IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

IDAHO GROUND WATER APPROPRIATORS, INC.

Petitioners,

vs.

CITY OF POCATELLO,

Petitioners,

vs.

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

Petitioners,

vs.

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

Respondents.

Case No. CV-2010-382

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

SURFACE WATER COALITION'S JOINT REPLY BRIEF (METHODOLOGY and AS APPLIED APPEALS)

On Appeal from the Idaho Department of Water Resources

Honorable Eric Wildman, Presiding

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INTRODUCTION

The Surface Water Coalition submits this *Joint Reply* in support of its petition for judicial review.[1] The Idaho Department of Water Resources ("IDWR" or "Department"), the Idaho Groundwater Appropriators, Inc. ("IGWA"), and the City of Pocatello ("Pocatello") all filed responses in this matter.[2] Rather than acknowledge and accept the Idaho Supreme Court's procedure, each Respondent avoids or misinterprets *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 315 P.3d 828 (2013). Their avoidance of this decision is a telling admission of error.

The Court's three-step administration is straight-forward: 1) The Director develops a "pre-season" management plan "in advance of the applicable irrigation season"; 2) A senior may initiate a call and specify how the plan, which has "no determinative role," results in injury; and 3) juniors may respond and bear the burden of proving any defenses by clear and convincing evidence. *A&B*, 315 P.3d at 841. The Director must determine the call "in a timely and expeditious manner" based on "the record and the applicable presumptions and burdens of proof." *Id.* Overarching this obligation is the settled recognition that "a timely response is required when a delivery call is made and water is necessary to respond to that call." *AFRD#2 v. IDWR*, 143 Idaho 862, 874 (2007). The Director is bound by this law.

While conjunctive administration includes the application of the CM Rules and their factors, the Director's fundamental duty to administer and timely deliver water is not altered. Further, the Director cannot merely base administration an "allocation of risk" of prediction errors, or cap a senior's right to mitigation in April. The Director has no authority to deprive seniors of water needed for beneficial use, not under any theory.

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[1] The Coalition submits this consolidated reply in support of both of its opening briefs (methodology and as applied).

[2] The Department response brief will be cited as "*IDWR Br.*"; IGWA's response will be cited as "*IGWA Br.*"; and the City of Pocatello's response brief will be cited as "*Poc. Br.*".

The Respondents offer no viable defense for the Director's errors and the Methodology Order's failures. Instead, the Department argues the Methodology Order embodies the Director's accommodation of competing constitutional principles. *IDWR Br.* at 20-22, 30. The Department even goes so far to claim that *A&B* "does not" require the Director to implement a "three-step methodology" – accusing the Coalition of being "overly-technical" in its reading of the case.[3] *Id.* at 30-31. Contrary to the agency's claim, there is no question the Idaho Supreme Court enumerated three basic steps, including an appropriate timeframe, to implement proper conjunctive administration.[4]

The Department offers no meritorious response that would preserve the Methodology Order and: 1) its untimely forecast plan; 2) its failure to adjust and provide complete and timely mitigation to seniors during the irrigation season; and 3) its bias toward allowing unmitigated junior groundwater pumping at every step. Accordingly, the Department's attempt to rescue the Methodology Order and its unlawful 10-step program should be denied.

The Coalition respectfully requests this Court set aside and remand the Methodology and As Applied Orders to the Department with the instructions to issue revised decisions consistent with Idaho law. Further, the Coalition requests this Court require the agency to specifically include and implement the process set forth by the Idaho Supreme Court in *A&B*.

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[3]Although IDWR originally represented a few months ago the Methodology Order "does not conform to the Idaho Supreme Court decisions," the agency has reversed course in its response. Compare *Motion to Remand Methodology Order to Idaho Department of Water Resources* (Jan. 29, 2014) with *Brief of Respondents* (July 14, 2014). Curiously, IDWR now asks this Court to "dismiss" the Coalition's petition for judicial review even though it previously admitted the Methodology Order did not conform to Supreme Court precedent and requested a remand. The agency should be judicially estopped from its unexplained change in position before this Court. *See Buckskin Properties, Inc. v. Valley County*, 154 Idaho 486, 497 (2013).

[4] The Court's opinion states "we conclude as follows" and even sets the procedure out in steps "1." through "3." The Department cannot ignore the Court's plain and unambiguous language. The procedure mirrors what the Hearing Officer recommended for purposes of an annual protocol. R. 7072-75 (identifying the presumption to apply, the senior's call, and the junior's burden to prove defenses by clear and convincing evidence); *see also*, R. 7098 ("The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol").

ARGUMENT

I. The Law Requires the Director to Administer Water Rights, Not Just Allocate Risk.

The Department's response is based on the theory that the Coalition solely demands consideration of "priority" while the Groundwater Users only request review of "beneficial use." *IDWR Br.* at 18-19. With this false premise the agency then sets up the Director as the "great accommodator" of the two theories, falling somewhere in between the parties' requests. *See id.* The Department's arguments misstate the Coalition's appeal and misinterpret what is required under the law.

Water right administration is a regulatory duty carried out by IDWR and the watermaster. *See* I.C. § 42-602, 607; *Musser v. Higginson*, 125 Idaho 392, 394 (1994). Although conjunctive administration concerns additional variables and is more complex than surface water administration, that fact does not change the agency's fundamental duty. Moreover, it does not give the Director authority to transform water right administration into some mysterious "balancing act" or "weighing" of constitutional principles.[5]

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[5] The Supreme Court in *A&B* noted the "tension" between priority and beneficial use, it did not state they were conflicting constitutional principles. In the *A&B* district court proceedings, Judge Melanson adopted this Court's poignant analysis of how the Director must analyze injury to a senior right and implement lawful administration:

> In sum, if a water user is not making beneficial use of the water diverted, irrespective of the decreed quantity, the result is waste. . . . Waste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call.
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> * * *
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> If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. . . . 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. There is no remedy for the senior if the Director's determination turns out to be in error and the senior comes up short of water during the irrigation season. ***Any burden of this uncertainty should be borne by the junior.***

R. 10,589 (reference and adoption of *Memorandum Decision*, pp. 24-38, Case No. 2009-647) (emphasis added).

As an executive agency charged with implementing the law IDWR and its Director must follow what the legislature requires. *See Henderson v. Eclipse Traffic Control & Flagging, Inc.*, 147 Idaho 628, 632 (2009). The law mandates distribution of water in accordance with the prior appropriation doctrine. *See* I.C. §§ 42-602, 607. The standard set forth in the CM Rules provides a clear path as well; junior rights causing injury must either curtail or pump pursuant to a pre-approved mitigation plan. *See* CM Rule 40.01.a, b.

Lowering the administration of real property rights to an undefined subjective exercise is not supported by Idaho law. The *A&B* Court made this clear. While it is true that application of the CM Rules involves the consideration of various factors and the Director's exercise of discretion in doing so, the Director is still bound by the law, including the applicable presumptions and burdens of proof. *See AFRD#2,* 143 Idaho at 877-78; *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 524 (2012) ("It is Idaho's longstanding rule that proof of 'no injury' by a junior appropriator in a water delivery call must be by clear and convincing evidence"); *A&B Irr. Dist. v. Spackman*, 315 P.3d at 841.

Contrary to IDWR's argument, there is no overarching "weighing" of constitutional principles that qualifies conjunctive administration or a senior's right to water that will be put to beneficial use. *See AFRD#2 v. IDWR*, 143 Idaho 862, 876-78 (2007); CM Rules 40, 42, 43. Stated simply, if a senior will put the water to beneficial use, juniors causing injury must either mitigate or face curtailment. If it is proven that a senior will waste the water, then there is no validity to the call. The Director is not free to "weigh" the constitution in the name of "allocating risk" amongst water users and make administrative decisions accordingly.

The Coalition fully agrees that water distributed to its members must be put to beneficial use. The Coalition has repeatedly and expressly acknowledged this fundamental tenet of water

law. *See e.g., Coalition Br.* at 19-21 ("water needed by the Coalition for beneficial use . . . the above quantities better reflect the Coalition members' actual water requirements needed for beneficial use . . ."); R. 11,018 ("the Coalition acknowledges that beneficial use is the measure of a water right in Idaho").

Notwithstanding this admission, the Respondents continue to assert that the Coalition demands a "priority only" or "shut and fasten" administrative scheme.[6] This straw-man is easily defeated and does not reflect the Coalition's appeal in this case. It is undisputed that Idaho law prohibits the wasting of water. *See Martiny v. Wells*, 91 Idaho 215, 218-19 (1966). Importantly, the Coalition members do not waste water as they operate reasonable and efficient irrigation projects. R. 7102-04; R. Vol. 3 at 551; *see also, IDWR Br.* at 76-77. Since water can and will be put to beneficial use on the Coalition irrigation projects in a reasonable and efficient manner, it must be properly distributed according to priority. That is what the Coalition members have always requested, lawful administration that protects their senior rights. *See e.g. Lockwood v. Freeman*, 15 Idaho 385, 398 (1908).

The Court should reject the Respondents' repeated efforts to recast the Coalition's appeal into something it is not. The fact that conjunctive administration involves ground water rights does not give the Director license to alter his fundamental duty to honor existing law or any discretion to adjust priorities. As described below, the Methodology Order falls short of what is required and fails to provide for timely and lawful administration.

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[6] The Department later refers to this mischaracterized claim as a "maximum protection protocol" sufficient to meet the "full licensed and decreed amounts of the Coalition's natural flow and storage water rights, regardless of actual need." *IDWR Br.* at 40. Again, this assertion is not true. While an adjustable baseline would certainly work better for all involved when juniors are prepared to meet a senior's demonstrated demands up front, it is the juniors that bear the risk of curtailment later in the season if the Director under-predicts a senior's need at the outset. *See Coalition Br.* at 21. A conservative approach that reflects recent history of the Coalition's demands (i.e. 2012/13) would ensure water is available to meet the senior's needs while authorizing juniors to fully mitigate and pump for the irrigation season. The Department offers no rational argument against this approach other than to falsely claim the Coalition is asking for its full decreed quantity "regardless of actual need."

II. The Methodology Order Unlawfully Caps a Senior's In-Season Injury and Juniors' Required Mitigation.

The Methodology Order's signature flaw is the immutable "baseline year" and "cap" placed on the Coalition members' water needs at the beginning of the irrigation season (Steps 3 and 8).[7] The Department disputes this contention and notes that the methodology "explicitly provides for upward revisions to the initial forecasts of the Coalition members' water supplies, demands, and material injury." *IDWR Br.* at 23-24. IDWR argues form over substance on this issue as adjustments without water are no solace to the senior trying to irrigate his field in July.

In truth, the referenced "adjustments" have no meaning since they do not affect administration or the actual mitigation obligation imposed on junior ground water right holders. Certainly the Hearing Officer, District Court, and Idaho Supreme Court did not approve an "adjustable baseline" in theory only. *See A&B*, 315 P.3d at 840-41. The task of recalculating supplies and demands and noting that adjustment on paper is one thing. However, in order to satisfy Idaho law, real-time adjustments to a senior's increased demand during the irrigation season must be satisfied with real water. *See AFRD#2*, 143 Idaho at 874 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call"). This is where the Methodology Order falls woefully short, and the Respondents point to no legal theory to save it.

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[7] The Department provides no viable response for the failure to implement a "pre-season management plan." *IDWR Br.* at 31-32. Instead, the agency argues that it is free to issue its initial forecast after the irrigation season has started because the *A&B* "Court was well aware that the Director's initial forecasts are issued in April." *Id.* Ironically, IDWR also argues that the findings of fact that shape the Methodology Order were not before the Court. *Id.* In other words, the Department defeats its own argument on this point. If the Supreme Court considered the Director's forecast it clearly found the process to be too late because it was not issued before the irrigation season. The Court should deny the Department's attempt to the read the "pre-season" requirement out of the decision. Further, the Coalition did not suggest the decision "must" be issued in January. *IDWR Br.* at 38. The Coalition simply highlighted an example of the Director's initial forecast in 2014 which was made in January. *See Coalition Br.*, Attachment A. One has to ask if the agency truly believed its April forecast satisfied the standard in *A&B* then why was the Director compelled to analyze the hydrologic conditions and send out letters in January and early March this year? Clearly those actions tell another story compared to the present argument.

The Methodology Order plainly states that the "baseline year" establishes the "upper limit of material injury at the start of the irrigation season." R. Vol. 3 at 569 (emphasis added). The Coalition explained how this "cap" violates Idaho law in its opening brief. *See Coalition Br.* at 12-14. The Department admits the resulting ceiling on mitigation: "this provision limits the in-season administrative action that may be taken against junior ground water users . . ." *IDWR Br.* at 24 (emphasis added). The Department can point to nothing in the constitution, statutes, or rules that would justify injury to a senior's water right in this manner.[8] *See Lockwood*, 15 Idaho at 398; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982). Given this admission, the Court can grant the requested relief and set aside Steps 3 and 8.

While the Department cites no legal basis for this "cap" it turns instead to forecast weighting, predictability, and a new "total water supply" concept to justify the result. *IDWR Br.* at 25-27. None of these reasons save the unlawful procedure.

First, the Director's use of the 2006/08 average year baseline and the weighting of the initial water supply forecasts does not comply with the law. It is undisputed that the use of the 2006/08 baseline creates a "ceiling" for the juniors' in-season mitigation obligation at the outset. As such, the Director's in-season adjustments to demand can only benefit junior ground water users by reducing mitigation obligations downward. If the initial prediction underestimates the senior's water use needs, junior ground water users have no responsibility for that increased

[8] Without any supporting facts in the record the Department also wrongly suggests that only a "small fraction" of the water diverted by juniors is part of the senior's water supply. *See IDWR Br.* at 9. The Department points to no facts in the agency record and instead cites the Hearing Officer's opinion in the Spring Users' case. *See id.* at 10, n. 8. That case concerned specific spring complexes, not hundred mile river reaches impacted by ground water use, and the groundwater use needed to be curtailed or mitigated there does not reflect the facts in this case. Moreover, here the Hearing Officer found that pumping results in a net reduction in annual aquifer recharge ranging between 1.6 and 3.0 million acre-feet per year. R. 7052. Further, large scale pumping has contributed to the decline in ground water levels across the plain ranging between five and 60 feet. R. 7053. Finally, the Hearing Officer concluded that additional depletions to reach gains are likely to occur in the future as a result of past pumping. R. 7059. The Department cannot support its continued efforts to minimize the juniors' injuries to senior surface water rights. The reference and reliance upon the Hearing Officer's opinion in the Spring Users' case therefore has no relevance.

injury. Such administration violates the prior appropriation doctrine as a matter of law. *See Coalition Br.* at 13-14.

Next, predictability or "reasonable certainty" does not justify capping a junior's mitigation obligation and increased injury to a senior later in the summer. *See IDWR Br.* at 25. The Department misconstrues the Hearing Officer's decision as justifying the Methodology Order. *See id.* Although the Hearing Officer described the reasoning behind the former Director's approach with the May 2005 Order and the resulting problems with the unlawful "cap" in 2007, the Department misinterprets those statements as providing support for the current methodology. Nowhere did the Hearing Officer conclude that a juniors' mitigation obligation would be capped at the start of the year.

Just the opposite, the Hearing Officer expressly condemned such an approach and recommended an adjustable process that would meet the senior's increased demands. R. 7094-95, 7098 ("[T]he conclusion was reached that those who exceeded the full minimum supply may not have needed it which precluded mitigation or replaced water to cover the excess used. . . . The process utilized runs contrary to the presumptive right of a senior water user noted in *AFRD#2* and contrary to the expectations under which the water users were operating since the May 2, 2005 Order. . . . The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol"). Consistent with the Hearing Officer, the Supreme Court affirmed the use of an adjustable baseline as only the "starting point" in administration. *See A&B*, 315 P.3d at 838.

By its very nature the prior appropriation doctrine does not provide "certainty" for junior water users. Water supplies and conditions can change over the course of an irrigation season, they are not always predictable or certain. Evidence in this case shows how recent years (2007

and 2013) can turn hot and dry compared to early forecasts. Contrary to IDWR's theory, uncertainty does not excuse juniors from satisfying an increased mitigation obligation to meet a senior's increased demand. Accordingly, the Department's second reason for cementing the groundwater user' mitigation obligation in April is unavailing as well.

Finally, the Department wrongly justifies "capping" a senior's water use needs with a new "total water supply" concept. *See IDWR Br.* at 25-28. This argument exemplifies the agency's constantly evolving view of conjunctive administration, even contrary to the terms of the Methodology Order itself.[9] Although the Director evaluates the Coalition's natural flow and storage water rights together (i.e. "total water supply"), the Department now proposes to transmute this into combining injury to "reasonable in-season demand" with injury to "reasonable carryover." *Id.* The Court should reject the agency's efforts to confuse these concepts.

Total water supply concerns the Coalition members' water rights, both natural flow and storage. The District Court upheld the Director's consideration of both rights together for purposes of administration. R. 10,097. However, the court did not say the Director is free to only evaluate injury at the end of the season, or that injury does not occur "unless it requires storage use that results in less than 'reasonable carryover.'" *IDWR Br.* at 27.

The Department admits the in-season flaw but claims it is corrected when evaluating reasonable carryover storage. For the first time the agency makes this startling argument:

[9] Tellingly, the Department cites no provision in the Methodology Order itself that authorizes the Director to only review in-season material injury at the end of an irrigation season. Whereas the order plainly provides for determining material injury to reasonable in-season demand and reasonable carryover separately, the Department now argues that shortfalls during the season can be remedied at the end of the year instead. R. Vol. 3 at 568-69. The Court should reject counsel's effort to modify the agency's procedure solely through its argument on appeal. *See e.g. Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1141 (9th Cir. 2008).

> 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."

IDWR Br. at 26.

The Department's new argument would eliminate any need for Steps 3 and 4. If the Director is free to ignore "in-season" injury and need only determine a total mitigation obligation at the end of the irrigation season, then what is the purpose of making the initial prediction and ordering mitigation for RISD shortfalls as part of the April Forecast Supply? R. Vol. 3 at 598. Why are juniors required to show evidence of storage mitigation by May 1st if the shortage only needs to be addressed after the irrigation season? The agency's argument is not supported by the Methodology Order and further contradicts the Hearing Officer's finding on this issue. R. 7106. This argument also demonstrates the inherent inconsistency of the Department's changing and moment-to-moment theories for administration.

Moreover, if in-season injury was only determined at the end of the irrigation season that would effectively eliminate the risk of curtailment of junior rights in the event mitigation was not provided, and would unlawfully shift all the risk of shortage on the seniors. That is not what the Methodology Order or Idaho law provides. Notably, the order requires mitigation for the RISD shortfall so that water can be delivered at the "time of need," not after the irrigation season only. R. Vol. 3 at 593 ("Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the time of need, the purpose of allowing junior ground water users to continue to divert by providing water for mitigation is defeated. Members of the SWC should have certainty entering the irrigation season that mitigation water will be provided at the time of need, or curtailment of junior ground water rights will be ordered at the start of the irrigation season").

Further, the Hearing Officer addressed this exact point:

> When a determination is made that surface water users are suffering material injury from ground water pumping, they are entitled to curtailment or replacement water ***in the season of injury***. The theory underlying predicting material injury and allowing replacement water as mitigation instead of requiring curtailment ***is that the replacement water will be provided in time and in place in stages comparable to what would occur if curtailment were ordered.***

R. 7112-13 (emphasis added).

Idaho's constitution, water distribution statutes, CM Rules, and established case law all require "timely in-season" administration. *See* IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602, 607; CM Rule 40; *AFRD#2*, 143 Idaho at 874 ("We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that the drafters intended that there be ***no unnecessary delays in the delivery of water*** pursuant to a valid water right") (emphasis added); *see also*, *A&B*, 315 P.3d at 841-42 ("timely and expeditious manner . . . [Rules] require that such plan identify ***prospective means*** by which ***water will be provided in order to prevent material injury***") (emphasis added).

The Department's current argument and its effort to allow injury to only be determined at the end of the season would render most of the Methodology Order meaningless. Moreover, it would essentially preclude conjunctive administration altogether. The circuitous reasoning to only evaluate material injury at the end of the irrigation season has no legal basis and should be soundly rejected.

The Coalition respectfully requests the Court to deny the Department's response on this issue and set aside Steps 3 and 8 and the order's provision that wrongly prevents mitigation to a senior's increased injury during the irrigation season.

III. The Timing of Delivering Mitigation Water Does Not Comply with Idaho Law.

Steps 6 – 8 identify the "Time of Need" and the requirement to deliver mitigation water to injured senior water users. In its opening brief the Coalition addressed the problems with this vague and problematic standard, and how the Director has arbitrarily applied it to the detriment of senior rights. *See Coalition Br.* at 43-49; *see also, Jenkins,* 103 Idaho at 388. Rather than require delivery of water to a "crop in progress" or "when needed during a time of storage," the Methodology Order forces seniors to exhaust storage supplies and wait until nearly September to receive any mitigation.[10] The unnecessary delay does not satisfy Idaho law or even the plain language in the Methodology Order. *See* CM Rule 40.01.b; 43.03.b; *AFRD#2*, 143 Idaho at 874 ("a timely response is required when a delivery call is made and water is necessary to respond to that call").

The Department argues the delayed schedule is permissible under its "total water supply" theory, or the new effort to combine in-season and reasonable carryover injury together. *See IDWR Br.* at 41. Further, the agency mischaracterizes the Coalition's argument. *See id.* at 42. Contrary to IDWR, the Coalition does not claim that it "should not be required to use some of their storage supplies prior to seeking mitigation or curtailment" or that "storage should not be considered part of the Coalition's in-season supplies." *Id.* Again, this is a fabricated straw-man. The Coalition members use both natural flow and storage water rights to varying degrees. Each member's reliance on storage varies depending upon the irrigation year and available water. The Hearing Officer described these differences. R. 7057, 7104. The Coalition accepts the fact that when junior natural flow rights are curtailed storage must be used to continue water deliveries. R. 7070 ("By July 8, 2007, only Twin Falls Canal Company and North Side Canal Company

[10] Certain crops like small grains are typically already harvested by this date. As such, untimely mitigation does not satisfy the senior's right to water.

were diverting form natural flow. All other SWC members were dependent upon their storage water").

While storage is part of the in-season irrigation supply, the law does not require exhaustion of that right prior to seeking or receiving mitigation for injuries caused by junior groundwater use. Further, a senior's injury is not just evaluated at the end of the year. Former Director Dreher acknowledged this fact by requiring mitigation for reasonable carryover storage "up front" and explaining that injury was not predicated upon exhausting available storage. Tr. Vol. I, p. 83, lns. 5-9 (2008 Hearing). The agency's current argument defeats timely administration and eviscerates the legal presumptions and burdens of proof required by Idaho law. After all, if injury is only shown at the point when reasonable carryover is used or depleted, then what is the point of Steps 1-8 and analyzing RISD during the irrigation season? The Hearing Officer rejected this theory and found the following with respect to injury to both in-season demand and carryover storage:

> Times of shortage call the CM Rules into play. The evidence in this case establishes that during recent periods of water shortage ground water pumping has affected the quantity and timing of water available to SWC members. Natural flow rights have been exhausted earlier and storage has been used earlier and more extensively, limiting the application of water during the irrigation season ***and*** diminishing the amount of carryover storage to which the surface water users are entitled.

R. 7076-77 (emphasis added).

The Department's argument slips into the trap of only analyzing injury at the end of the irrigation season, a claim soundly rejected by the Hearing Officer. *Id.*, *see also* R. 7106. While diminished reasonable carryover is an injury, it is only one kind of injury. In-season injuries also occur. R. 7066 ("Junior water pumping caused material injury to senior surface water irrigators affecting natural flow and storage rights"); R. 7076 ("A hindrance to reasonable carry-over

storage constitutes material injury"). Accordingly, the Coalition has a right to sufficient water to meet both in-season irrigation demands and the right to reasonable carryover storage.

The Department offers no legal support for its failure to timely deliver mitigation water even under the terms of the Methodology Order. Although the order provides that the Director will re-evaluate the Coalition's water use demands, issue a revised forecast supply, and estimate the time of need "approximately halfway through the irrigation season," the Director has failed to do so. The Department claims this is justified because "approximately" does not mean "exactly." *IDWR Br.* at 43. The Court should reject the Department's semantic dodge. If the term "halfway" has any relevance and meaning at all then it must be honored. Although the "halfway point" of the defined irrigation season is mid-July, the agency claims that the end of August is close enough because of the "approximately" qualifier. *Id.* at 44. Such lax timing may work for the Department personnel in Boise, but it is inadequate for purposes of operating large irrigation projects on the ground and it provides no water. Whereas the Coalition managers must monitor supplies and make delivery decisions in advance of running out of storage, waiting until the end of August, near the end of the irrigation season is not timely as it has forced these entities to curtail water deliveries in-season. *See Coalition Br.* at 47-49.

In sum, the Methodology Order fails to require the delivery of mitigation water at a time when it is needed during the irrigation season. The Court should set aside Step 8 and remand it to the Department with instructions to follow the Supreme Court's process in *A&B.*

IV. The Reasonable Carryover Provision Violates the CM Rules and Fails to Require Timely Mitigation to Protect Against or Prevent Injury.

The Department disputes the Hearing Officer's findings and conclusions regarding the timing of providing mitigation to a reasonable carryover injury.[11] The former Director and Hearing Officer agreed that mitigation for an injury to reasonable carryover must be provided in the year juniors propose to pump out-of-priority, not in the future. The Hearing Officer was clear on this point:

> The logic of the ground water users' position is that it is a question of timing and that it places the issue of curtailment or mitigation in the actual year of shortage, not in a prospective analysis that might never develop if there is sufficient water in storage to meet irrigation needs. ***However, the position advocated by IGWA and Pocatello runs contrary to the Conjunctive Management Rules, the decision of the Idaho Supreme Court, and the history defining the purposes of the elaborate BOR reservoir system.***

R. 7106 (emphasis added).

Former Director Tuthill erroneously reversed course in the 2008 Final Order. R. 7384-86. Instead of requiring mitigation for reasonable carryover up front, he concluded that carryover injury could be addressed the following spring. R. 7391. The District Court, however, rejected this approach on appeal:

> . . . Ultimately, the prior appropriation doctrine is turned upside down. Therefore, ***unless assurances are in place that carry-over shortfalls will be replaced if the reservoirs do not fill***, the risk of shortage ultimately falls on the senior. As such, the very purpose of the carry-over component of the storage right – insurance against risk of future shortage is defeated.
>
> Accordingly, ***the Court concludes that the Director abused discretion in failing either to order curtailment in the season of injury or alternatively require a contingency provision to assure protection of senior right in the event the reservoirs do not fill.***

R. 10,094 (emphasis added).

[11] This argument contradicts the fact the Director did not accept the Hearing Officer's findings on the timing of reasonable carryover. R. 7384-86. If the Hearing Officer agreed with the Department's current argument then there would have been no reason for the Director's changed ruling in the 2008 final order.

The Supreme Court affirmed the District Court's holding on this issue:

> The district court held that the Director abused his discretion because he failed to require mitigation of material injury to reasonable carry-over storage in the season in which the injury occurs.
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> 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. . . .
>
> We affirm the district court's holding that the Director abused his discretion by failing to approve a mitigation plan that provided contingency plans by which junior water right holders would ensure that material injury would not occur to the seniors' carry-over storage rights.

315 P.3d at 841-42.

The above findings all query "where's the water" and have no meaning unless the Director evaluates reasonable carryover up front and either orders curtailment or mitigation and contingency plans in "the season of injury." Stated another way, if a senior is predicted to suffer injury to its reasonable carryover supply, the juniors must show how they will mitigate or "prevent" that injury or else face curtailment in that season. This is the process required by the CM Rules and the Supreme Court. *See* CM Rule 40.01; 43.03.c; *A&B*, 315 P.3d at 841-42.

The Department ignores the existing law and claims mitigation does not have to be provided "in the same year." *IDWR Br.* at 48. The Methodology Order wrongly reverses the requirement to mitigate reasonable carryover injury in a timely manner, before juniors pump out-of-priority. This change in agency position, without a supporting rationale, is arbitrary and capricious. *See Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 114 (2002).

Moreover, addressing shortfalls to carryover injury the following year would preclude ordering curtailment in the year when the carryover injury occurs. After all, it is injury to "carryover" storage, not the following year's in-season supply that is the focus of the analysis. If mitigation to reasonable carryover (i.e. real water) is not secured up front to "prevent" injury to the senior's reasonable carryover supply, the only other option available to the Director is to order curtailment of junior ground water rights. CM Rule 40.01. However, curtailment in November or the following year is untimely administration and does not remedy the past injury. The Department provides no legal justification for this conundrum.

In addition to failing the requisite timeframe required by law, the Methodology Order's carryover equation also fails to comply with the CM Rules. *See* CM Rule 42.01.g. Notably, the Director under-predicts the Coalition's needed carryover to protect against future dry years. First, contrary to the Department's arguments, the order's calculation of subtracting the 2002/04 average supply from the 2006/08 average baseline year does not protect the Coalition's senior storage rights. The Hearing Officer ruled that "the element of storage as insurance against severely dry weather conditions remains a legitimate objective. SWC members have invested in major facilities to deliver water to irrigators based on an expectation that the storage system would achieve its purpose of providing water when needed when weather conditions are unkind." R. 7110. The Director's analysis fails this standard and does not apply the criteria in the CM Rules. The rule requires consideration of "average annual rate of fill" and the "average annual carryover for prior comparable water conditions." CM Rule 42.01.g. The Department claims the rule's factors are just "guidance" and that the Director applied them in the order's analysis. *IDWR Br.* at 52. However, a careful review of the Director's equation shows the

Methodology Order simply recites or gives lip service to the rule rather than actually applying it. Simply restating a rule does not mean it is substantively applied.

A review of the evidence in the record shows the Director's "reasonable carryover" quantities are not reflective of the Coalition's "average annual carryover for prior comparable water conditions":

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

R. Vol. 3 at 586, 588.

The Department does not dispute the above numbers or the shortage created by the Director's "reasonable" carryover quantities. Instead, the agency reverts to claiming the Coalition is only seeking to secure mitigation for "the full amount" of its storage water rights "regardless of the likelihood of need."[12] *IDWR Br.* at 56. To the contrary, the above quantities are an "average" over prior comparable water years, they do not represent the Coalition's "full storage rights." Furthermore, the Department offers no response to the facts in the record, and the testimony of the Coalition managers regarding the need for carryover storage and how it protects their shareholders and landowners against future dry years or "unkind" weather conditions. *See Coalition Br.* at 61.

Finally, the example of a 2012/13 average baseline year minus a 2007/13 average supply shows actual carryover needed to protect against "severely dry conditions," which the Hearing

[12] Unable to address the facts or law, the Department repeatedly resorts to attacking this "straw-man" argument throughout its response. Again, the Court should reject the agency's mischaracterization of the Coalition's appeal.

Officer concluded was a "legitimate objective." *See id.* at 64; R. 7110. While the Department alleges that such dry year scenarios would invite "hoarding," the agency cannot dispute the possibility of multi-year droughts (i.e. 2001-2005, *see* R. 7053), or the fact the Coalition has increased water demands in such years. *See infra*, n. 23; Attachment A.

In sum, any action that would diminish a senior's right during times of shortage, including an arbitrary reduction in reasonable carryover storage, is unlawful and must be rejected. *See Lockwood*, 15 Idaho at 398; *Jenkins*, 103 Idaho at 388. The Methodology Order does not provide either a lawful quantity or timing with respect to mitigating reasonable carryover injury. Consequently, the Department's failure to comply with the CM Rules and honor the Coalition's right to reasonable carryover storage in timely manner should be set aside.

V. The Supplemental Groundwater Use Provision in Step 1 is Not Supported by the Law or the Record.

The Respondents all support the Director's consideration of supplemental groundwater use to reduce surface water delivery to the Coalition. *See IDWR Br.* at 61, *IGWA Br.* at 17; *Poc. Br.* at 4. However, they cannot escape the Hearing Officer's conclusion on this issue and the fact no party challenged it on appeal. The law of the case doctrine precludes the Director from changing this decision. Further, each Respondent misreads the CM Rules and fails to acknowledge what a private "supplemental" ground water right means for purposes of water use. Finally, each admits there is no substantial evidence in the record to support such a finding. Accordingly, under well-established administrative law, such an agency finding is clearly erroneous and must be reversed. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008).

The Department claims that private supplemental groundwater use has always been considered part of the Coalition's water supply. [13] *IDWR Br.* at 61. However, the agency can point to no specific facts in the record to support this proposition. Indeed, when questioned at hearing, former Director Dreher testified that such information was not considered, and that it would have likely been inconsequential anyway. Tr. Vol. II, p. 449, lns. 16-24 (2008 Hearing). The Hearing Officer made no specific findings and noted the former Director found it to be "minimal in effect." R. 7057. No party, including the Department, appealed this issue to district court. As such, the parties are bound by this prior finding – the Director cannot change it through the Methodology Order. *See Taylor v. Maile*, 146 Idaho 705, 709 (2009).

Next, the Department argues that private supplemental ground water rights are part of the canal company's or irrigation district's "existing facilities and water supplies" because the entities themselves do not "use" water. *IDWR Br.* at 62. Contrary to the agency's view, a canal company cannot dictate how a private supplemental ground water right is used. Further, the private right is not available for the canal company's overall water supply for use by others throughout the irrigation project.[14]

Moreover, authorized "supplemental" groundwater use is conditioned upon an insufficient surface water supply. Stated another way, "supplemental" rights cannot be pumped

[13] The Department even tries to fault the Coalition for the lack of evidence in the record. It's an odd argument for the agency in charge of water resources in this state and who issued the groundwater rights in the first place to claim that individual canal companies and irrigation districts should know who holds private ground water rights within their projects. IDWR is the entity that has records for this information. *See* I.C. §§ 42-202, 219. Moreover, since the Director issued recommendations for all water rights, including the Coalition's, in the Snake River Basin Adjudication, the Department has no legal or factual basis to claim that cataloging and supplying private supplemental ground water right information is the Coalition's responsibility.

[14] The Department's and Pocatello's arguments about irrigated acres are misplaced. The Coalition submits irrigated acreage information under Step 1 (which the Director has arbitrarily refused to use). If a shareholder or landowner is entitled to receive surface water and will irrigate with that water, the Coalition cannot refuse to deliver surface water to that user just because she may also own a supplemental ground water right. Further, supplemental ground water rights are not "primary" in the sense they can be used all irrigation season, regardless of surface water delivery. The Respondents' efforts to further reduce the Coalition's senior surface water rights should be rejected.

all season as if they were primary ground water rights. Therefore, the supplemental right is not available for an entire irrigation season to discount surface water use on those lands. Moreover, if a water user is delivered sufficient surface water the Director has no right to force that individual to go to the expense of pumping his or her individual well which would further deplete the groundwater resource.

Finally, in addition to failing to support the supplemental ground water use provision, the Department fails to justify the "arbitrary" groundwater fraction.[15] *See Coalition Br.* at 29-30. Although no information was presented at hearing, the Methodology Order arbitrarily grabs a random citation to a model design document in support. The Department confuses the issue and alleges the Coalition is challenging the Director's use of the groundwater model (ESPAM). *See IDWR Br.* at 63. This is simply not true. The Coalition supports the use of ESPAM to administer junior ground water rights.[16]

However, the model has nothing to do with the lack of information concerning supplemental ground water use on the Coalition projects. That is the very point. There is no evidence to support the Director's decision on this matter. Since the Director has no specific facts in the record to support his decision, he instead cites a model design document which admittedly set "arbitrary" fractions for various Coalition entities at 30% (AFRD#2, BID, MID, NSCC, and TFCC). *See Coalition Br.* at 30. The document further assigned groundwater fractions of 50% to Milner and 95% to A&B, again without any supporting facts in the record. The model's design document and its water budget for calibration are not reflective of the use or non-use of supplemental ground water rights on the Coalition projects. Since the Department

[15] IGWA and Pocatello offer no response on this point and do not attempt to justify the Director's arbitrary groundwater fractions.

[16] The Hearing Officer also described how the model was used: "After the Director made a determination of the amount of material injury to the surface water users caused by ground water pumping, the ESPAM was used to determine the priority date for curtailment that would remediate the material injury." R. 7079.

can identify no substantial evidence to support its finding, the decision is clearly erroneous and must be set aside. *See Galli,* 146 Idaho at 158.

Finally, one cannot help but notice the irony of the Department's suggestion that if junior ground water depletions have injured and reduced senior surface water supplies, the agency's administration suggests there is a solution in additional groundwater use. The supplemental ground water provision in Step 1 is contrary to law and is not supported by any substantial evidence in the record. The Court should reverse and set aside this provision accordingly.

VI. The Department Provides No Justification for the Director's Failure to Use the Most Current Irrigated Acreage and NASS Crop Distribution Data.

IDWR disputes the Coalition's challenges with respect to Steps 1(irrigated acreage) and 2 (improper use of NASS data). *See IDWR Br.* at 64, 69. In its opening brief the Coalition explained how the Director misapplied the stated methodology by not using the irrigated acreage information submitted by the various canal companies and irrigation districts. *See Coalition As Applied* at 33-37. Further, the Coalition described how the Director relied upon outdated crop distribution data, inconsistent with the most updated information. *See Coalition Br.* at 31-33. Each mistake resulted in underestimating the water needed for beneficial use on the Coalition members' irrigation projects. The Department has no meritorious response for these errors.

A. The Director Arbitrarily Ignored the Coalition's Irrigated Acreage.

First, the Department claims that BID, MID and TFCC did not submit irrigated acreage "shape files" in 2013. *See IDWR Br.* at 70. To the contrary, BID and TFCC submitted irrigated acreage "shape files" to IDWR on March 26, 2013. *See* R. Vol. 4 at 827-28.[17] Further, MID also submitted irrigated acreage "shape files" by email in 2012, and as provided by the order,

[17] *See also, 20130329 BID & TFCC Folder* (in Bates Stamped OCR Docs) (Agency Record Disc 1).

represented that the acreage had not changed by more than 5% in 2013. R. Vol. 4 at 726-27.[18] Accordingly, the Department's claims are yet again not supported by the agency record.

IDWR's only other response on this point is a reference to the Methodology Order itself. *See IDWR Br.* at 70-71. The Department claims that in the absence of a shape file submittal, "the Department will determine the total irrigated acres based upon past year cropping patterns and current satellite and/or aerial imagery." *Id.* However, the Department has made no such determination. The acreage numbers IDWR used in 2013 are not based upon a review of 2012 cropping patterns or "current" satellite or aerial imagery. As detailed in the opening brief, IDWR wrongly relied upon exhibits presented at the 2008 hearing to set irrigated acreage for BID, MID, and TFCC. *See Coalition As Applied Br.* at 35. Accordingly, the Department did not even follow its order as claimed. If so, the 2012 cropping information and "current" aerial imagery would have been used. The information in the exhibits does not match what the Hearing Officer found[19] and is contrary to the most current and best available information submitted by BID, MID, and TFCC. *See* R. Vol. 4 at 823, 827-28.[20]

In sum, the Department's implementation of Step 1 in 2013 is arbitrary and capricious and should be set aside. The Coalition followed the requirement and submitted irrigated acreage "shapefiles" that were wrongly ignored by the agency. IDWR had no basis to rely upon outdated information presented at the 2008 hearing that was contrary to the Hearing Officer's findings and contrary to the best information submitted by the Coalition members. The Court should reverse the Director's actions accordingly.

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[18] *See also, 20120316 MID Folder* (in Bates Stamped OCR Docs) (Agency Record Disc 1).

[19] Even using the Hearing Officer totals, the total irrigated acreage would have been: BID (47,622 – 2,907 = 44,715; MID (75,152 – 5,008 = 70,144); TFCC (198,632 – 6,600 = 192,032). R. 7100; *see also, Coalition As Applied Br.* at 35-36.

[20] *See also, 20130329 BID & TFCC Folder, 20120316 MID Folder* (in Bates Stamped OCR Docs) (Agency Record Disc 1).

B. The Director Improperly Used Outdated NASS Crop Distribution Data.

With respect to NASS crop distribution data used in Step 2, the Department erroneously mischaracterizes the Coalition's argument. *IDWR Br.* at 64. The Coalition identified the errors in the data that must be corrected and supplemented in order to accurately capture current crop distributions on their irrigation projects. *See Coalition Br.* at 31-32. While the federal data provides a base of information that can be considered, it is not the only source when determining what crops are grown on the Coalition irrigation projects in a given year.

The most glaring error in the Methodology Order's use of NASS data is the reliance upon a 1990-2008 average crop distribution.[21] The reliance upon 20+ year-old crop data fails to capture the increase in more water consumptive forage crops, particularly alfalfa and corn. This error has a real impact on the calculation of needed water. Indeed, when comparing bean acreage from 2004 (the last year reported) with the average of all years, it shows a 40% reduction. R. Vol. 2 at 304. On the other hand, alfalfa for the same comparison shows a 10% increase. *See id.* When overlaid on 2007 ET data, the result is a required irrigation diversion increase of 23,400 acre-feet on the TFCC project. *See id.* Accordingly, the Director's reliance upon outdated average has significant and substantial errors when evaluating "real water" implications for injury and mitigation requirements. Moreover, while the Director limited the consideration of years post 1999 "to capture current irrigation practices" to select a baseline year, he did not apply the same reasoning to a review of cropping patterns. R. Vol. 3 at 569. This type of inconsistent and arbitrary decision-making should be rejected. *See* I.C. § 67-5279(3)(e).

[21] An example of the crop mix resulting from the NASS data analysis is included in the "Crop Water Need" tab in the "DS_&_RISD Calculator" spreadsheet found in the "IDWR 11-30-2010 Background Data" subfolder in the "Bates Stamped OCR Docs" folder on Disc 1 of the agency record. The NASS data itself is the "Crop Area Data" spreadsheet in the "IDWR 4-20-2010 Supplied Background Info" subfolder in the "Bates Stamped OCR Docs" folder on Disc 1 of the agency record.

The second major problem with the methodology is the Director's decision to "not include years in which harvested values were not reported." R. Vol. 3 at 580. A review of the "Crop Area Data.xlsx" spreadsheet shows consistent data were reported in all selected counties in the early part of the 1990 – 2008 period but more data are missing in the later part of the period. *See* "IDWR 4-20-10 Supplied Background" subfolder in "Bates Stamped OCR Docs" folder on Agency Disc 1. The lack of data in the more recent years biases the averages used by the Director toward the crop mix in place early in the period making the result less representative of current cropping patterns and further skews the results since the missing data are not consistent from county to county. This creates uncertainty in what the county averages used by the Director actually represent. NASS data are reported every year and with the availability of CropScape the crop mix for individual Coalition member projects can be assessed without relying upon county averages. The failure to use the best available information on this factor is arbitrary and should be set aside as well.

Finally, the Department misses the point on the consideration of additional information. Contrary to its representation, the agency has never relied upon NASS data "from the current season." *IDWR Br.* at 64. Moreover, the Methodology Order admits that "[i]n the future, the NASS data may not be the most accurate source of data." R. Vol. 3 at 580. While the Coalition managers have advised the Department of changes in cropping patterns to increased forage crops, the Director has wrongly ignored such information. R. 4432-4495; 4502-4537. Specifically, TFCC's manager confirmed the changes shown in the NASS data as he had witnessed "additional acreage in corn and alfalfa" planted in 2007. R. 4467. The Director's refusal to consider such information further violates the procedure articulated by the Supreme

Court in *A&B*. 315 P.3d at 841. At a minimum the Director should consult with the managers and consider information submitted from those working on the ground.

Whereas the Director is required to consider the Coalition's information on irrigated acreage, the same standard should apply to crop distribution data as well. The Court should require the Director to modify the Step 2 procedure accordingly.

VII. The Director's Analysis of Groundwater Rights Outside the CM Rule 50 Area of Common Ground Water Supply is Erroneous and Should be Set Aside.

The Department claims the CM Rules require the Director to reduce the groundwater acres subject to administration. *IDWR Br.* at 65. The agency bootstraps its "model run" argument in support of its theory. *Id.* Further, the Department argues that because the Rule 50 "area of common ground water" falls within the larger ESPA boundary, that requires the Director to "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." *Id.* at 66. Contrary to the Department's claim, the larger model boundary does not excuse the Director's erroneous reduction of calculated demand shortfalls, and corresponding mitigation obligations.[22]

The Department's error is grounded in its flawed theory that the "model run identifies those junior ground water rights injuring the senior surface water user's supply" and "the water users that impact the senior surface water users." *IDWR Br.* at 65-66. To the contrary, the

[22] The Department further misrepresents the status of the petition to amend Rule 50 pending before the agency. There are no negotiations "currently ongoing." *IDWR Br.* at 65, n. 44. Clear Springs Foods filed a petition in 2010 requesting an update to the aquifer boundary which was based upon a map created in 1992. While the Department held various meetings and accepted comments, it has not taken any formal action on the petition or conducted any negotiations with parties that have submitted comments. The Department initially delayed consideration of the petition due to the update of ESPAM taking place in 2011-12. Once ESPAM 2.0 was released the agency still delayed consideration of the petition. Counsel for the Coalition wrote the Director in August 2013 requesting action, which prompted additional meetings and comments. http://www.idwr.idaho.gov/WaterInformation/GroundWaterManagement/Petition/documents.htm. However, the Department has not initiated any negotiations as of the filing of this reply brief.

Director identifies predicted injury by the simple formula of comparing a forecasted supply to the baseline year demand. R. Vol. 3 at 568 ("In-season demand shortfalls will be computed by taking the difference between the RISD and forecast supply").

The Director only uses the model to determine which groundwater rights would need to be curtailed if the demand shortfall was not mitigated. R. Vol. 3 at 599. The Hearing Officer described this process:

> 2. **The ESPAM was used to determine a curtailment date that would supply the amount of water in the Near Blackfoot to Minidoka reach that the former Director had determined to be material injury.** After the Director made a determination of the amount of material injury to the surface water users caused by ground water pumping, the ESPAM was used to determine the priority date for curtailment that would remediate the material injury.

R. 7079 (emphasis in original).

The fundamental error is the Director's incorporation and use of the ESPA model boundary in his analysis "to determine the priority date necessary to produce the necessary volume." R. Vol. 3 at 599. Contrary to the Department, Rule 50 does not require the Director to take any additional steps or "trim" out any effects of junior ground water users it simply identifies the "area of common ground water supply." *See* CM Rule 50.01. Since the Director is limited to administration of ground water rights within the Rule 50 boundary that is the only set of water rights he is authorized to analyze. The Department's use of the model to arbitrarily reduce the demand shortfall produced through curtailment is not supported by the law or facts and prejudices the Coalition.

Contrary to IDWR's argument, this issue is not about a proper application of the model. *IDWR Br.* at 66. Moreover, any resulting effects on junior groundwater users inside the area of common ground supply are irrelevant. Indeed, since the Director admits he cannot administer junior ground water rights outside the Rule 50 boundary, then those rights should not be

considered at all. R. Vol. 3 at 599. The Department claims it would "artificially" increase the burden on juniors within the Rule 50 boundary by excluding juniors outside the area. *IDWR Br.* at 67. Yet, the Department has no problem reducing water provided to meet the Coalition's demand shortfall through curtailment in return.

It is simply erroneous and arbitrary to consider those rights when identifying a priority date to curtail in the first place. This error artificially reduces the water that would be supplied through curtailment. Although IDWR admits it can limit the application of the model to rights within the area of common ground water supply to fully mitigate any projected demand shortfall, it has refused to do so. Tr. Vol. I, p. 118, lns. 10-15 (2010 Hearing). Since the Department has the tools and ability to perform the correct analysis, it has no justification for the errors in the Methodology Order.

Consequently, the provisions in Steps 4 and 10 that consider junior rights outside the Rule 50 area of common ground water supply to the detriment of the Coalition are erroneous and should be set aside.

VIII. The Department Has No Justification for the Arbitrary Step 10 Reduction to the Juniors' Reasonable Carryover Obligation.

The Department admits the failures of the Step 10 alternative modeling analysis. *IDWR Br.* at 67. Specifically, the Department acknowledges that its reliance upon the constitution (Art. XV, § 7) and Idaho Code § 42-226 was erroneous in light of existing Supreme Court precedent. *See id.* However, despite its error, the agency now claims for the first time on appeal that "phased in curtailment" justifies the juniors' reduced mitigation obligation. *Id.* at 68. This new reason should be rejected by the Court as it is not supported by the Methodology Order or the record.

The Department has never adopted a "phased in" curtailment approach in this matter, which even if had been used, is limited to "not more than a five-year (5) period," not the 20-year transient approach used in the Step 10 order. R. Vol. 6 at 1065. Accordingly, Department counsel's post hoc justification in the response brief does not absolve the order's error on this issue. *See e.g. Oregon Natural Desert Ass'n*, 531 F.3d at 1141 ("The short — and sufficient — answer" to the BLM's argument, therefore, "is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action." "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (internal citations omitted).

Whereas it is undisputed that Step 10 reduces the senior's right to mitigation for an injury to reasonable carryover storage, the order's "alternative" model exercise violates the CM Rules and Idaho law. The Department admits that its legal justification for the new modeling approach is flawed. *See IDWR Br.* at 68. Since neither the constitution nor I.C. § 42-226 supports reducing mitigation owed for an injury to carryover storage, Step 10 should be reversed and set aside. If injury is predicted to a reasonable carryover supply, then affected juniors must mitigate the injury in order to pump out-of-priority that year. *See* CM Rules 40.01; 43. If the injury is experienced, then the mitigation water must be delivered to the seniors so that it can be carried over for use in "future dry years." CM Rule 42.01.g.

Since Step 10 violates the rules and Idaho law it should be reversed and set aside. The Coalition further requests the Court to remand the order back to the Department with instructions to follow the Supreme Court's administrative process and provide full mitigation for any reasonable carryover injuries up front.

IX. The Director Violated the Coalition's Right to Due Process.

The Department disputes the Coalition's due process argument on the theory that the hearings in 2008 and 2010 were sufficient. *IDWR Br.* at 69. The agency does not address the statutory right to a hearing on any "action" or "decision" by the Director. *See* I.C. § 42-1701A(3). The Coalition requested hearings on the Director's application of the Methodology in both 2012 and 2013. R. Vol. 4 at 743; Vol. 5 at 860. The Director denied these requests without any legal basis. While the Coalition requested the opportunity to provide updated data and the best available science regarding hydrologic and climatic conditions, the Director arbitrarily refused to consider such information. R. Vol. 4 at 757; R. Vol. 5 at 890-91; R. Vol. 6 at 1040-41. The Director fails to recognize the order's own language on this issue. R. Vol. 3 at 568 ("The methodology for determining material injury to RISD and reasonable carryover should be based on updated data, the best available science, analytical methods, and the Director's professional judgment as manager of the state's water resources").

The 2008 and 2010 hearings did not address the Director's implementation of the Methodology Order in 2012 and 2013. Accordingly, the Director's reference to these prior hearings is irrelevant as they did not consider the unique factual conditions of those particular irrigation seasons. Since the Director foreclosed the Coalition members from providing updated information, he violated the plain language of I.C. § 42-1701A(3) and denied their right to due process. *See Friends of Minidoka v. Jerome County*, 153 Idaho 298, 311 (2012). Furthermore, such action violated the administrative process set forth by the Idaho Supreme Court in *A&B* as well. *See* 315 P.3d at 841 ("party making the call shall specify the respects in which the management plan results in injury to the party. While factual evidence supporting the plan may

be considered along with other evidence in making a determination with regard to the call, the plan by itself shall have no determinative role") (emphasis added).

In sum, the Director denied the Coalition's right to due process and those decisions should be reversed and set aside accordingly.

X. The Methodology Order's In-Season Administration Injures the Coalition and is Not Cured By After-the-Fact Calculations.

The Department claims there was no un-mitigated injury 2013 based upon the Director's post-season review of the year. *IDWR Br.* at 28. Pocatello also alleges the in-season injury was remedied by the calculations at the end of the year. *Poc. As Applied Br.* at 3-4. The arguments are wholly based on the after the season review, not what was happening on the ground when water needed to be delivered.

While IDWR admits the injury determination of 105,200 acre-feet as of late August, after the Coalition members had already curtailed deliveries to their water users, the agency claims the 14,200 acre-feet of mitigation was a "windfall." *Id.* at 30. Such claims brush aside the in-season injuries and provide no solace to the irrigators whose deliveries were curtailed during the irrigation season. While junior groundwater users reaped the benefit of the mitigation cap established in April, seniors were forced to curtail deliveries in July. *See Coalition As Applied Br.* at 40-41.

The Department claims there was no "actual material injury" to "in-season demand" in 2013 after the fact. To the contrary, the Department overestimated the 2013 forecasted water supply in April and underestimated the Coalition members' actual demand. Whereas TFCC and AFRD#2 curtailed deliveries to their water users during the irrigation season, the Director's promise of 14,200 acre-feet to TFCC was no remedy to the injury they suffered. Further, a review of the background data from 2010-2013 shows the Director consistently over-predicts

supply and under-predicts the Coalition's irrigation demands based on the after-the-fact review of RISD, or what the Department relies upon to support its response.

Contrary to the current claims, the Methodology Order does not provide the Coalition members with a reasonable water supply required for irrigation use. The post-hoc review of the 2013 irrigation season makes it appear acceptable that the 100,000 acre-feet shortfall mid-season is acceptable so long as a miracle happened and there was not a shortage, in the Director's view, at the end of the season. *IDWR Br.* at 17.

However, there was no miracle, instead Coalition members shorted the water supply to their irrigators to preserve water in order to finish the season and their crops, no doubt with reduced yields. *See Coalition Br.* at 40-41. The fact is, in 2013 the Director's methodology overestimated the available water supply for 6 of the 7 Coalition members by over 119,000 ac-ft and nearly as much in 2012 for just 4 of the members.[23] The failure to adjust for reduced water supplies is not a "windfall," rather it is a pattern of consistent over-prediction of supply that never materialized. Further, it's similar to 2007 when the former Director refused to adjust to the injury of Coalition members. R. 7092-95. Such action "runs contrary to the presumptive right" and in effect unlawfully "readjudicates" the senior's water right. R. 7095.

Despite the present assertion that the Methodology Order "'purposefully underestimates' the Coalition's expected water supply" the methodology has overestimated the actual water supply in half the years. *IDWR Br.* at 20. This evidence is not a record that builds confidence for those relying on the methodology to protect their senior water rights.[24]

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[23] All data was retrieved from the "RISD & DS Calculator" tab of the "DS RISD Calculator" excel spreadsheet found in "IDWR 11-27-13_November Background Data" subfolder in the "Bates Stamped OCR Docs" folder on the Agency Disc 1.

[24] The Department's claims that "The irrigation season the following year, 2013, was similar to 2012 but when 2012 data was [sic] incorporated into the 2013 forecast revision, the result was to overestimate material injury by an even greater margin that it has underestimated in 2012" demonstrates the agency's apparent lack of understanding of the

In addition, the after-the-fact evaluation of RISD does not take into account actual delivery conditions during the season. Properly applied, with the correct irrigated acreage and updated crop distribution data (*see supra* Part VI), the RISD can be a useful tool to predict the amount of water needed by the Coalition members for in-season irrigation purposes. However, to be effective, the water must be available and delivered at a meaningful time for the Coalition's planning and actual deliveries to its water users. The Director's decision to delay the revaluation until the end of August in 2013 far exceed the "halfway" point in the irrigation season and failed to provide meaningful mitigation to Coalition members that were forced to curtail weeks before that time.[25] *See Coalition Br.* at 47-49. The after-the-fact calculations only illustrate the shortages that occurred, and provide no substitute for timely mitigation during the season.

Further, it's undisputed that the Methodology Order wholly relies upon the use of a "baseline year" concept for purposes of establishing and ordering mitigation. Now that the Director has 4 years of experience with his methodology, he should be analyzing how well, or poorly, the initial selection of baseline year and forecast methods define the actual water supply and water needs of the Coalition members. If the Director were to review the RISD's indication of the actual water needs of the SWC for the past 4 years, he would find the selected baseline year for Milner and NSCC has been exceeded by the RISD in all years, and about half the years for A&B, BID, MID, and TFCC. *See supra*, n.23; *see also*; Attachment A. Stated differently, the Director has consistently underestimated the actual crop water needs for the majority of the Coalition in either half or all of the years since 2010.

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methodology. *See IDWR Br.* at 16. The 2013 projection was based on the April 1st Heise forecast, and the 2002/04 average storage accrual after April 1st. R. Vol. 5 at 813-814. If the 2012 data had not been incorporated into the forecast, the estimated material injury would have been 17,390 not 14,200 acre-feet.

[25] The Director also wrongly slashed the in-season mitigation owed to TFCC by more than half to 6,900 acre-feet. *See Coalition As Applied Br.* at 14. The Department erroneously maintains this was acceptable based on the after-the-fact review and the blending of "reasonable carryover" with in-season injury. *See IDWR Br.* at 29.

Notably in 2012 the RISD for every Coalition member exceeded the respective baseline year water supply by a total of over 500,000 ac-ft. *See supra*, n. 23; *see also*, Attachment A. In 2013 the RISD for 6 of the 7 SWC members exceeded their respective baseline year water supplies by a total of over 160,000. *Id.* Accordingly, the after the fact review shows a vastly different picture than what the Department claims were no unmitigated shortfalls. In truth, the Coalition has been forced to curtail water deliveries shorting crop water needs due to the failed methodology procedure.[26] Moreover, while the Methodology Order indicates that baseline years will be reviewed annually so far the Director has refused to look beyond his initial analysis. R. Vol. 3 at 600; *IDWR Br.* at 57-60.

The after-the-fact review of RISD is no substitute for timely administration and delivery of water for mitigation during the irrigation season. Contrary to the Department, there is no "windfall" when irrigators' deliveries are curtailed at the peak of hot and dry year. Whereas the Director has failed to deliver mitigation in a timely manner, in-season injuries have gone unmitigated. This process undeniably does not satisfy what the law requires. *See AFRD#2*, 143 Idaho at 874 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call"). The Court should deny the Department's arguments on this point accordingly.

[26] In 2013 the forecast supply in April was over 119,000 acre-feet greater than the actual water supply and demand was over 80,000 acre-feet greater than baseline year amounts, leaving the Coalition to "find" nearly 200,000 acre-feet to satisfy 2013 water diversions. *See supra*, n. 23; *see also*, Attachment A.

XI. The Department Erroneously Misconstrues the Hearing Officer's Decision as Creating a "Flood Control" Defense, a New Theory Never Previously Applied by the Director or Proven in this Case.

The Department makes a passing reference to an issue that should not go unnoticed by this Court.[27] While flood control releases are not part of the storage "sold or leased" for non-irrigation purposes, the Department nonetheless claims such action should reduce a junior's mitigation obligation. In response to the reasonable carryover issue the Department states the following:

> 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" though 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.

IDWR Br. at 55.

With the above argument the Department attempts to inject the "refill" issue into this case, contrary to its prior findings, and despite the fact no party ever raised this issue as a defense to the Coalition's delivery call.[28] Further, the Department misinterprets *AFRD#2* and the Hearing Officer's decision in support of its new argument.

First, nothing in the Court's *AFRD#2* decision addresses flood control releases or supports a theory that would reduce a junior's mitigation obligation due to protective reservoir

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[27] The issue was not raised by any party either in this appeal on remand, or the underlying appeal (Case No. 2009-551). As such, the Court should deny the Department's untimely attempt to raise it now.

[28] While the Department's present counsel represents the State of Idaho in the Snake River Basin Adjudication (SRBA), and has previously claimed that Idaho is a "one-fill" state, that argument was rejected by Special Master Dolan. *See Order on Motions for Partial Summary Judgment* at 18 (Subcase Nos. 01-2064 et al., Case No. 39576, Twin Falls County Dist. Ct., Fifth Jud. Dist, July 27, 2012). That decision was not appealed by any party, including the State. Despite the denial of the State's Motion for Partial Summary Judgment in the SRBA, the State continues to oppose the Coalition's efforts to ensure storage water rights are protected and that actual water is available for beneficial use on their irrigation projects. *See e.g. Basin-Wide Issue No 17* (In re SRBA, Case No. 39576, Twin Falls County Dist. Ct., Fifth Jud. Dist).

operations. The discussion in *AFRD#2* concerned a facial constitutional challenged to the CM Rules' reasonable carryover provision. The Court, in dicta, referenced a statement at oral argument that some irrigation districts "sell or lease the water for uses unrelated to the original rights." 143 Idaho at 880. However, the Court acknowledged it did not have a factual record to review. The Court denied the facial challenge but noted that "upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out." *Id.* IDWR attempts to read the Court's statement as standing for a proposition that is simply not true.

Next, the Hearing Officer addressed storage water rentals by the Coalition, not the failure to fill storage in the first place due to protective flood control operations. The Hearing Officer addressed the *AFRD#2* comment and made the following findings:

> Consequently, in determining the amount of carryover storage to which the irrigation districts are entitled when curtailment is ordered, ***the amount of water sold or leased for purposes outside the licensed or adjudicated right must not be considered in calculating the shortage.*** The ground water users have no obligation to make up for water that will not be applied to its licensed or adjudicated purpose, e.g. the sale of water for flow augmentation. If the water is sold to another irrigator who has a priority over the ground water users and is applied to a beneficial purpose within the licensed or adjudicated right, the ground water users would be liable for remediation to one surface water holder or the other if the necessity for rentals arose out of ground water depletions.

R. 7108 (emphasis added).

While the Hearing Officer noted that juniors are not responsible for shortages caused by storage sales or leases for non-irrigation uses only, there is nothing to suggest that Reclamation's flood control operations have any effect on the Director's injury determination. The Director forecasts a water supply but does not break down the impacts to that supply caused by individual factors, whether it is junior pumping, drought, or flood control actions.

Indeed, nothing in the Methodology Order absolves juniors on a theory of protective flood control operations either. The Hearing Officer understood the history of the reservoir development and made specific findings with respect to Reclamation's operations:

> The Bureau of Reclamation has partnered with Idaho to promote the State's welfare. It is unlikely that the farm economy of Idaho could have grown and developed without the enormous projects it manages. It has had to transform itself from limited roles to attempt to provide more things to more people who often compete to use the same water – irrigation, flood control, power, protection of fish, endangered species, flow augmentation of what appears to be a growing amount of demand upon the limited amount of water that falls from the sky and becomes subject to management.

R. 7049.

> **4. The Bureau of Reclamation manages a series of reservoirs that were developed to retain water for storage, flood control, and generation of electricity incidental to reservoir releases.** The development of irrigation from the Snake River was accompanied by uncertainties in supplies and the potential for flooding while uncontrolled.

R. 7051 (emphasis in original).

> The attempt to rectify that situation led to the construction of Palisades Dam and Reservoir, primarily as a storage facility for irrigation but combining multiple purposes including power and flood control which reduced the cost to irrigators.

R. 7061.

> **6. In addition to the storage of water for irrigation the BOR has responsibility for flood control** . . . Beyond these obligations there is a need to manage the system to avoid flooding, which at times is inconsistent with holding water for irrigation.

R. 7063 (emphasis in original).

> **a. Flood control releases were greater than anticipated.** Consequently, the earlier expectation that the reservoir would fill did not occur, resulting in 264,546.9 acre-feet of storage less than expected.

R. 7070.

> **8. The ground water pumping at issue in this case developed subsequent to the storage rights under consideration.** Ground water users developed their rights against the background of an existing system that was designed with storage as a primary purpose in coordination with the development of substantial surface irrigation systems dependent upon the storage water. The contractual rights to the storage water were in place when ground water pumpers entered the arena.

R. 7107-08 (emphasis in original).

As detailed above, flood control operations have always been a part of reservoir management, including prior to the appropriation and use of groundwater. Not once in the history of this case did the Hearing Officer or Director indicate that flood control releases were to be discounted from the injury caused by junior groundwater users. While the sale or lease of water for non-irrigation purposes was addressed, that finding does not extend to protective flood control operations beyond the control of the Coalition.

Furthermore, no party raised flood control as a defense to the Coalition's delivery call. As such, the parties are barred from re-litigating this issue and are bound by the law of the case. *See Taylor v. Maile*, 146 Idaho 705, 709 (2009) ("The 'law of the case' doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal").

In sum, the Department wrongly tries to inject new issues into this case that are foreclosed. The Department's misrepresentation of the Hearing Officer's decision should be rejected. Whereas flood control releases do not affect the Director's material injury determination or a corresponding mitigation obligation in anyway, the Department's new argument should be denied.

CONCLUSION

This case is not about "strict priority" only or disregarding "beneficial use." The Coalition members beneficially use water to operate their reasonable and efficient irrigation projects. Their landowners need real water and they need it at a meaningful time in the irrigation season. The call was filed to protect their senior property rights and halt the continued decline of their surface water supplies.

The Methodology Order does not comply with Idaho law, including the Supreme Court's recent mandates set out in *A&B Irr. Dist. v. Spackman.* If the Director follows the clear and timely procedure required by the Court, the problems with the present administration will dissipate.

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

Respectfully submitted this 4th day of August, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of August, 2014, I served true and correct copies of the foregoing **SURFACE WATER COALITION'S REPLY BRIEF (METHODOLOGY and AS APPLIED ORDERS)** upon the following by the method indicated:

SRBA District Court 253 3rd Ave. N. P.O. Box 2707 Twin Falls, Idaho 83303-2707	___ U.S. Mail, Postage Prepaid _✓_ Hand Delivery ___ Overnight Mail ___ Facsimile ___ Email
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Travis L. Thompson

Attachment
A

Summary of SWC Water Supply, Demand and RISD 2010 - 2013

			2010	2011	2012	2013
A&B	**Supply**	**4/1**	**135,571**	**154,569**	**146,420**	**121,805**
		11/1	**152,428**	**169,281**	**131,380**	**117,261**
		11/1 - 4/1	16,857	14,712	-15,040	-4,544
	BLY		**58,492**	**58,492**	**58,492**	**58,492**
	Demand		**52,527**	**53,788**	**62,993**	**62,016**
	RISD		**49,052**	**51,973**	**61,709**	**63,972**
	BLY - Demand		5,965	4,704	-4,501	-3,524
	BLY - RISD		9,440	6,519	-3,217	-5,480
AFRD2	**Supply**	**4/1**	**403,976**	**557,480**	**488,692**	**441,503**
		11/1	**539,947**	**701,749**	**490,168**	**412,067**
		11/1 - 4/1	135,971	144,269	1,476	-29,436
	BLY		**415,730**	**415,730**	**415,730**	**415,730**
	Demand		**431,376**	**427,228**	**451,557**	**401,186**
	RISD		**382,043**	**399,360**	**504,854**	**403,754**
	BLY - Demand		-15,646	-11,498	-35,827	14,544
	BLY - RISD		33,687	16,370	-89,124	11,976
BID	**Supply**	**4/1**	**287,630**	**378,117**	**339,496**	**308,776**
		11/1	**313,302**	**401,872**	**341,590**	**301,400**
		11/1 - 4/1	25,672	23,755	2,094	-7,376
	BLY		**250,977**	**250,977**	**250,977**	**250,977**
	Demand		**231,543**	**219,855**	**252,638**	**249,514**
	RISD		**213,635**	**230,778**	**271,913**	**293,518**
	BLY - Demand		19,434	31,122	-1,661	1,463
	BLY - RISD		37,342	20,199	-20,936	-42,541
MIL	**Supply**	**4/1**	**90,031**	**112,917**	**103,221**	**88,082**
		11/1	**104,320**	**125,771**	**94,162**	**83,891**
		11/1 - 4/1	14,289	12,854	-9,059	-4,191
	BLY		**46,332**	**46,332**	**46,332**	**46,332**
	Demand		**45,470**	**46,935**	**48,742**	**52,562**
	RISD		**46,570**	**48,736**	**55,287**	**50,228**
	BLY - Demand		862	-603	-2,410	-6,230
	BLY - RISD		-238	-2,404	-8,955	-3,896
MID	**Supply**	**4/1**	**452,924**	**584,263**	**529,069**	**474,037**
		11/1	**514,306**	**608,671**	**519,438**	**431,759**
		11/1 - 4/1	61,382	24,408	-9,631	-42,278
	BLY		**362,884**	**362,884**	**362,884**	**362,884**
	Demand		**319,838**	**319,744**	**382,708**	**364,920**
	RISD		**308,708**	**333,424**	**394,855**	**420,257**
	BLY - Demand		43,046	43,140	-19,824	-2,036
	BLY - RISD		54,176	29,460	-31,971	-57,373

Summary of SWC Water Supply, Demand and RISD 2010 - 2013

			2010	2011	2012	2013
NSCC	**Supply**	**4/1**	**1,086,572**	**1,469,576**	**1,295,901**	**1,188,173**
		11/1	**1,348,037**	**1,563,958**	**1,217,109**	**1,156,941**
		11/1 - 4/1	261,465	94,382	-78,792	-31,232
	BLY		**965,536**	**965,536**	**965,536**	**965,536**
	Demand		**995,821**	**963,049**	**1,006,520**	**1,021,802**
	RISD		**1,042,783**	**986,020**	**1,176,554**	**1,005,718**
	BLY - Demand		-30,285	2,487	-40,984	-56,266
	BLY - RISD		-77,247	-20,484	-211,018	-40,182
TFCC	**Supply**	**4/1**	**988,750**	**1,148,127**	**1,073,527**	**1,031,209**
		11/1	**1,064,441**	**1,215,802**	**1,173,413**	**1,128,023**
		11/1 - 4/1	75,691	67,675	99,886	96,814
	BLY		**1,045,382**	**1,045,382**	**1,045,382**	**1,045,382**
	Demand		**1,029,645**	**1,054,435**	**1,089,269**	**1,058,154**
	RISD		**1,013,079**	**1,020,795**	**1,209,713**	**1,056,907**
	BLY - Demand		15,737	-9,053	-43,887	-12,772
	BLY - RISD		32,303	24,587	-164,331	-11,525
SWC Totals						
		4/1 > 11/1			-112,522	-119,057
		Count			4	6
	BLY<Demand		-45,931	-20,551	-149,094	-80,828
		Count	2	3	7	5
	BLY<RISD		-77,485	-22,888	-529,552	-160,997
		Count	2	2	7	6

Supply is reported in 2 parts, the April 1 forecast water supply and the November 1 final water supply.
11/1 - 4/1 is the difference between the November 1 final water supply and the April 1 forecast supply.
BLY is the Baseline Year water supply adopted for each SWC entity in the June 23, 2010 Methodology Order.
Demand is the adjusted diversion volume for each year for each SWC entity.
RISD is the Reasonable In-Season Demand volume for each year for each SWC entitiy.
BLY - Demand is the difference between the Baseline Year water supply and the Demand for each year.
BLY - RISD is the difference between the Baseline Year water supply and the RISD for each year.
4/1 > 11/1 is the total of the amounts in which the April 1 forecast supply was larger than the final Supply.
BLY < Demand is the total amount by which the Baseline Year amount underestimated the actual Demand.
BLT < RISD is the total amount by which the Baseline Year amount underestimated the RISD water requirement.
Count is the number of SWC members impacted for each condition in any year.

Bold values are taken from the RISD DS Calculator tab in the DS & RISD Calculator spreadsheet in the IDWR 11-27-13_November Background Data subfolder in the Bates Stamped OCR Docs folder on Disc 1 of the agency record.

The remaining values were computed within this spreadsheet.