11 (Eighth Supplemental Order). Conversely, adjustments will be made to assure that water supplied to private leases or to the rental pool will not increase the shortfall obligation.

32. Monthly project efficiencies will be computed for the entire irrigation season. Project efficiency varies from month-to-month during the season, and will typically be lower during the beginning and ending of the season. Monthly project efficiencies will be divided into actual monthly crop water need (“CWN”) values to determine RISD during the year of evaluation. The tables below present average project efficiencies for each SWC member (2007-2014), with project efficiencies during that time span greater or less than two standard deviations excluded from the calculation. By including only those values within two standard deviations, extreme values from the data set are removed.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Monthly Avg.
4	1.67	0.39	0.43	0.77	0.47	0.16	0.30	0.60
5	0.61	0.29	0.28	0.41	0.37	0.29	0.31	0.37
6	0.73	0.43	0.44	0.63	0.54	0.47	0.51	0.54
7	0.68	0.45	0.56	0.74	0.61	0.50	0.58	0.59
8	0.50	0.39	0.60	0.66	0.53	0.32	0.44	0.49
9	0.41	0.26	0.48	0.56	0.44	0.21	0.26	0.38
10	0.14	0.26	0.14	0.15	0.14	0.05	0.04	0.13
Season Avg.	0.68	0.35	0.42	0.56	0.44	0.29	0.35	0.44

SWC Member Average Monthly Project Efficiencies from 2007-2014.

ii. Crop Water Need

33. CWN is the project wide volume of irrigation water required for crop growth, such that crop development is not limited by water availability, for all crops supplied with surface water by the surface water provider. Crop water need is the difference between the fully realizable consumptive use associated with crop development, or ET, and effective precipitation (W_e) and is synonymous with the terms irrigation water requirement and precipitation deficit. Ex. 3024. For the purposes of the methodology, CWN is calculated as set forth below:

$$CWN = \sum_{i=1}^n (ET_i - W_e) A_i$$

Where,

CWN = crop water need

ET_i = consumptive use of specific crop type,

W_e = effective precipitation,

A_i = total irrigated area of specific crop type,
 i = index variable representing the different specific crop types grown within the irrigation entity, and
 n = upper bound of summation equal to the total number of different specific crop types grown within the irrigation entity.

iii. Evapotranspiration

34. Evapotranspiration ("ET") can be calculated with theoretically based equations that calculate ET for an individual crop, necessitating crop distribution maps for each year. Ex. 3007A at 21, Figure 3, Tables 6-12; Ex. 3024 at 1-58; Ex. 8000, Vol. II at Chapter 9; Ex. 8000, Vol. IV, Appdx. AU.

35. At hearing, values of ET were estimated by the SWC from AgriMet, Ex. 8000, Vol. IV, Appdx. AU-1, and by the ground water users from ETIdaho, Ex. 3007A at 21; Ex. 3024 at 1-58. At this time, the Director finds that the use of AgriMet is more appropriate for determining ET than ETIdaho. At this time, AgriMet, is available to all parties in real-time without the need for advanced programming. Accordingly, the methodology will rely on AgriMet derived ET values in the calculations of project efficiency, crop water need, and RISD. In the future, with the development of additional enhancements, ETIdaho may become a more appropriate analytical tool for determining ET.

36. CWN is derived by multiplying crop specific ET values, adjusted for estimated effective precipitation, by the total irrigated area of individual crop types, and summing for all crop types. The areas for individual crop types will be derived from published crop distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS"). Ex. 1005 at 1. NASS creates a crop-specific land cover digital dataset from satellite imagery and field checks. The dataset is called the Cropland Data Layer (CDL). Each year this dataset will be used to calculate a crop distribution acreage for each SWC entity. In the future, the NASS data may not be the most accurate source of data. The Department prefers to rely on data from the current season if and when it becomes usable.

37. AgriMet crop water use (i.e. ET) and weather data are gathered at the Rupert and Twin Falls (Kimberly) stations. Both stations are located in the vicinity of the SWC entities. A&B Irrigation District ("A&B"), Burley Irrigation District ("BID"), and Minidoka Irrigation District ("Minidoka") are nearest to the Rupert AgriMet station. ET data gathered at the Rupert station reasonably represents the climate conditions for A&B, BID, and Minidoka. ET data gathered at the Twin Falls (Kimberly) station reasonably represents the climate conditions for American Falls Reservoir District No. 2 ("AFRD2"), Milner Irrigation District ("Milner"), North Side Canal Company ("NSCC"), and TFCC. Ex. 8000, Vol. IV at AU-2, AU-8.

iv. Effective Precipitation

38. Effective precipitation (" W_e ") is the amount of total precipitation held in the soil horizon available for crop root uptake. Effective precipitation will be estimated from total precipitation (W) employing the methodology presented in the USDA Technical Bulletin 1275.

Ex. 8000, Vol. IV, Appdx. AU3, AU8. Total precipitation (W) data is published by the USBR as part of its Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. IV, Appdx. AU3. W_e values derived from AgriMet based precipitation values are independent of crop type.

39. AgriMet precipitation (W) values are easy to understand and regularly used by the farming, water supply, and water management communities. Accordingly, the methodology will rely on AgriMet derived W values in the calculations of crop water need and RISD.

40. As with ET data, AgriMet precipitation data are available from the Rupert and Twin Falls (Kimberly) stations. AgriMet data from the Rupert station reasonably represents of the climate conditions for A&B, BID, and Minidoka. AgriMet data from Twin Falls (Kimberly) reasonably represents climate conditions for AFRD2, Milner, NSCC, and TFCC. Ex. 8000, Vol. IV at AU-2, AU-8.

v. Summary of Reasonable In-Season Demand Calculation

41. At the start of the irrigation season, RISD is equal to the baseline demand, or total season adjusted diversions for the baseline year(s). When calculated in-season, RISD is calculated below.

$$RISD_{milestonex_x} = \sum_{j=1}^m \left(\frac{CWN_j}{E_{p,j}} \right) + \sum_{j=m+1}^7 BD_j$$

Where:

- RISD_{milestone_x} = reasonable in season demand at specified evaluation milestones during the irrigation season,
- CWN = crop water need for month j,
- E_p = baseline project efficiency for month j,
- BD = baseline demand for month j,
- j = index variable, and
- m = upper bound of summation, equal to the month calculation occurs, where April = 1, May =2, ... October = 7.

42. Water is sometimes diverted into canals and onto crops fields in support of crop development for reasons other than strictly meeting the consumptive requirement of the crop; such as canal wetting, salt leaching, soil wetting, and soil temperature control. April and October represent months during the irrigation season when the method of calculating RISD strictly as a function of CWN and E_p is less reliable, because CWN is often not the driving factor in diversions during these bookend months. To account for uncertainty of RISD calculations during those time periods, April and October RISD adjustments have been developed.

43. April RISD Adjustment: In April, calculated RISD, as a function of CWN and E_p , can grossly under estimate actual diversion needs. Therefore, for each individual surface water provider, if the calculation of CWN/E_p for the month of April is less than the April average diversion volume over a record of representative years in the recent past, then RISD will be equal to the April average diversion volume. If the calculation of CWN/E_p is greater than the

April average, then RISD will equal the calculated CWN/E_p volume.

44. October RISD Adjustment: In October, calculated RISD, as a function of CWN and E_p, can either grossly under or over estimate actual diversion needs. For each individual surface water provider, if the calculation of CWN/E_p for the month of October is greater than the October maximum diversion volume, or less than the October minimum diversion volume,⁶ over a record of representative years in the recent past, then RISD will be equal to the October average diversion volume, over the same period of representative years. If the calculation of CWN/E_p is less than the October maximum diversion volume, or greater than the October minimum diversion volume, then RISD will equal the calculated CWN/E_p volume.

D. Adjustment of Forecast Supply

45. As stated by the Hearing Officer, “There must be adjustments as conditions develop if any baseline supply concept is to be used.” R. Vol. 37 at 7093.

i. April Forecast Supply

46. The forecast supply is comprised of natural flow and stored water.

47. Typically within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. The joint forecast (“Joint Forecast”) issued by the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers (“USACE”) for the period April 1 through July 31 “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” R. Vol. 8 at 1379, ¶ 98. Given current forecasting techniques, the earliest the Director can predict material injury “with reasonable certainty” is soon after the Joint Forecast is issued. R. Vol. 2 at 226. With data from 1990 through the irrigation year previous to the current year, a regression equation will be developed for each SWC member. The regression equations for A&B and Milner were developed by comparing the actual Heise natural flow to the natural flow diverted. *See e.g.* R. Vol. 8 at 1416-22. For AFRD2, BID, Minidoka, NSCC, and TFCC, multi-linear regression equations were developed by comparing the actual Snake River near Heise natural flow and the flows at Box Canyon to the natural flow diverted. The regression equations will be used to predict the natural flow diverted for the upcoming irrigation season. *Id.* at 1380. The actual natural flow volume that will be used in the Director’s April Forecast Supply for each SWC entity will be one standard error below the regression line, which underestimates the available supply. *Id.*; Tr. p. 65, lns. 6-25; p. 66, lns. 1-2. The purpose of the shift to one standard error below the regression line is to ensure senior water right holders do not bear the risk of under-prediction of supply. The forecasting techniques will be revised based on updated data and the forecasting techniques may be revised when improvements to the forecasting tools occur.

⁶ Minimum October diversion values will not be considered for years in which a SWC entity had zero carryover storage, as the Department will consider this an indication that October diversions were potentially limited by available water supply.

48. The storage allocation for each member of the SWC will be estimated by the Department following the Joint Forecast. The Department will forecast reservoir fill and storage allocation consistent with the methods established in the *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*. R. Vol. 23 at 4294-97 as explained below. The Department will evaluate the current reservoir conditions and the current water supply outlook to determine historical analogous year or years to predict reservoir fill. The Department may identify and use a combination of different analogous years to predict individual reservoir fill. Input variables for determining the individual storage water allocation for each SWC member are: (a) the analogous year's or years' total reservoir fill volume; (b) an estimated evaporation volume; and (c) the previous year's carryover volume. The FS (the combination of the forecast of natural flow supply and the storage allocation) for each SWC member will be determined by the Director shortly after the date of the Joint Forecast.

49. If, at any time prior to the Director's final determination of the April FS, the Director can determine with certainty that any member of the SWC has diverted more natural flow than predicted, or has accrued more storage than predicted, the Director will revise his initial, projected shortfall determination.

ii. July Forecast Supply

50. Approximately halfway through the irrigation season, the FS will be adjusted. FS is comprised of natural flow and stored water.

51. When adjusting the natural flow component of the FS, the Department's water rights accounting model will be used to compute the natural flow diverted by each member of the SWC. The natural flow diversion for the remainder of the irrigation season will be estimated based on the regression analyses.

52. Linear regression equations for AFRD2, A&B, and Milner, were developed by comparing the July 1 snow water equivalent (inches) at the Two Oceans Plateau SNOTEL site to the natural flow diversions. The regression equations for AFRD2, A&B, and Milner would be used only in those years when the snow water equivalent at the Two Oceans Plateau SNOTEL site is greater than zero (0). Years when the snow water equivalent equals zero, the total natural flow prediction for the period July 1 to October 31 will be zero (0) AF.

53. Multiple linear regression equations for BID, Minidoka, and NSCC were developed to predict natural flow diversions employing the following predictor variables: (1) Snake River near Heise natural flow (April – June), (2) March depth to water at well 05S2E27ABA1 and (3) the snow water equivalent at the Two Oceans Plateau SNOTEL site on June 15.

54. The multiple linear regression model for TFCC will be based on the following

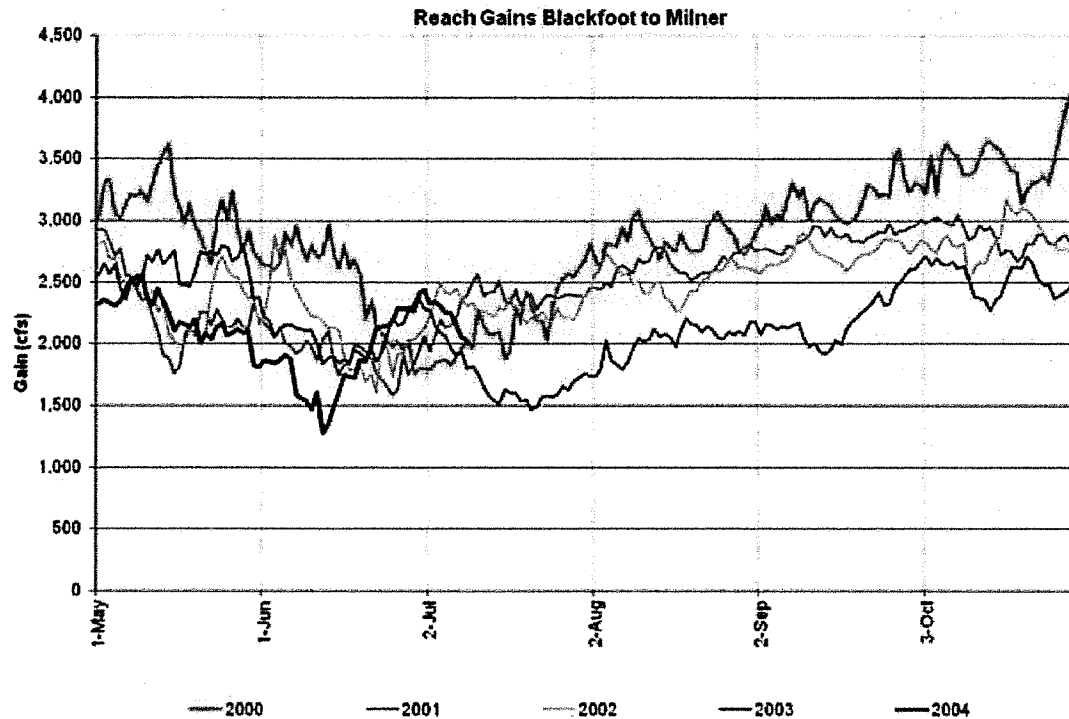
predictor variables: (1) Snake River near Heise natural flow (April – June), (2) Spring Creek total discharge (January – May) and (3) the snow water equivalent at the Two Oceans Plateau SNOTEL site on June 15.

55. When adjusting the storage component of the FS, the Department must consider whether stored water has been allocated in determining the storage component of the FS. In normal to dry years, the reservoirs will typically have filled to their peak capacity for the season and the storage water will have been allocated. If the BOR and Water District 01 have allocated stored water to placeholders, the Department will use the actual preliminary storage allocations to the SWC. If the BOR and Water District 01 have not yet allocated stored water to placeholders, the Department will predict the storage allocations based on the storage allocations from an analogous year.

iii. Time of Need

56. The FS will again be adjusted shortly before the Time of Need. The Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover. The Time of Need will not be earlier than the Day of Allocation. FS is comprised of natural flow and stored water.

57. When adjusting the natural flow component of the FS the Department's water rights accounting model will compute the natural flow diverted by each member of the SWC as of the new forecast date. The natural flow diversion for the remainder of the irrigation season will be estimated based on a historical year with similar reach gains in the Blackfoot to Milner reach. The following is an example of estimating reach gains from an analysis of historical years. Reach gains for the years 2000 – 2003 and a portion of year 2004 are graphed below. Considering 2004 as an example of a current year, and comparing 2004 to the hydrographs for 2000 – 2003, year 2003 has similar reach gains and is appropriately conservative. Therefore, the natural flow diverted in 2003 would be used to predict the natural flow diversions for the remainder of the 2004 season.



Example Reach Gain Analysis for 2004.

58. When adjusting the storage component of the FS, the Department will use the actual preliminary storage allocations to the SWC.

59. The adjusted FS is the sum of the actual natural flow diversions, the predicted natural flow diversions, and the storage allocation.

E. Calculation of Demand Shortfall

60. The equation below is used to determine the amount of predicted demand shortfall during the irrigation season.

$$DS = FS - RISD$$

Where:

- DS = demand shortfall for specified evaluation points throughout the season,
- FS = forecasted supply for remainder of season after specified evaluation point during the season, and
- RISD = Reasonable in-season demand from above.

61. The amount calculated represents the volume that junior ground water users will be required to have available for delivery to members of the SWC found to be materially injured by the Director. The amounts will be calculated in April, at the middle of the season, and at the time of need.

III. Methodology for Determining Material Injury to Reasonable Carryover

62. CM Rule 42.01.g states the following guidance for determining reasonable carryover: “In determining a reasonable amount of carry-over storage water, the Director shall consider average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.”

A. Projected Water Supply

63. CM Rule 42.01.g states that the Director “shall consider . . . the projected water supply for the system.” Carryover shortfall will be determined following the completion of the irrigation season. Because it is not possible to adequately forecast the irrigation demand for the following irrigation season at the end of the current irrigation season, the Director must make a projection of need. R. Vol. 37 at 7109 (“Anticipating the next season of need is closer to faith than science.”). The average of 2006/2008/2012 BLY will be the projected demand.

64. Similar to projecting demand, the Director must also project supply. The Heise natural flow, for the years 2002 and 2004, were well below the long term average (1991-2014) but were not the lowest years on record. The average of the 2002 and 2004 supply will be the projected supply, representing a typical dry year. The 2002 and 2004 supply is computed as follows:

- 2002 supply = natural flow diverted + new fill
- 2004 supply = natural flow diverted + new fill
- Projected supply = average of 2002 supply and 2004 supply

Carryover from previous years is not included in the 2002 and 2004 supply calculation because it was not new water supplied during the 2002 or 2004 irrigation year.

65. Reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply. Reasonable carryover is computed using the following equation:

$$\text{Reasonable carryover} = 2006/2008/2012 \text{ average} - 2002/2004 \text{ average}$$

B. Average Annual Rate of Fill

66. CM Rule 42.01.g states that the Director “shall consider the average annual rate of fill of storage reservoirs” The average annual reservoir fill serves as a means to evaluate reasonable carryover, calculated as the difference between the projected demand and the projected supply. For purposes of the table below, any water contributed to the rental pool from the previous year was added to the next year’s fill volume so that it does not artificially lower the percent fill. R. Vol. 37 at 7108. Water that is supplied to the rental pool lowers carryover and could impact the following year’s fill. The percent fill does not include water deducted for reservoir evaporation. The annual percent fill of storage volume by SWC entity is shown below:

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	100%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	90%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	98%	48%	95%	82%	63%
2005	58%	100%	100%	77%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	83%	92%	77%	95%	97%
2008	100%	100%	85%	100%	80%	99%	100%
2009	100%	100%	100%	100%	100%	100%	100%
2010	100%	100%	100%	100%	100%	100%	100%
2011	100%	100%	100%	100%	100%	100%	100%
2012	88%	100%	97%	91%	94%	94%	96%
2013	80%	100%	97%	90%	86%	97%	100%
2014	93%	100%	100%	100%	93%	100%	100%
Average	87%	99%	99%	92%	96%	96%	96%
Std Dev	22%	4%	2%	14%	4%	6%	8%

Annual Percent Fill of Storage Volume by Entity (1995-2014).⁷

C. Average Annual Carryover

⁷ See e.g. Ex. 4125. Exhibit 4125 accounts for water deducted for evaporation, but does not take into account water supplied to the rental pool.

67. CM Rule 42.01.g states that the Director “shall consider the . . . average annual carryover for prior comparable water conditions . . .” This factor will be taken into consideration when determining reasonable carryover. Actual carryover volumes were adjusted from values reported in the storage reports so that they did not include water received for mitigation purposes or water rental by the canal company for use within the irrigation district. R. Vol. 37 at 7108. Actual carryover from 1995 through 2014 was sorted into categories ranging from very dry to wet. The categories are based on the Heise natural flow volumes from April through September.

Heise April - Sept. Natural Flow (KAF)	Year	Heise Natural Flow April - Sept	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
Very Dry <3000	2001	1,968	9,902	4,217	37,430	26,854	55,132	42,421	26,917
	1994	2,319	82,885	26,894	54,136	45,902	102,823	128,356	18,687
	2007	2,320	62,739	7,962	34,639	36,520	61,744	68,947	-21,811
	2013	2,721	55,245	10,647	50,107	34,342	68,405	132,899	23,949
	2002	2,775	30,192	8,570	72,835	14,531	99,488	128,572	32,635
	2004	2,833	-3,771	18,537	47,845	8,735	97,905	19,145	21,551
	2003	2,931	9,401	3,649	51,686	6,906	81,673	166,217	-18,169
Average		2,552	35,228	11,496	49,811	24,827	81,024	98,080	11,966
Dry 3000 - 4000	2000	3,059	66,915	20,787	107,425	43,173	160,183	205,510	52,536
	2010	3,108	95,604	103,272	113,262	58,754	174,009	313,341	30,989
	2005	3,195	36,665	99,097	90,190	37,593	150,623	365,001	64,452
	2012	3,385	68,356	38,682	86,178	45,124	139,426	194,255	76,578
	Average		3,187	66,885	65,460	99,264	46,161	156,060	269,527	56,139
Average 4000 - 4500	2006	4,079	89,311	107,682	102,873	58,755	182,612	365,672	51,187
	1993	4,116	102,493	123,508	154,461	50,332	264,713	300,942	104,424
	2008	4,288	92,193	102,753	130,762	63,342	182,531	413,408	65,648
	1995	4,447	82,567	167,451	134,340	75,451	237,300	441,729	58,675
	1998	4,498	87,250	144,057	109,014	67,777	193,810	494,664	156,433
	Average		4,286	90,763	129,090	126,290	63,131	212,193	403,283	87,274
>4500 KAF	2014	4,510	78,065	92,232	144,930	56,202	208,714	441,951	133,411
	2009	4,613	104,174	145,530	125,688	66,935	204,581	426,779	95,533
	1999	4,949	78,312	121,793	168,545	67,147	205,716	454,338	191,501
	1996	5,583	85,209	145,019	127,123	70,250	228,786	472,790	111,459
	2011	6,347	116,495	231,938	170,150	65,072	294,967	563,360	151,678
	1997	7,007	89,811	114,324	87,073	65,307	202,475	464,715	136,926
	Average		5,502	92,011	141,806	137,251	65,152	224,206	470,655	136,751

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1995-2014).

68. In considering the principles articulated in CM Rule 42.01.g, the Director will project reasonable carryover shortfalls for members of the SWC. The following table represents the 2006/2008/2012 BLY diversion volumes and total reservoir storage space by entity. By dividing the total reservoir space by the 2006/2008/2012 diversion volume, a metric is established that describes the total number of seasons the entity's reservoir space can supply water.

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
06/08/12 BLY	59,993	427,672	251,531	47,135	369,492	978,888	1,060,011
Total Reservoir Space	137,626	393,550	226,487	90,591	366,554	859,898	245,930
Number of Seasons of Reservoir Space	2.3	0.9	0.9	1.9	1.0	0.9	0.2

Total Reservoir Space⁸ in Comparison to Demand.

D. Reasonable Carryover

i. A&B

69. A&B's reservoir space has the lowest average annual rate of fill with the highest variability in fill. *See* Finding of Fact 66. In very dry years, the potential exists that A&B's actual carryover will be less than the reasonable carryover. *See* Finding of Fact 67. A&B has an approximate two-year water supply provided by its total available storage space. *See* Finding of Fact 68. Because of its lower rate of fill, it is likely A&B will experience carryover shortfalls in consecutive dry years. Because of these factors, the calculated reasonable carryover of 18,500 AF is used for A&B. *See* Finding of Fact 75.

ii. AFRD2

70. AFRD2 has the highest and most consistent reservoir rate of fill of any member of the SWC. *See* Finding of Fact 66. Therefore, any unfilled space in the fall will most likely fill. AFRD2 has an approximate one-year supply available in storage. *See* Finding of Fact 68. In a very dry year, AFRD2's historical carryover volume is often less than the calculated reasonable carryover volume using the reasonable carryover equation (BLY 06/08/12 – 2002/2004 supply) *See* Finding of Fact 67. Given the high likelihood of filling during a multi-year drought and after a very dry year, the reasonable carryover can be adjusted downward from the calculated value without shifting the risk of shortage to the senior right holder. Because of these factors, the historical average carryover in very dry years of 11,500 AF is used as the reasonable carryover for AFRD2. *See* Finding of Fact 75.

iii. BID & Minidoka

⁸ *See* R. Vol. 8 at 1373-74.

71. In an average demand year, BID and Minidoka will have enough water to meet demands given a low water supply. *See* Finding of Fact 67. *See also* R. Vol. 37 at 7105. Historically, even in very dry years, BID's and Minidoka's carryover have been well above the calculated reasonable carryover and it is unlikely that they will have reasonable carryover shortfalls in the future. *See* Finding of Fact 67. *See also* R. Vol. 37 at 7105. Because of these factors, the calculated reasonable carryover of 0 AF is used for BID and Minidoka. *See* Finding of Fact 75. *See also* R. Vol. 37 at 7105.

iv. Milner

72. Similar to A&B, Milner's reservoir space has the second lowest average annual rate of fill of all entities with a high degree of variability in fill. *See* Finding of Fact 66. In very dry years, the potential exists that Milner's actual carryover will be less than the reasonable carryover. *See* Finding of Fact 67. Milner has an approximate two-year water supply available in storage. *See* Finding of Fact 68. Because of its rate of fill, it is likely Milner will experience carryover shortfalls in consecutive dry years. Because of these factors, the calculated reasonable carryover of 4,800 AF is used for Milner. *See* Finding of Fact 75.

v. NSCC

73. NSCC has a near average annual rate of fill in comparison to all entities and an approximate one-year water supply available in storage. *See* Findings of Fact 66 and 68. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. *See* Finding of Fact 67. Because of these factors, the calculated reasonable carryover of 65,500 AF is used for NSCC. *See* Finding of Fact 75.

vi. TFCC

74. TFCC has a near average annual rate of fill in comparison to all entities, but only a one-quarter of a year's water supply available in storage. *See* Findings of Fact 66 and 68. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. *See* Finding of Fact 67. Because of these factors, the calculated reasonable carryover of 25,200 AF is used for TFCC. *See* Finding of Fact 75.

75. Reasonable carryover values for the SWC members are as follows:

	Reasonable Carryover (Acre-Feet)
A&B	18,500
AFRD2	11,500
BID	0
Milner	4,800
Minidoka	0
NSCC	65,500
TFCC	25,200

E. Reasonable Carryover Shortfall

76. Reasonable carryover shortfall is the numerical difference between reasonable carryover and actual carryover, calculated at the conclusion of the irrigation season. Actual carryover is defined as the storage allocation minus the total storage use plus or minus any adjustments. Examples of adjustments include SWC water placed in the rental pool and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. Any storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC carryover volume. Water that is purchased or leased by an SWC member may become part of IGWA’s carryover shortfall obligation. *See e.g.* R. Vol. 38 at 7201, fn. 11 (Eighth Supplemental Order). Conversely, adjustments will be made to assure that water supplied by a SWC member to private leases or to the rental pool will not increase the reasonable carryover shortfall obligation to the same SWC member.

77. Reasonable carryover shortfall is calculated as follows:

$$\text{Reasonable Carryover Shortfall} = \text{Actual Carryover} - \text{Reasonable Carryover}$$

CONCLUSIONS OF LAW

1. This order contains the methodology by which the Director will determine material injury to RISD and reasonable carryover to members of the SWC.
2. “The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251(5); IDAPA 37.01.01.600.
3. Idaho Code § 42-602 states that, “The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . The director of the department of water resources shall distribute water . . . in accordance with

the prior appropriation doctrine.” According to the Hearing Officer, “It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature [in Idaho Code § 42-602] did not intend to sum up water law in a single sentence of the Director’s authority.” R. Vol. 37 at 7085. The Idaho Supreme Court has recently stated, “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007).

4. “The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use.” *In Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012). “The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *Id.*; see also *American Falls*, 143 Idaho at 879, 154 P.3d at 450 (stating that while an appropriation for a beneficial use is “a valuable right entitled to protection Nevertheless, that property right is still subject to other requirements of the prior appropriation doctrine.”).

5. “Concurrent with the right to use water in Idaho ‘first in time,’ is the obligation to put that water to beneficial use.” *American Falls*, 143 Idaho at 880, 154 P.3d at 451; see *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840 (referring to “the constitutional requirement that priority over water be extended only to those using the water”) (quoting *American Falls*, 143 Idaho at 876, 154 P.3d at 447). “It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into account.” *Id.* at 14 (quoting *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915)).

6. “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)). The Idaho Constitution enunciates a policy of promoting optimum development of water resources in the public interest. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); Idaho Const. Art. XV, § 7. “There is no difference between securing the maximum use and benefit and least wasteful use of this State’s water resources and the optimum development of water resources in the public interest. Likewise, there is no material difference between ‘full economic development’ and the ‘optimum development of water resources in the public interest.’ They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest.” *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90. “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and ground waters, and it requires that they be managed conjunctively.” *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90.

7. “Conjunctive administration ‘requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water

sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.’ . . . That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.” *American Falls*, 143 Idaho at 877, 154 P.3d at 448.

8. The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. *American Falls*, 143 Idaho at 873, 154 P.3d at 444; CM Rule 20.02, 10.12.

9. While the presumption under Idaho law is that an appropriator is entitled to his decreed water right and the CM Rules may not be applied so as require a senior appropriator to demonstrate an entitlement to the water in the first place, there may be post-adjudication factors relevant to the determination of how much water is actually needed in responding to a delivery call. *American Falls* at 877-878, 154 P.3d at 448-449. Under the CM Rules and Idaho law, the Director has the “authority and responsibility to investigate claims when delivery calls are made,” and the “authority to evaluate the issue of beneficial use in the administration context.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840. “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls*, 143 Idaho at 875, 154 P.3d at 446. “If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840 (quoting *American Falls*, 143 Idaho at 876, 154 P.3d at 447).

10. In responding to a delivery call under the CM Rules, the Director “may employ a baseline methodology as a starting point for considering material injury,” provided the baseline methodology otherwise comports with the prior appropriation doctrine as established by Idaho law. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841; *see also Methodology Remand Order* at 17.

11. Once the Director determines that material injury is occurring or will occur, junior appropriators subject to the delivery call bear the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call. *American Falls* at 877-878, 154 P.3d at 448-449; *see also Methodology Remand Order* at 31. Junior appropriators have the burden of proving by clear and convincing evidence that the delivery call is futile or otherwise unfounded. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841.

12. “This case illustrates the tension between the first in time and beneficial use aspects of the prior appropriation doctrine.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838. The Idaho Supreme Court has in this case “recognized the critical role of the Director in managing the water resources to accommodate both first in time and beneficial use aspects: ‘Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the

Director.” 155 Idaho at 651, 315 P.3d at 839 (quoting *American Falls*, 143 Idaho at 880, 154 P.3d at 451). Thus, in this case the Director may use “a baseline methodology, both as a starting point for consideration of the Coalition’s call and in determining the issue of material injury.” *Id.* at 155 Idaho 650-651, 315 P.3d at 838-39. However, “[i]f changing conditions establish that material injury is greater than originally determined pursuant to the baseline analysis, then adjustments to the mitigation obligation of the juniors must be made when the Director undertakes his mid-season calculations.” *Methodology Remand Order* at 18.

13. In the context of conjunctive administration, the Director’s methodology for projecting material injury does not impose an obligation upon members of the SWC to reprove their water rights. To the extent water is available, members of the SWC are authorized to divert and store water in accordance with the terms of their licenses or decrees. Nothing established herein reduces that authorization. The question that the CM Rules require the Director to answer in this proceeding is, when water is not available to fill the water rights of the SWC, how much water is reasonably necessary for the SWC to accomplish the beneficial purpose of raising crops; because what is needed to irrigate crops may be less than the decreed or licensed quantities. *American Falls*, 143 Idaho at 880, 154 P.3d at 451; see *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838 (“[i]t is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation”) (quoting *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915)). “The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *Id.*

14. Holders of senior-priority water rights may receive less than their licensed or decreed quantities and not suffer material injury within the meaning of the CM Rules. As a result, in-season demand should be viewed in light of reasonableness and optimum development of water resources in the public interest. CM Rules 20 and 42; *American Falls*, 143 Idaho at 876-80, 154 P.3d at 447-51; *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650-652, 315 P.3d at 838-40.

15. Here, the Director has established a methodology for determining material injury to members of the SWC. The methodology predicts material injury to RISD by taking the difference between RISD and the forecasted supply. The years 2000 through 2014 were analyzed to select the initial BLY because the period of years captured current irrigation practices in a dry climate. Based upon evaluation of the record, members of the SWC were exercising more reasonable efficiencies during this time period than during the 1990s when supplies were more plentiful. During periods of drought when junior ground water users are subject to curtailment, members of the SWC should exercise reasonable efficiencies to promote the optimum utilization of the State’s water resources. CM Rules 20 and 42; *American Falls*, 143 Idaho at 876-80, 154 P.3d at 447-51; *Clear Springs*, 150 Idaho at 807-10; 252 P.3d at 88-91; *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650-652, 315 P.3d at 838-40.

16. At this time, with the recognition that the methodology is subject to adjustment and refinement, RISD will be equal to the historic demands associated with the BLY

(2006/2008/2012), and will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

17. Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director's predictions of material injury to RISD and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director's professional judgment as the manager of the State's water resources. Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. As more data is gathered and analyzed, the Director will review and refine the process of predicting and evaluating material injury. The methodology will be adjusted, if the data supports a change.

18. If the Director predicts that the SWC will be materially injured because of a demand shortfall prediction, either in the preseason or in the midseason, the demand shortfall represents a mitigation obligation that must be borne by junior ground water users. If mitigation water in the amount of the projected RISD shortfall cannot be secured or optioned by junior ground water users to the satisfaction of the Director (*see Order on Petition for Judicial Review* at 19), the Director will curtail junior ground water users to make up any deficit.

19. By requiring that junior ground water users secure mitigation water or have options to acquire water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to deliver or assign mitigation water until the time of need, the Director ensures that junior ground water users supply only the amount of mitigation water necessary to satisfy the reasonable in-season demand. All approved methods of mitigation shall be considered in the Director's review of projected RISD shortfall.

20. Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the time of need, the protection afforded to the senior water right holders is compromised. The risk of shortage is then impermissibly shouldered by the SWC. Members of the SWC should have certainty entering the irrigation season and at midseason that mitigation water will be delivered or assigned at the time of need, or curtailment of junior ground water rights will be ordered.

21. Because climate and the supply that the SWC appropriated (natural flow and storage) are inherently variable, the Director cannot and should not insulate the SWC against all shortages. The Director can, however, protect the SWC against reasonably predicted shortages to RISD.

22. Currently, the USBR and USACE's Joint Forecast is an indispensable predictive tool at the Director's disposal for predicting material injury to RISD. Given current forecasting techniques, the earliest the Director can predict material injury to RISD with reasonable certainty is soon after the Joint Forecast is issued in early April. The pre-irrigation season supply forecast for A&B and Milner can be predicted solely from the Joint Forecast. To improve the accuracy of prediction, the pre-irrigation season supply forecast for AFRD2, BID, Minidoka, NSCC, and

TFCC will currently be predicted from both the Joint Forecast and from flow data at Box Canyon.⁹

23. By shifting the April Forecast Supply prediction curve down one standard error of estimate, the Director purposely underestimates the water supply that is predicted. The Director further guards against RISD shortage by using the 06/08/12 BLY, which has above average diversions, above average ET, below average in-season precipitation, and above average growing degree days. The 06/08/12 average represents years in which water supply did not limit diversions. The Director's prediction of material injury to RISD is purposely conservative. While it may ultimately be determined after final accounting that less mitigation water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Cost. Art. XV, § 3; Idaho Code § 42-106. Shifting the prediction curve down one standard error of estimate and adoption of a baseline year that uses above average diversions, above average temperatures and evapotranspiration and below average precipitation is necessary to protect senior rights if the Director administers to an amount less than the full decreed quantity of the SWC's rights. *Methodology Remand Order* at 33, 35.

24. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

25. "Storage water is water held in a reservoir and is intended to assist the holder of the water right in meeting their decreed needs." *American Falls*, 143 Idaho at 878, 154 P.3d at 449. "Carryover is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *Id.* Under Idaho Code, "[o]ne may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right," but "[t]here is no statutory provision for obtaining a decreed right to 'carryover' water." *Id.* Rather, carryover is a "component of the storage right." *Order on Petition for Judicial Review* (Jul. 24, 2009) at 20. Storage carryover is "permissible . . . absent abuse." *American Falls*, 143 Idaho at 880, 154 P.3d at 451.

26. The storage reservoirs implicated in this proceeding were intended to provide supplemental supplies of water "to create a buffer against the uncertainty of the weather." *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (April 29, 2008) at 6. "The history of the development of the reservoir system, most recently Palisades, makes it clear that storage of water was a primary purpose to prevent disaster during periods of shortage as have been experienced in the recent past." *Id.* at 60. The purpose of carryover also is "insurance against the risk of future shortage." *Order on Petition for Judicial Review* (Jul. 24, 2009) at 20.

27. CM Rule 42.01 sets forth factors the Director is "may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste." CM Rule 42.01 does not limit the Director's determination of reasonable carryover to consideration of the factors enumerated in CM Rule 42.01g, but only requires that

⁹ The method for predicting the natural flow supply may be subject change based upon improved predictive models.

the Director consider those enumerated factors. One such factor is “[t]he 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.” CM Rule 42.01g. This factor is qualified, however, by the provision that “the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.” CM Rule 42.01g. Thus, CM Rule 42.01g does not require water right holders to exhaust their storage water supplies prior to making a delivery call under the conjunctive management rules. This is consistent with the purposes of the storage reservoirs and the carryover components of the storage water rights.

28. In considering CM Rule 42.01g in *American Falls*, the Idaho Supreme Court framed the SWC’s challenge to the “reasonable carryover” provision as presenting the question of whether the holders of storage water rights are “entitled to insist on all available water to carryover for future years in order to assure that their full storage water is met (regardless of need),” *American Falls*, 143 Idaho at 879, 154 P.3d at 450, and answered this question in the negative:

At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. *Supra*, paragraph 11.

American Falls, 143 Idaho at 880, 154 P.3d at 451.

29. As discussed in the Findings of Fact, reasonable carryover is determined by projecting the water supply for the system. This is accomplished by projecting the 2002/2004 supply and the 2006/2008/2012 demand. Next, the Director examines the average annual rate of fill of the storage rights held by members of the SWC to determine each entities’ relative probability of fill. Finally, the Director examines the average annual carryover for prior comparable water conditions by reviewing Heise natural flow.

30. 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 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 short fall 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.

31. Recognizing that reservoir space held by members of the SWC may fill, and to prevent the waste of water, junior ground water users are not required to deliver or assign the volume of reasonable carryover until after the Day of Allocation (defined in footnote 16, *infra*). Junior ground water users are obligated to hold the secured or optioned mitigation water until reservoir space held by the SWC fills. If the reservoir space does not fill, junior ground water right holders must deliver or assign the secured or optioned mitigation water to the senior water right holders up to the amount of storage space that did not fill.

32. The Director recognizes that his analysis of the obligation for reasonable carryover differs from his analysis for RISD obligations. In predicting RISD shortages, the Director is able to premise his determination on the Joint Forecast. The Director requires junior ground water users to provide the entire RISD shortage because the Joint Forecast allows determination of material injury with reasonable certainty.

33. In the fall of the subsequent irrigation season, the Director cannot, with reasonable certainty, predict material injury to reasonable carryover. As found by the Hearing Officer, "Anticipating the next season of need is closer to faith than science." R. Vol. 37 at 7109.

ORDER

Based upon and consistent with the Findings of Fact and Conclusions of Law, the Director hereby orders that, for purposes of determining material injury to reasonable in-season demand and reasonable carryover, the following steps will be taken:

1. Step 1: By April 1, members of the SWC will submit electronic shape files to the Department delineating the total anticipated irrigated acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than 5%. Department staff will review submitted shapefiles and modify them as necessary to ensure that: (1) the total acreage count does not exceed the decreed number of acres; (2) all of the irrigated land is located within the decreed place of use; and (3) acres are not counted more than once due to overlapping polygons within a shape file or between shape files submitted by different SWC members. Because the SWC members can best determine the irrigated acres within their service area, the SWC should be responsible for submitting the information to the Department. If this information is not timely submitted, the Department will determine the total irrigated acres based upon past cropping patterns and current satellite and/or aerial imagery. If a SWC member fails or refuses to identify the number of irrigated acres within its service area by April 1, the Department will be cautious about recognizing acres as being irrigated if there is uncertainty about whether the acres are or will be irrigated during the upcoming irrigation season. The Department will electronically post electronic shape files for each member of the SWC for the current water year for review by the parties. In determining the total irrigated acreage, the Department may account for supplemental ground water use. The Department currently does not have sufficient information to accurately determine the contribution of supplemental ground water to irrigate lands irrigated with surface water delivered by the SWC. If and when reliable data is available to the Department, the methodology will be amended to account for the supplemental ground water use.

2. If the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then the Department will assess the impact of this reduction in use of the water right on any mitigation requirement.

3. Step 2: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within fourteen (14) days after issuance of the Joint Forecast, the Director will predict and issue an April Forecast Supply for the water year for each SWC entity. The Director will compare the April Forecast Supply for each SWC entity to the baseline demand (“BD”) for each SWC entity to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season. The April Forecast Supply for each SWC entity is the sum of the forecasted natural flow supply and the forecasted storage allocation for each SWC entity. The forecasted natural flow supply will be determined using regression analysis. The forecasted storage allocation will be determined using an analogous year(s).

4. Step 3: The April DS is the volume of mitigation water junior water right holders must actually physically secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations, unless adjusted as explained below. If junior ground water users previously secured mitigation water for a reasonable carryover shortfall to an individual SWC member in the previous year, the current-year mitigation obligation to the individual SWC member will be reduced by the quantity of water secured for the reasonable carryover shortfall.

5. By May 1, or within fourteen (14) days from issuance of the values set forth in Step 2, whichever is later in time, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver water to the injured members of the SWC at the time of need.

6. Step 4: If junior ground water users fail or refuse to submit this information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 2, whichever is later in time, the Director will issue an order curtailing junior ground water users.¹⁰ The ESPA Model will be run to determine the priority date to produce the necessary volume within the area of common ground water supply as described by CM Rule 50.01.

7. If, at any time prior to the Director’s final determination of the April Forecast Supply, the Director can determine with certainty that any member of the SWC has diverted more natural flow than predicted, or has accrued more storage than predicted, the Director will revise his initial, projected demand shortfall determination.

8. Step 5: If the storage allocations held by members of the SWC fill, there is no reasonable carryover shortfall. If the storage allocations held by members of the SWC do not fill, within fourteen (14) days following the publication of Water District 01’s initial storage

¹⁰ This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year’s obligation.

report, which typically occurs soon after the Day of Allocation,¹¹ the volume of water secured by junior ground water users to fulfill the reasonable carryover shortfall shall be made available to injured members of the SWC. The amount of reasonable carryover to be provided shall not exceed the empty storage space on the Day of Allocation for that entity. If water is owed in addition to the reasonable carryover shortfall volume, this water shall be delivered or assigned to members of the SWC at the Time of Need, described below. The Time of Need will be no earlier than the Day of Allocation.

9. Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) recalculate RISD; (2) issue a revised Forecast Supply and (3) estimate the Time of Need date.¹²

10. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The cumulative CWN volume will be calculated for all land irrigated with surface water within the boundaries of each member of the SWC. Volumetric values of CWN will be calculated using ET and precipitation values from the USBR's AgriMet program, irrigated areas provided by each entity, and crop distributions based on NASS data

11. The Forecast Supply for each SWC is the sum of the year-to-date actual natural flow diversions, the forecasted natural flow supply for the remainder of the season, and the storage allocation for each member of the SWC. The forecasted natural flow supply for the remainder of the season will be based on regression analysis. The storage allocation will be based on the actual preliminary storage allocations issued by the BOR and Water District 01. If the BOR and Water District 01 have not yet allocated stored water to spaceholders, the Department will predict the storage allocations based on an analogous year(s).

12. 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 the 06/08/12 average demand and the 02/04 supply. The Time of Need will not be earlier than the Day of Allocation.

13. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. The Director will then issue revised RISD and DS values. Any increase to the projected DS for each SWC entity is an additional mitigation obligation of the junior ground water users.

14. Upon a determination of an additional mitigation obligation, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver the

¹¹ The Day of Allocation is the time in the irrigation season when the Water District 01 watermaster is able to issue allocations to storage space holders after the reservoir system has achieved its maximum physical fill, maximum water right accrual, and any excess spill past Milner Dam has ceased. Tr. p. 902, lns. 7-25; p. 903, lns. 1-10.

¹² At the earliest established Time of Need for any member of the SWC, junior ground water users are required to provide remaining mitigation to all materially injured members of the SWC.

additional mitigation obligation water to the injured members of the SWC at the time of need. If junior ground water users fail or refuse to submit this information within fourteen (14) days from issuance of a Step 6 order, the Director will issue an order curtailing junior ground water users.¹³ The ESPA Model will be run to determine the priority date to produce the necessary additional mitigation obligation volume within the area of common ground water supply, as described by CM Rule 50.01.

15. Step 7: Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) recalculate RISD; (2) issue a revised Forecast Supply; and (3) establish the Time of Need. The revised Forecast Supply for each SWC entity is the sum of the year-to-date actual natural flow diversions, the forecasted natural flow supply for the remainder of the season, and the storage allocation for each member of the SWC. The forecasted natural flow supply for the remainder of the season will be based on analogous years with similar Blackfoot to Milner reach gains. The storage allocation will be based on the actual preliminary storage allocations issued by the BOR and Water District 01.

16. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue revised RISD and DS values.

17. Step 8: At the Time of Need, junior ground water users are required to deliver to each injured member of the SWC the Step 7 revised DS calculated at the Time of Need. Alternatively, any additional mitigation obligation calculated in Step 6 and Step 7 can be satisfied from the each SWC member's reasonable carryover if (a) the reasonable carryover exceeds the additional mitigation obligation, and (b) the junior ground water users secure sufficient water to replace the reasonable carryover.

18. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water delivered by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

19. 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 crop water need for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future baseline years, and for the refinement and continuing improvement of the method for future use.

20. 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

¹³ This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year's obligation.

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 short fall 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.

IT IS FURTHER ORDERED that the amended Final Order supersedes the Final Order issued April 7, 2010 and the Amended Final Order issued June 16, 2010.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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: (a) of the service date of the final order; (b) 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* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 16th day of April, 2015.

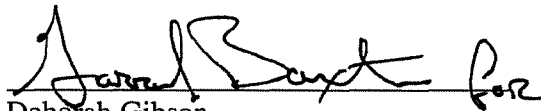

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 2015, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pja@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18 th St, South Terrace, Ste 370 Denver, CO 80202 david.gehlert@usdoj.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@pn.usbr.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Sarah A. Klahn Mitra Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email


Deborah Gibson
Administrative Assistant to the Director

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.

RECEIVED
OCT 19 2015
DEPARTMENT OF
WATER RESOURCES

**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) Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT,)
AMERICAN FALLS RESERVOIR DISTRICT #2,) **FINAL ORDER REGARDING**
BURLEY IRRIGATION DISTRICT, MILNER) **APRIL 2015 FORECAST**
IRRIGATION DISTRICT, MINIDOKA IRRIGATION) **SUPPLY**
DISTRICT, NORTH SIDE CANAL COMPANY,)
AND TWIN FALLS CANAL COMPANY) **(METHODOLOGY STEPS 1 – 3)**
_____)

FINDINGS OF FACT

1. On April 16, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Third 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 will apply Methodology steps 1, 2, and 3.

A. Step 1

2. Step 1 requires members of the SWC to provide electronic shape files delineating the total irrigated acres to the Department by April 1, “or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5% . . .” *Methodology Order* at 32. If the SWC does not timely provide the information, the Department will conservatively determine the total number of irrigated acres. *Id.*

3. On March 6, 2015, Minidoka Irrigation District (“Minidoka”) submitted its electronic shape files delineating its total irrigated acres to the Department.

4. On March 15, 2015, the Department received a letter from American Falls Reservoir District #2 (“AFRD2”), stating that its total number of irrigated acres have not varied by more than 5%.

5. On April 8, 2015, the Department received a letter from A&B Irrigation District (“A&B”), Burley Irrigation District (“BID”), Milner Irrigation District (“Milner”), North Side Canal Company (“NSCC”) and Twin Falls Canal Company (“TFCC”), stating that their total

number of irrigated acres for 2015 will not vary by more than 5% from the electronic shape files submitted in prior years.

6. Based on the information submitted by the SWC, the Department will use the following total irrigated acres:

	Total Irrigated Acres	Data Source
A&B	15,924	Director's Report
AFRD2	62,361	Director's Report
BID	46,035	2013 shapefile submitted, reduced for overlapping acres and acres outside of service area.
Milner	13,335	Director's Report
Minidoka	74,662	2015 shapefile submitted, reduced for overlapping acres and acres outside of service area.
NSCC	154,067	Director's Report
TFCC	194,732	2013 shapefile submitted, reduced for overlapping acres and acres outside of service area.

B. Step 2

7. Step 2 states that, within fourteen days of the issuance of the joint forecast (“Joint Forecast”) prepared by the United States Bureau of Reclamation and the United States Army Corp of Engineers, the Director “will predict and issue an April Forecast Supply for the water year and will compare the April Forecast Supply to the baseline demand (“BD”) to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season. A separate April Forecast Supply and DS will be determined for each member of the SWC.” *Methodology Order* at 16.

8. On April 2, 2015, the Joint Forecast was announced, predicting an unregulated inflow of 2,515,000 acre-feet at the Snake River near Heise gage for the period of April through July. The Joint Forecast “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” *Methodology Order* at 16. The forecasted flow volume equates to 78% percent of average¹ and is most similar to the flow volume experienced in 2003. The Heise forecast was used in regression equations developed for A&B and Milner to predict the natural flow supply.²

¹ The average is based on years 1981-2010.

² Attached hereto are the regression analyses for each SWC entity used to predict natural flow supply.

9. The variables, Heise forecast and Box Canyon total discharge for the period November – March, were utilized in multiple linear regression equations to predict the natural flow supplies for AFRD2, BID, Minidoka, NSCC, and TFCC. *Methodology Order at 16*. The U.S. Geological Survey (“USGS”) measures and monitors the flow at the Box Canyon stream flow measurement gage. A unique circumstance developed this year at the Box Canyon gage. The Box Canyon gaging location has historically been a very stable gage and not subject to regular shifts. Based on stream discharge and stream gaging standards, the USGS began to apply a shift to the Box Canyon data starting in February 2015. The Director does not question the shift applied by the USGS to the Box Canyon data. The concern is that regression models adopted by the Methodology Order are based on unshifted data. A technical working group, comprised of technical experts of the parties, was briefed and did not express significant apprehension with the Director using unshifted Box Canyon data in the regression models for this order. The Box Canyon total discharge used in the regression models by the Director was based on unshifted data and totaled 95,310 acre-feet for the period November – March.

10. The storage allocations were predicted for each SWC member. As of the April 9, 2015 water right accounting, the water rights for Jackson, Lake Walcott, Palisade Winter Water Savings, and American Falls space have filled. The Director anticipates that the SWC will receive a full allocation in their Jackson, Lake Walcott, Palisades Winter Water Savings, and American Falls storage space. Given the runoff forecast, the Director anticipated that the Palisades storage rights will fill to 93%. The storage allocations are based on the anticipated allocation minus evaporation charges.

11. Based on the above, the Director predicts as follows:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 06/08/12	Shortfall
A&B	2,820	133,106		135,926	59,993	-
AFRD2	28,573	382,844	1,000	412,417	427,672	15,300
BID	72,579	220,262	5,130	297,971	251,531	-
Milner	6,136	86,940		93,075	47,135	-
Minidoka	107,013	350,228	8,370	465,611	369,492	-
NSCC	307,726	836,505	(7,750)	1,136,481	978,888	-
TFCC	753,817	239,240	(6,750)	986,307	1,060,011	73,700
Total Predicted Demand Shortfall (AF)						89,000

C. Step 3

12. Step 3 requires the following:

The April DS is the volume of mitigation water junior water right holders must actually physically secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations, unless adjusted as explained below. If junior ground water users previously secured mitigation water for a reasonable carryover shortfall to an individual SWC member in the previous year, the current-year mitigation obligation to the individual SWC member will be reduced by the quantity of water secured for the reasonable carryover shortfall.

By May 1, or within fourteen (14) days from issuance of the values set forth in Step 2, whichever is later in time, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver water to the injured members of the SWC at the time of need.

13. The April predicted demand shortfall for AFRD2 is 15,300 acre-feet. The April predicted demand shortfall for TFCC is 73,700 acre-feet. The total predicted demand shortfall of 89,000 acre-feet is the volume of mitigation water junior water right holders must actually secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations. There was no carryover shortfall in the fall of 2014, junior ground water users did not secure any mitigation water for a carryover shortfall, and there is no adjustment to the mitigation obligation.

CONCLUSIONS OF LAW

1. The Fifth Judicial District Court, in and for the County of Minidoka, held that the evidentiary standard of proof to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2009-000647 (Fifth Jud. Dist., May 4, 2010); *Memorandum Decision and Order on Petitions for Rehearing*, CV-2009-000647 (Fifth Jud. Dist., Nov. 2, 2010).

2. “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).

3. In 2015, the Director has sufficient information to quantify irrigated areas for each of the SWC members as required by Step 1.

4. The Joint Forecast predicts an unregulated inflow of 2,515,000 acre feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 78% of average and is most similar to the flow volume experienced in 2003.

5. The April predicted demand shortfall of 89,000 acre-feet is the volume of mitigation water junior water right holders must actually secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations. There was no carryover shortfall in the fall of 2014, junior ground water users did not secure any mitigation water for a carryover shortfall, and there is no adjustment to the mitigation obligation.

6. Junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver 89,000 acre-feet of water to the injured members of the SWC at the time of need. If junior ground water users fail or refuse to submit this information by April 30, 2015, the Director will issue an order curtailing junior ground water users.

7. If, at any time prior to the Director's final determination of the April Forecast Supply, the Director can determine with certainty that any member of the SWC has diverted more natural flow than predicted, or has accrued more storage than predicted, the Director will revise his initial, projected demand shortfall determination.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Director predicts, at this time, an in-season demand shortfall of 89,000 acre-feet. On or before April 30, 2015, IGWA shall establish, to the satisfaction of the Director that it has secured 89,000 acre-feet of storage water to mitigate for the predicted, in-season demand shortfall. If IGWA cannot establish, to the satisfaction of the Director, that it has secured the required volume of water, in whole or in part, the Director will issue an order curtailing junior-priority ground water users. IGWA is not required to deliver or assign the secured volume of storage water until after the Director determines the SWC's Time of Need, as established in Step 7 of the Third Amended Methodology Order.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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: (a) of the service date of the final order; (b) 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* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 16th day of April, 2015.



GARY SPACKMAN
Director

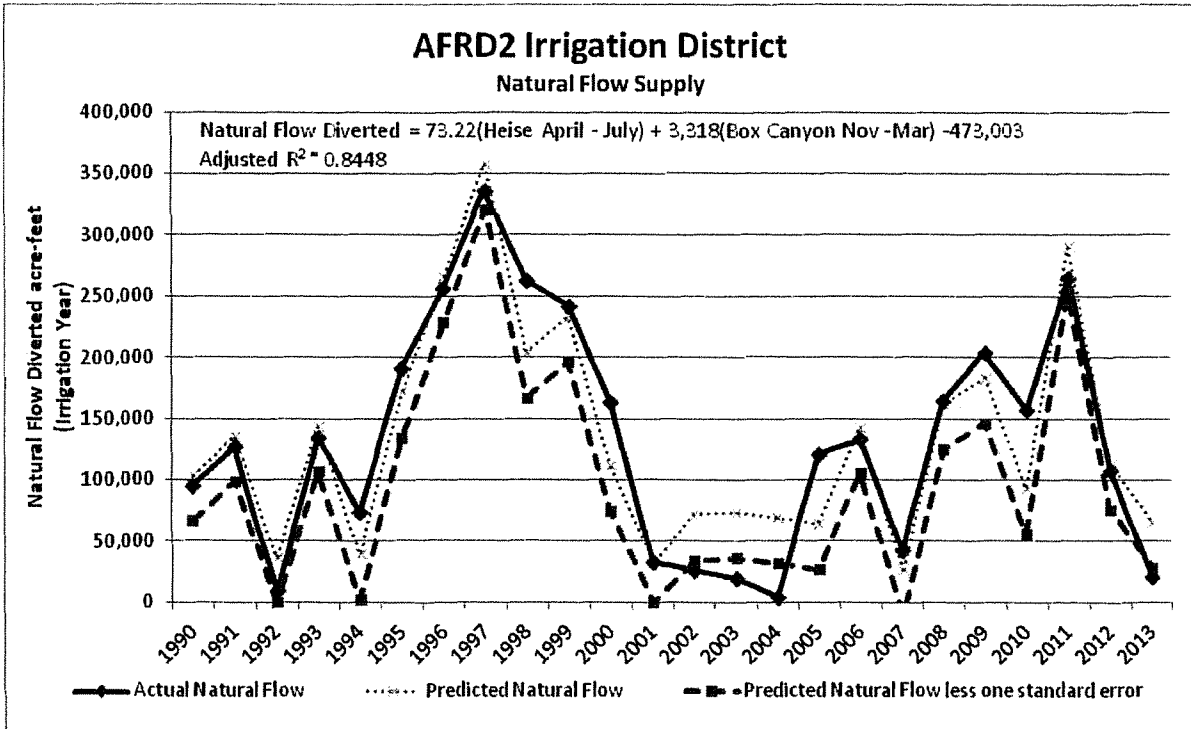
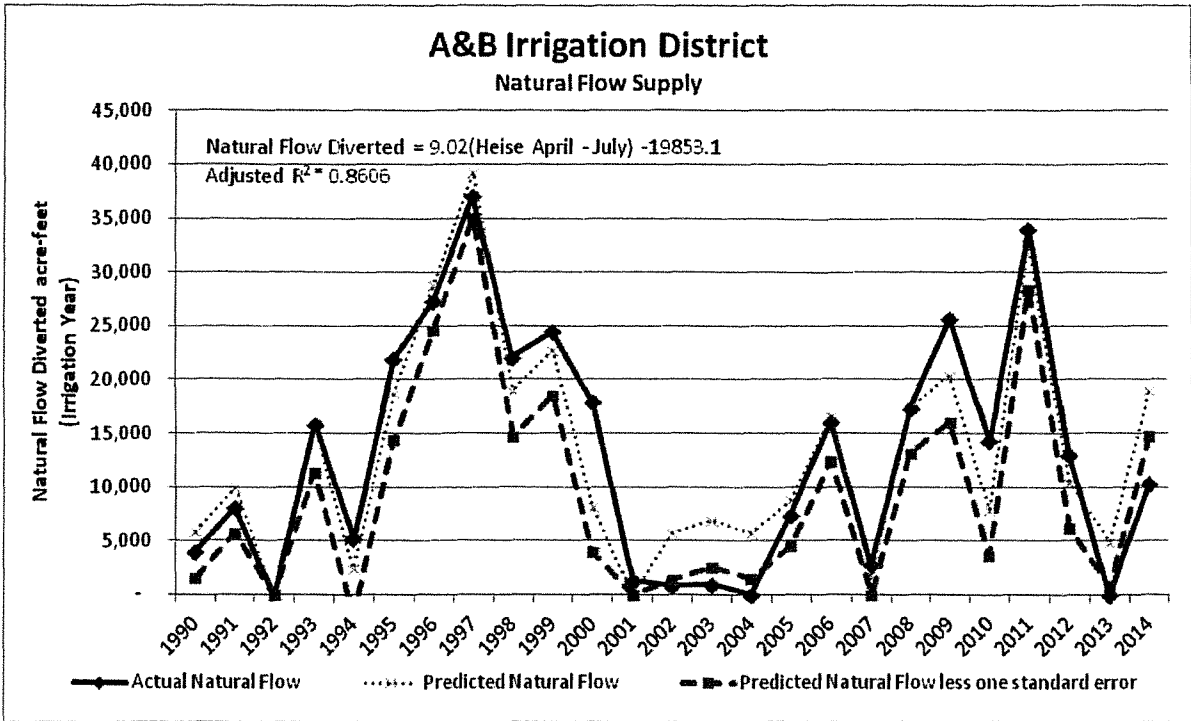
CERTIFICATE OF SERVICE

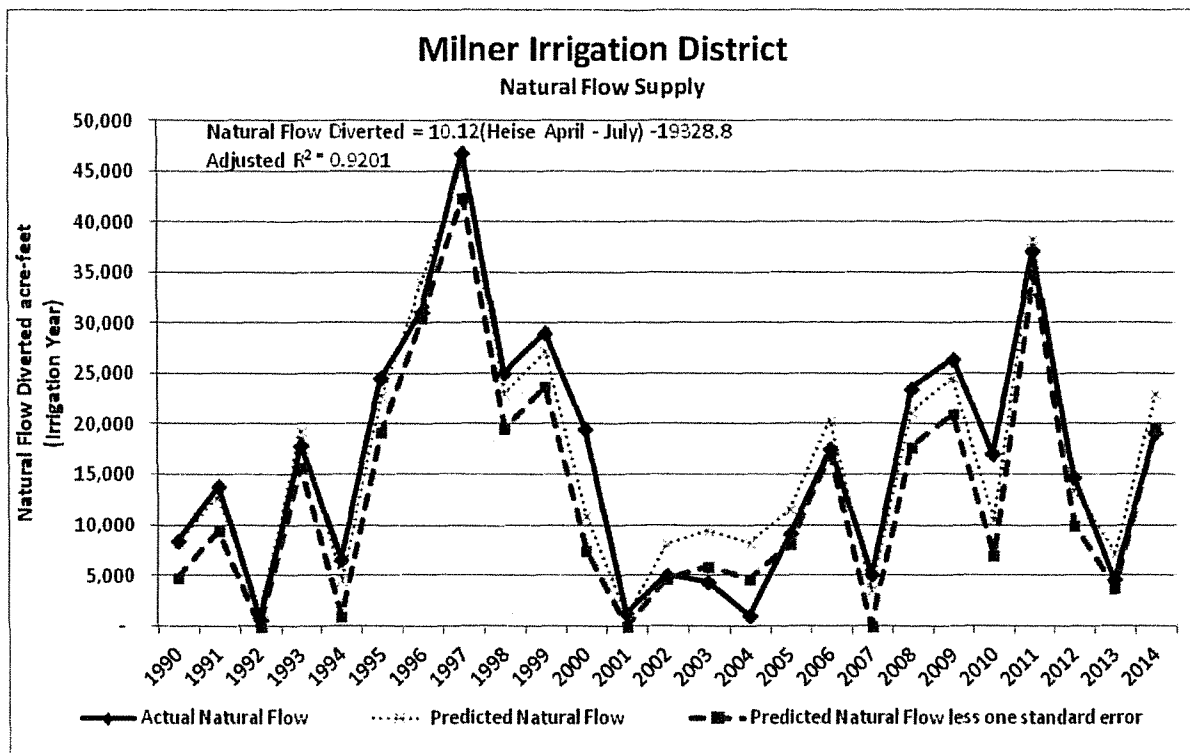
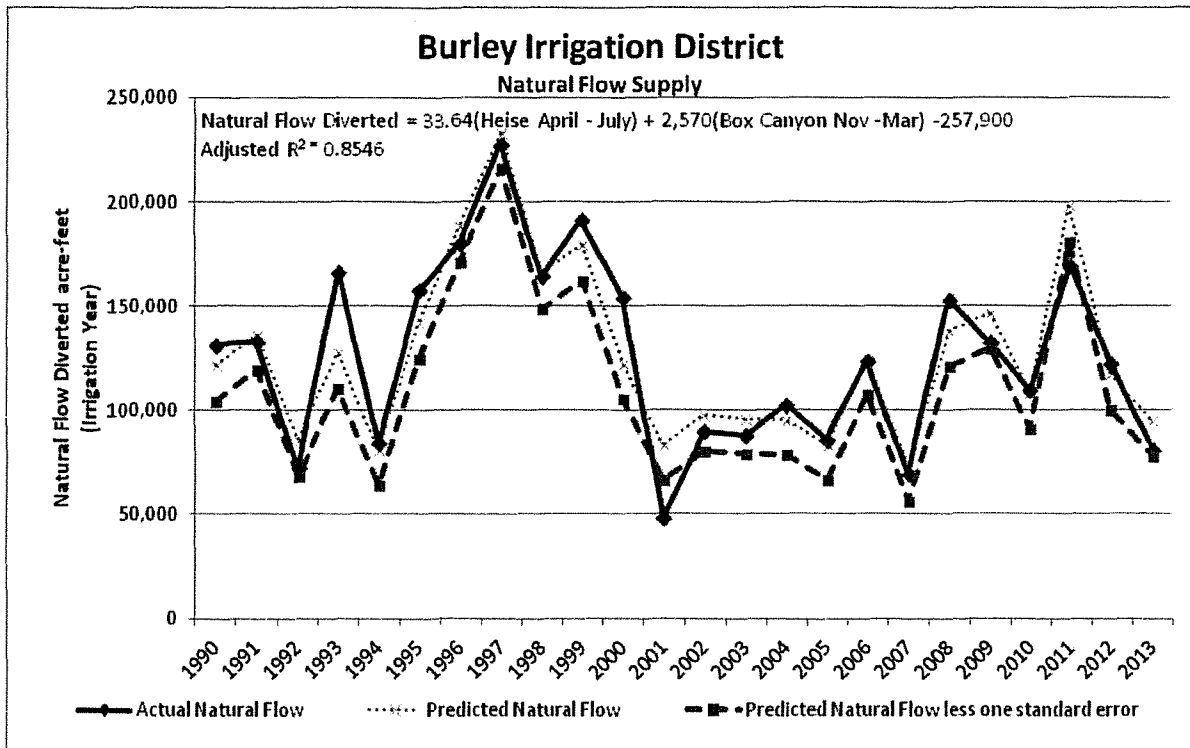
I HEREBY CERTIFY that on this 17TH day of April, 2014, the above and foregoing, was served by the method indicated below, and addressed to the following:

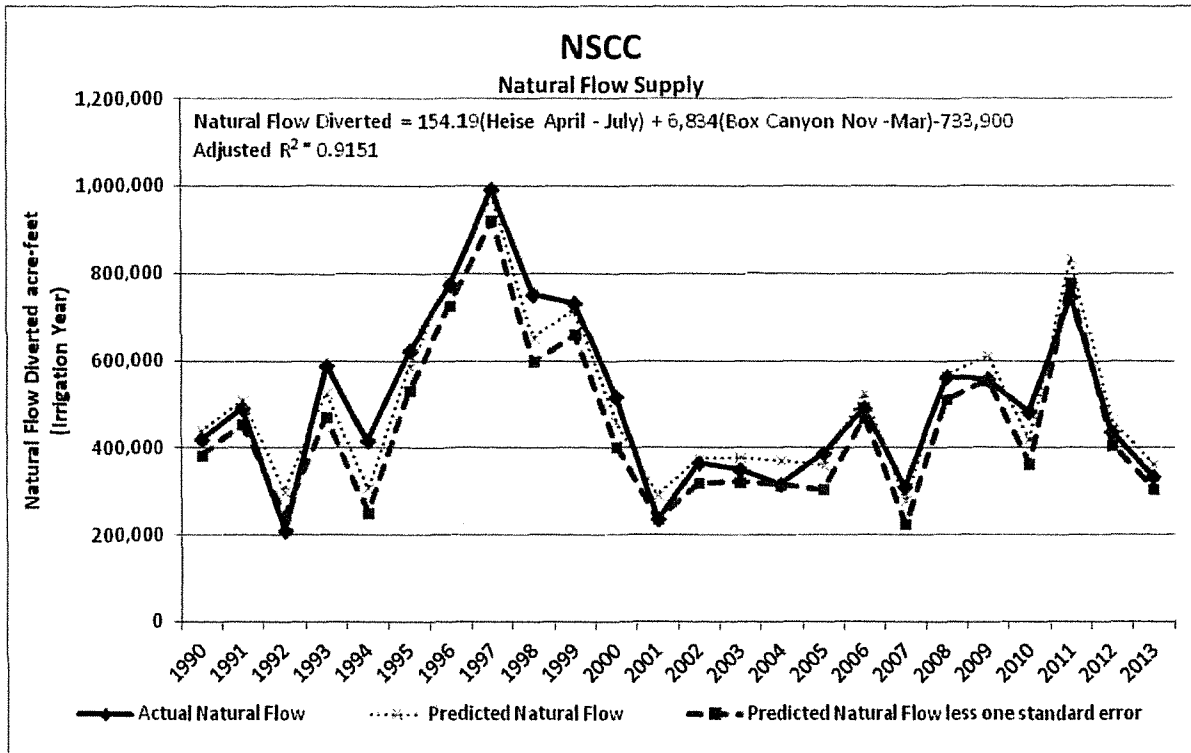
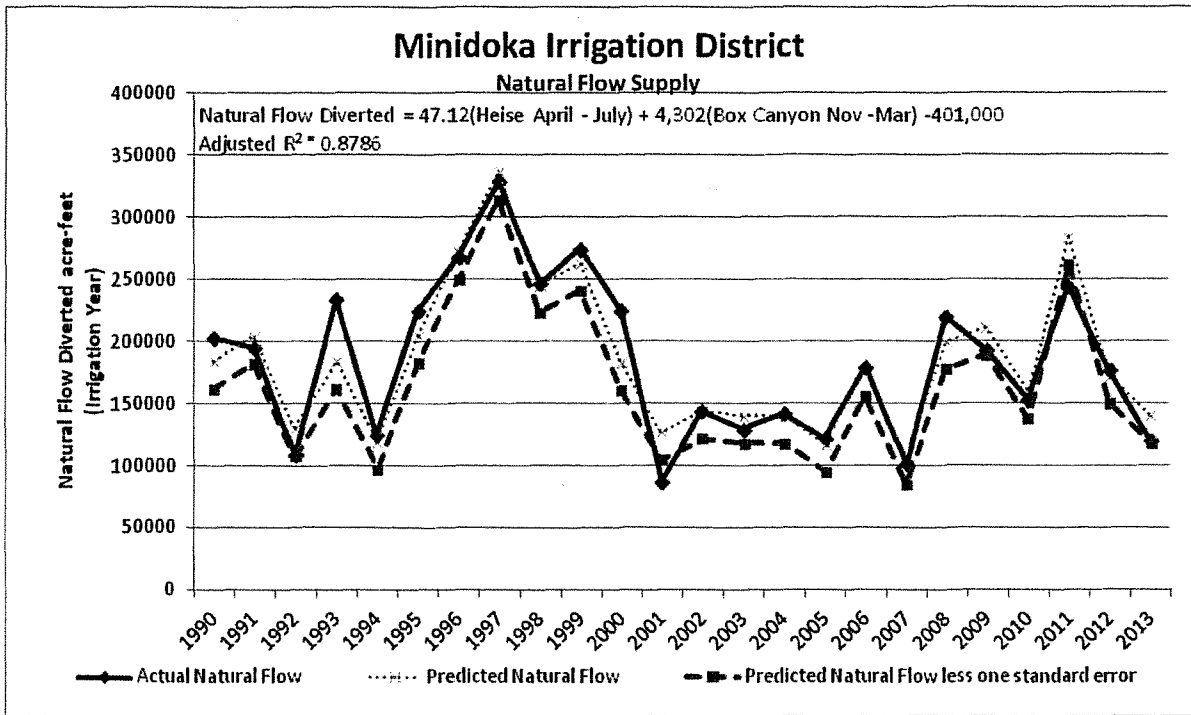
<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP 195 River Vista Place, Ste. 204 Twin Falls, ID 83301-3029 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>

<p>Sarah A. Klahn Mitra Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 lyle.swank@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>


 Deborah Gibson
 Administrative Assistant



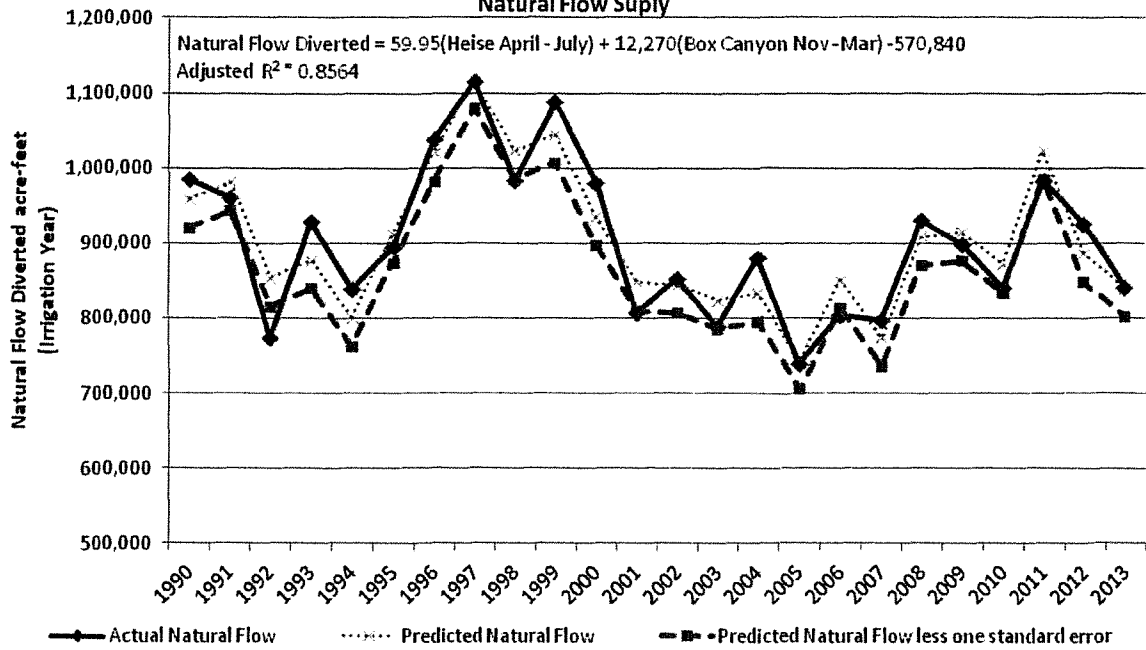




TFCC

Natural Flow Supply

Natural Flow Diverted = 59.95(Heise April - July) + 12,270(Box Canyon Nov - Mar) - 570,840
Adjusted R² = 0.8564



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.

Table of Contents

37.03.11 - Rules for Conjunctive Management of Surface and Ground Water Resources

000. Legal Authority (Rule 0).	2
001. Title And Scope (Rule 1).	2
002. Written Interpretations (Rule 2).	2
003. Administrative Appeals (Rule 3).	2
004. Severability (Rule 4).	2
005. Other Authorities Remain Applicable (Rule 5).	2
006. -- 009. (Reserved)	2
010. Definitions (Rule 10).	2
011. -- 019. (Reserved)	4
020. General Statements Of Purpose And Policies For Conjunctive Management Of Surface And Ground Water Resources (Rule 20).	4
021. -- 029. (Reserved)	5
030. Responses To Calls For Water Delivery Made By The Holders Of Senior-Priority Surface Or Ground Water Rights Against The Holders Of Junior-Priority Ground Water Rights Within Areas Of The State Not In Organized Water Districts Or Within Water Districts Where Ground Water Regulation Has Not Been Included In The Functions Of Such Districts Or Within Areas That Have Not Been Designated Ground Water Management Areas (Rule 30).	5
031. Determining Areas Having A Common Ground Water Supply (Rule 31).	7
032. -- 039. (Reserved)	8
040. Responses To Calls For Water Delivery Made By The Holders Of Senior-Priority Surface Or Ground Water Rights Against The Holders Of Junior-Priority Ground Water Rights From Areas Having A Common Ground Water Supply In An Organized Water District (Rule 40).	8
041. Administration Of Diversion And Use Of Water Within A Ground Water Management Area (Rule 41).	9
042. Determining Material Injury And Reasonableness Of Water Diversions (Rule 42).	10
043. Mitigation Plans (Rule 43).	11
044. -- 049. (Reserved)	12
050. Areas Determined To Have A Common Ground Water Supply (Rule 50).	12
051. -- 999. (Reserved)	12

**IDAPA 37
TITLE 03
CHAPTER 11**

**37.03.11 - RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE
AND GROUND WATER RESOURCES**

000. LEGAL AUTHORITY (RULE 0).

These rules are promulgated pursuant to Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code, which provides that the Director of the Department of Water Resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department.
(10-7-94)

001. TITLE AND SCOPE (RULE 1).

These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water Resources." The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently.
(10-7-94)

002. WRITTEN INTERPRETATIONS (RULE 2).

In accordance with Section 67-5201(19)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements that pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter.
(10-7-94)

003. ADMINISTRATIVE APPEALS (RULE 3).

Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department's Rules of Procedure, IDAPA 37.01.01.
(10-7-94)

004. SEVERABILITY (RULE 4).

The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter.
(10-7-94)

005. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 5).

Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.
(10-7-94)

006. -- 009. (RESERVED)

010. DEFINITIONS (RULE 10).

For the purposes of these rules, the following terms will be used as defined below.
(10-7-94)

01. Area Having a Common Ground Water Supply. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. (Section 42-237a.g., Idaho Code) (10-7-94)

02. Artificial Ground Water Recharge. A deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code, and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply.
(10-7-94)

03. Conjunctive Management. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground

water supply. (10-7-94)

04. Delivery Call. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. (10-7-94)

05. Department. The Department of Water Resources created by Section 42-1701, Idaho Code. (10-7-94)

06. Director. The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or an employee, hearing officer or other appointee of the Department who has been delegated to act for the Director as provided by Section 42-1701, Idaho Code. (10-7-94)

07. Full Economic Development of Underground Water Resources. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42. (10-7-94)

08. Futile Call. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource. (10-7-94)

09. Ground Water Management Area. Any ground water basin or designated part thereof as designated by the Director pursuant to Section 42-233(b), Idaho Code. (10-7-94)

10. Ground Water. Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code. (10-7-94)

11. Holder of a Water Right. The legal or beneficial owner or user pursuant to lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose. (10-7-94)

12. Idaho Law. The constitution, statutes, administrative rules and case law of Idaho. (10-7-94)

13. Junior-Priority. A water right priority date later in time than the priority date of other water rights being considered. (10-7-94)

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. (10-7-94)

15. Mitigation Plan. A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply. (10-7-94)

16. Person. Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. (10-7-94)

17. Petitioner. Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule. (10-7-94)

18. Reasonable Ground Water Pumping Level. A level established by the Director pursuant to Sections 42-226, and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law. (10-7-94)

19. Reasonably Anticipated Average Rate of Future Natural Recharge. The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change. (10-7-94)

20. Respondent. Persons against whom complaints or petitions are filed or about whom investigations are initiated. (10-7-94)

21. Senior-Priority. A water right priority date earlier in time than the priority dates of other water rights being considered. (10-7-94)

22. Surface Water. Rivers, streams, lakes and springs when flowing in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code. (10-7-94)

23. Water District. An instrumentality of the state of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law. (10-7-94)

24. Watermaster. A person elected and appointed as provided in Section 42-605, and Section 42-801, Idaho Code, to distribute water within a water district. (10-7-94)

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. (10-7-94)

011. -- 019. (RESERVED)

020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES (RULE 20).

01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. (10-7-94)

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. (10-7-94)

03. Reasonable Use of Surface and Ground Water. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule. (10-7-94)

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. (10-7-94)

05. Exercise of Water Rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made. (10-7-94)

06. Areas Having a Common Ground Water Supply. These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code. (10-7-94)

07. Sequence of Actions for Responding to Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state. (10-7-94)

08. Reasonably Anticipated Average Rate of Future Natural Recharge. These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge. (Section 42-237a.g., Idaho Code) (10-7-94)

09. Saving of Defenses. Nothing in these rules shall affect or in any way limit any person's entitlement to assert any defense or claim based upon fact or law in any contested case or other proceeding. (10-7-94)

10. Wells as Alternate or Changed Points of Diversion for Water Rights from a Surface Water Source. Nothing in these rules shall prohibit any holder of a water right from a surface water source from seeking, pursuant to Idaho law, to change the point of diversion of the water to an inter-connected area having a common ground water supply. (10-7-94)

11. Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury. (10-7-94)

021. -- 029. (RESERVED)

030. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS OR WITHIN AREAS THAT HAVE NOT BEEN DESIGNATED GROUND WATER MANAGEMENT AREAS (RULE 30).

01. Delivery Call (Petition). When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230: (10-7-94)

a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water. (10-7-94)

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records. (10-7-94)

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury. (10-7-94)

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated. (10-7-94)

02. Contested Case. The Department will consider the matter as a petition for contested case under the Department's Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. (10-7-94)

03. Informal Resolution. The Department may initially consider the contested case for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without prejudicing the interests of any party. (10-7-94)

04. Petition for Modification of an Existing Water District. In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. (10-7-94)

05. Petition for Creation of a New Water District. In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area having a common ground water supply which is not in an existing water district, and the water rights have been adjudicated, the Department may consider such to be a petition for creation of a new water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

06. Petition for Designation of a Ground Water Management Area. In the event the petition proposes regulation of ground water rights from an area having a common ground water supply within which the water rights have not been adjudicated, the Department may consider such to be a petition for designation of a ground water management area pursuant to Section 42-233(b), Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

07. Order. Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district; (10-7-94)

d. Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district; (10-7-94)

e. Create a new water district following the procedures of Section 42-604, Idaho Code, provided that

the water rights to be included in the new water district have been adjudicated; (10-7-94)

f. Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code; (10-7-94)

g. By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well; or (10-7-94)

h. Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights. (10-7-94)

08. Orders for Interim Administration. For the purposes of Rule Subsections 030.07.d. and 030.07.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the water rights involved. (10-7-94)

09. Administration Pursuant to Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40. (10-7-94)

10. Administration Pursuant to Rule 41. Upon the designation of a ground water management area, the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41. (10-7-94)

031. DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY (RULE 31).

01. Director to Consider Information. The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply. (10-7-94)

02. Kinds of Information. The information considered may include, but is not limited to, any or all of the following: (10-7-94)

a. Water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and (10-7-94)

b. The testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district or designation of a ground water management area. (10-7-94)

03. Criteria for Findings. A ground water source will be determined to be an area having a common ground water supply if: (10-7-94)

a. The ground water source supplies water to or receives water from a surface water source; or (10-7-94)

b. Diversion and use of water from the ground water source will cause water to move from the surface

water source to the ground water source. (10-7-94)

c. Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source. (10-7-94)

04. Reasonably Anticipated Average Rate of Future Natural Recharge. The Director will estimate the reasonably anticipated average rate of future natural recharge for an area having a common ground water supply. Such estimates will be made and updated periodically as new data and information are available and conditions of diversion and use change. (10-7-94)

05. Findings. The findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07. (10-7-94)

032. -- 039. (RESERVED)

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall: (10-7-94)

a. 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, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or (10-7-94)

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director. (10-7-94)

02. Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code, and under the following procedures: (10-7-94)

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source. (10-7-94)

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director. (10-7-94)

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority. (10-7-94)

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by Section 42-606, Idaho Code. (10-7-94)

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated. (10-7-94)

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste. (10-7-94)

04. Actions of the Watermaster Under a Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan. (10-7-94)

05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. (10-7-94)

06. Collection of Assessments Within Water District. Where a mitigation plan has been approved, the watermaster of the water district shall include the costs of administration of the plan within the proposed annual operation budget of the district; and, upon approval by the water users at the annual water district meeting, the water district shall provide for the collection of assessment of ground water users as provided by the plan, collect the assessments and expend funds for the operation of the plan; and the watermaster shall maintain records of the volumes of water or other compensation made available by the plan and the disposition of such water or other compensation. (10-7-94)

041. ADMINISTRATION OF DIVERSION AND USE OF WATER WITHIN A GROUND WATER MANAGEMENT AREA (RULE 41).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows: (10-7-94)

a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient. (10-7-94)

b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area. (10-7-94)

02. Order. Following the hearing, the Director may take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Find that the water supply of the ground water management area is insufficient to meet the

demands of water rights within all or portions of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water, provided that the Director shall consider the expected benefits of an approved mitigation plan in making such finding. (10-7-94)

d. Require the installation of measuring devices and the reporting of water diversions pursuant to Section 42-701, Idaho Code. (10-7-94)

03. Date and Effect of Order. Any order to cease or reduce withdrawal of water will be issued prior to September 1 and shall be effective for the growing season during the year following the date the order is given and until such order is revoked or modified by further order of the Director. (10-7-94)

04. Preparation of Water Right Priority Schedule. For the purposes of the Order provided in Rule Subsections 041.02 and 041.03, the Director will utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule. (10-7-94)

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following: (10-7-94)

a. The amount of water available in the source from which the water right is diverted. (10-7-94)

b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (10-7-94)

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. (10-7-94)

e. The amount of water being diverted and used compared to the water rights. (10-7-94)

f. The existence of water measuring and recording devices. (10-7-94)

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10-7-94)

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority. (10-7-94)

02. Delivery Call for Curtailment of Pumping. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan. (10-7-94)

043. MITIGATION PLANS (RULE 43).

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

- a. The name and mailing address of the person or persons submitting the plan. (10-7-94)
- b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)
- c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)
- d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)
- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)
- c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water 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 pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)
- d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)
- e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)
- f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)
- g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)
- h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)
- i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or

time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

044. -- 049. (RESERVED)

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. (10-7-94)

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)

b. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)

d. The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area. (10-7-94)

051. -- 999. (RESERVED)

Subject Index

- A**
Administration Of Diversion & Use Of Water Within A Ground Water Management Area 9
Date & Effect of Order 10
Order 9
Preparation of Water Right Priority Schedule 10
Responding to a Delivery Call 9
Areas Determined To Have A Common Ground Water Supply 12
Eastern Snake Plain Aquifer 12
- D**
Definitions, IDAPA 37.03.11 2
Area Having a Common Ground Water Supply 2
Artificial Ground Water Recharge 2
Conjunctive Management 2
Delivery Call 3
Department 3
Director 3
Full Economic Development of Underground Water Resources 3
Futile Call 3
Ground Water 3
Ground Water Management Area 3
Holder of a Water Right 3
Idaho Law 3
Junior-Priority 3
Material Injury 3
Mitigation Plan 3
Person 3
Petitioner 3
Reasonable Ground Water Pumping Level 3
Reasonably Anticipated Average Rate of Future Natural Recharge 4
Respondent 4
Senior-Priority 4
Surface Water 4
Water District 4
Water Right 4
Watermaster 4
Determining Areas Having A Common Ground Water Supply 7
Criteria for Findings 7
Director to Consider Information 7
Findings 8
Kinds of Information 7
Reasonably Anticipated Average Rate of Future Natural Recharge 8
Determining Material Injury & Reasonableness Of Water Diversions 10
Delivery Call for Curtailment of Pumping 10
Factors 10
- G**
General Statements Of Purpose & Policies For Conjunctive Management Of Surface & Ground Water Resources 4
Areas Having a Common Ground Water Supply 5
Delivery Calls 4
Distribution of Water Among the Holders of Senior & Junior-Priority Rights 4
Domestic & Stock Watering Ground Water Rights Exempt 5
Exercise of Water Rights 5
Prior Appropriation Doctrine 4
Reasonable Use of Surface & Ground Water 4
Reasonably Anticipated Average Rate of Future Natural Recharge 5
Saving of Defenses 5
Sequence of Actions for Responding to Delivery Calls 5
Wells as Alternate or Changed Points of Diversion for Water Rights from a Surface Water Source 5
- I**
Idaho 3
- M**
Mitigation Plans 11
Factors to Be Considered 11
Notice & Hearing 11
Submission of Mitigation Plans 11
- R**
Responses To Calls For Water Delivery Made By The Holders Of Senior-Priority Surface Or Ground Water Rights Against The Holders Of Junior-Priority Ground Water Rights 5
Administration Pursuant to Rule 40 7
Administration Pursuant to Rule 41 7
Contested Case 6
Delivery Call (Petition) 5
Informal Resolution 6
Order 6
Orders for Interim Administration 7
Petition for Creation of a New Water District 6
Petition for Designation of a Ground Water Management Area 6
Petition for Modification of an Existing Water District 6
Responses To Calls For Water Delivery Made By The Holders Of Senior-Priority Surface Or Ground Water Rights Against The Holders Of Junior-Priority Ground Water Rights From Areas Having A Common Ground Water Supply In An Organized Water District 8
Actions of the Watermaster Under a Mitigation Plan 9
Collection of Assessments Within Water District 9
Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective 9
Reasonable Exercise of Rights 9
Regulation of Uses of Water by Watermaster 8
Responding to a Delivery Call 8

SETTLEMENT AGREEMENT ENTERED INTO JUNE 30, 2015 BETWEEN PARTICIPATING MEMBERS OF THE SURFACE WATER COALITION¹ AND PARTICIPATING MEMBERS OF THE IDAHO GROUND WATER APPROPRIATORS, INC.²

IN SETTLEMENT OF LITIGATION INVOLVING THE DISTRIBUTION OF WATER TO THE MEMBERS OF THE SURFACE WATER COALITION, THE PARTIES AGREE AS FOLLOWS:

1. Objectives.

- a. Mitigate for material injury to senior surface water rights that rely upon natural flow in the Near Blackfoot to Milner reaches to provide part of the water supply for the senior surface water rights.
- b. Provide “safe harbor” from curtailment to members of ground water districts and irrigation districts that divert ground water from the Eastern Snake Plain Aquifer (ESPA) for the term of the Settlement Agreement and other ground water users that agree to the terms of this Settlement Agreement.
- c. Minimize economic impact on individual water users and the state economy arising from water supply shortages.
- d. Increase reliability and enforcement of water use, measurement, and reporting across the Eastern Snake Plain.
- e. Increase compliance with all elements and conditions of all water rights and increase enforcement when there is not compliance.
- f. Develop an adaptive groundwater management plan to stabilize and enhance ESPA levels to meet existing water right needs.

¹ The Surface Water Coalition members (“SWC”) are A&B Irrigation District (A&B), American Falls Reservoir District No. 2 (AFRD2), Burley Irrigation District (BID), Milner Irrigation District (Milner), Minidoka Irrigation District (MID), North Side Canal Company (NSCC), and Twin Falls Canal Company (TFCC). The acronym “SWC” in the Settlement Agreement is used for convenience to refer to all members of the Surface Water Coalition who are the actual parties to this Settlement Agreement.

² The Idaho Ground Water Appropriators, Inc. (“IGWA”) are Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Southwest Irrigation District, and Fremont-Madison Irrigation District, Anheuser-Busch, United Water, Glambia Cheese, City of Blackfoot, City of American Falls, City of Jerome, City of Rupert, City of Heyburn, City of Paul, City of Chubbuck, and City of Hazelton. The acronym “IGWA” in the Settlement Agreement is used for convenience to refer to all members of the Idaho Ground Water Appropriators, Inc. who are the actual parties to this Settlement Agreement.

2. Near Term Practices.

- a. For 2015 IGWA on behalf of its member districts will acquire a minimum of 110,000 ac-ft for assignment as described below:
 - i. 75,000 ac-ft of private leased storage water shall be delivered to SWC;
 - ii. 15,000 ac-ft of additional private leased storage water shall be delivered to SWC within 21 days following the date of allocation;
 - iii. 20,000 ac-ft of common pool water shall be obtained by IGWA through a TFCC application to the common pool and delivered to SWC within 21 days following the date of allocation; and
 - iv. Secure as much additional water as possible to be dedicated to on-going conversion projects at a cost not to exceed \$1.1 million, the cost of which will be paid for by IGWA and/or the converting members.
- b. The parties stipulate the director rescind the April 16 As-Applied Order and stay the April 16 3rd Amended Methodology Order, and preserve all pending rights and proceedings.
- c. "Part a" above shall satisfy all 2015 "in-season" mitigation obligations to the SWC.
- d. This Settlement Agreement is conditional upon approval and submission by the respective boards of the Idaho Ground Water Appropriators, Inc. ("IGWA") and the Surface Water Coalition ("SWC") to the Director by August 1.
- e. If the Settlement Agreement is not approved and submitted by August 1 the methodology order shall be reinstated and implemented for the remainder of the irrigation season.
- f. Parties will work to identify and pass legislative changes needed to support the objectives of this Settlement Agreement, including, development of legislation memorializing conditions of the ESPA, obligations of the parties, and ground water level goal and benchmarks identified herein.

3. Long Term Practices, Commencing 2016.

- a. *Consumptive Use Volume Reduction.*
 - i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.
 - ii. Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.
- b. *Annual storage water delivery.*
 - i. IGWA will provide 50,000 ac-ft of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to SWC 21 days after the date of allocation, for use to the extent needed to meet irrigation

requirements. Any excess storage water will be used for targeted conversions and recharge as determined by SWC and IGWA.

- ii. IGWA shall use its best efforts to continue existing conversions in Water Districts 130 and 140.

c. *Irrigation season reduction.*

Ground water users will not irrigate sooner than April 1 or later than October 31.

d. *Mandatory Measurement Requirement.*

Installation of approved closed conduit flow meter on all remaining unmeasured and power consumption coefficient (PCC) measured ground water diversions will be completed by the beginning of the 2018 irrigation season. Measurement device installation will be phased in over three years, by ground water district, in a sequence determined by the parties. If an adequate measurement device is not installed by the beginning of the 2016 irrigation season, a cropping pattern methodology will be utilized until such measuring device is installed.

e. *Ground Water Level Goal and Benchmarks.*

- i. Stabilize and ultimately reverse the trend of declining ground water levels and return ground water levels to a level equal to the average of the aquifer levels from 1991-2001. Utilize groundwater levels in mutually agreed upon wells with mutually agreed to calculation techniques to measure ground water levels. A preliminary list of 19 wells has been agreed to by the parties, recognizing that the list may be modified based on additional technical information.
- ii. The following benchmarks shall be established:
 - o Stabilization of ground water levels at identified wells by April 2020, to 2015 ground water levels;
 - o Increase in ground water levels by April 2023 to a point half way between 2015 ground water levels and the ground water level goal; and
 - o Increase of ground water levels at identified wells by April 2026 to the ground water level goal.
- iii. Develop a reliable method to measure reach gain trends in the Blackfoot to Milner reach within 10 years.
- iv. When the ground water level goal is achieved for a five year rolling average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained.
- v. If any of the benchmarks, or the ground water level goal, is not achieved, adaptive measures will be identified and implemented per section 4 below.

f. *Recharge.*

Parties will support State sponsored managed recharge program of 250 KAF annual-average across the ESPA, consistent with the ESPA CAMP and the direction in HB

547. IGWA's contributions to the State sponsored recharge program will be targeted for infrastructure and operations above American Falls.

g. *NRCS Programs.*

Parties will support NRCS funded permanent water conservation programs.

h. *Conversions.*

IGWA will undertake additional targeted ground water to surface water conversions and/or fallow land projects above American Falls (target near Blackfoot area as preferred sites).

i. *Trust Water Rights.*

The parties will participate and support the State in initiating and conducting discussions regarding long-term disposition of trust water rights and whether trust water rights should be renewed or cancelled, or if certain uses of trust water rights should be renewed or cancelled.

j. *Transfer Processes.*

Parties agree to meet with the State and water users to discuss changes in transfer processes within or into the ESPA.

k. *Moratorium Designations.*

State will review and continue the present moratoriums on new applications within the ESPA, including the non-trust water area.

l. *IDWR Processes.*

Develop guidelines for water right applications, transfers and water supply bank transactions for consideration by the IDWR.

m. *Steering Committee.*

- i. The parties will establish a steering committee comprised of a representative of each signatory party and the State.
- ii. Steering committee will be formed on or before September 10, 2015 and will meet at least once annually.
- iii. The Steering Committee will develop an adaptive management plan for responding to changes in aquifer levels and reach gain trends, review progress on implementation and achieving benchmarks and the ground water goal.
- iv. A technical work group ("TWG") will be created to support the Steering Committee. The TWG will provide technical analysis to the Steering Committee, such as developing a better way to predict and measure reach gains and ground water levels, to assist with the on-going implementation and adaptive management of the Settlement Agreement.

4. Adaptive Water Management Measures.

- a. If any of the benchmarks or the ground water level goal is not met, additional recharge, consumptive use reductions, or other measures as recommended by the

Steering Committee shall be implemented by the participating ground water parties to meet the benchmarks or ground water level goal.

- b. The SWC, IGWA and State recognize that even with full storage supplies, present (2015) reach gain levels in the Near Blackfoot to Milner reach (natural flows) are not sufficient to provide adequate and sustainable water supplies to the SWC.

5. Safe Harbor.

No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.

6. Non-participants.

Any ground water user not participating in this Settlement Agreement or otherwise have another approved mitigation plan will be subject to administration.

7. Term.

This is a perpetual agreement.

8. Binding Effect.

This Agreement shall bind and inure to the benefit of the respective successors of the parties.

9. Entire Agreement.

This Agreement sets forth all understandings between the parties with respect to SWC delivery call. There are no other understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

10. Effect of Headings.

Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

11. Effective Date.

This Agreement shall be binding and effective when the following events have occurred:

- a. This Agreement is approved and executed by the participating parties consistent with paragraph 2.e. above; and
- b. IGWA has assigned all of the storage water required by paragraph 2.a.i. , ii., and iii. to the SWC by July 8, 2015.

The parties have executed this Agreement on the date following their respective signatures.

RACINE OLSON NYE BUDGE AND BAILEY, CHARTERED

Randall C. Budge 7/1/2015
Randall C. Budge Date

Attorney for Idaho Ground Water Appropriators, Inc.

IDAHO GROUND WATER APPROPRIATORS, INC.

 7/1/2015
Tim Deeg Date

President

FLETCHER LAW OFFICE

W. Kent Fletcher

Date

On Behalf of the Surface Water Coalition

BARKER ROSHOLT AND SIMPSON LLP

John K. Simpson Date

On Behalf of the Surface Water Coalition

**The following signature pages are
for the August 1 Deadline**

FLETCHER LAW OFFICE

W. Kent Fletcher Date

Attorney for Minidoka Irrigation District
and American Falls Reservoir District No. 2

BARKER ROSHOLT AND SIMPSON LLP

John K. Simpson

Date

Attorney for A&B Irrigation District, Burley Irrigation
District, Milner Irrigation District, North Side Canal
Company, and Twin Falls Canal Company

ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT

Nick Behrend

Date

Chairman

BINGHAM GROUND WATER DISTRICT

Craig Evans

Date

Chairman

BONNEVILLE-JEFFERSON GROUND WATER DISTRICT

Dane Watkins

Date

Chairman

CAREY VALLEY GROUND WATER DISTRICT

Leta Hansen

Date

Chairman

JEFFERSON CLARK GROUND WATER DISTRICT

Kirk Jacobs Date

Chairman

MADISON GROUND WATER DISTRICT

Jason Webster

Date

Chairman

MAGIC VALLEY GROUND WATER DISTRICT

Dean Stevenson

Date

Chairman

NORTH SNAKE GROUND WATER DISTRICT

Lynn Carlquist

Date

Chairman

FREMONT MADISON IRRIGATION DISTRICT

Dale L. Swenson Date

Manager

SOUTHWEST IRRIGATION DISTRICT

RANDY BROWN Date

Chairman

WATER WARS - IS THE END IN SIGHT?

“A Perspective from Groundwater Users”

Prepared by Randall C. Budge, Attorney for
Idaho Groundwater Appropriators, Inc. (“IGWA”)¹

I.

INTRODUCTION

While frequently used and often an exaggeration, “Water Wars” is a fairly apt description of the intransigent battles between the holders of senior surface and spring water rights in the Magic Valley and the holders of junior groundwater rights across the Eastern Snake Plain. After more than a decade of litigation, however, a few glimmers of light have recently appeared at the end of the tunnel . . . or it is an illusion?

The hydraulic connection between the Eastern Snake Plain Aquifer (“ESPA” or “Aquifer”)² and the Snake River has been known for more than a century, but it wasn’t until the 1990s that the State of Idaho undertook to administer them as connected sources. The Idaho Department of Water Resources (IDWR) developed its *Rules for Conjunctive Management of Surface and Groundwater Resources* (“Conjunctive Management Rules”) in 1994, followed by development of a computer model that attempts to simulate the impacts of groundwater pumping on the Snake River and various springs tributary to the River. These developments led to a series of delivery calls by surface water users against groundwater users.

There are two fronts in the battle for the ESPA. On one front, canal companies in the Magic Valley have made delivery calls to protect and enhance natural flow in the Snake River and storage water in reservoirs. On the other, spring users in the Hagerman area have made delivery calls in an effort to increase the amount of water that overflows from the ESPA from springs. These water right holders have sought to gain exclusive control over vast quantities of water which are stored within and flow through the

¹ These comments are provided from the perspective of ground water users and reflect the author’s opinions and biases as their counsel.

² The ESPA is approximately 170 miles long and 60 miles wide, comprised of more than 10,800 square miles, and is estimated to contain approximately 1 billion acre feet of water.

ESPA, the largest Aquifer in Idaho and one of the largest and most productive Aquifers in the world.

Junior groundwater users have been unwilling to allow a hostile takeover of their water source without a fight. Consisting of not only irrigators, but also dairies, municipalities, and commercial and industrial businesses, their water rights were, after all, issued by the State of Idaho without objection. The contribution of these businesses to Idaho's economy is dependent upon their continued ability to utilize groundwater stored in the Aquifer.

Conjunctive management has been a new frontier for Idaho (one that many other western states are just now stepping foot in). While the Conjunctive Management Rules provide a serviceable structure for responding to conjunctive management delivery calls, the lack of any judicial precedent, combined with the competing bedrock principles of "first in time is first in right" and "beneficial use," left many questions unanswered, resulting in a series of legal battles before the IDWR and appeals to the Snake River Basin Adjudication (SRBA) court and, in some instances, the Idaho Supreme Court. These battles have provided answers to many questions, including how much water is needed to raise crops and grow fish, whether pumpers are responsible for shortages related to changed irrigation practices and drought conditions, how far into the Aquifer a senior can reach to curtail juniors, the implications of Bureau of Reclamation leases of storage water from fish production, types of acceptable mitigation plans, and the methodology for calculating mitigation obligations.

Whereas most civil litigation cases settle before going to trial, there have been virtually no settlements of the major water call cases until after trial, until recently. This is not because of a lack of effort by the parties and their attorneys, but because most of the conjunctive management delivery call cases involved complex factual circumstances and legal issues had never before been decided by IDWR or the judiciary.

After nearly a decade of litigation, it would be a fair characterization for each party to say that some battles have been won and some lost. Holders of senior surface water rights can claim success in establishing material injury to their senior rights and imposing mitigation obligations on junior groundwater users to avoid curtailment. Junior groundwater users can claim success in minimizing their impacts and gaining approval and implementing a variety of mitigation plans as a result of which not one junior groundwater right has been curtailed.

II.

THE PARTIES

The senior right holders:

- The Surface Water Coalition³ (“SWC”) of irrigators that irrigate approximately 550,000 acres below American Falls dam with priority dates around 1900 that irrigate below American Falls dam who rely upon Snake River flows fed in part by the ESPA.
- Spring Users⁴ in the Thousand Springs reach of the Snake River with water rights for fish propagation with priority dates in the 1950s and 60s who rely upon spring water discharging from the ESPA.
- A&B Irrigation District, the first major pumping project developed by the U.S. Bureau of Reclamation with 1948 priority groundwater rights for irrigation. (Also a member of the SWC)
- Idaho Power Company, which holds minimum flows rights at the Snake River Murphy gage under the 1984 Swan Falls Settlement Agreement.

The junior right holders:

- Idaho Groundwater Appropriators, Inc., (“IGWA”) whose members consist of eight groundwater districts and two irrigation districts⁵ collectively representing approximately 2,500 water users who own 16,000 cfs of groundwater rights and irrigate approximately

³ The Surface Water Coalition members are the A&B Irrigation District (A&B), American Falls Reservoir District No. 2 (AFRD2), Burley Irrigation District (BID), Milner Irrigation District (Milner), Minidoka Irrigation District (MID), North Side Canal Company (NSCC), and Twin Falls Canal Company (TFCC).

⁴ Blue Lakes Trout Co., Clear Springs Food, Inc., Rimview Trout Co., SeaPac of Idaho, Inc., Bill Jones, Rangen, Inc., Aquarius Aquaculture, LynClif Farms, ARK Fisheries, Lees, Buckeye Farms, Billingsley Creek Ranch and others in the Hagerman Valley area.

⁵ Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Southwest Irrigation District, and Fremont-Madison Irrigation District, Anheuser-Busch, United Water, Glambia Cheese, City of Blackfoot, City of American Falls, City of Jerome, City of Rupert, City of Heyburn, City of Paul, City of Chubbuck, and City of Hazelton..

950,000 acres from the ESPA. IGWA's members also include a number of municipal, commercial and industrial water right holders. Groundwater rights have priority dates generally ranging from the early 1950s through 1994.

- City of Pocatello which holds municipal water rights.

III.

HISTORICAL PERSPECTIVE

Without question surface water users, spring users, and groundwater users have all made immense contribution to the development of the agricultural economy of the State of Idaho. At great expense and considerable effort farmers brought vast expanses of land in southern Idaho under irrigation to make the desert bloom, with the surface water users' enterprises occurring in the first half of the 20th Century and the groundwater users in the second half.

Surface water rights enjoy priority dates in the late 1800s and early 1900s followed by the spring users and Idaho Power with many rights in the 1950 to 1970 period. These users relied upon the prior appropriation doctrine ("first in time is first in right"), statutes and case law to protect their prior rights from interference by junior users.⁶

Groundwater users also developed their water rights under the protection of state law. As former Idaho Supreme Court Justice Schroeder recognized in his 2008 opinion in the SWC delivery call case:

They are not poachers who sneak through an unlocked door to take away water from Surface Water Users. They entered under state law in the open and have contributed significantly to the economic development of the state and local communities.

The Idaho Legislature promoted groundwater development by enacting the Ground Water Act⁷ in 1951 with the following policy statement: "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources."⁸ This policy is grounded in the constitutional

⁶ See Constitution of the State of Idaho, Article 15, Section 3, Idaho Code §42-106.

⁷ 1951, I.C. §§ 42-201 et seq.,

⁸ I.C. § 42-226.

requirement of beneficial use, and was incorporated into the Conjunctive Management Rules which state: “An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.”⁹ In practice, the policy simply implements the concept that has always existed in both surface water and conjunctive management that the holder of a senior-priority water right may exercise priority to shut off a junior only so long as the senior will beneficially use a significant amount of the water that would have otherwise been used by the junior. As one might expect, the practical application of this policy has been fiercely debated.

In addition to the protections provided under the Groundwater Act, Idaho Power substantially contributed to the rapid expansion of groundwater pumping from the Aquifer. As Idaho Power constructed the Hells Canyon complex in the 1950s and 1960s, it had a surplus of cheap power to sell. Idaho Power’s brochure of the day touted an abundant and near limitless supply of groundwater which should be pumped by cheap, clean electricity which it stood ready to supply. Those policies stand in stark contrast to the Idaho Power we know today.

At the time, it appeared to many that groundwater supplies were nearly limitless, and, in any case, created an opportunity to greatly expand the State’s agricultural economy by enabling irrigation of lands that could not be serviced by surface water canals due to location or capacity. Hence, nearly a millions acres of new farmland was developed from the 1950s through the early 1990s, spurring significant growth in Idaho’s agriculture-based economy.

These groundwater diversions from the ESPA occurred at the same time incidental recharge of surface water was decreasing as farmers converted from flood irrigation to more efficient sprinkler irrigation. In addition, canals stopped running water during the winter as a part of water savings agreements with the United States Bureau of Reclamation to fill newly constructed reservoirs. These changes in surface water irrigation practices significantly reduced the amount of water stored in the ESPA, which in turn caused a decline in the spring flows that surface water users had become accustomed to.

⁹ CM Rule 20.03.

The hydraulic connection between groundwater and surface water was ignored for a significant period of time by many educated people who were aware of it, with surface water rights and groundwater rights being administered entirely independent of one another. This is still happening in some states, though not for long. We now know better than ever that water supplies in the Aquifer are not limitless. Further, we know that Aquifer water levels vary and are highly responsive to normal precipitation variations and changes in irrigation practices.

The reality of the impending conflict between surface water and groundwater rights was first realized with the Swan Falls Agreement in 1985, followed by the implementation in 1992 of the moratorium on new groundwater rights from the ESPA. With the need for conjunctive management officially recognized, IDWR proceeded to promulgate the Rules for Conjunctive Management of Surface and Groundwater Resources on October 7, 1994¹⁰ (“Conjunctive Management Rules”). Thereafter, it was simply a matter of time until the next drought created supply shortfalls which senior surface water users would want made up by junior groundwater rights. The drought that began in 2000 set the stage for putting the Conjunctive Management Rules to the test.

IV.

DELIVERY CALLS AND SOLUTIONS

Since 2003, IGWA has defended fifteen different delivery calls made by senior surface, spring, and groundwater right holders. Five of those calls¹¹ were fully litigated before the IDWR, SRBA Court, and Supreme Court. In each case where it was determined that junior groundwater users were causing material injury to the senior right, IGWA has secured approval of one or more mitigation plans under the Conjunctive Management Rules to avoid curtailment of junior groundwater rights.

IGWA has implemented a wide range of mitigation solutions, including the direct delivery of water to the senior, groundwater recharge, demand reduction such as CREP¹² and conversions,¹³ water exchanges, the pur-

¹⁰ IDAPA 37, Title 03, Chapter 11(37.03.11), promulgated 10-7-1994 pursuant to Chapter 52, Title 67 of IDAPA and I.C. Section 42-603.

¹¹ A&B Irrigation District, SWC, Clear Springs Food, Inc., Blue Lakes Trout Co., SeaPac of Idaho, Inc. and Rangen.

¹² The CREP program has removed from production about 20,000 groundwater irrigated acres.

chase of subordination agreements, and the purchase of fish hatcheries. These actions have come at a cost exceeding \$65 million, a significant portion of which has required loans that remain outstanding.

These costs are hard to fathom, until one realizes that the alternative for groundwater users is to give up their farms and businesses. Some seniors have taken advantage of this, using deliver calls to try and extort big paydays from juniors. Whether juniors will ultimately be able to withstand and survive the financial burdens imposed by conjunctive management, and imposed reductions on groundwater use that appear forthcoming, remains to be seen.

V.

UNSOLVED PROBLEMS AND ONGOING CURTAILMENT RISKS

While IGWA has successfully resolved most of the past delivery calls, there remain unresolved risks of curtailment in three areas:

1. Hagerman Valley.

The delivery calls of Rangen and four other small fish farmers in the Hagerman area have been fully mitigated, although Rangen continues to appeal the decisions that make its mitigation possible. IGWA is currently working cooperatively with the State of Idaho and other senior water users in the Hagerman area to implement mitigation solutions to resolve the remaining delivery call risks from that front. A settlement term sheet is approaching finalization, with the expectation of being implemented in 2016.

2. Idaho Power's Minimum Flows at Murphy Gage.

Under the Swan Falls Settlement Agreement, Idaho Power is entitled to minimum Snake River flows at the Murphy Gage (roughly south of Kuna) of 5,600 cfs in the winter and 3,900 cfs in the summer. Declining Aquifer levels coupled with low runoff during drought years have caused Snake River flows to drop below these thresholds. Approximately 15 days of breaches so far in 2015 have been successfully mitigated by the State releasing water available under its 5,000 acre-foot Palisades storage water right.

¹³ Conversions consist of 12,500 acres of groundwater irrigated land converted to surface water deliveries supplied by Upper Snake storage and delivered through canal systems.

With the continuing decline of the Aquifer in drought years, there is a risk that the Murphy Gage minimums could be breached to a greater extent and for longer periods creating very real risks of curtailment to junior groundwater rights. Stabilizing declines and restoring groundwater levels in the Aquifer are necessary to avoid curtailments associated with breach of the Murphy Gage minimum flows in the future.

3. SWC.

Up until 2015, IGWA has been able to lease sufficient storage water from several space holders in the Upper Snake reservoir system to all meet mitigation obligations to the SWC. Getting these leases in place timely has become increasingly difficult because space holders do not want to commit to long term leases or options until after the date of allocation¹⁴ when their storage supplies and rental pool prices are known, and because the Water District 01 Rental Pool Rules have been changed to impose penalties on space holders who lease water to IGWA for mitigation.

Furthermore, mitigation obligations are likely to increase and become more difficult to satisfy in the future for two reasons. First, as groundwater levels in the Aquifer continue to decline, reach gains in the near Blackfoot to Milner Reach will be diminished, resulting in increased mitigation obligations to the SWC. Second, the Director recently changed the methodology he uses to calculate mitigation obligations to the SWC, in a manner that produces significantly higher obligations than existed previously.

VI.

FACTORS LEADING TO SETTLEMENT

A low snowpack, early arrival of warm weather with record springtime diversions, the Director's new methodology, and continuing declines in groundwater levels combined to set the table for a new round of settlement negotiations between IGWA and the SWC. Several of these factors warrant further discussion.

1. Changing Water Conditions.

We have no control over precipitation—the single largest factor affecting water supplies for surface and groundwater users. This year is yet another example of how water supply conditions can significantly change in a

¹⁴ The date of allocation is the date when reservoir storage peaks each year and is allocated by the watermaster of the space holders.

short period. Late summer of 2014 brought near record rains. While causing considerable losses to grain and hay crops, these rains halted irrigation demand and added unusual amounts of refill to the reservoirs. High reservoir storage carryover at the end of the year, together with early snowpack which stood at a 109% of average in the Upper Snake on January 1, 2015, ordinarily would give no reason to expect any water shortages during the 2015 irrigation season. Based on conditions earlier in the year and to stay within flood rule curves, the Bureau of Reclamation actually even began to evacuate water from reservoirs.

Water conditions quickly changed with winter snowfall much below normal and spring rains virtually nonexistent. After 4 months of drought conditions the abundant water supply was replaced by an 89,000 acre-foot mitigation obligation to the SWC under the Director's new methodology.

2. New 2015 Methodology.

Since the SWC's first delivery call was filed in 2005, the Director has entered different methodology orders in 2008, 2010 and 2015 to predict the amount of water needed by SWC, the amount of storage water and natural flow available to full those needs, and the resulting shortfall, if any, which must be made up by juniors. Because the water supply changes from year to year, so do the mitigation obligations of juniors. In years when demand exceeds supply, the shortfall becomes IGWA's mitigation obligation. IGWA receives mitigation credit from its Aquifer enhancement activities, but most of its mitigation obligation to the SWC is satisfied by leasing storage water from space holders in the Upper Snake reservoir system. The leased water is assigned to the storage account of SWC members, then released from storage and delivered down the Snake River for diversion as needed. To date, mitigation has been owed primarily to Twin Falls Canal Company, with small amounts also owed to American Falls Reservoir District #2 ("AFRD2") on two occasions.

The uncertainty of a mitigation obligation that is not known until May of each year, together with the practical difficulties of securing a supply of storage water due on short notice far in advance of the date of allocation, are matters of great frustration to groundwater users. Water supply uncertainty and delays in water delivery are also matters of considerable frustration to Twin Falls Canal Company and AFRD2.

The Director's 2015 methodology order utilized Box Canyon Springs data in addition to Snake River flows at Heise to forecast water supply,

which resulted in an exponentially higher mitigation obligation to the SWC than would have existed under the prior methodology. The April calculation produced a mitigation obligation of 89,000 acre-feet (73,700 to TFCC and 15,300 to AFRD2), with an approximate curtailment priority date of 1982, affecting 86,000 acres. This mitigation obligation was more than double what would have been required under the prior methodology.

Because of continued dry and warm weather, the mitigation obligation to the SWC was projected exceed 125,000 acre-feet by May, with the prospect of significantly more mitigation being ordered in July. This faced groundwater users with the prospect of curtailment dates in the 1960s or 1970s, putting hundreds of thousands of acres at risk of curtailment.

Eliminating the risks of curtailment and providing operational certainty, not only for 2015 but also in the future, weighed heavily on the minds of the parties during negotiations.

3. Declining Aquifer Levels.

Because of the moratorium on groundwater pumping that was implemented in the early 1990s, and because most farmland has been converted from flood to sprinkler irrigation many years, many experts believed only a few years ago that the amount of water stored in the ESPA was at or near equilibrium. Yet, the Aquifer continues to decline, affecting Snake River flows and spring discharges, elevating the risk of breach of the minimum flows imposed by the Swan Falls Agreement, and increasing pump lifts and well deepening expenses.

Attachment 4 to this paper is a chart depicting the cumulative change in the volume of water stored in the Aquifer over time. From the turn of the century up to the mid 1950s, water levels increased as a result of flood irrigation. Canal companies diverted vast amounts of water on a year-round basis through hundreds of miles of leaky canals, adding over 18 million acre-feet to the amount of water stored in the Aquifer. This caused spring discharges in the Thousand Springs area to increase by approximately fifty percent, from 4,200 cfs to 6,700 cfs.

Beginning in the late 1950s, Aquifer storage and spring discharge have steadily declined, on average 216,000 acre-feet annually. These declines resulted from reduced infiltration as flood irrigation converted to more efficient sprinkler irrigation, canal companies diverted less water, and groundwater pumping expanded.

Recharge and reduced groundwater diversions are obvious solutions. While groundwater levels will never be restored to the peak of the 1950s, the Aquifer can be stabilized and restored to a reasonable level which will benefit all water users. The significant challenge is how to accomplish and pay for the changes that must take place for this to happen. This was the focus of the parties negotiating the SWC-IGWA Term Sheet.

VII.

SWC-IGWA SETTLEMENT TERM SHEET OF MAY 7, 2015

The above factors, as well as years of litigation that brought no satisfaction to any party, resulted in a willingness of the parties and their managers to talk about a long-term solution to the problem. A series of regular meetings eventually produced a Settlement Term Sheet agreement on May 7, 2015. Under the direction and leadership of House Speaker Scott Bedke, and with technical support from IDWR, the parties were able to negotiate, compromise, and reach an agreement that charts a path forward to solve water allocation problems, sustain the agricultural economy, and end the litigation.

The importance of by Speaker Bedke in getting the parties together and keeping them at the table cannot be understated. The Term Sheet simply would not have been achieved without his leadership and technical support provided by Mat Weaver, Brian Patton and others from IDWR.

As of June 5, Term Sheet has a few “placeholders” requiring further technical analysis to work out. These primarily relate to identify wells that will be used to present groundwater levels and future goals and to measure progress toward Aquifer stabilization and restoration over time. The Term Sheet requires that the agreement be finalized by July 1, 2015, and signed by the parties, subject to final approval by their respective boards by August 1, 2015.

(1) Goals:

- Stabilize the decline in Aquifer storage, and to restore groundwater levels in the ESPA to protect and preserve water supplies for surface water users and groundwater users.
- Settle all present and future mitigation obligations of junior groundwater users to the SWC;

- Provide a “safe harbor” from curtailment and water supply certainty to participating junior groundwater users; and

(2) Near Term Practices for 2015:

- IGWA will lease 110,000 AF of storage for assignment to the SWC for 2015.
- IGWA will lease additional water for ongoing conversion projects, up to 1.1 million.
- The Director’s 2015 Methodology Order is stayed and the As-Applied Order is rescinded.
- The above satisfies all 2015 mitigation obligations to the SWC.
- The parties will work to identify and pass necessary legislation and mitigation plans to implement the Term Sheet.

(3) Long Term Practices, Commencing 2016:

- 240,000 AF of average annual groundwater diversions reductions by ground water users
- 250,000 AF average annual recharge by the State.
- Each participating district will be responsible to satisfy their share of the diversion reductions.
- 50,000 AF annually of storage water leased by IGWA and for delivery to the SWC as needed for irrigation requirements, with any excess used for recharge and conversions.
- Groundwater users will not irrigate sooner than April 1 or later than October 31.
- Measuring devices will be installed by the beginning of 2018 irrigation season.
- End gun removal program funded by NRCS.
- Additional conversions above American Falls.

(4) Adaptive Management.

- Adaptive management plan to be developed.

- An Aquifer level goal to be identified.
- Once the goal is achieved, groundwater diversion reductions will be reduced or removed.

(5) Safe Harbor. No groundwater user within participating districts will be subject to curtailment as long as the Term Sheet is being performed. Non-participants subject to administration.

(6) Term. The agreement is perpetual.

It will be the responsibility of each district to determine how their share of the 240,000AF reduction in consumption will be achieved. Possible mechanisms include end gun removal programs, additional CREP acres, additional conversion acres, rotation to less water intensive crops, fallowing land and private recharge.

The Idaho Water Resource Board and the Department will be responsible to develop and implement recharge programs to achieve the average annual goal of 250,000 acre-feet.

VIII.

CONCLUSION

The finalizing of the term sheet remains a work in process. Getting approval of all parties will be challenging. When it comes to implementation the devil will be in the details. Each participating district will need to chart its own way to achieve the goals by practical and innovative means. It will be difficult but necessary to have all ESPA groundwater users participate to reduce diversions by 240,000 AF to accomplish the objectives.

Stabilizing then restoring the Aquifer will cause chronic pain for a number of years until the declines are fixed and reductions relaxed. In return, ground water users will receive certainty by removing the risk of curtailment for the future. It will not be business as usual, but a way to stay in business.

We are not to the end of the war, but at the beginning of the end.

Randall C. Budge is the managing partner the Racine Olson law firm with 30 attorneys in Pocatello, Idaho Falls and Boise. He organized and has been the lead attorney for IGWA and the ground water districts, with a practice focus on water law, real estate, business and public utility law.



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

June 2, 2015

Robert E. Williams
Williams, Meservy & Lothspeich, LLP
P.O. Box 168
Jerome, Idaho 83338

Candice McHugh
Chris M. Bromley
McHugh Bromley, PLLC
380 S. 4th Street, Suite 103
Boise, ID 83702

Re: SWC Delivery Call
Docket No. CM-DC-2010-001

Dear Ms. McHugh and Messers. Williams and Bromley:

I am returning to you the *Notice of Secured Water* ("Notice") submitted on behalf of the Coalition of Cities ("Cities") in the Surface Water Coalition ("SWC") delivery call. I cannot approve the Notice because the Cities do not have an approved mitigation plan for the SWC delivery call. The Notice describes the actions the Cities propose to take to mitigate for injury to the SWC. The Cities are in effect proposing a mitigation plan. I can only approve mitigation activities that are conducted pursuant to approved mitigation plans. *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 654, 315 P.3d 828, 842 (2013); *Order on Petition for Judicial Review*, Gooding County Case No. 2008-551 (July 24, 2009). To recognize and approve the actions proposed in the Notice would be contrary to established case law. If you want the mitigation activities proposed in the Notice to be approved for mitigation in the SWC delivery call, you must resubmit the Notice as a Conjunctive Management Rule 43 mitigation plan to be processed in accordance with the conjunctive management rules.

Sincerely,

A handwritten signature in black ink that reads "Gary Spackman". The signature is fluid and cursive, with the first name "Gary" being particularly prominent.

Gary Spackman
Director

Encl.
Cc: Parties

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 2015, the letters to Candice McHugh, Chris Bromley, and Robert Williams for the Coalition of Cities and Michael Creamer and Jeffrey Fereday for Tessengerlo Kerley, Inc., dated June 2, 2015, was served by the method indicated below, and addressed to the following:

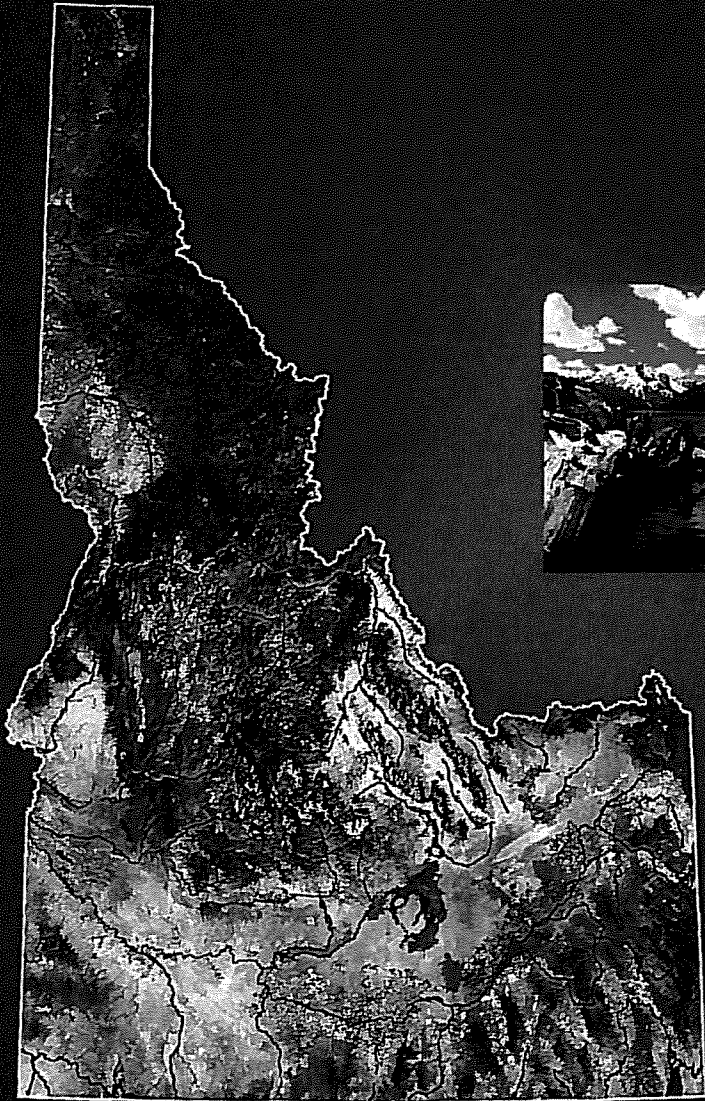
<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP 195 River Vista Place, Ste. 204 Twin Falls, ID 83301-3029</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>Kathleen M. Carr U.S. Dept. Interior 960 Broadway, Ste 400 Boise, ID 83706</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th Street South Terrace, Suite 370 Denver, CO 80202</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>Matt Howard U.S. Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>

<p>Sarah A. Klahn Mitra Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>

Deborah J. Gibson

Deborah Gibson
Administrative Assistant for the Director

IDAHO STATE WATER PLAN



IDAHO WATER RESOURCE BOARD

November 2012

BEFORE THE WATER RESOURCE BOARD

OF THE

STATE OF IDAHO

IN THE MATTER OF THE)
)
IDAHO STATE WATER PLAN)

A RESOLUTION

WHEREAS, the Idaho Water Resource Board (Board) conducted public meetings to gather public input concerning policies contained in the Idaho State Water Plan ; and,


WHEREAS, the Board, based on input from the public, has proposed changes to existing policies and suggested new policies; and,

WHEREAS, the Board has provided a 90-day public comment period and has conducted seven public meetings and hearings providing opportunities for public input; and,


WHEREAS, the Board has reviewed the public record consisting of oral testimony and written comments and has modified their proposed changes accordingly.

NOW, THEREFORE, BE IT RESOLVED that, having considered the proposed revised Idaho State Water Plan and the public record, the Board hereby adopts the Idaho State Water Plan dated November 2012 and directs that it be provided to the Idaho Legislature for their consideration.

PASSED AND APPROVED this 28th day of November, 2012.



TERRY T. UHLING, Chairman
Idaho Water Resource Board

ATTEST: 
BOB GRAHAM, Secretary

State of Idaho
THE STATE WATER PLAN

C.L. “Butch” Otter, Governor

Idaho Water Resource Board

Terry T. Uhling
Chairman

Roger W. Chase
Vice-Chairman

Robert Graham
Secretary

Vince Alberdi
Leonard Beck
Charles “Chuck” Cuddy
Peter Van Der Meulen
Jeff Raybould

Idaho Water Resource Board
November 2012

Former members of the Idaho Water Resource Board

Vic Armacost, New Meadows
Robert M. Bandy, Priest River
Brent J. Bell, Rexburg
Mary T. Brooks, Boise
Jack Buell, St. Maries
Gary Chamberlain, Challis
George Crookham, Caldwell
Sally L. Cupan, Sandpoint
J. David Erickson, Buhl
Leonard E. Graham, Rigby
Gene M. Gray, Payette
Robert M. Hammes, St. Maries
M. Reed Hansen, Idaho Falls
Kenneth E. Hungerford, Moscow
Franklin Jones, Boise
Joseph L. Jordan, Boise
Dr. Evan Kackley, Soda Springs
Donald R. Kramer, Castleford
Ferris M. Kunz, Montpelier
William J. Lanting, Twin Falls
Charles J. Marshall, Jerome
Herman J. McDevitt, Pocatello
Joe Nettleton, Murphy
Thomas Olmstead, Twin Falls
Arlie Parkins, Marsing
Clarence Parr, Heyburn
William S. Platts, Boise
Erval Rainey, Sandpoint
Scott Reed, Coeur d'Alene
Edward Reichert, Filer
Jerry Rigby, Rexburg
F. Dave Rydalch, St. Anthony
D. Mike Satterwhite, Lewiston
Edwin Schlender, Malta
James Shawver, Eden
LeRoy Stanger, Idaho Falls
Claude Storer, Idaho Falls
John F. Streiff, Lewiston
Richard W. Wagner, Lewiston
J.D. Williams, Boise
D. Richard Wyatt, Lewiston
George L. Yost, Emmett

To the Citizens of Idaho:

Water is the lifeblood of Idaho. The optimum use of our water will keep Idaho a vital and prosperous state as we grow and change in the future. The Idaho State Water Plan is a dynamic set of policies which guides our use, management, development, and conservation of water for all citizens.

This is the fifth revision of the State Water Plan since the first plan was adopted in 1976. Each revision reflects the changing landscape of water in Idaho. Many changes have occurred since the last Plan was adopted in 1996 and this revision reflects those changes. For the first time, this Plan includes implementation strategies and milestones which will guide the execution of the policies and evaluate the effectiveness of each policy.

Competing demands for water has increased conflicts, with a positive result of innovative solutions. These solutions demonstrate that the water resources of Idaho can meet emerging water demands while respecting existing water users. As water demands increase, it is critical that we use the technical tools available to assess strategies to plan for meeting our water needs. Understanding the complexity and interaction of our water resources and using that knowledge to manage water is crucial to using our water resources effectively.

The policies and actions in this Plan reflect a keen awareness of the uncertainty of future conditions of water supply and demand. The intent of the Plan is to establish policies and actions which can adapt to changing circumstances.

Public involvement has been and continues to be a cornerstone of developing the Idaho State Water Plan. The Idaho Water Resource Board appreciates your participation and interest in ensuring that Idaho's water is meeting our needs and making our state the best it can be.

Sincerely,

A handwritten signature in black ink, appearing to read 'Terry Uhling', written in a cursive style.

Terry Uhling
Chairman

Table of Contents

WATER PLANNING PROGRAM	
Constitutional Authority	1
Legislative Authority	2
Idaho Water Resource Board Programs	3
Comprehensive State Water Plan Formulation.....	4
COMPREHENSIVE STATE WATER PLAN	
Objectives	6
Policies.....	7
1. Optimum Use	8
1A State Sovereignty.....	8
1B Beneficial Use of Water	8
1C Change in Use	9
1D Water Supply Bank	10
1E Conjunctive Management.....	11
1F Ground Water Withdrawal	12
1G Interstate Aquifers	14
1H Quantification and Measurement of Water Resources	14
1I Aquifer Recharge	15
1J Water Quality	16
1K Comprehensive Aquifer Management Plans	17
1L Surface Water Supply Enhancement	18
1M Weather Modification.....	21
1N Hydropower.....	22
2. Conservation	24
2A Water Use Efficiency	24
2B Federally Listed and Other Aquatic Species	25
2C Minimum Stream Flow	27
2D State Protected River System	28
2E Riparian Habitat and Wetlands.....	29
2F Stream Channel Rehabilitation.....	30
2G Safety Measures Program.....	31
2H Flood Hazard Areas.....	32
2I Flood Damage Reduction Levee Regulation.....	33
3. Management.....	34
3A Review of Federal Reservoir Water Allocation	34
3B Hydropower Siting	35
3C Research Program	36
3D Funding Program.....	37
3E Water Resource Planning Program	38
3F Water Rights Adjudication.....	39
3G Climate Variability	40

Table of Contents (cont.)

4. Snake River Basin	42
4A Snake River Minimum Stream Flows	43
4B Snake River Milner Zero Minimum Flow	46
4C Reallocation of Snake River Trust Water	48
4D Conjunctive Management of the ESPA and Snake River	51
4E Snake River Basin New Storage	55
4F Snake River Basin Agriculture	57
4G Snake River Domestic, Commercial, Municipal, and Industrial Uses	58
4H Snake River Hydropower Use	60
4I Snake River Navigation	61
4J Snake River Fish, Wildlife, Recreation, and Scenic Resources	63
5. Bear River Basin	66
5A Bear River Compact	66
5B Bear River Basin Water Management	67
5C Interstate Water Delivery	68
5D Bear Lake	69
6. Salmon/Clearwater River Basins	71
6A Conservation Plans	71
6B Instream Flow Program	72
7. Panhandle River Basins	75
7A Interstate Aquifers	75
7B Minimum Stream Flows	77
7C Navigation, Fisheries, and Recreation	78

LIST OF TABLES

Table 1 Reservoir Sites with Apparent High Potential for Development	20
--	----

LIST OF FIGURES

Figure 1 Total Annual Volume of Natural Flow Passing Milner Dam	47
Figure 2 Trust Water Area	49
Figure 3 Swan Falls Trust Water Flows	50



Photo: Wheat Field

Photo Courtesy of Idaho Department of Agriculture

THE WATER PLANNING PROGRAM

The Idaho Comprehensive State Water Plan (“State Water Plan” or “Plan”) was adopted by the Idaho Water Resource Board (“Idaho Water Resource Board” or “Board”) to guide the development, management, and use of the state's water and related resources. The wise use and management of the state’s water is critical to the state’s economy and to the welfare of its citizens. The Plan seeks to ensure that through cooperation, conservation, and good management, future conflicts will be minimized and the optimum use of the state’s water resources will benefit the citizens of Idaho. The Plan is subject to change so as to be responsive to new opportunities and needs.

Constitutional Authority

Article XV, section 7 of the Idaho Constitution provides the authority for the preparation of a State Water Plan. This constitutional amendment was adopted in November 1964 following a statewide referendum and states:

There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state land required for water projects; all under such laws as may be prescribed by the Legislature.

Article XV, section 3 of the Idaho Constitution provides for the appropriation and allocation of water. Section 3 provides that:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining have preference over those using the same for manufacturing or agriculture purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

Legislative Authority

Article XV, section 7 of the Idaho Constitution provided for the creation of a "Water Resource Agency" but did not establish the agency. In 1965, the 38th legislature established the Idaho Water Resource Board, and directed that (as amended):

The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest... In adopting a comprehensive state water plan the board shall be guided by these criteria:

(a) Existing rights, established duties, and the relative priorities of water established in article XV, section 3, of the constitution of the state of Idaho, shall be protected and preserved;

(b) Optimum economic development in the interest of and for the benefit of the state as a whole shall be achieved by integration and coordination of the use of water and the augmentation of existing supplies and by protection of designated waterways for all beneficial purposes;

(c) Adequate and safe water supplies for human consumption and maximum supplies for other beneficial uses shall be preserved and protected;

(d) Subject to prior existing water rights for the beneficial uses now or hereafter prescribed by law, minimum stream flow for aquatic life, recreation and aesthetics and the minimization of pollution and the protection and preservation of waterways in the manner hereafter provided shall be fostered and encouraged and consideration shall be given to the development and protection of water recreation facilities;

(e) Watershed conservation practices consistent with sound engineering and economic principles shall be encouraged.

Idaho Code § 42-1734A(1).

These criteria recognize that exclusive authority over the appropriation of public surface and ground waters of the state is vested in the Department of Water Resources ("Department") [Idaho Code § 42-201(7)] and require that the Plan be consistent with state law.

To assist the Board in its duties, the legislature also provided for the Director of the Department:

To perform administrative duties and such other functions as the Board may from time to time assign to the Director to enable the Board to carry out its powers and duties.

Idaho Code § 42-1805(6).

Article XV, section 7 was amended by the electorate during the general election of November 6, 1984. The amendment provides that:

The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Chapter 17 of Title 42, Idaho Code, was amended in 1988 to designate the Plan as the Comprehensive State Water Plan Part A. Plans developed for specific geographic areas became components of the Comprehensive State Water Plan Part B.

The board may develop a comprehensive state water plan in stages based upon waterways, river basins, drainage areas, river reaches, ground-water aquifers, or other geographic considerations.

Idaho Code § 42-1734A(2).

As part of the comprehensive state water plan, the board may designate selected waterways as protected rivers as provided in this chapter.

Idaho Code § 42-1734A(1).

Legislation in 2008 provided for the development of a statewide comprehensive aquifer management planning and management effort and fund. Idaho Code §§ 42-1779 and 42-1780.

Pursuant to the provisions of Idaho law and legislative funding approval, the Idaho water resource board and the Idaho department of water resources shall conduct a statewide comprehensive aquifer planning and management effort over a ten (10) year period of time beginning in fiscal year 2009.

Idaho Code § 42-1779.

Idaho Water Resource Board Programs

Pursuant to its constitutional and statutory authorities, the Board:

1. Formulates, adopts, and implements the State Water Plan, River Basin Plans, and Comprehensive Aquifer Management Plans (“CAMPs”).
2. Designates natural and protected rivers and files applications for and holds minimum stream flow water rights.
3. Provides financial assistance for water development and conservation projects in the form of revenue bonds, loans, and grants.

4. Establishes programs that address specific water resource issues at the direction of the Idaho legislature.
5. Adopts rules governing:
 - Well Construction
 - Well Driller Licensing
 - Construction and Use of Injection Wells
 - Drilling for Geothermal Resources
 - Mine Tailings Impoundment Structures
 - Safety of Dams
 - Stream Channel Alteration

The Department administers these programs.

6. Hears appeals challenging the Department's administrative decisions pursuant to programs administered under the Board's administrative rules.
7. Administers the Idaho Water Supply Bank.
8. At the request of the Governor, appears on behalf of and represents the state in proceedings, negotiations, or hearings involving the federal government, Indian tribes, or other states.
9. Files applications and obtains permits to appropriate, store, or use unappropriated waters, and acquires water rights subject to the provisions of applicable law.
10. Investigates, undertakes, and promotes water resource projects deemed to be in the public interest. While all state agencies are required to exercise their duties in a manner consistent with this Plan [Idaho Code § 42-1734B], the Plan contemplates the implementation of water resource projects through cooperation and collaboration with the numerous units of state and local governments with statutory responsibilities for the conservation of Idaho's water resources.
11. Cooperates and enters into contracts with federal, state, and local units of governmental and private entities for water studies, planning, research, and activities.
12. Studies water pollution and advises the Idaho State Board of Environmental Quality regarding the establishment of water quality criteria in the context of the optimum development of the state's water resources.
13. Formulates and recommends legislation for water resource conservation, development, and utilization.

Comprehensive State Water Plan Formulation

Formulation of the State Water Plan is a dynamic process. Adoption of The State Water Plan – Part One, The Objectives, in 1974, and The State Water Plan - Part Two, in 1976,

provided an initial state water policy. The purpose of Part One was to identify and define policies and objectives adopted by the Board to govern the planning, development, and conservation of the state's water and related lands. Part Two identified and evaluated projects and programs necessary to implement the objectives of Part One and delineated those areas where legislative action was required, identified the programs to be implemented by the Board, and described programs requiring the cooperation of public and private interests. The Plan was updated and re-adopted in 1982 and was amended in 1985 in connection with the Swan Falls settlement. The Plan was revised in 1986, 1992, and 1996 to reflect changing social and economic conditions and water resource needs. The Plan continues to evolve and provides a framework for the adoption and implementation of policies, programs, and projects that develop, utilize, conserve, and protect the state's water supplies.

Planning Process

The planning process encompasses five steps:

1. A comprehensive public involvement program to determine public views and interests regarding resource problems, needs, and opportunities as they relate to water use and management;
2. An ongoing evaluation of the state's water resources and uses and estimation of the future availability and demands on the resource;
3. A comprehensive evaluation of the effects resulting from the development and protection of the state's water resources;
4. Adoption of the Plan by the Board as required by Article XV, section 7 of the Idaho Constitution; and
5. Approval by the Idaho legislature as provided by law.

Public involvement is an essential part of the planning process. Scoping meetings, comment periods, and formal hearings provide opportunity for public input during plan development. After adoption and approval, public comment on the effectiveness of the Plan is encouraged.

COMPREHENSIVE STATE WATER PLAN

The Comprehensive State Water Plan represents the state's position on water development, management, and conservation. Accommodating Idaho's growing and changing water needs and the increasing demands on both surface and ground water presents a significant challenge. The Plan seeks to meet that challenge through the establishment of policies on water development, management, and conservation with accompanying strategies that may be implemented as funds become available and milestones which will assist in ongoing Plan review.

Objectives

The following objectives of the State Water Plan are formulated for the conservation, development, management, and optimum use of all unappropriated water resources and waterways of this state in the public interest. Idaho Code § 42-1734A.

1. **Water Management** - Encourage the quantification of water supplies, water uses, and water demands for all water rights within the state. Encourage integrated, coordinated, and adaptable water resource management and the prudent stewardship of water resources.
2. **Public Interest** - Ensure that the needs and interests of the public are appropriately considered in decisions involving the water resources of the state.
3. **Economic Development** - Encourage and support economic development through the optimum use of water resources. Promote the integration and coordination of the use of water, the augmentation of existing supplies, and the protection of designated waterways for all beneficial purposes. Idaho Code § 42-1734A(1)(b).
5. **Environmental Quality** - Maintain, and where possible enhance water quality and water-related habitats. Study and examine the quality of rivers, streams, lakes, and ground water [Idaho Code § 42-1734(15)], and ensure that due consideration is given to the needs of fish, wildlife, and recreation in managing the water resources of the state. Where appropriate, initiate state protection of waterways or water bodies with outstanding fish and wildlife, recreation, geologic, or aesthetic values.
6. **Public Safety** - Encourage programs ensuring that life and property within the state are not threatened by the management or use of the state's water resources.

Policies

A main goal of this document is to help water managers, planners, and users formulate management strategies and policies needed to meet growing and changing water use needs.

The Board adopts the following policies for the conservation, development, management, and optimum use of all the unappropriated water resources and waterways of this state in the public interest. Idaho Code § 42-1734A.



Photo: Falls on the Teton River in Eastern Idaho (IDWR Photo)

1. OPTIMUM USE

It is in the public interest to establish policies, initiatives, and programs that lead to optimum use of the water resources of the state. Water is essential to the vitality and prosperity of the state.

1A - STATE SOVEREIGNTY

The State asserts sovereignty over the development and use of Idaho's water resources for the benefits of its citizens. Any action by the federal government or other states that would impair Idaho's sovereignty over its water resources is against state policy.

Discussion:

The Idaho Water Resource Board is responsible for the formulation of state water policy through the State Water Plan. The state's position on existing and proposed federal policies and actions affecting Idaho's waters is coordinated by the Board to ensure the state retains its sovereign right to control its water resources. Idaho Code § 42-1734B(4). The State Water Plan is filed with the Federal Energy Regulatory Commission ("FERC"), the Pacific Northwest Electric Power and Conservation Planning Council, and other federal agencies as Idaho's plan for the conservation, development, management and optimum use of the state's water resources. Idaho Code § 42-1734C.

Implementation Strategies:

- Take legal action when necessary to protect the state's sovereignty over its water resources.
- Implement and maintain cooperative water resource agreements and partnerships with neighboring states, the federal government, and Indian tribes for the benefit of Idaho's citizens.
- Work with the office of the Governor, state agencies, and the legislature to ensure the development and implementation of a unified state position on water resource issues.

Milestones:

- Partnerships established with neighboring states, federal agencies, and Indian tribes to anticipate and plan for water resource conflicts that may occur.
- Protocols established ensuring coordination of the state's position on water resource issues.

1B - BENEFICIAL USE OF WATER

The concept of beneficial use must necessarily evolve with changing conditions.

Discussion:

Idaho Code § 42-104 provides that an appropriation of water must be for “some useful or beneficial purpose” but does not define beneficial purpose. Except for the constitutionally protected beneficial uses which are domestic, agricultural, manufacturing, and mining, the concept of what constitutes a beneficial use of water has evolved over time based upon societal needs. For example, use of water for hydropower, the protection of fish and wildlife habitat, aquatic life, recreation, aesthetics, municipalities, navigation, water quality, and managed ground water recharge are recognized as beneficial uses. A broad definition of beneficial use has and will continue to allow for the optimum use of the state’s water resources.

Implementation Strategies:

- Review existing state policies and programs to ensure that traditional and emerging water use needs are recognized as beneficial uses of water.
- Establish or participate in local and regional advisory groups to formulate recommendations regarding traditional and emerging water use needs and priorities.

Milestones:

- Policies and rules revised to accommodate emerging water use needs.
- Reports submitted on advisory group recommendations.
- Statutory and/or regulatory changes made to accommodate emerging beneficial uses of water.

1C – CHANGE IN USE

Changes in the use of a water right should be allowed to meet changing needs and to provide for optimum use of the state’s water resources.

Discussion:

The demand for water increases every year while the volume of unappropriated water within the state continually decreases. Many basins do not provide a dependable water supply for current uses. Allowing for changes in the use of water rights provides flexibility in water allocation to meet changing conditions. Idaho Code §§ 42-108 and 42-222 provide for changes in point of diversion, place of use, period of use, or nature of use with the approval of the Department, while also providing for the protection of other water users, the agricultural base of a region, and the local public interest. Pursuant to state law, priority dates are retained when other water right holders are not injured. The Board is responsible for the implementation of voluntary programs also designed to meet changing water use needs.

Implementation Strategies:

- Review existing statutes and regulations and recommend revisions as necessary to establish a more efficient process for changes in the use of water rights.
- Review Department policies and procedures and recommend revisions as necessary to implement a more efficient process for changes in the use of water rights.

Milestones:

- Number of changes in the use of water rights that meet emerging needs.

1D - WATER SUPPLY BANK

The sale or lease of water is critical to the efficient management and optimal use of the state’s water resources. Thus, use of the state’s Water Supply Bank should be expanded to meet traditional and emerging needs for water.

Discussion:

As the state approaches the time when there is little or no unappropriated water, the Water Supply Bank, established by Idaho Code § 42-1761, provides an efficient mechanism for the sale or lease of water from natural flow and storage. The purpose of the Water Supply Bank is to obtain the highest duty of water, provide a source of adequate water supplies to benefit new and supplemental water users, and provide a source of funding for improving water use facilities and efficiencies. By aggregating water available for lease, rental pools operating under the authority of the Water Supply Bank can supply the water needs of many users, provided there is no injury to other right holders, or enlargement of the use of the water rights, and the change is in the local public interest. Idaho Code § 42-1763.

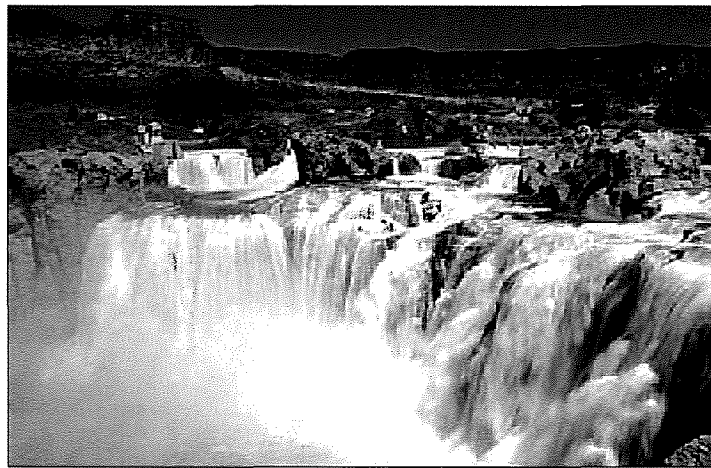


Photo: Shoshone Falls near Twin Falls (IDWR Photo)

The Idaho Water Resource Board has adopted rules governing the sale or lease of water through the Water Supply Bank. IDAPA 37.02.03. Pursuant to state law, the Board has authorized local entities to operate storage and natural flow rental pools in numerous water districts that meet regional needs. The Shoshone-Bannock Tribes are also authorized by the state to operate a storage water rental pool.

The scope of existing and future water use needs requires further development of flexible water banking systems that address local water use needs and ensure the optimum use of the state's water resources. The Water Supply Bank should provide for efficient mechanisms that are responsive to traditional and emerging needs for water.

Implementation Strategies:

- Monitor existing procedures, statutes, and rules of the Water Supply Bank to determine whether additional strategies are needed to meet current and future water use demands.
- Establish through state action, natural flow and storage rental pools in basins where local water users have identified the need for rental pools.
- Develop a public information and education program to promote use of the Water Supply Bank.

Milestones:

- Increased use of the Water Supply Bank.
- New storage and natural flow rental pools established.
- Efficient mechanisms in place that facilitate the optimum use of water.

1E - CONJUNCTIVE MANAGEMENT

Where a hydraulic connection exists between ground and surface waters, they should be conjunctively managed to maintain a sustainable water supply.

Discussion:

Region-specific factors impact the available supply of ground and surface water and effect changes in regional water budgets. This can result in insufficient water supplies to satisfy beneficial uses and may result in increased administrative curtailment, conflict among water users, and litigation.

This policy addresses conjunctive management and not water rights administration. Water rights administration is the enforcement of the relative rights of water right holders under the prior appropriation doctrine. By comparison, conjunctive management encompasses actions other than water rights administration that can be taken to optimize the benefits and value of Idaho's water resources. While conjunctive management is not a substitute for water rights administration, the legislature has determined that it is in the public interest to adopt plans and policies that facilitate and encourage a resolution of

conflicts that occur in water basins where there is a hydraulic connection between ground and surface waters. Quantification and monitoring is a key component of conjunctive management and necessary for the development of plans and projects designed to maintain a stable balance between supply and demand.

Implementation Strategies:

- Continue to quantify the hydraulic relationship between ground and surface water supplies in designated river basins.
- Develop prioritized list of basins where additional technical information is needed to assess ground and surface water interaction.
- Develop enhanced technical tools for evaluating the interaction between surface and ground water resources for use in planning.
- On a continuing basis, assess conditions and trends of ground water levels in primary aquifers to estimate the rate of future aquifer recharge and withdrawal under various climatic conditions.
- Procure funding for studies and project implementation.

Milestones:

- Number of studies initiated and completed to quantify ground water/surface water relationships.
- Increased effectiveness of technical tools used to evaluate the hydraulic relationship between ground water and surface water and other water supply data.
- Region-specific projects implemented that contribute to a stable balance between supply and demand.

1F - GROUND WATER WITHDRAWAL

Withdrawals from an aquifer should not exceed the reasonably anticipated average rate of future natural recharge to that aquifer.

Discussion:

Idaho Code § 42-226 protects senior ground water appropriators in the maintenance of reasonable pumping levels in order to obtain full economic development of the state’s underground water resources. The Director of the Department is authorized to establish reasonable ground water pumping levels when necessary to protect prior appropriations of ground water. Idaho Code § 42-237a provides that the Director may prohibit or limit the withdrawal of water from a well if withdrawal would result in diversion of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director may allow withdrawals to exceed natural recharge if a program exists to increase recharge or decrease withdrawals and senior water rights are protected. Idaho Code §§ 42-233a and 42-233b authorize the Director to designate areas as either Critical Ground Water Areas or Ground Water Management Areas. Designating a ground water basin as a Critical Ground Water Area or Ground Water Management Area

provides management options to prevent excessive withdrawals from an aquifer. Where such designations are made, the Department requires additional measurement and reporting to determine available ground water supplies and use.

The comprehensive aquifer management planning initiated by the Idaho Water Resource Board discussed in Policy 1E provides opportunities for stakeholder participation in ground water management. Local advisory committees help the Board establish goals, objectives, and strategies to maximize available water supplies and assist with plan implementation. Public participation is key to the development of innovative approaches for meeting current and future demands on the state's ground water resources.

Implementation Strategies:

- Monitor ground water levels to estimate the rate of future natural aquifer recharge and withdrawal under various climate conditions.
- Develop region-specific water budgets for aquifers.
- Establish local advisory committees and solicit recommendations for ground water management.
- Identify opportunities for conducting cooperative ground water studies with state, federal and local agencies.
- Implement management strategies to maximize available water supply.

Milestones:

- Number of water budgets developed.
- Number of advisory committees active in ground water management and critical ground water areas.
- Number of ground water management plans adopted for all administratively designated areas.
- Number of basins with adequate monitoring networks.



Photo: Alfalfa field near Glenns Ferry
Photo Courtesy of Idaho Department of Agriculture

1G - INTERSTATE AQUIFERS

Cooperative arrangements with neighboring states should be developed for shared aquifers to avoid water supply conflicts and to optimize utilization of the resource for the citizens of Idaho.

Discussion:

The growing demand for water increases competition between states with shared aquifers. Cooperative agreements to jointly develop, manage, and protect shared aquifers are necessary to avoid water supply conflicts, to ensure economic development, and to provide a mechanism for the exchange of technical information.

Implementation Strategies:

- Establish cooperative agreements with neighboring states to gather data and conduct studies to assess ground water conditions and trends.
- Develop coordinated aquifer management plans with neighboring states that resolve interstate conflict and protect Idaho's water supplies.

Milestones:

- Approval and implementation of cooperative agreements, which may include coordinated aquifer management plans, that ensure Idaho's water supply meets current and future needs.
- Cooperative technical studies conducted.

1H - QUANTIFICATION AND MEASUREMENT OF WATER RESOURCES

Quantification and measurement of Idaho's water supply and use is essential for sound water resource planning, management, and administration.

Discussion:

The Director of the Department is required to maintain an inventory of the state's water resources. Idaho Code § 42-1815. The measurement of water availability and use is necessary to administer and regulate existing water uses and to promote optimal water resource planning and management.

Chapters 6 and 7, Title 42, Idaho Code, provide for water use measurement and reporting throughout the state. New instrument technologies for the measurement of water availability and use will continue to improve the accessibility and reliability of data collection and interpretation. These new technologies, such as automated electronic data recording equipment and transfer of data through wireless systems provide transparency and instantaneous access to data, improve calibration of models used for administration and planning, and educate the public about regional and statewide water use.

Implementation Strategies:

- Assess existing measurement network and facilities and develop plan for improving data collection and reporting.
- Prioritize projects for conversion to automated electronic data collection and reporting systems.
- Provide technical assistance and participate in securing funding for improved measurement and reporting systems.

Milestones:

- Number of assessments completed.
- Number of automated data collection systems in use.
- Number of improved measurement and reporting strategies implemented.

11 - AQUIFER RECHARGE

Aquifer recharge should be promoted and encouraged, consistent with state law.

Discussion:

Managed aquifer recharge: Managed recharge projects may be an appropriate means for enhancing ground and surface water supplies, providing mitigation for junior ground water depletions, or to help maintain desirable aquifer levels. In addition, managed recharge may help optimize existing water supplies by changing the timing and availability of water supplies to meet demand. Managed recharge may also be used as an adaptive mechanism for minimizing the impacts of variability in climate conditions. Idaho Code § 42-234(4) requires that managed recharge projects do not injure existing water rights and gives the Director authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge. The effects on ground water and surface water budgets from managed recharge projects must be monitored to determine the effectiveness of such projects after implementation..

The Board supports and assists in the development of managed recharge projects that further water conservation and increase water supplies available for beneficial use. Projects involving the diversion of natural flow water appropriated pursuant to Idaho Code § 42-234 for managed recharge in excess of ten thousand (10,000) acre-feet on an average annual basis must be submitted to the Idaho Water Resource Board for approval prior to construction. Idaho Code § 42-1737.

Aquifer storage and recovery: The use of managed recharge to store surface water in a confined underground area could be an important element in meeting future water use needs. Further understanding of the economic, legal, ecological, and technical feasibility of using confined underground aquifers for water storage in Idaho is required for the purpose of policy development and planning and to avoid injury to existing water rights.

Incidental aquifer recharge: The incidental recharge of aquifers occurring “as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest.” Idaho Code § 42-234(5)]. Incidental recharge may be an important component of some aquifer water budgets.

Implementation Strategies:

- Cooperate with public and private entities to develop, implement, and evaluate managed recharge projects.
- Identify and propose changes to statutes, rules, and policies that will assist the development and implementation of managed recharge projects.
- Identify river basins where the use of managed recharge projects should be evaluated as a potential strategy for addressing increased demand on water supplies.
- Monitor and evaluate recharge projects to document effects on water supply and water quality.
- Appoint an Aquifer Storage and Recovery Task Force.

Milestones:

- Managed recharge projects that optimize water supplies implemented.
- Effects of managed recharge projects on water supply and water quality documented.
- Aquifer Storage and Recovery Task Force recommendations submitted.

1J - WATER QUALITY

The citizens of Idaho will be best served by a cooperative effort involving public and private entities to assure that the state’s surface and ground water sources meet state water quality standards and maintain designated beneficial uses.

Discussion:

Water quality impacts the usability of water for a variety of purposes and it is essential that the quality of Idaho’s water resources be protected for public safety and economic stability and growth. The Department of Environmental Quality (“DEQ”) is the lead state agency charged with maintaining and improving surface and ground water quality through regulatory and permitting programs and coordination with other state agencies. DEQ’s Surface Water Program measures and assesses the levels of pollutants in surface waters. Pursuant to the Ground Water Quality Protection Plan, adopted by the legislature in 1992, the Department administers a statewide ambient ground water quality monitoring network and the Environmental Data Management System. The system collects, and makes available to the public, data obtained from ground water monitoring networks across the state.

When water quality fails to meet state standards, DEQ works with communities, industry, agricultural interests, state and federal agencies, and other stakeholders to develop water quality improvement plans, known as total daily maximum loads or TMDLs. These plans outline actions needed to restore impaired water bodies so that they support designated uses.

The use of water flow to dilute pollution is not a substitute for adequate water quality treatment. The Idaho Agriculture Pollution Abatement Plan (“Ag Plan”) is a guidance document that describes the state’s process for the control and abatement of agricultural nonpoint source pollution as it relates to water quality. The Ag Plan provides for the review and identification of specific watershed management strategies that contribute to the full support of beneficial uses through enhancement and maintenance of the quality of surface and ground water, to the extent they are impacted by nonpoint source agricultural pollutants. Water quality improvement strategies for non point sources are implemented through voluntary programs. Numerous state agencies and local units of government participate in plan implementation, including: the Idaho Soil and Water Conservation Commission, DEQ, Soil Conservation Districts, Idaho State Department of Agriculture (“ISDA”), University of Idaho – Cooperative Extension System, the Department, the Board, IDFG, the Idaho Department of Lands, and the Office of Species Conservation (“OSC”). Where the quality of surface and ground water depends on land and water-use practices within a watershed, water users, land managers, state and federal agencies, and other units of local government are working together to implement through voluntary mechanisms best management practices and other strategies that reduce impairments to beneficial uses.

Implementation Strategies:

- Coordination and integration of monitoring programs with public and private entities.
- Ongoing analysis of statewide water quality monitoring programs to identify need for modifications.
- Participate with state agencies to integrate water management programs and policies that promote the improvement of the quality of the state’s surface and ground water through voluntary mechanisms.
- Ongoing monitoring of baseline conditions and trends.

Milestones:

- Collaborative projects implemented that protect and enhance the water quality of the state’s surface and ground water.

1K - COMPREHENSIVE AQUIFER MANAGEMENT PLANS

The Idaho Water Resource Board will complete and implement comprehensive aquifer management plans to address the changing demands on the state’s water supply.

Discussion:

Idaho Code §§ 42-1779 and 42-1780 established the Statewide Comprehensive Aquifer Planning and Management Program and the Aquifer Planning and Management Fund, which are designed to provide the Board and the Department with the necessary information to develop comprehensive aquifer management plans, (“CAMPs”) throughout the state. The program will be implemented in three phases. First, technical information describing the hydrology of the ground and surface water systems and the relationship between surface and ground water in a designated basin will be compiled. Second, the Board, with the assistance of an advisory committee, will develop a management plan, based on an assessment of current and projected water uses and constraints, to address water supply and demand issues specific to each basin. Finally, the Board will be responsible for implementing the CAMPs to obtain sustainable water supplies and provide for the optimum use of a region’s water resources.

Idaho’s first CAMP was developed for the Eastern Snake River Plain Aquifer (“ESPA CAMP”). The ESPA CAMP was adopted by the Idaho Water Resource Board and approved by the legislature in 2009. The ESPA CAMP sets forth actions designed to stabilize and improve spring flows, aquifer levels, and river flows across the Eastern Snake River Plain. The ESPA CAMP uses a phased approach to achieve a designated water budget change through a mix of management actions, including but not limited to, aquifer recharge, ground-to-surface water conversions, and demand reduction strategies. The Board is responsible for implementation of the plan with the assistance of an advisory committee made up of representatives of stakeholders who rely upon the Eastern Snake River Plain Aquifer to supply water for beneficial use.

Statewide comprehensive aquifer planning was initiated in 2008. The Rathdrum Prairie plan was completed in 2011 and the Treasure Valley plan is expected to be completed in 2012. Additional aquifers will be designated for the development of comprehensive plans as funding and conditions allow.

Implementation Strategies:

- Develop and implement CAMPs for selected basins that establish goals, objectives, and implementation strategies to maximize available water supplies.
- Secure funding for technical studies and planning activities.

Milestones:

- Number of CAMPs completed.
- Number of CAMPs implemented.

1L - SURFACE WATER SUPPLY ENHANCEMENT

Surface water development will continue to play an important role in meeting Idaho’s future water needs.

Discussion:

Future economic development, population growth, and evolving priorities will bring additional demands on Idaho's water resources, and surface water development will continue to play an important role in the state's future. The construction of new reservoirs, enlargement of existing reservoirs, and development of off-stream storage sites could increase water supplies necessary to meet increased demand. These strategies are also important for flood management, hydropower generation, and recreation use.

Engineering, economic, legal, political, and environmental issues associated with water development projects affect decisions concerning the construction of reservoir facilities. In addition, changes in climate conditions will likely be an important factor in determining the costs and benefits of additional storage. As required by Idaho Code § 42-1736B(3)(c), the Idaho Water Resource Board maintains an inventory of potential storage sites. An inventory of reservoir sites with apparent high potential for development is set forth in Table 1.

Implementation Strategies:

- Concentrate assessment and evaluation of potential storage facilities on projects with the highest potential for development. Major considerations in defining high-potential projects are: cost per unit of storage, extent of public support, environmental considerations, adequacy of existing information and studies, extent and availability of funding sources for evaluation and assessment, and expected benefits that would accrue from the development of additional storage.
- Review inventory and prioritize potential projects annually.
- Initiate feasibility/construction design studies for sites determined to be high priority.
- Identify potential funding sources for project evaluation and construction.
- Develop collaborative processes and partnerships with private entities, concerned stakeholders, local governments, and federal agencies to evaluate, design, and construct water storage projects.
- Provide recommendations regarding potential storage sites to private and public entities to ensure that land and resource development associated with these sites is consistent with the State Water Plan.

Milestones:

- Complete annual review of potential storage site inventory and revise as appropriate.
- Initiate construction of additional storage to meet current and expected needs by 2025.

Table 1 Reservoir Sites with Apparent High Potential for Development

Potential Reservoir	Stream	Reservoir Capacity (AF)	Potential Purpose	Status of Study
<i>Upper Snake</i> Minidoka (enlargement)	Snake River	67,000	Irrigation, Power, Flood Control, Flow Augmentation, Recharge, Recreation	<i>Minidoka Dam Raise</i> <i>Special Study</i> (USBOR, Dec. 2009). Raise determined to be feasible. No action by the IWRB at this time.
Teton (or alternative)	Teton River	300,000	Irrigation, Power, Flood Control, Flow Augmentation, Recreation	<i>Henrys Fork Basin Study</i> ongoing. Multiple on- and offstream sites within basin under consideration.
<i>Southwest Idaho</i> Twin Springs (or alternative)	Boise River	70,000 to 300,000	Irrigation, Power, Flood Control, Flow Augmentation, Recreation	<i>Lower Boise Interim</i> <i>Feasibility Study</i> ongoing. Three sites prioritized for further analysis: (1) replacement of existing Arrowrock Dam, (2) new dam at Alexander Flats site, and (3) new dam at Twin Springs site.
Lost Valley (enlargement)	Lost Valley Creek	20,000 (increase)	Irrigation, Recreation	Not currently under investigation.
Galloway	Weiser River	900,000	Irrigation, Power, Flood Control, Flow Augmentation, Recreation	Weiser-Galloway Studies currently ongoing: <i>Geologic Investigation and</i> <i>Analysis Project</i> and <i>Snake</i> <i>River Operational Analysis</i> <i>Project</i> .
<i>Bear</i> Caribou	Bear River	48,000	Irrigation, Power, Flood Control, Recreation	Last study update completed in 1996. Not currently under investigation.

1M - WEATHER MODIFICATION

Weather modification offers the possibility of augmenting water supplies.

Discussion:

Weather modification, primarily winter cloud seeding to increase snowpack, has been practiced in Idaho and across the western states for many years. Increasing challenges, including a changing climate, growing population, and water allocation conflicts related to the presence of threatened and endangered species magnify pressures on a variable water supply. While the specific water quantities resulting from weather modification remain unknown, additional investigation should be conducted and pilot projects implemented to determine where and under what circumstances weather modification is a feasible strategy for increasing water supplies. A number of cloud seeding programs and studies have been conducted in Idaho with positive overall results, including programs funded by the Board and Idaho Power Company.

Weather modification has the potential to raise legal issues related to the effect of weather modification activities outside state boundaries, potential adverse environmental effects, and intergovernmental conflicts where projects occur on or near public lands. Addressing these issues through legislation, rulemaking, and interstate agreements will help avoid future conflicts and litigation.

Under Idaho law, any person who intends to conduct weather modification activities is required to register with the ISDA and file a log of activities upon completion of the program. Idaho Code §§ 22-3201, 22-3202. Idaho law also provides for the creation of weather modification districts. Idaho Code §§ 22-4301, 22-4302.

Implementation Strategies:

- Support the continued evaluation of existing weather modification projects.
- Develop criteria for the development and implementation of additional weather modification projects.
- Collect baseline data and continue effectiveness research.
- Coordinate weather modification research and pilot projects with neighboring states.
- Ensure that state-funded projects are scientifically sound and include robust monitoring and evaluation components.

Milestones:

- Number of weather modification projects implemented that increase water supply.
- Increase in annual runoff resulting from weather modification projects.

- Increase in baseline data and effectiveness research.
- Agreements in place with neighboring states and federal agencies addressing research and implementation of weather modification projects.

1N - HYDROPOWER

Appropriation of water for hydropower should be subordinated to subsequent upstream beneficial uses to assure an adequate supply of water for all future beneficial uses and minimum stream flows for hydropower projects should be established by state action.

Discussion:

The relationship of hydropower water rights to future upstream uses was the subject of an ongoing debate from statehood until the 1985 Swan Falls Settlement, when the Idaho legislature enacted Idaho Code § 42-203B to resolve the debate. Pursuant to section 3 of Article XV of the Idaho Constitution, the legislature determined that it was in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes. Through enactment of Idaho Code § 42-203B, the legislature sought to avoid future Swan Falls-like controversies by creating a framework for balancing the use of water for hydropower and other beneficial uses. This framework provides for the subordination of appropriations of water for hydropower purposes to assure an adequate supply of water for all future upstream beneficial uses. The framework also provides for protection of base flows for hydropower and other instream uses through minimum stream flows established by state action. The establishment of minimum stream flows through an open and transparent public process ensures a balance between sustaining economic growth, maintaining reasonable electric rates, protecting and preserving existing water rights, and protecting water quality and other environmental values.

Small hydropower projects using existing water flows and infrastructure can be cost-effective and provide for the optimum utilization of the water resource. Recognizing the benefits of such projects, loans are available through the Board's programs to study the feasibility and for development of such projects. The FERC provides a permitting exemption to certain qualifying facilities. The National Hydropower Association's Small Hydro Council recently issued a set of recommendations that would streamline FERC's conduit and small hydropower permitting process.

Implementation Strategies:

- Ensure that all future applications, permits and licenses for the appropriation of water for hydropower purposes contain a subordination provision.
- Establish minimum stream flows through state action to protect base flows for future hydropower water rights as necessary.
- Define, through agreements with the holders of existing hydropower water rights, the relationship between such rights and existing and future depletionary water rights.

Milestones:

- Execution of subordination agreements and establishment of minimum stream flows through state action for existing hydropower facilities.
- Loans provided to study the feasibility and development of small hydropower projects.



Photo: Swan Falls Dam (*photo by IDWR Dam Safety Program*)

2. CONSERVATION

The Conservation policies focus on careful planning and prudent management of Idaho’s water. The policies in this section encourage water conservation practices and efficient management of water resources for the benefit of Idaho citizens. Conservation and water efficiency practices should be implemented through voluntary, market-based programs, when economically feasible.

2A - WATER USE EFFICIENCY

Water conservation and water use efficiency should be promoted.

Discussion:

The legislature, in Idaho Code § 42-250(1) determined that voluntary water conservation practices and projects can advance the policy of the state to promote and encourage conservation, development, augmentation, and utilization of Idaho’s water resources. “Water conservation practice” means any practice, improvement, project, or management program that results in the diversion of less than the authorized quantity of water while maintaining the full beneficial use(s) of the water right. Idaho Code § 42-250(2). Water conservation practices include, but are not limited to, practices that reduce consumptive use as defined in Idaho Code § 42-220B, reductions in conveyance losses, and reductions in surface and seepage losses occurring at the place of use. Idaho Code § 42-223 encourages conservation of water resources by providing that no portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice which maintains the full beneficial use(s) authorized by a water right. As water efficiencies increase, conserved water may be available to supply existing uses, new demands, or improve instream flows. Conservation and water efficiency practices may offset the need for new water supply enhancement projects. Policies that promote water conservation and efficiency should be encouraged, where such practices do not result in adverse consequences to other users of the resource.

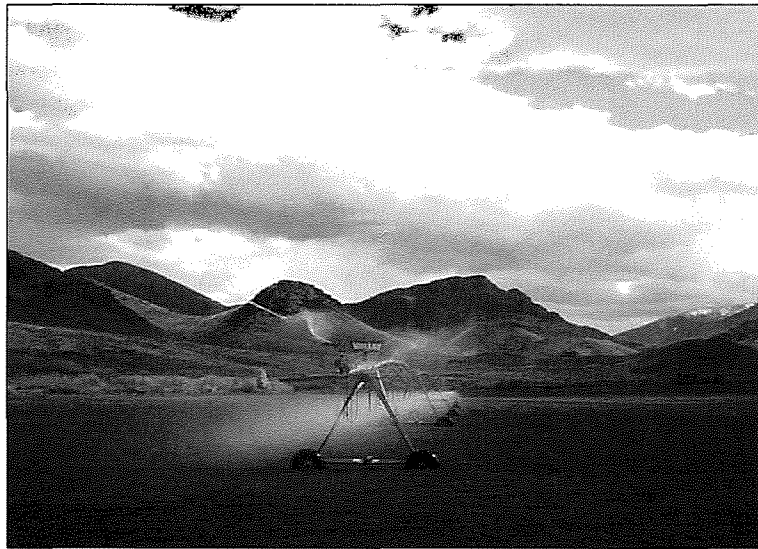


Photo: Idaho Irrigation (IDWR Photo)

Implementation Strategies:

- Review existing laws and regulations and identify inconsistencies or constraints to implementing water efficiency practices.
- Develop partnerships with local, state, and federal governments and non-governmental organizations to coordinate and support water conservation programs.
- Establish a public information program and conservation guidelines for a range of water uses.
- Evaluate opportunities for conservation and water efficiency practices in conjunction with the evaluation of new water supply enhancement facilities, including existing and new water metering for all municipalities that provide public drinking water and water for other uses.
- Identify localized opportunities for water conservation.

Milestones:

- Number of conservation guidelines implemented.
- Number of partnerships developed to coordinate water conservation.
- Number of water use efficiency practices implemented.
- Effects of conservation efforts quantified.

2B - FEDERALLY LISTED AND OTHER AQUATIC SPECIES

The state asserts primacy over the management of its fish and wildlife and water resources. Accordingly, any reintroduction or introduction of federally listed species or other aquatic species without state consultation and approval is against the policy of the State of Idaho because it would impair or impede the state's primacy over its water resources.

Discussion:

The intersection between state water rights and the Endangered Species Act (“ESA”) requires development of integrated solutions to water allocation conflicts. Pursuant to Idaho Code § 36-103, the Idaho Fish and Game Commission, through the IDFG, is responsible for the preservation, protection, perpetuation, and management of all wildlife, including aquatic species, within Idaho. IDFG also maintains a list of Species of Greatest Conservation Need, species that are low in numbers, limited in distribution, or have suffered significant habitat losses. The OSC is responsible for the coordination of all state activities affecting endangered, threatened, and candidate species, and species petitioned to be listed under the ESA, and rare and declining species. Idaho Code § 67-818. OSC coordinates state implementation and response to federal recovery plans and participates in regional efforts with state and federal agencies and tribes on issues related to such species. Idaho Code § 67-818. Pursuant to Chapter 19, Title 22, Idaho Code, the ISDA is responsible for the regulation of aquatic invasive species. All activities related to the introduction or reintroduction of aquatic species that would affect Idaho’s fish and

wildlife and water resources should be coordinated through these agencies, including species listed under the ESA.

In enacting the ESA, Congress contemplated a state-federal alliance to advance the recovery of listed species and provided for the development of state-led recovery efforts. Congress has directed federal agencies to “cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species.” 16 U.S.C. § 1531(c)(2). Cooperative community-based conservation programs can be more effective in providing on-the-ground habitat benefits than enforcement actions. With site-specific information about water and land use practices and habitat requirements, targeted and effective conservation strategies can be developed and implemented that protect private property rights and assure state primacy over water resources while, at the same time, providing natural resource protection.

The Idaho Water Resource Board holds minimum stream flow water rights for 205 river reaches important to ESA-listed species and established as part of the Snake River Water Rights Settlement Act of 2004 (“2004 Snake River Water Rights Agreement”). The minimum stream flow water rights provide significant protection for ESA-listed species in the Salmon and Clearwater River basins. The water rights for streams in watersheds with substantial private land ownership and private water use were established after consultation with local communities. Where the minimum stream flow water rights are higher than existing flows, the state works with water users on a voluntary basis to rent or otherwise acquire water to return to the streams. The Water Supply Bank and Idaho Water Transactions Program are used to achieve these objectives. In conjunction with the minimum stream flows, the state agreed to work with local stakeholders and communities to address habitat concerns on a limited number of streams with degraded habitat. The work plans include measures to remove barriers to fish passage, revegetate stream banks, and restore wetlands to proper functioning. These programs also assist in the implementation of the Columbia Basin Fish Accords in which the state, the Bonneville Power Administration, and the U.S. Army Corps of Engineers (“USACE”) agreed to address issues associated with the direct and indirect effects of the Federal Columbia River Power System and U.S. Bureau of Reclamation’s (“USBOR”) Upper Snake River Project on the fish and wildlife resources in the Columbia River Basin. As discussed in Policy 6B, these projects target flow-related limiting factors in the Lemhi and Pashimeroi rivers.

The 2004 Snake River Water Rights Agreement also provides for the development of agreements to assist in the recovery of ESA-listed species, under Section 6 of the ESA. The plans are to be developed in collaboration with local landowners and water users, affected Indian tribes, and state and federal natural resource agencies. Section 6 agreements will provide incentives for conservation through the granting of incidental take coverage to participants in the program. Such agreements would provide participating water users with protection against uncertainty and regulatory delays while contributing to the recovery of listed species. Section 6 of the ESA may also provide opportunities for the implementation of voluntary conservation plans developed in collaboration with local water users and stakeholders in other regions of the state. The Board, in collaboration with other state agencies and local units of government, develops

local and regional conservation strategies that contribute to the recovery of ESA-listed species and Species of Greatest Conservation Need.

Implementation Strategies:

- Participate in the development and implementation of habitat conservation plans pursuant to Section 6 agreements.
- Collaborate with OSC, IDFG, other state and federal agencies, affected Indian tribes, local units of government and local stakeholders to develop and implement conservation programs that preclude the need for listing of species and contribute to listed species' recovery.
- Coordinate with OSC and IDFG to integrate water resource programs with species protection and recovery, including the establishment of minimum stream flows and state designation of protected rivers.

Milestones:

- Number of Section 6 agreements implemented.
- Number of voluntary conservation agreements and measures implemented.
- Number of strategies implemented that preclude the need for listing under the ESA and result in listed species' recovery.

2C – MINIMUM STREAM FLOWS

The Idaho Water Resource Board will exercise its authority to establish and to protect minimum stream flow water rights on those water bodies where it is in the public interest to protect and support instream uses.

Discussion:

Minimum stream flows protect and support many nonconsumptive beneficial uses of water such as fish and wildlife habitat, aquatic life, recreation and aesthetic values, transportation, navigation, hydropower generation, and water quality. These uses contribute to Idaho's economy and the well being of its citizens.

In 1925 and 1927, the legislature declared that the preservation of certain lakes for scenic beauty, health, and recreation was a beneficial use of water. In 1971, the legislature authorized the first formal appropriation of minimum stream flows by directing the Idaho Department of Parks and Recreation to appropriate a specific reach of Niagara Springs in the Malad Canyon area for instream flow purposes. The 1976 State Water Plan called for, and eventually legislation was enacted, creating a state-wide minimum stream flow program. Chapter 15, Title 42, Idaho Code, authorizes the Idaho Water Resource Board to appropriate the minimum flow of water required to protect designated uses if the appropriation is in the public interest and will not interfere with any vested water right, permit, or water right application with a senior priority. Idaho currently has 297 licensed or permitted water rights for minimum stream flow purposes, including six minimum

lake level water rights held by the state. At the legislature's direction, 205 of the minimum stream flow water rights were adopted pursuant to the 2004 Snake River Water Rights Agreement which, as discussed more fully in Policy 6B, provided a programmatic approach to addressing the needs of species listed under the ESA. Similarly, the legislature has authorized the Board to appropriate minimum stream flow water rights in the Lemhi and Wood River basins where the rights are maintained through operation of a Water Supply Bank. These locally managed programs are used to maintain or enhance instream flow in a manner that respects water use practices and addresses community concerns.

The Water Supply Bank and local rental pools are tools that can be used to improve instream flows through voluntary cooperation and to meet local needs. It is important to monitor existing mechanisms for establishing local rental pools to determine whether additional strategies are required to meet local needs. It is also important to monitor whether existing mechanisms for meeting instream flow needs are adequate.

Implementation Strategies:

- Monitor whether existing mechanisms for meeting instream flow needs are adequate.
- Coordinate with state and federal agencies and stakeholders to identify potential minimum stream flow needs.
- Submit applications for minimum stream flow water rights that are in the public interest.
- Monitor existing mechanisms for establishing local rental pools to determine whether additional strategies are required to meet local needs.
- Establish local rental pools to meet instream flow needs as requested.

Milestones:

- Annual inventories of minimum flow water rights completed.
- Minimum stream flow water rights established.
- Instream flow needs met.

2D - STATE PROTECTED RIVER SYSTEM

The Idaho Water Resource Board will exercise its authority to protect the unique features of rivers where it is in the public interest to protect recreational, scenic, and natural values.

Discussion:

Idaho Code § 42-1734A(1) authorizes the Board to protect highly valued waterways as state protected rivers. The authority to designate "protected rivers" derives from the state's ownership of the beds of navigable streams and the state's right to regulate all

waters within the state. The Idaho Water Resource Board has consistently recognized the value of free-flowing waterways by designating specific streams and rivers as natural or recreational rivers.

Although rivers can be protected under the federal Wild and Scenic Rivers Act, the Board works with federal officials to seek protection of streams and rivers through the Comprehensive State Water Planning process. The state planning process ensures coordinated and efficient water planning for Idaho rivers and streams and avoids potential state/federal sovereignty conflicts.

Implementation Strategies:

- Coordinate with local governments and federal agencies to identify specific waterways for consideration as protected rivers.
- Develop priority list of potential rivers for consideration in comprehensive basin planning.
- Establish agency policy and procedures to ensure requirements of the protected rivers program are addressed when the Department reviews water right permit applications and stream channel alteration permits.
- Ensure that permits issued include provisions for the protection, restoration, or enhancement of designated river reaches.

Milestones:

- Ongoing review of state rivers and streams to determine whether they should be designated as part of the protected river system.
- Number of state/federal agreements to coordinate river planning implemented.
- Designation of streams or rivers determined to warrant protected status.

2E - RIPARIAN HABITAT AND WETLANDS

Protecting the ecological viability of riparian habitat and wetlands within the state is a critical component of watershed planning.

Discussion:

Functional riparian zones and wetlands contribute to water quality protection, storm water control, and ground water protection and provide important habitat for fish and wildlife. Riparian and wetlands areas provide support to numerous species across much of the state. Riparian zones and wetlands should be protected to preserve their ecological values and functions. The Board supports voluntary efforts to restore riparian zones and wetlands.

The integration of water resource and land use planning activities that affect riparian zones and wetlands requires coordination among various local, regional, and state authorities. The Department regulates the alteration of stream channels and stream beds

below the mean high watermark. Idaho Code §§ 42-3801 - 42-3812. Local governments are authorized to regulate land use and development. The DEQ administers the state's Nonpoint Source Management Program which is based upon strong working partnerships and collaboration with state, tribal, regional, and local entities, private sector groups, citizens' groups, and federal agencies and the recognition that a successful program must be driven by local wisdom and experience.

In 2008, the Idaho Wetlands Working Group developed a Draft Wetlands Conservation Strategy that sets out a framework for protecting, restoring, and enhancing wetlands through collaborative, voluntary approaches. The Board supports voluntary watershed-based conservation strategies for the protection of riparian and wetland areas above the mean high water mark developed and implemented through collaboration with water users, land managers, local governments, and state and federal agencies.

Implementation Strategies:

- Support collaborative watershed planning and the implementation of voluntary strategies to protect Idaho's wetlands and riparian areas.
- Support the development of guidelines and strategies to assist in the implementation of projects that protect, restore, and enhance wetlands and riparian areas.
- Evaluate whether the Stream Channel Protection Act, [Idaho Code §§ 42-3801 - 42-3812], adequately assists in the protection of wetlands and riparian areas and propose statutory changes as appropriate.
- Assist state and federal agencies and stakeholders in the acquisition of funding for project implementation.

Milestones:

- Project and funding proposals submitted.
- Projects implemented.

2F - STREAM CHANNEL REHABILITATION

The Idaho Water Resource Board will support cost-effective stream channel rehabilitation where past activities adversely affect or could affect the ecological goods and services of the state's watersheds.

Discussion:

Functional stream channels provide ecological goods and services desired by the public. Ecological goods are those qualities that have economic value, such as timber resources, habitat that supports fishing and hunting, and aesthetic qualities of landscapes that would attract tourists. Ecological services include systems that best manage water resources, such as the regulation of runoff and flood waters, or the stabilization of landscapes to prevent erosion. Damage and destruction of stream channels can result from natural and

human-caused changes and disturbances. Where current practices, legacy effects of past activities, or natural disturbances threaten public safety, private property, or the overall quality and quantity of water produced in the affected watershed, it is in the state's interest to take remedial action in a cost-effective manner. In many instances, historical targets for restoration are not practical and therefore restoration efforts should be designed to be sustainable in a rapidly-changing environment. Preventing damage to a stream channel and adjacent property is more cost effective than restoration. In addition, it is in the state's interest to ensure that the stream channels of the state and their environments are protected and restored through the implementation of voluntary restoration projects.

Implementation Strategies:

- Conduct a statewide inventory of streams where natural events or human activities have altered channels and the disturbances threaten the public safety, private property, or other water resource values.
- Conduct cost/benefit analyses for rehabilitation of affected streams.
- Prioritize projects.
- Obtain funding for restoration of prioritized streams.

Milestones:

- Inventory conducted.
- Cost/benefit analyses conducted and priorities established.
- Funding obtained.
- Projects implemented.

2G - SAFETY MEASURES PROGRAM

Owners of water distribution and storage facilities are encouraged to establish or continue safety initiatives including construction and maintenance of safety features and development of public awareness programs to educate residents about hazards associated with these facilities.

Discussion:

Fatal accidents occur in waterways at or near water distribution and storage facilities in Idaho because of the inherent dangers of these facilities. With the increasing urbanization of rural areas, there has been a greater effort to provide public awareness programs and, where feasible, implement measures designed to prevent such occurrences. The Idaho Water Resource Board supports these voluntary initiatives.

Implementation Strategies:

- Secure and provide funding for the construction and maintenance of safety features at water distribution and storage facilities.

- Encourage the implementation of public safety awareness programs.

Milestones:

- Reduced number of accidents associated with water distribution and storage facilities.

2H - FLOOD HAZARD AREAS

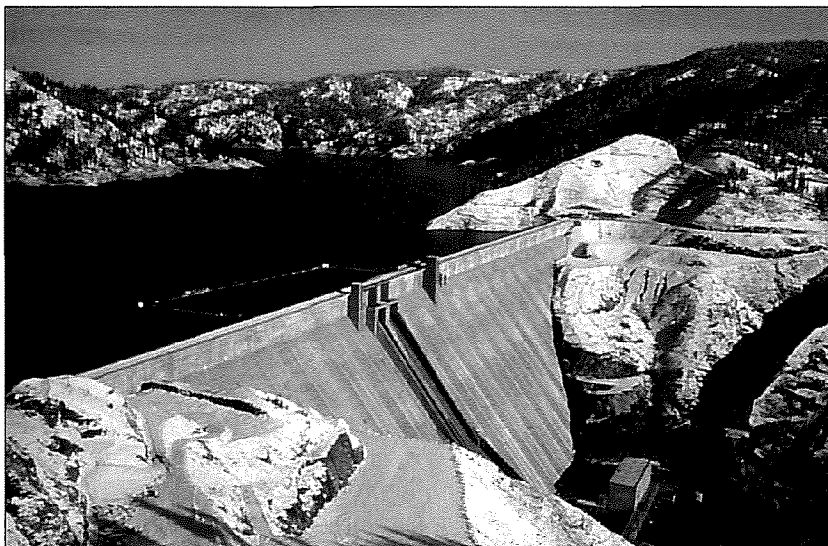
Protection of floodplains through effective floodplain management and pre-disaster mitigation is essential to reducing and preventing flood damages.

Discussion:

Floods are the most frequent and costly disasters in Idaho and can occur in most any area of the state. With population growth, there will be increased interest in the development of lands subject to periodic flooding. The Federal Emergency Management Agency (“FEMA”) administers the National Flood Insurance Program (“NFIP”), which many Idaho communities have joined by adopting and enforcing flood damage prevention ordinances. Although FEMA has prepared Flood Insurance Rate Maps (“FIRMs”) for some of the waterways within Idaho, the majority of FIRMs are more than 20 years old and require updating. In order to create safer communities and reduce the loss of life and property due to flood events, local governments are encouraged to use land use controls, building practices, and other tools to protect the natural function of floodplains. Land use controls on additional development in flood plains can also preserve storage water supplies by reducing the need for additional flood control releases.

Implementation Strategies:

- Assist local governments in securing funding to update or develop digital FIRMs.
- Provide technical information on flood plain management and flood risk to elected officials, public and private organizations, and land developers.



Milestones:

- Increased participation in NFIP by communities.
- Decreasing trends in annual flood damages.

2I - FLOOD DAMAGE REDUCTION LEVEE REGULATION

Levees should be designed, constructed, and maintained to meet the intended purpose of reducing water and flood damage for the useful life of the levee.

Discussion:

Pursuant to Idaho Code § 42-1717, the Department regulates nearly 600 water storage dams and more than 20 mine tailing impoundment structures throughout the state. Levees are exempted by statute from the Department's dam safety regulations, and the construction, maintenance, and safety of levees is, for the most part, left to local entities. Presently, there is no state agency that is authorized to regulate levees for the protection of public health or safety.

The Board supports the development of a comprehensive state program governing the design, construction, and maintenance of new flood reduction levees, and the periodic safety inspection of existing levees. A state flood reduction levee program should focus on the use of sound technical practices in levee design, construction, and operation. This should include the establishment of a safety program that helps ensure public education and awareness of the capacities and limitations of levees during flood events.

Implementation Strategies:

- Develop a state safety program to regulate the design, construction, and maintenance of new flood reduction levees.
- Investigate the implementation of a state levee safety program consistent with the standards and guidelines recommended by the Draft National Levee Safety Program.
- Provide testimony upon request to the legislature regarding the benefits offered to Idaho citizens resulting from implementation of a state levee safety inspection program.
- Participate in the development of a National Levee Safety Program with other state and federal agencies, as appropriate.
- In the event a National Levee Safety Program is adopted, obtain certification as a state levee safety program and assist with development of levee criteria for use by the states and the federal government.

Milestones:

- State levee safety program established.
- Levee failures in Idaho decreased.
- Reduction in property loss resulting from levee failures.

3. MANAGEMENT

The Management policies focus on maintaining and enhancing administrative programs and practices related to current and future demands on Idaho's water and energy resources.

3A - REVIEW OF FEDERAL RESERVOIR WATER ALLOCATION

It is in the state's interest that proposed water allocations and reallocations of water in federal reservoirs be consistent with the State Water Plan.

Discussion:

Historically, the Board has reviewed federal water allocations proposed by the USBOR to determine whether the proposed allocations are consistent with state water resource planning and management objectives. In 1988, this cooperative arrangement was formalized through an agreement providing for Idaho Water Resource Board review of proposed water allocations from federal reservoirs in excess of 500 acre-feet annually, within an existing approved water right not otherwise reviewable by the Department. This state and federal partnership ensures that water resource and management issues are addressed in a comprehensive way, thereby providing for optimal use of the state's resources. It will become even more important to coordinate state and federal management strategies as demands on the state's water supply increase.

Implementation Strategies:

- Review status of existing cooperative agreements related to review of proposed allocations and revise accordingly.
- Identify opportunities for additional agreements providing for review of proposed allocations.
- Work with the USACE to determine if cooperative agreements addressing water allocations in other parts of the state would be in the state's interest.

Milestones:

- Existing agreements maintained and revised as necessary.
- Additional cooperative agreements executed that promote optimal use of the state's water resources.



3B - HYDROPOWER SITING

The expansion of hydropower capacity and generation consistent with the state water plan can help meet the need for affordable and renewable energy resources.

Discussion:

Hydropower provides a clean, efficient, and renewable energy source and has contributed significantly to the state's energy supply. The state and region's power demand is expected to increase substantially over the next several decades as the population continues to grow. Although most cost effective and flexible sites have been developed, there will be opportunities for increasing hydroelectric generating capacity, while preserving environmental protection. These include enhancing incremental capacity at existing sites through new technologies that yield greater energy efficiency, adding generation capacity at existing dams, and the development of generation capacity in conjunction with the construction of new water storage projects. Development of small hydropower generation at existing facilities is also an important strategy for contributing to the state's energy supply. The Board provides loans to assist irrigation entities interested in studying the feasibility and development of such projects.

The 2012 Idaho Energy Plan recommends that energy conservation and energy efficiency should be the highest priority resource. The 2012 Idaho Energy Plan also recommends development of in-state renewable resources that will contribute to a secure, reliable energy system for the state. The Board supports the promotion of a more efficient use of energy throughout Idaho's economy, implementation of efficiency improvements at existing sites, and retrofitting existing dams. Hydropower development should be considered when planning new water storage projects. Feasibility studies for new storage projects should include evaluation of the costs, benefits, and adverse consequences of hydropower generation.

Under 16 U.S.C. § 803, the FERC must determine that proposed projects are consistent with Idaho's comprehensive water plans when making licensing decisions. The Board will review hydropower development proposals to determine whether they are consistent with the State Water Plan, including the comprehensive basin and river plans, which address region-specific siting issues. The Board agrees with the 2012 Idaho Energy Plan recommendation to establish an Energy Facility Site Advisory Team that would provide technical expertise and assistance upon request from local officials considering energy facility siting proposals.

Implementation Strategies:

- Provide information and technical assistance to local communities through participation in an Energy Facility Site Advisory Team.
- Include evaluation of hydropower generation potential in feasibility studies for water storage projects.

- Provide information and technical assistance to proponents of projects that increase energy efficiency, increase generation capacity, or retrofit existing dams or other facilities for hydroelectric generation.

Milestones:

- Hydropower siting proposals and projects comply with the State Water Plan.
- Efficiency improvements implemented at existing hydropower facilities.
- Generation capacity increased at existing hydropower projects, while protecting the environment.
- Existing dams retrofitted with generation capacity, while protecting the environment.
- Development of small hydropower generation at existing facilities, while protecting the environment.

3C - RESEARCH PROGRAM

Focused research is necessary to support water resource planning and collaborative solutions that address changing demands on the state's water supplies.

Discussion:

Research and data gathering are essential to the state's efforts to meet future water challenges in a sustainable way. Adequate data on water availability, use and efficiencies, surface and ground water interaction and relationships, and emerging water management technologies is needed to help water managers and end users make sound decisions and develop adaptive strategies for responding to the impacts of climate variability. Data collection and research is conducted by numerous public and private entities. A cooperative exchange of information contributes to more efficient use of limited financial resources for research and monitoring necessary to further the state's water supply objectives. Research priorities include: water use efficiency; water use monitoring; ground and surface water relationships, specifically the timing and spatial distribution of pumping and recharge efforts; ground water flow models; and system operation modeling methods for Idaho river basins. Environmental considerations should be addressed as studies are designed and implemented.

Implementation Strategies:

- Facilitate coordination and dissemination of research and data among state and federal agencies, local units of government, universities, and private entities.
- Identify and prioritize research needs.
- Identify dedicated funding sources for basic and applied research.

Milestones:

- Cooperative research activities implemented.
- Completed research projects.
- Application of research results to planning and management.

3D - FUNDING PROGRAM

Funding mechanisms to support the development, preservation, conservation, and restoration of the water resources of the state should be based on flexible strategies that provide equitable benefits.

Discussion:

The water resources of the state are essential to Idaho's economy and its citizens. There is no single strategy for successfully financing water resource projects. Instead, funding mechanisms for water planning and management should be based on flexible strategies that are broad-based and provide equitable benefits. Strategies for financing water resource programs may include state appropriations, the establishment of water management improvement or conservancy districts, targeted user fees, the development of a state water fund supported by power franchise fees, targeted sales, property, or special product and services taxes, and revenue bonds. While the existing institutional and legal framework may be adequate for some projects, it is important to develop innovative approaches that are responsive to future needs. Transparency and clarity about the intent and limitations of any particular funding strategy will help ensure that a strategy is used and evaluated appropriately. Projects proposed for funding must be in the public interest and in compliance with the State Water Plan.

The Board's Revolving Development Fund and Water Management Account are supported by appropriations from the state's general fund, federal funds, and other revenue sources. These programs have and will continue to provide financial assistance to project sponsors for water development and conservation, system rehabilitation, and treatment projects. The Board is also authorized to finance water projects with revenue bonds. The issuance of revenue bonds does not constitute a general obligation of the state or the Idaho Water Resource Board.

Sources of funding for programs focused on the protection and restoration of species listed under the ESA include 2004 Snake River Water Rights Agreement appropriations, the Columbia Basin Water Transaction Program, the Pacific Coast Salmon Recovery Fund, and the 2008 Columbia Basin Fish Accords.

The ESPA CAMP provides for a water-user fee in conjunction with state appropriations. Implementation of strategies for addressing regional water use issues on the Eastern Snake River Plain Aquifer will assist in the development of comprehensive aquifer management implementation plans in other areas of the state.

The Board will continue to pursue opportunities for partnerships with the federal government and private entities to determine the feasibility of increasing water supplies through development of additional storage capacity. As discussed in Policy 4E, the Board has entered into agreements with the USACE and the USBOR for studies in the Boise River and Snake River basins. As demands increase on Idaho's water storage and delivery systems, the need for additional water storage feasibility studies and funding partnerships will be assessed.

Implementation Strategies:

- Review existing authorities and identify changes needed to optimize financing for water resource projects.
- Evaluate Idaho Water Resource Board financial program procedures to determine whether revisions are needed to improve efficiency and accessibility.
- Pursue opportunities for private funding partnerships.
- Pursue opportunities for local, federal, and intra-state funding partnerships and projects.

Milestones:

- Financial programs and funding strategies meet the future water resource needs of the state.

3E - WATER RESOURCE PLANNING PROGRAM

Comprehensive water planning will help ensure sufficient water supplies to satisfy Idaho's future water needs.

Discussion:

Idaho Code § 42-1734A(1) directs the Idaho Water Resource Board to formulate and adopt a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of the state. The legislature also authorized the Idaho Water Resource Board to develop plans for specific geographical areas. Comprehensive plans for individual hydrologic river basins include state protected river designations and basin-specific recommendations concerning water use and resource values. Basin plans also assure that the state's interests will be considered in federal management agency decisions. Public review and comment ensures that the state water plan serves the public interest.

As demands for water increase, the need for water-related planning escalates. The planning process provides opportunities for involving all affected parties – water users, resource managers, and policymakers, identifies problems, alternatives, and solutions, and allows for continuous updating and revisions in light of new problems and opportunities.

In exercising its responsibilities for water resource planning, the Board will focus on the coordination of local, state and federal planning activities to minimize duplication and to promote the optimum use of Idaho's water resources.

Implementation Strategies:

- Review and update existing agreements for coordinated water resource planning.
- Develop new cooperative planning agreements.
- Secure funding to complete CAMPs for priority aquifers consistent with the schedule established by the Board.

Milestones:

- Cooperative planning agreements executed and implemented.
- Adoption of Treasure Valley and Rathdrum Prairie CAMPs.
- Completion and adoption of CAMPs for remaining priority aquifers.

3F - WATER RIGHTS ADJUDICATION

Adjudication of water rights through the state courts should be completed to fully define and quantify all state, tribal, and federal water rights.

Discussion:

The purpose of a general stream adjudication is to provide certainty and predictability in the administration and distribution of water diverting from hydraulically connected water sources. "A general adjudication is an action for both the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided in section 42-1410, Idaho Code and for the administration of those rights." Idaho Code § 42-1401A(5). The need for a general adjudication of water rights in the Snake River Basin became apparent as the spring flows in the Thousand Springs reach began to decline and disputes arose over the availability of water supplies on the Snake River Plain. As part of the 1984 Swan Falls Agreement, the state agreed to commence the Snake River Basin Adjudication ("SRBA"), the largest legal proceeding in the history of the state. The SRBA is the cornerstone for the long-term management of the Snake River Basin within Idaho. At the conclusion of the SRBA, the state will have a listing of all water rights within the basin, which is the predicate for establishing water districts to administer all water rights. Pursuant to Idaho Code § 42-1734(3), the Idaho Water Resource Board is authorized to represent the state, when requested to do so by the Governor, in proceedings, negotiations, and hearings involving the federal government. In the SRBA, the Board coordinated state participation in the negotiation of federal reserved water rights, including tribal claims. Successful agreements were negotiated resolving federal reserved water right claims including those filed by the Shoshone-Bannock, Nez Perce, and Shoshone-Paiute tribes as well as the claims of numerous federal agencies. The final settlement of the Nez Perce

Tribe's claims reflected the tribe's and the state's shared interest in addressing environmental concerns and addressed the conflicting demands for consumptive and nonconsumptive uses. Consistent with state law, the Board should serve as the lead agency for coordinating state participation in all general stream adjudications.

On November 12, 2008, the district court ordered the commencement of an adjudication in the Coeur d'Alene Spokane River water system. Like the SRBA, the determination of all existing water rights from the water basins in Northern Idaho will provide the basis for administration of water rights.

Implementation Strategies:

- As requested by the Governor, provide coordination and negotiation of adjudication activities.
- As determined by state and local support, encourage general adjudications in unadjudicated basins in northern Idaho and the Bear River Basin in eastern Idaho.

Milestones:

- Issuance of final unified decree in the SRBA.
- Coeur d'Alene Spokane River Basin adjudication completed.

3G - CLIMATE VARIABILITY

Preparedness strategies should be developed to account for the impact of climate variability on the state's water supplies.

Discussion:

Evidence suggests that currently the Earth's climate is warming and that warming may continue into the foreseeable future. While recognizing the uncertainties inherent in climate prediction, it is important to anticipate how a warming climate can potentially affect water supplies and plan accordingly.

Climate experts are less confident about how continued warming will affect the overall amount of precipitation Idaho receives, but changes in seasonal stream flows and increased annual variability have been documented. It is expected that seasonal flows in snowmelt-fed rivers will occur earlier, summer and fall stream flows will be reduced, and water temperatures will increase. Increased precipitation in the form of rain and fewer, but more intense, storm events are expected to result in more severe droughts and greater flooding. Potential impacts could also include more evaporation, reduced ground water recharge, water quality challenges, reduced productivity of hydropower facilities, and irreversible impacts on natural ecosystems. Water resource managers must evaluate and plan for these possibilities.

Planning for the potential impacts of climate variability requires increased flexibility in water management and the identification of existing tools that can be adapted to address

climate-induced changes in water supplies. Increased monitoring and data collection as well as conducting an initial vulnerability analysis for watersheds will help managers develop adaptive approaches to changes in the hydrologic regime that may accompany an increase in climate variability. Increasing public awareness and strengthening community and regional partnerships to manage shared water resources are proactive steps that should be taken now to provide for the optimum use of Idaho's water resources.

Implementation Strategies:

- Evaluate existing legal and institutional tools and constraints that can be adapted to provide flexibility for water resource managers.
- Implement a collaborative approach to the analysis of reservoir operation rule curves that adequately considers past and current hydrologic data.
- Pursue expansion and diversification of water supplies, including increased surface and ground water storage.
- Develop and update flood-risk assessments and environmental impact mitigation measures.
- Identify and implement adaptive mechanisms to address the impact of climate variability on water supplies.
- Establish stakeholder forums involving state and local water supply managers, scientists, state and federal agencies, and water users to enhance understanding about the science of climate variability, to share information about existing and potential tools for ameliorating the impact of climate variability, and to increase understanding of the challenges facing water users and managers.

Milestones:

- Completion and implementation of updated flood control rule curves.
- Construction or expansion of water supply projects.
- Finalization of risk assessment studies.
- Documentation of legal and institutional framework and water management tools that anticipate and respond to climate variability.
- Establishment of regional forums that encourage the development of collaborative programs and decision making.
- Funding mechanisms in place for climate variability preparedness and risk assessment.

4. SNAKE RIVER BASIN

The Snake River was described in the 1960s as “A Working River” by Senator (and former Idaho Governor) Len B. Jordan. This description accurately portrays the development of the river since the earliest settlement and irrigation of the semiarid lands of southern Idaho.

The Snake River has had – and continues to have – many competing demands for its water that affect the management of the river, among them: irrigation, hydroelectricity, municipal supply, flood control, recreation, fish, and wildlife management. Multiple governmental agencies regulate activities that affect the use of the waters of the Snake River, among them: the Idaho Water Resource Board (water policy), Idaho Department of Water Resources (water administration), U.S. Bureau of Reclamation (irrigation, water storage, and hydroelectricity), U.S. Army Corps of Engineers (flood control), National Marine Fisheries Service (anadromous fisheries management), U.S. Fish and Wildlife Service (resident fisheries), Bonneville Power Administration (federal power), and the Federal Energy Regulatory Commission (hydropower). The Snake River policies in this Plan provide essential guidance for the management of the Snake River in the public interest. When competing demands for Idaho’s unappropriated water resources arise, the laws of the State of Idaho and the policies in this Plan establish the blueprint for management of the resource.

This plan sets forth ten Snake River Basin policies. Policy 4A describes the minimum stream flow management framework that provides for the optimum development of the water resources of the Snake River Basin. Policy 4B reaffirms the Milner Zero minimum average daily flow policy that guides the optimum development of unappropriated flows of the Snake River Basin above Milner Dam. Policy 4C addresses reallocation of Snake River trust water in the Milner to Murphy reach of the Snake River Basin. Policy 4D addresses conjunctive management of the Eastern Snake Plain Aquifer and the Snake River. Policy 4E addresses the need for development of storage in the Snake River Basin. Finally, Policies 4F through 4J set forth policies for agriculture, DCMI (domestic, commercial, municipal and industrial), hydropower, navigation, fish, wildlife, recreation, and scenic values.

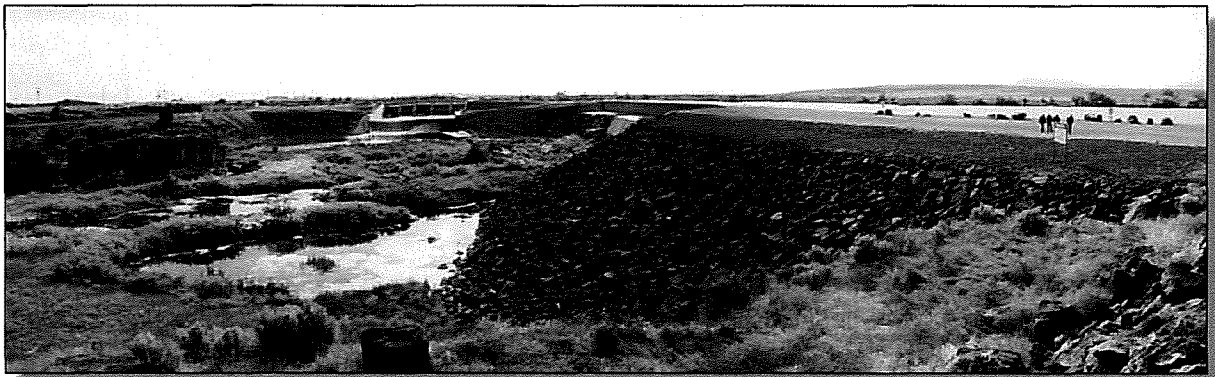


Photo: Milner Dam

Photo Courtesy of IDWR Dam Safety Program

4A - SNAKE RIVER MINIMUM STREAM FLOWS

The main stem Snake River above Hells Canyon Dam will be managed to meet or exceed the following minimum average daily flows at the designated stream gaging stations:

<u>Gaging Station</u>	<u>Minimum Average Daily Flow</u>
Milner	0 cfs
Murphy	3,900 cfs (4/1 through 10/31) 5,600 cfs(11/1 through 3/31)
Weiser	4,750 cfs
Johnson Bar	5,000 cfs
Lime Point	13,000 cfs

These minimum stream flows provide the management framework for the optimum development of water resources of the Snake River Basin. The minimum stream flow water rights shall be administered in priority with other water rights.

Discussion:

Approximately 57%¹ of the surface area of the State of Idaho is within the Snake River Basin. Although the Snake River Basin represents 50% of the water resources of the State, it is the water supply for 76% of Idaho's population. Thus, the Snake River Basin is the backbone of Idaho's economy. Effective management of this resource is essential to protecting existing water rights, supporting agriculture, sustaining economic growth, maintaining base flows for hydropower generation, and preserving fish, wildlife, and other environmental values.

The Milner, Murphy and Weiser minimum stream flows have been an integral part of the State Water Plan since their adoption in 1976. They establish a balance between diversion of water for consumptive uses and preservation of Snake River flows for instream uses. The Johnson Bar and Lime Point minimum flows were added in 1978 and 1985, respectively, to address navigational concerns below the Hells Canyon Complex (HCC).

The Snake River minimum stream flow policy evolved over the course of the 20th Century in connection with efforts to reconcile the conflict between irrigation, which requires diverting water out of the stream, and hydropower, which relies on retaining water in the stream. A brief overview of the evolution of the Snake River minimum stream flow framework is provided as context for the Snake River policies that follow.

The inherent tension between diversion of water for consumptive uses and retention of flows for instream uses became apparent with the simultaneous development of the irrigable lands within the Snake River Basin and the development of the hydropower

¹ The Salmon and Clearwater Basins are not included in this calculation because they are treated as separate basins for purposes of the State Water Plan.

potential of the main stem Snake River. The inevitable conflict between these two uses was recognized as early as the 1889 Constitutional Convention, and the tension continued through the 20th Century.

The initial effort to create a balance between irrigation and hydropower development arose out of a 1920 plan prepared by the Board of Engineers “for the development of the remaining resources of the Snake River water supply on a broad and comprehensive basis which would insure to the state the maximum utility of the possibilities of the stream.” Report of Board of Engineers (dated April 10, 1920). The Board of Engineers consisted of the State Commissioner of Reclamation and engineers representing the U.S. Reclamation Service and private irrigation interests. The plan was based on the physical division of the Snake River Basin at Milner Dam. Upstream from Milner Dam the Snake River is not deeply entrenched, but below the dam the river enters a deep canyon. This physical characteristic of the Snake River led the Board of Engineers to propose that the Snake River above Milner Dam be dedicated to irrigation because of the ease of diverting the flow through gravity irrigation. The Board of Engineers proposed that the main stem Snake River below Milner Dam should be devoted to hydropower because the flow of the river was largely inaccessible for agricultural development at that time.

The Board of Engineers’ plan proposed the construction of storage capacity, to the extent economically feasible, to capture flows above Milner Dam for existing and future agricultural development. Because it would take a number of years to develop the water supply above Milner Dam for agricultural purposes, the Board of Engineers’ report recommended hydropower water rights be conditioned to prevent them from interfering with future upstream development. This limitation on hydropower water rights was integral to the Board of Engineers’ plan for the “maximum utility” and “greatest use” of the water resources of the Snake River. The Board of Engineers’ viewed the plan as not greatly impacting hydropower development because the Snake River soon reconstituted itself downstream from Milner Dam from irrigation return flows, tributary springs, and surface water sources.

The physical differences in the reaches above and below Milner Dam, and the corresponding differences in existing and anticipated development above and below Milner Dam, evolved over time to the commonly-held view of the Snake as consisting of “two rivers.” The “two rivers” concept recognizes that separating water administration at Milner Dam and precluding downstream calls for the water above Milner, the optimum development of the water supply above Milner Dam can be achieved. The “two rivers” concept has been repeatedly reaffirmed as part of every major Snake River water project and resolution of every major water controversy. For example, Idaho Power Company’s “HCC” water rights were subordinated to upstream consumptive uses, consistent with the “two rivers” concept.

The “two rivers” concept was formally recognized in the 1976 State Water Plan, which set a “protected flow” of zero cfs at the Milner U.S.G.S. Gaging Station. The purpose for establishing a zero flow at Milner Dam was to allow for existing uses to be continued and for some new uses to be developed. The 1986 State Water Plan, however, recognized that the Milner zero minimum average daily flow policy meant “that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-

water discharge during portions of low-water years.” The 1992 State Water Plan further clarified that the Milner zero minimum stream flow “is not a target or goal to be achieved, and may not necessarily be desirable.” The 1996 State Water Plan was amended by the Idaho Legislature to provide that “the exercise of water rights above Milner Dam has, and may reduce flow at the dam to zero.”

The 1976 State Water Plan established minimum average daily flows² at the Murphy gage of 3,300 cfs, and the Weiser gage of 4,750 cfs “to maintain water for production of hydropower and other main stem uses.” In 1985, the Murphy minimum stream flow was increased to an average daily flow of 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season as part of the resolution of the Swan Falls controversy, which dealt with whether Idaho Power Company’s hydropower water rights were subordinate to upstream uses. The 1986 State Water Plan described the Murphy and Weiser minimum stream flows as “management constraints” to “insure that minimum flow levels of Snake River water will be available for hydropower, fish, wildlife and recreational purposes.” The 1986 Plan also recognized the hydraulic connection between the Eastern Snake Plain Aquifer and directed that it “be managed as an integral part of the river system.”

In 1978, the Idaho Legislature established a minimum stream flow of 5,000 cfs at the Johnson Bar Gaging Station “to retain the stream flows and hydro-base.” Chapter 345, 1984 Idaho Sess. L. 884, 886. As part of the Swan Falls Settlement, a minimum flow of 13,000 cfs was established at the Lime Point Gaging Station. These minimum stream flows were initially established to protect navigational flows below the HCC, but now serve to protect flows of the main stem Snake River below the HCC for instream uses. As discussed in Policy 4I, however, the Johnson Bar and Lime Point minimum stream flows are not enforceable against water rights diverting from the waters of the Snake River or surface or ground water tributary to the Snake River upstream of the HCC. Additionally, the Lime Point minimum stream flow cannot be enforced against water rights diverting waters of the Salmon River or surface or ground water tributary to the Salmon River.

To summarize, the Milner, Murphy and Weiser minimum stream flows establish the management framework for optimum development of the water resources of the Snake River Basin above the HCC. The Johnson Bar and Lime Point minimum stream flows protect main stem Snake River flows below the HCC for instream uses.

Implementation Strategies:

- Develop a monitoring program by 2014 to account for fluctuations resulting from the operation of Idaho Power Company’s hydropower facilities in the calculation of the Murphy minimum average daily flow.
- Develop tools to predict Snake River flows at the Murphy Gage based on ESPA ground water level trends, precipitation patterns, new appropriations, and changes in conservation practices.

² An average daily flow is the average of multiple flow measurements taken during a 24-hour period.

- Develop by 2014 management scenarios to ensure that Snake River flows at the Murphy and Weiser Gages remain above established minimum stream flow levels.

Milestones:

- Snake River minimum stream flows maintained.
- Tools developed to predict Snake River flows at the Murphy Gage.
- Management strategy developed to ensure that Snake River minimum stream flows at the Murphy and Weiser Gages are maintained.

4B - SNAKE RIVER MILNER ZERO MINIMUM FLOW

Water resource policy, planning, and practice should continue to provide for full development of the Snake River above Milner Dam recognizing that the exercise of water rights above Milner Dam has and may reduce flow at the Dam to zero.

Discussion:

Idaho Code § 42-203B(2) provides that “[f]or the purpose of the determination and administration of rights to the use of the waters of the Snake River or its tributaries downstream from Milner Dam, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered.” This provision was enacted in 1986 to confirm and clarify the Milner zero minimum stream flow and the “two rivers” concept. Policy 4B reaffirms the Milner zero minimum stream flow and the “two rivers” concept, which have appeared in each successive revision of the Idaho State Water Plan.

Figure 1 shows the annual volume of natural flow passing Milner Dam from 1980 through 2011. Because of year-to-year variability of the natural flow passing Milner Dam, the optimum development of the natural flow will be achieved through storage in surface water reservoirs above Milner Dam and in the ESPA.

Implementation of managed recharge will have an effect on the flow characteristics of the Snake River above and below Milner Dam. Accordingly, while the Eastern Snake Plain Aquifer Comprehensive Management Plan established a long-term annual hydrologic target of 150,000 to 250,000 acre-feet of managed recharge, this target should be phased in to allow for informed water management and planning.” The Phase I managed recharge hydrologic target for the Snake River Basin above Milner is to recharge between 100,000 and 175,000 acre-feet on an average annual basis. Based upon data gathered during this initial phase of managed recharge, the Board will consider in 2019 whether to implement the ESPA long-term managed recharge hydrologic target.³

³ The Board entered into a Memorandum of Agreement with Idaho Power Company as part of the 2009 Framework Reaffirming the Swan Falls Settlement dated May 6, 2009, that sets forth additional understandings between the Idaho Power Company and the Board regarding implementation of managed recharge.

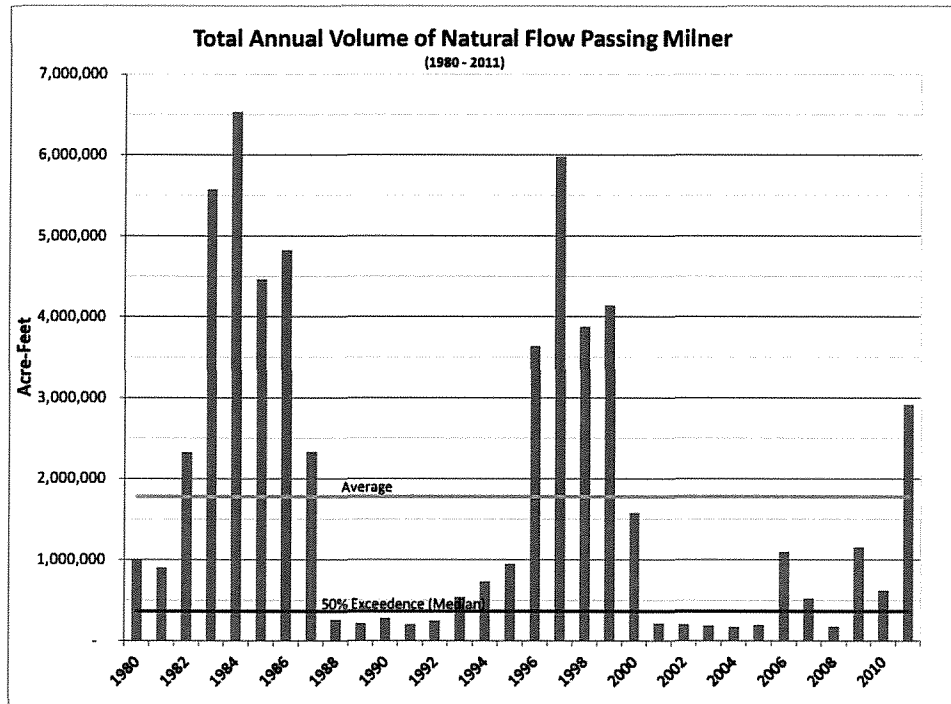


Figure 1 Total Annual Volume of Natural Flow Passing Milner Dam

As discussed in Policy 4E, development of new surface storage will take time. In the interim, the Board will cooperate with stakeholders to explore ways to optimize the management of flows that are currently passing over Milner Dam to first meet water supply needs above Milner Dam, and second to shape any remaining unappropriated flows for hydropower and other uses below Milner Dam.

Consistent with Idaho Code § 42-203B(2), no use of unappropriated flows passing Milner Dam by downstream users establishes a right to call on such flows now or in the future.

Implementation Strategies:

- Develop and maintain a reliable supply of water for existing uses and future beneficial uses above Milner Dam.
- Assess the feasibility of construction of new on-stream and off-stream storage in the Snake River Basin above Milner Dam.
- Implement a sustainable aquifer recharge program.
- Address water management and reservoir operation needs through the Upper Snake River Advisory Committee.
- Measurement and Monitoring Implementation Strategy:
 - Continuously improve the Eastern Snake River Aquifer Model (“ESPAM”), the Snake River Planning Model (“SRPM”), and the Snake River Water Right Accounting Program.

- Promote linkage of the models and their use in evaluation of impacts of various management decisions on Snake River flows, aquifer levels, and reservoir operations.
- Undertake measurement and monitoring of the combined river and aquifer system to facilitate water management and planning in the Snake River Basin above Milner Dam.
- Investigate, test, and adopt new water measurement and modeling methods and technologies that improve water management capabilities.
- Implement and maintain cooperative water resource agreements and partnerships with neighboring states, the federal government, and Indian tribes in managing the water resources of the Snake River above Milner Dam.

Milestones:

- Process in place that provides recommendations to optimize the management of the water resources and the reservoir system above Milner Dam.
- A managed aquifer recharge program above Milner Dam implemented that recharges between 100,000 and 175,000 acre-feet on an average annual basis by 2019 and data gathered to assess the efficacy of the program.
- Projects implemented that enhance the water supply above Milner Dam.

4C - REALLOCATION OF SNAKE RIVER TRUST WATER

Water made available for reallocation to new uses in the Snake River trust water area pursuant to Idaho Code § 42-203B shall be allocated in accordance with criteria established by Idaho Code §§ 42-203A and 42-203C.

Discussion:

The term “trust water” refers to water made available for future development as a result of the 1984 Swan Falls Settlement, which resolved the long-standing conflict between use of the flow of the Snake River for hydropower purposes and for agriculture and other depletionary uses. The details of this century-long conflict are chronicled in two Idaho Supreme Court decisions and the SRBA District Court’s Memorandum Decision and Order on Cross-Motions for Summary Judgment dated April 18, 2008, and therefore, are not repeated here. A brief overview of the trust created by Idaho Code § 42-203B(2), however, is provided as context for this policy.

A core principle of the Swan Falls Settlement is that flows of the Snake River downstream from Milner Dam in excess of the Murphy minimum average daily flow of 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season are available for future development in accordance with state law. The Settlement, however, recognized development would occur over time and that in the interim it was in the public interest to allow Idaho Power Company to continue to use such flows up to the licensed amount of the hydropower water rights “pending approval of depletionary future beneficial uses.”

These dual objectives were implemented through, a trust, established by Idaho Code § 42-203B(2), which operates for the joint benefit of Idaho Power Company and the people of the State of Idaho. The statutory trust consists of twenty-five hydropower water rights originally appropriated by Idaho Power Company for flows in excess of the Murphy minimum flow, and now held by the State, by and through the Governor. Idaho Power Company uses the flows available under the water rights held in trust for hydropower purposes until those flows are appropriated to new uses approved pursuant to state law, including Idaho Code §§ 42-203A and 42-203C. The “reallocation” is accomplished through subordination of the hydropower water rights held in trust to the new uses, pursuant to Idaho Code § 42-203B(2).

While the water made available for future development as a result of the trust is often referred to as “trust water,” this term is a misnomer. The trust consists of “water rights” as opposed to “water.” Trust Water is simply a shorthand term referring to flows above the minimum stream flow at the Murphy Gage, which were originally appropriated under water rights for hydropower generation at Idaho Power Company’s facilities located between Milner Dam and the Murphy Gage. Additionally, the term refers only to water sources tributary to the Snake River below Milner Dam, as shown on Figure 2 (the “Trust Water Area”).⁴

The Swan Falls Settlement and the implementing statutes did not attempt to define the specific amount of trust water available for future development. Rather, the availability of trust water is linked to the Murphy minimum flow and a number of other statutory factors. “The actual amount of development that can take place without violation of the [Murphy] minimum stream flows will depend on the nature and location of each new development, as well as the implementation of new practices to augment the stream flow.”

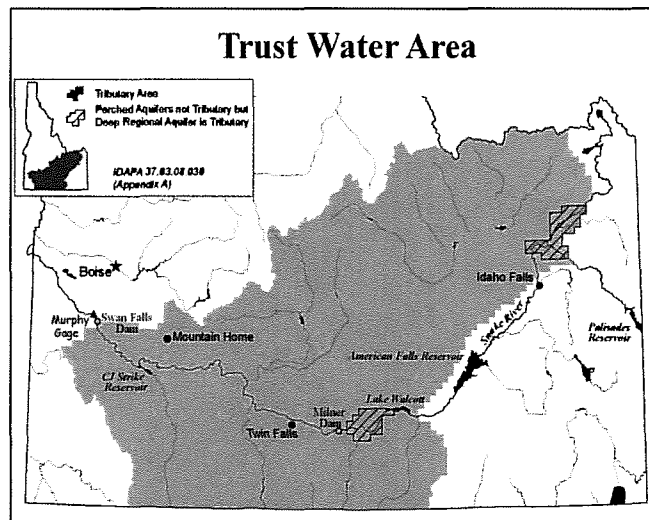


Figure 2 Trust Water Area

⁴ Pursuant to the Swan Falls Settlement and Idaho Code § 42-203B(2) “water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner Dam.” Thus, the hydropower water rights held in trust carry no right to seek administration of the rights to the use of the waters of the Snake or its tributaries upstream from Milner Dam.

Figure 3 shows the portions of the hydrograph at Murphy deemed to be “minimum stream flows” and “trust water.”⁵ A similar hydrograph was prepared in 1988 in connection with the implementation of the Swan Falls Settlement, and included the 1961 average daily flow at the Murphy Gage as representative of the then-existing low flow year. Figure 3 includes average daily flow data from 1984 through 2011 to show the relative change in flow at the Murphy Gage since implementation of the Swan Falls Settlement.

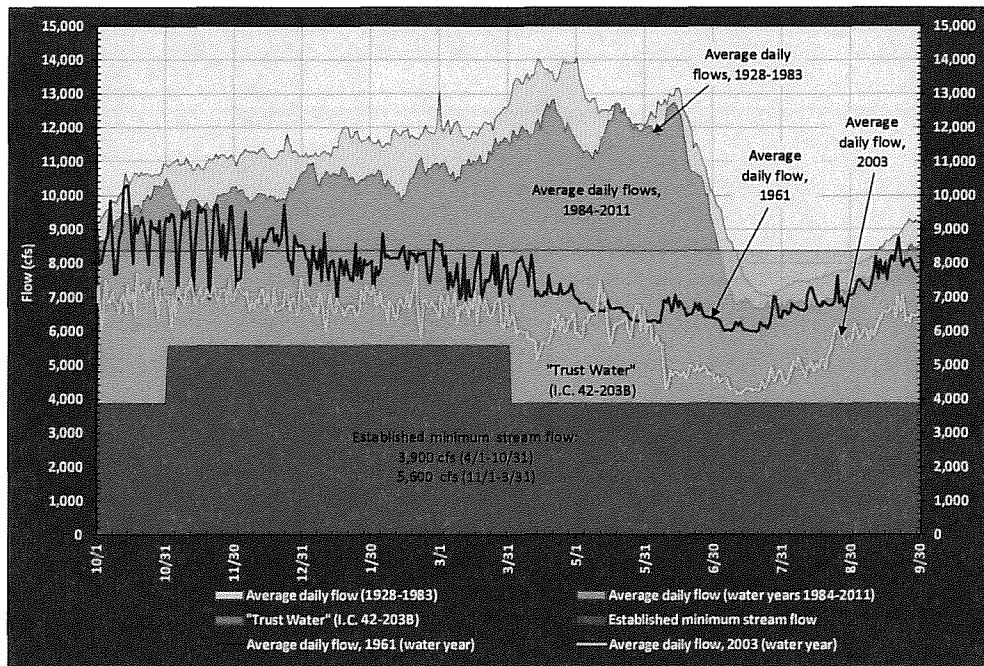


Figure 3 Swan Falls Trust Water Flows

While flows are beginning to approach the minimum average daily flow at the Murphy Gage at certain times in low flow years, Snake River flows in most years are significantly above the Murphy minimum average daily flow.

⁵Figure 3 updates Figure 3 contained in the IDWR Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area, dated November 3, 1988, which depicted water made available for appropriation above the Murphy Gage as a result of the Swan Falls Settlement. The 1988 graph plotted average monthly flows, but since that time, technology has made it easier to graph average daily flows. Thus, Figure 3 uses average daily flows as reported by the USGS to provide a more accurate depiction of flow conditions at the Murphy Gage. Specifically, Figure 2 shows average daily flows for 1961 and 2003 and the average of the average daily flows for the years 1928 through 1983 and 1984 through 2010. (The Swan Falls Settlement excludes fluctuations resulting from the operation of Idaho Power Company facilities from the calculation of the minimum average daily flow at Murphy. The methodology for calculating the minimum average daily flow is currently being refined.) The upper limit of the “trust water” portion of the hydrograph at any given location between Milner and Murphy is defined by the hydropower water rights held in trust by the State for the corresponding Idaho Power Company facility. Figure 3 applies only to Murphy, where trust water is limited to that flow between the Murphy minimum stream flow and 8,400 cfs, the amount of the Swan Falls hydropower water right held in trust. The “trust water” available at locations upstream from Murphy is the difference between the Murphy minimum stream flow and the amount of the water rights held in trust for each upstream facility.

The opportunity for further development of trust water is currently limited by three factors. First, there is uncertainty regarding the administration of surface and ground water rights other than hydropower. While the Swan Falls Settlement subordinated the use of the flows of the Snake River for hydropower purposes, it did not address the rights of other senior water right holders. Second, the amount of trust water that remains to be developed is uncertain because some trust water rights were issued for a term of years. Those permits are nearing the end of their terms and are subject to review by the Director. Third, in almost all cases, a moratorium precludes issuance of new water rights within the trust water area. Until these issues are resolved, it is not possible to make informed decisions regarding the allocation of any remaining trust water.

Implementation Strategies:

- Conduct hydrologic studies to determine the amount of additional development possible within the Murphy minimum stream flow constraint.
- Develop a conjunctive management plan setting forth measures necessary for future development of trust water.
- Review term limited trust water rights.

Milestones:

- Quantification of the amount of additional development possible within the Milner to Murphy reach of the Snake River consistent with maintaining the Murphy minimum stream flow.
- Adoption of a conjunctive management plan for the Milner to Murphy reach of the Snake River.
- Complete review term limited trust water rights.

4D - CONJUNCTIVE MANAGEMENT OF THE ESPA AND SNAKE RIVER

The Eastern Snake Plain Aquifer and the Snake River below Milner Dam should be conjunctively managed to provide a sustainable water supply for all existing and future beneficial uses within and downstream of the ESPA.

Discussion:

The ESPA is approximately the size of Lake Erie and underlies more than 10,800 square miles of southern Idaho, stretching from St. Anthony to King Hill. It is one of the largest and most productive aquifers in the world, estimated to contain 1 billion acre feet of water. Most of the ESPA is in direct hydraulic connection with the Snake River. The Snake River alternately contributes water to and receives water from the ESPA.

The volume of water stored in the ESPA derives from natural inputs (precipitation, tributary underflow, seepage from rivers) and from irrigation related inputs (seepage from canals and farm fields). The volume of water stored in the ESPA increased dramatically during the first half of the 20th century as large irrigation canals transported millions of

acre feet of water from the Snake River out on to the Eastern Snake River Plain. Crops were irrigated by flood irrigation, and the water not consumed by the crops percolated into the ESPA as "incidental recharge. As a result, the groundwater table rose across the ESPA by as much as 30-50 feet. The flow of springs near American Falls and in the Thousand Springs reach also increased dramatically. Thousand Springs flows increased from 4,200 cfs prior to irrigation to about 6,800 cfs by the late 1950s. Since then spring flows have declined as a result of more efficient surface water irrigation practices, the termination of winter canal flows, ground water pumping, and drought. Spring flows in the Thousand Springs reach currently are about 5,200 cfs, a decline of just over 20% over the past sixty years. While spring discharges from the ESPA remain above pre-irrigation levels, the decline from peak levels has created conflicts between surface and groundwater users, and in some instances between senior and junior groundwater users.

In most years when irrigation demands exceed water being accumulated to upstream storage reservoirs, flows at Milner Dam are reduced to zero until the end of the irrigation season. At these times the Snake River flow at the Murphy Gage consists mostly of ESPA discharge from the Thousand Springs area.

Recognizing a hydraulic connection between the ESPA and the Snake River, the 1986 State Water Plan identified the need conjunctive management of ground and surface water resources. In recent years, the State has implemented scientific measures to increase knowledge of the hydraulic connection between the ESPA and the Snake River, and implemented measures to improve aquifer conditions in, and spring discharge from, the ESPA. Continuation of these efforts is fundamental to ensuring an adequate water supply for existing and future water demands within the Eastern Snake River Basin.

Conjunctive management of the Snake River Basin water resources is also key to meeting the Murphy minimum stream flows. The 1984 Swan Falls Settlement explicitly recognized effective water management of the ESPA and Snake River – and associated policies and recommendations laid out in the State Water Plan – as the means of ensuring the Murphy minimum average daily flow while optimizing the development of the Snake River Basin: “[t]he State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as a part of the settlement.”⁶

Building on the existing conjunctive management efforts, the Idaho Legislature in 2006, adopted Senate Concurrent Resolution 136, which requested the Idaho Water Resource Board to develop a CAMP for the Eastern Snake River Plain Aquifer. In January 2009, the Board adopted the ESPA CAMP the goal of which is to “[s]ustain the economic viability and social and environmental health of the Eastern Snake Plain by adaptively managing the balance between water use and supplies.” The objectives of the plan are to

⁶ This policy addresses conjunctive management of the Eastern Snake River Aquifer and the Snake River and not water rights administration. Water rights administration is the enforcement of the relative rights of water right holders under the prior appropriation doctrine. As noted in Policy 1E conjunctive management is broader and encompasses actions that can be taken to optimize the benefits and value of Idaho’s water resources. While conjunctive management is not a substitute for water rights administration, it is in the public interest to conjunctively manage the ESPA and the Snake River to lessen or obviate the need for broad-scale water rights administration to accomplish general water-management goals.

increase predictability for water users by managing for a reliable supply, creating alternatives to administrative curtailment, managing overall demand for water within the Eastern Snake Plain, increasing recharge to the aquifer, and reducing withdrawals from the aquifer.

The long-term objective of the ESPA CAMP is to effectuate a net annual ESPA water budget change of 600 thousand acre-feet (kaf) by the year 2030. This change is to be achieved through implementation of measures designed to reduce demand on and to augment the water supply of the ESPA. Approximately 100 kaf of demand reduction is to be achieved through groundwater to surface water conversions, and another 250-350 kaf of demand reduction is to be achieved through various measures designed to retire existing water rights. Aquifer recharge is expected to increase the ESPA water supply by 150-250 kaf.

The ESPA CAMP uses a phased approach to achieving the long-term change in the water budget. The goal of Phase I of the ESPA CAMP is to implement measures that will result in a net annual change in the ESPA water budget of between 200 kaf and 300 kaf. The recommended actions to achieve this change include ground- to-surface water irrigation conversions, managed aquifer recharge, and augmentation of supplies through demand reduction and weather modification. ESPA CAMP Phase I strategies are to be implemented by 2018 with ongoing monitoring and evaluation of the intended and unintended effects of the strategies. The Phase I monitoring and evaluation studies will be used to select, design, and implement Phase II strategies that will lead to an additional 300-400 kaf water budget change.

Policy 4D embraces the conjunctive management goals and objectives of the ESPA CAMP. Implementation of the ESPA CAMP will improve the opportunities to adaptively manage and optimize water supplies within and downstream of the ESPA, may result in: increased gains in some river reaches; improved storage carryover; increased aquifer levels; opportunities for municipal and industrial growth; reductions in overall consumptive use; increased spring discharge rates; and an ongoing public process for assessing the hydrologic, economic, and environmental issues related to the implementation of management strategies.

Most of the human made changes to the ESPA water balance during the past decades are reflected in current aquifer levels and spring flows. Continued changes in irrigation practices (e.g., conversion from gravity irrigation to sprinkler irrigation) and future climate variability, however, may create additional impacts to ESPA aquifer levels and aggregate spring discharge. Such impacts affect not only the ESPA area but also the Snake River downstream of the ESPA, because aggregate spring discharge from the Thousand Springs reach is the primary source of river flows in the Milner to Murphy reach during portions of some years.

To date, efforts to monitor and measure ESPA groundwater levels, diversion volumes, and river reach/gains have focused on the ESPA, individual springs discharging water from the ESPA, and reaches of the Snake River hydraulically-connected with the ESPA. Because of the importance of the ESPA discharge on downstream reaches of the Snake River, however, it is imperative that an enhanced spring-flow monitoring program be

developed to provide the information necessary for identifying, tracking, and predicting future spring discharge trends. Such a monitoring program needs to include long-term measurements of aggregate annual spring discharge (as opposed to point-in-time discharge from individual springs) and ESPA ground water levels.

Sustaining Snake River minimum stream flows downstream of the ESPA may require short-term and long-term adaptive management measures. A monitoring program aimed at identifying long-term spring discharge trends in the Snake River Thousand Springs reach should be designed to support the development of one or more adaptive management “triggers” based on pre-determined observed or predicted change in aggregate spring discharge rate, aquifer levels, and/or Snake River flow. The triggers should be used to initiate adaptive management measures that address the cause – or impacts – of any unacceptable decline in Snake River flow downstream of the ESPA.

Monitoring efforts and adaptive management measures are crucial to sustaining the economic viability and social and environmental health of the ESPA and the Snake River. Successful adaptive management strategies, built on the principles of conjunctive management of ground and surface water, supported by scientific understanding and reliable data that take into account the complex and interrelated nature of Snake River subbasins, will accomplish two goals: 1) ensure an adequate and sustainable water supply for existing and future uses, and 2) reduce conflicts between ground and surface water users.

Implementation Strategies:

- Implement actions delineated in the ESPA CAMP that will enhance aquifer levels and spring flows.
- Continue existing efforts to measure and monitor ground and surface water diversions, water levels, spring discharge rates, and Snake River reach gains/losses, and quantify ground and surface water interactions.
- Develop and implement a monitoring program to better predict the occurrence and duration of future low flows in the Snake River.
- Create a working group to assist in the development of a spring monitoring program.
- Update the Snake River: Milner Dam to King Hill Part B State Water Plan to incorporate ESPA CAMP goals and objectives and to account for water management developments since its adoption.

Milestones:

- ESPA CAMP hydrologic conjunctive management targets met or exceeded.
- Snake River flows at the Murphy and Weiser Gages remain at or above established minimum stream flows.
- Reduced water-related conflict in the Snake River Basin.
- Revision of Part B of the State Water Plan.

4E - SNAKE RIVER BASIN NEW STORAGE

Development of new on-stream, off-stream, and aquifer storage is in the public interest; provided, however, applications for large surface storage projects in the Milner to Murphy reach of the Snake River should be required to mitigate for impacts on hydropower generation.

Discussion:

ESPA Managed Recharge Pilot program

Recharging aquifers as a water supply alternative has significant potential to address water supply needs, in addition to addressing conjunctive management issues. Pursuant to the ESPA CAMP, the Board is undertaking a five-year pilot program of managed aquifer recharge to the Eastern Snake Plain Aquifer. One of the potential benefits of managed recharge in the ESPA is increased water storage in the aquifer. Effectiveness monitoring and evaluation results will be used to select and design future managed recharge strategies and projects.

Surface Water Projects

New Snake River surface storage projects should be investigated and constructed if determined to be feasible. Although there are major dams and reservoirs designed for water storage, flow regulation, and flood control on the Snake River and its tributaries, their existing capacity is insufficient to provide the water supply and management flexibility needed for the myriad of existing and future beneficial uses.

Diversion of water from the main stem of the Snake River between Milner and the Murphy Gaging station for storage during the period November 1 to March 31 will have a significant impact on hydropower generation. Thus, any new storage projects in this reach should be coupled with provisions that mitigate for the impact of such storage depletions on hydropower generation. The term “mitigation” is defined as causing to become less harsh or hostile, and is used here rather than “compensate” which connotes equivalence. Methodology will be developed for use in calculating impacts on hydropower generation as part of any application to construct new storage within this reach of the Snake River.

A number of studies focusing on water storage as one potential measure for addressing water supply demand and flood risk reduction are underway. This section provides a brief description of the most significant studies that have been initiated or are in the planning process.

Henry’s Fork Project/Teton River Basins

The Board and the U.S. Bureau of Reclamation are conducting a study of water resources in the Henry’s Fork/Teton River Basins to develop alternatives for improving water supply conditions in the Eastern Snake Plain Aquifer and upper Snake River Basin. These alternatives include new water storage projects, enlargement of existing reservoirs,

and conservation and water management strategies, including managed aquifer recharge and automated water delivery systems.

Minidoka Dam Enlargement

In the 1980s, the Bureau of Reclamation and irrigation districts initiated the required planning process and feasibility studies to replace the spillway and two canal headworks due to the state of deterioration and potential for ongoing damage to sections of the Minidoka Dam. In 2008, the Board partnered with the Bureau of Reclamation to also evaluate the structural raising of Minidoka Dam to accommodate a 5-foot rise in normal reservoir surface elevation, in conjunction with planned spillway repairs. The study found that a 5-foot rise is technically feasible, and would provide an additional 67,000 acre-feet of storage with an average annual yield of 33,000 acre-feet. Funding for the enlargement of Minidoka Dam, however, is currently not available. If economic or other conditions change, the Board will consider further evaluation of this storage option.

ESPA Managed Recharge Pilot program

Recharging aquifers as a water supply alternative has significant potential to address water supply needs, in addition to addressing conjunctive management issues. Pursuant to the ESPA CAMP, the Board is undertaking a five-year pilot program of managed aquifer recharge to the Eastern Snake Plain Aquifer. One of the potential benefits of managed recharge in the ESPA is increased water storage in the aquifer. Effectiveness monitoring and evaluation results will be used to select and design future managed recharge strategies and projects.

Lower Boise River Interim Feasibility Study

The lower Boise River corridor, from Lucky Peak Dam to its confluence with the Snake River has experienced rapid population growth and significant urban development over the past several decades. As a consequence, there is renewed interest in addressing water supply and flood control issues. Interest has also been expressed in environmental restoration, to include habitat preservation, aesthetics and recreation along the Boise River.

In 2009, the Board and the U.S. Army Corps of Engineers partnered to conduct an Interim Feasibility Study focused on water storage potential and flood reduction in the Boise River Basin. A preliminary analysis ranked an enlargement of Arrowrock Reservoir as the highest priority alternative, followed by the construction of a new reservoir at the Alexander Flat site and a new reservoir at the Twin Springs site. A preliminary analysis completed in 2011 concluded that based on existing information, raising Arrowrock Dam is technically feasible. The evaluation identified a number of uncertainties that will be addressed during future study and data collection efforts, as funding becomes available.

Weiser-Galloway Gap Analysis, Economic Evaluation and Risk-Based Cost Analysis (Gap Analysis)

Water storage on the Weiser River and at the Galloway site has been studied for decades. In 1954, the Corps received a study authorization resolution for the Galloway Project

from the U.S. Senate Public Works Committee. In the early 1970s, federal lands for the potential Galloway dam and reservoir site were classified and withdrawn for hydropower purposes by the Federal Power Commission (now FERC). In 2008, Idaho House Joint Memorial 8 directed the Board to investigate water storage projects statewide, including the Weiser-Galloway Project. The Board and the Corps partnered to conduct a “Gap Analysis” which was completed in March 2011. The Gap Analysis was designed to inform decision makers of critical information gaps that need to be addressed before deciding whether to move forward with comprehensive new environmental, engineering, and economic feasibility studies. The analysis identified two critical information gaps that must be resolved before moving forward:

1. Determine the safety, suitability, and integrity of geologic structures at the potential dam and reservoir site.
2. Evaluate whether basin and system benefits would be realized by analyzing a series of system operating scenarios with a range of new storage options on the Weiser River. Potential benefits include flood risk reduction, hydropower, additional water storage, pump back, irrigation, recreation, and flow augmentation requirements for anadromous fish recovery. On July 29, 2011, the Idaho Water Resource Board authorized expenditure of up to \$2 million to address these questions, and the required studies are currently underway.

Implementation Strategies:

- Implement a long-term managed aquifer recharge program to achieve an average annual recharge of 250,000 - 300,000 acre feet. In recognition that implementation of managed recharge will have an effect on the flow characteristics of the Snake River above and below Milner Dam and in order to confirm the relative merits of managed recharge, the Board’s managed recharge program will be limited to not more than 175,000 acre-feet on an average annual basis until January 1, 2019.
- Evaluate the economic, social and environmental benefits and costs of the proposed surface projects.

Milestones:

- Aquifer recharge program implemented.
- Actions taken to determine feasibility of identified storage projects.

4F - SNAKE RIVER BASIN AGRICULTURE

Development of supplemental water supplies to sustain existing agricultural development is in the public interest.

Discussion:

Agricultural use accounts for about 85% of the total diversions of the water of the Snake River Basin. Approximately 3.4 million acres of land are irrigated with surface water and

1.13 million acres of land are irrigated with ground water. As discussed more fully in Policy 4B, it has been the policy of the State since the adoption of the first state water plan to encourage the development of on-stream and off-stream storage above Milner Dam to capture unappropriated flows to the extent economically feasible for existing and future agricultural development and other beneficial uses in the Snake River Basin above the Dam.

As a result of the Swan Falls Settlement, the flow of the Snake River between Milner Dam and the Murphy Gage in excess of the Murphy minimum stream flow is available for future agricultural and DCMI development. As discussed in Policy 4C, however, the opportunity for additional agricultural development of the waters of the Snake River and surface and ground water tributary to the Snake River between Milner Dam and the Murphy Gage is limited because of the conflicts over conjunctive management of Thousand Springs flows and a moratorium on the issuance of new permits within this reach of the Snake River issued on April 30, 1993.

In summary, agricultural development for the foreseeable future is likely to be limited because of the absence of a reliable water supply. To the extent new agricultural development occurs, it is likely to be located on streams tributary to the main stem Snake River. Appropriation of water for agriculture likely will be for a supplemental water supply to address existing water shortages.

Implementation Strategies:

- Identify and develop opportunities to acquire water to address existing agricultural water supply shortages.
- Encourage the more efficient use of existing water supplies where such action will provide water to address existing agricultural water supply shortages.

Milestones:

- Existing water supply maintained.
- Supplemental water supply developed.
- Enrollment of agricultural lands into Conservation Reserve Enhancement Program (CREP).
- Implementation of water conservation projects that reduce demand.
- Acres in agricultural production maintained.

4G - SNAKE RIVER DOMESTIC, COMMERCIAL, MUNICIPAL AND INDUSTRIAL USES (DCMI)

It is in the public interest to ensure the availability of water for future DCMI uses in the Snake River Basin.

Discussion:

While most DDMI water uses are largely nonconsumptive, future growth in Idaho's population and commercial and industrial expansion require a sustainable water supply.

Snake River Above the Murphy Gage

As discussed in Policy 4C, the flow of the Snake River between Milner Dam and the Murphy Gage is approaching the Murphy minimum flow of 3,900 cfs at certain times in low flow years. Implementation of the strategies in Policy 4D is essential to identifying the amount of trust water available to meet future DDMI uses in this reach of the Snake River.

Snake River Below the Murphy Gage

DDMI demands on the Snake River downstream of the Boise River drainage are anticipated to grow at a slow to moderate rate but the increased demands are not as pressing as in the lower Boise River area.

Boise River Basin

As discussed in Policy 4E, the lower Boise River area has experienced rapid population growth over the past several decades with land-use changing from agriculture to urban use. Water supply for DDMI uses is forecasted to be one of the most pressing water supply issues in this area. Additional DDMI demands are particularly pressing upstream of Star located on the Boise River.

The principle source of water for DDMI in the Boise River Basin is ground water, however, there is unappropriated water during the spring runoff that could be captured and stored. Thus, while increased demand for DDMI use may be partially met by water conservation and some decrease in or conversion from agricultural production, additional strategies, such as aquifer and surface water storage, efficient water marketing systems, and water re-use must be evaluated. Because the Treasure Valley water system is a complex system of ground and surface water, further studies are underway to determine the contribution of surface water to aquifer recharge and the importance of aquifer discharge to surface water systems.

Implementation Strategies:

- Maintain existing surface irrigation distribution system and establish dual-use residential systems to preserve incidental recharge to aquifers.
- Develop flexible water marketing tools to facilitate rental and/or acquisition of water rights for new uses on a willing buyer/willing seller basis. Water acquisition strategies, however, must account for any adverse hydrologic, economic, and social impacts.
- Evaluate opportunities to enhance water supplies including but not limited to, ground water conservation, additional storage, and water re-use.
- Support programs that protect water quality for DDMI use.

Milestones:

- Completion of water supply enhancement projects.
- Infrastructure in place to distribute surface irrigation water to lands undergoing conversion from agricultural to residential.

4H - SNAKE RIVER HYDROPOWER USE

Hydropower generation is a beneficial use of the flow of the Snake River, and it is in the public interest to protect the minimum average daily flows set forth in Policy 4A as a base flow for hydropower use.

Discussion:

The Snake River and related tributaries provide Idaho with significant hydropower energy resources. Hydropower generation is a beneficial use of the waters of the Snake River, supplying approximately 65% of the State’s energy production and ensuring that Idaho electric rates are among the lowest in the nation. Through enactment of Idaho Code § 42-203B the State established the framework for balancing the use of the flow of the Snake River for hydropower and other instream purposes and the diversion of flow for depletionary uses.

As discussed in Policy 4C, the Swan Falls Settlement recognized the Snake River minimum stream flows set forth in Policy 4A provide an adequate base flow for hydropower use. While hydropower water rights in excess of the Murphy minimum average daily flow are subject to subordination to future consumptive uses approved in accordance with state law, the Swan Falls Settlement allows Idaho Power Company to use up to the decreed amount of the hydropower water rights held in trust by the State of Idaho for power generation pending reallocation of such flows for future consumptive uses.

The HCC, which represents the majority of Idaho Power’s hydropower generation capacity, is the largest privately owned hydroelectric project in the United States. The FERC license for the HCC expired in 2005, and Idaho Power is currently operating the project under annual licenses while FERC processes Idaho Power’s pending relicense application. The new license for the HCC will determine the operating conditions for the project and address the protection and enhancement of recreational, aesthetic, navigation, and fish and wildlife resources in the reach of the Snake River affected by the project. The Board is participating in the FERC licensing proceeding to ensure the new license for the HCC includes operational conditions that preserve and enhance the generation capacity of the project in a manner consistent with the State Water Plan.

Implementation Strategies:

- Develop technical tools capable of assessing the impact of actions within the Snake River hydrologic system on the minimum stream flows of the Snake River.

- Evaluate management and administrative activities to determine the intended and unintended consequences of meeting the minimum stream flows on the Snake River.

Milestones:

- Minimum flows are maintained for power generation.

4I - SNAKE RIVER NAVIGATION

The minimum stream flows set forth in Policy 4A are sufficient for commercial and recreational navigation on the Snake River.

Discussion:

Above Milner Dam the flow of the Snake River is completely regulated; therefore, no base flow for navigation is proposed for this reach of the Snake River. The Murphy and Weiser minimum stream flows set forth in Policy 4A provide a sufficient base flow for recreational and commercial navigation in the Snake River between Milner Dam and the Hells Canyon Dam.

Below HCC, the Snake River flows into a steep and spectacular gorge that cuts through the Salmon River Mountains and Blue Mountains of Idaho and Oregon. Hells Canyon is one of the most rugged and treacherous portions of the Snake River. The river flows 8,000 feet below the He Devil Peak of Idaho's Seven Devils Mountains. The Salmon River is a major tributary in this reach of the Snake River.

The Hells Canyon reach of the Snake River below the HCC provides unique recreational opportunities, including rafting, fishing, private and commercial jet boating, hiking, camping, and wildlife viewing. The area is a tourist destination that positively contributes to the local and regional economy. As such, providing adequate navigation conditions for private and commercial boating below the HCC is in the public interest.



Photo: Rafting on the Snake River in Hells Canyon
(Photo Courtesy of IDWR Staff)

The license issued by the Federal Power Commission for the HCC in 1955 addressed navigational flows below the HCC. Article 43 of the power HCC license provides that:

The project shall be operated in the interest of navigation to maintain 13,000 cfs flow in the Snake River at Lime Point (river mile 172) a minimum of 95 percent of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 cfs will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 cfs at Johnson's Bar, at which point the maximum variation in river stage will not exceed one foot per hour. These conditions will be subject to review from time to time as requested by either party

This license article has governed navigation flows since the original licensing of the HCC in 1955.

In the 1976 State Water Plan, the Board concluded that there was sufficient water in excess of the minimum flows established at the Milner, Murphy, and Weiser gaging stations to provide for additional uses and development and also allow for the navigation flow targets in Article 43 of the HCC license to be met without significantly affecting hydropower production. Based upon these conclusions, the 1976 State Water Plan found providing flows consistent with Article 43 was in the public interest. The 1976 Plan, however, did not establish minimum stream flows at Johnson Bar or Lime Point.

In 1978, the Idaho Legislature, through enactment of Idaho Code § 42-1736A, created a minimum stream flow at Johnson Bar to provide for “stream flows and hydro-power base” below the HCC. Through the adoption of the 1986 Idaho State Water Plan a minimum stream flow was established at Lime Point. Both minimum stream flows were recognized as providing a sufficient base flow for recreational and commercial navigation below the HCC. Consistent with the HCC FERC license, the Johnson Bar and Lime Point minimum stream flows, however, are subordinated to upstream consumptive uses above the HCC and carry no right to seek the release of water from the HCC other than that required to be released by the terms of the FERC license.

As discussed in Policy 4F, FERC is in the process of relicensing the HCC. Various state and federal agencies exercise jurisdiction over resources in Hells Canyon and each of these agencies, together with private interests are parties to the HCC relicensing proceedings pending before FERC. Section 10(a)(1) of the Federal Power Act requires that a FERC licensed project “be best adapted to a comprehensive plan for improving and developing a waterway”; which requires a balancing of public interest factors. The FERC will set forth navigational flow conditions in the final license for the HCC. The Board will participate in the FERC relicensing process to ensure navigational flow conditions are consistent with the State Water Plan.

Implementation Strategies:

- Participate with state and federal agencies in FERC relicensing proceedings to ensure the new FERC license for the HCC is consistent with the State Water Plan.

Milestones:

- When issued, FERC license consistent to Idaho State Water Plan.

4J - SNAKE RIVER FISH, WILDLIFE, RECREATION, AND SCENIC RESOURCES

The minimum stream flows set forth in Policy 4A provide adequate flows for Snake River fish, wildlife, recreation, and scenic values in the main stem Snake River below Milner Dam. Protection for fish, wildlife, recreation, and scenic uses in tributaries to the Snake River should be addressed through Part B of the State Water Plan and the establishment of minimum stream flows pursuant to Chapter 15, Title 42, Idaho Code. The Board finds that implementation of the collaborative agreements provide benefits for fish, wildlife, recreation, and scenic values.

Discussion:

In addition to the Policy 4A main stem Snake River minimum stream flows, over fifty minimum stream flows have been established in the Snake River Basin above the HCC and protected rivers have been designated through the adoption of Part B state water plans. Additional protections for fish, wildlife, recreation, and scenic resources in Snake River tributary streams should be pursued through the Board's minimum stream flow and water planning processes.

The State has entered into a number of voluntary agreements that benefit fish, wildlife, recreation, and scenic values while protecting existing water rights and uses and providing for economic stability. The agreements described below.

Snake River Flow Augmentation

The State of Idaho, as part of the 2004 Snake River Water Rights Agreement, established a flow augmentation program that provides water for salmon and steelhead listed under the ESA. Pursuant to the provisions of the biological opinion for the Federal Columbia River Power System ("FCRPS"), and the 2004 Snake River Water Rights Agreement, the U.S. Bureau of Reclamation annually seeks to rent up to 487,000 acre-feet of water from willing lessors in Idaho for Snake River flow augmentation to assist in offsetting the impact of the FCRPS. Although flow augmentation from the upper Snake River has proven to be controversial because of the uncertainty regarding specific benefits to ESA-listed fish, the State of Idaho cooperates with the federal program (see Idaho Code § 42-1763B) as a means of providing incidental take coverage for U.S. Bureau of Reclamation project operations in Idaho.

This flow augmentation program consists of two tiers. Tier 1 minimum flows are those established through implementation of the Swan Falls Settlement. Tier 2 provides for the rental of up to 427,000 acre feet of storage water in accordance with the provisions of Idaho Code § 42-1736B and the Snake River flow component of the 2004 Snake River Water Rights Agreement. The 2004 Snake River Water Rights Agreement also allows for the United States to rent up to 60,000 acre feet of consumptive natural flow water rights through the Board's water bank in accordance with state law. The Board acquired the natural flow water rights of the Bell Rapid's irrigation project and is leasing a portion of those water rights to the U.S. Bureau of Reclamation to provide the 60,000 acre feet of natural flow water. The rental agreement provides that "protection of the Leased Water . . . will result in the protection of 48,320 acre-feet during the period of April 10 through August 31 of each year for the term of the Agreement."

The state agreed to the implementation of the flow augmentation program for the term of the Biological Opinion as a means of protecting existing water rights and uses and providing for economic stability. It is important, however, that evaluation of the efficacy of flow augmentation be conducted in conjunction and/or cooperation with other State and Federal agencies and regional interests.

Hells Canyon National Recreation Area

The early controversy over the development of Hells Canyon gave rise to emerging concerns about the preservation of the region's natural features and ultimately led to enactment of the Hells Canyon National Recreation Area Act of 1975, which precluded future hydropower development in the Hells Canyon reach of the Snake River. The Act also designated the Snake River as "wild" (Hells Canyon Dam to Pittsburg Landing) and "scenic" (Pittsburg Landing to 37 miles south of Lewiston) to preserve the free-flowing character and unique environment while providing for continued public use. While providing protection to these important resources, the Act also protects present and future uses of the waters of the Snake River for consumptive or non-consumptive beneficial uses, including domestic, municipal, stock water, irrigation, mining, power, and industrial uses. The Act specifically provides that no flow requirements of any kind may be imposed on the waters of the Snake River below Hells Canyon Dam under the provisions of the Act, or any rules, regulations, or guidelines adopted pursuant to the Act. Pursuant to an agreement between the state and the federal government, the United States' federal reserved water rights associated with the HCNRA are limited to the tributary streams of the Snake River within the HCNRA. The decrees quantifying the federal reserved water rights on streams tributary to the main stem Snake River contain subordination provisions that protect existing rights and allow for a limited amount of future development on the tributary streams.

Owyhee Initiative

In 2009, Congress enacted the Owyhee Public Land Management Act, Pub. L. 111-11, 123 Stat. 1037. This Act set aside certain lands in southwestern Idaho as wilderness. The Act was the result of a collaborative effort initiated by the Owyhee County Commissioners to resolve decades-old land management issues in Owyhee County. The goal was to develop and implement a landscape-scale program that preserves the natural character of the area while providing for economic stability and growth. Central to local

support for enactment of the Act was the 2006 Owyhee Initiative Water Rights Agreement, which provided for a balance between instream and out-of-stream water uses within the Owyhee River Basin. The 2006 Agreement recognizes the ecological importance of stream and river flows in this arid region and recognizes local citizens' desire to maintain and protect their current way and quality of life. The 2006 Agreement calls for memorializing this balance through subordination language in the decreed federal reserved water rights for the designation of river segments that sets aside a certain amount of water for future development. The Agreement was signed by a local collaborative group that included ranchers, conservationists, landowners, business interests, outfitters, and off-road recreationists. Implementation of this water rights agreement will provide additional fish and wildlife benefits for the Owyhee River Basin.

Implementation Strategies:

- Maintain existing minimum stream flows and evaluate the need for additional minimum stream flows.
- Ensure the flow augmentation plan of the 2004 Snake River Water Rights Agreement is implemented consistent with the Agreement.
- In conjunction and/or cooperation with other state and federal agencies and regional interests, evaluate the efficacy of the flow augmentation program.
- Ensure the federal reserved water rights decreed as part of the implementation of the Owyhee Public Land Management Act contain subordination provisions consistent with the 2006 Owyhee Initiative Water Rights Agreement.
- Ensure new appropriations of water are consistent with the subordination provisions of the reserved water rights for the HCNRA and the Owyhee wild and scenic rivers.

Milestones:

- Minimum stream flows maintained and new minimum stream flows are established as needed.
- Snake River flow augmentation is conducted in accordance with the terms of the 2004 Snake River Water Rights Agreement.
- Flow augmentation evaluation studies underway or completed.
- Federal reserved water rights decreed for Owyhee wild and scenic rivers contain subordination provisions consistent with the 2006 Owyhee Water Rights Agreement.
- New appropriations of water in the streams tributary to the Snake River within the Hells Canyon National Recreation Area satisfy the subordination requirements contained in the federal reserved water right decrees.
- New appropriations within the Owyhee River Basin satisfy the subordination requirements contained in the federal reserved water right decrees for the Owyhee wild and scenic river reaches.

5. BEAR RIVER BASIN

5A - BEAR RIVER COMPACT IN THE BEAR RIVER BASIN

Water use and management in the Bear River Basin shall conform to the allocations agreed to in the Bear River Compact.

Discussion:

The original Bear River Compact was signed into law on March 17, 1958, and amended on February 8, 1980. Idaho Code § 42-3402. The Compact was negotiated to provide for the efficient use of water for multiple purposes, to permit additional development, to promote interstate comity, and to accomplish the equitable apportionment of the waters of the Bear River among Idaho, Utah, and Wyoming. Water allocations for the Bear River Basin were adopted in 1978. The Compact is administered by an interstate administrative agency, the Bear River Commission, which is comprised of three members from each state and a non-voting federal chairman. The Bear River Commission must review the Compact at intervals of not more than twenty years and may propose amendments.

The Compact divides the Bear River into three divisions and treats allocation differently in each. The Upper Division of the river extends from its source in the Uinta Mountains, to and including Pixley Dam Wyoming. The Central Division includes the portion of the Bear River from Pixley Dam to, and including Stewart Dam. The Lower Division of the Bear River includes the flow from Stewart Dam to the Great Salt Lake and encompasses Bear Lake and its tributary drainage. The Compact makes allocations for the diversions of surface water, the storage of water above Bear Lake, ground water depletion, and future development. The allocation provisions for the three divisions of the Bear River apply only during times of shortage.

Idaho and Utah are implementing conjunctive management of surface and ground water. Idaho's Bear River Conjunctive Management Plan guides the development of ground water in the Bear River Ground Water Management Area. Although initial estimates of ground water depletions in the Lower Division indicate equal depletions in Idaho and Utah, the Idaho Water Resource Board encourages the Bear River Commission to prioritize additional studies to determine the effects of ground water use on the Bear River system.

Implementation Strategies:

- Encourage and assist the Bear River Commission to initiate further study and consideration of the effects of ground water use on Bear River surface flow.
- Ongoing review of Bear River Compact implementation and related issues, including depletion calculation procedures.

Milestones:

- Studies completed on the interaction between ground water and surface water in the Bear River Basin.

5B - BEAR RIVER BASIN WATER MANAGEMENT IN THE BEAR RIVER BASIN

The Idaho Water Resource Board supports enhancing water supplies, increasing water use efficiency, and implementing water supply bank mechanisms to help meet future water needs in the Bear River Basin.

Discussion:

The Bear River Compact designates how the undeveloped water supplies of the Bear River are to be allocated among Idaho, Utah, and Wyoming. The Compact allocates a first right to development and depletion of water not currently allocated in the Lower Division to Idaho, in the amount of 125,000 acre feet. In addition to the efficient use of existing developed water supplies, the state should move forward with the development of Idaho's depletion allocations as provided for in the Compact.

Ground water is available for development, but its development cannot injure existing senior water rights. In 2001, the Department established the Bear River Ground Water Management Area and created an advisory committee to provide guidance in the preparation of a ground water management plan. The Bear River Ground Water Management Plan, adopted in 2003, provides for managing the effects of ground water withdrawals to accommodate projected growth and water demand in the Bear River Basin, while protecting senior priority surface and ground water rights from injury. In addition to the use of mitigation plans that protect existing rights, the plan encourages flexible strategies for making water available for new development including new surface storage, ground water recharge projects, and transfers of existing rights through water banking and other marketing mechanisms. The ground water management plan encourages the wise use of available water supplies and continues the involvement of a local advisory committee in the development of management policies for the area. To address declining ground water levels, the Bear River Basin has been designated as a priority basin for the development and implementation of a comprehensive aquifer management plan.

Idaho Code § 42-1765 authorizes the Idaho Water Resource Board to create a local rental pool to facilitate marketing of stored water. A Bear River rental pool would provide the advantage of being locally managed and controlled, with the flexibility to develop specific procedures designed to address special conditions existing in the basin. Use of water supply banks also provides protection from forfeiture for unused water rights in Idaho and a source of funding for improving water management. Cooperation between Idaho, Utah, and PacifiCorp will be required to establish a storage rental pool for Bear Lake.

Implementation Strategies:

- Initiate further discussion concerning the development of a Bear River storage water rental pool with the Bear River Commission, Utah, and PacifiCorp.
- Develop strategies to improve water supplies and reduce demand through the implementation of a CAMP, in coordination with Utah, Wyoming, and PacifiCorp.

Milestones:

- Bear River Basin comprehensive aquifer management planning underway.
- Strategies developed to meet future water needs.
- Local storage rental pool established.
- Development of Idaho’s depletion allocation.

5C - INTERSTATE WATER DELIVERY IN THE BEAR RIVER BASIN

Idaho water users in the Lower Division of the Bear River Basin must be protected from inequitable water allocation in the event of a water emergency and the scheduling of interstate water deliveries.

Discussion:

The Bear River Compact authorizes the Bear River Commission to implement a water delivery schedule in the Lower Division without regard to state boundaries if the Bear River Commission finds that a “water emergency” exists. Idaho Code § 42-3402. This provision was intended to apply only to true emergency conditions which must be determined using comprehensive accounting processes. Idaho and Utah have developed separate, but similar water accounting models that incorporate the rights identified in the Commission Approved Lower Division Water Delivery Schedule. Absent a water emergency, Idaho water users are not required to accept delivery based upon interstate accounting allocation. Both states, however, have worked to reconcile their respective accounting models to reduce conflict over water delivery.

The “Bear Lake Settlement Agreement” was signed and voluntarily adopted by Lower Division water users and PacifiCorp in 1995 and amended in 2004. The agreement established, among other things, an “Irrigation Water Allocation and Lake Recovery Proposal” for Bear Lake. The proposal provides for an “Annual Allocation” which represents the total, estimated quantity of water available to be delivered to storage contract holders. This agreement and the state water accounting models have resulted in a process by which Lower Division water users have voluntarily agreed to water delivery by water right priority without regard to state boundaries.

Implementation Strategies:

- Continue work with Utah and Lower Division water users to improve water right accounting models.

- Facilitate and promote improved water delivery and measurement, including gage and diversion automation.

Milestones:

- Continued cooperation in interstate water administration.
- Completion of technical upgrades to water delivery and measurement infrastructure.

5D - BEAR LAKE IN THE BEAR RIVER BASIN

The outstanding recreational, aesthetic, and fish and wildlife resource values of Bear Lake should be preserved, while recognizing the existing storage allocations for irrigation and hydroelectric power generation.

Discussion:

Bear Lake, noted for its unique coloration and endemic fish species, provides an abundance of recreational opportunities. To protect these values, the Idaho Water Resource Board obtained a minimum lake level water right for Bear Lake of 5902 feet.

The 2004 Amended and Restated Bear Lake Settlement Agreement between PacifiCorp and several water users and private interests confirmed that Bear Lake must be operated primarily as a storage reservoir to satisfy contracts for existing irrigation uses and flood control needs in the three states, with the use of water for hydropower generation being incidental to other purposes. Bear Lake storage is allocated based on lake elevation with reduced allocations occurring when Bear Lake falls below the irrigation reserve of 5914.7 feet. The settlement agreement also provides for a portion of the active storage in Bear Lake to be voluntarily retained to enhance recreation and water quality values.

Pursuant to the 2002 Settlement Agreement Resolving the Relicensing of the Bear River Hydroelectric Projects and the FERC licenses issued for PacifiCorp's Bear River projects, protection, mitigation, and enhancement measures are being implemented to benefit fish and wildlife and recreational resources in the Bear River Basin. The settlement agreement established a committee to guide implementation of these measures, with a primary focus on protecting and improving habitat for Bonneville Cutthroat Trout. The settlement agreement confirms that PacifiCorp's ability to regulate Bear Lake reservoir levels and provide instream flows at the projects for these purposes is restricted by and subject to historic practices, water rights, and flood control responsibilities that are memorialized in water contracts, water agreements, and judicial decrees and opinions.

The Bear River Compact provides for cooperation with state and federal agencies in matters relating to water pollution of interstate significance. The Idaho Water Resource Board supports the Bear River Commission's efforts to develop opportunities for more integrated watershed management throughout the basin.

Implementation Strategies:

- Cooperate with the Bear River Commission to address interstate issues of concern related to Bear Lake, including water quality, threatened or endangered species and species of special concern, and recreation.

Milestones:

- Bear Lake operations are consistent with 2004 Bear Lake Settlement Agreement.
- Cooperative programs addressing interstate issues of concern related to water quality, recreation, and sensitive species implemented.



Photo: Last Chance Canal over the Bear River *(Photo Courtesy of Liz Cresto)*

6. SALMON/CLEARWATER RIVER BASINS

6A - CONSERVATION PLANS IN THE SALMON/CLEARWATER RIVER BASINS

Voluntary, community-based conservation plans and strategies for the benefit of ESA-listed species and other species of concern are key components of water planning and management in the Salmon and Clearwater River Basins.

Discussion:

The Salmon and Clearwater River basins support a thriving agricultural industry and significant tourism. Because a number of fish species in the Salmon and Clearwater River basins have been listed as threatened or endangered under the ESA, numerous programs are being implemented to improve fish habitat, while protecting existing water rights. A significant portion of freshwater habitat important to ESA-listed fish is located on private lands. As a consequence, local support is key to implementing conservation measures that advance species' recovery. Federal agencies are encouraged to cooperate with state and local landowners to develop voluntary, incentive-based conservation plans. Any water required for instream uses must be obtained in compliance with state law.

In the Snake River Basin Adjudication, the state entered into two agreements that provide for water management within the basin that supports agricultural-based communities, while encouraging the voluntary implementation of flow-related conservation measures that improve instream conditions for ESA-listed fish. The agreements are based upon improving instream flow conditions pursuant to state law.

- **2004 Snake River Water Rights Agreement**

The 2004 Snake River Water Rights Agreement resolved all of the issues related to the Nez Perce Tribe's water right claims in the SRBA. In the Salmon and Clearwater basins, the primary goal of the settlement agreement provisions is to conserve and enhance fish habitat in order to address ESA concerns. There are three cornerstones to such efforts: the establishment of state minimum flows, the establishment of a voluntary forestry program with standards to improve fish habitat, and the establishment of voluntary programs by irrigators and other water users to improve instream flow.

The state and local water users are working with the federal agencies, tribes, and other stakeholders to advance the recovery of listed species through the development of conservation agreements under Section 6 of the ESA. In coordination with the OSC, the state has begun early implementation of voluntary conservation measures that provide immediate benefits to ESA-listed fish and provide the foundation for implementation of long-range plans.

As a result of the 2004 Snake River Water Rights Agreement, the Idaho Water Resource Board holds minimum stream flow water rights on 205 streams that provide significant protection for steelhead, salmon, and bull trout. Most of the streams flow through federal public lands and have minimal use. Twenty-four streams, however, are in basins with

substantial private ownership and significant private water use. The flows for those streams were established after consultation with local communities. Where the minimum stream flow water rights are higher than existing flows, the Idaho Water Resource Board works with water users on a voluntary basis to rent or otherwise acquire water to return to streams, in accordance with state law.

- **Wild and Scenic Rivers Agreement**

The Wild and Scenic Rivers Agreement resolved issues related to federal reserved water right claims filed by the federal government under the Wild and Scenic Rivers Act. The agreement provides for the quantification of the wild and scenic federal reserved water rights and state administration of those rights. To protect existing rights and allow for some future development, the United States agreed to subordinate the federal rights to certain existing and future water right uses.

Implementation Strategies

- Ensure that the water right application review process considers basin conservation plans and limiting factors for ESA-listed fish.
- Ensure that the stream channel alteration permit process considers basin conservation plans and limiting factors for ESA-listed fish.
- Develop flow-limited reach GIS maps for use in water administration.
- Continue early implementation of conservation measures.
- Develop and implement conservation projects and plans based on local problem-solving and support.

Milestones

- Conservation measures implemented.
- Conservation plans approved pursuant to Section 6 of the ESA and implemented.
- Approved water right transfers address limiting factors for ESA-listed fish.
- Water right permits address limiting factors for ESA-listed fish.
- Flow-limited reach GIS maps completed and in use.

6B - INSTREAM FLOW PROGRAM IN THE SALMON/CLEARWATER RIVER BASINS

The Idaho Water Resource Board will promote, provide, and where possible, expand opportunities for voluntary, market-based transactions to improve instream flow for the benefit of ESA-listed aquatic species.

Discussion:

The Idaho Water Resource Board administers and participates in a variety of programs to improve instream flows throughout the Salmon and Clearwater River basins. This programmatic approach to addressing the needs of ESA-listed and other sensitive species includes a suite of water supply acquisition tools including short and long-term leases, permanent purchases, partial season leases, diversion reduction agreements, and water use efficiency measures, all of which are market-based and voluntary. The Board works collaboratively with organizations committed to voluntary, market-based conservation strategies, such as conservation easements, to maximize instream flow programs. These partnerships benefit targeted fish species and support local economies.

- **Columbia Basin Water Transaction Program**

The Columbia Basin Water Transactions Program was initiated in 2002 to support innovative, voluntary, grassroots strategies to improve flows in the Columbia River Basin's streams and rivers. The majority of funding is provided by the Bonneville Power Administration in cooperation with the Northwest Power and Conservation Council. Continued implementation of the Columbia Basin Water Transactions Program in the Salmon and Clearwater basins will keep agriculture productive and improve instream flows for ESA-listed and other sensitive fish species.

- **Section 6 Conservation Fund**

Section 6 of the ESA directs "that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C.A. § 1531(C)(2). Pursuant to the 2004 Snake River Water Rights Agreement of 2004, in addition to the establishment of minimum stream flow water rights, the state agreed to work with local stakeholders and communities to develop work plans for addressing limiting factors for fish on streams with degraded habitat. The state also agreed to develop cooperative agreements under Section 6 of the ESA with the assistance of local land owners, federal agencies, and tribes to establish long-term conservation goals and conservation measures that will contribute to the recovery of anadromous and resident fish in the Upper Salmon River Basin. The Board's instream flow programs are central to the development and implementation of Section 6 Conservation Plans.

- **Pacific Coast Salmon Restoration Fund**

The Pacific Coast Salmon Restoration Fund provides grants to state agencies and treaty Indian tribes for salmon recovery efforts. The Idaho Water Resource Board works with agencies, tribes, and stakeholders to use Pacific Coast Salmon Restoration Fund monies for early implementation of conservation measures in the basins.

- **2008 Columbia Basin Fish Accords**

The Columbia Basin Fish Accords are designed to supplement biological opinions for listed salmon and steelhead and the Northwest Power and Conservation Council's fish and wildlife program. The agreement between the state of Idaho, the Bonneville Power Administration, the USACE, and the USBOR addresses issues associated with the direct and indirect effects of construction, inundation, operation and maintenance of the Federal

Columbia River Power System, and USBOR's Upper Snake River Project on the fish and wildlife resources in the Columbia River Basin.

Under the agreement, the Bonneville Power Administration committed to funding a suite of habitat quality improvement projects designed to address limiting factors within the basins affecting ESA-listed salmon and steelhead. The Idaho Water Resource Board uses these funds to develop projects that improve instream flow and freshwater survival of ESA-listed salmon and steelhead. The program targets flow-related projects that reconnect tributaries and increase flow in the mainstem Lemhi and Pashimeroi rivers to improve fish passage conditions and increase the quantity and quality of fish habitat.

Implementation Strategies:

- Continue implementation of programs to improve instream flows in the Salmon and Clearwater River basins.
- Pursue opportunities for partnerships with local water users and other stakeholders to implement programs that improve instream flows and support local economies.

Milestones:

- Number and scope of instream flow improvement projects implemented.
- Number of participants in instream flow improvement projects.
- Degree of habitat improvement resulting from instream flow programs.

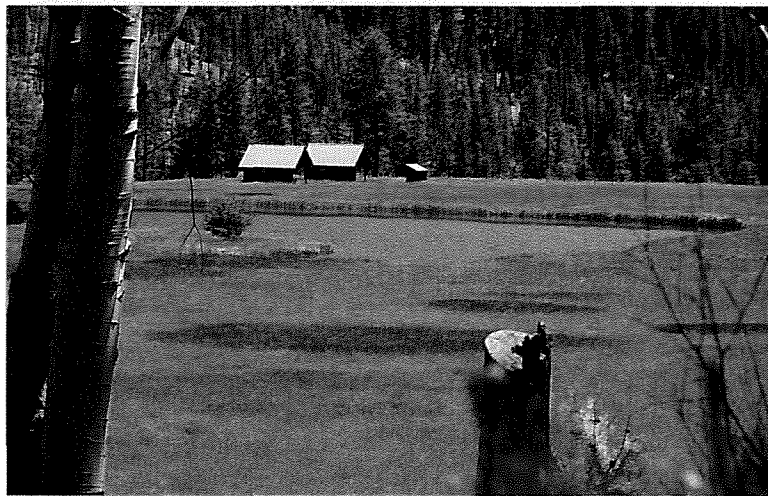


Photo: Scenic Central Idaho near Salmon *(Photo Courtesy of Shari Ferree)*

7. PANHANDLE RIVER BASINS

7A - INTERSTATE AQUIFERS IN THE PANHANDLE RIVER BASINS

Completion of comprehensive aquifer management plans and the Northern Idaho Adjudication and implementation of interstate agreements are central to the optimum use of the Panhandle Basin's water resources.

Discussion:

The Panhandle's rivers and lakes are key to continued economic development and provide for multiple uses of water including irrigation, domestic supplies, mining, and commercial uses. These lakes and rivers also provide significant recreation, fish and wildlife, and aesthetic resources important for the region's economy. In average water years, Idaho's Panhandle region has a stable water supply. A growing population and the urbanization of agricultural lands, however, have resulted in increased ground water use which has resulted in conflicts over water quantity and quality within the region and across state boundaries.

- **Spokane Valley-Rathdrum Prairie Aquifer**

The Rathdrum Prairie Aquifer ("RPA") extends south from Bonner County through Kootenai County toward the cities of Coeur d'Alene and Post Falls and west to the Idaho-Washington state line. The aquifer extends into Washington and becomes part of the larger Spokane Valley-Rathdrum Prairie ("SVRP") Aquifer. The area includes the rapidly growing cities of Spokane, Washington and Coeur d'Alene and Post Falls, Idaho. The SVRP Aquifer was designated a "Sole Source Aquifer" by the U.S. Environmental Protection Agency in 1978 and a sensitive source aquifer by the state of Idaho.

In 2002, the Director of the Department, pursuant to Idaho Code § 42-233b, designated the Rathdrum Prairie Ground Water Management Area and created the Rathdrum Prairie Ground Water Management Area Advisory Committee, composed of members representing the interests of citizen groups, municipalities, counties, and other irrigation, commercial, and industrial water users within the designated area. On September 15, 2005, the Director issued a final order adopting the Ground Water Management Plan for the Rathdrum Prairie Ground Water Management Area. The plan, based in large part on the recommendations of the advisory committee, sets forth goals, strategies, and actions for managing the ground water resources of the SVRP Aquifer. Goals include obtaining adequate technical data and quantification of water availability and water use, managing the ground water resource efficiently and fairly for all users, and encouraging planning and water conservation efforts.

Although the states of Idaho and Washington have primary responsibility for water allocation and water quality, local governments are increasingly being called upon to consider water supply and water quality implications in land use planning. To address these challenges, a study of the SVRP Aquifer was conducted jointly by the Department, the Washington State Department of Ecology, and the United States Geological Service. Begun in 2003 with broad community support, the purpose of the project is to provide a

scientific foundation to assist the states in water administration. The SVRP Aquifer study established a collaborative modeling committee of experts from both states. Significant new information from the study refined earlier estimates of hydrologic information. The data, computer model, water budget, and other information are available to the public and provide a detailed, up-to-date basis for assessing all aspects of ground water use, including water development, establishing well head protection zones, and local and regional land use planning. A 2007 agreement between the Department and the Washington State Department of Ecology establishes a collaborative framework to maintain and enhance the model to inform state management decisions.

Pursuant to Idaho Code § 42-1779, which established the Statewide Comprehensive Aquifer Planning and Management Program, a comprehensive aquifer management plan was adopted on July 29, 2011 for the Rathdrum Prairie Aquifer by the Idaho Water Resource Board. The Board will be responsible for implementing the plan to obtain sustainable water supplies and optimum use of the region's water resources.

- **Palouse Basin Aquifers**

The development of a CAMP for the Palouse Basin is also a priority. The Grande Ronde and Wanapum aquifers underlie the Palouse Basin. The Pullman-Moscow area of eastern Washington and northern Idaho relies almost entirely on ground water for its supply of municipal, institutional, and domestic water. The Palouse Basin Aquifer Committee consists of representatives from the cities of Moscow, Pullman, Colfax, Latah, and Whitman counties, the University of Idaho and Washington State University and was formed to address concerns about declining ground water levels and coordinate studies to further inform water management decisions. In 1992, with the assistance of the states and pursuant to several intergovernmental agreements, a Pullman-Moscow Ground Water Management Plan was completed. The plan provides technical information about the general response of the Wanapum and Grande Ronde aquifers to pumping withdrawals and recommendations for future use that limit ground water depletion and protect water quality through conservation practices and other measures. Additional studies are needed to better understand the hydrology of the aquifers.

Managing cross-boundary conflicts requires an accounting of the state's water resources. Adjudication of water rights in the Panhandle region should therefore be completed to fully define and quantify existing water rights. The determination of all existing water rights from the river basins in northern Idaho will provide the basis for administration of water rights and for interstate cooperation. Pursuant to Idaho Code § 42-1406B, the Director of the Department filed a petition in the district court to commence an adjudication for northern Idaho. On November 12, 2008, the district court ordered the commencement of adjudication in the Coeur d'Alene Spokane River water system. The estimated date for completion of the adjudication is Fiscal Year 2018.

Idaho Code § 42-1734(3) authorizes the Idaho Water Resource Board to appear on behalf of the state in negotiations with the federal government. Consistent with state law, the Idaho Water Resource Board should serve as the lead agency for coordinating state participation in the Northern Idaho Adjudication.

Implementation Strategies:

- Implement the CAMP for the Rathdrum Prairie.
- Evaluate timing for developing a CAMP for the Palouse River Basin that establishes goals, objectives, and strategies to address the increasing demand on water supplies, reduce cross-boundary conflicts, and provide for effective conjunctive management of hydraulically connected water resources.
- Complete the Northern Idaho Adjudication.
- Implement and maintain the cooperative agreement between Idaho and Washington for maintenance of the SVRP Aquifer ground water model.
- Advise and provide technical support to Palouse Basin Aquifer Committee and other stakeholders to promote the wise use of the region's water supply.
- Provide technical support for the completion of aquifer studies that will assist in water management.

Milestones:

- Cooperative agreements approved and implemented by Idaho and Washington.
- Implementation of Rathdrum Prairie CAMP action items.
- Development and implementation of Palouse CAMP.
- Aquifer studies completed.
- Northern Idaho Adjudication completed.

7B - MINIMUM STREAM FLOWS IN THE PANHANDLE RIVER BASINS

The Idaho Water Resource Board will establish and protect minimum stream flow and lake level water rights to preserve the scenic and recreational water bodies in the Panhandle river basins.

Discussion:

The Panhandle contains some of the most significant scenic and recreational water bodies in the state. The Idaho Water Resource Board holds 19 minimum stream flow water rights on reaches of the Pend Oreille, St. Maries, Pack, Moyie, St. Joe, Coeur d'Alene, and Spokane rivers that protect approximately 17,600 cfs total flow. In 1927, the state established minimum lake levels for Priest, Pend Oreille and Coeur d'Alene lakes. These water rights protect and support many beneficial uses of water such as fish and wildlife habitat, aquatic life, recreation and aesthetic values, and navigation in the Panhandle basins and make a significant contribution to the economy of the region and the state.

Population growth and new water demands may increase the need to obtain additional minimum stream flows in the Panhandle region. The establishment and use of local water supply banks and rental pools should be considered as a strategy for addressing the

need for meeting minimum stream flow water rights or new water rights in the Panhandle region, including minimum lake levels for the protection of navigation and transportation, fish and aquatic resources, and aesthetic and recreational values.

Implementation Strategies:

- Coordinate with state and federal agencies and stakeholders to identify potential minimum stream flow needs.
- Submit applications for minimum stream flow water rights that are in the public interest.
- Monitor activities that could impair minimum stream flows.
- Evaluate the need for establishment of local water supply banks.

Milestones:

- Minimum stream flow water rights established.

7C - NAVIGATION, FISHERIES, AND RECREATION IN THE PANHANDLE RIVER BASINS

Water management decisions in the Panhandle Region should minimize, where feasible, adverse effects on navigation, fisheries, and recreation.

Discussion:

The Panhandle's lakes and rivers provide for commercial and recreational navigation and important habitat for numerous fish and wildlife species. These resources are also affected by the operation of private and federal hydropower projects. Avista's Clark Fork projects, located in Montana and Idaho, are operated pursuant to a FERC license based upon a comprehensive settlement agreement executed by Idaho, Montana, federal agencies and Indian tribes, and other stakeholders. The Post Falls project license is also based, in part, upon a settlement agreement between Avista, the IDFG and the Idaho Department of Parks and Recreation. The Post Falls license requires a summer full-pool elevation and fall draw-down protocol for Lake Couer d'Alene that is protective of fishery needs, while providing adequate lake levels for summer recreation activities and navigation.

On the Pend Oreille River, the USACE operates Albeni Falls Dam, which controls the level of Lake Pend Oreille. Lake Pend Oreille has been designated a Special Resource Water, a special body of water recognized by the state as needing intensive protection. Since 1996, consistent with a U.S. Fish and Wildlife Service Biological Opinion on the operation of the Federal Columbia River Power System, winter lake levels have been managed for the protection of the lake's kokanee population, an important forage base for ESA-listed bull trout. Winter lake level management also directly affects the amount of erosion and sedimentation that occurs, waterfowl habitat, water quality, navigation, and shoreline infrastructure. Cooperation between the state and federal government and

community stakeholders is essential for making sound management decisions regarding the operation of Albeni Falls Dam.

In 2003, the Idaho legislature created the Lake Pend Oreille, Pend Oreille River, Priest Lake and Priest River Commission (“Lakes Commission”) to address water quantity and water quality issues affecting the state’s and local communities’ interests, while recognizing existing authorities. The Idaho Water Resource Board supports the Lakes Commission’s participation in regional water management decisions and efforts to minimize adverse effects on navigation, water quality, and fish, wildlife, and recreational resources.

Implementation Strategies:

- Identify proposed actions that may affect navigation, water quality, and fish, wildlife, and recreation resources, in coordination with state and federal agencies and stakeholders.
- Provide technical assistance to assist the Lake Commission’s participation in regional water management decisions.

Milestones:

- Collaborative water management decisions made that minimize adverse effects on navigation, water quality, and fish, wildlife, and recreational resources.



Photo: Mackay Lost River Range *(Photo Courtesy of Mike McVay)*



**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE MITIGATION	)	CM-MP-2014-001
PLAN FILED BY THE IDAHO GROUND	)	CM-DC-2011-004
WATER APPROPRIATORS FOR THE)	
DISTRIBUTION OF WATER TO WATER	)	ORDER APPROVING IN PART
RIGHT NOS. 36-02551 AND 36-07694 IN	)	AND REJECTING IN PART
THE NAME OF RANGEN, INC.	)	IGWA'S MITIGATION PLAN;
	)	ORDER LIFTING STAY ISSUED
	)	FEBRUARY 21, 2014; AMENDED
	)	CURTAILMENT ORDER
IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHT NOS. 36-02551)	
AND 36-07694)	
(RANGEN, INC.))	
)	

PROCEDURAL BACKGROUND

On January 29, 2014, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order"). The Curtailment Order recognizes that holders of junior-priority ground water rights may avoid curtailment if they participate in a mitigation plan which provides "simulated steady state benefits of 9.1 cfs to Curren Tunnel [sometimes referred to as the "Martin-Curren Tunnel"] or direct flow of 9.1 cfs to Rangen." *Curtailment Order* at 42. The Curtailment Order explains that mitigation provided by direct flow to Rangen "may be phased-in over not more than a five-year period pursuant to CM Rule 40 as follows: 3.4 cfs the first year, 5.2 cfs the second year, 6.0 cfs the third year, 6.6 cfs the fourth year, and 9.1 cfs the fifth year." *Id.*

On February 11, 2014, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed with the Department *IGWA's Mitigation Plan and Request for Hearing* ("Mitigation Plan") to avoid curtailment imposed by the Curtailment Order. The Mitigation Plan sets forth nine proposals for junior-priority ground water pumpers to meet mitigation obligations: 1) credit for current and ongoing mitigation activities; 2) mitigation via the Sandy Pipe; 3) assignment of water right no. 36-16976; 4) fish replacement; 5) monetary compensation; 6) improvements to the Curren Tunnel diversion; 7) drilling a horizontal well in the vicinity of the Curren Tunnel; 8) drilling new groundwater wells or utilizing existing wells with delivery over-the-rim; and 9) construction of a direct pump-back and aeration system within the Rangen facility.

On March 14, 2014, Rangen, Inc. ("Rangen") filed three documents with the Department: *Rangen's Motion in Limine to Exclude Evidence of Tucker Springs Project; Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing; and Rangen, Inc.'s Petition to Intervene to Become a Party Protestant and Rangen's Motion for Reconsideration Re: Denial of Participation in Mitigation Plan Hearing.* At the commencement of the hearing on IGWA's Mitigation Plan, which was held on March 17-19, 2014 at the Department's State office in Boise, Idaho, the Director verbally ruled on Rangen's motions and petition to intervene. Specifically, the Director granted Rangen's motion to exclude evidence of the Tucker Springs Project; dismissed proposals four and five of IGWA's Mitigation Plan, and granted Rangen's petition to intervene. On March 26, 2014, the Director issued the following to reflect those verbal rulings: *Order Granting Rangen's Motion in Limine to Exclude Evidence of Tucker Springs Project; Order Granting in Part and Denying in Part Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing; and Order Granting Rangen, Inc.'s Petition to Intervene and Denying Motion for Reconsideration.*

APPLICABLE LAW

Conjunctive Management Rule 43.03 ("Rule 43.03") establishes the following factors that "may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights":

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
- c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water 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 pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.
- d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

- e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.
- f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.
- g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.
- h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.
- i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.
- j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.
- k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.
- l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.
- m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.
- n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.
- o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

IDAPA 37.03.11.043.03(a-o).

A proposed mitigation plan must contain information that allows the Director to evaluate these factors. IDAPA 37.03.11.043.01(d).

While Rule 43.03 lists factors that “may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights,” factors 43.03(a) through 43.03(c) are necessary components of mitigation plans that call for the direct delivery of mitigation water. A junior water right holder seeking to directly deliver mitigation water bears the burden of proving that (a) the “delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law,” (b) “the mitigation plan will provide replacement water, at the time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source,” and (c) “the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage.” IDAPA 37.03.11.043.03(a-c) These three inquiries are threshold factors against which IGWA’s mitigation plan proposal must be measured.

To satisfy its burden of proof, IGWA must present sufficient factual evidence at the hearing to prove that (1) the proposal is legal, and will generally provide the quantity of water required by the curtailment order; (2) the components of the proposed mitigation plan can be implemented to timely provide mitigation water as required by the curtailment order; and (3)(a) the proposal has been geographically located and engineered, and (b) necessary agreements or option contracts are executed, or legal proceedings to acquire land or easements have been initiated.

Consideration of the first three factors in Rule 43.03 requires that the water be provided in the season of use.

ANALYSIS

This decision approves portions of IGWA’s Mitigation Plan, but determines that the quantities of mitigation water available to Rangen during the time of need are insufficient to fully mitigate as required by the Curtailment Order. As a result, curtailment of the use of water by a segment of the ground water holders whose use was curtailed in the Curtailment Order is required.

This decision recognizes credit for only two components of IGWA’s proposed mitigation plan: (1) Aquifer enhancement activities (conversions, recharge, and voluntary curtailments), and (2) Exchange of irrigation water diverted from the Curren Tunnel with operational spill water from the North Side Canal Company. The Director rejects the remaining components (proposals 3, 6- 9) of IGWA’s mitigation plan. The primary reason for rejection of the other proposed components of IGWA’s mitigation plan is the lack of evidence in the record to determine how the proposal could be implemented, either legally or physically. IGWA did not address and carry its evidentiary burden by: (1) Establishing the legality of the proposal, (2) Presenting details about how the proposed physical infrastructure could be physically located, constructed and operated, and (3) Predicting when the proposal could be completed to provide

the required mitigation. The only evidence that IGWA presented about proposed physical infrastructure was testimony that the proposals requiring infrastructure would be feasible or that there is no reason why IGWA couldn't implement sections its mitigation proposals. Brendeke, Tr., Vol. II, pp. 483-85, 494-95, 501, 504, 511, 515, 519, 522-23, 525-27. Testimony that IGWA has an optimistic vision of successfully completing proposals 3 and 6-9 of its mitigation plan is not a substitute for presenting actual activities or written plans demonstrating that it has initiated and at least completed preliminary tasks in implementing its mitigation plan.

Use of ESPAM 2.1

The Eastern Snake Plain Aquifer Model ("ESPAM") is a calibrated regional ground water model representing the Eastern Snake Plain Aquifer ("ESPA"). In the Curtailment Order the Director adopted ESPAM 2.1 to model the stresses to the ESPA related to Rangen's renewed delivery call. In this decision, the Director uses ESPAM 2.1 to determine the simulated benefits of aquifer enhancement activities conducted by IGWA and other private entities and to determine a curtailment date because of a mitigation deficiency.

Benefits of Aquifer Enhancement Activities

ESPAM 2.1 can simulate the equilibrium, steady-state impacts resulting from a constant stress, or, alternatively, it can simulate the impacts of constant or time-variable stresses during a specific period of time. Model simulations that analyze impacts over a specific time period are called "transient runs." The length of the simulation is dependent on the time period of interest. Curtailment of ground water pumping was simulated over a period of five years representing the five-year curtailment phase-in period from April 2014 through March 2019. Aquifer enhancement activities by IGWA and other private entities were simulated over a period of 14 years representing April 2005 through March 2019. In both simulations, the volume of benefit to the aquifer during each year was averaged over a one-year "stress period." For example, the volume of aquifer enhancement activities during 2005 was input into the model at a constant rate from April 2005 through March 2006.

For purposes of both the Curtailment Order and analyzing the mitigation required in response to a delivery call, the Department employed an annual stress period in ESPAM 2.1, predicted the annual volume accruing to the Curren Tunnel within each year of the five-year phase-in period, and calculated an average annual mitigation flow requirement for each year from the annual volume. The mitigation requirement was calculated by dividing the total volume predicted to accrue over a one year period by 365 days and converting the units to cubic feet per second. The use of the average annual mitigation requirement promotes annual planning and is a reasonable time period for model prediction and analysis.¹

¹ The Director notes that Rangen also evaluated IGWA's aquifer enhancement activities using an annual stress period approach. See Rangen Ex. 2071. Rangen's evaluation neglected aquifer enhancement activities performed by Southwest Irrigation District and the ongoing transient effects of aquifer enhancement activities performed by IGWA in prior years, thus Rangen's evaluation did not include all of the transient benefits predicted to accrue to the Curren Tunnel after April 2014.

Benefits of Mitigation Using Senior Irrigation Water Rights

Ground water pumping for irrigation causes depletions of Curren Tunnel flows during the non-irrigation season after ground water pumping ceases. As stated above, however, predicted accretions to flows in the Curren Tunnel from curtailment were modeled over one year stress periods to determine the obligations of the ground water users to mitigate for their ground water diversions. Predicted accretions to the Curren Tunnel resulting from aquifer enhancement activities were also modeled over one year stress periods.

In this decision, the Director also employs an annual time period to evaluate the average benefit of IGWA's proposal to deliver water to Rangen that would have been diverted pursuant to irrigation water rights held by Howard (Butch) and Rhonda Morris (hereafter referred to in the singular as "Morris"). The Curtailment Order allowed staged mitigation, requiring incremental increases in mitigation for each of the first five years of implementation. Each of the incremental mitigation requirements assumed an average obligation within each year. For each of the first four years, the determination of the annual obligation was computed by applying annual stresses and computing an average annual obligation. Because the conjunctive management rules limit the staged mitigation period to five years, the mitigation obligation for the fifth year increased to the full 9.1 cfs obligation. Similarly, an annual averaging of delivery of irrigation water can be employed to determine whether the junior water right holder has satisfied the mitigation obligation. Averaging IGWA's mitigation activities over a period of one year will establish consistent time periods for combining delivery of the Morris water for mitigation and the average annual benefit provided by aquifer enhancement activities, and for direct comparison to the annual mitigation requirement. If the proposed mitigation falls short of the annual mitigation requirement, the deficiency can be calculated at the beginning of the irrigation season. Diversion of water by junior water right holders will be curtailed to address the deficiency. The senior water right holder will be assured of a water supply, particularly during periods of low spring flow, as the low flow periods occur during the irrigation season in recent years. *See Rangen Ex. 2045, 2073.*

Time Period for Mitigation

The first year mitigation requirement of 3.4 cfs will begin on April 1, 2014, and continue through March 31, 2015. On April 1, 2015, the ground water users must have sufficient mitigation in place to deliver 5.2 cfs to Rangen, either by direct delivery or by transient modeled accretions.

FINDINGS OF FACT

Eastern Snake Plain Aquifer Model Version No. 2.1

1. ESPAM is a calibrated regional ground water model representing the ESPA. In the Curtailment Order the Director adopted ESPAM 2.1 to model the stresses to the ESPA related to Rangen's renewed delivery call. IDWR will use ESPAM 2.1 to determine the simulated benefits of aquifer enhancement activities conducted by IGWA and other private

entities, and, if there is a deficiency in the mitigation plan, to determine a curtailment date to provide for the deficiency.

Proposal No. 1: Aquifer Enhancement Activities

2. Proposal No. 1 requests mitigation credit for the following ongoing and future activities by IGWA: (a) conversions from ground water irrigation to surface water irrigation, (b) voluntary “dry-ups” of acreage irrigated with ground water through the Conservation Reserve Enhanced Program (“CREP”) or other cessation of irrigation with ground water, and (c) ground water recharge. This order will subsequently refer to these activities as “aquifer enhancement activities.”

3. Exhibit 3001 in the hearing record contains data compiled by IDWR that quantifies the aquifer enhancement activities of IGWA and other private entities during the time period beginning in 2005 through 2010. Data for 2011-2013 private aquifer enhancement activities were received into evidence as Exhibits 1022, 1023, 1082 and 1083.

4. In the past, the Department input data for aquifer enhancement activities into ESPAM as a stress in the model to simulate benefits accruing to spring/Snake River reaches from the aquifer enhancement activities that benefit spring/Snake River reaches that supply water to senior surface water right holders who called for delivery of water pursuant to their senior surface water rights against junior ground water right holders. These data have been recognized by the Department in other conjunctive management contested cases as a reliable representation of previous aquifer enhancement activities of IGWA. *See Final Order Approving Mitigation Credits Regarding SWC Delivery Call*, In the Matter of the Idaho Ground Water Appropriators, Inc.’s Mitigation Plan for Conversions, Dry-ups, and Recharge, Doc. No. CM-MP-2009-006 (July 19, 2010), *aff’d on appeal in Memorandum Decision and Order on Petition for Judicial Review*, CV-2010-3822 (Fifth Jud. Dist., Twin Falls County, April 22, 2011).

5. The Curtailment Order stated that, to avoid curtailment, IGWA must either provide mitigation of 9.1 cfs in combined direct flows and steady state simulated flows to Rangen during 2014, or must provide 3.4 cfs of direct flows to Rangen during the first year of the curtailment order. To predict the benefit of aquifer enhancement activities in a steady state and also to predict transient benefits of aquifer enhancement activities in year 2014, ESPAM Model 2.1 must be run (a) once to determine the steady state benefits assuming constant implementation of fixed aquifer enhancement activities; and (b) once in transient mode with a stress period for each year of aquifer enhancement activities (2005 – 2013 plus projected future activities) to determine the benefits of past and projected future activities predicted to accrue to the Curren Tunnel during each year of the five-year phase-in period.

6. Exhibit no. 1025 summarizes model runs predicting benefits to Rangen resulting from steady state simulations of activities in 2011, 2012, and 2013. The predicted flow benefits to Rangen in Exhibit 1025 were accepted and referred to by all parties in the presentation of evidence.

7. For comparison with the phased-in requirement of 3.4 cfs during the first year of the curtailment order, it is necessary to predict the benefits of aquifer enhancement that would accrue during the first year. Rangen used ESPAM 2.1 to evaluate the transient benefits of aquifer enhancement activities beginning in 2014 in Exhibit 2071, but neglected to include ongoing transient benefits of prior IGWA aquifer enhancement projects that occurred between 2005 and 2013 and neglected to include aquifer enhancement activities performed by Southwest Irrigation District. *See* Brockway, Tr. Vol. III, p. 681-685. Using the data entered into evidence at the hearing, the Department input data into the model for each year of private party aquifer enhancement activities from 2005 through 2014. The 2005 through 2013 data were compiled from previously documented activities. IDWR Ex. 3001; IGWA Ex. 1025. For 2014, conversions, CREP, and voluntary curtailment projects were assumed to be identical to 2013, and private party managed recharge was assumed to be zero. The Department determined the average annual benefit from aquifer enhancement activities predicted to accrue to the Curren Tunnel between April 2014 and March 2015 is 871 acre feet, which is equivalent to an average rate of 1.2 cfs for 365 days. The modeling files and a summary table of the model results are included on a CD accompanying this order.

Proposal No. 2: Mitigation Using Senior Irrigation Water Rights Diverted from the Curren Tunnel

8. IGWA proposes to mitigate using water from Morris, who holds certain senior irrigation water rights from the Curren Tunnel. Specifically, IGWA and Morris agreed that IGWA would deliver Snake River water discharging from the North Side Canal Co. system into the Sandy Pond as operational spill to Morris through the Sandy Pipeline, and, in exchange, Morris would forego diversion of water from Curren Tunnel pursuant to water right numbers 36-123D, 36-134E, 36-135D, 36-135E, 36-10141A, and 36-10141B that bear priority dates senior to Rangen's fish propagation water rights. The foregone diversion of water by Morris will result in discharge and capture of water from the Curren Tunnel by Rangen that would have been diverted and used by Morris but for the agreement with IGWA.

9. It is necessary to apply the first three threshold factors of Rule 43.03.

Legality of Use of North Side Canal Company Water Spilled into the Sandy Ponds

10. Morris is presently irrigating approximately 205 acres of his own land with wastewater from the Sandy Ponds. Morris, Tr. Vol. II, p. 371-72. Morris testified that he also irrigates adjacent land owned by Musser and Candy with water from the Sandy Ponds. Morris, Tr. Vol. II, pp. 363, 372.

11. Morris holds a water right to irrigate 125 acres of his own land with water from the Sandy Pond. Department records do not identify any water rights in the name of Musser or Candy to irrigate their lands with water from the Sandy Pond.

12. The lands of Musser, Candy, and Morris are all within the water right place of use service area of the North Side Canal Company. *See* Exhibit 3000. The Sandy Pond was originally constructed by North Side Canal Company to capture its operational spill for water

quality purposes. When North Snake Ground Water District acquired the Sandy Pond, it enlarged the size of the pond. The enlargement of the pond did not change the character or assumed ownership of the water in the pond, however. Until other water rights are established authorizing diversion and use of water from the pond, the Department will presume the water in the pond is North Side Canal Company operational spill water that is being captured and may be applied to North Side Canal Company lands. *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950).

Quantity of Water Delivered to Rangen

13. The quantity of water available for diversion by Morris pursuant to water right numbers 36-123D, 36-134E, 36-135D, 36-135E, 36-10141A, and 36-10141B is limited by the discharge of the Curren Tunnel and by diversions of other water users pursuant to other senior water rights.

14. The Morris water rights authorize a beneficial use of irrigation. The contribution of water to Rangen by leaving water in the Curren Tunnel that normally would have been diverted by Morris only benefits Rangen during the irrigation season. In contrast, as identified in the Curtailment Order, the modeled 2014 **year-round** average Curren Tunnel depletion resulting from junior ground water pumping is 3.4 cfs. *Curtailment Order* at 42. The benefit to Rangen of Morris' nondiversion of water from Curren Tunnel to Rangen must be estimated and then compared to the year-round depletion average. The calculation of the average first year depletion of 3.4 cfs starts April 1. IGWA needs to compensate for depletions of water for the entire 365 days from April 15 to March 31.

15. Morris irrigates crops from approximately April through mid-October. Tr. Vol. II, p 392-93. The number of days he would have irrigated with water from the Curren Tunnel is approximately 184 days (April 15 through October 15). This means that IGWA can claim credit only for that volume of water available to Morris for 184 days between April 15 and October 15.

16. Flows discharging from Curren Tunnel have been measured for approximately 20 years. The Curren Tunnel discharge is the sum of the average monthly flow measured at the mouth of the tunnel by IDWR (Exhibit 2045) and the average monthly flow diverted into Rangen's 6-inch PVC pipe (Exhibit 3000). The magnitude of discharges from the Curren Tunnel varies annually and seasonally depending on hydrologic conditions, related water uses, and other activities on the ESPA.

17. Table 1 lists the average irrigation season (April 15 through October 15) flow from Curren Tunnel for years 1996 through 2013. There is a distinct change in the magnitude of average irrigation season flow values starting in 2002. It is likely that the average discharge from the Curren Tunnel during the 2014 irrigation season will be within the range represented by the 2002-2013 conditions. From 2002 through 2013, the average irrigation season flow has varied between 2.3 cfs and 5.7 cfs. The years of 2002 through 2013 will be used as a historical data set to predict the flows from Curren Tunnel for 2014. The average of the average irrigation season values for each year from 2002 through 2013 is 3.7 cfs.

Year	Average Curren Tunnel discharge, April 15 - October 15
1996	12.4
1997	17.9
1998	17.0
1999	15.2
2000	13.9
2001	8.0
2002	4.5
2003	3.9
2004	4.4
2005	2.3
2006	5.7
2007	4.9
2008	3.2
2009	2.8
2010	2.3
2011	3.4
2012	4.1
2013	2.8
2002-2013 average	3.7

Table 1. Average Curren Tunnel discharge during Morris' irrigation season.

18. Rangen holds water rights for irrigation and domestic purposes that identify Curren Tunnel as the source of water. Water right no. 36-00134B authorizes diversion of 0.09 cfs from Curren Tunnel and bears a priority date of October 9, 1884.

19. Morris holds water rights for irrigation and stockwater purposes that identify Curren Tunnel as the source of water. Water right no. 36-134D authorizes diversion of 1.58 cfs of water from Curren Tunnel. Water right no. 36-134E also authorizes diversion of 0.82 cfs for water from Curren Tunnel. Both water right no. 36-134D and water right no. 36-134E bear a priority date of October 9, 1884 (identical to the priority date for Rangen's water right no. 36-00134B identified above). Morris is entitled to divert a total of 2.4 cfs from Curren Tunnel under water right nos. 36-134D and 36-134E. Morris currently diverts up to 15 miner's inches of water from the Curren Tunnel for maintenance of his irrigation pipe. Morris, Tr. Vol. II, p. 390. Because Morris currently diverts up to 15 miner's inches of water from the Curren Tunnel, the Director will subtract 15 miner's inches (0.3 cfs) from the available supply for mitigation.

20. Walter and Margaret Candy (hereafter referred to in the singular as "Candy") hold water right no. 36-134A, a water right authorizing diversion for domestic use of 0.04 cfs and irrigation of 36 acres with water from the Curren Tunnel. Water right no. 36-134A authorizes a total diversion of 0.49 cfs from the Curren Tunnel for both the domestic and irrigation uses and bears a priority date of October 9, 1884 (identical to the priority date for Rangen's water right

no. 36-00134B identified above). Water right 36-134A authorizes a diversion rate of 0.014 cfs per acre. Candy uses water from the Curren Tunnel for domestic use and to irrigate land around their home. The land irrigated with water from the tunnel is approximately one half acre. Morris, Tr. Vol. II, p. 382. As stated above, the remainder of Candy's land is irrigated from the Sandy Pipeline. Candy domestic water use would be 0.04 cfs. Because irrigation is included in a small domestic use of one-half acre or less, the total use by Candy is limited to 0.04 cfs.

21. Alvin and Hope Musser Living Trust (hereafter referred to in the singular as "Musser") hold water right no. 36-102. Water right no. 36-102 authorizes the diversion of 4.1 cfs for irrigation purposes on Musser's property, and bears a priority date of April 1, 1892. Morris is farming Musser's property but Morris does not irrigate Musser's property with water right no. 36-102. Instead, Morris is irrigating the Musser's property with water from the Sandy Pipeline,

22. Rangen holds water right no. 36-135A. Water right no. 36-135A authorizes diversion of 0.05 cfs for irrigation and domestic purposes, and bears a priority date of April 1, 1908.

23. Candy holds water right no. 36-135B. Water right no. 36-135B authorizes diversion of 0.51 cfs for irrigation purposes and bears a priority date of April 1, 1908. Morris is farming Candy's property but Morris does not irrigate Candy's property with water right no. 36-135B. Instead, Morris is irrigating the land with water from the Sandy Pipeline,

24. Morris holds water right nos. 36-135D and 36-135E. Water right no. 36-135D authorizes the diversion of 1.58 cfs for irrigation and stockwater purposes. Water right no. 36-135E authorizes the diversion of 0.82 cfs for irrigation and stockwater purposes. Both water rights bear a priority date of April 1, 1908.

25. The following spreadsheet quantifies the allocation of water according to the priority dates of water rights offered for mitigation. Water right nos. 36-134A, 36-134B, 36-134D, and 36-134E are the earliest priority date (October 9, 1884) water rights authorizing diversion of water from the Curren Tunnel. The total flow rate authorized for diversion pursuant to these water rights is 2.98 cfs. A flow rate of 3.7 cfs exceeds the 2.98 cfs maximum diversion rate authorized by water rights held by Morris, Candy, and Rangen bearing an 1884 priority date. Morris will divert 0.3 cfs of Curren Tunnel water into his irrigation pipeline. Candy will divert 0.04 cfs, and because his lands are being irrigated with water from the Sandy Pipeline, he will not divert the remaining 0.45 cfs pursuant to water right no. 36-134A. Rangen will divert 0.09 cfs pursuant to water right no. 36-134B.

26. Water right no. 36-102 (Musser) is the next water right in priority bearing a priority date of April 1, 1892 and authorizing diversion of 4.1 cfs.. Because Musser lands are being irrigated by water from the Sandy Pipeline, Musser will not divert water from Curren Tunnel, and the next in line priority holders must be considered until the total quantity of use or mitigation equals 3.7 cfs.

27. Water right nos. 135A (Rangen), 36-135B (Candy), 36-135D (Morris) , and 36-135E (Morris) all bear a priority date of April 1, 1892. Rangen will divert 0.05 cfs. Candy will not divert water authorized by water right no. 36-135B because his lands are being irrigated with water from the Sandy Pipeline. Morris’s water right nos. 36-135D and 36-135E are available for additional mitigation.

Water Right Holder	Water Right Number	Water Right Quantity (cfs)	Diverted for beneficial use, not available for mitigation (cfs)	Non-diversion of Morris water, available for mitigation (cfs)
Morris	36-134D & 36-134E	2.4	0.3	2.1
Candy	36-134A	0.49	0.04	
Rangen	36-134B	0.09	0.09	
Musser	36-102	4.1	0.00	
Rangen	36-135A	0.05	0.05	
Candy	36-135B	0.51	0.00	
Morris	36-135D	1.58	0.0	1.12
Morris	36-135E	0.82	0.00	
Total			0.5 ²	3.2

As a result of the above summary, IGWA would be entitled to the following for mitigation:

$$3.7 \text{ cfs} - 0.3 \text{ cfs (Morris)} - 0.14 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 3.2 \text{ cfs (approximately)}$$

The average annual benefit provided by the Morris water portion mitigation plan for comparison with the annual requirement (3.4 cfs for April 1, 2014 through March 31, 2015, 5.2 cfs for April 1, 2015 through March 31, 2106, etc.) is computed as follows:

$$\frac{184 \text{ days}}{\text{_____}} \times 3.2 \text{ cfs} = \text{annual average of 1.6 cfs provided}$$

365 days

If Morris foregoes diversion of the 0.3 cfs from the Curren Tunnel, additional water would be available for IGWA as follows:

$$3.7 \text{ cfs} - 0.14 \text{ cfs (Rangen)} - 0.04 \text{ cfs (Candy)} = 3.5 \text{ cfs (approximately)}$$

² Number reflects rounding to the nearest 1/10 of a cfs.

If Morris foregoes diversion of the 0.3 cfs from the Curren Tunnel, the average annual benefit provided would be as follows:

$$\frac{184 \text{ days}}{365 \text{ys}} \times 3.5 \text{ cfs} = \text{annual average of } 1.8 \text{ cfs provided}$$

Proposal No. 3: Assignment of IGWA's Water Right Application to Rangen

28. IGWA proposes to assign pending application to appropriate water no. 36-16976 to Rangen as mitigation. Application no. 36-16976 proposes to appropriate 12 cfs from Springs and Billingsley Creek at Rangen's existing physical diversion from Billingsley Creek known as the "bridge diversion."

29. IGWA filed application to appropriate water no. 36-16976 on April 3, 2013, shortly after the Director ruled in the contested case for Rangen's delivery call that Rangen's water rights only authorized diversion of water from the Curren Tunnel. This ruling was the basis for a determination in the Director's Curtailment Order that Rangen does not hold a water right authorizing diversion of water from Billingsley Creek at the bridge diversion.

30. IGWA's water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application.

Legality of Assigning Application to Appropriate Water no. 36-16976 to Rangen

31. Pursuant to Rule 43, the Director can approve proposal no. 3 only if the Director believes that the application can provide water to Rangen in the time of need, i.e. this year. The pending application cannot be prejudged in this proceeding. IGWA essentially asked the Director to prejudge the application. The Director declines to do so. The application seeks authorization to divert 12 cfs from a point of diversion on the Rangen property. IGWA Ex. 1018 at 1. A map attached to the application shows the general area of the planned point of diversion. *Id.* at 4. The Department published notice of the application and the application was protested by Rangen. Rangen also filed a competing application and a transfer to address the point of diversion issue. The facts behind IGWA's application and the competing application and transfer are unique. Given the uncertainty of the application given the specific facts which have developed in this case, the Director concludes that it is too speculative to consider.

Quantity of Water Delivered to Rangen

32. As stated above, the facts behind IGWA's application and the competing application and transfer are unique. Given the uncertainty of the application given the specific facts of this case, the Director concludes that it is too speculative to determine that Rangen will deliver water in its time of need pursuant to this application.

Proposal Nos. 4 and 5: Mitigation with Money or Fish

33. IGWA proposed fish replacement or monetary compensation to mitigate injury caused to Rangen by junior-priority ground water pumpers. These proposals will not be evaluated in this decision because proposal nos. 4 and 5 were dismissed as part of IGWA's Mitigation Plan in the *Order Granting in Part and Denying in Part Rangen's Motion to Dismiss Proposals 3-9 of IGWA's Mitigation Plan and Limit Scope of Hearing* issued March 26, 2014.

Proposal No. 6: Cleaning, Deepening, or Enlarging Curren Tunnel

34. IGWA suggests that cleaning, maintaining, and improving the Curren Tunnel will increase the flows from Curren Tunnel. IGWA implies that the Director should require that Rangen grant IGWA access to the tunnel to remove debris and rock from the tunnel and to assess whether the tunnel can be deepened or enlarged.

Quantity of Water Delivered to Rangen from Proposed Tunnel Cleaning

35. Morris testified that cleaning out fallen rock and dirt that collected at the mouth of the Hoagland Tunnel resulted in additional water discharging from the Hoagland Tunnel. Morris Tr. Vol. II, p. 384-85. However, there is no evidence that the rock-fall in any tunnel changed the hydraulic conditions in the tunnel itself. Morris' testimony suggests the rock at the mouth of the Hoagland tunnel likely blocked collection works and created diffuse flow channels around or underneath the collection works that prevented collection of the water into the associated diversion works.

36. There is no fallen rock at the mouth of Curren Tunnel impeding Rangen's collection of water. Curren Tunnel is lined with a large diameter corrugated pipe from its mouth 50 feet into the tunnel. The remainder of the tunnel is completed in basalt rock. IGWA failed to present evidence demonstrating that cleaning the Curren Tunnel would provide any additional water to Rangen.

Quantity of Water Delivered to Rangen from an Enlargement or Deepening of Curren Tunnel

37. There is evidence in the record that deepening or enlarging the Curren Tunnel could increase flows from the Curren Tunnel. However, there is no evidence quantifying the potential increase. Any physical work to deepen or enlarge the tunnel could not be completed to timely provide water during the 2014 irrigation season.

Proposal No. 7: Construction of a Horizontal Well

38. IGWA proposes to drill a horizontal well in the vicinity of the Curren Tunnel and divert the water from the well to Rangen's facility. IGWA proposes to drill the horizontal well near the Curren Tunnel at an elevation lower than the outlet of the Curren Tunnel.

Legality of Constructing a Horizontal Well

39. Prior to construction of a horizontal well, IGWA would need to obtain a water right to divert and beneficially use water from the horizontal well. IGWA has not filed any applications to appropriate water from a horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well could be constructed. The source of water proposed to be diverted is trust water. The Department has issued a moratorium on all appropriations of water from the Eastern Snake Plain Aquifer in the area where the proposed horizontal well would be constructed. Any horizontal well proposal will need to mitigate to address injury to other water users. IGWA failed to satisfy its burden because it failed to present any evidence that it will be able to address the injury to other water users.

Quantity of Water Delivered to Rangen

40. IGWA has failed to present evidence that it could timely deliver water to Rangen when water is needed by Rangen in 2014. No evidence was presented quantifying the available water supply. The lack of information makes the proposal too speculative to approve.

Proposal No. 8: Mitigation With Water from New Wells or Existing Wells

41. IGWA proposes to drill new ground water wells or utilize existing wells to deliver water directly to Rangen. IGWA asserts this plan would be similar to its over-the-rim plan previously approved in the Clear Springs Foods delivery call.

Legality of Diverting Ground Water From New or Existing wells and Delivering the Water to Rangen for Mitigation

42. IGWA has not identified any water rights that could be exercised, through a change in nature of use, to deliver water to Rangen. Because no water rights have been identified, the Director cannot evaluate important components of the water rights such as priority date, flow rate limitations, volume limitations, and periods of use to determine whether water diverted pursuant to the water rights could be delivered for mitigation.

43. IGWA cites the Director's approval of the over-the-rim plan in the Snake River Farms delivery call as support for its argument the Director should conditionally approve Proposal No. 8 and then allow IGWA to provide engineering and other plans at a later date. However, there are important distinctions between the progress IGWA had made in the over-the-rim plan when it was considered by the Department and this plan. At the time the hearing for the over-the-rim plan was heard, IGWA had exerted significant effort to justify the plan, including identifying water rights that would be acquired and wells that could be used, testing of water temperature, quality, and evaluating the reliability and biosecurity of the proposed pumping system. IGWA had also provided preliminary engineering plans. While the Director conditionally approved the over-the-rim plan, IGWA had taken significant steps towards implementation of that plan. Here, IGWA has not taken any steps toward implementation of this proposal.

44. There is no evidence in the record that would allow the Director to recognize mitigation provided through new or existing wells.

Quantity of Water Delivered to Rangen

45. No evidence was presented in the record about how water could physically be delivered to Rangen, and whether IGWA could obtain necessary rights of way. No quantification of available water was presented either. Planning and design for an over the rim project would take at least six months. IGWA could not timely deliver water to Rangen when water is needed in 2014.

Proposal No. 9: Mitigation by Pumping Water in Billingsley Creek Back to Rangen

46. IGWA proposes a direct pump-back and aeration system within the Rangen facility to satisfy mitigation obligations.

Legality of IGWA Providing a direct Pump-Back and Aeration System Within the Rangen Facility

47. There is no evidence in the record that IGWA has the water rights or property access to construct and operate a pump back and aeration system to Rangen. IGWA did not present any evidence about how the water rights or property access would be acquired.

Delivery of Pump-Back Water to Rangen

48. There is no evidence in the record that IGWA could timely deliver water to Rangen when Rangen needs the water in 2014.

Mitigation Shortfall

49. Proposal No. 1 provides an average of 1.2 cfs during the first year (April 1, 2014 through March 31, 2015) through aquifer enhancement activities.

50. Proposal No. 2 provides an average of 1.6 cfs through delivery of water not diverted by Morris. If Morris foregoes diversion of all water from Curren Tunnel, the water available for Proposal No. 2 would increase to an average of 1.8 cfs.

51. There is no evidence in the record establishing that other proposals would provide mitigation during the first year.

52. The mitigation plan provides an average predicted benefit of 2.8 cfs during the first year if Morris continues to divert 0.3 cfs of water from the Curren Tunnel. If Morris foregoes diversion of all water from Curren Tunnel, the average predicted benefit would increase to 3.0 cfs.

53. The mitigation plan fails to provide the required 3.4 cfs during the first year, and the mitigation shortfall is 0.6 cfs if Morris continues to divert 0.3 cfs of water from the Curren Tunnel. If Morris foregoes diversion of all water from Curren Tunnel, the mitigation shortfall would decrease to 0.4 cfs.

54. Curtailment dates coinciding with various priority dates were iteratively entered into ESPAM 2.1 to determine the curtailment date required to provide the mitigation shortfall. A curtailment date of October 13, 1978 is predicted to provide an average benefit of 0.6 cfs to the Curren Tunnel during the first year. A curtailment date of July 1, 1983 is predicted to provide an average benefit of 0.4 cfs during the first year to the Curren Tunnel.

Conclusion

55. IGWA's evidence established that foregone diversion of Curren Tunnel water by Morris is predicted to deliver an average of 1.6 cfs water directly to Rangen from April 1, 2014 through March 31, 2015. If Morris also foregoes diversion of 15 miner's inches (0.3 cfs) of water diverted from Curren Tunnel through his irrigation pipeline during the 2014 irrigation season, the foregone diversion of Curren Tunnel water by Morris is predicted to deliver an average of 1.8 cfs directly to Rangen from April 1, 2014 through March 31, 2015

56. IGWA's evidence established that it can provide an average of 1.7 cfs water to Rangen through its aquifer enhancement activities, based on steady state ESPAM model runs.

57. IGWA's evidence established that it can provide 1.2 cfs of water from its aquifer enhancement activities, based on transient ESPAM 2.1 model runs, from April 1, 2014 through March 31, 2015.

58. IGWA's evidence established that it can provide a total of 3.3 cfs in steady state benefits to Rangen.

59. Evidence from the hearing establishes that IGWA can provide a total of 2.8 cfs of direct flow benefits to Rangen from April 1, 2014 through March 31, 2015 if Morris continues to divert 15 inches of water (0.3 cfs) from Curren Tunnel through his irrigation pipeline. The mitigation credit of 2.8 cfs is 0.6 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of October 13, 1978 or later (junior) must be curtailed to provide the 0.6 cfs to Rangen.

60. If Morris discontinues diversion of 15 inches (0.3 cfs) through his irrigation pipeline, IGWA can provide a total of 3.0 cfs of direct flow benefits to Rangen from April 1, 2014 through March 31, 2015. The mitigation credit of 3.0 cfs is 0.4 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of July 1, 1983 or later (junior) must be curtailed to provide the 0.4 cfs to Rangen.

61. IGWA did not establish that it can provide any steady state benefits or direct delivery of water to Rangen in the current annual period for the following proposals: assignment of a water right application, cleaning and/reconstruction of the Curren Tunnel, drilling a

horizontal well, delivery of water from new or existing wells, or pumping water back through the Rangen facility.

CONCLUSIONS OF LAW

Aquifer Enhancement Activities

1. IGWA is entitled to a mitigation credit of 1.7 cfs toward its steady state obligation of 9.1 cfs because of its aquifer enhancement activities.

2. IGWA is entitled to a mitigation credit of 1.2 cfs toward its from April 1, 2014 through March 31, 2015 direct flow obligation of 3.4 cfs because of its aquifer enhancement activities.

3. The steady state and direct flow obligations are separate alternatives in the Director's Curtailment Order, and the model simulations resulting in the above steady state and direct flow credits are mutually exclusive.

Irrigation Water Not Diverted from the Curren Tunnel

4. IGWA is entitled to a mitigation credit of 1.6 cfs for Curren Tunnel water directly provided to Rangen because of the non diversion of irrigation water from the Curren Tunnel pursuant to water rights held by Morris. Alternatively, if Morris ceases diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, IGWA is entitled to a mitigation credit of 1.8 cfs for Curren Tunnel water directly provided to Rangen because of the non diversion of irrigation water from the Curren Tunnel pursuant to water rights held by Morris. The quantity of 1.6 cfs or 1.8 cfs counts toward both the steady state and direct flow obligations in the Curtailment Order.

Assignment of IGWA's Water Right Application to Rangen

5. Because all IGWA offered to Rangen at the hearing is assignment of a bare application to appropriate water for mitigation with no supporting evidence about its development and perfection, there is currently no legal basis for the Director to hold that an application to appropriate water can provide mitigation to Rangen. Furthermore, the unique factual situation of this case will likely play an important role in the application proceeding. IGWA is not entitled to any mitigation credit for its proposal to assign application to appropriate water no. 36-16976 to Rangen.

Cleaning, Deepening, or Enlarging Curren Tunnel

6. Rangen is not required to construct a deeper or larger tunnel to enhance the flow of water from the Curren Tunnel. The Director does not have the legal authority to require that Rangen grant access to IGWA to study a proposed enlargement, nor does the Director have the authority to order construction proposed by IGWA after studies are complete.

7. The proposed work is not legally possible without Rangen's consent.

8. Any physical work to deepen or enlarge the tunnel could not be completed to timely provide water during the 2014 irrigation season when the water is needed.

9. There was no evidence presented that IGWA could timely deliver water to Rangen when water is needed by Rangen in 2014.

10. IGWA is not entitled to any mitigation credit for its proposal to clean, deepen, or enlarge the Curren Tunnel.

Construction of a Horizontal Well

11. IGWA did not establish what water rights would be exercised to deliver water to Rangen from a new horizontal well. IGWA did not identify a location for construction of the well, and did not present any evidence about land ownership or easements on land where a well could be constructed. The planning and construction of a delivery system could not be completed in 2014 during the time water is needed by Rangen.

12. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water directly to Rangen from a newly constructed horizontal well.

Mitigation with Water from New Wells or Existing Wells

13. IGWA did not establish what water rights would be exercised or that there were any commitments by the owners of wells, either by contract or acquisition, authorizing diversion of water to Rangen from new wells or existing wells for mitigation. The planning and construction of a delivery system could not be completed in 2014 during the time water is needed by Rangen.

14. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water directly to Rangen from new wells or existing wells.

Mitigation by Pumping Water in Billingsley Creek Back to Rangen

15. IGWA did not establish what water rights would be exercised or that IGWA owns, or that there are commitments by an owner of land, authorizing construction of a pump back system and delivery of Billingsley Creek water.

16. IGWA is not entitled to any mitigation credit for its proposal to provide mitigation water from Billingsley Creek directly to Rangen through a pump back system.

Conclusion

17. IGWA is entitled to a total steady state mitigation credit of 3.3 cfs toward its steady state obligation of 9.1 cfs.

18. IGWA is entitled to a total direct credit of 2.8 cfs toward its first annual period direct flow obligation of 3.4 cfs. The mitigation credit of 2.8 cfs is 0.6 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of October 13, 1978 or later must be curtailed to provide the 0.6 cfs to Rangen.

19. Alternatively, upon agreement by Morris that he will not divert 0.3 cfs directly from Curren Tunnel, IGWA is entitled to a total direct credit of 3.0 cfs toward its first annual period direct flow obligation of 3.4 cfs. The mitigation credit of 3.0 cfs is 0.4 cfs less than the 3.4 cfs obligation. ESPAM 2.1 determines that water rights bearing priority dates of July 1, 1983 or later must be curtailed to provide the 0.4 cfs to Rangen.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Director APPROVES proposal no. 1 (aquifer enhancement activities) and proposal no. 2 (delivery of Morris Curren Tunnel Water) of IGWA's mitigation plan.

IT IS FURTHER ORDERED that the Director rejects proposals nos. 3 and 6 through 9 of IGWA's mitigation plan.

IT IS FURTHER ORDERED that IGWA is granted 1.2 cfs of transient mitigation credit for the annual period from April 1, 2014 through March 31, 2015, because of its past and ongoing, multi-year aquifer enhancement activities.

IT IS FURTHER ORDERED that IGWA is granted 1.6 cfs of mitigation credit for direct delivery of surface water from Curren Tunnel to Rangen.

IT IS FURTHER ORDERED that IGWA is granted 2.8 cfs of total mitigation credit for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that the 2.8 cfs total annual mitigation credit is 0.6 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that the stay issued in the February 21, 2014, *Order Granting IGWA's Petition to Stay Curtailment* of the Curtailment Order is hereby lifted.

IT IS FURTHER ORDERED that, at 12:01 a.m. on or before May 5, 2014, users of ground water holding consumptive water rights bearing priority dates junior or equal to October 13, 1978, listed in Attachment A to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that this amended order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition

ORDER APPROVING IN PART AND REJECTING IN PART IGWA'S MITIGATION PLAN; ORDER LIFTING STAY ISSUED FEBRUARY 21, 2014; AMENDED CURTAILMENT ORDER - Page 20

set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that the watermasters for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, are directed to issue written notices to the holders of the consumptive ground water rights listed in Attachment A to this order. The water rights on the list bear priority dates junior or equal to October 13, 1978. The written notices are to advise the holders of the identified ground water rights that their rights are subject to curtailment in accordance with the terms of this order.

IT IS FURTHER ORDERED that pursuant to Conjunctive Management Rule 37.03.11.040.40, for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, shall permit the diversion and use of ground water by water rights with priority date senior to October 13, 1978 to continue out of priority diversions within the water district provided IGWA's mitigation plan is complied with.

CONTINGENT ALTERNATIVE OBLIGATION

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, IGWA will be granted 3.0 cfs of total annual mitigation credit for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that the 3.0 cfs total mitigation credit is 0.4 cfs less than the annual mitigation requirement of 3.4 cfs for the annual period from April 1, 2014 through March 31, 2015.

IT IS FURTHER ORDERED that water rights bearing priority dates junior or equal to July 1, 1983 shall be curtailed during the 2014 irrigation season.

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, at 12:01 a.m. on or before May 5, 2014, users of ground water holding consumptive water rights bearing priority dates junior or equal to July 1, 1983, as may be determined from Attachment A to this order, within the area of common ground water, located west of the Great Rift, and within a water district that regulates ground water, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that this amended order of curtailment has been modified or rescinded as to their water rights. This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, the watermasters for the water districts within the area of

common ground water, located west of the Great Rift, and who regulate ground water, are directed to issue written notices to the holders of the consumptive ground water rights listed in Attachment A to this order with water rights that bear priority dates junior or equal to July 1, 1983. The written notices are to advise the holders of the identified ground water rights that their rights are subject to curtailment in accordance with the terms of this order.

IT IS FURTHER ORDERED that, if Morris agrees to cease diverting 0.3 cfs from Curren Tunnel through his irrigation pipeline, pursuant to Conjunctive Management Rule 37.03.11.040.40, for the water districts within the area of common ground water, located west of the Great Rift, and who regulate ground water, shall permit the diversion and use of ground water by water rights with priority date senior to July 1, 1983 to continue out of priority diversions within the water district provided IGWA's mitigation plan is complied with.

Dated this 11th day of April, 2014.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11~~4~~4 day of April, 2014, the above and foregoing document was served on the following by providing a copy of the *ORDER APPROVING IN PART AND REJECTING IN PART IGWA'S MITIGATION PLAN; ORDER LIFTING STAY ISSUED FEBRUARY 21, 2014; AMENDED CURTAILMENT ORDER* in the manner selected:

J JUSTIN MAY
MAY BROWNING & MAY PLLC
1419 W WASHINGTON
BOISE ID 83702-5039
jmay@maybrowning.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

ROBYN BRODY
BRODY LAW OFFICE PLLC
PO BOX 554
RUPERT ID 83350-0554
robynbrody@hotmail.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

FRITZ X HAEMMERLE
HAEMMERLE HAEMMERLE
PO BOX 1800
HAILEY ID 83333-1800
fxh@haemlaw.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

RANDY BUDGE
T J BUDGE
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

SARAH KLAHN
MITRA PEMBERTON
WHITE & JANKOWSKI
511 16TH ST STE 500
DENVER CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

A DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205
dtranmer@pocatello.us

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOHN K SIMPSON
TRAVIS L THOMPSON
PAUL L ARRINGTON
BARKER ROSHOLT & SIMPSON LLP
195 RIVER VISTA PL STE 204
TWIN FALLS ID 83301-3029
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

W KENT FLETCHER,
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318
wkf@pmt.org

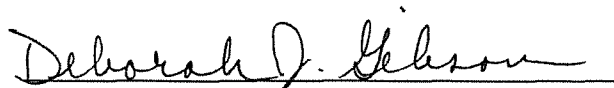
U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

C THOMAS ARKOOSH
CAPITOL LAW GROUP PLLC
PO BOX 32
GOODING ID 83330-0032
tarkoosh@capitollawgroup.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

GARY LEMMON
BLIND CANYON AQUARANCH, INC.
2757 S 1050 EAST
HAGERMAN, ID 83332
glemmon@northrim.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail


Deborah J. Gibson
Admin. Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.
- (8) The provisions of this section do not preclude an agency from taking immediate

action to protect the public interest in accordance with the provisions of section 67-5247, 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.

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: a) of 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.

LAW OFFICES OF

**RACINE OLSON NYE BUDGE & BAILEY
CHARTERED**

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
LANE V. ERICKSON
FREDERICK J. HAHN, III
DAVID E. ALEXANDER
PATRICK N. GEORGE
SCOTT J. SMITH
JOSHUA D. JOHNSON
STEPHEN J. MUHONEN
BRENT L. WHITING
JONATHON S. BYINGTON
DAVE BAGLEY
CAROL TIPPI VOLYN
THOMAS J. BUDGE
CANDICE M. MCHUGH
JONATHAN M. VOLYN
MARK A. SHAFER
JASON E. FLAIG

101 SOUTH CAPITOL BOULEVARD
SUITE 208
BOISE, IDAHO 83702

TELEPHONE (208) 395-0011
FACSIMILE (208) 433-0167

WWW.RACINELAW.NET

SENDER'S E-MAIL ADDRESS: CMM@RACINELAW.NET

POCATELLO OFFICE
201 EAST CENTER STREET
POST OFFICE BOX 1381
POCATELLO, IDAHO 83201
TELEPHONE: (208) 232-6101
FACSIMILE: (208) 232-6109

IDAHO FALLS OFFICE

477 SHOUP AVENUE
SUITE 203A
POST OFFICE BOX 50898
IDAHO FALLS, ID 83402
TELEPHONE: (208) 528-6101
FACSIMILE: (208) 528-6109

COEUR D'ALENE OFFICE

250 NORTHWEST
BOULEVARD, SUITE 106A
COEUR D'ALENE, ID 83814
TELEPHONE: (208) 765-6888

ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2008)
WILLIAM D. OLSON, OF COUNSEL

November 9, 2009

Idaho Department of Water Resources
Attn: Victoria Wigle, Assistant to Interim Director
P.O. Box 83720
Boise, ID 83720-0098

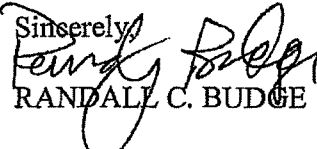
Re: Docket No. CM-MP-2009-07

Dear Victoria:

Enclosed please find for filing, publication, and processing, *IGWA's Mitigation Plan for the Surface Water Coalition Plan Delivery Call* which should be substituted for the mitigation plan titled *IGWA's Mitigation Plan for the Surface Water Coalition Delivery Call, Water District 120* which was filed on November 5, 2009. By this letter, IGWA withdraws the mitigation plan filed on November 5, 2009 and would like you to substitute the enclosed plan and file it and conform, stamp and return the extra copy enclosed herewith.

Please bring this matter to the attention of Director Spackman and proceed with advertisements. We have also provided courtesy copies to the Surface Water Coalition attorneys as indicated on the Certificate of Mailing.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Sincerely,

RANDALL C. BUDGE

Randall C. Budge, ISB #1949
Candice M. McHugh, ISB #5908
RACINE OLSON NYE
BUDGE & BAILEY, CHARTERED
PO Box 1391
Pocatello, ID 83204-1391
Telephone: (208) 395-0011
rcb@racinelaw.net
cmm@racinelaw.net

ATTORNEYS FOR THE IDAHO GROUND WATER APPROPRIATORS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

**IDAHO GROUND WATER
APPROPRIATORS, INC.,**
Petitioners.

Docket No.: CM-MP-2009-007

**IGWA'S MITIGATION PLAN FOR THE
SURFACE WATER COALITION
DELIVERY CALL**

COME NOW THE IDAHO GROUND WATER APPROPRIATORS, INC. ("IGWA"), through counsel and on behalf of its Ground Water District Members and its other water user members, which are set forth on Exhibit A attached hereto, for and on behalf of their respective members and those groundwater users who are non-member participants in their mitigation activities (collectively the "Ground Water Users") and hereby submit this *Mitigation Plan for the Surface Water Coalition Delivery Call* ("Mitigation Plan") pursuant to the Rules for the *Conjunctive Management of Surface and Ground Water Resources*, ("CM Rules") Rule 43, IDAPA 37.03.11.043.

I. PRELIMINARY DETAILS

In support of this Mitigation Plan the following information is provided:

The name and mailing address of the parties filing the Mitigation Plan are:

Idaho Ground Water Appropriators, Inc.
P.O. Box 2624
Boise, ID 83701

Counsel of record:
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
Randall C. Budge
Candice M. McHugh
PO Box 1391
Pocatello, ID 83204-1391

The water rights that will benefit from the mitigation activities under this proposed Mitigation Plan are any senior surface water rights diverting from the Snake River or its tributaries and administered by the Watermaster of Water District 01 that the Director has previously found or may in the future find to have been materially injured by the use of groundwater under junior groundwater rights. The water rights that may benefit from this Mitigation Plan include the surface water rights held by or on behalf of Twin Falls Canal Company, North Side Canal Company A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, and Minidoka Irrigation District. These irrigation entities are commonly known and hereafter referred to collectively as the Surface Water Coalition ("SWC"). Because future obligations for mitigation cannot be determined in advance, this Mitigation Plan is intended to secure advance approval of the mitigation methods and practices that junior groundwater users can rely upon and implement in order to avoid curtailment. It is the desire and intent of the Ground Water Users by this mitigation plan to have a permanent and ongoing mitigation plan in place that can be

IGWA'S MITIGATION PLAN FOR THE SURFACE WATER COALITION DELIVERY CALL - p. 2

implemented on a year-to-year basis as necessary to avoid or reduce curtailment.

This Mitigation Plan will allow the Director and the effected parties to timely comply with hearing and procedural requirements under the CM Rules as established by the Gooding County District Court in *Clear Springs Foods, Inc. v. Tuthill, Case No. 2008-444* (Fifth Jud. Dist., Gooding Co.). The storage water supply for use under this Mitigation Plan is secured by agreements entered into between IGWA and storage space holders in the Upper Snake Reservoir System. Through these existing agreements, IGWA has a reliable supply of up to 68,000 acre-feet of storage water that will be available on an annual basis for delivery to SWC entities as may be required by the Director's orders. The exact amount of water required to be delivered to SWC entities under this Mitigation Plan cannot be known in advance but can be expected to vary annually based upon the forecasted water supply and reasonable irrigation requirements which are used to determine the amount of water needed for the irrigation season and reasonable carryover storage.

II. MITIGATION ACTIVITIES

This Mitigation Plan will mitigate any and all material injury by guaranteeing and underwriting the senior water user's water supply. If the Director projects material injury for a senior water user, then the Ground Water Users will provide water for mitigation in accordance with this Mitigation Plan for that mitigation year. The mitigation year is that part of any irrigation season and/or Water District 1 accounting year for which the Director has projected there will be material injury to a senior user caused by junior groundwater pumping. This Mitigation Plan will fully mitigate and compensate the senior water user for material injury by making water available for direct delivery of replacement water by the Water District 1 Watermaster when necessary during the irrigation season.

a. Mitigation Plan Methodology and Details -- Twin Falls Canal Company

Because the water supply of the Twin Falls Canal Company is most clearly established it is used as the example below. Yet, the same process described for Twin Falls Canal Company will be used to mitigate any material injury to other SWC entities.

The Director has determined that a full water supply for the Twin Falls Canal Company is 1,009,100 acre-feet based upon 5/8 inch per acre headgate delivery¹. Accordingly, the Ground Water Users will underwrite Twin Falls Canal Company's supply to guarantee up to 1,009,000 acre-feet of water. Should the combined sum of the storage allocated to Twin Falls Canal Company and the natural flow delivered to Twin Falls Canal Company during the irrigation season be less than 1,009,100 acre-feet as calculated by the Water District 1 Watermaster in the manner described below, the Ground Water Users will supply sufficient water to eliminate the resulting water debt ("excess use") of Twin Falls Canal Company on the books of Water District 1. Twin Falls Canal Company's water supply shall be measured at the broad crested weir at the main canal headgate. In determining the water supply available to Twin Falls Canal Company and any actual shortfall to be made up by the Ground Water Users, the Watermaster shall apply established year-end accounting procedures used since 1978.

If Twin Falls Canal Company diverts its allocated natural flow and storage of 1,009,100 acre-feet or more, then there is no in-season injury and no mitigation is required. The Ground Water Users' commitment to underwrite Twin Falls Canal Company's water supply is subject to the following conditions:

- (1) If Twin Falls Canal Company does not divert 1,009,100 acre-feet no mitigation requirement shall exist if Twin Falls Canal Company has

¹ If in the future the Court determines that 3/4 inch per acre is the correct head gate delivery, then the amount of water guaranteed by this Mitigation Plan is 1,075,900 acre-feet and that amount should be substituted accordingly.

carryover storage remaining when the final Water District 01 Water Right Accounting is complete for the mitigation year.

- (2) All water spilled at the end of the Twin Falls Canal Company canal system shall be measured and accounted for by the Watermaster. Unreasonable waste shall be accounted for and deducted from any obligation of the Ground Water Districts.
- (3) Any water leased to others by Twin Falls Canal Company shall be considered a delivery to Twin Falls Canal Company for the purpose of calculating any obligation of the ground water users.
- (4) Only water diverted and used by Twin Falls Canal Company for beneficial purposes of providing irrigation water to its shareholders for irrigation of lands within the service area during the mitigation year shall be included in calculating the obligation of the Ground Water Districts.
- (5) Existing accounting procedures employed by Water District 01 should not be modified and the accounting will be the final year-end accounting by the Water District 01 Watermaster.
- (6) Any water released past Milner Dam during the mitigation year for hydropower generation or related to Endangered Species Act requirements shall be accounted for by the Water District 01 Watermaster and shall not increase the mitigation obligation of the Ground Water Users.
- (7) The Department of Water Resources shall examine the diversion and climate-based water requirements of the mitigation year and adjust mitigation obligations downward if sufficient precipitation or other circumstances indicate that a full water supply was available to Twin Falls with a diversion less than 1,009,100 acre-feet.
- (8) If on any day the Twin Falls Canal Company diverts less than the natural flow that is available to its water rights in priority, such foregone amount of natural flow diversion will be deducted from any obligation of the Ground Water Users.
- (9) In no event will any actual shortfall be made up by the Ground Water Users as determined by the Watermaster, which exceeds the actual current shortfall to Twin Falls Canal Company as determined by the Director of the Department.
- (10) The calculated amount of the Minidoka Dam Return Flow Credit shall

be deducted from any obligation of the Ground Water Users.

The mitigation obligation resulting from Twin Falls Canal Company's irrigation season diversions will be replaced by the Ground Water Districts by the delivery of storage water credited to the storage water account of Twin Falls Canal Company as determined by order of the Director. The mitigation water will be delivered to Twin Falls Canal Company as it is needed during the irrigation season.

In the event that direct replacement water from storage is not available, the Ground Water Users will reimburse Twin Falls Canal Company (or the senior water user who has been determined to be materially injured) for any actual seasonal water supply shortfall at the Water District 1 Rental Pool rate for the short-fall alleged by the Director to have occurred during the current season.

b. Other SWC Entities

The water supply of each member of the SWC is different. In the event there is a determination of material injury to other entities caused by groundwater pumping, the process for determining the amount of mitigation in all cases will be determined by the Watermaster in completing his annual final water distribution and accounting. Other material injury to other SWC Entities will be mitigated by underwriting and guaranteeing their supply in the same manner as described above for Twin Falls Canal Company.

The Ground Water Districts reserve the right to modify this Mitigation Plan as needed to secure approval and to comply with other requirements that may be imposed by the Director

III. ADDITIONAL INFORMATION

This Mitigation Plan is based upon the following facts:

- (1) By their delivery call, the Surface Water Coalition seeks to establish water

rights that are greater in quantity and reliability than what was originally appropriated. Their rights have yet to be adjudicated in the Snake River Basin Adjudication and remain pending subject to objections of record.

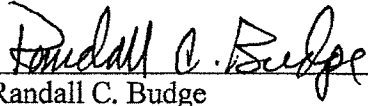
- (2) Ground Water Users are not responsible for reductions in water supply due to drought conditions or changed irrigation practices.
- (3) The Twin Falls Canal Company natural flow water rights are supplied primarily from the reach gains that accrue to the river in the Blackfoot to Neeley reach. These river gains have experienced substantial annual and seasonal variation in their natural flow supplies well before the beginning of groundwater development and Twin Falls Canal Company could never have expected their natural flow rights to be fully satisfied from reach gains arising below Blackfoot.
- (4) All other Surface Water Coalition members including American Falls Reservoir District No. 2 are totally dependent upon storage water that is supplied primarily from snow-melt and late spring runoff, and they have no entitlement to groundwater.

IV. RELIEF REQUESTED

The Ground Water Users requests that:

1. IDWR advertise this Mitigation Plan as required under the CM Rules;
2. IDWR hold any hearing as may be required;
3. The Director enter an order approving this Mitigation Plan upon such terms and conditions as may be reasonable and necessary to comply with CM Rule 43.
4. For such other and further relief as the Director may determine is reasonable and necessary to enable the Ground Water Users to mitigate for any material injury to senior surface water rights in Water District 120 to avoid or reduce curtailment.

Submitted this 9th day of November, 2009.



Randall C. Budge
Candice M. McHugh

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2009, I served a true and correct copy of the foregoing IGWA'S MITIGATION PLAN FOR THE SURFACE WATER COALITION DELIVERY CALL by delivering it to the following individuals by the method indicated below, addressed as stated:

Gary Spackman, Interim Director Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 Fax: 208-287-6700	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
C. Tom Arkoosh Arkoosh Law Offices, Chtd. 301 Main Street; P.O. Box 32 Gooding, ID 83330	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, Idaho 83318-0248	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Roger D. Ling Ling, Robinson & Walker 615 H Street; P.O. Box 396 Rupert, Idaho 83350-0396	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
John A. Rosholt John K. Simpson Travis L. Thompson Barker, Rosholt & Simpson 113 Main Avenue W., Ste 303 Twin Falls, ID 83301-6167	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Kathleen Marion Carr U.S. Department of the Interior 960 Broadway, Ste 400 Boise, Idaho 83706	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Matt J. Howard U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

Michael S. Gilmore Deputy Attorney General Civil Litigation Division P.O. Box 83720 Boise, ID 83720-0010	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Josephine P. Beeman Beeman & Associates 409 W. Jefferson Boise, Idaho 83702-6049	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Sarah H. Klahn White & Jankowski 511 16 th Street, Ste 500 Denver, CO 80202	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Terry T. Uhling J.R. Simplot Company P.O. Box 27 Boise, ID 83707	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Michael C. Creamer Jeffrey C. Fereday Givens Pursley P.O. Box 2720 Boise, Idaho 83701-2720	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
James C. Tucker Idaho Power Company P.O. Box 70 Boise, Idaho 83707	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, Idaho 83205	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

Randall C. Budge

Exhibit A

**IGWA MEMBERS
November, 2009**

- Aberdeen American Falls Ground Water District
- Bingham Ground Water District
- Bonneville-Jefferson Ground Water District
- Clark Jefferson Ground Water District
- Madison Ground Water District
- Magic Valley Ground Water District
- North Snake Ground Water District
- Fremont Madison Irrigation District
- Goose Creek Irrigation District
- South West Irrigation District
- City of American Falls
- City of Blackfoot
- City of Chubbuck
- City of Heyburn
- City of Jerome
- City of Paul
- City of Rupert
- Busch Agricultural
- Jerome Cheese
- United Water of Idaho

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE IDAHO GROUND)	CM-MP-2009-007
WATER APPROPRIATORS, INC.'S)	
MITIGATION PLAN IN RESPONSE TO THE)	ORDER APPROVING
SURFACE WATER COALITION'S WATER)	MITIGATION PLAN
DELIVERY CALL)	
_____)	

PROCEDURAL HISTORY

This matter came before the Director of the Department of Water Resources ("Director" or "Department") on January 14, 2005 with the filing of a letter ("Letter") and petition ("Petition") by members of the Surface Water Coalition ("SWC").¹ The Letter and Petition sought administration and curtailment of junior ground water rights. The Director of the Department considered the Letter and Petition as a delivery call under the Department's Conjunctive Management Rules ("CM Rules"), IDAPA 37.03.11 *et seq.*

On February 14, 2005, the former Director entered the first of a series of orders ("February 2005 Order") in this matter, which provided an initial response to the Letter and Petition. The February 2005 Order was followed by an order issued on May 2, 2005 ("May 2005 Order"), which superseded an order issued on April 19, 2005. Based on forecasting from the United States Bureau of Reclamation ("USBR") and the United States Army Corp of Engineers for the unregulated inflow into the Upper Snake River Basin at the Heise Gage, the May 2005 Order predicted that some members of the SWC would be materially injured by junior ground water pumping and ordered curtailment of junior users in lieu of acceptable replacement water being provided to mitigate for the depletions causing the injury. During the 2005, 2006, and 2007 irrigation seasons, the Director issued seven supplemental orders regarding material injury predictions to the SWC. Under these orders, the Idaho Ground Water Appropriators, Inc.

¹ The Surface Water Coalition is made up of the 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.

(“IGWA”)² was authorized by the Director to mitigate for material injury to the SWC with replacement water plans.

On September 5, 2008, following a recommended order (“Recommended Order”) from hearing officer Gerald F. Schroeder, the Director issued a final order in this matter (“2008 Final Order”), in which he ruled on all issues raised at hearing, with the exception of stating his methodology for determining material injury to the SWC’s reasonable in-season demand and reasonable carryover

On July 24, 2009, the Honorable John M. Melanson issued his *Order on Judicial Review*, which found that the Director’s decision to bifurcate his orders was unlawful under the IDAPA. Judge Melanson also determined that the replacement water plans previously approved by the Director did not satisfy the requirements of Rule 43 of the Conjunctive Management Rules, and that, in order for a junior ground water user to derive the benefits of providing replacement or mitigation for depletions causing injury to senior water right users, the junior water right holder must propose a mitigation plan, and the Department must approve the plan under CM Rule 43.

On November 9, 2010, IGWA filed its *Mitigation Plan for the Surface Water Coalition Delivery Call* (“the mitigation plan”). The Department published notice of the mitigation plan. The mitigation plan was protested by the SWC and by the USBR.

On April 7, 2010, upon an order of remand from Judge Melanson, the Director issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order sets out the process by which the Director will determine material injury, if any, to members of the SWC.

On May 25-26, 2010, the interim director of the Department conducted a hearing for protests against the mitigation plan. At the hearing, the USBR withdrew its protest on the record.

DESCRIPTION OF THE MITIGATION PLAN

The mitigation plan generally proposes supplying water stored in Snake River reservoirs to the SWC “that will be available on an annual basis for delivery to SWC entities as may be required by the Director’s orders.” The storage water supply for use under the mitigation plan will be “secured by agreements entered into between IGWA and storage space holders in the Upper Snake Reservoir System.” IGWA represented it controls 68,000 acre-feet of storage water. The mitigation plan recognizes that the “exact amount of water required to be delivered to SWC entities under this Mitigation Plan cannot be known in advance but can be expected to vary annually based upon the forecasted water supply and reasonable irrigation requirements which are used to determine the amount of water needed for the irrigation season and reasonable carryover storage.” Finally the mitigation plan seeks express limitations or prohibitions on

² IGWA is comprised of ground water districts, irrigation districts, municipal providers, and commercial and industrial water users. A list of members is attached as the last page of IGWA’s Mitigation Plan.

requiring mitigation if the SWC fails to comply with very strict conditions that will be discussed later in this order.

REQUIREMENTS OF A MITIGATION PLAN

CM Rule 43.a requires the following components be included in a plan:

043. MITIGATION PLANS (RULE 43).

01. Submission of Mitigation Plans A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information:

- a. The name and mailing address of the person or persons submitting the plan.
- b. Identification of the water rights for which benefit the mitigation plan is proposed.
- c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.
- d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03.

The mitigation plan contained IGWA's name and mailing address.

The mitigation plan did not specifically identify "the water rights for which benefit the mitigation is proposed." Nonetheless, the mitigation plan is filed to address a specific petition for delivery call that identifies the senior water rights (natural flow and storage) that may be injured by depletions to Snake River flows caused by ground water pumping. The rights have been expressly identified in the previous litigation in the larger contested case and need not be expressly repeated in the mitigation plan. *See May 2005 Order* at 11-16.

Finally, information about the Snake River reservoirs was also presented in the larger contested case. The volume capacity of the reservoirs and the frequency of fill need not be repeated in the mitigation plan. *See Recommended Order* at 13-17; 34-36.

The Director has sufficient information to evaluate the factors set form in CM Rule 43.03.

FACTORS CONSIDERED

CM Rule 43 states as follows:

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water 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 pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

Rule 43 does not require the Director to apply each of the factors to the mitigation plan. Nonetheless, the rule requires that the Director review the mitigation plan against a sufficient number of factors to assure adequate breadth of review.

ANALYSIS OF THE MITIGATION PLAN

The closing arguments of parties define their respective and mutually extreme positions.

IGWA stated that the mitigation plan proposes providing storage water at the times and quantities required by the Director. In the details of its presented testimony, however, IGWA suggested that the mitigation water should be supplied after the irrigation season is over through an adjustment of the Water District 01 accounting of deliveries of storage water and natural flow. At a minimum, IGWA argued it should not be required to show it has contractually secured its obligation for delivery of storage water until the day when the storage in the Snake River

reservoirs is allocated to the various space holders. This “day of allocation” often falls in late June or early July, well into the irrigation season.

IGWA’s argument adopts the theory that if water is diverted, a supply will be provided. Underlying the argument is a presumption that there is always sufficient storage to make the SWC users whole. Yet, IGWA argues that these always available supplies of water cannot be acquired prior to the irrigation season.

IGWA’s position places an unreasonable burden upon the SWC senior water right holders that the water supply will be available at the time of need. The SWC must have an assurance at the beginning of the irrigation season that water can be provided when the water is needed. The proposals by IGWA do not provide these assurances.

In contrast, the SWC argued that storage water rented from willing lessors through the Idaho Water Resources Board’s Upper Snake River Rental Pool should not be a source of mitigation water for IGWA because IGWA is proposing to use the same source of water for mitigation that ground water pumping is depleting, causing a double negative impact to surface water supplies.

The SWC argument fails because the Snake River reservoirs fill in many years despite ground water pumping. When there is sufficient water in the reservoirs to provide the demand shortfall to SWC members caused by ground water pumping, the ground water users should not be prohibited from supplying the mitigation water to the SWC from rented storage water.

IGWA can rent storage water or acquire options to rent water prior to the irrigation season. These contracts may be more expensive prior to the lessor or potential lessor knowing the water supply that will be available. Nonetheless, as junior water users, IGWA cannot shift this risk of uncertainty upon the SWC.

IGWA should provide sufficient evidence of preseason commitment of water rights to provide any demand shortfalls projected by the Director in steps three and four of the Methodology Order.

IGWA’S PROPOSED CONDITIONS

IGWA proposed ten limitations on its obligation to mitigate for material injury to the SWC. Some of these limitations would apply only to the Twin Falls Canal Company water obligation, used by IGWA as an example for application of the mitigation plan. Each of these proposed limitations will be addressed immediately following quotation of the proposed limitation.

- (1) If Twin Falls Canal Company does not divert 1,009,100 acre-feet no mitigation requirement shall exist if Twin Falls Canal Company has carry-over storage remaining when the final Water District 01 Water Right Accounting is complete for the mitigation year.

This proposed limitation ignores the requirement that the Director consider reasonable storage water carryover in determining the obligation of IGWA. The proposed limitation assumes an after season accounting before mitigation is required. Finally the condition attempts to establish demand water volume not consistent with the Methodology Order. The entire proposed limitation should be rejected.

(2) All water spilled at the end of the Twin Falls Canal Company canal system shall be measured and accounted for by the Watermaster. Unreasonable waste shall be accounted for and deducted from any obligation of the Ground Water Districts.

Measurement of spill at the end of the SWC delivery systems is not the job of the Water District 01 watermaster. Furthermore, the interim director recognizes that water deliveries through long and complex conveyance systems cannot always immediately respond to changes in weather and water user behaviors. The interim director rejects this limitation, but agrees that IGWA should not be responsible for waste by the SWC. In the future, it may be possible to measure spill at the end of the SWC's conveyance systems. The Director reserves the right to re-examine measurement of spill.

(3) Any water leased to others by Twin Falls Canal Company shall be considered a delivery to Twin Falls Canal Company for the purpose of calculating any obligation of the ground water users.

This proposed method of calculating obligation at the time of need is appropriate.

(4) Only water diverted and used by Twin Falls Canal Company for beneficial purposes of providing irrigation water to its shareholders for irrigation of lands within the service area during the mitigation year shall be included in calculating the obligation of the Ground Water Districts.

This proposed method of calculating obligation at the time of need is appropriate.

(5) Existing accounting procedures employed by Water District 01 should not be modified and the accounting will be the final year-end accounting by the Water District 01 Watermaster.

Accounting procedures may change as to employ better methods of accounting or interpretations of the law. This proposed limitation also requests year-end determination of mitigation obligation. The interim director entirely rejects the proposed limitation.

(6) Any water released past Milner Dam during the mitigation year for hydropower generation or related to Endangered Species Act requirements shall be accounted for by the Water District 01 Watermaster and shall not increase the mitigation obligation of the Ground Water Users.

This proposed limitation too broadly proposes that **any** “water released past Milner Dam during the mitigation year for hydropower generation or related to Endangered Species Act requirements . . . shall not increase the mitigation obligation . . .” If a specific SWC entity leases water for hydropower or flow augmentation, either through a direct lease or as a participant in the rental pool, the water provided for this purpose by the SWC entity must be added into the total supply available to the SWC member to determine the adequacy of supply to the SWC member. Leases of water by other water right holders for hydropower or flow augmentation should not reduce the quantity of water needed for reasonable in season demand for the SWC members not participating in the specific lease.

(7) The Department of Water Resources shall examine the diversion and climate-based water requirements of the mitigation year and adjust mitigation obligations downward if sufficient precipitation or other circumstances indicate that a full water supply was available to Twin Falls with a diversion less than 1,009,100 acre-feet.

This proposed limitation again implies an end-of-year determination of obligation. The interim director rejects the proposed limitation except as it is inconsistent with the mid-irrigation season adjustments set forth in the Methodology Order.

(8) If on any day the Twin Falls Canal Company diverts less than the natural flow that is available to its water rights in priority, such foregone amount of natural flow diversion will be deducted from any obligation of the Ground Water Users.

This proposed condition ignores core principles of delivery of water in the arid West. A SWC member might have to divert its full authorized flow rate on the hottest day of the year and may not have to divert its full natural flow rate water on a cooler, rainy day. The SWC should not be penalized for simply using water as needed. The interim director rejects this proposed limitation in its entirety.

(9) In no event will any actual shortfall be made up by the Ground Water Users as determined by the Watermaster which exceeds the actual current shortfall to Twin Falls Canal Company as determined by the Director of the Department.

This proposed limitation is confusing and ambiguous and the interim director rejects the limitation in its entirety.

(10) The calculated amount of the Minidoka Dam Return Flow Credit shall be deducted from any obligation of the Ground Water Users.

Twin Falls Canal Company and North Side Canal Company are required to provide the Minidoka Dam Return Flow Credit to upstream SWC members. The return flow credit is part of the historical water supply, and is implicitly included in the Director’s determination of obligation in the Methodology Order. The interim director rejects this limitation in its entirety.

FINDINGS OF FACT

The mitigation plan contains sufficient information, as augmented by the information presented in the contested case for the delivery call and the hearing on the mitigation plan, to allow the interim director to evaluate the mitigation plan to determine its adequacy.

During many irrigation seasons, IGWA can rent or acquire options to rent storage water in the Snake River Reservoirs to supply mitigation or replacement water to the SWC.

IGWA can rent or acquire options to rent storage water prior to or at the beginning of the irrigation season.

Rental or acquisition of an option to rent storage water prior to or at the beginning of the irrigation season will assure the SWC of an adequate quantity of water for the upcoming irrigation season.

The rental of storage water by IGWA will not diminish the supply of water available to the SWC.

Storage water must also be provided for reasonable storage carryover at the end of the irrigation season.

CONCLUSIONS OF LAW

IGWA's proposed rental of storage water and delivery of the storage water and use of water pursuant to the mitigation plan is in compliance with Idaho law.

The mitigation plan will provide replacement water at the time and place required by the senior-priority water right. During many years, there will be sufficient storage water to offset the depletive effect of ground water withdrawal on the water available in the Snake River at such time and place as necessary to satisfy the rights of diversion from the Snake River.

The mitigation plan provides replacement water supplies to the senior-priority water right when needed during a time of shortage even though the effect of pumping is spread over many years.

Approval of the mitigation plan requires pre-irrigation season commitment of rented storage water to the SWC. This commitment must be proven by executed contract documents and obligation to the Upper Snake River Rental Pool of the storage for mitigation.

A contingency of the mitigation plan approval is that, if insufficient water is committed to assure protection of the senior-priority water rights, junior-priority ground water rights will be curtailed.

Storage in the Snake River reservoirs is a reliable source of replacement water.

The mitigation plan does not propose enlargement of the rate of diversion, seasonal quantity, or time of diversion under any water right being proposed for use in the mitigation plan.

The mitigation plan will maximize the beneficial use of water in the State of Idaho and promote conservation of water resources.

Use of storage water for mitigation is in the public interest and will not injure other water rights.

The mitigation plan, with flexibility for determining annual and seasonal requirements as set for in the Methodology Order, provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

ORDER

IT IS HEREBY ORDERED that *IGWA'S Mitigation Plan for the Surface Water Coalition Delivery Call* is **Approved**, subject to the following conditions:

IGWA's obligation to provide storage water shall be determined as set forth in the Methodology Order. The obligation includes mitigation for material injury to the SWC's reasonable in-season demand and reasonable carryover.

IGWA must provide proof of rental or an option to rent storage water and of a commitment of the storage water to the SWC within the deadlines provided by the Methodology Order and any order of the Director implementing the Methodology Order for a given year. Proof of rental or an option to rent storage water shall consist of fully executed and irrevocable contracts with holders of Snake River storage (fully disclosed in the contracts). Storage shall be committed to the SWC by IGWA submitting the storage rental or storage option contracts to the Upper Snake River Rental Pool and the Director with a written instruction to the Watermaster of Water District 01 that the underlying storage water is committed solely for mitigation to the SWC and that the contracts or options may only be released back to IGWA or the storage water lessors by directive to the Watermaster by the Director of the Department.

Waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member.

Water rented to another water user by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member. In addition, water placed in the rental pool by a SWC member and used for any purpose, including hydropower and flow augmentation below Milner Dam, shall be subtracted from IGWA's obligation to the SWC member.

IT IS FURTHER ORDERED that IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order. When the obligations for reasonable in-season demand and reasonable carryover are established, the determination of obligation shall be subject to a

hearing but the obligation will not be stayed during the pendency of hearing preparation and response by the Director to the request for hearing.

IT IS FURTHER ORDERED that, if IGWA does not provide proof of acquisition of storage water and commitment of storage water as set forth above, ground water rights pumping from the Eastern Snake Plain Aquifer will be curtailed according to the Methodology Order to provide water to the SWC.

DATED this 3rd day of June, 2010.



GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

RANDY BUDGE
CANDICE MCHUGH
THOMAS BUDGE
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOHN SIMPSON
BARKER ROSHOLT
PO BOX 2139
BOISE ID 83701-2139
jks@idahowaters.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

TRAVIS THOMPSON
PAUL ARRINGTON
BARKER ROSHOLT
113 MAIN AVE WEST STE 303
TWIN FALLS ID 83301-6167
tlt@idahowaters.com
pla@idahowaters.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

TOM ARKOOSH
CAPITOL LAW GROUP
PO BOX 32
GOODING ID 83330
tarkoosh@capitolawgroup.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

W. KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318-0248
wkf@pmt.org

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

KATHLEEN CARR
U.S. DEPT INTERIOR
960 BROADWAY STE 400
BOISE ID 83706
KathleenMarion.Carr@sol.doi.gov

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

MATT HOWARD
US BUREAU OF RECLAMATION
1150 N CURTIS ROAD
BOISE ID 83706-1234
mhoward@pn.usbr.gov

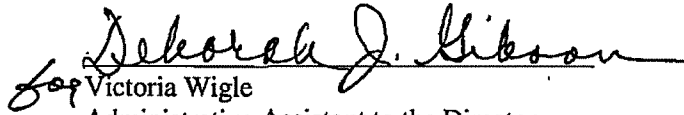
U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

LYLE SWANK
IDWR
900 N SKYLINE DR
IDAHO FALLS ID 83402-6105
(208) 525-7177
lyle.swank@idwr.idaho.gov

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

ALLEN MERRITT
CINDY YENTER
IDWR
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3033
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

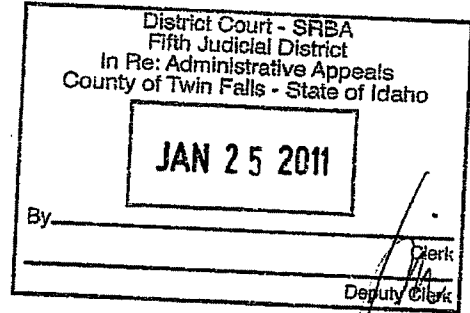
U.S. Mail, Postage Prepaid
 Facsimile
 E-mail


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

RECEIVED

JAN 26 2011

DEPARTMENT OF WATER RESOURCES



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

TWIN FALLS CANAL COMPANY, NORTH)
SIDE CANAL COMPANY, A & B)
IRRIGATION DISTRICT, AMERICAN)
FALLS RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT, and)
MINIDOKA IRRIGATION DISTRICT,)

Petitioners,)

vs.)

GARY SPACKMAN, in his capacity as)
Interim Director of the Idaho Department of)
Water Resources, and THE DEPARTMENT)
OF WATER RESOURCES,)

Respondents,)

and)

THE IDAHO GROUND WATER)
APPROPRIATORS, INC.,)

Intervenor.)

IN THE MATTER OF THE IDAHO)
GROUND WATER APPROPRIATORS,)
INC.'S MITIGATION PLAN IN RESPONSE)
TO THE SURFACE WATER COALITION'S)
DELIVERY CALL)

Case No. CV-2010-3075

**MEMORANDUM DECISION
AND ORDER ON PETITION
FOR JUDICIAL REVIEW**

Ruling: The Director's *Order Approving Mitigation Plan* is **affirmed**.

Appearances:

Travis L. Thompson of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

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

Chris M. Bromley and Garrick Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

Candice M. McHugh of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for the Idaho Ground Water Appropriators, Inc.

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case originated when Petitioners 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 (collectively, "Surface Water Coalition" or "SWC") filed a *Petition for Judicial Review* in the above-entitled district court seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department").¹ The final order under review is the *Order Approving Mitigation Plan* issued on June 3, 2010 by Interim Director Gary Spackman in IDWR Docket No. CM-MP-2009-007. The *Order* approved a mitigation plan submitted by the Idaho Ground Water Appropriators, Inc. ("IGWA") in response to a delivery call made by the Surface Water Coalition. The Surface Water Coalition asserts in its *Petition for Judicial Review* that the *Order*

¹ The case was reassigned by the clerk of the court to this Court on July 12, 2010, pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights*.

Approving Mitigation Plan is contrary to law in several respects and requests that this Court reverse the same.

B. Course of Proceedings and Statement of Facts.

At issue in this matter is one order (i.e., *Order Approving Mitigation Plan*) of a series of orders issued by the Director in response to a delivery call filed by the SWC in 2005. While the filing of the delivery call has resulted in numerous administrative proceedings before the Director and resulting orders not all of which are at issue here, context requires a brief review of the entirety of the delivery call commencing with its origin. Thus, a brief background of the delivery call will be provided followed by a recitation of the relevant facts and proceedings at issue in the SWC's *Petition for Judicial Review*.

1. Delivery Call Background.

The underlying administrative proceeding at issue here had its origin in 2005 when the SWC filed a delivery call with the Department requesting administration and curtailment of certain hydraulically connected junior ground water rights located in the Eastern Snake Plain Aquifer ("ESPA"). On May 2, 2005, former Director Karl J. Dreher issued an *Amended Order of May 2, 2005* in response to the delivery call, wherein he found that certain junior ground water diversions from the ESPA were materially injuring senior SWC natural flow and storage rights. R. Vol. I, pp. 1-66. The May 2, 2005 *Order* required IGWA to provide 27,700 acre-feet of replacement water in the form of a "replacement water plan" to the injured members of the SWC in lieu of curtailment. R. Vol. I, pp. 45-48.

During the 2005, 2006 and 2007 irrigation seasons, the Director issued a series of supplemental orders regarding material injury which likewise permitted IGWA to mitigate for material injury to the SWC with replacement water plans. Following a hearing before Hearing Officer Gerald F. Schroeder, and the Hearing Officer's issuance of his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, former Director David R. Tuthill issued a *Final Order Regarding the Surface Water Coalition Delivery Call* on September 5, 2008. R. Vol. I, pp. 140-156. Among other

things, the *Final Order* permitted IGWA to mitigate for material injury to the SWC with a replacement water plan. R. Vol. I, pp. 142–143. However, the *Final Order* did not rule on or set forth the methodology for determining material injury to the SWC’s reasonable in-season demand and reasonable carryover.

Petitions for Judicial Review of the Final Order Regarding the Surface Water Coalition Delivery Call were timely filed in Gooding County Case CV 2008-551 and the case was assigned to District Judge John M. Melanson. One of the issues raised was the validity under the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 (“CMR”) of the “replacement water plan” authorized by the Director in his *Final Order*. Another issue raised was whether the Director erred by failing to set forth the methodology for determining material injury to the SWC’s reasonable in-season demand and reasonable carryover (for storage) in his *Final Order*. On July 24, 2009, Judge Melanson issued his *Order on Petition for Judicial Review* affirming in part and reversing in part Director Tuthill’s decision. R. Vol. II, pp. 157–190. For reasons that will be discussed further in this *Memorandum Decision*, Judge Melanson determined that the replacement water plans previously approved by Director Tuthill did not satisfy the requirements of Rule 43 of the CMR. R. Vol. II, pp. 183–186. Judge Melanson also held that Director Tuthill erred in failing to set forth the methodology for determining material injury to the SWC’s reasonable in-season demand and reasonable carryover in his *Final Order*. R. Vol. II, p. 188. Judge Melanson remanded the case to the Department for further proceedings on the methodology for determining material injury to the SWC’s reasonable in-season demand and reasonable carryover. R. Vol. II, p. 189.

On April 7, 2010, Interim Director Gary Spackman (“Director”) issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*. On June 23, 2010, the Director issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”). In the *Methodology Order* the Director set forth the procedures, including a 10 step process, for determining material injury to the SWC’s reasonable in-season demand and reasonable carryover. On June 24, 2010, the Director issued his *Final Order Regarding*

April 2010 Forecast Supply (Methodology Steps 3&4); Order on Reconsideration (“As-Applied Order”). The *As-Applied Order* is the codification of the Director’s application of the *Methodology Order* for the 2010 irrigation season. It should be noted that neither the *Methodology Order* nor the *As-Applied Order* are at issue in this proceeding, although *Petitions for Judicial Review* seeking judicial review of both *Orders* have been filed and are currently pending before this Court in Gooding County Case CV 2010-382.²

2. Facts and Proceedings at Issue in the *Petition for Judicial Review*.

At issue in this proceeding is the Director’s approval of IGWA’s *Mitigation Plan for the Surface Water Coalition Delivery Call, Water District 120 (“Mitigation Plan”)*. The *Mitigation Plan* was submitted by IGWA to the Department in accordance with Rule 43 of the CMR on November 9, 2009. R. Vol. II, pp. 202–211. By its terms, the *Mitigation Plan* proposed to benefit “senior surface water rights diverting from the Snake River or its tributaries and administered by the Watermaster of Water District 01 that the Director has previously found or may in the future find to have been materially injured by the use of groundwater under junior groundwater rights.” R. Vol. II, p. 203.

The proposed *Mitigation Plan* was subsequently published by the Department in *The Times-News, The Post Register, The Idaho Statesman, and The Idaho State Journal*. R. Vol. II, pp. 213–219. Protests to the proposed *Mitigation Plan* were timely filed by the U.S. Department of Interior, Bureau of Reclamation, and the SWC.³ R. Vol. II, pp. 223–228. A hearing on the proposed *Mitigation Plan* was held before the Director on May 25-26, 2010. On June 3, 2010, the Director issued his *Order Approving Mitigation Plan*, wherein the Director approved the *Mitigation Plan* subject to certain specified conditions. R. Vol. II, pp. 274–286.

On July 1, 2010, the SWC filed a *Petition for Judicial Review* asserting that the *Order Approving Mitigation Plan* is contrary to law in several respects and requests that this Court reverse the same. The parties briefed the issues contained in the *Petition for*

² In conjunction with an opposed *Motion to Consolidate* the Court determined that although related, the issues in this case could proceed independently of the issues raised in proceedings pertaining to the *Methodology Order* and the *As-Applied Order*. See *Order Denying Motion for Consolidation* (Oct. 15, 2010).

³ The U.S. Bureau of Reclamation subsequently withdrew its protest and as such it is not at issue here.

Judicial Review and a hearing on the same was held before this Court on December 13, 2010.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held on December 13, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or December 14, 2010.

III.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), Chapter 52, Title 67, I.C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

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

The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the court shall not overturn an agency's decision

that is based on substantial competent evidence in the record.⁴ *Id.* The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs*, 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline*, 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

IV. ANALYSIS

A. **The approved *Mitigation Plan* complies with the requirements of the CMR.**

The SWC argues the Director's approval of the *Mitigation Plan* for an indefinite period without requiring the specific identification of a replacement supply of water is arbitrary, capricious and not supported by the evidence. The SWC asserts that the Director's conditioning the approval of the *Mitigation Plan* on the showing of a

⁴ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

committed replacement water supply on an as-needed annual basis in effect makes the *Plan* indistinguishable from the “replacement water plan” that was previously rejected by the Gooding County District Court. The SWC further asserts the *Mitigation Plan* does not comply with the requirements of the CMR because it does not provide a contingency plan in the event replacement water is unavailable. For the reasons explained below, this Court holds that the approved *Mitigation Plan* complies with the requirements of Rule 43 of the CMR and therefore the Director did not act arbitrarily or capriciously in approving the *Plan*.

1. CMR procedures for responding to a delivery call.

The CMR govern the procedures the Director must follow in responding to a delivery call made by the holder of a senior priority surface or ground water right against the holder of a junior priority ground water right in an area having a common ground water supply. CMR Rule 40 provides:

[U]pon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. 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

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a *mitigation plan* that has been approved by the Director.

IDAPA 37.03.11.040.01.a. and b (emphasis added). CMR Rule 010.15 defines *mitigation plan* as:

A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

IDAPA 37.03.11.010.15. Rule 43 of the CMR sets forth the requirements for a mitigation plan, the necessary procedures and the factors the Director may consider in reviewing a proposed mitigation plan for approval. The Rule provides in pertinent part:

043. MITIGATION PLANS (RULE 43).

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information:

a. The name and mailing address of the person or persons submitting the plan.

b. Identification of the water rights for which benefit the mitigation plan is proposed.

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03.

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

03. Factors to Be Considered. Factors that *may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to*, the following:

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.

b. *Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source.* Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at

times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water 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 pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

...

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

...

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

IDAPA 37.03.11.043.01 *et. seq.* (emphasis added).

2. The proposed *Mitigation Plan* approved by the Director.

On November 9, 2009, IGWA submitted the proposed *Mitigation Plan* to the Director. The *Mitigation Plan* was intended to be an on-going plan for an indefinite term that could be implemented on a year-to-year basis as necessary to avoid or reduce curtailment of ground water rights. IGWA described the purpose of the *Mitigation Plan* as follows:

Because future obligations for mitigation cannot be determined in advance, this *Mitigation Plan* is intended to secure advance approval of the mitigation methods and practices that junior groundwater users can rely upon and implement in order to avoid curtailment. It is the desire and intent of the Ground water users by this mitigation plan to have a permanent and ongoing mitigation plan in place that can be implemented on a year-to-year basis as necessary to avoid or reduce curtailment.

R. Vol. II, p. 191.

Generally speaking the *Mitigation Plan* proposed that, subject to certain conditions, IGWA would secure storage water located in Upper Snake Reservoir System by entering into agreements with various storage space holders in the system making water available for delivery to SWC members should it become necessary to mitigate for material injury.

On June 3, 2010, following a hearing on protests to the *Mitigation Plan*, the Director entered his *Order Approving Mitigation Plan*, wherein he approved the *Mitigation Plan* subject to certain conditions. The Director concluded that IGWA's proposal of securing storage water in the Upper Snake Reservoir System and delivering it to the members of the SWC under the terms of the *Plan*, together with the imposed conditions, complied with Idaho law, would maximize the beneficial use of water in the state and promote conservation of water resources, and was in the public interest. R. Vol. II, pp. 282--283. Among other things, the *Order* requires a "pre-irrigation season commitment of rented storage water to the SWC," that must be proven by "executed contract documents and obligation to the Upper Snake River Rental Pool of the storage for mitigation." R. Vol. II, p. 282. If a pre-irrigation season commitment is not proven by IGWA to the satisfaction of the Director, the *Order* contemplates curtailment:

A contingency of the mitigation plan approval is that, if insufficient water is committed to assure protection of the senior-priority water rights, junior-priority ground water rights will be curtailed.

R. Vol. II, p. 282.

With respect to the procedures for determining IGWA's obligation for mitigation in a given year, as well as the deadlines by which IGWA has to prove its pre-irrigation season commitment to the Director, the *Order* incorporates those procedures and deadlines set forth in the *Methodology Order*. In the *Methodology Order*, the Director set forth 10 steps to be taken annually governing the determination of material injury to the SWC in a given year and IGWA's obligation to mitigate. The first four steps are pertinent here, and provide in pertinent part as follows:

Step 1: By April 1, members of the SWC will provide electronic shape files to the Department delineating the total irrigated acres within their

water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%

Step 2: Starting at the beginning of April, the Department will calculate the cumulative CWN [crop water need] volume for all land irrigated with surface water within the boundaries of each member of the SWC. . . .

Step 3: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within 14 days after the issuance of the Joint Forecast, the Director will predict and issue an April Forecast Supply for the water year and will compare the April Forecast Supply to the baseline demand (“BD”) to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season. . . .

Step 4: If the April DS is greater than the reasonable carryover shortfall from the previous year, junior water ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and 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 difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users fail or refuse to provide this information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users. . . .

R. Augmented, pp. 33-34. Although the *Methodology Order* is the subject of a separate petition for judicial review, for purposes of this decision, the validity of the *Methodology Order* is assumed.

3. Gooding County Case No. 2008-551.

This case arose following remand in Gooding County Case No. 2008-551 where judicial review was sought, among other things, on the Director’s implementation of a “replacement water plan” process in lieu of following the procedures set forth in the CMR in responding to the same SWC delivery call. *See Order on Petition for Judicial Review*, Case No. 2008-551, Gooding County (July 24, 2009); R. Vol. II., p. 157. The Director justified the use of a replacement water plan as a short term form of relief akin

to a court issuing a preliminary injunction pending the approval of a longer term mitigation plan. The District Court rejected the process holding that the use of a replacement plan in effect becomes an unauthorized substitute for a mitigation plan thereby allowing the Director to circumvent the requirements of the CMR. *Order on Petition for Judicial Review* at 27-33. The Court held that in responding to a call the Director must follow the procedural framework set forth in the CMR. *Id.*

Relevant to the issues in this case was the Director's approval of allowing shortfalls to reasonable in-season demand and reasonable carryover to accrue and be carried forward into the following irrigation season as a debit owed to SWC storage supplies. In the event the reservoir system filled to capacity the following year, any accrued shortfall owed the SWC would then be cancelled. Conversely, if the reservoir system did not fill and a future shortfall was predicted, junior ground pumpers would then be required to acquire and provide actual replacement water in time of need in order to avoid curtailment. *Id.* at 19. The Director's reasoning in support of this approach was to allow junior ground pumpers to avoid the cost associated with securing the actual replacement water (as opposed to a "paper" accounting of water owed) which may ultimately become unnecessary should the reservoir system fill to capacity. *Id.* The approval was based on the finding that during drought periods replacement water has always been available somewhere at a price. *Id.*

The District Court characterized the process as a "wait and see" approach and held that while Rule 43 of the CMR expressly authorized such an approach, the Rule unambiguously required a "contingency plan" in the event actual replacement water could not be obtained. The Court reasoned that unlike administration as between surface rights, curtailment of ground water rights in the midst of the irrigation season was unlikely to provide timely relief to senior rights. Ultimately the risk of not being able to obtain replacement water would then unconstitutionally be borne by the senior right holders. *Id.* The Court explained the potential consequences as follows:

In the event replacement water could not be obtained in the following irrigation season or was determined too costly to obtain, ordering curtailment after the irrigation season has already begun or is about to begin presents new issues and problems. Both senior and juniors will have already planted crops. At that point curtailment may not timely remediate for the carry-over shortfall. The seniors are therefore forced to

assume losses and adjust their cropping plans based on not having the anticipated quantity of carry-over storage. The Director is also faced with the issue of as to whether or not to curtail junior ground water users based on futile call as to the instant irrigation season or considerations regarding lessening the impact of economic injury. The Hearing Officer aptly pointed out this dilemma: ‘Curtailment of the ground water users may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous economy.’ Ultimately, the prior appropriation doctrine is turned upside down. Therefore, unless assurances are in place that carry-over shortfalls will be replaced if the reservoirs do not fill, the risk of shortage ultimately falls on the senior. As such, the very purpose of the carry-over component of the storage right – insurance against risk of future shortage – is effectively defeated.

Id. at 20. The District Court ultimately concluded: “While water may be available somewhere, the failure to require any protections for seniors is contrary to the express provisions and framework of the CMR.” *Id.* at 19. The Court did however suggest how the process could be remedied in compliance with the CMR:

This does not mean that juniors must transfer replacement water in the season of injury, however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example.

[FN] An option for water or some other mechanism for securing water pursuant to a long term mitigation plan where the cost would be less than actually transferring or leasing water.

Id. Following remand, IGWA submitted, and the Director approved with conditions, the subject *Mitigation Plan* now at issue.

4. The *Mitigation Plan* complies with the requirements of the CMR and satisfies the concerns addressed by the District Court in the Gooding County case.

One of the issues that has overshadowed the application of the CMR with respect to mitigation plans is ensuring a timely meaningful response to a delivery call so as to avoid injury to senior rights, while at the same time allowing holders of junior ground water rights the meaningful opportunity to submit and seek approval of a mitigation plan so as to avoid curtailment. The issue is complicated because the Director must make

predictions regarding water supplies; climatic conditions can vary significantly and unpredictably within an irrigation season; and mitigation to remediate for the depletive effects of ground water withdrawals can be provided in a number of different ways and combinations. The less certainty associated with a particular mitigation plan leaves more room for disagreement and ultimately a longer approval process as well as uncertainty as to the outcome. Consequently, a preferable mitigation plan is one that applies to more than just the instant irrigation season. However, even a long term plan would not entirely eliminate uncertainty or reevaluation by the Director because the Director must still make predictions regarding the water supply as well as determinations regarding the replacement water obligations. Nonetheless, under a long term plan the scope and complexity of the issues that the Director would be required to address would be significantly less than if a completely different mitigation plan were submitted for approval every year. Ultimately under a long term plan the result is less delay and more certainty and predictability for both senior and junior right holders.

a. Rule 43 expressly authorizes the implementation of a long term mitigation plan.

The SWC argues the Director abused his discretion by approving the *Mitigation Plan* for an indefinite term. This Court disagrees. Rule 43 does not preclude the Director from approving a mitigation plan on a long term basis, provided the plan meets certain criteria. Rule 43 expressly contemplates the use of replacement water as mitigation extending over multiple seasons. Rule 43.03.c provides that: “A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply.” Provided that the plan includes “contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.” Clearly this provision expressly authorizes the approval of a mitigation plan on a long term basis and does not impose any limitations as to a particular term. This is also consistent with the District Court’s holding in the Gooding County case.

b. Curtailment can be a “contingency provision” if curtailment will prevent injury to senior rights.

The SWC argues the *Mitigation Plan* does not provide a contingency plan as required by Rule 43. This Court disagrees to the extent the *Methodology Order* is determined to be valid. Curtailment can be a contingency plan provided it will prevent injury to senior rights. One reason the Gooding County District Court rejected the “replacement water plan” was because the process did not require an actual commitment of water going into the irrigation season. As such, the risk of IGWA not being able to obtain replacement water fell squarely on the SWC. The approved *Mitigation Plan* eliminates that risk by requiring the actual commitment of water as soon as the demand shortfall is calculated, otherwise curtailment is ordered at the outset of the irrigation season. The conundrum addressed in the Gooding County case is avoided because actual water is committed. The Director is not faced with the decision of curtailing ground water pumpers with crops in the ground when curtailment may not provide timely relief to senior rights. Tr. Vol. I, p. 44. Junior groundwater pumpers are on notice going into the irrigation season that any cropping decisions are contingent on the quantity of replacement water committed at the beginning of the season. They are further aware that they will not be allowed to pump out of priority if that replacement water is not timely secured. In sum, curtailment under the *Mitigation Plan* can be a contingency provision if ordered at the beginning of the irrigation season consistent with the deadlines in the *Methodology Order* and assuming the validity of the *Methodology Order*.⁵

c. The Director did not act arbitrarily or capriciously or abuse his discretion by allowing IGWA to secure replacement water on an annual basis as opposed to the full term of the *Mitigation Plan*.

The *Mitigation Plan* requires that IGWA demonstrate committed replacement water consistent with the deadlines set forth in the *Methodology Order*. In 2010, IGWA

⁵ The caveat is that curtailment may not be sufficient if the amount of replacement water secured at the beginning of the season turns out to be short. The *Methodology Order* provides that in such a circumstance ground pumpers will not be required to provide additional water nor will they be curtailed. *Methodology Order* at 35. The Court makes no ruling on the validity of that determination as issues pertaining to the *Methodology Order* are addressed in a separate proceeding. Again this ruling assumes the validity of the *Methodology Order*.

provided replacement water through a series of renewable one-year term leases. The SWC argues the Director abused discretion by approving the *Mitigation Plan* for replacement water without requiring a showing of a secured definite water supply for the full term of the *Plan*. This Court disagrees.

The obligation, if any, of replacement water varies annually. The *Order Approving Mitigation Plan* requires that:

IGWA must provide proof of rental or an option to rent storage water and of a commitment of the storage water to the SWC within the deadlines provided by the Methodology Order and any order of the Director implementing the Methodology Order for a given year. Proof of rental or an option to rent storage water shall consist of fully executed and irrevocable contracts with holders of the Snake River storage (fully disclosed in the contracts). Storage shall be committed to the SWC by IGWA submitting the storage rental or storage option contracts to the Upper Snake River Rental Pool and the Director with a written instruction to the Watermaster of Water District 01 that the underlying storage water is committed solely for mitigation to the SWC and that the contracts or options may only be released back to IGWA or the storage water lessors by directive to the Watermaster by the Director of the Department.

...

IGWA's obligation for mitigation shall be determined as set forth in the Methodology Order. *When the obligations for reasonable in-season demand and reasonable carryover are established, the determination of obligation shall be subject to a hearing but the obligation will not be stayed during the pendency of hearing preparation and response by the Director to the request for hearing.*

R. Vol. II, pp.283–284 (emphasis added).

As discussed previously, the CMR authorize a long term mitigation plan. The *Mitigation Plan* provides replacement water at the time and place required by the senior priority water right holder to avoid injury. The replacement water is secured with a contract for the commitment of water at the beginning of the irrigation season as opposed to merely an accounting of the shortfall owed. The failure to provide proof of such commitment results in curtailment or partial curtailment at the outset of the irrigation season pursuant to a firm deadline. Curtailment in accordance with the deadlines at the outset of the irrigation season will satisfy the contingency requirement in the event

replacement water is not secured. The Director conducted a hearing on the proposed *Mitigation Plan* in accordance with Rule 43.02. The only variable left to an annual determination is the obligation (quantity) of replacement water which necessarily includes a review of the reliability of the source of the quantity pledged, if any.⁶ The Director's approval of the *Mitigation Plan* includes the opportunity for a hearing on this limited determination. Further, the *Plan* provides that the obligation determination will not be stayed during the pendency of the hearing. Therefore, no delays in administration occur despite the opportunity for a hearing.

Recognizing that the obligation will vary year-to-year, in addition to other factors, if a mitigation plan is to be approved on a long term basis, this Court fails to find a meaningful distinction between requiring a showing of commitment of replacement water for the entire length of the long term mitigation plan or requiring a showing of commitment on an annual basis prior to the commencement of any irrigating. Assuming for the sake of discussion the *Mitigation Plan* was for a definite long term period and IGWA secured a quantity of replacement water for the entire term of the plan. The quantity secured represents the maximum secured but not necessarily the quantity of water owed in the event of a shortfall. The quantity will vary. As such, a long term plan for a definite period would still require that the Director determine the replacement water obligation on a periodic basis. Any shortfall exceeding the maximum would result in a partial curtailment or the securing of more replacement water. Senior surface users could also change the number of irrigated acres in excess of the five percent from the previous year as addressed in Step 1 of the *Methodology Order* requiring a reevaluation of the obligation. Finally, even under a long term plan the reliability of the replacement source would still have to be reevaluated on an annual basis given the "last to fill priority" rule discussed elsewhere in this opinion.

Given that the water obligation will vary, as well as other factors, a periodic review of the water obligation is inescapable irrespective of the term of a mitigation plan. Therefore even if the *Mitigation Plan* were for a long term definite period, the same or similar conditions would still need to be imposed. Accordingly, the Court cannot find

⁶ The Department acknowledged in its responsive briefing and at oral argument that a hearing on the mitigation obligation would necessarily include the opportunity to be heard on the reliability of the replacement source.

that the Director acted arbitrarily, capriciously, or abused his discretion in approving the *Mitigation Plan* for an indefinite term provided the conditions are met and the deadlines are strictly enforced should curtailment or partial curtailment become necessary. Recognizing that water supplies vary significantly it would appear that one way to achieve a mitigation plan that protects senior rights but does not require that juniors provide more water than may be necessary is to adopt a plan that sets forth a framework which incorporates a process for addressing those limited issues that that will vary annually provided that there has been preapproval of the process consistent with the procedures set forth in the CMR. The *Mitigation Plan* meets the requirements of the CMR and satisfies the concerns addressed in the Gooding County 551 case. Therefore the Court cannot find that the Director abused his discretion in approving a plan that requires the commitment of replacement water on an annual basis prior to the irrigation season.

d. The SWC's argument that the *Order Approving Mitigation Plan* fails to consider the reliability of the source is unsupported by the record.

The SWC argues the Director's approval of the *Mitigation Plan* also fails to take into consideration the reliability of the source of the replacement water. One of the factors that may be considered under Rule 43 in determining whether the proposed mitigation plan will prevent injury to senior rights is the "reliability of the source of the replacement water over the term in which it is proposed to be used under the mitigation plan." IDAPA 37.03.11.043.03.h. The SWC argues that pursuant to the Water District 01 Rental Pool Rules in the event storage water is provided to IGWA through private leases and the reservoir system does not fill the following year, the storage space held by the lessors assumes a "last to fill priority" and therefore becomes the most junior storage in the reservoir system. The SWC argues this is a limitation on the reliability of the replacement source. The SWC asserts that the Director erred by failing to take into account this limitation in approving the *Plan*. Further, that because the evidence in the record supports this limitation, the Director's approval of the replacement source was not supported by substantial evidence.

This Court disagrees that the finding is not supported by the evidence as to the 2010 irrigation season as the reservoir system apparently filled and the last to fill rule was not an issue. However, for purposes of prospective application of the *Mitigation Plan*, the last to fill rule factors significantly in any determination pertaining to the reliability of the source of the replacement water. Tr. Vol. II, p. 295, lns. 7-10, *see also* Tr. Vol II, p. 529 (storage under private leases is a reliable source for one year but depending on reservoir fill may not be available in subsequent years). Indeed the priority of the source affects its availability and reliability and should be considered in determining whether or not a particular replacement source will in fact mitigate for injury. The Hearing Officer expressly acknowledged that “for purposes of refilling in subsequent years the space that has been used for a private lease becomes the most junior space in the reservoir system.” R. Vol. I, p. 101.

However, the evidence in the record establishes that the Director concluded in the *Order Approving Mitigation Plan* that the *Plan* “will provide replacement water at the time and place required by the senior-priority water right.” R. Vol. II, p. 281. It further states that IGWA’s obligation for mitigation will be determined as set forth in the *Methodology Order*, which provides that if shortfall exists, “junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage *water* or to conduct other approved mitigation activities that will provide *water* to the injured members of the SWC” R. Augmented, p. 122 (emphasis added). The *Order Approving Mitigation Plan* requires that IGWA provide proof of rental or an option to rent storage *water* and a commitment of storage *water* as opposed to the mere pledging of a *water right*, which may or may not provide actual water depending on fill conditions. R. Vol. II, p. 282. In addition, the *Order* provides further that a contingency of the approval is that if insufficient *water* is committed to assure protection of senior-priority rights then curtailment will be ordered.

While the SWC is correct in its assertion that the Director should take into account the reliability of the source of the replacement water, in this case storage water provided under secured leases, there is no indication that the Director will fail to do so in his annual review of the proof submitted by IGWA of the rental of storage water. Simply put, pursuant to the *Order Approving Mitigation Plan* in reviewing the contracts the

Director must ensure that the contracts secured by IGWA will provide actual *water* so as to mitigate for any material injury.⁷ *Id.* On review this Court must conclude that the Director will act in accordance with the directives and contingencies set forth in his *Order*.

5. The *Mitigation Plan* is not the same as the “replacement water plan” rejected in the Gooding County 551 Case.

The SWC argues the approved *Mitigation Plan* is indistinguishable from the “replacement water plan” previously rejected by the District Court in the Gooding County 551 case. This Court disagrees. Replacement water is an authorized form of mitigation under the CMR but not a substitute for circumventing the application of the CMR. For the reasons previously discussed, unlike the “replacement water plan,” the Director followed the notice and procedural requirements, as well as applied the factors, set forth in Rule 43.

B. The Director did not act arbitrarily or capriciously or abuse his discretion in approving storage water as the source of replacement water for mitigation.

The SWC asserts that because the Director found that the diversions under junior priority ground water rights cause material injury to senior surface and *storage* rights, the approval of the use of *storage* water for mitigation from the same system results in essentially a double negative impact to the supply of *storage* water. The SWC argues the Director erroneously concluded without any supporting analysis that the rental of storage water by IGWA will not diminish the supply of water available to the SWC. In support, the SWC refers to the uncontradicted testimony of its expert:

Q. Mr. Shaw, in your opinion, does using storage as the only mitigation source or the only source of water to provide mitigation magnify the effect of pumping on the storage reservoirs?

⁷ The Department acknowledges as much in its briefing; that as part of the hearing on the obligation the Director will review and allow hearing on the specific leases offered as replacement water. *IDWR Respondent's Brief* at 7.

A. I think any additional use of storage out of system affects carryover. And at some point that will have an impact on water availability out of the reservoirs.

Tr. Vol. II, p.528; see also Tr. Vol. II, p. 535.

In the *Order Approving Mitigation Plan* the Director concluded:

The SWC argument fails because the Snake River reservoirs fill in many years despite ground water pumping. *When there is sufficient water in the reservoirs to provide the demand shortfall* to SWC members caused by ground water pumping, the ground water users should not be prohibited from supplying mitigation water to the SWC from rented storage water.

R. Vol. II, p. 279 (emphasis added).

The Director's approval of the use of storage water is limited to the circumstance when there is sufficient water in the reservoir to cover the demand shortfall. While it may be uncontradicted that the use of storage for mitigation reduces the overall supply of storage water if the reservoir system does not fill, the SWC controls only 47% of the storage water in the system. R. Vol. I, p. 15-16. The carryover storage that is potentially affected is that of the lessors not the SWC. Subject to the "last to fill priority" rule, Water District 01 Rental Pool Rules authorize the lease of storage water to third parties. Other than the "last to fill priority" rule no further restrictions or prohibitions on the purpose for which the water can be leased, or to whom the water can be leased, have been presented to the Court. Accordingly, there is no legal basis for this Court to place restrictions on to whom storage water can be leased. Therefore, the Court cannot conclude that the Director abused his discretion in approving storage water as the sole source of mitigation, recognizing however, that the source pledged may not be available in subsequent years if the reservoir system does not fill. Towards that end, a factor that the Director must evaluate in conjunction with the annual mitigation obligation includes the reliability of the source pledged and allow the opportunity for a hearing thereon.

C. No substantial right of the SWC or its members was prejudiced with respect to the implementation of the *Mitigation Plan* for the 2010 irrigation season.

The SWC argues the Court should reverse the *Order Approving Mitigation Plan* on the basis that IGWA failed to comply with, and the Director failed to enforce, the

terms of the *Methodology Order* on which the *Order Approving Mitigation Plan* is conditioned during the 2010 irrigation season.

For context, the following events took place leading up to the approval of the *Mitigation Plan*. IGWA filed the *Mitigation Plan* on November 12, 2009. Ex. 1. On March 4, 2010, the District Court in the Gooding County 2008-551 case entered an *Order Staying Decision on Petition for Rehearing Pending Issuance of Final Revised Order*, which among other things, ordered that the Director enter an order by March 31, 2010, addressing the methodology for determining injury to reasonable in-season demand and reasonable carryover. On March 10, 2010, the Director entered a scheduling order setting a hearing on the *Mitigation Plan* for May 24-26, 2010.

The Director issued the *Methodology Order* on April 7, 2010. R. Augmented, p. 1. The *Methodology Order* provides in relevant part that “[w]ithin 14 days after the issuance of the Joint Forecast, the Director will predict and issue an April Forecast Supply for the water year.” *Methodology Order* at 34. The Joint Forecast was announced April 8, 2010. Petitions for reconsideration to the *Methodology Order* were filed April 21, 2010.

On April 29, 2010, the Director issued the *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* (“*April Forecast Supply Order*” or “*As-Applied Order*”) predicting a cumulative shortfall to the SWC of 84,300 acre-feet. *April Forecast Supply Order* at 2, R. Augmented, p. 45. According to the Director the issuance of the *As-Applied Order* was delayed beyond the 14 days specified in the *Methodology Order* in order to review the petitions for reconsideration to the *Methodology Order*. *As-Applied Order* at 1; R. Augmented, p. 44.

In accordance with the deadline set forth in the *Methodology Order*⁸, the *April Forecast Supply Order* required that by May 13, 2010 (14 days from issuance of order), IGWA establish to the satisfaction of the Director that it has secured 84,300 acre-feet to mitigate for the predicted material injury or curtailment would be ordered. *As-Applied*

⁸ The *Methodology Order* requires that if a demand shortfall is projected, junior ground pumpers are required to establish to the satisfaction of the Director their ability to secure water to mitigate for the shortfall by May 1 or within fourteen days from the issuance of the *As-Applied Order*, whichever is later in time. *Methodology Order* at 34.

Order at 4. Petitions for reconsideration to the *As-Applied Order* were also filed and a hearing was scheduled for May 24, 2010.

On May 13, 2010, IGWA filed a *Notice of Water Secured and Renewed Request for Stay*. The *Notice* also sought a stay pending the conclusion of the hearing on the *Mitigation Plan*. In response, the Director filed an *Order Regarding Filing Deficiency of IGWA's Notice of Secured Water* requiring IGWA to provide copies of the executed contracts, agreements or options securing the water and the quantity specifically pledged to the SWC delivery call by the close of business May 14, 2010. On May 14, 2010, IGWA filed a *Supplement to Notice of Secured Water* stating IGWA had pledged 53,000 acre-feet to the SWC delivery call, together with copies of executed written agreements for the commitment of water. Ex. 4001. The agreements are in the form of leases with cutoff dates for providing for automatic renewals and cutoff dates for reductions in the quantity leased. The latest renewal date for some of the leases is April 15 and the latest date to exercise a reduction in quantity is May 15. Prior to that date the cumulative minimum guaranteed under the leases is 27,500 acre-feet.⁹

On May 17, 2010, the Director issued an *Order Regarding IGWA Mitigation Obligation*, which revised the shortfall from 84,000 acre-feet to 62,232 acre-feet due to an unusually wet spring. R. Augmented, p. 63. The *Order Regarding IGWA Mitigation Obligation* found that IGWA had secured 58,707 acre-feet¹⁰ resulting in a shortfall of 3,525 acre-feet, which in turn would result in the curtailment of 13,208 acres. *Id.*

⁹ SUMMARY OF RENEWABLE IGWA WATER LEASES:

Entity	Quantity Minimum	Quantity Maximum	Renewal Date	Reduce Date
Aberdeen-Springfield Canal Company	10,000	20,00	02/01	05/01
Enterprise Canal Company	3,000	10,000	04/15	05/15
Palisades Water Users	500	1,000	04/15	05/15
Idaho Irrigation District	1,000	3,000	04/15	05/15
New Sweden	5,000	20,000	04/15	05/15
Snake River Valley Irrigation District	5,000	10,000	04/15	05/15
People's Canal Company	3,000	5,000	04/15	05/15
TOTAL	27,500	69,000		

¹⁰ In addition to the 53,000 acre-feet IGWA, received credit for 5,707 acre-feet for conversion, CREP and recharge, under a separate mitigation plan.

However, based on the District Court's Order in Gooding County 2008-444 case,¹¹ a case also involving the application of the CMR and which held that the Director was required to conduct a hearing on a proposed mitigation plan prior to ordering curtailment, the Director stayed curtailment pending the hearings on the *As-Applied Order*, the *Methodology Order* and the *Mitigation Plan* scheduled to begin May 24, 2010. R. Vol. II, p. 256.

Some of the objections to the Director's overall approval of the *Mitigation Plan* stem from what specifically occurred in 2010. However, the issues that arose in 2010 result in part from the delay in the issuance of the *Methodology Order*, which sets forth the entire process for determining material injury and establishing the mitigation obligation as well as the relevant deadlines. The *Mitigation Plan* was filed in November 2009 but the *Methodology Order* was not issued until April 7, 2010. This left little time for a hearing on the *Methodology Order*, the *As-Applied Order*, which applied the provisions of the *Methodology Order*, or on the *Mitigation Plan* in advance of the irrigation season. As such, junior ground pumpers had already made preparations for the forthcoming irrigation season. Curtailment at that point would have resulted in injury to junior pumpers with crops already in the ground. *See e.g. Aff. of Tim Deeg*, Ex. 4003. Although not free of uncertainty and risk to junior ground pumpers, the expectation under the deadlines and procedures set forth in the *Methodology Order* is that junior ground pumpers have some indication going into the season regarding water supplies and adjust cropping decisions accordingly. The Director therefore opted to allow parties to be heard on the series of orders before administering rights.

Although no unmitigated injury resulted to the SWC in 2010, the delay in the issuance of the *Methodology Order*, the deadlines of which the entire *Mitigation Plan* is conditioned, ultimately delayed final approval the *Methodology Order* which in turn delayed final approval of the *As-Applied Order* and ultimately the *Mitigation Plan*. However, the delay only has relevance with respect to the 2010 irrigation as the Director has now issued final approval of all orders. Prospectively, the deadlines established in the *Methodology Order* will control and should be strictly applied.

¹¹ *Order on Petition for Judicial Review*, Gooding County Case No. 2008-444 (June 19, 2009)(Clear Springs Foods Inc. and Blue Lakes Trout Farm, Inc. delivery call proceedings).

In addition, the argument was raised that the Director approved the replacement water sources prior to the expiration of the water quantity reduction deadline under the leases. Simply put, lessors could still reduce the quantity leased after the Director approved the leases. This Court agrees that as of the deadline for demonstrating the commitment of pledged water, all renewal and reduction deadlines for contingencies should have expired in order to eliminate any uncertainty as to the quantity pledged. On May 13, 2010, when the proof of commitments were initially filed and extended to the 14th, the quantity reduction deadline had not yet expired for most of the leases and would not expire until the May 15. Although the *Order Regarding Mitigation Obligation* was issued on May 17, 2010, the *Order* did not specifically address whether the Director confirmed that the quantity pledged had not been reduced. However, the Director at his ordering was provided with copies of the leases for review to ensure the commitment of pledged water. For purposes of review this Court can only assume that the Director acted in accordance with his directive. Nonetheless, as concerns any subsequent approval regarding mitigation obligations it must be unequivocal that any contingencies regarding replacement water have expired. Accordingly, for purposes of prospective application this will require that IGWA modify its leases with respect to the quantity reduction deadlines in order to meet the May 1 deadline set forth in the *Methodology Order*. The current May 15 deadline will not work with the deadlines in the *Methodology Order*.

Despite what occurred in 2010, no substantial right of the SWC was prejudiced with respect to the 2010 irrigation season. However, strict adherence to the deadlines set forth in the *Methodology Order* as set forth in the *Order Approving Mitigation Plan* is necessary so as to effectively promote certainty and predictability.

D. The Director did not err by ordering that water rented to another water user by the SWC should be subtracted from the mitigation obligation.

In the *Order Approving Mitigation Plan* the Director concluded:

Water rented to another water user by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member. In addition, water placed in the rental pool by a SWC member and used for

any purpose, including hydropower and flow augmentation below Milner Dam, shall be subtracted from IGWA's obligation to the SWC member.

R. Vol. II, p. 283. The SWC argues that the issue of potential storage rentals was not at issue in the proceeding and therefore should be rejected. This Court disagrees. The Director's order on this issue is the application of a legal ruling on that particular issue previously decided and from which no review was sought in the Gooding County 2008-551 case. In the *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, the Hearing Officer concluded:

In AFRD #2 the Supreme Court made it clear that there are standards of reasonableness that may limit the absolute right to fill storage rights completely if curtailment is required to do so. The Court specifically noted that some irrigation districts sell or lease storage water rights for purposes unrelated to the original right. The thrust of the Court's comment is that curtailment cannot be utilized to make up storage water that is disposed of in that process. Consequently in determining the amount of carryover storage to which the irrigation districts are entitled when curtailment is ordered, the amount of water sold or leased for purposes outside the licensed or adjudicated right must not be considered in calculating a shortage. The ground water users have no obligation to make up for water that will not be applied to its licensed or adjudicated purpose, e.g. the sale of water for flow augmentation. If the water is sold to another irrigator who has a priority over the ground water users and is applied to a beneficial purpose within the licensed or adjudicated right, the ground water users would be liable for remediation to one surface water holder or the other if the necessity for rental arose out of ground water depletions.

R. Vol. I, p. 127 (internal citations omitted). The Hearing Officer also addressed the following exception:

Also, a different question as to the requirement of the ground water users to provide flow augmentation would be presented if the requirement for augmentation were to arise from a mandate without compensation to the surface water users. Were that the case the ground water users would be subject to a contribution for their depletion to the river.

Id. These findings and conclusions were adopted by former Director Tuthill in the *Final Order Regarding the Surface Water Coalition Delivery Call*, R. Vol. I, p. 151.

Accordingly, the Director did not err by addressing this limitation in the approval of the mitigation plan.

E. The Director did not abuse his discretion by including a provision in the Order Approving Mitigation Plan addressing waste.

The *Order Approving Mitigation Plan* also provides: “Waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member.” R. Vol. II, p. 283. The SWC argues that the condition is contrary to the Director’s prior decision in the context of the SWC delivery call.

The SWC is correct that any re-examination of its already approved irrigation practices or infrastructure is outside the scope of the delivery call on which the *Mitigation Plan* is predicated. Indeed, a determination has already been made as part of the underlying delivery call proceedings that the existing facilities utilized by the SWC members are reasonable, and that the SWC members are not wasting water. As was the situation pertaining to water rented by the SWC, the Hearing Officer specifically addressed the issue:

If the means of diversion utilizing existing facilities, the methods of conveyance, or the conservation practices are not reasonable the water wasted does not constitute material injury attributable to junior ground water pumpers, even if the diversion is within the amount of the water right. Curtailment will not be invoked to make up for water lost through the use of unreasonable diversion or conveyance practices or unreasonable use of the water.

R. Vol. I, p. 120. However, the Hearing Officer went on to conclude:

The existing facilities utilized by the Surface Water Coalition members are reasonable.... The evidence does not show substandard facilities for diversion or conveyance.... There is no evidence of decayed or damaged systems that are allowed to continue or practices that cause water to be wasted in transit. The evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency.

Id. at 120-21.

As a result, any re-examination of the SWC’s already approved irrigation practices or infrastructure is outside the scope of the delivery call on which the *Mitigation Plan* is predicated. Otherwise the “mitigation plan” becomes little more than a process for self-initiating delivery call proceedings every time a demand shortfall is predicted

whereby a number of the core issues originally litigated are “back on the table.” At this point the goals of certainty and predictability sought to be achieved through the implementation of a long term mitigation plan start to collapse, particularly if under the plan the SWC is required to re-defend it use under the plan. This is not to say that the SWC is insulated from a subsequent determination of waste, only that any such determination should be pursuant to a separate proceeding and in accordance with the attendant burdens and legal standards and should not result in delaying adherence to the deadlines set forth in the *Methodology Order*.

That being said, there is no evidence in the record that the Director will re-evaluate the issue of waste annually as part of his mitigation obligation determination. Any such argument is speculation. The statement in the *Order Approving Mitigation Plan* that “Waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member” is simply a restatement of the law that there is no obligation to mitigate for waste. Moreover, the subject provision can be interpreted consistently with the law. If, for instance, a separate proceeding is commenced in accordance with the attendant burdens and legal standards applicable to a waste proceeding and a determination of waste is made, the Director can, consistent with the subject provision, subtract that waste from the storage water mitigation requirement for the SWC member. The Director did not abuse his discretion by including a provision in the *Order Approving Mitigation Plan* stating that waste by a SWC member will be subtracted from the storage water mitigation requirement for the SWC member.

F. The *Order Approving Mitigation Plan* complies with the requirements of Idaho Code § 67-5248.

The SWC argues the *Order Approving Mitigation Plan* should be reversed because the Director did not comply with the requirements of Idaho Code § 67-5248, which requires among other things a “reasoned statement in support of the decision. Findings of fact . . . shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings . . . and must be based exclusively on the evidence in the record of the contested case and on matter officially noticed in that proceeding.” I.C. § 67-5248. This Court disagrees.

The *Order Approving Mitigation Plan* is not devoid of findings of fact. Further, the *Mitigation Plan* (although approved to apply beyond the instant delivery call), like the *Methodology Order* and the *As-Applied Order* all stem from the SWC delivery call proceedings involving the same parties. Some of the various issues raised in the SWC delivery call were resolved through a series of final orders, subject to independent review. Nonetheless, the issues and facts interrelate, and the *Order Approving Mitigation Plan* refers to the findings, conclusions and decisions rendered in related actions. For example, the *Order* provides for the procedural background and cites to the various orders that culminated in the proceedings on the mitigation plan. R. Vol. II, pp. 274-75. The *Order* provides further:

The mitigation plan did not specifically identify “the water rights for which benefit the mitigation proposed.” Nonetheless, the mitigation plan is filed to address a specific petition for delivery call that identifies the senior water rights (natural flow and storage) that may be injured by depletions to Snake River flows caused by ground water pumping. **The rights have been expressly identified in the previous litigation in the larger contested case and need not be expressly repeated in the mitigation plan. See May 2005 Order at 11-16.**

Finally, information about Snake River reservoirs was also presented in the larger contested case. The volume capacity of the reservoirs and the frequency of fill need not be repeated in the mitigation plan. See *Recommended Order at 13-17, 34-36.*

The Director has sufficient information to evaluate the factors set form (sic) in CM Rule 43.03.

Id. at 276. The Findings of Fact provides:

The mitigation plan contains sufficient information, as augmented by the information presented in the contested case for the delivery call and the hearing on the mitigation plan, to allow the interim director to evaluate the mitigation plan to determine its adequacy.

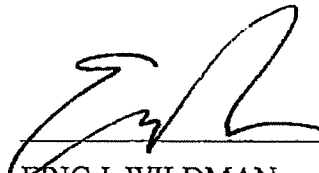
Id. at 282. It is abundantly clear based on the multiple references to the various orders and proceedings that the *Order Approving Mitigation Plan* is tiered to those other orders and proceedings. Simply put, the *Order Approving Mitigation Plan* was not decided in a vacuum.

V.

CONCLUSION

Based on the foregoing, the Director's *Order Approving Mitigation Plan* is **affirmed**. As stated above, the Court's ruling in this matter assumes the validity of the *Methodology Order*, pursuant to which the *Order Approving Mitigation Plan* was issued. A challenge to the validity of the *Methodology Order* is presently pending before this Court in Gooding County Case CV-2010-382 ("2010-382 Case"). The Court notes that while this ruling has no effect on the outcome of the 2010-382 Case, the same cannot necessarily be said of the reverse situation. If, for instance, the *Methodology Order* is found to be unlawful in whole or in part in the 2010-382 case, such a determination may affect the validity of the *Order Approving Mitigation Plan* and render parts of this opinion moot. Again, such a result is possible because this *Memorandum Decision* assumes the validity of the *Methodology Order*, an assumption that is challenged by various parties in the 2010-382 Case.

Dated January 25, 2011


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW was mailed on January 25, 2011, with sufficient first-class postage to the following:

A&B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY

Represented by:
BARKER ROSHOLT & SIMPSON LLP
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

TWIN FALLS CANAL COMPANY

Represented by:
BARKER, ROSHOLT & SIMPSON LLP
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

GARY SPACKMAN

Represented by:
BAXTER, GARRICK L
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

AMERICAN FALLS RESERVOIR

Represented by:
C THOMAS ARKOOSH
CAPITOL LAW GROUP, PLLC
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

IDAHO GROUND WATER

Represented by:
RACINE OLSON NYE BUDGE BAILEY
201 E CENTER
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-395-0011

MINIDOKA IRRIGATION DISTRICT

Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE IDAHO GROUND	)	Docket No: CM-MP-2009-006
WATER APPROPRIATORS, INC.'S)	
MITIGATION PLAN FOR CONVERSIONS,	)	ORDER APPROVING
DRY-UPS, AND RECHARGE	)	MITIGATION PLAN
)	
)	

FINDINGS OF FACT

1. On October 6, 2009, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed with the Director of the Department of Water Resources ("Director" or "Department") a *Mitigation Plan for Conversions, Dry-Ups and Recharge* ("Plan") in accordance with the Conjunctive Management Rules ("CM Rules"). IDAPA 37.03.11.043. IGWA filed the Plan "on behalf of its Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities" *Plan* at 1.

2. In accordance with CM Rule 43 and Idaho Code § 42-222, IGWA's Plan was published. The Plan was not protested.

3. IGWA's Plan proposes that the Director authorize any or all of the following mitigation activities: "1) existing and future conversions of acres irrigated from groundwater to surface water irrigation; 2) dried up acres through the Conservation Reserve Enhancement Program (CREP); AWEP or other voluntary program[s] resulting in the dry-ups of groundwater irrigated acres; and 3) groundwater recharge." *Plan* at 1-2.

4. The Plan "is proposed to provide IGWA and its members with the right to obtain mitigation credit for the Mitigation Activities that will then be applied in response to a finding of material injury to senior water rights under the CM Rules." *Id.* at 2. The Plan recognizes, "in response to a delivery call or order from the Director, the exact amount of mitigation credit obtained from a specific Mitigation Activity would be subject to analysis and calculation by the Director based upon the ESPA Model or other methodologies determined by the Department or the Courts." *Id.* at 2-3. Moreover, IGWA recognizes that the proposed mitigation activities "should be evaluated when implemented at which time any dispute concerning the calculation of the mitigation credit, but not the Mitigation Activity itself could be subject to hearing." *Id.* at 9.

5. Presently, the Plan is designed to “obtain mitigation credit in response to findings of material injury in the existing and any future delivery calls placed by Clear Springs Foods, Inc. (Clear Springs), Blue Lakes Trout Farm, Inc. (Blue Lakes), [and] the Surface Water Coalition (SWC)” *Id* at 3. In addition, IGWA seeks authorization to seek credit for the proposed mitigation activities “where a determination of material injury to a senior water right holder has been determined for which junior groundwater rights must provide mitigation to avoid curtailment.” *Id*.

CONCLUSIONS OF LAW

1. CM Rule 43 states as follows:

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

a. The name and mailing address of the person or persons submitting the plan. (10-7-94)

b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or

other appropriate compensation to the senior-priority water 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 pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

2. The Plan, filed by IGWA, complies with CM Rule 43.01 by identifying the current conjunctive management delivery calls filed by Blue Lakes, Clear Springs, and the SWC. The Plan describes the water supplies for purposes of conversion and recharge.¹ The Plan requests that the Director use the ESPA Model to determine mitigation credits. See CM Rule 43.03.e. On its face, the Director is able to consider the factors in CM Rule 43.03.

3. Regarding CM Rule 43.02, the Plan was submitted, published, and no protests were filed. A hearing is not necessary on the Plan itself. In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED as follows:

IGWA's *Mitigation Plan for Conversions, Dry-Ups and Recharge* is GRANTED. If mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the issuance of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter 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 a hearing was held, the final agency action was taken, the party seeking review of the order resides, or 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: (a) of the service date of the final order; (b) 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 Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 14th day of May, 2010.

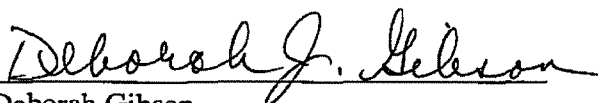

GARY SPACKMAN
Interim Director

¹ The Plan states that IGWA has utilized the North Side Canal Company's ("NSCC") canal system for recharge. Approval of this Plan in no way authorizes IGWA's use of NSCC's system for recharge. IGWA must receive approval from NSCC to conduct recharge through NSCC's system.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 14th day of May, 2010.

Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 cmm@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email



Deborah Gibson
 Administrative Assistant, IDWR

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF A REQUEST FOR)
RECOGNITION OF GROUND WATER)
RECHARGE CREDITS IN THE NAME) **FINAL ORDER DENYING REQUEST**
OF THE EASTERN SNAKE PLAIN) **FOR MITIGATION CREDITS**
RECHARGE ALLIANCE)
_____)

FINDINGS OF FACT

1. On February 21, 2012, the Idaho Department of Water Resources (“Department” or “Director”) received a *Request for Recognition of Recharge Credits* (“Request”), filed by Upper Snake Mitigation Solutions, LLC (on behalf of the Eastern Snake Plain Recharge Alliance), Alliance Member Irrigation Districts and Companies, and Idaho Ground Water Appropriators, Inc. (the entities will be collectively referred to hereafter as the “Alliance”).

2. The Request seeks Department approval for “recognition of credit for recharge made to the Eastern Snake Plain Aquifer (“ESPA”) during Fall 2011 through the efforts of its members” *Request* at 2. “The purpose of the Alliance is to develop, implement and maintain privately funded and managed programs to deliver recharge water to the ESPA from the Snake River to enhance aquifer levels and discharge at strategic locations and to develop a market for the resulting mitigation credits.” *Id.* The Request discusses recharge activities performed during the Fall of 2011, the method in which credits would be calculated, and the percent assignment of calculated credits amongst the Alliance.

3. As understood by the Department, the Request seeks approval of modeled recharge credits in the following three instances: (1) for use by the Idaho Ground Water Appropriators, Inc. (“IGWA”) under its conjunctive management rule 43 mitigation plans, IDAPA 37.03.043 (“CM Rules”); (2) for use by the Alliance under IGWA’s CM Rule 43 mitigation plans; (3) for use by Alliance members related to existing or newly-approved water uses. *Id.* at 2, 8-9.

CONCLUSIONS OF LAW

A. IGWA’s CM Rule 43 Mitigation Plans

1. In response to senior-priority delivery calls, and in accordance with CM Rule 43, IGWA has previously filed mitigation plans. Some of IGWA’s CM Rule 43 mitigation plans have been approved by the Department. Pertinent to the questions raised in the Request, the Department has approved a mitigation plan that authorizes IGWA to obtain mitigation credit for conversions, dry-ups, and recharge. *Order Approving Mitigation Plan*, CM-MP-2009-006 (May

14, 2010). The Order Approving Mitigation Plan stated, if, in the future, “mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.” *Order Approving Mitigation Plan* at 4 (emphasis added). On May 14, 2010, in response to a finding of material injury to the Surface Water Coalition (“SWC”), IGWA filed a *Request for Mitigation Credit* with the Department. On July 19, 2010, the Director entered a *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*. The Final Order was appealed by the SWC and affirmed by the district court on judicial review. *Memorandum Decision and Order on Petition for Judicial Review*, CV-2010-3822 (Fifth Jud. Dist., Twin Falls County, April 22, 2011).

2. The Director views the first part of the Request as a request by IGWA for mitigation credit, and will process the first part of the Request separately. The Director will independently consider the request for mitigation credit for IGWA under docket no. CM-MP-2009-006.

B. Alliance Use of IGWA’s CM Rule 43 Mitigation Plans

3. As stated above, the Department has previously approved CM Rule 43 mitigation plans filed by IGWA. The Request makes specific reference to two of IGWA’s CM Rule 43 Mitigation Plans: “IGWA’s Mitigation Plan for Conversions, Dry-Ups and Recharge” and “IGWA’s Mitigation Plan for the Surface Water Coalition Delivery Call.” *Request* at 5-6.¹ The Request then states as follows: “Through IGWA’s participation as a member of the Eastern Snake Plain Recharge Alliance, the Alliance is in a position to rely upon IGWA’s approved mitigation plans to request credit for its fall 2011 recharge to the ESPA.” *Id.* at 6 (emphasis added).

4. The mitigation plans referenced by the Alliance were filed by IGWA for the benefit of its member ground water districts, published by the Department, and approved by the Director in accordance with the requirements of CM Rule 43. To the extent the Alliance seeks mitigation credit for conjunctive management delivery calls, it should file a mitigation plan in accordance with CM Rule 43.01. The plan will then be subject to notice and consideration in accordance with CM Rule 43.02 and CM Rule 43.03.

5. The Director cannot authorize the Alliance to sidestep the procedural requirements of CM Rule 43 by seeking mitigation benefits under the auspices of IGWA’s previously approved mitigation plans.

C. Recharge Credits for Existing or Newly-Approved Water Uses

6. Lastly, the Request seeks mitigation credit that is not associated with the CM Rules. The Alliance asks the Department to:

¹ Under the storage water plan, IGWA is authorized to mitigate material injury to the SWC by providing the SWC with a certain volume of storage water. Even if the Alliance had an interest in the storage plan—which it does not—it is unclear how the storage plan would apply to the Alliance’s request for modeled recharge credits. As stated above, the Director will independently consider IGWA’s request for mitigation credit under CM-MP-2009-006.

Recognize the potential use of Alliance recharge credits for other mitigation uses related to existing or newly-approved water uses, in accordance with Idaho law, for which the Alliance or its members may subsequently seek approval from IDWR, or for which they may consent to others seeking such approval to mitigate for the effects of ground water depletions.

Request at 9 (emphasis added).

7. Other than CM Rule 43, which applies only in conjunctive management delivery calls, CM Rule 1, there is no provision in Idaho law that allows the Director to authorize, much less approve, mitigation credits for applications for new water rights or transfers of existing water rights that have not yet been filed.

8. The Director supports the parties' efforts at recharging the ESPA, and would support the parties' efforts in advancing legislation or formal rulemaking on the subject. Without, however, a procedural mechanism to authorize mitigation credits, the Director cannot approve the Request.

ORDER


Consistent with the foregoing, the Director DENIES the Alliances' Request for mitigation credits.

IT IS FURTHER ORDERED that the Director will separately address IGWA's request for mitigation credit associated with CM-MP-2009-006.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency shall dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the director to contest the action taken provided the person files 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. Idaho Code § 42-1701A(3). Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01.

DATED this 23rd day of March, 2012.

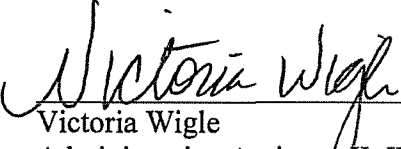

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 23rd day of March, 2012.

Robert L. Harris HOLDEN KIDWELL HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Jerry R. Rigby RIGBY ANDURS RIGBY P.O. Box 250 Rexburg, ID 83440 jrigby@rex-law.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 tarkoosh@capitolawgroup.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>



Victoria Wigle
Administrative Assistant II, IDWR

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE IDAHO GROUND) Docket No: CM-MP-2009-006
WATER APPROPRIATORS, INC.'S)
MITIGATION PLAN FOR CONVERSIONS,) **NOTICE OF REQUEST**
DRY-UPS, AND RECHARGE) **FOR STAFF MEMORANDUM**
)
(Surface Water Coalition))
_____)

1. On October 6, 2009, the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed with the Director of the Department of Water Resources (“Director” or “Department”) a *Mitigation Plan for Conversions, Dry-Ups and Recharge* (“Plan”) in accordance with the Conjunctive Management Rules (“CM Rules”). IDAPA 37.03.11.043. The Plan was filed broadly, “on behalf of [IGWA’s] Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities” *Plan* at 1. “The proposed Mitigation Activities are submitted for advance approval to provide authorized mitigation tools which could be used to obtain mitigation credit in response to findings of material injury [to] the Surface Water Coalition” *Plan* at 3.

2. In accordance with CM Rule 43 and Idaho Code § 42-222, IGWA’s Plan was published. The Plan was not protested. On May 14, 2010, the Director approved the Plan. *Order Approving Mitigation Plan*. In the Order Approving Mitigation Plan, the Director stated: “In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.”

3. On February 21, 2012, the Department received a *Request for Recognition of Recharge Credits* (“Request”). The Request was filed by counsel for IGWA, Upper Snake Mitigation Solutions, LLC, and Alliance Member Irrigation Districts and Canal Companies. Among other things, the Request states, “the recharge credits are intended for use by IGWA under its approved mitigation plans” *Request* at 1, ¶ 2. The Request specifically references the Surface Water Coalition (“SWC”) delivery call and the above-captioned mitigation plan proceeding, CM-MP-2009-006.

4. The Director will treat the filing as a request by IGWA, under its mitigation plan, for a determination of mitigation credit to be applied in 2012 to a finding of material injury, if any, to the SWC.¹


5. IGWA's request seeks mitigation credit for recharge undertaken in "fall 2011." *Request* at 3. "Modeling was performed using aquifer response functions generated using the modeling approach and data files of ESPAM1.1 embodied in the Enhanced Ground-water Rights Transfer Spreadsheet of University of Idaho and Idaho Department of Water Resources. The details of application of these response functions are described in ESPRA 2011 Accounting System and Results." *Request* at 29.

6. The SWC derives reach gains in the Near Blackfoot to Minidoka reach of the Snake River. *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, CM-DC-2010-001 (June 23, 2010). Gains in the Near Blackfoot to Minidoka reach can be utilized by the SWC. *Id.*

7. According to the Request, "31,294 acre feet of water was diverted for recharge, with 1,916 acre feet returning to the Snake River. The net recharge of 29,378 acre feet includes water delivered to off-canal recharge sites and also recharge in the beds of canals after the end of the irrigation season." *Request* at 4. "Diversion measurements were provided by Water District 01. Deliveries to off-canal sites and return flows were measured by Upper Snake Mitigation Solutions, University of Idaho and canal-company personnel, in coordination with Water District 01. Data were forwarded weekly to IDWR and a final accounting of recharge volume was provided at the end of 2011." *Id.*

8. To assist the Director in evaluating IGWA's request, the Director has requested that Department staff prepare a staff memorandum analyzing IGWA's request for credit. Staff will calculate the benefits accrued to the Snake River using ESPA Model simulations (version 1.1) during the time of need, which for the SWC is the 2012 irrigation season.

DATED this 23rd day of March, 2012.


Gary Spackman
Interim Director

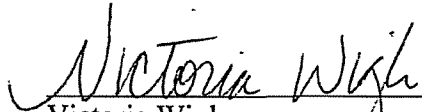
¹ The Request also seeks approval of modeled recharge credits for use by the Eastern Snake Plain Recharge Alliance ("Alliance") under IGWA's CM Rule 43 mitigation plans and for use by Alliance members related to existing or newly-approved water uses. *Request* at 2, 8-9. That portion of the request is addressed in the Department's *Order Denying Request for Mitigation Credits* in the matter captioned as *In the Matter of A Request for Recognition of Ground Water Recharge Credits in the Name of the Eastern Snake Plain Recharge Alliance*.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 23rd day of March, 2012.

<p>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 tarkoosh@capitollawgroup.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris HOLDEN KIDWELL HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Jerry R. Rigby RIGBY ANDURS RIGBY P.O. Box 250 Rexburg, ID 83440 jrigby@rex-law.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>

<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>


Victoria Wigle
Administrative Assistant II, IDWR