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**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, Appellants

vs.

CITY OF POCATELLO,

Petitioner/Appellant

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/Appellants

vs.

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

Consolidated Case No.: CV-2010-382

(Gooding County Cases CV-2010-382, CV-
2010-383, CV-2010-384, CV-2010-387,
CV-2010-388; and Twin Falls County
Cases CV-2010-3403, CV-2010-5520, and
CV-2010-5946)

IGWA'S RESPONSE BRIEF

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

Idaho Ground Water Appropriators, Inc., (IGWA), acting for and on behalf of its member water users, submits this brief in response to the *Surface Water Coalition’s Joint Opening Brief (Methodology Appeal)* and *Surface Water Coalition’s Joint Opening Brief (As-Applied Appeal)*.¹

INTRODUCTION

The Surface Water Coalition (“Coalition”), filed a Petition for Judicial Review of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”), issued by the Idaho Department of Water Resources (“IDWR”) on February 14, 2014. A statement of the facts of the case can be found in *IGWA’s Opening Brief* in support of its petition for judicial review of the Methodology Order, and will not be repeated here. In short, this case requires that the Court resolve disagreements over the methods, timing, and application of the IDWR’s Methodology Order, which the IDWR uses to determine material injury to senior surface water rights and the mitigation requirements of

¹ The Surface Water Coalition’s Joint Opening Brief (Methodology Appeal) will be cited to as “Coalition Methodology Br.”. The Surface Water Coalition’s Joint Opening Brief (As-Applied Appeal) will be cited to as “Coalition As-Applied Br.”

groundwater users to avoid curtailment.² As is set forth in IGWA’s opening brief, in determining material injury, the Director must make a reasonable and accurate determination of available water supply and establish the amount of water actually needed for beneficial use by the senior, and then provide a reasonable opportunity for the junior to mitigate to avoid curtailment. However, the timing of when material injury is predicted and when mitigation water must be provided to the senior user is one of discretion reserved to the Director. With respect to discretionary matters, courts defer to the agency decision unless the agency “acted without a reasonable basis in fact or law.”³

ARGUMENT

IGWA requests that the Court affirm that it is not an abuse of discretion for the IDWR (1) to use either the Day of Allocation or the April 1st Joint Forecast as the date that the IDWR predicts the water supply and injury; (2) to set the Time of Need, and order the delivery of mitigation water from IGWA to SWC during the month of August; (3) to permit junior groundwater users to pump before mitigation water is delivered, since the mitigation plan requires IGWA to rent and reserve mitigation water prior to delivery and mitigation with storage water is appropriate; (4) to allow for re-adjustment of the cap so long as it is before the Day of Allocation; (5) to use the seniors’ supplemental ground water in determining available water supply to the senior; (6) to require IGWA to supply mitigation water to injured carryover the season following the current irrigation season; and (7) to calculate the actual amount of carryover storage that is needed and order IGWA to mitigate in that amount. IGWA requests that the Court find that the IDWR abused its discretion in the Methodology Order when it forecasted the supply and injury using analog years, and requests that the Court remand to IDWR with instructions to use current year crop needs.

I. The Prior Appropriation Doctrine requires an evaluation of beneficial use and the questions of when to evaluate injury and when to require mitigation water delivery are matters of the Director’s discretion.

² *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonably Carryover* issued June 23, 2010. This case also involves a myriad of “As-Applied” Orders that are set forth in detail in the Coalition Methodology Br. and the Coalition As-Applied Br.

³ *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 88 (2007).

The Coalition's argument that the Methodology Order (1) violates the prior appropriation doctrine; (2) violates the standard in the Conjunctive Management Rules' to regulate diversions of juniors; and (3) minimizes the senior's water rights, is a stale reiteration of their prior arguments advocating shut and fasten and strict priority administration, which has been repeatedly rejected by the IDWR and the Courts over the past five years of litigating the Conjunctive Management delivery call cases.⁴

The prior appropriation doctrine in Idaho consists of more than just strict priority and shut and fasten administration. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes."⁵ The Idaho Supreme Court in *American Falls Reservoir District No. 2 v. Dreher* ("AFRD2"), acknowledged that applying the prior appropriation doctrine is more "easily stated than applied," explaining:

While the Constitution, statutes and case law in Idaho set forth the principles of the prior appropriation doctrine, those principles are more easily stated than applied. These principles become even more difficult, and harsh, in their application in times of drought. Because of concepts like beneficial use, waste, reasonable means of diversion and full economic development, the decisions are highly fact driven and sometimes have unintended or unfortunate consequences.⁶

In *AFRD2*, the Supreme Court acknowledged that a court-ordered timeline was not necessary, and that the administration and distribution of water between hydraulically connected surface and groundwater rights requires an exercise of discretion by the Director. The *AFRD2* Court further explained:

[N]either the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is

⁴ Methodology Br. p. 9-10.

⁵ *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44,147 P. 1073, 1079 (1915).

⁶ *American Falls Reservoir District No. 2 v. Dreher*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) ("AFRD2").

vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.⁷

The *AFRD2* Court found that American Falls was provided timely relief when “just months after their call” and “only weeks after the Director received water forecasts for the upcoming year,” the Director issued his orders and required replacement water to the injured senior.⁸ While IGWA takes issue with the methodology for unnecessarily restricting the forecast of supply and arriving at a reasonable in-season demand without properly evaluating current crop needs, the Director’s decisions are timely made, and he orders mitigation water to be supplied within the proper season. As a result, in every year that a mitigation obligation has been established, IGWA has met all mitigation obligations and avoided any curtailment.

The Coalition takes issue with two timing issues: (1) timing of when the Director makes his initial finding of material injury; and (2) timing of when the Director orders water to be delivered. As discussed below, both of these issues are a matter of discretion, and the Director has not abused his discretion in either case. The Coalition focuses its arguments on the errors in estimates of their “needs,” but conveniently ignores the conservatism the methodology contains in estimating their supply. As set forth in IGWA’s Opening Brief, the Methodology Order is conservative because it does not address actual crop needs and it also unreasonably restricts supply. Both crop needs and forecasted supply are factors in determining injury. The Coalition’s argument is premised on the fact that there should be a presumption of injury to each Coalition member the moment they begin diverting water in the spring. A prediction of material injury and shortage is not material injury; rather, it is a *projected* or *possible* injury. The injury does not become material until there is a physical shortage. The faulty premise underlies the Coalition’s arguments that (1) they should be provided actual delivery of water early in the irrigation season; (2) the delivery of mitigation water in-season at the Time of Need is insufficient to meet their senior priority rights; and (3) the delivery of

⁷ *Id.* at 875.

⁸ *Id.* at 875 (emphasis added).

carryover mitigation water in the subsequent year is also insufficient to meet their needs under the law.

However, a methodology that only considers the senior's priority is not what is required pursuant to the conjunctive management rules. This is precisely why Idaho Code § 42-602 provides that "[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural sources...." The Director must be allowed to exercise his discretion, within reason, to control the timing of the delivery of water and allow the junior users a reasonable opportunity to acquire and deliver the same to avoid curtailment after the determination of material injury is made. So long as the junior users actually provide the water to the injured senior within the irrigation season when needed to grow crops, the senior user is not materially injured and the senior user's priority is protected.

A. The Director has an obligation to use reliable tools to make supply predictions and should not be forced to make decisions too early which would disregard reliable evidence.

The Coalition argues that the recent Supreme Court case, *In the Matter of Dist. Of Water to Various Rights Held by or For the Benefit of A&B Irr. Dist. et al*, ("SWCI"), requires a management plan in place prior to the irrigation season, which begins on March 15th.⁹ This method would require an earlier prediction of water supply than is currently used in the Methodology's Order, which does not make the prediction until the April Joint Forecast. According to the Coalition, waiting until the April Joint Forecast violates the law.¹⁰ However, the law imposes on the Director a duty to act reasonably and to make decisions that are not arbitrary and capricious.¹¹ If the Director disregards the facts in the record, then his decision is arbitrary.¹² The Director also has a duty to

⁹ *In the Matter of Dist. Of Water to Various Rights Held by or For the Benefit of A&B Irr. Dist. et al*, ___ Idaho ___, 315 P.3d 828,835 (2013) ("SWCI"); Coalition Methodology Br. at 33-34.

¹⁰ Coalition Methodology Br. at 34.

¹¹ I.C. § 67-5279(3).

¹² *Enterprise v. Nampa City*, 96 Idaho 734, 739, 536 P.2d 729, 734, (1975) ("For the city council's actions to be deemed 'arbitrary or capricious,' its actions [must be] without rational basis; or in disregard of the facts and circumstances presented; or without adequate determining principles.").

base his decision on substantial competent evidence in the record.¹³ Competent evidence requires that the evidence used not be mere speculation, and be of “sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.”¹⁴ Therefore, it is within the IDWR’s discretion to choose when the water supply prediction should be made, so long as its decision is based on the evidence in the record and is not arbitrary and capricious.

Pursuant to that standard, IGWA submits that the water supply and injury prediction may be made, within the Court’s discretion, on the April 1st Joint Forecast or on the Day of Allocation, which occurs later in the irrigation season, usually in June.

1. The April 1st Joint Forecast is a Reliable Tool for Predicting Water Supply.

The former Director of IDWR, who was affirmed by the Hearing Officer, found that the April 1st Joint Forecast is a reliable tool for predicting water supply:

Because the snowpack in the Upper Snake River Basin generally peaks in April, with most of the melting of the snowpack and resulting inflow occurring thereafter, the later forecasts are generally more accurate than the earlier forecasts, based on comparisons of predicted inflow versus observed inflow, although at times the later forecasts are less accurate. *The forecast issued soon after April 1 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.*¹⁵

Consistent with this testimony, Finding of Fact 24 in the Methodology Order provides, “[t]he predictions made in [the Joint Forecast] are a good indicator of the total available irrigation water supply for a season.”¹⁶ This present year of 2014 is a good example of the difficulties of predicting water supply and injury too early in the year. In January 2014 the Director sent a letter to the junior users, warning that there was a fifty percent (50%) chance of curtailment in the 2014 irrigation season. Although the Director issued the letter to prepare the junior users for curtailment, the weather

¹³ *Id.*

¹⁴ *Cowan v. Bd. of Comm'rs*, 143 Idaho 501, 517, 148 P.3d 1247, 1263 (Idaho 2006), citing *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974)

¹⁵ Amended Order of May 2, 2005 at 21, ¶98 (551 R. Vol. 8, p. 1379) (emphasis added)

¹⁶ Second Amended Final Order Regarding Methodology dated June 23, 2010 at 9, ¶24 (382 R. Vol. 3, p. 572).

conditions dramatically changed for the better, with near record snowfall in February and March. In contrast, the 2014 April 1st forecast accurately predicted that there would be no injury to the Coalition.

An introduction of the untested and unverified, March 15 date to predict water supply, as advocated by the Coalition, is not supported by substantial competent evidence in the record, would result in a disregard for the facts in the record, and therefore, would result in an arbitrary and capricious prediction. At the very least, the prediction would not be based on evidence that is of sufficient quantity and probative value to meet the standard.

The record in this case shows that a good estimate of supplies for most of the Coalition members is the April 1st Joint Forecast, which has been relied upon for decades to predict water supplies. As such, it is not an abuse of discretion or arbitrary and capricious to use the April 1st Joint Forecast as the tool to forecast supply for the Coalition.¹⁷

2. The Day of Allocation would be a more reliable date to use in making the water supply prediction.

However, the record shows that even the April 1st Joint Forecast is not a reliable indicator of the supply for all Coalition members. Rather, a later date in June, such as the Day of Allocation, would be a more reliable date for predicting water supply for the Coalition members. The Director uses a regression equation developed for Twin Falls Canal Company with an R² value of 0.543.¹⁸ This means that the prediction of natural flow diversions by the Twin Falls Canal Company under the IDWR's current April 1st Joint Forecast methodology is only right about half the time. The facts show that, at least for Twin Falls Canal Company, moving the time of when the Director predicts material injury further into the irrigation season will increase the prediction's accuracy. This is further illustrated by (1) the year 2010, when the methodology, as applied, dramatically

¹⁷ Although altering that predictor of supply by forcing a restricted supply one standard deviation below the predicted supply does result in an arbitrary and capricious prediction. See IGWA's Opening Br. pp.31-33.

¹⁸ Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4) (382 R. Vol. 1, p. 198)

over predicted injury; and (2) the year 2013, when the methodology, as applied, initially underestimated injury.

In the year 2010, the Director predicted injury to the Coalition of 84,300 acre-feet on April 29, 2010.¹⁹ Just a few short weeks later on May 17, 2010, the Director reduced that prediction to 68,400 acre-feet.²⁰ By June 4, 2010, IGWA had secured leases for storage water in the amount of 82,000 acre-feet.²¹ However, by June 24, 2010, the Director had further refined his prediction of injury to require only 56,600 acre-feet from IGWA.²² By August 10, 2010, the prediction of in-season needs was reduced to zero.²³ Finally, by September 17, 2010, there was no predicted injury to any Coalition entity.²⁴ Yet, in response to the large mitigation obligation imposed by the methodology, IGWA leased mitigation water to avoid curtailment at a cost of well over \$1,000,000 for water that was never needed or delivered and lost at the end of the irrigation season.

The opposite occurred in 2013, a year the Coalition complains about, when the April 1st forecast resulted in a relatively small mitigation obligation, which was then followed by a dry spring and hot summer with later adjustments to the prediction of shortage, showing an underestimate of injury. Although the Coalition complained heavily about the 2013 irrigation season, during lean water years, it is reasonable that the Coalition, along with all other water users have to operate on thin margins without the absolute certainty that comes in good water years. Yet, in the end, the injured Coalition members still diverted more than what the Director deemed to be the quantity they needed for the 2013 irrigation season.²⁵

The facts clearly demonstrate, and IGWA argues, that it would be much more accurate to move the date of predicting the supply and injury to a date later in the spring

¹⁹ Order on Reconsideration dated June 24, 2010 at 2, (382 R. Vol. 4, p. 606).

²⁰ *Id.* at 5, (382 R. Vol. 4, p. 609).

²¹ As-Applied Hearing Ex. 2001, Ground Water Users' Supplement to Signed Leases (382 R. Vol. 3, p. 501).

²² Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration at 10 (382 R. Vol. 4, p. 614).

²³ Order Revising April 2010 Forecast Supply (Methodology Step 6) at 6 (382 R. Vol. 4, p. 632).

²⁴ Final Order Revising April 2010 Forecast Supply (Methodology Step 7) at 7 (382 R. Vol. 4, p. 642).

²⁵ (R.) (Showing Twin Falls Canal Company's RISD was 1,056,907 acre-feet compared with 1,128,023 actually diverted and AFRD2 RISD was 403,754 acre-feet compared to 412,067 acre-feet actually diverted); See too Pocatello's Response to the Coalition As-Applied Br.

near or at the Day of Allocation of the storage reservoir supplies.²⁶ The Day of Allocation is the date when the reservoirs have reached their peak supply for the year, usually in mid-June, when the storage water is allocated to the spaceholders.²⁷ On that date, the water supplies of the Coalition are known with accuracy. Further, on the Day of Allocation, IGWA is able to secure mitigation water with certainty because the storage water in the upper Snake Reservoirs, as well as the rental prices, are known to those spaceholders who lease water to meet junior users' mitigation obligations.

Consequently, the Court should affirm that it is within the Director's discretion to determine the best timing to predict water supplies and the delivery of mitigation water. The Court should not mandate fixed timelines that can make predictions even less accurate. IGWA argues that the Day of Allocation is the better date to use when predicting supply and injury, and there is substantial evidence in the record to support such a decision by the Director. However, IGWA also believes that there is sufficient evidence in the record for the Director to choose the April 1st Joint Forecast as the date to make the supply and injury prediction, although it is less reliable than the Date of Allocation. Finally, IGWA does not believe that there is substantial evidence in the record to use the Coalition's proposed March 15th date for predicting supply and injury because that early date is untested and unproved, without support in the record, and therefore would be an arbitrary and capricious decision by the IDWR.

B. So Long as Water is Delivered During the Irrigation Season, there is No Abuse of Discretion

The Coalition argues that the Director's methodology does not deliver water to them for their crops in progress or when needed.²⁸ However, the evidence shows that the Director has actually set the Time of Need during the month of August, well within the

²⁶ Date of allocation is the date when the reservoirs cease to fill. Date of Allocation Water District 01 Rental Pool Rules, Rule 2.13. ("The date determined each year by the Watermaster on which the maximum accrual to reservoir space holders occurs.")

²⁷ Water District 01, Rental Pool Rules, Rule 2.13.

²⁸ Coalition Opening Br. at 45.

irrigation season, and when crops are growing.²⁹ The Coalition's real complaint is that they do not have confidence that they will receive the mitigation water that the junior users have leased, even though IGWA's supplies are based on signed leases verified by the Director early in the irrigation season (usually at or around May 1st) and even though IGWA has never yet failed to fully meet all mitigation obligations.³⁰

The timing of the actual delivery of mitigation water should be no sooner than the Day of Allocation because (1) that is when storage supplies are known and become available to lease; and (2) prior to that time the Coalition has no shortage or need for additional water because storage supplies are at their maximum and river base flows are at or near their peaks and just beginning to be exceeded by irrigation demand. Thus, the Director has not abused his discretion by ordering the delivery of mitigation water to the injured senior later in the irrigation season when the actual injury exists. This is entirely in keeping with the law in Idaho.³¹

The Coalition's further argument that the junior users should not be allowed to pump before it has delivered the seniors' mitigation water ignores the fact that IGWA has an approved mitigation plan in place for the use and delivery of storage water as mitigation to the senior in lieu of curtailment, which has been approved by this Court.³² Furthermore, CM Rule 43 contemplates such mitigation so long as it is provided to the senior when needed:

Whether the mitigation plan will provide replacement water, *at the time and place required by the senior-priority water right*, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source *at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source*.³³

²⁹ Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover dated June 23, 2010 at 21 (382 R. Vol. 3, p. 584) (Time of Need will be sometime after the Day of Allocation but during the irrigation season).

³⁰ *Id.* pp. 35-36 (382 R. Vol. 3, pp. 598-99, Step 4).

³¹ See *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7 (1944) (there must not be "merely a fanciful injury but a real and actual injury.").

³² *Twin Falls Canal Company v. Spackman*, Case No. CV. 2010-3075, "Memorandum Decision on Petition for Judicial Review" (Idaho 5th Jud. Dist. January 11 2011).

³³ CM Rule 43.03.b (emphasis added).

The *SWCI* Court affirmed the use of mitigation plans in response to a finding of material injury.³⁴ In other words, “the Director shall either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion.”³⁵

The Coalition also claims that there is no “lawful” procedure to allow IGWA to obtain storage water leases and goes so far to say that leases can only be accomplished by spaceholders, which IGWA is not.³⁶ This argument ignores the fact that in every year a mitigation obligation existed, IGWA has leased water from the spaceholders and assigned the water to the injured Coalition member, which the watermaster then delivered directly to their storage water account for use at the time established in the Director’s order. Contrary to the Coalition’s claim that the storage system is “highly unreliable and uncertain,” this Court has found that the storage system is sufficiently reliable and that so long as the Director evaluates the storage leases with the projected reservoir fill in mind, there is no abuse of discretion by the Director.³⁷ The evidence in the record supports this conclusion that even in the worst drought years, the reservoirs have never run out of water.³⁸ Even in 2013, the year most complained about by the Coalition in their briefing, there was still 375,594 acre-feet in the Coalition’s storage accounts after the irrigation season.³⁹

In each year that a mitigation obligation exists, the Director confirms IGWA’s storage water leases in early May, pursuant to an already approved mitigation plan to provide storage water, which provides the senior users the necessary assurances that the water will be available to them for use during the irrigation season when needed.

³⁴ *SWCI* at 841-43, quoting IDAPA 37.03.43.03.c.

³⁵ *SWCI* at 842, citing CM Rule 40.01.a,b.

³⁶ Coalition As-Applied Br. at 37-38; see also Coalition Methodology Br. at 49; Coalition As-Applied Br. at 9.

³⁷ *Twin Falls Canal Company v. Spackman*, “Memorandum Decision on Petition for Judicial Review” at p. 20.

³⁸ Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover dated June 23, 2010 at 24 (382 R. Vol.3, p. 587)

³⁹ *FINAL ORDER ESTABLISHING 2013 REASONABLE CARRYOVER* dated November 27, 2013, Docket No. CM-DC-2010-001.

In summary, the law requires a timely response to a claim of injury and further requires that water be delivered to the senior user “during the irrigation season.” The Director has fully complied, IGWA has always performed, and mitigation water has always been timely delivered to the Coalition member in need.

C. Allowing Junior Users Reasonable Opportunity to Mitigate with Storage Water Does not Unlawfully Delay Administration

Another of the Coalition’s multitude of complaints is that junior users should be curtailed upfront and early in the irrigation season while the Director is gathering information to determine whether there is a possible injury to the senior user – “just in case” the senior user is found to be injured.⁴⁰ However, such an administrative scheme unlawfully deprives junior users of their decreed water rights every year before any material injury can be determined in a reasonably accurate manner and without any meaningful opportunity for the juniors to exercise their lawful right to mitigate.

The law does not allow curtailment of juniors based on mere speculation of a possibility of injury. The Coalition’s suggested approach is not in keeping with the prior appropriation doctrine in Idaho, which requires the injury to be “real and actual” not “merely a fanciful injury.”⁴¹ Furthermore, premature curtailment without basis would be arbitrary and capricious action by the Director and would result in a hoarding of the underground water resource by the senior surface water user under a theory that juniors should not be allowed to pump groundwater until all future risk of possible shortage to the senior user has been eliminated.⁴² This ignores the well-established law in Idaho of maximum beneficial use of water resources.

The Supreme Court, in *A&B Irr. Dist v. Idaho Dep’t of Water Resources*, accepted that there may be some risk of shortage borne by the senior user, but so long as the Director was convinced under a clear and convincing standard that the quantity he predicted was

⁴⁰ Coalition Methodology Br. at 35 and 38; Coalition As-Applied Br. at 42 (junior users have been allowed to pump the entire time.).

⁴¹ *Beecher* at 7 (1944).

⁴² The law also requires (1) that the Director’s distribution of water not result in an unlawful hoarding of water *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912); *AFRD2* at 876-77, 154 P.3d at 447-48; (2) that water is not wasted (CM Rule 42.01); and (3) that the water resource is used and developed to protect the important agriculture component of the State’s economy.

needed to grow crops was the correct quantity for the current season, the Director's action was appropriate.⁴³ The *A&B* Court explained:

If the Director regulates juniors to satisfy the senior's decreed quantity there is no risk of injury to the senior. However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director's determination is incorrect.... [thus] [t]he requisite high standard [of evidence] accords appropriate presumptive weight to the decree.⁴⁴

Therefore, it would be unlawful to curtail juniors prior to a finding of what water supply is available as compared to the senior user's actual needs for the upcoming season.⁴⁵

In addition, the Director's distribution of water between junior groundwater users and senior surface water users must equally guard all the interests to the use of the water, including the junior users, because "[w]ater [is] essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depend[s] upon its just apportionment to, and economical use by, those making a beneficial application of the same, [and therefore], its control shall be in the state, which, *in providing for its use shall equally guard all the various interests involved.*"⁴⁶

Furthermore, junior users are entitled to mitigate injury to a senior user and must be given a reasonable time to acquire mitigation water before being curtailed. As this Court has found,

A reasonable interpretation of the CMR reveals that curtailment of junior water rights should not occur until after the Director has an opportunity to review any mitigation plan submitted and conduct a hearing on such a plan if necessary in accordance with the procedures set out in CMR 43. Curtailing junior water users pending the outcome of such a hearing circumvents the purpose of issuing mitigation plans in the first place.⁴⁷

⁴³ *A&B Irr. Dist v. Idaho Dep't of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012).

⁴⁴ *Id.*

⁴⁵ *Id.* (The "Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use.").

⁴⁶ I.C. § 42-101 (emphasis added).

⁴⁷ R. 10592.

Thus, the Director's decision to provide junior users time to acquire mitigation water to address material injury to the senior user does not result in untimely administration or further injury to the senior.

Therefore, the Director has not abused his discretion in allowing the junior users to mitigate their injury, and providing them time to do so does not delay administration.

II. Any Necessary Adjustment to Predicted Amounts of Injury Must Come Relatively Early in the Irrigation Season

The Coalition argues that the Director cannot set an amount of water owed to the senior without leaving room to adjust that amount after the initial injury projection.⁴⁸ The Coalition argues that disallowing a readjustment of the cap, in practical effect, adjudicates a new amount of water to which they are entitled.⁴⁹ While IGWA acknowledges that some kind of an adjustment of the original predicted amount of shortage (or no shortage), could be part of the Director's methodology, there comes a point in the irrigation season, when there can no longer be an adjustment to the prediction because (1) curtailment will no longer be a viable option to give the senior water; and (2) mitigation water will not be available to the junior users to allow them to protect their interests.

As part of his duty to direct and control the state's water resource, the Director must also make decisions that take into account the real-world distribution systems available to the water users. In this case, there comes a point in the irrigation season when curtailment of junior users will not provide water to the senior user at a time or place when needed. This Court recognized that curtailment must occur relatively early in the irrigation season in order to address injury to that season's supply. However, that reality does not justify speculative or premature curtailment to deliver water to the senior's maximum water right quantity. Hence, the Director's discretion must come into play, as

⁴⁸ Coalition Joint Opening Br. at 15-19; Additionally, IGWA maintains that if the Director uses the tools and methods available to him to actually make predictions based on crop needs, rather than relying on analog years, and uses the best estimate of supply which can be updated closer to the date of allocation, that the finding of injury will be much more accurate, making the Coalition's complaint about the "cap" on their water right much less of a burden on them and the groundwater users.

⁴⁹ Coalition Opening Br. at 19.

contemplated by the Supreme Court in *AFRD2*, to fairly and reasonably predict injury and make adjustments thereto.⁵⁰ Allowing adjustments throughout the entire irrigation season is not practical and provides no certainty to any water user. It would not provide certainty to the seniors because at some point, curtailment will not provide them any water, and it provides no certainty to the juniors because they could be curtailed at any given time in the season without remedy.

As the evidence in this record demonstrates, it may be possible to update the Director's prediction up and until the Day of Allocation, when the reservoirs are at their peak, because at least the quantity of storage water is known and there is some certainty that it is associated with having a final storage allocation number. Furthermore, curtailment or mitigation water are both still viable options to address the senior's in-season injury if that becomes the only viable option.

III. The Methodology's Forecast of Supply and Injury (Steps 1-4) should be Remanded to Consider Current Year Crop Needs and Reasonable Efficiencies and Not Based on "Analog" Years.

IGWA agrees with the Coalition that the selection of the analog years of 2006 and 2008 is arbitrary and not supported by substantial competent evidence in the record.⁵¹ Rather, the Director should base his decision on actual crop needs.

As set forth in IGWA's Opening Brief, no party presented facts and circumstances that would support the use of analog years, rather than current crop needs and application efficiencies.⁵² Because the Director disregarded the evidence as presented by the parties, his decision is arbitrary and capricious and not based on substantial competent evidence in the record, and therefore, the decision should be remanded.

Furthermore, IGWA agrees with the Coalition that (1) the Director should use more recent data; and (2) one size does not fit all of the Coalition member's current demand.⁵³ The Coalition also argues in Section V of its Joint Opening Brief that the crop distribution

⁵⁰ *AFRD2*, 143 Idaho at 880.

⁵¹ Coalition Joint Opening Brief p. 19.

⁵² IGWA's Opening Br., pp. 23-25.

⁵³ Coalition Methodology Br. at 20-21.

used by the Director underestimates the Coalition's water needs and is thus invalid.⁵⁴ As is set forth in IGWA's Opening Brief, the Director is required by law to analyze actual crop needs, which is not a matter of discretion. However, IGWA disagrees with the Coalition that the Director's current methodology necessarily underestimates the Coalition's water needs; to the contrary, as the year 2010 shows, the methodology may overestimate the Coalition's water needs.

The problem in this case is that the Director did not base his decision on substantial, competent evidence in the record by making his prediction on actual crop needs, application efficiencies, and with the best method for predicting supply. The Director erred because his methodology artificially restricts supply rather than evaluating actual crop needs.⁵⁵ Therefore, IGWA asks that the methodology be remanded to the Director with instructions to base his prediction on actual crop needs and on the best estimate of supply.

IV. Supplemental Ground Water Provides a Valid Supply of Water for the Senior and Must be Considered in Determining Available Water Supply

The Coalition argues that the Director is not permitted to consider supplemental groundwater rights in determining the senior's water supply.⁵⁶ However, when groundwater is a valid supply of water that supplements the surface water supply, the Director should take that supply into consideration when projecting the amount of water needed by the senior. The rationale for taking additional sources of supply into account was set forth by the Hearing Officer: "[i]f crop needs are met by combined use of natural flow and storage water and there is sufficient water for reasonable carryover, there is no material injury."⁵⁷ This finding was affirmed by the District Court when it held that it was proper to consider both the natural flow and the storage water that was used "to supplement the natural flow for irrigating the same lands."⁵⁸ The same should be true for groundwater rights that supplement the surface water supplies in some of the senior

⁵⁴ Coalition Opening Br. at 31-32.

⁵⁵ See IGWA Opening Br. at .

⁵⁶ Coalition Opening Br. at 22-23.

⁵⁷ 551 R., Vol. 37, p. 7114.

⁵⁸ 551 R., Vol. 51, p. 10097.

users' lands. Additionally, CM Rule 42.01.g provides that the Director should consider whether the senior can meet its use "with the use's existing water supplies." Therefore, the Director did not abuse his discretion when he considered supplemental groundwater rights as part of the senior user's supply.

V. The Season for Reasonable Carryover Storage Occurs after the Current Irrigation Season (Steps 5, 9).

While it is true that seniors are entitled to carryover storage for future dry years, it does not mean that juniors are to be curtailed in order to ensure full carryover supplies. The Director is duty bound to make decisions that are based on actual evidence. The *season* when there is injury to carryover storage is not the current irrigation season as argued by the Coalition.⁵⁹ Rather, the season when carryover storage is needed occurs after the current irrigation season and when the reservoirs are filling, and then only if the reservoirs don't fill the following year. Therefore, the methodology's requirement that IGWA have leases in hand to supply mitigation water to injured carryover during the season following the current irrigation season is not an abuse of discretion by the Director. In support of this argument, the *SWC* Court provided the following:

Where a mitigation plan is the response to a finding of material injury, the [CM] Rules provide that the Director must consider several factors to determine whether the proposed plan 'will prevent injury to senior rights,' including:

[w]hether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right *when needed* during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan *may allow for multi-season accounting* of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan *must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.*

⁵⁹ See Coalition Methodology Brief at 53-54.

IDAPA 37.03.11.043.03.c ... Thus, while the Rules permit a mitigation plan to ‘wait and see’ how much water is necessary to protect against material injury, they require that such plan identify prospective means by which water will be provided in order to prevent material injury.”...

....Therefore, unless assurances are in place that carry-over shortfalls will be replaced if the reservoirs do not fill, the risk of shortage ultimately falls on the senior. As such, the very purpose of the carry-over component of the storage right -- insurance against risk of future shortage -- is effectively defeated.

SWC1 at 842 (emphasis in the original).

Hence, the Director’s requirement that the junior users provide leases showing they have water to replace carryover storage to be delivered the following irrigation season is in keeping with the *SWC1* decision and provides the appropriate contingency to assure that the senior users will have their reasonable carryover replaced if the storage reservoirs fail to fill the following spring.

VI. The Methodology Order’s Step 10 Properly Allows Junior Groundwater Users to Supply the Actual Amount of Injury to Reasonable Carryover Storage.

The Coalition argues that by allowing the junior users to provide the accrued volume associated with the first year of the model run reduces the senior’s carryover, increases risks of future water shortages, and lessens the junior mitigation obligation, and is therefore, arbitrary and capricious.⁶⁰ However, junior users cannot be required to mitigate for injury they do not cause. As the District Court found, included in the Director’s discretion is the authority to not curtail ground water users in excess, and to “significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances....”⁶¹ As explained by the AFRD2 Court, “[t]o permit excessive carryover of stored water without regard to the need for it, would be in itself unconstitutional. The CM Rules are not facially unconstitutional in permitting some

⁶⁰ Jt. Opening Br. at 65.

⁶¹ 551 R., Vol. 51, p. 10096.

discretion in the Director to determine whether the carryover water is reasonably necessary for future needs.”⁶²

To the extent that the Director can calculate what the ground water users’ actual yearly depletion to the carryover storage is, it is not an abuse of discretion to allow the junior users the opportunity to provide that quantity of water rather than an excess amount. Rather, this provision is in keeping with the Supreme Court and the District Court’s cautions as to the amount of water that is truly reasonable for carryover storage.

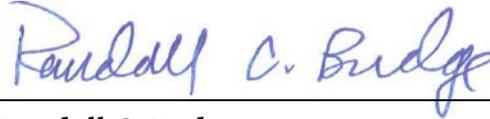
CONCLUSION

Pursuant to the foregoing, IGWA respectfully requests that the Court affirm the IDWR’s Methodology Order in part and remand the Methodology in part. IGWA requests that the Court affirm that it is not an abuse of discretion for the IDWR (1) to use either the Day of Allocation or the April 1st Joint Forecast as the date that the IDWR predicts the water supply and injury; (2) to set the Time of Need, and order the delivery of mitigation water from IGWA to SWC during the month of August; (3) to permit junior groundwater users to pump before mitigation water is delivered, since the mitigation plan requires IGWA to rent and reserve mitigation water prior to delivery and mitigation with storage water is appropriate; (4) to consider the seniors’ supplemental ground water in determining available water supply to the senior; (5) to require IGWA to supply mitigation water to meet carryover shortfall the following current irrigation season; and (6) to calculate the actual amount of carryover storage that is needed and order IGWA to mitigate in that amount. IGWA requests that the Court find that the IDWR abused its discretion in the Methodology Order when it forecasted the supply and injury using analog years, and requests that the Court remand to IDWR with instructions to use current year crop needs.

⁶² AFRD2, at 880, 154 P.3d at 451.

RESPECTFULLY SUBMITTED this 14th day of July, 2014.

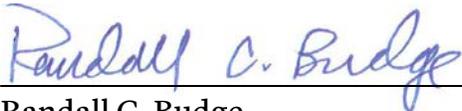
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED



Randall C. Budge
Thomas J. Budge

CERTIFICATE OF SERVICE

I certify that on this 14th day of July, 2014, a true and correct copy of the foregoing document was served on the following persons in the manner indicated:



 Randall C. Budge

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