IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

IDAHO GROUND WATER APPROPRIATORS, INC.

Petitioners,

vs.

CITY OF POCATELLO,

Petitioners,

vs.

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,**

Petitioners,

vs.

GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES**,

Respondents.

Case No. CV-2010-382

(consolidated Gooding County Cases CV-2010-382, 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)

SURFACE WATER COALITION'S JOINT OPENING BRIEF (METHODOLOGY APPEAL)

On Appeal from the Idaho Department of Water Resources

Honorable Eric Wildman, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

Seven canal companies and irrigation districts (hereinafter collectively referred to as the "Surface Water Coalition" or "Coalition")[1] filed a water right delivery call with the Idaho Department of Water Resources ("IDWR" or "Department") in 2005.[2] This appeal culminates the near decade-long journey toward final judicial review of the methodology for conjunctive administration of junior ground water rights. Although review of the Department's methodology was delayed due to the former Director's failure to issue a complete final order in 2008, the case is now properly before this District Court.

The Idaho Supreme Court's recent decision in *A&B Irr. Dist. v. Spackman*, 315 P.3d 828, ___ Idaho ___ (2013) directs this Court's review of the Director's actions. In *A&B*, the Supreme Court instructed the agency to: 1) honor decreed water rights; 2) adhere to established evidentiary standards and burdens of proof; 3) provide timely and effective administration; and finally and most importantly, 4) ensure seniors are protected from material injury caused by junior rights. These principles are implemented through *A&B*'s clear three-step methodology.

The Director's *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order") fails the Supreme Court's mandate. R. Vol. 3 at 564. Consequently, this Court must set aside the Methodology Order and remand it to IDWR with clear guidance to implement administration consistent with Idaho law. *See* I.C. § 67-5279(3). The Coalition respectfully requests this Court to grant this requested relief.

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[1] The Coalition is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company. Each entity holds separate senior surface natural flow and storage water rights to the Snake River. R. 1370-74.

[2] IDWR processed the delivery call under the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CM Rules").

II. Course of Proceedings

The Coalition requested administration of hydraulically-connected junior ground water rights on January 14, 2005. R. 1.[3] In response, the Director issued an *Amended Order* on May 2, 2005 finding material injury to the senior surface water rights held by AFRD#2 and TFCC. R. 1359, 1382-85. Additional orders were issued thereafter and the case ultimately proceeded to an administrative hearing. Former Chief Justice Gerald F. Schroeder presided and issued an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("*Recommended Order*") on April 29, 2008. R. 7048. The Director then issued a final order on September 5, 2008. Although termed a "final" order, the Director failed to fully decide all of the issues contested at hearing. In particular, he left open for a future date the issuance of an order "detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover." R. 7386.

The Coalition and the U.S. Bureau of Reclamation appealed the Director's 2008 order. R. 7398; 7508. On July 29, 2009 the Honorable John M. Melanson issued an *Order on Petition for Judicial Review*. R. 10,075. Judge Melanson held, among other things, that: 1) the Director erred in refusing to require mitigation in the season in which the injury occurs; 2) the Director exceeded his authority by failing to follow procedural steps for mitigation plans set forth in the CM Rules; 3) the Director exceeded his authority by determining the full headgate delivery for TFCC should be reduced to 5/8 miner's inch per acre instead of its decreed 3/4 miner's inch per acre; and 4) the Director abused his discretion by issuing two final orders.

[3] All citations to the 2008 agency record, as lodged in Case No. CV-2008-551, will be designated "R.___." All citations to the 2010 agency record, as lodged in Consolidated Case No. CV-2010-382 will be designated "R. Vol. __ at __."

The District Court remanded the case back to IDWR for further proceedings consistent with the court's decision.[4] R. 10,107. The decision was appealed and the Idaho Supreme Court issued an opinion late last year. *See A&B*, 315 P.3d at 828.

On remand, the Director issued a final order concerning the methodology for determining material injury. R. Vol. 1 at 32. Petitions for reconsideration were filed and the Director held an administrative hearing in May 2010. R. Vol. 1 at 78, 87, 110. Thereafter, on June 23, 2010, the Director issued the final Methodology Order. R. Vol. 3 at 564. Petitions for judicial review were filed resulting in the current consolidated case before this Court.[5]

III. Statement of Facts

The facts of the underlying case are set forth in the District Court's July 29, 2009 *Order* and the Idaho Supreme Court's decision in *A&B Irr. Dist. v. Spackman*. R. 10,082-87; 315 P.3d at 830-35. The specific facts concerning the Director's application of the Methodology Order (2010 – 2013) are set forth in the Coalition's *Opening Brief (As Applied)*.

ISSUES PRESENTED

a. Whether the Methodology Order complies with Idaho law, including the CM Rules and the Idaho Supreme Court's decision in *A&B Irr. Dist. v. Spackman*, 315 P.3d 828?

b. Whether the Director's methodology is unconstitutional and arbitrary and capricious where it establishes a mitigation obligation threshold early in the irrigation season (April) that may be adjusted downward based on precipitation and water use during that

[4] In addition, the district court issued an amended order on petitions for rehearing. R. 10,607.
[5] The petitions for judicial review were stayed by stipulation of the parties until the Idaho Supreme Court issued its decision in *A&B v. Spackman*. Following the issuance of the opinion, this case resumed and the court set a briefing and oral argument schedule. *See Order Amending in Part Procedural Order Governing Judicial Review of Final Orders of Director of Idaho Department of Water Resources* (February 24, 2014); *Order Granting Joint Motion to Amend Oral Argument and Briefing Schedule* (May 8, 2014).

irrigation season but cannot be adjusted upward regardless of the exigencies of the seniors' water use demands?

c. Whether the supplemental groundwater use provision in Step 1 is contrary to law and not supported by substantial evidence in the record?

d. Whether Step 4 of the Methodology Order unlawfully delays timely administration and artificially reduces the affected groundwater acres subject to curtailment?

e. Whether Steps 6 and 8 of the Methodology Order complies with Idaho law in the timing of delivery of mitigation water?

f. Whether the Director's "reasonable carryover" scheme in Steps 5 and 9, that does not determine shortfall until after the irrigation season and does not require that any shortfall to reasonable carryover be made-up until the following irrigation, is contrary to law?

g. Whether Step 9 violates the CM Rules and unlawfully reduces the senior's carryover storage water rights?

h. Whether Step 10 wrongfully reduces the juniors' carryover mitigation requirements through an alternative modeling analysis?

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County*, 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.* Constitutional questions and questions of

statutory interpretation are questions of law over which the Court exercises free review. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 35, 40 (2011).

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure, " (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." I.C. § 67-5279(3); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796 (2011).

An agency's decision must be supported by "substantial evidence." *Chisholm*, 142 Idaho at 164 ("Substantial evidence … need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder"). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id*.

Although the Court grants the Director discretion in his decision making, *supra*, the Director cannot use this discretion as a shield to hide behind a decision that is not supported by the law or facts. Such decisions are "clearly erroneous" and must be reversed. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008) ("A decision is clearly erroneous when it is not supported by substantial and competent evidence").

ARGUMENT

I. Introduction – Idaho Supreme Court's Standard in *A&B Irr. Dist. v. Spackman*.

Although the Department urged the Idaho Supreme Court to avoid ruling on the required methodology to use in conjunctive administration, the Court rejected this argument:

> [T]he district court did not merely address the minimum full supply methodology. Rather, it adopted the hearing officer's conclusion that "the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable provided the baseline was adjustable to account for weather variations and that the process satisfied certain other enumerated conditions." . . . [G]iven the legal issue that the district court decided, we may determine whether and for what purposes a baseline methodology is consistent with Idaho law.

315 P.3d at 837.

The Supreme Court analyzed the Director's "baseline" methodology and identified the necessary steps and process to ensure compliance with Idaho law.[6] First, the Court noted:

> With regard to the usage of the baseline in the management context, the Director is required to observe the well-established legal principles of Idaho's prior appropriation doctrine. Additionally, when utilizing the baseline in the administration context, the Director must abide by established evidentiary standards, presumptions, and burdens of proof.

315 P.3d at 838.

The Court referenced the Hearing Officer's approval of the Director's baseline methodology "both as a starting point for consideration of the Coalition's call for administration and in determining the issue of material injury." *Id*. Finally, the Court noted the district court affirmed the Hearing Officer's proposed modifications to the methodology to ensure it complied with the Court's decision in *AFRD#2*:

> On first impression it would appear that the use of such a baseline constitutes a re-adjudication of a decreed or licensed water right. As stated by the Hearing Officer "[t]he logic of [the Coalition] in objecting to the Director's use of a minimum full supply is difficult to avoid." However, on closer examination the

[6] The Court recognized that the prior appropriation doctrine consists of two "bedrock" principles, "first in time is first in right" and that water must be placed to beneficial use. 315 P.3d at 828.

> use of a baseline is a necessary result of the Director implementing the conditions imposed by the [Rules] with respect to regulating junior rights to protect senior storage rights. Put differently, senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in [Rule] 042. . . . Although the [Rules] do not expressly provide for the use of a "baseline" or other methodology, the Hearing Officer concluded that: "***Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at a base and works up according to need, the end result should be the same***." Ultimately the Hearing Officer determined that ***the use of a baseline estimate*** to represent predicted in-season irrigation needs ***was acceptable provided the baseline was adjustable to account for weather variations and the process satisfied certain other enumerated conditions***. This Court affirms the reasoning of the Hearing Officer on this issue.

315 P.3d at 836 (emphasis added).

Confirming the use of a baseline as only a "starting point," the Supreme Court then set out the "other enumerated conditions" for the Director to follow:

> 1. The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, which methodology must comport in all respects with the requirements of Idaho's prior appropriation doctrine, be made available ***in advance of the applicable irrigation season, and be promptly updated to take into account changing conditions.***
>
> 2. A senior right holder may initiate a delivery call based on allegations that specified provisions of the management plan will cause it material injury. The baseline serves as the focal point of such delivery call. The party making the call shall specify the respects in which the management plan results in injury to the party. While factual evidence supporting the plan may be considered along with other evidence in making a determination with regard to the call, ***the plan by itself shall have no determinative role***.
>
> 3. ***Junior right holders*** affected by the delivery call may respond thereto, and ***shall bear the burden of proving by clear and convincing evidence*** that the call would be futile or is otherwise unfounded. A determination of the call shall be made by the Director ***in a timely and expeditious manner***, based on the evidence in the record and the applicable presumptions and burdens of proof.

315 P.3d at 841 (emphasis added).

The Methodology Order fails the Supreme Court's standard. Instead of the straightforward three-step analysis described above, the Director adopted a ten (10) step program that begins after the irrigation season starts, caps a senior's water use requirements in April, delays provision of mitigation water until the end of the irrigation season, and reduces the senior's right to carryover storage. Despite an identified carryover injury, the Director's process injures a senior even further by employing an arbitrary modeling exercise that reduces the juniors' mitigation obligation. The 10-step process does not require juniors to carry any burden of proof at any point and instead authorizes full out-of-priority groundwater diversions without sufficient mitigation. The result is an unconstitutional process where seniors are constantly short of water while juniors pump their full rights.

As discussed in detail below, the methodology does not: 1) comply with Idaho's prior appropriation doctrine; 2) include a pre-season management plan; 3) provide for timely updates to a senior's increased water needs in response to changing water conditions; 4) allow seniors to show how the plan will result in injury; 5) require juniors to prove a call would be futile or otherwise unfounded; and finally 6) provide for administration in "a timely and expeditious manner," including delivery of water to completely mitigate the identified injury. In sum, the resulting conjunctive administration does not comply with Idaho law.

The Coalition respectfully requests this Court set aside and remand the Methodology Order to the Department with instructions to issue a revised decision consistent with Idaho law. Further, the Coalition requests this Court require the agency to specifically include and implement the process set forth by the Idaho Supreme Court in *A&B Irr. Dist. v. Spackman*, 315 P.3d 828.

II. The Methodology Order's Philosophy Violates the Prior Appropriation Doctrine.

When the Director finds material injury to a senior surface water right, as occurred in this case, the CM Rules expressly require the Director to either: 1) regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users; or 2) allow out-of-priority diversion of water by junior-priority ground water users pursuant to an approved mitigation plan. CM Rule 40.01; *see also*, 315 P.3d at 842. While juniors are provided an opportunity to prove defenses to a call by clear and convincing evidence, no such defenses were proven in this case. *See* 315 P.3d at 841, 843.

The Methodology Order does not follow the CM Rules' clear and unambiguous standard. Instead, the order establishes a paradigm that restricts or limits the senior's lawful use of needed water while at the same time protecting out-of-priority ground water users at all costs. It is as if the agency seeks to minimize the senior's right to water at every turn, while juniors take priority. Indeed, the Director cements his initial forecast supply and calculated "demand shortfall" as a senior's water use "ceiling" for that year. If conditions worsen and injury increases after early April, as happened in 2013, the methodology does not adjust the juniors' mitigation requirement. R. Vol. 3 at 569 ("The purposes in predicting need is to project an upper limit of material injury at the start of the season").

This paradigm expressly violates Idaho law. R. 7095 ("Using the minimum full supply as a fixed amount in effect readjudicates a water right outside the processes of the SRBA. … When treated as a fixed amount in 2007 it had great significance beyond its intended purpose"). Moreover, it's telling that under the Director's program over the past four years not a single junior ground water user has been curtailed despite findings of unmitigated injury to the

Coalition members' senior water rights.[7] R. Vol. 1 at 405-06 ("a shortfall of 3,525 acre-feet exists. . . The Director will therefore stay curtailment …"); R. Vol. 5 at 954 ("the current, predicted shortfall to the SWC's RISD is 105,200 acre-feet"). Whereas senior surface water users have been forced to endure short water supplies and changing conditions, junior ground water users have enjoyed their full rights through the Director's flawed and biased program.

Although the CM Rules require timely and effective mitigation before junior groundwater diversions are allowed, the Director's methodology turns this standard upside down. While juniors are allowed to begin out-of-priority pumping prior to the Director's initial order, senior surface water users must endure the risk of changed water conditions and suffer the consequences of not having the water needed to put to beneficial use. Further, the Director does not require actual delivery of mitigation water until an arbitrary "Time of Need," defined as the "day in which the remaining storage allocation will be equal to reasonable carryover." R. Vol. 3 at 584, n. 9. Coalition members must therefore exhaust storage supplies to the brink before receiving any mitigation water needed to deliver to their farmers. This program offends the constitution, statutes, and established case law that govern proper water right administration. *See Clear Springs Foods*, 150 Idaho at 800 ("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water").

In addition, the Director's evaluation of injury to reasonable carryover storage further restricts the Coalition's water requirements and the ability to guard against future dry years. Similar to the flawed in-season administrative scheme, the carryover analysis fails to provide timely mitigation to the Coalition's storage rights required by law. Instead, the Director "waits"

[7] The refusal to curtail junior ground water rights causing injury to senior surface water rights is a recurring theme at the agency. *See e.g., Order Granting IGWA's Second Petition to Stay Curtailment* (April 28, 2014); *Order Granting IGWA's Petition to Stay Curtailment* (February 21, 2014) (*In re Rangen*, CM-DC-2011-004). While such "non-curtailment" has proven to be true for juniors, seniors, lacking water, have necessarily been short of water and have been involuntarily curtailed by the Department's refusal to administer.

until the following irrigation season to determine whether or not storage accounts fill. The Director's analysis relies upon overly optimistic average years' data that does not reflect the Coalition's demonstrated water use needs and the right to carryover sufficient storage for subsequent dry years. Again, in the event the Director misses the mark in calculating the carryover requirement, his methodology does not revert back and enforce any correction to protect the senior rights. Instead, the misstep becomes arbitrarily written in stone, unfairly and illegally, forcing the senior to bear the burden of water shortage. The carryover analysis underestimates water needed for beneficial use forcing the seniors to suffer the consequences of water short conditions.

Moreover, even the in the face of a reasonable carryover injury, the Director provides juniors with one last "free pass" through a modeling "sleight of hand" that further reduces their obligation (Step 10). Again, this step results in less water for seniors. Instead of requiring complete and timely mitigation to the injured seniors, the methodology provides an alternative that has reduced the juniors' carryover storage obligation by 75%. R. Vol. 6 at 1064-65 (reducing carryover mitigation obligation from 45,995 af to 11,924 af).

In short, the Methodology Order does not follow the prior appropriation doctrine or apply the required presumptions and burdens of proof. A senior's water needs are not protected through an adjustable baseline, mitigation is not provided in a timely and expeditious manner, and the only certainty provided is that juniors will divert their full rights out-of-priority. The agency's desire to restrict and prevent lawful administration to the detriment of senior rights does not withstand judicial review. Since the Director's Methodology Order does not comply with the Idaho Supreme Court's requirements and other provisions of Idaho law, it must be set aside and remanded to the agency.

III. The "Baseline Year" Constitutes an Unlawful "Ceiling" or "Cap" on the Coalition's In-Season Irrigation Demands. (Steps 3 / 8)

The signature flaw in the Methodology Order is the selection of a "baseline year" and the resulting "cap" placed on the Coalition members' water needs for the irrigation season.[8] Instead of beginning with the presumption of the decreed quantity, the Director uses a skewed "baseline" supply to predict a senior's water needs for the season.[9] The Hearing Officer, District Court, and Supreme Court all approved this concept only as a "starting point" in administration, not as the final word. 315 P.3d at 828, 841 ("the plan by itself shall have no determinative role"). The District Court expressly adopted the Hearing Officer's reasoning, quoting "[w]hether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed ***or starts at a base and works up according to need***, the end results should be the same." *Id.* at 836 (emphasis added). The court's judgment is clear and unambiguous and must be followed. *See e.g., Toyama v. Toyama*, 129 Idaho 142, 144 (1996).

Despite the court's clear ruling in 2009, the Director ignored it and failed to include an adaptive baseline in the 2010 Methodology Order. The Director admits the fatal error in his description of the baseline year:

> 16. A BLY is a year or average of years that represents demands and supplies that can be used as a benchmark to predict need in the current year of irrigation at the start of the irrigation season. ***The purpose in predicting need is to project an upper limit of material injury at the start of the season***.

R. Vol. 3 at 569 (emphasis added).

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[8] The Coalition requested the Director to reconsider this issue. R. Vol. 1 at 110. However, the Director refused to change his analysis. R. Vol. 3 at 547, 564.

[9] The Director wrongly limits the selection of a "baseline year" (BLY) to the 2000-2008 period. The unregulated Snake River flow at Heise was well below the 30-year average in 7 out of the 9 years in that timeframe. Therefore, just looking at actual diversions in those years does not accurately portray the Coalition members' actual demands since the diversions were limited by water supply. Moreover, during the dry period of 2000-2005, the Coalition was forced to curtail water deliveries to its landowners and shareholders. R. 405-10; 6852-55. In short, the Director's decision to limit selection of a BLY to 2006 and 2008 artificially limits what the Coalition members' need. R. Vol. 1 at 116-125 (showing the Coalition's average diversions 1990-2008 and the problems with the Director's selection of 2006 and 2008 to meet his identified criteria and the resulting underestimation of need).

The Director's "baseline" year concept does not provide for increased adjustments to a senior's water needs during the irrigation season. *See* R. Vol. 3 at 600 (Step 8) ("If the calculations from steps 6 or 7 indicate a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, ***no additional water is required***") (emphasis added). Consequently, the procedure diminishes a senior's priority resulting in administration that violates the Idaho Constitution. *See* IDAHO CONST. Art. XV, § 3; I.C. § 42-602; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982). If water supply conditions worsen after early April and the senior's demand and predicted injury increases due to a lack of water, the Director's methodology wrongly forecloses mitigation for that injury.[10]

Accordingly, on its face, the immutable "baseline" year concept violates the Idaho Constitution and the Idaho Supreme Court's ruling in *A&B Irr. Dist. v. Spackman*. This methodology therefore must be reversed and set aside. *See Greenfield Village Apartments, L.P. v. Ada County*, 130 Idaho 207, 209 (1997).

Notwithstanding the plain legal error, the Director attempts to justify this unconstitutional result as follows:

> 18. Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water uses will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need (defined in footnoted 8, *supra*). ***If it is determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment.*** This determination is based upon the Director's discretion and his balancing of the principle of priority of right with the principles of optimum utilization and full economic development of the State's water resources. Idaho Const. Art. XV, § 3; Idaho Const. Art. XV,

[10] The Director admits the error in the methodology: "If water demand data is averaged for several years and these averages are used 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." R. Vol. 3 at 569. This is exactly what happened in 2013. R. Vol. 5 at 953.

> § 7; Idaho Code § 42-106; Idaho Code § 42-226. Because the methodology is based upon conservative assumptions and is subject to refinement, the possibility of under-predicting material injury is minimized and should lessen as time progresses. The methodology should provide both the SWC and junior ground water users certainty at the start of the irrigation season.

R. Vol. 3 at 594 (emphasis added).[11]

Despite admitting that an under-prediction of a senior's injury would not be fully mitigated, thus injuring the senior water user, the Director asserts this result is acceptable pursuant to "optimal utilization" and "full economic development of the State's water resources." *Id.* The Director's misinterpretation of Idaho law must be reversed. *See Petersen v. Franklin County*, 130 Idaho 176, 182 (1997) ("Erroneous conclusions of law made by an agency may be corrected on appeal").

Although the Director did not have the benefit of the Court's *Clear Springs Foods* decision when he issued the Methodology Order that still does not excuse the errors of law. First, nothing in the constitution, statutes, or the CM Rules authorizes a junior ground water user to injure a senior surface water user. *See Lockwood v. Freeman*, 15 Idaho 385, 398 (1908). Idaho follows the prior appropriation doctrine which means in times of shortage a senior's water right is satisfied first. *See Clear Springs*, 150 Idaho at 800. The CM Rules only authorize out-of-priority diversions pursuant to an approved mitigation plan that "will prevent injury to senior rights." Rule 40.01.b; 43.03. Since the Director's methodology expressly allows for unmitigated shortfalls, the process violates Idaho law and must be set aside. As detailed below, the Director's reasons for "capping" a senior's water use needs at the beginning of the irrigation season are also without merit.

[11] The prior appropriation doctrine is not designed to provide junior water users "with certainty." In times of water shortage it is understood that not every water user will receive water. Although the doctrine has been described as "harsh," it is Idaho's water law. *See* IDAHO CONST. Art. XV; § 3; I.C. §§ 42-106; 602.

First, the Idaho Water Resource Board's duty to develop a state water plan pursuant to Art. XV, § 7 of the Idaho Constitution does not qualify or limit the Director's duties to administer water rights pursuant to the prior appropriation doctrine. The Supreme Court explained "[t]here is nothing in the wording of Article XV, § 7, that indicates it grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV, § 3, which states, 'Priority of appropriation shall give the better right as between those using the water [of any natural stream]. . . .'" 150 Idaho at 807. Moreover, the Board only has the authority to create a plan for the development and optimum use of "unappropriated water resources." I.C. § 42-1734A. Neither the Board, let alone the Director, can take water from a senior surface water user and give it to a junior ground water user under a theory of "optimal utilization" of the state's water resources. *See Lockwood*, 15 Idaho at 398. Yet this is exactly what the Director's methodology allows. Juniors pump their full rights for an entire season, whereas seniors suffer unmitigated injury. Accordingly, the program violates the law.

Finally, neither section 42-226 nor a reference to "full economic development" justifies unmitigated injury to a senior surface water user caused by junior ground water users. Again, in *Clear Springs* the Supreme Court explained:

> It is the "prior appropriators" of underground water who are protected "in the maintenance of reasonable ground water pumping levels," Idaho Code § 42-226, and in context ***it is only when there is a conflict between senior and junior ground water appropriators***.
>
> * * *
>
> There is nothing in the statute addressing reasonable aquifer levels. It only mentions reasonable pumping levels. ***By its terms, section 42-226 only applies to appropriators of ground water***.
>
> * * *

> The words "full economic development" only appear in Idaho Code § 42-226 and the cases discussing that statute. . . . ***As explained above, Idaho Code § 42-226 has no application in this case.*** It only modifies the rights of ground water users with respect to being protected in their historical pumping levels.

150 Idaho at 803-804, 807-808 (emphasis added).

The Supreme Court later explained the above holding in *A&B Irr. Dist. v. IDWR*, 153 Idaho 500 (2012):

> Additionally, an interpretation of the GWA in *Musser* is immaterial after this Court's opinion in *Clear Springs Foods, Inc. v. Spackman* [citation omitted]. ***In Clear Springs, this Court held that I.C. § 42-226 has no application in delivery calls between senior spring users and junior ground water users***.

153 Idaho at 509 (emphasis added).[12]

The Coalition's delivery call concerns senior surface water, not ground water rights. Therefore, the Director's reliance upon section 42-226 (Ground Water Act) is misplaced and must be reversed and set aside. *See Clear Springs*, 150 Idaho at 816 ("The Spring Users are surface water appropriators, not ground water appropriators"); *A&B*, 153 Idaho at 509.

As explained above, the Director's misinterpretation of Idaho law does not justify unmitigated injuries to senior surface water users. Stripped of this misinterpretation, the Director has no "discretion" to allow such injury in conjunctive administration either.[13] *See* I.C. § 42-607; CM Rule 40. In sum, the Director has no authority or discretion to diminish a senior's water right and allow juniors to pump their full rights without completely mitigating the resulting injury. *See* CM Rule 40; *Jenkins*, 103 Idaho at 388; *Lockwood*, 15 Idaho at 398.

[12] IDWR finally admitted this error of law earlier this year. *See Motion to Remand Methodology Order to IDWR* at 4 (January 29, 2014).

[13] The Director wrongly alleges his decision to "cap" a senior's water use needs and not require junior to fully mitigate injury is based upon his "discretion." R. Vol. 3 at 594. The Director has no discretion to ignore Idaho's constitution and water distribution statutes.

Finally, the use of a baseline year as a "cap" or "ceiling" on the seniors' water needs and resulting injury contradicts the agency's prior position on this issue.[14] Both former Directors Dreher and Tuthill presented methodologies that allowed for increased adjustments to a senior's water use needs.[15] For instance, Director Dreher's original order provided:

> 121. The material injury predicted for 2005 is reasonably likely. However, climatic conditions for the remainder of 2005 can not be precisely predicted, meaning that the predicted material injury and the carryover storage, assuming the predicted material injury is mitigated with replacement water, are both likely to be greater or smaller.
>
> 122. A mechanism can be devised whereby additional mitigation will be required if the predicted material injury is less than what is later determined to be the actual material injury, and credits against future mitigation requirements can be recognized if the predicted material injury is more than what is later determined to be the actual material injury.
>
> * * *
>
> 10. The Director will monitor water supply requirements and the water supplies available throughout the irrigation season and may issue additional orders or instructions to the watermasters as conditions warrant.

R. 1385, 1405.

Director Tuthill presented an interlocutory methodology (later rescinded)[16] that similarly provided for adjustments to a senior's water use needs during the irrigation season:

> 36. The Protocol uses RISD from the chosen baseline year as the projected annual supply for each SWC entity during the year of evaluation. Given that the year being evaluated will likely be different from the baseline year in terms of climate and system operations, a process is necessary to adjust for those

[14] Since the current methodology conflicts with the prior agency position it cannot withstand judicial review for that reason as well. *See e.g., Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 831 (9th Cir. 2009) (The court must consider the agency's position over time, and if the agency's interpretation of a relevant provision conflicts with the agency's earlier interpretation, the agency is "entitled to considerably less deference than a consistently held agency view").

[15] The Coalition does not adopt or advocate for the former Directors' proposed methodologies. Moreover, former Director Tuthill's interlocutory methodology is not part of the agency record. However, it is worth noting that each allowed for increased adjustments to a senior's needs whereas the current Director's methodology does not. Moreover, both former Directors acknowledged the Coalition's rights to use their full decreed quantities when needed during the irrigation season. R. 3736, n. 2; 4291, n. 3.

[16] R. Vol. 1 at 1 (*Order Rescinding Interlocutory Order of June 30, 2009*).

> 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." Recommended Order at 51.

Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover at 18 (June 30, 2009). R. 10,106, n. 8.

At hearing, former Director Dreher described the reasoning behind the adjustable process and why it was necessary to protect seniors if injury was underestimated at the start of the irrigation season:

> A. . . . we started with what we termed the minimum full supply, which was based upon the amount needed in 1995. And the intent was then to make adjustments – that was the floor. The intent was to make adjustments either above or potentially below, but more likely above, if the climatic conditions varied substantially . . .

Tr. Vol. II, p. 282, lns. 16-23 (2008 Hearing).

Contrary to the Department's original decisions and position, the present Methodology Order prohibits such adjustments to a senior's water use needs. Although the baseline year was initially developed as a "floor," the current Director has transformed it into a "ceiling." If Coalition members need more water to deliver based upon hot and dry conditions, their farmers must suffer the consequence of not having additional mitigation. At the May 2010 hearing, IDWR's Deputy Director acknowledged this very scenario:

> Q. [BY MR. ARKOOSH]: Again, if the determination of mitigation water is too low when they arrive late in the season, who will be short of water; the senior or the junior?
>
> A. [BY MR. WEAVER]: The senior.

Tr. Vol. I, p. 101, lns. 3-7 (2010 Hearing).

Although this practice was firmly rejected by the Hearing Officer, the Methodology Order repeats the same mistake. R. 7095 ("Treating the minimum full supply as a cap reducing the right to mitigation in carryover storage has profound consequences. In practical effect it adjudicates a new amount of the water right outside the SRBA without a determination of specific factors warranting a reduction. … Using the minimum full supply as the fixed supply departs from the original concept").

Since the Methodology Order violates Idaho's prior appropriation doctrine by capping a senior's "baseline" water needs at the beginning of the irrigation season, resulting in unmitigated injuries caused by junior ground water users, it must be set aside. The Coalition respectfully requests the Court to set aside Steps 3 and 8 and the order's provision that prevents mitigation to a senior's increased injury that occurs throughout the irrigation season.

The Court should further remand the methodology to IDWR with clear instructions to follow the process set forth by the Supreme Court in *A&B Irr. Dist. v. Spackman*.

IV. The Methodology Order's Baseline Year Underestimates the Coalition's Water Use Needs and Should be Amended.

Even if part of the Director's process in Step 3 is confirmed, at a minimum the "baseline year" and "projected water supplies" must be updated and modified to fully protect the Coalition's senior water rights and irrigation demands.[17] As documented below, the Director's refusal to modify the "baseline year" and analysis of projected water supplies underestimates the water needed by the Coalition for beneficial use. As such, the Director's arbitrary selection of the 2006/08 baseline year is not supported by substantial evidence in the record and must be amended. *See Galli*, 146 Idaho at 159.

[17] The Director's "cap" or "ceiling" approach violates the Supreme Court's holding in *A&B*. Therefore, it is uncertain how such a methodology or any parts thereof could be upheld. Notwithstanding, the Coalition's example of protecting the senior's recent demonstrated beneficial use (i.e. 2012 or 2013 "baseline" year) would provide juniors more advance notice of the seniors' expected irrigation requirements.

If the Director truly wants to provide more "certainty" for all water users in advance of the irrigation season, he must expect and protect against dry conditions so that seniors are not unlawfully short of water later in the irrigation season. Further, the Director must provide this pre-season management plan in advance of the irrigation season. *See A&B*, 315 P.3d at 841.

First, the Methodology Order arbitrarily uses a single data set as "the selection criteria for all members of the SWC." R. Vol. 3 at 574. The Director admits that the 2006/08 average under-represents Milner Irrigation District's average diversions; let alone what is actually required in a hot, dry year. *See id.* (noting 91% of 2000-08 average). The agency has provided no rational basis that demands finding a single year, or set of years for all members of the Coalition to use for purposes of a baseline year. *See American Lung Assoc. of Idaho/Nevada*, 142 Idaho at 547.

Indeed, water use and demand varies by entity and year. R. 7092-95. There is no requirement to find a "one-size-fits-all" in this process. Accordingly, to properly find a representative "baseline year," different years can and should be used for individual Coalition members. R. Vol. 1 at 116-25. The Methodology Order recognizes the use of a "baseline year" can be adjusted for purposes of calculating a demand shortfall. R. Vol. 3 at 568 ("In the future, climate may vary and conditions may change; therefore, the methodology may need to be adjusted to take into account a different baseline year or years"). Despite this provision, the Director has refused to vary from the use of the 2006/08 average as the "baseline year" for all Coalition members from 2010 to 2014. In order to provide the greatest certainty that the Coalition's senior water needs will be met during the irrigation season, the Director should be required to use the most recent data reflecting a potential dry year condition.

For instance, the following table better represents the Coalition's water needs and what could be expected in a high demand irrigation season:

SWC Member:	Baseline Year	Diversion (acre-feet)
A&B	2012	62,016
AFRD #2	2012	451,357
BID	2012	252,638
Milner	2013	52,562
MID	2012	382,708
NSCC	2013	1,021,802
TFCC	2012	1,089,269

R. Vol. 4 at 771 (2012 data); R. Vol. 6 at 1046 (2013 data).

At a minimum, the above quantities better reflect the Coalition members' actual water requirements needed for beneficial use and should be incorporated into any "baseline" year analysis that the Court may authorize. While the Director refused to adjust the senior's water needs throughout the 2013 irrigation season, the Coalition members were forced to suffer the consequences of his underestimated water needs. *See As Applied Brief* at 23-24. Using the above numbers would reduce the possibility of that scenario occurring again. By predicting for a high demand use year up front, junior groundwater users can plan and obtain the necessary mitigation water in advance of the irrigation season. The Coalition would then have assurances that later shortfalls would be fully mitigated. Moreover, the amended baseline year up front would protect against any problems associated with juniors having to acquire additional storage water or take other actions late in the irrigation season to make up for increased injury suffered by the Coalition members.

The Court should require the Director to amend and modify the baseline year analysis accordingly.

V. The Supplemental Ground Water Use Provision in Step 1 Violates Idaho Law.

The Methodology Order sets forth a straightforward requirement in Step 1. The Coalition members must provide electronic shape files delineating the total irrigated acres within their boundaries or confirm that the number has not varied from the previous year by more than five percent (5%). R. Vol. 3 at 597. The Director then uses this information in calculating "Crop Water Need" in Step 2 and subsequent steps. *See id.* at 597-98.

Since 2010 the Director has arbitrarily refused to use the irrigated acreage information submitted by the Coalition members. *As Applied Brief* at 33-37. Consequently, the Director has underestimated certain Coalition members' in-season "Crop Water Need" requirements and the resulting material injury. The failure to properly implement conjunctive administration with the correct irrigated acreage has prejudiced the Coalition members' senior water rights. This issue is addressed in the *As Applied Brief* at 33-37.

In addition to the Director's refusal to consider the Coalition's irrigated acreage information, Step 1 also contains a facial flaw that must be set aside. The end of Step 1 provides that in determining "total irrigated acreage, the Department will account for supplemental ground water use." R. Vol. 3 at 597. The so-called "accounting" of private supplemental ground water use to the detriment of the Coalition's senior surface water rights is unlawful for several reasons.

First, private supplemental ground water use has no relevance to the administration of the Coalition's surface water rights and the delivery of surface water by the Coalition. Idaho law requires the Director to honor the Coalition's surface water rights in conjunctive administration. Since the Director is required to administer to the Coalition's water rights, he has no authority to limit that administration based upon individual private ground water rights.

Second, the Hearing Officer concluded there was no evidence to account for supplemental ground water use. The former Director accepted this finding and no party challenged the decision on appeal. According to the "law of the case" doctrine the Director is precluded from changing his decision on this issue now. Finally, there is no substantial evidence in the record to support the Methodology Order's "new" qualification. Instead, the order only contains a footnote reference to an outdated model design document that relies upon "arbitrary" assumptions. Therefore, the Step 1 supplemental ground water use provision should be set aside as it violates the Idaho APA as well. Each reason is addressed in detail below.

A. Administration of the Coalition's Surface Water Rights is Not Qualified by Private Supplemental Ground Water Use.

The Director and Watermaster have a mandatory duty to administer water rights. *See* I.C. § 42-607; CM Rule 40.01; *Musser v. Higginson*, 125 Idaho 392, 394 (1994). Although the Director may consider the Coalition's natural flow and storage water rights together, and begin an analysis with an adjustable baseline supply, he cannot ignore the number of irrigated acres on the Coalition's water right decrees. The Coalition is entitled to divert and deliver water to the number of irrigated acres authorized by their partial decrees without qualification by other private supplemental water rights.[18] While the Director may consider the number of acres irrigated by the Coalition members in a given year, private supplemental ground water rights have no bearing on the Coalition's water deliveries or the acres that receive surface water. *See AFRD #2 v. IDWR*, 143 Idaho 862, 876-78 (2007) ("The Rules should not be read as containing a

[18] All of the Coalition's water rights have been partially decreed by the SRBA Court. The Court can take judicial notice of the SRBA Court's decrees and their elements, including the number of irrigated acres identified under the place of use. *See* I.C. § 9-101; *Doe v. Doe*, 146 Idaho 386, 389 (Ct. App. 2008).

burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has").[19]

The CM Rules do not allow the Director to "account" for private supplemental ground water rights held by certain individuals to the detriment of the senior calling canal company or irrigation district. Instead, the CM Rules provide the following when evaluating material injury to a senior surface water right:

> 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;

CM Rule 42.01.g (emphasis added)

The rule's plain language identifies the water right "holder" or the "user" making the delivery call, and its "existing facilities" and "water supplies." The rule does not contemplate whether an individual landowner or shareholder may hold a supplemental groundwater right. Contrary to the rule, the Director looked beyond the water right "holder" – i.e. the Coalition irrigation districts and canal companies – and their "water supplies" – i.e. the Coalition's senior surface rights – and included unknown private supplemental ground water wells in the accounting of irrigated acres.

Of the Coalition entities, only Milner Irrigation District holds a decreed ground water right that can be used to supplement its surface water delivery. R. 402. The rest of the Coalition members do not have "existing" ground water "facilities" or ground "water supplies."[20] Nothing in the CM Rules allows the Director to include "private" supplemental ground water rights as

[19] Although the Coalition has complied with the Methodology Order's requirement concerning submission of information on irrigated acres, the Director has wrongly refused to use this information. *See As Applied Brief* at 33-37.

[20] The rest of the Coalition members do not hold any ground water rights that supplement their surface water rights. However, a few members recapture limited water on their projects that is redelivered. R. 374. Finally, A&B holds primary ground water rights used on lands subject to a separate groundwater delivery call.

part of the Coalition's existing "facilities" or "water supplies."[21] This misreading of the rule must be rejected as a matter of law. *See State v. Yeoman*, 149 Idaho 505 (2010); *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 533 (2008) ("Administrative regulations are subject to the same principles of statutory construction as statutes").

Whether individual shareholders or landowners hold supplemental ground water rights has no bearing on the Coalition's surface water rights and their obligation to delivery surface water to their farmers. For example, an irrigation district is statutorily obligated to "do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes." I.C. § 43-304. Similarly, canal companies must furnish surface water upon demand by their shareholders. *See* I.C. § 42-912 ("shall furnish water . . . upon a proper demand being made and reasonable security being given for the payment thereof . . ."). Nothing in the statutes or regulations authorizes an irrigation district or canal company to rely on the private, supplemental ground water rights of their landowners or shareholders to meet this statutory obligation. Indeed, private "supplemental" ground water rights are not available to the Coalition entities for delivery throughout their respective projects to compensate for a reduction in surface water availability.

Similarly, the Director cannot use these private rights to reduce the mitigation obligation of junior ground water users causing material injury. Since the water is not available to the Coalition members for delivery, it cannot be used to offset material injury to their senior surface water rights. Whether an individual is authorized or chooses to pump a supplemental well does not alter the canal entities' statutory duty to ensure that sufficient water is "furnished" for

[21] It is erroneous to assume that a private ground water right holder must pump a "supplemental" ground water right that may be conditioned or limited to only be authorized for use if surface water is not delivered. Moreover, forcing individuals to the additional expense to pump ground water is not warranted if a full surface water supply can be delivered by the canal company or irrigation district.

irrigation upon demand. I.C. §§ 42-914; 43-304. Indeed, a Coalition member cannot reduce delivery to a water user just because he or she may own a supplemental ground water right. If a water user requests their delivery from a Coalition member, that member is statutorily obligated to deliver that water – subject to available water supplies.

Moreover, assuming supplemental ground water use must occur unlawfully forces those individuals with such wells to incur the added cost of pumping and exacerbates the material injury being suffered by the Coalition. It is nonsensical to require further pumping as a means to discount the material injury suffered by the senior right. Such reasoning is also flawed by the fact that, as Hearing Officer Schroeder found, such rights would likely be "subject to curtailment" anyway. R. 7057.

Perhaps most important, supplemental ground water rights held by private individuals within a project area have nothing to do with the number of irrigated acres authorized under the Coalition's partial decrees. Those decrees were issued without any reference to, or consideration of, private supplemental irrigation rights. If surface water is delivered for irrigation purposes, those acres must be fully accounted for in Director's analysis. The Director has no authority to reduce or discount surface water irrigated acreage just because certain individuals may hold supplemental ground water rights.

Finally, by their nature, supplemental ground water rights are only exercised when a surface water right cannot provide a full supply. IDWR's standard condition on supplemental ground water rights typically reads:

> The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right and shall only divert groundwater under this right when water from the appurtenant surface water rights cannot be delivered to the right holder.

See e.g., Water Right Decree 37-02627C (decreed May 15, 2012).

If the Director assumes "supplemental ground water use" will or must occur, then it follows that the senior surface water right is injured and inadequate to supply the individual's irrigation needs – thus, necessitating conjunctive administration in first place.

In sum, the Director has no legal authority to account for supplemental ground water use in any manner that further injures or prejudices the senior surface water right. For this reason the Court should set aside the supplemental ground water use provision in Step 1.

B. The Supplemental Ground Water Use Provision is Contrary to the Law of the Case and is Not Supported by Substantial Evidence in the Record.

In addition to the above reasons, the Director's supplemental ground water use provision fails for at least two additional reasons. First, the law of the case prohibits the consideration of supplemental water rights. In fact, this exact issue was rejected by the Hearing Officer – a conclusion that was subsequently accepted by the Director in the 2008 final order. Since this issue was not appealed it is "law of the case" and the Director had no authority to change this finding in the 2010 Methodology Order. Second, the Director's new provision is not supported by substantial evidence in the record. As such, the provision violates the Idaho APA and should be set aside accordingly.

The Director added the "supplemental groundwater use" provision for the first time in the April 2010 methodology order. R. Vol. 1 at 45, 64. The Coalition challenged the provision. *Id.* at 127-130. The Director completely disregarded the Coalition's request for reconsideration, R. Vol. 3 at 547-559, maintaining the supplemental ground water use provision in the final Methodology Order, R. Vol. 3 at 576.

Although former Director Dreher originally requested supplemental groundwater use information from the Coalition members, it was not provided because such information is not kept by the Coalition. R. 374-75; *see also AFRD #2*, 143 Idaho at 877 ("the Rules are clear in

saying that the additional information should be provided only *if available* to the petitioner") (emphasis in original). As such, the May 2005 Order did not include "supplemental ground water use" in the evaluation of the Coalition's irrigated acres. When questioned at hearing, former Director Dreher explained his reasoning:

> A. [BY MR. DREHER]: I would have rather not taken it into account than made a kind of an arbitrary attempt at trying to include some amount of it. But I mean – yeah. I'd rather go the approach that I did given that supplemental ground water use likely is a relatively small – I'm not saying an unconsequential [sic] amount of water, but in the scheme of the water supplies we were looking at, it probably was a rather small component.

Tr. Vol. II, p. 449, lns. 16-24 (2008 Hearing).

The Hearing Officer confirmed that any supplemental "ground water rights would be junior" in priority and, therefore, such information was not necessary for evaluation:

> **11. An undetermined number of individual irrigators within SWC may hold supplemental ground water rights which the former Director found to be minimal in effect.** It would seem that any such ground water rights would be junior to the surface irrigation rights and subject to curtailment.

R. 7057 (emphasis in original).

The Director accepted this finding in the 2008 final order and no party appealed this issue. R. 7382. This prior agency decision, therefore, is "law of the case." As such, the Director was without authority to change that finding in the Methodology Order. *Taylor v. Maile*, 146 Idaho 705, 709 (2009) ("The 'law of the case' doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal"); *see e.g.*, *Memorandum Decision on Petition for Judicial Review* at 10-13 (*A&B Irr. Dist. v. IDWR*, Minidoka County District Court, Fifth Jud. Dist., Case No. CV-2011-512, April 25, 203).

Despite having no information or substantial evidence on this issue, the Director included the following finding in the Methodology Order:

> . . . All acres identified as receiving supplemental ground water within the boundaries of a single SWC entity will initially be evaluated by assigning an entity wide split of the ground water fraction to the surface water fraction as utilized in the development of the ESPA Model. *See* Ex. 8000, Vol. II, Bibliography at II, referencing *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017*. For each entity the ground water fraction to the surface water fraction is as follows: A&B 95:5; AFRD2 30:70; BID 30:70; Milner 50:50; Minidoka 30:70; NSCC 30:70; & TFCC 30:70. If these ratios change with a subsequent version of the ESPA Model, the Department will use the value assigned by the current version of the ESPA Model.

R. Vol. 3 at 576, n. 6. The Director's conclusion was based entirely on a bibliography reference to a model design document – which he used to create a "new" supplemental ground water "fraction" for purposes of administration. Such an action is arbitrary and capricious and not supported by substantial evidence in the record.[22] I.C. § 67-5279(3).

Aside from former Director Dreher's brief testimony above, this issue was not addressed at the hearing. The Hearing Officer found the Director should not include supplemental ground water use in his decision and that it would be "minimal in effect." R. 7057. That issue was not appealed – therefore, the Director has no authority to alter the previous holding. That notwithstanding, the Director failed to explain why the prior final decision should be changed. The failure to provide such an explanation in the Methodology Order violates the Idaho APA. *Pearl v. Bd. of Prof'l Discipline*, 137 Idaho 107, 112 (2002) (in such cases the Court "will scrutinize the agency's findings more critically," since the Court imposes on agencies "an

[22] The reliance upon design documents for ESPAM 1.1 is also flawed since it is outdated and does not represent the best available science. The procedure to assign an entity-wide split of the ground water fraction to the surface water fraction has since been completely revised. IDWR and IWRRI have completed and adopted a revised groundwater model, ESPAM 2.1. The Director recently confirmed this updated version of the model is the best available science and must be used in conjunctive administration. *See Final Order Regarding Rangen Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* (CM-DC-2011-004) (Jan. 29, 2014).

obligation of reasoned decision making includes a duty to explain why the agency differed from the administrative law judge").

Even a review of the referenced document (which is not in the record) shows most of the assigned fractions are arbitrary "estimates" or assumptions that are insufficient to rely upon for purposes of using "supplemental ground water use" against the Coalition members in administration. Indeed, the document provides: "If an entity had virtually no mixed-source lands, ***the fraction was arbitrarily set at 0.30***." *Design Document 017* at 21 (emphasis added). The finding makes no sense. If a canal entity has "virtually no mixed-source" surface and ground water lands then the author arbitrarily used 30% as the number. In other words, he wrongly assumed that 30% of the lands received supplemental groundwater. This fraction is assigned to AFRD#2, BID, MID, NSCC, and TFCC. R. Vol. 3 at 576, n. 6. Further, the author assigned a fraction of 50% to Milner and 95% to A&B. There are absolutely no facts in this design document or the record to support the 30%, 50%, or 95% groundwater use number within the Coalition entities identified. The document cites no supporting information. Moreover, although certain entities are assigned specific fractions, many are assigned even numbers that denote an "arbitrary" estimate or guess. Clearly, there is no factual support in the record for the Methodology Order's new supplemental ground water use finding.

The Director's supplemental ground water use provision, which relies upon arbitrary "assumptions" and is contrary to the Hearing Officer's finding on the issue, is not supported by substantial evidence and violates Idaho's APA. *Galli*, 146 Idaho at 158 ("A decision is clearly erroneous when it is not supported by substantial and competent evidence"). As such, the Methodology Order's supplemental ground water use provision should be set aside accordingly.

VI. The Methodology Order's Use of 1990-2008 Average Crop Distribution is Invalid and Underestimates the Coalition's Water Needs (Step 2).

Step 2 requires the Director to calculate each Coalition members' "crop water need" throughout the irrigation season. R. Vol. 3 at 597. The order provides that the Director will use "crop distributions based on NASS data." *Id.* There are several errors in the Director's use of the U.S. Department of Agriculture's National Agricultural Statistics Service (NASS) data that must be corrected to properly use this variable in the calculation.[23]

First, the use of a crop mix based upon an average from 1990-2008 is outdated and not based upon the best information. Although NASS uses a county-wide crop distribution it does not reflect specific crop distribution within particular Coalition projects. Moreover, only those years when acreage for all counties for a given crop was reported have acreage amounts reported. R. Vol. 2 at 310. For each blank in the cited table, R. Vol. 2 at 310, one or more counties did not report acreage for that crop in that year. The last year in which all crops selected by the Director were reported in all counties was 1994.[24] Indeed, the Coalition has submitted more updated information on this issue that has been repeatedly ignored by the Director. For example, in 2013, the Coalition urged the Director to use the most current NASS data from 2012 as the managers confirmed that year's cropping pattern was likely to be similar in 2013. R. Vol. 5 at 827. The Director refused to consider this information. Again, this violates the Methodology Order's own requirement to use the most "updated data" and "best available science." R. Vol. 3 at 568.

Next, another reason the Director's use of 1990-2008 average data is inaccurate is illustrated in the referenced Figure 1 showing the trend of increasing acreage for alfalfa and corn.

[23] An example of the NASS data is included in the "Crop Water Need" tab in the "DS_&_RISD Calculator" spreadsheet found in the "IDWR 11-30-2010 Background Data" subfolder in the "Bates Stamped OCR Docs" folder on Disc 1 of the record.

[24] Although the Director appears to have included the average of 1990-2010 in the 2013 orders it is unknown whether the same analysis was applied such that only years when all crops were reported are included in the actual calculations.

R. Vol. 2 at 311. This increase in forage crops has been confirmed by the Coalition managers. By ignoring the most current information the Director underestimates the Coalition's crop water need. The Coalition's consultant described this problem to the Director in early 2010:

> To illustrate, ET data for 2007 were taken from the Twin Falls AgriMet station. For 2007 mean alfalfa ET is 39.8 inches and bean ET is 18.8 inches of water. From Table 1 the difference in bean acreage in 2004, the last year reported, and the average of all years in Table 1 is about 38,000 acres or about a 40% reduction. The difference in alfalfa acreage is about 25,000 acres between the average and 2004, the last year reported or about 10% increase. If these changes were applied to TFCC, for example, the increase in alfalfa would be about 5,000 acres with a comparable decrease in beans. The increase in ET based in 2007 data would be (39.8 – 18.8) / 12x5000 = 8,750ac – ft. Using TFCC project efficiency of 37.4 % the increased diversion requirement would be about 23,400 acre-feet. Had these acreages been applied to an RISD analysis in 2007 the result would show TFCC entitled to about 23,400 acre-feet more in-season water need than currently proposed.

R. Vol. 2 at 304.

Indeed, as the above example shows, the significance of the trend is that alfalfa and corn demand more water than beans. When the Director relies upon an estimate based upon the 19-average it is likely more weighted toward the crop mix in the earlier period than the current crop mix. As a result, the crop water need is underestimated. The use of inaccurate crop data reduces the projected injury, further reducing any mitigation water owed to the Coalition's senior rights.

Next, the Director only uses "harvested" acres in this analysis. *See e.g.* "Crop Area Data" spreadsheet, "IDWR 4-20-10 Supplied Background Data" subfolder in "Bates Stamped OCR Docs" folder on Agency Disc 1. No water user starts irrigating in the spring with the intention of not harvesting the crop they are trying to raise. At harvest time there can be any number of reasons for not harvesting due to a lack of water, weather, disease, market value, etc. At the point a decision is made to not harvest a particular crop or portion thereof, the Coalition cannot pull back the water that has already been used for the season. In short, the Director

cannot use unharvested crops against the Coalition for purposes of underestimating the water needs throughout the irrigation season.

At a minimum, the Director should be required to identify all sources of crop data and should consult with the Coalition managers to better understand actual crop distribution on an annual basis. Indeed, the Coalition managers have provided such information that the Hearing Officer found was wrongfully ignored by the Director. R. 4432-4495; 4502-4537; 7095. Accordingly, the use of this crop distribution data in the Crop Water Need equation in Step 2 should be corrected consistent with the information provided by the Coalition. The Court should require the Director to modify this procedure accordingly.

VII. The April Forecast Supply is not a "Pre-Season Management Plan." (Step 3)

The Supreme Court identified the steps the Director must follow in order to use a "baseline" approach in administration. *See A&B*, 315 P.3d at 841. Regarding timing, the Court held the Director may develop and implement a "pre-season management plan" that "must comport in all respects with the requirements of Idaho's prior appropriation doctrine." *Id.* Further, the plan "must be available ***in advance*** of the applicable irrigation season, and be promptly updated to take into account changing conditions." *Id.* (emphasis added). The Court explained that the legislature authorized the development of the CM Rules in "the context of developing a water allocation plan for ***an up-coming irrigation season***." *Id.* at 838 (emphasis added). Step 3 of the Methodology Order, termed the "April Forecast Supply," fails the Court's standard.

First, the Methodology Order does not provide for a "pre-season management plan." Instead, it requires the Director to delay issuing an initial order until after the irrigation season begins. The order provides:

> 4. 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 fourteen (14) days after 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. A separate April Forecast Supply and DS will be determined for each member of the SWC.

R. Vol. 3 at 598.[25]

Under the order, the Director must wait for Reclamation and the Corps to issue the joint operating forecast for the April-July unregulated inflow of the Snake River at the Heise Gage. This particular forecast is not a "pre-season management plan" or made "available in advance of the applicable irrigation season." 315 P.3d at 841.

"Pre" is a prefix meaning "earlier than," "prior to," or "before." WEBSTER'S NEW COLLEGIATE DICTIONARY 925 (9th ed. 1987). Accordingly, "pre-season" means before the start of the irrigation season. The Coalition's partial decrees all include an irrigation season of use from March 15th through November 15th. Ex. 4001A.[26] Similarly, decreed ground water rights throughout the ESPA also provide for an irrigation season beginning either March 15th or April 1st. Ex. 4614; *see also,* IDAPA 37.03.08 (App. B) (season of use map for irrigation water rights). Accordingly, waiting until mid to late April to issue the forecast supply order violates the Supreme Court's requirement for a "pre-season management plan." *A&B,* 315 P.3d at 841.

By waiting until mid to late April, the Director's methodology delays an initial decision until after the irrigation season has already begun. Consequently, when seniors attempt to submit

[25] The Director has issued this initial order after the start of the irrigation season every year the methodology has been used. *See* R. Vol. 1 at 185 (April 29, 2010); R. Vol. 4 at 701 (April 18, 2011); at 728 (April 13, 2012); R. Vol. 5 at 829 (April 17, 2013); *see also, Final Order Regarding April 2014 Forecast Supply* (April 18, 2014); a copy of the order can be found at http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/default.htm.

[26] The season of use for the Coalition's water rights is March 15th to November 15th as documented on the Director's Reports. All of the Coalition's water rights have since been partially decreed with the same season of use. The Court can take judicial notice of the SRBA Court's decrees and their elements. *See* I.C. § 9-101; *Doe,* 146 Idaho at 389.

additional information and evidence concerning the Director's forecast and their expected water needs for the year, it is too late. *See* 315 P.3d at 841; *As Applied Brief* at 5-8. However, the delayed timing benefits junior ground water users causing injury, as this means they will be allowed to begin pumping out-of-priority contrary to law.

The arbitrary timing of the initial forecast supply order is further highlighted by the Director's actions this year. Due to a low snowpack in the early winter, the Director sent certain junior ground water users a "notice" of potential curtailment on January 28, 2014, well before the start of the irrigation season. Attachment A. However, such a notice is not provided for in the Methodology Order. Regardless, the Director relied upon the following hydrologic data for this notice:

> The Department has completed preliminary curtailment predictions based on the water supply conditions presented at the Department's January Idaho Water Supply Committee by the USBR and the Natural Resource Conservation Service (NRCS). Curtailment predictions were based on years with similar carryover conditions as presented by the USBR coupled with years of similar runoff forecasts as presented by the NRCS for the Snake River at Heise. Based on those predictions, there is a 50% chance that no curtailment will be required and a 30% chance that ground water rights within priority dates junior to May 31, 1989, may be curtailed. If the predicted runoff is the same as in 2001, the lowest runoff water year since 1981, ground water rights with priority dates junior to September 23, 1974, may be subject to curtailment.

Director Spackman January 28, 2014 Letter at 1-2; Attachment A.

A little over a month later, on March 4, 2014, the Director sent affected ground water users a second notice, again relying upon runoff forecasts published by the Natural Resource Conservation Service (NRCS). Attachment B. Based upon the changed watershed conditions and the updated NRCS predictions, the Director advised "there is a better than 90% chance that no curtailment will be required." *Id.* Accordingly, by his own admission as evidenced in 2014, the Director has the ability to evaluate water supply conditions and make early forecasts for a

"pre-season management plan" without waiting for the Reclamation / Corps joint forecast. While the NRCS and the Idaho Water Supply Committee evaluate conditions and issue forecasts before the beginning of the irrigation season, the Director's Methodology Order does not include provisions for evaluating this information.

The above example demonstrates that the Director has the tools and ability to comply with the Supreme Court's requirements. Issuing a "pre-season management plan" is feasible. Since Step 3 of the Methodology Order does not provide for a "pre-season management plan," and delays the initial decision until after juniors begin pumping out-of-priority, it violates the Supreme Court's *A&B* decision.

Therefore, the Coalition respectfully requests the Court to set aside Step 3 and remand it to IDWR with guidance to comply with the "pre-season management plan" requirement for purposes of an initial forecast supply.

A. The Heise Regression is Not Reflective of TFCC's Water Supply / Not Supported by Substantial Evidence in the Record.

The Director uses the Reclamation / Corps joint forecast for the unregulated inflow at the Heise Gage (April 1 - July 31) to establish the April Forecast Supply. R. Vol. 3 at 572, 598. Apart from the timing problems addressed above, the order fails to use the best evidence to predict available water for Twin Falls Canal Company, which primarily relies upon Snake River reach gains.[27] Although the forecast may be a "good indicator" of the total available irrigation water supply for some Coalition members, it is not the best evidence for all. *Id.* at 572. For instance, the Director used a regression equation to predict the available natural flow supply for each Coalition member by comparing historic natural flow diversions with the unregulated Heise inflow. R. Vol. 1 at 185, 192-98. Although the R^2 values for most Coalition members ranged

[27] This argument also applies to NSCC, which holds a 1900 priority natural flow right (400 cfs) that is primarily reliant upon reach gains, not unregulated flow at Heise. R. 7056.

between 0.80 and 0.90, the value for TFCC is a meager 0.54 which demonstrates a poor relationship between the two variables. This issue was addressed at the May 2010 hearing with IDWR staff who admitted the lack of correlation. Tr. Vol. II, p. 168, lns. 2-12; p. 174, lns. 3-10 (2010 Hearing).

The Hearing Officer also commented on the regression and how it was not a good indicator of reach gains in the Snake River. R. 7100 ("source of information for reevaluating water conditions should be expanded . . . Initial use of the Heise Gage unregulated flow is reasonable as a starting point in predicting the water supply, but as the year progresses and adjustments become necessary other sources utilized by the irrigation districts to monitor and predict their water supplies should be included").

Consistent with the Hearing Officer's recommendation, and the Director's recognition to use "updated data" and the "best available science," TFCC submitted information to IDWR to better evaluate and predict Snake River reach gains later in the irrigation season. R. Vol. 5 at 863, 872. TFCC's manager Brian Olmstead described the information in his affidavit and how it was provided for IDWR's consideration in 2013:

> 3. The Director predicted an in-season material injury to TFCC in the amount of 14,200 acre-feet in his April 17, 2013 *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*. TFCC and the other members of the Surface Water Coalition disagreed with the Director's assessment of injury for the 2013 irrigation season and requested reconsideration of the order. TFCC further requested the Director to consider updated hydrologic information for purposes of assessing the 2013 water supply conditions. TFCC specifically requested the Director to consider updated modeling provided by TFCC for purposes of predicting available natural flow below Blackfoot during the irrigation season. . . .

R. Vol. 6 at 1001; *see also* R. Vol. 5 at 863, 872.

Despite submission of the information on April 21, 2013, the Director refused to evaluate and consider this "updated data" and "best available science." The failure to use the best available information specifically resulted in unmitigated injury to TFCC's senior rights. R. Vol. 5 at 953. Consequently, the Director's reliance upon the Heise regression to predict the available water supply for TFCC in Step 3 is arbitrary and capricious and not supported by substantial evidence. The Court should set aside and require IDWR to amend its water supply forecasting procedures accordingly.

VIII. Step 4 Further Delays Timely Administration and Artificially Reduces Affected Groundwater Acres in Curtailment.

A. The Director Gives Juniors an Additional Fourteen Days or Until May 1st, Whichever is Later, to Prove They can Mitigate.

Along with failing to include a "pre-season management plan," the Methodology Order compounds the problem of untimely administration in Step 4. If the Director determines that an in-season "demand shortfall" exists based upon the April Forecast Order, juniors are given another fourteen (14) days or until May 1st, whichever is later, to show they have acquired storage or will take other actions to mitigate the injury. R. Vol. 3 at 598-99. Again, such a procedure allows junior ground water users to begin irrigating out-of-priority before establishing and providing approved mitigation to the injured senior. This process violates the prior appropriation doctrine and the CM Rules.

Whereas certain junior ground water rights have authorized seasons of use beginning on March 15th and April 1st, out-of-priority diversions may pump for 30-45 days before mitigation is actually secured under the Methodology Order. Ex. 4614; IDAPA 37.03.08 (App. B). Accordingly, the additional delay built into Step 4 only benefits junior ground water users, not injured senior surface water users. For instance, if juniors do not satisfy the ordered mitigation

requirement, then curtailment would be presumably implemented sometime in May or June. The delayed administration, particularly where ground water users have already pumped out-of-priority for nearly two months, further injures the senior water rights. The delayed curtailment would not satisfy the identified obligation since affected ground water rights would have already taken hydraulically connected groundwater to the detriment of the senior's water supplies, unless this early pumping was factored into the curtailment.

Since the Director allows junior rights to begin pumping before mitigation is provided and approved, the additional delay in Step 4 further injures the senior rights. The problematic timing does not comply with the Supreme Court's requirements in *A&B*. Therefore, the Coalition respectfully requests the Court to set aside Step 4 accordingly.

B. The Director Arbitrarily Reduces the Demand Shortfall Through Erroneous Model Analysis Beyond the CM Rule 50 Area of Common Ground Water Supply (Steps 4 & 10).

Apart from the delayed decision for the initial forecast, the Director also arbitrarily reduces the junior groundwater acres subject to administration in Steps 4 and 10. With respect to requiring mitigation or ordering curtailment in the event of the initial demand shortfall, the Methodology Order provides the following:

> 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. Modeled curtailment shall be consistent with previous Department efforts. The ESPA Model will be run to determine the priority date necessary to produce the necessary volume within the model boundary of the ESPA. However, because the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01, junior ground water users will be required to meet the volumetric obligation within the area of common ground water supply, not the full model boundary.

R. Vol. 3 at 599.[28]

[28] The same modeling procedure is provided in Step 10 and should also be set aside for the reasons explained herein.

Through this provision the Methodology Order wrongly reduces the calculated demand shortfall to the detriment of injured senior water users in the event curtailment is ordered. The facts in 2010 provide a concrete example of how this step causes further injury to seniors. In the April 2010 Forecast Supply Order the Director predicted an in-season demand shortfall of 84,300 acre-feet to AFRD#2 and TFCC. R. Vol. 1 at 186. Consequently, the Director ordered juniors to establish their ability to provide 84,300 acre-feet within fourteen (14) days. *See id.* If juniors failed to provide the full mitigation obligation of 84,300 acre-feet, then curtailment was to be ordered. *See id.* at 188.

Pursuant to the Step 4 modeling exercise the Director used the entire ESPA model boundary to determine the appropriate priority date for curtailment. Modeling ground water rights within the entire model boundary the Director found that curtailing rights junior to April 5, 1982 would increase reach gains in the Near Blackfoot to Minidoka reach by 84,361 acre-feet. R. Vol. 1 at 187. However, the Director recognized that curtailing rights junior to April 5, 1982 within the smaller Rule 50 "area of common ground water supply" would only increase reach gains by 77,985 acre-feet, a difference of about 6,500 acre-feet or 8%. *Id.* On its face the Step 4 modeling procedure for curtailment did not satisfy the Coalition's material injury.

The Methodology Order wrongly uses the ESPA Model boundary, instead of the Rule 50 "area of common ground water supply," to determine a priority date for curtailment. Since the model boundary extends beyond the Rule 50 "area of common ground water supply," the order uses that fact against the Coalition for the sole benefit of junior ground water users. Instead of identifying the proper priority date of curtailment for junior rights within the "area of common ground water supply" to increase reach gains by 84,000 acre-feet, the Methodology Order arbitrarily includes junior water rights within the model boundary to reduce the number of

affected acres.[29] IDWR's Deputy Director admitted this modeling procedure does not produce the calculated demand shortfall:

> Q. [BY MR. THOMPSON]: And I guess in both orders, we'll take this one at a time. Did that reduce the number of acres, or the ground water rights affected, when you just looked at the common ground water supply compared to what was included within the model boundary?
>
> A. [BY MR. WEAVER]: It does, yes.
>
> Q. And did the curtailment that was run, did that produce the entire shortfall that was estimated by implementing Steps 3 and 4?
>
> A. In the re-evaluated number? I guess in either case, no.

Tr. Vol. I, p. 117, lns. 13-24 (2010 Hearing).

The CM Rules only authorize the Director to administer or regulate water rights within the "area of common ground water supply." CM Rule 50.01. The Director admits the same in the Methodology Order. R. Vol. 3 at 599 ("the Director can only curtail junior ground water rights within the area of common ground water supply"). Accordingly, the Director's provision to model ground water rights within the entire ESPA Model boundary is arbitrary, capricious, and in excess of his authority. *See* I.C. § 67-5279(3); *see also, Eddins v. City of Lewiston*, 150 Idaho 30, 33 (2010); *Morgan v. Idaho Dept. of Health & Welfare*, 120 Idaho 6, 9 (1991).

If the Director cannot curtail junior ground water rights outside the "area of common ground water supply" then it follows that he has no authority or rational basis to include those water rights in the modeling of curtailment to meet the identified demand shortfall. Stated another way, if junior priority ground water rights outside the area of common ground water supply cannot be curtailed, then they cannot be included in the modeled curtailment in the first place. Accordingly, the Court should set aside this procedure in Steps 4 and 10.

[29] Under the Supreme Court's *A&B* paradigm, affected juniors have the burden to prove, by "clear and convincing evidence," they are not subject to administration or are not causing material injury.

The order's error is further exposed by the fact that IDWR has the ability to perform the proper analysis. For example, when the ESPA Model boundary is used to model curtailment of junior rights to produce 84,361 acre-feet (i.e. April 5, 1982), the water rights with that same priority within the area of common ground water supply only supply 77,985 acre-feet. Accordingly, the Director has the tools and the ability to analyze and curtail a set of junior ground water rights within the "area of common ground water supply" that would supply the full 84,000 acre-feet, the identified injury. At the May 2010 hearing, IDWR's Deputy Director acknowledged this fact:

> Q. [BY MR. THOMPSON]: Would you agree that you could perform a model run to determine what rights would need to be curtailed, just within the area of common ground water supply to make up the entire shortfall?
>
> A. [BY MR. WEAVER]: I agree with that.

Tr. Vol. I, p. 118, lns. 10-15 (2010 Hearing).

Accordingly, IDWR has the ability to model the appropriate set of junior ground water rights within the "area of common ground water supply" to completely mitigate the identified shortfall. The Methodology Order's failure to exclude those rights outside the Rule 50 "area of common ground water supply" from the curtailment model run is not supported by law and is also arbitrary and capricious.

Since the modeling procedure does not provide full mitigation through curtailment, these provisions in Steps 4 and 10 are erroneous and must be set aside. The Director should be required to only model the ground water rights within the CM Rule "area of common ground water supply." The Coalition respectfully requests the Court to set aside these provisions and remand the steps to IDWR with instructions to follow the CM Rules' definition of the "area of common ground water supply" for purposes of administration.

IX. The Timing of Delivering Mitigation Water Does not Comply with Idaho Law (Steps 6 – 8).

Ground water users can only pump out-of-priority pursuant to an approved mitigation plan. *See* CM Rules 40.01.b; 43. The mitigation plan rule requires the delivery of mitigation water under the following standard:

> 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.

CM Rule 43.03 (emphasis added).

Idaho courts have also commented on the "timeliness" factor for purposes of conjunctive administration, and the standard the Director must meet. First, the Honorable Barry Wood carefully analyzed the constitutional requirement for administration and found:

> The mechanism now in place also creates a process that cannot be completed within the attendant time frame exigencies associated with water usage for a crop in progress. In practice, an untimely decision effectively becomes the decision; i.e. "no decision is the decision."
>
> * * *
>
> At least as to curtailment for irrigation water the CMR's must recognize that time is of the essence and set up procedural time frames commensurate with these constitutional principles. . . . However, as chronicled in the historical portion of this decision, a primary consideration of the preference system in Section was to protect "crops in progress, being green . . ." Proceedings and Debates at 1115 and 1123. I.C. § 42-607 provides the means for curtailment – the watermaster fastens the headgate or other diversion device. In fact, the constitution contemplates timely administration in two respects: priority in time and preference in use. That was the "real world" then and it is the real world today.

Order on Plaintiffs' Motion for Summary Judgment at 97, 102-103 (*AFRD#2 v. IDWR*, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2005-600) (June 2, 2006).

The Idaho Supreme Court affirmed the above principles in *AFRD#2*, *supra*:

> We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that ***the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.***

143 Idaho at 874 (emphasis added).

Recently, the Court further addressed the timeliness requirements for the Director's administration of the Coalition's delivery call and when mitigation water must be delivered:

> 1. The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, which methodology must comport in all respects with the requirements of Idaho's prior appropriation doctrine, be made available in advance of the applicable irrigation season, and promptly updated to take into account changing conditions.
>
> * * *
>
> Where a mitigation plan is the response to material injury, the Rules do provide that the Director must consider several factors to determine whether the proposed plan "will prevent injury to senior rights," including:
>
> > 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 multiseason 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*.
>
> *IDAPA 37.03.43.03.c* (emphasis added). As the district court held, this language is unambiguous. Thus, while the Rules permit a mitigation plan to "wait and see" how much water is necessary to protect against material injury, they require that such plan identify prospective means by which water will be provided in order to prevent material injury.

A&B, 315 P.3d at 841-42 (emphasis in original).

The Methodology Order falls short of the standards set forth in the CM Rules and Idaho case law. Instead of delivering water for a "crop in progress" or "when needed during a time of shortage," the order sets up a vague and arbitrary schedule for the Director to implement.

Moreover, the order provides no formal requirements or a defined process for interaction between IDWR, Water District 01, and junior ground water users supplying mitigation water. Consequently, Steps 6 – 8 result in untimely and unlawful administration to the detriment of the Coalition's senior surface water rights. The lack of standards and identified process has led to confusion and further uncertainty, causing seniors to once again suffer the consequences of not having the water when needed. *See As Applied Brief* at 37-39. The Court should set aside these steps and require the Director to implement timely administration and delivery of mitigation water consistent with Idaho law.

Approximately "halfway through the irrigation season," the Methodology Order provides the Director will evaluate each Coalition member's crop water needs, issue a revised Forecast Supply, and "estimate the Time of Need date." R. Vol. 3 at 599 (Step 6). This information is then used to recalculate reasonable in-season demand and "adjust the projected" demand shortfall for each Coalition member. *Id.* If the estimated "Time of Need" is reasonably certain, then the step is not repeated through Step 7. R. Vol. 3 at 600. At Step 8, the "Time of Need," the order provides as follows:

> 14. Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes[fn 17] from Step 4 (May 1 secured water) and the [DS] volume calculated at the Time of Need. If the calculations from steps 6 or 7 indicate a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.
>
> [FN 17] This refers to the overall volume for the entire estimate. While the overall volume predicted at the start of the season represents with certainty the upper bounds of water that junior ground water users will need to provide to

> members of the SWC, values predicted as the start of the season may adjust up or down at the time of mid-season re-evaluation.

R. Vol. 3 at 600.

The decreed irrigation season of use on the Coalition members' water rights is March 15th through November 15th. Ex. 4001A. Using this 245-day season, "approximately halfway" would fall on day 122, or July 14th. This is similar to the midway point of when the Coalition members typically begin diverting water (early April) and when they shut off for the year (mid- to late October).[30] Even using a typical irrigation season (April 7th – October 21st) described by the Coalition members at hearing, the halfway point of this 198-day season also falls July 14th.

While the plain terms of the Methodology Order require the Director to examine actual water conditions and recalculate any demand shortfalls in mid-July, the Director has failed to do so in the four years of its implementation. *See As Applied Brief* at 39-43. Consequently, the Director has failed to implement administration and deliver mitigation water in a "timely" and lawful manner to the Coalition's "growing crops."

In addition, the Director has arbitrarily defined the "Time of Need" as follows:

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

R. Vol. 3 at 584, n. 9.

In other words, the Director does not require junior ground water users to deliver any in-season mitigation water until the Coalition's storage supply is drained to the Director's reduced "reasonable carryover" level. The timing of such administration is problematic for the Coalition members who must forecast demand and schedule water deliveries accordingly. *See As Applied*

[30] As described in the manager and water users' testimony at hearing, the Coalition entities typically begin diverting water in early April and usually end their irrigation seasons in late October. R. 6123, 6329-30, 6362.

Brief at 16-18. For entities BID and MID, with reasonable carryover requirements of "0" acre-feet, this means they must completely exhaust their available storage before any mitigation water would be delivered. Such a requirement is contrary to what is required for proper administration of carryover storage as described by former Director Dreher: "the other extreme that I also thought was unreasonable, was that the surface water rightholders should not be expected to exhaust their storage before they can claim injury." Tr. Vol. I, p. 83, lns. 5-9 (2008 Hearing) (emphasis added).

For TFCC, who regularly diverts about 6,000 acre-feet a day during the peak of the irrigation season, the company would have to use all of its storage until it only had a 5-day supply remaining before the Director would require delivery of any mitigation water. Tr. Vol. VIII, p. 1775, lns. 14-15 (2008 Hearing). Large irrigation projects that deliver water to thousands of users with crops in the ground cannot be operated on such a slim margin. *See id.* at p. 1585, ln. 3 ("We [TFCC] have in excess of 5,000 turnout gates").

Notably, Coalition managers repeatedly advised the Director of their operations and planning process, including when they need mitigation water to deliver to growing crops:

> 4. I advise the Board weekly and monthly about water supply information and the Board typically makes decisions on water delivery operations (how much water to deliver per share) at the end of March or early April and again between July 1st and 15th.
>
> * * *
>
> 15. Based upon my observations on the TFCC project through this date, temperatures have been higher than normal and I have witnessed very little precipitation. For example, temperature forecasts for the Twin Falls area this week are in the low to mid 90s (degrees farenheit). Accordingly, water demand for the shareholders' crops on the TFCC project is high. I expect this high demand to continue throughout the season, particularly when additional corn has been planted. I expect that the additional corn on the project will push demand higher than normal in August.
>
> * * *

24. IGWA's plan does not provide me with any certainty regarding water delivery operations for TFCC for the rest of this irrigation season. If the mitigation required by the Director's *Fifth Supplemental Order* is not provided (including additional mitigation that should be forthcoming), TFCC will be forced to seek additional water supplies, make additional delivery curtailments (lower per share headgate deliveries or shut down during the irrigation season) in order to provide water through the end of the irrigation season.

R. 4465, 4468, 4471.

AFRD #2 has to date this irrigation season limped along with delivery of only 80% of full headgate deliveries, or 1/2 inch per acre, in consideration of the amount of carryover with which we began the season, as well as the past and anticipated very hot and dry conditions of this year. . . .

R. 4517.

. . . TFCC's management decisions and water deliveries this year have been altered due to reduced water supply conditions, unreliable reach gains, and the lack of mitigation water provided by junior ground water users. Shareholders have also been denied water they have requested pursuant to TFCC's senior water rights.

14. The Director apparently revised our predicted material injury for the 2013 irrigation season from 14,200 acre-feet to 51,200 acre-feet. Although the methodology used by the Director is contested, had the 51,200 acre-feet been provided to TFCC during the irrigation [season] we would have been able to deliver additional water to our shareholders for irrigation use. Many shareholders reminded the Board and me that they needed more water throughout the irrigation season. Instead of cutting deliveries to 5/8" we would have been able to deliver our full water right through the season to meet irrigation demands.

R. Vol. 6 at 1004.

7. When the 2013 irrigation season started, the Board of AFRD2 hoped to be able to deliver 5/8" to its water users during the season, which is needed by our water users to fully irrigation crops. Since, after the irrigation season began, the Director changed the amounts that would be supplied to AFRD2, it became apparent that AFRD2 could not rely upon the amounts that the Director ordered as mitigation. Flows in and into the Snake River deteriorated very quickly in 2013. There was no large runoff past Blackfoot and it was obvious to me in the spring and early summer that the available water supply would be less than what the Director predicted in his orders. . . . On July 1, 2013, the Board made a determination to cut water deliveries to AFRD2 water users by 20% to 1/2" commencing July 15, 2013 for the rest of the season or until water supplies ran out. Since July 15, 2013, AFRD2 has been delivering 1/2" to its

> water user, which has stressed crops and reduced yields. Meanwhile, junior ground water users have irrigated without reduction.
>
> * * *
>
> 9. . . . By the Director's own calculations, AFRD2 has been injured by 46,700 AF that will not be mitigated, even though AFRD2 has a water right senior to the junior ground water users' rights who have been diverting the entire 2013 irrigation season.

R. Vol. 6 at 1007-08.

As described above, the lack of timely mitigation under the Methodology Order has injured the Coalition's senior water rights and prevented the required delivery of water to their farmers' fields.

Apart from the lack of timely administration, the Methodology Order provides no formal mechanism to ensure that any mitigation water acquired by junior ground water users is actually delivered to the Coalition's storage accounts pursuant to the Water District 01 rental pool rules. For instance, the order contains no details of how the Director, Water District 01, and junior ground waters must communicate and ensure storage water is properly delivered to the injured Coalition members. *As Applied Brief* at 37-39.

The lack of defined standards allows the Watermaster to ignore junior ground water users' requests and delay the delivery of mitigation water. Further, the injured Coalition members are left without any remedy to ensure the order is properly implemented and injury is prevented. In sum, the Methodology Order fails to require the delivery of mitigation water when needed during the irrigation season. The Court should set aside Step 8 and remand it to the Department with instructions to follow the Supreme Court's process in *A&B*.

X. Injury to Reasonable Carryover Storage Occurs the Year Out-of-Priority Groundwater Diversions Occur, Not the Following Year (Steps 5, 9).

The CM Rules entitle a senior water right holder to maintain a "reasonable amount of carry-over storage to assure water supplies for future dry years." CM Rule 42.01.h. The Supreme Court has upheld this provision. *See AFRD#2*, 143 Idaho at 880. Inherent in the right is the presence of actual water in the senior's storage space to "carryover" for use in future years. The law does not speak to a storage "option" or a "promise" to deliver someone else's storage the following year.

The Coalition entities carry storage water over for purposes of irrigation planning and to protect against future dry years. Carryover storage is unquestionably a critical component of their project operations. Each manager testified to the importance of carryover storage for water delivery and how it affects their landowners' and shareholders' decisions. *See* R. 6378 (carryover provides BID with "a sure knowledge [that] that much water will be there to use in the future year"); R. 6139 (AFRD#2 relies "on having a full storage right each year because the largest portion of our water right is storage"); R. 6324 (A&B "relies primarily on its storage carry over and projected run off forecasts for planning purposes"); R. 6129 ("carryover storage held by MID is a critical fact that is looked at early in our planning process for the coming irrigation season").

Coalition managers carefully and frequently gauge their water users' demands with the quantity of water in storage and "start planning for the ***next*** season's irrigation supplies based upon [ ] carryover." R. 6307 (emphasis added); R. 6306 (NSCC tries to "carryover as much storage as possible"). Many Coalition members "cannot risk an inadequate carryover because [they do] not have senior natural flow rights to satisfy early season irrigation demands." *Id*. at 6307; R. 6248 ("with the increased uncertainty of Milner's 1916 and 1939 natural flow rights,"

Milner is "growing increasingly dependent on carryover storage to meet the needs of our water-users"); *see* R. 7056-57, 7104-07. As storage supplies decline during the season, Coalition members must curtail their shareholders' deliveries to ensure that there is some carryover for the next season. *See* R. 6307 (NSCC "self-mitigates by cutting deliveries to the Company's stockholders to provide carry-over water for the next"); R. 1002 (TFCC curtailed delivery rates in June to plan and ensure deliveries through the irrigation season); R. 1007-08 (AFRD#2 detailing management to protect carryover and delivery curtailment in 2013).

Indeed, carryover storage is essential in years when certain reservoirs accrue little or no new storage water. Ex. 8000 at 6-12 (identifying recent years when American Falls and Palisades Reservoir did not fill); Ex. 8000 at App. AB (graphs depicting years when American Falls, Palisades, and Jackson Lake Reservoirs did not fill); R. Vol. 5 at 831 (Director predicting 1939 Palisades Reservoir right only expected to fill 535,000 acre-feet); R. Vol. 5 at 894 (Water District 01 2013 Storage Allocation Report, showing 1939 Palisades Reservoir right only filled to 414,724 acre-feet).

Both former Director Dreher and Hearing Officer Schroeder affirmed the senior's "right" to have water provided up front so that it could be carried over to the next year. First, Director Dreher described when carryover storage should be provided to the Coalition members:

> Q. [BY MR. BROMLEY]: And for purposes of reasonable carryover, when, under your methods, were you envisioning that to be owed or due?
>
> A. [BY MR. DREHER]: Certainly, ***during the irrigation season prior to the subsequent year***. So in 2005 the amount for reasonable carryover would have been due during that irrigation season so that both sides, the ground water folks and the surface water folks, would know going into 2006 what they had.

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

Tr. Vol. I, p. 103, lns. 11-25 (2008 Hearing) (emphasis added).

In other words, unless water is provided <u>in-season</u> "prior to the subsequent year" (i.e. in the irrigation season that the material injury determination is made), curtailment must follow. The Hearing Officer agreed, wherein upon a plain reading of the CM Rules, he found the Coalition had a right to "carryover" storage and to have that right protected from interference by out-of-priority ground water diversions. *See* R. 7076 & 7109. The Hearing Officer further acknowledged the requirement that carryover storage had to be provided during the irrigation season so that an injured senior could actually carry "wet water" over for use the following year:

> **5. There is a right to reasonable carryover of storage water and there may be curtailment or a requirement of mitigation to meet that amount**. . . . The logic of the ground water users' position is that it is a question of timing and that it places the issue of curtailment or mitigation in the actual year of shortage, not in a prospective analysis that might never develop if there is sufficient water in storage to meet irrigation needs. <u>However, the position advocated by IGWA and Pocatello runs contrary to the Conjunctive Management Rules, the decision of the Idaho Supreme Court, and the history defining the purposes of the elaborate BOR reservoir system.</u>
>
> *** * ***
>
> **10. According to the May 2, 2005 Order the initial determination of carryover storage was to be made at the beginning of the irrigation season to project if there would be a shortage to be addressed by replacement water.** The approach utilized by the former Director was that early in the irrigation year a determination of would be made as to the amount of carryover storage to which the various surface water districts were entitled. The ground water users were obligated to contract to provide replacement water during the irrigation season or face curtailment in the event of shortages. <u>The amount of replacement water was due in the current irrigation season</u>.

R. 7106 & 7108 (underline added).

In the final order, former Director Tuthill reversed course and determined that reasonable carryover storage did not need to be provided until the following irrigation season.[31] R. 7386. This decision and procedure for providing carryover storage is not supported by the law and completely contradicts the Hearing Officer's ruling. As such this Court should review such a changed agency view with more scrutiny. *See Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 114 (2002); *Woodfield v. Bd. of Prof'l Discipline*, 127 Idaho 738, 746 (Ct. App. 1995); *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 285 (2007) ("this Court will review the Board's decision with greater scrutiny when it does not accept the hearing officer's recommendations"); *overruled on other grounds*, *City of Osburn v. Randel*, 152 Idaho 906 (2012).

Recently, the Supreme Court rejected former Director Tuthill's sudden change in policy and agreed with former Director Dreher's and the Hearing Officer's timing requirements for purposes of mitigating injury to a senior's right to reasonable carryover storage:

> The Coalition and the City dispute whether the Director timely administered the delivery call. ***The district court held that the Director abused his discretion because he failed to require mitigation of material injury to reasonable carry-over storage in the season in which the injury occurs***. . . . Here, the district court assessed whether the Director's "wait and see" approach to mitigating material injury to carry-over storage rights complied with the Conjunctive Management Rules. Based on the plain language of Rule 43, the district court concluded that the Director's approach was contrary to the Rule's requirement that the mitigation plan contain contingency provisions to protect senior rights in the event that mitigation water becomes unavailable. . . . ***We affirm the district court's holding that the Director abused his discretion by failing to approve a mitigation plan that provided contingency plans by which junior water right holders would ensure that material injury would not occur to the seniors' carry-over storage rights***.

A&B, 315 P.3d at 841-42 (emphasis added).

[31] Former Director Tuthill made the initial change to the timing of reasonable carryover that was implemented with the Fifth, Sixth, and Seventh Supplemental Orders. *See* R. 7385.

The Supreme Court further clarified that the Rules require the Director to determine whether a proposed mitigation plan "will ***prevent injury*** to senior rights." *Id.* at 841 (emphasis added). "Preventing" injury to a senior's right to reasonable carryover storage requires mitigation up front so that actual water can be carried over. Former Director Dreher described this exact requirement at hearing:

> Now, I still think that should be provided in advance. The carryover storage for 2006 should have been provided in 2005. Why? Because the senior didn't know what he was going to have in 2006. I think they're entitled to some minimum level of insurance that they have sufficient carryover in the event of a drought year. That's why I required the carryover storage component to be provided in 2005, not 2006.

Tr. Vol. I, p. 167, lns. 7-16 (2008 Hearing).

Contrary to the above requirements, the Methodology Order falls short of this standard and thus violates Idaho law. First, Step 5 allows the Director to "wait and see" if the Coalition's storage water rights "fill" before requiring delivery of any water to mitigate an injury to reasonable carryover storage.[32] R. Vol. 3 at 599. In other words, although injury to carryover storage occurs the prior season when the pumps are diverting out-of-priority, the Methodology Order does not purport to mitigate that injury until the following year. Instead, the order provides:

> 16. 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.

[32] This is the same failed standard that former Director Tuthill implemented, contrary to former Director Dreher's requirements. Former Director Tuthill changed the timing of when the carryover storage mitigation had to be provided from the year the injury occurred to the following year in the *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* (May 23, 2007). R. 4301 ("Providing this carryover water is an obligation that IGWA and its member ground water districts must meet in 2008").

> 17. On or before November 30, the Department will publish estimates of actual carryover and reasonable carryover shortfall volumes for all members of the SWC. These estimates will be based on but not limited to the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the publication 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 provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

R. Vol. 3 at 600-01.

Step 9 does not require actual mitigation of any reasonable carryover injury. Instead, juniors only need to show, to the undefined "satisfaction of the Director, their ability to provide water or take other actions to cover the carryover shortfall" the following year.[33] No water is delivered to mitigate the carryover injury in the season in which it occurs. Although juniors receive the benefit of pumping out-of-priority for the entire irrigation season, they have no obligation to mitigate any injury to reasonable carryover storage. Ordering curtailment in December or the following irrigation season does not provide timely mitigation to the senior's carryover injury that is realized the prior fall.

Moreover, delaying the timing of providing reasonable carryover storage is even more problematic when lessors fail to deliver on the leases executed with junior ground water users. For example, various lessors have not always delivered the water they contract with IGWA. Tr. Vol. II, p. 255, lns. 4-17 (2010 Hearing) ("And I guess we did have one company, New Sweden,

[33] Contrary to the order's provision, delaying providing mitigation water is problematic, particularly when IGWA's lessors have refused to provide storage in years where the forecast supply is low. For example, in 2010 junior ground water users did not have sufficient storage to cover the estimated injury of 84,000 acre-feet as some spaceholders initially backed out of their leases. Moreover, there is no defined objective standard of what the juniors need to show to cover the injury.

that did earlier in the year decide not to provide any water . . . but then they came back and did decide to provide water").

Further, IGWA's president Tim Deeg admitted that junior ground water users did not have sufficient water to meet the Director's initial mitigation requirement in 2010:

> Q. [BY MR. ARKOOSH]: And at that time you made that submission on [May] 13th, did IGWA have the full 84,300 acre-feet under lease and available to meet the obligation of the Surface Water Coalition in Water District 120?
>
> A. [BY MR. DEEG]: No.

Tr. Vol. II, p. 262, lns. 1-6 (2010 Hearing).

Again, former Director Dreher described this exact problem and why junior ground water users had to mitigate carryover storage up front in order to prevent injury to the senior right:

> A. [BY MR. DREHER]: . . . I always envisioned a process under which we would get to a point to where the junior-priority ground water users that were going to continue to divert out of priority, would be providing water in advance in an amount that would at least equal, if not exceed, what was needed, putting the burden on the junior-priority ground water rightholders. Why? Because they were the ones that would be allowed to continue to divert out of priority when, absent that replacement water, those diversions would cause injury.
>
> It was not my vision to get to a point to where we waited to see how much injury actually occurred before replacement water actually provided. That was not the intent. The intent here was to provide the replacement water up front.

Tr. Vol. I at p. 84, ln. 17 – p. 85, ln. 8 (2008 Hearing).

> Q. [BY MR. SIMPSON]: Mr. Dreher, with respect to reasonable carryover, would you acknowledge that carryover allows for the managers and boards of these irrigation entities to plan for future needs to supply?
>
> A. [BY MR. DREHER]: It's one component of their plan; certainly.
>
> Q. And so as a component of their planning process, is that in part why you recognize that – that that amount as you identified as a reasonable carryover must be supplied in that prior irrigation season?
>
> A. Yes.

> Q. So that those managers could, in part, understand what carryover they – a minimum carryover they would have going into the storage season so that they could plan for next year's water supply?
>
> A. Correct.
>
> Q. And without – without some identifiable carryover, those managers in planning would face greater uncertainties as to what next year's water supply would be; correct?
>
> A. Yeah, that's correct. And the reason for that is because if – if you wait until the subsequent irrigation year – in the case of the May 2d order, it would be the year 2006. If you wait till 2006 to attempt to provide reasonable carryover, there may or may not be water available to provide. So that's why I felt it was important that the carryover storage to be provided for 2006, be provided during the irrigation season of 2005.

Tr. Vol. II at p. 269, ln. 3 – p. 270, ln. 10 (2008 Hearing).

Since the injury to reasonable carryover storage results from out-of-priority diversions that occur during the irrigation season, juniors must mitigate for their pumping up front. The Director's Methodology Order is untimely as it allows juniors to pump out-of-priority without providing mitigation to the senior's right to carryover storage. The process violates the prior appropriation doctrine and CM Rules.

Moreover, since the Director's new process conflicts with the agency's previous position, including the Hearing Officer's decision, that further demonstrates why the methodology is arbitrary and capricious and should be set aside. *See Pearl*,137 Idaho at 114; *Ater*, 144 Idaho at 285 ("this Court will review the Board's decision with greater scrutiny when it does not accept the hearing officer's recommendations"); *see also*, *Amalgamated Sugar Co. LLC*, 563 F.3d at 831 (The court must consider the agency's position over time, and if the agency's interpretation of a relevant provision conflicts with the agency's earlier interpretation, the agency is "entitled to considerably less deference than a consistently held agency view").

Finally, the Methodology Order does not require any contingency plans to "prevent" the injury to the senior's carryover storage rights. In order to begin diverting out-of-priority, juniors causing injury can only do so pursuant to an approved mitigation plan. CM Rules 40.01; 43. Accordingly, if juniors seek to divert for an irrigation season they must mitigate a senior's right to reasonable carryover storage up front. As held by the *A&B* Court, juniors must include a "contingency plan" in their mitigation of reasonable carryover in order to pump out-of-priority. *See* 315 P.3d at 842. Since the Methodology Order does not require juniors to include such a contingency plan to "ensure material injury would not occur to the senior's carry-over storage rights," the order violates Idaho law and must be set aside.

In sum, Step 9 violates the senior's right to carryover actual storage water in the fall of the irrigation season when the injury is realized. By delaying delivery of mitigation water until the following year and not requiring any contingency plans, juniors are allowed to pump their full rights while seniors must endure the risk of future dry years and reduced storage supplies. Consequently, the Director's methodology order as to carryover storage plainly violates the prior appropriation doctrine and must be set aside. The Court should further require IDWR to follow the Supreme Court's requirements set forth in *A&B*.

XI. The Methodology Order's Reasonable Carryover Equation (Step 9) Violates the CM Rules and Unlawfully Reduces the Senior's Carryover Rights.

Carrying storage water over for future dry years protects the Coalition's landowners and is a primary reason why the reservoirs were constructed in the first place. Carryover is a critical insurance policy that farmers rely upon to guard against future dry years. Notably, the Palisades project was specifically planned for the purpose of providing irrigation projects with a supplemental water supply in future dry years. R. 7061; Ex. 7008 at 15; Tr. Vol. IV, p. 1209-10

(2008 Hearing). The Coalition members paid for the development of additional storage to create a greater reliability of water supplies. R. 6119; 6300; Tr. Vol. VI; p. 1186 (2008 Hearing).

The CM Rules entitle a senior water right holder to maintain a "reasonable amount of carry-over storage to assure water supplies for future dry years." Rule 42.01.g. As described above, the law requires juniors to mitigate injury to a senior's carryover storage in the year in which it occurs, not the year after. The Director's implementation of this rule in the Methodology Order is arbitrary, uncertain, and does not provide timely mitigation to prevent injury to senior's right to reasonable carryover storage. Accordingly, the methodology should be set aside and modified consistent with the agency record to protect the senior's rights. Moreover, as described below, the Director's calculation of the Coalition's reasonable carryover under-predicts needed carryover and is therefore contrary to law for that reason as well.

The CM Rules set forth following standard to determine a senior's entitled reasonable carryover:

> 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.

CM Rule 42.01.g.

The language of the rule is plain and unambiguous. The Director shall consider: 1) the average annual rate of fill of storage reservoirs; 2) the average annual carryover for prior comparable water conditions; and 3) the projected water supply for the system. The Director did not use any of these criteria to calculate the Coalition members' reasonable carryover rights in this case. Instead, the Methodology Order defines "reasonable carryover" as follows:

> 70. 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:
>
> Reasonable carryover = 2006/2008 average – 2002/2004 average

R. Vol. 3 at 585.

Admittedly, the order's definition of "reasonable carryover" is wholly comprised of an arbitrary equation concerning the baseline year and a water supply average of two years, 2002 and 2004. Nowhere does the order's definition take into account the "average annual rate of fill of storage reservoirs" and the "average annual carryover for prior comparable water conditions." CM Rule 42.01.g. As such, the Director's determination of reasonable carryover storage is flawed and does not follow the CM Rules.

First, the Methodology Order lists in table form the various carryover amounts in very dry, dry, average, and wet years. R. Vol. 3 at 588. By comparing the average year carryover quantities (R. Vol. 3 at 588) to the Director's identified amounts for administration, it is obvious that the order's "reasonable carryover" amounts are woefully deficient. Notably, the Director's reasonable carryover quantities are significantly lower than the Coalition members' "average annual carryover for prior comparable water conditions":

SWC Member	Avg. Carryover (1995-2008)	Director's Reasonable Carryover
A&B	61,663	17,000
AFRD#2	81,447	56,000
BID	98,323	0
Milner	48,140	4,800
MID	160,775	0
NSCC	312,476	57,200
TFCC	68,575	29,700

R. Vol. 3 at 586, 588.

In addition, the Director's "reasonable carryover" quantities conflict with the undisputed evidence in the record. Each manager testified to the shortages that would result from the former Director's "reasonable carryover" quantities.[34] For example, the former Director's determination of 83,300 acre-feet of "reasonable carryover" for NSCC was wholly inadequate in 2007, when NSCC used nearly all of its 350,000 acre-feet of carryover from 2006 and yet was still forced to reduce deliveries to its shareholders. R. 6307-08. Similar problems were described by other Coalition managers. R. 6325 ("reasonable carryover" of 8,500 acre-feet is wholly insufficient to provide A&B with an adequate supply of water); R. 6130 (MID "reasonable carryover" of 0 acre-feet denies MID with the ability to plan for the future and forces MID to deplete its water resources before making a call); R. 6379 (BID's "reasonable carryover" of 0 acre-feet places BID at "risk of being short every year in times of drought"); R. 6248 ("reasonable carryover" of 7,200 acre-feet for Milner fails to provide "sufficient carryover to reduce the impacts of ongoing drought"); Tr. Vol. III, p. 1629-30 (2008 Hearing) (Although TFCC carried over about 78,000 acre-feet from 2006, it was still forced to rent an additional 40,000 acre-feet in 2007 to ensure a sufficient supply through the 2007 irrigation season).

The Director's analysis is flawed for other reasons as well. First, the determination uses the "baseline year" concept which artificially "caps" the senior's needed water. The Director used the 2006/08 average diversion quantity as the only "projected demand" in his analysis.[35] Second, the Director used the 2002/04 "average" as the only projected water supply. Although the Director claims this represents a "typical" dry year, the projected quantity is not

[34] The "reasonable carryover" quantities established in the May 2, 2005 *Amended Order* are very similar to those established in the 2010 Methodology Order. The 2010 determination compared to the 2005 determination is as follows: A&B +8,500 acre-feet; AFRD#2 +4,800 acre-feet; BID "0" no change; Milner -2,400 acre-feet; MID "0" no change; NSCC -26,100 acre-feet; TFCC -8,700 acre-feet.

[35] Moreover, the Director has failed to adjust the reasonable carryover quantities in a manner to protect the Coalition members' senior water rights.

representative of "future dry years" that the Coalition has and will likely experience and therefore results in an underestimation of needed carryover storage. Notably, water supply conditions in both 2007 and 2013 were drier and hotter than those conditions experienced in 2002 and 2004. R. 7092-93; R. Vol. 5 at 950; Attachment C.[36] As such, the Director's analysis overestimates expected water supplies which then underestimates the injury to the Coalition's reasonable carryover storage.

Using the 2006/08 "average" as the ceiling demand for projecting reasonable carryover storage also unlawfully diminishes the Coalition's senior surface water rights. *See supra, Argument Parts I-III*. The quantity underestimates what the Coalition members need for carryover storage to guard against "future dry years." CM Rule 42.01.g. As recognized in his order, the average rate of storage fill for each Coalition member is highly variable, ranging between 34% and 100%. R. Vol. 3 at 587. Moreover, the standard deviation for the average fill from 1995 – 2008 ranges between 5% and 26%.[37] *See id.* This wide deviation shows that storage fill is highly unreliable and at a minimum, uncertain. Indeed, some reservoirs received little or no new storage fill in certain years. Ex. 8000 at 6-12 (identifying recent years when American Falls and Palisades Reservoir did not fill); at Ex. 8000 at App. AB (graphs depicting years when American Falls, Palisades, and Jackson Lake Reservoirs did not fill); R. Vol. 5 at 831 (Director predicting 1939 Palisades Reservoir right only expected to fill 535,000 acre-feet); R. Vol. 5 at 894 (Water District 01 2013 Storage Allocation Report, showing 1939 Palisades Reservoir right only filled to 414,724 acre-feet).

[36] The table at Attachment C compares the evapotranspiration and precipitation measured at the Twin Falls and Rupert Agrimet stations for the years 2002/2004 and 2007/2013. The information is included in the record in the "Agrimet ET Data.xlsx" spreadsheet in the "IDWR 11-27-2013_November Background Data" subfolder in the "Bates Stamped OCR Doc" folder on Disc1 of the agency record.

[37] At a minimum, reasonable carryover should include two standard deviations to recognize the uncertainty in storage fill, as is done in the projected natural flow supply.

In addition to underestimating "demand," the Director's use of the 2002/04 average overestimates the future supply. The Director described this factor as follows:

> 69. 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 (1971 – 2000) but were not the lowest years on record. Ex. 8000, Vol. II at 6-37:6-28; R. Vol. 8 at 1379-80. 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 the 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.

R. Vol. 3 at 585.

The "natural flow diverted + new fill" in 2002 and 2004 does not adequately protect the senior's right to reasonable carryover storage. Indeed, by using projected supplies from 2002 and 2004 as the basis for all future years, the Director does not protect the Coalition's senior carryover storage rights. The effect of a lower predicted demand and a higher predicted supply conflates the reasonable carryover storage quantities. In order to comply with the CM Rules and the senior's right to carryover storage, the Director must use years that are more representative of a senior's needs with a limited supply.

For example, if the Director used the average of 2012/13 as the "baseline year" demand (BLY) and the average of 2007/13 as the projected future supply, the Coalition's reasonable carryover quantities would be as follows:

Reasonable carryover = 2012/2013 average – 2007/2013 average

	Reasonable Carryover 2012/2013 BLY (Acre-Feet)
A&B	25,661
AFRD2	83,539
BID	55,728
Milner	16,146
Minidoka	93,075
NSCC	171,681
TFCC	91,627

R. Vol. 4 at 771 (2012 data); Vol. 6 at 1046 (2013 data).[38]

Given the documented variability in water supply and storage, and the demonstrated needs of the Coalition, the Director must be conservative to protect a senior's right to reasonable carryover. The above example shows how the Director underestimated the Coalition members' carryover storage needs by over 370,000 acre-feet using the present Methodology Order. Unless the Director modifies the reasonable carryover analysis it will diminish the senior rights and result in unlawful administration.

XII. The Methodology Order Wrongly Reduces the Junior Groundwater Users Reasonable Carryover Obligation. (Step 10)

In addition to the untimely and reduced carryover obligation in Step 9 as described above, the Methodology Order goes one step further in diminishing the rights of senior surface

[38] The amended "reasonable carryover" amounts in the table were calculated using "new water supply" for the Coalition entities in 2007 and 2013 as described in finding of fact 69 of the Methodology Order. R. Vol. 3 at 585. Carryover storage and new storage allocation were taken from the Water District 01 Annual Storage Reports for 2006, 2007, 2012 and 2013 to determine "new fill" and "natural flow diverted" for 2007 and 2013 were taken from the spreadsheets in spreadsheet in the "IDWR 11-27-2013_November Background Data" subfolder in the "Bates Stamped OCR Doc" folder on Disc1 of the agency record. The new water supply for 2007 and 2013 were averaged as described in the Methodology Order. R. Vol. 3 at 585. The new 07/13 water supply was then subtracted from the 2012/13 BLY Supply from FF 30 of the Order and the difference is the reasonable carryover.
A new base line year was calculated as described in FF 28-31 of the Order using 2012 and 2013 water demand by the SWC. The new 07/13 water supply was subtracted from the newly calculated 12/13 BLY supply and the difference is the reasonable carryover based upon the updated water use information. The information for 2012 and 2013 diversions was taken from the spreadsheets in the "IDWR 11-27-2013_November Background Data" subfolder in the "Bates Stamped OCR Doc" folder on Disc1 of the agency record.

water users in Step 10. Instead of requiring junior ground water users to mitigate the calculated injury determined in Step 9, the Director provides junior ground water users with one last reprieve. Consequently, the order violates the CM Rules and Idaho law.

As an "alternative" to providing full mitigation junior ground water users are given the option to request IDWR to "model the transient impacts of the proposed curtailment." R. Vol. 3 at 601. Through that exercise junior ground water users are then only "obligated to provide the accrued volume of water associated with the first year of the model run." *Id*. This step reduces the senior's carryover storage, increases their risk of future water shortages, and lessens the junior's mitigation obligation. Similar to Step 9, the Methodology Order's final step (Step 10) is unconstitutional and should be set aside.

The Director describes Step 10 and his reasoning for the same as follows:

> 25. If, in the fall, the Director finds that a reasonable carryover shortfall exists, the Director will use the ESPA Model to determine the transient impacts of curtailment (year-to-year). The ESPA Model will be used to determine the yearly impacts of curtailment of junior ground water users, if curtailed from April 1 through March 31. It is this volume of water that junior ground water users must provide or have optioned in the fall in order to start the subsequent irrigation season without an order of curtailment. All approved methods of mitigation shall be considered in the Director's review of reasonable carryover shortfall.
>
> * * *
>
> 29. 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. Because of the uncertainty associated with this prediction, and in the interest of balancing priority of right with optimum utilization and full economic development of the State's water resources, Idaho Const. Art. XV, § 3; Idaho Const. Art XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226, the Director will use the ESPA Model to simulate transient curtailment of the projected reasonable carryover shortage. By requiring that junior ground water users provide water or have options in place in the fall of the subsequent irrigation season in the amount of the first year of curtailment (accruing from season-to-season until reservoir space fills), the Director ensures that a certain

> volume of water will be carried over from one season to the next. This allows the SWC to plan for the coming irrigation season, and places the risk of reasonable shortage on junior ground water users. In light of the unpredictable nature of the determination of material injury to reasonable carryover, the use of the ESPA Model imposes a reasonable burden on junior ground water users.

R. Vol. 3 at 596-97.

The Director justifies the reduced mitigation obligation because: 1) he cannot predict next year's injury; and 2) in the interest of balancing priority with "optimum utilization and full economic development of the State's water resources." *Id.* Neither reason justifies further injury to a senior water user and the resulting unlawful water right administration.

Addressing the latter reason first, nothing in the Idaho Constitution or Ground Water Act allows the Director to further "write off" mitigation to a senior's carryover storage injury. Similar to the flawed reasoning behind Step 3's baseline year "cap" that prevents full mitigation to a senior's increased water needs during the irrigation season, the Director's reliance upon IDAHO CONST. Art. XV, § 7 and Idaho Code § 42-226 is misplaced and clearly erroneous. *See supra, Argument Part* II.

Moreover, the Director has no legal authority to "balance" injury to a senior's right to carryover storage against what he perceives as a more "reasonable burden" on junior ground water users. R. Vol. 3 at 597. If injury to reasonable carryover storage is found, juniors must either curtail that irrigation season (not the following) or provide full and complete mitigation. CM Rule 40.01. As such, the Director cannot reduce the junior's obligation through a transient modeling exercise.

Next, any uncertainty in predicting injury the following year is also no legal reason to reduce a junior's mitigation obligation. Indeed, where junior ground water users receive the benefit of pumping out-of-priority for the entire irrigation season, they must mitigate any injury

to a senior's reasonable carryover storage up front, not after-the-fact. The Director's analysis in Step 10 wrongly shifts the curtailment analysis to the following year, after the juniors have already pumped for the season. If injury is predicted to a senior's reasonable carryover, the injury must be mitigated in order to authorize the out-of-priority junior diversions in the first place. *See* CM Rules 40.01; 43. Stated another way, the Director has no authority to let the juniors pump and cause the injury, and then reduce the owed mitigation for that injury through a modeling exercise performed after the irrigation season. Again, such administration turns the prior appropriation doctrine on its head and forces the senior to lose actual carryover storage and assume the risk of future water shortages.

The Directors' so-called "balancing" and reduction of the obligation in order to impose a "reasonable burden" on junior ground water users is not supported by Idaho law. As such, the Coalition respectfully requests the Court to set aside Step 10 accordingly. The Court should further remand the Methodology Order back to the Department with instructions to follow the Supreme Court's process in *A&B* and provide full mitigation for any reasonable carryover injuries up front.

CONCLUSION

For well over a century Idaho has followed the prior appropriation doctrine. At its heart, the law protects senior water rights and prohibits injuries by junior users. *See Malad Valley Irr. Co. v. Campbell*, 2 Idaho 411, 414 (1888) ("Whatever conflict there may seem to be in the adjudged cases in this country relating to the subject of water rights, the law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld").

The Methodology Order does not comply with Idaho law, including the Supreme Court's recent mandates set out in *A&B Irr. Dist. v. Spackman*. The Director's 10-step program falls short of providing complete and timely relief to the injuries suffered by senior surface water users. Moreover, the program arbitrarily protects junior ground water users at all costs, even reducing and eliminating obligations for injuries that they inflict. Since the Director's methodology turns the prior appropriation doctrine upside down, it cannot withstand judicial review.

This Court must uphold the Idaho Constitution, water distribution statutes, and the CM Rules to ensure lawful water right administration. The Coalition respectfully requests the Court to grant the requested relief and set aside and remand the Methodology Order accordingly.

Respectfully submitted this 13th day of June, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of June, 2014, I served true and correct copies of the foregoing **SURFACE WATER COALITION'S OPENING BRIEF (METHODOLOGY ORDER)** upon the following by the method indicated:

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