

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT**  
**OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

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, )

**Case No. CV-2010-3822**

vs. )

GARY SPACKMAN, in his capacity as Interim )  
Director of the Idaho Department of Water )  
Resources, THE IDAHO DEPARTMENT )  
OF WATER RESOURCES, and THE IDAHO )  
GROUND WATER APPROPRIATORS, INC., )

Respondents. )

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IN THE MATTER OF THE IDAHO GROUND )  
WATER APPROPRIATORS, INC.'S )  
MITIGATION PLAN FOR CONVERSIONS, )  
DRY-UPS & RECHARGE )

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**IDWR RESPONDENTS' BRIEF**

On Appeal from the Idaho Department of Water Resources  
Gary Spackman, Interim Director

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Honorable Eric. J. Wildman, Presiding

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Lawrence G. Wasden  
**ATTORNEY GENERAL**  
Clive J. Strong  
Deputy Attorney General  
Chief, Natural Resources Division

Garrick L. Baxter, ISB # 6301  
Chris M. Bromley, ISB# 6530  
Deputy Attorneys General  
P.O. Box 83720  
Boise, Idaho 83720-0098  
(208) 287-4800

*Attorneys for Respondents Gary Spackman,  
Interim Director, and the Idaho Department of  
Water Resources*

Randall C. Budge  
Candice M. McHugh  
T.J. Budge  
**RACINE OLSON NYE BUDGE & BAILEY**

*Attorneys for Respondents Idaho Ground Water  
Appropriators, Inc., North Snake Ground  
Water District, and Magic Valley Ground  
Water District*

John K. Simpson  
Travis L. Thompson  
Paul L. Arrington  
**BARKER ROSHOLT & SIMPSON**

*Attorneys for Petitioners A&B Irrig. Dist.,  
Burley Irrig. Dist., Milner Irrig. Dist., North  
Side Canal Co., and Twin Falls Canal Co.*

C. Thomas Arkoosh  
**CAPITOL LAW GROUP**

*Attorneys for Petitioner American Falls Res.  
Dist. No. 2*

W. Kent Fletcher  
**FLETCHER LAW OFFICE**

*Attorneys for Petitioner Minidoka Irrig. Dist.*

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## **I. STATEMENT OF THE CASE**

The Surface Water Coalition (“SWC”) seeks judicial review of the Director of the Idaho Department of Water Resources’ (“Director” or “Department”) *Final Order Approving Mitigation Credits Regarding SWC Delivery Call* (“Final Order”). The Final Order approved the Idaho Ground Water Appropriators, Inc.’s (“IGWA”) request for mitigation credit for conversions, fallowing of acres under the Conservation Reserve Enhancement Program (“CREP”), and recharge. Using the Eastern Snake Plain Aquifer model (“ESPA Model”), the Director modeled the 2010 irrigation season benefit of these activities in the Blackfoot to Minidoka reach of the Snake River. Gains in the Blackfoot to Minidoka reach benefit the SWC. Modeling showed an irrigation season benefit of 5,621 acre-feet to the SWC, of which 5,390 acre-feet was directly attributable to acres enrolled by IGWA members in CREP.

While not disagreeing with the ESPA Model or the results of the Director’s modeling, the SWC asks the Court to ignore reach gains that would benefit the SWC during the 2010 irrigation season and were directly attributable to IGWA members’ fallowing of acres and foregone ground water pumping under CREP. The SWC demands that the Court substitute its judgment for the Director and reduce the approved mitigation credit from 5,621 acre-feet to 301 acre-feet.<sup>1</sup>

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

This matter stems from the SWC’s 2005 delivery call. As part of its response to the Director’s finding that junior ground water diversion can materially injure the SWC, IGWA filed a mitigation plan (“Plan”) for conversions, CREP, and recharge. R. at 1. The Plan was filed

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<sup>1</sup> The SWC argues that the mitigation credit for CREP should be 70 acre-feet (1.3% of 5,390)—1.3% is IGWA’s monetary contribution to CREP. When added to conversions (220 acre-feet) and recharge (11 acre-feet), the total mitigation credit would be 301 acre-feet.

pursuant to Conjunctive Management Rule 43 and sought the Director's approval to mitigate material injury to the SWC: "This Mitigation Plan is submitted to the Director to secure advance approval of certain mitigation activities from which mitigation credit will be calculated for any and all existing and future mitigation activities to offset or reduce the depletive effect of groundwater withdrawal on the water available to senior surface and groundwater users." *Id.* at 2. The Plan did not set forth the amount of mitigation credit sought: "[T]he exact amount of mitigation credit obtained from a specific Mitigation Activity would be subject to analysis and calculation by the Director based upon the ESPA Model or other methodologies determined by the Department or the Courts." *Id.* at 2-3.

In accordance with CM Rule 43.02 and Idaho Code § 42-222, the Plan was published by the Department. *Id.* at 10-14. No protests were filed. *Id.* at 32. On May 14, 2010, the Director issued a final order ("May 14 Final Order") approving IGWA's ability to seek a mitigation credit. *Id.* The approval was subject to additional proceedings for the Director to determine "the appropriate credit, if any, to provide." *Id.* No petitions for judicial review were filed to the May 14 Final Order.

In response to the Director's finding of material injury to the SWC's 2010 reasonable in-season demand, IGWA filed a request for mitigation credit. *Id.* at 23. In its request, IGWA sought credit for conversion, CREP, and recharge undertaken by its members, as well as the Idaho Dairymen, Processors, and Southwest Irrigation District ("SWID"). *Id.* at 25.

On May 17, 2010, the Director entered his initial order ("Initial Order") approving a mitigation credit for conversion, CREP, and recharge activities that were attributable only to IGWA. *Id.* at 34-35. Because mitigation must be provided to the SWC during the irrigation season, the Director modeled the transient benefits of these activities for the months April

through October, 2010. *Id.* at 35. On May 28, 2010, the SWC requested a hearing on the Initial Order. *Id.* at 46.

On June 29, 2010, a hearing was held. At hearing, the SWC argued against the Director's decision to authorize mitigation credit for CREP that exceeded IGWA's 1.3% monetary contribution to the program. *Id.* at 96. On July 19, 2010, the Director issued his Final Order. The Final Order found it was appropriate to authorize a mitigation credit for increased reach gains that would benefit the SWC during the 2010 irrigation season and were directly attributable to IGWA members' fallowing of acres and foregone ground water pumping under CREP. *Id.* at 95-96, 98.

Even though a mitigation credit was approved, it was never applied in the 2010 irrigation season. The Director's finding of no material injury to the SWC's 2010 reasonable in-season demand obviated its application. *See Final Order Revising April 2010 Forecast Supply (Methodology Step 7)* at 7 (September 17, 2010), *appeal docketed*, CV-2010-5520 (Fifth Jud. Dist. Nov. 19, 2010) (attached hereto as Attachment A). The credit approved in the Final Order cannot be applied "to future determinations of material injury." *Id.* at 8.

### **III. STANDARD OF REVIEW**

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IAPA"), chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under IAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful

procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. “Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.” *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998).

#### IV. ARGUMENT

Despite taking no issue with the ESPA Model, the Director’s modeling of reach gains, or the water that will benefit it, the SWC demands that IGWA’s 1.3% financial contribution to CREP serve as the only basis for assigning mitigation credit. The Director’s decision to focus on water that would benefit the SWC during the 2010 irrigation season that was attributable to IGWA members’ fallowed acres and foregone ground water use is supported by the record, is based on a reasonable interpretation of the CM Rules, and should be affirmed on review.

##### A. While The SWC’s Petition For Judicial Review Is Moot, It Is Capable Of Repetition And Appropriate For Review

An issue is not moot if it constitutes an “actual or justiciable controversy.” *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281-82, 912 P.2d 644, 649-50 (1996). A “case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Bradshaw v. State*, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991). The court cannot “hear and resolve an issue that presents no justiciable



controversy and a judicial determination will have no practical effect on the outcome.” *Idaho Sch. for Equal Educ. Opportunity* at 281, 912 P.2d at 649. If the issue before the court is “capable of repetition, yet evading review,” an exception to the mootness doctrine exists. *State v. Hyde*, 140 Idaho 679, 682, 99 P.3d 1069, 1072 (2004); *see also Roe v. Wade*, 410 U.S. 113, 125 (1973).

Resolution of this issue is appropriate because it will arise in the future and is likely to evade review. Here, the Director found no material injury to the SWC in the 2010 irrigation season, *Attachment A* at 7, and determined that the mitigation credit approved in the Final Order could not be applied “to future determinations of material injury.” *Id.* at 8. While the current controversy is now moot, similar situations will arise in the future. Just as happened here, however, because of timing for filing petitions for judicial review and briefing, the Director’s orders would not be subject to review until after the senior’s need for water has passed; thereby rendering the controversy moot. Thus, the issue is capable of repetition, and the Court should find it falls within a recognized exception to the mootness doctrine.

**B. The Director’s Reasoned Interpretation Of The CM Rules Is Entitled To Deference**

The Director’s interpretation of the CM Rules to authorize mitigation credit for reach gains that benefit the SWC and are directly attributable to IGWA members’ fallowing of acres and foregone ground water pumping under CREP is entitled to deference. “[T]he courts are not alone in their responsibility to interpret and apply the law. As the need for responsive government has increased, numerous executive agencies have been created to help administer the law. To carry out their responsibility, administrative agencies are generally clothed with power to construe [the law] as a necessary precedent to administrative action.” *J.R. Simplot Co., Inc. v. Idaho State Tax Comm’n*, 120 Idaho 849, 854, 820 P.2d 1206, 1211 (1991).

Under *Simplot*, a four-prong test has been developed for agency deference. The first prong asks whether the agency has been entrusted with the responsibility to administer the statute at issue. *Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002); *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903 (2001) (extending *Simplot* to an agency's interpretation of its administrative rules).<sup>2</sup> Here, the first prong is met as the Director is entrusted with the responsibility to administer the State's water resources in accordance with the prior appropriation doctrine, as established by Idaho law. Idaho Code § 42-602. In accordance with the authority granted to him, the Director promulgated the CM Rules. Idaho Code § 42-603; CM Rule 0.

The second prong asks whether the agency's construction is reasonable. *Pearl* at 113, 44 P.3d at 1168. Here, the SWC argues that the Director erred in authorizing 5,390 acre-feet of mitigation credit because IGWA funds CREP at a rate of 1.3%. *Opening Brief* at 3-4; *see also* Ex. 6 at 17-18. The SWC argues that the Director's decision to authorize mitigation credit for CREP in excess of 70 acre-feet (1.3% of 5,390) is an abuse of discretion. In making its argument, the SWC ignores the purpose of CREP, the water that will benefit it, and the Director's duty to reasonably interpret the CM Rules to promote and conserve the State's water resources. CM Rule 20.03.

In the Final Order, the Director explained that a stated goal of CREP is "demand reduction in the Eastern Snake River Basin." R. at 98; *see also* Ex. 6 at 6-7. Under CREP, ground water right holders "sign an 'Agreement not to Divert' which is an agreement between the contract holder and the State of Idaho not to irrigate out of water righted wells within the CREP area." Ex. 6 at 1 (emphasis added). "[M]odel[ing]" of "water savings due to non use of

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<sup>2</sup> *See also* Order on Petitions for Judicial Review 13-19, CV-2009-241 & CV-2009-270, (Fifth Jud. Dist. Dec. 4, 2009) (applying *Simplot* and affirming Director's interpretation of CM Rule 43).

the water rights” is required under CREP. *Id.* By voluntarily curtailing ground water pumping, aquifer levels are increased, which improves spring water discharge to the Snake River, thereby increasing river flows. *Id.* at 6. Increased river flows in the Blackfoot to Minidoka reach benefit the SWC.

In approving a mitigation plan, the Director considers, among other things, whether use of water is in compliance with Idaho law, CM Rule 43.03.a; if replacement water will be provided “at the time and place” and “when needed” by the senior-priority right, CM Rule 43.03.b-c; and if the plan is “consistent with the conservation of water resources, the public interest or injures other water rights,” CM Rule 43.03.j. The CM Rules specifically allow modeling of mitigation benefits. CM Rule 43.03.e-g.

Under its Plan, IGWA sought mitigation credit for acres its members enrolled in CREP, as well as acres enrolled by SWID. The Final Order reasonably limited mitigation credit to the Plan’s applicant, IGWA. For the 2010 irrigation season, the modeling in the Final Order found that fallowing of acres and foregone ground water irrigation by IGWA members provided 5,390 acre-feet of water to the Blackfoot to Minidoka reach of the Snake River. *R.* at 95. Due to these actions, water was available “at the time and place” and “when needed” by the SWC.

The Director reasonably interpreted the CM Rules to require that the entity responsible for the Plan provide water in time, in place, and when needed by the SWC. The Director’s interpretation satisfies *Pearl*’s second prong. 137 Idaho at 113, 44 P.3d at 1168.

The third prong asks for the court to determine that the language at issue does not treat the precise issue. *Pearl* at 113, 44 P.3d at 1168. The CM Rules allow modeling of mitigation benefits, CM Rules 43.03.e-g, but do not state, one way or the other, if the Director may approve mitigation credit for CREP. Therefore, the third prong is met.

Finally, the fourth prong asks whether any of the rationales underlying the rule of deference are present. *Pearl* at 113, 44 P.3d at 1168. The rationales to be considered include:

(1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.

....

If one or more of the rationales underlying the rule are present, and no ‘cogent reason’ exists for denying the agency some deference, the court should afford ‘considerable weight’ to the agency’s statutory interpretation.

*Canty v. Idaho State Tax Com’n*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002).

Here, rationales one, two, three, and five are met: (1) the Director’s interpretation promotes conservation of ground water through demand reduction, which increases reach gains, and provides water to the SWC during the time of need; (2) the Legislature has not acted to alter or amend any portion of the CM Rules since their adoption, and has not acted to alter or amend the CM Rules since institution of CREP; (3) the Director is steeped with expertise in his ability to administer the State’s water resources; and (5) the interpretation advanced by the Director was contemporaneous with his response to a different yet related mitigation plans filed in response to the Blue Lakes delivery call.<sup>3</sup> Therefore, the Court “should afford considerable weight” to the Director’s statutory interpretation of the CM Rules and affirm the Final Order.

### **C. The Director’s Treatment Of Modeled Mitigation Credit Is Consistent**

The SWC tries to convince the Court that the Director’s decision to authorize mitigation credit in the Final Order “is inconsistent with [his] approval of credit for other mitigation activities. For example, even though there have been recharge efforts conducted by IGWA, the

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<sup>3</sup> See *infra* Part C for further discussion of the Director’s contemporaneous and consistent treatment of the issue on review.

Idaho Dairymen's Association ("IDA") and the State of Idaho, the Director only gave IGWA credit for its recharge efforts—not those of the IDA or the State." *Opening Brief* at 1.

As stated by the SWC, the only issue in this proceeding is whether the Director erred in approving a mitigation credit for acres enrolled in CREP. Therefore, the SWC has waived its ability to contest the Director's treatment of mitigation credit for recharge. *Rowley v. Fuhrman*, 133 Idaho 105, 108, 982 P.2d 940, 943 (1999). Nevertheless, the Director's actions are wholly consistent.

In the Final Order, the Director assigned mitigation credit to IGWA for storage water it leased for the express purpose of recharge, but did not assign credit to IGWA for recharge water leased by other entities. R. at 95, ¶¶ 7-9; 98, ¶ 7. Consistent with his treatment of recharge, the Director credited IGWA only for increased reach gains due to its members' enrollment of acres in CREP, but did not assign credit to IGWA for acres enrolled by SWID. R. at 25.

Moreover, the Director's treatment of CREP in the Final Order before the Court is wholly consistent with his *Final Order Approving Mitigation Plans (Blue Lakes Delivery Call)* (May 7, 2010) ("May 7 Final Order"), *appeal docketed*, CV-2010-13520 (Fifth Jud. Dist. July 9, 2010).<sup>4</sup> There, the Director approved mitigation plans filed by A&B Irrigation District ("A&B"), IGWA, and SWID in response to the Blue Lakes Trout Farm, Inc. ("Blue Lakes") delivery call. *Attachment B* at 1-2. In that proceeding, A&B—a member of the SWC—and SWID each sought and received full mitigation credit for CREP. *Id.* at 3-4. Prior to hearing, A&B specifically

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<sup>4</sup> The May 7 Final Order is before the Court on judicial review, but is stayed pending the Idaho Supreme Court's decision in 37308-2010 (argued December 3, 2010). For convenience, the May 7 Final Order is attached hereto as Attachment B. The May 7 Final Order is cited in footnote 2 to the Final Order before the Court. R. at 98.

stipulated with Blue Lakes for full CREP mitigation credit. *Id.* at 9. SWID received full mitigation credit for the acres its members enrolled in CREP. *Id.* at 9.<sup>5</sup>

Just as he did in the May 7 Final Order, the Director in this case assigned mitigation credit to IGWA for acres it enrolled in CREP. This Court should reject the SWC's theory that the Director treats entities and activities inconsistently and affirm the Final Order.

**D. There Has Been No Prejudice To The SWC Because The Mitigation Credit Was Not Applied In 2010 And Cannot Be Applied To Future Determinations Of Material Injury**

In order to prevail, the SWC must demonstrate that the Director erred in a manner specified in Idaho Code § 67-5279(3), "and then establish that a substantial right has been prejudiced." *Barron*, 135 Idaho at 417, 18 P.3d at 222 (emphasis added); *see also* Idaho Code § 67-5279(4). Here, the SWC cannot point to a substantial right that has been prejudiced.

In the Final Order, the Director concluded that the mitigation credit could only be applied during the 2010 irrigation season. *R.* at 99. For 2010, the Director found no material injury to the SWC and the mitigation credit was not applied. *Attachment A* at 7. Furthermore, the Director held that the mitigation credit could "not be applied to future determinations of material injury." *Id.* at 8. Because the mitigation credit was not applied in 2010 and cannot be applied prospectively, the SWC has not been prejudiced. *See Memorandum Decision and Order on Petition for Judicial Review (In the Matter of the Idaho Ground Water Appropriators, Inc.'s Mitigation Plan in Response to the Surface Water Coalition Delivery Call)*, CV-2010-3075, at 25 (Fifth Jud. Dist. January 25, 2011) (holding no substantial right of the SWC was prejudiced in 2010 because there was no unmitigated material injury). Moreover, due to IGWA members'

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<sup>5</sup> Only after hearing in this proceeding, and before the Final Order was issued, did A&B withdraw its CREP mitigation credit from the May 7 Final Order. *See* [http://www.idwr.idaho.gov/News/MitigationPlan/TS/2010/07Jul/20100707\\_Notice.pdf](http://www.idwr.idaho.gov/News/MitigationPlan/TS/2010/07Jul/20100707_Notice.pdf).

voluntary curtailment of junior ground water rights and placement of acres in CREP, the Director quantified a 5,390 acre-feet benefit to the SWC. Therefore, no substantial right has been prejudiced and the Final Order should be affirmed on review

## **V. CONCLUSION**

In this case, the Final Order assigned mitigation credit for water that would benefit the SWC during the 2010 irrigation season and was directly attributable to IGWA members' fallowing of acres and foregone ground water pumping. The Final Order is consistent with constitutional and statutory provisions, is supported by the record, is made upon lawful procedure, and is within the Director's discretion. Furthermore, no substantial right of the SWC has been prejudiced because the mitigation credit was not applied in 2010 and cannot be applied to future determinations of material injury. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of February, 2011.

LAWRENCE G. WASDEN  
Attorney General

CLIVE J. STRONG  
Deputy Attorney General  
CHIEF, NATURAL RESOURCES DIVISION



CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 22<sup>nd</sup> day of February, 2011.

Document Served: **IDWR RESPONDENTS' BRIEF**

John K. Simpson  
Travis L. Thompson  
Paul L. Arrington  
BARKER ROSHOLT &  
SIMPSON LLP  
P.O. Box 485  
Twin Falls, ID 83303

[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlt@idahowaters.com](mailto:tlt@idahowaters.com)  
[pla@idahowaters.com](mailto:pla@idahowaters.com)

Randall C. Budge  
Candice M. McHugh  
Thomas J. Budge  
RACINE OLSON  
P.O. Box 1391  
Pocatello, ID 83204-1391

[rcb@racinelaw.net](mailto:rcb@racinelaw.net)  
[cmm@racinelaw.net](mailto:cmm@racinelaw.net)  
[tjb@racinelaw.net](mailto:tjb@racinelaw.net)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
1200 Overland Ave.  
P.O. Box 248  
Burley, ID 83318

[wkf@pmt.org](mailto:wkf@pmt.org)

C. Thomas Arkoosh  
CAPITOL LAW GROUP  
205 N. 10<sup>th</sup> St., 4<sup>th</sup> Flr.  
P.O. Box 2598  
Boise, ID 83701

[tarkoosh@capitollawgroup.net](mailto:tarkoosh@capitollawgroup.net)



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CHRIS M. BROMLEY  
Deputy Attorney General



# **ATTACHMENT A**

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER )	
TO VARIOUS WATER RIGHTS HELD BY OR FOR )	Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>FINAL ORDER</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>REVISING APRIL 2010</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>FORECAST SUPPLY</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	
AND TWIN FALLS CANAL COMPANY )	<b>(METHODOLOGY STEP 7)</b>
_____ )	

**FINDINGS OF FACT**

**Background**

1. On June 23, 2010, the Director of the Idaho Department of Water Resources ("Director" or "Department") issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). The Methodology Order established 10 steps for determining material injury to members of the Surface Water Coalition ("SWC").

2. In applying steps 3 and 4 of the Methodology Order, the Director predicted that the SWC would be materially injured during the 2010 irrigation season. The predicted injury was 56,600 acre-feet. *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* ("April Forecast Supply Order"). At that time, the only predicted in-season injury was to the Twin Falls Canal Company ("TFCC").

3. The Department approved CM Rule 43 mitigation plans for the Idaho Ground Water Appropriators, Inc. ("IGWA") to mitigate for material injury to in-season demand and reasonable carryover. *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*, CM-MP-2009-006 (July 19, 2010); *Order Approving Mitigation Plan*, CM-MP-2009-007 (June 3, 2010). IGWA secured in excess of 57,000 acre-feet of storage water to mitigate for 2010 in-season injury, as well as projected 2011 reasonable carryover shortfalls (Methodology Steps 9 and 10), if any. The Director instructed the watermaster for Water District 01 to not deliver storage water leased by IGWA under specific contracts for SWC mitigation to any entity other than the SWC, including the lessor, until further notice by the Director. The Director ordered dedication of IGWA's secured water to the SWC mitigation until he could determine the SWC's in-season injury. IGWA also established a 5,621 acre-feet mitigation credit, if needed, for the 2010 irrigation season.

4. On August 10, 2010, the Director issued his *Order Revising April Forecast Supply (Methodology Step 6)* ("August 2010 Order"), determining that the SWC would not be

materially injured during the 2010 irrigation season. However, because of uncertainty in predicting reach gains for TFCC, the Director issued the August 2010 Order as an interlocutory order, subject to review pursuant to IDAPA 37.01.01.711. *August 2010 Order* at 6-7.

5. In this order, the Director will re-examine the August 2010 Order and apply Methodology Step 7. Step 7 states as follows:

Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) issue a revised Forecast Supply; and (3) establish the Time of Need.

This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. . . . The Director will then issue revised RISD and DS values.

*Methodology Order* at 37.

## **Demand**

### April – August Climate

6. In April 2010, the Natural Resources Conservation Service (“NRCS”) determined that the 2009-2010 snow season would be the second driest snow season in the Upper Snake River Basin of the last 50 years. The April 2010 forecast prepared jointly by the United States Army Corp of Engineers and the United States Bureau of Reclamation predicted 1,940,000 acre-feet of natural flow at the Heise gage for the period April – July.

7. The months of April and May 2010 were unusually wet and cold. According to NRCS Snotel sites, the Upper Snake River Basin received 140% and 119% of average precipitation in April and May, respectively. The National Weather Service’s Twin Falls weather station reported 139% and 136% of average precipitation in April and May, respectively.

8. June and July 2010 precipitation were below normal. Twin Falls temperatures were near normal for April, were 4.2 degrees below normal for May, were near normal for June, and were 4.3 degrees above normal for July.<sup>1</sup> Because of the cool wet spring, the water supply improved dramatically. The actual Heise natural flow for April – July was 2,598,000 acre-feet, or 658,000 acre-feet greater than the April joint forecast.

9. August 2010 was drier than normal and had near average temperatures. The National Weather Service’s Twin Falls weather station reported precipitation was 0.22 inches, which is 0.16 inches below normal.

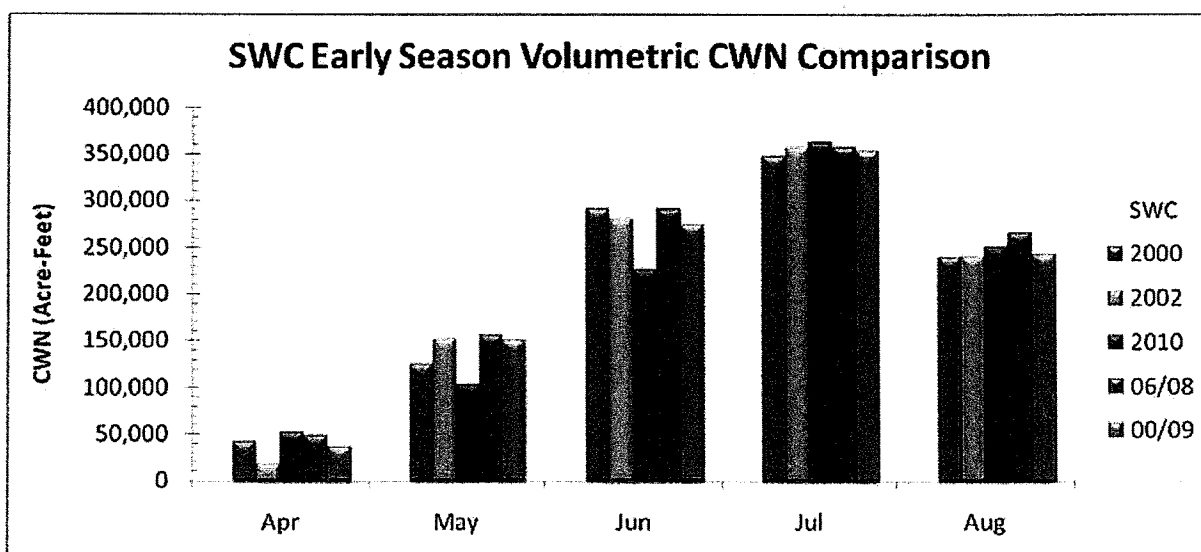
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<sup>1</sup> Precipitation and temperature data obtained from the NOAA National Weather Service Preliminary Monthly Climate Data for the Twin Falls 3SE weather station (Twin Falls Airport).

### Crop Water Need

10. Crop water need (“CWN”) is the project wide volume of irrigation water required for crop growth such that crop development is not limited by water availability. CWN is the difference between the fully realized consumptive use associated with crop development, or evapotranspiration, and effective precipitation. CWN is used as input for calculating reasonable in-season demand (“RISD”) for those months of the irrigation season that are complete. It is combined with monthly baseline demands for the remaining months of the irrigation season to arrive at a season total RISD volume. Demand shortfall is then calculated as the difference between the adjusted forecast supply and the RISD. For specifics regarding determination of CWN, *see Methodology Order* at 16. Included with this order is a CD with background calculations.

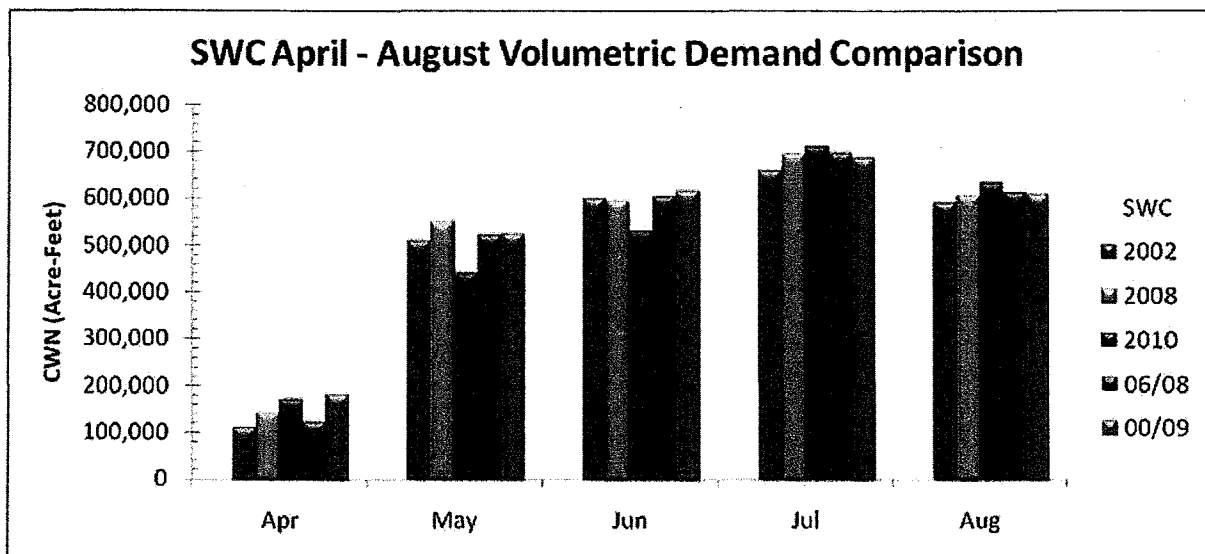
11. The SWC’s volumetric CWN for the current water year through the month of August 2010 is 994,934 acre-feet. This volume is 5.9% less than the ten year average CWN from 2000 – 2009 and 11.2% less than the baseline year CWN (2006/2008). Over the last ten years (2000 – 2009), the 2000 and 2002 water years have the most similar CWN accumulation to the current irrigation season. The following graph summarizes April through August monthly volumetric CWN values for 2000, 2002, 2010, the 2000 – 2009 average, and the baseline year (2006/2008).



12. The monthly CWN value for each of the SWC entities was divided by the average monthly efficiency value for each entity as identified in the table accompanying Finding of Fact 46 (page 16) of the *Methodology Order*. Monthly RISD values were summed to determine the already expired season-total RISD for 2010 climate data through August of the current year. The first summation term on the right side of the equal sign in equation 4 on page 18 of the *Methodology Order* computes the already expired season-total RISD. Based on the foregoing, the total RISD through August of the current year for all the SWC entities is 2,385,806 acre-feet.

### SWC Diversions

13. The SWC's total irrigation diversion for the current water year through the month of August 2010 is 2,485,078 acre-feet. This volume of water is not used in determining RISD, but is presented herein as a comparison to the computed RISD values through August of the current year. This volume is 5.1% less than the ten-year average demand from 2000 – 2009 and 2.9% less than the baseline year demand (2006/2008). Over the last ten years (2000 – 2009), the 2002 and 2006 water years have the most similar diversions to the current irrigation season. The following graph summarizes monthly volumetric demands for 2002, 2006, 2010, the 2000 – 2009 average, and the baseline year.



### Selection of an Analogous Year to Predict Remaining Natural Flow

14. The second summation term in the RISD equation on page 18 of the *Methodology Order* is the Baseline Demand ("BD"). The BD values are the sum of the 2006/2008 baseline year values for the months of September and October for each SWC entity.

### **Supply**

15. The supply for each SWC entity is the sum of the actual natural flow supply, the predicted natural flow supply for the remainder of the irrigation season, the preliminary storage allocation, and adjustments to the natural flow supply and storage allocation.

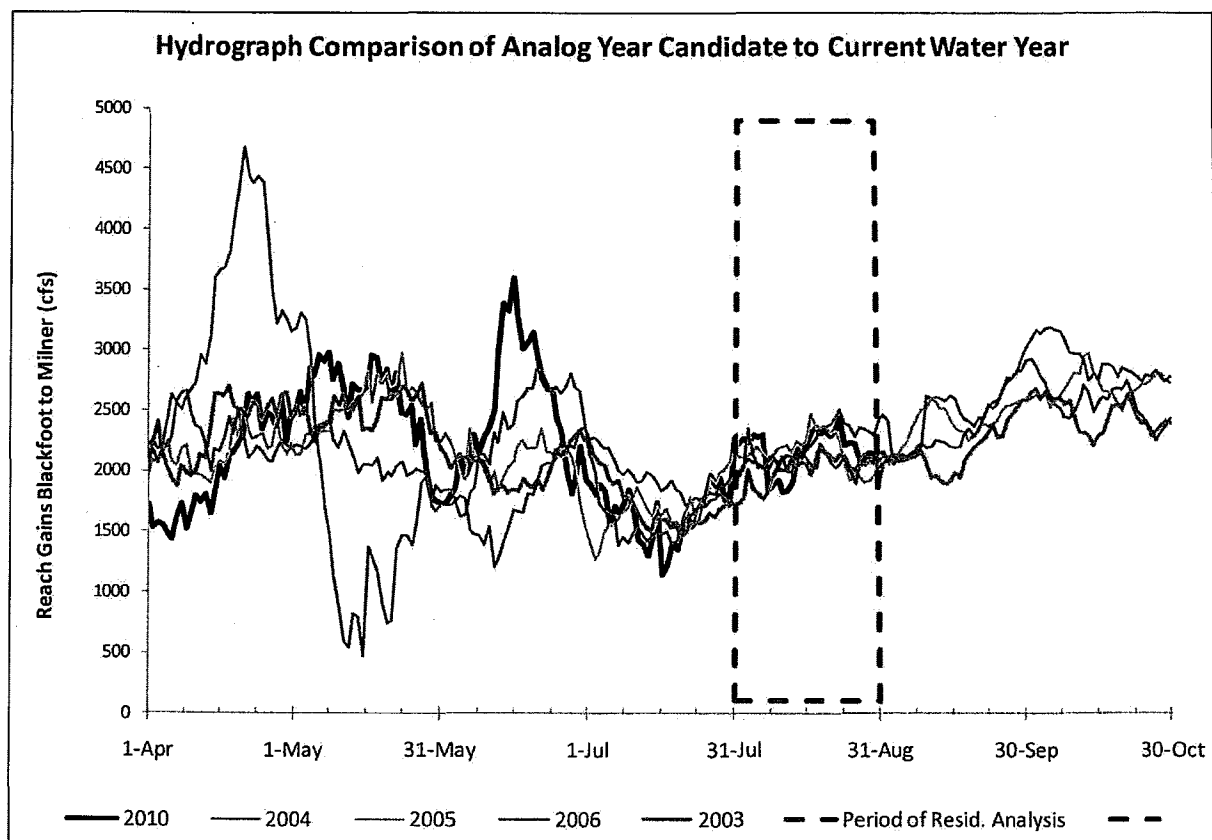
16. Natural flow supply for the remainder of the irrigation season was predicted by choosing an analogous year. The Department used a residual analysis<sup>2</sup> carried out at a daily time step to compare the reach gains from August 1 to August 31 for the current water year to

<sup>2</sup> The daily residual, or more accurately the daily relative residual (R), is expressed as a percentage and defined as the difference between the current water year reach gain (CY) and the historical reach gain (HY) divided by the current water year reach gain.  $R = (CY - HY)/CY$ .

historical reach gains for the same time period for the 1991 – 2009 water years. From the residual analysis, four candidate water years were selected: 2003, 2004, 2005, and 2006. These years represent the four years with the smallest average daily residual over the analysis period as summarized in the following table:

<b>Summary of Residual Analysis of Candidate Years</b>				
<b>Period of Analysis</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
11/1-8/31	-6.7%	-5.7%	-6.4%	-8.2%
8/1-8/31	7.0%	-2.5%	-0.3%	3.7%

17. The hydrograph shown below compares the current water year to the four candidate years with the most similar reach gains as determined by the residual analysis. The natural flow diversions for each of the candidate years were examined and 2003 was selected as the analog year to predict natural flow diversions for the remainder of the irrigation season. The 2003 irrigation season was selected because it represented the best fit when considering the SWC as a whole. The 2003 irrigation season was also selected because it represents a conservative estimate of natural flow diversions for the remainder of the season.



#### Adjustments to Total Supply

18. Adjustments were made to both the natural flow and storage water supplies, as shown on the following page. Adjustments to natural flow include 6,725 acre-feet of natural

flow wheeled to South West Irrigation District through Burley Irrigation District and Milner Irrigation District. Preliminary adjustments to the storage water supply that were used in this analysis were published by Water District 01 in its Weekly Water Report dated July 20, 2010. The only adjustments made to the stored water supply in the table below were for the Minidoka Credit. Adjustments for wheeled storage water were not included in the storage adjustment because the water is not available for use by the SWC. Adjustments for wheeled storage water that were published in the Weekly Report were not included as an adjustment because wheeled water does not actually increase the amount of water available for use by the SWC. Water supplied to the rental pool was not included in the adjustments. An adjustment for water supplied to the rental pool would artificially increase the shortfall obligation.

19. The total supply for each of the entities is set forth in the table below.

### **Revised Shortfall Prediction**

20. Based on the above, and as summarized in the table below, no member of the SWC will experience material injury to in-season demand during the 2010 irrigation season.

	Natural Flow Diverted through 8/31	Predicted Natural Flow 9/1 to 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	Preliminary Storage Adjustments	Total Supply	RISD	Shortfall
A&B	9,374	-	-	135,382	-	144,756	48,503	-
AFRD2	76,422	-	-	387,132	1,000	464,554	400,986	-
BID	86,233	1,274	(3,714)	222,794	5,130	311,717	205,897	-
Milner	14,067	-	(3,011)	87,992	-	99,048	45,373	-
MID	140,695	1,803	-	360,576	8,370	511,444	300,735	-
NSCC	354,037	26,085	-	845,875	(7,750)	1,218,247	971,298	-
TFCC	621,250	195,311	-	241,919	(6,750)	1,051,730	997,837	-
						3,801,496	2,970,629	
							Total	0

### **CONCLUSIONS OF LAW**

1. The Director concludes that, for the 2010 irrigation season, no member of the SWC will be materially injured. CM Rule 42.

2. The Director is aware that the issue of which standard of proof to apply in the context of conjunctive administration (preponderance or clear and convincing) is on review. When the Director made his original prediction of material injury (56,600 acre-feet), it was based on the best available information. *See April Forecast Supply Order*. As required by the Methodology Order, the Director updated the April Forecast Supply Order to evaluate the SWC's actual crop water need to determine RISD shortfalls, if any. In updating the April Forecast Supply Order, the Director used 2003 as the analog year to examine reach gains for

purposes of calculating RISD. 2003 was also selected because it represents the best fit when considering the SWC as a whole and provides a conservative estimate of natural flow diversions for the remainder of the 2010 irrigation season. The Director concludes that, even under the heightened standard of review, the SWC will not experience material injury this irrigation season. See *Luttrell v. Clearwater County Sheriff's Office*, 140 Idaho 581, 584, 97 P.3d 448, 451 (2004) ("Clear and convincing evidence means a degree of proof greater than a mere preponderance.").

3. IGWA has 57,000 acre-feet of secured storage water to mitigate for 2010 in-season injury, as well as projected 2011 reasonable carryover shortfalls (Methodology Steps 9 and 10), if any. IGWA also has a 5,621 acre-feet mitigation credit that may be applied to 2010 in-season shortfalls. Because the Director has not found material injury during the 2010 irrigation season, IGWA may not transfer its 5,621 acre-feet credit to future material injury determinations, including any perspective determination of 2011 reasonable carryover shortfalls (Methodology Steps 9 and 10).

4. Because there will be no 2010 in-season shortfalls, the Director notifies the watermaster for Water District 01 to release IGWA's 57,000 acre-feet of secured water.

5. On or before November 30, the Director will project IGWA's reasonable carryover shortfall, if any, for 2011. *Methodology Order* at 37-38 (Steps 9 and 10). If the Director projects a reasonable carryover shortfall, IGWA shall have fourteen days to establish its ability to secure "a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC." *Id.* at 38.

6. If the Director projects a 2011 reasonable carryover shortfall and determines that the shortfall exceeds 57,000 acre-feet, IGWA will be required to prove to the Director that it has secured additional mitigation. If IGWA no longer holds all or part of the 57,000 acre-feet, and a projected carryover shortfall is found in excess of its remaining secured water, IGWA will be required to prove to the Director that it has secured additional mitigation.

7. The Director should rescind the August 10, 2010 interlocutory order. IDAPA 37.01.01.711.

## ORDER

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

The Director predicts that, for the 2010 irrigation season, no member of the SWC will be materially injured.

IT IS FURTHER ORDERED that the watermaster for Water District 01 shall release IGWA's 57,000 acre-feet of secured storage water.



IT IS FURTHER ORDERED that IGWA's 2010 in-season mitigation credit (5,621 acre-feet) may not be applied to future determinations of material injury.

IT IS FURTHER ORDERED that the Director rescinds the August 10, 2010 interlocutory order.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 17<sup>th</sup> day of September, 2010.

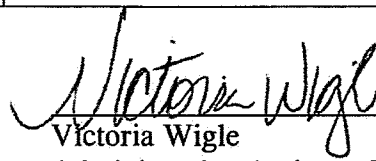
  
GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of September, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson Travis L. Thompson Paul L. Arrington BARKER RSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 <a href="mailto:tarkoosh@capitollawgroup.net">tarkoosh@capitollawgroup.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a> <a href="mailto:tjb@racinelaw.net">tjb@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 1961 Stout Street, 8 <sup>th</sup> Floor Denver, CO 80294 <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@pn.usbr.gov">mhoward@pn.usbr.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Sarah A. Klahn  Mitra M. Pemberton  WHITE JANKOWSKI  511 16<sup>th</sup> St., Ste. 500  Denver, CO 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>  <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Dean A. Tranmer  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Michael C. Creamer  Jeffrey C. Fereday  GIVENS PURSLEY LLP  P.O. Box 2720  Boise, ID 83701-2720  <a href="mailto:mcc@givenspursley.com">mcc@givenspursley.com</a>  <a href="mailto:jcf@givenspursley.com">jcf@givenspursley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>William A. Parsons  Parsons Smith &amp; Stone  P.O. Box 910  Burley, ID 83318  <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Lyle Swank  IDWR—Eastern Region  900 N. Skyline Drive  Idaho Falls, ID 83402-6105  <a href="mailto:lyle.swank@idwr.idaho.gov">lyle.swank@idwr.idaho.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Allen Merritt  Cindy Yenter  IDWR—Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033  <a href="mailto:allen.merritt@idwr.idaho.gov">allen.merritt@idwr.idaho.gov</a>  <a href="mailto:cindy.yenter@idwr.idaho.gov">cindy.yenter@idwr.idaho.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

  
Victoria Wigle  
Administrative Assistant II, IDWR

# **ATTACHMENT B**

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE NORTH SNAKE	)	
AND MAGIC VALLEY GROUND WATER	)	<b>CM-MP-2009-001</b>
DISTRICTS' 2009 JOINT MITIGATION	)	
PLAN TO COMPENSATE BLUE LAKES	)	
TROUT FARM, INC.	)	
	)	
IN THE MATTER OF THE A&B IRRIGATION	)	
DISTRICT'S 2009 MITIGATION PLAN TO	)	<b>CM-MP-2009-002</b>
COMPENSATE BLUE LAKES TROUT	)	
FARM, INC.	)	
	)	
IN THE MATTER OF SOUTHWEST AND	)	
GOOSECREEK IRRIGATION DISTRICTS'	)	<b>CM-MP-2009-003</b>
MITIGATION PLAN	)	
	)	
(Water Right Nos. 36-02356a, 36-07210,	)	<b>FINAL ORDER APPROVING</b>
and 36-07427)	)	<b>MITIGATION PLANS</b>
	)	<b>(BLUE LAKES DELIVERY CALL)</b>

On May 19, 2005, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") issued an order ("May 2005 Order") in response to a delivery call filed by Blue Lakes Trout Farm, Inc. ("Blue Lakes") in accordance with Rule 42 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), IDAPA 37.03.11.042. The Blue Lakes water rights are diverted from Alpheus Creek, which derives its flows from springs emitting from the Eastern Snake Plain Aquifer ("ESPA"). The May 2005 Order found material injury to Blue Lakes' water right no. 36-07427 bearing a priority date of December 28, 1973.

The May 2005 Order determined that springs feeding Alpheus Creek discharge within a spring reach located between Devil's Washbowl and Buhl, Idaho. The May 2005 Order also

determined that the spring flows feeding Alpheus Creek account for approximately 20% of the total spring flow in the Devil's Washbowl to Buhl Reach.

The May 2005 Order determined that ground water users holding water rights junior to December 28, 1973 must be curtailed to satisfy Blue Lakes' delivery call, or, alternatively, the ground water users must (a) initiate actions providing simulated steady state reach gains of 51 cubic feet per second ("cfs") to the Devil's Washbowl to Buhl reach, or (b) provide 10.0 cfs directly to Blue Lakes (multiplying 51 cfs by 20% equals approximately 10 cfs).

In 2009, with the inclusion of Water District 140 in the delivery call and to account for ground water rights junior to December 28, 1973 located within Water District 140, the Director increased the simulated steady state obligation in the Devil's Washbowl to Buhl reach to 59.31 cfs. Therefore, the direct delivery requirement to Blue Lakes' facility was increased to 11.9 cfs (20% of 59.31 cfs).

On July 2, 2009, North Snake Ground Water District ("North Snake") and Magic Valley Ground Water District ("Magic Valley") filed a mitigation plan for the Blue Lakes delivery call under CM Rule 43. North Snake and Magic Valley will be referred to hereafter as North Snake/Magic Valley. On January 11, 2010, North Snake/Magic Valley amended the mitigation plan. The amendment will be discussed later in this text.

On August 18, 2009, A&B Irrigation District ("A&B") filed a CM Rule 43 mitigation plan for the Blue Lakes call.

On October 20, 2009, Southwest Irrigation District ("Southwest") and Goose Creek Irrigation District ("Goose Creek") filed a joint CM Rule 43 mitigation plan for both the Blue Lakes call and a separate call by Clear Springs Foods, Inc. ("Clear Springs"). Southwest and Goose Creek will be jointly referred to hereafter as Southwest/Goose Creek.

## FINDINGS OF FACT

### DESCRIPTION OF THE PLANS

#### North Snake/Magic Valley Plan

1. On January 11, 2010, North Snake/Magic Valley filed *Groundwater Districts' Statement Regarding Mitigation Activities under Mitigation Plan for Blue Lakes*. The statement amends the original mitigation plan, and establishes that "the groundwater districts intend to provide only direct delivery of water to Blue Lakes Trout Company, Inc. . . . to mitigate for material injury to Blue Lakes water rights." North Snake/Magic Valley can deliver water directly to Blue Lakes because North Snake/Magic Valley acquired a portion of water rights equal to 10.0 cfs of water flowing in Alpheus Creek.

#### A&B Mitigation Plan

2. A&B irrigates 2,063 enlargement acres with ground water authorized by ground water enlargement rights that are subordinated to a priority date of 1994. These 2,063 enlargement acres are subject to curtailment under the Blue Lakes call. Alternatively, A&B could mitigate for the depletions caused by the ground water diversions to irrigate the 2,063 enlargement acres.

3. To compensate for the depletions, A&B converted the irrigation of 1,378 acres originally irrigated with ground water authorized by a 1948 priority water right to surface water irrigation. The surface water delivered to the 1,378 conversion acres is storage water held by A&B under contract with the United States Bureau of Reclamation ("USBR"). In addition, A&B enrolled 121 acres in the federal CREP program, labeled in the mitigation plan as voluntary curtailment.

#### Southwest /Goose Creek Plan

4. The Southwest/Goose Creek mitigation plan consists primarily of conversion of irrigation with ground water to irrigation with surface water. In addition there is some voluntary curtailment under the federal CREP program or other miscellaneous voluntary curtailment.

#### **PROCEDURAL FACTS**

5. The North Snake/Magic Valley mitigation plan was protested by Blue Lakes and Clear Springs. North Snake/Magic Valley's petition to strike Clear Springs' protest was denied by the interim director. *Order Granting Motion to Limit Scope of Hearing; Denying Motion to Strike Clear Springs' Protest and Scheduling Order* at 4-5 (December 22, 2009).

6. The A&B mitigation plan was protested by Blue Lakes, North Snake/Magic Valley, the City of Pocatello ("Pocatello"), and the Unit A Association ("Unit Association"), a group of surface water irrigators within Unit A of A&B. The Unit A Association receives surface storage water for irrigation under contracts with the USBR.

7. The Southwest/Goose Creek mitigation plan was protested by Clear Springs. Clear Springs protested only the portion of the plan proposing mitigation for a delivery call by Clear Springs.

8. On December 22, 2009, the interim director issued an *Order Granting Motion to Limit Scope of Hearing; Denying Motion to Strike Clear Springs' Protest and Scheduling Order*. In his order, the interim director prohibited Blue Lakes from presenting evidence in these proceedings regarding the extent of injury previously determined in the May 2005 Order. The interim director stated that the "hearing on the three mitigation plans that have been filed with the Department shall be limited to the ability of the plans, either individually or collectively, to satisfy the mitigation requirement of 59.3 cfs to the Devil's Washbowl to Buhl Gage spring reach



or 11.9 cfs to Blue Lakes . . . .” Furthermore, the interim director stated: “Protestants to the mitigation plans are precluded from addressing, in these proceedings, those issues that are on appeal, particularly: model uncertainty, the timeline, spring apportionment, the amount of material injury found, the amount of mitigation owed, and injury to water right 36-7210.”

9. The Unit A Association’s protest to A&B’s mitigation plan asserted that the use of surface storage water to lands previously irrigated with ground water would reduce the surface water supply to Unit A Association members, and alleged that this reduction would cause injury to its members. The Unit A Association filed a motion for summary judgment on the issue of injury. On March 31, 2010, the interim director issued an *Order Denying Unit A Association’s Motion for Summary Judgment*. In the order, the interim director concluded that A&B holds the water rights in trust for its patrons who beneficially use the water. The order concluded that the trust relationship establishes a fiduciary duty in the irrigation district. Whether or not there is a breach of the fiduciary duty is not an injury question before the Department. The interim director further held that, “IDWR is not authorized to determine whether an individual patron within an irrigation district is receiving the patron’s entitlement under the trust relationship with the irrigation district.”

10. In a subsequent order issued April 6, 2010, the interim director stated that the *Order Denying Unit A Association’s Motion for Summary Judgment* further limits the scope of evidence by prohibiting Unit A Association from presenting evidence whether “an individual patron within an irrigation district is receiving the patron’s entitlement under the trust relationship with the district.” The interim director further stated that he would “prohibit presentation of information on the subject at the April 7-8, 2010 hearing.”

## ANALYSIS OF MITIGATION PLANS

11. The Department's technical staff input the information submitted with the mitigation plans and, using the ESPA Model ("ESPAM"), simulated the reach gains resulting from the proposed mitigation. A summary table of the simulations is attached to this order as Attachment A. The attached table was distributed to the parties on February 19, 2010.

## POSITIONS/AGREEMENTS OF THE PARTIES

12. Based on the ESPAM simulations, the parties determined that each of the mitigation plans filed by North Snake/Magic Valley, A&B, and Southwest/Goose Creek satisfied the mitigation requirements of the May 2005 Order, as amended. Based on the ESPAM simulations, the parties executed various stipulations regarding the adequacy of the submitted plans. Blue Lakes recognized these quantities satisfied the requirements of the May 2005 Order. In recognizing the adequacy of the plans to address the requirements of the May 2005 Order, Blue Lakes did not waive any possible issues regarding increased mitigation that may be associated with challenges to the determination of the mitigation quantities in the May 2005 Order. The May 2005 Order has been appealed and is before the Idaho Supreme Court.

13. With the above recognized mitigation, the only issue remaining for the April 7-8, 2010 hearing was the dispute between the Unit A Association and A&B regarding the delivery of surface water to lands previously irrigated by ground water.

14. A&B is delivering surface water derived from storage and reservoirs constructed on the Snake River to irrigate approximately 1,378 Unit B acres that were once irrigated with ground water.

15. The lands once irrigated with ground water are also described as a place of use for storage water from the Snake River.

16. A&B can physically deliver the storage water for irrigation to the acres previously irrigated with ground water.

## CONCLUSIONS OF LAW

1. CM Rule 43 states as follows:

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

a. The name and mailing address of the person or persons submitting the plan. (10-7-94)

b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

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

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

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The

mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

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

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

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

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

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

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

2. The three mitigation plans submitted to the Director contained sufficient

information "to evaluate the factors set forth in Rule Subsection 043.03." CM Rule 43.01.d.

The three mitigation plans were published and subsequently protested. CM Rule 43.01.02. A hearing occurred on April 7, 2010. *Id.*

3. The mitigation obligations established in the May 2005 Order, as amended, and simulated by ESPAM (*see* Attachment A), comply with CM Rule 43.03.e, .f, and .g. Blue Lakes stipulated that the mitigation plan submitted by North Snake/Magic Valley will deliver up to 10.0 cfs of water from Alpheus Creek directly to Blue Lakes, thereby complying with CM Rule 43.03.a and .b. Blue Lakes stipulated that the mitigation plan submitted by A&B will increase reach gains through conversions and CREP participation by 1.27 cfs, and add an additional flow of 0.4 cfs to the flows of Alpheus Creek, thereby complying with A&B's obligation under the May 2005 Order, as amended, and CM Rule 43.03.a, .b, and .d-g. The mitigation plan submitted by Southwest/Goose Creek will increase reach gains by 10.20 cfs and add 2.4 cfs to the flows of Alpheus Creek through conversions, CREP participation, or other miscellaneous voluntary curtailment, thereby complying with CM Rule 43.03.a, .b, and .d-g.

5. The mitigation plans submitted by North Snake/Magic Valley, A&B, and Southwest/Goose Creek satisfy the mitigation requirements of the May 2005 Order, as amended. The mitigation plans and the use of water for mitigation are in accordance with the factors set forth in CM Rule 43.03 and approval of the mitigation plans will not injure other water users, CM Rule 43.02.

6. Clear Springs' protest to the North Snake/Magic Valley mitigation plan raised issues about the magnitude of injury and the method by which injury was calculated. The interim director refused to allow evidence, in these proceedings, regarding those issues. *Order Granting Motion to Limit Scope of Hearing; Denying Motion to Strike Clear Springs' Protest*

*and Scheduling Order.* Clear Springs did not attend the hearing, and no evidence was presented by Clear Springs at the hearing regarding its issues.

7. Pocatello and North Snake/Magic Valley argue that any mitigation offered in excess of the quantity required should be recognized by the Department as mitigation credits. The Department will not institute a bookkeeping accounting for mitigation in excess of what was required. If additional mitigation is required in the future, or other ground water users must provide mitigation, any junior ground water right holder may propose to the Department that previous activities resulting in simulated reach gains in excess of the mitigation obligation be considered.

8. A&B argued that springs discharging to Alpheus Creek are used for calibration in ESPAM, and that, as an alternative to the method employed in the May 2005 Order for simulating the mitigation benefits, the Department should accept the higher calibration numbers as the benefits of the mitigation plan. The interim director declines to adopt this alternative at the present time, and concludes that the A&B and North Snake/Magic Valley plans satisfy their obligations under the May 2005 Order, as amended.

## **ORDER**

IT IS HEREBY ORDERED that the mitigation plans filed by the North Snake Ground Water District and Magic Valley Ground Water District, A&B Irrigation District, and Southwest Irrigation District and Goose Creek Irrigation District, filed to mitigate for the Blue Lakes call are approved by the interim director, subject to further refinement if there is a determination of further injury.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the issuance of this

order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of issuance of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 7<sup>th</sup> day of May, 2010.



GARY SPACKMAN  
Interim Director

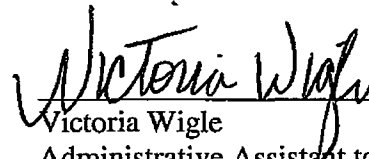
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7<sup>th</sup> day of May, 2010, the above and foregoing document was served to the following by the method indicated:

Randall C. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Candice M. McHugh RACINE OLSON 101 S Capitol Suite 208 Boise, ID 83702 <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Daniel V. Steenson Charles L. Honsinger S. Bryce Farris RINGERT LAW CHARTERED P.O. Box 2773 Boise, ID 83701-2773 <a href="mailto:dvs@ringertlaw.com">dvs@ringertlaw.com</a> <a href="mailto:clh@ringertlaw.com">clh@ringertlaw.com</a> <a href="mailto:sbf@ringertlaw.com">sbf@ringertlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
John K. Simpson BARKER ROSHOLT & SIMPSON, LLP 1010 West Jefferson, Ste. 102 PO Box 2139 Boise, ID 83701-2139 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Sarah A. Klahn WHITE & JANKOWSKI 511 Sixteenth Street, Suite 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Robert A. Maynard Erika E. Malmen PERKINS COIE, LLP 1111 West Jefferson Street, Suite 500 Boise, ID 83702-5391 <a href="mailto:rmaynard@perkinscoie.com">rmaynard@perkinscoie.com</a> <a href="mailto:emalmen@perkinscoie.com">emalmen@perkinscoie.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email



Travis L. Thompson Paul L. Arrington Sarah W. Higer <b>BARKER RSHOLT &amp; SIMPSON, LLP</b> 113 Main Avenue West, Suite 303 PO Box 485 Twin Falls, ID 83303-0485 <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a> <a href="mailto:swh@idahowaters.com">swh@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
William Parsons <b>PARSONS SMITH &amp; STONE</b> 137 West 13 <sup>th</sup> Street Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email



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

**Table of computed obligation and mitigation for Blue Lakes Call**

entity	acres	Impact to reach (cfs)	Obligation to spring (cfs)	Mitigation plan benefit (cfs)
N Snake	23,397	25.59	5.1	^
Magic V*	29,659	17.37	3.5	^
Carey V	1,970	0.97	0.2	^
non-member participants~	3,149	3.91	0.8	^
IGWA Subtotal	58175.2	47.8	9.6	10
A&B	2,063	1.27	0.3	0.40
Southwest+Goose Cr#	13,641	10.20	2.1	2.4

Total	73,879	59.3	11.9	12.8
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^ N Snake + Magic V + Carey V = 10 cfs Pristine Spg  
~ all non-member participants may not be in either N Snake, Magic V, or Carey V  
\* About 2,000 junior acres within Magic Valley are in WD 140  
# Includes 0.1 cfs benefit from CREP lands within SWID as evaluated by Department's CREP shapefile (733 ac).  
No evaluation of benefit from voluntary reductions.