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Attorneys for City of Pocatello and the Association of Idaho Cities

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

CITIES OF BLISS, BURLEY, CAREY, DECLO, DIETRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, and WENDELL,

Petitioners

vs.

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

Respondents

and

RANGEN, INC.,

Intervenor.

IN THE MATTER OF THE COALITION OF CITIES' SECOND MITIGATION PLAN FOR THE DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-15501, 36-02551, AND 36-07694 HELD BY RANGEN, INC.

Case No. CV-2015-172

AMICUS BRIEF OF THE ASSOCIATION OF IDAHO CITIES AND THE CITY OF POCATELLO

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INTRODUCTION

The Association of Idaho Cities ("AIC") and the City of Pocatello ("Pocatello") are participating as amicus curiae in this appeal to ensure the Idaho Department of Water Resources ("IDWR" or "Department") reviews mitigation plans, including those submitted by municipal entities, in a manner consistent with the law of Idaho. The Director's treatment of the Coalition of Cities ("COC") Mitigation Plan raises concerns both with how stipulated mitigation plans are treated under IDWR's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CMR"), and with the Director's decision to increase the amount of mitigation water owed by municipalities, in conflict with his prior orders.

CMR 43.03 includes a list of factors the Director "may" consider in reviewing a mitigation plan. In the proceeding below, the Director determined that one of these permissible factors—CMR 43.03.b, which asks whether mitigation water will reach a senior "at the time and place" required—was in fact a mandatory requirement for all mitigation plans. In addition to ignoring the plain language of the rule, which makes clear no CMR 43.03 factor is mandatory, the Director went on to find that Rangen's stipulation to the plan could not excuse compliance with CMR 43.03.b, despite the fact that CMR 43.03.o authorizes approval of stipulated mitigation plans that "may not otherwise be fully in compliance" with the CMR.

The Director's interpretation of CMR 43.03 should not be afforded discretion by this Court as it is contrary to the plain language of the rule, and results in administration that is arbitrary and capricious and an abuse of his discretion. Further, the Director's application of CMR 43.03 in this matter is utterly lacking in understandable and predictable standards, and is unconstitutionally void as applied. AIC and Pocatello respectfully request that this Court grant COC's appeal for the above reasons and reverse and remand to the Director to properly apply CMR 43 to the COC's Second Mitigation Plan.

STATEMENT OF THE CASE[1]

On January 29, 2014, the Director entered a finding of material injury to Rangen, Inc. ("Rangen") and ordered curtailment of certain junior priority ground water rights, including municipal water rights, unless 9.1 cfs of mitigation water was delivered to Rangen. R. 42 (*Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order")). Junior water rights within the zone of curtailment, including those belonging to the members of the COC,[2] were ordered to be curtailed unless Rangen received 9.1 cfs of mitigation water by March 14, 2014. *Id.* Pocatello and other non-COC members of the AIC were not subject to the notice of curtailment, and with the exception of Pocatello, were not served with the Order. R. 60−61.

On November 20, 2014, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone and Wendell (collectively referred to as the "Coalition of Cities" or "COC") filed *Coalition of Cities Second Mitigation Plan* ("Second Mitigation Plan") with the Director in response to the Curtailment Order. R. 259. The Second Mitigation Plan proposed to mitigate material injury to Rangen by recharge at an approved recharge site. *Id.* at 260. Rangen stipulated that the Second Mitigation Plan mitigated COC's out-of-priority ground water pumping in CM-DC-2011-004 and CM-DC-2014-004. *Id.* at 262.

[1] An abbreviated Statement of the Case is provided in this brief, and AIC and Pocatello hereby incorporate by reference the *Statement of the Case*, Section I, from the COC's *Opening Brief*, dated May 28, 2015.

[2] The Curtailment Order did not limit the water rights subject to curtailment based on type of use, and municipal water rights within the zone of curtailment were subject to the order. "This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and **municipal** uses, but excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(l 1), pursuant to IDAPA 37.03.11.020.11." R. 42 (emphasis added).

After hearing, the Director entered an *Order Confirming Final Order Conditionally Approving Cities Second Mitigation Plan* on February 13, 2015 ("Final Order"). R. 459. The Director "approved" the Second Mitigation Plan, but found that the COC members with junior pumping were still subject to curtailment, as the recharge water would not reach Rangen in significant amounts before the end of the first year of mitigation. *Id.* The Director ordered that COC members were still under threat of curtailment because "[t]he delivery of the recharge water will have contributed no water to mitigate for depletions caused by the Cities' pumping during the 11 months (approximately) of the first mitigation year (April 1, 2014 through March 31, 2015) when mitigation was required." *Id.* at 463. The Director concluded that the plan therefore did not meet the requirements of CMR 43.03.b. because it did not "'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.'"[3] *Id.* at 467−68 (emphasis added). In sum, the Director held that if mitigation water does reach a senior within "the time required" by the senior, (CMR 43.03.b), a mitigation plan cannot be approved by the Director, even if a senior has stipulated to the plan and it is filed under CMR 43.01.o, which permits stipulated plans to be approved "even though such plan may not otherwise be fully in compliance with these provisions." *Id.* at 466.

In the Final Order, the Director also confirmed that the Department's January 2014 ESPAM 2.1 curtailment run calculating Rangen's injury at 9.1 cfs did not include amounts accruing from curtailment of municipal rights, despite the fact that the Curtailment Order

[3] The Director ordered that COC would be curtailed until either "(a) the date the modeled transient benefits of the recharge activities to the Curren Tunnel equal the modeled depletions to the Curren Tunnel caused by the Cities' diversions, or (b) April 1, 2015, the beginning of the next mitigation 'phase-in' year as established in previous orders," whichever came earlier. R. 468.

expressly included municipal rights on the curtailment list, and that the depletionary effects of the COC members were not included in the 9.1 cfs mitigation requirement. *Id.* at 459−60.

As described in the COC's *Opening Brief*, the COC presented evidence at hearing that established the plan would provide the following benefits to Rangen:

- In its first year (2015), the recharge would provide approximately six times the amount of mitigation water the COC owed to the Rangen facility. R. 374; Ex. 100 at i; Ex. 113; Ex. 116.[4]
- In the course of negotiations between Rangen and COC, the parties agreed to a recharge location (the Gooding Recharge Site), which was substantially closer to the Rangen facility than the points of depletion for the cities with junior rights, which meant the mitigation water would reach Rangen quickly, and exceed the COC's depletions in the first year of operation. R. 374.
- Rangen stated that the COC plan provided "information and data that may allow for more efficient restoration of aquifer levels and spring flows." R. 431.
- The mitigation to be provided by the COC was over and above the amount originally ordered by the Director as necessary to mitigate injury in the Curtailment Order, and would not decrease Idaho Ground Water Appropriators, Inc.'s ("IGWA") mitigation obligation.
- Because "curtailment of municipal use was not simulated in the curtailment simulations made in preparation of the Rangen orders . . . . any benefits accruing from either curtailment of municipal rights or mitigation in lieu of curtailment of municipal rights will provide benefits to the Rangen facility over and above those calculated by IDWR as necessary to satisfy the Rangen delivery call." R. 374.

The Director did not consider or evaluate this evidence, and instead stated approval of the plan as submitted would let a senior pick and choose which water users to call out:

> In a surface water delivery call, the holder of a senior water right cannot agree to allow one junior water right holder to divert water that would have satisfied the senior right while continuing to call for water against the other junior users. The junior user could only divert and avoid curtailment if the quantity of water diverted by the junior right holder is replaced/delivered to the senior water right holder.

[4] The Staff Memorandum reached the conclusion that "the cumulative benefit of the recharge event is predicted to exceed the cumulative impact of the Cities' junior pumping during the first two years of mitigation (April 2014 through March 2016)." R. 420.

R. 468 n.3. The Director stated that "in this instance, Rangen and the Cities are carving out special consideration for one group of junior users, and not the other junior users. The disparity could be reconciled if the Cities were timely mitigating. They are not." R. 467.

ARGUMENT

I. THE DIRECTOR'S DECISION TO RETROACTIVELY INCREASE THE MITIGATION OBLIGATION OF JUNIORS IN RESPONSE TO THE SECOND MITIGATION PLAN WAS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

As described above, the Director's January 29, 2014 Curtailment Order ordered that certain ground water rights junior to July 13, 1962, including municipal rights belonging to the COC, be curtailed in response to the Rangen Delivery Call. R. 42, 60−61. The Curtailment Order stated that if Rangen received 9.1 cfs of mitigation water, the water rights on the Curtailment Order list would not be subject to curtailment. *Id.* at 42.

In response to the COC's Second Mitigation Plan, the Director ruled that the 9.1 cfs mitigation obligation (decided nearly a year earlier) did not, in fact, account for the COC members' mitigation obligation:

> [T]he Cities' depletions to Curren Tunnel were not included in the model run that quantified depletions and mitigation requirements. Inclusion would have increased the mitigation obligation and would have contributed to an earlier curtailment date and a larger mitigation requirement. The Cities cannot argue that because the precision of the curtailment model run did not include their increment of real depletion, they should receive special treatment or should be excluded from curtailment.

R. 387 (emphasis added). *See also* R. 415.[5] The Director went on to hold that the COC members owed mitigation water in excess of 9.1 cfs, despite the fact that the Curtailment Order stated that they would be spared curtailment if Rangen received 9.1 cfs:

[5] "The mitigation obligation specified in the January 29, 2014 curtailment order was determined by simulating curtailment of groundwater irrigation junior to July 13, 1962 with ESPAM2.1. Irrigation and other water uses within municipalities were not included in the curtailment simulation, because municipal use is a very small component of water use within the Eastern Snake Plain Aquifer (ESPA)." *Id.* "Estimates of municipal water use

> The modeled depletions from ground water pumping calculated to determine the mitigation obligations of the ground water users [in the curtailment order] only included depletions resulting from diversions of ground water for irrigation purposes. The Department did not calculate additional depletions caused by diversion of ground water by the Cities or other industrial or commercial uses. As a result, the mitigation obligations of the ground water users were lower, by some small number, because the comprehensive depletionary effects of all diversions were not calculated. The omission in the calculation of the depletive effects of other ground water pumping did not eliminate the true and actual depletive effect of the additional pumping by the Cities, industries, and commercial users.

R. 459 (emphasis added).

Finally, the Director found that this mitigation amount in excess of 9.1 cfs was owed beginning in April 2014, and because the COC's Second Mitigation Plan was not operating in 2014, they were not protected until the "second" mitigation year (April 1, 2015 through March 31, 2016) and would be curtailed. *Id.* at 467 ("During the first year when mitigation is required (April 1, 2014 through March 31, 2015), the Cities' Second Mitigation Plan does not 'provide replacement water, at the time and places required . . . .").

The Director has discretion administering water rights, including reviewing mitigation plans, but his discretion is not unfettered. *In Re Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.* ("*A&B*"), 155 Idaho 640, 654, 315 P.3d 828, 842 (2013). Here, the Director's Curtailment Order ruled that juniors affected by the Curtailment Order—including the COC members on the curtailment list—would not be curtailed if Rangen received 9.1 cfs of water. However, one year later he reversed himself, ruling that the COC owed water in excess of 9.1 cfs, and warned that COC members would be curtailed unless Rangen received this additional water by the end of the first mitigation year. Such administration is an abuse of the Director's discretion, and improperly curtails juniors without

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were included in calibration of ESPAM2.1, but junior-priority municipal water use was not included in the curtailment simulation used to calculate the mitigation obligation in the January 29, 2014 order. Input for the curtailment simulation was calculated based on irrigation consumptive use." *Id.*

affording them notice and due process of the amount of mitigation that is owed. *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 200, 204, 280 P.3d 703, 707 (2012).

II. THE DIRECTOR'S INTERPRETATION AND APPLICATION OF CMR 43.03 VIOLATES THE LAW

A. The Director's interpretation of CMR 43.03 is not entitled to deference.

The Second Mitigation Plan was submitted pursuant to CMR 43.03, which states

> 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:
>
> . . . .
>
> 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. . . .
>
> . . . .
>
> 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.

CMR 43.03 (emphasis added). As emphasized above, the rule includes a list of permissive factors the Director may consider in evaluating mitigation plans. "When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall.'" *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) (the use of "may" in I.C. § 33-1801 does not impose a mandatory duty). Contrary to the plain language of the rule, the Director held that the timing factor found in CMR 43.03.b is a mandatory element of mitigation plans, and precluded approval of the Second Mitigation Plan on that basis. R. 467−68 ("[T]he Cities' Second Mitigation Plan does not '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

. . . ." (quoting CMR 43.03.b)). This interpretation is not entitled to deference and must be reversed.

> Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present.

Duncan v. State Bd. of Accountancy, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).[6]

First, the language of CMR 43.03 "expressly treat[s] the matter at issue"—stating the Director "may"—not "must" —consider the factors listed therein. *Id.* This language does not leave room for the Director's interpretation that CMR 43.03.b is a mandatory element of a stipulated mitigation plan. *See Farrell v. Whiteman*, 146 Idaho 604, 611 n.2, 200 P.3d 1153, 1160 n.2 (2009). Second, the Director's construction—which is conclusory and without an explanatory analysis—is not reasonable. *Id.*; *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998). There is no basis within the rules to hold CMR 43.03.b to be a mandatory element of all mitigation plans, and the Director has not articulated one.

Further, the Director's decision completely ignores the express authority granted under CMR 43.03.o that the Director may approve stipulated mitigation plans that do not meet all the requirements of the rules—including the CMR 43.03 permissive factors. *See Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990) ("The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein."). A comparison to CMR 42 is helpful in understanding the import of CMR 43.03.o. CMR 42 contains a list of factors the Director "may" consider in evaluating material injury. These are permissive factors, just like

[6] "There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation." *Id*.

those found in CMR 43. Each rule permits the Director to approve or deny, within a proper exercise of his discretion, a delivery call or mitigation plan pursuant to one of the factors listed therein. However, CMR 43 contains a provision that CMR 42 does not—it expressly authorizes the Director to approve a mitigation plan even if certain factors are not met. CMR 42 has no such provision. Accordingly, if a mitigation plan is stipulated, no one CMR 43 factor can be considered mandatory. Therefore, deference to the Director's interpretation of CMR 43 is not appropriate, as the Director's analysis is "so obscure and doubtful that it is entitled to no weight or consideration." *Preston*, 131 Idaho at 505, 960 P.2d at 188 (quotations and citation marks omitted).

B. The Director's Order violates I.C. § 67-5279(3)

The Director's only stated concern with the COC's plan was that he saw it as giving COC members a "sweetheart deal" as compared to other juniors:

> It is ironic and inconsistent for Rangen to stipulate to a mitigation plan that will not provide mitigation water in the time of need. Approval of the Cities' Second Mitigation Plan would allow the Coalition of Cities to avoid curtailment on January 19, 2015, without providing timely mitigation. At the same time other junior ground water users may be curtailed despite efforts to provide mitigation according to the order approving the Fourth Mitigation Plan.
>
> The agreement by Rangen to accept the Cities' Second Mitigation Plan is not grounds to justify the mitigation plan's non-delivery of replacement water to Rangen during the first "phase-in" year.

R. 363 (emphasis added).

The COC's plan provided tangible benefits—indeed a windfall to Rangen in the form of recharge water at six times the amount of COC's depletions. This was a deal bargained for between COC and Rangen, and is not evidence of an effort by Rangen or COC members to treat other juniors disparately—no other juniors have proposed to provide (at significant cost) six times the amount of their depletions at a location agreed to by Rangen. R. 374; Ex. 100 at i; Ex.

113; Ex. 116. An agreement between the senior water user and junior water users that provides more water than expected from curtailment and in a location that is more desirable by the senior-priority user meets the requirements of CMR 43.03.o.

The Director's interpretation of CMR 43.03.b, a plainly permissive factor, to be a mandatory requirement that COC had to meet in order to obtain unconditional approval of their mitigation plan is arbitrary and capricious and an abuse of discretion. I.C. § 67-5279(3). Further, the Director's decision contains no analysis of why CMR 43.03.b is a mandatory factor in this case, and includes no explanation of the basis of this decision or what principles the Director relied upon to reach such a conclusion. "An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *A&B*, 153 Idaho at 511, 284 P.3d at 236 (citations omitted).

Indeed, the Director's approval of a recent stipulation in the SWC Delivery Call—*see* pleadings attached as Exhibit A—indicates that the Director is willing to approve settlements that do not provide mitigation water at the time mandated, but which provide the additional compensation of providing, at a later time, more water than a junior actually owes. In the SWC Delivery Call on April 16, 2015, the Director ordered that IGWA was required to provide 89,000 acre feet of mitigation water by April 30, 2015. Final Order Regarding April 2015 Forecast Supply (Methodology Steps 1 − 3) at 6, Docket No. CM-DC-2010-001. However, on May 8, 2015, the Surface Water Coalition and IGWA submitted a stipulation to the Director. The stipulation showed that IGWA had agreed to provide water in excess of 89,000 acre feet, however, that water would not be provided until after the day of allocation, and not by April 30, 2015. Order Approving Stipulation and Granting Joint Motion, Docket Nos. CM-DC-2010-001

and CM-MP-2009-07, May 8, 2015.[7] In other words, in exchange for more water than was owed, the Director approved juniors providing that mitigation water at a later time—the same thing that the COC attempted to do in their mitigation plan. Such disparate treatment among juniors highlights the arbitrary and capricious nature of the Director's administration of mitigation plans, and this Court should reverse and remand for further proceedings.

There is not substantial evidence in the record to support the conclusion that the Second Mitigation Plan would have resulted in "special treatment" for COC members and/or disadvantaged other users—indeed, the record shows and the Director found the plan adequately mitigated COC members' junior depletions. R. 468. Furthermore, the Director failed to acknowledge that Rangen bargained for a mitigation plan with benefits that would not reach Rangen until March 31, 2015. Rangen's entry into the stipulation waived its right to water during the time that the Director found the plan to be lacking, therefore waiving Rangen's ability to obtain additional amounts related to effects of COC pumping prior to March 31, 2015.

Finally, the Final Order does not include a "[a] reasoned statement in support of the decision." I.C. § 67-5248(1)(a). The COC and Rangen bargained for the stipulation that is encompassed in the Mitigation Plan and in light of this, the Director's decision provides no analysis to support the imposition of CMR 43.03.b as a mandatory factor for COC to meet in order to obtain unconditional approval of their Mitigation Plan.

Because of these deficiencies, the Director's Order should be reversed and remanded.

C. The Director's application of CMR 43.03 is unconstitutionally vague.

As explained above, the Director's application of the factors in CMR 43.03 arbitrarily finds that one factor (43.03.b) is a mandatory element of all CMR 43 mitigation plans, while another factor (43.03.o) is interpreted to effectively have no meaning under the rules. As argued

[7] Pocatello is a party to the SWC Delivery Call and does not object to this stipulation.

above, this interpretation is not consistent with the language of CMR 43 and is not entitled to deference. Further, it calls into question whether CMR 43.03 has been applied in consistent manner such that due process is not offended.

CMR 43.03.o is unconstitutionally vague as applied in this case. A statute may be challenged as unconstitutionally vague on its face or as applied. *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003) (abrogated on other grounds by *Evans v. Michigan*, 133 S.Ct. 1069, 185 L. Ed. 2d 124 (2013)); *State v. Martin*, 148 Idaho 31, 35, 218 P.3d 10, 14 (2009); *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007) (finding certain CMR facially constitutional, but noting that "[t]o the extent one can bring a constitutional claim based on a particular fact scenario that occurred and was permitted within the Rules, an 'as applied' challenge is appropriate."). "[T]o prevail in an as-applied challenge, one must demonstrate only that the statute is unconstitutional as applied in a specific instance." *Hernandez v. Hernandez*, 151 Idaho 882, 884, 265 P.3d 495, 497 (2011).[8] "Although most decisions invoking the constitutional 'void for vagueness' doctrine have dealt with criminal statutes and ordinances, this doctrine applies equally to civil statutes." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 716, 791 P.2d 1285, 1295 (1990). *See Tuma v. Bd. of Nursing*, 100 Idaho 74, 79, 593 P.2d 711, 716 (1979).

In *Tuma*, the Idaho Supreme Court found that Idaho Code section 54-122 while facially valid, was unconstitutionally vague as applied to the conduct of a nurse. 100 Idaho at 79, 593 P.2d at 716. The Court found that the statute "cannot withstand scrutiny for vagueness as applied to the specific conduct here made the basis" for the Board's decision. *Id*. There, the

[8] The result of the Director's Final Order was to curtail COC until the time specified—accordingly, the Director's interpretation of CMR 43.03 resulted in the deprivation, or threatened deprivation, of the COC's water rights, violating their due process rights. The deprivation of property is protected by due process. *Olsen*, 117 Idaho at 716, 791 P.2d at 1295 (facial vagueness challenge to products liability statute (citing *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 520 (1966))).

Court stated that "we find nothing in the statutory definition of 'unprofessional conduct' which can be said to have adequately warned Tuma of the possibility that her license would be suspended if she engaged in conversations with a patient regarding alternative procedures." *Id.* at 80, 593 P.2d at 717.

The Director's application of the CMR 43.03 factors to the Second Mitigation Plan—a plan that Rangen stipulated to, but that the Director found did not meet the timing requirements of CMR 43.03.b—meant the COC faced immediate curtailment of their water rights. The Director's application of CMR 43.03 to the COC's plan was such that some elements were required and others were ignored. This application of the rule makes it impossible for junior water users to anticipate in any meaningful way what sort of stipulated mitigation plans are and are not proper under CMR 43. The Director's application of CMR 43 here was so vague that the COC could not have anticipated such a result. The Director's interpretation of CMR 43.03 to reach this result does not provide knowable standards that would have informed the COC that their Mitigation Plan would be denied because the Director found it did not meet the requirements of 43.03.b—a permissive factor under the rules.

In *Tuma,* the Court noted that

> It is important to note also that the void-for-vagueness doctrine is two-pronged. Not only are those whose activities are proscribed entitled to definite standards by which they may be guided, but it is equally important that the standards are there to guide those officers or agencies required to pass judgment on licensees called to account for their conduct. . . .
>
> . . . .
>
> . . . [the Board claims] it is enough that the Board will hear evidence of a licensee's conduct, and with its expertise then reach a conclusion whether such was or was not unprofessional. We cannot agree. Such a procedure would be an intolerable state of affairs, and not in compliance with requirements of due process.

100 Idaho at 80−81, 593 P.2d at 717−18 (emphasis added). The COC, and indeed all junior water users, are entitled to the application of Department rules to mitigation plans that provide "definite standards" by which their decision can be guided. As applied to the COC's mitigation plan, the Director's decision to find certain of the CMR 43.03 factors as mandatory, and ignore the language of other factors, results in a process that lets the Director decide which factors of CMR 43.03 are mandatory in a particular case. This sort of administration abuses his discretion, as described above, and as far as administration goes, would permit an "intolerable state of affairs." *Id. See also Burton v. State, Dep't of Transp*., 149 Idaho Ct. App. 746, 749, 240 P.3d 933, 936 (2010) (I.C. § 49-808(1) found unconstitutionally vague as applied, holding "[p]ersons of ordinary intelligence can only guess at the statute's directive in this circumstance. Therefore, the statute is unconstitutionally vague as applied to Burton's conduct.").

D. The Director's decision violates public policy.

Finally, the Director's decision cannot be said to promote good public policy. *See* COC's Opening Brief at 16−17. As explained above, the Director's interpretation of CMR 43 provides juniors, particularly municipal water providers, little guidance in how their water rights and mitigation plans will be administered. The COC's mitigation plan was no paper tribute to Rangen—it provides wet water, and required a significant investment in recharge infrastructure, necessary contracts, and engineering costs to achieve. The COC filed this plan trying to protect their citizen's water supply from curtailment in the event IGWA was not successful in providing the full 9.1 cfs of mitigation water. In response to this plan, the Director reversed his prior order and increased the mitigation obligation as to COC members.

The COC went through months of negotiations to come up with a mitigation plan that satisfied Rangen. "Because there is an obvious public policy favoring the amicable settlement of litigation," the Director's decision is troubling for junior water users who wish to avoid further

litigation over delivery calls and seek to resolve their differences with seniors through stipulated mitigation plans. *Lomas & Nettleton Co. v. Tiger Enterprises, Inc.*, 99 Idaho 539, 542, 585 P.2d 949, 952 (1978) (citation and quotation omitted).

AIC members face the uncertain choice of gambling that another entity will cover all juniors' mitigation obligations, or risk filing their own mitigation plan, which will be subject to uncertain standards under CMR 43.03 and unpredictable application by the Director. As argued above, such administration violates Idaho law, and does not promote water users to come to the table and resolve their differences rather than litigate.

CONCLUSION

For the reasons argued above, the AIC and Pocatello request the Court reverse and remand the Final Order, in part in accordance with the request in the COC's Opening Brief.

Respectfully submitted this 10th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2015, I caused to be served a true and correct copy of the foregoing **Amicus Brief of the Association of Idaho Cities and the City of Pocatello in Case No. CV-2015-172** upon the following by the method indicated:

Sarah Klahn, White & Jankowski, LLP

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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 THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. CM-DC-2010-001 **FINAL ORDER REGARDING APRIL 2015 FORECAST SUPPLY** **(METHODOLOGY STEPS 1 – 3)**

FINDINGS OF FACT

1. On April 16, 2015, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued his *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). The Methodology Order established nine steps for determining material injury to members of the Surface Water Coalition ("SWC"). This order will apply Methodology steps 1, 2, and 3.

A. Step 1

2. Step 1 requires members of the SWC to provide electronic shape files delineating the total irrigated acres to the Department by April 1, "or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5% . . . ." *Methodology Order* at 32. If the SWC does not timely provide the information, the Department will conservatively determine the total number of irrigated acres. *Id.*

3. On March 6, 2015, Minidoka Irrigation District ("Minidoka") submitted its electronic shape files delineating its total irrigated acres to the Department.

4. On March 15, 2015, the Department received a letter from American Falls Reservoir District #2 ("AFRD2"), stating that its total number of irrigated acres have not varied by more than 5%.

5. On April 8, 2015, the Department received a letter from A&B Irrigation District ("A&B"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), North Side Canal Company ("NSCC") and Twin Falls Canal Company ("TFCC"), stating that their total

EXHIBIT A

number of irrigated acres for 2015 will not vary by more than 5% from the electronic shape files submitted in prior years.

6. Based on the information submitted by the SWC, the Department will use the following total irrigated acres:

	Total Irrigated Acres	Data Source
A&B	15,924	Director's Report
AFRD2	62,361	Director's Report
BID	46,035	2013 shapefile submitted, reduced for overlapping acres and acres outside of service area.
Milner	13,335	Director's Report
Minidoka	74,662	2015 shapefile submitted, reduced for overlapping acres and acres outside of service area.
NSCC	154,067	Director's Report
TFCC	194,732	2013 shapefile submitted, reduced for overlapping acres and acres outside of service area.

B. Step 2

7. Step 2 states that, within fourteen days of the issuance of the joint forecast ("Joint Forecast") prepared by the United States Bureau of Reclamation and the United States Army Corp of Engineers, the Director "will predict and issue an April Forecast Supply for the water year and will compare the April Forecast Supply to the baseline demand ("BD") to determine if a demand shortfall ("DS") is anticipated for the upcoming irrigation season. A separate April Forecast Supply and DS will be determined for each member of the SWC." *Methodology Order* at 16.

8. On April 2, 2015, the Joint Forecast was announced, predicting an unregulated inflow of 2,515,000 acre-feet at the Snake River near Heise gage for the period of April through July. The Joint Forecast "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." *Methodology Order* at 16. The forecasted flow volume equates to 78% percent of average[1] and is most similar to the flow volume experienced in 2003. The Heise forecast was used in regression equations developed for A&B and Milner to predict the natural flow supply.[2]

[1] The average is based on years 1981-2010.

[2] Attached hereto are the regression analyses for each SWC entity used to predict natural flow supply.

9. The variables, Heise forecast and Box Canyon total discharge for the period November – March, were utilized in multiple linear regression equations to predict the natural flow supplies for AFRD2, BID, Minidoka, NSCC, and TFCC. *Methodology Order at 16.* The U.S. Geological Survey ("USGS") measures and monitors the flow at the Box Canyon stream flow measurement gage. A unique circumstance developed this year at the Box Canyon gage. The Box Canyon gaging location has historically been a very stable gage and not subject to regular shifts. Based on stream discharge and stream gaging standards, the USGS began to apply a shift to the Box Canyon data starting in February 2015. The Director does not question the shift applied by the USGS to the Box Canyon data. The concern is that regression models adopted by the Methodology Order are based on unshifted data. A technical working group, comprised of technical experts of the parties, was briefed and did not express significant apprehension with the Director using unshifted Box Canyon data in the regression models for this order. The Box Canyon total discharge used in the regression models by the Director was based on unshifted data and totaled 95,310 acre-feet for the period November – March.

10. The storage allocations were predicted for each SWC member. As of the April 9, 2015 water right accounting, the water rights for Jackson, Lake Walcott, Palisade Winter Water Savings, and American Falls space have filled. The Director anticipates that the SWC will receive a full allocation in their Jackson, Lake Walcott, Palisades Winter Water Savings, and American Falls storage space. Given the runoff forecast, the Director anticipated that the Palisades storage rights will fill to 93%. The storage allocations are based on the anticipated allocation minus evaporation charges.

11. Based on the above, the Director predicts as follows:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 06/08/12	Shortfall
A&B	2,820	133,106		135,926	59,993	-
AFRD2	28,573	382,844	1,000	412,417	427,672	15,300
BID	72,579	220,262	5,130	297,971	251,531	-
Milner	6,136	86,940		93,075	47,135	-
Minidoka	107,013	350,228	8,370	465,611	369,492	-
NSCC	307,726	836,505	(7,750)	1,136,481	978,888	-
TFCC	753,817	239,240	(6,750)	986,307	1,060,011	73,700
				Total Predicted Demand Shortfall (AF)		89,000

C. Step 3

12. Step 3 requires the following:

> The April DS is the volume of mitigation water junior water right holders must actually physically secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations, unless adjusted as explained below. If junior ground water users previously secured mitigation water for a reasonable carryover shortfall to an individual SWC member in the previous year, the current-year mitigation obligation to the individual SWC member will be reduced by the quantity of water secured for the reasonable carryover shortfall.
>
> By May 1, or within fourteen (14) days from issuance of the values set forth in Step 2, whichever is later in time, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver water to the injured members of the SWC at the time of need.

13. The April predicted demand shortfall for AFRD2 is 15,300 acre-feet. The April predicted demand shortfall for TFCC is 73,700 acre-feet. The total predicted demand shortfall of 89,000 acre-feet is the volume of mitigation water junior water right holders must actually secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations. There was no carryover shortfall in the fall of 2014, junior ground water users did not secure any mitigation water for a carryover shortfall, and there is no adjustment to the mitigation obligation.

CONCLUSIONS OF LAW

1. The Fifth Judicial District Court, in and for the County of Minidoka, held that the evidentiary standard of proof to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2009-000647 (Fifth Jud. Dist., May 4, 2010); *Memorandum Decision and Order on Petitions for Rehearing*, CV-2009-000647 (Fifth Jud. Dist., Nov. 2, 2010).

2. "Clear and convincing evidence refers to a degree of proof greater than a mere preponderance." *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). "Clear and convincing evidence is generally understood to be '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); *see also Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

3. In 2015, the Director has sufficient information to quantify irrigated areas for each of the SWC members as required by Step 1.

4. The Joint Forecast predicts an unregulated inflow of 2,515,000 acre feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 78% of average and is most similar to the flow volume experienced in 2003.

5. The April predicted demand shortfall of 89,000 acre-feet is the volume of mitigation water junior water right holders must actually secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations. There was no carryover shortfall in the fall of 2014, junior ground water users did not secure any mitigation water for a carryover shortfall, and there is no adjustment to the mitigation obligation.

6. Junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver 89,000 acre-feet of water to the injured members of the SWC at the time of need. If junior ground water users fail or refuse to submit this information by April 30, 2015, the Director will issue an order curtailing junior ground water users.

7. If, at any time prior to the Director's final determination of the April Forecast Supply, the Director can determine with certainty that any member of the SWC has diverted more natural flow than predicted, or has accrued more storage than predicted, the Director will revise his initial, projected demand shortfall determination.

ORDER

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

The Director predicts, at this time, an in-season demand shortfall of 89,000 acre-feet. On or before April 30, 2015, IGWA shall establish, to the satisfaction of the Director that it has secured 89,000 acre-feet of storage water to mitigate for the predicted, in-season demand shortfall. If IGWA cannot establish, to the satisfaction of the Director, that it has secured the required volume of water, in whole or in part, the Director will issue an order curtailing junior-priority ground water users. IGWA is not required to deliver or assign the secured volume of storage water until after the Director determines the SWC's Time of Need, as established in Step 7 of the Third Amended Methodology Order.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order 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 16th day of April, 2015.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17TH day of April, 2014, the above and foregoing, was served by the method indicated below, and addressed to the following:

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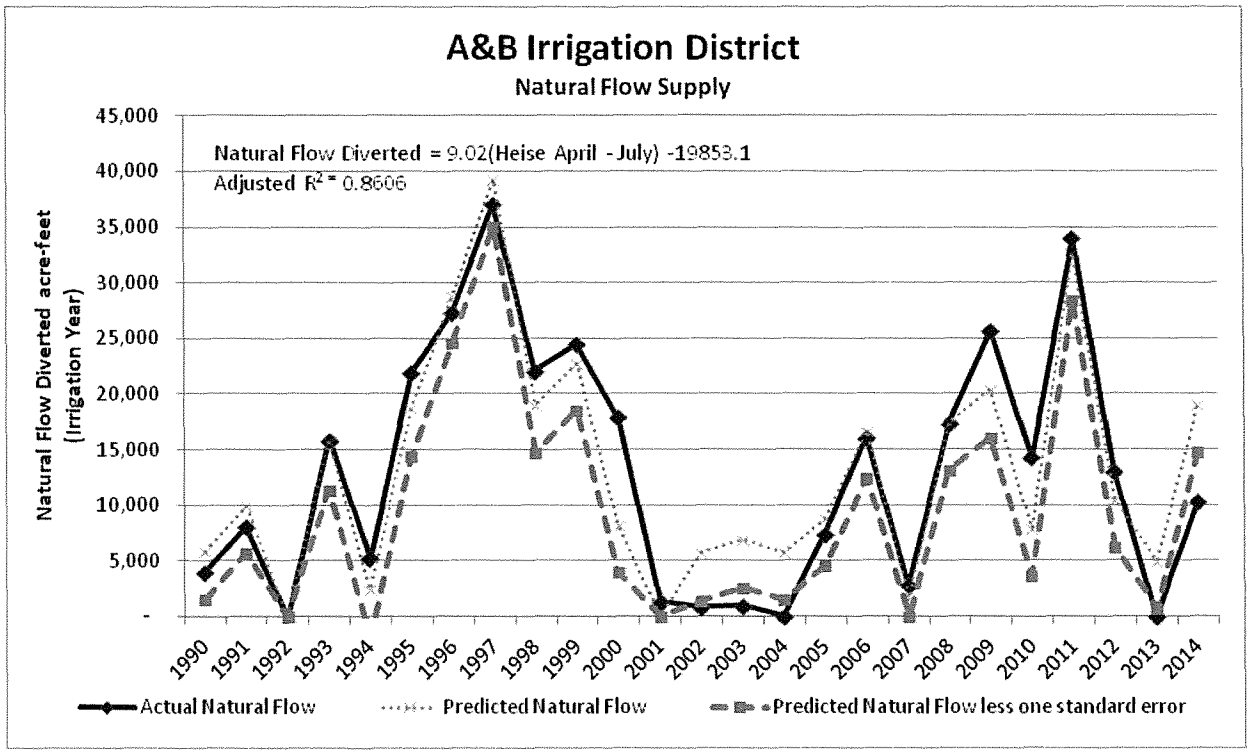
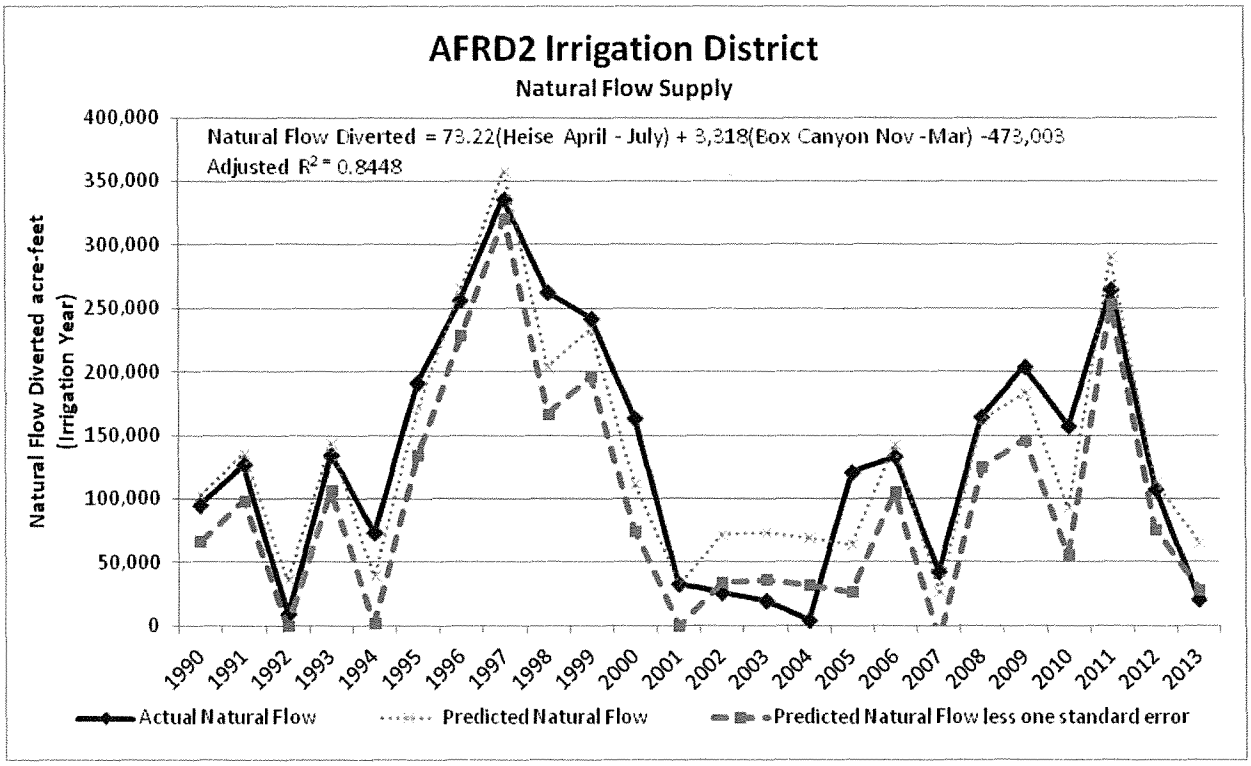
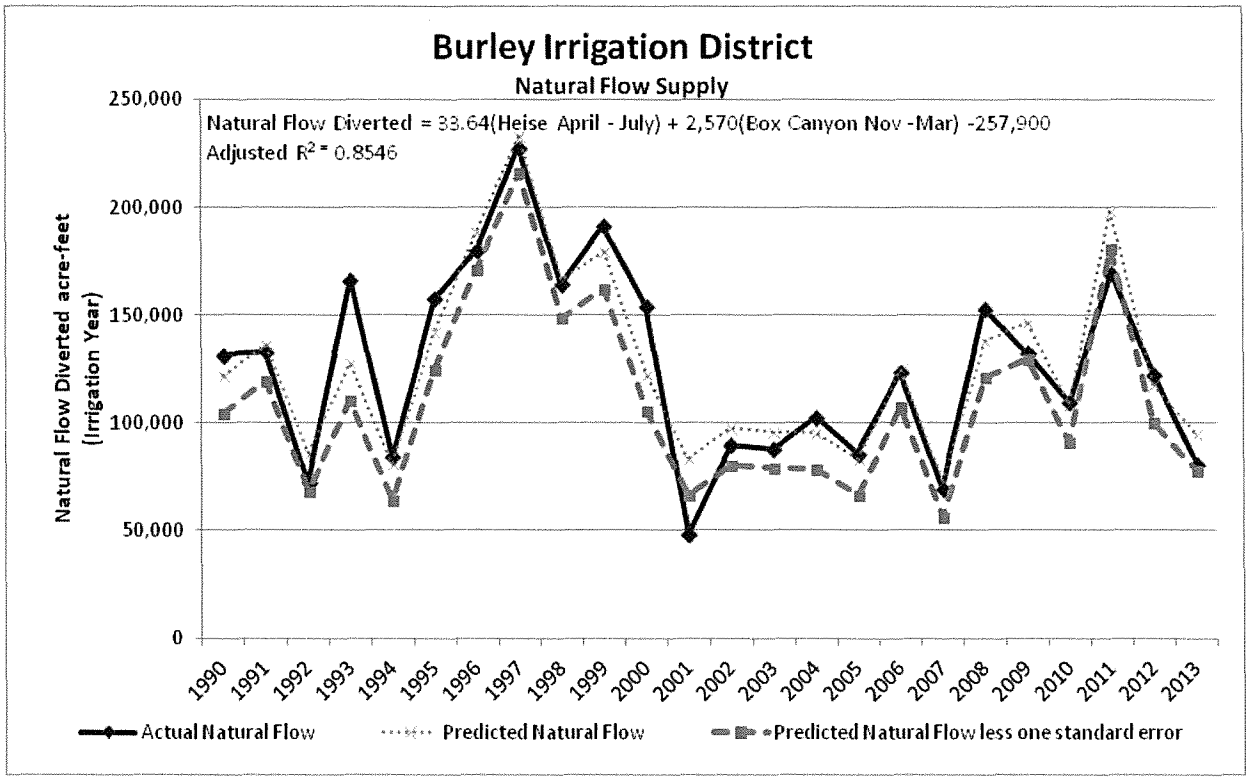
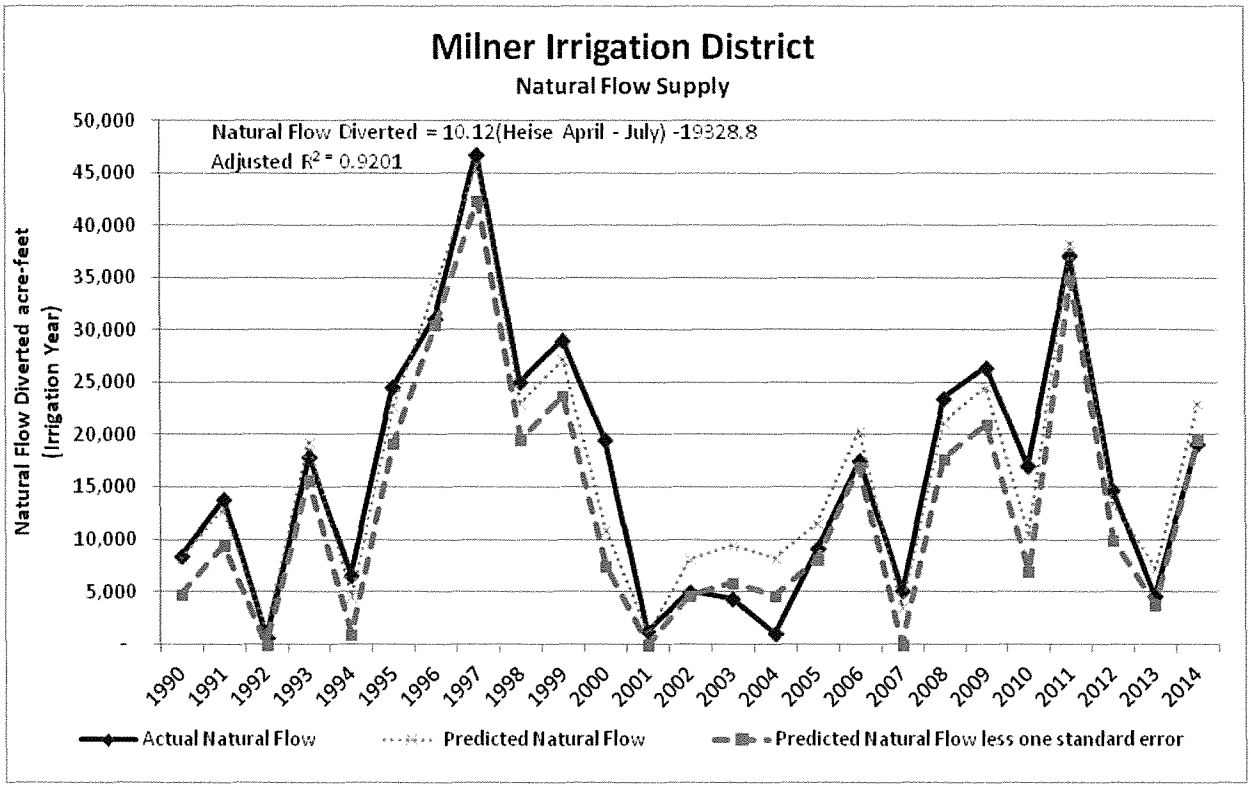
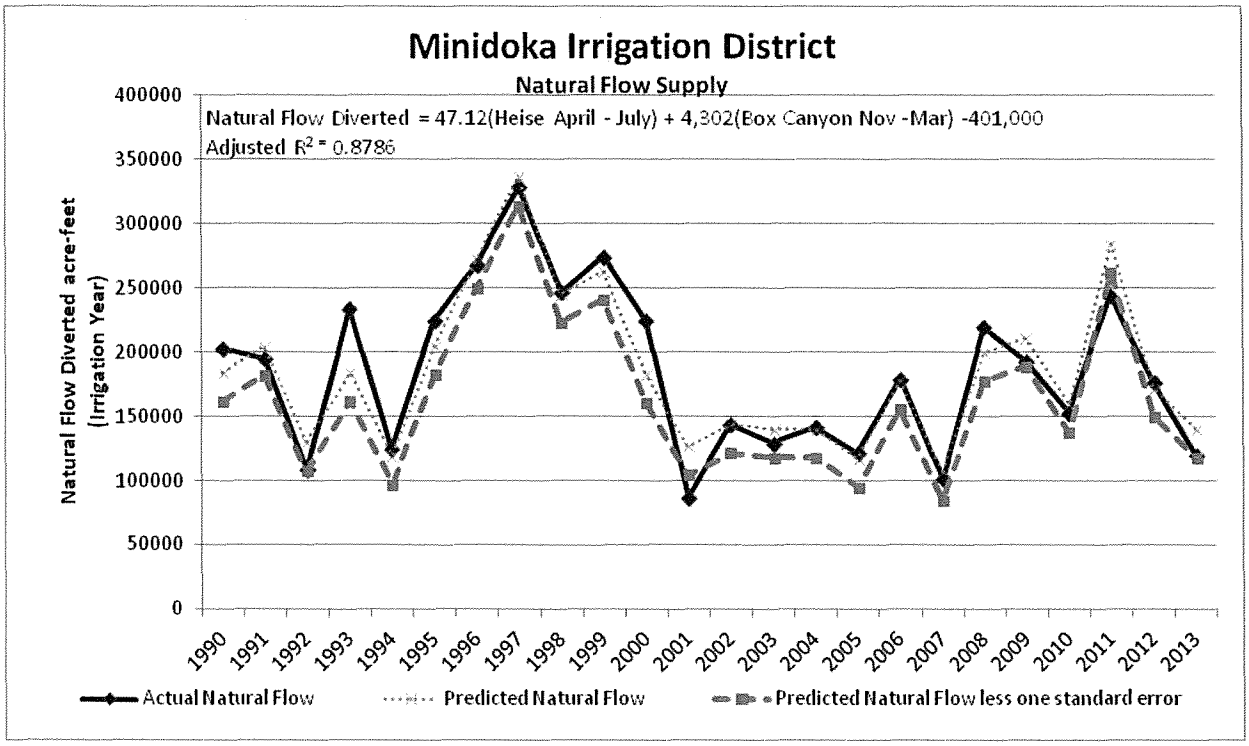
Deborah Gibson
Administrative Assistant

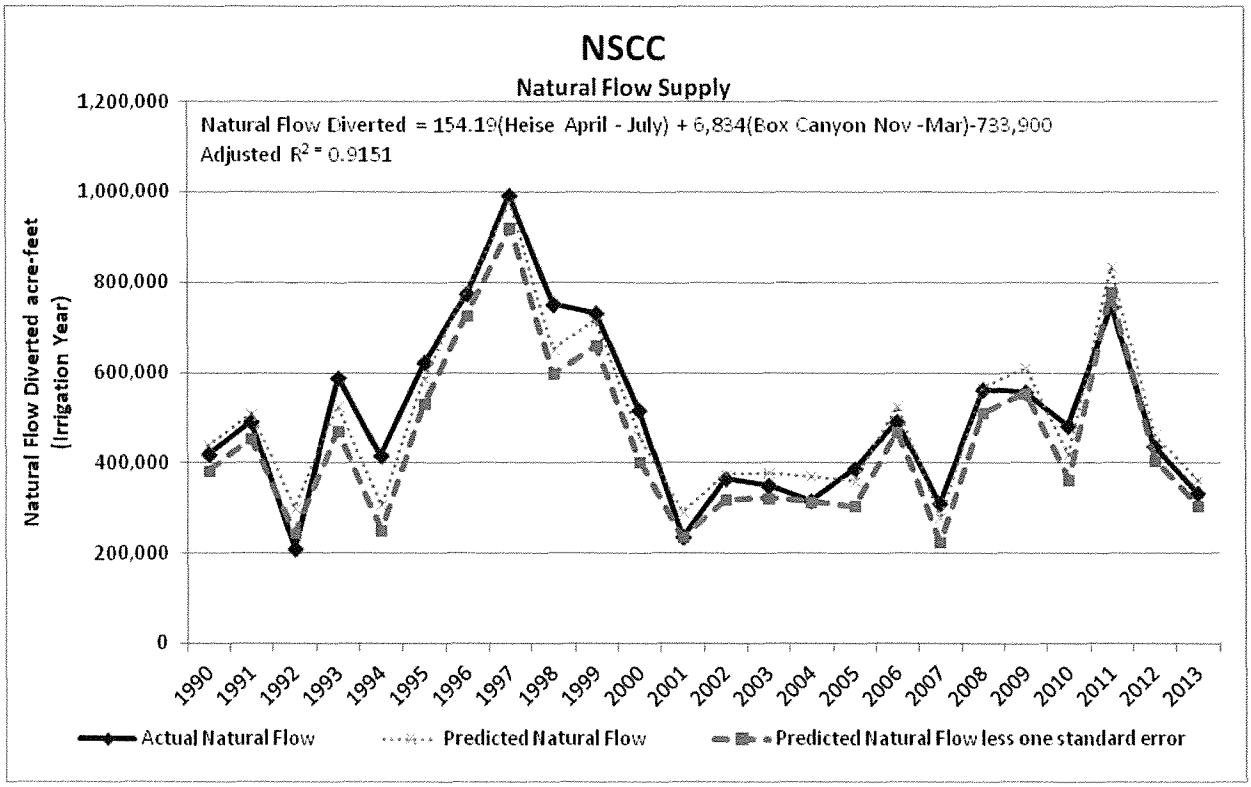

A&B Irrigation District
Natural Flow Supply
Natural Flow Diverted = 9.02(Heise April - July) -19853.1
Adjusted R² = 0.8606
Natural Flow Diverted acre-feet (Irrigation Year)
45,000
40,000
35,000
30,000
25,000
20,000
15,000
10,000
5,000
-
1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014
Actual Natural Flow
Predicted Natural Flow
Predicted Natural Flow less one standard error

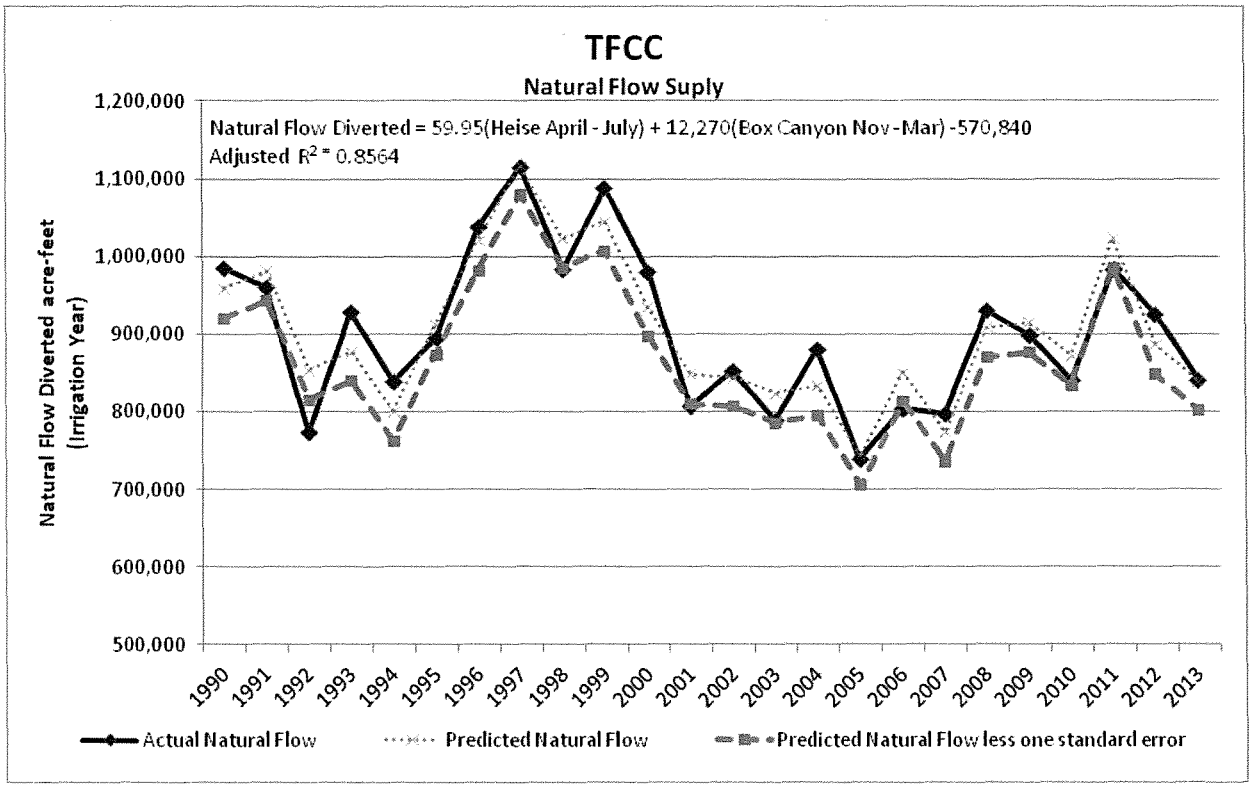

AFRD2 Irrigation District
Natural Flow Supply
Natural Flow Diverted = 73.22(Heise April - July) + 3,318(Box Canyon Nov -Mar) -473,003
Adjusted R² = 0.8448
Natural Flow Diverted acre-feet (Irrigation Year)
400,000
350,000
300,000
250,000
200,000
150,000
100,000
50,000
0
1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013
Actual Natural Flow
Predicted Natural Flow
Predicted Natural Flow less one standard error


Burley Irrigation District
Natural Flow Supply
Natural Flow Diverted = 33.64(Heise April - July) + 2,570(Box Canyon Nov -Mar) -257,900
Adjusted R² = 0.8546
Natural Flow Diverted acre-feet (Irrigation Year)
250,000
200,000
150,000
100,000
50,000
0
1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013
Actual Natural Flow
Predicted Natural Flow
Predicted Natural Flow less one standard error


Milner Irrigation District
Natural Flow Supply
Natural Flow Diverted = 10.12(Heise April - July) -19328.8
Adjusted R² = 0.9201
Natural Flow Diverted acre-feet (Irrigation Year)
50,000
45,000
40,000
35,000
30,000
25,000
20,000
15,000
10,000
5,000
-
1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014
Actual Natural Flow
Predicted Natural Flow
Predicted Natural Flow less one standard error


Minidoka Irrigation District
Natural Flow Supply
Natural Flow Diverted = 47.12(Heise April - July) + 4,302(Box Canyon Nov -Mar) -401,000
Adjusted R2 = 0.8786
Natural Flow Diverted acre-feet (Irrigation Year)
400000
350000
300000
250000
200000
150000
100000
50000
0
1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013
Actual Natural Flow
Predicted Natural Flow
Predicted Natural Flow less one standard error


NSCC
Natural Flow Supply
Natural Flow Diverted = 154.19(Heise April - July) + 6,834(Box Canyon Nov -Mar)-738,900
Adjusted R2 = 0.9151
Natural Flow Diverted acre-feet (Irrigation Year)
1,200,000
1,000,000
800,000
600,000
400,000
200,000
0
1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013
Actual Natural Flow
Predicted Natural Flow
Predicted Natural Flow less one standard error


TFCC
Natural Flow Suply
Natural Flow Diverted = 59.95(Heise April - July) + 12,270(Box Canyon Nov-Mar) -570,840
Adjusted R^2 = 0.8564
Natural Flow Diverted acre-feet (Irrigation Year)
1,200,000
1,100,000
1,000,000
900,000
800,000
700,000
600,000
500,000
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
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2007
2008
2009
2010
2011
2012
2013
Actual Natural Flow
Predicted Natural Flow
Predicted Natural Flow less one standard error

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department 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:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. 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 of: a) the service date of the final order, b) the service date 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 section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

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 THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. CM-DC-2010-001 Docket No. CM-MP-2009-07 **ORDER APPROVING STIPULATION AND GRANTING JOINT MOTION**
IN THE MATTER OF IGWA'S MITIGATION PLAN IN RESPONSE TO THE SURFACE WATER COALITION'S DELIVERY CALL	

On May 8, 2015 the Surface Water Coalition ("Coalition") and the Idaho Ground Water Appropriators, Inc. ("IGWA"), through counsel, filed the *Surface Water Coalition and IGWA Stipulation and Joint Motion Regarding April As Applied Order and Third Methodology Order*. The Director has reviewed the same and makes the following order.

ORDER

IT IS THEREFORE ORDERED:

1. The Director approves the Stipulation filed by the Coalition and IGWA.

2. Pursuant to the Stipulation and in satisfaction of the April mitigation obligation, IGWA, on behalf of its member districts, shall acquire a minimum of 110,000 acre-feet (AF) for delivery as directed by the Coalition as follows:

   i. 75,000 AF of private leased storage water on the date of allocation of Water District 01 storage accounts.

   ii. 15,000 AF of private leased storage water within 21 days of the date of allocation of Water District 01 storage accounts.

EXHIBIT B

iii. IGWA shall pay Twin Falls Canal Company the amount required by Water District 01 to apply for rental of 20,000 AF of common pool water from the Water District 01 Rental Pool, to be delivered within 21 days of the date of allocation of Water District 01 storage accounts.

3. The *Amended Order Shortening Time to File Responses to Filings* is withdrawn. Deadlines for such responses, if necessary, will be set after July 1, 2015.

4. The April As Applied Order is withdrawn pursuant to the terms of the Stipulation.

5. The Third Methodology Order is withdrawn pursuant to the terms of the Stipulation.

DATED this 8th day of May, 2015.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2015, the above and foregoing document was served on the following by providing a copy of the *ORDER APPROVING STIPULATION AND GRANTING JOINT MOTION* in the manner selected:

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