ORIGINAL

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,

Petitioner,

vs.

TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and MINIDOKA IRRIGATION DISTRICT,

Petitioners,

vs.

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

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

Case No. CV-2010-382

(consolidated Gooding County Cases CV-2010-382, CV-2010-383, CV-2010-384, CV-2018-387, CV-2010-388, and Twin Falls County Cases CV-2010-3403, 2010-5520, 2010-5946, 2012-2096, 2013-2305, 2013-4417, and Lincoln County Case CV-2013-155)

BRIEF OF RESPONDENTS GARY SPACKMAN IN HIS CAPACITY AS DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES, AND THE IDAHO DEPARTMENT OF WATER RESOURCES

RESPONDENTS IDAHO DEPARTMENT OF WATER RESOURCES' BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable Eric Wildman, Presiding

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
MICHAEL C. ORR, ISB #6720
Deputy Attorney General
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098
Tele: (208) 287-4800
FAX: (208) 287-6700

Attorneys for the Idaho Department of Water Resources

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STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This case is a judicial review proceeding in which the Surface Water Coalition, the Idaho Ground Water Appropriators, and the City of Pocatello have appealed the Director's orders responding to the Coalition's delivery call under the Conjunctive Management Rules ("CM Rules"). This is the third round of judicial review associated with the Coalition's delivery call, which was filed in 2005.

The case arises from the tension that exists between the "two bedrock principles" of prior appropriation in the context of administering water rights in a complex and imperfectly understood system of interconnected surface and ground waters. Throughout the course of the proceedings the parties have taken diametrically opposed views of how to resolve this tension. The Coalition has argued that priority is the more important principle and trumps beneficial use; IGWA and Pocatello have argued that beneficial use is more important, and trumps priority.

The real issue in this case is not, as the parties would have it, which of the "two bedrock principles" of prior appropriation is more important and must prevail in conjunctive administration. Under the Idaho Supreme Court's decisions, the Director may not diminish or ignore either of the two bedrock principles of prior appropriation simply because they are in tension with one another. Rather, the Director's "critical role" in this matter is "to accommodate both the first in time and beneficial use aspects" of Idaho prior appropriation law.[1]

This "difficult and contentious task"[2] requires administrative techniques that are based in large part on annually predicting the extent of material injury to senior surface water rights

[1] *In The Matter Of Distribution Of Water To Various Water Rights Held By Or For The Benefit Of A&B Irrigation District, et al.*, 155 Idaho 640, 651, 315 P.3d 828, 839 (2013). For purposes of this brief, this decision will be referenced as "*A&B.*"
[2] *AFRD2 v. IDWR*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007).

anticipated to result from junior ground water diversions, and requiring juniors to secure mitigation sufficient to remedy the predicted injury. The problem is that predictions can be wrong, and the actual magnitude of the seniors' material injury cannot be known with certainty until the season is essentially over. At that point it will become known whether the actual material injury was larger or smaller than the predicted material injury, and that either the seniors' needs were not fully satisfied, or alternatively that juniors were needlessly curtailed or required to provide water even though the seniors' needs had been satisfied. Consequently, the real issue in this case is how to allocate the risk of potential prediction errors consistent with the constitutional requirement of "accommodat[ing] both the first in time and beneficial use aspects" of prior appropriation.[3]

The Director's methodology addresses this conundrum by purposefully overestimating the seniors' material injury, limiting the juniors' in-season obligation to provide water to the artificially increased estimate, and providing "reasonable carryover" for any storage use resulting from an underestimate of seniors' needs. This approach provides predictability for all water users and protects the priority of senior rights without routinely requiring juniors to provide water in excess of the seniors' actual beneficial use needs. This approach accommodates both bedrock principles of the prior appropriation doctrine and reconciles the tension between them consistent with the burdens and presumptions of applicable Idaho law.

The plain language of the Director's methodology and the record show that, contrary to the parties' arguments, the Director's methodology predicts material injury and requires juniors to provide water on the basis of seniors' anticipated needs rather than their historic diversions. The record also belies the Coalition's assertions that application of the methodology has resulted in unmitigated material injury or failed to take changed conditions into account.

[3] *A&B*, 155 Idaho at 651, 315 P.3d at 839.

The parties present various other and narrower challenges to the Methodology Order. As discussed herein, these challenges lack merit.

II. STATEMENT OF FACTS.

The procedural background and posture of this case is familiar to this Court and the parties. Most of the relevant background facts are discussed in the Idaho Supreme Court's decisions in *AFRD2*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) and *A&B*, 155 Idaho 640, 651, 315 P.3d 828, 839 (2013); they are also discussed in this Court's *Order On Petition For Judicial Review*, Case No. 2008-551 (Jul. 24, 2009). The briefs filed by the Surface Water Coalition ("Coalition"), the Idaho Ground Water Appropriators, Inc. ("IGWA"), and the City of Pocatello ("Pocatello") also discuss their views of the relevant factual and procedural background.

In light of this and the overall volume of the briefing that has been filed in this proceeding, this brief does not include a detailed "Statement of Facts." The specific facts relevant to the Respondents' arguments are discussed and cited in the "Argument" section of this brief. A brief discussion of what is known as the "Methodology," however, is provided below.

For purposes of this brief, the terms "Methodology" and *Methodology Order* refer to the *Second Amended Final Order Regarding Methodology For Determining Material Injury To Reasonable In-Season Demand And Reasonable Carryover* (Jun. 23, 2010). 382 R. 564-601.[4] The *Methodology Order* is intended to be "a single, cohesive document by which the Director

[4] The agency record in this proceeding consists of two subparts: the previously-compiled record for the judicial review proceeding under Case No. CV-2008-551 and the more recently compiled record for the judicial review petitions consolidated under Case No. CV-2010-382. For clarity and convenience, citations to the former record will use the form "551 R. [page number]," and citations to the latter record will use the form "382 R. [page number]." The predecessor orders were *Final Order Regarding Methodology For Determining Material Injury To Reasonable In-Season Demand And Reasonable Carryover* (Apr. 7, 2010), 382 R. 32-74; and the *Amended Final Order Regarding Methodology For Determining Material Injury To Reasonable In-Season Demand And Reasonable Carryover* (Jun. 16, 2010). 382 R. 507-46.

will quantify material injury in terms of reasonable in-season demand and reasonable carryover" for purposes of responding to the Coalition's delivery call under the CM Rules. 382 R. 565.[5]

In narrow terms, the Methodology sets forth ten "steps" that describe an annual, step-by-step process for determining the material injury to the Coalition's senior surface water rights, and the mitigation junior ground water right holders must provide as a result of the material injury. The ten steps can be sorted into three groups: Steps 1-4 (early or pre-season) pertain to forecasting the seniors' in-season water supplies, needs, and shortfalls, and juniors' in-season mitigation obligations; Steps 5-8 (in-season) provide for revising (if necessary) the forecasts of the seniors' water supplies, needs and shortfalls, and the delivery of mitigation; Steps 9-10 (end of season) include the final in-season accounting, and determine seniors' "reasonable carryover" shortfalls and juniors "reasonable carryover" mitigation obligations. *See Methodology Order* at 34-38.

In broader terms, the *Methodology Order* sets forth the factual and legal bases and rationales for the Methodology in lengthy and detailed findings of fact and conclusions of law. These include, among other things, discussion of the factual and procedural background of the delivery call proceedings, the recommendations of the Hearing Officer,[6] a number of technical matters, and the procedures and standards applicable to the ten steps.

STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d

[5] The *Methodology Order* will be cited directly for the remainder of this brief.
[6] The Hearing Officer presiding over the 2008 hearing in this matter was former Idaho Supreme Court Justice Gerald F. Schroeder.

527, 529 (1992). The Court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998).

ARGUMENT

I. THE METHODOLOGY MUST ACCOMMODATE THE "TWO BEDROCK PRINCIPLES" OF PRIOR APPROPRIATION.

The parties seeking review of the Methodology Order have, as in previous proceedings, grounded their positions in competing interpretations of Idaho's prior appropriation doctrine. The Coalition focuses on priority of right and the undisputed principle that "'priority of appropriation shall give the better right between those using the water.'" *SWC Methodology Brief* at 10 (quoting *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 800, 252 P.3d 71, 81 (2011)). IGWA and Pocatello (the "Ground Water Users") focus on the equally undisputed principle that "'beneficial use acts as a measure and limit upon the extent of a water right.'" *Pocatello Methodology Brief* at 21 (quoting the Idaho Supreme Court's 2013 decision in this

matter, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013)).[7] Each of the parties' arguments are rooted in one of these competing interpretations of Idaho law.

Both of the "bedrock" principles—"that the first appropriator in time is the first in right and that water must be placed to a beneficial use," *A&B*, 155 Idaho at 650, 315 P.3d at 838, serve the single overarching "policy of the law of this State [which] is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Clear Springs Foods, Inc.*, 150 Idaho at 808, 252 P.3d at 89 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)). As the Idaho Supreme Court recognized in its latest conjunctive management decision: "These two doctrines [that the first appropriator in time is the first in right and that water must be placed to a beneficial use] encouraged settlers to divert surface water from its natural course and put it to beneficial use, thus leading to the development of Idaho's arid landscape." *Id* (emphasis added).

The priority principle promotes the overarching policy of Idaho water law by providing legal protection for investments in water development. The beneficial use principle promotes the overarching policy of Idaho water law by limiting the protection of priority to the actual need for water. Elevating either principle over the other defeats the policy of Idaho law.

Idaho law prohibits ignoring or diminishing either of the two bedrock principles. It is well established that "[p]riority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. IDWR*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). It is also equally well established that "no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation." *Wash. State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915). Indeed, the priority and beneficial use principles are intertwined in the same

[7] The Idaho Supreme Court's 2013 decision in this matter has a lengthy title as officially reported, and for purposes of this brief will be referenced as "*A&B v. Spackman*," or simply "*A&B*."

section of the Idaho Constitution. *See* Idaho Const. Art. XV § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water . . . .") (emphasis added). Related constitutional provisions "must be construed together." *Idaho Press Club, Inc. v. State*, 142 Idaho 640, 644, 132 P.3d 397, 401 (2006).

In this case, the Idaho Supreme Court has recognized that the priority and beneficial use principles are in "tension." *A&B*, 155 Idaho at 650, 315 P.3d at 838. They are in tension by constitutional design, and the fact that the tension is evident in this case does not authorize the Director to accommodate only one of the "bedrock" principles in conjunctive administration. The Idaho Supreme Court's conjunctive management decisions confirm this conclusion. In *AFRD2* the Idaho Supreme Court rejected the argument that senior surface water rights should be administered "strictly on a priority in time basis" so that "the *full quantity* of decreed senior rights [is delivered] according to their priority" without consideration of actual beneficial use and whether water was being used efficiently and without waste. *Am. Falls Res. Dist. No. 2 v. IDWR* ("*AFRD 2*"), 143 Idaho 862, 871, 876, 154 P.3d 433, 441, 447 (2007) (internal quotation marks omitted; emphasis in original). In *Clear Springs* the Idaho Supreme Court also rejected the argument that "priority of water rights as between surface and ground water users is not to be considered" simply because it would impede full economic development of the Eastern Snake Plain Aquifer. *Clear Springs Foods, Inc.*, 150 Idaho at 804, 252 P.3d at 85.

The Idaho Supreme Court has flatly rejected the narrow interpretations of Idaho prior appropriation law advanced by the Coalition and the Ground Water Users. Rather, the Court has recognized the "critical role of the Director" in this case is "to accommodate both the first in

time and beneficial use aspects" of prior appropriation in addressing the Coalition's delivery call. *A&B*, 155 Idaho at 651, 315 P.3d at 839 (emphasis added). As a matter of law, the Director in responding to the Coalition's delivery call must chart a course that accommodates both "bedrock principles" of prior appropriation under Idaho law. *A&B*, 155 Idaho at 650, 315 P.3d at 838.

II. CONJUNCTIVE ADMINISTRATION REQUIRES PREDICTIONS OF SUPPLIES AND NEEDS AND THE DIRECTOR MUST ALLOCATE THE RISK OF PREDICTION ERROR CONSISTENT WITH THE "BEDROCK PRINCIPLES" OF PRIOR APPROPRIATION.

The requirement "to accommodate both the first in time and beneficial use aspects" of Idaho prior appropriation law, *A&B*, 155 Idaho at 651, 315 P.3d at 839, is not the only consideration that shapes the CM Rules and the Methodology. Administering senior surface water rights and junior ground water rights in the Snake River basin's complex system of interconnected surface and ground waters raises significant water distribution challenges. As discussed below, the application of traditional surface water administration principles in the conjunctive management context must include recognition of the unique challenges of administering interconnected surface and ground water sources if both "bedrock principles" of prior appropriation are to be accommodated.

A. The Difficult Issues In Conjunctive Administration Are A Result Of The Physical And Hydrological Differences Between Surface Water Systems And Ground Water Systems.

Accommodating "both the first in time and beneficial use aspects" of prior appropriation, *A&B*, 155 Idaho at 651, 315 P.3d at 839, is relatively straightforward in traditional surface water-only administration because: (1) the effect of a junior diversion and/or its curtailment on a senior's water supply is easily observed and measured; (2) regulation of the junior diversion produces an immediate response; and (3) the senior typically receives all or most of the benefit of the curtailment.

In conjunctive administration, "[t]he issues presented are simply not the same." *AFRD2*, 143 Idaho at 877, 154 P.3d at 448. This is the inevitable result of the need to administer two distinctly different resources under a single system of rules. As the Hearing Officer stated:

> Conjunctive management of surface and ground water rights depends upon an understanding of the hydrology of surface and ground water and the relationship between the two. Unlike the history of surface water administration in which a watermaster could monitor water he or she could see and understand the immediate effect of curtailment, the relationship between surface water and ground water rights is much more complex. The same water may be surface water at one point and ground water at another. When it is surface water it may be tracked with some certainty as to amount, direction, and speed or flow. When it is ground water its course is hidden.
>
> . . . .
>
> In surface to surface water administration the watermasters are able to observe the conditions of crops and know the immediate effect of curtailing a junior surface water user to deliver water to another surface water user. Curtailment may be partial or complete for a brief period during which the junior user's crop may survive until curtailment ends. In ground water to surface water administration there is not the immediacy of response in the delivery of water to a senior user.

551 R. 7078, 7090. As a result, conjunctive administration of water rights interconnected surface water systems and ground water systems must address and resolve a number of difficult water distribution issues that simply are not present in traditional surface water-only administration.

B. The Conjunctive Management Rules Reconcile Traditional Principles Of Surface Water Administration With Ground Water Hydrology By Authorizing Delivery Calls That Otherwise Would Be Deemed Futile But Conditioning Such Calls On Material Injury Rather Than Decreed Quantities.

The hydrogeology of the Eastern Snake Plan Aquifer is such that only a small fraction of the water diverted by junior ground water pumpers is part of the senior surface water users' supply. Thus, remedying the senior surface water users' shortages requires a degree of curtailment greatly disproportionate to that typically required in surface water-only administration.[8]

[8] As stated by the Hearing Officer in the Blue Lakes and Clear Springs delivery call proceedings (former Idaho Supreme Court Justice Gerald F. Schroeder), who was also the Hearing Officer in this case:

> Curtailment of the ground water users may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous farm economy.

551 R. 7090.

In traditional surface water administration, such a delivery call would likely be deemed *per se* futile or unreasonable. *See Clear Springs Foods, Inc.*, 150 Idaho at 812, 252 P.3d at 93 ("'If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile.'") (quoting the Hearing Officer). Direct application of this principle in the conjunctive administration context without recognition of the significant hydrologic differences between surface water and ground water systems, therefore, would have the effect of allowing ground water pumping to "'continue uncurtailed despite deleterious effects upon surface water use.'" *Id.*

The CM Rules therefore relax the futile call doctrine so that it does not preclude curtailment or mitigation simply because most of the pumped water would not reach the senior and the benefits of curtailment may be delayed or diffuse:

> One of the most startling facts in these cases is the amount of acreage that must be curtailed in order to delivery water to the Spring Users facilities. It is not a one cfs curtailed to one cfs increase to the Spring Users ratio. The vast majority of the water that will be produced from curtailment does not go to the Blue Lakes and Snake River Farm facilities. Perhaps it will go to beneficial use in Idaho, perhaps not. According to Dr. Allan Wylie, absent application of the trim line or clip . . . the curtailment required for Blue Lakes would go from 57,220 acres to 300,000 acres. The acres curtailed to be applied to Snake River Farm would rise from 57,740 to 600,000 acres, producing a 38 cfs gain to the reach and 2.7 cfs to Snake River Farm.

Opinion Constituting Findings Of Fact, Conclusions Of Law And Recommendation, In The Matter Of Distribution Of Water To Water Rights Nos. 36-02356A, 36-07210, And 36-07427 (Blue Lakes Delivery Call); In The Matter Of Distribution Of Water To Water Rights Nos. 36-04013A, 36-04013B, And 36-07148 (Snake River Farm); And To Water Rights Nos. 36-07083 And 36-07568 (Crystal Springs Farms) (Clear Springs Delivery Call), (Jan. 11, 2008), at 22. While this opinion is not part of the record in this proceeding, a copy is attached hereto, and this Court may take judicial notice of it pursuant to I.R.E. 201. It should be noted that while the number of acres that would have to be curtailed in this case would doubtlessly be different from those cited by the Hearing Officer, most if not all of the Coalition's water rights are senior in priority to the water rights held by Blue Lakes and Clear Springs.

> **Delivery Calls**. . . . Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

CM Rule 20.04. This provision recognizes that "'[t]he parameters of a futile call in surface to surface delivery do not fit in the administration of ground water.'" *Clear Springs Foods, Inc.*, 150 Idaho at 812, 252 P.3d at 93 (quoting Hearing Officer).

The CM Rules also recognize, however, that relaxing the futile call doctrine opens the door to allowing a senior water right holder "to command the entirety of large volumes of water in a surface or ground water source to support his appropriation" in contravention of Idaho Supreme Court decisions. CM Rule 20.03; *see Clear Springs Foods, Inc.*, 150 Idaho at 809, 252 P.3d at 90 ("Conjunctive Management Rule 20.03 . . . is consistent with our holding in *Van Camp* [*v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907)]."). The CM Rules preclude this, in part, by limiting the extent of a delivery call to material injury rather than to the licensed or decreed quantity. As stated by the Hearing Officer:

> The Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in the license or decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of actual need for the water and the consequences to the State, its communities and citizens.

382 R. 7086.[9]

In sum, the CM Rules authorize delivery calls that would otherwise be deemed futile, but limit such delivery calls to prevent monopolization of the resource by the senior. This

[9] The Hearing Officer's *Opinion Constituting Findings Of Fact, Conclusions Of Law And Recommendation* (Apr. 29, 2008) (*"Opinion*), is in the record at 382 R. 7048-7118. The *Opinion* is cited directly in the remainder of this brief.

framework ensures that application of traditional administration principles to water distribution in interconnected surface water and ground water accommodates both "bedrock" principles of prior appropriation. *A&B*, 155 Idaho at 651, 315 P.3d at 839.

C. Conjunctive Administration Must Be Based On Predictions Of Water Supplies, Needs, And Mitigation Requirements.

In traditional surface water-only administration there generally is little or no need for the Director or the Watermaster to predict water supplies or needs, or to require juniors to secure mitigation at the outset of the season. As discussed above, any actual interference with or injury to a senior surface water right by a junior surface water diversion can be quickly and reliably identified when it actually occurs, and can be promptly remedied by curtailment.

The situation is different in conjunctive administration because the delays and uncertainties impede or prevent determination of actual material injury and actual mitigation requirements until the season is effectively over. Waiting until the end of the season to determine the actual magnitude of material injury and ordering the appropriate amount of mitigation, however, would not provide timely or effective administration. The Methodology addresses these issues by projecting or predicting seniors' water supplies, needs, and material injury, and juniors' mitigation requirements, at the start of each season. The seniors' needs are predicted using scientific algorithms that rely on available water use data and safety factors to protect the senior water rights, rather than relying solely on licensed or decreed quantities for determining mitigation requirements.

Just as the futile call and material injury provisions of the CM Rules are departures from traditional surface water-only administration, predicting water supplies and needs and ordering curtailment or mitigation on the basis of the predictions is a departure from familiar surface water administration methods. Nonetheless, the Hearing Officer, this Court, and the Idaho

Supreme Court have recognized the need for such an approach and approved its use. *See Recommendation* at 43-44 ("The practicalities of hydrology justify a departure in ground water administration from surface to surface water administration in the interest of irrigators and the public . . . . The attempt to project the amount of water that is necessary for the members of the SWC to fully meet crop needs within the licensed or decrees amounts is an acceptable approach to conjunctive management"); *Order* at 26 (concluding this approach "is a necessary result of the Director implementing the conditions imposed by the [Conjunctive Management Rules] with respect to regulating junior rights"); *A&B*, 155 Idaho at 651, 315 P.3d at 839 (stating that the Snake River Basin's large and complex system of interconnected ground and surface waters "simply cannot be managed without a great deal of prior analysis and planning toward determining the proper apportionment of water to and among the various water right holders according to their priority.").

D. Establishing Mitigation Requirements Early In The Season Benefits Both Senior Surface Water Users And Junior Ground Water Users.

Water supplies and needs are difficult to forecast and predictions of them can miss the mark. As the Hearing Officer stated:

> Long term weather forecasting has limited reliability, and the so-called average year is unusual, reflecting the average of high and low water years rather than a customary amount of precipitation that can be predicted with a high degree of certainty. The problem has been accentuated over the past twenty years when it appears that wet years are wetter and dry years drier.

Opinion at 6. These difficulties assume even greater significance in light of the "many variables, moving parts, and imponderables that present themselves during any particular irrigation season," *A&B*, 155 Idaho at 651, 315 P.3d at 839, which can have unanticipated and poorly understood effects in the Snake River basin's complex system of interconnected surface water and ground water.

These considerations undermine predictability, which "is a strong value in water administration." *Opinion* at 48. Predictability allows the parties to make plans and arrangements for the upcoming season, which has always been a central concern in these delivery call proceedings. *See, e.g., SWC As-Applied Brief* at 26 ("water users are planning for the upcoming irrigation season long before the middle of April") (internal quotation marks omitted); *IGWA's Opening Brief* at 13 ("The initial determination of material injury is the most critical for junior groundwater users because it determines the amount of mitigation that must be secured prior to the irrigation season to avoid curtailment"). All parties benefit from having advance notice of anticipated water supplies, needs, and mitigation requirements.

Risks to both seniors and juniors increase without an early mitigation decision "in place," *Opinion* at 43, because of the increased likelihood of ineffectual curtailment and continued controversy. The Department's consistent approach, therefore, has been "to determine the likelihood of shortages in advance." *Id.* "[T]he aim was to have a decision in place" to alert the parties of anticipated mitigation requirements. *Id.* This benefits both senior surface water users and junior ground water users by providing seniors with certainty of water supply and reducing the potential for a curtailment that may well provide seniors with little or no relief in real time but can impose devastating impacts on juniors. *See id.* 12 ("curtailment does not result immediately in increases to the Snake River flow equal to curtailment"). As the Hearing Officer stated:

> If [the junior ground water users] did not have lease agreements in place the acquisition of water might be exceptionally expensive or they might not be able to obtain replacement water and be curtailed. That would ruin them for the season and possibly fail to get water to the surface users in time of need. Additionally, it would not eliminate mid-season disputes when the surface water users claim they need every acre-foot of their rights and the ground water users maintain that there is no such need so the water would not be applied to a beneficial use.

Opinion at 44.

E. The Risk Of Incorrect Predictions Must Be Allocated Consistent With The Requirement of Accommodating Both "Bedrock" Principles Of The Prior Appropriation Doctrine.

The need to base conjunctive administration largely on predictions of material injury and mitigation requirements, which can be incorrect, introduces an element of risk into conjunctive administration that does not exist in traditional surface water administration. Even projections that are adjusted in-season to account for changed conditions can be off the mark; indeed, even further off than the projection at the beginning of the season.

The events of 2012 and 2013 illustrate these problems. In 2012, the *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)* predicted no material injury to any members of the Coalition. 382 R. 730. The November accounting of actual supplies and needs under Methodology Step 9,[10] however, determined that between AFRD2 and TFCC there had been an in-season demand shortfall of 59,986 acre-feet, 382 R. 772, even though their actual water supplies had been greater than predicted. *Compare* 382 R. 730 *with id.* at 772.[11]

The irrigation season the following year, 2013, was similar to 2012 but when 2012 data was incorporated into the 2013 forecast revision, the result was to overestimate material injury by an even greater margin than it had been underestimated in 2012. To illustrate, the *Final Order Regarding April 2013 Forecast (Methodology Steps 1-4)* projected an in-season demand shortfall to the Coalition of 14,200 acre-feet, 382 R. 835, and ordered juniors to secure mitigation in this amount or be curtailed. 382 R. 831-32, 836. By the summer conditions had

[10] *Final Order Establishing 2012 Reasonable Carryover (Methodology Step 9).* 382 R. 770.

[11] All of the Coalition entities had storage remaining at the end of the season, including AFRD2 and TFCC, and all but AFRD2 had storage in excess of "reasonable carryover." 382 R. 772; *see Opinion* at 67 ("If crop needs are met by the combined use of natural flow and storage water and there is sufficient water for reasonable carryover, there is no material injury."). AFRD2's 2012 "reasonable carryover" shortfall of 17,318 acre-feet was fully mitigated pursuant to a stipulation with IGWA. *Id.* at 791-93.

became hot and dry, and the water supply was running below the amount predicted in April. 382 R. 950-51. "Crop Water Need" had increased significantly, and the Coalition's actual diversions were well above the ten-year average. *Id.* The Director issued the *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)*, which revised the April predictions for in-season demand shortfall and the remaining natural flow supply based on data from a recent "analogous year"—which based on a residual analysis was determined to be the preceding year, 2012. *Id.* at 952-53.

While the forecast revision increased the predicted material injury to in-season demand by approximately 700% (from 14,200 acre-feet to a total of 105,200 acre-feet), 382 R. 953, the final accounting of in-season demand determined that the actual material injury to in-season demand had been "zero." *Id.* at 1047.[12] In short, when the forecast for 2013 was updated using data from 2012—the very year the Coalition argues the Director should be using as the basis for forecasting material injury[13]—the revised forecast ended up being much farther off than the original forecast. And, in fact, the Coalition in 2013 did not suffer actual material injury to in-season demand, but junior ground water users nonetheless were required to provide 14,200 acre-feet in mitigation. 382 R. 954, 966.

This example illustrates the conjunctive management prediction dilemma: even adjusted predictions that use the most recent data to account for changing weather conditions can be

[12] In late November the Director, in applying Methodology Step 9, determined the Coalition's "total actual volumetric demand and total actual crop water need for the entire irrigation season." 382 R., pp. 1045-46. The Director then calculated the "2013 season ending in-season shortfall values," *id.* at 1046, and determined that there had been no actual shortfall (material injury) to in-season demand for any of the Coalition entities. *Id.* at 1047. The Director determined that the differences between the revised forecast and the final accounting were "due to changes in total supply and [Reasonable In-Season Demand] that reflect diversion and [Evapotranspiration] data not available" when the revised forecast had been issued in August. *Id.*

[13] The Coalition argues that using 2012 or 2013 as a "baseline" year "would provide juniors more advance notice of the seniors' expected irrigation needs." *SWC Methodology Brief* at 19 n. 17; *see id.* at 21 (arguing that a table using 2012 and 2013 as "baseline" years "better represents the Coalition's water needs").

incorrect, and it cannot be assumed that adjusted predictions using additional or more recent data will prove more accurate than the initial prediction—they can be even less accurate. Further, prediction errors can result in either too little mitigation or too much. Too little mitigation violates priority of right because "priority of appropriation shall give the better right between those using the water." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 800, 252 P.3d 71, 81 (2011)). Too much mitigation violates the principle that actual need for beneficial use "acts as a measure and limit" on the extent of a senior water right to call for water. *A&B*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013).

While neither of these outcomes is legally consistent with the prior appropriation doctrine as established by Idaho law, they are inevitable because it is not possible to predict with certainty the amount of actual material injury, or the amount of mitigation that will be necessary for actual beneficial use. *See Opinion* at 6 ("Long term weather forecasting has limited reliability, and the so-called average year is unusual"). Decisions must be made and administrative actions must be taken long before it is possible to make such determinations.

The question, therefore, is not which one of the "two bedrock principles" should carry the day. *A&B*, 155 Idaho at 650, 315 P.3d at 838. The question is how to allocate the risk of incorrect predictions in an administrative framework that "accommodate[s] both the first in time and beneficial use aspects principles." *Id.* at 651, 315 P.3d at 839. As the Hearing Officer stated: "The variability and unpredictability of weather creates risks which must be allocated between surface and ground water users. . . . Conjunctive management means that risks must be allocated as to timing and expense, based on water forecasts which, using the best available science, may be wrong." *Opinion* at 6.

III. THE PARTIES' POSITIONS FAIL TO ACCOMMODATE BOTH OF THE "BEDROCK PRINCIPLES" OF PRIOR APPROPRIATION.

The parties' arguments on the question of allocation of risk fail to squarely address the dilemma of how to do so while accommodating both "bedrock principles" of prior appropriation. The Coalition simply assumes that conjunctive administration is required to provide "the greatest certainty" possible to senior surface water rights. *SWC Methodology Brief* at 20. IGWA and Pocatello (the "Ground Water Users"), meanwhile, argue the Director must allocate risks equally because intentionally overestimating seniors' needs and underestimating their supplies can result in unnecessary curtailment or mitigation, which violates the beneficial use principle. *See, e.g., IGWA Brief* at 33; *Pocatello Methodology Brief* at 16.

Each of these approaches impermissibly accommodates only one of "two bedrock principles." *A&B*, 155 Idaho at 651, 315 P.3d at 839. The Ground Water Users' view that risks must be allocated equally between seniors and juniors impermissibly diminishes priority of right, *see Clear Springs Foods, Inc.*, 150 Idaho at 798, 252 P.3d at 79 ("'to diminish one's priority works an undeniable injury to that water right holder'") (citation omitted), and is contrary to the presumptions favoring senior water rights during administration. *See AFRD2*, 143 Idaho at 878, 154 P.3d at 449 (2007) ("The presumption under Idaho law is that the senior is entitled to his decreed water right . . . ."). As the Director stated in the *Methodology Order*, "[e]quality in sharing the risk will not adequately protect the senior surface water right holder from injury." *Methodology Order* at 6.

On the other hand, as the Hearing Officer stated, the Coalition's protocol of "maximum protection"—i.e., administering to the full decreed quantity rather than on the basis of material injury—to eliminate risk to surface water rights would require junior ground water user "to stand ready to provide mitigation up to the full extent of SWC's rights or face curtailment when a shortage attributable to them occurred." *Opinion* at 43-44. As a result, ground water users

"might well incur the expense of leasing water that is not needed" or, if they did not have leases in place, "might not be able to obtain replacement water and be curtailed. That would ruin them for the season and possibly fail to get water to the surface users in time of need." *Id.* The Hearing Officer declined to recommend the Coalition's "maximum protection" protocol:

> The licensed or decreed amount of a water right is a maximum which if used to establish yearly need would often over predict material injury. Using the maximum amount in determining a level of water that will be needed would in instances be higher than the amount necessary. Although it could be adjusted down, it would require commitments to be made for the acquisition of water that at times would not be needed. It would not encourage reasonable conservation as required in CM Rule 42.01.

Opinion at 48.

The Director does not have the option, as the respective sides in this case would have it, to elevate one of the two "bedrock principles" over the other.

IV. THE METHODOLOGY ACCOMMODATES BOTH OF THE TWO "BEDROCK PRINCIPLES" OF PRIOR APPROPRIATION IN ALLOCATING THE RISK OF INCORRECT PREDICTIONS.

The Methodology allocates prediction risk consistent with the requirement of accommodating both bedrock principles of prior appropriation. The principle that "priority of appropriation shall give the better right between those using the water," *Clear Springs Foods, Inc.*, 150 Idaho at 800, 252 P.3d at 81, is protected by biasing predictions and mitigation requirements in favor of senior surface water right holders. The Director's April forecast "purposefully underestimates" the Coalition's expected water supply, reducing by one standard error the predicted natural flow supply derived from the Joint Forecast by a regression analysis. *Methodology Order* at 31.[14] As the Hearing Officer stated, this "cause[s] an increase in the

[14] The Joint Forecast "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques," *Methodology Order* at 9, and "a sufficiently reliable predictor of spring runoff to use early in the process." *Opinion* at 24. The effect of reducing the USBR-USACE Joint Forecast by a standard error or deviation

amount of expected shortfall," *Opinion* at 22, which favors the seniors. The Methodology "further guards" against injury to seniors by use of a composite "baseline year" specifically selected to overestimate seniors' needs: the composite baseline year "has above average [Evapotranspiration], below average in-season precipitation, and above average growing degree days," *Methodology Order* at 11, which favors seniors.

These "purposefully conservative" assumptions, *id.*, allow the Director "to project an upper limit of material injury at the start of the season." *Id.* at 6. Junior water users are required to secure the same amount of mitigation water within two weeks of the initial forecast, *Id.* at 35 (Step 5), even though "it may ultimately be determined after final accounting that less water was owed than was provided." *Id.* at 31. Under the Methodology's approach, "this is an appropriate burden for junior appropriators to carry. Idaho Cost. Art. XV,§ 3; Idaho Code § 42-106." *Id.* at 31.

> 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 underpredict the demand shortfall. In a high water demand year, underprediction of demand shortfall might be acceptable if the junior priority ground water right holders and the senior priority surface water right holders shared equally in the risk of water shortages. Equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury. The incurrence of actual demand shortfalls by a senior surface water right holder resulting from pre-irrigation season predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder. Therefore, a BLY [Baseline Year] should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors.

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is "to conservatively estimate the natural flow available to the members of the Surface Water Coalition, causing an increase in the amount of predicted shortfall." *Opinion* at 22.

While the Director's April forecast relies heavily on the Joint Forecast of the USBR and the USACE, in-season adjustments to the forecast do not rely on the Joint Forecast because it is less reliable and useful as the season progresses. *Opinion* at 23-24, 53. For instance, in 2010 and 2013 the Director's orders revising original forecasts did not rely on the Joint Forecast to predict the remaining natural flow. Rather, they used a residual analysis comparing the actual runoff data for each of those years that for previous years, and predicted the remaining natural flow on the basis of the most "analogous year" as determined via the comparison. 382 R. 630, 639-40, 952.

> In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

Methodology Order at 6-7.

This approach gives effect to the presumptions favoring senior water rights, *AFRD2*, 143 Idaho at 878, 154 P.3d at 449, and accords "the benefit of the doubt" to the senior water right holder during administration. *Memorandum Decision And Order On Petition For Judicial Review, A&B Irr. Dist. v. IDWR* (Fifth Jud. Dist. Case No. 2009-000647) (May 4, 2010), at 35.

The Methodology accommodates the other "bedrock" principle—that actual need for beneficial use "acts as a measure and limit" on the right to call for water—by basing material injury and mitigation requirements on a determinations of "Reasonable In-Season Demand" and "Reasonable Carryover" rather than on whether the senior surface water users are diverting and storing the full licensed or decreed quantities of their natural flow water rights and storage water rights. *Methodology Order* at 5-6. This avoids providing "maximum protection" to the senior surface water users, *Opinion* at 44, at the cost of discouraging "reasonable conservation as provided in CM Rule 42.01" and requiring water to be routinely secured in amounts that often "would not be needed." *Opinion* at 48; *see Memorandum Decision And Order On Petition For Judicial Review, A&B Irr. Dist. v. IDWR* (Fifth Jud. Dist. Case No. 2009-000647) (May 4, 2010), at 33 ("Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use."). As the Director concluded, the water supplies appropriated by the Coalition are "inherently variable" and it is not feasible or permissible to "insulate the SWC against all shortages. The Director can, however, protect the SWC against reasonably predicted shortages." *Methodology Order* at 31.

In sum, the Methodology allocates the risk of incorrect predictions so as to protect the constitutional principle of priority of right without subverting the constitutional principle limiting

the exercise of priority to the amount of water actually needed for beneficial use. While all the parties challenge this approach, it is constitutionally required and resolves the "tension" between the two "bedrock principles" while accommodating both.

V. THE COALITION'S ARGUMENT THAT THE METHODOLOGY IMPERMISSIBLY "CAPS" SENIORS' WATER SUPPLIES LACKS MERIT.

The Coalition argues that "[t]he signature flaw" in the Methodology is that it results in a "'cap' . . . on the Coalition's water needs for the irrigation season." *SWC Methodology Brief* at 12. The Coalition asserts the Methodology establishes a fixed upper limit or "cap" on the seniors' "water user requirements," "in-season irrigation demands," "'baseline' water needs," "water use needs," "needed water," and results in "unmitigated material injury." *Id.* at 8, 12, 14, 18, 61, 66; *SWC As-Applied Brief* at 24, 28, 32. The Coalition characterizes this as the central feature of a far-reaching attempt to favor junior ground water users at the expense of senior surface water users. *See SWC Methodology Brief* at 9 ("It is as if the agency seeks to minimize the senior's right to water at every turn, while juniors take priority.").[15] There is no support for this contention.

A. The Methodology Expressly Provides For Upward In-Season Revisions To Forecasts Of Seniors' Water Supplies And Needs.

Hyperbole aside, the Methodology simply does not impose a "cap" on seniors' "supplies," "needs," "demand" or "material injury." To the contrary, the *Methodology Order* explicitly recognizes that "[a]s stated by the Hearing Officer, 'There must be adjustments as conditions develop if any baseline supply concept is to be used.'" *Methodology Order* at 19.

[15] While the Coalition has argued throughout the course of these proceedings that the Department's administration is tailored to elevate junior ground water rights over senior surface water rights, the Hearing Offer in evaluating the competing "water balance" estimates the Coalition and IGWA stated that "[t]he Director's minimum full supply amount of 3,105,000 falls between the two, though much closer to the SWC analysis." *Opinion* at 49.

The *Methodology Order* goes on to discuss the process of "Adjustment of Forecast Supply." *Id.* at 19-22. This process is set forth in Steps 6 and 7:

> 9. Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) estimate the Time of Need date;[16] and (3) *issue a revised Forecast Supply*.
>
> 10. *This information will be used to recalculate RISD [Reasonable In-Season Demand]and adjust the projected DS [Demand Shortfall] for each member of the SWC*. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. *The Director will then issue revised RISD and DS values*.
>
> 11. If the Director determines that the estimated Time of Need is reasonably certain, Step 7 will not be implemented for in-season purposes.
>
> 12. Step 7: Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) *issue a revised Forecast Supply*; and (3) establish the Time of Need.
>
> 13. *This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC*. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative crop water need determined up to that point in the irrigation season. *The Director will then issue revised RISD and DS values*.

Methodology Order at 37 (emphases added). Pursuant to these provisions in August of 2013 the Director made upward revisions to the Coalition members' needs for the remainder of the season, and made upward revisions to the predicted in-season demand shortfalls for AFRD2 and TFCC. 382 R. 948-55.[17]

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

[17] In August of 2010, pursuant to the same provisions, the Director made downward revisions to the Coalition members' needs and material injury as a result of cooler and wetter conditions than anticipated. 382 R. 627-28, 636-37.

Thus, the Coalition's argument that the Methodology "caps" the seniors' "water supplies" and "material injury" is simply incorrect. The Methodology explicitly provides for upward revisions to the initial forecasts of the Coalition members' water supplies, demands, and material injury, and the Director has made such revisions.

B. The Methodology's In-Season Administration Provisions Are Supported By The Record And Are Consistent With A&B.

The Methodology provision that the Coalition cites in support of its "cap" argument does not limit the Coalition's water supply needs or material injury. Rather, the provision states, in part, that "[i]f 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." *Methodology Order* at 31. While this provision limits the in-season administrative action that may be taken against junior ground water users if the Director's initial forecast at the start of the season underestimates the seniors' actual demands as the season develops,[18] the Methodology is structured to significantly reduce the likelihood of such an underestimate by weighting or biasing the initial forecast in the seniors' favor.

"[T]he aim" of this approach, as the Hearing Officer stated, is "to have a decision in place" at the beginning of the season to notify the parties "as to the amount of water [the ground water users] must secure." *Opinion* at 43. "Predictability is a strong value in water administration," *id.* at 48, and the Methodology seeks to provide all parties with "reasonable certainty" early in the season. *Methodology Order* at 30-31. It also avoids a problem identified

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[18] The limitation on in-season administration is also set forth in Step 8:

> Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes[18] from Step 4 (May 1 secured water) and the RISD volume calculated at the Time of Need. If the calculations from steps 6 or 7 indicate that 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.

Methodology Order at 37.

by the Hearing Officer: "At some point in the irrigation season it is clear what the needs and the availability of water are, but that may come well into the season when everybody is scrambling to find a source for water and the price when found is high." *Opinion* at 6-7. The Coalition's assertions that the result is "unmitigated" material injury if the initial forecast underestimates in-season demand are simply incorrect. The Coalition's arguments create an artificial separation between in-season demand and "reasonable carryover." Both are integral parts of the "total water supply," as explained in the next section.

C. The Methodology's In-Season Administration Provisions Do Not Result In Unmitigated Material Injury And Are Consistent With The CM Rules, the Hearing Officer's Findings, And The Upper Snake River Basin's Existing System Of Water Administration.

The Coalition's argument that establishing the upper limit of the junior ground water users' mitigation obligation also amounts to a "cap" on seniors' water supplies and material injury is incorrect. The Coalition's argument ignores the "total water supply" concept and "reasonable carryover," which remedy any actual material injury to in-season demand in excess of the mitigation secured pursuant to the April forecast order.

Under CM Rule 40.01, the Director in determining material injury refers to CM Rule 42, which in turn provides for the Director to consider, among other things,

> [t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies . . . provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.

CM Rule 42.01.g. Thus, the CM Rules contemplate that senior surface water users will use their existing water supplies, including some of their storage, before they are materially injured and entitled to mitigation. The Director is not required to determine material injury to in-season demand and "reasonable carryover" separately, nor is he required to order separate mitigation for

each. Material injury and mitigation may be determined with respect to the senior surface water users' "total water supply."

CM Rule 42.01.g. and the Director's order of May 2, 2005 are the basis for the "total water supply" concept. 551 R. 1377 (referring to "total water supply, under natural flow water rights and from storage, and in some instances supplemental ground water rights"). The Hearing Officer explained and supported the "total water supply" concept:

> Two elements of the Surface Water Coalition water rights must be considered—natural flow and storage rights. SWC challenges the Director's use of a 'total water supply' analysis, combining natural flow rights and storage rights to determine if there was injury and a need for curtailment. . . . According to SWC natural flow and storage should be addressed separately. SWC argues that requiring the senior right holder to use storage water to make up the shortage amounts to self-mitigation that damages the storage right. . . . However, if the damage to the 'total water supply' is properly recognized, the harshness identified by SWC is ameliorated. . . .
>
> All SWC members rely upon a combination of natural flow and storage water to meet their needs. That is their total water supply. . . . "[w]ater comes and is used. It may be from natural flow, as all water would be if there were not reservoirs, or it may be storage. The source of the water is not significant to the crop. It is significant to accounting and allocating rights.

Opinion at 66-67.

"If depletion of the storage right to make up the loss of natural flow reduces the amount of carryover storage below the level of reasonable carryover," the Hearing Officer stated, "there is material injury and that amount must be made up through curtailment or replacement, or another form of mitigation." *Id.* at 67. By the same token, "[i]If crop needs are met by the combined use of natural flow and storage water and there is sufficient water for reasonable carryover, there is no material injury." *Id.* at 67.[19]

[19] This was also the standard for determining material injury case under the "minimum full supply" methodology: "According to the former Director, the sum of shortage to the minimum full supply and to reasonable carryover constituted the material injury." *Opinion* at 40.

Accordingly, an in-season demand shortfall does not result in material injury unless it requires storage use that results in less than "reasonable carryover" at the end of the season. Should this occur, the senior surface water user is entitled to mitigation for the "reasonable carryover" usage required for in-season use.[20] Thus, contrary to the Coalition's argument, the fact that the Methodology does not require junior ground water users to secure additional mitigation to cover a larger-than-predicted in-season demand does equate to authorizing unmitigated material injury.

This approach to conjunctive administration is consistent with existing water administration and accounting in the Upper Snake River basin.

> The Surface Water Coalition members may use water from both natural flow and storage with an accounting at the end of the irrigation season. The Coalition members divert what water they need as long as they have water available in storage. At the end of the year there is application of an accounting model to determine what portion of the water they consumed during the year was considered to be natural flow and what portion was considered to be storage. As long as the Coalition members have a positive number in their storage account they divert what they need during the season and there are not day to day adjustments or shutdowns by the watermasters. If they exceed their storage rights an accounting is done and reimbursement for the overage is required.

Opinion at 11 (emphasis added).

The Methodology's provisions for in-season and "reasonable carryover" mitigation are similar in that there are not "day to day adjustments or shutdowns," *id.*, if the mitigation secured pursuant to the initial forecast is insufficient to cover an increased material injury prediction in a subsequent in-season revision of the forecast. While this means the senior surface water users may in some instances find it necessary to use more of their storage supplies, they will receive mitigation at the end of the season for any "reasonable carryover" usage because the "reasonable carryover" mitigation determination takes the Coalition's actual carryover into account.

[20] The Methodology also authorizes the Director to take in-season usage into account and "readjust the reasonable carryover shortfalls." *Methodology Order* at 31.

D. The Methodology's In-Season Administration Provisions Did Not Result In Unmitigated Material Injury In 2013.

The Coalition argues that in 2013 "the Director capped the material injury at 14,200 acre-feet – allowing 91,000 acre-feet of material injury to go unmitigated." *SWC As-Applied Brief* at 28. This contention mischaracterizes the Director's 2013 orders and the results of the orders. In April 2013 the Director issued the *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)* and predicted a material injury of 14,200 acre-feet to TFCC's in-season demand; no material injury was predicted for the other Coalition entities. 382 R. 831. The Director therefore ordered IGWA to secure 14,200 acre-feet of mitigation within fourteen days or be curtailed, *id.* at 832, 836,[21] and IGWA secured a sufficient amount of storage water for this purpose. *Id.* at 884. In August 2013 the Director issued the *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)*, and revised the April prediction of material injury to TFCC's in-season demand upward to 51,200 acre-feet, and also predicted 54,000 acre-feet of material injury to AFRD's in-season demand. *Id.* at 949, 953. In short, the Director revised the total material injury prediction for all Coalition members upward approximately 700%, from 14,200 acre-feet to 105,200 acre-feet. *Id.* Contrary to the Coalition's argument, the record demonstrates that the Director did not "cap" the Coalition's predicted material injury.

The Coalition's argument that the Director allowed "91,000 acre-feet of material injury to go unmitigated," *SWC As-Applied Brief* at 28, is based on the fact that the Director did not order IGWA to secure additional mitigation to cover the difference between the April prediction and the revised prediction issued in August (105,200 – 14,200 = 91,000). While the Director ordered the Watermaster to assign the 14,200 acre-feet in secured mitigation to the accounts of TFCC

[21] IGWA also was required to establish that the mitigation secured with respect to the predicted shortfall of 14,200 acre-feet to TFCC's in-season demand "is different than the volume of storage water required to mitigate the [existing] 14,605 acre-feet reasonable carryover obligation to AFRD2." 382 R. 836. IGWA satisfied this requirement. *Id.* at 884.

and AFRD2, 382 R. 955,[22] consistent with the Methodology he did not order junior ground water users to secure additional mitigation:

> At this time, the current, predicted, shortfall to SWC's RISD is 105,200 acre-feet. However, consistent with the Methodology Order, "junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) [14,200 acre-feet] and the [DS] volume calculated at the Time of Need [105,200 acre-feet]. *Methodology Order* at 37, IGWA has secured 14,200 acre-feet of storage water for mitigation. *Order Confirming IGWA's Notice of Secured Water*.

382 R. 954 (parentheses and brackets in original).

The Coalition's contention that this resulted in 91,000 acre-feet of "unmitigated" material is simply incorrect. As the Methodology and the Director's orders clearly state, the April forecast and the in-season adjustments to it were predictions of material injury, *see* 382 R. 954 ("the current, predicted, shortfall to SWC's RISD is 105,200 acre-feet"), not final determinations of actual material injury. In fact, the predicted material injury never materialized. Rather than experiencing 91,000 acre-feet of material injury to in-season demand, the Coalition experienced a small windfall: 14,200 acre-feet of mitigation delivered even though there had been no actual material injury to in-season demand. 382 R. 1047. Moreover, the in-season demand mitigation provided to TFCC—6,900 acre-feet—was more than enough to cover TFCC's "reasonable carryover" shortfall in that year of 5,751 acre-feet. 382 R. 1047.[23]

VI. THE COALITION'S ARGUMENTS STRETCH *A&B* BEYOND THE ISSUES AND THE RECORD IN THAT CASE.

A. A&B Does Not Require The Director To Implement A "Three-Step Methodology."

[22] The Director had determined that it was "reasonably certain" the date of the "Time of Need" would fall on August 29, 382 R. 954, and therefore ordered the Watermaster to assign and allocate the 14,200 acre-feet in mitigation "upon issuance of this order, but no later than August 30, 2013." *Id.* at 955.

[23] For this reason, there is no merit in the Coalition's argument the Director improperly reduced the mitigation owed to TFCC when he ordered the 14,200 acre-feet divided between TFCC and AFRD2. *SWC As-Applied Brief* at 14.

The Coalition reads too much into *A&B* in arguing that the Idaho Supreme Court laid out a "three step methodology" for the Director to "implement." *SWC Methodology Brief* at 1, 8. The Idaho Supreme Court did not establish a three-step methodology, but rather considered the question of "[w]hether the Director may utilize a baseline methodology—a methodology based upon the senior water right holder's projected need in considering whether that right holder has been materially injured." *A&B*, 155 Idaho at 647, 315 P. 3d at 835. The Court approved of the use of a "baseline" methodology as a starting point and provided guidance, such as that a "baseline" methodology must include provisions for prompt updates to account for changed conditions. *A&B*, 155 Idaho at 648-53, 315 P. 3d at 836-41.

The Court also cautioned that "the findings of fact that shape that methodology and any modifications to the methodology," and "the nuances of the final methodology," were "not properly before this Court." *A&B*, 155 Idaho at 649, 315 P.3d at 837.[24] The Coalition's argument that the guidance provided in *A&B* was intended as a "three-step methodology" lack merit.

B. A&B Does Not Require That The Initial Forecast Order Be Issued Prior To The Decreed Starting Date For The "Period Of Use."

The Coalition further argues that the Idaho Supreme Court's reference in *A&B* to a "pre-season management plan" requires each year's initial forecast to be issued before the starting date for the "Period of Use" element identified in the Coalition's water rights, because that element defines "season." *SWC Methodology Brief* at 33. This argument reads too much into the term "pre-season management plan." The Court was well aware that the Director's initial forecasts are issued in April; the forecasts use and rely upon the Joint Forecast issued in April by the USBR and USACE, which were referenced in the Court's decision. *A&B*, 155 Idaho at 645,

[24] The Idaho Supreme Court also noted that "the factual basis underlying the final methodology order is not properly before this Court at this time." *Id.* n.6.

315 P.3d at 832. Nonetheless, the Court did not state that a "pre-season management plan" means a plan issued prior to the "Period of Use" for the Coalition's water rights.[25] To the contrary, when the term "pre-season management plan" is read in context there is nothing to suggest the Court intended the overly-technical import that the Coalition's argument attaches to the term.

Further, the Idaho Supreme Court in *A&B* recognized that a "baseline" methodology can be used in two different ways: either "in the administration context," i.e., "the context of determining a water call"; or simply as "a predictive tool for preparing the Director's pre-season plan for allocation of water." *A&B*, 155 Idaho at 650, 315 P.3d at 838. The Director's April forecast orders in this matter are water distribution orders issued in response to Coalition's 2005 delivery call,[26] i.e., orders issued "in the administration context" rather than "pre-season plan[s] for allocation of water" outside of a delivery call. *A&B*, 155 Idaho at 650, 315 P.3d at 838. The enumerated paragraphs in *A&B* however, generally address both "the administration context" and "pre-season management plan[s] for allocation of water resources." *A&B*, 155 Idaho at 653, 315 P.3d at 841. This confirms that the enumerated paragraphs were intended as general guidance rather than as a specific "three step methodology" to be used in place of the Methodology developed by the Director, *SWC Methodology Brief* at 1, 8, which the Court emphasized was not properly before it. *A&B*, 155 Idaho at 649 & n. 6, 315 P.3d at 837 & n. 6.

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[25] The "Period of Use" for storage under storage rights typically is year-round: January 1 to December 31. Under the Coalition's overly-strict interpretation of *A&B*, there is no "pre-season" for these water rights.

[26] The Coalition's 2005 delivery call did not mention or challenge an existing plan for allocation of water; rather, it asserted the senior priorities of the Coalition's water rights and requested "Water Right Administration" and "Delivery of Water" by the Director "pursuant to Idaho Code Chapter 6 Title 42 and the Rules for Conjunctive Management of Surface and Ground Water Resources (Idaho Administrative Code Section 37.01.01)." , 551 R. 1-6. The only pre-existing administrative actions referenced in the Coalition's delivery call that might be characterized as "pre-season plans for allocation of water," *A&B*, 155 Idaho at 650, 315 P.3d at 838, were "moratorium" orders. 551 R. 4-5

C. A&B Does Not Impose A Rigid Requirement To Update The Forecast Whenever A Party Offers Any "Newer" Or "Better" Data.

The Coalition also over-reads *A&B* in arguing that the phrase "promptly updated to take into account changing conditions," *A&B*, 155 Idaho at 653, 315 P.3d at 841, is a *per se* requirement for the Director to update his initial forecast order as soon as any party—such as the Coalition—comes forward with any data or forecasts asserted to be more recent, more reliable, and/or better predictors of water supplies or needs. *See, e.g., SWC Methodology Brief* at 31, 37-38; *SWC As-Applied Brief* at 5-8. Nothing in *A&B* supports such a rigid, mechanical updating requirement. Indeed, this interpretation would likely trigger repeated submissions and counter-submissions by the various parties asserting that their "newer" or "better" data established "changing conditions" and required a prompt forecast update, bogging down the process and impeding rather than promoting timely and efficient administration.[27]

To the contrary, the Idaho Supreme Court has repeatedly recognized the "critical role" the Director's sound exercise of discretion plays in responding to a delivery call under the CM Rules. *A&B*, 155 Idaho at 650, 652, 315 P.3d at 838, 840, *AFRD2*, 143 Idaho 876-77, 154 P.3d at 447-48. The Methodology recognizes that the Director must exercise his "professional judgment as manager of the state's water resources." *Methodology Order* at 5. The decision of whether conditions have changed sufficiently to warrant an update falls within the Director's

[27] The Hearing Officer also did not contemplate that every new piece of information or data submitted by a party disagreeing with the Director's forecast would automatically trigger the need for an adjustment or revision. To the contrary, in citing an example of "the type of situation . . . that would call for adjustments," *Opinion* at 46, Hearing Officer referred to 2007, which was a truly unusual year. The Hearing Officer described the conditions of 2007 as "creat[ing] a vexing problem," with April, May and June runoff "below the long term average," followed by "hot, dry" summer, and "was either the first or second highest storage use year since Palisades Reservoir was built." *Opinion* at 45-46. It was further complicated by flood control releases of over a quarter million acre-feet made in anticipation of subsequent runoff that did not materialize. *Id.* at 6, 23. While the Hearing Officer stated this "type of situation" would call for adjustments, *id.* at 6, it is a different situation when a party comes forward with what is asserted to be some "newer" or "better" data. The Hearing Officer and the Idaho Supreme Court did not intend to say that the Director must invariably update the forecast simply because assertedly "newer" or "better" information has been submitted.

statutory discretion and professional expertise as the State's engineer. *See Keller v. Magic Water Co.*, 92 Idaho 276, 282-83, 441 P.2d 725, 731-32 (1968) ("As stated by Mr. Justice Holmes, the state engineer is 'the expert on the spot' . . . and we are constrained to realize the converse, that 'judges are not super engineers.'") (citation omitted).[28] "This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451.

Moreover, the fact that in 2013 the Director's April forecast was more accurate than the revised forecast issued in August demonstrates that a rigid requirement of mechanically updating the forecast to take into account any purportedly "newer" or "better" data would not necessarily result in better predictions. The affidavit of the manager of TFCC the Coalition quotes in its brief, *SWC As-Applied Brief* at 16-17, underscores this conclusion: the affidavit states that while natural flow began to "recede rapidly" in mid-June of 2013, it "[s]omewhat inexplicably rebounded" during July, "[a]gain inexplicably . . . crashed" on August 5, but then "appeared more reliable" after August 16. 382 R., pp., 1002-03. The affidavit confirms that weather and water supplies can change suddenly and dramatically for no apparent reason, and that it cannot be assumed that updating projections of material injury and mitigation requirements simply because there is "new" data will improve administration. Indeed, the events of 2013 demonstrate

[28] Idaho Code § 42-1701(2) provides that the Director shall be:

> a licensed civil or agricultural engineer with not less than five (5) years of experience in the active practice of such profession; a registered geologist with not less than five (5) years of experience in the active practice of hydrology; or a hydrologist holding a bachelor's or advanced degree in hydrology from a college or university accredited by a nationally recognized accrediting organization and with not less than five (5) years of experience in surface water and ground water modeling, water delivery and water measurement. The director of the department of water resources shall also demonstrate experience and expertise in interpreting and applying Idaho water law and shall be familiar with irrigation and other water use practices in Idaho.

that a rigid requirement to mechanically update projections whenever any party presents "new" or "better" data would often result in continuous or serial updates that simply track "inexplicable" or poorly understood changes in weather and water supplies, and ultimately may result in predictions that are farther off the mark than the initial projection at the start of the season.

VII. THE COALITION MISCHARACTERIZES THE RECORD IN ASSERTING THE DIRECTOR ARBITRARILY REFUSED TO UPDATE THE FORECAST IN 2012 AND 2013.

The Coalition's assertions that the Director abused his discretion by "refusing" to update the April forecasts in 2012 and 2013 also lack merit. The Coalition asserts that the Director arbitrarily chose to ignore what the Coalition characterizes as data demonstrating deteriorating water conditions. *See, e.g., SWC Methodology Brief* at 31, 37-38; *SWC As-Applied Brief* at 5-8. These are mischaracterizations.

In 2012, the Coalition simply filed a combined "Petition for Rehearing" and "Motion Authorizing Discovery," summarily asserting the Director had relied on "the wrong, or an outdated joint forecast" by using the USBR's and USACE's Joint Forecast of April 1 rather than the mid-month forecast issued approximately two weeks later, which predicted slightly less natural flow (91% of average and 85% of average, respectively). 382 R. 745-46. The Coalition also speculated the Director's predicted storage allocations "may also be incorrect." *Id.*

The Director treated the filing as a petition for reconsideration and denied it because the Methodology "requires the Director to use the actual Joint Forecast (April 1-July 31), not a mid-month forecast (April 16-July 31)." *Id.* at 755. The Director further determined that even if the April Forecast Order was revised to incorporate the mid-month forecast, "the Director would still predict no material injury," and provided a tabular summary of the revised predictions of natural

flow supply, storage allocation, Minidoka Credit Adjustment, total supply, and shortfall (material injury) for each entity under the mid-month forecast. *Id.* at 756. The Director also stated that storage allocation predictions had been based on the Joint Forecast, the USBR's report that it "expected the reservoir system to fill," and the fact that all storage allocations had filled in the most recent "analogous year" (2011). *Id.* Further, while the Director's season-end accounting showed in-season demand shortfalls for two Coalition entities—AFRD2 and TFCC—it also showed that their water supplies had been larger than predicted, not smaller. *Compare* 382 R. 730 (predicted "Total Supply") *with id.* at 772 (actual "Total Supply").

In 2013, the Coalition again filed a combined petition for reconsideration/motion for discovery regarding the Director's *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4).* The petition asserted the Director's April forecast was "not representative of actual hydrologic conditions that exist in the Upper Snake River Basin." 382 R. 862. This assertion relied upon a one-page document attached to the petition entitled "Water Report – April 30, 2013." 382 R. 862. The "Water Report" stated the American Falls storage right had not yet filled, early season storage use was not expected to be "cancelled" as no excess water had spilled past Milner Dam, and that if future weather conditions were dry, it could result in very little new fill accruing to the Palisades and Island Park storage rights. 382 R. 862. The Coalition also asserted that several of its members had begun to use storage, and the Methodology was flawed for not incorporating a "predictive tool" developed by TFCC that purportedly "provided a more accurate planning forecast." *Id.* at 863.

The Director recognized that the premise of Coalition's petition argument was that the Director should immediately revise the April forecast whenever new information "becomes available." 382 R. 889. The Director declined to do so for two reasons. First, the Director

determined that such a process would require "continually updating" the April Forecast Order and undermine the purpose of providing a reasonably reliable prediction of the natural flow supply "as early in the season as possible. . . . If the Director were to updated the April Forecast Order every time new forecast information became available, there would never be a final decision upon which water users could plan for the upcoming irrigation season." *Id.* [29]

Second, the Director determined that "the information from the Water Report quoted by the SWC d[id] not conflict with the April Forecast Order." *Id.* The Director determined that the "Water Report" anticipated the American Falls storage right likely would fill and there would be additional fill to the Palisades and Island Park rights, 382 R. 889-91, a determination supported by the plain language of the "Water Report." *See id.* at 867 ("The Island Park and Palisades storage water rights won't get any new fill . . . until snowmelt increase to an amount that's sufficient to finish filling the 1921 American Falls storage right . . . . This won't occur until peak runoff begins sometime between mid-May and late-June."). The Director also determined that the April forecast order did not predict or rely upon cancellation of early season storage use, and the "Water Report" "merely provides a broad overview of fill possibilities depending on weather patterns and does not contradict the April Forecast Order." *Id.* at 890. This conclusion is supported by the express language of the "Water Report." *Id.* at 867.

The Director declined to adopt the "predictive tool" developed by TFCC for the remainder of 2013 because TFCC "failed to provide the Department information necessary to be able to evaluate TFCC's predictive tool." 382 R. 890. The Director stated "it is unreasonable for TFCC to expect the Department to implement any new predictive tool this year when information has yet to be provided to the Department for evaluation and consideration." *Id.* The

[29] As previously discussed, *A&B* does not impose a rigid, mechanical requirement of promptly updating the April forecast whenever any purportedly "new" or "better" information becomes available, and the Coalition's argument to the contrary would result in delayed, inefficient and unwieldy administration.

Director also noted that for 2013, "the difference between TFCC's predictive tool . . . and the sum of the Department's predicted storage allocation for TFCC and the shortfall . . . is small: only 3,726 AF or a 1.5% difference." *Id.*[30]

There is also no merit in the Coalition's argument that the Director improperly ignored affidavits of the managers of TFCC and AFRD2 in declining to revise the 2013 April Forecast Order. *See SWC As-Applied Brief* at 16-18 (quoting affidavits of Brian Olmstead and Lynn Harmon). These affidavits were filed in September, after the Director had already revised the April Forecast Order. *See* 382 R., pp. at 1004, 1009 (affidavit signature pages).

Moreover, there is no record support for the Coalition's assertions that the Director's denial of the 2013 petition for reconsideration resulted in a 740% increase in material injury over that predicted in the April Forecast Order. *SWC As-Applied Brief* at 8. As previously discussed, while the Director revised the 2013 April Forecast Order in August on the basis of changed conditions and predicted a significant increase in the Coalition's in-season material injury, at season's end it was determined there had been no actual injury. 382 R. 1047.

VIII. THERE IS NO MERIT IN THE COALITION'S ARGUMENTS THAT THE METHODOLOGY RESULTS IN UNTIMELY ADMINISTRATION.

A. The Coalition's Untimely Administration Arguments Seek To Implement The Discredited "Maximum Protection" Protocol.

The Coalition argues that the standard for determining whether administration is timely was established by the District Court in *AFRD2*, and quotes extensively from the District Court's decision. *SWC Methodology Brief* at 43-44. This argument overlooks the Idaho Supreme Court's *AFRD2* decision. While the Idaho Supreme Court commended the District Court for its

[30] The Department recognizes that while the Joint Forecast is a "good indicator" for predicting the supplies of most Coalition members, it is "not the best evidence" for purposes of predicting TFCC's supply. *SWC Methodology Brief* at 36. The Director has "previously expressed to TFCC that the Department is willing to work with TFCC to improve the predictors for TFCC for future application in the Methodology Order and Department staff have even met with TFCC consultants on this issue." 382 R. 890.

"lengthy and scholarly opinion," *AFRD2*, 143 Idaho at 869, 154 P.3d at 440, the Court declined to adopt the strict timeliness standard applied by the District Court. *See id.* at 875, 154 P.3d at 446 ("While there must be a timely response to a delivery call . . . . [i]t is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.").

While *AFRD2* recognized the tension between the need for timely administration and the need "to get it right," *SWC Methodology Brief* at 24, the Coalition simply ignores the issue. The Coalition argues that the Director must issue the initial material injury forecast in January because it is needed for planning purposes, *SWC Methodology Brief* at 35.[31] The Coalition also argues that the Director's material injury forecasts issued in April are usually wrong because conditions soon change. *See SWC Methodology Brief* at 23 ("After receiving the 2013 Forecast Order, it quickly became apparent that the Director's forecast was woefully inadequate.").

This contradiction does not appear to trouble the Coalition, possibly because the Coalition advocates for a system of updating the initial forecast each time a party presents information alleged to be newer or better. As previously discussed, this would undermine predictability, which "is a strong value in water administration," *Opinion* at 48, and necessary for the very planning activities that the Coalition argues are one of its main concerns. *See SWC As-Applied Brief* at 26, 30; *SWC Methodology Brief* at 47, 50.

The Coalition's solution to this dilemma is to require junior ground water users to annually secure mitigation sufficient to provide the full licensed or decreed quantity of the

[31] The Coalition's argument that the Director can and should issue the initial material injury forecast in January relies on documents that were attached to the Coalition's methodology brief and are outside the record. *See SWC Methodology Brief* at 35 & Attachments A, B. While the Coalition argues these documents prove the Director has sufficient information at his disposal in January to issue a reliable forecast, the record establishes that for the initial material injury forecast, the Joint Forecast for the Heise Gage issued in April "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." *Methodology Order* at 9; *see Opinion* at 24 ("The Heise Gage is a sufficiently reliable indicator of spring runoff to use early in the process").

Coalition water rights. The SWC proposed this "protocol" of "maximum protection" to the Hearing Officer, who discussed it in the *Opinion*:

> Starting with this protocol the ground water users would know at the beginning of the water season that they would have to stand ready to provide mitigation up to the full extent of SWC's rights or face curtailment when a shortage attributable to them occurred. The surface water users would have maximum protection to their rights. The detriment is that the ground water users might well incur the expense of leasing water that is not needed. If they did not have lease agreements in place the acquisition of water might be exceptionally expensive or they might not be able to obtain replacement water and be curtailed. That would ruin them for the season and possibly fail to get water to the surface users in time of need. Additionally, it would not eliminate mid-season disputes when the surface water users claim they need every acre-foot of their rights and the ground water users maintain that there is no such need so the water would not be applied to a beneficial use.

Opinion at 44. The Hearing Officer declined to recommend the Coalition's "maximum protection" protocol.

The "maximum protection" protocol is simply a repackaging of the Coalition's real objective from the start of this conjunctive management litigation. In *AFRD2*, "one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs." 143 Idaho at 880, 154 P.3d at 451 The Coalition's arguments that Methodology administration is untimely and fails "to get it right" ineluctably reduce to the contention that the only way conjunctive administration can be timely and predictable is to provide "maximum protection" by annually requiring juniors to secure mitigation sufficient to cover the full licensed and decreed amounts of the Coalition's natural flow and storage water rights, regardless of actual need. This argument is contrary to the Idaho Constitution and *A&B* because it fails "to accommodate both the first in time and beneficial use aspects" of prior appropriation." *A&B*, 155 Idaho at 651, 315 P.3d at 839.

B. The Methodology's Definition Of "Time Of Need" Is Consistent With The CM Rules, *AFRD2*, And The Hearing Officer's Recommendations.

The Coalition also argues that the Methodology's definition of "Time of Need" establishes an "arbitrary schedule" for mitigation delivery, *SWC Methodology Brief* at 45, and "fail[s] to provide any water to the Coalition members when they actually needed it." *SWC As-Applied Brief* at 40. This argument is contrary to the plain language of CM Rules 40 and 42 and the Hearing Officer's recommendations.

As previously discussed, pursuant to the "reasonable carryover" provision of CM Rule 42.01.g the Director may take into account the senior's storage supply for purposes of determining when mitigation is owed. As the Hearing Officer stated, the Director may look to the "total water supply," *Opinion* at 66, and "[i]f crop needs are met by the combined use of natural flow and storage water and there is sufficient water for reasonable carryover, there is no material injury." *Id.* at 67.

The CM Rules' "reasonable carryover" provision and the "total water supply" analysis are implemented, in part, through the "Time of Need" as defined in the Methodology: "Time of Need" is "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." *Methodology Order* at 21 n.9 (emphasis added).[32] The Methodology also provides that "Time of Need" defines the date juniors must provide mitigation to remedy the predicted material injury. *Methodology Order* at 30, 36-37.

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[32] The full definition of "Time of Need" is 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.

Id.

The Methodology's definition of the "Time of Need" is consistent with the plain language of the CM Rules and the Hearing Officer's recommendation: both provide that seniors must use their existing supplies, except for "a reasonable amount of carry-over storage," before seeking mitigation. CM Rules 40.01, 42.01.g; *Opinion* at 66-67.[33] The Coalition's argument that the Methodology's definition of the "Time of Need" is "arbitrary" and "fail[s] to provide any water to the Coalition members when they actually needed it" is contradicted by the plain language of the CM Rules and the Hearing Officer's recommendations.

The Coalition argues, however, that its entities must have mitigation in hand early in the year to "forecast demand and schedule water deliveries." *SWC Methodology Brief* at 46. The Coalition argues this means "time of need" actually occurs whenever a Coalition entity curtails deliveries to conserve its storage supplies, *SWC As-Applied Brief* at 40-43, and that unless mitigation is provided sooner it is "of little benefit to the Coalition members who ha[ve] made water management decision for the remainder of the season." *Id.* at 42. The Coalition therefore argues that mitigation must be provided before "the Coalition's storage supply is drained to the Director's 'reasonable carryover' level." *SWC Methodology Brief* at 46.

The Coalition has made similar contentions previously; and the Hearing Officer rejected them as contrary to the CM Rules and *AFRD2*: "Application of the water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies management of the water right." *Opinion* at 39. Indeed, the Coalition's contentions resurrect the same challenge to "reasonable carryover" that was made and rejected in *AFRD2*. In that decision the Idaho Supreme Court confirmed that the Coalition may not seek

[33] The seniors' actual storage allocation is not established until the "Day of Allocation," and therefore their "reasonable carryover" cannot be established until after the "Day of Allocation." *See Methodology Order* at 21 n. 9. ("The Time of Need will not be earlier than the Day of Allocation.").

curtailment of junior ground water users to increase or preserve their storage supplies "regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights." *AFRD2*, 143 Idaho at 880, 154 P.3d at 450.

The Coalition's arguments that its members should not be required to use some of their storage supplies prior to seeking mitigation or curtailment are contrary to the purpose of storage under Idaho law: "Concurrent with the right to use water in Idaho "first in time," is the obligation to put that water to beneficial use. To permit excessive carryover of stored water without regard to the need for it, would be in itself unconstitutional." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451. The Coalition's argument is also contrary to the Hearing Officer's recommendation, which recognized that the primary purpose for which the reservoirs had been built was "to contain water at times when it was not needed for irrigation, primarily the winter and spring, and release it when most needed, principally in July and August." *Opinion* at 57; *see id.* at 60 ("The reservoir system tamed the river and contained runoff for a particular year so water could be used when needed."); *id.* at 4 ("Reservoirs were developed . . . to meet irrigation needs.").

The Coalition essentially argues that the primary or only purpose of storage is to hold water against the contingencies of <u>future</u> years, and storage should not be considered part of the Coalition's in-season supplies. This argument is contrary to the Hearing Officer's *Opinion*. "Storage water," the Hearing Officer stated, "<u>is held to meet crop needs as requirements arise</u>." *Opinion* at 27 (emphasis added). In addition, storage is the "primary" supply for most of the Coalition entities. *See id.* at 10 ("MID, BID, A&B, AFRD #2 and Milner rely primarily on water from their storage contracts with the BOR.") With respect to these entities, the Coalition's

argument reduces to a contention that they should be allowed to obtain mitigation without being required to draw from their "primary" water supplies.

C. The Coalition's Assertions That Timely Administration Requires The Forecast To Be Updated And Mitigation To Be Delivered Halfway Through The Irrigation Season Are Contrary To The Methodology Order And The Record.

There is no merit in the Coalition's argument that administration was untimely in 2013 because the initial forecast was revised and mitigation delivery was ordered later than "approximately halfway" through the irrigation season. *SWC Methodology Brief* at 40; *SWC As-Applied Brief* at 46. In making this argument the Coalition dwells on the meaning of the word "approximately" as used in Step 6 of the Methodology and essentially argues it means "exactly," *id.*, but this misses the point.

While the Methodology provides that Step 6 will occur "[a]pproximately halfway" through the irrigation season, Step 6 does not define the date mitigation is delivered to the Coalition. *Methodology Order* at 36. As previously discussed, the date of the "Time of Need" is the date when mitigation is owed, and this date is determined by the seniors' water supplies and demands, not by the date when a forecast revision is issued. The Step 6 forecast revision provides an "estimate" of the date of the "Time of Need." *Id.* Even if the Director issues the revised forecast and "Time of Need" estimate later than "approximately" halfway through the season, there is no "unmitigated" material injury unless the estimated "Time of Need date" has already passed.

There is little if any risk that the "Time of Need date" would pass before the Director issues the revised forecast and/or his estimate of the "Time of Need" date, because the Director determines the "Time of Need" largely on the basis of the Coalition's remaining storage supplies, which are readily monitored as the season progresses. Moreover, the Director issued

the revised forecast and his estimate of the "Time of Need date" on August 27, and estimated that the "Time of Need date" would fall two days later, on August 29. 382 R. 954-55. Thus, there was no "unmitigated" injury even if the 2013 revised forecast was not issued "approximately" halfway through the season.

To the extent the Coalition argues that the phrase "[a]pproximately halfway through the irrigation season" must be interpreted to mean exactly halfway through the irrigation season, such an assertion is contrary to plain language and the common understanding of the word "approximately." 382 R. 1093. Further, as previously discussed, the Coalition admits the weather and water supply conditions in 2013 swung significantly and "inexplicably" on several occasions. *SWC As-Applied Brief* at 17. Just as the members of the Coalition were struggling to understand the confusing data and make appropriate management decisions based upon it, *id.* at 17-19, the Director was attempting to develop an accurate and useful forecast revision from the same information. *See Methodology Order* at 5 (stating that the methodology for determining material injury "should be based on updated data, the best available science, analytical methods, and the Director's professional judgment as manager of the state's water resources").

In any event, the 2013 forecast revision was provided and the assignment of mitigation was ordered "approximately" halfway through the irrigation season (August 27) and in advance of the estimated date of the "Time of Need." 382 R. 954-55. And even then, as previously discussed, the season-end accounting showed there had been no actual material injury to in-season demand. *Id.* at 1047. Thus, there is no factual or legal basis for the Coalition's arguments that the Methodology's definition of the "Time of Need" results in "untimely" administration and "unmitigated" material injury.

IX. REQUIRING MITIGATION STORAGE WATER TO BE SECURED BY ACTUALLY ASSIGNING IT TO THE STORAGE ACCOUNTS OF THE

SENIOR SURFACE WATER USERS WOULD BE CONTRARY TO THE CM RULES AND THE RECORD.

The Coalition argues that the Methodology and the Director's orders are flawed because they do not require junior ground water users to secure storage water for mitigation by formally leasing water through the Water District 1 "Rental Pool Rules,"[34] including an actual assignment of the mitigation to the Coalition entities' accounts and payment of the rental pool fees. *SWC As-Applied Brief* at 9-12. The Coalition argues that storage water has not been "secured" for mitigation purposes until assignments to the Coalition accounts are actually made and evidenced by "weekly reports issued by Water District 01," and payment of rental pool fees. *Id.* at 10. These arguments lack merit.

Nothing in the CM Rules or the Methodology states or implies that the only way storage water may be secured for mitigation purposes is by actually assigning the storage to the senior surface water user. The CM Rules specifically provide mitigation may be secured through "contingency provisions" that "assure protection of the senior-priority water right." CM Rule 43.03.c. This Court has held that under this rule, "[a]n option for water or some other mechanism for securing water" is acceptable: "Seniors can therefore plan for the future the same as is they have the water in their respective accounts and juniors may avoid the threat of curtailment." *Order On Petition For Judicial Review*, Case. No. 2008-0000551 (Jul. 24, 2009), at 19. The Idaho Supreme Court agreed that this provision authorizes "prospective means by which water will be provided in order to prevent material injury." *A&B*, 155 Idaho at 654, 315 P.3d at 842 (emphasis added).

[34] The Water District 1 Water Supply Bank has "Rental Pool Procedures" for storage water rental that were developed by Water District 1 and approved by the Idaho Water Resources Board. Idaho Code § 42-1765. These are commonly known as the "Rental Pool Rules."

The Methodology as written and applied is consistent with these standards. The Methodology provides that mitigation must be "provided or optioned by junior water users to the satisfaction of the Director (*see Order on Petition for Judicial Review* at 19)." *Methodology Order* at 30 (emphasis added). To meet this requirement, the Director has required "fully executed and irrevocable contracts" for leases, rentals or options, 382 R., p. 611, "or other similar form of legally binding documentation." *Id.* at 1099. In addition, the Director has determined that emails and "verbal agreement[s]" are insufficient to establish legally binding lease or options, and rejected attempts to prove that mitigation has been "secured" through such means. *Id.* at 1099-1100; *see also* 382 R. 391 ("Order Regarding Filing Deficiency Of IGWA's Notice Of Secured Water"). The Coalition's assertion that the Director has accepted a "summary" of storage leases without requiring more, *SWC As-Applied Brief* at 11, is simply incorrect: the leases referenced in the "summary" had been provided and were on file with the Director and the Watermaster. 382 R. 883.

The Coalition's argument that storage water cannot be considered sufficiently "secured" for mitigation purposes unless it has actually been assigned to the Coalition entities' accounts also ignores the fact that the Watermaster in distributing water is subject to the Director's supervision, Idaho Code § 62-602, and may not release storage leased or optioned secured to provide mitigation to the Coalition entities to any other entity (including the lessor), unless the Director so orders. 382 R. 614. As stated by the Hearing Officer: "the water should be accounted for in the storage holder's account subject to IGWA's contractual right, which is in turn subject to the Director's right to order distribution of the water to the proper [Coalition] entity, at which point it is accounted for in that entity's account." *Opinion* at 36. This approach recognizes that the mitigation actually required may be less than the prediction or even zero

(such as in 2010). In such cases, the Coalition's proposal to require immediate assignment of the storage to the Coalition accounts as soon as a mitigation forecast has been issued would in some cases result in mitigation being required in the absence of material injury.

X. THE COALITION'S ARGUMENT THAT "REASONABLE CARRYOVER" MITIGATION MUST BE PROVIDED IN THE SAME YEAR IS CONTRARY TO THE "CONTINGENCY PROVISIONS" OF THE CM RULES AND THE METHODOLOGY.

The Coalition argues that mitigation for material injury to "reasonable carryover," must be provided in the same year that junior ground water pumping causes a "reasonable carryover" shortfall, *SWC Methodology Brief* at 50-58. This is sometimes termed the "same year," to distinguish it from the year in which the senior actually requires the water for irrigation, which is sometimes termed "subsequent year." The Coalition relies primarily on the fact that this was the approach of the former Director's orders issued before the *AFRD2* decision, *id.*, although the Coalition admits this approach was modified in subsequent Director's orders. *Id.* at 53 & n. 31.[35]

The Coalition argues for a return to the former approach of "same year" mitigation delivery, but ignores the fact that under the former approach the "reasonable carryover" determination was made "at the beginning of the irrigation season." *Opinion* at 61. Under the Methodology, however, the "reasonable carryover" determination is made at the end of the season, "[o]n or before November 30." *Methodology Order* at 37. The Coalition's argument also is contrary to the CM Rules. The Rules, as previously discussed, provide that mitigation may be secured through "contingency provisions" that "assure protection of the senior-priority water right." CM Rule 43.03.c; *see Order On Petition For Judicial Review*, Case. No. 2008-0000551

[35] The Methodology provides that junior ground water users must "provide or have optioned" the required amount of "reasonable carryover" mitigation to avoid being curtailed at the start of the next season. *Methodology Order* at 33, 37-38.

(Jul. 24, 2009), at 19 ("Seniors can therefore plan for the future the same as if they have the water in their respective accounts and juniors may avoid the threat of curtailment.").

The Coalition nonetheless argues the Hearing Officer made a "ruling" that "reasonable carryover" mitigation water must be provided in the same year the injury occurs, and this is the law of the case. *SWC Methodology Brief* at 53. This argument mischaracterizes the Hearing Officer's statements: he simply found as a factual matter that under the May 2005 order, the predicted "reasonable carryover" shortfall "was due in the current irrigation season." *Opinion* at 61-62. Moreover, the Hearing Officer stated the leased or optioned mitigation should be accounted for in the account of the lessor, "subject to IGWA's contractual right, which in turn is subject to the Director's right to order distribution of the water to the proper entity, at which time it is accounted for in that entity's account." *Opinion* at 36.[36]

This Court in disapproving former Director Tuthill's methodology of a "wait and see" approach to "reasonable carryover" mitigation did so only because there were no "contingency provisions" as required by CM Rule 43.03.c. *Order On Petition For Judicial Review*, Case No. 2008-0000551, at 18-19. In affirming this Court, the Idaho Supreme Court agreed the problem was lack of "contingency provisions," *A&B*, 155 Idaho at 654, 315 P.3d at 842, not a failure to provide mitigation water in the same year.

The Coalition nonetheless argues the record shows "contingency provisions" are inadequate because IGWA's president testified in 2010 that IGWA did not have sufficient water to mitigate a "reasonable carryover" obligation of 84,300 acre-feet. *SWC As-Applied Brief* at 56. This argument relies on mischaracterizations and omissions. First, the 84,300 acre-feet was mitigation for in-season demand, not "reasonable carryover." 382 R. 186. Second, the 84,300

[36] The Hearing Officer had determined that the Director had authority under Chapter 6 of Title 42 to supervise the distribution of water. *Opinion* at 35.

acre-feet obligation was an initial prediction and subsequently reduced, first to 68,400 acre-feet, 382 R. 402, then 56,600 acre-feet, *id.* at 613, and finally to zero, *id.* at 632, 641, because conditions changed and the weather became cooler and wetter. Third, by the time IGWA's president testified, IGWA had provided the Director with leases and options showing that IGWA had secured a minimum of 53,000 acre-feet towards satisfying the mitigation obligation. *Id.* at 374. Fourth, at the time of the testimony IGWA had requested a stay of its mitigation obligation pending the outcome of the hearing on IGWA's mitigation plan, and the Director granted the stay under the reasoning of this Court's *Order On Petition For Judicial Review* in 2009. *Id.* at 405-06.

XI. THE METHODOLOGY ORDER DEFINES "REASONABLE CARRYOVER" CONSISTENTLY WITH THE CM RULES AND IDAHO LAW.

The Coalition argues that the Methodology's definition of "reasonable carryover" is contrary to the CM Rules, and the Director's "reasonable carryover" determinations diminish the Coalition's storage rights. These argument lack merit.

A. The Methodology Order Recognizes And Applies The Guidance In CM Rule 42.01.g In Determining "Reasonable Carryover."

The Coalition argues that the Methodology's definition of "reasonable carryover" as "the difference between a baseline year demand and a typical dry year supply" is "arbitrary" and ignores the requirement of taking into account "'average annual rate of fill of storage reservoirs' and the 'average annual carryover for prior comparable water conditions" as required by CM Rule 42.01.g. *SWC Methodology Brief* at 60 (quoting CM Rule 42.01.g). These objections lack merit.

The Hearing Officer found that for purposes of determining "reasonable carryover," anticipating future needs is "closer to faith then science." *Opinion* at 62. The Hearing Officer

also stated that while "[t]here is no precise amount of reasonable carryover storage," the amount "should at least be sufficient to assure that if the following year is a year of water shortage there will be sufficient water in storage in addition to whatever natural flow rights exist to fully meet crop needs." *Opinion* at 62. Consistent with this recommendation, the Methodology defines "reasonable carryover" as "the difference between a baseline year demand and a typical dry year supply." *Methodology Order* at 67. The Methodology goes further and favors the senior in this respect, because it uses the composite "baseline year" of 2006/2008, which as previously discussed intentionally overestimates seniors' demands. This approach automatically takes into account not just the following year but also "future years," as this Court has confirmed is required under the CM Rules. *Order On Petition For Judicial Review*, Case No. 2008-551 (Jul. 24, 2009), at 22.

The Coalition's assertion that the Methodology ignores the "reasonable carryover" factors of CM Rule 42.01.g is incorrect. The "reasonable carryover" factors are repeatedly quoted and applied in the Methodology Order's section entitled "The Methodology for Determining Material Injury to Reasonable Carryover." *Methodology Order* at 24-27. Indeed, the first paragraph of the pertinent *Methodology Order* section quotes the CM Rule 42.01.g provision regarding "reasonable carryover":

> 67. CM Rule 42.01.g provides the following guidance for determining reasonable carryover: "In determining a reasonable amount of carry-over storage water, the Director shall consider average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system."

Methodology Order at 24 (emphases added). The three factors are specifically recognized and analyzed in subsections entitled ""Projected Water Supply," "Average Annual Rate of Fill," and "Average Annual Carryover." *Id.* at 22, 23, 24-25. The Methodology applies these analyses to

the estimated "reasonable carryover" amount for each Coalition entity (i.e., the difference between "a baseline year demand and projected typical dry year supply," *Methodology Order* at 22-23), to test whether the estimated carryover amounts are appropriate for purposes of the CM Rules.[37] *Methodology Order* at 26-27. The Coalition's argument that "[n]owhere does the order's definition take into account" the factors listed in CM Rule 42.01.g, *SWC Methodology Brief* at 60, is without merit.

The Coalition's argument essentially reads CM Rule 42.01.g as requiring the Director to define "reasonable carryover" as "average" carryover. *See SWC Methodology Brief* at 60 ("By comparing the average year carryover quantities . . . to the Director's identified amounts for administration, it is obvious that the order's 'reasonable carryover' amounts are woefully deficient . . . [and] . . . significantly lower than the Coalition members' 'average annual carryover'") (emphasis in original). This argument is contrary to the plain language of CM Rule 42.01.g, which does not say "reasonable carryover" "shall be" or "is" defined as the "average" carryover. What the rule actually says is that the Director "shall consider" average annual carryover for prior comparable water years "[i]n determining a reasonable amount of carry-over storage water." CM Rule 42.01.g. The rule sets forth "guidance," *see Methodology Order* at 22 ("CM Rule 42.01.g provides the following guidance . . . ."), rather than equating "reasonable" carryover to "average" carryover.

The record demonstrates the Director applied the factors identified as guidance in CM Rule 42.01.g by developing them into meaningful standards and metrics using data in the record, and using them to test the initial estimates. There is no merit in the Coalition's argument that his

[37] As will be discussed and as the Hearing Officer recognized, the "reasonable carryover" provisions of the CM Rules do not define or limit the right to carry storage water over from year to year, but only the right to seek curtailment or mitigation for such purposes. *Opinion* at 58 ("The limitation only applies to the amount to be obtained from curtailment or mitigation water from the ground water users.").

approach was "arbitrary" and failed to take the CM Rules into account. *SWC Methodology Brief* at 60.

B. "Reasonable Carryover" Is A Limitation On Curtailment And Mitigation, Not Storage.

The Coalition also argues that the Methodology's "reasonable carryover" provision "unlawfully reduces the carryover rights," *SWC Methodology Brief* at 58, because it "underestimates what the Coalition members need for carryover storage to guard against 'future dry years.'" *Id.* at 62 (citation omitted). This argument is based on a mischaracterization of the "reasonable carryover" provision of the CM Rule 42. CM Rule 42 provides that material injury is determined, in part, on the extent to which a senior surface water user's need can be met "with the user's existing facilities and water supplies," including storage— "provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years." CM Rule 42.01.g. In other words, "reasonable carryover" is not a limitation on the right to carryover but only on the right to seek curtailment or mitigation. The Hearing Officer emphasized this important distinction:

> **SWC members are entitled to carry over the entire amount of their contracted storage rights when there is sufficient water and curtailment is not sought.** There has been some confusion caused by the Director's perceived limitation on carryover storage. The Director did not rewrite the contracts the irrigation districts have with BOR or interfere with the right to carryover storage water when available. The limitation only applies to the amount to be obtained from curtailment or mitigation water from the ground water users. If the irrigation district's needs for carryover can be met without curtailment, there will be zero carryover storage provided by curtailment or replacement. There is still a right to as much carryover water as water supplies will provide within the limits of the contract. The perception that the Director determined some irrigation districts were not entitled to carryover storage is in error.

Opinion at 58 (bold in original). The argument that the Methodology's "reasonable carryover" determinations "reduce" the Coalition's storage rights, *SWC Methodology Brief* at 58, is based on a "perceived limitation" or "perception" that is simply "in error." *Opinion* at 58.

The Coalition's argument that the Methodology's "reasonable carryover" amounts are insufficient because they are less than what "the Coalition members need for carryover storage to guard against 'future dry years,'" *SWC Methodology Brief* at 62, is incorrect for similar reasons. "Reasonable carryover" as determined under the CM Rules is not intended to be a measure of how much carryover is necessary to ensure a full storage allocation, come what may; it is, rather, an assurance that a senior surface water user's storage supply need not be completely exhausted before seeking curtailment of junior ground water uses, or mitigation from junior ground water users.

For some senior surface water users, "there will be zero carryover storage provided by curtailment or replacement" because they will have sufficient carryover regardless of junior ground water use. *Opinion* at 58. For instance, the Director determined the "reasonable carryover" for Burley Irrigation District and Minidoka Irrigation District to be "zero," *Methodology Order* at 26, but this determination did not mean or imply they have no need for carryover storage. To the contrary, the Director was fully aware that these two districts and three others "rely primarily on water from their storage contracts." *Opinion* at 10. Rather, "reasonable carryover" was determined to be "zero" for Burley Irrigation District and Minidoka Irrigation District because, based on the record,

> In an average demand year, [Burley] and Minidoka will have enough water to meet demands given a low water supply. . . . Historically, even in very dry years, [Burley's] and Minidoka's carryover have been well above calculated reasonable carryover and it is unlikely that they will have reasonable carryover shortfalls in the future.

Methodology Order at 26 (citations omitted). In other words, Burley Irrigation District and Minidoka Irrigation District usually will have sufficient carryover. By setting their "reasonable carryover" at "zero," the Director did not limit their right to carryover in the future the amounts they historically have in previous years. The Director only limited their ability to add to that carryover by seeking mitigation from junior ground water users.

C. The Methodology's Approach To Determining "Reasonable Carryover" Is Supported By The CM Rules And The Record.

There is no merit in the Coalition's argument the Director systematically underestimated senior needs and overestimated senior supplies in determining "reasonable carryover." The Director estimated "reasonable carryover" by subtracting "a typical dry year supply" (2002/2004 average) from the intentionally over-estimated demand of the composite "baseline year" (2006/2008 average). *Methodology Order* at 22. This approach appropriately weighted the "reasonable carryover" determination in the seniors' favor for purposes of assuring water supplies "for future dry years." CM Rule 42.01.g.

The Coalition's argument that the Director should have used drier supply and demand years—and specifically that the Director should have used the 2007/2013 average for "supply" and the 2012/2013 average for "demand," *SWC Methodology Brief* at 63-64, also lack merit. The years 2007 and 2013 are some of the lowest supply and highest demand years in recent years[38]—the Coalition is simply arguing for using a worst-case scenario. The CM Rules do not contemplate or require worst-case scenarios or "driest possible future years" for determining "reasonable carryover": they simply refer to "future dry years," "prior comparable water

[38] "Unfortunately, the summer of 2007 turned into a historically hot and dry year, sometimes classified as a 200 year event," and storage supplies were further reduced by over a quarter million acre-feet by flood control releases made in anticipation of subsequent runoff that did not materialize. *Opinion* at 6, 23. 2012 and 2013 also were unusually hot and dry. *See, e.g.*, 382 R. 950 (stating that "[b]ecause of the hot, dry spring, [2013] water levels were less than predicted," and referring to precipitation levels reported at 73%, 24%, 26%, and 19% of average, and temperatures in May, June, and July of 1.6°,3.7°, and 5.7° above normal, respectively).

conditions," and the "projected water supply." In addition, the 2007 situation was further exacerbated when storage supplies were further reduced by over a quarter million acre-feet by flood control releases made in anticipation of subsequent runoff that did not materialize. *Opinion* at 6, 23. The right to secure additional water for "reasonable carryover" through curtailment or mitigation is not intended to replace water lost through "uses unrelated to the original rights." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451; *Opinion* at 64.

Further, ordering curtailment or mitigation sufficient to protect against a worst-case scenario "is almost certain to require ground water pumpers to give up valuable property rights or incur substantial financial obligations when no need would develop enough times to warrant such action." *Opinion* at 62.[39] Such a requirement is essentially indistinguishable from the Coalition's discredited "protocol" of "maximum protection," because it would annually require junior ground water users to secure mitigation for the full amount of the Coalition's storage water rights regardless of the likelihood of need, and "incur the expense of leasing water that is not needed." *Id.* at 44. This would be contrary to the Idaho Supreme Court's holding that "[t]o permit excessive carryover of stored water without respect to the need for it, would itself be unconstitutional." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451. Indeed, authorizing curtailment or mitigation to ensure carryover sufficient for worst-case scenarios invites "hoarding." *See Opinion* at 39 ("The public interest affects determination of whether there will be curtailment or other mitigation to provide for carryover storage water, drawing a line between what it reasonable and what is hoarding."); *see AFRD2*, 143 Idaho at 880, 154 P.3d at 451 ("Neither the

[39] While the Hearing Officer made this observation with respect to the question of anticipating "more than one season of need," *id.*, it is equally as apt to the Coalition's argument that "reasonable carryover" should be defined to fully protect seniors against all possible shortages.

Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.").[40]

D. The Coalition's Objections To The Methodology's "Reasonable Carryover" Determinations For TFCC Lack Merit.

The Coalition's argument that TFCC's "reasonable carryover" is deficient because it provides only a five-day supply during peak demand, *SWC Methodology Brief* at 47, takes this figure out of context. The Coalition's argument ignores the fact that TFCC "is primarily dependent upon its natural flow rights to meet its needs," *Opinion* at 10, and "has a very early and large natural flow right which commands most of the natural flow of the Snake River." *Id.* at 57. Consequently, TFCC holds "a much smaller storage right" in relation to its size and demands than other members of the Coalition. *Opinion* at 10.

The Coalition's argument that TFCC's "reasonable carryover" is too small because large irrigation projects "cannot be operated on such a slim margin," *SWC Methodology Brief* at 47, misconstrues the purpose and effect of the CM Rules "reasonable carryover" provision. The Director's "reasonable carryover" determination for TFCC does not prevent it from maintaining a higher operational margin in storage, but only limits TFCC's right to obtain additional carryover water through mitigation or curtailment. While the CM Rules authorize mitigation or curtailment to protect a senior surface water user's "reasonable carryover," this remedy is intended to provide water for actual beneficial use, not to simplify irrigation project management. *See Opinion* at 39 ("Application of the water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies

[40] The Coalition incorrectly implies the Hearing Officer made broad determination that limiting the right to obtain carryover through curtailment or mitigation is impermissible because it has "'profound consequences.'" *SWC Methodology Brief* at 19 (quoting the Hearing Officer). This argument ignores the Hearing Officer's support of the "reasonable carryover" limitation and takes the Hearing Officer's statement out of context. The Hearing Officer was not addressing the "reasonable carryover" standard; rather, he was referring to the fact that in 2007 AFRD2's "reasonable carryover" shortfall was reduced because its in-season diversions exceeded its "minimum full supply," even though they also were within AFRD2's water rights. *Opinion* at 46-48.

management of the water right."). It is also not intended to provide for mitigation or curtailment simply to ensure that storage allocations fill every year. *See id.* at 15 ("There was an expectation when the reservoirs were built that they would fill approximately two-thirds of the time, and historically they have filled roughly two-thirds of the time.").

XII. THE METHODOLOGY'S APPROACH FOR SELECTING A BASELINE YEAR INCORPORATES THE RECOMMENDATIONS OF THE HEARING OFFICER AND ACCOUNTS FOR DIFFERENCES BETWEEN INDIVIDUAL COALITION ENTITIES.

The Coalition argues the Methodology's BLY selection process is flawed because it is a "one-size-fits-all" approach and "different years can and should be used for individual Coalition members." *SWC Methodology Brief* at 20. The Coalition filed this delivery call as a collective and has generally consistently pursued it as a collective; from this perspective it is difficult to discern the basis for the Coalition's "one-size-fits all' objection. In any event, the Coalition's argument ignores the impact of the Hearing Officer's recommendations. The BLY selection process is one of the Methodology's primary means for incorporating the Hearing Officer's recommendations for modifying the "minimum full supply" analysis.

"The minimum full supply was established by reviewing diversion records over a fifteen-year period (1990-2004), and selecting a single year with the smallest annual diversion amount that had full headgate deliveries absent the lease of any storage water." *Methodology Order* at 2. The former Director selected 1995 as the "minimum full supply" year and used it to predict the Coalition's water needs. The Hearing Officer found that 1995 was a less than ideal choice because it was a relatively "wet year," and also "a decade old year" that "does not reflect current efficiencies" such as sprinklers, computerization, and the acres irrigated. *Methodology Order* at 3. The Hearing Officer also noted the "minimum full supply" approach emphasized "supply rather than need." *Id.* The Hearing Officer recommended that if 1995 was to be retained as the

basis for predicting needs, it should be adjusted to account for the "well–above average precipitation in that year." *Id.* at 3-4. The Hearing Officer also made additional recommendations for using a "baseline" methodology, including:

- significant cropping changes should be factored into the analysis
- changes in facilities, diversion, conveyance, and irrigation practices from earlier years should be considered;
- non-irrigated acres should not be considered in determining irrigation needs.

Id. at 4.

The Director determined that implementing these recommendations requires limiting the range of candidate BLY years to the relatively recent past. *See, e.g., id.* at 6 ("To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999"). Further, to ensure the BLY was chosen on the basis of need rather than supply and to reduce the risk of under-predicting senior surface water users' water needs, the Director determined "a BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions." *Id.* at 7. For the same reasons, the Director determined the BLY should be "a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply." *Id.* at 7.

Thus, "[a] BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices." *Id.* at 6. The "Climate" factor is evaluated by three criteria: "precipitation, ET [evapotranspiration], and growing degree days." *Id.* The "Available Water Supply" factor is measured in terms of "actual unregulated flow volumes at Heise." *Id.* at 9. The "Irrigation Practices" factor is evaluated in terms of "the net area of the irrigated crops, farm application methods (flood/furrow or sprinkler irrigation), and the conveyance system from the

river to the farm." *Id.* at 10. All of these factors were carefully considered in selecting a BLY. *Id.* at 6-12.

Applying this selection process to the limited range of years that satisfied the Hearing Officer's recommendations, the Director determined that 2006 was the overall "best fit," but also had drawbacks "from the standpoint of annual diversions for individual entities." *Methodology Order* at 11. The Director selected an average of two years from the candidate range of years—2006 and 2008—because the composite year "better represents the required conditions for each and all entities":

> If BLY selection is limited to a single year, 2006 is the best fit in the recent past. However, from the standpoint of annual diversion for individual entities, 2006 was a year of below average diversions for Milner, Minidoka Irrigation District ("MID"), and TFCC, at 82%, 98%, and 96%, respectively (*see* Finding of Fact 30). The selection of a single BLY for all entities is challenging, with all years representing average or near average diversions for some entities, but not others. By selecting a BLY that is comprised of the average of multiple years, a BLY can be selected that better represents the required conditions for each and all entities. . . .
>
> The Director finds that using the values of 2006 and 2008 (06/08) to arrive at an average BLY fits the selection criteria for all members of the SWC.[41] The 06/08 average has below average precipitation, near average ET, above average growing degree days, and represents years in which diversions were not limited by availability of water supply. When compared to the average of the annual diversions from 1990-2008, the 06/08 diversions were above average. When compared to the average of the annual diversions from 2000-2008, the 06/09 diversion were average.

Id. at 11. The BLY selection process was not a "one-size-fits-all" approach as suggested by the Coalition, but rather, a soundly considered means of implementing the Hearing Officers' recommendations.

The Coalition nonetheless argues that BLY selected was flawed because it did not provide the "greatest certainty" to the Coalition members, and the BLY selection should be a

[41] In 2006, TFCC delivered ¾ of a miner's inch. Tr. p. 1601, lns. 1-15.

"dry year" with a "high demand irrigation season" to predict need—specifically 2012 and 2013. *SWC Methodology Brief* at 20-21. The Coalition's argument for the "greatest certainty" is conceptually indistinguishable from the "maximum protection" protocol the Coalition urged before the Hearing Officer, which he declined to accept as impracticable and contrary to Idaho law. *Opinion* at 43-44. The Coalition's argument for a worst-case "dry year" with a "high demand irrigation season" is also contrary to the Hearing Officer recommendation that the baseline year should be an "average" year. *Opinion* at 48-49.

Further, while 2012 and 2013 may have been "high demand" years, the Coalition has argued that they were years of limited supplies. *See, e.g., SWC As-Applied Brief* at 22-24. Using limited supply years for BLY to predict future needs will potentially depress the projected need, because in limited supply years the Coalition entities may be self-limiting their diversions. In selecting a BLY, therefore, the Methodology provides that "actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply." *Methodology Order* at 7.[42]

XIII. THE CM RULES, THE RECORD, AND IDAHO LAW SUPPORT CONSIDERATION OF SUPPLEMENTAL GROUND WATER USE.

The Coalition argues that supplemental ground water use by Coalition irrigators should not be considered in determining irrigated acreages because it has "no relevance" and it is the "law of the case" that "there is no evidence to account for supplemental ground water use." *SWC Methodology Brief* at 22-23.

The CM Rules, however, provide that in determining material injury the Director may take "the user's existing facilities and water supplies" into account, CM Rule 42.01.g. As previously discussed, the Director is authorized under the CM Rules to consider the senior

[42] This illustrates that simply focusing one variable can have unintended effects. There are a number of factors that go into selecting a BLY and proposed changes should be carefully evaluated.

surface water user's "total water supply," and the Hearing Officer supported this approach. *Opinion* at 66-67.

In this delivery call, the Director has always viewed the "total water supply" as including supplemental ground water. *See* 551 R. 1377 ("Amended Order of May 2, 2005") (stating "the total water supply" includes "in some instances supplemental groundwater rights"). In the 2008 hearing, the former Director testified that "[i]n making a determination of how much water is needed, I thought it was important to look at all three of those sources," including "supplemental ground water." 551 Tr. Vol. I, p.25 l.25—p.26, l.2. The only reason the former Director's May 2, 2005 Order did not take the acreage irrigated by supplemental ground water into account was that, as the Coalition admits, it failed to supply him with this information and without it the former Director preferred not to make "'an arbitrary attempt'" to quantify it. *SWC Methodology Brief* at 27-28.

The Coalition's argument that the Hearing Officer "rejected" consideration of supplemental ground water use, *SWC Methodology Brief* at 27, is a mischaracterization. The Hearing Officer only made a factual finding that the former Director found supplemental ground water use to be "minimal" and that "any such ground water rights would be junior to surface irrigation rights and subject to curtailment." *Opinion* at 10. This plainly was not a "rejection" of the considering supplemental ground use in determining material injury, and construing it so would conflict with the Hearing Officer's support of the "total water supply" concept and with the "existing facilities and water supplies" language of CM Rule 42.01.g.[43]

[43] To the extent the Coalition's argues the Director may not curtail the supplemental ground water rights held by Coalition water users in response the Coalition's delivery call, the Coalition's argument is contrary to the Hearing Officer's conclusion that the former Director was correct in determining the Coalition "could not selectively seek administration." *Opinion* at 24.

The Coalition attempts to avoid the plain language of CM Rule 42.01.g by arguing that the Coalition entities—the irrigation districts and canal companies—are the "users" of the water diverted under the surface water rights that are the subject of this deliver call, while the "users" of supplemental ground water are the private landowners and irrigators to whom the Coalition entities distribute water. *SWC Methodology Brief* at 23-24. In short, the Coalition attempts to escape the plain language of CM Rule 42.01.g by characterizing its entities as "users" of water. This argument fails for the obvious reason that the Coalition entities do not "use" the water. They simply divert and distribute it to the actual "users"—the irrigators, who are also the owners and users of the supplemental groundwater rights. The Coalition entities hold title to their water rights in trust for the benefit of the water users. *Jones v. Big Lost River Irr. Dist.*, 93 Idaho 227, 229, 459 P.2d 1009, 1011 (1969) ("title to all property acquired by an irrigation district, including its water rights, is vested in the district and held by the district in trust for, and dedicated and set apart to, the uses and purposes set forth in the law"); *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 546-47, 381 P.2d 440, 450-51 (1963) (same). This delivery call was filed by the Coalition entities on behalf and for the benefit of the water users.

The Coalition also returns to its perennial argument that the Director may not look beyond the face of a decree, asserting "he cannot ignore the number of irrigated acres the Coalition's water right decrees" and therefore may not take the acreage irrigated by supplemental ground water into account. *SWC Methodology Brief* at 23 (emphasis in original). This is contrary to *AFRD2,* in which the Idaho Supreme Court held that "there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed," *AFRD2*, 143 Idaho at 878, 154 P.3d at 449, and "the Director 'has the duty and

authority' to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *Id.* at 876, 154 P.3d at 447.

The Coalition's argument that the Director went outside the record and arbitrarily relied on the ESPAM for purposes of quantifying supplemental ground water acreage, *SWC Methdology Brief* at 29-30, also lacks merit. The Hearing Officer stated "[i]t [i]s appropriate to use the ESPAM in making the conjunctive management decisions in this case." *Opinion* at 33. The *Methodology Order* also refers to and relies upon the ESPAM. *Methodology Order* at 33, 34, 36, 38. The ESPAM has been integral to the Director's orders from the start of these proceedings, and is a sufficiently reliable basis for determining supplemental ground water use acreage, particularly in light of the Coalition's failure to provide the Director with such information.

XIV. THE COALITION'S OBJECTIONS TO THE USE OF NASS CROP DISTRIBUTION DATA LACK MERIT.

The Coalition argues the Methodology may not rely upon data from the USDA National Agricultural Statistics Service ("NASS") in determining crop distributions for purposes of predicting the Coalition's water needs. *SWC Methodology Brief* at 31-33. The Coalition argues there are several problems with this data and the Director should instead rely upon crop distribution data provided by the Coalition. *Id.*

The Methodology uses NASS crop distribution data because NASS "reports annual acres of planted and harvested crops by county. NASS also categorizes harvested crops by irrigation practice, i.e. irrigated, non irrigated, non irrigated following summer fallow, etc." *Methodology Order* at 17. NASS crop distribution figures are provided by a disinterested federal agency that specializes in collecting such data; NASS data thus provides reasonably reliable information while reducing potential controversies over the source of the data and how it was collected,

processed, and presented. For present purposes the Methodology relies on "harvested" areas and does not include years in which harvested values were not reported, *id.*, which reduces uncertainty.

The Coalition's argument that its consultant "described [a] problem" with the NASS data, *SWC Methodology Brief* at 32, lacks merit because the problem the consultant described was "lack of data," 382 R. 304, and the Coalition's solution to the lack of data is to make assumptions or speculate to fill in the blanks. As the Methodology states, "[t]he Department prefers to rely on data from the current season if and when it becomes usable." *Methodology Brief* at 17.

XV. THE CM RULES LIMIT ADMINSTRATION TO THE COMMON GROUND WATER AREA AS DEFINED IN CM RULE 50.

The SWC argues the Director "arbitrarily reduces the junior groundwater acres subject to administration." *SWC Methodology Brief* at 39. The reduction is not arbitrary but is required as the Director is restricted in his ability to curtail junior ground water use outside the area of common ground water established in the CM Rules. CM Rule 50.01.

The Department's approach is not unique to the *Methodology Order* but has been applied in other delivery calls. 382 R. 599. Nor is this the only venue in which this issue is being addressed.[44] Consistent with the CM Rules, if the Director determines that ground water pumping by junior ground water users on the Eastern Snake River Plain is causing material injury to a senior surface water user, the Eastern Snake Plain Aquifer ("ESPA") model is run "to

[44] The scope of the area of common ground is currently at issue in an administrative proceeding before the Department. A petition was filed by Clear Springs Foods, Inc. requesting the initiation of rulemaking to modify and amend Rule 50 to enlarge the area of common groundwater for the ESPA and make it consistent with the boundary as defined in the ESPA model. The Department has commenced negotiated rulemaking on this issue and negotiations are currently ongoing.
http://www.idwr.idaho.gov/WaterInformation/GroundWaterManagement/Petition/default.htm.

determine the priority date necessary to produce the necessary volume within the model boundary of the ESPA." *Id.* The ESPA model has been found to "represent[] the best available science for determining the effects of ground water diversions and surface water uses on the [Aquifer] and hydraulically-connected reaches of the Snake River and its tributaries." *Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95.

The model run identifies those junior ground water rights injuring the senior surface water user's supply. However, because the model boundary is not equivalent to the area of common groundwater supply, and the Director can only administer junior groundwater users within in the area of common groundwater supply, he must take an additional administrative step in determining the junior groundwater acres subject to administration. *See* CM Rules 1, 40.01. The CM Rules "provide the basis for the designation of areas of the state that have a common ground water supply." CM Rule 20.06.

The area of common ground water boundary for the ESPA is defined as:

> [T]he aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian

CM Rule 50.01 Because the area of common ground water falls within the larger ESPA model boundary, the Director must take an additional step and "trim" or subtract out the effects of those junior ground water users within the model boundary, but outside the area of common ground water when determining the final obligation. This additional step ensures administration is consistent with the CM Rules. This step does not "wrongly reduce[] the calculated demand shortfall," *SWC Methodology Brief* at 40, but recognizes an express limitation in the CM Rules.

The Coalition suggests that instead of using the model boundary in determining impacts of junior ground water pumping, the smaller area delineated by the common ground water boundary should be used. *Id.* Such a change would be inconsistent with the application of the ESPA model as the best representation of the effects of ground water pumping. As was found in *Clear Springs*, "there is no other technical basis as reliable as the simulations from the ESPA ground water model that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho at 813, 252 P.3d at 94 (quotations and citations omitted). The model identifies the water users that impact the senior surface water users.

The calculation of an obligation based upon the smaller area of common ground water, as suggested by the Coalition, results in a more senior priority date in administration, as junior groundwater users within the common groundwater supply area would have to compensate for the effects of junior groundwater pumpers outside the area of common groundwater, but within the model boundary. This in turn subjects ground water users within the area of common groundwater to administration (and potential curtailment), who would not otherwise have been subject to administration. While this may remedy the senior surface water users' complaints, it would be inconsistent with and ignores the model results that expressly identify the impacts of junior ground water users and artificially increases the burden on the junior ground water users within the area of common ground water contrary to the impacts determined by the model. The existing approach is not "arbitrary, capricious, and in excess of [the Director's] authority" as it is consistent with the CM Rules and reflects the best information as established by the ESPA model.

XVI. THE COALITION'S OBJECTIONS TO TRANSIENT MODELING UNDER STEP 10 LACK MERIT.

The Coalition argues the "transient modeling" provision of Step 10 of the Methodology is contrary to law. *SWC Methodology Brief* at 64-67. This provision states that as alternative to providing the full volume of "reasonable carryover" mitigation in one year, junior ground water users can request modeling of the transient impacts of curtailment, and "in the year of injury provide the accrued volume of water associated with the first year of the model run." *Methodology Order* at 38. Junior groundwater users are also required to provide the respective volume of water associated with reach gain accruals for each subsequent year of the modeled curtailment until "the reservoir storage space held by members of the SWC fills." *Id.*

This provision is supported by the CM Rules' provisions for phased curtailment, CM Rules 20.04, 40.01.a., and requires junior ground water users to provide mitigation at the time and place necessary to offset the actual depletive effect that would be remedied by curtailment. CM Rule 43.03.b. While the Coalition argues that the authorities cited by the *Methodology Order*'s textual discussion of transient modeling are inapplicable under subsequent decisions of the Idaho Supreme Court, *SWC Methodology Brief* at 64-67, the Director did not have the benefit the guidance in *Clear Springs* and the 2012 and 2013 *A&B* decisions when the *Methodology Order* was issued. Partly for this reason the Department requested a remand to incorporate that guidance before proceeding with judicial review. In this proceeding a remand to the Director with instructions to apply the Idaho Supreme Court's guidance is the appropriate remedy if this Court determines that the *Methodology Order* does not provide an adequate explanation of the basis for the transient modeling provision of Step 10. Idaho Code § 67-5279.

XVII. THE COALITION WAS NOT DENIED DUE PROCESS.

The Coalition argues it was denied due process because the Director denied several of the Coalition's requests to engage in discovery and hold hearings on the Director's forecast orders. *SWC As-Applied Brief* at 44-46. The Coalition asserts it filed these requests in order "to provide additional information for the Director's consideration in preparing or revising his forecasts under the Methodology. *Id.* at 44.

The Coalition's arguments are without merit. The Director denied the requests under Idaho Code § 42-1701A(3) because, "in the view of the Director, the SWC was seeking a hearing on issues already considered in a hearing or issues not properly raised." 382 R. 1094; *see also id.* at 1041, 891, 757. A review of the petitions for discovery and hearings filed by the Coalition confirms this conclusion. *See, e.g.,* 382 R. 743, 860, 969. The Coalition's petitions challenged the overall Methodology or individual steps by seeking to have the Director base forecasts on information, procedures and standards other than those described and established in the *Methodology Order*. The Coalition had a full and fair opportunity to be heard on the information, procedures and standards that the Coalition believes should be used for purposes of preparing or revising forecasts in the hearings of 2008 and 2010, as the Director determined. 382 R. 1094, 1041, 891, 757. The Coalition was not denied due process.[45]

XVIII. THE COALITION'S STEP 1 ACREAGE ARGUMENTS LACK MERIT.

The Coalition argues that "[s]ince 2010 the Director has refused to use the irrigated acreage submitted information by Coalition members." *SWC As-Applied Brief* at 33. This statement mischaracterizes the record.

[45] When the Coalition has requested hearings for purposes other than simply to challenge the Methodology itself, the Director has granted the requests. 382 R. 1059, 1079, 1093, 1178.

Step 1 of the Methodology requires the Coalition to provide the Director, by April 1, with "electronic shape files to the Department delineating the total irrigated acres within their water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%." *Methodology Order* at 34. The *Methodology Order* states "the SWC should be responsible for submitting the information to the Department," because "the SWC members can best determine the irrigated acres within their service area." *Id.*[46]

There were no Step 1 acreage submittals in 2010 because the initial *Methodology Order* was issued after April 1 (on April 7, 2010). 382 R. 68. In 2011, the Department did not receive Step 1 acreage submittals from any member of the Coalition and therefore the Director used the 2010 acreage figures. 382 R. 702. In light of the "ample snowpack and water supply," the Director did not "reassess" the 2010 acreage figures, *id.*, even though the Methodology provides that if a Coalition member "fails or refuses to identify the number of irrigated acres within its service area by April 1, the Department will be cautious about recognizing acres as being irrigated if there is uncertainty." *Methodology Order* at 34.

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[46] Step 1 of the Methodology provides in full as follows:

> Step 1: By April 1, members of the SWC will provide electronic shape files to the Department delineating the total irrigated acres within their water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%; provided that the total acreage count does not exceed the number of acres to be irrigated within the decreed place of use. Because the SWC members can best determine the irrigated acres within their service area, the SWC should be responsible for submitting the information to the Department. If this information is not timely provided, the Department will determine the total irrigated acres based upon past year cropping patterns and current satellite and/or aerial imagery. If an SWC member fails or refuses to identify the number of irrigated acres within its service area by April 1, the Department will be cautious about recognizing acres as being irrigated if there is uncertainty about whether the acres are or will be irrigated during the upcoming irrigation season. The Department will publish electronic shape files for each member of the SWC for the current water year for review by the parties. In determining the total irrigated acreage, the Department will account for supplemental ground water use.

Methodology Order at 34.

In January 2012, the Director sent a letter to the Coalition members, notifying them of the Step 1 requirement to submit shape files, and requesting that the shape files be provided "as soon as possible." 382 R. 723-24. Only AFRD2 and Minidoka Irrigation District responded. 382 R. 725-27. In February 2013, the Director sent another letter to the Coalition members, again requesting that they submit their shape files. 382 R. 813. In sum, only in 2013 did all of the Coalition members actually respond, although most did not provide shape files. 382 R. 815, 821-28. The Coalition's assertion that the Director has each year "refused" to consider the Coalition's information is contrary to the record.

The Coalition argues that in 2013 the Director should have used different acreage figures for Burley Irrigation District, Minidoka Irrigation District and TFCC, either their decreed acreages, or other acreages derived from other sources and calculations. In the absence of shape file submittals consistent with Step 1, however, the Methodology provides "the Department will determine the total irrigated acres based upon past year cropping patterns and current satellite and/or aerial imagery." *Methodology Order* at 34. The Coalition's objections to the Director's acreage figures are without merit.

IXX. THE GROUNDWATER USERS' ARGUMENTS ELEVATE THE PRINCIPLE OF BENFICIAL USE OVER THE PRINCIPLE OF PRIORITY OF RIGHT.

While the Coalition's briefs focus almost exclusively on the principle of priority of right, the briefs of IGWA and Pocatello (the "Ground Water Users") focus almost exclusively on the principle of beneficial use. Virtually absent from the Ground Water Users' briefs is any acknowledgment of the constitutional principle that "[p]riority of appropriation shall give the better right as between those using the water," Id. Const. Art XV § 3 (emphasis added), or any acknowledgement that the Director's "critical role" in this matter is "to accommodate both the

first in time and beneficial use aspects" of Idaho prior appropriation law. *A&B Irr. Dist.*, 155 Idaho at 651, 315 P.3d at 839 (emphasis added).

The basic premise of the Ground Water Users' arguments is that all aspects of the Coalition's diversion, conveyance, distribution, and use of water must be relentlessly scrutinized to identify every source of waste or inefficiency, no matter how small or remote, and every improvement that might reduce need must be implemented, no matter how insignificant. *See IGWA Brief* at 20 (arguing the Coalition's water use must be "scrutinized"); *id.* at 22 ("'need must be evaluated based on current water use practices"); *id.* at 25 ("[t]he critical issue is ensuring the baseline accurately reflects the water needs of the senior, and that any subsequent changes in water use practices are taken into account to determine current water needs"); *see Pocatello's Methodology Brief* at 8 (arguing the "reasonableness" of the Coalition's diversion should be evaluated monthly); *id.* at 18 (arguing that "efficiency" should be a "limit on initial RISD").

The level of scrutiny to which the Ground Water Users would subject the Coalition's water uses is simply too high. For instance, the Hearing Officer stated as follows with respect to the Ground Water Users' "water balance" analyses for NSCC and TFCC:

> Evidence submitted concerning North Side's terrain and length of system make it highly unlikely that North Side could raise crops to full maturity with the number of cuttings otherwise possible with the smaller amount of water calculated by the ground water users. Only unusual weather conditions would provide enough water. The same is true for Twin Falls Canal Company where the difference is in excess of 310,000 acre-feet. Subtracting that much water from irrigation in a year would not meet crop needs utilizing the systems and practices in place.

Opinion at 50. Further, the Hearing Officer determined that "the systems and practices in place" are reasonable and efficient, *id.*, "[t]he existing facilities utilized by the Surface Water Coalition

members are reasonable," *id.* at 54, and "[t]he evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency." *Id.* at 55.

The scrutiny to which the Ground Water Users would subject the Coalition's water uses goes beyond promoting maximum use and minimizing waste; it effectively reduces the amount of water the Coalition members are entitled to divert and use under their water rights even though they are using water reasonably and efficiently. The Ground Water Users' arguments are merely the reciprocal of the Coalition's arguments, and fail for the same basic reason: they recognize only one of the "two bedrock principles," *A&B Irr. Dist.*, 155 Idaho at 651, 315 P.3d at 839, effectively diminishing or nullifying the other. The only difference is that the Ground Water Users ignore the "bedrock" principles of priority of right rather than the principle of beneficial use.

XX. THE HEARING OFFICER DECLINED TO RECOMMEND A "WATER BALANCE" METHODOLOGY AND APPROVED USE OF HISTORIC DIVERSIONS AS THE STARTING POINT FOR PREDICTING NEEDS.

The Ground Water Users also argue that the Methodology is flawed because it did not adopt a "water balance" or "water budget" for predicting the Coalition's water needs. *Pocatello's Methodology Brief* at 12; *IGWA Brief* at 11. The Ground Water Users argue the Hearing Officer was "persuaded" by the "water balance" approach, *IGWA Brief* at 11, gave "clear direction" that it should be adopted in place of the "minimum full supply" analysis, *Pocatello Methodology Brief* at 20. These arguments are mischaracterizations and contrary to the record.

While the Hearing Officer found the parties' "water balance" presentations to be "enlightening science," he also saw "irony" in the fact that while the Coalition and the Ground Water Users "used much of the same information and in some respect the same approaches,"

they "came up with a difference of 869,000 acre-feet for an average diversion budget analysis of SWC districts for the period from 1990 through 2006." *Opinion* at 49. The Hearing Officer stated this "does not promote much faith in the science of water budget analysis," *id.* at 49-50, and explicitly declined to recommend a "water balance" or "water budget" approach to predicting the Coalition's water needs. *See Opinion* at 50 ("that recommendation cannot be made").

The Ground Water Users nonetheless argue that the Hearing Officer categorically disapproved of using historic diversion data as a basis for predicting the Coalition's water needs. *See IGWA Brief* at 11 (arguing that an approach of "looking backward" to predict needs "troubled" the Hearing Officer); *Pocatello Methodology Brief* at 11 (arguing it "is not consistent with the Hearing Officer's Recommendations" to use "historical diversions" to predict the Coalition's water needs"). These contentions also are contrary to the Hearing Officer's *Opinion.* The Hearing Officer determined "[i]t is appropriate to use historical information when crops are adequately irrigated and to test that information to determine if the usage involved waste." *Opinion* at 51. The Hearing Officer recognized this was "the concept behind the minimum full supply," and stated "[t]he concept is good." *Id.* at 49.

The Hearing Office recommended: "In the absence of acceptable budget analysis amounts from either party, the Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury." *Opinion* at 51. In the *Methodology Order,* the Director carefully assessed the "water balance" studies presented at the hearing and reviewed the Hearing Officer's findings and recommendations. *Methodology Order* at 12-14. The Director "decline[d] to adopt the water

balance method" and instead selected the BLY method. *Id.* 14. This determination is supported by the Hearing Officer's recommendations and substantial evidence in the record.

XXI. THERE IS NO MERIT IN THE GROUND WATER USERS' ARGUMENTS THAT THE METHODOLOGY IS SIMPLY "MINIMUM FULL SUPPLY" UNDER A NEW NAME.

A. The BLY Selection Process Implements The Hearing Officer's Recommendations.

The Ground Water Users argue that the Methodology did not incorporate the Hearing Officer's recommended modifications to the "minimum full supply" analysis, but simply gave it a new name, "Reasonable In-Season Demand" or RISD. *See IGWA Brief* at 13 ("the initial determination of need under the RISD analysis is the same as the minimum full supply analysis"); *Pocatello Methodology Brief* at 14-15 ("the new methodology, termed RISD . . . disregards the Hearing Officer's factors, and, like MFS, relies solely on historical diversions"). These arguments are contrary to the *Methodology Order*, which expressly recognizes and adopts the Hearing Officer recommendations, largely through the process for BLY selection. As previously discussed, the Methodology's detailed selection process shows that BLY selection is not simply the "minimum full supply" approach under another name; but rather, the Methodology incorporates the Hearing Officer's recommendations.

For instance, the Hearing Officer recommended modifying the "minimum full supply" analysis because, among other things, it had an "emphasis on supply rather than need." *Methodology Order* at 3 (quoting Hearing Officer's *Opinion*).

The BLY selection focuses on need rather than supply through consideration of various factors, for instance, precipitation, ET, and growing degree days. Precipitation "has a substantial influence on crop water need," *id.* at 7, and ET serves "as an indicator of overall crop water need for a season." *Id.* at 8. "Growing degree days are an arithmetic accumulation of daily mean

temperature above a certain base temperature" and "[a] higher annual growing degree day value correlates to a higher potential rate of plant growth." *Id.* at 9. The BLY selected by the Methodology is actually a composite year, "an average" of 2006 and 2008, that has "below average precipitation, near average ET, and above average growing degree days." *Id.* at 11. Basing BLY selection, in part, thus on the "Climate" factors avoids emphasizing supplies rather than needs, and also avoids using a relatively "wet" or "cool" year, which can result in underestimate need. This is consistent with the Hearing Officer's recommendations.

Further, the BLY selection process accounts for significant changes in cropping, irrigated acres, and diversion/conveyance/irrigation facilities and practices—which the Hearing Officer also identified as important considerations—by limiting the BLY candidates the period beginning with the year 2000. *See id.* at 6 ("To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999").

The Hearing Officer also recommended that "[t]here must be adjustments as conditions develop if any baseline supply concept is to be used." *Opinion* at 46. The Methodology incorporates this recommendation through provisions specifically addressing in-season revisions to the initial projections of water supplies, needs, and material injury, as previously discussed, and as recommended by the Hearing Officer. *Methodology Order* at 5, 15-20, 36-37. In-season forecast revisions incorporate other aspects of the Hearing Officer's recommendations by including monthly project efficiency and crop water need calculations, ET and precipitation estimates for the season to date, and "adjustments" to account for diversions for purposes other than irrigation. *Id.* at 14-15, 36-37. The Hearing Officer's recommendation to exclude non-

irrigated acreages is incorporated in part by obtaining crop distribution acres from the USDA National Agricultural Statistics Service. *Id.* at 17.[47]

B. The Hearing Officer Found That The Coalition Entities Are Using Water Efficiently And Reasonably.

The Ground Water Users also argue that the Methodology ignores the factors of CM Rule 42. *IGWA Brief* at 20; *Pocatello Methodology Brief* at 19-20. CM Rule 42 sets forth "[f]actors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste." CM Rule 42.01. The Ground Water Users' arguments lack merit to the extent they read this rule as providing that the Director "shall" or "must" explicitly consider each one of the factors in the Methodology. *See* CM Rule 42.01 ("may consider").

The Ground Water Users nonetheless argue that the Methodology should include a detailed analysis under each of the CM Rule 42 factors to ensure that water is being used reasonably, efficiently and without waste, *Pocatello Methodology Brief* at 19-20, and if this is not done it will "incentivize[] the SWC to continue inefficient irrigation practices." *IGWA Brief* at 29. These arguments ignore the Hearing Officer's findings on these very questions. The Hearing Officer found that the Coalition's existing facilities are "reasonable," *Opinion* at 54, that the Coalition members are "operating with reasonable diversion and conveyance efficiency," *id.* at 55, and "are employing reasonable conservation practices." *Id.* at 56. The arguments of IGWA and Pocatello that the CM Rule 42 factors have been ignored are contrary to the record.

C. The Ground Water Users' Argument That The Methodology Should Incorporate "System Efficiency" Lack Merit.

[47] The Ground Water Users' arguments that the Methodology does not provide for adjustments to account for "wheeled" water and other diversions for non-irrigation purposes is incorrect. *See, e.g., Methodology Order* at 15 ("Examples of adjustments include the removal of diversions associated with in-season recharge and diversion of irrigation water on the behalf of another irrigation entity.").

The Ground Water Users' argue that the Methodology's "project efficiency" analysis is flawed and should be replaced with a "system efficiency." *Pocatello Methodology Brief* at 19. The *Methodology Order* explained that a "project efficiency" calculation was selected because "[i]t is the same concept as system efficiency," but through use of the "project efficiency" formula "the influence of the unknown components"—specifically seepage/conveyance losses, on-farm application losses such as deep percolation and field runoff, and system operational losses—"can be captured and described without quantifying each of the components." *Methodology Order* at 15. This is a significant advantage, because at this time a "system efficiency" approach requires the use of estimated values for these variables, which was one of the principal reasons for the significant differences between the "water balance" analyses of the Coalition and the Ground Water Users. *Id.* at 13-14.

In addition, the Director carefully and thoroughly addressed Pocatello's "system efficiency" and "project efficiency" arguments in the *Order On Reconsideration Of Final Order Regarding Methodology For Determining Material Injury To Reasonable In-Season Demand And Reasonable Carryover* (Jun. 16, 2010). 382 R. 547-52. Among other things, the Director determined that Pocatello's preferred "efficiency" approaches have two problems: they rely on "Crop Water Need" average for the years 2000-2008 rather than the BLY value, and are based on unrealistic assumptions of efficiency that are "much higher" than any historically realized by TFCC and NSCC. 382 R. 550, 552. The Director has addressed Pocatello's efficiency approaches and declined to use them. These decisions are soundly reasoned and based on substantial evidence.

XXII. THE GROUND WATER USERS' ARGUMENTS THAT PREDICTIONS OF NEED MUST BE THE NEEDS OF AN "AVERAGE" YEARS ARE CONTRARY TO THE RECORD AND THE PRESUMPTIONS FAVORING SENIOR WATER RIGHTS.

The Ground Water Users argue that the *Methodology Order* violates the "law of the case" and impermissibly overestimates predictions of material injury and mitigation obligations by ignoring the Hearing Officer's recommendations for modifying the "minimum full supply" analysis, which, they assert, specifically required the Director to use an "average" year to predict "actual needs." *Pocatello Methodology Brief* at 11, 14, 20, 21; *IGWA Brief* at 32. These arguments are not supported by the record and fail to accommodate both "bedrock" principles of prior appropriation.

The Ground Water Users' arguments on this point are based primarily on the Hearing Officer's recommendation that "[p]redictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation." *Opinion* at 49. IGWA and Pocatello over-read this statement as foreclosing the use of any baseline year other than an "average" year, and take it strictly in isolation. The Hearing Officer stated "the so-called average year is unusual, reflecting the average of high and low years rather than a customary amount of precipitation that can be predicted with a high degree of certainty." *Id.* at 6. The Hearing Officer also recognized that "as appealing as the concept of flexibility is, implementation is more important," *id.* at 45, and if conditions worsen as the season progresses, the expense of securing additional mitigation might "ruin" the groundwater users for the season and possibly fail to get water to the surface water users in time of need." *Id.* at 43.

The Director discussed these concerns in the *Methodology Order* and determined they raised a question of risk allocation, and that using a strictly "average" year as the BLY would not sufficiently protect the seniority of the Coalition's water rights:

> 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 underpredict the demand shortfall. In a high water demand year, underprediction of demand shortfall might be acceptable if the junior priority ground water right holders and the senior priority surface water right holders shared equally in the risk of water shortages. Equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury. The incurrence of actual demand shortfalls by a senior surface water right holder resulting from pre-irrigation season predictions based on average data unreasonably shifts the risk of shortage to the senior surface water right holder. Therefore, a BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

Methodology Order at 6-7 (emphasis added).

As previously discussed, intentionally underestimating seniors' supplies and overestimating their needs is a necessary element of the Methodology's carefully crafted framework for allocating the risk of incorrect predictions consistent with Idaho law. It also takes into account the water distribution and administration challenges of conjunctive management. The Ground Water Users' arguments that the *Methodology Order*'s must use a strictly "average" year or years for the BLY, and that the Director may not weight or bias the initial estimate for this purpose, *IGWA Brief* at 32, is contrary to the record and Idaho law.

XXIII. THE GROUND WATER USERS WERE NOT DENIED DUE PROCESS.

The Ground Water Users argue that the Director denied them due process by limiting the scope of the hearings of May 2010. *IGWA Brief* at 16-18; *Pocatello Methodology Brief* at 23-24; *Pocatello As-Applied Brief* at 11-12. These arguments lack merit because IGWA and Pocatello had a full hearing on the issues in 2008, and their challenge to the Director's *Methodology Order* is a matter for judicial review.

IGWA argues it was denied due process because it was not given an opportunity to call witnesses or present evidence on its position that "the RISD methodology does not adequately address the recommendations of Hearing Officer Schroeder . . . and does not accurately predict material injury to the SWC." *IGWA Brief* at 18. Pocatello also argues it was denied the opportunity to demonstrate that the *Methodology Order* "[i]s not consistent with the Hearing Officer's Recommendations and was not based on evidence in the record." *Pocatello Methodology Brief* at 24.

The questions of whether the *Methodology Order* is consistent with the Hearing Officer's recommendations or is based on evidence in the record are not evidentiary issues but rather matters for judicial review. *Methodology Order* at 38 (stating that "pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court"). These questions are challenges to the *Methodology Order* and suited to an appellate proceeding rather than a *de novo* hearing.

What the Ground Water Users are requesting goes beyond due process—they seek, rather, a second bite at the apple. The 2008 hearing provided a full and fair opportunity for the Ground Water Users to call witnesses, present evidence, and develop their cases. This included the opportunity to present their theories—including the question of how to "accurately predict material injury" to the SWC. *IGWA Brief* at 18. As previously discussed, and as the *Opinion* and the *Methodology Order* confirm, the Ground Water Users argued that material injury must be predicted through a "water balance" analysis, but the Hearing Officer declined to recommend it and the Director declined to adopt it. It is simply not true that the Ground Water Users were

denied the opportunity to be heard on the issues. The Ground Water Users are entitled to judicial review of the *Methodology Order*, but not a do-over.

XXIV. THERE IS NO MERIT IN THE ARGUMENT THAT THE METHODOLOGY IS NOT BASED ON THE RECORD.

The Ground Water Users argue that the *Methodology Order* is not based on the record or supported by substantial evidence because none of the parties at the hearing advocated for the RISD Methodology, and the *Methodology Order* does not sufficiently explain BLY selection and projecting water supplies and storage allocations. *IGWA Brief* at 30-31; *Pocatello Methodology Brief* at 9-11. These arguments simply ignore the *Methodology Order*, which explicitly addresses and explains these matters in detail. *Methodology Order* at 6-12, 19-27. The Director also addressed these concerns in the *Order On Reconsideration Of Final Order Regarding Methodology For Determining Material Injury To Reasonable In-Season Demand And Reasonable Carryover*. 382 R. 558-59.

CONCLUSION

For the reasons set forth herein, the Respondents respectfully request that this Court dismiss the petitions for judicial review.

RESPECTFULLY SUBMITTED, this 14th day of July 2014.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
GARRICK L. BAXTER
Deputy Attorney General

MICHAEL C. ORR
Deputy Attorney General
Attorneys for Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

SRBA District Court
253 3rd Avenue N
P.O. Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☒ E-Mail: pharrington@idcourts.net

Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT
195 River Vista Pl. STE #204
Twin Falls, ID 83301-3030

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☒ E-Mail: tlt@idahowaters.com
  pla@idahowaters.com

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☒ E-Mail: wkf@pmt.org

Randall C. Budge
TJ Budge
RACINE OLSON NYE & BUDGE
P.O. Box 1391
Pocatello, ID 83204-1391

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☒ E-Mail: rcb@racinelaw.net
  tjb@racinelaw.net

Sarah Klahn
Mitra Pemberton
WHITE JANKOWSKI
511 16th St, Suite 500
Denver, CO 80202

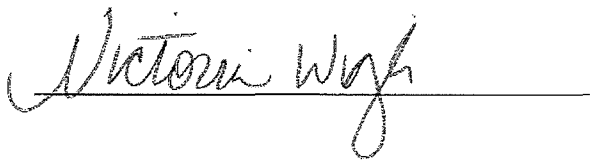
- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☒ E-Mail: sarahk@white-jankowsi.com
  mitrap@white-jankowski.com

Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83205

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☒ E-Mail: dtranmer@pocatello.us

John K. Simpson
BARKER ROSHOLT
PO Box 2139
Boise, ID 83701-2139

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile:
☒ E-Mail: jks@idahowaters.com



ATTACHMENT

Opinion Constituting Findings Of Fact, Conclusions Of Law And Recommendation, In The Matter Of Distribution Of Water To Water Rights Nos. 36-02356A, 36-07210, And 36-07427 (Blue Lakes Delivery Call); In The Matter Of Distribution Of Water To Water Rights Nos. 36-04013A, 36-04013B, And 36-07148 (Snake River Farm); And To Water Rights Nos. 36-07083 And 36-07568 (Crystal Springs Farms) (Clear Springs Delivery Call), (Jan. 11, 2008).

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, AND 36-07427 **(Blue Lakes Delivery Call)**	**OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION**
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARMS) **(Clear Springs Delivery Call)**	

Hearing was held commencing November 28, 2007, to resolve disputes arising from the Director's Orders entered May 19, 2005, concerning the delivery call made by Blue Lakes Trout Farm, Inc. and the Order entered July 8, 2005, concerning the delivery call made by Clear Springs Food, Inc. for Snake River Farm. When issues common to Blue Lakes and Clear Springs are considered they are referred to as the Spring Users, a term that is not inclusive of other users of spring water in the reaches of concern. The Spring Users are aquaculture businesses that use water flowing from springs in the Thousand Springs Reach to raise trout for sale. IGWA, Idaho Ground Water Appropriators, Inc., is a collective association of ground water users including the North Snake Ground Water District and the Magic Valley Ground Water District. Members of IGWA are subject to the Director's Orders which mandated curtailment of ground water usage to meet the Spring Users' delivery calls. The Idaho Dairymen's Association and Rangen, Inc. participated in the hearing with regard to issues of common concern with the Spring Users and IGWA, as did the cities of Wendell, Shoshone, Paul, Jerome, Heyburn and Hazelton. Prior to hearing the parties filed written testimony and exhibits of expert witnesses and some lay witnesses who were then subject to examination on their

testimony at hearing. The Idaho Department of Water Resources is not a party in this proceeding. The Department provided witnesses to explain the background of the Department's action and the administrative record relied upon by the Director in entering the Orders at issue to assist the parties and the Hearing Officer. Some issues were determined by summary judgment prior to trial. A copy of that opinion is attached for further explanation of those determinations.

Also at issue in this case are orders entered and actions taken by the Department subsequent to the May 19 and July 8, 2005, orders. These concern efforts by IGWA to avoid curtailment by alternate methods and the Director's responses to those efforts.

I.

HISTORICAL BACKGROUND

The current legal dispute arises from the dilemma of attempting to parse out the rights to water when there are more demands, and in fact more paper rights to water, than there is available water in times of shortage. The scientific and cultural history leading to this dispute is epic in the development of a significant portion of the State. It is important to understand to avoid simplifying the case by identifying villains to be the scapegoats and losers. Resolution would be easy if that were the case. This is a case, however, of industrious and often visionary people pursuing laudable goals dependent upon a water resource that for decades appeared infinite and is now known to be finite and in fact in short supply.

1. The Eastern Snake River Plain Aquifer. An aquifer is an underground source of water. The Eastern Snake River Plain Aquifer (ESPA) underlies the Eastern Snake River Plain that is approximately 170 miles long and 60 miles wide. The ESPA begins at the Teton Range near Ashton in the east and extends in a southwesterly direction following the Snake River downstream to King Hill. It comprises more than 10,800 square miles. There are estimates that it contains approximately one billion acre feet of water. The aquifer is made up primarily of fractured basalt, sometimes interspersed with river sediment or windblown material. It ranges in depth from thousands of feet to much more shallow levels. The significance of its structure is that it forms a conduit for the flow of water, but that flow is neither consistent in pace nor direction. Unlike a river channel that can be observed and which flows along clearly defined lines and identifiable speeds, water in the aquifer may move as little as 0.1 feet per day to as

much as 100,000 feet per day. The fractured basalt may form barriers that impede the flow of water and change its direction or may form conduits that channel the flow of water, allowing it to move quickly from one point to another. The movement is below ground. Consequently, particular water cannot be traced from one precise point under ground to another precise point where it emerges to the surface. This becomes significant in determining the cause and effect of junior ground water usage upon senior surface water rights. At any given point in its travels water may be either ground water or surface water as it enters or exits the aquifer.

2. The development of irrigation on the Eastern Snake River Plain. The initial development of irrigation in Idaho began in the second half of the 19th century when water was diverted from the Snake River and its tributaries and delivered to crops by channels on the ground – flood irrigation. From this practice developed what is called incidental recharge of the aquifer. That is, water that was not consumed by the crops or through evaporation entered the ground and joined the water that was in the aquifer. As a consequence, the level of water in the aquifer rose above what that level would be absent the irrigation practices. As the extent of flood irrigation increased, incidental recharge increased. This trend continued until the middle of the twentieth century at which time there were approximately 1.83 million acres under irrigation. At that time two developments occurred. In the 1950's Idaho Power had abundant inexpensive electrical power for which it needed a market in the summer. Idaho Power and the State of Idaho through its policy makers encouraged ground water development and the expansion of farming by pumping water from the aquifer. This was the science that made practical irrigation in areas that were impractical for flood irrigation from the river. It was, as the promotional literature of the day stated, the way to use this vast reservoir of untapped water and to make the desert bloom. That is what happened. Water in vast quantities began to be withdrawn from the aquifer for agricultural purposes.

3. The changes in irrigation practices. Coordinate with the development of ground water pumping was a change in irrigation practices by many surface water users who moved away from flooding the ground to the more efficient method of sprinkler irrigation. Flooding typically used more water than was necessary for crop growth. Additionally, it often meant crops at the beginning of the diversion received more water than crops further down the line and that it was impractical to deliver water to some property that would otherwise produce crops.

The use of sprinkler irrigation allowed the more efficient and uniform use of water. The collateral effect of this change was a reduction of the incidental recharge that had occurred with the less efficient flooding practices.

4. The need for conjunctive management of surface and ground water. Ground water pumping increased, incidental recharge diminished, and additional water rights were licensed. No doubt many people understood the connection between the water on the surface in the Snake River and its tributaries and the water below the ground in the aquifer. Nonetheless, for a significant period of time the connection was ignored as the administration of surface water and ground water progressed independent of one another. Ultimately the connection became obvious and the need for conjunctive management apparent. A drought of historic proportions that began in 2000 brought the problem to a head.

II.

THE SPRING USERS' WATER RIGHTS

1. **The Blue Lakes Trout Farm, Inc. rights at issue.** On March 22, 2005, Gregory Kaslo of Blue Lakes Trout Farm, Inc. provided a letter to the Director of the Department of Water Resources demanding that the Director "direct the watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code Section 42-607 in order to supply Blue Lakes prior rights." The letter asserted that Blue Lakes was then receiving 137.7 cfs and that at its low point in 2003 it received only 111 cfrs. The letter sought protection for Water Rights 36-02356A for 99.83 cfs with a priority date of May 29, 1958, 36-07210 for 45 cfs with a priority date of November 17, 1971, and 36-0747 for 52.23 with a priority date of December 28, 1973. Collectively the three water rights total 197.06. The water rights are for fish propagation and the period of use is January 1 through December 31.

2. The Blues Lakes facilities. The Blue Lakes Farm is located in the Thousand Springs in which there are numerous springs that emanate from the canyon walls. The Thousand Springs area is divided into six spring complexes or reaches: a) Devil's Washbowl to the USGS stream gage near Buhl, b) Buhl Gage to Thousand Springs, c) Thousand Springs, d) Thousand Springs to Malad Gorge, e) Malad Gorge, f) Malad Gorge to Bancroft. The Blue Lakes Trout Farm is in the Devil's Washbowl to Buhl spring reach which includes springs having moderately large rates

of discharge at intermittent locations. Blue Lakes diverts water from Alpheus Creek which is formed by spring water. The Blue Lakes facility consists of three ponds with 35 raceways each for a total of 105 raceways. Water passes from one set of raceways to a lower set by gravity flow with settling areas between the ponds. The youngest fish receive the water at the upper raceways to provide them with the purest water when they are most vulnerable to disease. The Blue Lakes facility is designed to use the 197.06 cfs. decreed.

3. Clear Springs Food, Inc. On May 2, 2005, Larry Cope of Clear Springs provided two letters to the Director requesting water rights administration in Water District No. 130 pursuant to Idaho Code Section 42-607 for the benefit of rights held by Clear Springs for use at the Snake River Farm and Crystal Springs Farm. The Snake River Farm facility which is at issue is located in the Buhl to Thousand Springs reach westerly of the Blue Lakes facility. The Snake River Farm facility is served by water rights 36-02703 for 40.00 cfs issued November 23, 1933, 36-02048 for 20.00 cfs issued April 11, 1938, 36-04013C for 14.00 cfs issued November 20, 1940, 36-04013A for 15.00 cfs issued September 15, 1955, 36-04013B for 27.00 cfs issued February 4, 1964, 36-07148 for 1.67 cfs issued January 31, 1971. The total of the water rights is 117.67 cfs year round and is a non-consumptive use. The water rights derive from spring flows that are collected and used in a manner similar to the Blue Lakes process.

4. The Spring Users' water rights are non-consumptive. The use of water by Blue Lakes and Clear Springs is non-consumptive. Unlike growing crops which take water into their structure which depletes the water supply, water used in the trout farms passes on and may be used again in lower elevations, similar to the non-consumptive use of hydroelectric power plants.

5. The quality of water is important for the propagation of trout. The use of spring water from the aquifer is important to the maintenance of the trout farms. The temperature, purity and oxygen content of the water from the springs makes it desirable for trout farming.

6. The use of water by the Spring Users is a beneficial use. The propagation of trout is a substantial business that competes in a global market. Blue Springs markets nationally. Clear Springs markets internationally. Water they receive pursuant to their water rights enables them to engage in an enterprise that benefits the owners and employees and the State of Idaho through tax revenues and employment. Each is capable of utilizing the total amount of water

decreed in their various rights to produce trout. The more water available under the rights the more fish they can produce.

7. The Spring Users need an adequate supply of water every day of the year. Trout propagation is a year round process. An adequate and predictable supply of water is necessary twenty-four hours a day. An interruption in the flow of water to the raceways would be devastating to the fish crop.

III.

THE DECLINES IN SPRING FLOWS AND THE CONSEQUENT RIGHT TO CURTAILMENT

1. There has been a decline in the spring flows in the Thousand Springs area from the time of and before the adjudication of the Spring Users water rights which has reduced the water available to their facilities well below the adjudicated amounts. The flow records of Blue Lakes show consistent declines in average daily flows from 1995 through 2004, ranging in the areas of 20cfs to 10cfs, depending on the months within the years. The former Director compared the November, 2004, average daily flow of Blue Lakes of 149.45 cfs to the USGS records for November 10, 1980, a time following Blue Lakes' last water right. The USGS record indicated that Blue Lakes would have received 184.7 cfs, accounting for that portion of the flow that would have been diverted to Pristine Springs senior right.

Analysis of records available for the Snake River Farm facility indicated spring flows from November 1, 1989, of 116 cfs, compared to 93.18 cfs October 20, 2004, which amounts to a decline of approximately 21%. There are variations in years and within years, but the long term trend has been a significant decline in the flow of water to the Spring Users' facilities.

2. Ground water pumping is a contributing factor to the decline in spring flows. Various factors contribute to the decline in spring flows, including reductions in incidental recharge as a consequence of improved irrigation practices, ground water pumping, and most recently, drought. Ground water pumping accounts for a withdrawal of nearly 2.0 million acre feet of water from the aquifer annually. Ground water pumping for agriculture is a consumptive

use and must have an effect upon the amount of water in the aquifer that will continue to the Thousand Springs area.

3. Agricultural ground water pumping accounts for 95% of the withdrawal from the aquifer. USGS records for the year 2000 indicate that 95% of ground water use is for agriculture. The remaining 5% is divided among public use (2.6%), domestic (1.2%), industrial (0.7%) and livestock (0.6%).

4. The relevant periods for consideration of aquifer levels are those beginning when the water rights were licensed or adjudicated. IGWA argues that analysis of the Spring Users' rights to water should look back to the time before incidental recharge from flood irrigation dramatically increased the amount of water in the aquifer. IGWA maintains that the spring flows were artificially inflated by decades of inefficient flood irrigation practices when vastly more water was placed on the ground than was necessary for crop growth. There is evidence that in the early part of the twentieth century some flood irrigators poured as much as thirty acre feet of water onto the land when only two acre feet was necessary, resulting in a mass of water going into the aquifer. Dr. Charles Brendecke testified that early ground water development was almost non-existent in the early 1900's and points to early measurement records that show significantly lower spring discharges in the Thousand Springs area than at the time the Spring Users' rights were licensed. He maintains that measurements in 1902 showed that Blue Lakes Spring, synonymous with Alpheus Creek, showed flows of 86.37 cfs in April and 80 cfs in August. Together with other information, he concludes that the natural flow of the springs in the Thousand Springs area was significantly lower than flows when the Spring Users rights were licensed and subsequently adjudicated. This was primarily the consequence of incidental recharge from surface irrigation practices. From this type of information IGWA maintains that there should not be curtailment when the Spring Users rights are dependent upon an inflated water level that was dependent upon incidental recharge that resulted from inefficient farming practices that cannot now be required.

There is a serious question as to the reliability of the 1902 measurements. Nonetheless, it is clear that the level in the aquifer increased when there were inefficient flood irrigation practices and has declined with the advent of more efficient practices. However, the extreme result pressed by IGWA is unacceptable.

5. To the extent that the level of the aquifer increased from irrigation practices, the ground water users began pumping from the same increased level. Were the calendar turned back to 1902 levels, the priorities would still be the same. The Spring User senior rights would come ahead of the ground water junior rights. The Spring Users cannot require the continuance of inefficient flood practices. To the extent spring flows decline as a consequence, the Spring Users lose water without recourse. But to the extent that water is in the aquifer subject to appropriation, senior rights come ahead of junior rights. Otherwise it would result in junior ground water users continuing to pump to the detriment of senior surface water users simply because they can reach water that would otherwise continue in the aquifer until it emerged at the Thousand Springs area. The Spring Users are entitled to curtailment to the extent that the junior ground water users interfere with the water the Spring Users would otherwise have under their water rights.

IV.

THE DIRECTOR'S ORDERS

The Director responded to the calls made by the Spring Users with Orders dated May 19, 2005, determining the Blue Lakes call, and July 8, 2005, concerning the Clear Springs call. There are common issues in dispute in the two orders, including the determination that the Spring Users are entitled to curtailment of some junior ground water users, the exclusion of some junior ground water users from curtailment, a limitation on the amount of water to which the Spring Users are entitled to under the calls, and the implementation of the orders which included alternatives available to the ground water users to avoid curtailment. There are issues concerning the use of pre-adjudication information and seasonal differences in spring flows in making the determination of the extent of the curtailment. There is an issue as to whether the model (ESPAM) developed for the use in conjunctive management of surface and ground water should be relied upon.

V.

THE EFFECT OF THE AMOUNT ADJUDICATED IN THE PARTIAL DECREES AND THE BURDENS OF PROOF

1. There is a presumption that a senior water user is entitled to the amount of water set forth in the partial decree. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources,* 143 Idaho 862, 878, 154 P.3d 433, 449 (2007), addressed the threshold burden in a water adjudication:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. We note that in the Initial Order entered in this case, the Director requested extensive information from American Falls for the prior fifteen irrigation seasons, to which American Falls objected in part. While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on a senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication facts which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

2. The senior water right holder must allege material injury under oath setting forth the basis of that belief. *Id., 878:*

> The Rules require the petitioner, that is the senior water rights holder, to file a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury. That is consistent with the statutory provision which requires a surface priority water right holder claiming injury by junior water right holders pumping from an aquifer to file a "written statement under oath" setting forth "the facts upon which [he] founds his belief that the use of his right is being adversely affected" by the pumping. I.C. sec. 42-237b. The Rules further provide that the petitioner file a description of his water rights, including the decree, license, permit or claim for such right, the water diversion and delivery system he is using and the beneficial use being made. The Rules then provide three additional types of information which must be provided by the petition; however, the Rules are clear in saying that the additional information should be provided only *if available* to the petitioner.

In this case the Spring Users did not follow this process. They made calls for water by demands in letters. Nonetheless, the Director treated those letters as sufficient calls for water and initiated the investigation that led to the curtailments in this case. There is now considerable sworn

testimony as to the basis for the claims of material injury. The threshold showings necessary by the Spring Users have been made. They demonstrated their decreed rights and they have now alleged under oath material injury, i.e., they cannot utilize their fish propagation facilities fully from lack of their adjudicated rights.

3. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *AFRD#2,* 879.

4. The decreed amount of a water right is a maximum amount to which the right holder is entitled. The right holder is presumed entitled to that amount, and the burden is upon a junior right holder to show a defense to a call for the amount of water in the partial decree. Id. 878, 879. The Director ordered curtailment of junior ground water rights holders but not to an extent that would ultimately meet the amounts set forth in the partial decrees. There are questions as to whether there was information produced that would overcome the presumption that the senior right holders are entitled to the full extent of their adjudicated rights.

5. The Director could consider information prior to the partial decrees in considering curtailment. It is clear that the Director could consider post-adjudication information in deciding whether to curtail junior rights holders. This case presents the question of whether it was proper to consider pre-adjudicative historical factors in determining issues of curtailment. The answer to the question of the use of pre-adjudicative information begins with the nature of the adjudicated right. If the adjudicated amount is the fixed amount of water to be provided at all times if it may be put to a beneficial use and absent waste, it would seem that pre-adjudication history is irrelevant. On the other hand if the adjudicated amount represents a maximum amount of water that may be used, historical information is relevant to determine what a water user could reasonably expect to be available at the time of licensing and subsequent adjudication short of optimal conditions when the full amount of water will appear without curtailment. The Spring Users maintain that such a process is a re-adjudication of the senior user's water right and impermissible. It is not. The right to the adjudicated amount continues. The question remains whether the information informs the Director as to any defenses that might be available to the calls.

The practice has been to license and subsequently adjudicate the water right as a maximum amount. The Director properly determined that he could examine historical information, together with post-adjudicative information, to utilize in determining the amount of curtailment, if any

VI.

THE REASONABLENESS OF ALTERNATIVE METHODS OF DIVERSION

1. The Spring Users are not required to pursue alternative methods of diversion. In the order resolving the motion for summary judgment and partial motion for summary judgment resolved prior to hearing the Hearing Officer ruled that the evidence established that the Spring Users' means of diversion were reasonable and that there was no evidence that the Spring Users had an obligation to "chase" water, a practice in ground water use. This concept was renewed at the hearing. The result does not change.

2. The current means of diversion are reasonable. The burden is on IGWA to show that there is a satisfactory alternative to curtailment that would satisfy the adjudicated rights of the Spring Users. There is speculation offered, but there is no scientific evidence that would lead to the conclusion that the Spring Users are neglecting a reasonable opportunity to satisfy their water rights in an alternative manner. Brian Patton, an engineer with IDWR examined the Spring Users' diversion facilities. He testified that horizontal wells into the canyon wall might be an option, but that such a proposal would need extensive study. IGWA offered no such evidence, and there appears to be none in the record. There is no evidence of cost or probable results.

3. The collateral effects of drilling for water in the Spring User reaches have not been established. The former Director determined in the Orders that the Spring Users were no obligated to pursue alternate means of diversion considering the nature of their water rights. At hearing he testified that he considered this proposed solution but rejected it because it would most likely lead to similar efforts along the spring reaches by others with rights dependent upon the springs pursuing the same water. The resulting actions might lead to additional problems of administration.

VII.

THE PROPOSAL FOR REUSE OF WATER BY THE SPRING USERS

1. The Spring Users are not obligated to pursue repumping of water beyond the current practices. IGWA maintains that the Spring Users should be required to institute systems for resuse of the water they receive before calling for the curtailment of junior rights. At the present time water is reused in the trout farms as it moves from one set of raceways in a pond to a lower set of raceways. The process works by gravity and utilizes a settling system between the ponds. IGWA maintains that this process can be replicated by repumping the water through the raceways. This is a theory. The burden of proof is upon IGWA to show that it is a realistic method.

Several problems prevent acceptance of this alternative: a) There is no showing that it is financially feasible to run pumps twenty-four hours a day, three hundred sixty-five days a year. b) There is evidence that there would be risks that make this process unacceptable. Any breakdown for even a brief time could be catastrophic to fish deprived of water containing adequate oxygen. c) While water is presently reused in a process of settling waste that works, there is no evidence that a similar quality of water could be maintained with repumping.

VIII.

THE ESPA MODEL AND ITS APPLICATION

1. The implementation of conjunctive management of surface and ground water required the development of a model to understand the interaction of the two. Conjunctive management of surface and ground water rights depends upon an understanding of the hydrology of surface and ground water and the relationship between the two. Unlike the history of surface water administration in which a watermaster could monitor water he or she could see and understand the immediate effect of curtailment, the relationship between surface water and ground water rights is much more complex. In its travels the same water may be surface water at one point and ground water at another. When it is surface water it may be tracked with some certainty as to amount, direction and speed or flow. When it is ground water its course is hidden. Water that enters the aquifer at the eastern end may take a century to exit at the western end.

There have been numerous studies of the geology of the aquifer and ground water resources of the eastern Snake River Plain (ESP) dating from 1902 (Russell), 1938 (Stearns, et al.), 1964 (Mundorff, et al.) 1962, (Shibitzke and da Costa), 1969 (Norwich), 1974 (Maintei), 1974 (de Sonneville), 1978 (Newton), 1980 (Wytzes), 1984 (Johnson, et al.), 1974, 1977 (Robertson), 1982 (Lewis and Goldstein). See S. P. Garabedian, *Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho.* Pp. 10, 11. None of these studies provided an adequate basis for actual administration of water rights between ground and surface water. Consequently, IDWR contracted with the University of Idaho Water Resources Research Institute to develop a new and enhanced model. The model was developed with broad based representation, including a substantial number of the witnesses who testified for competing interests in this litigation. The model was calibrated to a 22 year data set from 1980 through 2002. The model divides the Eastern Snake River Plain into square mile cells which are assumed to be homogenous in their composition. It is described as "a numerical ground-water model of the eastern Snake River Plain which is calibrated to a sufficient time period to represent a wide range of aquifer stresses." *Abstract,* p. 113. The ESPAM was utilized by the Director in deciding the dispute between the Spring Users and IGWA.

2. There are limitations in the use of the model. a) The aquifer is not uniform in its geology. It is composed of fractured basalt that may lie in random patterns, sometimes interspersed with soil of a different composition. There may be variations within the model cells, contrary to the assumption of homogeneity. Hydrologists describe a cone that is created when water is pumped. Water from connected areas then flows to the cone. The assumption for model purposes is that the cone is uniform, but it may not be, since the aquifer is not uniform in its structure. The scientists know these things and developed the model to account for them. b) The model cannot predict the effect of a particular well on a particular spring. Conclusions must be drawn on a regional basis. That is, withdrawal of water from wells in certain cells will have an effect on spring flows within a particular reach, not that a particular well will have a certain effect upon a particular spring. The closer the well is to a spring source the more likely there is to be an immediate effect. c) Development of the model has not proceeded to the point of establishing a margin of error. Those involved in the development of the model agree that it is not 100% accurate and that it is desirable to determine an error factor. However, the shortages in water precipitated calls that necessitated decisions before the next stage in model development

could occur. The former Director recognized that there had to be a margin of error in the application of the model and assigned a 10% error factor. This conclusion was based on the fact that the gauges used in water measurement have a plus or minus error factor of 10%. Some will be high; some will be low. The Director concluded that the model could be no better than the measuring gauges and used the 10% margin absent a better figure developed through further testing of the model.

3. It was and is appropriate to use the ESPAM in making the conjunctive management decisions in these cases. There is no better science available. Decisions had to be made and will have to be made. The limitations of the model are identifiable and important but they do not preclude reliance upon it. It has an acceptable level of reliability based on peer reviewed science. There is evidence By Eric J. Harmon, a professor of hydrogeology, that water table contours can be utilized to estimate contributing areas to the springs that supply the Spring Users facilities. This approach would supplement and might improve model results, but the evidence does not tell us what that would mean in the outcome of this case. It appears to be a method to add to, not replace the ESPAM. Stated redundantly, the Director had no better tool than the model available in 2005, and there is no showing of any better tool today than the ESPAM. It is the product of an intense effort by scientists with adequate opportunities to present any competing views.

4. It was proper for the Director to determine a margin of error which resulted in the so called "trim line." The 10% margin of error factor assigned by the former Director was not the result of a perfect protocol that might render a different figure or range of figures. No such protocol was in place and there was none forthcoming in a reasonable time when the decisions on the Spring Users' calls had to be made. There is common sense to the 10% error factor assigned by the former Director, based on the assumption that the model cannot be better than the input of a key component. The evidence is clear that the model is not perfect and should have an error factor developed to utilize. It may be simple but true – a 10% factor is closer to accurate than no error factor, once the scientists agree, as they do, that an error factor is desirable. Until a better factor is established, the Director in his best judgment may use 10%. The development of a more scientifically based error factor should be a priority in improvement

of the model. The question of whether this is an appropriate basis for a "trim line" is addressed separately. That intersects State policy which must be considered.

IX.

THE ROLE OF PUBLIC INTEREST IN CONSIDERING CURTAILMENT

1. The public interest is a proper interest to be considered when a call is made that requires curtailment. The concept of "first in time, first in right" is a deeply held principle in Idaho water law. Idaho Code section 42-106 provides, "As between appropriators, the first in time is first in right." Case law has enforced this rule for generations. However, this principle of law is not without limitation. In *AFRD#2, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007),* the Supreme Court cited *Schodde v. Twin Falls Land and Water Co.,* 224 U.S 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912), noting that "evaluation of whether a diversion is reasonable in the administrative context should not be deemed a re-adjudication." In *Schodde* the U.S. Supreme Court was interpreting Idaho law. The Idaho Supreme Court would not be bound by the interpretation, but two factors make it persuasive authority. First, the Idaho Supreme Court has cited it favorably. Second, the Legislature has had nearly one hundred years to address issues presented by *Schodde* and act otherwise. It has not done so.

Schodde presented the issue of weighing public interest against the exercise of an established water right. Construction of a dam downstream from Schodde's point of diversion eliminated his means of diversion. Those means of diversion were reasonable when constructed, but construction of the dam would foreclose their usage and render his water right unusable by the means then available. He retained the water right and its priority but could not use it with the then existing technology. His water right could not trump the public welfare. The result was that junior water right holders would be able to use water as a consequence of the dam construction but Schodde could not utilize his senior right because of the construction. The public good was considered and outweighed the private right.

Article XV, Section 5 of the Idaho Constitution acknowledges the priority in time of water rights but passed to the Legislature the authority to subject that priority to "such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or

improvement, may by law prescribe." The Legislature responded in Idaho Code section 42-106: "As between appropriators, the first in time is first in right." This provision must be read in the context of Idaho Code section 42-101:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for delivery of such water."

Idaho Code section 42-602 vests supervision of the distribution and control of water in the Director of the Department of Water Resources, this authority to be accomplished by watermasters. Section 42-602 provides that, "The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine." This provision raises the question of whether the Director may consider the public interest in making a determination that there should or should not be curtailment or is to look solely at the timing of the water right and the amount stated in the partial decree. It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature did not intend to sum up water law in this single statement. The appropriation must be for "some useful or beneficial purpose." *Idaho Code section 42-104.* A water user cannot waste water. These principles remain. Similarly, the constrictions of Idaho Code section 42-101 that water is the property of the state "which, in providing for its use shall equally guard all the various interests involved." See *Schodde.*

As noted in *American Falls,* there is a presumption that the senior water right holder is entitled to the decreed water right. However, "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call

would be futile or to challenge in some constitutionally permissible way, the seniors call." The Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules), Rule 020.01, acknowledge the prior appropriation doctrine: "These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law." However, Rule 020.03 acknowledges other elements:

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

In *American Falls* the Supreme Court determined that the Conjunctive Management Rules are not facially unconstitutional. Rule 020.03 is at the heart of the rules and how they will be applied. Had any Rule been subject to a facial challenge, 020.03 was one. It was adopted October 7, 1994, and has remained untouched by the Legislature or the Supreme Court. It incorporates the law as it has developed. "First in time, first in right" is fundamental to water administration but is subject to consideration of the public interest. The Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens. These conclusions have significance in several issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment was not ordered. The public interest affects the timing of curtailment. Consideration of the public interest gives relevance to the economic evidence that was presented.

X.

THE INTRA-YEAR AND INTER-YEAR VARIATIONS IN WATER FROM THE SPRINGS

1. It is proper to consider intra-year and inter-year variations in the spring flows in determining curtailment. The Director found that springs discharging in the Thousand Springs area do not discharge at a constant rate. There are significant variations in discharge in a single year and variations from year to year. Among factors influencing these variations are differences in the amount of water available for surface water irrigation and the collateral effect of incidental recharge, changes in the amounts and timing of tributary underflow to the ESPA, and differences in precipitation and temperature. Additionally, the variations can result from ground water withdrawals and managed recharge to the aquifer. The Director found that for the water rights in issue for the Snake River Farm and Blue Lakes the factors contributing to variations would have been present when the rights were licensed. Finding 54 Clear Springs; finding 49 Blue Lakes. The Director found that the Spring Users "are not entitled to water supplies...that are enhanced beyond the conditions that existed at the time such rights were established..." And the Spring Users "cannot call for the curtailment of junior priority ground water rights simply because seasonally the discharge from springs is less than the authorized rates of diversion...unless seasonal variations are caused by depletions resulting from diversions and use of water under such junior priority rights." Finding 55, Clear Springs; finding 50 Blue Lakes.

The concept that curtailment of junior water rights can enhance a senior's rights beyond the amount available at the time the senior's rights were established is not sound. Curtailment of juniors would not put more water in the system than existed prior to the junior's appropriation. In ruling on the motion for summary judgment the Hearing Officer was concerned from language in the Orders that the former Director was imposing conditions on the amount of the water rights in issue, limiting the adjudicated amounts. Following testimony by the former Director it is clear that was not the intent and cannot be the case. The Spring Users retain the full amount of the adjudicated rights which they can use when water is available. But as a matter of fact the flows fluctuate annually and within the year. That is a matter of science, not a legal conclusion. It is a relevant fact in considering the extent of curtailment. If curtailment were ordered and could provide the full amount of the water rights at the lowest point of the year it seems almost certain

that significantly more water would be delivered in the high points of the year than the Spring Users are entitled to receive.

According to Dr. Brockway, the Snake River Farm rights of 117 cfs have not been met since 1988, and then not for the entire year. Apparently it is necessary to go back to 1972 to find a time the full rights were previously met, and that would not have been year round. The variations in spring flows from year to year and within years are facts, influenced in part by ground water pumping but also attributable to such factors as changes in incidental recharge, stream underflow, and weather.

In context the sense of the Director's finding is that the Spring Users cannot be guaranteed the full amount of the water rights adjudicated every day of the year or every year when that condition has not existed during any relevant time. Consequently, seasonal variations must be considered to determine what the Spring Users would have received throughout the year absent junior water users' appropriations.

XI.

THE FUTILE CALL RULE

1. **The Spring Users' Calls Are Not Futile.** The Director determined that the Spring Users can only call for the distribution of water to their rights through the curtailment of junior priority ground water rights when such curtailment would result in a usable amount of water reaching the Spring Users "in time of need." Clear Springs Finding 56. Blue Lakes Finding 51. Rule 10.08 of the *Conjunctive Management Rules* defines a futile call:

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

The relationship of water in the aquifer to surface water differs from that of surface water to surface water in ways that affect interpretation of the futile call rule. In managing surface water to surface water for irrigating crops a reasonable time for the delivery of water has been considered to be the time to get water in a surface channel to a crop before it perishes. Two different factors intersect in the Spring User cases. First, curtailing ground water pumping does

not provide the immediacy of delivery to the senior user that would be present in the curtailment of surface water. Surface water travels in a channel from one source that may be seen to a destination that can be seen. It can be routed to a particular point. Ground water does not fall into this model. Its route is determined by the contours of fractured basalt interspersed at times with soil of a different composition. Part of the water curtailed may travel one direction, part another. The effects of curtailment may be years to be realized. The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile. In effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated.

A second complexity exists in this case. Fish propagation is a year round enterprise. It is not limited by a growing season, so water in some amount is necessary every day of the year. Unlike plant crops which may survive for a period of days without water, common knowledge, tells us that it is minutes, not days, for fish to survive without water. Further, water cannot simply be held in raceways. Trout need flowing water or the effects will be adverse in a short time. According to the testimony of Gregory Kaslo, Vice President in charge of operations for Blue Lakes, it is necessary to anticipate low cycles to determine the stocking of fish. Consequently predictability is necessary to avoid overstocking or understocking of fish. A curtailment system that depended upon an immediate response when a shortage appeared would not work either for the health of the fish or the businesses.

What these facts establish is that in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks. This is the reverse process of the depletion of the water flowing to the springs from the aquifer over a substantial number of years. The Director's orders of curtailment recognized that the Spring Users' calls were not futile, though remediation would take considerable time. The evidence supports that determination.

XII.

USABLE QUANTITY

1. The percentages of curtailed water used by the former Director that will go to the Spring Users facilities should be utilized, with a small adjustment for the Snake River Farm facility. The Director determined that curtailment of ground water users would only be appropriate if the curtailment would result in a usable amount of water reaching the Spring Users. The usable quantity issue presents a continuing problem peculiar to ground water administration since the majority of the water curtailed will not go to the two Spring Users. Use of the ESPAM renders an amount that will go to the Thousand Springs area and the reaches within that area. However, it does not establish an amount that will go to the particular springs supplying the Spring Users' facilities. The result determined by the Director must come from calculating the percentage of the water in the area of concern that will go to the Blue Lakes and Snake River Farm raceways. That percentage applied to the Blue Lakes facility is supported by the evidence and was proper to be applied. However, the Director determined that 7% of the spring flows go to the Snake River Farm facility in the Buhl Gage to Thousand Springs reach. There is some confusion concerning this finding. The former Director testified that he thought the figure came from Dr. Allan Wylie, an expert with IDWR. However, Dr. Wylie's memorandum to the former Director set the percentage applicable to the Snake River Farm at 4.2%: "As best I can figure (after talking with Tim Luke) Snake River Trout gets 4.2% of the Buhl to Thousand Springs reach." Dr. Wylie did not defend the 4.2% figure. Tim Luke indicated that 6.9% is the figure supplied. It does not appear that the Director made an independent determination apart from the information he received from staff. The most likely state of the evidence is that he rounded the figure up from the 6.9%. The 6.9% figure should be used as the only one supported by evidence.

3. The amount of water that would be delivered to the Spring Users' facilities is a usable quantity. Using the ESPAM establishes the increased amount of water that will go to the reaches. The percentage of that water that will go to the particular Spring Users is a usable quantity.

XIII.

THE QUALITY OF WATER THAT MUST BE PROVIDED

1. The quality of water is not an element of a water right but may be considered. IGWA maintains correctly that quality of water is not one of the elements of a water right. However, the quality of water may be considered in alternative proposals to curtailment. The Spring Users businesses are dependent upon a certain quality of water in order to operate their business. The purpose of the water rights enumerated in their partial decrees is fish propagation. If something happens in nature that prevents the quality of water necessary for fish propagation from coming to them from the springs they are out of luck and most likely out of business. There are no guarantees against natural processes that might alter either the quantity or quality of the water they receive. However, in considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of the water may be considered. They are adjudicated to have water rights for the purpose of fish propagation. If their rights are met through curtailment they will receive the quality of water that nature provides and that will most likely be suitable for fish propagation. Any alternative to curtailment must accomplish the same result as curtailment. Otherwise the purpose of the water right is defeated.

XIV.

THE USE OF THE "TRIM LINE"

1. The Director's use of the "trim line" to limit curtailment was proper. One of the most startling facts in these cases is the amount of acreage that must be curtailed in order to deliver water to the Spring Users facilities. It is not a one cfs curtailed to one cfs increase to the Spring Users ratio. The vast majority of the water that will be produced from curtailment does not go to the Blue Lakes and Snake River Farm facilities. Perhaps it will go to beneficial use in Idaho, perhaps not. According to Dr. Allan Wylie, absent the application of the trim line or clip, as he termed it, the curtailment required for Blue Lakes would go from 57,220 acres to 300,000 acres. The acres curtailed to be applied to Snake River Farm would rise from 52,740 to 600,000 acres, producing a 38 cfs gain to the reach and 2.7 cfs to Snake River Farm. Dr. Wylie indicated that in 2005 the Spring Users' rights would not be satisfied year round even if there were

curtailment in the entire Snake River Plain. It is within this context that the Director's decision to use a "trim line" excluding certain pumpers from curtailment must be viewed. Conjunctive Management Rule 020.03 provides the following:

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

The development of ground water pumping has not been an act of piracy. State policy has sanctioned it. Making the "desert bloom" as the promotional literature of Idaho Power proclaimed was a reality. The cities of Wendell, Shoshone, Paul, Jerome, Heyburn and Hazelton have offered testimony as to the damage that would occur from curtailment. Vast areas of land were brought into production, jobs created, businesses in communities serving farm needs have benefited and become dependent on the agricultural economy. Tax revenue increased to the State and local communities. In this context to say that land will not be dried up when there is a substantial possibility that there will be no significant contribution to the Spring Users water rights is consistent with the policies set forth in the Conjunctive Management Rules, which are consistent with the Idaho Constitution and the legislative policy towards ground water development. The Spring Users retain the full extent of their water rights to be used when water is available, but parallel to *Schodde* they do not trump the interests of the State by commanding "the entirety of large volumes of water in a surface or ground water source to support [their] appropriation[s] contrary to the public policy of reasonable use of water..." CM Rule 020.03. The Spring Users are entitled to curtailment, or alternative redress, but not to the extent of drying up hundreds of thousands of acres when that action may contribute little or nothing in any reasonable time to their shortage. The same logic applies to the exclusion from curtailment of water users whose consumption is so small that it is unlikely any benefit to the Spring Users could be traced but the effect on the individual user potentially devastating.

2. The financial impact of curtailment has limited relevance. There was expert evidence concerning the financial impact of curtailment. John Church, an expert in financial forecasting, testified that widespread curtailment of ground water users would have dramatic negative impacts, including the loss of thousands of jobs, millions of dollars in lost personal income, and losses to the State and local governments in tax revenues. In his opinion, which is persuasive, the losses would not be offset by comparable gains through improved aquaculture. These conclusions are consistent with the January 31, 2005, "*Assessment of Relative Economic Consequences of Curtailment of Eastern Snake Plain Aquifer Ground Water Irrigation Rights*," which was prepared by Donald L. Snyder, Utah State University, and Roger H. Coupal, University of Wyoming, for the Natural Resources Interim Committee. Such information is very relevant to legislative considerations but has limited relevance in an adjudication. Were such information prominent in an adjudication, the Director and the courts would be drawn into comparing the merits of one water user against another and passing out water to the one perceived to be better. That is not the Director's or a court's role. The hallmark of water adjudication is first in time, first in right when the water is applied to a beneficial use without waste. However, this is the extreme case in which the requested curtailment would dry up as many as 600,000 acres, or more if an effort were made to supply the full amount of adjudicated rights every day of the year for a speculative benefit. At that point the Director has a responsibility to the State to consider the impact of the requested curtailment.

The curtailment ordered by the former Director would improve the position of the Spring Users to the level they could reasonably expect when their rights were adjudicated. From that there is harm to ground water users who are curtailed, but it is reasonable considering priorities and the effects of their pumping. The same would not be the case if the trim line were left out of consideration. This is not a case of saying crop farmers are more important than fish farmers. It is the case where two businesses cannot "command the entirety of large volumes of water in a surface or ground water source to support [their] appropriation[s] contrary to the public policy of reasonable use of water as described in this rule." *Conjunctive Management Rule* 020.03.

XV.

BLUE LAKES COUNTRY CLUB, INC. WATER RIGHT NO. 36-08593

1. The amount of water Blue Lakes Country Club, Inc. receives under right no. 36-08593 which is junior to all Blue Lakes water rights should be deducted from the amount Blue lakes is entitled to receive by curtailment of other junior water users. Blue Lakes Country Club has a water right, no. 36-08593 for 0.7 cfs, which is junior to all Blue Lakes water rights. This is water that it uses during the irrigation season, together with other water it receives, to water its golf course. Pursuant to an agreement, Blue Lakes Trout Farm does not assert its priority rights and object to this use. The Director reduced the amount to which Blue Lakes Trout Farm is entitled by the amount that goes to Blue Lakes Country Club pursuant to the agreement. This decision is proper. It is water to which Blue Lakes Trout Farm has a priority right. Unlike the calculation of water that must be determined by the use of the ESPAM, this is water from the source used by the Trout Farm. Rather than curtail to provide this water, it should be counted as water already available to Blue Lakes Trout Farm.

XVI.

THE CURTAILMENT ORDERS

1. The information available to the Director and presented at hearing in this matter justify curtailment of junior ground water users. IGWA objects on various grounds to any curtailment. In the mass of expert opinions and evidence offered a number of conclusions could be reached on different issues in this case. It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. The ground water pumpers are upstream from the springs that supply water to the Spring User facilities. The ground water users draw water from the body of water that ultimately spills water into the canyon reaches from a variety of springs. The ground water users that have been curtailed are junior to all Spring User adjudicated rights. The Spring Users have been prevented from applying water that would otherwise be available to them for a beneficial use, causing them material injury. Curtailment is proper.

2. The target amounts set by the Director in the Orders of curtailment are reasonable. The Spring Users object to the curtailment orders because they do not focus on providing the amount of their adjudicated rights. However, the Orders seek to provide improvement of their rights to the levels that could reasonably be expected when they were adjudicated, curtailing the amounts attributable to the junior ground water rights users' depletions that reduce spring flows, and excluding from curtailment a marginal group that might or might not provide water to the springs in any reasonable time and any measurable amount. There was information available to the Director and evidence presented at hearing that supports these amounts. An Order should be entered confirming the amounts.

3. Implementing the curtailment orders, or alternative methods of remediation, over time is consistent with State policy and justified in the public interest. The Conjunctive Management Rules have not been altered by the Legislature since their promulgation in 1994 and do, consequently reflect State policy. Rule 040.01.a. of the Conjunctive Management Rules provides that the Director, acting through the watermaster may:

> Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included with the district, provided that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment.

This process of phased in curtailment would extend to a mitigation plan approved by the Director pursuant to CM Rule 040.01.b. The failure to meet the targets in a mitigation plan approved by the Director is addressed separately.

XVII.

THE ALTERNATIVE METHODS OF ADDRESSING CURTAILMENT

1. A replacement water plan is an acceptable alternative to curtailment if it meets the target goals of curtailment. The Director's Orders afforded the ground water users the alternative of providing replacement water in lieu of curtailment. IGWA has attempted to provide adequate replacement water through various methods, including drying up of acres and running water through the North Side Canal system in the hopes that an adequate amount of

water would seep into the aquifer to improve spring flows. These are legitimate methods in the attempt to avoid full curtailment.

2. Replacement plans must meet the targeted goals of curtailment. Replacement plans are an alternative to curtailment. To be valid they must meet the goals of curtailment within the time frames of curtailment. A failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years. The cap on phased in curtailment is five years. That period of time should apply also to any approved mitigation plan, unless an agreement is reached with the Spring Users that extends the period or provides a different alternative. That appears unlikely. Consequently, if the targeted goals are not met in the five year phase in period, curtailment to meet the initial goals is required.

3. The Director's approval of a mitigation plan does not eliminate the need to meet the goals to be achieved by curtailment. The fact that the Director approves a replacement water plan for a particular year does not eliminate the ultimate goal of providing the amount of water to the Spring Users set forth in the Orders. The value of the approval is that the rights of IGWA and the Spring Users are settled for that year and they may plan accordingly. But the ultimate obligation that would be met by curtailment remains and is carried over. This is relevant in this case, since it appears that the last approved mitigation plan falls short of the targeted goal.

XVIII.

DUE PROCESS CONCERNS

1. Rules outlining an immediate process for hearing are necessary. The Director's Orders for curtailment were entered in the spring and summer of 2005. This hearing occurred in December, 2007. There are reasons. When the Conjunctive Management Rules were challenged, the authority of the Director and the policies of the State were in doubt. There is no remediation for what has occurred. The Director's Orders are supportable and should be enforced. Actions that were taken pursuant to them have been actions that would have been necessary had there been a hearing in a short time from their issuance. Nonetheless, it is critical that procedures be adopted which define the immediate rights of parties subject to emergency conjunctive management orders of curtailment, or denial of curtailment.

XIX.

THE DAIRYMEN

The Hearing Officer has been informed that the Dairymen have reached an agreement with the Department which should be addressed. However, that agreement has not yet been formalized and presented, and apparently not all parties have stipulated to it. Further action awaits the presentation of the agreement and the impact that it may have on these proceedings.

XX.

CONCLUSION

This opinion constitutes the findings of fact and the conclusions of law of the Hearing Officer for consideration by the Director.

Dated January 11, 2008.

GERALD F. SCHROEDER, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

RANDY BUDGE
CANDICE M. MCHUGH
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JOHN SIMPSON
BARKER ROSHOLT
PO BOX 2139
BOISE ID 83701-2139
(208) 344-6034
jks@idahowaters.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

DANIEL V. STEENSON
CHARLES L. HONSINGER
RINGERT CLARK
PO BOX 2773
BOISE ID 83701-2773
(208) 342-4657
dvs@ringertclark.com
clh@ringertclark.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

MIKE CREAMER
JEFF FEREDAY
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720
(208) 388-1300
mcc@givenspursley.com
jeffereday@givenspursley.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

MICHAEL S. GILMORE
ATTORNEY GENERAL'S OFFICE
PO BOX 83720
BOISE ID 83720-0010
(208) 334-2830
mike.gilmore@ag.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

J. JUSTIN MAY
MAY SUDWEEKS & BROWNING
1419 W. WASHINGTON
BOISE ID 83702
(208) 429-0905
jmay@may-law.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ROBERT E. WILLIAMS
FREDERICKSEN WILLIAMS MESERVY
PO BOX 168
JEROME ID 83338-0168
rewilliams@cableone.net

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ALLEN MERRITT
CINDY YENTER
WATERMASTER - WD 130
IDWR – SOUTHERN REGION
1341 FILLMORE STREET SUITE 200
TWIN FALLS ID 83301-3380
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources