

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
Ph: (208) 232-6101  
tj@racineolson.com  
elisheva@racineolson.com

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

**DISTRICT COURT OF THE STATE OF IDAHO  
FOURTH JUDICIAL DISTRICT  
ADA COUNTY**

IDAHO GROUND WATER  
APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents.

Case No. CV01-23-13173

**IGWA'S OBJECTION TO  
THE AGENCY RECORD AND  
TRANSCRIPT**

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

Idaho Ground Water Appropriators, Inc. (“IGWA”), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, American Falls-Aberdeen Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District, through counsel, respectfully objects, pursuant to Rule 84(j) of the Idaho Rules of Civil Procedure and paragraph 7 of the Court’s Procedural Order dated August 16, 2023, to the agency record and transcript filed by the Idaho Department of Water Resources (“Department”) in this matter on August 30, 2023. There are two main reasons for this objection: (1) certain documents are missing from the record; and (2) certain pre-marked exhibits were duplicative and so the transcript should be clarified to reference the admitted exhibit.

### **INTRODUCTION**

IGWA’s Petition for Judicial Review challenges actions taken by the Idaho Department of Water Resources (“IDWR”) in IDWR Docket No. CM-DC-2010-001, which is a contested case that began in 2005 and has been ongoing ever since. The contested case broadly involves the Surface Water Coalition (SWC) delivery call. This action involves one component of the contested case—the “Methodology Order” used to predict material injury and administer junior-priority groundwater rights under the SWC call.

The Methodology Order has undergone several amendments. IGWA’s present petition for judicial review challenges the Fifth Methodology Order issued April 21, 2023, the April As-Applied Order issued the same day, and several orders issued in connection with an evidentiary hearing on the Fifth Methodology Order and the April As-Applied Order held in June of 2023.

Because this Fifth Methodology Order is the latest of a series of iterations of the Methodology Order, and because expert testimony at the hearing referenced prior versions of the Methodology Order, it is appropriate to include prior iterations of the Methodology Order in the agency record for judicial review. The Fourth Methodology Order was admitted at the hearing as Exhibit 306. Prior versions of the Methodology Orders were not admitted as evidence but were relied upon and referenced in IGWA’s expert report (Exhibit 837A).

In addition, the agency record omits certain documents and a hearing transcript that were created in connection with IDWR Docket No. CM-DC-2010-001 and referenced in IGWA’s Post-Hearing Brief filed June 16, 2023, in this matter.

## DOCUMENTS MISSING FROM THE RECORD

The agency record filed by the Department did not include the following documents that IGWA seeks to have included because they are relevant to IGWA's petition for judicial review. Copies of these documents are attached hereto.

1. *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, issued by the Department on April 7, 2010.

2. *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, issued by the Department on June 23, 2010.

3. *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, issued by the Department on April 16, 2015.

4. *Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application to Show Cause*, filed May 19, 2023, in Ada County Case No. CV01-23-08187. This brief was incorporated by reference in section 4 of IGWA's Post-Hearing Brief.

5. *Declaration of Thomas J. Budge in Support of Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application to Show Cause*, filed May 19, 2023, in Ada County Case No. CV01-23-08187. This declaration contains documents in the agency record that were cited and relied upon in IGWA's district court brief which, as explained above, is incorporated by reference in section 4 of IGWA's Post-Hearing Brief.

The documents cited in paragraphs number 4 and 5 pertain to IGWA's argument raised in prehearing filings, at the hearing, and in IGWA's post-hearing brief concerning the Department's non-compliance with the Idaho Administrative Procedure Act ("APA"), due process violations, and discovery violations. At the hearing, the Director shut down the presentation of evidence concerning these matters. First, at the onset of the hearing the Director reiterated his earlier limitation on materials and testimony made in the May 5, 2023 *Order Denying the Appointment of an Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions and Notice of Materials Department Witnesses May Rely Upon At Hearing and Intent to Take Official Notice*, stating:

[T]he testimony that I receive in this particular hearing will be limited to the factual components that were a part of the development and writing of the Fifth Methodology Order. . . . Now, there may be other areas that [sic] exploration that are outside of the methodology order, itself, and those areas if there is examination regarding those areas, I will allow objections. And will rule on those objections depending on the relevance to the Fifth Methodology Order.

Tr. Vol. I, 22:7-11; 19-24.

When Bingham Ground Water District attempted to make an offer of proof regarding the APA non-compliance and due process violations, to introduce two exhibits, Exhibits 340 and 354, the Director denied the offer in this exchange:

Hearing Officer: Okay. Mr. Anderson, I'm not even accepting this. I will tell you that I am always meeting with staff trying to establish priorities as to what I need to work on and what I don't need to work on, and that's what I'm doing here.

Mr. Anderson: Well, I'm not intending to try to make you a witness, Director. I just – this is information that was disclosed to us as a part of a request.

Hearing Officer: That's fine. And we supplied this information in good faith, but I don't see anything in this that would either establish any nefarious intent or any reason to bring this document that was – I've never seen this document that I'm aware of. SWC discussion points, main discussion points, I've never seen any of this, and I think it's because it was part of settlement, and I was excluded from those discussions. So my string of emails here and what's included simply was an attempt on my part to say what do we need to prioritize and work on in the many responsibilities that the Department and the Director has, and that was the intent of these emails. And we disclosed them in good faith, and I guess, from my perspective, for you to even insinuate that there was something nefarious, I find to be offensive, and I won't let it in. Thank you.

Tr. Vol. IV, 1032:4-1033:5.

Notwithstanding, because IGWA not only raised these issues but also took a position on these issues, consistent with *County Highway District v. Brooke View, Inc.*, 162 Idaho 138, 140-41 (2017), the issues are preserved for appeal. And the agency record should be augmented to include the documents referenced above so that IGWA can properly apprise the court of the issues on judicial review concerning compliance with the APA.

#### **CORRECTION TO THE TRANSCRIPT**

On May 30, 2023, a week before the start of the June 6th Department hearing, the parties submitted and exchanged witness lists and pre-marked exhibits. The pre-marked exhibits,

collectively, were numerous (approximately 250 documents identified). The parties attempted to identify and consolidate common exhibits, but time constraints hampered these efforts. As a result, Ms. Sukow was questioned and testified about Exhibit 197, however this exhibit was not admitted. Rather, Exhibit 829, which is substantially<sup>1</sup> the same as Exhibit 197, was admitted later. Ms. Sigsted also testified about Exhibit 829 but was also identified differently. To clarify the record, IGWA requests the following corrections be made to the transcript:

1. T. Vol. I, p. 76, L. 1-5:

(Exhibit ~~197~~ 829 marked.)

Q. (BY MR. BUDGE) Let me have you turn to ~~Exhibit 197~~ Exhibit 829. Jennifer, do you recognize this document? It's labeled "~~Attachment 1, Table 3-1. Results of Jaxon Higgs Analysis on IGWA's Proportionate Share Modeling, Related to Reach Gain Benefits and Acres Curtailed for the May 2023 Curtailment~~ April 2023 As-Applied Order."?"

2. T. Vol. III, p. 644, L. 16-18:

Q: Thank you. Let's move next to Section 3.4.4, and if you can just explain this section and ~~the Table 3-1~~ Exhibit 829.

Respectfully submitted this 13th day of September, 2023.

RACINE OLSON, PLLP

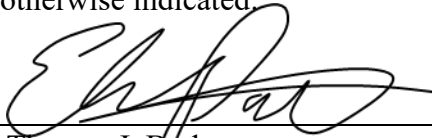
By:   
Elisheva M. Patterson  
*Attorneys for IGWA*

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<sup>1</sup> The only difference between Exhibit 197 and admitted Exhibit 829 is the title; the substantive chart and footnote content is the same. Exhibit 197 is attached to this objection for reference. Exhibit 829 is located at R. 2111, and Table 3-1 is located at R. 2411.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of September, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
 \_\_\_\_\_  
 Thomas J. Budge

Clerk of the Court ADA COUNTY DISTRICT COURT	iCourt
Director Gary Spackman Garrick Baxter Sarah Tschohl IDAHO DEPT. OF WATER RESOURCES 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion Carr U.S. DEPT. INTERIOR 960 Broadway Ste 400 Boise, ID 83706	<a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. DEPT. OF JUSTICE 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>

<p>Matt Howard  U.S. BUREAU OF RECLAMATION  1150 N Curtis Road  Boise, ID 83706-1234</p>	<p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>
<p>Sarah A Klahn  SOMACH SIMMONS &amp; DUNN  2033 11th Street, Ste 5  Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl  CITY OF POCATELLO  P.O. Box 4169  Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife  City Attorney  CITY OF IDAHO FALLS  P.O. Box 50220  Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Skyler C. Johns  Nathan M. Olsen  Steven L. Taggart  OLSEN TAGGART PLLC  P.O. Box 3005  Idaho Falls, ID 83403</p>	<p><a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a>  <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a>  <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>

Dylan Anderson  
DYLAN ANDERSON LAW PLLC  
P.O. Box 35  
Rexburg, Idaho 83440

[dylan@dylanandersonlaw.com](mailto:dylan@dylanandersonlaw.com)



## ATTACHMENT 1

*Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, issued by the Department on April 7, 2010.

**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 )	<b>FINAL ORDER REGARDING</b>
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	<b>METHODOLOGY FOR</b>
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>DETERMINING MATERIAL</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>INJURY TO REASONABLE</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>IN-SEASON DEMAND AND</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>REASONABLE CARRYOVER</b>
AND TWIN FALLS CANAL COMPANY )	
_____ )	

**FINDINGS OF FACT**

**I. Procedural Background**

1. On September 5, 2008, the Director of the Department of Water Resources (“Director” or “Department”) issued a final order in this matter (“2008 Final Order”), in which he ruled on all issues raised at hearing, with the exception of stating his methodology for determining material injury to the Surface Water Coalition’s (“SWC”) reasonable in-season demand (“RISD”) and reasonable carryover. R. Vol. 37 at 7386.<sup>1</sup>

2. On July 24, 2009, the Honorable John M. Melanson issued his *Order on Judicial Review*, which found that the Director’s decision to bifurcate his orders was unlawful under the IDAPA. *Order on Judicial Review* at 32. The court remanded this issue “for further proceedings consistent with this decision.” *Id.* at 33. Petitions for rehearing were filed by the City of Pocatello (“Pocatello”) and the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively referred to herein as the “IGWA”). At times, this order will refer to IGWA and Pocatello collectively as “ground water users” or “GWU.”

3. On March 4, 2010, the court issued its *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*. The order was issued pursuant to Idaho

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<sup>1</sup> For purpose of convenience, all citations in this Final Order are to material that was admitted during the hearing and is part of the final agency record on appeal, which was lodged with the Fifth Judicial District Court on February 6, 2009.

Appellate Rule 13(b)(14) and tasked the Director to issue a final order determining material injury to RISD and reasonably carryover by March 31, 2010. On March 29, 2010, the court extended the deadline to April 7, 2010. *Order Granting Unopposed Motion for Extension of Time to File Order on Remand.*

4. The purpose of this Final Order is to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC.

## **II. Methodology For Determining Material Injury To Reasonable In-Season Demand**

### **A. Background to Reasonable In-Season Demand**

5. The May 2, 2005 Amended Order ("May 2005 Order") and its progeny used the concept of a minimum full supply to quantify the amount of water members of the SWC needed during an irrigation season to ensure a reasonable supply. The minimum full supply was established by reviewing diversion records over a fifteen-year period (1990-2004), and selecting a single year with the smallest annual diversion amount that had full headgate deliveries without leasing any storage space. R. Vol. 37 at 7065. The year that best fit these criteria was 1995. *Id.* at 7066.

6. The May 2005 Order and its progeny were the subject of a fourteen-day hearing before hearing officer Gerald F. Schroeder ("Hearing Officer"). During the hearing, the Department presented its use of the minimum full supply analysis for determining material injury to in-season diversions. The parties presented competing proposals that were based on a water budget method. R. Vol. 37 at 7096.

7. In his April 29, 2008 *Opinion Constituting Findings Of Fact, Conclusions Of Law And Recommendation* ("Recommended Order"), the Hearing Officer stated that he could not reconcile the water budget methods advanced by the parties. R. Vol. 37 at 7096-97. The Hearing Officer stated that "the Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury." R. Vol. 37 at 7098. Reasons for modifying the Director's method were as follows:

Predictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation season. This is the initial concept behind the minimum full supply. The development of an acceptable baseline subject to adjustment for changing conditions retains the value of having senior rights while providing some level of protection against unnecessary curtailment. The concept is good, but the minimum full supply identified by the Director has no defenders from the parties. A brief summary of objections to the Director's minimum full supply can be stated:

- a. It is based on a wet year. To get to an average moisture year an adjustment would be necessary to determine how much greater the minimum full supply would be if the weather equated to an average year when an adequate amount of water was delivered.

b. It is based on a decade old year that does not reflect current efficiencies such as the increased use of sprinkler irrigation and computer monitoring or changes in the amount of land irrigated.

c. It has an emphasis on supply rather than need. That is the amount of water that provided full headgate deliveries. Those may or may not have been needed in that wet year.

R. Vol. 37 at 7096.

8. For purposes of future administration, the Hearing Officer provided the following guidance:

**a. To the extent 1995 is utilized it should be adjusted to determine how much the need for irrigation water was depressed by the well-above average precipitation and how much less loss from evaporation there would have been from depressed temperatures compared to a normal temperature year.** This would result in an increase in the baseline utilized by the Director. The objection that arriving at a baseline by using the amount delivered in a specific year emphasized supply rather than need is worthy of consideration. However, the evidence does not establish waste in the use of water in 1995. Absent evidence of waste it is appropriate to assume that the water was applied to a beneficial use.

**b. If there have been significant cropping changes resulting in either greater or less need for water, those should be factored.** This is an area of caution. Cropping decisions are matters for the irrigators acting within their water rights. Those decisions should be driven by the market. The fact that a particular crop may take less water does not dictate that it be planted.

**c. Changes in facilities, diversion, conveyance, and irrigation practices from earlier years should be considered, e.g. the extent to which conversions to sprinklers have affected water use over time.** This again must be considered with caution to avoid rewriting a water right through the process of determining a baseline water need for predictions of material injury. There may be legitimate reasons to revert to gravity flow in the future or change other practices.

**d. Analysis of soil conditions to determine how water is retained or lost is a factor.** Soil may hold water to be used by crops in the future. The fact that water may be applied to the ground when there are no plants growing does not mean the water is wasted. That depends on the nature of the soil and the amount of soil. Some soil retains water well, other does not. This affects the timing and extent of water delivery.

**e. Non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members.** IGWA has established that at least 6,600 acres claimed by TFCC in its district are not irrigated. Similar information was submitted concerning the Minidoka Irrigation District, indicating that the claimed

acreage of 75,152 includes 5,008 acres not irrigated and Burley Irrigation District has some 2,907 acres of the 47,622 acres claimed not irrigated. These amounts may, of course, change as acreage is removed from irrigation or possibly added back.

**f. Calculation of a water budget should be based on acres, not shares.** The allocation of water within a district is a matter of internal management, but the calculation of a water budget in determining if there will be curtailment should be based on acres not shares.

**g. Full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 inch instead of 3/4 inch.** The former Director accepted Twin Falls Canal Company's response that 3/4 inch constituted full headgate delivery, and TFCC continued to assert that position at hearing. This is contradicted by the internal memoranda and information given to the shareholders in the irrigation district. It is contrary to a prior judicial determination. It is inconsistent with some of the structural facilities and exceeds similar SWC members with no defined reason. Any conclusions based on full headgate delivery should utilize 5/8 inch.<sup>2</sup>

R. Vol. 37 at 7099-7100 (emphasis in original).

9. According to the Hearing Officer, "it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff." R. Vol. 37 at 7098. In the 2008 Final Order, the Director recognized the Hearing Officer's recommendations and stated his intention of adjusting his future analysis for determining material injury to RISD and reasonable carryover. R. Vol. 39 at 7386.

10. The methodology for determining material injury to RISD and reasonable carryover should be based on updated data, the best available science, analytical methods, and the Director's professional judgment as manager of the state's water resources. In the future, climate may vary and conditions may change; therefore, the methodology may need to be adjusted to take into account a different baseline year or baseline years.

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<sup>2</sup> This recommendation was accepted by former Director Tuthill in his Final Order. R. Vol. 39 at 7392. In his July 24, 2009 *Order on Judicial Review*, Judge Melanson found that the Director exceeded his authority in making this determination. *Order on Judicial Review* at 31. The court based its decision on the filing of the *Director's Report* in the Snake River Basin Adjudication, which "recommend[ed] ¾ of an inch per acre." *Id.* at 31. In its *Opening Brief on Rehearing*, IGWA asked the court to "clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decreed (or recommended amount)[.]" This issue has been stayed and held in abeyance until after the Director issues his final order regarding his methodology for determining material injury to RISD and reasonable carryover. *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 3.

**B. Brief Overview of the Methodology for Determining Material Injury to the SWC's Reasonable In-Season Demand and Reasonable Carryover**

11. In-season demand shortfalls will be computed by taking the difference between the RISD and forecast supply ("FS"). Initially RISD will be equal to the historic demands associated with a baseline year or years ("BLY") as selected by the Director, but will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions. The above description is represented by the following equation:

- $\text{In-Season Demand Shortfall} = \text{RISD} - \text{FS}$

12. Reasonable carryover shortfall will be computed by taking the difference between reasonable carryover and actual carryover, where reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply.

- $\text{Reasonable Carryover Shortfall} = \text{Actual Carryover} - \text{Reasonable Carryover}$

13. The concepts underlying the selection of the BLY, determination of in-season demand shortfall, and reasonable carryover shortfall will be discussed in detail below.

**C. Reasonable In-Season Demand**

**i. Considerations for the Selection of a Baseline Year**

14. A BLY is a year(s) that represents demands and supplies that can be used as a benchmark to predict need in the current year of irrigation at the start of the irrigation season. The purpose in predicting need is to project an upper limit of material injury at the start of the season.

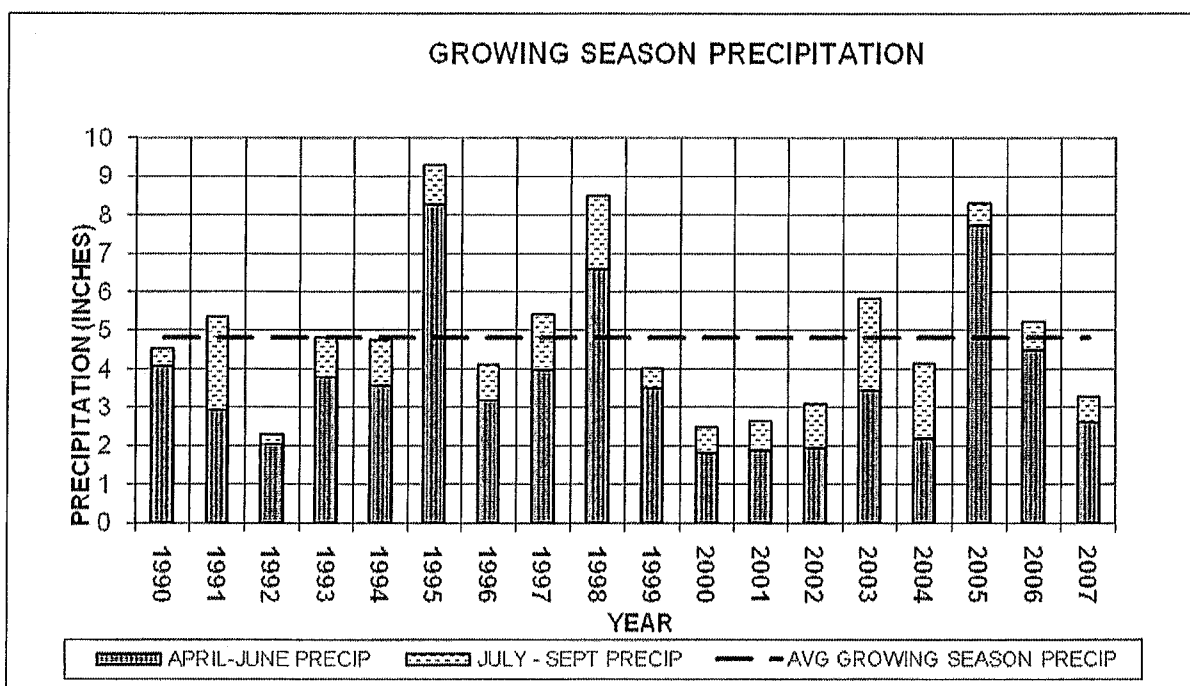
15. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098. To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

16. The historic diversion volumes from the BLY, along with the predicted supply forecast at the start of the irrigation season, are used to predict the initial in-season demand shortfall, where demand shortfall is the difference between the BLY demand ("BD") and the FS. Demand shortfall increases in magnitude the greater the difference between BD and FS; demand shortfall increases with increases in BD, decreases in FS, or both. Assuming constant irrigation practices, crop distributions, and total irrigated acres, demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration ("ET"), and lower precipitation. If a year(s) exactly representing average conditions is used for predicting demand shortfall at the start of the season, which turns out to be a high demand season, demand shortfall will be under estimated at the start of the season. Therefore, a BLY should represent a year(s) of above average diversion, and to avoid years of below average diversions. Above average diversion year(s) selected as the BLY should also represent year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

a. Climate

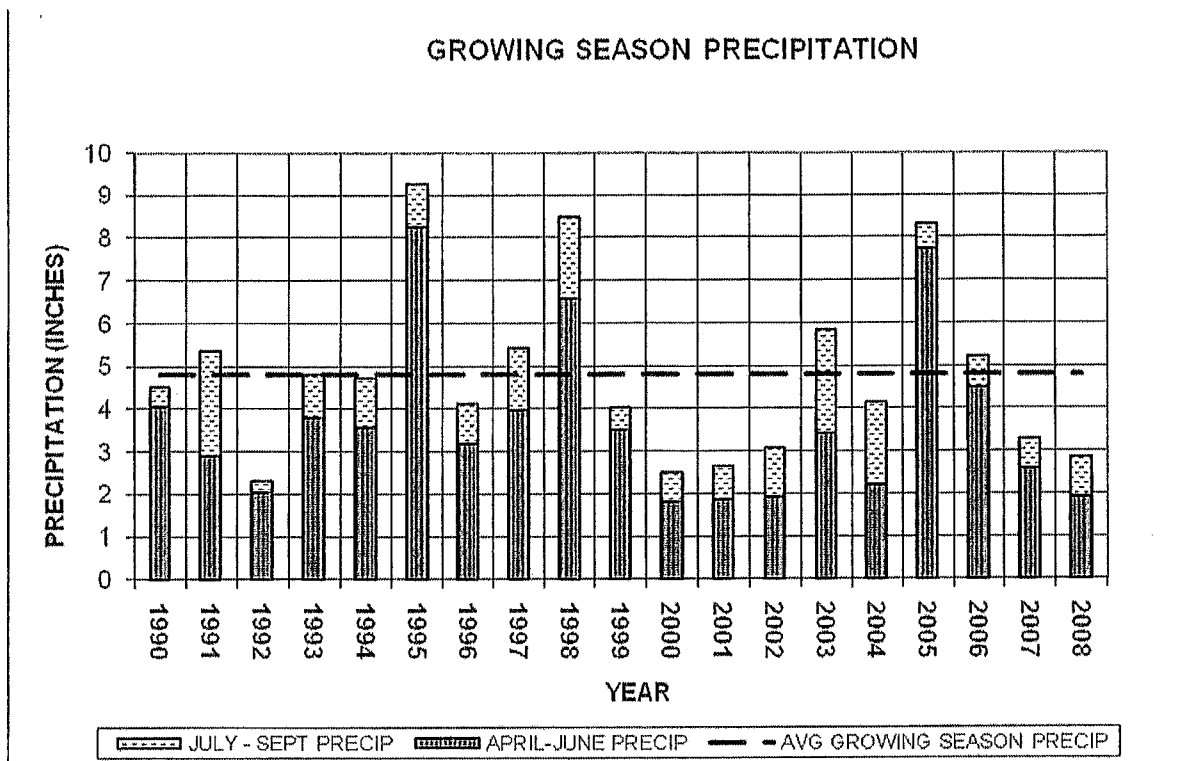
17. For the methods outlined herein, climate is represented by precipitation, ET, and growing degree days.

18. Precipitation. Water, in all phases, introduced to Idaho from the atmosphere is termed precipitation. During the growing season, precipitation has a substantial influence on crop water need both as a source of water to growing crops and as an influencing factor on ET. Ex. 3024 at 19. The figure below shows the precipitation recorded during the growing season at the National Weather Service's Twin Falls weather station. *Id.* at 12. Since 2000, the year 2006 received the nearest to average of growing season precipitation (April through September) relative to the 1990 through 2007 average, with 5.22 inches out of 4.79 inches for the average, or 109% of average. No other years were within +/- 10% of average.



Growing Season Precipitation at Twin Falls Weather Station 1990-2007.<sup>3</sup>

<sup>3</sup> Graph created from raw AgriMet precipitation data. Examples of the use of AgriMet precipitation data in the record may be found at: Ex. 3007 at 21; Ex. 8000, Vol. II at 6-2:6-4; Ex. 8000, Vol. IV at AU-2.



Growing Season Precipitation at Twin Falls Weather Station 1990–2008.<sup>4</sup>

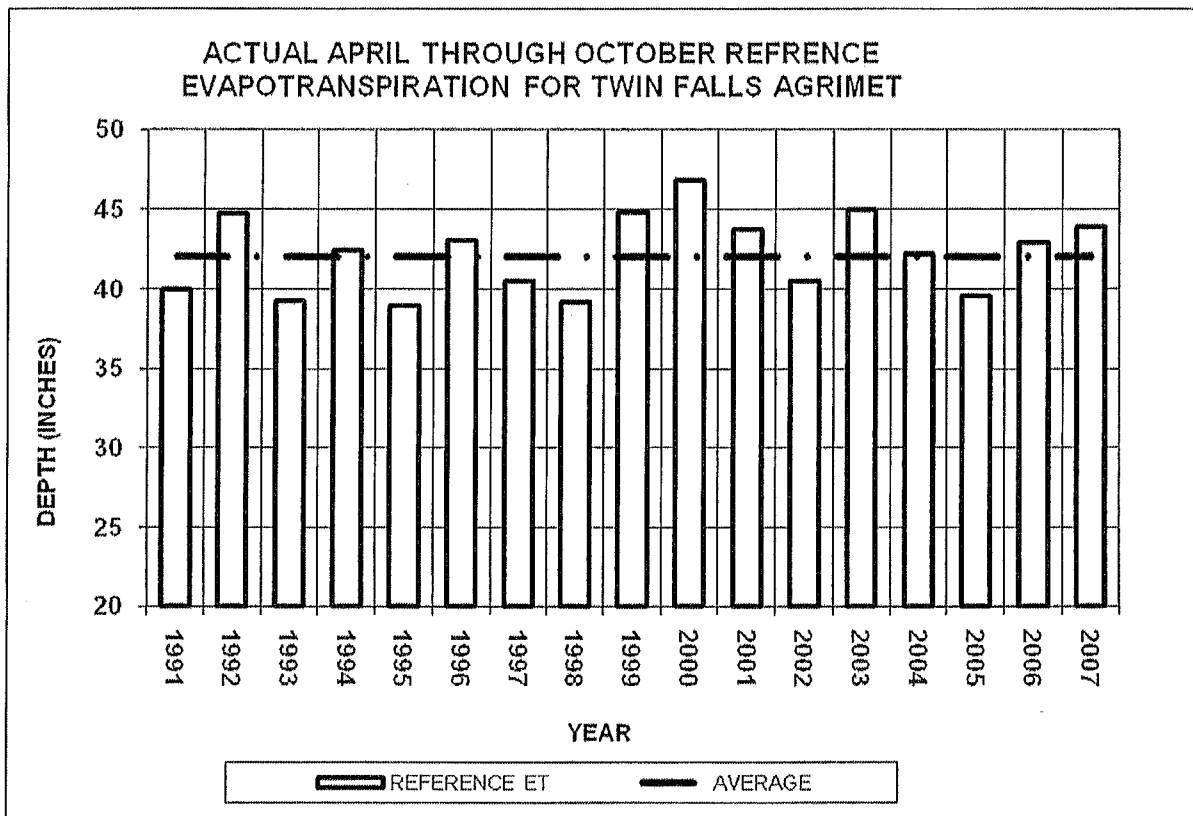
19. Evapotranspiration. ET is a combined variable that describes the amount of water that evaporates from the ground from irrigation and transpires from vegetation. ET is an important factor for properly estimating RISD. In its water budget calculations, the SWC proposed the use of ET values from the USBR as part of their Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. II, Chap. 9; Ex. 8000, Vol. IV, Appdx. AU. The GWU proposed the use of ET values from Allen Richard G. and Clarence W. Robison 2007, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, i.e. ETIdaho. Ex. 3007A at 21; Ex. 3024 at 1-58.

20. The use of reference ET calculated using ETIdaho for the Twin Falls (Kimberly) AgriMet site as an indicator of overall crop water need for a season is appropriate for purposes of comparison of historical average water need between seasons. Similar use of ETIdaho crop irrigation requirement data for AgriMet stations were employed in some of the expert reports submitted during hearing. *See* Ex. 3007 at 21. The ETIdaho method includes the contribution of effective precipitation in the reference ET calculation, and is a strong measure of the actual reference ET as opposed to the traditional potential ET, or the amount of ET the reference crop would use if water were not a limiting factor. ETIdaho is used here for the specific task of selecting appropriate BLY candidates. Total April through October reference ET for the period of record

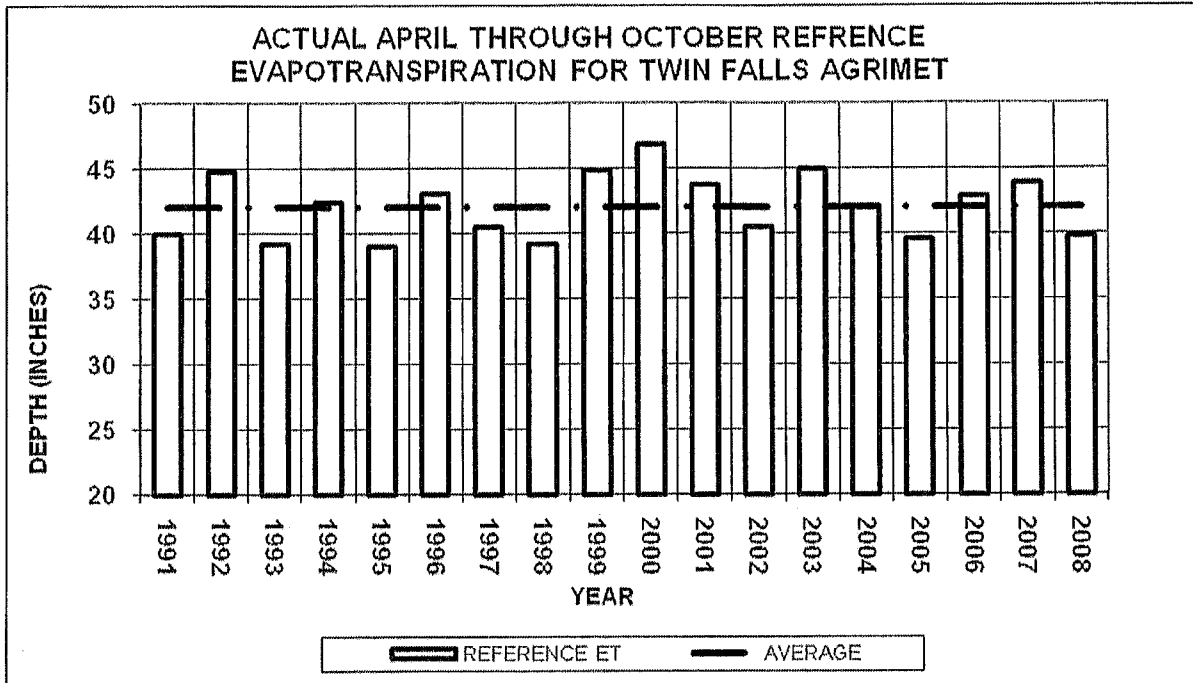
<sup>4</sup> The record established at hearing was current through the year 2007. Since that time, Water District 01 has finalized its accounting for the 2008 irrigation season; thereby making the use of 2008 data appropriate. Water District 01 has not yet finalized its accounting for the 2009 irrigation season. For purposes of this order, the Director will specifically denote instances in which he uses 2008 data.



from the Twin Falls (Kimberly) AgriMet site is shown below. Since 2000, the years of 2000, 2001, 2003, 2006 and 2007 have been years of above average ET.



Actual Reference ET for Twin Falls (Kimberly) AgriMet using ETIdaho methodology 1991-2007.



Actual Reference ET for Twin Falls (Kimberly) AgriMet using ETIdaho methodology 1991-2008.

21. Growing Degree Days. Growing degree days provide a way to characterize the length and type of growing season. Growing degree days are an arithmetic accumulation of daily mean temperature above a certain base temperature. Ex. 3024 at 10; 117-21. These growth units are a simple method of relating plant growth and development to air temperatures. Different plant species have different base temperatures below which they do not grow. At temperatures above this base, the amount of plant growth is approximately proportional to the amount of heat or temperature accumulated. A higher annual growing degree day value indicates a higher potential rate of plant growth. The table below shows growing degree days accumulated for April through September for the Twin Falls (Kimberly) AgriMet site. Above average years since 2000 include: 2000, 2001, 2002, 2003, 2006, and 2007.

Year	GDD: April-Sept	% of Average	Year	GDD: April-Sept	% of Average
1991	2,095.4	86%	2000	2,591.3	107%
1992	2,610.7	107%	2001	2,600.8	107%
1993	2,004.7	82%	2002	2,465.6	101%
1994	2,516.8	103%	2003	2,585.4	106%
1995	2,257.8	93%	2004	2,428.9	100%
1996	2,418.6	99%	2005	2,320.1	95%
1997	2,478.4	102%	2006	2,601.9	107%
1998	2,422.2	100%	2007	2,657.7	109%
1999	2,294.9	94%			

Average GDD: 2,432.4

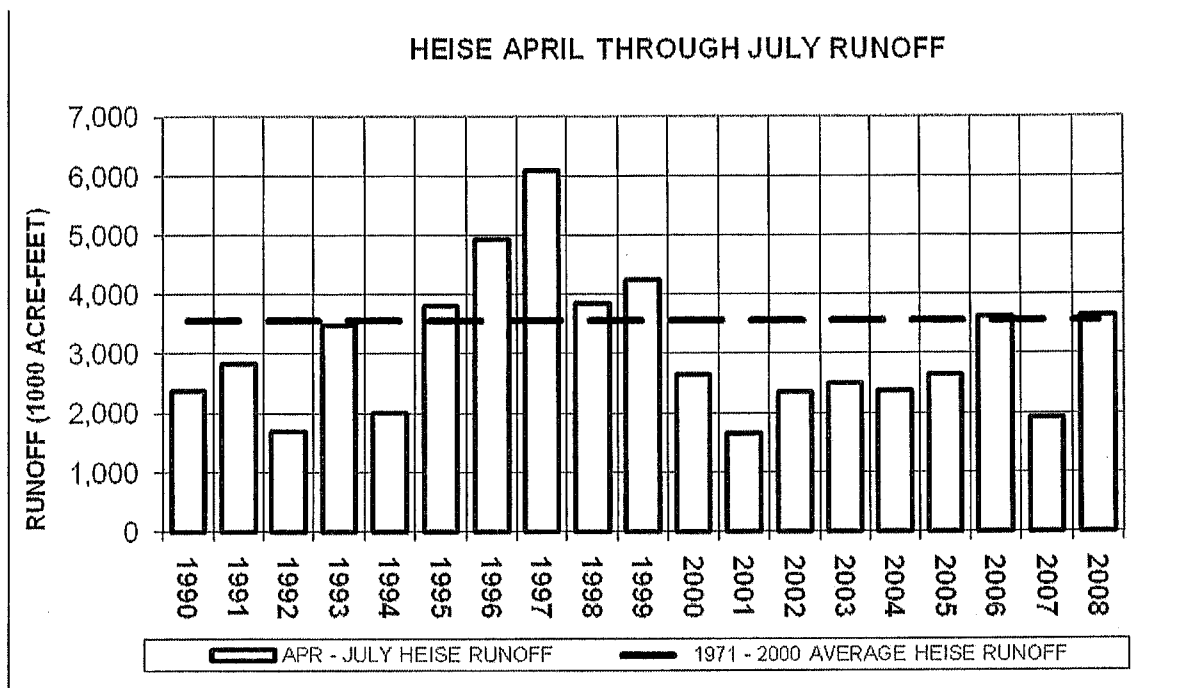
Growing Degree Days (“GDD”) for Twin Falls (Kimberly) AgriMet Site 1991-2007, Ex. 3024 at 10.

Year	GDD: April-Sept	% of Average	Year	GDD: April-Sept	% of Average
1991	2,095.4	86%	2000	2,591.3	107%
1992	2,610.7	107%	2001	2,600.8	107%
1993	2,004.7	83%	2002	2,465.6	101%
1994	2,516.8	104%	2003	2,585.4	106%
1995	2,257.8	93%	2004	2,428.9	100%
1996	2,418.6	100%	2005	2,320.1	95%
1997	2,478.4	102%	2006	2,601.9	107%
1998	2,422.2	100%	2007	2,657.7	109%
1999	2,294.9	94%	2008	2,382.9	98%
Average GDD:				2,429.7	

Growing Degree Days (“GDD”) for Twin Falls (Kimberly) AgriMet Site 1991-2008.

**b. Available Water Supply**

22. The joint forecast (“Joint Forecast”) issued by the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers (“USACE”) for the period April 1 through July 31 “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” R. Vol. 8 at 1379, ¶ 98. The predictions made in this forecast are a good indicator of the total available irrigation water supply for a season. R. Vol. 37 at 7071. The April through July volume represents the amount available for diversion into storage reservoirs and also serves as an indicator of natural flow supplies. *Id.* at 7066. The figure below shows actual unregulated flow volumes at Heise for 2000-2007 and the Joint Forecast volume for 2008. Since the 2000 irrigation season, and recognizing that diversions for each individual member of the SWC are different, 2006 and 2008 are the only years in which water supply was not severely limited. The thirty-year average is indicated by the dashed line.



April through July Unregulated Flow Volume at Heise, 1990-2008. Ex. 8000, Vol. II at 6-37:6-38; R. Vol. 37 at 7018-28 (includes 2008 Joint Forecast projection for Heise).

**c. Irrigation Practices**

23. A BLY must be recent enough to represent current irrigation practices. R. Vol. 37 at 7099-7100. Conditions that should be consistent are the net area of the irrigated crops, farm application methods (flood/furrow or sprinkler irrigation), and the conveyance system from the river to the farm. The type of sprinkler systems should be similar between the BLY and the current year, whether side roll systems, hand lines, or center pivot.

24. Sprinkler systems are currently the predominant application system. *Id.* at 7101-02. In order to ensure that current irrigation practices are captured, selection of a BLY for the SWC should be limited to years subsequent to 1999. *Id.* at 7096; 7099-7100.

25. Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acreage. R. Vol. 28, 5205-15; R. Vol. 37 at 7100. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated. R. Vol. 37 at 7100.

**ii. Selection of the Initial Baseline Year**

26. In evaluating the factors listed above, 2006 satisfies the Hearing Officer's recommendations better than any other single year in the recent record (since 2000).

27. From the standpoint of total annual SWC diversion volumes, 2006 is an appropriate BLY. From 2000-2008, 2006 had total diversions of 97%. If BLY selection is limited to a single

year, 2006 is the best fit in the recent past. However, from the standpoint of annual diversion for individual entities, 2006 was a year of below average diversions for Milner, Minidoka Irrigation District (“MID”), and TFCC, at 82%, 98%, and 96%, respectively (*see* Finding of Fact 29). The selection of a single BLY for all entities is challenging, with all years representing average or near average diversions for some entities, but not others. By selecting a BLY that is comprised of the average of multiple years, a BLY can be selected that best represents the required conditions for each and all entities.

28. With the exception of diversions for Milner, MID, and TFCC, 2006 is an appropriate BLY selection for a single year. The Director finds, however, that it would also be appropriate to use the values of 2006 and 2008 (06/08) to arrive at an average BLY that more strongly fits selection criteria for all members of the SWC.<sup>5</sup> The 06/08 average has below average precipitation, near average ET, above average growing degree days, and were years in which diversions were not limited by availability of water supply. When compared to a period of record spanning from 1990-2008, the 06/08 diversions were above average; or average when considering a period of record from 2000-2008.<sup>6</sup>

29. Comparison of 2006 diversions to the 2000-2008 overall average, below, indicates that, for the SWC entities, with the exception of Milner, the 2006 diversions were within 4% of average. By comparing the average of 2006 and 2008 (06/08) diversions to the 2000-2008 overall average for the SWC entities, the 06/08 diversion are above the historic average, with the exception of Milner, keeping in mind that the average includes the drought years of 2000-2005.

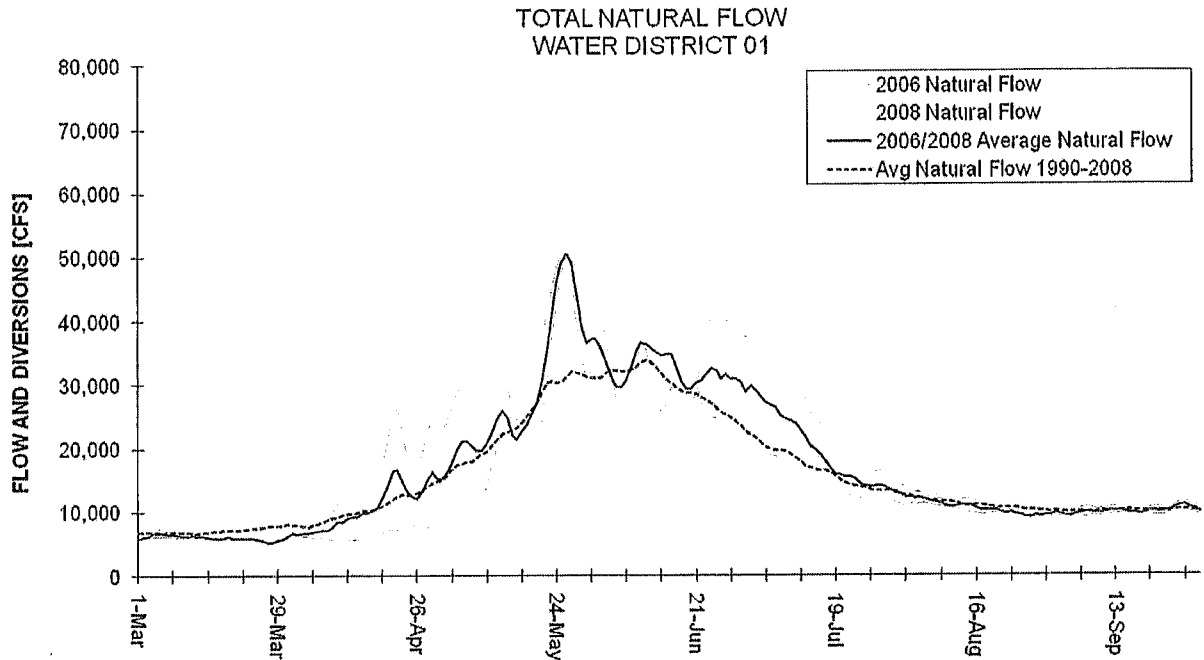
	2000-2008 Avg. Diversions	'06 Total Diversions	'06 % of Avg.	'06/'08 Avg. Total Diversions	'06/'08 % of Avg.
A&B	57,615	57,492	100%	58,492	102%
AFRD2	409,865	410,376	100%	415,730	101%
BID	245,295	247,849	101%	250,977	102%
Milner	50,786	41,671	82%	46,332	91%
Minidoka	358,018	352,269	98%	362,884	101%
NSCC	955,439	963,007	101%	965,536	101%
TFCC	1,031,987	995,822	96%	1,045,382	101%
		Average:	97%		100%

SWC Diversions for 2006; 2006/2008; and 2000 through 2008 Average. Ex. 8000, Vol. IV, Appdx. AS-1-8.

<sup>5</sup> In 2006, TFCC delivered  $\frac{3}{4}$  of a miner's inch. Tr. p. 1601, lns. 1-15.

<sup>6</sup> Former Director Dreher found in the May 2005 Order that “since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record.” R. Vol. 8 at 1375, ¶ 78. The drought during this time period was determined by former Director Dreher to have a “probability of recurrence of something in excess of 500 years . . . .” Tr. p. 327, lns. 20-21.

30. Daily natural flow supply for Water District 01 in 2006 and 2008 are depicted below. When averaged together, the 2006 and 2008 natural flow is near the long term average (1990-2008). The long term average is shown as the blue dashed line.



Water District 01 Natural Flow, 2006 and 2008. Ex. 4604.

**D. Calculation of Reasonable In-Season Demand**

31. RISD is the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity. Given that climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences. As stated by the Hearing Officer, “The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.” R. Vol. 37 at 7098.

**i. Assessment of Water Balance Studies Presented at Hearing**

32. Water balance approaches to address the quantity of water needed by members of the SWC were presented in testimony, reports, and exhibits at the hearing. The methodology used for water balance studies provided by the SWC and the GWU experts is summarized in equation form, as set forth in Equation 1, below:

$$(1) \quad Q = \left[ \left( \frac{ET_c \times F_c}{E_a} \right) - W_e \right] \times A_{ID} + S_{loss}$$

Where:

- Q = irrigation entity diversion requirement,
- ET<sub>c</sub> = consumptive use of each crop,
- F<sub>c</sub> = fraction of area of each crop in irrigation entity,
- E<sub>a</sub> = field application efficiency,
- W<sub>e</sub> = estimated effective rainfall during growing season,
- A<sub>ID</sub> = irrigated area in irrigation entity, and
- S<sub>loss</sub> = seepage loss from canals.

33. The variables described above were common to both the SWC and GWU water balance analyses, with the following exceptions. The GWU did not account for effective precipitation (W<sub>e</sub>). Ex. 3007 at 17-19. Analysis by the GWU included a reduction in the diversion requirement for supplemental ground water used within SWC service areas. *Id.* at 17. Both of these exceptions will be considered for purposes of determining RISD shortfalls.<sup>7</sup>

34. Another component not shown or considered by the parties is the operation loss, or project return flows. SWC experts recognized the lack of data necessary to estimate this factor: "Operational losses and returns within the delivery system were not included in the irrigation diversion estimate since no consistent measured operational waste records are available." Ex. 8000, Vol. II at 9-7.

35. The areal extent of the SWC is large. Obtaining field measurements of canal seepage losses on the vast network of canals and laterals is not presently feasible given the time and resources necessary to complete such a task. The same would be true for determining the true value of farm or field application efficiency. Measuring farm runoff and deep percolation losses out of the crop root zone at a field level scale is also not practical given the time and resources necessary to complete such a task. Lacking measured data for canal seepage losses, farm runoff, and deep percolation, these parameters must be estimated.

36. The Director must exercise his best professional judgment in quantifying inputs to the water balance study. Differences in judgment affect the numerical results. As stated by the Hearing Officer:

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<sup>7</sup> As stated by former Director Dreher, "In making a determination of how much water is needed, I thought it was important to look at all three of those sources [surface water, storage water, and supplemental ground water]." Tr. p. 25, ln. 25; p. 26, lns. 1-2. All acres identified as receiving supplemental ground water within the boundaries of a single SWC entity will initially be evaluated by assigning an entity wide split of the ground water fraction to the surface water fraction as utilized in the development of the ESPA Model. See Ex. 8000, Vol. II, Bibliography at II, referencing *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017*. For each entity the ground water fraction to the surface water fraction is as follows: A&B 95:5; AFRD2 30:70; BID 30:70; Milner 50:50; Minidoka 30:70; NSCC 30:70; & TFCC 30:70.

The irony in this case is that surface water and ground water expert testimony used much of the same information and in some respects the same approaches and came up with a difference of 869,000 acre-feet for an average diversion budget analysis of SWC districts for the period from 1990 through 2006. Sullivan Rebuttal Report, November 7, 2007, page 17. The total under the SWC analysis is 3,274,948 acre-feet as compared to the Pocatello analysis of . . . 2,405,861 [acre-feet]. The Director's minimum full supply amount of 3,105,000 falls between the two, though much closer to the SWC analysis.

R. Vol. 37 at 7096.

37. The Hearing Officer also found that the average annual surface irrigation requirements based on 1990 through 2006 for the North Side Canal Company ("NSCC") as calculated by experts for the SWC and GWU differed by 473,217 acre-feet. R. Vol. 37 at 7097. Annual average requirements based on the 1990 through 2006 period for TFCC vary by 310,000 acre-feet. *Id.* These discrepancies do not indicate errors in formulations or calculations, but do demonstrate the range of values in the total irrigation demand that are possible if contributing components to that total demand are calculated using different methods, or with different estimates of unknown parameters.

38. A further example of the range of possible values for seepage loss is shown by comparison of the SWC and GWU expert reports. In the SWC's Exhibit 8201, Pocatello's expert analysis of average annual canal seepage loss is presented as 338,984 acre-feet for NSCC. In the same exhibit, the SWC's expert analysis of average annual seepage loss for NSCC is reported as 586,136 acre-feet.

39. In a 1979 study published by the Idaho Water Resource Research Institute, R.G. Allen and C.E. Brockway determined that conveyance losses for the 1977 diversion volume of 794,930 acre-feet for NSCC was 286,012 acre-feet for 755 miles of canals. Ex. 3060 at 193. Brockway and B.A. Claiborne estimated conveyance losses to be 326,418 acre-feet for the same NSCC system, based on the 1974 diversion volume of 1,117,240 acre-feet. Ex. 3059 at 26.

40. The above seepage loss estimates were all calculated using the Worstall procedure, Ex. 3037 at 38, but range in magnitude by a factor of 1.8 for the two estimates with the highest, but similar, average diversion volumes. Clearly, the magnitudes of the conveyance losses are very sensitive to input parameters selected for use in that procedure.

## ii. Project Efficiency

41. Given that the water balance method for estimating annual diversion requirements is subject to varying results based on the range of parameters used as input, an alternate approach is to assume that unknown parameters are practically constant from year-to-year across the entire project. Project efficiency is a term used to describe the ratio of total volumetric crop water need within a project's boundary and the total volume of water diverted by that project to meet crop needs. It is the same concept as system efficiency, which was presented at hearing. Ex. 3007 at 28-29. Implicit in this relationship are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows). By utilizing



project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components can be captured and described without quantifying each of the components.

42. Project efficiency is calculated as set forth in Equation 2, below:

$$(2) \quad E_p = \frac{CWN}{Q_D}$$

Where:

$E_p$  = project efficiency,

CWN = crop water need, and

$Q_D$  = irrigation entity diversion of water specifically put to beneficial use for the growing of crops within the irrigation entity.

43. Monthly irrigation entity diversions ( $Q_D$ ) will be obtained from Water District 01's diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity. Examples of adjustments include the removal of diversions associated with in-season recharge and diversion of irrigation water on the behalf of another irrigation entity.

44. Project efficiencies will be computed for the entire irrigation season. Project efficiency varies from month-to-month during the season, and will typically be lower during the beginning and ending of the season. Project efficiencies will be calculated on a monthly basis for use in adjusting RISD during the year of evaluation. The tables below present average project efficiencies for each SWC member (2001-2007; 2001-2008), with project efficiencies during that time span greater or less than two standard deviations excluded from the calculation. By including only those values within two standard deviations, extreme values from the data set are removed.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	AVG.
4	0.93	0.19	0.27	1.12	0.17	0.14	0.19	0.43
5	0.42	0.27	0.30	0.62	0.26	0.28	0.32	0.35
6	0.63	0.42	0.47	0.61	0.49	0.44	0.52	0.51
7	0.80	0.44	0.56	0.66	0.65	0.50	0.56	0.60
8	0.69	0.38	0.43	0.55	0.48	0.38	0.41	0.47
9	0.52	0.26	0.32	0.49	0.35	0.30	0.24	0.35
10	0.15	0.46	0.11	0.44	0.11	0.24	0.12	0.23
	0.59	0.35	0.35	0.64	0.36	0.33	0.34	0.42

SWC Member Average Monthly Project Efficiencies from 2001-2007.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	AVG.
4	0.87	0.18	0.26	1.09	0.16	0.14	0.21	0.42
5	0.41	0.25	0.30	0.55	0.27	0.27	0.31	0.34
6	0.64	0.40	0.48	0.61	0.50	0.43	0.50	0.51
7	0.77	0.44	0.56	0.61	0.64	0.48	0.55	0.58
8	0.65	0.38	0.42	0.54	0.48	0.39	0.41	0.46
9	0.51	0.25	0.31	0.44	0.33	0.29	0.24	0.34
10	0.17	0.37	0.11	0.31	0.10	0.20	0.10	0.19
Season Avg.	0.57	0.32	0.35	0.59	0.35	0.31	0.33	0.41

SWC Member Average Monthly Project Efficiencies from 2001-2008.

### iii. Crop Water Need

45. 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, for all crops supplied with surface water by the surface water provider. Crop water need is the difference between the fully realizable consumptive use associated with crop development, or ET, and effective precipitation ( $W_e$ ) and is synonymous with the terms irrigation water requirement and precipitation deficit. Ex. 3024. For the purposes of the methodology, CWN is calculated as set forth in Equation 3, below:

$$(3) \quad CWN = \sum_{i=1}^n (ET_i - W_e) A_i$$

Where,

CWN = crop water need

$ET_i$  = consumptive use of specific crop type,

$W_e$  = estimated effective rainfall,

$A_i$  = total irrigated area of specific crop type,

$i$  = index variable representing the different specific crop types grown within the irrigation entity, and

$n$  = upper bound of summation equal to the total number of different specific crop types grown within the irrigation entity.

### iv. Evapotranspiration

46. ET has been estimated by experts for the parties using theoretically based equations that calculate ET for an individual crop, thus necessitating crop distribution maps for each year. Ex. 3007A at 21, Figure 3, Tables 6-12; Ex. 3024 at 1-58; Ex. 8000, Vol. II at Chapter 9; Ex. 8000, Vol. IV, Appdx. AU.

47. At hearing, values of ET were estimated by the SWC from AgriMet, Ex. 8000, Vol. IV, Appdx. AU-1, and by the GWU from ETIdaho, Ex. 3007A at 21; Ex. 3024 at 1-58. At this time, the Director finds that the use of AgriMet is more appropriate for determining ET than ETIdaho. At this time, AgriMet, is available to all parties in real-time without the need for

advanced programming. Accordingly, the methodology will rely on AgriMet derived ET values in the calculations of project efficiency, crop water need, and RISD. In the future, with the development of additional enhancements, ETIdaho may become a more appropriate analytical tool for determining ET.

48. The utilization of AgriMet derived crop specific ET values necessitates crop distribution profiles similar to those described and presented at hearing. R. Vol. 2 at 420-26; Ex. 3007 at 21 & Table 4; and Ex. 3026. The methodology will utilize crop distributions based on distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS"). Ex. 1005 at 1.<sup>8</sup> NASS reports annual acres of planted and harvested crops by county. NASS also categorizes harvested crops by irrigation practice, i.e. irrigated, non irrigated, non irrigated following summer fallow, etc. Crop distribution acreage will be obtained from NASS by averaging the "harvested" area for "irrigated" crops from 1990-2008. Years in which harvested values were not reported will not be included in the average. It is the Department's preference to rely on data from the current season if and when it becomes usable.

49. AgriMet crop water use (i.e. ET) and weather data are available from the Rupert and Twin Falls (Kimberly) stations for use with the closest SWC entity. Using AgriMet data from Rupert for A&B, Burley Irrigation District ("BID"), Milner, and MID provides a reasonable representation of the climate conditions for those entities and are consistent with common standards of practice. Using AgriMet data from Twin Falls (Kimberly) for American Falls Reservoir District No. 2 ("AFRD2"), NSCC, and TFCC provides a reasonable representation of the climate conditions for those entities and is consistent with common standards of practice. Ex. 8000, Vol. IV at AU-2, AU-8.

#### v. Effective Precipitation

50. Effective precipitation ( $W_e$ ), or the water in the soil horizon available for crop root uptake, will be estimated from total precipitation ( $W$ ) utilizing the methodology presented in the USDA Technical Bulletin 1275. Ex. 8000, Vol. IV, Appdx. AU3, AU8. Total precipitation ( $W$ ) is provided by the USBR as part of its Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. IV, Appdx. AU3.  $W_e$  derived from AgriMet based precipitation values are independent of crop type.

51. AgriMet precipitation ( $W$ ) values are easy to understand and regularly used by the farming, water supply, and water management communities. Accordingly, the methodology will rely on AgriMet derived  $W$  values in the calculations of crop water need and RISD.

52. As with ET data, AgriMet precipitation data are available from the Rupert and Twin Falls (Kimberly) stations for use with the closest SWC entity. Using AgriMet data from Rupert for A&B, BID, Milner, and MID provides a reasonable representation of the climate conditions for those entities and are consistent with common standards of practice. Using AgriMet data from Twin Falls (Kimberly) for AFRD2, NSCC, and TFCC provides a reasonable representation of the

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<sup>8</sup> The ESPA Modeling Committee uses NASS data in the ESPA Model to distribute crop types within the model. See Ex. 8000, Vol. 2, Bibliography at II, referencing *Final ESPA Model, IWRRRI Technical Report 06-002*.

climate conditions for those entities and is consistent with common standards of practice. Ex. 8000, Vol. IV at AU-2, AU-8.

**vi. Summary of Reasonable In-Season Demand Calculation**

53. At the start of the irrigation season, RISD is equal to the baseline demand, or total season adjusted diversions for the baseline year(s). When calculated in-season, RISD is calculated by Equation 4, below.

$$(4) \quad RISD_{milestonex\_x} = \sum_{j=1}^m \left( \frac{CWN_j}{E_{p,j}} \right) + \sum_{j=m+1}^7 BD_j$$

Where:

RISD<sub>milestonex\_x</sub> = reasonable in season demand at specified evaluation milestones during the irrigation season,

CWN = crop water need for month j,

E<sub>p</sub> = baseline project efficiency for month j,

BD = baseline demand for month j,

j = index variable, and

m = upper bound of summation, equal to the month calculation occurs, where April = 1, May =2, ... October = 7.

54. Water is sometimes diverted into canals and onto crops fields in support of crop development for reasons other than strictly meeting the consumptive requirement of the crop; such as canal wetting, salt leaching, soil wetting, and soil temperature control. April and October represent months during the irrigation season when the method of calculating RISD strictly as a function of CWN and PE is less reliable, because CWN is often not the driving factor in diversions during these bookend months. To account for uncertainty of RISD calculations during those time periods, April and October RISD adjustments have been developed.

55. April RISD Adjustment: In April, calculated RISD, as a function of CWN and PE, can grossly under estimate actual diversion needs. Therefore, for each individual surface water provider, if the calculation of CWN/E<sub>p</sub> for the month of April is less than the April average diversion volume over a record of representative years in the recent past, then RISD will be equal to the April average diversion volume. If the calculation of CWN/E<sub>p</sub> is greater than the April average, then RISD will equal the calculated CWN/E<sub>p</sub> volume.

56. October RISD Adjustment: In October, calculated RISD, as a function of CWN and PE, can either grossly under or over estimate actual diversion needs. For each individual surface water provider, if the calculation of CWN/E<sub>p</sub> for the month of October is greater than the October maximum diversion volume, or less than the October minimum diversion volume, over a record of representative years in the recent past, then RISD will be equal to the October average diversion volume, over the same period of representative years. If the calculation of CWN/E<sub>p</sub> is less than the October maximum diversion volume, or greater than the October minimum diversion volume, then RISD will equal the calculated CWN/E<sub>p</sub> volume.

## **D. Adjustment of Forecast Supply**

57. As stated by the Hearing Officer, "There must be adjustments as conditions develop if any baseline supply concept is to be used." R. Vol. 37 at 7093.

### **i. April 1**

58. Typically within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. Given current forecasting techniques, the earliest the Director can predict material injury to RISD "with reasonable certainty" is soon after the Joint Forecast is issued. R. Vol. 2 at 226. With data from 1990 through the previous water year, a regression equation will be developed for each SWC member by comparing the actual Heise natural flow to the natural flow diverted. *See e.g.* R. Vol. 8 at 1416-22. The regression equation will be used to predict the natural flow diverted for the upcoming irrigation season. *Id.* at 1380. The actual natural flow volume that will be used in the Director's Forecast Supply will be one standard error below the regression line, which underestimates the available supply. *Id.*; Tr. p. 65, lns. 6-25; p. 66, lns. 1-2.

59. The storage allocation for each member of the SWC will be estimated by the Department following the Joint Forecast. The reservoir fill and allocation will be predicted by using data from a similar year. The Forecast Supply is the sum of the estimated storage allocation and the predicted natural flow diversion. This volume will be used in the shortfall calculations until better data is available later in the irrigation season.

### **ii. Early to Mid-July**

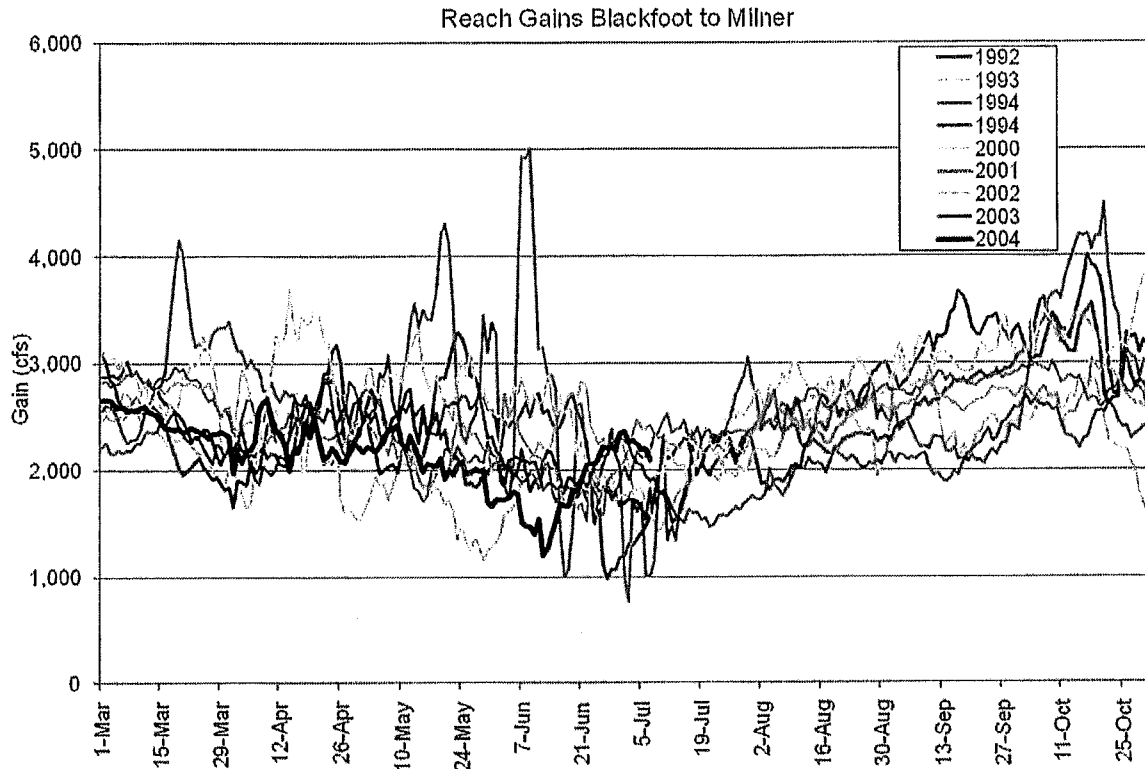
60. In early to mid-July, the Forecast Supply will be adjusted. The reservoirs will typically have filled to their peak capacity for the season and the storage water will have been allocated. The Department's water rights accounting model will be used to compute the natural flow diverted by each member of the SWC as of the new forecast date. The natural flow diversion for the remainder of the irrigation season will be estimated based on a historical year with similar gains in the Blackfoot to Milner reach. Reach gains are graphed below, using 2004 as an example. In this case, 2003 has similar reach gains and is appropriately conservative. Therefore, the natural flow diverted in 2003 would be used to predict the natural flow diversions for the remainder of the 2004 season. The adjusted Forecast Supply is the sum of the actual natural flow diversions, the predicted natural flow diversions, and the storage allocation.

### **iii. Time of Need**

61. The July procedure will be repeated shortly before the Time of Need<sup>9</sup> with the updated water rights accounting data.

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<sup>9</sup> The calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover, or the difference between the 06/08 average demand and the 02/04 supply.



Example reach gain analysis for 2004.

### E. Calculation of Demand Shortfall

62. Equation 5, below, is used to determine the amount of predicted demand shortfall during the irrigation season.

$$(5) \quad DS = RISD - FS$$

Where:

DS = demand shortfall for specified evaluation points throughout the season,  
 RISD = Reasonable in-season demand from Equation 4, and  
 FS = forecasted supply for remainder of season after specified evaluation point during the season.

63. The amount calculated represents the volume that junior ground water users will be required to have available for delivery to members of the SWC found to be materially injured by the Director. The amounts will be calculated in April and in the middle of the season.

### III. Methodology For Determining Material Injury To Reasonable Carryover

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

#### A. Projected Water Supply

65. CM Rule 42.01.g provides that the Director "shall consider . . . the projected water supply for the system." Carryover shortfall will be determined following the completion of the irrigation season. Because it is not possible to adequately forecast the irrigation demand for the following irrigation season at the end of the current irrigation season, the Director must make a projection of need. R. Vol. 37 at 7109 ("Anticipating the next season of need is closer to faith than science."). The average of 2006/2008 BLY will be the projected demand.

66. Similar to projecting demand, the Director must also project supply. The Heise natural flows, for the years 2002 and 2004, were well below the long term average (1971-2000) but were not the lowest years on record. Ex 8000, Vol. II at 6-37:6-28; R. Vol. 8 at 1379-80. The average of the 2002 and 2004 supply will be the projected supply, representing a typical dry year. The 2002 and 2004 supply is computed as follows:

- 2002 supply = natural flow diverted + new fill
- 2004 supply = natural flow diverted + new fill
- Projected supply = average of 2002 supply and 2004 supply

Carryover from the previous years is not included in the 2002 and 2004 supply calculation because it was not new water supplied during the 2002 or 2004 irrigation year.

67. As described above, reasonable carryover based on projected water supply (2002/2004) and projected demand (2006 BLY; 2006/2008 BLY) are as follows:

	Reasonable Carryover 2006 BLY (Acre-Feet)	Reasonable Carryover 2006/2008 BLY (Acre-Feet)
A&B	16,000	17,000
AFRD2	50,700	56,000
BID	0	0
Milner	100	4,800
Minidoka	0	0
NSCC	54,700	57,200
TFCC	0	29,700

Reasonable Carryover by Entity (2002/2004 supply; 2006 BLY; 2006/2008 BLY).

**B. Average Annual Rate of Fill**

68. CM Rule 42.01.g states that the Director “shall consider the average annual rate of fill of storage reservoirs . . . .” The average annual reservoir fill serves as a means to evaluate reasonable carryover, calculated as the difference between the projected demand and the projected supply. For purposes of the table below, any water contributed to the rental pool from the previous year was added to the next year’s fill volume so that it does not artificially lower the percent fill. R. Vol. 37 at 7108. Water that is supplied to the rental pool lowers carryover and could impact the following year’s fill. The percent fill does not include water deducted for reservoir evaporation. The annual percent fill of storage volume by SWC entity is shown below:

	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	100%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	90%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	98%	48%	95%	82%	63%
2005	58%	100%	100%	77%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	83%	92%	77%	95%	97%
Average	82%	99%	98%	90%	96%	95%	95%
Std Dev	27%	5%	5%	16%	7%	6%	10%

Annual Percent Fill of Storage Volume by Entity (1995-2007).<sup>10</sup>

<sup>10</sup> See e.g. Ex. 4125. Exhibit 4125 accounts for water deducted for evaporation, but does not take into account water supplied to the rental pool.



	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	100%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	90%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	98%	48%	95%	82%	63%
2005	58%	100%	100%	77%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	83%	92%	77%	95%	97%
2008	100%	100%	85%	100%	80%	99%	100%
Average	83%	99%	97%	90%	95%	96%	95%
Std Dev	26%	5%	6%	16%	8%	6%	10%

Annual Percent Fill of Storage Volume by Entity (1995-2008).

### C. Average Annual Carryover

69. CM Rule 42.01.g states that the Director “shall consider the . . . average annual carry-over for prior comparable water conditions . . .” This factor will be taken into consideration when determining reasonable carryover. Actual carryover volumes were adjusted from values reported in the storage reports so that they did not include water received for mitigation purposes or water rental by the canal company for use within the irrigation district. R. Vol. 37 at 7108. Actual carryover from 1995 through 2008 was sorted into categories ranging from very dry to wet. The categories are based on the Heise natural flow volumes from April through September.

Heise April – Sept Natural Flow		Year	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
Very Dry <3000 KAF	2001	9,902	4,217	37,430	26,854	55,132	42,421	26,917	
	2007	62,739	7,962	34,639	36,520	61,744	68,947	(21,811)	
	2002	30,192	8,570	72,835	14,531	99,488	133,702	32,635	
	2004	(3,771)	18,537	47,845	8,735	97,905	19,145	21,551	
	2003	9,401	3,649	51,686	6,906	81,673	166,217	(18,169)	
	<b>Average</b>	<b>21,693</b>	<b>8,587</b>	<b>48,887</b>	<b>18,709</b>	<b>79,188</b>	<b>86,086</b>	<b>8,225</b>	
Dry 3000 – 4000 KAF	2000	66,915	20,787	107,425	43,173	160,183	205,510	52,536	
	2005	36,665	99,097	90,190	37,593	150,623	365,001	64,452	
	<b>Average</b>	<b>51,790</b>	<b>59,942</b>	<b>98,808</b>	<b>40,383</b>	<b>155,403</b>	<b>285,256</b>	<b>58,494</b>	

Average 4000-4500 KAF	2006	89,311	107,682	102,873	58,755	182,612	365,672	51,187
	1995	82,567	167,451	134,340	75,451	237,300	441,729	58,675
	<b>Average</b>	<b>85,939</b>	<b>137,566</b>	<b>118,607</b>	<b>67,103</b>	<b>209,956</b>	<b>403,701</b>	<b>54,931</b>
Wet >4500 KAF	1998	87,250	144,057	109,014	67,777	193,810	494,664	156,433
	1999	78,312	121,793	168,545	67,147	205,716	454,338	191,501
	1996	85,209	145,019	127,123	70,250	228,786	472,790	111,459
	1997	89,811	114,324	87,073	65,307	202,475	464,715	136,926
	<b>Average</b>	<b>85,145</b>	<b>131,299</b>	<b>122,939</b>	<b>67,620</b>	<b>207,697</b>	<b>471,627</b>	<b>149,080</b>

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1995-2007).

Heise April – Sept Natural Flow		Year	A&B	AFRD2	BID	Milner	MID	NSSC	TFCC
Very Dry <3000 KAF	2001	9,902	4,217	37,430	26,854	55,132	42,421	26,917	
	2007	62,739	7,962	34,639	36,520	61,744	68,947	(21,811)	
	2002	30,192	8,570	72,835	14,531	99,488	133,702	32,635	
	2004	(3,771)	18,537	47,845	8,735	97,905	19,145	21,551	
	2003	9,401	3,649	51,686	6,906	81,673	166,217	(18,169)	
	<b>Average</b>	<b>21,693</b>	<b>8,587</b>	<b>48,887</b>	<b>18,709</b>	<b>79,188</b>	<b>86,086</b>	<b>8,225</b>	
Dry 3000 – 4000 KAF	2000	66,915	20,787	107,425	43,173	160,183	205,510	52,536	
	2005	36,665	99,097	90,190	37,593	150,623	365,001	64,452	
	<b>Average</b>	<b>51,790</b>	<b>59,942</b>	<b>98,808</b>	<b>40,383</b>	<b>155,403</b>	<b>285,256</b>	<b>58,494</b>	
Average 4000 – 4500 KAF	2006	89,311	107,682	102,873	58,755	182,612	365,672	51,187	
	2008	92,193	102,753	130,762	63,342	182,531	413,408	65,648	
	1995	82,567	167,451	134,340	75,451	237,300	441,729	58,675	
	<b>Average</b>	<b>88,024</b>	<b>125,962</b>	<b>122,659</b>	<b>65,849</b>	<b>200,814</b>	<b>406,936</b>	<b>58,504</b>	
Wet >4500 KAF	1998	87,250	144,057	109,014	67,777	193,810	494,664	156,433	
	1999	78,312	121,793	168,545	67,147	205,716	454,338	191,501	
	1996	85,209	145,019	127,123	70,250	228,786	472,790	111,459	
	1997	89,811	114,324	87,073	65,307	202,475	464,715	136,926	
	<b>Average</b>	<b>85,145</b>	<b>131,299</b>	<b>122,939</b>	<b>67,620</b>	<b>207,697</b>	<b>471,627</b>	<b>149,080</b>	

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1995-2008).

70. In considering the principles articulated in CM Rule 42.01.g, the Director will project reasonable carryover shortfalls for members of the SWC. The following table represents the 2006 and the 2006/2008 BLY diversion volumes and total reservoir storage space by entity. By dividing the total reservoir space by the 2006 or 2006/2008 diversion volume, a metric is established that describes the total number of seasons the entity's reservoir space can supply water.

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
06 BLY	57,492	410,376	247,849	41,671	352,269	963,007	995,822
06/08 BLY	58,492	415,730	250,977	46,332	362,884	965,536	1,045,382
Total Reservoir Space	137,626	393,550	226,487	90,591	366,554	859,898	245,930

Total Reservoir Space<sup>11</sup> in Comparison to Demand.

**D. Reasonable Carryover Shortfall**

**i. A&B**

71. A&B's reservoir space has the lowest average annual rate of fill with the highest variability in fill. *See* Finding of Fact 68. In very dry years, the potential exists that A&B's actual carryover will be less than the reasonable carryover. *See* Finding of Fact 69. A&B has an approximate two-year water supply provided by its total available storage space. *See* Finding of Fact 70. Because of its lower rate of fill, it is likely A&B will experience carryover shortfalls in consecutive dry years. Because of these factors, the estimated reasonable carryover for A&B (17,000 AF) is appropriate. *See* Finding of Fact 67.

**ii. AFRD2**

72. AFRD2 has the highest and most consistent reservoir rate of fill of any member of the SWC. *See* Finding of Fact 68. Therefore, any unfilled space in the fall will most likely fill. AFRD2 has, however, an approximate one-year supply available in storage. *See* Finding of Fact 70. In a very dry year, AFRD2's historical carryover volume is often less than the amount needed for reasonable carryover. Because of these factors, the estimated reasonable carryover for AFRD2 (56,000 AF) is appropriate. *See* Finding of Fact 67.

**iii. BID & Minidoka**

73. In an average demand year, BID and Minidoka will have enough water to meet demands given a low water supply. *See* Finding of Fact 67. *See also* R. Vol. 37 at 7105. Historically, even in very dry years, BID's and Minidoka's carryover have been well above the calculated reasonable carryover and it is unlikely that they will have reasonable carryover shortfalls in the future. *See* Finding of Fact 69. *See also* R. Vol. 37 at 7105. Because of these factors, the estimated reasonable carryover for BID and Minidoka is 0 AF. *See* Finding of Fact 67. *See also* R. Vol. 37 at 7105.

**iv. Milner**

74. Similar to A&B, Milner's reservoir space had the second lowest average annual rate of fill of all entities with a high degree of variability in fill. *See* Finding of Fact 68. In very dry years, the potential exists that Milner's actual carryover will be less than the reasonable carryover.

<sup>11</sup> *See* R. Vol. 8 at 1373-74.

See Finding of Fact 69. Milner has an approximate two-year water supply available in storage. See Finding of Fact 70. Because of its rate of fill, it is likely Milner will experience carryover shortfalls in consecutive dry years. Because of these factors, the estimated reasonable carryover for Milner (4,800 AF) is appropriate. See Finding of Fact 67.

v. NSCC

75. NSCC has a near average annual rate of fill in comparison to all entities and an approximate one-year water supply available in storage. See Findings of Fact 68 and 70. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. See Finding of Fact 69. Because of these factors, the estimated reasonable carryover for NSCC (57,200 AF) is appropriate. See Finding of Fact 67.

vi. TFCC

76. TFCC has a near average annual rate of fill in comparison to all entities, but only a one-quarter of a year's water supply available in storage. See Findings of Fact 68 and 70. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. See Finding of Fact 69. In the 2006 irrigation season, supplies were average, but TFCC's demands were below average. See Findings of Fact 22 and 29. Therefore, if 2006 is used as the BLY, it will predict zero reasonable carryover for TFCC. See Finding of Fact 67. The 2006/2008 BLY average reasonably predicts TFCC's reasonable carryover needs.<sup>12</sup> Because of these factors, the estimated reasonable carryover for TFCC (29,700 AF) is appropriate. See Finding of Fact 67.

## CONCLUSIONS OF LAW

1. In his September 5, 2008 Final Order, the Director stated his intention to issue a separate, final order "detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover . . ." R. Vol. 39 at 7386. On July 24, 2009, the Honorable John M. Melanson issued his *Order on Petition for Judicial Review*, in which he found that the Director's decision to bifurcate the proceedings conflicted with the Idaho Administrative Procedures Act; the court therefore remanded the issue to the Department.

2. Parties to the judicial review proceedings filed petitions for reconsideration with the court for a myriad of issues. Responding to the petition for reconsideration filed by IGWA regarding the issue of bifurcation, the Department stated that "sufficient information exists to issue an order determining material injury to reasonable carryover and reasonable in-season demand." *IDWR Response Brief on Rehearing* at 3 (November 6, 2009). At oral argument on rehearing, the Department requested that the court "hold in abeyance its decision on rehearing until the Director issues the new order and the time for filing a motion for reconsideration and a petition for judicial review of the order has expired." *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 2 (March 4, 2010). The court therefore ordered the Department to issue a final order determining material injury to reasonable in-season demand and reasonable

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<sup>12</sup> Although not as severe, the 2006 BLY also underestimates Milner's reasonable carryover needs. Similarly to TFCC, 2006/2008 reasonably estimates Milner's reasonable carryover.

carryover by March 31, 2010. "Pursuant to I.A.R. 13(b)(14), the Court shall hold in abeyance any final decision on rehearing until such an order is issued . . ." *Id.* at 3. On March 29, 2010, the court extended the deadline for the Director's order to April 7, 2010. *Order Granting Unopposed Motion for Extension of Time to File Order on Remand.*

3. The purpose of this order is to provide the methodology by which the Director will determine material injury to RISD and reasonable carryover to members of the SWC.

4. "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

5. Idaho Code § 42-602 states that, "The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . . The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine." According to the Hearing Officer, "It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature [in Idaho Code § 42-602] did not intend to sum up water law in a single sentence of the Director's authority." R. Vol. 37 at 7085. The Idaho Supreme Court has recently stated, "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. CM Rule 20.03.

6. "Priority of appropriation shall give the better right as between those using the water" of the State. Idaho Const. Art. XV, § 3. "As between appropriators, the first in time is first in right." Idaho Code § 42-106. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes." *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915).

7. It is the policy of this State to integrate the appropriation, use, and administration of ground water with the use of surface water in such a way as to optimize the beneficial use of water: "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources." Idaho Code § 42-226. *See also* Idaho Const. Art. XV, § 7; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

8. In *American Falls*, the Court stated as follows:

The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by

which to determine “how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].” *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call.

*American Falls* at 877-878, 154 P.3d at 448-449.

9. In the context of conjunctive administration, the Director’s methodology for projecting material injury does not impose an obligation upon members of the SWC to reprove their water rights. To the extent water is available, members of the SWC are authorized to divert and store water in accordance with the terms of their licenses or decrees. Nothing established herein reduces that authorization. The question that the CM Rules require the Director to answer in this proceeding is, when water is not available to fill the water rights of the SWC, how much water is reasonably necessary for the SWC to accomplish the beneficial purpose of raising crops; because what is needed to irrigate crops may be less than the decreed or licensed quantities. *American Falls* at 880, 154 P.3d at 451; *Order on Petition for Judicial Review* at 24-25; R. Vol. 37 at 7098 (“Properly applied the minimum full supply approach is an attempt to measure, for purposes of determining if there should be curtailment, the amount of water senior surface water users need to raise crops of their choosing to maturity with the number of cuttings weather conditions will allow.”).

10. Holders of senior-priority water rights may receive less than their licensed or decreed quantities and not suffer material injury within the meaning of the CM Rules. As a result, in-season demand should be viewed in light of reasonableness, optimum development of water resources in the public interest, and full economic development. Idaho Const. Art XV, § 7; Idaho Code § 42-226; CM Rule 20 and 42; *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912); *American Falls* at 876-77, 154 P.3d at 447-48.

11. Here, the Director has established a methodology for determining material injury to members of the SWC. The methodology predicts material injury to RISD by taking the difference between RISD and the forecasted supply. At this time, with the recognition that the methodology is subject to adjustment and refinement, RISD will be equal to the historic demands associated with the BLY (2006/2008), and will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

12. The years 2000 through 2008 were used to select the initial BLY because it captured current irrigation practices in a dry climate. Based upon his evaluation of the record, members of the SWC were exercising more reasonable efficiencies during this time period than during the 1990s when supplies were more plentiful and the climate more forgiving. During periods of drought when junior ground water users are subject to curtailment, members of the SWC should exercise reasonable efficiencies in order to promote the optimum utilization of the State’s water resources. Idaho Const. Art. XV, § 7; Idaho Code § 42-226; CM Rules 20 and 42.

13. Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director's predictions of material injury to RISD and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director's professional judgment as the manager of the State's water resources. Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. As the process of predicting and evaluating material injury moves forward, and more data is developed, the methodology will be subject to adjustment and refinement.

14. If the Director predicts that the SWC will be materially injured, the consequence of that prediction is an obligation that must be borne by junior ground water users. If mitigation water in the amount of the projected RISD shortfall cannot be optioned by junior ground water users to the satisfaction of the Director (*see Order on Petition for Judicial Review* at 19), the Director will curtail junior ground water users to make up any deficit. By requiring that junior ground water users have options for water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to provide mitigation water until the time of need, the Director ensures that junior ground water users provide only the required amount of water.

15. Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the time of need, the purpose of allowing junior ground water users to continue to divert by providing water for mitigation is defeated. The risk of shortage is then impermissibly shouldered by the SWC. Members of the SWC should have certainty entering the irrigation season that mitigation water will be provided at the time of need, or curtailment of junior ground water rights will be ordered at the start of the irrigation season.

16. Because climate and the supply that the SWC appropriated (natural flow and storage) are inherently variable, the Director cannot and should not insulate the SWC against all shortages. The Director can, however, protect the SWC against reasonably predicted shortages to RISD.

17. Currently, the USBR and USACE's Joint Forecast is the best predictive tool at the Director's disposal for predicting material injury to RISD. Given current forecasting techniques, the earliest the Director can predict material injury to RISD with reasonable certainty is soon after the Joint Forecast is issued in early April. By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. The Director further guards against RISD shortage by using the 2006/2008 BLY, which has above average ET, below average in-season precipitation, and above average growing degree days. The 2006/2008 average represents years in which water supply did not limit diversions. The Director's prediction of material injury to RISD is purposefully conservative. While it may ultimately be determined after final accounting that less water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Const. Art. XV, § 3; Idaho Code § 42-106.

18. Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water users will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need (defined in footnote 9, *supra*). If it is

determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment. This determination is based upon the Director's discretion and his balancing of the principle of priority of right with the principles of optimum utilization and full economic development of the State's water resources. Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226. Because the methodology is based upon conservative assumptions and is subject to refinement, the possibility of under-predicting material injury is minimized and should lessen as time progresses. The methodology should provide both the SWC and junior ground water users certainty at the start of the irrigation season.

19. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

20. According to CM Rule 42.01.g, members of the SWC are entitled to maintain a reasonable amount of carryover storage water to minimize shortages in "future dry years." Guidance for determining reasonable carryover is also found in CM Rule 42.01.g: "In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system."

21. While the right to reasonable carryover is provided by CM Rule 42.01.g, the Court in *American Falls* established that there are limitations upon that right:

At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out.

*American Falls* at 880, 154 P.3d at 451.

22. While CM Rule 42.01.g contemplates reasonable carryover for future dry years, the Hearing Officer determined that "requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in *AFRD#2*." R. Vol. 37 at 7109-10. Therefore, a



senior may only seek curtailment of juniors to provide reasonable carryover for a period of one year. *Id.* In his 2008 Final Order, former Director Tuthill accepted the recommendation of the Hearing Officer.

23. In its *Order on Petition for Judicial Review*, the court held that it was incorrect for the Director to categorically limit the right to carryover storage “for more than just the next season . . .” *Order on Petition for Judicial Review* at 22. The court went on to say, however, that the Director, “in the exercise of his discretion, can significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances of a particular delivery call. Ultimately, the end result may well be the same.” *Id.*

24. As discussed in the Findings of Fact, reasonable carryover is determined by projecting the water supply for the system. This is accomplished by projecting the 2002/2004 supply and the 2006/2008 demand. Next, the Director examines the average annual rate of fill of the storage rights held by members of the SWC to determine each entities’ relative probability of fill. Finally, the Director examines the average annual carryover for prior comparable water conditions by reviewing Heise natural flow.

25. If, in the fall, the Director finds that a reasonable carryover shortfall exists, the Director will use the ESPA Model to determine the transient impacts of curtailment (year-to-year). The ESPA Model will be used to determine the yearly impacts of curtailment of junior ground water users, if curtailed from April 1 through March 31.<sup>13</sup> It is this volume of water that junior ground water users must have optioned in the fall in order to start the subsequent irrigation season without an order of curtailment.

26. Recognizing that reservoirs space held by members of the SWC may fill, and in order to prevent the waste of water, junior ground water users are not required to provide the volume of reasonable carryover until after the Day of Allocation (defined in footnote 16, *infra*). Junior ground water users are required to provide reasonable carryover to the SWC until reservoir space held by the entities fills. If the reservoir space does not fill, the results of the transient analysis must be optioned by junior ground water users in the fall. In addition, the Director will determine shortfalls to the SWC’s reasonable carryover for the next irrigation season and use the ESPA Model to determine the transient volume of water that must be optioned. This transient obligation is in addition to the subsequent year’s transient obligation. *See* Attachment A.

27. By modeling the impacts of curtailments until the reservoir space held by members of the SWC fills, junior ground water users have an accruing mitigation obligation. In this way, the Director is able to account for reasonable carryover for “future dry years.” CM Rule 42.01.g.

28. The Director recognizes that his analysis of the obligation for reasonable carryover differs from his analysis for RISD obligations. In predicting RISD shortages, the Director is able to premise his determination on the Joint Forecast. The Director requires junior ground water users to

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<sup>13</sup> Version 1.1 of the ESPA Model runs on six-month time steps. Because an irrigation season is nine months long, simulating curtailment for a period of six months would under estimate the impacts of curtailment and unreasonably shift the risk of shortage to the SWC. Because version 1.1 of the ESPA Model cannot simulate curtailment for nine months, it is appropriate to simulate curtailment for one year, as opposed to six months. Because the methodology is subject to refinement, this determination may be revisited if the time steps are changed.

provide the entire RISD shortage because the Joint Forecast allows determination of material injury with reasonable certainty.

29. In the fall of the subsequent irrigation season, the Director cannot, with reasonable certainty, predict material injury to reasonable carryover. As found by the Hearing Officer, "Anticipating the next season of need is closer to faith than science." R. Vol. 37 at 7109. Because of the uncertainty associated with this prediction, and in the interest of balancing priority of right with optimum utilization and full economic development of the State's water resources, Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226, the Director will use the ESPA Model to simulate transient curtailment of the projected reasonable carryover shortage. By requiring that junior ground water users have options in place in the fall of the subsequent irrigation season in the amount of the first year of curtailment (accruing from season-to-season until reservoir space fills), the Director ensures that a certain volume of water will be carried over from one season to the next. This allows the SWC to plan for the coming irrigation season, and places the risk of reasonable shortage on junior ground water users. In light of the unpredictable nature of the determination of material injury to reasonable carryover, the use of the ESPA Model imposes a reasonable burden on junior ground water users.

### ORDER

Based upon and consistent with the Findings of Fact and Conclusions of Law, the Director hereby orders that, for purposes of determining material injury to reasonable in-season demand and reasonable carryover, the following steps will be taken:

1. Step 1: By April 1, members of the SWC will provide electronic shape files to the Department delineating the total irrigated acres within their water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%; provided that the total acreage count does not exceed the number of acres to be irrigated within the decreed place of use. If this information is not timely provided, the Department will determine the total irrigated acres based upon past year cropping patterns and current satellite and/or aerial imagery. The Department will publish electronic shape files for each member of the SWC for the current water year for review by the parties. In determining the total irrigated acreage, the Department will account for supplemental ground water use.

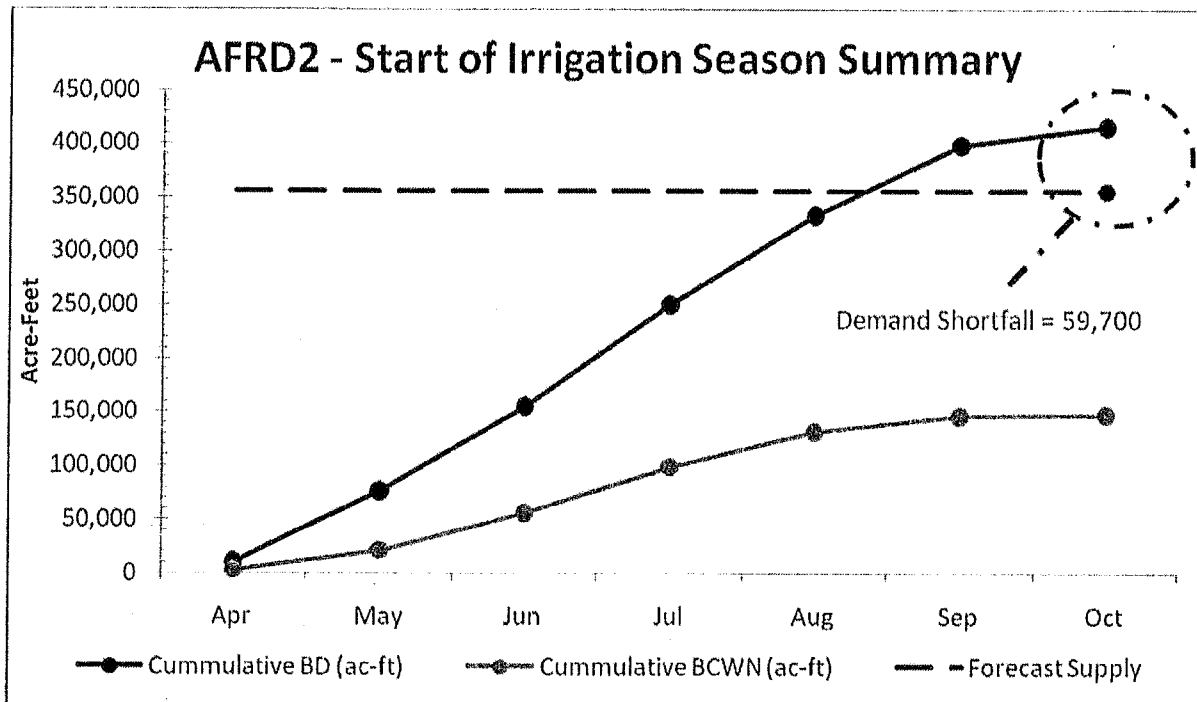
2. Beneficial use cannot occur on lands that are not described in the SWC's water rights. If, however, the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then an assessment must be made of the impact of this reduction in use of the water right on any mitigation requirement.

3. Step 2: Starting at the beginning of April, the Department will calculate the cumulative CWN volume for all land irrigated with surface water within the boundaries of each member of the SWC.

- Volumetric values of CWN will be calculated using ET and precipitation values from the USBR's AgriMet program, irrigated areas provided by each entity, and crop distributions based on NASS data.

- Cumulative in-season CWN values will be calculated for each member of the SWC, approximately once a month.

4. Step 3: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within fourteen (14) days after issuance of the Joint Forecast, the Director will predict and issue a Forecast Supply for the water year and will compare the forecast supply to the baseline demand (“BD”) to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season. A separate Forecast Supply and DS will be determined for each member of the SWC. See below for an example.<sup>14</sup>



AFRD2 Start of Irrigation Season Summary, Initial Demand Shortfall Prediction.

5. Step 4: If the April DS is greater than the reasonable carryover shortfall from the previous year, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water equal to the difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users cannot provide this information, by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users.<sup>15</sup>

<sup>14</sup> For the purposes of the illustrative example, AFRD2 was selected as the water user, a dry year was selected as the irrigation season, and 2006/2008 was selected as the BLY. Forecast supply was calculated utilizing historic natural flow and historic reservoir storage data.

<sup>15</sup> This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year’s obligation.

6. Step 5: Within fourteen (14) days following the publication of Water District 01's initial storage report, which typically occurs soon after the Day of Allocation,<sup>16</sup> the volume of water secured by junior ground water users to fulfill the reasonable carryover shortfall shall be made available to injured members of the SWC. The amount of reasonable carryover to be provided shall not exceed the empty storage space on the Day of Allocation for that entity. If water is owed in addition to the reasonable carryover shortfall volume, this water shall be provided to members of the SWC at the Time of Need.

7. Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) estimate the Time of Need date; and (3) issue a revised Forecast Supply.

8. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, projected demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue RISD and revised DS values.

9. Step 7: Shortly before the 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; and (2) issue a revised Forecast Supply.

10. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, projected demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue RISD and revised DS values.

11. Step 8: At the earliest forecasted Time of Need for any member of the SWC, junior ground water users are required to provide the lesser of the two volumes<sup>17</sup> from Step 4 (May 1 secured water) and Step 7 (RISD volume calculated at the Time of Need). If the calculations from Step 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.

12. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

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<sup>16</sup> The Day of Allocation is the time in the irrigation season when the Water District 01 watermaster is able to issue allocations to storage space holders after the reservoir system has achieved its maximum physical fill, maximum water right accrual, and any excess spill past Milner Dam has ceased. Tr. p. 902, lns. 7-25; p. 903, lns. 1-10.

<sup>17</sup> This refers to the overall volume for the entire estimate. While the overall volume predicted at the start of the season represents with certainty the upper bound of water that junior ground water users will need to provide to members of the SWC, values predicted at the start of the season may adjust up or down at the time of mid-season re-evaluation.

13. Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual *crop water need* for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future baseline years, and for the refinement and continuing improvement of the method for future use.

14. On or before November 30, the Department will publish estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on but not limited to the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the publication by the Department of reasonable carryover short fall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to provide a volume of storage water equal to the reasonable carryover shortfall for all injured members of the SWC. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

15. Step 10: As an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department's water rights data base and the ESPA Model. The modeling effort will determine total annual reach gain accruals due to curtailment over the period of the model exercise. *See R. Vol. 8 at 1386-87.* In the year of injury, junior ground water users would then be obligated to provide the accrued volume of water associated with the first year of the model run. *See id. at 1404, ¶ 5.* In each subsequent year, junior ground water users would be required to provide the respective volume of water associated with reach gain accruals for that respective year, until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided. *See id. at 1404, ¶ 6.*

16. Included as an attachment to this order is an illustrative tabulated example, for each SWC entity, for three consecutive water years, illustrating the accounting that will be applied in determining reasonable carryover shortfalls, in-season demand shortfalls, water optioning, and water delivery requirements.

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 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 7<sup>th</sup> day of April, 2010.

  
GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

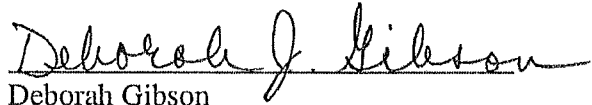
I HEREBY CERTIFY that on this 8<sup>th</sup> day of April, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

Honorable John M. Melanson Idaho Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 <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
Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 <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@capitolawgroup.net">tarkoosh@capitolawgroup.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
Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 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

<p>Randall C. Budge  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:tjb@racinelaw.net">tjb@racinelaw.net</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>Kathleen Carr  US Dept. Interior  960 Broadway Ste 400  Boise, ID 83706</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 type="checkbox"/> Email
<p>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></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>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 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>Sarah A. Klahn  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></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>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>	<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>
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Deborah Gibson  
Administrative Assistant to the Director

# ATTACHMENT A

Year	Step	Milestone	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Total
1	10	Carryover Shortfall Volume Optioned	3,000	18,700	0	0	0	0	15,600	37,300
		Volume of storage right that did not fill	90,000	70,000	4,000	45,000	20,000	150,000	70,000	449,000
	3	4/1 Predicted In-Season Shortfall	8,800	59,700	0	0	0	0	102,500	171,000
	4	May 1 additional water to secure by IGWA	5,800	41,000	0	0	0	0	86,900	133,700
	5	Day of Allocation Water Owed	3,000	18,700	0	0	0	0	15,600	37,300
	6	July Predicted In-Season Shortfall	14,400	125,300	0	0	0	0	103,600	243,300
	8	Time of Need water owed	5,800	41,000	0	0	0	0	86,900	133,700
		<b>Total Water Delivered In- Season</b>	<b>8,800</b>	<b>59,700</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>102,500</b>	<b>171,000</b>
		Final In-Season Shortfall (assuming no water provided by IGWA)	12,600	78,900	0	0	0	19,000	0	110,500
	9	Carryover	11,000	36,000	47,800	8,700	97,900	19,100	50,000	270,500
9	Reasonable Carryover	17,000	56,000	0	4,800	0	57,200	29,700	164,700	
9	Reasonable Carryover Shortfall	6,000	20,000	0	0	0	38,100	0	64,100	
2	10	Carryover Shortfall Volume Optioned	3,200	14,400	0	0	0	12,100	6,700	36,400
		Volume of storage right that did not fill	81,000	0	0	9,000	30,000	135,000	28,000	
	3	4/1 Predicted In-Season Shortfall	0	0	0	0	0	0	28,200	28,200
	4	May 1 additional water to secure by IGWA	0	0	0	0	0	0	21,500	21,500
	5	Day of Allocation Water Owed	3,200	0	0	0	0	12,100	6,700	22,000
	6	July Predicted In-Season Shortfall	0	30,300	0	0	0	0	0	30,300
	8	Time of Need water owed	0	30,300	0	0	0	0	0	30,300
		<b>Total Water Delivered In- Season</b>	<b>3,200</b>	<b>30,300</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>12,100</b>	<b>6,700</b>	<b>52,300</b>
		Final In-Season Shortfall (assuming no water provided by IGWA)	0	5,900	0	0	0	0	0	5,900
	9	Carryover	33,400	28,000	72,800	14,500	99,500	145,800	39,300	433,300
9	Reasonable Carryover	17,000	56,000	0	4,800	0	57,200	29,700	164,700	
9	Reasonable Carryover Shortfall	0	28,000	0	0	0	0	0	28,000	
3	10	Carryover Shortfall Volume Optioned	1,500	9,200	0	0	0	5,100	3,600	19,400
		Volume of storage right that did not fill	0	0	0	0	0	0	0	0
	3	4/1 Predicted In-Season Shortfall	0	8,100	0	0	0	0	66,800	74,900
	4	May 1 additional water to secure by IGWA	0	0	0	0	0	0	63,200	63,200
	5	Day of Allocation Water Owed	0	0	0	0	0	0	0	0
	6	July Predicted In-Season Shortfall	0	0	0	0	0	0	0	0
	8	Time of Need water owed	0	0	0	0	0	0	0	0
		<b>Total Water Delivered In- Season</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
		Final In-Season Shortfall (assuming no water provided by IGWA)	0	0	0	0	0	0	0	0
	9	Carryover	36,700	99,000	90,200	37,600	150,600	365,000	64,500	843,600
9	Reasonable Carryover	17,000	56,000	0	4,800	0	57,200	29,700	164,700	
9	Reasonable Carryover Shortfall	0	0	0	0	0	0	0	0	

Illustrative Analysis of Three Consecutive Years of Shortfall Accounting.<sup>1</sup>

<sup>1</sup> Illustrative analysis does not include the revised calculations at the Time of Need as represented by Step 7 in the Order.

**Example Transient Analysis of Carryover Shortfall Volumes**

Year	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Total
0	8,000	50,000	0	0	0	0	42,000	100,000
1	6,000	20,000	0	0	0	38,100	0	64,100
2	0	28,000	0	0	0	0	0	28,000
3	0	0	0	0	0	0	0	0

Reasonable Carryover Shortfalls (Acre-Feet).

Year	Total Carryover Shortfall	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
0	100,000	37,300	16,000	8,600	5,900			
1	64,100		20,400	8,600	4,500	3,100		
2	28,000			9,200	3,800	2,100	1,500	
3	0				0	0	0	0
Total		37,300	36,400	26,400	0			

Reasonable Carryover Transient Analysis Results over Four Years (Acre-Feet).

Year	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Total
1	3,000	18,700	0	0	0	0	15,600	37,300
2	3,200	14,400	0	0	0	12,100	6,700	36,400
3	1,500	9,200*	0	0	0	5,100	3,600	19,400

Reasonable Carryover Obligation by Junior Ground Water Users for each SWC Member, Proportioned by the Percentage of Total Reasonable Carryover Shortfall from the Original Carryover Shortfall Year.

\*AFRD2's space filled in year 2. Subsequently there are no carryover shortfall obligations in year 3 for carryover shortfalls that occurred in year 0 and year 1.

## **ATTACHMENT 2**

*Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, issued by the Department on June 23, 2010.*

**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 )	<b>SECOND AMENDED FINAL</b>
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	<b>ORDER REGARDING</b>
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>METHODOLOGY FOR</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>DETERMINING MATERIAL</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>INJURY TO REASONABLE</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>IN-SEASON DEMAND AND</b>
AND TWIN FALLS CANAL COMPANY )	<b>REASONABLE CARRYOVER</b>
_____ )	

This *Second Amended Final Order Regarding Methodology for Determining Injury to Reasonable In-Season Demand and Reasonable Carryover* corrects an omission in the June 16, 2010 Amended Methodology Order that limits mitigation to storage water. This order recognizes that other activities by junior water right holders may also provide mitigation benefits to senior water right holders. This order supersedes the June 16, 2010 Amended Methodology Order.

**FINDINGS OF FACT**

**I. Procedural Background**

1. On September 5, 2008, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued a final order in this matter (“2008 Final Order”), in which he ruled on all issues raised at hearing, with the exception of stating his methodology for determining material injury to the Surface Water Coalition’s (“SWC”) reasonable in-season demand (“RISD”) and reasonable carryover. R. Vol. 37 at 7386.<sup>1</sup>

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<sup>1</sup> For purpose of convenience, all citations in this Final Order are to material that was admitted during the hearing and is part of the final agency record on appeal, which was lodged with the Fifth Judicial District Court on February 6, 2009.

2. On July 24, 2009, the Honorable John M. Melanson issued his *Order on Judicial Review*, which found that the Director's decision to bifurcate his orders was unlawful under the IDAPA. *Order on Judicial Review* at 32. The court remanded this issue "for further proceedings consistent with this decision." *Id.* at 33. Petitions for rehearing were filed by the City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively referred to herein as the "IGWA"). At times, this order will refer to IGWA and Pocatello collectively as "ground water users" or "GWU."

3. On March 4, 2010, the court issued its *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*. The order was issued pursuant to Idaho Appellate Rule 13(b)(14) and tasked the Director to issue a final order determining material injury to RISD and reasonable carryover by March 31, 2010. On March 29, 2010, the court extended the deadline to April 7, 2010. *Order Granting Unopposed Motion for Extension of Time to File Order on Remand*.

4. On April 7, 2010, the Director issued his Final Order. Petitions for reconsideration were filed by the parties. Because the hearing record did not contain 2008 data, the Director set a hearing for the parties to contest and rebut the Director's use of 2008 data. Hearing occurred on May 24, 2010.

5. The purpose of this amended Final Order is to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC. The amended Final Order is issued in response to the petitions for reconsideration and hearing on 2008 data. Issued contemporaneously with the Final Order is the Director's order on reconsideration. The purpose of issuing the amended Final Order is to provide the parties with a single, cohesive document by which the Director will quantify material injury in terms of reasonable in-season demand and reasonable carryover. The amended Final Order supersedes the Final Order issued April 7, 2010.

## **II. Methodology for Determining Material Injury to Reasonable In-Season Demand**

### **A. Background to Reasonable In-Season Demand**

6. The May 2, 2005 Amended Order ("May 2005 Order") and its progeny used the concept of a minimum full supply to quantify the amount of water members of the SWC needed during an irrigation season to ensure a reasonable supply. The minimum full supply was established by reviewing diversion records over a fifteen-year period (1990-2004), and selecting a single year with the smallest annual diversion amount that had full headgate deliveries absent the lease of any storage water. R. Vol. 37 at 7065. The year that best fit these criteria was 1995. *Id.* at 7066.

7. The May 2005 Order and its progeny were the subject of a fourteen-day hearing before hearing officer Gerald F. Schroeder ("Hearing Officer"). During the hearing, the Department presented its use of the minimum full supply analysis for determining material injury to in-season diversions. The parties presented competing proposals that were based on a water budget method. R. Vol. 37 at 7096.

8. In the Hearing Officer's April 29, 2008 *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("Recommended Order"), he stated he could not reconcile the water budget methods advanced by the parties. R. Vol. 37 at 7096-97. The Hearing Officer stated that "the Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury." R. Vol. 37 at 7098. Reasons for modifying the Director's method were as follows:

Predictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation season. This is the initial concept behind the minimum full supply. The development of an acceptable baseline subject to adjustment for changing conditions retains the value of having senior rights while providing some level of protection against unnecessary curtailment. The concept is good, but the minimum full supply identified by the Director has no defenders from the parties. A brief summary of objections to the Director's minimum full supply can be stated:

- a. It is based on a wet year. To get to an average moisture year an adjustment would be necessary to determine how much greater the minimum full supply would be if the weather equated to an average year when an adequate amount of water was delivered.
- b. It is based on a decade old year that does not reflect current efficiencies such as the increased use of sprinkler irrigation and computer monitoring or changes in the amount of land irrigated.
- c. It has an emphasis on supply rather than need. That is the amount of water that provided full headgate deliveries. Those may or may not have been needed in that wet year.

R. Vol. 37 at 7096.

9. For purposes of future administration, the Hearing Officer provided the following guidance:

- a. **To the extent 1995 is utilized it should be adjusted to determine how much the need for irrigation water was depressed by the well-above average**



**precipitation and how much less loss from evaporation there would have been from depressed temperatures compared to a normal temperature year.** This would result in an increase in the baseline utilized by the Director. The objection that arriving at a baseline by using the amount delivered in a specific year emphasized supply rather than need is worthy of consideration. However, the evidence does not establish waste in the use of water in 1995. Absent evidence of waste it is appropriate to assume that the water was applied to a beneficial use.

**b. If there have been significant cropping changes resulting in either greater or less need for water, those should be factored.** This is an area of caution. Cropping decisions are matters for the irrigators acting within their water rights. Those decisions should be driven by the market. The fact that a particular crop may take less water does not dictate that it be planted.

**c. Changes in facilities, diversion, conveyance, and irrigation practices from earlier years should be considered, e.g. the extent to which conversions to sprinklers have affected water use over time.** This again must be considered with caution to avoid rewriting a water right through the process of determining a baseline water need for predictions of material injury. There may be legitimate reasons to revert to gravity flow in the future or change other practices.

**d. Analysis of soil conditions to determine how water is retained or lost is a factor.** Soil may hold water to be used by crops in the future. The fact that water may be applied to the ground when there are no plants growing does not mean the water is wasted. That depends on the nature of the soil and the amount of soil. Some soil retains water well, other does not. This affects the timing and extent of water delivery.

**e. Non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members.** IGWA has established that at least 6,600 acres claimed by TFCC in its district are not irrigated. Similar information was submitted concerning the Minidoka Irrigation District, indicating that the claimed acreage of 75,152 includes 5,008 acres not irrigated and Burley Irrigation District has some 2,907 acres of the 47,622 acres claimed not irrigated. These amounts may, of course, change as acreage is removed from irrigation or possibly added back.

**f. Calculation of a water budget should be based on acres, not shares.** The allocation of water within a district is a matter of internal management, but the calculation of a water budget in determining if there will be curtailment should be based on acres not shares.

**g. Full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 inch instead of 3/4 inch.** The former Director accepted Twin Falls Canal Company's response that 3/4 inch constituted full headgate delivery, and TFCC continued to assert that position at hearing. This is contradicted by the internal memoranda and information given to the shareholders in the irrigation district. It is contrary to a prior judicial determination. It is inconsistent with some of the structural facilities and exceeds similar SWC members with no defined reason. Any conclusions based on full headgate delivery should utilize 5/8 inch.<sup>2</sup>

R. Vol. 37 at 7099-7100 (emphasis in original).

10. According to the Hearing Officer, "it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff." R. Vol. 37 at 7098. In the 2008 Final Order, the Director recognized the Hearing Officer's recommendations and stated the Director's intention of adjusting his future analysis for determining material injury to RISD and reasonable carryover. R. Vol. 39 at 7386.

11. The methodology for determining material injury to RISD and reasonable carryover should be based on updated data, the best available science, analytical methods, and the Director's professional judgment as manager of the state's water resources. In the future, climate may vary and conditions may change; therefore, the methodology may need to be adjusted to take into account a different baseline year or baseline years.

## **B. Brief Overview of the Methodology for Determining Material Injury to the SWC's Reasonable In-Season Demand and Reasonable Carryover**

12. In-season demand shortfalls will be computed by taking the difference between the RISD and forecast supply ("FS"). Initially RISD will be equal to the historic demands associated with a baseline year or years ("BLY") as selected by the Director, but will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions. By selecting a BLY to establish RISD prior to the irrigation season, the Director declines to adopt the water balance method of estimating pre-irrigation season RISD

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<sup>2</sup> This recommendation was accepted by former Director Tuthill in his Final Order. R. Vol. 39 at 7392. In his July 24, 2009 *Order on Judicial Review*, Judge Melanson found that the Director exceeded his authority in making this determination. *Order on Judicial Review* at 31. The court based its decision on the filing of the *Director's Report* in the Snake River Basin Adjudication, which "recommend[ed] ¾ of an inch per acre." *Id.* at 31. In its *Opening Brief on Rehearing*, IGWA asked the court to "clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decreed (or recommended amount)[.]" This issue has been stayed and held in abeyance until after the Director issues his final order regarding his methodology for determining material injury to RISD and reasonable carryover. *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 3.

proposed by the parties (based on historic crop water need adjusted for estimated project efficiencies and other facts). The reasoning for using a BLY instead of a water balance method is explained later in the findings of fact.

13. In-season demand shortfall is computed using the following equation:

- In-Season Demand Shortfall = RISD – FS

14. Reasonable carryover shortfall will be computed by taking the difference between reasonable carryover and actual carryover, where reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply.

- Reasonable Carryover Shortfall = Actual Carryover – Reasonable Carryover

15. The concepts underlying the selection of the BLY, determination of in-season demand shortfall, and reasonable carryover shortfall will be discussed in detail below.

### **C. Reasonable In-Season Demand**

#### **i. Considerations for the Selection of a Baseline Year**

16. A BLY is a year or average of years that represents demands and supplies that can be used as a benchmark to predict need in the current year of irrigation at the start of the irrigation season. The purpose in predicting need is to project an upper limit of material injury at the start of the season.

17. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098. To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

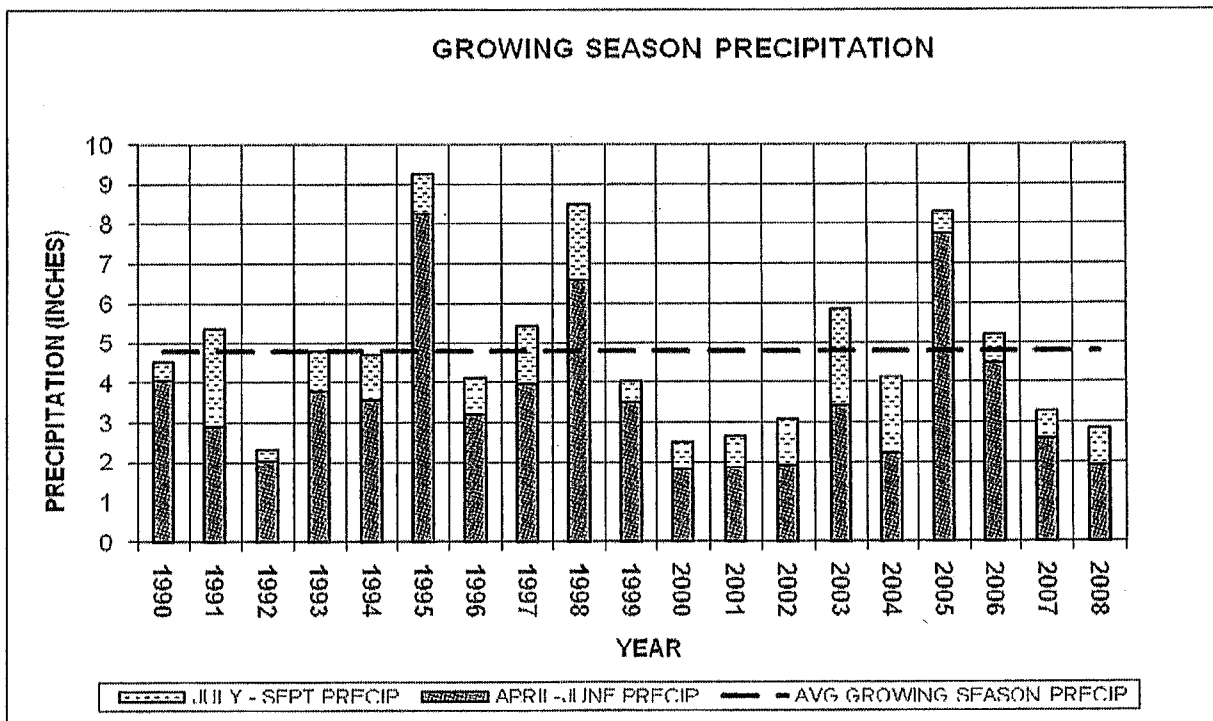
18. The historic diversion volumes from the BLY, along with the predicted supply forecast at the start of the irrigation season, are used to predict the initial in-season demand shortfall, where demand shortfall is the difference between the BLY demand (“BD”) and the FS. Demand shortfall increases in magnitude as the difference between BD and FS increases. Demand shortfall increases with increases in BD, decreases in FS, or both. Assuming constant irrigation practices, crop distributions, and total irrigated acres, demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration (“ET”), and lower precipitation. If water demand data is averaged for several years and these averages are used to predict demand shortfall at the start of the season, in a high water demand year, these averages may often underpredict the demand shortfall. In a high water demand year, underprediction of demand shortfall might be acceptable if the junior priority ground water right holders and the senior priority surface water right holders shared equally in the risk of water shortages. Equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury. The incurrence of actual demand shortfalls by a senior surface water right holder resulting from pre-irrigation season predictions based on average data unreasonably shifts the

risk of shortage to the senior surface water right holder. Therefore, a BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

**a. Climate**

19. For the methods outlined herein, climate is represented by precipitation, ET, and growing degree days.

20. Precipitation. Water, in all phases, introduced to Idaho from the atmosphere is termed precipitation. During the growing season, precipitation has a substantial influence on crop water need both as a source of water to growing crops and as an influencing factor on ET. Ex. 3024 at 19. The figure below shows the precipitation recorded during the growing season at the National Weather Service’s Twin Falls weather station. *Id.* at 12.

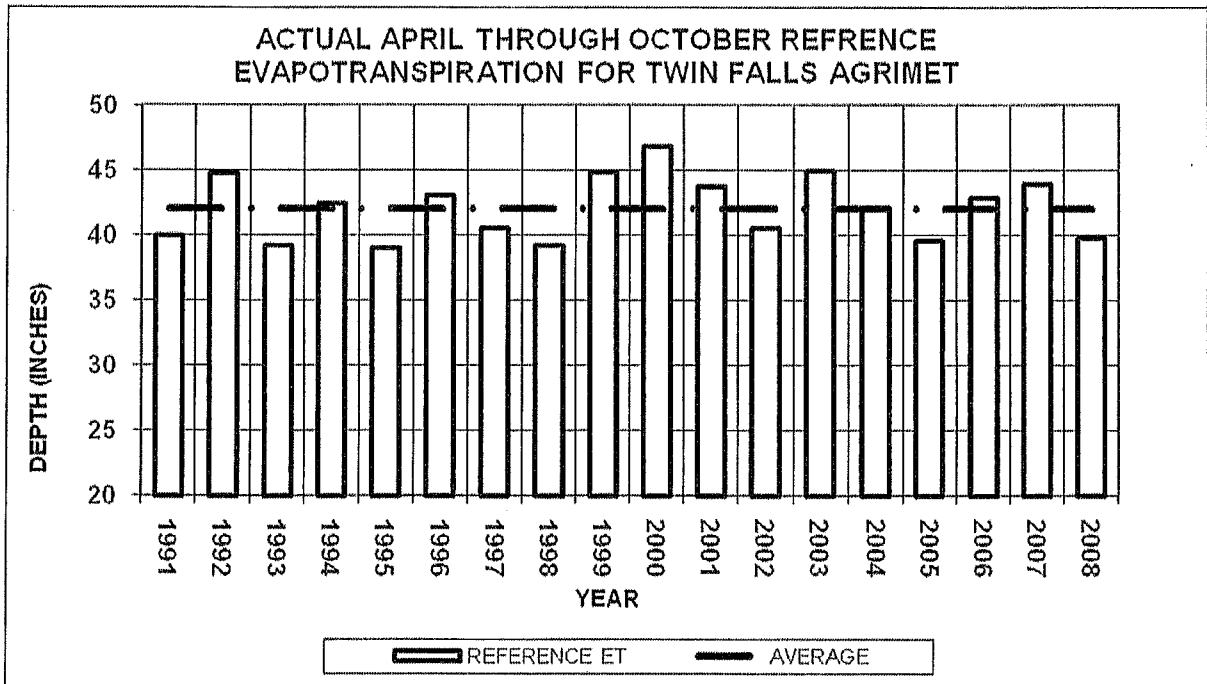


Growing Season Precipitation at National Weather Service’s Twin Falls Weather Station 1990–2008.<sup>3</sup>

<sup>3</sup> Chart created from raw NOAA National Weather Service total precipitation data obtained from the NCDC’s Climatological Data Annual Summary Idaho report series for the Twin Falls 6 E weather station (formerly Twin Falls WBASO and Twin Falls WSO).

21. Evapotranspiration. ET is a combined variable that describes the amount of water that evaporates from the ground from irrigation and transpires from vegetation. ET is an important factor for properly estimating RISD. In its water budget calculations, the SWC proposed the use of ET values from the USBR as part of their Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. II, Chap. 9; Ex. 8000, Vol. IV, Appdx. AU. The GWU proposed the use of ET values from Richard G. Allen and Clarence W. Robison 2007, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, i.e. ETIdaho. Ex. 3007A at 21; Ex. 3024 at 1-58.

22. The use of reference ET calculated using ETIdaho for the Twin Falls (Kimberly) AgriMet site as an indicator of overall crop water need for a season is appropriate for purposes of comparison of historical average water need between seasons. Similar use of ETIdaho crop irrigation requirement data for AgriMet stations were employed in some of the expert reports submitted during hearing. *See* Ex. 3007 at 21. The ETIdaho method includes the contribution of effective precipitation in the reference ET calculation, and is a strong measure of the actual reference ET as opposed to the traditional potential ET, or the amount of ET the reference crop would use if water were not a limiting factor. ETIdaho is used here for the specific task of selecting appropriate BLY candidates. Total April through October reference ET for the period of record from the Twin Falls (Kimberly) AgriMet site is shown below. Since 2000, the years of 2000, 2001, 2003, 2006 and 2007 were years of above average ET.



Actual Reference ET for Twin Falls (Kimberly) AgriMet using ETIdaho Methodology 1991-2008.

23. Growing Degree Days. Growing degree days define the length and type of growing season. Growing degree days are an arithmetic accumulation of daily mean temperature above a certain base temperature. Ex. 3024 at 10; 117-21. These growth units are a simple method of relating plant growth and development to air temperatures. Different plant species have different base temperatures below which they do not grow. At temperatures above this base, the amount of plant growth is approximately proportional to the amount of heat or temperature accumulated. A higher annual growing degree day value correlates to a higher potential rate of plant growth. The table below shows growing degree days accumulated for April through September for the Twin Falls (Kimberly) AgriMet site. Above average years since 2000 include: 2000, 2001, 2002, 2003, 2006, and 2007.

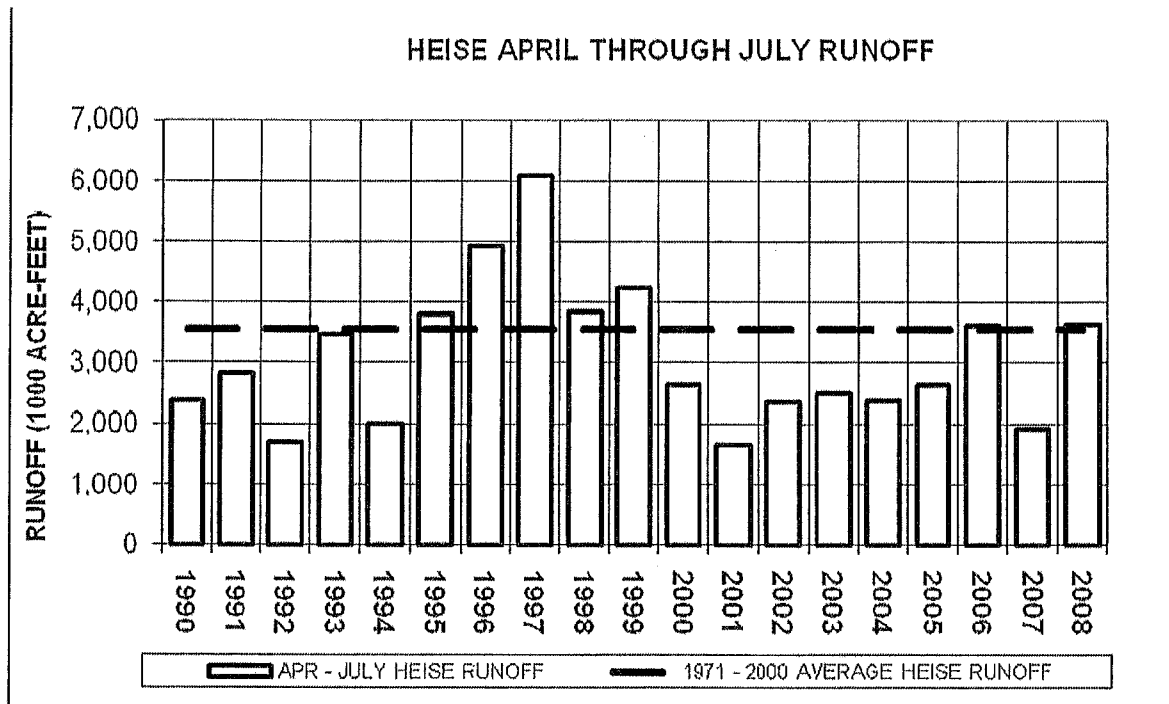
Year	GDD: April-Sept	% of Average	Year	GDD: April-Sept	% of Average
1991	2,095.4	86%	2000	2,591.3	107%
1992	2,610.7	107%	2001	2,600.8	107%
1993	2,004.7	83%	2002	2,465.6	101%
1994	2,516.8	104%	2003	2,585.4	106%
1995	2,257.8	93%	2004	2,428.9	100%
1996	2,418.6	100%	2005	2,320.1	95%
1997	2,478.4	102%	2006	2,601.9	107%
1998	2,422.2	100%	2007	2,657.7	109%
1999	2,294.9	94%	2008	2,382.9	98%
Average GDD:				2,429.7	

Growing Degree Days (“GDD”) for Twin Falls (Kimberly) AgriMet Site 1991-2008, Ex. 3024 at 10.

**b. Available Water Supply**

24. The joint forecast (“Joint Forecast”) issued by the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers (“USACE”) for the period April 1 through July 31 “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” R. Vol. 8 at 1379, ¶ 98. The predictions made in this forecast are a good indicator of the total available irrigation water supply for a season. R. Vol. 37 at 7071. The April through July Joint Forecast volume represents the volume of water available for diversion into storage reservoirs and also serves as an indicator of natural flow supplies. *Id.* at 7066. The graph below shows actual unregulated flow volumes at Heise for 1990 through 2008. Recognizing that diversions for each individual member of the SWC are

different, since the 2000 irrigation season, 2006 and 2008 are the only years in which water supply was not severely limited.<sup>4</sup> The current thirty-year average (3,563,000 acre-feet) is indicated by the dashed line.



April through July Unregulated Flow Volume at Heise, 1990-2008. Ex. 8000, Vol. II at 6-37:6-38; R. Vol. 37 at 7018-28 (includes 2008 Joint Forecast projection for Heise).

**c. Irrigation Practices**

25. A BLY must be recent enough to represent current irrigation practices. R. Vol. 37 at 7099-7100. Conditions that should be consistent are the net area of the irrigated crops, farm application methods (flood/furrow or sprinkler irrigation), and the conveyance system from the river to the farm. The type of sprinkler systems should be similar between the BLY and the current year, whether side roll systems, hand lines, or center pivot.

26. Sprinkler systems are currently the predominant application system. *Id.* at 7101-02. In order to ensure that current irrigation practices are captured, selection of a BLY for the SWC should be limited to years subsequent to 1999. *Id.* at 7096; 7099-7100.

<sup>4</sup> Former Director Dreher found in the May 2005 Order that “since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record.” R. Vol. 8 at 1375, ¶ 78. The drought during this time period was determined by former Director Dreher to have a “probability of recurrence of something in excess of 500 years . . .” Tr. p. 327, Ins. 20-21.

27. Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acreage. R. Vol. 28, 5205-15; R. Vol. 37 at 7100. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated. R. Vol. 37 at 7100.

**ii. Selection of the Initial Baseline Year**

28. If BLY selection is limited to a single year, 2006 is the best fit in the recent past. However, from the standpoint of annual diversion for individual entities, 2006 was a year of below average diversions for Milner, Minidoka Irrigation District (“MID”), and TFCC, at 82%, 98%, and 96%, respectively (*see* Finding of Fact 30). The selection of a single BLY for all entities is challenging, with all years representing average or near average diversions for some entities, but not others. By selecting a BLY that is comprised of the average of multiple years, a BLY can be selected that better represents the required conditions for each and all entities.

29. The Director finds that using the values of 2006 and 2008 (06/08) to arrive at an average BLY fits the selection criteria for all members of the SWC.<sup>5</sup> The 06/08 average has below average precipitation, near average ET, above average growing degree days, and represents years in which diversions were not limited by availability of water supply. When compared to the average of the annual diversions from 1990-2008, the 06/08 diversions were above average. When compared to the average of the annual diversions from 2000-2008, the 06/09 diversion were average.

30. When compared to the average season long diversion volume from 2000-2008, the 06/08 average season long diversion volumes are greater for each entity, with the exception of Milner, keeping in mind that the 2000-2008 averages include consecutive drought years from 2000-2005.

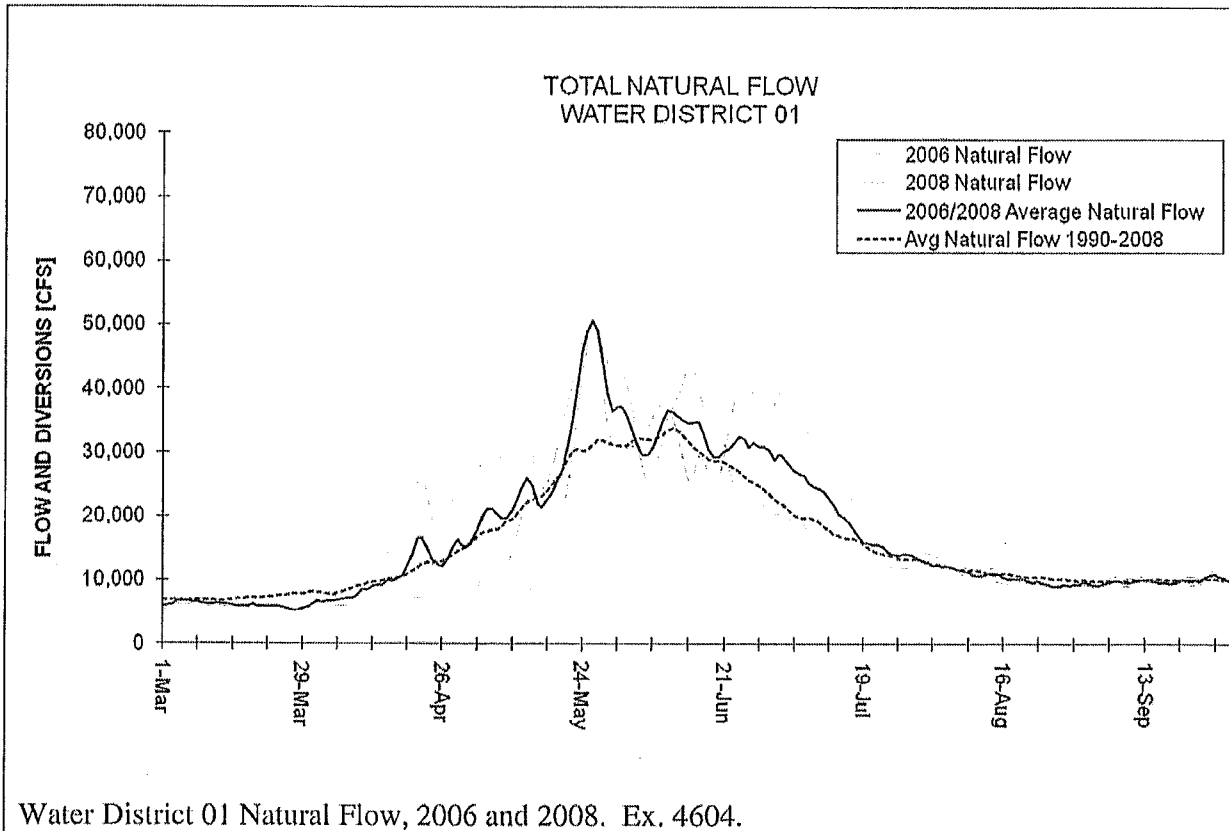
	2000-2008 Avg. Diversions	'06/'08 Avg. Total Diversions	'06/'08 % of Avg.
A&B	57,615	58,492	102%
AFRD2	409,865	415,730	101%
BID	245,295	250,977	102%
Milner	50,786	46,332	91%
Minidoka	358,018	362,884	101%
NSCC	955,439	965,536	101%
TFCC	1,031,987	1,045,382	101%
			100%

SWC Diversions for 2006/2008; and 2000 through 2008 Average. Ex. 8000, Vol. IV, Appdx. AS-1-8.

<sup>5</sup> In 2006, TFCC delivered ¾ of a miner’s inch. Tr. p. 1601, Ins. 1-15.



31. Daily natural flow supply for Water District 01 in 2006 and 2008 are depicted below. When averaged together, the 2006 and 2008 natural flow is near the long term average (1990-2008). The long term average is shown as the blue dashed line.



Water District 01 Natural Flow, 2006 and 2008. Ex. 4604.

#### D. Calculation of Reasonable In-Season Demand

32. RISD is the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity. Given that climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences. As stated by the Hearing Officer, “The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.” R. Vol. 37 at 7098.

##### i. Assessment of Water Balance Studies Presented at Hearing

33. The parties proposed a method of computing water need based on ET, referred to as a water balance method, to determine the quantity of water needed by members of the SWC. The parties computed a diversion requirement for crops grown within each SWC entity with the following equation:

$$(1) \quad Q = \left[ \left( \frac{ET_c \times F_c}{E_a} \right) - W_e \right] \times A_{ID} + S_{loss}$$

Where:

- Q = irrigation entity diversion requirement,
- ET<sub>c</sub> = consumptive use of each crop,
- F<sub>c</sub> = fraction of area of each crop in irrigation entity,
- E<sub>a</sub> = field application efficiency,
- W<sub>e</sub> = estimated effective rainfall during growing season,
- A<sub>ID</sub> = irrigated area in irrigation entity, and
- S<sub>loss</sub> = seepage loss from canals.

34. The variables described above were common to both the SWC and GWU water balance analyses, with the following exceptions. The GWU did not account for effective precipitation (W<sub>e</sub>). Ex. 3007 at 17-19. Analysis by the GWU included a reduction in the diversion requirement for supplemental ground water used within SWC service areas. *Id.* at 17. Both of these exceptions will be considered for purposes of determining RISD shortfalls.<sup>6</sup>

35. Another component not shown or considered by the parties is the operation loss, or project return flows. SWC experts recognized the lack of data necessary to estimate this factor: "Operational losses and returns within the delivery system were not included in the irrigation diversion estimate since no consistent measured operational waste records are available." Ex. 8000, Vol. II at 9-7.

36. The areal extent of the SWC is large. Obtaining field measurements of canal seepage losses on the vast network of canals and laterals is not presently feasible given the time and resources necessary to complete such a task. The same would be true for determining the true value of farm or field application efficiency. Measuring farm runoff and deep percolation losses out of the crop root zone at a field level scale is also not practical given the time and resources necessary to complete such a task. Lacking measured data for canal seepage losses, farm runoff, and deep percolation, these parameters must be estimated using a water balance method.

37. An example of the range of possible values for seepage loss is shown by comparison of the SWC and GWU expert reports. In the SWC's Exhibit 8201, Pocatello's

<sup>6</sup> As stated by former Director Dreher, "In making a determination of how much water is needed, I thought it was important to look at all three of those sources [surface water, storage water, and supplemental ground water]." Tr. p. 25, ln. 25; p. 26, lns. 1-2. All acres identified as receiving supplemental ground water within the boundaries of a single SWC entity will initially be evaluated by assigning an entity wide split of the ground water fraction to the surface water fraction as utilized in the development of the ESPA Model. See Ex. 8000, Vol. II, Bibliography at II, referencing *Final ESPA Model, IWRRRI Technical Report 06-002 & Design Document DDW-017*. For each entity the ground water fraction to the surface water fraction is as follows: A&B 95:5; AFRD2 30:70; BID 30:70; Milner 50:50; Minidoka 30:70; NSCC 30:70; & TFCC 30:70. If these ratios change with a subsequent version of the ESPA Model, the Department will use the values assigned by the current version of the ESPA Model.

expert analysis of average annual canal seepage loss is presented as 338,984 acre-feet for NSCC. In the same exhibit, the SWC's expert analysis of average annual seepage loss for NSCC is reported as 586,136 acre-feet.

38. In a 1979 study published by the Idaho Water Resource Research Institute, R.G. Allen and C.E. Brockway determined that conveyance losses for the 1977 diversion volume of 794,930 acre-feet for NSCC was 286,012 acre-feet for 755 miles of canals. Ex. 3060 at 193. Brockway and B.A. Claiborne estimated conveyance losses to be 326,418 acre-feet for the same NSCC system, based on the 1974 diversion volume of 1,117,240 acre-feet. Ex. 3059 at 26.

39. The above seepage loss estimates were all calculated using the Worstall procedure, Ex. 3037 at 38, but range in magnitude by a factor of 1.8 for the two estimates with the highest, but similar, average diversion volumes. Clearly, the magnitudes of the conveyance losses are very sensitive to input parameters selected for use in that procedure.

40. The Director must exercise his best professional judgment in quantifying inputs to the water balance study. Differences in judgment affect the numerical results. As stated by the Hearing Officer:

The irony in this case is that surface water and ground water expert testimony used much of the same information and in some respects the same approaches and came up with a difference of 869,000 acre-feet for an average diversion budget analysis of SWC districts for the period from 1990 through 2006. Sullivan Rebuttal Report, November 7, 2007, page 17. The total under the SWC analysis is 3,274,948 acre-feet as compared to the Pocatello analysis of . . . 2,405,861 [acre-feet]. The Director's minimum full supply amount of 3,105,000 falls between the two, though much closer to the SWC analysis.

R. Vol. 37 at 7096.

41. The Hearing Officer also found that the average annual surface irrigation requirements based on 1990 through 2006 for the North Side Canal Company ("NSCC") as calculated by experts for the SWC and GWU differed by 473,217 acre-feet. R. Vol. 37 at 7097. Annual average requirements based on the 1990 through 2006 period for TFCC vary by 310,000 acre-feet. *Id.* These discrepancies do not reflect errors in formulations or calculations, but do demonstrate the range of values in the total irrigation demand that are possible if contributing components to that total demand are calculated using different methods, or with different estimates of unknown parameters.

42. Because of the above reasons, the Director declines to adopt the water balance method of determining the quantity of water needed by SWC members. Instead, the Director selects the BLY method of establishing an adequate supply to compare to the predicted water supply to determine any demand shortfall.

## ii. Project Efficiency

43. Given that the water balance method for estimating annual diversion requirements is subject to varying results based on the range of parameters used as input, an alternate approach is to assume that unknown parameters are practically constant from year-to-year across the entire project. Project efficiency (“ $E_p$ ”) is a term used to describe the ratio of total volumetric crop water need within a project’s boundary and the total volume of water diverted by that project to meet crop needs. It is the same concept as system efficiency, which was presented at hearing. Ex. 3007 at 28-29. Implicit in this relationship are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows). By utilizing project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components can be captured and described without quantifying each of the components.

44. Project efficiency is calculated as set forth in Equation 2, below:

$$(2) \quad E_p = \frac{CWN}{Q_D}$$

Where:

$E_p$  = project efficiency,

CWN = crop water need, and

$Q_D$  = irrigation entity diversion of water specifically put to beneficial use for the growing of crops within the irrigation entity.

45. Monthly irrigation entity diversions (“ $Q_D$ ”) will be obtained from Water District 01’s diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity. Examples of adjustments include the removal of diversions associated with in-season recharge and diversion of irrigation water on the behalf of another irrigation entity. Adjustments, as they become known to the Department, will be applied during the mid-season updates and in the reasonable carryover shortfall calculation. Examples of adjustments that can only be accounted for later in the season include SWC deliveries for flow augmentation, SWC water placed in the rental pool, and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. Any natural flow or storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume. Water that is purchased or leased by a SWC member may become part of IGWA’s shortfall obligation; to the extent that member has been found to have been materially injured. *See e.g.* R. Vol. 38 at 7201, fn. 11 (Eighth Supplemental Order). Conversely, adjustments will be made to assure that water supplied to private leases or to the rental pool will not increase the shortfall obligation.

46. Monthly project efficiencies will be computed for the entire irrigation season. Project efficiency varies from month-to-month during the season, and will typically be lower during the beginning and ending of the season. Monthly project efficiencies will be divided into actual monthly crop water need (“CWN”) values to determine RISD during the year of evaluation. The tables below present average project efficiencies for each SWC member (2001-2008), with project efficiencies during that time span greater or less than two standard deviations excluded from the calculation. By including only those values within two standard deviations, extreme values from the data set are removed.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Monthly Avg.
4	1.08	0.24	0.27	1.36	0.17	0.13	0.22	0.50
5	0.42	0.28	0.31	0.59	0.27	0.28	0.32	0.35
6	0.64	0.40	0.48	0.62	0.50	0.44	0.51	0.51
7	0.79	0.44	0.56	0.66	0.64	0.48	0.55	0.59
8	0.68	0.38	0.42	0.56	0.48	0.39	0.41	0.47
9	0.51	0.26	0.32	0.49	0.35	0.29	0.24	0.35
10	0.16	0.41	0.11	0.34	0.11	0.22	0.11	0.21
Season Avg.	0.61	0.34	0.35	0.66	0.36	0.32	0.34	0.43

SWC Member Average Monthly Project Efficiencies from 2001-2008.

### iii. Crop Water Need

47. CWN is the project wide volume of irrigation water required for crop growth, such that crop development is not limited by water availability, for all crops supplied with surface water by the surface water provider. Crop water need is the difference between the fully realizable consumptive use associated with crop development, or ET, and effective precipitation ( $W_e$ ) and is synonymous with the terms irrigation water requirement and precipitation deficit. Ex. 3024. For the purposes of the methodology, CWN is calculated as set forth in Equation 3, below:

(3)

$$CWN = \sum_{i=1}^n (ET_i - W_e) A_i$$

Where,

CWN = crop water need

$ET_i$  = consumptive use of specific crop type,

$W_e$  = estimated effective rainfall,

$A_i$  = total irrigated area of specific crop type,

$i$  = index variable representing the different specific crop types grown within the irrigation entity, and

$n$  = upper bound of summation equal to the total number of different specific crop types grown within the irrigation entity.

#### iv. Evapotranspiration

48. Evapotranspiration ("ET") has been estimated by experts for the parties using theoretically based equations that calculate ET for an individual crop, thus necessitating crop distribution maps for each year. Ex. 3007A at 21, Figure 3, Tables 6-12; Ex. 3024 at 1-58; Ex. 8000, Vol. II at Chapter 9; Ex. 8000, Vol. IV, Appdx. AU.

49. At hearing, values of ET were estimated by the SWC from AgriMet, Ex. 8000, Vol. IV, Appdx. AU-1, and by the GWU from ETIdaho, Ex. 3007A at 21; Ex. 3024 at 1-58. At this time, the Director finds that the use of AgriMet is more appropriate for determining ET than ETIdaho. At this time, AgriMet, is available to all parties in real-time without the need for advanced programming. Accordingly, the methodology will rely on AgriMet derived ET values in the calculations of project efficiency, crop water need, and RISD. In the future, with the development of additional enhancements, ETIdaho may become a more appropriate analytical tool for determining ET.

50. The utilization of AgriMet derived crop specific ET values necessitates crop distribution profiles similar to those described and presented at hearing. R. Vol. 2 at 420-26; Ex. 3007 at 21 & Table 4; and Ex. 3026. The methodology will utilize crop distributions based on distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS"). Ex. 1005 at 1.<sup>7</sup> NASS reports annual acres of planted and harvested crops by county. NASS also categorizes harvested crops by irrigation practice, i.e. irrigated, non irrigated, non irrigated following summer fallow, etc. Crop distribution acreage will be obtained from NASS by averaging the "harvested" area for "irrigated" crops from 1990-2008. Years in which harvested values were not reported will not be included in the average. In the future, the NASS data may not be the most accurate source of data. The Department prefers to rely on data from the current season if and when it becomes usable.

51. AgriMet crop water use (i.e. ET) and weather data are available from the Rupert and Twin Falls (Kimberly) stations for use with the closest SWC entity. Using AgriMet data from Rupert for A&B, Burley Irrigation District ("BID"), and MID provides a reasonable representation of the climate conditions for those entities and are consistent with common standards of practice. Using AgriMet data from Twin Falls (Kimberly) for American Falls Reservoir District No. 2 ("AFRD2"), Milner, NSCC, and TFCC provides a reasonable representation of the climate conditions for those entities and is consistent with common standards of practice. Ex. 8000, Vol. IV at AU-2, AU-8.

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<sup>7</sup> The ESPA Modeling Committee uses NASS data in the ESPA Model to distribute crop types within the model. See Ex. 8000, Vol. 2, Bibliography at II, referencing *Final ESPA Model, IWRRRI Technical Report 06-002*.

**v. Effective Precipitation**

52. Effective precipitation (“ $W_e$ ”) is the amount of total precipitation held in the soil horizon available for crop root uptake. Effective precipitation will be estimated from total precipitation ( $W$ ) utilizing the methodology presented in the USDA Technical Bulletin 1275. Ex. 8000, Vol. IV, Appdx. AU3, AU8. Total precipitation ( $W$ ) is provided by the USBR as part of its Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. IV, Appdx. AU3.  $W_e$  values derived from AgriMet based precipitation values are independent of crop type.

53. AgriMet precipitation ( $W$ ) values are easy to understand and regularly used by the farming, water supply, and water management communities. Accordingly, the methodology will rely on AgriMet derived  $W$  values in the calculations of crop water need and RISD.

54. As with ET data, AgriMet precipitation data are available from the Rupert and Twin Falls (Kimberly) stations for use with the closest SWC entity. Using AgriMet data from Rupert for A&B, BID, and MID provides a reasonable representation of the climate conditions for those entities and are consistent with common standards of practice. Using AgriMet data from Twin Falls (Kimberly) for AFRD2, Milner, NSCC, and TFCC provides a reasonable representation of the climate conditions for those entities and is consistent with common standards of practice. Ex. 8000, Vol. IV at AU-2, AU-8.

**vi. Summary of Reasonable In-Season Demand Calculation**

55. At the start of the irrigation season, RISD is equal to the baseline demand, or total season adjusted diversions for the baseline year(s). When calculated in-season, RISD is calculated by Equation 4, below.

$$(4) \quad RISD_{\text{milestone}_x} = \sum_{j=1}^m \left( \frac{CWN_j}{E_{p,j}} \right) + \sum_{j=m+1}^7 BD_j$$

Where:

$RISD_{\text{milestone}_x}$  = reasonable in season demand at specified evaluation milestones during the irrigation season,

$CWN$  = crop water need for month  $j$ ,

$E_p$  = baseline project efficiency for month  $j$ ,

$BD$  = baseline demand for month  $j$ ,

$j$  = index variable, and

$m$  = upper bound of summation, equal to the month calculation occurs, where April = 1, May =2, ... October = 7.

56. Water is sometimes diverted into canals and onto crops fields in support of crop development for reasons other than strictly meeting the consumptive requirement of the crop; such as canal wetting, salt leaching, soil wetting, and soil temperature control. April and October represent months during the irrigation season when the method of calculating RISD

strictly as a function of CWN and  $E_p$  is less reliable, because CWN is often not the driving factor in diversions during these bookend months. To account for uncertainty of RISD calculations during those time periods, April and October RISD adjustments have been developed.

57. April RISD Adjustment: In April, calculated RISD, as a function of CWN and  $E_p$ , can grossly under estimate actual diversion needs. Therefore, for each individual surface water provider, if the calculation of  $CWN/E_p$  for the month of April is less than the April average diversion volume over a record of representative years in the recent past, then RISD will be equal to the April average diversion volume. If the calculation of  $CWN/E_p$  is greater than the April average, then RISD will equal the calculated  $CWN/E_p$  volume.

58. October RISD Adjustment: In October, calculated RISD, as a function of CWN and  $E_p$ , can either grossly under or over estimate actual diversion needs. For each individual surface water provider, if the calculation of  $CWN/E_p$  for the month of October is greater than the October maximum diversion volume, or less than the October minimum diversion volume,<sup>8</sup> over a record of representative years in the recent past, then RISD will be equal to the October average diversion volume, over the same period of representative years. If the calculation of  $CWN/E_p$  is less than the October maximum diversion volume, or greater than the October minimum diversion volume, then RISD will equal the calculated  $CWN/E_p$  volume.

#### **E. Adjustment of Forecast Supply**

59. As stated by the Hearing Officer, "There must be adjustments as conditions develop if any baseline supply concept is to be used." R. Vol. 37 at 7093.

##### **i. April 1**

60. Typically within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. Given current forecasting techniques, the earliest the Director can predict material injury to RISD "with reasonable certainty" is soon after the Joint Forecast is issued. R. Vol. 2 at 226. With data from 1990 through the water year previous to the current year, a regression equation will be developed for each SWC member by comparing the actual Heise natural flow to the natural flow diverted. *See e.g.* R. Vol. 8 at 1416-22. The regression equation will be used to predict the natural flow diverted for the upcoming irrigation season. *Id.* at 1380. The actual natural flow volume that will be used in the Director's Forecast Supply will be one standard error below the regression line, which underestimates the available supply. *Id.*; Tr. p. 65, lns. 6-25; p. 66, lns. 1-2.

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<sup>8</sup> Minimum October diversion values will not be considered for years in which a SWC entity had zero carryover storage, as the Department will consider this an indication that October diversions were potentially limited by available water supply.

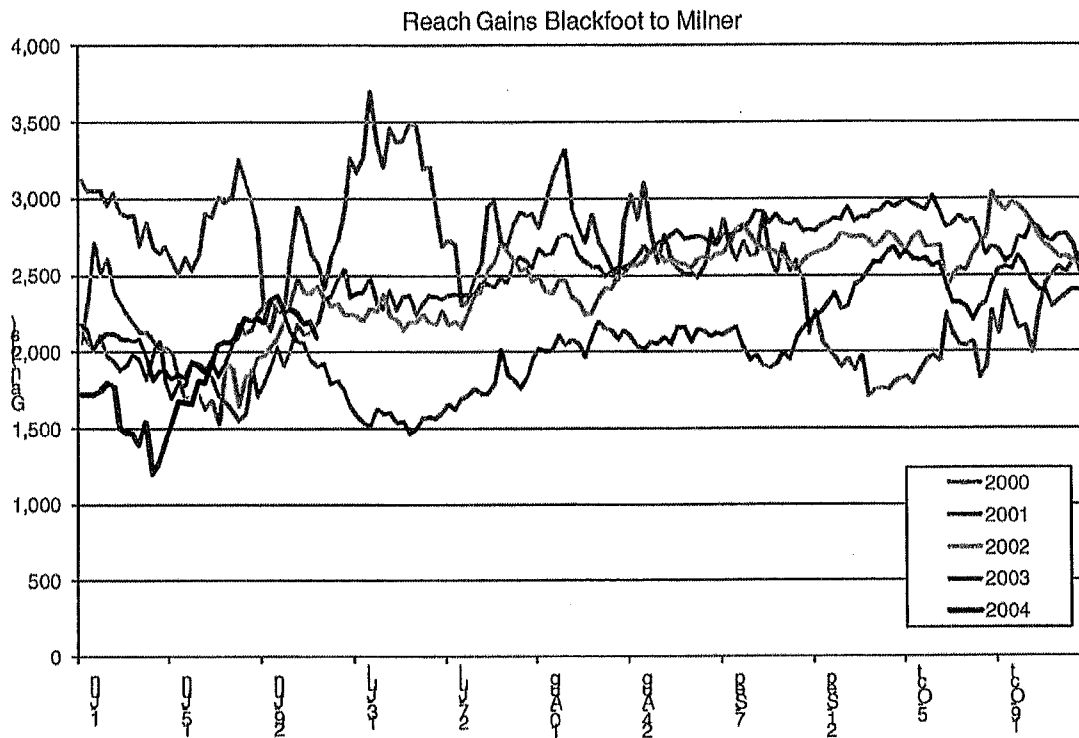


61. The storage allocation for each member of the SWC will be estimated by the Department following the Joint Forecast. The Department will forecast reservoir fill and storage allocation consistent with the methods established in the *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*. R. Vol. 23 at 4294-97 as explained below. The Department will evaluate the current reservoir conditions and the current water supply outlook to determine historical analogous year or years to predict reservoir fill. The Department may identify and use a combination of different analogous years to simulate for individual reservoir fill. The analogous year's or years' reservoir fill volume, an estimated evaporation volume, and the previous year's carryover volume will be input into the Department's accounting program as storage. The accounting program will be used to determine the individual storage water allocation for each SWC member. The Forecast Supply (the combination of the forecast of natural flow supply and the storage allocation) for each of SWC member will be determined by the Director shortly after the date of the Joint Forecast.

62. 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 shortfall determination.

**ii. Early to Mid-July**

63. If necessary, in early to mid-July, the Forecast Supply will be adjusted. The reservoirs will typically have filled to their peak capacity for the season and the storage water will have been allocated. The Department's water rights accounting model will be used to compute the natural flow diverted by each member of the SWC as of the new forecast date. The natural flow diversion for the remainder of the irrigation season will be estimated based on a historical year with similar gains in the Blackfoot to Milner reach. Reach gains for the years 2000 – 2003 and a portion of year 2004 are graphed below. Using 2004 as an example of a current year, and comparing 2004 to the hydrographs for 2000 – 2003, year 2003 has similar reach gains and is appropriately conservative. Therefore, the natural flow diverted in 2003 would be used to predict the natural flow diversions for the remainder of the 2004 season. The adjusted Forecast Supply is the sum of the actual natural flow diversions, the predicted natural flow diversions, and the storage allocation.



Example Reach Gain Analysis for 2004.

**iii. Time of Need**

64. The July procedure will be repeated shortly before the Time of Need<sup>9</sup> with the updated water rights accounting data.

**F. Calculation of Demand Shortfall**

65. Equation 5, below, is used to determine the amount of predicted demand shortfall during the irrigation season.

$$(5) \quad DS = RISD - FS$$

Where:

DS = demand shortfall for specified evaluation points throughout the season,

RISD = Reasonable in-season demand from Equation 4, and

FS = forecasted supply for remainder of season after specified evaluation point during the season.

<sup>9</sup> The calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover, or the difference between the 06/08 average demand and the 02/04 supply. The Time of Need will not be earlier than the Day of Allocation.

66. The amount calculated represents the volume that junior ground water users will be required to have available for delivery to members of the SWC found to be materially injured by the Director. The amounts will be calculated in April, and, if necessary, at the middle of the season and at the time of need.

### **III. Methodology for Determining Material Injury To Reasonable Carryover**

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

#### **A. Projected Water Supply**

68. CM Rule 42.01.g provides that the Director "shall consider . . . the projected water supply for the system." Carryover shortfall will be determined following the completion of the irrigation season. Because it is not possible to adequately forecast the irrigation demand for the following irrigation season at the end of the current irrigation season, the Director must make a projection of need. R. Vol. 37 at 7109 ("Anticipating the next season of need is closer to faith than science."). The average of 2006/2008 BLY will be the projected demand.

69. Similar to projecting demand, the Director must also project supply. The Heise natural flow, for the years 2002 and 2004, were well below the long term average (1971-2000) but were not the lowest years on record. Ex 8000, Vol. II at 6-37:6-28; R. Vol. 8 at 1379-80. The average of the 2002 and 2004 supply will be the projected supply, representing a typical dry year. The 2002 and 2004 supply is computed as follows:

- 2002 supply = natural flow diverted + new fill
- 2004 supply = natural flow diverted + new fill
- Projected supply = average of 2002 supply and 2004 supply

Carryover from the previous years is not included in the 2002 and 2004 supply calculation because it was not new water supplied during the 2002 or 2004 irrigation year.

70. Reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply. Reasonable carryover is computed using the following equation:

$$\text{Reasonable carryover} = 2006/2008 \text{ average} - 2002/2004 \text{ average}$$

Reasonable carryover values for the SWC members are as follows:

	Reasonable Carryover 2006/2008 BLY (Acre-Feet)
A&B	17,000
AFRD2	56,000
BID	0
Milner	4,800
Minidoka	0
NSCC	57,200
TFCC	29,700

Reasonable Carryover by Entity (2002/2004 Supply; 2006/2008 BLY).

**B. Average Annual Rate of Fill**

71. CM Rule 42.01.g states that the Director “shall consider the average annual rate of fill of storage reservoirs . . .” The average annual reservoir fill serves as a means to evaluate reasonable carryover, calculated as the difference between the projected demand and the projected supply. For purposes of the table below, any water contributed to the rental pool from the previous year was added to the next year’s fill volume so that it does not artificially lower the percent fill. R. Vol. 37 at 7108. Water that is supplied to the rental pool lowers carryover and

could impact the following year's fill. The percent fill does not include water deducted for reservoir evaporation. The annual percent fill of storage volume by SWC entity is shown below:

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	100%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	90%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	98%	48%	95%	82%	63%
2005	58%	100%	100%	77%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	83%	92%	77%	95%	97%
2008	100%	100%	85%	100%	80%	99%	100%
Average	83%	99%	97%	90%	95%	96%	95%
Std Dev	26%	5%	6%	16%	8%	6%	10%

Annual Percent Fill of Storage Volume by Entity (1995-2008).<sup>10</sup>

### C. Average Annual Carryover

72. CM Rule 42.01.g states that the Director “shall consider the . . . average annual carry-over for prior comparable water conditions . . .” This factor will be taken into consideration when determining reasonable carryover. Actual carryover volumes were adjusted from values reported in the storage reports so that they did not include water received for mitigation purposes or water rental by the canal company for use within the irrigation district.

<sup>10</sup> See e.g. Ex. 4125. Exhibit 4125 accounts for water deducted for evaporation, but does not take into account water supplied to the rental pool.

R. Vol. 37 at 7108. Actual carryover from 1995 through 2008 was sorted into categories ranging from very dry to wet. The categories are based on the Heise natural flow volumes from April through September.

Heise April – Sept Natural Flow		Year	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
Very Dry <3000 KAF	2001	9,902	4,217	37,430	26,854	55,132	42,421	26,917	
	2007	62,739	7,962	34,639	36,520	61,744	68,947	(21,811)	
	2002	30,192	8,570	72,835	14,531	99,488	133,702	32,635	
	2004	(3,771)	18,537	47,845	8,735	97,905	19,145	21,551	
	2003	9,401	3,649	51,686	6,906	81,673	166,217	(18,169)	
	<b>Average</b>	<b>21,693</b>	<b>8,587</b>	<b>48,887</b>	<b>18,709</b>	<b>79,188</b>	<b>86,086</b>	<b>8,225</b>	
Dry 3000 – 4000 KAF	2000	66,915	20,787	107,425	43,173	160,183	205,510	52,536	
	2005	36,665	99,097	90,190	37,593	150,623	365,001	64,452	
	<b>Average</b>	<b>51,790</b>	<b>59,942</b>	<b>98,808</b>	<b>40,383</b>	<b>155,403</b>	<b>285,256</b>	<b>58,494</b>	
Average 4000 – 4500 KAF	2006	89,311	107,682	102,873	58,755	182,612	365,672	51,187	
	2008	92,193	102,753	130,762	63,342	182,531	413,408	65,648	
	1995	82,567	167,451	134,340	75,451	237,300	441,729	58,675	
	<b>Average</b>	<b>88,024</b>	<b>125,962</b>	<b>122,659</b>	<b>65,849</b>	<b>200,814</b>	<b>406,936</b>	<b>58,504</b>	
Wet >4500 KAF	1998	87,250	144,057	109,014	67,777	193,810	494,664	156,433	
	1999	78,312	121,793	168,545	67,147	205,716	454,338	191,501	
	1996	85,209	145,019	127,123	70,250	228,786	472,790	111,459	
	1997	89,811	114,324	87,073	65,307	202,475	464,715	136,926	
	<b>Average</b>	<b>85,145</b>	<b>131,299</b>	<b>122,939</b>	<b>67,620</b>	<b>207,697</b>	<b>471,627</b>	<b>149,080</b>	

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1995-2008).

73. In considering the principles articulated in CM Rule 42.01.g, the Director will project reasonable carryover shortfalls for members of the SWC. The following table represents the 2006/2008 BLY diversion volumes and total reservoir storage space by entity. By dividing the total reservoir space by the 2006/2008 diversion volume, a metric is established that describes the total number of seasons the entity's reservoir space can supply water.

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
06/08 BLY	58,492	415,730	250,977	46,332	362,884	965,536	1,045,382
Total Reservoir Space	137,626	393,550	226,487	90,591	366,554	859,898	245,930

Total Reservoir Space<sup>11</sup> in Comparison to Demand.

<sup>11</sup> See R. Vol. 8 at 1373-74.

## **D. Reasonable Carryover**

### **i. A&B**

74. A&B's reservoir space has the lowest average annual rate of fill with the highest variability in fill. *See* Finding of Fact 71. In very dry years, the potential exists that A&B's actual carryover will be less than the reasonable carryover. *See* Finding of Fact 72. A&B has an approximate two-year water supply provided by its total available storage space. *See* Finding of Fact 73. Because of its lower rate of fill, it is likely A&B will experience carryover shortfalls in consecutive dry years. Because of these factors, the estimated reasonable carryover for A&B (17,000 AF) is appropriate. *See* Finding of Fact 70.

### **ii. AFRD2**

75. AFRD2 has the highest and most consistent reservoir rate of fill of any member of the SWC. *See* Finding of Fact 71. Therefore, any unfilled space in the fall will most likely fill. AFRD2 has, however, an approximate one-year supply available in storage. *See* Finding of Fact 73. In a very dry year, AFRD2's historical carryover volume is often less than the amount needed for reasonable carryover. Because of these factors, the estimated reasonable carryover for AFRD2 (56,000 AF) is appropriate. *See* Finding of Fact 70.

### **iii. BID & Minidoka**

76. In an average demand year, BID and Minidoka will have enough water to meet demands given a low water supply. *See* Finding of Fact 70. *See also* R. Vol. 37 at 7105. Historically, even in very dry years, BID's and Minidoka's carryover have been well above the calculated reasonable carryover and it is unlikely that they will have reasonable carryover shortfalls in the future. *See* Finding of Fact 72. *See also* R. Vol. 37 at 7105. Because of these factors, the estimated reasonable carryover for BID and Minidoka is 0 AF. *See* Finding of Fact 70. *See also* R. Vol. 37 at 7105.

### **iv. Milner**

77. Similar to A&B, Milner's reservoir space had the second lowest average annual rate of fill of all entities with a high degree of variability in fill. *See* Finding of Fact 71. In very dry years, the potential exists that Milner's actual carryover will be less than the reasonable carryover. *See* Finding of Fact 72. Milner has an approximate two-year water supply available in storage. *See* Finding of Fact 73. Because of its rate of fill, it is likely Milner will experience carryover shortfalls in consecutive dry years. Because of these factors, the estimated reasonable carryover for Milner (4,800 AF) is appropriate. *See* Finding of Fact 70.

### **v. NSCC**

78. NSCC has a near average annual rate of fill in comparison to all entities and an approximate one-year water supply available in storage. *See* Findings of Fact 71 and 73. In dry

years, the potential exists that its reasonable carryover will be less than its actual carryover. *See* Finding of Fact 72. Because of these factors, the estimated reasonable carryover for NSCC (57,200 AF) is appropriate. *See* Finding of Fact 70.

**vi. TFCC**

79. TFCC has a near average annual rate of fill in comparison to all entities, but only a one-quarter of a year's water supply available in storage. *See* Findings of Fact 71 and 73. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. *See* Finding of Fact 72. In the 2006 irrigation season, supplies were average, but TFCC's demands were below average. Because of these factors, the estimated reasonable carryover for TFCC (29,700 AF) is appropriate. *See* Finding of Fact 70.

**E. Reasonable Carryover Shortfall**

80. Reasonable carryover shortfall is the numerical difference between reasonable carryover and actual carryover, calculated at the conclusion of the irrigation season. Actual carryover is defined as the storage allocation minus the total storage use plus or minus any adjustments. Examples of adjustments include SWC deliveries for flow augmentation, SWC water placed in the rental pool, and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. Any storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC carryover volume. Water that is purchased or leased by an SWC member may become part of IGWA's carryover shortfall obligation. *See e.g.* R. Vol. 38 at 7201, fn. 11 (Eighth Supplemental Order). Conversely, adjustments will be made to assure that water supplied by a SWC member to private leases or to the rental pool will not increase the reasonable carryover shortfall obligation to the same SWC member.

81. Reasonable carryover shortfall is calculated as follows:

Reasonable Carryover Shortfall = Actual Carryover – Reasonable Carryover

**CONCLUSIONS OF LAW**

1. In his September 5, 2008 Final Order, the Director stated his intention to issue a separate, final order "detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover . . ." R. Vol. 39 at 7386. On July 24, 2009, the Honorable John M. Melanson issued his *Order on Petition for Judicial Review*, in which he found that the Director's decision to bifurcate the proceedings conflicted with the Idaho Administrative Procedures Act; the court therefore remanded the issue to the Department.

2. Parties to the judicial review proceedings filed petitions for reconsideration with the court for a myriad of issues. Responding to the petition for reconsideration filed by IGWA regarding the issue of bifurcation, the Department stated that "sufficient information exists to



issue an order determining material injury to reasonable carryover and reasonable in-season demand.” *IDWR Response Brief on Rehearing* at 3 (November 6, 2009). At oral argument on rehearing, the Department requested that the court “hold in abeyance its decision on rehearing until the Director issues the new order and the time for filing a motion for reconsideration and a petition for judicial review of the order has expired.” *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 2 (March 4, 2010). The court therefore ordered the Department to issue a final order determining material injury to reasonable in-season demand and reasonable carryover by March 31, 2010. “Pursuant to I.A.R. 13(b)(14), the Court shall hold in abeyance any final decision on rehearing until such an order is issued . . . .” *Id.* at 3. On March 29, 2010, the court extended the deadline for the Director’s order to April 7, 2010. *Order Granting Unopposed Motion for Extension of Time to File Order on Remand.*

3. The purpose of this order is to provide the methodology by which the Director will determine material injury to RISD and reasonable carryover to members of the SWC.

4. “The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

5. Idaho Code § 42-602 states that, “The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . . The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine.” According to the Hearing Officer, “It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature [in Idaho Code § 42-602] did not intend to sum up water law in a single sentence of the Director’s authority.” R. Vol. 37 at 7085. The Idaho Supreme Court has recently stated, “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. CM Rule 20.03.

6. “Priority of appropriation shall give the better right as between those using the water” of the State. Idaho Const. Art. XV, § 3. “As between appropriators, the first in time is first in right.” Idaho Code § 42-106. “A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.” *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915).

7. It is the policy of this State to integrate the appropriation, use, and administration of ground water with the use of surface water in such a way as to optimize the beneficial use of water: "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources." Idaho Code § 42-226. *See also* Idaho Const. Art. XV, § 7; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

8. In *American Falls*, the Court stated as follows:

The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

*American Falls* at 877-878, 154 P.3d at 448-449.

9. In the context of conjunctive administration, the Director's methodology for projecting material injury does not impose an obligation upon members of the SWC to reprove their water rights. To the extent water is available, members of the SWC are authorized to divert and store water in accordance with the terms of their licenses or decrees. Nothing established herein reduces that authorization. The question that the CM Rules require the Director to answer in this proceeding is, when water is not available to fill the water rights of the SWC, how much water is reasonably necessary for the SWC to accomplish the beneficial purpose of raising crops; because what is needed to irrigate crops may be less than the decreed or licensed quantities. *American Falls* at 880, 154 P.3d at 451; *Order on Petition for Judicial Review* at 24-25; R. Vol. 37 at 7098 ("Properly applied the minimum full supply approach is an attempt to measure, for purposes of determining if there should be curtailment, the amount of water senior surface water users need to raise crops of their choosing to maturity with the number of cuttings weather conditions will allow.").

10. Holders of senior-priority water rights may receive less than their licensed or decreed quantities and not suffer material injury within the meaning of the CM Rules. As a result, in-season demand should be viewed in light of reasonableness, optimum development of water resources in the public interest, and full economic development. Idaho Const. Art XV, § 7; Idaho Code § 42-226; CM Rules 20 and 42; *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912); *American Falls* at 876-77, 154 P.3d at 447-48.

11. Here, the Director has established a methodology for determining material injury to members of the SWC. The methodology predicts material injury to RISD by taking the difference between RISD and the forecasted supply. At this time, with the recognition that the methodology is subject to adjustment and refinement, RISD will be equal to the historic demands associated with the BLY (2006/2008), and will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

12. The years 2000 through 2008 were used to select the initial BLY because it captured current irrigation practices in a dry climate. Based upon evaluation of the record, members of the SWC were exercising more reasonable efficiencies during this time period than during the 1990s when supplies were more plentiful and the climate more forgiving. During periods of drought when junior ground water users are subject to curtailment, members of the SWC should exercise reasonable efficiencies in order to promote the optimum utilization of the State's water resources. Idaho Const. Art. XV, § 7; Idaho Code § 42-226; CM Rules 20 and 42.

13. Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director's predictions of material injury to RISD and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director's professional judgment as the manager of the State's water resources. Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. As the process of predicting and evaluating material injury moves forward, and more data is developed, the methodology will be subject to adjustment and refinement.

14. If the Director predicts that the SWC will be materially injured, the consequence of that prediction is an obligation that must be borne by junior ground water users. If mitigation water in the amount of the projected RISD shortfall cannot be provided or optioned by junior ground water users to the satisfaction of the Director (*see Order on Petition for Judicial Review* at 19), the Director will curtail junior ground water users to make up any deficit. By requiring that junior ground water users provide or have options to acquire water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to provide mitigation water until the time of need, the Director ensures that junior ground water users provide only the amount of water necessary to satisfy the reasonable in-season demand. All approved methods of mitigation shall be considered in the Director's review of projected RISD shortfall.

15. Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the time of need, the purpose of allowing junior ground water users to continue to divert by providing water for mitigation is defeated. The risk of shortage is then impermissibly shouldered by the SWC. Members of the SWC should have certainty entering the irrigation season that mitigation water will be provided at the time of need, or curtailment of junior ground water rights will be ordered at the start of the irrigation season.

16. Because climate and the supply that the SWC appropriated (natural flow and storage) are inherently variable, the Director cannot and should not insulate the SWC against all shortages. The Director can, however, protect the SWC against reasonably predicted shortages to RISD.

17. Currently, the USBR and USACE's Joint Forecast is the best predictive tool at the Director's disposal for predicting material injury to RISD. Given current forecasting techniques, the earliest the Director can predict material injury to RISD with reasonable certainty is soon after the Joint Forecast is issued in early April. By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. The Director further guards against RISD shortage by using the 2006/2008 BLY, which has above average ET, below average in-season precipitation, and above average growing degree days. The 2006/2008 average represents years in which water supply did not limit diversions. The Director's prediction of material injury to RISD is purposefully conservative. While it may ultimately be determined after final accounting that less water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Const. Art. XV, § 3; Idaho Code § 42-106.

18. Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water users will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need (defined in footnote 8, *supra*). If it is determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment. This determination is based upon the Director's discretion and his balancing of the principle of priority of right with the principles of optimum utilization and full economic development of the State's water resources. Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226. Because the methodology is based upon conservative assumptions and is subject to refinement, the possibility of under-predicting material injury is minimized and should lessen as time progresses. The methodology should provide both the SWC and junior ground water users certainty at the start of the irrigation season.

19. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

20. According to CM Rule 42.01.g, members of the SWC are entitled to maintain a reasonable amount of carryover storage water to minimize shortages in "future dry years." Guidance for determining reasonable carryover is also found in CM Rule 42.01.g: "In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system."

21. While the right to reasonable carryover is provided by CM Rule 42.01.g, the Court in *American Falls* established that there are limitations upon that right:

At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out.

*American Falls* at 880, 154 P.3d at 451.

22. While CM Rule 42.01.g contemplates reasonable carryover for future dry years, the Hearing Officer determined that "requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in *AFRD#2*." R. Vol. 37 at 7109-10. Therefore, a senior may only seek curtailment of juniors to provide reasonable carryover for a period of one year. *Id.* In his 2008 Final Order, former Director Tuthill accepted the recommendation of the Hearing Officer.

23. In its *Order on Petition for Judicial Review*, the court held that it was incorrect for the Director to categorically limit the right to carryover storage "for more than just the next season . . ." *Order on Petition for Judicial Review* at 22. The court went on to say, however, that the Director, "in the exercise of his discretion, can significantly limit or even reject carryover for multiple years based on the specific facts and circumstances of a particular delivery call. Ultimately, the end result may well be the same." *Id.*

24. As discussed in the Findings of Fact, reasonable carryover is determined by projecting the water supply for the system. This is accomplished by projecting the 2002/2004 supply and the 2006/2008 demand. Next, the Director examines the average annual rate of fill of the storage rights held by members of the SWC to determine each entities' relative probability of fill. Finally, the Director examines the average annual carryover for prior comparable water conditions by reviewing Heise natural flow.

25. If, in the fall, the Director finds that a reasonable carryover shortfall exists, the Director will use the ESPA Model to determine the transient impacts of curtailment (year-to-year). The ESPA Model will be used to determine the yearly impacts of curtailment of junior ground water users, if curtailed from April 1 through March 31.<sup>12</sup> It is this volume of water that junior ground water users must provide or have optioned in the fall in order to start the subsequent irrigation season without an order of curtailment. All approved methods of mitigation shall be considered in the Director's review of reasonable carryover shortfall.

26. Recognizing that reservoirs space held by members of the SWC may fill, and in order to prevent the waste of water, junior ground water users are not required to provide the volume of reasonable carryover until after the Day of Allocation (defined in footnote 16, *infra*). Junior ground water users are obligated to provide reasonable carryover to the SWC until reservoir space held by the entities fills. If the reservoir space does not fill, the results of the simulated transient benefits of curtailment must be provided or optioned by junior ground water users in the fall. In addition, the Director will determine shortfalls to the SWC's reasonable carryover for the next irrigation season and use the ESPA Model to determine the transient volume of water that must be provided or optioned. This transient obligation is in addition to the subsequent year's transient obligation.

27. By modeling the impacts of curtailments until the reservoir space held by members of the SWC fills, junior ground water users have an accruing mitigation obligation. In this way, the Director is able to account for reasonable carryover for "future dry years." CM Rule 42.01.g.

28. The Director recognizes that his analysis of the obligation for reasonable carryover differs from his analysis for RISD obligations. In predicting RISD shortages, the Director is able to premise his determination on the Joint Forecast. The Director requires junior ground water users to provide the entire RISD shortage because the Joint Forecast allows determination of material injury with reasonable certainty.

29. In the fall of the subsequent irrigation season, the Director cannot, with reasonable certainty, predict material injury to reasonable carryover. As found by the Hearing Officer, "Anticipating the next season of need is closer to faith than science." R. Vol. 37 at 7109. Because of the uncertainty associated with this prediction, and in the interest of balancing priority of right with optimum utilization and full economic development of the State's water resources, Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226, the Director will use the ESPA Model to simulate transient curtailment of the

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<sup>12</sup> Version 1.1 of the ESPA Model runs on six-month stress periods. Because an irrigation season is nine months long, simulating curtailment for a period of six months would under estimate the impacts of curtailment and unreasonably shift the risk of shortage to the SWC. Because version 1.1 of the ESPA Model cannot simulate curtailment for nine months, it is appropriate to simulate curtailment for one year, as opposed to six months. Because the methodology is subject to refinement, this determination may be revisited if the stress periods are changed in subsequent versions of the model.

projected reasonable carryover shortage. By requiring that junior ground water users provide water or have options in place in the fall of the subsequent irrigation season in the amount of the first year of curtailment (accruing from season-to-season until reservoir space fills), the Director ensures that a certain volume of water will be carried over from one season to the next. This allows the SWC to plan for the coming irrigation season, and places the risk of reasonable shortage on junior ground water users. In light of the unpredictable nature of the determination of material injury to reasonable carryover, the use of the ESPA Model imposes a reasonable burden on junior ground water users.

## ORDER

Based upon and consistent with the Findings of Fact and Conclusions of Law, the Director hereby orders that, for purposes of determining material injury to reasonable in-season demand and reasonable carryover, the following steps will be taken:

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

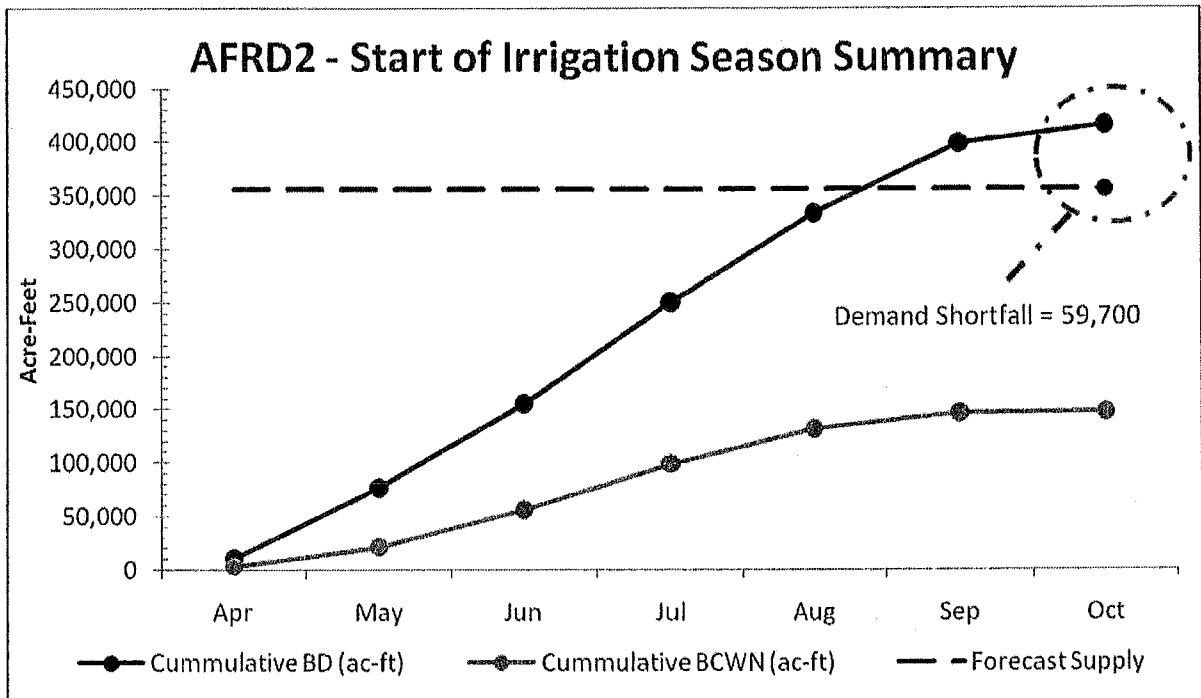
2. Beneficial use cannot occur on lands that are not described in the SWC's water rights. If, however, the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then an assessment must be made of the impact of this reduction in use of the water right on any mitigation requirement.

3. Step 2: Starting at the beginning of April, the Department will calculate the cumulative CWN volume for all land irrigated with surface water within the boundaries of each member of the SWC.

- Volumetric values of CWN will be calculated using ET and precipitation values from the USBR's AgriMet program, irrigated areas provided by each entity, and crop distributions based on NASS data.

- Cumulative in-season CWN values will be calculated for each member of the SWC, approximately once a month.

4. Step 3: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within fourteen (14) days after issuance of the Joint Forecast, 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. See below for an example.<sup>13</sup>



AFRD2 Start of Irrigation Season Summary, Initial Demand Shortfall Prediction.

5. Step 4: If the April DS is greater than the reasonable carryover shortfall from the previous year, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide 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 difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users fail or refuse to provide this

<sup>13</sup> For the purposes of the illustrative example, AFRD2 was selected as the water user, a dry year was selected as the irrigation season, and 2006/2008 was selected as the BLY. Forecast supply was calculated utilizing historic natural flow and historic reservoir storage data.



information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users.<sup>14</sup> Modeled curtailment shall be consistent with previous Department efforts. The ESPA Model will be run to determine the priority date necessary to produce the necessary volume within the model boundary of the ESPA. However, because the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01, junior ground water users will be required to meet the volumetric obligation within the area of common ground water supply, not the full model boundary.

6. 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.

7. If there is no projected demand shortfall in the April Forecast Supply, steps 5, 6, 7, and 8 will not be implemented for in-season purposes.

8. Step 5: If the storage allocations held by members of the SWC fill, there is no reasonable carryover shortfall. If the storage allocations held by members of the SWC do not fill, within fourteen (14) days following the publication of Water District 01's initial storage report, which typically occurs soon after the Day of Allocation,<sup>15</sup> the volume of water secured by junior ground water users to fulfill the reasonable carryover shortfall shall be made available to injured members of the SWC. The amount of reasonable carryover to be provided shall not exceed the empty storage space on the Day of Allocation for that entity. If water is owed in addition to the reasonable carryover shortfall volume, this water shall be provided to members of the SWC at the Time of Need, described below. The Time of Need will be no earlier than the Day of Allocation.

9. Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) estimate the Time of Need date;<sup>16</sup> and (3) issue a revised Forecast Supply.

10. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, baseline

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<sup>14</sup> This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year's obligation.

<sup>15</sup> The Day of Allocation is the time in the irrigation season when the Water District 01 watermaster is able to issue allocations to storage space holders after the reservoir system has achieved its maximum physical fill, maximum water right accrual, and any excess spill past Milner Dam has ceased. Tr. p. 902, Ins. 7-25; p. 903, Ins. 1-10.

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

demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue revised RISD and DS values.

11. If the Director determines that the estimated Time of Need is reasonably certain, Step 7 will not be implemented for in-season purposes.

12. Step 7: Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) issue a revised Forecast Supply; and (3) establish the Time of Need.

13. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue revised RISD and DS values.

14. Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes<sup>17</sup> from Step 4 (May 1 secured water) and the RISD volume calculated at the Time of Need. If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.

15. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

16. Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual crop water need for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future baseline years, and for the refinement and continuing improvement of the method for future use.

17. On or before November 30, the Department will publish estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on but not limited to the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the publication by the Department of reasonable carryover short fall obligations, junior ground water users will be

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<sup>17</sup> This refers to the overall volume for the entire estimate. While the overall volume predicted at the start of the season represents with certainty the upper bounds of water that junior ground water users will need to provide to members of the SWC, values predicted at the start of the season may adjust up or down at the time of mid-season re-evaluation.

required to establish, to the satisfaction of the Director, their ability to provide 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. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

18. Step 10: As an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department's water rights data base and the ESPA Model. The modeling effort will determine total annual reach gain accruals due to curtailment over the period of the model exercise. *See* R. Vol. 8 at 1386-87. In the year of injury, junior ground water users would then be obligated to provide the accrued volume of water associated with the first year of the model run. *See id.* at 1404, ¶ 5. In each subsequent year, junior ground water users would be required to provide the respective volume of water associated with reach gain accruals for that respective year, until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided. *See id.* at 1404, ¶ 6. Modeled curtailment shall be consistent with previous Department efforts. The ESPA Model will be run to determine the priority date necessary to produce the required volume within the model boundary of the ESPA. However, because the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01, junior ground water users will be required to meet the volumetric obligation within the area of common ground water supply, not the full model boundary.

IT IS FURTHER ORDERED that the amended Final Order supersedes the Final Order issued April 7, 2010 and the Amended Final Order issued June 16, 2010.

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 23<sup>rd</sup> day of June, 2010.

  
GARY SPACKMAN  
Interim Director

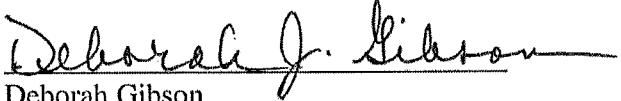
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of June, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

Honorable John M. Melanson Idaho Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>	<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
Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 <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@capitolawgroup.net">tarkoosh@capitolawgroup.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
Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	<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>Randall C. Budge  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:tjb@racinelaw.net">tjb@racinelaw.net</a></p>	<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>
<p>Kathleen 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></p>	<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>
<p>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></p>	<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>
<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>	<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>
<p>Sarah A. Klahn  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></p>	<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>
<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>	<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>
<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>	<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>

<p>William A. Parsons  Parsons, Smith &amp; Stone, LLP  P.O. Box 910  Burley, ID 83318  <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<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>
<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>	<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>
<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>	<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>

  
Deborah Gibson  
Administrative Assistant to the Director

## **ATTACHMENT 3**

*Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, issued by the Department on April 16, 2015.*

**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 )	<b><i>THIRD AMENDED FINAL</i></b>
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	<b>ORDER REGARDING</b>
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>METHODOLOGY FOR</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>DETERMINING MATERIAL</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>INJURY TO REASONABLE</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>IN-SEASON DEMAND AND</b>
AND TWIN FALLS CANAL COMPANY )	<b>REASONABLE CARRYOVER</b>
_____ )	

**BACKGROUND**

On June 23, 2010, the Director (“Director”) of the Idaho Department of Water Resources (“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 explained how the Director would determine material injury to storage and natural flow water rights of members of the Surface Water Coalition (“SWC”).<sup>1</sup> The SWC, the Idaho Ground Water Appropriators, Inc. (“IGWA”), and the City of Pocatello filed petitions seeking judicial review of the Methodology Order and its subsequent application. The petitions were consolidated with Gooding County Case No. CV-2010-382.<sup>2</sup>

On September 26, 2014, District Court Judge Eric Wildman issued his *Memorandum Decision and Order on Petitions for Judicial Review* (“Methodology Remand Order”) in Gooding County Consolidated Case No. CV-2010-382. The Court “affirmed in part and set aside in part” the Methodology Order. *Methodology Remand Order* at 48. The Court remanded the Methodology Order to the Director for further proceedings as necessary. *Id.* The Court identified six general topics on remand. Each of the six topics are margin headings in the following text and are discussed below.

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<sup>1</sup> The SWC is comprised of A&B District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. Each entity holds separate senior surface natural flow water rights and have separate storage contracts for storage water space in the reservoirs.

<sup>2</sup> The following cases were consolidated with Gooding County Case No. CV-2010-382: Gooding County Cases CV-2010-383, CV-2010-384, CV-2010-387, CV-2010-388, Twin Falls County Cases CV-2010-3403, CV-2010-5520, CV-2010-5946, CV-2012-2096, CV-2013-2305, CV-2013-4417, and Lincoln County Case CV-2013-155.



## Remedy for Material Injury to SWC Irrigation Season Natural Flow and Storage Water Rights

The Court held the Methodology Order failed to “provide a proper remedy for material injury to reasonable in-season demand when taking into account changing conditions.” *Methodology Remand Order* at 10. If material injury to the SWC’s irrigation season water rights is greater than originally determined by the Director in April, the injury must be remedied through either curtailment or mitigation at the time of the additional determination of injury. *Id.*

The Court went on to say that when taking into account changing conditions the Director must “apply his established procedure as written or further define and/or refine the procedure so that [SWC] members relying on the procedure know when to anticipate its application and are able to plan accordingly.” *Id.* at 40.

The Court held the Director may require use of reasonable carryover pursuant to a properly enacted mitigation plan that contains appropriate contingency provisions to protect senior rights.” *Id.* at 16. In conjunction with a mitigation plan, the Director can require the SWC “rely on its reasonable carryover provided that: 1) existing carryover storage allocations meet or exceed the additional shortfall to the revised reasonable in-season demand; and 2) junior users secure a commitment at that time for a volume of water equal to the shortfall to the revised reasonable in-season demand to be provided the following season if necessary.” *Id.*

## Supplemental Ground Water Adjustment

The Court affirmed that supplemental ground water is a factor the Director has the authority to consider in the context of a delivery call. *Id.* at 18. However, administration “to less than the full amount of acres set forth on the face of the [SWC’s] Partial Decrees. . . must be supported by clear and convincing evidence.” *Id.* at 19. The Director’s “assignment of an entity wide split for each member of the [SWC] of the ground water fraction to the surface water fraction is not supported by substantial evidence in the record.” *Id.*

## Predictors for Twin Falls Canal Company

The Court held the Joint Forecast prediction does not accurately predict water supply for the Twin Falls Canal Company (“TFCC”), and remanded the issue back to the Department for further proceedings as necessary. *Id.* at 20.

## Crop Distribution Data

The Court affirmed the Director’s use of the U.S. Department of Agriculture’s 1990-2008 National Agricultural Statistics Service (“NASS”) data for determining crop distributions but also encouraged the Director to “take into account available data reflecting current cropping patterns.” *Id.* at 21.

## ESPA Model Boundary

The Court concluded “the *Methodology Order* wrongly uses the ESPA Model boundary, instead of the boundary of the area of common water supply, to determine a curtailment priority date.” *Id.* at 24.

## Mitigation for Reasonable Carryover Shortfall

Step 10 of the Methodology Order offered an alternative to providing the full volume of reasonable carryover shortfall established in Step 9. Under Step 10, junior ground water users could request that the Department model the transient impacts of the proposed curtailment. Junior water right holders could alternatively mitigate modeled transient depletions over a period of years. The Court remanded Step 10 to the Department, concluding that when the Director determines a shortfall to reasonable carryover and a corresponding mitigation obligation, the alternative of mitigating for transient future simulated reach gains resulting from modeled curtailment needs to be further justified. *Id.* at 28. The Court questioned the “viability of phased curtailment as a justification” for Step 10. *Id.*

## SUMMARY

The purpose of this Third Amended Final Order is to establish the Director’s methodology for determining material injury to storage and natural flow water rights either held by or committed to members of the SWC consistent with the Court’s holding in the Methodology Remand Order.

## FINDINGS OF FACT

### **I. Overview of the Methodology for Determining Material Injury to Water Rights by Determining Reasonable In-Season Demand and Reasonable Carryover**

1. The methodology for determining material injury to water rights by determining reasonable in-season demand (“RISD”) and reasonable carryover should be based on updated data, the best available science, analytical methods, and the Director’s professional judgment as manager of the state’s water resources. In the future, climate may vary and conditions may change; therefore, the methodology may need to be adjusted to consider a different baseline year or baseline years.

2. In-season demand shortfall will be computed by subtracting RISD from the forecast supply (“FS”). In-season demand shortfall is computed using the following equation:

- In-Season Demand Shortfall = FS – RISD

3. If the FS is greater than the RISD, there is no demand shortfall. If the FS is less than the RISD, the negative difference is the demand shortfall. Initially, RISD will be equal to the historic demands associated with a baseline year or years (“BLY”) as selected by the

Director, but will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

4. Reasonable carryover shortfall will be computed by subtracting reasonable carryover from actual carryover, where reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply. Reasonable carryover shortfall will be computed using the following equation:

- Reasonable Carryover Shortfall = Actual Carryover – Reasonable Carryover

5. If actual carryover exceeds the reasonable carryover, there is no reasonable carryover shortfall. In contrast, if reasonable carryover exceeds the actual carryover, the negative difference is the reasonable carryover shortfall.

6. The concepts underlying the selection of the BLY, determination of in-season demand shortfall, and reasonable carryover shortfall will be discussed in detail below.

## **II. In-Season Demand Shortfall**

### **A. Considerations for the Selection of a Baseline Year**

7. A BLY is a year or average of years when irrigation demand represents conditions that can be used to predict need in the current year of irrigation at the start of the irrigation season. The purpose in predicting need is to project an upper limit of material injury at the start of the season.

8. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098.<sup>3</sup> To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

9. The historic diversion volumes from the BLY, along with the predicted supply forecast at the start of the irrigation season, are used to predict the initial in-season demand shortfall, where demand shortfall is the difference between the BLY demand (“BD”) and the FS. Demand shortfall increases in magnitude as the difference between BD and FS increases. Demand shortfall increases with increases in BD, decreases in FS, or both. Assuming constant irrigation practices, crop distributions, and total irrigated acres, demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration (“ET”), and lower precipitation. If water demand data is averaged for several years and these averages are the basis to predict demand shortfall at the start of the season, in a high water demand year, these averages may often under-predict the demand shortfall. In a high water demand year, under-prediction of demand shortfall might be acceptable if the junior priority ground water right holders and the senior priority surface water right holders shared equally in the risk of water shortages. Equality

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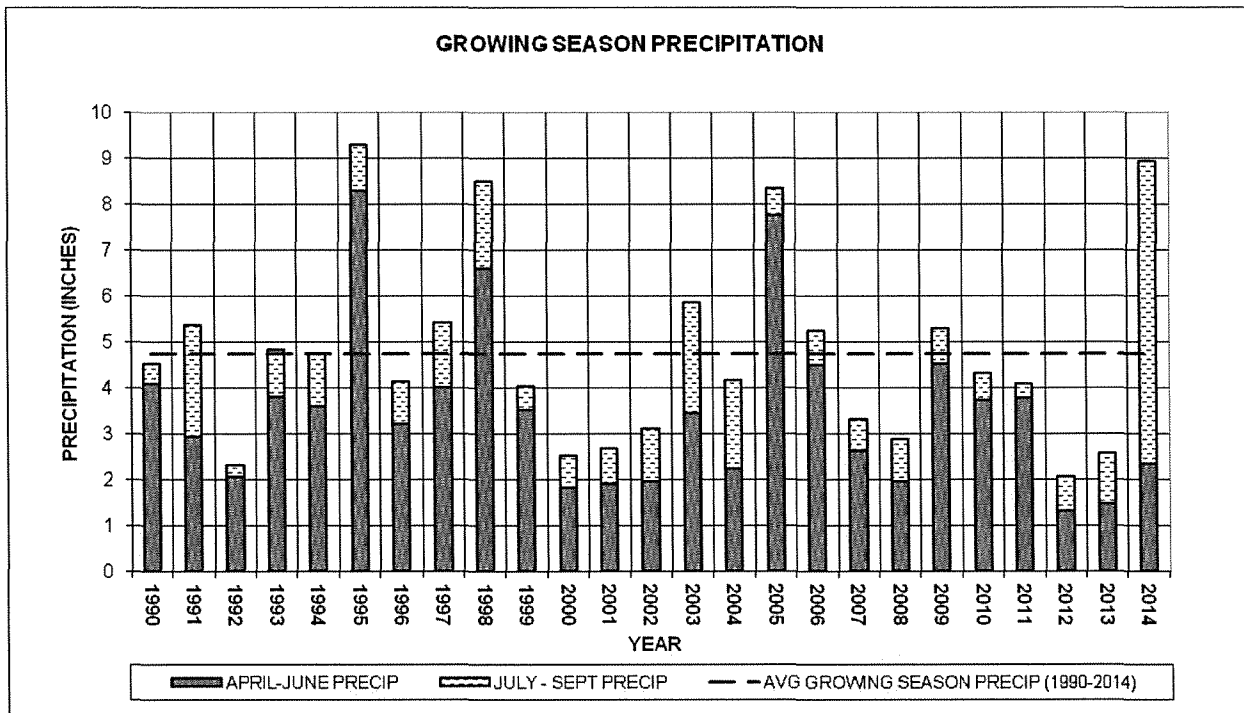
<sup>3</sup> All citations in this Order are to material that was admitted during the original hearing and is part of the final agency record on appeal in Gooding County Case No. CV-2008-551, which was lodged with the Fifth Judicial District Court on February 6, 2009.

in sharing the risk will not adequately protect the senior priority surface water right holder from injury. Actual demand shortfalls to a senior surface water right holder resulting from predictions at the start of the irrigation season based on average data unreasonably shifts the risk of shortage to the senior surface water right holder. Therefore, a BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

**i. Climate**

10. For the methods outlined herein, climate is represented by precipitation, ET, and growing degree days.

11. Precipitation. Water, in all phases, introduced to Idaho from the atmosphere is termed precipitation. During the growing season, precipitation has a substantial influence on crop water need, both as a source of water to growing crops and as an influencing factor on ET. Ex. 3024 at 19. The figure below shows the precipitation recorded during the growing season at the National Weather Service’s Twin Falls weather station.



Growing Season Precipitation at National Weather Service’s Twin Falls Weather Station 1990–

2014.<sup>4</sup>

12. Evapotranspiration. ET is a combined variable representing the amount of water that transpires from vegetation and evaporates from the underlying soil. ET is an important factor for properly estimating RISD. In its water budget calculations, the SWC proposed the use of ET values from the USBR as part of their Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. II, Chap. 9; Ex. 8000, Vol. IV, Appdx. AU. The ground water users proposed the use of ET values from Richard G. Allen and Clarence W. Robison 2007, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, i.e. ETIdaho. Ex. 3007A at 21; Ex. 3024 at 1-58.

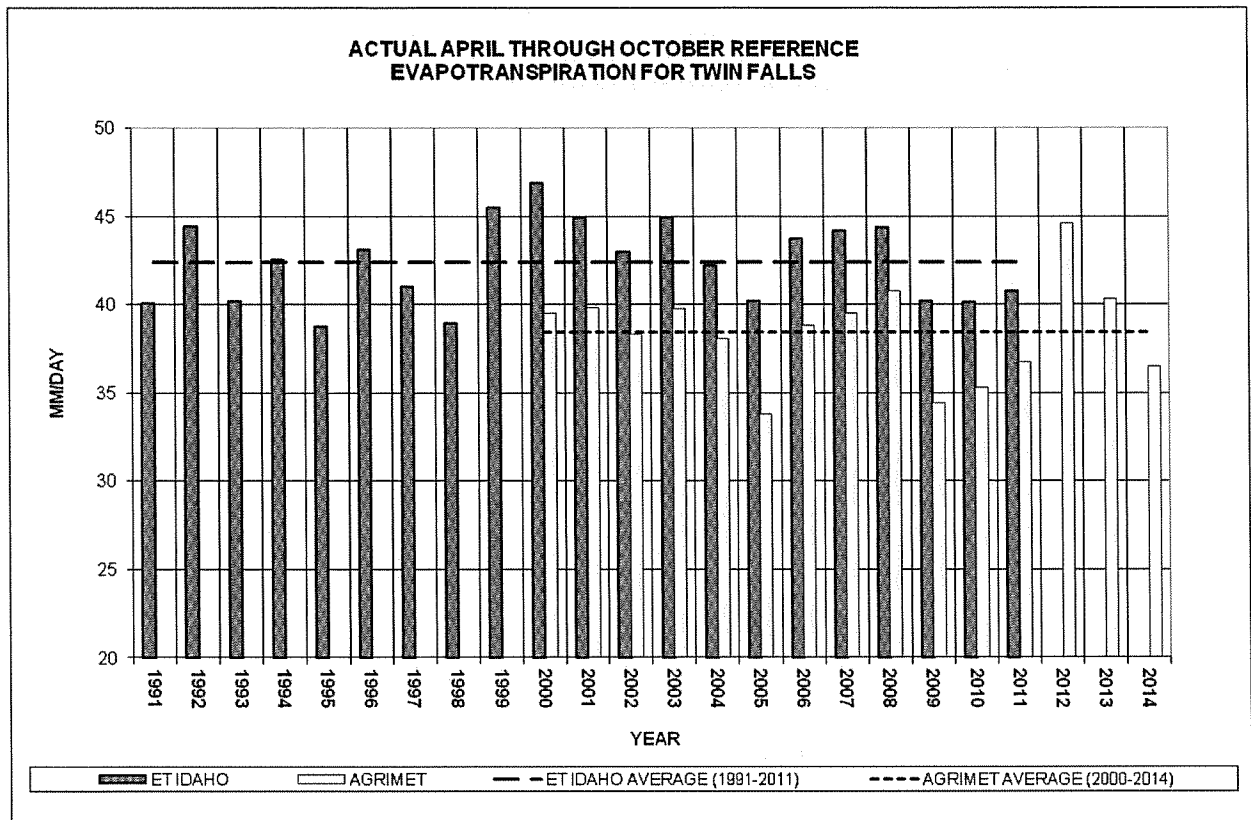
13. Reference ET is a standardized index that approximates the climatic demand for water vapor (i.e. ET) and is used here to identify potential BLY. Because there is not a single Reference ET data set that spans the entire period of analysis (1990-2014), two separate Reference ET data sets are considered. ETIdaho Reference ET data are currently available from 1990 through 2011. AgriMet Reference ET data are available from 2000 to 2014. Ideal candidate BLY are years in which Reference ET exceeds average Reference ET values. The individual year is compared using both AgriMet and ETIdaho Reference ET data for those years in which both data are available and only AgriMet data in those years where there is no ETIdaho data.

14. Years of above average values of Reference ET are appropriate BLY candidates.<sup>5</sup> Total April through October Reference ET for the period of record from the Twin Falls (Kimberly) AgriMet site is shown below.

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<sup>4</sup> Chart created from raw NOAA National Weather Service total precipitation data obtained from the NCDC's Climatological Data Annual Summary Idaho report series for the Twin Falls 6 E and Twin Falls Sun Valley Regional Airport weather stations.

<sup>5</sup> Values for Reference ET between ETIdaho and AgriMet do not match because they are derived differently. The relevant information for identifying a potential BLY is the relationship between the year under consideration and the average for the data sets.



Actual Reference ET for Twin Falls (Kimberly) with both AgriMet and ETIdaho data. 1991-2014.

15. Growing Degree Days. Growing degree days define the length and type of growing season. Growing degree days are an arithmetic accumulation of daily mean temperature above a certain base temperature. Ex. 3024 at 10; 117-21. These growth units are a simple method of relating plant growth and development to air temperatures. Different plant species have different base temperatures below which they do not grow. At temperatures above this base, the amount of plant growth is approximately proportional to the amount of heat or temperature accumulated. A higher annual growing degree day value correlates to a higher potential rate of plant growth. The table below shows growing degree days accumulated for April through September for the Twin Falls (Kimberly) AgriMet site.

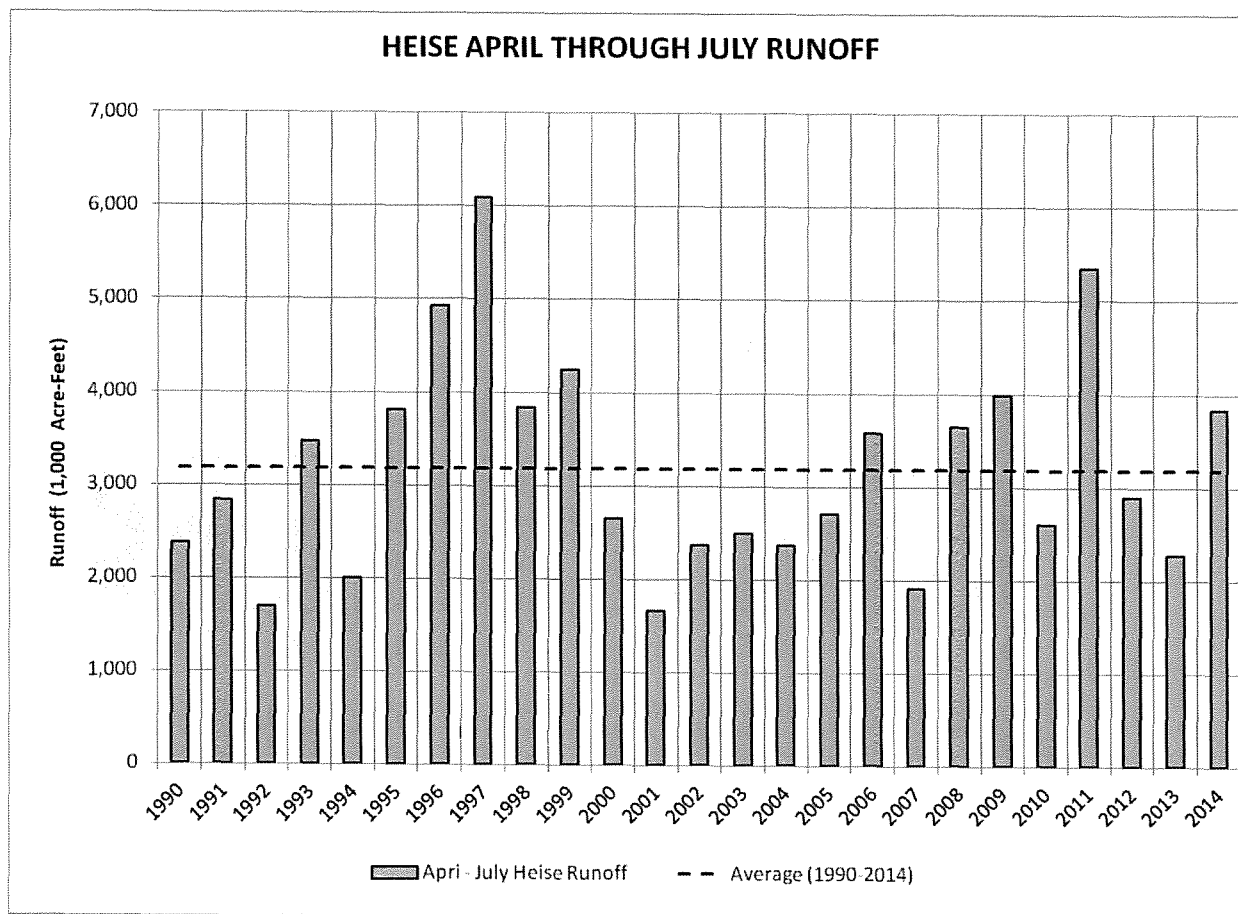
Year	GDD: April-Sept	% of Average	Year	GDD: April-Sept	% of Average
1991	2,095.4	86%	2003	2,585.4	106%
1992	2,610.7	107%	2004	2,428.9	99%
1993	2,004.7	82%	2005	2,320.1	95%
1994	2,516.8	103%	2006	2,601.9	106%
1995	2,257.8	92%	2007	2,657.7	109%
1996	2,418.6	99%	2008	2,382.9	97%
1997	2,478.4	101%	2009	2,469.7	101%
1998	2,422.2	99%	2010	2,215.0	91%
1999	2,294.9	94%	2011	2,314.6	95%
2000	2,591.3	106%	2012	2,735.3	112%
2001	2,600.8	106%	2013	2,672.8	109%
2002	2,465.6	101%	2014	2,553.0	104%

Average GDD (1991-2014): 2,445.6

Growing Degree Days (“GDD”) for Twin Falls (Kimberly) AgriMet Site 1991-2014.

## ii. Available Water Supply

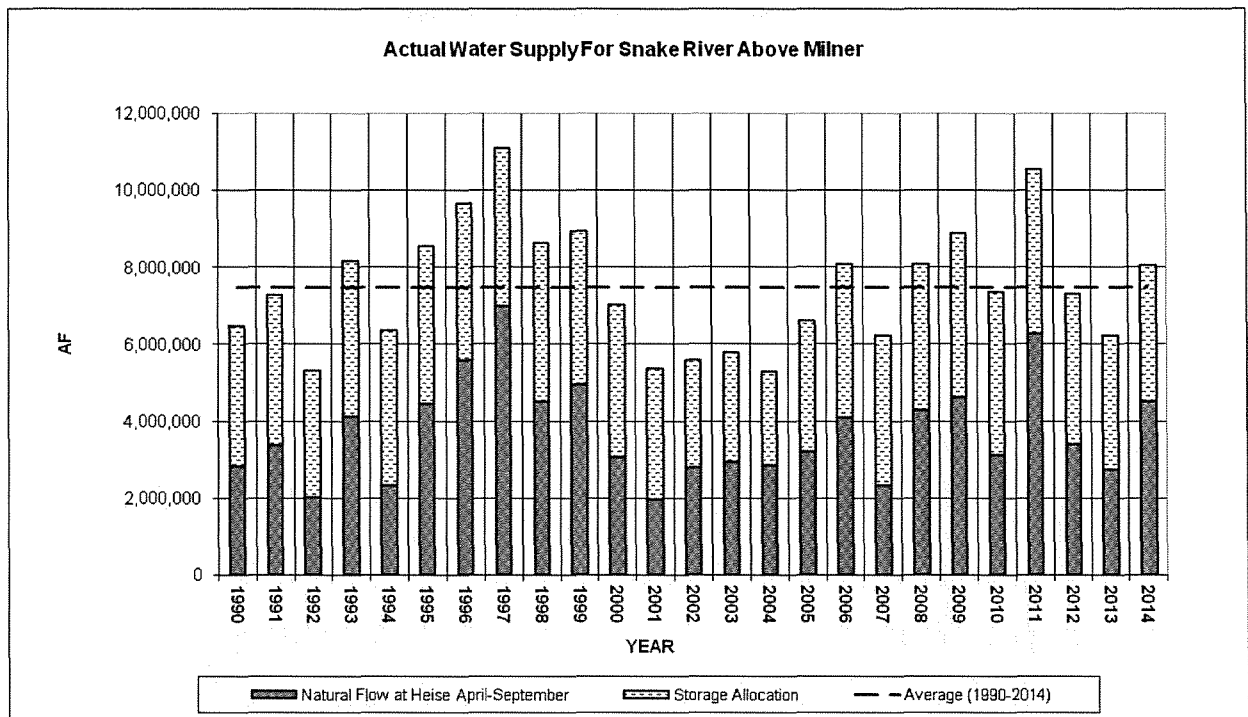
16. The April through July Heise runoff volume represents the volume of water available for diversion into storage reservoirs and also serves as an indicator of natural flow supplies. The graph below shows actual unregulated flow volumes at Heise for 1990 through 2014. The 1990 to 2014 average (3,186,000 acre-feet) is indicated by the dashed line.



April through July Unregulated Flow Volume at Heise, 1990-2014.

17. The total actual supply of the Snake River is represented in the graph below as the sum of the Heise natural flow and reservoir storage allocations for years 1990-2014.





Actual water supply for the Snake River above Milner 1990-2014.

### iii. Irrigation Practices

18. A BLY must be recent enough to represent current irrigation practices. R. Vol. 37 at 7099-7100. Conditions that should be consistent are: (a) the net area of the irrigated crops, (b) farm application methods (flood/furrow or sprinkler irrigation), and (c) the conveyance system from the river to the farm. The type of sprinkler systems should be similar between the BLY and the current year.

19. Sprinkler systems are currently the predominant application system. *Id.* at 7101-02. To ensure that current irrigation practices are captured, selection of a BLY for the SWC should be limited to years subsequent to 1999. *Id.* at 7096; 7099-7100.

20. Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acreage. R. Vol. 28, 5205-15; R. Vol. 37 at 7100. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated. R. Vol. 37 at 7100.

21. There are lands within the service areas of SWC entities that are irrigated with supplemental groundwater. Exhibit 3007. Supplemental groundwater is a factor the Director can consider in the context of a delivery call. *Methodology Remand Order* at 18-19.

**B. Selection of the Initial Baseline Year**

22. The selection of a single BLY for all entities is challenging, with individual years meeting some of the BLY requirements but not all. By selecting a BLY that is comprised of the average of multiple years, a BLY can be selected that better represents the required conditions for each and all entities. The years 2000-2014 were considered for the BLY selection.

23. When selecting the BLY the Director must evaluate the most recent data to determine whether the standards of selection of a BLY are satisfied.

24. In the Methodology Order the Director used an average of 2006 and 2008 (06/08) for the BLY. The 06/08 BLY no longer meets the BLY selection criteria. In particular, when compared to the average of the annual diversions from 2000-2014, the 06/08 diversions are no longer above average.

25. The Director reviewed the years since the issuance of the Methodology Order and finds that 2012 meets the selection criteria for a BLY. However, 2012 had the lowest growing season precipitation, highest ET, and most growing degree days during the BLY selection period (1991-2014). Because 2012 represents the maximum values for these criteria during the period of analysis, 2012 is not an appropriate single-year BLY candidate.

26. Individually no one year during the period of analysis met all the BLY requirements; 2006 had below average diversions, 2008 had below average growing degree days, and 2012 had record high ET, record high growing degree days, and record low precipitation. The Director finds that using the values from 2006, 2008, and 2012 (06/08/12) for an average BLY fits the selection criteria for the SWC. When compared to the period 1991-2014, the 06/08/12 average has below average growing season precipitation, above average ET, above average growing degree days, and represents years in which diversions were not limited by availability of water supply. The 06/08/12 average diversions are greater than the average of the combined annual diversions from 2000-2014.

	2000-2014 Avg. Diversions	06/08/12 Avg. Total Diversions	06/08/12 % of Avg.
A&B	57,906	59,993	104%
AFRD2	420,863	427,672	102%
BID	242,646	251,531	104%
Milner	50,430	47,135	94%
Minidoka	354,277	369,492	104%
NSCC	982,567	978,888	100%
TFCC	1,045,120	1,060,011	101%
			Average 101%

Average SWC Diversions for 2000-2014 and 2006/2008/2012 BLY.

27. The average total actual supply of the Snake River for the 06/08/12 BLY is 7,823,757 AF. The 1990-2014 average total actual supply of the Snake River is 7,478,899 AF as

depicted in Finding of Fact 17. Because the 06/08/12 BLY total actual supply exceeds the 1990-2014 total actual supply average, the BLY is not a year in which diversions were limited by water supply.

### C. Calculation of Reasonable In-Season Demand

28. RISD is the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity. Given that climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences. As stated by the Hearing Officer, “The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.” R. Vol. 37 at 7098.

#### i. Project Efficiency

29. Project efficiency (“ $E_p$ ”) is the ratio of total volumetric crop water need within a project’s boundary and the total volume of water diverted by that project to satisfy crop needs. It is the same concept as system efficiency, which was presented at hearing. Ex. 3007 at 28-29. Implicit in this relationship are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows). By utilizing project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components can be captured and described without quantifying each of the components.

30. Project efficiency is calculated as set forth below:

$$E_p = \frac{CWN}{Q_D}$$

Where:

$E_p$  = project efficiency,

CWN = crop water need, and

$Q_D$  = irrigation entity diversion of water specifically put to beneficial use for the growing of crops within the irrigation entity.

31. Monthly irrigation entity diversions (“ $Q_D$ ”) will be obtained from Water District 01’s diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity. Examples of adjustments include the removal of diversions associated with in-season recharge and diversion of irrigation water on the behalf of another irrigation entity. Adjustments, as they become known to the Department, will be applied during the mid-season updates and in the reasonable carryover shortfall calculation. Examples of adjustments that can only be accounted for later in the season include SWC water placed in the rental pool and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. Any natural flow or storage water deliveries to

entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume. Water that is purchased or leased by a SWC member may become part of IGWA’s shortfall obligation; to the extent that member has been found to have been materially injured. *See e.g.* R. Vol. 38 at 7201, fn. 11 (Eighth Supplemental Order). Conversely, adjustments will be made to assure that water supplied to private leases or to the rental pool will not increase the shortfall obligation.

32. Monthly project efficiencies will be computed for the entire irrigation season. Project efficiency varies from month-to-month during the season, and will typically be lower during the beginning and ending of the season. Monthly project efficiencies will be divided into actual monthly crop water need (“CWN”) values to determine RISD during the year of evaluation. The tables below present average project efficiencies for each SWC member (2007-2014), with project efficiencies during that time span greater or less than two standard deviations excluded from the calculation. By including only those values within two standard deviations, extreme values from the data set are removed.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Monthly Avg.
4	1.67	0.39	0.43	0.77	0.47	0.16	0.30	0.60
5	0.61	0.29	0.28	0.41	0.37	0.29	0.31	0.37
6	0.73	0.43	0.44	0.63	0.54	0.47	0.51	0.54
7	0.68	0.45	0.56	0.74	0.61	0.50	0.58	0.59
8	0.50	0.39	0.60	0.66	0.53	0.32	0.44	0.49
9	0.41	0.26	0.48	0.56	0.44	0.21	0.26	0.38
10	0.14	0.26	0.14	0.15	0.14	0.05	0.04	0.13
Season Avg.	0.68	0.35	0.42	0.56	0.44	0.29	0.35	0.44

SWC Member Average Monthly Project Efficiencies from 2007-2014.

**ii. Crop Water Need**

33. CWN is the project wide volume of irrigation water required for crop growth, such that crop development is not limited by water availability, for all crops supplied with surface water by the surface water provider. Crop water need is the difference between the fully realizable consumptive use associated with crop development, or ET, and effective precipitation ( $W_e$ ) and is synonymous with the terms irrigation water requirement and precipitation deficit. Ex. 3024. For the purposes of the methodology, CWN is calculated as set forth below:

$$CWN = \sum_{i=1}^n (ET_i - W_e) A_i$$

Where,

CWN = crop water need

$ET_i$  = consumptive use of specific crop type,

$W_e$  = effective precipitation,

$A_i$  = total irrigated area of specific crop type,  
 $i$  = index variable representing the different specific crop types grown within the irrigation entity, and  
 $n$  = upper bound of summation equal to the total number of different specific crop types grown within the irrigation entity.

### **iii. Evapotranspiration**

34. Evapotranspiration ("ET") can be calculated with theoretically based equations that calculate ET for an individual crop, necessitating crop distribution maps for each year. Ex. 3007A at 21, Figure 3, Tables 6-12; Ex. 3024 at 1-58; Ex. 8000, Vol. II at Chapter 9; Ex. 8000, Vol. IV, Appdx. AU.

35. At hearing, values of ET were estimated by the SWC from AgriMet, Ex. 8000, Vol. IV, Appdx. AU-1, and by the ground water users from ETIdaho, Ex. 3007A at 21; Ex. 3024 at 1-58. At this time, the Director finds that the use of AgriMet is more appropriate for determining ET than ETIdaho. At this time, AgriMet, is available to all parties in real-time without the need for advanced programming. Accordingly, the methodology will rely on AgriMet derived ET values in the calculations of project efficiency, crop water need, and RISD. In the future, with the development of additional enhancements, ETIdaho may become a more appropriate analytical tool for determining ET.

36. CWN is derived by multiplying crop specific ET values, adjusted for estimated effective precipitation, by the total irrigated area of individual crop types, and summing for all crop types. The areas for individual crop types will be derived from published crop distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS"). Ex. 1005 at 1. NASS creates a crop-specific land cover digital dataset from satellite imagery and field checks. The dataset is called the Cropland Data Layer (CDL). Each year this dataset will be used to calculate a crop distribution acreage for each SWC entity. In the future, the NASS data may not be the most accurate source of data. The Department prefers to rely on data from the current season if and when it becomes usable.

37. AgriMet crop water use (i.e. ET) and weather data are gathered at the Rupert and Twin Falls (Kimberly) stations. Both stations are located in the vicinity of the SWC entities. A&B Irrigation District ("A&B"), Burley Irrigation District ("BID"), and Minidoka Irrigation District ("Minidoka") are nearest to the Rupert AgriMet station. ET data gathered at the Rupert station reasonably represents the climate conditions for A&B, BID, and Minidoka. ET data gathered at the Twin Falls (Kimberly) station reasonably represents the climate conditions for American Falls Reservoir District No. 2 ("AFRD2"), Milner Irrigation District ("Milner"), North Side Canal Company ("NSCC"), and TFCC. Ex. 8000, Vol. IV at AU-2, AU-8.

### **iv. Effective Precipitation**

38. Effective precipitation (" $W_e$ ") is the amount of total precipitation held in the soil horizon available for crop root uptake. Effective precipitation will be estimated from total precipitation ( $W$ ) employing the methodology presented in the USDA Technical Bulletin 1275.

Ex. 8000, Vol. IV, Appdx. AU3, AU8. Total precipitation (W) data is published by the USBR as part of its Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. IV, Appdx. AU3.  $W_e$  values derived from AgriMet based precipitation values are independent of crop type.

39. AgriMet precipitation (W) values are easy to understand and regularly used by the farming, water supply, and water management communities. Accordingly, the methodology will rely on AgriMet derived W values in the calculations of crop water need and RISD.

40. As with ET data, AgriMet precipitation data are available from the Rupert and Twin Falls (Kimberly) stations. AgriMet data from the Rupert station reasonably represents of the climate conditions for A&B, BID, and Minidoka. AgriMet data from Twin Falls (Kimberly) reasonably represents climate conditions for AFRD2, Milner, NSCC, and TFCC. Ex. 8000, Vol. IV at AU-2, AU-8.

#### v. **Summary of Reasonable In-Season Demand Calculation**

41. At the start of the irrigation season, RISD is equal to the baseline demand, or total season adjusted diversions for the baseline year(s). When calculated in-season, RISD is calculated below.

$$RISD_{milestone\_x} = \sum_{j=1}^m \left( \frac{CWN_j}{E_{p,j}} \right) + \sum_{j=m+1}^7 BD_j$$

Where:

$RISD_{milestone\_x}$  = reasonable in season demand at specified evaluation milestones during the irrigation season,  
 CWN = crop water need for month j,  
 $E_p$  = baseline project efficiency for month j,  
 BD = baseline demand for month j,  
 j = index variable, and  
 m = upper bound of summation, equal to the month calculation occurs, where April = 1, May =2, ... October = 7.

42. Water is sometimes diverted into canals and onto crops fields in support of crop development for reasons other than strictly meeting the consumptive requirement of the crop; such as canal wetting, salt leaching, soil wetting, and soil temperature control. April and October represent months during the irrigation season when the method of calculating RISD strictly as a function of CWN and  $E_p$  is less reliable, because CWN is often not the driving factor in diversions during these bookend months. To account for uncertainty of RISD calculations during those time periods, April and October RISD adjustments have been developed.

43. April RISD Adjustment: In April, calculated RISD, as a function of CWN and  $E_p$ , can grossly under estimate actual diversion needs. Therefore, for each individual surface water provider, if the calculation of  $CWN/E_p$  for the month of April is less than the April average diversion volume over a record of representative years in the recent past, then RISD will be equal to the April average diversion volume. If the calculation of  $CWN/E_p$  is greater than the

April average, then RISD will equal the calculated CWN/E<sub>p</sub> volume.

44. October RISD Adjustment: In October, calculated RISD, as a function of CWN and E<sub>p</sub>, can either grossly under or over estimate actual diversion needs. For each individual surface water provider, if the calculation of CWN/E<sub>p</sub> for the month of October is greater than the October maximum diversion volume, or less than the October minimum diversion volume,<sup>6</sup> over a record of representative years in the recent past, then RISD will be equal to the October average diversion volume, over the same period of representative years. If the calculation of CWN/E<sub>p</sub> is less than the October maximum diversion volume, or greater than the October minimum diversion volume, then RISD will equal the calculated CWN/E<sub>p</sub> volume.

#### **D. Adjustment of Forecast Supply**

45. As stated by the Hearing Officer, “There must be adjustments as conditions develop if any baseline supply concept is to be used.” R. Vol. 37 at 7093.

##### **i. April Forecast Supply**

46. The forecast supply is comprised of natural flow and stored water.

47. Typically within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. The joint forecast (“Joint Forecast”) issued by the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers (“USACE”) for the period April 1 through July 31 “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” R. Vol. 8 at 1379, ¶ 98. Given current forecasting techniques, the earliest the Director can predict material injury “with reasonable certainty” is soon after the Joint Forecast is issued. R. Vol. 2 at 226. With data from 1990 through the irrigation year previous to the current year, a regression equation will be developed for each SWC member. The regression equations for A&B and Milner were developed by comparing the actual Heise natural flow to the natural flow diverted. *See e.g.* R. Vol. 8 at 1416-22. For AFRD2, BID, Minidoka, NSCC, and TFCC, multi-linear regression equations were developed by comparing the actual Snake River near Heise natural flow and the flows at Box Canyon to the natural flow diverted. The regression equations will be used to predict the natural flow diverted for the upcoming irrigation season. *Id.* at 1380. The actual natural flow volume that will be used in the Director’s April Forecast Supply for each SWC entity will be one standard error below the regression line, which underestimates the available supply. *Id.*; Tr. p. 65, lns. 6-25; p. 66, lns. 1-2. The purpose of the shift to one standard error below the regression line is to ensure senior water right holders do not bear the risk of under-prediction of supply. The forecasting techniques will be revised based on updated data and the forecasting techniques may be revised when improvements to the forecasting tools occur.

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<sup>6</sup> Minimum October diversion values will not be considered for years in which a SWC entity had zero carryover storage, as the Department will consider this an indication that October diversions were potentially limited by available water supply.

48. The storage allocation for each member of the SWC will be estimated by the Department following the Joint Forecast. The Department will forecast reservoir fill and storage allocation consistent with the methods established in the *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*. R. Vol. 23 at 4294-97 as explained below. The Department will evaluate the current reservoir conditions and the current water supply outlook to determine historical analogous year or years to predict reservoir fill. The Department may identify and use a combination of different analogous years to predict individual reservoir fill. Input variables for determining the individual storage water allocation for each SWC member are: (a) the analogous year's or years' total reservoir fill volume; (b) an estimated evaporation volume; and (c) the previous year's carryover volume. The FS (the combination of the forecast of natural flow supply and the storage allocation) for each SWC member will be determined by the Director shortly after the date of the Joint Forecast.

49. If, at any time prior to the Director's final determination of the April FS, 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 shortfall determination.

## **ii. July Forecast Supply**

50. Approximately halfway through the irrigation season, the FS will be adjusted. FS is comprised of natural flow and stored water.

51. When adjusting the natural flow component of the FS, the Department's water rights accounting model will be used to compute the natural flow diverted by each member of the SWC. The natural flow diversion for the remainder of the irrigation season will be estimated based on the regression analyses.

52. Linear regression equations for AFRD2, A&B, and Milner, were developed by comparing the July 1 snow water equivalent (inches) at the Two Oceans Plateau SNOTEL site to the natural flow diversions. The regression equations for AFRD2, A&B, and Milner would be used only in those years when the snow water equivalent at the Two Oceans Plateau SNOTEL site is greater than zero (0). Years when the snow water equivalent equals zero, the total natural flow prediction for the period July 1 to October 31 will be zero (0) AF.

53. Multiple linear regression equations for BID, Minidoka, and NSCC were developed to predict natural flow diversions employing the following predictor variables: (1) Snake River near Heise natural flow (April – June ), (2) March depth to water at well 05S2E27ABA1 and (3) the snow water equivalent at the Two Oceans Plateau SNOTEL site on June 15.

54. The multiple linear regression model for TFCC will be based on the following



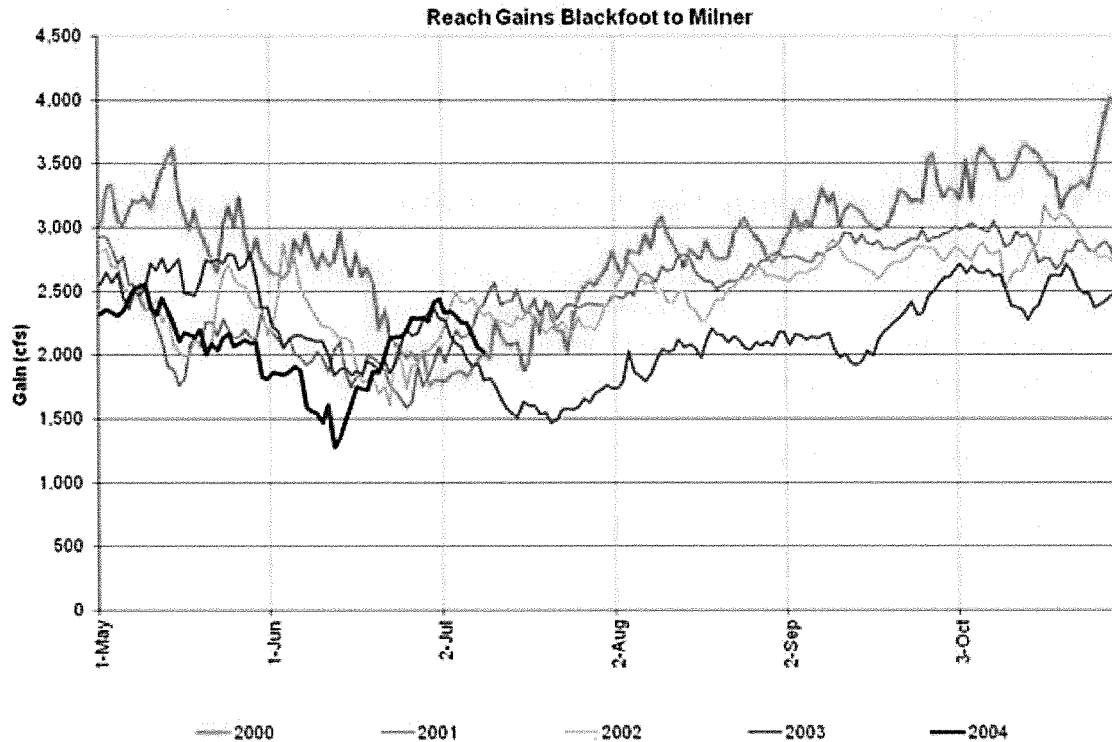
predictor variables: (1) Snake River near Heise natural flow (April – June), (2) Spring Creek total discharge (January – May) and (3) the snow water equivalent at the Two Oceans Plateau SNOTEL site on June 15.

55. When adjusting the storage component of the FS, the Department must consider whether stored water has been allocated in determining the storage component of the FS. In normal to dry years, the reservoirs will typically have filled to their peak capacity for the season and the storage water will have been allocated. If the BOR and Water District 01 have allocated stored water to spaceholders, the Department will use the actual preliminary storage allocations to the SWC. If the BOR and Water District 01 have not yet allocated stored water to spaceholders, the Department will predict the storage allocations based on the storage allocations from an analogous year.

### **iii. Time of Need**

56. The FS will again be adjusted shortly before the Time of Need. The Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover. The Time of Need will not be earlier than the Day of Allocation. FS is comprised of natural flow and stored water.

57. When adjusting the natural flow component of the FS the Department's water rights accounting model will compute the natural flow diverted by each member of the SWC as of the new forecast date. The natural flow diversion for the remainder of the irrigation season will be estimated based on a historical year with similar reach gains in the Blackfoot to Milner reach. The following is an example of estimating reach gains from an analysis of historical years. Reach gains for the years 2000 – 2003 and a portion of year 2004 are graphed below. Considering 2004 as an example of a current year, and comparing 2004 to the hydrographs for 2000 – 2003, year 2003 has similar reach gains and is appropriately conservative. Therefore, the natural flow diverted in 2003 would be used to predict the natural flow diversions for the remainder of the 2004 season.



Example Reach Gain Analysis for 2004.

58. When adjusting the storage component of the FS, the Department will use the actual preliminary storage allocations to the SWC.

59. The adjusted FS is the sum of the actual natural flow diversions, the predicted natural flow diversions, and the storage allocation.

**E. Calculation of Demand Shortfall**

60. The equation below is used to determine the amount of predicted demand shortfall during the irrigation season.

$$DS = FS - RISD$$

Where:

- DS = demand shortfall for specified evaluation points throughout the season,
- FS = forecasted supply for remainder of season after specified evaluation point during the season, and
- RISD = Reasonable in-season demand from above.

61. The amount calculated represents the volume that junior ground water users will be required to have available for delivery to members of the SWC found to be materially injured by the Director. The amounts will be calculated in April, at the middle of the season, and at the time of need.

### **III. Methodology for Determining Material Injury to Reasonable Carryover**

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

#### **A. Projected Water Supply**

63. CM Rule 42.01.g states that the Director “shall consider . . . the projected water supply for the system.” Carryover shortfall will be determined following the completion of the irrigation season. Because it is not possible to adequately forecast the irrigation demand for the following irrigation season at the end of the current irrigation season, the Director must make a projection of need. R. Vol. 37 at 7109 (“Anticipating the next season of need is closer to faith than science.”). The average of 2006/2008/2012 BLY will be the projected demand.

64. Similar to projecting demand, the Director must also project supply. The Heise natural flow, for the years 2002 and 2004, were well below the long term average (1991-2014) but were not the lowest years on record. The average of the 2002 and 2004 supply will be the projected supply, representing a typical dry year. The 2002 and 2004 supply is computed as follows:

- 2002 supply = natural flow diverted + new fill
- 2004 supply = natural flow diverted + new fill
- Projected supply = average of 2002 supply and 2004 supply

Carryover from previous years is not included in the 2002 and 2004 supply calculation because it was not new water supplied during the 2002 or 2004 irrigation year.

65. Reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply. Reasonable carryover is computed using the following equation:

$$\text{Reasonable carryover} = 2006/2008/2012 \text{ average} - 2002/2004 \text{ average}$$

**B. Average Annual Rate of Fill**

66. CM Rule 42.01.g states that the Director “shall consider the average annual rate of fill of storage reservoirs . . . .” The average annual reservoir fill serves as a means to evaluate reasonable carryover, calculated as the difference between the projected demand and the projected supply. For purposes of the table below, any water contributed to the rental pool from the previous year was added to the next year’s fill volume so that it does not artificially lower the percent fill. R. Vol. 37 at 7108. Water that is supplied to the rental pool lowers carryover and could impact the following year’s fill. The percent fill does not include water deducted for reservoir evaporation. The annual percent fill of storage volume by SWC entity is shown below:

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	100%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	90%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	98%	48%	95%	82%	63%
2005	58%	100%	100%	77%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	83%	92%	77%	95%	97%
2008	100%	100%	85%	100%	80%	99%	100%
2009	100%	100%	100%	100%	100%	100%	100%
2010	100%	100%	100%	100%	100%	100%	100%
2011	100%	100%	100%	100%	100%	100%	100%
2012	88%	100%	97%	91%	94%	94%	96%
2013	80%	100%	97%	90%	86%	97%	100%
2014	93%	100%	100%	100%	93%	100%	100%
Average	87%	99%	99%	92%	96%	96%	96%
Std Dev	22%	4%	2%	14%	4%	6%	8%

Annual Percent Fill of Storage Volume by Entity (1995-2014).<sup>7</sup>

**C. Average Annual Carryover**

<sup>7</sup> See e.g. Ex. 4125. Exhibit 4125 accounts for water deducted for evaporation, but does not take into account water supplied to the rental pool.

67. CM Rule 42.01.g states that the Director “shall consider the . . . average annual carryover for prior comparable water conditions . . . .” This factor will be taken into consideration when determining reasonable carryover. Actual carryover volumes were adjusted from values reported in the storage reports so that they did not include water received for mitigation purposes or water rental by the canal company for use within the irrigation district. R. Vol. 37 at 7108. Actual carryover from 1995 through 2014 was sorted into categories ranging from very dry to wet. The categories are based on the Heise natural flow volumes from April through September.

Heise April - Sept. Natural Flow (KAF)	Year	Heise Natural Flow April - Sept	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
Very Dry	2001	1,968	9,902	4,217	37,430	26,854	55,132	42,421	26,917
	1994	2,319	82,885	26,894	54,136	45,902	102,823	128,356	18,687
<3000	2007	2,320	62,739	7,962	34,639	36,520	61,744	68,947	-21,811
	2013	2,721	55,245	10,647	50,107	34,342	68,405	132,899	23,949
	2002	2,775	30,192	8,570	72,835	14,531	99,488	128,572	32,635
	2004	2,833	-3,771	18,537	47,845	8,735	97,905	19,145	21,551
	2003	2,931	9,401	3,649	51,686	6,906	81,673	166,217	-18,169
	<b>Average</b>	<b>2,552</b>	<b>35,228</b>	<b>11,496</b>	<b>49,811</b>	<b>24,827</b>	<b>81,024</b>	<b>98,080</b>	<b>11,966</b>
Dry 3000 - 4000	2000	3,059	66,915	20,787	107,425	43,173	160,183	205,510	52,536
	2010	3,108	95,604	103,272	113,262	58,754	174,009	313,341	30,989
	2005	3,195	36,665	99,097	90,190	37,593	150,623	365,001	64,452
	2012	3,385	68,356	38,682	86,178	45,124	139,426	194,255	76,578
		<b>Average</b>	<b>3,187</b>	<b>66,885</b>	<b>65,460</b>	<b>99,264</b>	<b>46,161</b>	<b>156,060</b>	<b>269,527</b>
Average 4000 - 4500	2006	4,079	89,311	107,682	102,873	58,755	182,612	365,672	51,187
	1993	4,116	102,493	123,508	154,461	50,332	264,713	300,942	104,424
	2008	4,288	92,193	102,753	130,762	63,342	182,531	413,408	65,648
	1995	4,447	82,567	167,451	134,340	75,451	237,300	441,729	58,675
	1998	4,498	87,250	144,057	109,014	67,777	193,810	494,664	156,433
	<b>Average</b>	<b>4,286</b>	<b>90,763</b>	<b>129,090</b>	<b>126,290</b>	<b>63,131</b>	<b>212,193</b>	<b>403,283</b>	<b>87,274</b>
>4500 KAF	2014	4,510	78,065	92,232	144,930	56,202	208,714	441,951	133,411
	2009	4,613	104,174	145,530	125,688	66,935	204,581	426,779	95,533
	1999	4,949	78,312	121,793	168,545	67,147	205,716	454,338	191,501
	1996	5,583	85,209	145,019	127,123	70,250	228,786	472,790	111,459
	2011	6,347	116,495	231,938	170,150	65,072	294,967	563,360	151,678
	1997	7,007	89,811	114,324	87,073	65,307	202,475	464,715	136,926
	<b>Average</b>	<b>5,502</b>	<b>92,011</b>	<b>141,806</b>	<b>137,251</b>	<b>65,152</b>	<b>224,206</b>	<b>470,655</b>	<b>136,751</b>

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1995-2014).

68. In considering the principles articulated in CM Rule 42.01 .g, the Director will project reasonable carryover shortfalls for members of the SWC. The following table represents the 2006/2008/2012 BLY diversion volumes and total reservoir storage space by entity. By dividing the total reservoir space by the 2006/2008/2012 diversion volume, a metric is established that describes the total number of seasons the entity’s reservoir space can supply water.

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
06/08/12 BLY	59,993	427,672	251,531	47,135	369,492	978,888	1,060,011
Total Reservoir Space	137,626	393,550	226,487	90,591	366,554	859,898	245,930
Number of Seasons of Reservoir Space	2.3	0.9	0.9	1.9	1.0	0.9	0.2

Total Reservoir Space<sup>8</sup> in Comparison to Demand.

**D. Reasonable Carryover**

**i. A&B**

69. A&B’s reservoir space has the lowest average annual rate of fill with the highest variability in fill. *See* Finding of Fact 66. In very dry years, the potential exists that A&B’s actual carryover will be less than the reasonable carryover. *See* Finding of Fact 67. A&B has an approximate two-year water supply provided by its total available storage space. *See* Finding of Fact 68. Because of its lower rate of fill, it is likely A&B will experience carryover shortfalls in consecutive dry years. Because of these factors, the calculated reasonable carryover of 18,500 AF is used for A&B. *See* Finding of Fact 75.

**ii. AFRD2**

70. AFRD2 has the highest and most consistent reservoir rate of fill of any member of the SWC. *See* Finding of Fact 66. Therefore, any unfilled space in the fall will most likely fill. AFRD2 has an approximate one-year supply available in storage. *See* Finding of Fact 68. In a very dry year, AFRD2’s historical carryover volume is often less than the calculated reasonable carryover volume using the reasonable carryover equation (BLY 06/08/12 – 2002/2004 supply) *See* Finding of Fact 67. Given the high likelihood of filling during a multi-year drought and after a very dry year, the reasonable carryover can be adjusted downward from the calculated value without shifting the risk of shortage to the senior right holder. Because of these factors, the historical average carryover in very dry years of 11,500 AF is used as the reasonable carryover for AFRD2. *See* Finding of Fact 75.

**iii. BID & Minidoka**

<sup>8</sup> *See* R. Vol. 8 at 1373-74.

71. In an average demand year, BID and Minidoka will have enough water to meet demands given a low water supply. *See* Finding of Fact 67. *See also* R. Vol. 37 at 7105. Historically, even in very dry years, BID's and Minidoka's carryover have been well above the calculated reasonable carryover and it is unlikely that they will have reasonable carryover shortfalls in the future. *See* Finding of Fact 67. *See also* R. Vol. 37 at 7105. Because of these factors, the calculated reasonable carryover of 0 AF is used for BID and Minidoka. *See* Finding of Fact 75. *See also* R. Vol. 37 at 7105.

**iv. Milner**

72. Similar to A&B, Milner's reservoir space has the second lowest average annual rate of fill of all entities with a high degree of variability in fill. *See* Finding of Fact 66. In very dry years, the potential exists that Milner's actual carryover will be less than the reasonable carryover. *See* Finding of Fact 67. Milner has an approximate two-year water supply available in storage. *See* Finding of Fact 68. Because of its rate of fill, it is likely Milner will experience carryover shortfalls in consecutive dry years. Because of these factors, the calculated reasonable carryover of 4,800 AF is used for Milner. *See* Finding of Fact 75.

**v. NSCC**

73. NSCC has a near average annual rate of fill in comparison to all entities and an approximate one-year water supply available in storage. *See* Findings of Fact 66 and 68. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. *See* Finding of Fact 67. Because of these factors, the calculated reasonable carryover of 65,500 AF is used for NSCC. *See* Finding of Fact 75.

**vi. TFCC**

74. TFCC has a near average annual rate of fill in comparison to all entities, but only a one-quarter of a year's water supply available in storage. *See* Findings of Fact 66 and 68. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. *See* Finding of Fact 67. Because of these factors, the calculated reasonable carryover of 25,200 AF is used for TFCC. *See* Finding of Fact 75.

75. Reasonable carryover values for the SWC members are as follows:

	Reasonable Carryover (Acre-Feet)
A&B	18,500
AFRD2	11,500
BID	0
Milner	4,800
Minidoka	0
NSCC	65,500
TFCC	25,200

#### **E. Reasonable Carryover Shortfall**

76. Reasonable carryover shortfall is the numerical difference between reasonable carryover and actual carryover, calculated at the conclusion of the irrigation season. Actual carryover is defined as the storage allocation minus the total storage use plus or minus any adjustments. Examples of adjustments include SWC water placed in the rental pool and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. Any storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC carryover volume. Water that is purchased or leased by an SWC member may become part of IGWA's carryover shortfall obligation. *See e.g. R. Vol. 38 at 7201, fn. 11 (Eighth Supplemental Order)*. Conversely, adjustments will be made to assure that water supplied by a SWC member to private leases or to the rental pool will not increase the reasonable carryover shortfall obligation to the same SWC member.

77. Reasonable carryover shortfall is calculated as follows:

$$\text{Reasonable Carryover Shortfall} = \text{Actual Carryover} - \text{Reasonable Carryover}$$

### **CONCLUSIONS OF LAW**

1. This order contains the methodology by which the Director will determine material injury to RISD and reasonable carryover to members of the SWC.

2. "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

3. Idaho Code § 42-602 states that, "The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . . The director of the department of water resources shall distribute water . . . in accordance with



the prior appropriation doctrine.” According to the Hearing Officer, “It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature [in Idaho Code § 42-602] did not intend to sum up water law in a single sentence of the Director’s authority.” R. Vol. 37 at 7085. The Idaho Supreme Court has recently stated, “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007).

4. “The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use.” *In Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012). “The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *Id.*; *see also American Falls*, 143 Idaho at 879, 154 P.3d at 450 (stating that while an appropriation for a beneficial use is “a valuable right entitled to protection . . . . Nevertheless, that property right is still subject to other requirements of the prior appropriation doctrine.”).

5. “Concurrent with the right to use water in Idaho ‘first in time,’ is the obligation to put that water to beneficial use.” *American Falls*, 143 Idaho at 880, 154 P.3d at 451; *see In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840 (referring to “the constitutional requirement that priority over water be extended only to those using the water”) (quoting *American Falls*, 143 Idaho at 876, 154 P.3d at 447). “It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into account.” *Id.* at 14 (quoting *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915)).

6. “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960)). The Idaho Constitution enunciates a policy of promoting optimum development of water resources in the public interest. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); Idaho Const. Art. XV, § 7. “There is no difference between securing the maximum use and benefit and least wasteful use of this State’s water resources and the optimum development of water resources in the public interest. Likewise, there is no material difference between ‘full economic development’ and the ‘optimum development of water resources in the public interest.’ They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest.” *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90. “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and ground waters, and it requires that they be managed conjunctively.” *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90.

7. “Conjunctive administration ‘requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water

sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.’ . . . That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.” *American Falls*, 143 Idaho at 877, 154 P.3d at 448.

8. The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. *American Falls*, 143 Idaho at 873, 154 P.3d at 444; CM Rule 20.02, 10.12.

9. While the presumption under Idaho law is that an appropriator is entitled to his decreed water right and the CM Rules may not be applied so as require a senior appropriator to demonstrate an entitlement to the water in the first place, there may be post-adjudication factors relevant to the determination of how much water is actually needed in responding to a delivery call. *American Falls* at 877-878, 154 P.3d at 448-449. Under the CM Rules and Idaho law, the Director has the “authority and responsibility to investigate claims when delivery calls are made,” and the “authority to evaluate the issue of beneficial use in the administration context.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840. “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls*, 143 Idaho at 875, 154 P.3d at 446. “If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840 (quoting *American Falls*, 143 Idaho at 876, 154 P.3d at 447).

10. In responding to a delivery call under the CM Rules, the Director “may employ a baseline methodology as a starting point for considering material injury,” provided the baseline methodology otherwise comports with the prior appropriation doctrine as established by Idaho law. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841; *see also Methodology Remand Order* at 17.

11. Once the Director determines that material injury is occurring or will occur, junior appropriators subject to the delivery call bear the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call. *American Falls* at 877-878, 154 P.3d at 448-449; *see also Methodology Remand Order* at 31. Junior appropriators have the burden of proving by clear and convincing evidence that the delivery call is futile or otherwise unfounded. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841.

12. “This case illustrates the tension between the first in time and beneficial use aspects of the prior appropriation doctrine.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838. The Idaho Supreme Court has in this case “recognized the critical role of the Director in managing the water resources to accommodate both first in time and beneficial use aspects: ‘Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the

Director.” 155 Idaho at 651, 315 P.3d at 839 (quoting *American Falls*, 143 Idaho at 880, 154 P.3d at 451). Thus, in this case the Director may use “a baseline methodology, both as a starting point for consideration of the Coalition’s call and in determining the issue of material injury.” *Id.* at 155 Idaho 650-651, 315 P.3d at 838-39. However, “[i]f changing conditions establish that material injury is greater than originally determined pursuant to the baseline analysis, then adjustments to the mitigation obligation of the juniors must be made when the Director undertakes his mid-season calculations.” *Methodology Remand Order* at 18.

13. In the context of conjunctive administration, the Director’s methodology for projecting material injury does not impose an obligation upon members of the SWC to improve their water rights. To the extent water is available, members of the SWC are authorized to divert and store water in accordance with the terms of their licenses or decrees. Nothing established herein reduces that authorization. The question that the CM Rules require the Director to answer in this proceeding is, when water is not available to fill the water rights of the SWC, how much water is reasonably necessary for the SWC to accomplish the beneficial purpose of raising crops; because what is needed to irrigate crops may be less than the decreed or licensed quantities. *American Falls*, 143 Idaho at 880, 154 P.3d at 451; see *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838 (“[i]t is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation”) (quoting *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915)). “The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *Id.*

14. Holders of senior-priority water rights may receive less than their licensed or decreed quantities and not suffer material injury within the meaning of the CM Rules. As a result, in-season demand should be viewed in light of reasonableness and optimum development of water resources in the public interest. CM Rules 20 and 42; *American Falls*, 143 Idaho at 876-80, 154 P.3d at 447-51; *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650-652, 315 P.3d at 838-40.

15. Here, the Director has established a methodology for determining material injury to members of the SWC. The methodology predicts material injury to RISD by taking the difference between RISD and the forecasted supply. The years 2000 through 2014 were analyzed to select the initial BLY because the period of years captured current irrigation practices in a dry climate. Based upon evaluation of the record, members of the SWC were exercising more reasonable efficiencies during this time period than during the 1990s when supplies were more plentiful. During periods of drought when junior ground water users are subject to curtailment, members of the SWC should exercise reasonable efficiencies to promote the optimum utilization of the State’s water resources. CM Rules 20 and 42; *American Falls*, 143 Idaho at 876-80, 154 P.3d at 447-51; *Clear Springs*, 150 Idaho at 807-10; 252 P.3d at 88-91; *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650-652, 315 P.3d at 838-40.

16. At this time, with the recognition that the methodology is subject to adjustment and refinement, RISD will be equal to the historic demands associated with the BLY

(2006/2008/2012), and will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

17. Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director's predictions of material injury to RISD and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director's professional judgment as the manager of the State's water resources. Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. As more data is gathered and analyzed, the Director will review and refine the process of predicting and evaluating material injury. The methodology will be adjusted, if the data supports a change.

18. If the Director predicts that the SWC will be materially injured because of a demand shortfall prediction, either in the preseason or in the midseason, the demand shortfall represents a mitigation obligation that must be borne by junior ground water users. If mitigation water in the amount of the projected RISD shortfall cannot be secured or optioned by junior ground water users to the satisfaction of the Director (*see Order on Petition for Judicial Review* at 19), the Director will curtail junior ground water users to make up any deficit.

19. By requiring that junior ground water users secure mitigation water or have options to acquire water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to deliver or assign mitigation water until the time of need, the Director ensures that junior ground water users supply only the amount of mitigation water necessary to satisfy the reasonable in-season demand. All approved methods of mitigation shall be considered in the Director's review of projected RISD shortfall.

20. Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the time of need, the protection afforded to the senior water right holders is compromised. The risk of shortage is then impermissibly shouldered by the SWC. Members of the SWC should have certainty entering the irrigation season and at midseason that mitigation water will be delivered or assigned at the time of need, or curtailment of junior ground water rights will be ordered.

21. Because climate and the supply that the SWC appropriated (natural flow and storage) are inherently variable, the Director cannot and should not insulate the SWC against all shortages. The Director can, however, protect the SWC against reasonably predicted shortages to RISD.

22. Currently, the USBR and USACE's Joint Forecast is an indispensable predictive tool at the Director's disposal for predicting material injury to RISD. Given current forecasting techniques, the earliest the Director can predict material injury to RISD with reasonable certainty is soon after the Joint Forecast is issued in early April. The pre-irrigation season supply forecast for A&B and Milner can be predicted solely from the Joint Forecast. To improve the accuracy of prediction, the pre-irrigation season supply forecast for AFRD2, BID, Minidoka, NSCC, and

TFCC will currently be predicted from both the Joint Forecast and from flow data at Box Canyon.<sup>9</sup>

23. By shifting the April Forecast Supply prediction curve down one standard error of estimate, the Director purposely underestimates the water supply that is predicted. The Director further guards against RISD shortage by using the 06/08/12 BLY, which has above average diversions, above average ET, below average in-season precipitation, and above average growing degree days. The 06/08/12 average represents years in which water supply did not limit diversions. The Director's prediction of material injury to RISD is purposely conservative. While it may ultimately be determined after final accounting that less mitigation water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Cost. Art. XV, § 3; Idaho Code § 42-106. Shifting the prediction curve down one standard error of estimate and adoption of a baseline year that uses above average diversions, above average temperatures and evapotranspiration and below average precipitation is necessary to protect senior rights if the Director administers to an amount less than the full decreed quantity of the SWC's rights. *Methodology Remand Order* at 33, 35.

24. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

25. "Storage water is water held in a reservoir and is intended to assist the holder of the water right in meeting their decreed needs." *American Falls*, 143 Idaho at 878, 154 P.3d at 449. "Carryover is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *Id.* Under Idaho Code, "[o]ne may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right," but "[t]here is no statutory provision for obtaining a decreed right to 'carryover' water." *Id.* Rather, carryover is a "component of the storage right." *Order on Petition for Judicial Review* (Jul. 24, 2009) at 20. Storage carryover is "permissible . . . absent abuse." *American Falls*, 143 Idaho at 880, 154 P.3d at 451.

26. The storage reservoirs implicated in this proceeding were intended to provide supplemental supplies of water "to create a buffer against the uncertainty of the weather." *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (April 29, 2008) at 6. "The history of the development of the reservoir system, most recently Palisades, makes it clear that storage of water was a primary purpose to prevent disaster during periods of shortage as have been experienced in the recent past." *Id.* at 60. The purpose of carryover also is "insurance against the risk of future shortage." *Order on Petition for Judicial Review* (Jul. 24, 2009) at 20.

27. CM Rule 42.01 sets forth factors the Director is "may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste." CM Rule 42.01 does not limit the Director's determination of reasonable carryover to consideration of the factors enumerated in CM Rule 42.01g, but only requires that

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<sup>9</sup> The method for predicting the natural flow supply may be subject change based upon improved predictive models.

the Director consider those enumerated factors. One such factor is “[t]he extent to which the requirements of the holder of a senior priority water right could be met with the user’s existing facilities and water supplies.” CM Rule 42.01g. This factor is qualified, however, by the provision that “the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.” CM Rule 42.01g. Thus, CM Rule 42.01g does not require water right holders to exhaust their storage water supplies prior to making a delivery call under the conjunctive management rules. This is consistent with the purposes of the storage reservoirs and the carryover components of the storage water rights.

28. In considering CM Rule 42.01g in *American Falls*, the Idaho Supreme Court framed the SWC’s challenge to the “reasonable carryover” provision as presenting the question of whether the holders of storage water rights are “entitled to insist on all available water to carryover for future years in order to assure that their full storage water is met (regardless of need),” *American Falls*, 143 Idaho at 879, 154 P.3d at 450, and answered this question in the negative:

At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. *Supra*, paragraph 11.

*American Falls*, 143 Idaho at 880, 154 P.3d at 451.

29. As discussed in the Findings of Fact, reasonable carryover is determined by projecting the water supply for the system. This is accomplished by projecting the 2002/2004 supply and the 2006/2008/2012 demand. Next, the Director examines the average annual rate of fill of the storage rights held by members of the SWC to determine each entities’ relative probability of fill. Finally, the Director examines the average annual carryover for prior comparable water conditions by reviewing Heise natural flow.

30. On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover short fall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply 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. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

31. Recognizing that reservoir space held by members of the SWC may fill, and to prevent the waste of water, junior ground water users are not required to deliver or assign the volume of reasonable carryover until after the Day of Allocation (defined in footnote 16, *infra*). Junior ground water users are obligated to hold the secured or optioned mitigation water until reservoir space held by the SWC fills. If the reservoir space does not fill, junior ground water right holders must deliver or assign the secured or optioned mitigation water to the senior water right holders up to the amount of storage space that did not fill.

32. The Director recognizes that his analysis of the obligation for reasonable carryover differs from his analysis for RISD obligations. In predicting RISD shortages, the Director is able to premise his determination on the Joint Forecast. The Director requires junior ground water users to provide the entire RISD shortage because the Joint Forecast allows determination of material injury with reasonable certainty.

33. In the fall of the subsequent irrigation season, the Director cannot, with reasonable certainty, predict material injury to reasonable carryover. As found by the Hearing Officer, "Anticipating the next season of need is closer to faith than science." R. Vol. 37 at 7109.

## ORDER

Based upon and consistent with the Findings of Fact and Conclusions of Law, the Director hereby orders that, for purposes of determining material injury to reasonable in-season demand and reasonable carryover, the following steps will be taken:

1. Step 1: By April 1, members of the SWC will submit electronic shape files to the Department delineating the total anticipated irrigated acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than 5%. Department staff will review submitted shapefiles and modify them as necessary to ensure that: (1) the total acreage count does not exceed the decreed number of acres; (2) all of the irrigated land is located within the decreed place of use; and (3) acres are not counted more than once due to overlapping polygons within a shape file or between shape files submitted by different SWC members. Because the SWC members can best determine the irrigated acres within their service area, the SWC should be responsible for submitting the information to the Department. If this information is not timely submitted, the Department will determine the total irrigated acres based upon past cropping patterns and current satellite and/or aerial imagery. If a SWC member fails or refuses to identify the number of irrigated acres within its service area by April 1, the Department will be cautious about recognizing acres as being irrigated if there is uncertainty about whether the acres are or will be irrigated during the upcoming irrigation season. The Department will electronically post electronic shape files for each member of the SWC for the current water year for review by the parties. In determining the total irrigated acreage, the Department may account for supplemental ground water use. The Department currently does not have sufficient information to accurately determine the contribution of supplemental ground water to irrigate lands irrigated with surface water delivered by the SWC. If and when reliable data is available to the Department, the methodology will be amended to account for the supplemental ground water use.

2. If the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then the Department will assess the impact of this reduction in use of the water right on any mitigation requirement.

3. Step 2: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within fourteen (14) days after issuance of the Joint Forecast, the Director will predict and issue an April Forecast Supply for the water year for each SWC entity. The Director will compare the April Forecast Supply for each SWC entity to the baseline demand (“BD”) for each SWC entity to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season. The April Forecast Supply for each SWC entity is the sum of the forecasted natural flow supply and the forecasted storage allocation for each SWC entity. The forecasted natural flow supply will be determined using regression analysis. The forecasted storage allocation will be determined using an analogous year(s).

4. Step 3: 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.

5. 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.

6. Step 4: If junior ground water users fail or refuse to submit this information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 2, whichever is later in time, the Director will issue an order curtailing junior ground water users.<sup>10</sup> The ESPA Model will be run to determine the priority date to produce the necessary volume within the area of common ground water supply as described by CM Rule 50.01.

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.

8. Step 5: If the storage allocations held by members of the SWC fill, there is no reasonable carryover shortfall. If the storage allocations held by members of the SWC do not fill, within fourteen (14) days following the publication of Water District 01’s initial storage

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<sup>10</sup> This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year’s obligation.



report, which typically occurs soon after the Day of Allocation,<sup>11</sup> the volume of water secured by junior ground water users to fulfill the reasonable carryover shortfall shall be made available to injured members of the SWC. The amount of reasonable carryover to be provided shall not exceed the empty storage space on the Day of Allocation for that entity. If water is owed in addition to the reasonable carryover shortfall volume, this water shall be delivered or assigned to members of the SWC at the Time of Need, described below. The Time of Need will be no earlier than the Day of Allocation.

9. Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) recalculate RISD; (2) issue a revised Forecast Supply and (3) estimate the Time of Need date.<sup>12</sup>

10. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The cumulative CWN volume will be calculated for all land irrigated with surface water within the boundaries of each member of the SWC. Volumetric values of CWN will be calculated using ET and precipitation values from the USBR's AgriMet program, irrigated areas provided by each entity, and crop distributions based on NASS data

11. The Forecast Supply for each SWC is the sum of the year-to-date actual natural flow diversions, the forecasted natural flow supply for the remainder of the season, and the storage allocation for each member of the SWC. The forecasted natural flow supply for the remainder of the season will be based on regression analysis. The storage allocation will be based on the actual preliminary storage allocations issued by the BOR and Water District 01. If the BOR and Water District 01 have not yet allocated stored water to spaceholders, the Department will predict the storage allocations based on an analogous year(s).

12. The calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover, or the difference between the 06/08/12 average demand and the 02/04 supply. The Time of Need will not be earlier than the Day of Allocation.

13. 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. Any increase to the projected DS for each SWC entity is an additional mitigation obligation of the junior ground water users.

14. Upon a determination of an additional mitigation obligation, 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 the

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<sup>11</sup> The Day of Allocation is the time in the irrigation season when the Water District 01 watermaster is able to issue allocations to storage space holders after the reservoir system has achieved its maximum physical fill, maximum water right accrual, and any excess spill past Milner Dam has ceased. Tr. p. 902, lns. 7-25; p. 903, lns. 1-10.

<sup>12</sup> At the earliest established Time of Need for any member of the SWC, junior ground water users are required to provide remaining mitigation to all materially injured members of the SWC.

additional mitigation obligation 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 within fourteen (14) days from issuance of a Step 6 order, the Director will issue an order curtailing junior ground water users.<sup>13</sup> The ESPA Model will be run to determine the priority date to produce the necessary additional mitigation obligation volume within the area of common ground water supply, as described by CM Rule 50.01.

15. Step 7: Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) recalculate RISD; (2) issue a revised Forecast Supply; and (3) establish the Time of Need. The revised Forecast Supply for each SWC entity is the sum of the year-to-date actual natural flow diversions, the forecasted natural flow supply for the remainder of the season, and the storage allocation for each member of the SWC. The forecasted natural flow supply for the remainder of the season will be based on analogous years with similar Blackfoot to Milner reach gains. The storage allocation will be based on the actual preliminary storage allocations issued by the BOR and Water District 01.

16. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, baseline demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue revised RISD and DS values.

17. Step 8: At the Time of Need, junior ground water users are required to deliver to each injured member of the SWC the Step 7 revised DS calculated at the Time of Need. Alternatively, any additional mitigation obligation calculated in Step 6 and Step 7 can be satisfied from the each SWC member's reasonable carryover if (a) the reasonable carryover exceeds the additional mitigation obligation, and (b) the junior ground water users secure sufficient water to replace the reasonable carryover.

18. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water delivered by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

19. Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual crop water need for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future baseline years, and for the refinement and continuing improvement of the method for future use.

20. On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on, but not limited to, the consideration of the best available water diversion and

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<sup>13</sup> This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year's obligation.

storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover short fall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply 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. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

IT IS FURTHER ORDERED that the amended Final Order supersedes the Final Order issued April 7, 2010 and the Amended Final Order issued June 16, 2010.

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 16<sup>th</sup> day of April, 2015.

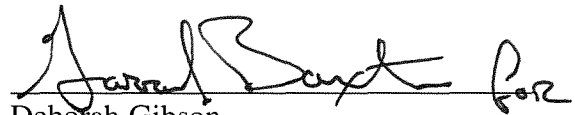
  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of April, 2015, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson          Travis L. Thompson          Paul L. Arrington          BARKER ROSHOLT &amp; SIMPSON, LLP          P.O. Box 485          Twin Falls, ID 83303  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:ltt@idahowaters.com">ltt@idahowaters.com</a>  <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a></p>	<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>
<p>W. Kent Fletcher          FLETCHER LAW OFFICE          P.O. Box 248          Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<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>
<p>Randall C. Budge          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:tjb@racinelaw.net">tjb@racinelaw.net</a></p>	<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>
<p>Kathleen Marion 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></p>	<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>
<p>David W. Gehlert          Natural Resources Section          Environment and Natural Resources Division          U.S. Department of Justice          999 18<sup>th</sup> St, South Terrace, Ste 370          Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<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>
<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>	<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>

<p>Sarah A. Klahn  Mitra 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></p>	<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>
<p>A. Dean Tranmer  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<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>
<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>	<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>
<p>William A. Parsons  Parsons, Smith &amp; Stone, LLP  P.O. Box 910  Burley, ID 83318  <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<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>
<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>	<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>
<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>	<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>



Deborah Gibson  
Administrative Assistant to the Director

## 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.

## **ATTACHMENT 4**

*Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for expedited Decision, and Application to Show Cause, filed May 19, 2023, in Ada County Case No. CV01-23-08187.*

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
tj@racineolson.com  
elisheva@racineolson.com  
Tel: (208) 232-6101  
*Attorneys for Idaho Ground Water  
Appropriators, Inc. (IGWA)*

Dylan Anderson (ISB# 9676)  
DYLAN ANDERSON LAW  
PO Box 35  
Rexburg, Idaho 83440  
Tel: (208) 684-7701  
dylan@dylanandersonlaw.com  
*Attorney for Bingham Groundwater District*

Skyler C. Johns (ISB# 11033)  
Nathan M. Olsen (ISB# 7373)  
Steven L. Taggart (ISB# 8551)  
OLSEN TAGGART PLLC  
1449 E 17th St, Ste A  
PO Box 3005  
Idaho Falls, ID 83403  
Tel: (208) 552-6442  
johns@olsentaggart.com  
nolsen@olsentaggart.com  
staggart@olsentaggart.com  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

**DISTRICT COURT OF THE STATE OF IDAHO  
FOURTH JUDICIAL DISTRICT  
ADA COUNTY**

IDAHO GROUND WATER APPROPRIATORS,  
INC., BONNEVILLE-JEFFERSON GROUND  
WATER DISTRICT, and BINGHAM GROUND  
WATER DISTRICT,

Petitioners,

vs.

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

Respondents.

IN THE MATTER OF THE DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY AND FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN FALLS  
RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER

CV01-23-08187

Case No. \_\_\_\_\_

**Ground Water Districts' Brief in Support  
of Motion for Stay, Motion for Injunctive  
Relief, Motion to Compel, Motion  
for Expedited Decision, and Application  
for Order to Show Cause**



IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, AND TWIN FALLS  
CANAL COMPANY

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Aberdeen-American Falls Area Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District; and Bingham Ground Water District and Bonneville-Jefferson Ground Water District (collectively, the “Ground Water Districts”), submit this brief pursuant to Rule 84(p) of the Idaho Rules of Civil Procedure in support of *Ground Water Districts’ Motion For Stay*, *Ground Water Districts’ Motion for Injunctive Relief*, *Ground Water Districts’ Motion to Compel*, *Ground Water Districts’ Motion for Expedited Decision*, and *Ground Water Districts’ Application for Order to Show Cause* filed herewith, referred to collectively herein as the “Motions.”

### INTRODUCTION

This case involves a petition for judicial review of a series of actions taken recently by the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) in the Surface Water Coalition<sup>1</sup> (SWC) delivery call case, which is a contested case governed by the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code (“APA”).

On April 21, 2023, the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Fifth Methodology Order*”) which radically changes the way water rights are administered under the SWC delivery call. The *Fifth Methodology Order* was issued without a prior hearing, and it is based on evidence that is not in the agency record.

The Director immediately put the *Fifth Methodology Order* to work by implementing it in the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“*April 2023 As-Applied Order*”) issued the same day. Due to changes made in the *Fifth Methodology Order*,

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<sup>1</sup> The SWC consists of seven irrigation entities in the Magic Valley that divert water from the Snake River: 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.

the *April 2023 As-Applied Order*, which has not yet taken effect, orders curtailment of every groundwater right from the Eastern Snake Plain Aquifer (ESPA) with a priority date junior to December 30, 1953, unless mitigation is provided.

Knowing that sweeping changes in the *Fifth Methodology Order* would cause an uproar, the Director did not wait for affected parties to request a hearing under Idaho Code 42-1701A(3). Rather, on the same day he issued the *Fifth Methodology Order* and the *April 2023 As-Applied Order*, he issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“*Hearing Notice*”) setting an after-the-fact hearing June 6-10, 2023.

As explained below, the *Fifth Methodology Order* should be set aside because it was issued in blatant violation of due process and the APA. However, the Ground Water Districts recognize this court might not set aside the *Fifth Methodology Order* before the Director holds an after-the-fact hearing. The purpose of the Motions is to ensure that the Ground Water Districts and other junior-priority groundwater users have a fair opportunity to review and contest the *Fifth Methodology Order* before it takes effect.

The Director has implemented a calculated scheme to prevent junior-priority groundwater users from having a fair opportunity to review and contest the *Fifth Methodology Order*. First, he set a rushed hearing on June 6-10, 2023, which does not afford sufficient time for adequate review and scrutiny of the *Fifth Methodology Order*. He then denied an extremely compelling motion for a continuance. Second, the Director blocked junior-priority groundwater users from discovering some of the information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*. He did this by (i) disallowing interrogatories, (ii) issuing an order that limits the topics and information that Department witnesses can testify to at the after-the-fact hearing, (iii) issuing an order that limits the topics and information that parties to the case can access via discovery, (iv) denying a request for an I.R.P.C. 30(b)(6) deposition, (v) claiming a “deliberative process” privilege that does not exist under Idaho law, and (iv), through counsel, instructing Department deponents to not answer questions about certain information the Director considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*.

The Director’s extreme actions are anathema to Idaho suite of laws designed to ensure that Idaho government agencies provide open and transparent processes and fair hearings in contested

cases (the Public Records Act, Open Meeting Law, and APA). His actions blatantly violate the APA and deprive the Ground Water Districts of due process, as explained below. To restore due process, the Ground Water Districts respectfully ask this court to take the following actions or enjoin the Director to take such actions:

1. Stay implementation the *Fifth Methodology Order* until after it is properly adjudicated. Until then, the Director can continue to administer water rights under the *Fourth Methodology Order*.
2. Continue the after-the-fact hearing currently scheduled for June 6-10, 2023, to October 16-20, 2023, to account for the unavailability of expert witnesses and to give junior-priority groundwater users adequate time to prepare for the hearing.
3. Instruct the Director to disclose all documents and other information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*.
4. Instruct the Director to allow the Ground Water Districts to depose and, if needed, call as witnesses any Department staff member who contributed to development of the *Fifth Methodology Order* or the *April 2023 As-Applied Order*.
5. Instruct counsel for the Director to refrain from instructing Department deponents or witnesses to not answer questions at depositions or the hearing on the basis that the information pertains to the Director's deliberative process.
6. Vacate the *Notice of Hearing*, *Notice of Prehearing Conference*, and *Order Authorizing Discovery* ("Order Limiting Evidence"), and the *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* issued May 5, 2023 ("Order Limiting Discovery")

The Motions provide tools for this court to exercise its legal and equitable powers to grant such relief. The Ground Water Districts believe the foregoing relief can be granted under the *Ground Water Districts' Motion for Stay*. The *Ground Water Districts' Motion for Injunctive Relief* and the *Ground Water Districts' Motion to Compel* provide alternative justifications for granting such relief.

### **PROCEDURAL HISTORY**

In January 2005, the SWC petitioned the Director to shut off groundwater diversions from the ESPA so more water will discharge from the ESPA into the Snake River in the American Falls area, upstream from SWC diversions at Minidoka Dam and Milner Dam. After a period of litigation over the constitutionality of the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), an evidentiary hearing was held in 2008 before former

Idaho Supreme Court Chief Justice Gerald F. Schroeder who was appointed hearing officer. On the recommendation of Justice Schroeder, former IDWR Director David R. Tuthill, Jr. developed a formula known as the “methodology” to annually predict material injury to SWC members in accordance with the CM Rules. The methodology was subsequently revised in 2010 (Second Methodology Order), 2015 (Third Methodology Order), and 2016 (Fourth Methodology Order).

In a status conference held August 5, 2022, involving a mitigation plan for the SWC delivery call, the Director verbally notified those present that he intended to convene a technical working group to review the *Fourth Methodology Order* and consider what changes might be made to improve its functionality.

In September, a Department staff member, Matt Anders, sent an email notifying various individuals that Department staff had been reviewing data used in the *Fourth Methodology Order* and would be presenting their findings to outside consultants in coming months. From November 16-December 21, 2022, Department staff held six virtual meetings where they shared new data they had reviewed and various analyses they had conducted. On December 23, 2022, Department staff issued a one-page document containing “preliminary recommendations” for changes to the *Fourth Methodology Order*. (Budge Decl., Ex. B.) The staff’s preliminary recommendations address three components of the methodology. With respect to other components it states: “IDWR will continue to evaluate the integration of these and other techniques into the methodology.” *Id.* The document then invited outside consultants to submit written comments by January 16, 2023, roughly three weeks later.

Outside consultants could not thoroughly analyze in three weeks the complex and voluminous data that Department staff spent months reviewing and analyzing, but since Department staff had provided only a one-page summary of “preliminary recommendations,” and since the APA required the Director to hold a hearing before amending the *Fourth Methodology Order*, IGWA’s consultant prepared comments that were likewise preliminary in nature, expecting that a full evidentiary record would be developed in the contested case in which the *Fourth Methodology Order* was issued. This expectation, however, was not realized.

Rather than hold a hearing in the contested case, the Director worked behind closed doors from late December 2022 through April 2023 to develop the *Fifth Methodology Order* based on information that is not in the agency record. Some changes made to the *Fourth Methodology*

*Order* differ wildly from the preliminary recommendation of Department staff, while other seemingly obvious changes were disregarded without explanation.

In a year of exceptionally high snowpack, with no foreseeable risk of curtailment under the *Fourth Methodology Order*, application of the *Fifth Methodology Order* in the *April 2023 As-Applied Order* generated in a predicted water supply shortage of 75,200 acre-feet to the SWC, all of which pertains to Twin Falls Canal Company. The *April 2023 As-Applied Order* orders curtailment of every groundwater right from the ESPA junior to December 30, 1953, stating: “If junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.” (Budge Decl., Ex. A-2; emphasis added.)

The effect has been chaotic. The Department reports that approximately 900 water rights are not covered by approved mitigation plans. (Budge Decl., Ex. E.) In addition, there is uncertainty as to whether IGWA’s mitigation plans will be effective in 2023. (Budge Decl., p. 4 ¶ 9.) Consequently, many holders of groundwater rights from the ESPA are currently in a state of fear of curtailment.

On the same day the *Fifth Methodology Order* and the *April 2023 As-Applied Order* were issued, the Director issued the *Hearing Notice* setting a prehearing conference the following week, on April 28, 2023, and an after-the-fact hearing six weeks later on June 6-10, 2023.

Prior to the prehearing conference, the Cities filed a *Motion for Continuance*, which the Ground Water Districts joined, requesting that the hearing be continued until December 2023 or January 2024 to provide adequate time to prepare. The Director verbally denied the motion at the April 28<sup>th</sup> prehearing conference, which he confirmed in writing in the *Order Limiting Discovery* issued on May 5, 2023.

On May 2, 2023, the Director issued a *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (“*Scheduling Order*”) setting various deadlines, including a deadline of May 5<sup>th</sup> for the parties to submit to the Department a written statement of issues for the hearing, and a deadline of May 31<sup>st</sup> for the parties to complete all discovery, serve expert reports on the other parties, file lay and expert witness lists with a summary of anticipated testimony, and file pre-marked exhibits with the Department. In sum, junior-priority groundwater users have been

given five weeks to review two lengthy and complex orders that are predicated on a large volume of technical data—orders that the Department spent some 10 months developing—and to prepare expert reports and prepare for a four-day hearing.

On May 5, 2023, the Ground Water Districts and the Cities filed a *Motion for Reconsideration* of the Director’s denial of their prior *Motion for Continuance*, which further explained the need for a continuance, including:

1. Written responses to discovery will not be available until after May 29, 2023—weeks after the depositions scheduled by the Director and only days before the June hearing.
2. The June hearing provides inadequate time for the Ground Water Districts to obtain all discovery and the conduct inspections and analyses necessary to formulate expert opinions and develop reports addressing the complex issues involved in the *Fifth Methodology Order* such as (a) the Director’s change from steady-state to transient-state modeling, (b) the seven years of additional, voluminous hydrologic and water use data used in the *Fifth Methodology Order*, (c) revised calculations employed in the *Fifth Methodology Order*, (d) the large discrepancy between the SWC’s actual irrigated acreage and the acreage used by the Director in the *Fifth Methodology Order*, (e) increasing diversions and decreasing project efficiency of SWC members in recent years, and (f) the Director’s failure to address the doctrines of futile and reasonable use of water resources despite a massive increase in curtailment.
3. The attorney for McCain Foods, Candice McHugh, is unavailable for the June hearing due to a previously-scheduled out-of-state obligation.
4. Greg Sullivan, the sole expert consultant for the Cities, will be out of the country from May 17, 2023-June 3, 2023, leaving him unavailable to consult with the Cities’ attorneys to assist in developing strategy, preparing expert reports, preparing exhibits, and attending depositions.
5. Sophia Sigstedt, expert consultant for IGWA, is unable to perform all of the work required to properly analyze the *Fifth Methodology Order* before the June hearing, and has a medical condition that prevents her from leaving her home state of Colorado until July 10, 2022.
6. Jaxon Higgs, expert consultant for IGWA, has a long-standing out-of-country vacation planned for May 27-June 10, 2023, and is unable to participate in the June hearing.
7. IGWA has been unable to locate a qualified engineering firm that has capacity to analyze the “project efficiency” component of the *Fifth Methodology Order* by the hearing currently scheduled June 6-10, 2023.
8. Water supplies are above-average for the 2023 irrigation season, and mitigation has been secured by IGWA and the Cities, thereby causing little to no prejudice to the SWC.

9. The Director can administer water rights pursuant to the *Fourth Methodology Order* until the *Fifth Methodology Order* is properly adjudicated.

(Budge Decl., Exs. A-6 and A-9 through A-15.) As of the filing of this brief, the *Motion for Reconsideration* has sat with the Director for 14 days without action, despite a request from counsel for the Ground Water Districts to counsel for the Department requesting a prompt decision given the compressed hearing schedule.

On May 5, 2023, the Director took action to block junior-priority groundwater users from discovering some of the information he considered in developing the *Fifth Methodology Order*. First, he issued the *Order Limiting Evidence*, which (i) identifies two Department staff members who would be allowed to testify at the hearing, Matt Anders and Jennifer Sukow, and (ii) limits the topics and data that Mr. Anders and Ms. Sukow may discuss at the hearing to certain technical matters. (Budge Decl., Ex. A-9.) Second, he issued an *Order Limiting Discovery* which limits the scope of discovery to “preclude questions regarding the Director’s deliberative process on legal and policy considerations.” (Budge Decl., Ex. A-8.) Based on these orders, at the depositions for Ms. Sukow and Matt Anders held May 8 and 10, 2023, counsel for the Department instructed them to not answer almost 50 questions on the basis that they related to the Director’s deliberative process. (Budge Decl., p. 4 ¶ 11, Ex. D.) Many of the questions they did not answer requested information the Director considered in developing the *Fifth Methodology Order*, not his deliberative process for evaluating such information. In any case, the Director has used the *Order Limiting Evidence* and the *Order Limiting Discovery* to prevent the parties to the contested case from discovering and putting into evidence some of the information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*.

On May 16, 2023, counsel for the Ground Water Districts held a “meet and confer” meeting with counsel for the Director, explaining that they were being deprived of due process and would be filing a motion to compel unless the Director provides access to all of the information he considered in developing the *Fifth Methodology Order* and the *April 2023 As-Applied Order*. Counsel for the Director confirmed that no such access would be given. (Andersen Decl., ¶¶ 6-10.)

## LEGAL STANDARD

The Motions collectively authorize this court to grant the relief requested above. While the legal standards differ, the facts support judicial relief under each of the Motions.

### A. Motion for Stay

The Idaho Administrative Procedures Act (APA) provides that upon the filing of a petition for judicial review, the “reviewing court may order ... a stay [of enforcement of the agency action] upon appropriate terms.” Idaho Code 67-5274. Idaho Rule of Civil Procedure 84(m) also provides that the reviewing court may grant a stay “upon appropriate terms.”

Neither the APA nor Rule 84(m) enunciate factors that must be considered when deciding whether to stay agency action, indicating that district courts sitting in an appellate capacity have broader latitude under Rule 84(m) than they do under Rule 65. The Idaho Supreme Court has held that “where it appears necessary to preserve the status quo to do complete justice the appellate court will grant a stay of proceedings in furtherance of its appellate powers.” *McHan v. McHan*, 59 Idaho 41, 46 (1938). The Idaho Court of Appeals has similarly held that a stay is appropriate “when it would be unjust to permit the execution on the judgment, such as where there are equitable grounds for the stay or where certain other proceedings are pending.” *Haley v. Clinton*, 123 Idaho 707, 709 (Ct. App. 1993).

The APA and Rule 84(m) do not prescribe what qualifies as “appropriate terms” for a stay, nor are there any published Idaho cases imposing guidelines or limitations as to what may qualify. In keeping with guidance from the Idaho Supreme Court, district courts have power to impose whatever terms the court deems appropriate “to preserve the status quo to do complete justice.”

Accordingly, this Court may grant the relief requested above as appropriate terms in connection with a stay of implementation of the *Fifth Methodology Order*.

### B. Motion for Injunctive Relief

This Court has additional authority to grant the relief requested above under its general jurisdiction over cases in equity. Idaho Const. art. V, § 20. By statute, this Court may issue “all writs necessary to the exercise of its powers.” Idaho Code § 1-705(2). In addition, I.R.C.P. 65(e)(3) provides that a preliminary injunction may be granted “...when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to



do, some act in violation of the plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual.” The Court, acting in its appellate capacity, may issue an injunction during the pendency of an appeal. Rule 62(g). The decision whether to grant or deny injunctive relief is left to the district court's discretion. *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997).

### **C. Motion to Compel**

This Court has additional authority to rule on discovery-related matters under rule 520.02 of the rules of procedure of the Department (IDAPA 37.01.01.520.02) and Rule 37 of the Idaho Rules of Civil Procedure which authorizes this Court to compel discovery upon “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” A motion to compel may be granted if “a deponent fails to answer a question asked under Rule 30 or 31.” Rule 37(a)(3)(A)(i). An “evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” I.R.C.P. 37(a)(4).

### **D. Motion for Expedited Decision**

Idaho Rule of Civil Procedure 84(o) provides that motions “filed with this Court be determined without oral argument unless ordered by the court.” Generally, courts may “limit oral argument at any time.” Rule 7(b)(3)(F). Courts may grant any exception to the time limits for motions pursuant to Rule 7 for good cause shown. Rule 7(b)(3)(H). “If time does not permit a hearing or response on a motion to extend or shorten time, the court may rule without opportunity for response or hearing.” *Id.*

### **E. Exhaustion of administrative remedies is not required.**

The Ground Water Districts need not exhaust their administrative remedies before this Court rules on the Motions because, under the APA, “A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.” Idaho Code § 67-5271(2). The Idaho Supreme Court has held that exhaustion is not required “when the interests of justice so require.” *Regan v. Kootenai Cty.*, 140 Idaho 721, 725 (2004) (citing *Arnze v. State*, 123 Idaho 899, 906 (1993)).

## ARGUMENT

As explained below, implementation of the *Fifth Methodology Order* should be stayed until it is properly adjudicated because (1) it was issued in violation of due process and the APA; (2) there are clear errors in the *Fifth Methodology Order*; (3) severe, irreparable harm will result from implementation of an erroneous *Fifth Methodology Order*; and (4) there is no emergency requiring immediate implementation of the *Fifth Methodology Order* because the Director can administer water rights under the *Fourth Methodology Order* until the *Fifth Methodology Order* is properly adjudicated.

As an appropriate term of the stay and/or under this court's equitable power to grant injunctive relief, this court should restore due process by instructing the Director to (a) continue the after-the-fact hearing until October 16-20, 2023; (b) disclose all documents and other information he considered in developing the *Fifth Methodology Order*; (c) allow the Ground Water Districts to depose and, if needed, call as witnesses any Department staff member who contributed to development of the *Fifth Methodology Order*; (d) instruct counsel for the Director refrain from instructing Department deponents or witnesses to not answer questions on the basis that the information pertains to the Director's deliberative process; and (e) vacate the *Scheduling Order* and the *Discovery Order*.

### **1. The *Fifth Methodology Order* was issued in violation of due process and the APA.**

The *Fifth Methodology Order* was issued in violation of due process and the APA because (i) it was issued in a contested case governed by the APA, (ii) there was no emergency, (iii) the Director failed to provide a hearing before issuing the order, and (iv) it is based on information outside the record of the contested case.

#### **1.1 In the absence of an emergency, due process and the APA require the Director to hold a hearing before issuing an order on contested issues.**

A fundamental right afforded by the United States Constitution is that "No state ... shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Under Idaho law, "individual water rights are real property rights which must be afforded the protection of due process." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815-16 (2011).

Due process entitles a property owner to “an opportunity for a hearing before he is deprived of any significant property interest.” *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). Not only must a hearing be held, but the decision-making process must be fair to those persons affected by the decision, as explained by the U.S. Supreme Court:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon application of and for the benefit of a private party.

*Id.* at 80-81. The hearing requirement “is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.” *Id.* at 90, fn 22.

Importantly, a hearing “must be granted at a meaningful time and in a meaningful manner.” *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Usually the hearing must be held “*before* [a property owner] is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Id.* at 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original)).

Furthermore, the hearing “must be provided at a time which allows the person to reasonably be prepared to address the issue.” *State v. Doe*, 147 Idaho 542, 546 (Ct. App. 2009). “An individual must have an opportunity to confront all the evidence adduced against him, in particular that evidence with which the decisionmaker is familiar.” *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982). When a government agency fails to provide due process before issuing an order, a court may instruct the agency “to vacate the Final Order ... and hold a new hearing that complies with due process.” *Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F. Supp. 3d 1216, 1230 (D. Idaho 2018).

To ensure that Idaho agencies afford due process in contested cases, the Idaho legislature enacted the APA which requires state agencies, in any case that is not resolved by stipulation of the parties, and in the absence of an emergency, to hold a hearing *before* the agency decides the

matter. Idaho Code § 67-5242. The purpose of the hearing is “to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary.” Idaho Code § 67-5242(3)(a) (emphasis added). At the hearing, parties must be given “the opportunity to respond and present evidence and argument on all issues involved,” Idaho Code § 67-5242(3)(b), and all findings of fact must be “based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding,” Idaho Code § 67-5248(2).

The only time a state agency can take action in a contested case, other than by stipulation of the parties, without first holding a hearing, is “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action.” Idaho Code § 67-5247(1). When emergency action is taken, the order must include a “brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action.” Idaho Code § 67-5247(2). In addition, the agency must “proceed as quickly as feasible to complete any proceedings that could be required.” Idaho Code § 67-5247(4).

The Idaho Supreme Court has confirmed that in the context of conjunctive management of surface and ground water rights, if there is no emergency a hearing must be held *before* an order is issued. In *American Falls Reservoir District No. 2 vs. Idaho Department of Water Resources* (“AFRD2”), the Idaho Supreme Court reversed the district court decision which would have allowed the Director to make conjunctive management decisions first and hold hearings later. The Supreme Court explained that when it comes to conjunctive management, “It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *AFRD2*, 143 Idaho 862, 875 (2006). In keeping with that decision, the Court later reprimanded the Director for issuing a curtailment order before holding a hearing, stating: “the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.” *Clear Springs Foods*, 150 Idaho at 815.

## **1.2 IGWA notified the Director that any revision of the *Fourth Methodology Order* must comply with due process and the APA.**

When the Director announced at a status conference on August 5, 2022, that he wished to undertake a review and update of the *Fourth Methodology Order*, counsel for IGWA expressed

concern about the process the Department would follow, stating: “It would be helpful if we had a more clear picture of the process the Department anticipates going through in terms of revising the Methodology Order ... this was all created in the context of a contested and litigated case so we’ve got principals of ... due process that need to be taken into account.” (Budge Decl., Ex. C.)

In late September, a Department staff member, Matt Anders, sent an email stating that Department staff had begun analyzing the data used in the *Fourth Methodology Order* and would be sharing their findings with outside consultants in coming months. Counsel for the Department, Garrick Baxter, informed counsel for IGWA that attorneys were not invited to participate. Counsel for IGWA responded as follows, reiterating that any revision of the *Fourth Methodology Order* must comply with the APA:

... I would also like to understand how this working group will function within the contested case structure of the Administrative Procedures Act. ... Before any technical issues are discussed, I recommend that a scoping meeting be held to discuss which elements of the Methodology Order will be reconsidered, the process that will be followed, and how it fits within the contested case structure of the APA. Please advise if the Department will do this.

(Budge Decl., Ex. D.) In a subsequent email to Mr. Baxter, counsel for IGWA repeated his concern that any review of the *Fourth Methodology Order* must comply with due process and the APA:

Please know that I do not wish to make things difficult. I appreciate that the Department is inviting input on technical issues as it reconsiders the Methodology Order. It is important that the process comply with the APA, which as you know requires that decisions in contested cases be confined to the agency record. It would help me, and presumably others, to understand how the actions of the TWG fit within the APA, including how and when the Department envisions evidence being added to the agency record, action being taken on this new evidence, etc. I kindly ask that these issues be clarified up front so we avoid disputes down the road over compliance with the APA.

*Id.*

Despite IGWA’s request, the Director did not hold a scoping meeting, status conference, or any other meeting with the parties to the SWC delivery call case to discuss how he intended to comply with the APA, nor did he hold a hearing to develop the evidentiary record upon which the methodology would be revised. He simply undertook a review of the *Fourth Methodology*

*Order* on his own, and then proceeded to develop the *Fifth Methodology Order* behind closed doors, outside of the contested case parameters of the APA.

**1.3 The *Fifth Methodology Order* was issued in a contested case, in the absence of an emergency.**

The *Fifth Methodology Order* was issued in what is commonly known as the SWC delivery call case, IDWR Docket No. CM-DC-2010-001. This is a contested case under the APA that has been ongoing since 2005 when the SWC filed its delivery call (IDWR did not begin using docket numbers until 2010). Every iteration of the methodology order has been issued in this case.

The *Fifth Methodology Order* was not issued in an emergency. The *Fourth Methodology Order* has been in place since 2016, and there is no reason it could not continue functioning in 2023. The Department began reviewing the *Fourth Methodology Order* in August of 2022. Nothing has occurred in recent months that creates “a situation involving an immediate danger to the public health, safety, or welfare requiring immediate action.” Idaho Code § 67-5247(1). Indeed, the *Fifth Methodology Order* contains no such statement.

**1.4 The *Fifth Methodology Order* was issued in violation of due process and the APA.**

Since there was no emergency, the APA requires the Director to hold a hearing prior to issuing the *Fifth Methodology Order* to assure that “there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary,” Idaho Code § 67-5242(3)(a), the parties are given “the opportunity to respond and present evidence and argument on all issues involved,” Idaho Code § 67-5242(3)(b), and all findings of fact are “based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding,” Idaho Code § 67-5248(2).

The Director initiated his review of the *Fourth Methodology Order* on August 5, 2022. He had ample time to hold an evidentiary hearing before developing or issuing the *Fifth Methodology Order*. For reasons unknown, he intentionally chose not to. Instead, he developed the *Fifth Methodology Order* based on facts and analyses developed internally, that are not contained in the evidentiary record of the contested case. In so doing, he violated due process and the APA.

**1.5 The so-called “Technical Working Group” cited by the Director does not satisfy due process or the APA.**

The Director’s rationale for refusing to hold a hearing before developing the *Fifth Methodology Order* appears to rely, in part, on the fact that Department staff disclosed some of their technical analyses to outside consultants in November-December 2022, which the Director refers to as a “technical working group.” However, the actions of Department staff fall far short of what due process and the APA require.

First, the term “working group” is a misnomer. The term suggests a collaborative process among Department staff and outside consultants, yet in fact it was limited to Department staff working under the directions of the Director.

Second, there was no formal notice to the parties to the contested case of the so-called “working group,” nor of what the working group would be doing, nor of how or when a hearing would be held to develop an evidentiary record upon which the *Fourth Methodology Order* may be amended.

Third, outside consultants had no input as to what components of the *Fourth Methodology Order* would be analyzed or what types of studies would be performed; rather, that was all directed by the Director, who personally directed the analyses and then reviewed and edited the presentations of Department staff to outside consultants in advance.

Fourth, the “preliminary recommendations” of Department staff did not preview major changes that were ultimately made to the *Fifth Methodology Order*. Department staff published nothing more than a one-page document with conclusory recommendations. What’s more, the Ground Water Districts recently learned in depositions that while this document masquerades as a recommendation from Department staff to the Director, the Director actually reviewed and edited the content of the document before it was shared with consultants of the parties to the contested case.

Fifth, the preliminary recommendation document fails to provide any analysis of why certain critical components of the methodology were not modified. For example, the *Fifth Methodology Order* calculates water demand for Twin Falls Canal Company based on the number of acres that TFCC reports to the Department as being irrigated even though the Department’s own investigation shows that there are more than 15,000 fewer acres that are

actually irrigated. (Budge Decl., Ex. A-11.) Ordering curtailment to service non-irrigated acres is contrary to law: “[T]he Director has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority of water be extended only to those using the water.” *A&B v. Idaho Dept. of Water Res.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (emphasis added).

## **2. There are obvious errors in the *Fifth Methodology Order*.**

The *Fifth Methodology Order* contains severe and obvious errors. For the purpose of this brief, two are demonstrated.

First, as mentioned above, the *Fifth Methodology Order* calculates TFCC’s water demand based on the number of acres that TFCC reports to the Director as being irrigated instead of the number of acres actually irrigated.

Second, the *Fifth Methodology Order* shifts from a steady-state model to a transient-state model, which causes the methodology to curtail exponentially more acres in response to a demand shortfall. To illustrate, the *April 2023 As-Applied Order* predicts a shortfall to TFCC of 75,200 acre-feet, then orders curtailments all water rights junior to December 30, 1953, which would eliminate beneficial use of an estimated 1.4 to 1.8 million acre-feet of water in an effort to provide an additional 75,200 acre-feet of water to TFC. Given this massive change in water rights administration, the Director must apply CM Rules 10.07, 10.08, 20.03, 20.04, 40.03, and 42.01 and make findings of fact and conclusions of law concerning the futile call doctrine and the principle of reasonable use of water resources. Yet, the *Fifth Methodology Order* contain no application of these rules.

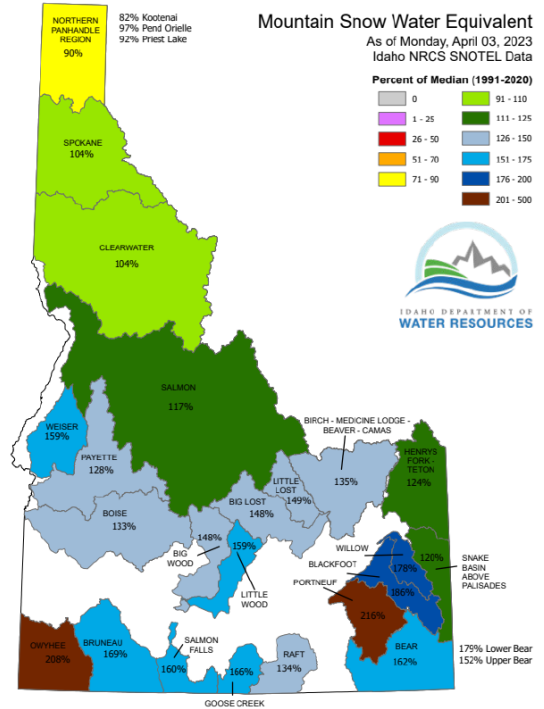
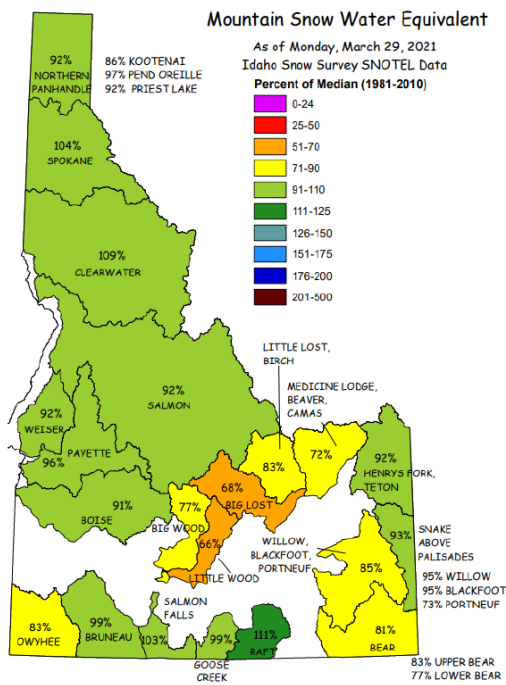
The *Fifth Methodology Order* suggests that the Director declined to apply these rules because it is the junior’s burden to prove futile call, but this only underscores the injustice caused by the Director’s failure to provide a hearing before developing the *Fifth Methodology Order*. In any case, the omission of any findings of fact concerning these rules is an egregious error.



**3. Severe, irreparable harm will result from implementation of an erroneous *Fifth Methodology Order*.**

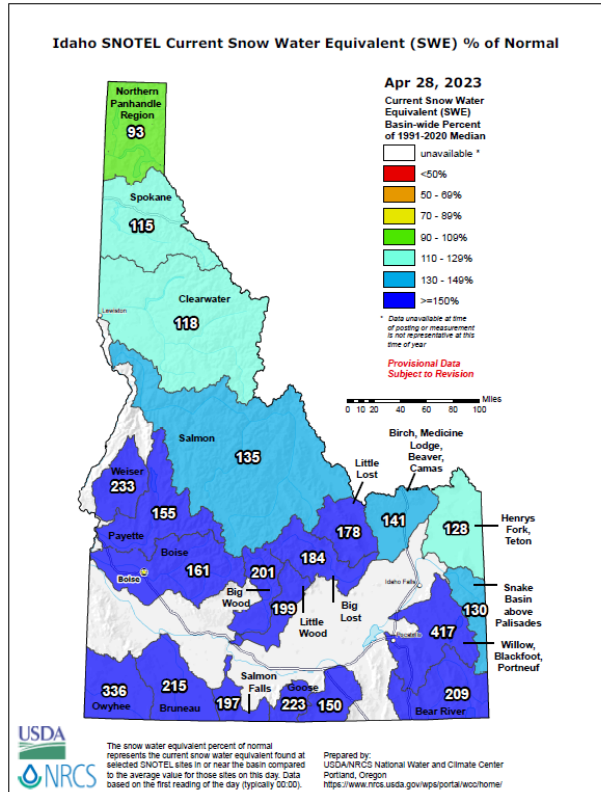
The *April 2023 As-Applied Order* states: “If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.” (*April 2023 As-Applied Order*, p. 6; Budge Decl., Ex. A-2.) The Department has issued a news release stating: “Approximately 900 ground water rights junior to December 30, 1953, not protected by an approved mitigation plan, could be subject to curtailment as this irrigation season develops.” (Budge Decl., Ex. E.) In addition, there is uncertainty as to whether IGWA’s mitigation plans will be effective in 2023, putting hundreds of thousands more acres at risk of curtailment. (Budge Decl., p. 4, ¶ 9.)

It is important to distinguish the present circumstance against the Basin 37 delivery call where the Director was permitted to take immediate action. There, there was no methodology order in place, and Basin 37 was in a severe drought. By contrast, the snowpack in the Upper Snake River Basin is well above average, with some tributary basins such as the Portneuf experiencing flooding for several weeks. Ironically, flooding of the Portneuf River is not taken into account in the *Fifth Methodology Order*, resulting in a water supply windfall to the SWC. Below are Idaho snow water equivalency maps comparing the spring of 2021, when curtailment was allowed in Basin 37, with the Spring of 2023:



<https://idwr.idaho.gov/water-data/water-supply/snow-water-equivalency/>

The situation has even improved since then, as shown by the April 28, 2023, snow water equivalency:



[https://www.wcc.nrcs.usda.gov/ftpref/data/water/wcs/gis/maps/id\\_swepctnormal\\_update.pdf](https://www.wcc.nrcs.usda.gov/ftpref/data/water/wcs/gis/maps/id_swepctnormal_update.pdf)

**4. There is no need to immediately implement the *Fifth Methodology Order* because the Director can administer water rights under the *Fourth Methodology Order*.**

A stay of implementation of the *Fifth Methodology Order* will not interfere with or prevent water rights administration because the Director can apply the *Fourth Methodology Order*, as has occurred since 2016, until the *Fifth Methodology Order* are properly adjudicated.

**5. The Director should be ordered to continue the after-the-fact hearing to October 16-20, 2023.**

Due process requires that the Ground Water Districts be given a hearing “at a time which allows [them] to reasonably be prepared to address the issue[s].” *State v. Doe*, 147 Idaho at 546. They are entitled to “to confront all the evidence adduced against [them], in particular that evidence with which the decisionmaker is familiar.” *Vanelli*, 667 F.2d at 780.

The Department spent eight months analyzing data and developing the *Fifth Methodology Order*. The Director then scheduled a hearing in 39 days, giving junior-priority groundwater

users five weeks to review what took the Department some eight months to develop. This is woefully inadequate, patently unjust, and unnecessary as any sense of urgency was created by the Director's decision to wait until the start of the irrigation season to spring the *Fifth Methodology Order* on water users when he could and should have held a hearing in advance. Monumental changes to the methodology must be published long before crops are in the ground so farmers, cities, and other can prepare for it.

Given the volume of the data utilized in the *Fifth Methodology Order*, the complexity of the analyses, and the fact that it was developed behind closed doors based on evidence that is not in the record of the contested case, it is impossible for the Ground Water Districts to be fairly prepared for a hearing in five or six weeks, especially with the Director blocking the Ground Water Districts from access to some of the information he considered. It is simply impossible to conduct discovery necessary to collect the data and analyses underlying the *Fifth Methodology Order*, analyze that data, conduct site inspections, prepare expert reports, formulate legal and technical positions, develop evidence, organize evidence for presentation at a contested case hearing, and otherwise prepared for a hearing in 39 days. As mentioned above, one of the Ground Water Districts' retained experts will be out of the country for three weeks leading up to the hearing, another will be out of the country during the hearing, and another is unable to attend the hearing for medical reasons.

A rushed after-the-fact hearing does not remedy the Director's violations of due process and the APA. Staying implementation of the *Fifth Methodology Order* and allowing the Director to proceed with administration under the *Fourth Methodology Order* removes the exigency that compelled the Director to schedule an immediately hearing, allowing the hearing to be continued to the Fall of 2023 to allow affected parties to adequately prepare.

Therefore, this court should instruct the Director to continue the after-the-fact hearing to October 16-20, 2023. The parties to this case are all involved in another case that is scheduled for hearing that week but is not time-sensitive and can be continued to a later date. The court has authority to require this as an "appropriate term" of the stay of agency action under Idaho Code § 67-5274, and also pursuant to the court's power to grant equitable relief when justice so requires.

**6. The Director should be ordered to disclose all documents and other information he considered in developing the *Fifth Methodology Order*.**

On May 5, 2023, the Director implemented a scheme to block the Ground Water Districts from discovering all of the information he considered in developing the *Fifth Methodology Order*. First, he issued the *Order Limiting Evidence* which (i) designates two Department staff members, Matt Anders and Jennifer Sukow, who would be permitted to testify at the hearing, and (ii) limits the topics and data they may discuss to certain technical matters. (Budge Decl., Ex. L.) In addition, the Director issued the *Order Limiting Discovery* which precludes the Ground Water Districts from asking Mr. Anders and Ms. Sukow “questions regarding the Director’s deliberative process on legal and policy considerations.” (Budge Decl., Ex. M.)

Based on these orders, at the depositions for Ms. Sukow and Matt Anders held May 8 and 10, 2023, respectively, counsel for the Department instructed them to not answer almost 50 questions on the basis that they related to the Director’s deliberative process. (Budge Decl., Ex. F). Among the questions they refused to answer are the following:

- What other documents are responsive to [Deposition Notice] Request No. 1, that show your involvement in the issuance of the *Fifth Methodology Order* outside of the technical working group documents that you’ve just described?
- Did you prepare any analysis, memos, those kinds of things that you would have shared?
- Are you aware of any documents, whether or not they were authored by you, that reflect other Department employees’ input on the Department’s decision to move from the steady state to transit modeling in the *Fifth Methodology Order* that are not uploaded to the website?
- Was there any discussion about whether or not using the transient model might impact analysis of futile call?
- Did you provide to Mat Weaver any documents relating to the *Fifth Methodology Order* or the *April 2023 As-Applied Order* that have not been uploaded to the Department’s website?
- Did you participate in any meetings involving Mat Weaver, or meetings with Mat Weaver or the Director involving the *Fifth Methodology Order* or the *April 2023 As-Applied Order*?
- How were the comments that Sophia and Greg considered on January 16th, how are those considered in the Department?

- Did you have discussions with any Department staff members about potential use of a trim line?
- Were concepts of reasonable use, futile call, or full economic development ever brought up during your work on the *Fifth Methodology Order*?

As this list shows, many of the questions that Department staff refused to answer asked for information the Director considered in developing the *Fifth Methodology Order*, not his deliberative process for evaluating information.

Since the topics that these orders allow Mr. Andrews and Ms. Sukow to discuss do not encompass all of the information the Director considered in developing the *Fifth Methodology Order*, and do not address all of the issues involved in the *Fifth Methodology Order*, the Ground Water Districts served upon the Department an I.R.C.P. 30(b)(6) deposition notice asking to depose Department personnel who can speak to information considered by the Director that goes beyond the topics and data that Mr. Anders and Ms. Sukow are permitted to address under the *Order Limiting Evidence* and the *Order Limiting Discovery*. (Budge Decl., p. 5 ¶ 15.) The Department refused to produce deponents in response to the I.R.C.P. 30(b)(6) based on the *Order Limiting Evidence* and the *Order Limiting Discovery*. *Id.*

Thus, the *Order Limiting Evidence* and the *Order Limiting Discovery* have been employed to hide not only the Director's deliberative process but to also hide information he considered in developing the *Fifth Methodology Order*. The Director has taken these actions in reliance on rule 521 of the Department's rules of procedure which authorizes the Director to "limit the type and scope of discovery." IDAPA 37.01.01.521. However, this rule must be applied in a manner that is both constitutional and consistent with the APA. *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 241 (2009); *State v. Perkins*, 135 Idaho 17, 22 (Ct. App. 2000).

Due process entitles the Ground Water Districts "to confront all the evidence adduced against [them], in particular that evidence with which the decisionmaker is familiar." *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982) (emphasis added). Likewise, the APA requires "a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary," and "the opportunity to respond and present evidence and argument on all issues involved," Idaho Code § 67-5242(3) (emphasis added). The Director has applied rule 521 in a manner that violates both due process and the APA.

The Director appears to claim that information related to his deliberative process is exempt from due process and the APA. This argument fails, first and foremost, because neither the APA nor Idaho courts have recognized such a privilege. When pressed to provide a legal basis for claiming such a privilege, counsel for the Director could provide none. Because there is none. In fact, Idaho courts have already rejected the deliberative process privilege theory espoused by the Director. *The Idaho Press Club, Inc., v. Ada County*, Case No. CV 01-19-16277 (Decision and Order, filed 12/13/2019, Budge Decl., Ex. G).

Moreover, as explained above, the Department has employed the Order Limiting Evidence and the Order Limiting Discovery to block the Ground Water Districts from considering, not just his deliberative process, but actual *information* the Director considered in developing the *Fifth Methodology Order*.

Therefore, this court should instruct the Director to (a) disclose all documents and other information he considered in developing the *Fifth Methodology Order*, (b) allow the Ground Water Districts to depose and, if needed, call as witnesses any Department staff member who contributed to development of the *Fifth Methodology Order*, and (c) refrain from instructing Department deponents or witnesses to not answer questions on the basis that the information pertains to the Director's deliberative process. In connection therewith, this court should vacate the *Order Limiting Evidence* and *Order Limiting Discovery*. The fact that such information has been kept from the Ground Water Districts is further reason to continue the after-the-fact hearing to October 16-20, 2023.

## CONCLUSION


For the foregoing reasons, the Ground Water Districts respectfully ask this court to:

1. Stay implementation the *Fifth Methodology Order* until after it is properly adjudicated, and, in until then, continue to administer water rights under the *Fourth Methodology Order*.
2. Continue the after-the-fact hearing currently scheduled for June 6-10, 2023, to October 16-20, 2023, to account for the unavailability of the Ground Water Districts' expert witnesses and to give the Ground Water Districts adequate time to prepare for the hearing.
3. Instruct the Director to disclose all documents and other information he considered in developing the *Fifth Methodology Order* or the *April 2023 As-Applied Order*.


4. Instruct the Director to allow the Ground Water Districts to depose and, if needed, call as witnesses any Department staff member who contributed to development of the *Fifth Methodology Order* or the *April 2023 As-Applied Order*.
5. Instruct counsel for the Director to refrain from instructing Department deponents or witnesses to not answer questions at depositions or the hearing on the basis that the information pertains to the Director's deliberative process.
6. Vacate the *Order Limiting Evidence* and the *Order Limiting Discovery*.

DATED this 19<sup>th</sup> day of May, 2023.


RACINE OLSON, PLLP

By:   
Thomas J. Budge  
Attorneys for IGWA

OLSEN & TAGGART PLLC

By:   
Signed for: Skyler C. Johns  
Attorneys for Bonneville-Jefferson  
Ground Water District

DYLAN ANDERSON LAW

By:   
Signed for: Dylan Anderson  
Attorney for Bingham Ground Water  
District



**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of May, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
 \_\_\_\_\_  
 Thomas J. Budge

Clerk of the Court Jerome County District Court 233 West Main Street Jerome, ID 83338	iCourt
Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
Dylan Anderson DYLAN ANDERSON LAW PO Box 35 Rexburg, Idaho 83440	<a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a>
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC 1449 E 17th St, Ste A PO Box 3005 Idaho Falls, ID 83403	<a href="mailto:johns@olsentaggart.com">johns@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>

<p>Kathleen Marion Carr  US Dept. Interior  960 Broadway Ste 400  Boise, ID 83706</p>	<p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202</p>	<p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234</p>	<p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>
<p>Sarah A Klahn  Somach Simmons &amp; Dunn  2033 11th Street, Ste 5  Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>

<p>Randall D. Fife  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Corey Skinner  IDWR-Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak  IDWR-Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p><i>COURTESY COPY TO:</i>  William A. Parsons  PARSONS SMITH &amp; STONE  P.O. Box 910  Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>

## **ATTACHMENT 5**

*Declaration of Thomas J. Budge in Support of Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application to Show Cause, filed May 19, 2023, in Ada County Case No. CV01-23-08187.*

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
tj@racineolson.com  
elisheva@racineolson.com  
Tel: (208) 232-6101  
*Attorneys for Idaho Ground Water  
Appropriators, Inc. (IGWA)*

Dylan Anderson (ISB# 9676)  
DYLAN ANDERSON LAW  
PO Box 35  
Rexburg, Idaho 83440  
Tel: (208) 684-7701  
dylan@dylanandersonlaw.com  
*Attorney for Bingham Groundwater District*

Skyler C. Johns (ISB# 11033)  
Nathan M. Olsen (ISB# 7373)  
Steven L. Taggart (ISB# 8551)  
OLSEN TAGGART PLLC  
1449 E 17th St, Ste A  
PO Box 3005  
Idaho Falls, ID 83403  
Tel: (208) 552-6442  
johns@olsentaggart.com  
nolsen@olsentaggart.com  
staggart@olsentaggart.com  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

**DISTRICT COURT OF THE STATE OF IDAHO  
FOURTH JUDICIAL DISTRICT  
ADA COUNTY**

IDAHO GROUND WATER APPROPRIATORS,  
INC., BONNEVILLE-JEFFERSON GROUND  
WATER DISTRICT, and BINGHAM GROUND  
WATER DISTRICT,

Petitioners,

vs.

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

Respondents.

IN THE MATTER OF THE DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY AND FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN FALLS  
RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER

CV01-23-08187

Case No. \_\_\_\_\_

**Declaration of Thomas J. Budge  
in Support of Ground Water Districts'  
Motion to Stay, Motion to Compel,  
Motion for Injunctive Relief, Motion  
for Expedited Decision, and Motion  
for Order to Show Cause**

IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, AND TWIN FALLS  
CANAL COMPANY

I, Thomas J. Budge, declare the following:

1. I am an attorney representing Idaho Ground Water Appropriators, Inc. (“IGWA”) in the above-captioned matter, IDWR Docket No. CM-DC-2010-001.
2. The above-captioned matter is a contested case of the Idaho Department of Water Resources (“Department”), presided over by the Director of the Department (“Director”).
3. On April 21, 2023, the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Fifth Methodology Order*”) and the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“*April 2023 As-Applied Order*”). Numerous pleadings and documents have been filed with the Department or issued by the Department since that time, which can be accessed at this link: <https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/>. The following Exhibits A-1 through A-44 attached hereto were filed by parties or issued by the Department in Docket No. CM-DC-2010-001:
  - 3.1 Attached as Exhibit A-1 is a true and correct copy of the *Fifth Methodology Order*, entered on April 21, 2023.
  - 3.2 Attached as Exhibit A-2 is a true and correct copy of the *April 2023 As-Applied Order*, entered on April 21, 2023.
  - 3.3 Attached as Exhibit A-3 is a true and correct copy of the *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery*, filed on April 21, 2023 (“*Hearing Notice*”).
  - 3.4 Attached as Exhibit A-4 is a true and correct copy of *Motion for Continuance*, filed April 28, 2023 by Coalition of Cities, Pocatello, and the City of Idaho Falls.
  - 3.5 Attached as Exhibit A-5 is a true and correct copy of *Scheduling Order and Order Authorizing Remote Appearance at Hearing*, entered May 2, 2023.
  - 3.6 Attached as Exhibit A-6 is a true and correct copy of *Motion for Reconsideration [of Denial of Continuance]*, filed May 5, 2023, by the Cities and IGWA.

3.7 Attached as Exhibit A-7 is a true and correct copy of *Declaration of Candice M. McHugh* [in support of Motion for Reconsideration of Denial of Continuance], filed May 5, 2023.

3.8 Attached as Exhibit A-8 is a true and correct copy of *Order Denying the Cities' Motion for Appointment of Independent hearing Officer and Motion for Continuance and Limiting Scope of Depositions*, entered May 5, 2023 (“*Order Limiting Discovery*”).

3.9 Attached as Exhibit A-9 is a true and correct copy of *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice*, entered May 5, 2023 (“*Order Limiting Evidence*”).

3.10 Attached as Exhibit A-10 is a true and correct copy of *Declaration of Jaxon Higgs*, filed May 5, 2023.

3.11 Attached as Exhibit A-11 is a true and correct copy of *Declaration of Sophia Sigstedt*, filed May 5, 2023.

3.12 Attached as Exhibit A-12 is a true and correct copy of *Declaration of Bryce Contor in Support of Motion for Reconsideration of Denial of Continuance*, filed May 5, 2023.

3.13 Attached as Exhibit A-13 is a true and correct copy of *Declaration of Skyler C. Johns in Support of Motion for Reconsideration of Denial of Continuance*, filed May 5, 2023.

3.14 Attached as Exhibit A-14 is a true and correct copy of *Declaration of Thane Kindred in Support of Motion for Reconsideration of Denial of Continuance*, dated May 5, 2023.

3.15 Attached as Exhibit A-15 is a true and correct copy of *Declaration of Gregory K. Sullivan, P.E. (in support of Motion for Reconsideration of Denial of Continuance)*, filed May 8, 2023.

3.16 Attached as Exhibit A-16 is a true and correct copy of *Surface Water Coalition's Opposition to Groundwater Users' Motion for Reconsideration of Order Denying Motion for Continuance*, filed May 8, 2023.

3.17 Attached as Exhibit A-17 is a true and correct copy of *I.R.C.P. 30(b)(6) Notice of Taking Deposition Duces Tecum of IDWR*, filed May 8, 2023.

3.18 Attached as Exhibit A-18 is a true and correct copy of *Groundwater Users' First Set of Request for Production to IDWR; or, Alternatively, Request for Public Records*, filed May 8, 2023.

4. Attached hereto as Exhibit B is a true and correct copy of *Summary of Recommended Technical Revisions to the 4th Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover for the Surface Water Coalition* dated December 23, 2022, by Department staff members Kara Ferguson and Matt Anders, which was provided to IGWA’s consultants via email on or about that date.

5. Attached hereto as Exhibit C is an excerpt of the transcript of a status conference held by the Director on August 5, 2022, in the above-captioned matter.

6. Attached hereto as Exhibit D is email correspondence between myself and Garrick Baxter, Deputy Attorney General representing the Department, wherein I expressed that the Department must provide due process and comply with the Idaho Administrative Procedures Act in reviewing and revising the Fourth Methodology Order.

7. Attached hereto as Exhibit E is a Department news release dated April 25, 2023, titled “IDWR Updates Its Method for Determining Injury in the Surface Water Coalition Delivery Call – With Implications for Junior Ground Water Pumpers.”

8. There is uncertainty as to whether the IGWA-SWC Settlement Agreement Mitigation Plan will protect the patrons of some ground water districts from curtailment in 2023 due to disagreements over the terms of that Agreement. This issue is currently being litigated before the Director of the Department, and has subject to a filed petition for judicial review. The outcome of this dispute could put hundreds of thousands of acres at risk of curtailment under the *April 2023 As-Applied Order*.

9. I have contacted multiple engineering firms requesting their services to evaluate changes in the system efficiencies of SWC and determine whether the SWC is employing reasonable diversion and conveyance efficiencies and conservation practices in accordance with Conjunctive Management Rules 42.01.g and 42.01.h. None of the engineering firms I’ve contacted are able to perform this analysis prior to June 6, 2023. Each firm I contacted explained that they would need at least the 2023 irrigation season to collect and analyze data in order to perform this analysis.

10. At depositions of Matt Anders held May 10, 2023, and Jennifer Sukow held May 12, 2023, Mr. Baxter instructed Mr. Anders and Ms. Sukow to not answer many of the questions that were asked, asserting that the questions called for information that is precluded by the *Order*



*Limiting Discovery*. A list of the questions that Mr. Anders and Ms. Sukow were instructed not to answer is attached hereto as Exhibit F.

11. Since the *Order Limiting Evidence* precludes Department staff members Matt Anders and Jennifer Sukow from disclosing all of the information the Director considered in developing the Fifth Methodology Order, the Ground Water Districts and the Cities jointly served upon the Department the I.R.C.P. 30(b)(6) deposition notices attached hereto as Exhibit A-17. Counsel for the Department verbally notified counsel for the Ground Water Districts and the Cities on the date of the deposition that the Department would not produce any deponents in response to the deposition notice, which was later confirmed by email, based on the *Order Limiting Evidence* and the *Order Limiting Discovery*.


12. Attached hereto as Exhibit G is a true and correct copy of the Decision and Order filed December 13, 2023, in *The Idaho Press Club, Inc., v. Ada County*, Ada County Case No. CV 01-19-16277.

13. Attached hereto as Exhibit H is a true and correct copy of a *Notice of Ground Water District Mitigation* filed with the Department by IGWA on May 5, 2023, as required by the *April 2023 April 2023 As-Applied Order*, showing that IGWA has secured sufficient storage water to mitigate the projected Demand Shortfall calculated under the *Fifth Methodology Order*.

I declare under the penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.


DATED this 19<sup>th</sup> day of May, 2023.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
Attorneys for IGWA

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> of May, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
 \_\_\_\_\_  
 Thomas J. Budge

Clerk of the Court Jerome County District Court 233 West Main Street Jerome, ID 83338	iCourt
Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
Dylan Anderson DYLAN ANDERSON LAW PO Box 35 Rexburg, Idaho 83440	<a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a>
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC 1449 E 17th St, Ste A PO Box 3005 Idaho Falls, ID 83403	<a href="mailto:johns@olsentaggart.com">johns@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>

<p>Kathleen Marion Carr  US Dept. Interior  960 Broadway Ste 400  Boise, ID 83706</p>	<p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202</p>	<p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234</p>	<p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>
<p>Sarah A Klahn  Somach Simmons &amp; Dunn  2033 11th Street, Ste 5  Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTHSPREICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>

DECLARATION OF THOMAS J. BUDGE IN SUPPORT OF GROUNDWATER USERS' MOTION TO STAY, MOTION TO COMPEL, MOTION FOR INJUNCTIVE RELIEF, MOTION FOR EXPEDITED DECISION, AND MOTION FOR ORDER TO SHOW CAUSE

<p>Corey Skinner  IDWR-Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak  IDWR-Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p><i>COURTESY COPY TO:</i>  William A. Parsons  PARSONS SMITH &amp; STONE  P.O. Box 910  Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>

# EXHIBIT A-1

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

IN THE MATTER OF THE DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS HELD  
BY AND 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

**FIFTH AMENDED FINAL ORDER  
REGARDING METHODOLOGY  
FOR DETERMINING MATERIAL  
INJURY TO REASONABLE  
IN-SEASON DEMAND AND  
REASONABLE CARRYOVER**

**BACKGROUND**

On April 19, 2016, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”). The Fourth Methodology Order: (1) explained how the Director would determine material injury to storage and natural flow water rights of members of the Surface Water Coalition (“SWC”)<sup>1</sup>; (2) established methods for quantifying material injury to SWC storage and natural flow water rights as predictive and actual demand shortfalls; (3) established methods for quantifying mitigation obligations by holders of junior priority ground water rights for shortfalls in predictive and actual SWC water demands; and (4) established a method for determining a priority date for curtailment if mitigation obligations are not satisfied.

The processes established in the Fourth Methodology Order for determining material injury are not carved in stone. Updates to the methodology order based on additional data and analyses were always anticipated:

Recognizing his ongoing duty to administer the State’s water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. As more data is gathered and analyzed, the Director will review and refine the process of predicting and evaluating material injury. The methodology will be adjusted if the data supports a change.

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<sup>1</sup> The SWC is comprised of A&B District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. Each entity holds separate senior surface natural flow water rights and has separate storage contracts for storage water space in the reservoirs.

*Fourth Methodology Order*, Conclusion of Law 17; *see also In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 645, 315 P.3d 828, 833 (2013) (“[t]he concept of a baseline is that it is adjustable . . .”). The prediction and determination of rights and obligations of the holders of senior priority and junior priority water rights respectively must: (1) apply the best available science and underlying water data; (2) consider changing climatic and cropping patterns; and (3) adhere to the most recent decisions of the courts related to water administration.

Many of the data sets the Department relied upon in the Fourth Methodology Order have been expanded and now include additional years. Furthermore, the Department now has multiple years of experience with the methodology to better understand the impact of applying steady-state modeling versus transient modeling to determine a curtailment priority date that would supply adequate water to the senior water right holders. The first version of the ESPA groundwater flow model was not calibrated at a time-scale that supported in-season transient modeling. In contrast, the current version was calibrated using monthly stress periods and half-month time steps, a refinement that facilitates in-season transient modeling for calculating the response to curtailment of groundwater use. The purpose of this *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”) is to update the Director’s methodology for determining material injury to storage and natural flow water rights either held by or committed to members of the SWC consistent with the Director’s ongoing obligation to use the best available science and information.

## FINDINGS OF FACT

### **I. Overview of the Methodology for Determining Material Injury to Water Rights by Determining Reasonable In-Season Demand and Reasonable Carryover**

1. The methodology for determining material injury to water rights by determining reasonable in-season demand (“RISD”) and reasonable carryover should be based on updated data, the best available science, analytical methods, and the Director’s professional judgment as manager of the state’s water resources. In the future, climate may vary and conditions may change; therefore, the methodology may need to be adjusted to consider a different baseline year or years (“BLY”) or changes to other components.

2. In-season demand shortfall (“IDS”) will be computed by subtracting RISD from the forecast supply (“FS”). In-season demand shortfall is computed using the following equation:

$$IDS = FS - RISD$$

3. If the FS is greater than the RISD, there is no demand shortfall. If the FS is less than the RISD, the negative difference is the demand shortfall. Initially, RISD is equal to the historic demands associated with a BLY as selected by the Director, but will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

4. Reasonable carryover shortfall will be computed by subtracting reasonable carryover from actual carryover, where reasonable carryover is defined as the difference between a baseline year demand (“BD”) and projected typical dry year supply. Reasonable carryover shortfall will be computed using the following equation:

$$\text{Reasonable Carryover Shortfall} = \text{Actual Carryover} - \text{Reasonable Carryover}$$

5. If actual carryover exceeds the reasonable carryover, there is no reasonable carryover shortfall. In contrast, if reasonable carryover exceeds the actual carryover, the negative difference is the reasonable carryover shortfall.

6. The concepts underlying the selection of the BLY, determination of in-season demand shortfall, and reasonable carryover shortfall will be discussed in detail below.

## **II. In-Season Demand Shortfall**

### **A. Considerations for the Selection of a Baseline Year**

7. A BLY is a year or average of years when irrigation demand represents conditions that can predict need in the current year of irrigation at the start of the irrigation season. The purpose of predicting need is to estimate material injury.

8. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098.<sup>2</sup> To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

9. The historic diversion volumes from the BLY and the predicted supply forecast at the start of the irrigation season are inputs to predict the initial ISD, where a demand shortfall is the difference between the BD and the FS. When the difference is a negative number, the ISD is zero. ISD increases with increases in BD, decreases in FS, or both. Assuming constant irrigation practices, crop distributions, and total irrigated acres, demand for irrigation water typically increases in years of higher temperature, higher reference evapotranspiration (“ET”), and lower precipitation. If water demand data is averaged for several years and these averages are the basis to predict demand shortfall at the start of the season, in a high-water demand year, these averages may often under-predict the demand shortfall. In a high-water demand year, under-prediction of IDS might be acceptable if the junior priority ground water right holders and the senior priority surface water right holders shared equally in the risk of water shortages. Equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury. Actual demand shortfalls to a senior surface water right holder resulting from predictions at the start of the irrigation season based on average data unreasonably shifts the risk of shortage to the senior surface water right holder. Therefore, a BLY should represent a

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<sup>2</sup> All citations in this Order are to material that was admitted during the original hearing and is part of the final agency record on appeal in Gooding County Case No. CV-2008-551, which was lodged with the Fifth Judicial District Court on February 6, 2009.

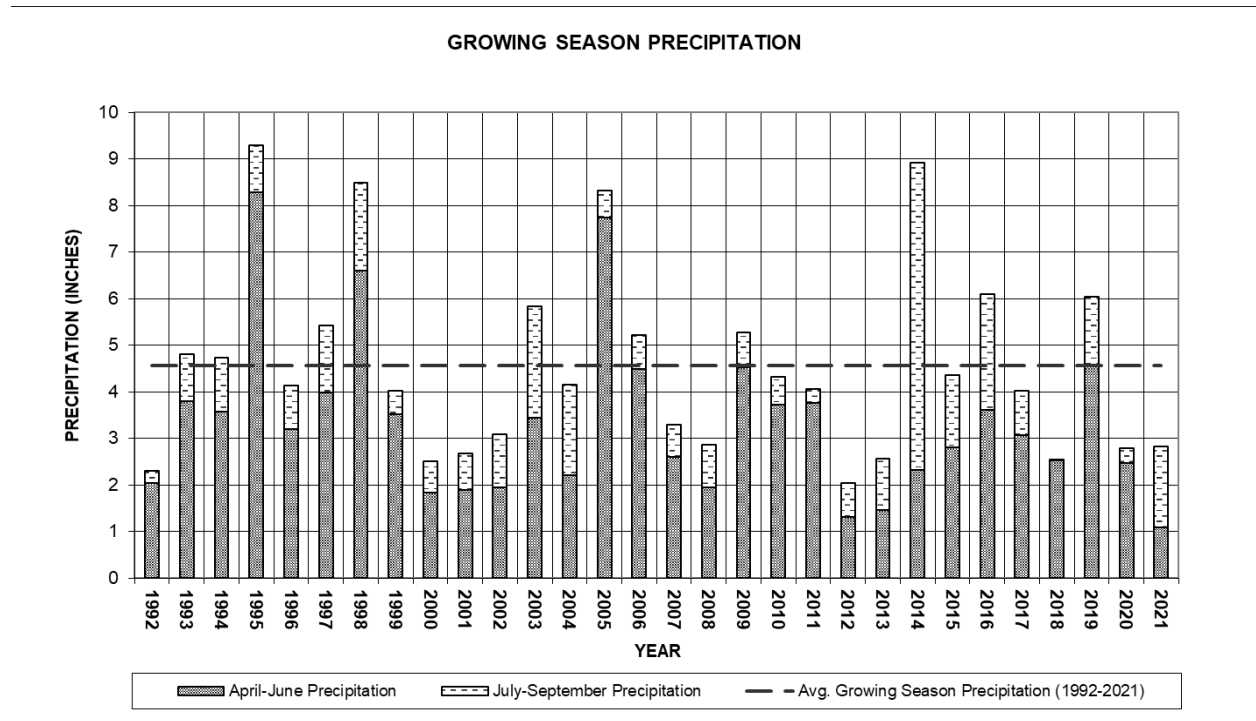


year(s) of above average diversions and should not represent a year(s) of average or below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and reference ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply should be analyzed to assure that the BLY is not a year of limited supply.

**i. Climate**

10. For the methods outlined herein, climate is represented by precipitation, reference ET, and growing degree days.

11. Precipitation. Water, in all phases, introduced to Idaho from the atmosphere is termed precipitation. During the growing season, precipitation reduces the irrigation water needed for growing crops. Ex. 3024 at 19. The figure below shows the precipitation recorded during the growing season at the National Weather Service’s Twin Falls weather station.



Growing Season Precipitation at National Weather Service’s Twin Falls Weather Station 1992–2021.<sup>3</sup>

<sup>3</sup> The Fourth Methodology Order included data for the period 1990 through 2014. This Fifth Methodology Order updates this chart with data for the period 1992 to 2021. The chart is created from NOAA National Weather Service total precipitation data obtained from the NCDC’s Climatological Data Annual Summary Idaho report series for the Twin Falls 6 E and Twin Falls Sun Valley Regional Airport weather stations.

12. Evapotranspiration. ET is a variable representing both the amount of water that transpires from vegetation and the amount of water that evaporates from the underlying soil. ET is an important factor for properly estimating RISD. In its water budget calculations, the SWC proposed the use of ET values from the USBR as part of their Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. II, Chap. 9; Ex. 8000, Vol. IV, Appdx. AU. The ground water users proposed the use of ET values from Richard G. Allen and Clarence W. Robison 2007, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, i.e. ETIdaho. Ex. 3007A at 21; Ex. 3024 at 1-58.

13. Reference ET is a standardized index that approximates the climatic demand for water vapor (i.e. ET). Both ETIdaho and AgriMet calculate and publish reference ET data. The Department will identify potential BLYs by consulting both ETIdaho reference ET and AgriMet reference ET.

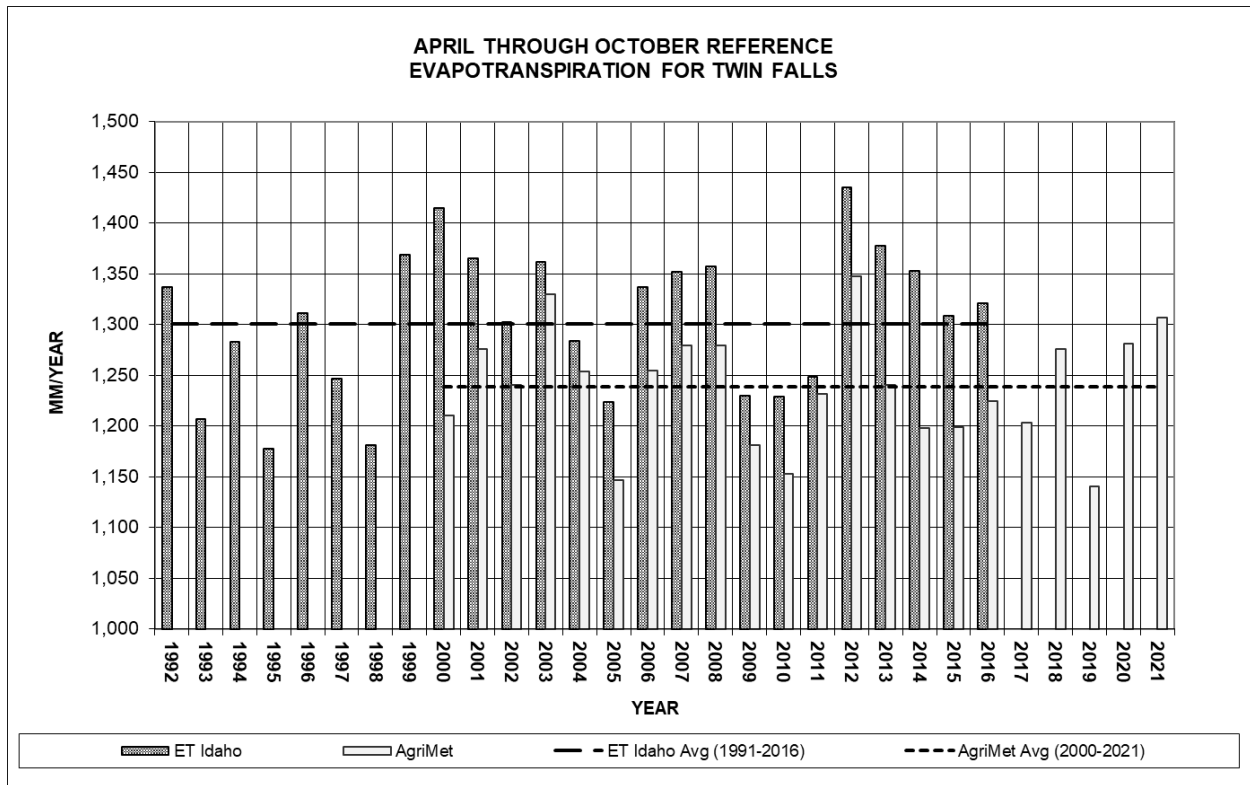
14. Neither ETIdaho reference ET data nor AgriMet reference ET data span the entire period of analysis (1992-2021). ETIdaho reference ET data are currently available from 1990 through 2016.<sup>4</sup> AgriMet reference ET data are available from 2000 to 2021.<sup>5</sup> Ideal BLY candidates are years in which reference ET exceeds average reference ET values. The individual year is compared using both AgriMet and ETIdaho reference ET data for those years in which both data are available and only AgriMet data in those years where there is no ETIdaho data.

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<sup>4</sup> The Fourth Methodology Order included ETIdaho reference ET data for the period 1991 to 2011. ETIdaho reference ET data is now available through 2016. This Fifth Methodology Order updates this chart with data for the period 1992 to 2016.

<sup>5</sup> The Fourth Methodology Order included AgriMet reference ET data for the period 2000 to 2014. . AgriMet reference ET data is now available through 2021. This Fifth Methodology Order updates this chart with data for the period 2000 to 2021.

15. Years of above average values of reference ET are appropriate BLY candidates.<sup>6</sup> Total April through October reference ET for the period of record from the Twin Falls (Kimberly) AgriMet site is shown below.

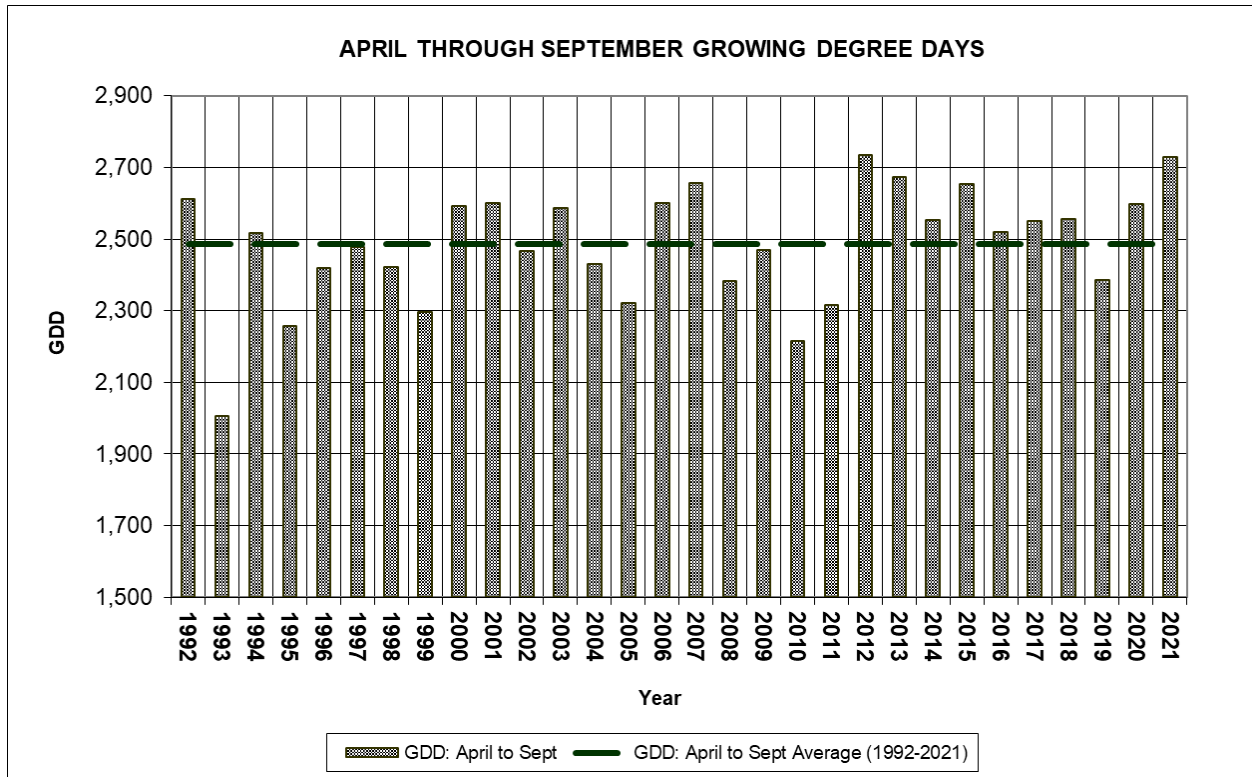


Reference ET for Twin Falls (Kimberly) with both AgriMet and ETIdaho data 1992-2021.<sup>7</sup>

<sup>6</sup> Values for reference ET between ETIdaho and AgriMet do not match because they are derived differently. The relevant information for identifying a potential BLY is the relationship between the year under consideration and the average for the data sets.

<sup>7</sup> The Fourth Methodology Order included data only through 2014. This Fifth Methodology Order updates this chart with combined data for the period 1992 to 2021, establishing a 30-year record which is the professional standard of practice for calculating climatic and hydrologic normals.

16. Growing Degree Days. Growing degree days define the length and type of growing season. Growing degree days are an arithmetic accumulation of daily mean temperature above a certain base temperature. Ex. 3024 at 10; 117-21. These growth units are a simple method of relating plant growth and development to air temperatures. Different plant species have different base temperatures below which they do not grow. At temperatures above this base, the amount of plant growth is approximately proportional to the amount of heat or temperature accumulated. A higher annual growing degree day value correlates to a higher potential rate of plant growth. The table below shows growing degree days accumulated for April through September for the Twin Falls (Kimberly) AgriMet site.

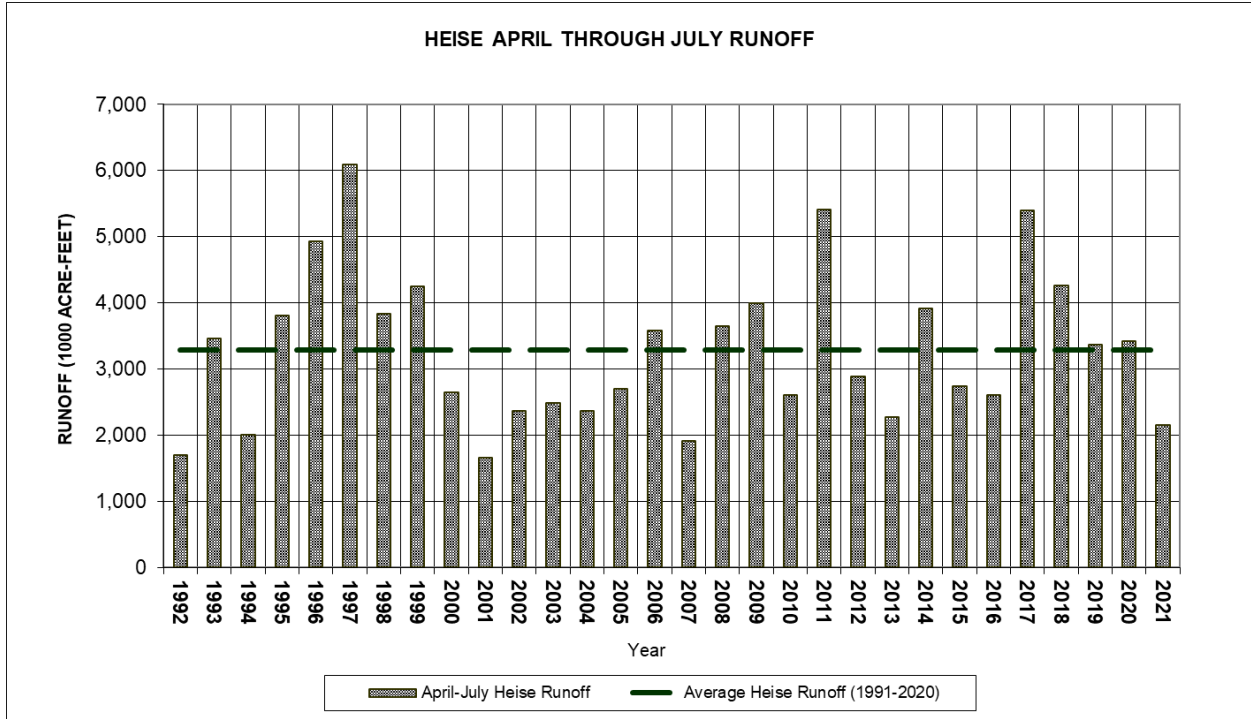


Growing Degree Days (“GDD”) for Twin Falls (Kimberly) AgriMet Site 1992-2021.<sup>8</sup>

<sup>8</sup> The Fourth Methodology Order included data only through 2014. This Fifth Methodology Order updates this chart with data for the period 1992 to 2021.

ii. Available Water Supply

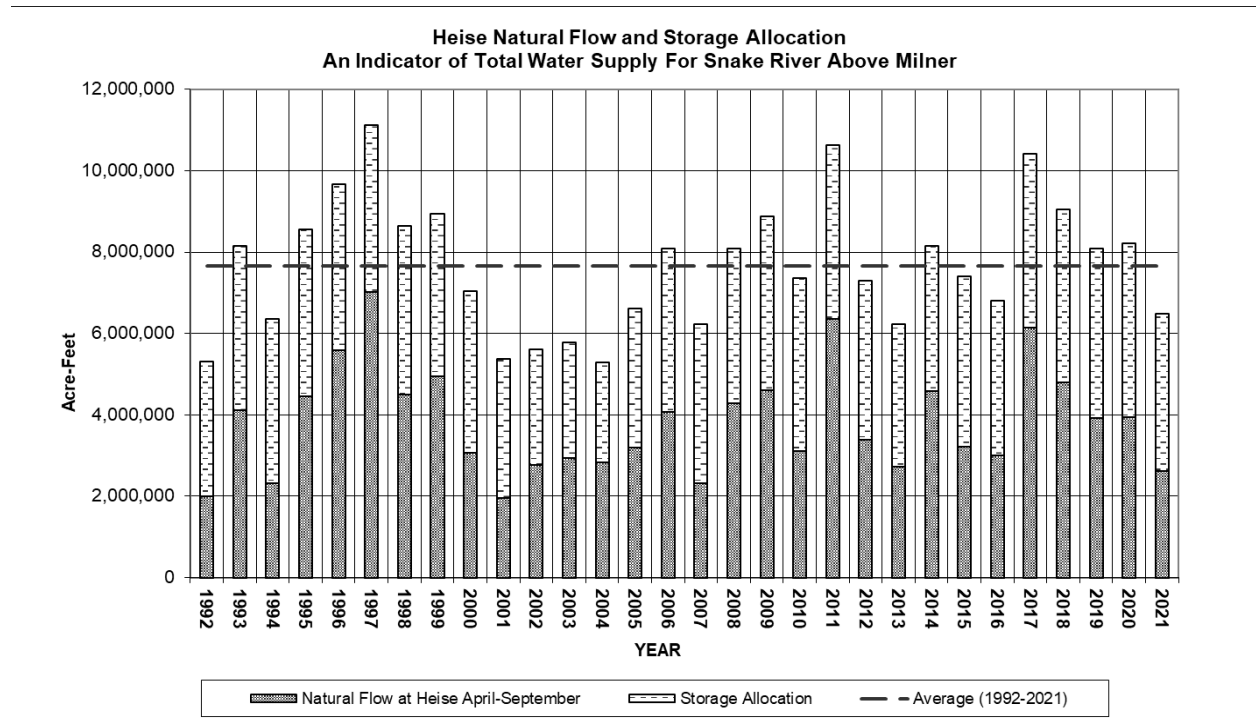
17. The April through July Heise runoff volume represents the volume of water available for diversion into storage reservoirs and is an indicator of natural flow supplies. The graph below shows actual unregulated flow volumes at Heise for 1992 through 2021. The 1992 to 2021 average (3,284,000 acre-feet) is displayed by the dashed line.



April through July Unregulated Flow Volume at Heise, 1992-2021.<sup>9</sup>

<sup>9</sup> The Fourth Methodology Order included data only through 2014. This Fifth Methodology Order updates this chart with data for the period 1992 to 2021.

18. The sum of the Heise natural flow and the reservoir storage allocations is an indicator of the total supply of the Snake River. The sum of the Heise natural flow and reservoir storage allocations for each year from 1992-2021 is represented in the graph below.



The sum of the Heise natural flow and the storage allocation for the Snake River above Milner 1992-2021.<sup>10</sup>

### iii. Irrigation Practices

19. A baseline year (“BLY”) must be recent enough to represent current irrigation practices. R. Vol. 37 at 7099-7100. Current conditions should be represented by: (a) the net area of the irrigated crops, (b) farm application methods (flood/furrow or sprinkler irrigation), and (c) the conveyance system from the river to the farm. The type of sprinkler systems should be similar between the BLY and the current year.

20. Sprinkler systems are currently the predominant application system. *Id.* at 7101-02. To ensure that current irrigation practices are captured, selection of a BLY for the SWC should be limited to years subsequent to 1999. *Id.* at 7096; 7099-7100.

<sup>10</sup> The Fourth Methodology Order included data for the period 1990 to 2014. This Fifth Methodology Order updates this chart with data for the period 1992 to 2021.

21. Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acreage. R. Vol. 28, 5205-15; R. Vol. 37 at 7100. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated. R. Vol. 37 at 7100.

22. The following table summarizes: a) SWC entities; b) shapefile source of reported irrigated acres; c) year shapefile created; d) decreed irrigated acres; (e) number of reported acres in shapefile; and f) irrigated acres used in this methodology order for the 2023 irrigation season. The number of irrigated acres used in this methodology order is the number of reported acres unless that number is larger than the decreed irrigated acres, and if so, then the decreed acres were used. This table will be updated annually based on the reported number of irrigated acres by each SWC entity in Step 1 of the Methodology Order.

Entity	Shapefile Source	Shapefile Year	Partial Decree Acres	Shapefile Acres	Acres Used in Methodology
A&B	PPU <sup>1</sup>	2010	15,924	21,972	15,924
AFRD2	PPU	2010	62,361	69,077	62,361
BID	SWC	2013	47,643	46,035	46,035
Milner	PPU	2010	13,335	13,264	13,264
Minidoka	SWC	2023	75,093	77,176	75,093
NSCC	PPU	2010	154,067	224,463	154,067
TFCC	SWC	2013	196,162	194,732	194,732

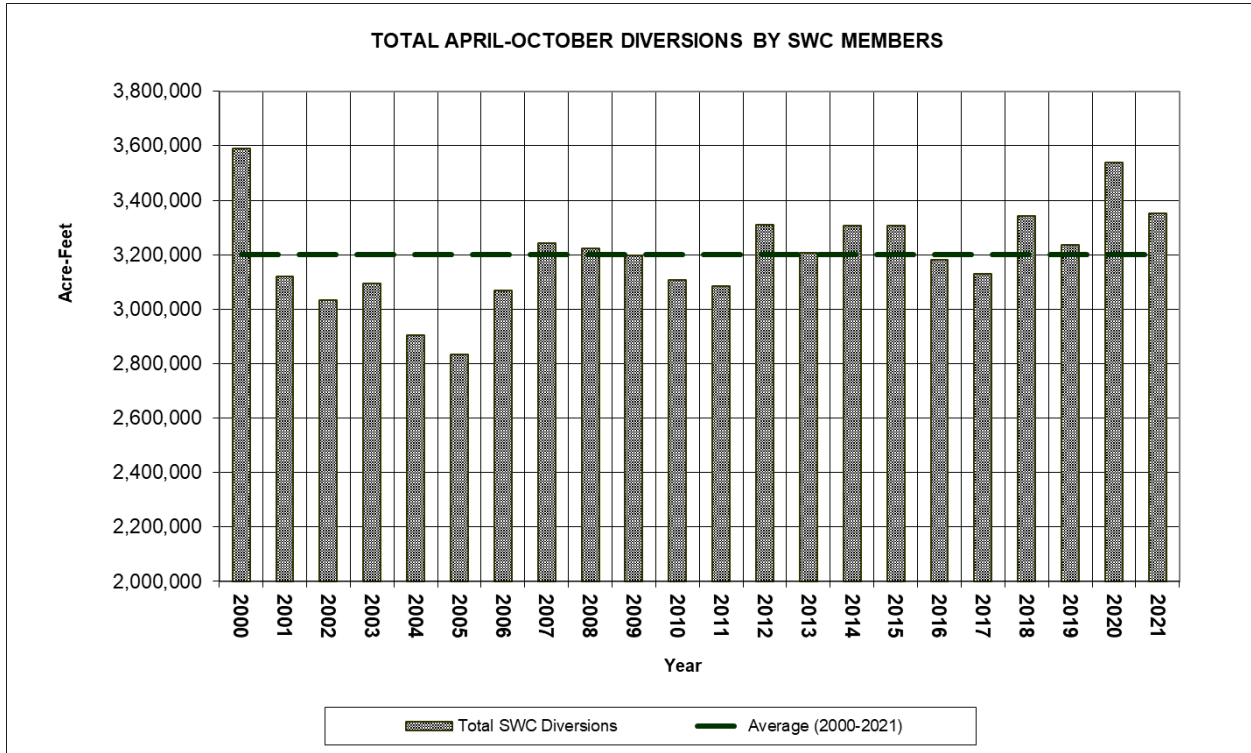
<sup>1</sup> IDWR permissible place of use.

Acres used in the methodology.

23. There are lands within the service areas of SWC entities that are irrigated with supplemental groundwater. Exhibit 3007. Supplemental groundwater is a factor the Director can consider in the context of a delivery call. *Memorandum Decision and Order on Petitions for Judicial Review* (“Methodology Remand Order”) in Gooding County Consolidated Case No. CV-2010-382, at 18-19. At this time, the information submitted or available to the Department is insufficient to determine the extent of supplemental irrigation on lands within the service areas of SWC entities.

**iv. Diversions**

24. The following figure summarizes the annual measured diversions by the combined SWC members from 2000-2021. Diversions for a baseline year should exceed the average diversions.



Total April-October Diversions by SWC Members.<sup>11</sup>

**B. Selection of the Initial Baseline Year**

25. When selecting the BLY the Director must evaluate recent data to determine whether the BLY section criteria are satisfied.

26. In the Fourth Methodology Order, the Department considered the years 2000-2014 when deciding the BLY. Ultimately, the Department chose an average of the years 2006, 2008, and 2012 for the BLY (“BLY 06/08/12”). For this Fifth Methodology Order, the years 2000-2021 were considered for the BLY selection. With the addition of new data from 2014 to 2021, the total diversions by the SWC for the previous BLY 06/08/12 are 100% of the average SWC diversions for the years 2000-2021. As a result of adding the new data, BLY 06/08/12 no longer satisfies the presumption criteria that total diversions in the BLY should exceed the average annual diversions. Mem. Decision & Order on Pets. for Jud. Rev., at 34, *IGWA v. Idaho Dep’t of Water Res.*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho Sept. 26, 2014).

<sup>11</sup> The Fourth Methodology Order did not include this chart. It was added to demonstrate that the baseline year is a year of above average total diversions.



27. Years 2018 and 2020 satisfy all the BLY selection criteria discussed above. Each of these years had (1) total diversions above the average diversions for the years 2000-2021, (2) total growing degree days above the average for the years 1992-2021, and (3) reference ET values above the average for the years 1992-2021. The years 2018 and 2020 also had total precipitation values below the average precipitation for the years 1992-2021 and were not water supply limited years. The Department has reviewed the SWC’s diversion data for the 2020 irrigation season. The Department finds that 2020 ranks as the second-highest year of total diversions for the SWC and is more than one standard deviation above the average for the years 2000-2021. In comparison, 2018 ranks as the fourth-highest year of total diversions for the SWC and is less than one standard deviation above the average for the years 2000-2021. Choosing a BLY with above average diversions but within one standard deviation, ensures that a conservative year is selected that protects the senior while excluding extreme years from consideration. The Director concludes that total diversions for 2018 adequately protect senior water rights when predicting the demand shortfall at the start of the irrigation season and selects 2018 as the BLY.

Entity	2000-2021 Avg. Total Diversions (Acre-Feet)	06/08/12 Avg. Total Diversions (Acre-Feet)	06/08/12 % of Avg.	2018 Total Diversions (Acre-Feet)	2018 % of Avg.
A&B	59,474	59,993	101%	64,192	108%
AFRD2	427,978	427,672	100%	453,890	106%
BID	247,049	251,531	102%	262,211	106%
Milner	53,343	47,135	88%	58,417	110%
Minidoka	354,181	369,492	104%	354,851	100%
NSCC	996,267	978,888	98%	1,026,661	103%
TFCC	1,062,098	1,060,011	100%	1,121,717	106%
Total	3,200,389	3,194,722	100%	3,341,939	104%

Average SWC Diversions (acre-feet) for 2000-2021, 2006/2008/2012 BLY, and 2018 BLY.

### C. Calculation of Reasonable In-Season Demand

28. Reasonable in-season demand (RISD) is the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity. Given that climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences. As stated by the Hearing Officer, “The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.” R. Vol. 37 at 7098.

#### i. Project Efficiency

29. Project efficiency (“E<sub>p</sub>”) is the ratio of total volumetric crop water needs within a SWC entity’s boundary and the total volume of water diverted by that entity to satisfy its crop needs. It is the same concept as system efficiency, which was presented at hearing. Ex. 3007 at FIFTH AMENDED FINAL ORDER REGARDING METHODOLOGY FOR DETERMINING MATERIAL INJURY TO REASONABLE IN-SEASON DEMAND AND REASONABLE CARRYOVER—Page 12

28-29. Implicit in this relationship are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows) for which data is not obtainable by the Department. By utilizing project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components for which data is not obtainable can be captured and described without quantifying each of the components. Project efficiency is derived by dividing crop water need by total diversions as depicted in the algorithm below:

$$E_p = \frac{CWN}{Q_D}$$

Where:

$E_p$  = project efficiency,

CWN = crop water need, and

$Q_D$  = irrigation entity diversion of water specifically put to beneficial use for the growing of crops within the irrigation entity.

30. Monthly SWC entity diversions (“ $Q_D$ ”) will be obtained from Water District 01’s diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity. Examples of adjustments include the removal of diversions associated with in-season recharge and diversion of irrigation water on the behalf of another irrigation entity. Adjustments are unique to each SWC member and each irrigation season and will be evaluated each year. Any natural flow or storage water deliveries to entities other than the SWC for purposes unrelated to the original right will not be included as a part of the SWC water supply or carryover volume. Water that is purchased or leased by a SWC member may become part of the shortfall obligation to the extent that member has been found to have been materially injured. *See e.g.* R. Vol. 38 at 7201, n. 11 (Eighth Supplemental Order). Conversely, water supplied to private leases or to the rental pool by a SWC member will be included as a part of the SWC supply for that member because non-inclusion would unjustifiably increase the shortfall obligation.

31. Monthly project efficiencies will be computed for the entire irrigation season. Project efficiency varies from month-to-month during the season and will typically be lower during the beginning and ending of the season. Monthly project efficiencies will be divided into actual monthly crop water need (“CWN”) values to determine RISD during the year of evaluation.

32. In the Fourth Methodology Order, project efficiencies for each SWC member were initially averaged over an eight-year period (2007-2014) and project efficiency greater or less than two standard deviations were excluded from the calculation. By including only those values within two standard deviations, extreme values from the data set are removed. Under the Fourth Methodology Order, an updated 8-year rolling average of project efficiencies was calculated each year the methodology was implemented. The Director now finds that averaging over a rolling period of 15 years results in project efficiency values that are more consistent from year-to-year, reducing the impact of short-term trends. The Director finds that it is still

appropriate to remove project efficiencies greater or less than two standard deviations from the average.

The following is a table of efficiency values averaged over the most recent fifteen-year period of record.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Monthly Avg.
4	0.98	0.33	0.45	0.87	0.43	0.24	0.31	0.51
5	0.47	0.22	0.32	0.39	0.35	0.24	0.30	0.33
6	0.66	0.40	0.49	0.60	0.56	0.41	0.51	0.52
7	0.74	0.44	0.52	0.67	0.63	0.48	0.58	0.58
8	0.58	0.41	0.42	0.55	0.52	0.43	0.46	0.48
9	0.45	0.27	0.32	0.45	0.38	0.32	0.27	0.35
10	0.18	0.16	0.09	0.14	0.11	0.06	0.04	0.11
Season Avg.	0.58	0.32	0.37	0.52	0.43	0.31	0.35	

SWC Member Average Monthly Project Efficiencies from 2007-2021.<sup>12</sup>

## ii. Crop Water Need

33. CWN is the volume of irrigation water required for crop growth within a SWC entity boundary, such that crop growth is not limited by water availability. CWN only applies to crops irrigated with surface water. CWN is the difference between the fully realizable consumptive use associated with crop growth, or ET, and effective precipitation ( $W_e$ ) and is synonymous with the terms irrigation water requirement and precipitation deficit. Ex. 3024. For the purposes of the methodology, CWN is calculated as set forth below:

$$CWN = \sum_{i=1}^n (ET_i - W_e) A_i$$

Where,

CWN = crop water need

$ET_i$  = consumptive use of specific crop type,

$W_e$  = effective precipitation,

$A_i$  = total irrigated area of specific crop type,

$i$  = index variable representing the different specific crop types grown within the irrigation entity, and

$n$  = upper bound of summation equal to the total number of different specific crop types grown within the irrigation entity.

<sup>12</sup> In the Fourth Methodology Order, this table summarized average  $E_p$  data for the period 2007 to 2014. This Fifth Methodology Order updates this table with average  $E_p$  data for the period 2007 to 2021.

### **iii. Evapotranspiration**

34. ET can be estimated with theoretically based equations that calculate ET for an individual crop, necessitating crop distribution maps for each year. Ex. 3007A at 21, Figure 3, Tables 6-12; Ex. 3024 at 1-58; Ex. 8000, Vol. II at Chapter 9; Ex. 8000, Vol. IV, Appdx. AU.

35. At hearing, values of ET were estimated by the SWC from AgriMet, Ex. 8000, Vol. IV, Appdx. AU-1, and by the ground water users from ETIdaho, Ex. 3007A at 21; Ex. 3024 at 1-58. At this time, the Director finds that the use of AgriMet is more appropriate for determining ET than ETIdaho because AgriMet is available to all parties in real-time without the need for advanced programming. Accordingly, the methodology will rely on AgriMet derived ET values in the calculations of project efficiency, CWN, and RISD. In the future, with the development of additional enhancements, ETIdaho may become a more appropriate analytical tool for determining ET.<sup>13</sup>

36. CWN is derived by multiplying crop specific ET values, adjusted for estimated effective precipitation, by the total irrigated area of individual crop types, and summing for all crop types. The areas for individual crop types will be derived from published crop distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS"). Ex. 1005 at 1. NASS annually creates a crop-specific land cover digital dataset from satellite imagery and field checks. The dataset is called the Cropland Data Layer ("CDL"). Each year, the Department will calculate acreage by crop type for each SWC entity using NASS CDL data. In the future, the NASS data may not be the most accurate source of data. The Department prefers to rely on data from the current season if and when it becomes usable.

37. AgriMet ET and precipitation data are gathered at the Rupert and Twin Falls (Kimberly) stations. Both stations are in the vicinity of the SWC entities. A&B Irrigation District ("A&B"), Burley Irrigation District ("BID"), and Minidoka Irrigation District ("Minidoka") are nearest to the Rupert AgriMet station. ET data gathered at the Rupert station reasonably represents the climate conditions for A&B, BID, and Minidoka. American Falls Reservoir District No. 2 ("AFRD2"), Milner Irrigation District ("Milner"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC") are nearest to the Twin Falls (Kimberly) AgriMet station. ET data gathered at the Twin Falls (Kimberly) station reasonably represents the climate conditions for AFRD2, Milner, NSCC, and TFCC. Ex. 8000, Vol. IV at AU-2, AU-8.

### **iv. Effective Precipitation**

38. Effective precipitation (" $W_e$ ") is the amount of total precipitation held in the soil horizon available for crop root uptake. Effective precipitation will be estimated from total precipitation ( $W$ ) employing the methodology presented in the USDA Technical Bulletin 1275. Ex. 8000, Vol. IV, Appdx. AU3, AU8. Total precipitation ( $W$ ) data is published by the USBR as

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<sup>13</sup> IDWR held a series of meetings in the winter of 2022-23 with the parties' technical consultants to discuss potential updates to the methodology order. During the meetings, IDWR discussed alternative methods of determining ET values, such as METRIC. However, the Director finds that the methods considered are not yet ready for incorporation into the administration of the SWC Delivery Call and will continue to rely on AgriMet ET data.

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part of its Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet.<sup>14</sup> Ex. 8000, Vol. IV, Appdx. AU3.  $W_e$  values derived from AgriMet based precipitation values are independent of crop type.

39. AgriMet precipitation ( $W$ ) values are easy to understand and regularly used by the farming, water supply, and water management communities. Accordingly, the methodology will rely on AgriMet derived  $W$  values in the calculations of CWN and RISD.

40. As with ET data, AgriMet precipitation data are available from the Rupert and Twin Falls (Kimberly) stations. AgriMet data from the Rupert station reasonably represents climate conditions for A&B, BID, and Minidoka. AgriMet data from Twin Falls (Kimberly) reasonably represents climate conditions for AFRD2, Milner, NSCC, and TFCC. Ex. 8000, Vol. IV at AU-2, AU-8.

**v. Summary of Reasonable In-Season Demand Calculation**

41. At the start of the irrigation season, RISD is equal to the BD, or total season adjusted diversions for the BLY. When calculated in-season, RISD is calculated below.

$$RISD_{\text{milestone}_x} = \sum_{j=1}^m \left( \frac{CWN_j}{E_{p,j}} \right) + \sum_{j=m+1}^7 BD_j$$

Where:

- RISD<sub>milestone\_x</sub> = reasonable in season demand at specified evaluation milestones during the irrigation season,
- CWN = crop water need for month  $j$ ,
- $E_p$  = baseline project efficiency for month  $j$ ,
- BD = baseline demand for month  $j$ ,
- $j$  = index variable, and
- $m$  = upper bound of summation, equal to the month calculation occurs, where April = 1, May =2, ... October = 7.

42. April RISD Adjustment: In April, the calculated RISD, which is the quotient of CWN and  $E_p$ , can underestimate actual canal operation diversions. Under-estimation occurs when the actual CWN value for April is much smaller than the diversion of water into the canal system necessary to effectively operate the irrigation delivery system. Often, CWN in April is small due to precipitation, cool temperatures, and/or the immaturity of the crop. The diversion rate at the head gate necessary to push water into all laterals and field head gates throughout the delivery system often dwarfs the water necessary to strictly satisfy CWN. In addition, it is difficult for canal systems to be dynamically operated to match the frequent precipitation events in April, which also contributes to a diversion of water at the canal head gate that exceeds the diversion of water necessary to strictly satisfy CWN. To account for the conditions affecting the

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<sup>14</sup> IDWR held a series of meetings in the winter of 2022-23 with the parties' technical consultants to discuss potential updates to the methodology order. During the meeting, IDWR discussed alternative methods to determine  $W$  values, such as PRISM. However, the Director finds that the methods considered are not yet ready for incorporation into the administration of the SWC Delivery Call and will continue to rely on AgriMet precipitation data.

usability of the calculated RISD value for April, the values may be adjusted for each individual irrigation delivery entity in the SWC as described below.

43. When the calculation of CWN/Ep results in a value for the month of April less than the average April diversion volume over a record of representative years in the recent past, the April RISD is set equal to the average April diversion volume. When the calculation of CWN/Ep results in a value greater than the average April diversion volume, the April RISD is equal to the calculated CWN/Ep volume.

44. October RISD Adjustment: In October, the calculated RISD, which is equal to the CWN divided by Ep, can both under-estimate and over-estimate actual canal operation diversions. The RISD may be underestimated when the actual CWN value for October is much smaller than the diversion of water into the canal system necessary to effectively operate the irrigation delivery system. The diversion rate at the head gate necessary to push water into all laterals and field head gates throughout the delivery system often dwarfs the water necessary to strictly satisfy CWN. In addition, it is difficult for canal systems to be dynamically operated to match the frequent precipitation events in October, which also contributes to a diversion of water at the canal head gate that exceeds the diversion of water necessary to strictly satisfy CWN. Furthermore, RISD may be underestimated in October when a farmer diverts water at the field head gate for farming practices other than strictly satisfying CWN. Examples of water diversion practices at the field head gate that sometimes occur in October include diverting water for soil salt leaching, diverting water to build up the soil moisture profile for the following irrigation season, and/or diverting water to wet-up bare soil to prevent wind-driven topsoil erosion.

45. Unlike the month of April, RISD can be over-estimated in October. RISD may be over-estimated in years when actual CWN in October is much greater than typical CWN over a record of representative years in the recent past due to low precipitation and/or warm temperatures. To account for the conditions affecting the usability of the RISD value calculated for October, the values may be adjusted for each individual irrigation delivery entity in the SWC as described below.

46. When the calculation of CWN/Ep results in a value for the month of October greater than the maximum October diversion volume from a record of recent representative years, or less than the minimum October diversion volume from the same record of recent representative years, the October RISD is set equal to the average October diversion volume over the same period of recent representative years. When the calculation of CWN/Ep results in a value between the maximum and minimum October diversion volumes from a record of recent representative years, the October RISD is equal to the calculated CWN/Ep volume.

#### **D. Adjustment of Forecast Supply**

47. As stated by the Hearing Officer, “There must be adjustments as conditions develop if any baseline supply concept is to be used.” R. Vol. 37 at 7093. A prediction of the upcoming season’s supply and demand is calculated at the beginning of the irrigation season and

adjusted at specified milestones during the irrigation season to address changes in water supply and demand conditions in response to actual climatic and water supply conditions.

**i. April Forecast Supply**

48. The FS is comprised of natural flow and stored water.

49. Typically, within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. The joint forecast (“Joint Forecast”) issued by the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers (“USACE”) for the period April 1 through July 31 “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” R. Vol. 8 at 1379, ¶ 98. Given current forecasting techniques, the earliest the Director can predict material injury “with reasonable certainty” is soon after the Joint Forecast is issued. R. Vol. 2 at 226. With data from 1990 through the irrigation year previous to the current year, a regression equation will be developed for each SWC member.<sup>15</sup> The regression equations for A&B and Milner will be developed by comparing the actual Heise natural flow to the natural flow diverted. *See e.g.* R. Vol. 8 at 1416-22. For AFRD2, BID, Minidoka, NSCC, and TFCC, multi-linear regression equations will be developed by comparing the actual Snake River near Heise natural flow and the flows at Box Canyon to the natural flow diverted. The regression equations will be used to predict the natural flow diverted for the upcoming irrigation season. *Id.* at 1380. The actual natural flow volume predicted in the Director’s April FS for each SWC entity will be one standard error below the regression line, which underestimates the available supply. *Id.*; Tr. p. 65, lns. 6-25; p. 66, lns. 1-2. The purpose of the shift to one standard error below the regression line is to ensure senior water right holders do not bear the risk of under-prediction of supply. The forecasting techniques will be revised based on updated data and the forecasting techniques may be revised when improvements to the forecasting tools occur.

50. The storage allocation for each member of the SWC will be estimated by the Department following issuance of the Joint Forecast. The Department will forecast reservoir fill and storage allocation consistent with the methods established in the *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007*. R. Vol. 23 at 4294-97 as explained below. The Department will evaluate the current reservoir conditions and the current water supply outlook to determine a historical analogous year or years to predict reservoir fill. The Department may identify and use a combination of different analogous years to predict individual reservoir fill. Input variables for determining the individual storage water allocation for each SWC member are: (a) the analogous year’s or years’ total reservoir fill volume; (b) an estimated evaporation volume; and (c) the previous year’s carryover volume. The FS (the combination of the forecast of natural flow supply and the storage allocation) for each SWC member will be determined by the Director shortly after the date of the Joint Forecast.

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<sup>15</sup> IDWR held a series of meetings in the winter of 2022-23 with the parties' technical consultants to discuss potential updates to the methodology order. During the meetings, IDWR discussed updating the regression models used to forecast the SWC’s water supplies in April. However, the Director finds that the current models still adequately forecast water supplies in April and will continue to rely on the existing regression models.

51. Any time prior to the Director's final determination of the April FS, if 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 shortfall determination.

**ii. July Forecast Supply**

52. Approximately halfway through the irrigation season, the FS will be adjusted. When adjusting the natural flow component of the FS, the Department's water rights accounting program will compute the year-to-date natural flow diverted by each member of the SWC. The natural flow diversion for the remainder of the irrigation season will be estimated based on the regression analyses.

53. The natural flow supplies for each SWC member are comprised of natural flow in the Snake River passing the near Blackfoot gage and gains that occur in the Snake River between the Blackfoot to Milner reach. Many different predictor variables were considered when developing the models used to predict the natural flow supplies for the remainder of the season, including those variables used in the April FS.<sup>16</sup> A step-wise statistical analysis was employed to help select the variables for each model. The following variables were selected to forecast water supplies halfway through the irrigation season: natural flow in the Snake River near Heise as reported by the U.S. Bureau of Reclamation; snow water equivalent (SWE) data at the Two Ocean Plateau SNOTEL site; Spring Creek discharge; and groundwater levels near American Falls Reservoir. The model predictors were optimized for each SWC member and are summarized in the sections below.

54. Linear regression equations for AFRD2, A&B, and Milner, will be developed by comparing the July 1 snow water equivalent (inches) at the Two Ocean Plateau SNOTEL site to the natural flow diversions. The regression equations for AFRD2, A&B, and Milner will be applied only in those years when the snow water equivalent at the Two Ocean Plateau SNOTEL site is greater than zero (0). Years when the snow water equivalent equals zero, the total natural flow prediction for the period July 1 to October 31 will be zero (0) AF.

55. Multiple linear regression equations for BID, Minidoka, and NSCC will be developed to predict natural flow diversions employing the following predictor variables: (1) Snake River near Heise natural flow (April – June), (2) March depth to water at well 05S 31E 27ABA1 and (3) the snow water equivalent at the Two Ocean Plateau SNOTEL site on June 15.

56. The multiple linear regression model for TFCC will be based on the following predictor variables: (1) Snake River near Heise natural flow (April – June), (2) Spring Creek total discharge (January – May) and (3) the snow water equivalent at the Two Ocean Plateau SNOTEL site on June 15.

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<sup>16</sup> IDWR held a series of meetings in the winter of 2022-23 with the parties' technical consultants to discuss potential updates to the methodology order. IDWR discussed updating the regression models used to forecast the SWC's water supplies in July. However, the Director finds that the current models still adequately forecast water supplies in July and will continue to rely on the existing regression models.

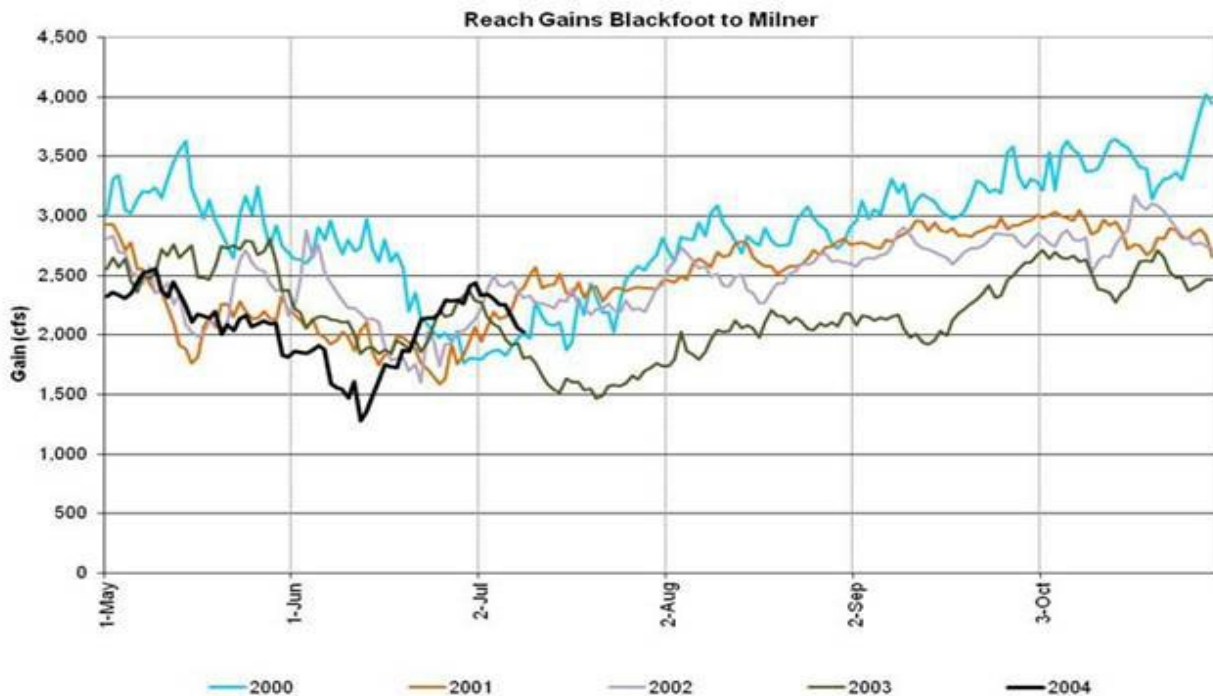


57. When adjusting the storage component of the FS, the Department must consider whether stored water has been allocated. In normal to dry years, the reservoirs will typically have filled to their peak capacity for the season and the storage water will have been allocated. If the BOR and Water District 01 have allocated stored water to spaceholders, the Department will use the actual preliminary storage allocations to the SWC. If the BOR and Water District 01 have not yet allocated stored water to spaceholders, the Department will predict the storage allocations based on the storage allocations from an analogous year or years.

**iii. Time of Need**

58. The FS will again be adjusted shortly before the Time of Need. The Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover. The Time of Need will not be earlier than the Day of Allocation.

59. When adjusting the natural flow component of the FS, the Department’s water rights accounting program will compute the natural flow diverted by each member of the SWC as of the new forecast date. The natural flow diversion for the remainder of the irrigation season will be estimated based on a historical year with similar reach gains in the Blackfoot to Milner reach. The following is an example of estimating reach gains from an analysis of historical years. Reach gains for the years 2000 – 2003 and a portion of year 2004 are graphed below. Considering 2004 as an example of a current year and comparing 2004 to the hydrographs for 2000 – 2003, year 2003 has similar reach gains and is appropriately conservative. Therefore, the natural flow diverted in 2003 would be used to predict the natural flow diversions for the remainder of the 2004 season.



Example Reach Gain Analysis for 2004.

60. When adjusting the storage component of the FS, the Department will use the actual preliminary storage allocations to the SWC.

61. The adjusted FS is the sum of the year-to-date natural flow diversions, the predicted natural flow diversions for the remainder of the season, and the storage allocation.

#### **E. Calculation of In-Season Demand Shortfall**

62. The equation below determines the amount of predicted demand shortfall during the irrigation season.

$$IDS = FS - RISD$$

Where:

IDS = demand shortfall for specified evaluation points throughout the season,

FS = forecasted supply adjusted for specified evaluation point during the season, and

RISD = reasonable in-season demand from above.

63. The amount calculated represents the volume that junior ground water users with approved mitigation plans for delivery of water will be required to have available for delivery to members of the SWC found to be materially injured by the Director to avoid curtailment. The amounts will be calculated in April, at the middle of the season, and at the Time of Need.

### **III. Methodology for Determining Material Injury to Reasonable Carryover**

64. Conjunctive Management (“CM”) Rule 42.01.g states the following guidance for determining reasonable carryover: “In determining a reasonable amount of carry-over storage water, the Director shall consider average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.” Carryover shortfall will be determined following the completion of the irrigation season.

#### **A. Projected Water Supply**

65. CM Rule 42.01.g states that the Director “shall consider . . . the projected water supply for the system.” Because it is not possible to adequately forecast the irrigation supply or demand for the following irrigation season at the end of the current irrigation season, the Director must estimate the carryover water needed in future dry years when demand exceeds supply, creating a need for carryover storage. The Director projected the water supply using typical dry years and subtracted it from a projected future demand to determine a projected carryover need.

66. The Heise natural flow is a predictive indicator of total water supply. For the years 2002 and 2004, the Heise natural flows were well below the long term average (1992-2021), but were not the lowest years on record.<sup>17</sup> The average of the 2002 and 2004 supply will be the projected supply, representing a typical dry year. The 2002 and 2004 supply is computed as follows:

- 2002 supply = natural flow diverted + new storage fill
- 2004 supply = natural flow diverted + new storage fill
- Projected supply = average of 2002 supply and 2004 supply

Carryover from previous years is not included in the 2002 and 2004 new storage fill because it was not new water supplied during the 2002 or 2004 irrigation year.

	2002 Natural Flow Diverted	2002 New Storage Fill	2002 Total Supply	2004 Natural Flow Diverted	2004 New Storage Fill	2004 Total Supply	Projected Supply (Average 02/04)
-----Acre-Feet-----							
A&B	853	45,603	46,456	1	36,535	36,536	41,496
AFRD2	25,749	381,451	407,200	4,562	309,698	314,260	360,730
BID	89,886	174,454	264,340	102,706	152,387	255,093	259,716
Milner	5,058	43,430	48,488	1,027	35,175	36,202	42,345
Minidoka	143,937	256,602	400,539	141,460	229,574	371,034	385,787
NSCC	363,960	667,799	1,031,759	315,942	479,068	795,010	913,385
TFCC	851,970	186,233	1,038,203	881,345	150,218	1,031,563	1,034,883

SWC water supplies 2002, 2004, and 2002/2004 average (acre-feet).

67. Similar to projecting supply, the Director must also project demand. Because it is not possible to adequately forecast the irrigation demand for the following irrigation season at the end of the current irrigation season, the Director must project demand. R. Vol. 37 at 7109. The 2018 BLY will be the projected demand.

<sup>17</sup> The Fourth Methodology Order included data for the period 1991 to 2014. This Fifth Methodology Order updates this chart with data for the period 1992 to 2021.

68. The maximum projected carryover need is defined as the difference between a BLY demand and projected typical dry year supply. The following equation computes the maximum projected carryover need:

$$\text{Maximum Projected Carryover Need} = \text{Projected Demand (2018 BLY)} - \text{Projected Supply (Average 02/04)}$$

	Projected Demand (2018 BLY)	Projected Supply (average 02/04)	Maximum Projected Carryover Need
-----Acre-Feet-----			
A&B	64,192	41,496	22,696
AFRD2	453,890	360,730	93,160
BID	262,211	259,716	2,495
Milner	58,417	42,345	16,072
Minidoka	354,851	385,787	0
NSSC	1,026,661	913,385	113,277
TFCC	1,121,717	1,034,883	86,834

SWC Projected Demand, Projected Supply and Maximum Projected Carryover Need (acre-feet).<sup>18</sup>

**B. Average Annual Rate of Fill**

69. CM Rule 42.01.g states that the Director “shall consider the average annual rate of fill of storage reservoirs . . . .” The average annual rate of fill of the storage reservoirs is the average of annual percentages of fill of each entity’s reservoir space. The average annual reservoir storage fill is a benchmark that can be compared to projected carryover need. For purposes of the table below, any water contributed to the rental pool from the previous year was added to the next year’s fill volume so that it does not artificially lower the percent fill. R. Vol. 37 at 7108. Water that is supplied to the rental pool lowers carryover and could impact the following year’s fill. The percent fill does not include water deducted for reservoir evaporation.

<sup>18</sup> This Fifth Methodology Order updates this chart with the new baseline year and calculates new maximum projected carryover need values.

The annual percent fill of storage volume by SWC entity is shown below:

Year	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
1992	96%	100%	98%	93%	75%	76%	86%
1993	100%	100%	100%	100%	100%	93%	92%
1994	100%	100%	100%	100%	99%	99%	99%
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	98%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	79%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	97%	48%	94%	78%	63%
2005	58%	100%	100%	76%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	97%	92%	94%	95%	97%
2008	100%	100%	100%	100%	100%	99%	100%
2009	100%	100%	100%	100%	100%	100%	100%
2010	100%	100%	100%	100%	100%	100%	100%
2011	100%	100%	100%	100%	100%	100%	100%
2012	88%	100%	97%	91%	94%	94%	96%
2013	80%	100%	97%	90%	90%	97%	100%
2014	93%	100%	100%	100%	95%	100%	100%
2015	100%	100%	100%	100%	100%	100%	100%
2016	100%	100%	100%	100%	95%	100%	100%
2017	100%	100%	100%	100%	100%	100%	100%
2018	100%	100%	100%	100%	100%	100%	100%
2019	96%	100%	99%	97%	98%	98%	99%
2020	100%	100%	100%	100%	100%	100%	100%
2021	100%	100%	100%	100%	98%	100%	100%
Average	91%	99%	99%	94%	97%	96%	97%
Std Dev	19%	3%	1%	12%	5%	6%	8%

Annual Percent Fill of Storage Volume by Entity (1992-2021).<sup>19</sup>

<sup>19</sup> The Fourth Methodology Order included data from 1995 through 2014. This Fifth Methodology Order updates this chart with data from 1992 through 2021.

**C. Average Annual Carryover**

70. CM Rule 42.01.g states that the Director “shall consider the . . . average annual carry-over for prior comparable water conditions . . .” Actual carryover volumes are from annual storage reports published by Water District 1. Actual carryover from 1992 through 2021 are sorted into two categories – below average (dry) and above average (wet). The categories are based on Heise natural flow volumes from April through September.

The 1992 to 2021 average natural flow volume is 3,827 thousand acre-feet (“KAF”).

Cat.	Year	Heise	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
		Apr–Sept (KAF)							
-----Acre-Feet-----									
	2001	1,968	9,902	4,217	37,430	26,854	55,132	42,421	26,917
	1992	2,001	11,966	11,548	31,977	28,896	16,928	19,439	3,590
	1994	2,319	82,885	26,894	54,136	45,902	102,823	128,356	38,686
	2007	2,320	62,739	7,962	32,138	37,761	61,744	66,807	39,999
	2021	2,622	73,688	988	61,327	27,448	65,393	121,946	13,581
	2013	2,721	55,563	21,477	54,350	34,740	55,374	135,658	23,419
Below	2002	2,775	30,192	8,932	74,573	14,662	102,139	133,702	46,825
Avg	2004	2,833	0	18,617	48,809	8,735	99,199	54,141	58,813
(Dry)	2003	2,931	9,401	3,904	52,550	6,944	82,895	169,674	0
	2016	3,012	89,845	58,689	84,302	46,050	108,482	283,728	21,497
	2000	3,059	69,436	20,787	107,425	45,762	161,423	205,510	56,536
	2010	3,108	96,172	113,895	101,620	59,628	184,940	324,712	46,243
	2005	3,195	36,665	99,097	90,190	37,593	150,623	365,001	68,352
	2015	3,208	88,616	57,344	73,449	47,322	130,942	208,274	44,957
	2012	3,385	68,109	41,395	88,526	42,214	119,361	198,853	72,267
	<b>Avg.</b>	<b>2,764</b>	<b>52,345</b>	<b>33,050</b>	<b>66,187</b>	<b>34,034</b>	<b>99,827</b>	<b>163,881</b>	<b>37,446</b>
	2019	3,930	88,506	106,833	113,278	48,393	203,434	406,865	94,193
	2020	3,962	95,105	99,782	110,640	52,750	168,213	360,234	66,609
	2006	4,079	89,311	107,682	102,873	58,755	182,612	365,672	78,562
	1993	4,116	102,493	123,508	154,461	60,332	264,713	300,942	104,424
	2008	4,288	91,835	104,219	124,128	62,359	182,722	414,171	70,192
	1995	4,447	103,295	167,451	159,214	75,451	258,028	476,312	68,576
Above	1998	4,498	100,817	144,057	157,265	69,384	227,726	494,385	156,433
Avg	2014	4,594	78,917	96,756	154,382	57,305	207,834	448,682	130,086
(Wet)	2009	4,613	104,174	145,530	125,688	66,935	204,581	426,779	95,533
	2018	4,796	93,754	115,442	92,727	50,776	163,465	351,483	54,285
	1999	4,949	93,354	121,793	168,545	67,147	243,322	453,706	191,501
	1996	5,583	105,209	145,019	150,358	70,250	253,786	522,790	111,459
	2017	6,139	110,348	219,940	168,293	67,754	258,106	528,880	169,862
	2011	6,347	102,139	107,618	104,915	64,487	246,699	504,578	129,757
	1997	7,007	102,539	114,684	134,906	65,307	242,758	464,411	136,926
	<b>Avg.</b>	<b>4,890</b>	<b>97,453</b>	<b>128,021</b>	<b>134,778</b>	<b>62,492</b>	<b>220,533</b>	<b>434,659</b>	<b>110,560</b>

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1992-2021).<sup>20</sup>

<sup>20</sup> In the Fourth Methodology Order, this table summarized data for the period 1994 to 2014 and adjusted WD 01 carryover values to remove water received for mitigation or water rented by the SWC entity to augment their supplies. This Fifth Methodology Order updates this chart with data for the period 1992 to 2021 and uses raw

71. In considering the principles articulated in CM Rule 42.01.g, the Director will project reasonable carryover shortfalls for members of the SWC. The following table represents the 2018 BLY diversion volumes and total reservoir storage space by entity. By dividing the total reservoir space by the 2018 diversion volume, a metric is established that describes the total number of seasons the entity’s reservoir space can supply water.

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
	-----Acre-Feet-----						
Projected Demand (2018 BLY)	64,192	453,890	262,211	58,417	354,851	1,026,661	1,121,717
Total Reservoir Space	137,626	393,550	226,487	90,591	366,554	859,898	245,930
Number of Seasons of Reservoir Space	2.1	0.9	0.9	1.6	1.0	0.8	0.2

Total Reservoir Space<sup>21</sup> in Comparison to Demand.<sup>22</sup>

**D. Reasonable Carryover**

**i. A&B**

72. A&B’s reservoir space has the lowest average annual rate of fill with the highest variability in fill. *See* Finding of Fact 69. In dry years, the potential exists that A&B’s actual carryover will be less than the maximum projected carryover need. *See* Finding of Fact 68 & 70. A&B has an approximate two-year water supply provided by its total available storage space. *See* Finding of Fact 71. Because of its lower rate of fill, it is likely A&B will experience carryover shortfalls in consecutive dry years. Based on the evaluation criteria in CM Rule 42.01.g, A&B’s reasonable carryover should be the maximum projected carryover need of 22,700 AF. *See* Finding of Fact 78.

**ii. AFRD2**

73. AFRD2 has the highest and most consistent reservoir rate of fill of any member of the SWC. AFRD2’s storage space fills 99% of the time and has a fill variability of 3%. As

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carryover values reported by WD 01. Raw numbers were used because adjusted numbers reduced the SWC’s potential entitlement to reasonable carryover.

<sup>21</sup> *See* R. Vol. 8 at 1373-74.

<sup>22</sup> This Fifth Methodology Order updates this chart with the new baseline year and calculates new number of seasons of reservoir space values.



shown in the Annual Percent Fill table in Finding of Fact 69 above, its space only failed to fill in 2004 (82%) and 2000 (99%). AFRD2 has a high likelihood of filling during multi-year droughts and after a dry year. *See* Finding of Fact 69. Therefore, any unfilled space in the fall will most likely fill. AFRD2 has an approximate one-year supply available in storage. *See* Finding of Fact 71. AFRD2's storage space only failed to fill in years when the natural flow volume at Heise was less than 3,100 KAF. In a dry year, AFRD2's historical carryover volume is often less than the maximum projected carryover need using the equation set forth in Finding of Fact 68 and 70. Based on the evaluation criteria for reasonable carryover in CM Rule 42.01.g, the reasonable carryover can be adjusted from the maximum projected carryover need without shifting the risk of shortage to the senior right holder. The historical average carryover of 16,700 AF in years when the natural flow volume at Heise was less than 3,100 KAF is the reasonable carryover for AFRD2. *See* Finding of Fact 78.

### **iii. BID & Minidoka**

74. Historically, in dry years, BID's and Minidoka's carryover volumes have been well above the maximum projected carryover need and it is unlikely that they will have reasonable carryover shortfalls in the future. *See* Finding of Fact 68 & 70; *see also* R. Vol. 37 at 7105. Based on the evaluation criteria for reasonable carryover in CM Rule 42.01.g, the reasonable carryover can be adjusted downward from the maximum projected carryover need without shifting the risk of shortage to the senior right holder. The reasonable carryover for BID and Minidoka is 0 AF. *See* Finding of Fact 78; *see also* R. Vol. 37 at 7105.

### **iv. Milner**

75. Similar to A&B, Milner's reservoir space has the second lowest average annual rate of fill of all entities and has a high degree of variability in fill. *See* Finding of Fact 69. In dry years, the potential exists that Milner's actual carryover will be less than the maximum projected carryover need. *See* Finding of Fact 68 & 70. Milner has an approximate one and one half water supply available in storage. *See* Finding of Fact 71. Because of its rate of fill, it is likely Milner will experience carryover shortfalls in consecutive dry years. Based on the evaluation criteria for reasonable carryover in CM Rule 42.01.g, the maximum projected carryover need of 16,100 AF is the reasonable carryover for Milner. *See* Finding of Fact 78.

### **v. NSCC**

76. NSCC has a near-average annual rate of fill in comparison to all entities and an approximate one-year water supply available in storage. *See* Findings of Fact 69 & 71. In dry years, the potential exists that its maximum projected carryover need will be less than its actual carryover. *See* Finding of Fact 68 & 70. Based on the evaluation criteria in CM Rule 42.01.g, the reasonable carryover for NSCC is 113,300 AF. *See* Finding of Fact 77.

### **vi. TFCC**

77. TFCC has a near average annual rate of fill in comparison to all entities, but only 20% of a single year's water supply is available in storage. TFCC's storage space fills 97% of

the time and has a fill variability of 8%. *See* Findings of Fact 69 & 71. In dry years, the potential exists that its maximum projected carryover need will be less than its actual carryover. *See* Finding of Fact 68 & 70. Based on the evaluation of the criteria in CM Rule 42.01.g, the reasonable carryover can be adjusted from the maximum projected carryover need without shifting the risk of shortage to the senior right holder. The historical average carryover in dry years of 37,400 AF is the reasonable carryover for TFCC. *See* Finding of Fact 78.

78. Reasonable carryover values for the SWC members are as follows:

	Reasonable Carryover (Acre-Feet)
A&B	22,700
AFRD2	16,700
BID	0
Milner	16,100
Minidoka	0
NSCC	113,300
TFCC	37,400

**E. Reasonable Carryover Shortfall**

79. Reasonable carryover shortfall is the numerical difference between reasonable carryover and actual carryover, calculated at the conclusion of the irrigation season. Actual carryover is defined as the storage allocation minus the total storage use plus or minus any adjustments. Examples of adjustments include SWC water placed in the rental pool and SWC private leases. Adjustments are unique to each irrigation season and will be evaluated each year. Any storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC carryover volume. Water that is purchased or leased by an SWC member may become part of the carryover shortfall obligation. *See e.g.* R. Vol. 38 at 7201, n. 11 (Eighth Supplemental Order). Conversely, actual carryover must be adjusted to assure that water supplied by a SWC member to private leases or to the rental pool will not increase the reasonable carryover shortfall obligation to the same SWC member.

80. Reasonable carryover shortfall is calculated as follows:

$$\text{Reasonable Carryover Shortfall} = \text{Actual Carryover} - \text{Reasonable Carryover}$$

**F. Determination of Curtailment Date**

81. The Eastern Snake Plain Aquifer Model (“ESPAM”) is the best scientific tool available to simulate aquifer and Snake River responses to stresses applied to the aquifer, such as ground water pumping from a well. Curtailment of junior ground water pumpers in response to the SWC Delivery Call would result in a reduction in the withdrawal of groundwater and a corresponding reduction in aquifer stress. ESPAM simulates the effects of the reduction in

aquifer stress and calculates predicted increases in aquifer discharge to the Snake River resulting from the curtailment of ground water pumping from the ESPA.

82. ESPAM simulations can be either steady-state or transient.

83. Merriam-Webster’s Dictionary defines steady-state as “a state or condition of a system or process ... that does not change in time.” *Steady state*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/steady-state> (April 19, 2023). A steady-state ESPAM simulation can only model increases in aquifer discharge to the Snake River resulting from continuous curtailments of an identical magnitude and location until the impacts of curtailment are fully realized. For example, a steady-state analysis of the curtailment of 1,000 acres, assumes that irrigation of the same 1,000 acres is curtailed every year at the same rate of consumptive use, until the impacts of that curtailment reach a steady state, or no longer change from year to year.

84. Steady-state analysis does not calculate the time to reach steady-state conditions nor describe the seasonal timing of the impacts. For the benefits of curtailment predicted by steady-state analysis to be realized by the river, the curtailment must occur continuously until steady-state is achieved. The assumption of continuous curtailment does not reflect reality in the SWC Delivery Call. Curtailments ordered as prescribed in the methodology are neither continuous nor long-term. Irrigation with ground water does not occur at a constant rate throughout the year nor from year to year. It is important to predict what benefits to the river are realized during the irrigation season in which injury has been determined. A steady-state ESPAM simulation cannot predict what benefits are realized during the irrigation season. In contrast, a transient ESPAM simulation will predict the timing of changes in river reach gains.

85. ESPAM was calibrated using one-month stress periods and can simulate a single (or partial) irrigation season of curtailment and predict the resulting increase in aquifer discharge to the Snake River during the same irrigation season using a transient simulation. In the context of this proceeding, the transient approach identifies the junior ground water rights that must be curtailed to produce increases in Snake River flows sufficient to offset material injury in the current irrigation season.

86. Only 9% to 15% of the steady state response is predicted to accrue to the near Blackfoot to Minidoka reach between May 1 and September 30 of the same year.<sup>23</sup> Fifty percent of the steady-state response is predicted to accrue at the near Blackfoot to Minidoka reach within approximately four years. Ninety percent of the steady-state response is predicted to accrue at the near Blackfoot to Minidoka reach within approximately 24 years.

87. A curtailment to a priority date calculated by the steady state analysis method used in the Fourth Methodology Order will only offset 9% to 15% of the predicted IDS. In contrast, curtailment to a priority date calculated with a transient simulation of a single season curtailment will offset the full predicted IDS unless the shortfall exceeds the accruals to the near

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<sup>23</sup> The near Blackfoot to Minidoka reach is the reach of the Snake River from which the SWC diverts.

Blackfoot to Minidoka reach by the end of the irrigation season with curtailment of all junior ground water rights.

88. Steady-state simulations are appropriate for evaluating the average annual impact of aquifer stresses that have been, or will be, applied for decades (i.e., ground water pumping year after year, or continuous curtailment to the same date every year). The steady-state simulation of continuous curtailment applied in the Fourth Amended Methodology Order does not simulate the short-term curtailments prescribed in the methodology. The methodology prescribes curtailment only in years with a predicted IDS or carryover shortfall and prescribes the determination of a curtailment priority date that varies with the magnitude of the predicted shortfall.

89. Transient simulations are necessary to evaluate the impacts of aquifer stresses applied for short periods of time (i.e. short-term curtailments with varying priority dates). Transient simulations are necessary to simulate the short-term curtailments prescribed in the methodology.

## CONCLUSIONS OF LAW

1. This order contains the methodology by which the Director will determine material injury to RISD and reasonable carryover to members of the SWC.

2. “The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

3. Idaho Code § 42-602 states that, “The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . . The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine.” According to the Hearing Officer, “It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature [in Idaho Code § 42-602] did not intend to sum up water law in a single sentence of the Director’s authority.” R. Vol. 37 at 7085. “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007).

4. “The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use.” *In Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012). “The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *Id.*; *American Falls*, 143 Idaho at 879, 154 P.3d at 450 (stating that while an appropriation for a beneficial use is “a valuable right entitled to protection . . . . Nevertheless, that property right is still subject to other requirements of the prior appropriation doctrine.”); *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 131, 369 P.3d 897, 909

(2016) (explaining the “policy of beneficial use” serves as a “limit on the prior appropriation doctrine.”).

5. “Concurrent with the right to use water in Idaho ‘first in time,’ is the obligation to put that water to beneficial use.” *American Falls*, 143 Idaho at 880, 154 P.3d at 451; see *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840 (quoting *American Falls*, 143 Idaho at 876, 154 P.3d at 447) (referring to “the constitutional requirement that priority over water be extended only to those using the water”). “It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into account.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838 (quoting *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915)).

6. “[T]he policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho.” *Idaho Ground Water Assoc.*, 160 Idaho at 131, 369 P.3d at 909 (citing *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011)). The Idaho Constitution enunciates a policy of promoting “optimum development of water resources in the public interest.” Idaho Const. Art. XV, § 7; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). “There is no difference between securing the maximum use and benefit and least wasteful use of this State’s water resources and the optimum development of water resources in the public interest. Likewise, there is no material difference between ‘full economic development’ and the ‘optimum development of water resources in the public interest.’ They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest.” *Clear Springs*, 150 Idaho at 809, 252 P.3d at 90. “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and ground waters, and it requires that they be managed conjunctively.” *Id.*

7. “Conjunctive administration ‘requires knowledge by the [Department] of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.’ . . . That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.” *American Falls*, 143 Idaho at 877, 154 P.3d at 448.

8. The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. *American Falls*, 143 Idaho at 873, 154 P.3d at 444; CM Rule 20.02, 10.12.

9. While the presumption under Idaho law is that an appropriator is entitled to his decreed water right and the CM Rules may not be applied to require a senior appropriator to demonstrate an entitlement to the water in the first place, there may be post-adjudication factors relevant to the determination of how much water is actually needed in responding to a delivery call. *American Falls*, 143 Idaho at 877-78, 154 P.3d at 448-49. Under the CM Rules and Idaho law, the Director has the “authority and responsibility to investigate claims when delivery calls

are made,” and the “authority to evaluate the issue of beneficial use in the administration context.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840. As the Idaho Supreme Court stated, “[w]hile the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception . . . the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost.” *Idaho Ground Water Assoc.*, 160 Idaho at 131, 369 P.3d at 909 (quoting *American Falls*, 143 Idaho at 880, 154 P.3d at 433). “[T]he Director must have some discretion to balance these countervailing considerations in a delivery call.” *Id.* “If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 652, 315 P.3d at 840 (quoting *American Falls*, 143 Idaho at 876, 154 P.3d at 447).

10. In responding to a delivery call under the CM Rules, the Director “may employ a baseline methodology as a starting point for considering material injury,” provided the baseline methodology otherwise comports with the prior appropriation doctrine as established by Idaho law. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841; see *Methodology Remand Order* at 17.

11. Once the Director determines “that material injury is occurring or will occur,” junior appropriators subject to the delivery call bear “the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call.” *American Falls*, 143 Idaho at 878, 154 P.3d at 449; *Methodology Remand Order* at 31. Junior appropriators have the burden of proving by clear and convincing evidence that the delivery call is futile or otherwise unfounded. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841.

12. “This case illustrates the tension between the first in time and beneficial use aspects of the prior appropriation doctrine.” *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838. The Idaho Supreme Court has in this case “recognized the critical role of the Director in managing the water resources to accommodate both first in time and beneficial use aspects: ‘Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director.’” *Id.* at 651, 315 P.3d at 839 (quoting *American Falls*, 143 Idaho at 880, 154 P.3d at 451). Thus, in this case the Director may use “a baseline methodology, both as a starting point for consideration of the Coalition’s call and in determining the issue of material injury.” *Id.* at 650-51, 315 P.3d at 838-39. However, “[i]f changing conditions establish that material injury is greater than originally determined pursuant to the baseline analysis, then adjustments to the mitigation obligation of the juniors must be made when the Director undertakes his mid-season calculations.” *Methodology Remand Order* at 18.

13. In the context of conjunctive administration, the Director’s methodology for projecting material injury does not impose an obligation upon members of the SWC to reprove

their water rights. To the extent water is available, members of the SWC are authorized to divert and store water in accordance with the terms of their licenses or decrees. Nothing established herein reduces that authorization. The question that the CM Rules require the Director to answer in this proceeding is, when water is not available to fill the water rights of the SWC, how much water is reasonably necessary for the SWC to accomplish the beneficial purpose of raising crops; because what is needed to irrigate crops may be less than the decreed or licensed quantities. *American Falls*, 143 Idaho at 880, 154 P.3d at 451; see *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838 (quoting *Washington State Sugar*, 27 Idaho at 44, 147 P. at 1079) (“[i]t is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation”). Again, “[t]he concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *Id.*

14. Holders of senior-priority water rights may receive less than their licensed or decreed quantities and not suffer material injury within the meaning of the CM Rules. As a result, in-season demand should be viewed in light of reasonableness and optimum development of water resources in the public interest. CM Rules 20 and 42; *American Falls*, 143 Idaho at 876-80, 154 P.3d at 447-51; *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650-652, 315 P.3d at 838-40.

15. Here, the Director has established a methodology for determining material injury to members of the SWC. The methodology predicts material injury to RISD by taking the difference between RISD and the FS. The years 2000 through 2021 were analyzed to select the BLY because the period of years captured current irrigation practices in a dry climate. Based upon evaluation of the record, members of the SWC were exercising more reasonable efficiencies during this time period than during the 1990s when supplies were more plentiful. During periods of drought when junior ground water users are subject to curtailment, members of the SWC should exercise reasonable efficiencies to promote the optimum utilization of the State’s water resources. CM Rules 20 and 42; *American Falls*, 143 Idaho at 876-80, 154 P.3d at 447-51; *Clear Springs*, 150 Idaho at 807-10; 252 P.3d at 88-91; *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 650-652, 315 P.3d at 838-40.

16. At this time, with the recognition that the methodology is subject to adjustment and refinement, RISD will be equal to the historic demands associated with the BLY (2018) and will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

17. Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director’s predictions of material injury to RISD and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director’s professional judgment as the manager of the State’s water resources. Recognizing his ongoing duty to administer the State’s water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. As more data is gathered and analyzed, the Director will continue to

review and refine the process of predicting and evaluating material injury. The methodology will continue to be adjusted if the data supports a change.

18. If the Director predicts that the SWC will be materially injured because of a demand shortfall prediction, either in the preseason or in the midseason, the demand shortfall represents a mitigation obligation that must be borne by junior ground water users. If mitigation water in the amount of the projected RISD shortfall cannot be secured or optioned by junior ground water users to the satisfaction of the Director, the Director will curtail junior ground water users to make up any deficit. *See Order on Pet. for Jud. Rev.*, at 19, *A&B Irrigation District v. Idaho Dairymen's Association, Inc.*, No. 2008-0000551 (Gooding Cnty. Dist. Ct. Idaho July 24, 2009),

19. In previous years, the Director used steady-state modeling when determining the curtailment priority date. The Department now has multiple years of experience with the methodology to better understand the impact of applying steady-state modeling versus transient modeling to determine a curtailment priority date that would supply adequate water to the senior water right holders. While the first version of the ESPA groundwater flow model was not calibrated at a time-scale that supported in-season transient modeling, the current version was calibrated using monthly stress periods and half-month time steps, a refinement that facilitates in-season transient modeling for calculating the response to curtailment of groundwater use. As part of the Director's ongoing obligation to evaluate the methodology, the Director must evaluate whether the use of steady-state continues to be supportable.

20. In surface water administration, uses by holders of junior priority surface water rights are curtailed until the senior surface water rights are fully satisfied, absent a futile call and if the senior surface water users need the water to accomplish a beneficial use. In other words, under surface water administration, junior surface water rights are generally curtailed unless the senior gets water in the quantity and at the time and place required.

21. Rule 43 of the CM Rules mandates that when the Director evaluates a mitigation plan, the mitigation plan must ensure that water is delivered to holders of senior priority surface water rights in both the quantity and at the time and place required by the senior. In considering a proposed mitigation plan pursuant to Rule 43, the Director must evaluate:

**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.

**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.

IDAPA 37.01.03.11.043.b-c (emphasis added). In other words, there is an assumption that senior water right holders calling for delivery of water under the CM Rules will receive, by curtailment or by mitigation, “replacement water at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal . . . .” Only in a mitigation plan can “multi-season accounting of ground water withdrawals” be employed, and even then, the plan must “assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.”

22. The Director has an obligation to address a mitigation deficiency in the year it occurs. Mem. Decision & Order on Pet. for Jud. Rev., at 10, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014); Mem. Decision & Order, at 8–9, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015).

23. As described in Finding of Fact 87, curtailment to a priority date calculated by the steady state analysis method used in the Fourth Methodology Order will only offset 9% to 15% of the predicted IDS. In contrast, curtailment to a priority date calculated with a transient simulation of a single season curtailment will offset the *full* predicted IDS unless the shortfall exceeds the accruals to the near Blackfoot to Minidoka reach by the end of the irrigation season with curtailment of all junior ground water rights. This methodology order depends on an annual evaluation of material injury and should also employ curtailment and or mitigation that supplies replacement water at the time and place required by the senior-priority water right in a quantity sufficient to offset the depletive effect of ground water withdrawal and to assure protection of the senior-priority right. Curtailment dates, periodically determined at time of recalculating in-season demand shortfall (IDS), should be calculated by a transient model simulation that will return the full quantity of water to the senior priority rights at the time and place required.

24. As described in Conclusion of Law 18, junior ground water users with approved mitigation plans to deliver storage water as mitigation must, to the satisfaction of the Director, secure or option mitigation water to avoid curtailment. By requiring that junior ground water users secure mitigation water or have options to acquire water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to deliver or assign mitigation water until the Time of Need, the Director ensures that junior ground water users supply only the amount of mitigation water necessary to satisfy the RISD. All approved methods of mitigation shall be considered in the Director’s review of projected RISD shortfall.

25. Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the Time of Need, the protection afforded to the senior water right holders is compromised. The risk of shortage is then impermissibly shouldered by the SWC. Members of the SWC should have certainty entering the irrigation

season and at midseason that mitigation water will be delivered or assigned at the Time of Need, or curtailment of junior ground water rights will be ordered.

26. Because climate and the supply that the SWC appropriated (natural flow and storage) are inherently variable, the Director cannot and should not insulate the SWC against all shortages. The Director can, however, protect the SWC against reasonably predicted shortages to RISD.

27. Currently, the USBR and USACE's Joint Forecast is an indispensable predictive tool at the Director's disposal for predicting material injury to RISD. Given current forecasting techniques, the earliest the Director can predict material injury to RISD with reasonable certainty is soon after the Joint Forecast is issued in early April. The pre-irrigation season supply forecast for A&B and Milner can be predicted solely from the Joint Forecast. To improve the accuracy of prediction, the pre-irrigation season supply forecast for AFRD2, BID, Minidoka, NSCC, and TFCC will currently be predicted from both the Joint Forecast and from flow data at Box Canyon.<sup>24</sup>

28. By shifting the April Forecast Supply prediction curve down one standard error of estimate, the Director purposely underestimates the water supply that is predicted. The Director further guards against RISD shortage by using the 2018 BLY, which has above average diversions, above average ET, below average in-season precipitation, and above average growing degree days. The 2018 BLY represents a year in which water supply did not limit diversions. The Director's prediction of material injury to RISD is purposely conservative. While it may ultimately be determined after final accounting that less mitigation water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Const. Art. XV, § 3; Idaho Code § 42-106. Shifting the prediction curve down one standard error of estimate and adoption of a BLY that uses above average diversions, above average temperatures and ET and below average precipitation is necessary to protect senior rights if the Director administers to an amount less than the full decreed quantity of the SWC's rights. *Methodology Remand Order* at 33, 35.

29. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

30. "Storage water is water held in a reservoir and is intended to assist the holder of the water right in meeting their decreed needs." *American Falls*, 143 Idaho at 878, 154 P.3d at 449. "Carryover is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *Id.* Under Idaho Code, "[o]ne may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right," but "[t]here is no statutory provision for obtaining a decreed right to 'carryover' water." *Id.* Rather, carryover is a "component of the storage right." Order on Pet. for Jud. Rev., at 20, *A&B Irrigation District v. Idaho Dairymen's Association, Inc.*, No. 2008-

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<sup>24</sup> The method for predicting the natural flow supply may be subject change based upon improved predictive models.

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0000551 (Gooding Cnty. Dist. Ct. Idaho July 24, 2009). Storage carryover is “permissible . . . absent abuse.” *American Falls*, 143 Idaho at 880, 154 P.3d at 451.

31. The storage reservoirs implicated in this proceeding were intended to provide supplemental supplies of water “to create a buffer against the uncertainty of the weather.” *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (April 29, 2008) at 6. “The history of the development of the reservoir system, most recently Palisades, makes it clear that storage of water was a primary purpose to prevent disaster during periods of shortage as have been experienced in the recent past.” *Id.* at 60. The purpose of carryover also is “insurance against the risk of future shortage.” Order on Pet. for Jud. Rev., at 20, *A&B Irrigation District v. Idaho Dairymen’s Association, Inc.*, No. 2008-0000551 (Gooding Cnty. Dist. Ct. Idaho July 24, 2009).

32. CM Rule 42.01 sets forth factors the Director “may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste.” CM Rule 42.01 does not limit the Director’s determination of reasonable carryover to consideration of the factors enumerated in CM Rule 42.01g, but only requires that the Director consider those enumerated factors. One such factor is “[t]he extent to which the requirements of the holder of a senior priority water right could be met with the user’s existing facilities and water supplies.” CM Rule 42.01g. This factor is qualified, however, by the provision that “the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.” CM Rule 42.01g. Thus, CM Rule 42.01g does not require water right holders to exhaust their storage water supplies prior to making a delivery call under the CM Rules. This is consistent with the purposes of the storage reservoirs and the carryover components of the storage water rights.

33. In considering CM Rule 42.01g in *American Falls*, the Idaho Supreme Court framed the SWC’s challenge to the “reasonable carryover” provision as presenting the question of whether the holders of storage water rights are “entitled to insist on all available water to carryover for future years in order to assure that their full storage water is met (regardless of need),” *American Falls*, 143 Idaho at 879, 154 P.3d at 450, and answered this question in the negative:

At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. *Supra*, paragraph 11.

*Id.* at 880, 154 P.3d at 451.

34. As discussed in the Findings of Fact, reasonable carryover is determined by projecting the water supply for the system. This is accomplished by projecting the 2002/2004 natural flow and average annual storage fill and the 2018 demand. Next, the Director examines the average annual rate of fill of each SWC entity's reservoir space to determine each entity's relative probability of fill. Finally, the Director examines the average annual carryover for prior comparable water conditions by reviewing Heise natural flow.

35. On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of the SWC. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover short fall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply 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. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

36. Recognizing that reservoir space held by members of the SWC may fill, and to prevent the waste of water, junior ground water users are not required to deliver or assign the volume of reasonable carryover until after the Day of Allocation (defined in footnote 27, *infra*). Junior ground water users are obligated to hold the secured or optioned mitigation water until reservoir space held by the SWC fills. If the reservoir space does not fill, junior ground water right holders must deliver or assign the secured or optioned mitigation water to the senior water right holders up to the amount of storage space that did not fill.

## ORDER

Consistent with the forgoing, the Director HEREBY ORDERS that, for purposes of determining material injury to RISD and reasonable carryover, the following steps will be taken:

1. Step 1: By April 1, members of the SWC will submit electronic shape files to the Department delineating the total anticipated irrigated acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent. Department staff will review submitted shapefiles and modify them as necessary to ensure that: (1) the total acreage count does not exceed the decreed number of acres; (2) all of the irrigated land is located within the decreed place of use; and (3) acres are not counted more than once due to overlapping polygons within a shape file or between shape files submitted by different SWC members. Because the SWC members can best determine the irrigated acres within their service area, the SWC should be responsible for submitting the information to the Department. If this information is not timely submitted, the Department will determine the total irrigated acres based upon past cropping patterns and current satellite and/or aerial imagery. If a SWC member fails or refuses to identify the number of irrigated acres within its service area by April 1, the Department will be cautious about recognizing acres as being irrigated if there is uncertainty about whether the acres are or will be irrigated during the upcoming irrigation season. The Department will electronically post

electronic shape files for each member of the SWC for the current water year for review by the parties. In determining the total irrigated acreage, the Department may account for supplemental ground water use. The Department currently does not have sufficient information to accurately determine the contribution of supplemental ground water to lands irrigated with surface water by the SWC. If and when reliable data is available to the Department, the methodology will be amended to account for the supplemental ground water use.

2. If the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then the Department will assess the impact of this reduction in use of the water right on any mitigation requirement.

3. Step 2: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within fourteen (14) days after issuance of the Joint Forecast, the Director will issue a final order predicting the April FS for the water year for each SWC entity. The Director will compare the April FS for each SWC entity to the BD for each SWC entity to determine if an in-season demand shortfall (“IDS”) is anticipated for the upcoming irrigation season. The April FS for each SWC entity is the sum of the forecasted natural flow supply and the forecasted storage allocation for each SWC entity. The forecasted natural flow supply will be computed with regression algorithms. The forecasted storage allocation will be determined by comparing storage accruals in an analogous year(s). A transient ESPAM simulation will be run to calculate the curtailment priority date predicted to produce a volume of water equal to the IDS in the near Blackfoot to Minidoka reach between May 1 and September 30 of the current year. Curtailment will be simulated within the area of common ground water supply as described by CM Rule 50.01.

4. Step 3: By May 1, or within fourteen (14) days from issuance of the final order predicting the April FS, whichever is later in time, junior ground water users with approved mitigation plans for delivery of water must secure, to the satisfaction of the Director, a volume of water equal to their proportionate share of the April IDS unless the April IDS is revised as explained below in paragraph 6. If junior ground water users secured 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. The secured water will not be required to be delivered to the injured members of the SWC until the Time of Need.

5. Step 4: As soon as practical after the deadline for junior ground water users with approved mitigation plans to provide notice of secured water, the Director will issue an order curtailing junior ground water users who: (1) do not have approved mitigation plans; (2) fail to secure the required water consistent with their approved mitigation plans; or (3) otherwise fail to comply with their approved mitigation plans.<sup>25</sup>

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<sup>25</sup> This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year’s obligation.

6. If, at any time prior to the Director's final determination of the April FS, 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.

7. Step 5: If the storage allocations held by members of the SWC fill, there is no reasonable carryover shortfall. If the storage allocations held by members of the SWC do not fill, within fourteen (14) days following the publication of Water District 01's initial storage report, which typically occurs soon after the Day of Allocation,<sup>26</sup> the volume of water secured by junior ground water users to fulfill the reasonable carryover shortfall shall be made available to injured members of the SWC. The amount of reasonable carryover to be provided shall not exceed the empty storage space on the Day of Allocation for that entity. If water is owed in addition to the reasonable carryover shortfall volume, this water shall be delivered or assigned to members of the SWC at the Time of Need, described below. The Time of Need will be no earlier than the Day of Allocation.

8. Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) recalculate RISD; (2) issue a revised FS and (3) estimate the Time of Need date.<sup>27</sup>

9. RISD will be calculated utilizing the project efficiency, BD, and the cumulative actual CWN determined up to that point in the irrigation season. The cumulative CWN volume will be calculated for all land irrigated with surface water within the boundaries of each member of the SWC. Volumetric values of CWN will be calculated using ET and precipitation values from the USBR's AgriMet program, irrigated areas provided by each entity, and crop distributions based on NASS data.

10. The FS for each SWC is the sum of the year-to-date actual natural flow diversions, the forecasted natural flow supply for the remainder of the season, and the storage allocation for each member of the SWC. The forecasted natural flow supply for the remainder of the season will be based on regression analysis. The storage allocation will be based on the actual preliminary storage allocations issued by the BOR and Water District 01. If the BOR and Water District 01 have not yet allocated stored water to spaceholders, the Department will predict the storage allocations based on an analogous year(s).

11. The calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover. The Time of Need will not be earlier than the Day of Allocation.

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<sup>26</sup> The Day of Allocation is the time in the irrigation season when the Water District 01 watermaster can issue allocations to storage space holders after the reservoir system has achieved its maximum physical fill, maximum water right accrual, and any excess spill past Milner Dam has ceased. Tr. p. 902, lns. 7-25; p. 903, lns. 1-10.

<sup>27</sup> At the earliest established Time of Need for any member of the SWC, junior ground water users are required to provide remaining mitigation to all materially injured members of the SWC.

12. This information will be used to recalculate RISD and adjust the projected IDS for each member of the SWC. The Director will then issue revised RISD and DS values. Any increase to the projected IDS for each SWC entity is an additional mitigation obligation of the junior ground water users.

13. Upon a determination of an additional mitigation obligation, 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 activities pursuant to an approved mitigation plan that will deliver the additional mitigation obligation 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 within fourteen (14) days from issuance of a Step 6 order, the Director will issue an order curtailing junior ground water users.<sup>28</sup> A transient ESPAM simulation will be run to determine the priority date to produce the necessary additional mitigation obligation volume by September 30 of the same year. Curtailment will be simulated within the area of common ground water supply, as described by CM Rule 50.01.

14. Step 7: Shortly before the estimated Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) recalculate RISD; (2) issue a revised FS; and (3) establish the Time of Need. The revised FS for each SWC entity is the sum of the year-to-date actual natural flow diversions, the forecasted natural flow supply for the remainder of the season, and the storage allocation for each member of the SWC. The forecasted natural flow supply for the remainder of the season will be based on analogous year(s) with similar Blackfoot to Milner reach gains. The storage allocation will be based on the actual preliminary storage allocations issued by the BOR and Water District 01.

15. This information will be used to recalculate RISD and adjust the projected IDS for each member of the SWC. RISD will be calculated utilizing the project efficiency, BD, and the cumulative actual CWN determined up to that point in the irrigation season. The Director will then issue revised RISD and IDS values.

16. A transient ESPAM simulation will be run to determine the priority date of water rights that must be curtailed to produce the demand shortfall volume by September 30 of the same year. Curtailment will be simulated within the area of common ground water supply, as described by CM Rule 50.01.

17. Step 8: At the Time of Need, junior ground water users are required to deliver to each injured member of the SWC the Step 7 revised IDS calculated at the Time of Need. Alternatively, any additional mitigation obligation calculated in Step 6 and Step 7 can be satisfied from each SWC member's reasonable carryover if (a) the reasonable carryover exceeds the additional mitigation obligation, and (b) the junior ground water users secure sufficient water to replace the reasonable carryover pursuant to an approved mitigation plan.

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<sup>28</sup> This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year's obligation.

18. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water delivered by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

19. Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual CWN for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future BLY, and for the refinement and continuing improvement of the method for future use.

20. On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on, but not limited to, the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover short fall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply 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. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights. A transient ESPAM simulation will be run to determine the priority date of water rights that must be curtailed to produce the reasonable carryover shortfall volume by September 30 of the following year. Curtailment will be simulated within the area of common ground water supply, as described by CM Rule 50.01.

IT IS FURTHER ORDERED that this Fifth Methodology Order supersedes all previously issued methodology orders in this matter.

Dated this 21st day of April 2023.



GARY SPACKMAN  
Director



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of April 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson  MARTEN LAW LLP  P.O. Box 2139  Boise, ID 83701-2139  <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson  MARTEN LAW LLP  P.O. Box 63  Twin Falls, ID 83303-0063  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON  P.O. Box 1391  Pocatello, ID 83204-1391  <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Marion 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></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>

<p>Sarah A Klahn  Somach Simmons &amp; Dunn  1155 Canyon Blvd, Ste. 110  Boulder, CO 80302  <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83702  <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405  <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Randall D. Fife  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405  <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Skyler C. Johns  Nathan M. Olsen  Steven L. Taggart  OLSEN TAGGART PLLC  P.O. Box 3005  Idaho Falls, ID 83403  <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a>  <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a>  <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Tony Olenichak  IDWR—Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402  <a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email

<p>Corey Skinner  IDWR—Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033  <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email
<p>COURTESY COPY TO:  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"/> Email


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Megan Jenkins  
Administrative Assistant II

## **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.

# EXHIBIT A-2

**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 2023 FORECAST SUPPLY**

**(METHODOLOGY STEPS 1-3)**

**FINDINGS OF FACT**

1. On April 21, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Fifth 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 applies steps 1, 2, and 3 of the Methodology Order.

**A. Step 1**

2. By April 1 of each year, Step 1 requires members of the SWC to submit to the Department electronic shapefiles delineating the total anticipated irrigated acres for the upcoming year “or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent.” *Methodology Order* ¶ 1 at 39.

3. On February 6, 2023, the Department received a letter from American Falls Reservoir District #2 (“AFRD2”), stating that its total number of irrigated acres has not varied by more than five percent.

4. On March 2, 2023, Minidoka Irrigation District (“Minidoka”) submitted its electronic shapefile delineating its total irrigated acres to the Department.

5. On March 10, 2023, 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 number of irrigated acres for 2023 will not vary by more than five percent from the electronic shapefiles 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 <sup>1</sup>	Data Source
A&B	15,924	SRBA Partial Decree
AFRD2	62,361	SRBA Partial Decree
BID	46,035	2013 shapefile submitted by BID, reduced by Department for overlapping acres and acres outside of service area.
Milner	13,264	2010 service area shapefile, reduced by Department for overlapping acres and acres outside of service area.
Minidoka	75,093	SRBA Partial Decree
NSSC	154,067	SRBA Partial Decree
TFCC	194,732	2013 shapefile submitted by TFCC, reduced by Department 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 prepared by the United States Bureau of Reclamation and the United States Army Corp of Engineers, the Director “will issue a final order predicting the April [Forecast Supply] for the water year for each SWC entity. The Director will compare the April [Forecast Supply] for each SWC entity to the [Baseline Demand] for each SWC entity to determine if a in-season demand shortfall (“IDS”) is anticipated for the upcoming irrigation season.” *Methodology Order* ¶ 3 at 40.

8. On April 7, 2023, the joint forecast (“Joint Forecast”) was announced, predicting an unregulated inflow 3,700,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 112% percent of average.<sup>2</sup> The Joint Forecast “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” *Id.* ¶ 49 at 18 (citation omitted).

9. The Heise natural flow data from years 1990–2022 were data inputs for development of regression equations for A&B and Milner to predict the natural flow supply.<sup>3</sup> Data greater or less than two standard deviations from average were excluded from the regression development.

10. The April–July Heise natural flow data from the years 1990–2022 and Box Canyon November–March total discharge data for the period 1989–2022, were data inputs for development of multiple linear regression equations to predict the natural flow supplies for

<sup>1</sup> The number of irrigated acres used in this methodology order is the number of reported acres unless that number is larger than the decreed irrigated acres, and if so, then the decreed acres were used.

<sup>2</sup> The average is based on the years 1991–2020. The Joint Forecast relies on a “30-Year Climate Normal” to calculate an Average April through July runoff volume.

<sup>3</sup> Attached hereto, as Attachment A, are the regression analyses for each SWC entity used to predict natural flow supply.

AFRD2, BID, Minidoka, NSCC, and TFCC. *Methodology Order* ¶ 49 at 18. The U.S. Geological Survey measures and monitors the flow at the Box Canyon stream flow measurement gage. The Box Canyon November–March total discharge used by the Director in the regression models for 2023 totaled 91,898 acre-feet.

11. The storage allocations were predicted for each SWC member. As of April 11, 2023, preliminary water right accounting for the 2023 irrigation year had not been completed. Storage allocations were calculated using an average of actual storage allocations of analogous years. The Surface Water Supply Index (SWSI)<sup>4</sup>, produced by the Natural Resources Conservation Service (NRCS), is calculated by summing reservoir carryover and the forecasted spring and summer streamflow runoff. The April 1 SWSI indicates the water supply in 1993 and 2016 are analogous to the water supply in 2023. Based on the analogous years, the Director anticipates SWC members will receive 95–100% of their allocation. The storage allocations are based on the anticipated allocations minus evaporation charges.

12. Based on the above, the Director projects as follows:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 2018	Shortfall
A&B	14,833	135,411		150,244	64,192	0
AFRD2	115,223	387,853	1,000	504,076	453,890	0
BID	109,313	221,713	5,130	336,156	262,211	0
Milner	18,347	88,047		106,393	58,417	0
Minidoka	156,468	342,620	8,370	507,458	354,851	0
NSCC	457,802	819,773	-7,750	1,269,825	1,026,661	0
TFCC	820,663	232,606	-6,750	1,046,519	1,121,717	75,200
Total Projected Demand Shortfall (AF)						75,200

### C. Step 3

13. Step 3 requires the following:

Step 3: By May 1, or within fourteen (14) days from issuance of the final order predicting the April FS, whichever is later in time, junior ground water users with approved mitigation plans for delivery of water must secure, to the satisfaction of the Director, a volume of water equal to their proportionate share of the April IDS unless the April IDS is revised as explained below in paragraph 6. If junior ground water users secured water for a reasonable carryover shortfall to an individual SWC member in the previous year, the current-year mitigation obligation to the

<sup>4</sup> SWSI is a predictive indicator of the surface water available in a basin compared to historic supply. The SWSI is produced monthly by the Natural Resources Conservation Service (NRCS). *See* Nat. Res. Conserv'n Serv., U.S. Dep't of Agric., *Surface Water Supply Index (SWSI)*, <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/id/snow/waterproducts/?cid=stelprdb1240689> (last visited Apr. 20, 2022).



individual SWC member will be reduced by the quantity of water secured for the reasonable carryover shortfall. The secured water will not be required to be delivered to the injured members of the SWC until the Time of Need.

*Methodology Order* ¶ 4 at 40.

14. The predicted April DS for TFCC is 75,200 acre-feet. The total predicted DS is 75,200 acre-feet.

15. The Eastern Snake Plain Aquifer Model (“ESPAM”) is used to predict the junior priority water rights that must be curtailed to produce the volume of water equal to the predicted April DS in the near Blackfoot to Minidoka reach. The ESPAM is updated periodically as new field measurements and advancements in modeling technology become available. ESPAM Version 2.2 (“ESPAM2.2”) is the current version. ESPAM2.2 model documentation reports (including a model calibration report, a predictive uncertainty analysis, a superposition model scenario, and a curtailment scenario) were finalized on May 27, 2021. See Idaho Dep’t of Water Res., *ESPAM2.2 Reports* (2021), [https:// research.idwr.idaho.gov/files/projects/espam/browse/ESPAM22\\_Reports/](https://research.idwr.idaho.gov/files/projects/espam/browse/ESPAM22_Reports/).

16. The Department ran ESPAM2.2 to predict the junior priority water rights within the area of common ground water supply that must be curtailed to produce the volume of water equal to the predicted April DS between the May 1 and September 30 of this irrigation season pursuant to the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*. Ground water rights bearing priority dates later than December 30, 1953, must be curtailed to produce the volume of water equal to the predicted April DS in the near Blackfoot to Minidoka reach.

### 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. See Mem. Decision & Order on Pets. for Jud. Rev., *A&B Irr. Dist., Inc. v. Idaho Dep’t of Water Res.*, No. CV-2009-647 (Minidoka Cnty. Dist. Ct. Idaho May 4, 2010); Mem. Decision & Order on Pets. for Reh’g, *A&B Irr. Dist., Inc. v. Idaho Dep’t of Water Res.*, No. CV-2009-647 (Minidoka Cnty. Dist. Ct. Idaho 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 Dep’t of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

3. The Director must utilize the best available technology for determining the impact of junior ground water diversions. See *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814,

252 P.3d 71, 95 (2011). ESPAM 1.1 and 2.1 are the model versions utilized previously in SWC delivery call proceedings. The Director determined that ESPAM 2.1 is the best available scientific tool for predicting the effects of ground water pumping. *See Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 124, 369 P.3d 897, 902 (2016). ESPAM 2.2 is the latest version of the ESPAM model. The improvements incorporated into ESPAM 2.2, as discussed in Finding of Fact 15, make it the best available scientific tool for predicting the effects of ground water pumping in this proceeding.

4. In 2023, the Director has sufficient information to quantify irrigated areas for each of the SWC members as required by Step 1.

5. The Joint Forecast predicts an unregulated inflow of 3,700,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 112% of average.

6. The April predicted DS is 75,200 acre-feet. Junior ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply must mitigate for their proportionate share of the predicted DS in accordance with an approved mitigation plan.<sup>5</sup> Junior ground water users mitigating for their proportionate share of the predicted DS with a secured volume of water pursuant to an approved mitigation plan must, to the satisfaction of the Director, secure their proportionate share for delivery to the injured members of the SWC on or before May 5, 2023. There was a reasonable carryover shortfall of 49,309 acre-feet in the fall of 2022. However, because junior ground water users did not secure any mitigation water for a carryover shortfall, there is no adjustment to the mitigation obligation.

7. If, on or before May 5 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply fail to establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user. Junior ground water users who are mitigating with a secured volume of water are not required to assign the secured volume of water until after the Director issues a subsequent order requiring assignment of the water.

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<sup>5</sup> There are seven approved mitigation plans in place responding to the SWC delivery call filed by: 1) A&B Irrigation District, 2) Southwest Irrigation District and Goose Creek Irrigation District (collectively, "SWID"), 3) the Idaho Ground Water Appropriators, Inc. ("IGWA"), 4) certain cities commonly referred to as the "Coalition of Cities", and 5) certain entities commonly referred to as the "Water Mitigation Coalition." A&B Irrigation District's proportionate share of the predicted DS of 75,200 acre-feet is 458 acre-feet. Due to the nature of the mitigation plans for SWID, the Coalition of Cities and the Water Mitigation Coalition, these entities do not need to establish that they can mitigate for their proportionate share of the predicted DS. IGWA has two approved mitigation plans. If IGWA is in compliance with mitigation plan CM-MP-2016-001, IGWA does not need to establish that it can mitigate for its proportionate share of the predicted DS. If IGWA seeks to provide mitigation by delivery of storage water as approved in mitigation plan CM-MP-2009-007, IGWA's proportionate share of the predicted DS of 75,198 acre-feet is 63,645 acre-feet.

8. 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, predicted DS determination.

**ORDER**

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

The Director predicts an in-season DS of 75,200 acre-feet. On or before May 5, 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan. If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.

Dated this 21st day of April 2023.



GARY SPACKMAN

Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of April 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

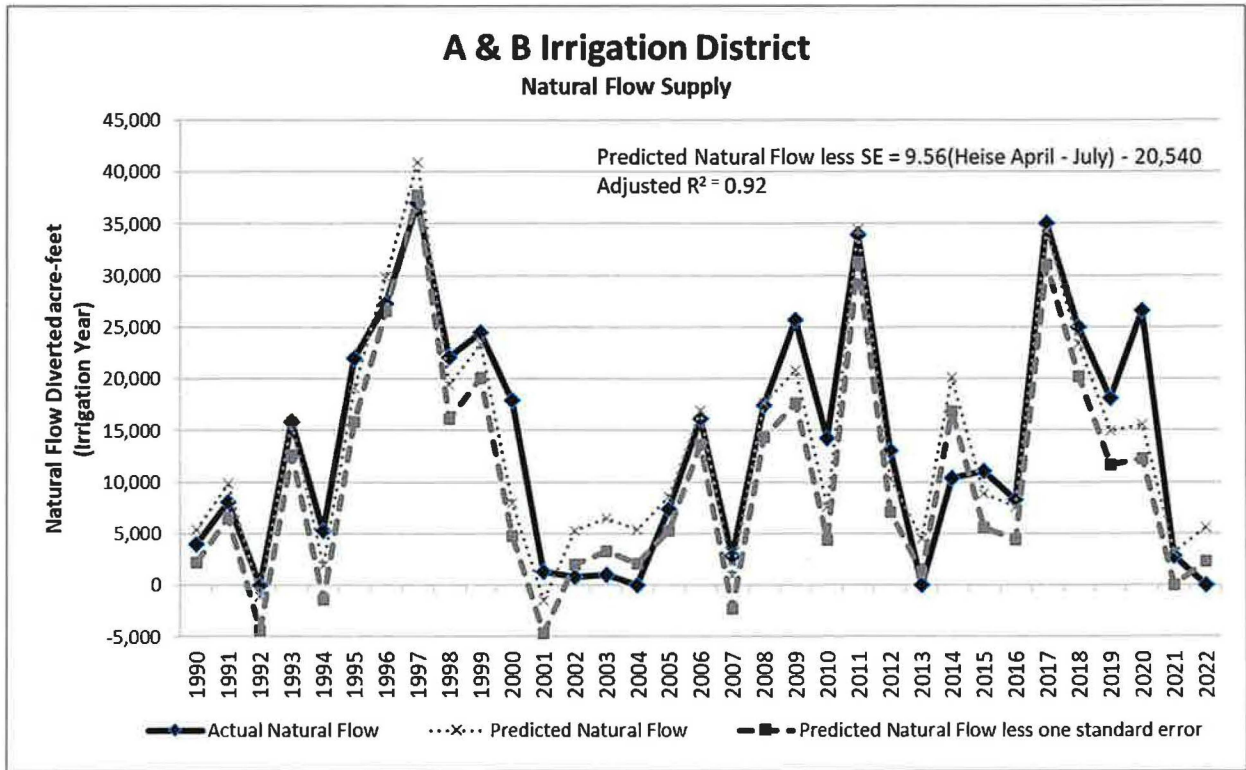
<p>John K. Simpson  MARTEN LAW LLP  P.O. Box 2139  Boise, ID 83701-2139  <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson  MARTEN LAW LLP  P.O. Box 63  Twin Falls, ID 83303-0063  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON  P.O. Box 1391  Pocatello, ID 83204-1391  <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Marion 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></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18<sup>th</sup> St., South Terrace, Suite 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>

<p>Sarah A Klahn Somach Simmons &amp; Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4<sup>th</sup> Street, Suite 103 Boise, ID 83702 <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert E. Williams WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP P.O. Box 168 Jerome, ID 83338 <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 <a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>	<p><input checked="" type="checkbox"/> Email</p>

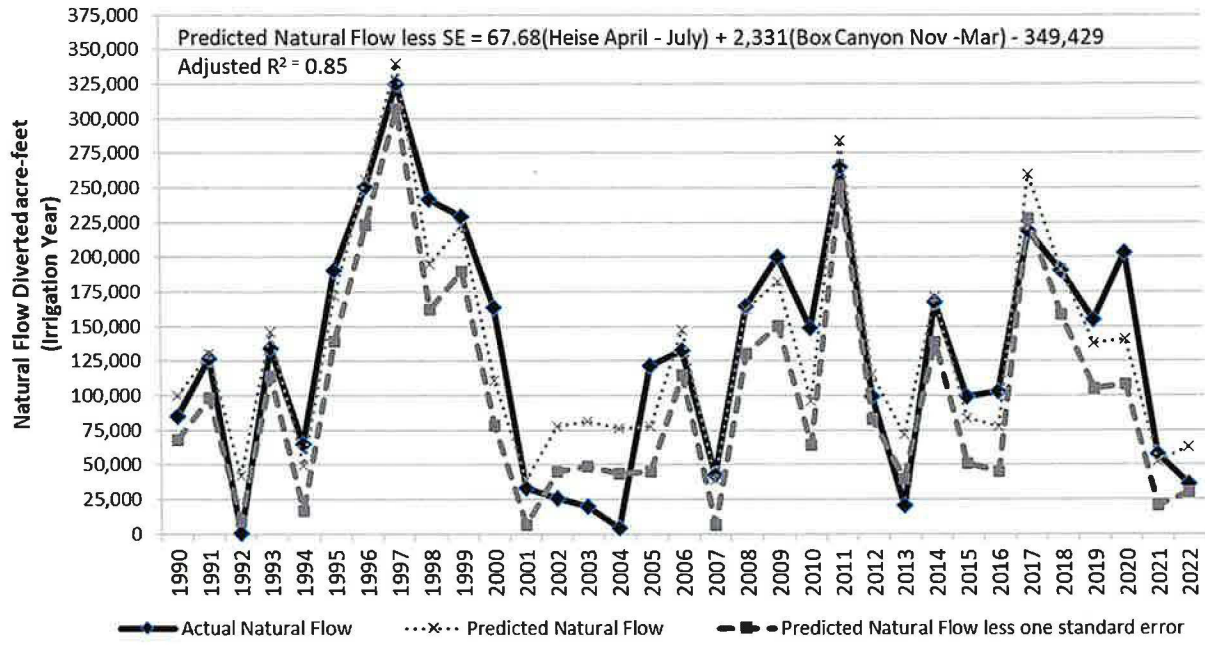
Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a>	<input checked="" type="checkbox"/> Email
<b>COURTESY COPY TO:</b> William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> Email

  
\_\_\_\_\_  
Megan Jenkins  
Administrative Assistant II

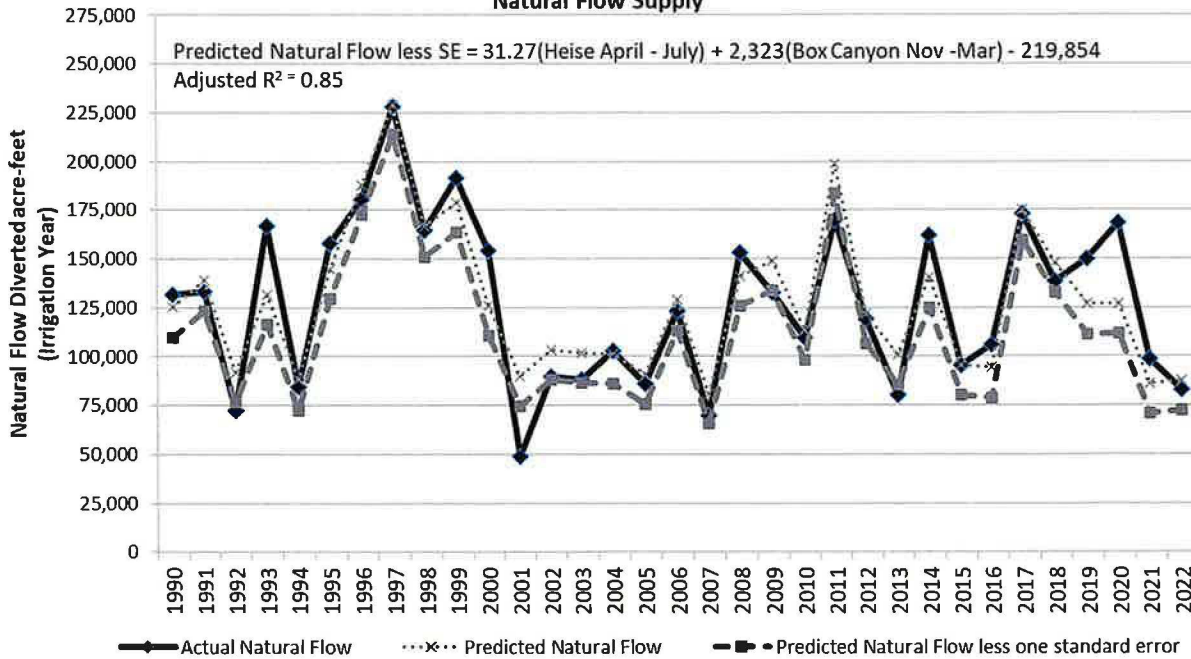
# ATTACHMENT A



### AFRD2 Irrigation District Natural Flow Supply

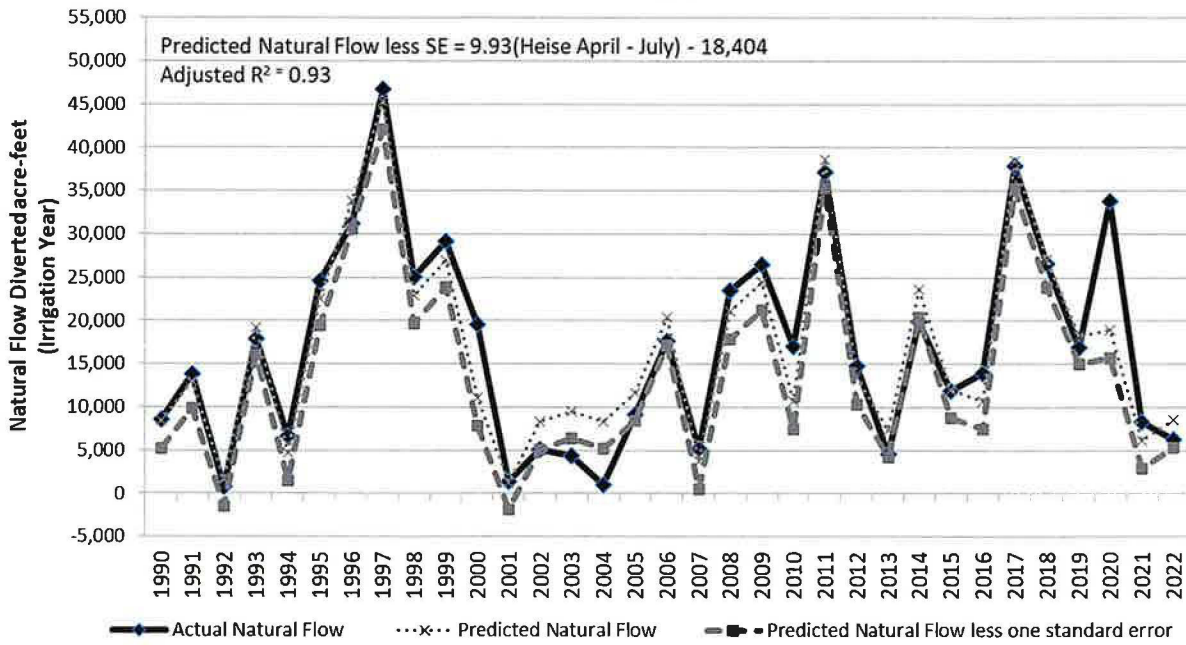


### Burley Irrigation District Natural Flow Supply

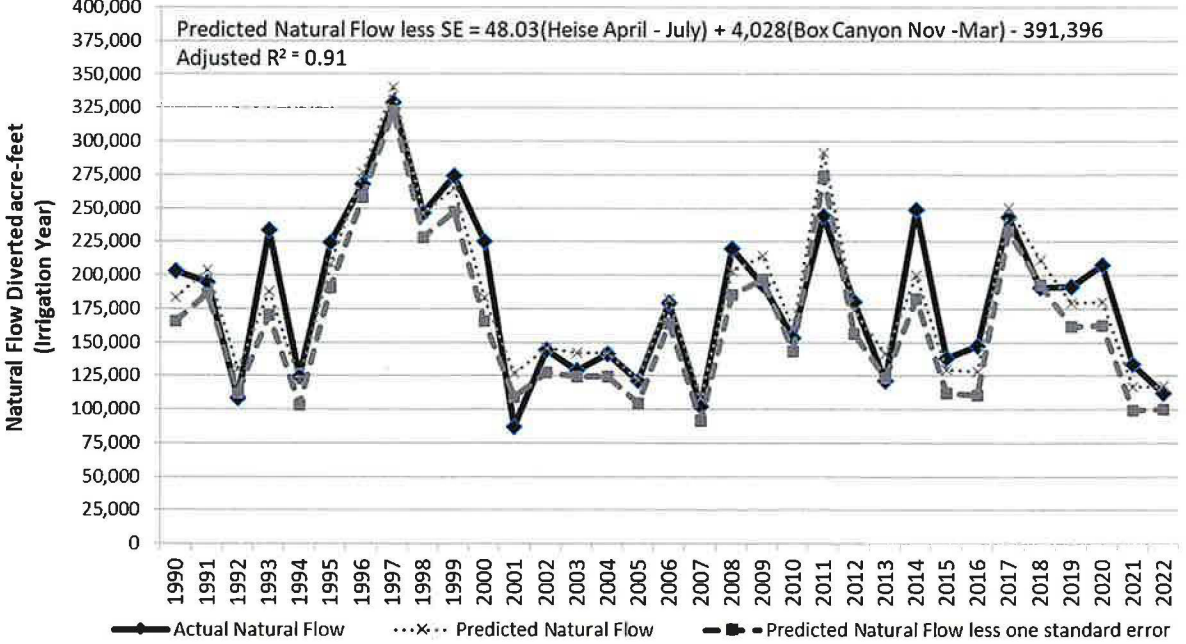


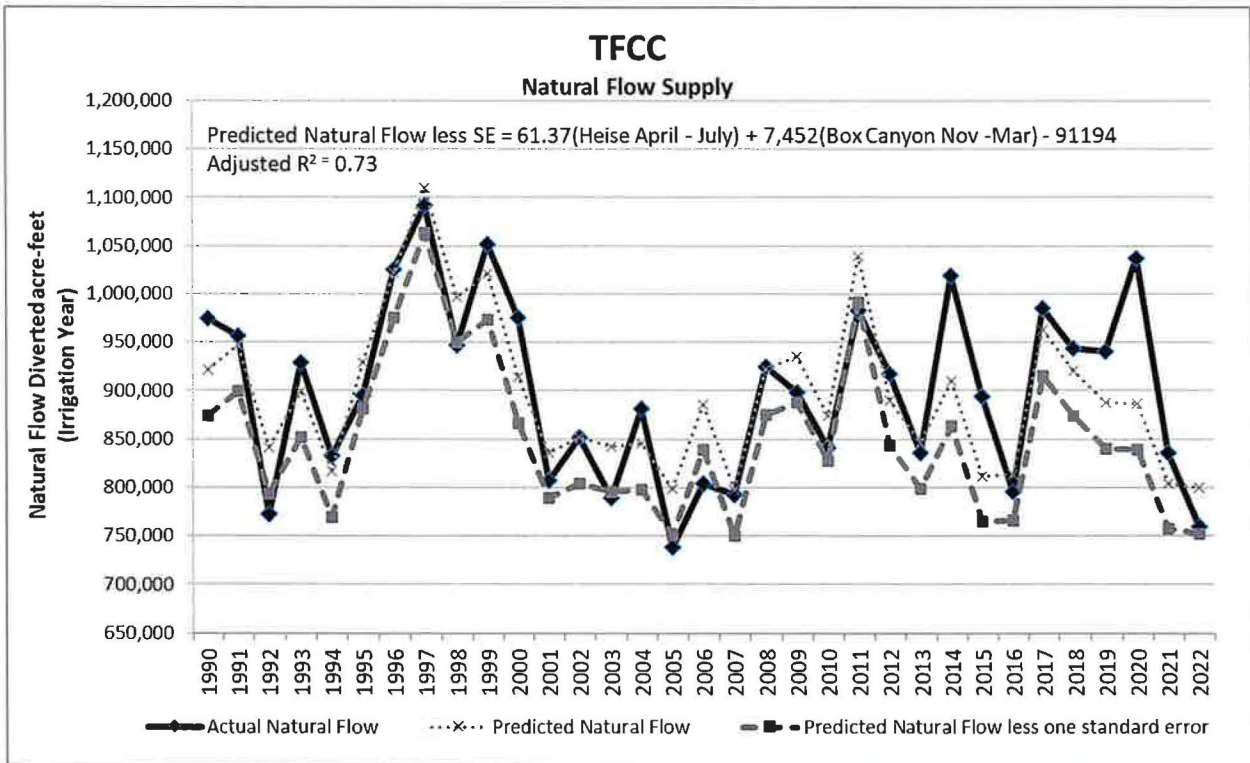
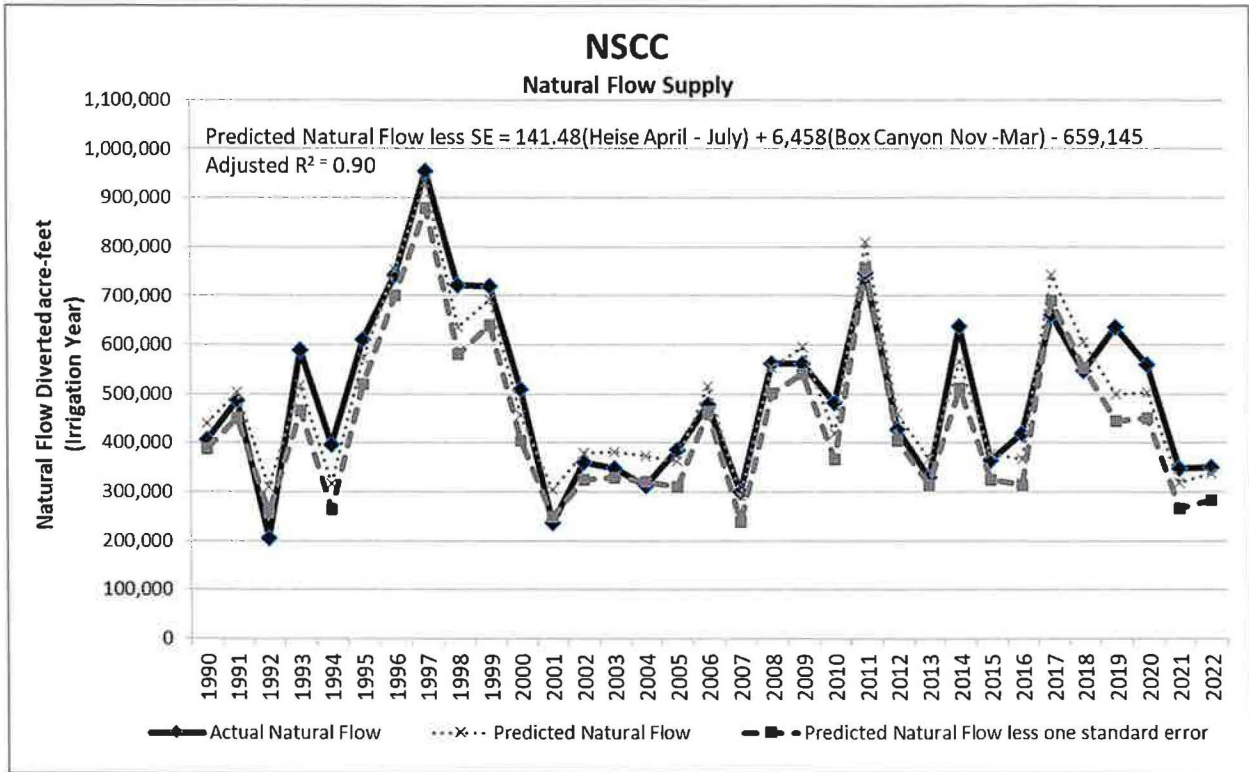


### Milner Irrigation District Natural Flow Supply



### Minidoka Irrigation District Natural Flow Supply





## **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.

# EXHIBIT A-3

**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

**NOTICE OF HEARING, NOTICE  
OF PREHEARING CONFERENCE,  
AND ORDER AUTHORIZING  
DISCOVERY**

On April 21, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) as well as his *Final Order Regarding April 2023 Forecast Supply* (“As-Applied Order”). The Methodology Order revises the nine steps used to determine material injury to members of the Surface Water Coalition (“SWC”). The As-Applied Order predicts a shortfall for the 2023 irrigation season, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953.

The Director anticipates that one or more parties will request a hearing pursuant to Idaho Code § 42-1701A(3) in response to one or both of the orders. Normally, a party has 15 days to request a hearing. However, time is of the essence because the irrigation season has commenced for many water users. Idaho's Constitutional Convention intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). “Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.” *Id.* Accordingly, the Director, consistent with the obligation to timely administer water rights, will take the proactive step of setting the matter for hearing, will set a prehearing conference, and will authorize discovery. Should the parties mutually agree that a hearing is unwarranted, the parties may file a stipulated motion to vacate.

**NOTICE OF HEARING**

**NOTICE IS HEREBY GIVEN** that the Department will hold a hearing on the Methodology Order and As-Applied Order on **June 6–10, 2023**. **The hearing will begin on June 6 at 9:00 a.m. (MST)**. Subsequent starting and ending times will be scheduled during the hearing. The last day of the hearing, June 10, is a Saturday. The day is reserved if needed to complete the hearing.

The hearing will take place at the Department’s State Office, located at **322 E. Front Street, 6th Floor, Conference Rooms 602A–D, Boise, Idaho**.

All parties wishing to participate in the hearing shall be present in person. Remote participation will be allowed for those who wish to observe the hearing. To request remote participation information, contact Sarah Tschohl at the phone number or email listed below.

The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, as well as the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at: <https://adminrules.idaho.gov/rules/current/37/370101.pdf>.

The hearing will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodation to attend, participate in, or understand the hearing, please advise the Department no later than five (5) days prior to the hearing. Inquiries for special accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815, email [sarah.tschohl@idwr.idaho.gov](mailto:sarah.tschohl@idwr.idaho.gov).

### NOTICE OF PREHEARING CONFERENCE

**NOTICE IS HEREBY GIVEN** that the Department will hold a prehearing conference on the Methodology Order and As-Applied Order on **April 28, 2023, at 1:30 p.m. (MST)**. The conference will take place at the Department's State Office, located at **322 E. Front Street, 6th Floor, Conference Rooms 602B–D, Boise, Idaho**. All parties wishing to participate in the prehearing conference must appear in person or by video conferencing. The parties shall come prepared to identify the issues to be addressed at the hearing.

To attend the conference via computer or smartphone, please click the following Webex link, follow the prompts, and wait to be admitted by the meeting host:  
<https://idahogov.webex.com/idahogov/j.php?MTID=mb39d4fed7de1bfefe8462aaefafd3dbb>.

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: 2450 253 0090.

The prehearing conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/370101.pdf>.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodation to attend, participate in, or understand the conference, please advise the Department no later than one (1) day before the conference. Inquiries for special accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815, email [sarah.tschohl@idwr.idaho.gov](mailto:sarah.tschohl@idwr.idaho.gov).

## ORDER AUTHORIZING DISCOVERY

**IT IS HEREBY ORDERED** that the parties are authorized to immediately conduct and engage in discovery pursuant to IDAPA 37.01.01.521.

**IT IS FURTHER ORDERED** that, pursuant to IDAPA 37.01.01.053, documents filed in this proceeding may be served on the parties and the Department via email. Service on the Department shall be made by email to [file@idwr.idaho.gov](mailto:file@idwr.idaho.gov). Service on the parties shall be made by email to the email addresses listed in the Certificate of Service below.

Dated this 21st day of April 2023.

  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

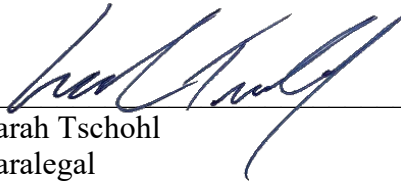
I HEREBY CERTIFY that on this 21st day of April 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson  MARTEN LAW LLP  P.O. Box 2139  Boise, ID 83701-2139  <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Travis L. Thompson  MARTEN LAW LLP  P.O. Box 63  Twin Falls, ID 83303-0063  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON  P.O. Box 1391  Pocatello, ID 83204-1391  <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Kathleen Marion 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></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email



<p>Sarah A Klahn Somach Simmons &amp; Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert E. Williams WILLIAMS, MESERVY, &amp; LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 <a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>	<p><input checked="" type="checkbox"/> Email</p>

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a>	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> Email

  
\_\_\_\_\_  
Sarah Tschohl  
Paralegal

# EXHIBIT A-4

Candice M. McHugh, ISB # 5908  
Chris M. Bromley, ISB # 6530  
MCHUGH BROMLEY, PLLC  
380 S. 4<sup>th</sup> St., Ste. 103  
Boise, ID 83702  
(208) 287-0991  
[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding, Hazelton,  
Heyburn, Jerome, Paul, Richfield, Rupert,  
Shoshone, and Wendell*

Sarah A. Klahn, ISB # 7928  
SOMACH SIMMONS & DUNN  
2033 11<sup>th</sup> St., Ste. 5  
Boulder, CO 80302  
(303) 449-2834  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)

*Attorneys for City of Pocatello*

Robert L. Harris, ISB # 7018  
HOLDEN KIDWELL HAHN & CRAPO  
100 Riverwalk Dr., Ste. 200  
PO Box 50130  
Idaho Falls, ID 83405  
(208) 523-0620  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)  
*Attorneys for City of Idaho Falls*

**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**

**MOTION FOR CONTINUANCE**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello, by and through its attorney of record, Sarah A. Klahn (collectively the “Cities”),

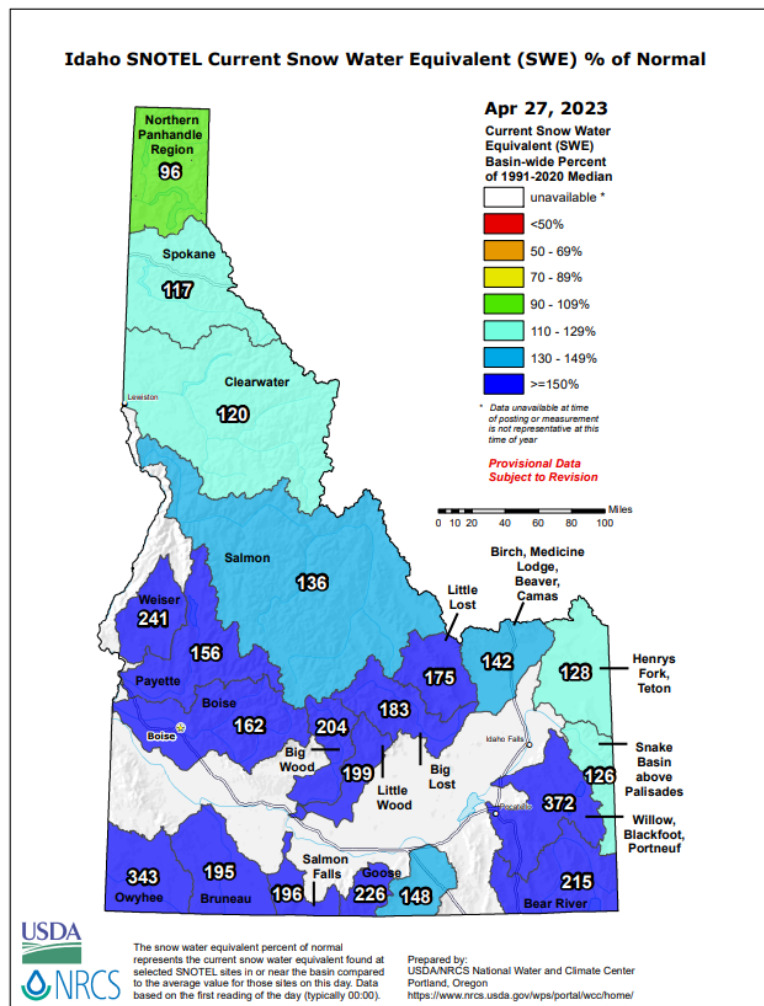
pursuant to IDAPA 37.01.01.220 and IDAPA 37.01.01.560, and hereby move for continuance of the hearing scheduled for June 6-10, 2023, in the above-captioned matter.

On April 21, 2023, the Director issued a series of orders regarding the Surface Water Coalition (“SWC”) delivery call: *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”); *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”); and *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Hearing Order”). While the Cities are in full compliance with their approved mitigation plan, the Cities nevertheless remain subject to the *Methodology Order* and its significant analytical departure from the Fourth Methodology Order.

The *Methodology Order* is a detailed, technical order, stating it is using the “best available science” to revise the Director’s predictive tools for determining material injury to the SWC pursuant to the CM Rules. The Director decided in this *Methodology Order* to make a material departure from all prior decisions in the SWC delivery call to use the Eastern Snake Plain Aquifer Model (“ESPAM”) in transient as opposed to steady-state to predict the priority date for curtailment needed to satisfy that injury. *See Methodology Order* at 35, ¶ 19. The significance of this policy change cannot be overstated and is unprecedented.

The *As-Applied Order* uses the information from the *Methodology Order* and applies it to the first half of the 2023 irrigation season, to compute a “Demand Shortfall” of 75,200 acre-feet to Twin Falls Canal Company (“TFCC”) for the period April – July. Using a transient modeling run, ESPAM predicts that ground water rights that are junior to

December 30, 1953 will need to be curtailed to satisfy the predicted injury. The predicted shortfall to TFCC in a year when the Upper Snake Reservoir systems is expected to fill and with the mountains of eastern Idaho currently containing more than 100% snow water equivalent, which is shown on the following page, results in an unprecedented quantification of material injury that defies logic:



[https://www.wcc.nrcs.usda.gov/ftpref/data/water/wcs/gis/maps/id\\_swepctnormal\\_update.pdf](https://www.wcc.nrcs.usda.gov/ftpref/data/water/wcs/gis/maps/id_swepctnormal_update.pdf)

Associated with the *As-Applied Order* is a link with files containing *April Background Information*. The *April Background Information* contains: historical diversion data for the SWC members; historical Heise flow data; analyses to estimate the 2023

shortages to the SWC members; transient ground water modeling files and results; irrigated area shape files for Minidoka Irrigation District.

The *Hearing Order* authorizes discovery, establishes that a prehearing conference will take place on April 28, 2023, and that the hearing in the contested case will commence on June 6, 2023.

IDAPA 560 states: “The presiding officer may continue proceedings for further hearing.” The Cities request that the hearing be continued until December 2023 or January 2024 for the following reasons:

1. The need for completion of adequate discovery by the parties. The Idaho Rules of Civil Procedure allows thirty (30) days for a party to respond to written discovery. If discovery is served on or after the prehearing conference, which is scheduled for April 28, 2023, answers would not be due until at least May 30, 2023, which is seven (7) days before the hearing is scheduled to commence. Additionally, compounding the already compressed schedule is the fact that Memorial Day is May 29, 2023. It is customary to have responses to written discovery before noticing depositions. Since written responses to discovery will not be available until after Memorial Day, it is simply not possible to have depositions before the June 6, 2023 hearing date.
2. The need for completion of expert reports and rebuttal reports. In order to properly formulate expert opinions and reports, the Cities require discovery from the parties as well as information from IDWR. Without discovery and information from IDWR, and based on what is understood now, issues that may be raised as expert opinions in expert reports include but are not limited to the following:
  - a) IDWR’s new reliance on transient modeling.
  - b) IDWR’s reliance on new data. IDWR has added seven (7) years of additional, voluminous hydrologic and water use data to the datasets used in the *Methodology Order* and *As-Applied Order*. There is insufficient time available to properly review and vet these data and how they were used in the revised calculations;
  - c) IDWR’s failure to properly identify the SWC’s irrigated acreage used in the determination of reasonable in-season demand;
  - d) IDWR’s failure to consider TFCC’s increase in diversions over the last twenty

years;

- e) IDWR's failure to consider changes in the efficiency of SWC operations;
  - f) IDWR's failure to apply CM Rule 20.03 and principles of reasonableness generally; and
  - g) IDWR's violation of due process rights of all interested water users:
    - i. By engaging in an apparently sham public process related to the Department's convening of the "Technical Work Group" to discuss modifications to the Fourth Methodology Order; and
    - ii. By setting the hearing without regard to the time required for discovery and without consideration of the existing obligations of the parties, their legal representatives, and consultants.
3. The allotted schedule leaves no time for necessary site investigations, let alone the ability for expert and lay witnesses to be deposed as to their opinions when it comes to water use and current practices. The original delivery call was filed eighteen (18) years ago in 2005 with various proceedings and an administrative hearing occurring in 2008. Water use, irrigation practices, and irrigated area have likely materially changed in the intervening fifteen (15) years since the hearing. If IDWR is using the "best available science" to administer junior-priority water rights, juniors, who have due process rights in delivery calls, must be afforded the same opportunity to use the best available science to evaluate the SWC's current water use.
  4. Evaluation of the factual and legal issues that the Director has addressed in the *Methodology Order* and *As-Applied Order* will be complex and require significantly more time from the Cities' attorneys, consultants, and expert witnesses than has been allotted.
  5. In prior delivery call hearings, the Director has asked for preparation of staff memoranda. If staff memoranda are prepared, those documents will need to be evaluated in an already compressed time period. With the likelihood that parties will request interviews or depositions of the authors of the staff memoranda and the likely need for expert rebuttal reports to the memoranda and to the expert reports of other parties, the time provided is grossly inadequate.
  6. The need for the Director to resolve the Cities' *Motion to Appoint an Independent Hearing Officer*.
  7. The Coalition of Cities' attorney, Candice M. McHugh, is unavailable during the dates set for hearing because of a previously scheduled out of state obligation, leaving the Coalition of Cities' other attorney, Chris M. Bromley, as the sole attorney representing

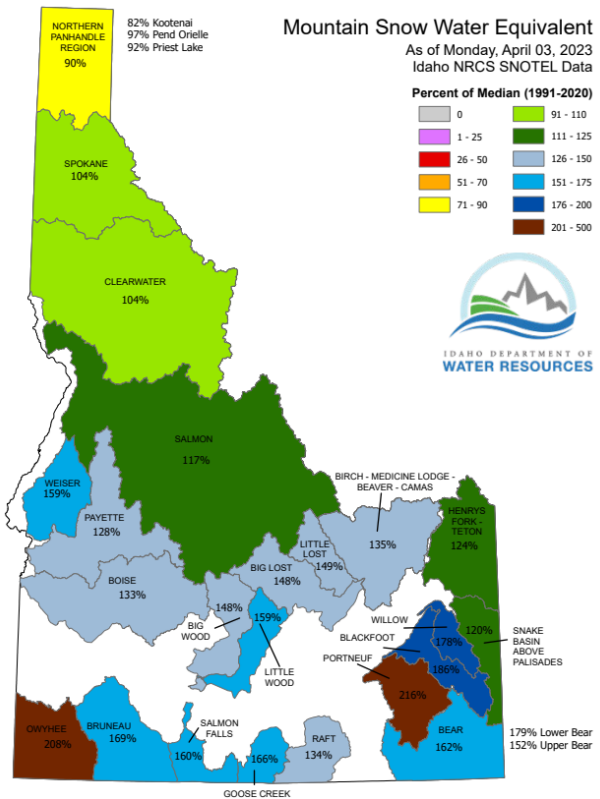
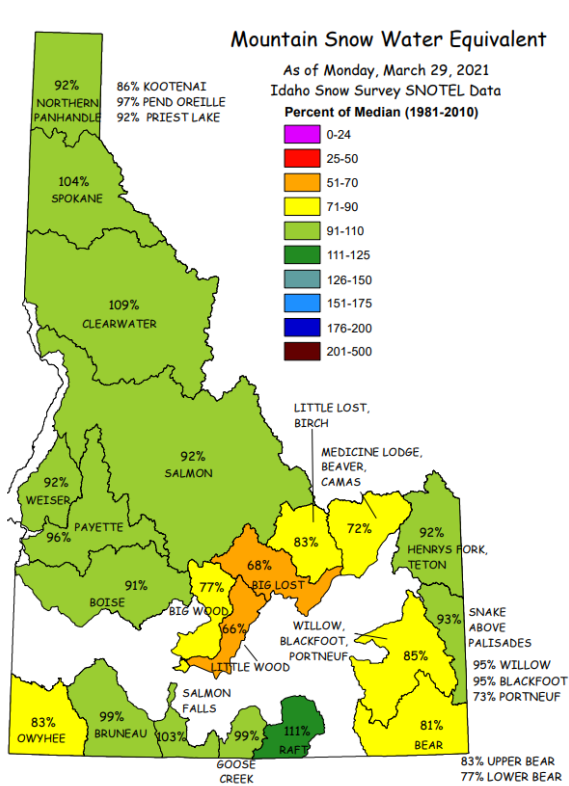


the client and running the office.

8. Mr. Bromley, as well as other counsel who represent parties in this matter, is set to argue before the Idaho Supreme Court on June 5, 2023 in the Department's appeal of the 2021 curtailment in Basin 37, *South Valley Ground Water Dist. v. Idaho Dept. of Water Res.*, Docket No. 49632. Mr. Bromley has a duty to another client in the appeal that will require his full attention in the week leading up to the argument and will be unable to provide the focus that is required to adequately represent the Coalition of Cities with Ms. McHugh's absence. Additionally, Mr. Bromley is scheduled to be out of the country on a previously planned trip with his family for most of the month of July.
9. Greg Sullivan, expert consultant for the Cities, is scheduled to be out of the country from May 17, 2023 through June 3, 2023 and will be unavailable to consult with the Cities' attorneys to assist in developing strategy, prepare expert reports, prepare exhibits, and to attend depositions if the schedule even allows for depositions to occur.

Based on the foregoing, the abbreviated hearing schedule leaves no time for discovery, fact finding, and the ability for the Cities' attorneys and experts to adequately represent their clients' interests.

A continuance is further warranted because, unlike in the Basin 37 delivery call that is referenced above, a "drought is [not] predicted for the 202[3] irrigation season . . . ." *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* at 1 (May 4, 2021). Indeed, "The Joint Forecast predicts an unregulated inflow of 3,700,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 112% of average." *As-Applied Order* at 5. The water supply in eastern Idaho is self-evident when looking at IDWR's snow water equivalency map for the spring of 2021 that was used to predict the drought in Basin 37 and comparing it with the same map for the spring of 2023, as shown on the follow page:



<https://idwr.idaho.gov/water-data/water-supply/snow-water-equivalency/>

In the Basin 37 delivery call, the Director stated he had to act with exigency because of a historically poor water supply and because he lacked a framework for determining material injury to senior-priority surface water rights. Here, material injury has already been determined in the current *Methodology Order* and those that preceded it, allowing the Director to administer water rights. Additionally, many of the junior-priority ground water users who pump from the Eastern Snake Plain Aquifer (“ESPA”) are allowed to do so based on previously approved CM Rule 43 mitigation plans. On April 24, 2023, the Director issued an order in the companion matter, CM-MP-2016-001, related to IGWA’s obligations for 2023; these obligations are also referenced in footnote 5 of the Final Order Regarding April 2023 Forecast Supply Methodology Steps 1-3. The ESPA Cities, of which the Cities are part, is one group that is allowed to pump in the 2023 irrigation season because they are in compliance with their mitigation plan. *As-Applied Order* at 5, fn. 5. Therefore, the

Director has all of the tools at his disposal to administer junior-priority ground water rights for the benefit of senior-priority surface water rights, with mitigation plans in place to address material injury, and no exigency to warrant a complex, technical hearing in such a compressed schedule.

As explained by the Supreme Court, expediency in conjunctive administration is important, however, “It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007) (emphasis added). Because there is no exigency, the schedule that the Director established does not allow time for the parties to present their information for consideration. Therefore, the Cities move to continue the hearing until a date in December 2023 or January 2024, which respects the schedules of the parties and will allow the Director sufficient time to evaluate the evidence and issue an order prior to the 2024 irrigation season.

Respectfully submitted this 28<sup>th</sup> day of April, 2023.

/s/ Robert L. Harris  
Robert L. Harris  
HOLDEN KIDWELL HAHN & CRAPO  
*Attorneys for City of Idaho Falls*

/s/ Candice M. McHugh  
Candice M. McHugh  
MCHUGH BROMLEY  
*Attorneys for Coalition of Cities*

/s/ Chris M. Bromley  
Chris M. Bromley  
MCHUGH BROMLEY  
*Attorneys for Coalition of Cities*

/s/ Sarah A. Klahn  
Sarah A. Klahn  
SOMACH SIMMONS & DUNN  
*Attorneys for City of Pocatello*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<sup>th</sup> day of April, 2023, the above and foregoing, was served electronically as follows:

Idaho Dept. of Water Res.  
PO Box 83720  
Boise, ID 83720-0098  
[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)

Kathleen Marion Carr  
US Dept. Interior 960 Broadway Ste 400  
Boise, ID 83706  
[kathleenmarion.carr@sol.doi.gov](mailto:kathleenmarion.carr@sol.doi.gov)

John K. Simpson  
MARTEN LAW LLP  
P.O. Box 2139 Boise, ID 83701-2139  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)

David W. Gehlert  
Natural Resources Section Environment and  
Natural Resources Division U.S. Department  
of Justice  
999 18th St., South Terrace, Suite 370  
Denver, CO 80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

Travis L. Thompson  
MARTEN LAW LLP P.O. Box 63  
Twin Falls, ID 83303-0063  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)  
[jnielsen@martenlaw.com](mailto:jnielsen@martenlaw.com)

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248 Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

Sarah A Klahn  
Somach Simmons & Dunn  
1155 Canyon Blvd, Ste. 110 Boulder, CO  
80302 [sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[dthompson@somachlaw.com](mailto:dthompson@somachlaw.com)

Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON  
P.O. Box 1391 Pocatello, ID 83204-1391  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

Rich Diehl  
City of Pocatello  
P.O. Box 4169 Pocatello, ID 83205  
[rdiehl@pocatello.us](mailto:rdiehl@pocatello.us)

Candice McHugh  
Chris Bromley  
MCHUGH BROMLEY, PLLC  
380 South 4th Street, Suite 103 Boise, ID  
83702 [cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO,  
PLLC  
P.O. Box 50130 Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

Robert E. Williams  
WILLIAMS, MESERVY, & LOTHSPREICH,  
LLP P.O. Box 168 Jerome, ID 83338  
[rewilliams@wmlattys.com](mailto:rewilliams@wmlattys.com)

Skyler C. Johns  
Nathan M. Olsen Steven L. Taggart  
OLSEN TAGGART PLLC P.O. Box 3005  
Idaho Falls, ID 83403  
[sjohns@olsentaggart.com](mailto:sjohns@olsentaggart.com)  
[nolsen@olsentaggart.com](mailto:nolsen@olsentaggart.com)  
[staggart@olsentaggart.com](mailto:staggart@olsentaggart.com)

Randall D. Fife City  
Attorney, City of Idaho Falls  
P.O. Box 50220 Idaho Falls, ID 83405  
[rfife@idahofallsidaho.gov](mailto:rfife@idahofallsidaho.gov)

Corey Skinner  
IDWR—Southern Region  
1341 Fillmore St., Ste. 200 Twin Falls, ID  
83301-3033  
[corey.skinner@idwr.idaho.gov](mailto:corey.skinner@idwr.idaho.gov)

Tony Olenichak IDWR—Eastern Region  
900 N. Skyline Drive, Ste. A Idaho Falls, ID  
83402  
[Tony.Olenichak@idwr.idaho.gov](mailto:Tony.Olenichak@idwr.idaho.gov)

William A. Parsons  
PARSONS SMITH & STONE  
P.O. Box 910 Burley, ID 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

/s/ Candice M. McHugh  
Candice M. McHugh

# EXHIBIT A-5

**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

**SCHEDULING ORDER AND  
ORDER AUTHORIZING REMOTE  
APPEARANCE AT HEARING**

**BACKGROUND**

On April 21, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) as well as his *Final Order Regarding April 2023 Forecast Supply* (“As-Applied Order”). The Methodology Order revises the nine steps used to determine material injury to members of the Surface Water Coalition (“SWC”). The As-Applied Order predicts a shortfall for the 2023 irrigation season, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953.

The Director, anticipating that one or more parties would request a hearing pursuant to Idaho Code § 42-1701A(3) in response to one or both of the orders, issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Notice of Hearing”) on April 21, 2023. In addition to scheduling an in-person hearing on the Methodology Order and As-Applied Order for June 6–10, 2023, the Notice of Hearing authorized the parties to begin conducting discovery immediately and scheduled a prehearing conference, which the Director held on April 28, 2023.

During the prehearing conference, the Director identified two Department witnesses who will be made available to the parties for deposition and will testify at the hearing—Jennifer Sukow, Engineer, Technical 2, and Matthew Anders, Technical Services Bureau Chief. The Director stated he did not intend to request a technical staff memorandum in advance of the hearing. Some counsel expressed concern about having enough time to respond to discovery given the compressed period for the hearing. The Director agreed to limit the scope and timing of discovery to address the concerns. Counsel for the Coalition of Cities<sup>1</sup> and McCain Foods USA, Inc., Candice McHugh, notified the Director of an out-of-state conflict with the hearing dates and requested that the Director allow her to formally appear virtually instead of in-person on June 6–10, 2023. No parties objected to attorney McHugh’s remote participation request

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<sup>1</sup> In this matter, the Coalition of Cities refers to the Idaho cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

during the prehearing. Further, the Director and the parties discussed and agreed upon a discovery and hearing schedule. The order below memorializes the various schedules and deadlines articulated during the prehearing conference on April 28, 2023.

## **ORDER**

**IT IS HEREBY ORDERED** that discovery will be limited as follows: (1) The parties shall not engage in interrogatories or requests for admissions; (2) The parties may request production of documents. The party upon whom a request for production of documents is served shall respond to the request within 10 days from the date the request is served.

**IT IS FURTHER ORDERED** that the following schedule is ADOPTED:

- |  |   |
|--|---|
| <b>May 5, 2023</b>                               | <ol style="list-style-type: none"><li>1) Deadline for the Department to identify materials Ms. Sukow and Mr. Anders may rely upon at the hearing.</li><li>2) Deadline for the Department to summarize topics Ms. Sukow and Mr. Anders will testify about at the hearing.</li><li>3) Deadline for the parties to submit to the Department a written statement of proposed issues for the hearing.</li></ol>                |
| <b>May 10, 2023</b>                              | Deadline for the Department to augment its above-mentioned list of materials Ms. Sukow and Mr. Anders may rely on at the hearing, if needed.  |
| <b>7 Days Prior to Hearing Day 1<sup>2</sup></b> | <ol style="list-style-type: none"><li>1) Deadline for the parties to complete all discovery.</li><li>2) Deadline for the parties to deliver copies of their expert reports to the other parties.</li><li>3) Deadline for the parties to exchange and file with the Department their proposed lay and expert witness lists. The parties should include a general summary of each witness' anticipated testimony.</li></ol> |

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<sup>2</sup> During the hearing one of the parties astutely suggested that the discovery deadline should be pinned to the hearing date, rather than an agreed upon calendar date, in the event the hearing date was moved.



- 4) Deadline for the parties to exchange and file with the Department their proposed exhibit lists. The parties shall also exchange and submit to the Department an electronic copy (via e-file email, USB thumb drive, or disc(s)) of their pre-marked exhibits using the following reserved exhibit numbers:

<b>Exhibit Numbers</b>	<b>Assigned Party</b>
1–99	Surface Water Coalition
100–199	Idaho Ground Water Appropriators
200–299	Coalition of Cities
300–399	City of Pocatello
400–499	City of Idaho Falls
500–599	Bonneville-Jefferson Ground Water District
600–699	McCain Foods USA, Inc.


Any future parties who have yet to appear and wish to submit exhibits at the hearing shall request a set of designated exhibit numbers from the Department by emailing [sarah.tschohl@idwr.idaho.gov](mailto:sarah.tschohl@idwr.idaho.gov) at least two business days prior to this deadline.

**Hearing  
Day 1**

Prior to the start of the hearing, the parties shall submit to the Department three physical copies of their pre-marked and numbered, proposed hearing exhibits.

**IT IS FURTHER ORDERED** that in accordance with IDAPA 37.01.01.552 and for good cause shown, counsel for the Coalition of Cities and McCain Foods USA, Inc., Candice McHugh, may appear virtually by video link on June 6–10, 2023. Sarah Tschohl, on behalf of the Department, will email the remote participation link to Candice McHugh no later than May 30, 2023.

DATED this 2<sup>nd</sup> day of May 2023.

  
\_\_\_\_\_  
Gary Spackman  
Director

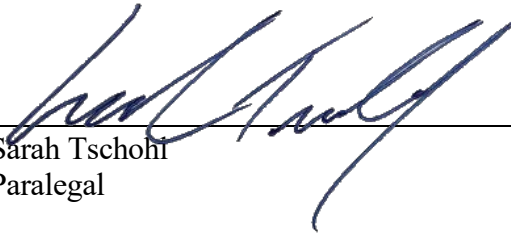
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson  MARTEN LAW LLP  P.O. Box 2139  Boise, ID 83701-2139  <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson  MARTEN LAW LLP  P.O. Box 63  Twin Falls, ID 83303-0063  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON  P.O. Box 1391  Pocatello, ID 83204-1391  <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn  Somach Simmons &amp; Dunn  1155 Canyon Blvd, Ste. 110  Boulder, CO 80302  <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>

<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83702  <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTHSPREICH, LLP  P.O. Box 168  Jerome, ID 83338  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405  <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Randall D. Fife  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405  <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Skyler C. Johns  Nathan M. Olsen  Steven L. Taggart  OLSEN TAGGART PLLC  P.O. Box 3005  Idaho Falls, ID 83403  <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a>  <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a>  <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Tony Olenichak  IDWR—Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402  <a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email
<p>Corey Skinner  IDWR—Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033  <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email

<p>COURTESY COPY TO: 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>	<p><input checked="" type="checkbox"/> Email</p>
--	--



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Sarah Tschohl  
Paralegal

# EXHIBIT A-6

Sarah A. Klahn (ISB# 7928)  
SOMACH SIMMONS & DUNN  
*Attorneys for City of Pocatello*

Robert L. Harris (ISB# 7018)  
HOLDEN KIDWELL HAHN & CRAPO  
*Attorneys for City of Idaho Falls*

Candice M. McHugh (ISB# 5908)  
Chris M. Bromley, ISB # 6530  
MCHUGH BROMLEY, PLLC  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding, Hazelton,  
Heyburn, Jerome, Paul, Richfield, Rupert,  
Shoshone, and Wendell*

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB# 11746)  
RACINE OLSON, PLLP  
*Attorneys for Idaho Ground Water  
Appropriators, Inc. (IGWA)*

Skyler C. Johns (ISB# 11033)  
Nathan M. Olsen (ISB# 7373)  
Steven L. Taggart (ISB# 8551)  
OLSEN TAGGART PLLC  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

Dylan Anderson (ISB# 9676)  
DYLAN ANDERSON LAW  
*Attorney for Bingham Groundwater District*

**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

**MOTION FOR RECONSIDERATION**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello by and through its attorney of record Sarah A. Klahn (collectively the “Cities”), the Idaho Ground Water Appropriators (“IGWA”), Bingham Ground Water District,

Bonneville-Jefferson Ground Water District (collectively the “Groundwater Users”), and pursuant to IDAPA 37.01.01.711 of the Department’s rules of procedure and hereby move for reconsideration of the Director’s April 21, 2023 *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand* (“Methodology Order”) and *Reasonable Carryover and Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”), (collectively the “2023 Orders”).

## INTRODUCTION

On April 21, 2023, at 6:45 p.m., the Director caused to be served on the parties to the Surface Water Coalition (“SWC”) delivery call the above-referenced orders.<sup>1</sup> This Motion asks the Director to reconsider his finding of material injury of 75,200 acre-feet to Twin Falls Canal Company (“TFCC”) based on the fact that if the irrigated acres for TFCC that was discussed during the Technical Working Group (“TWG”) were used in the 2023 Orders, the Director would not have found material injury.

## ARGUMENT

According to the Idaho Supreme Court, when the Director uses a baseline methodology for considering and determining material injury:

the Director has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority of water be extended only to those using the water.

*A&B v. Idaho Dept. of Water Res.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (emphasis added).

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<sup>1</sup> The 2023 Orders were not served until 6:45 p.m. Because of this the fourteen-day period to file for reconsideration should run until May 8, 2023. In an abundance of caution, the Groundwater Users are filing this *Motion for Reconsideration* on May 5, 2023, which will be timely supplemented with a technical declaration on May 8, 2023.

According to the *Methodology Order*, members of the SWC are required to “submit electronic shape files to the Department delineating the total anticipated irrigated acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent.” *Methodology Order* at 39. According to the *As-Applied Order*, on March 10, 2023, “the Department received a letter from . . . Twin Falls Canal Company . . . stating that their total number of acres for 2023 will not vary by more than five percent from the electronic shapefiles submitted in prior years.” *As-Applied Order* at 1. The total number of irrigated acres for TFCC was calculated as “194,732.” *Id.* at 2. The number of irrigated acres is critical in the *Methodology Order* because acres are used as an input in the Director’s quantification of material injury.

As the Director is aware, the SWC delivery call was commenced in 2005. In the intervening eighteen years, the number of irrigated acres has changed. For instance, in 2008, Hearing Officer Gerald Schroeder stated that TFCC claimed it was irrigating “196,162 acres,” and that IGWA had identified “at least 6,600 acres claimed by TFCC in its district are not irrigated.” *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 9, 53 (Apr. 29, 2008). The Director acknowledged the same: “Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acres. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated.” *Methodology Order* at 8. Despite these findings and statements, the number of irrigated acres asserted by TFCC has changed very little considering population growth and hardening of acres in Twin Falls County.

When questioned at the April 28, 2023 *Pre-Hearing Conference* why he was proceeding



so quickly to curtail junior ground water users with no time given to develop a record that would account for changes over the last eighteen years, the Director stated that factual issues should have been raised with the TWG:

So again, I understand your arguments, but I have little sympathy for them at this point in time. . . . . And I guess I could present facts about the time period within which the facts that you're talking about and the preparation and presentations to the Department took a period of time, but there's also been a period of time of four months, I think, since the last presentation by Department staff to the technical working group, and within which the experts and the parties anticipating the issuance of a Methodology Order certainly could have been preparing for the inevitable.

*Pre-Hearing Conference Transcript* p. 25:18-25; p. 26:1-2 (emphasis added).

In fact, the irrigated area for TFCC was discussed during a TWG meeting on December 21, 2022. During that meeting, IDWR provided the participants with the findings that TFCC is irrigating 180,956 acres. The Director should have used the TWG irrigated acres in his determination of injury – certainly that is what the TWG participants were anticipating. If he had done so, the reduction in demand would be as follows:

<u>TFCC Acres</u>	
Methodology:	194,732 acres (Fifth Methodology Order at 10)
<u>NRT Metric:</u>	<u>180,956 acres (12/21/2022 IDWR Presentation to TWG at 19)</u>
Difference:	13,776 acres

TFCC Average CIR: 2.2 AF/ac (IDWR Spreadsheet - DS RISD Calculator\_2022\_August 15.xlsx; Tab: "Crop Water Need)

TFCC Average PE: 35% (Fifth Methodology Order at 14)

Demand Reduction = (13,776 acres x 2.2 AF/ac) / 0.35

Demand Reduction = **86,600 AF**

*Declaration of Greg Sullivan.*<sup>2</sup>

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<sup>2</sup> As stated in footnote 1, and because of when IDWR served the 2023 Orders, the *Declaration of Greg Sullivan* will be filed on May 8, 2023.

The reduction in TFCC’s diversion demand of 86,600 acre-feet is computed using the reduction in TFCC acres indicated by IDWR’s NRT Metric analysis, which is greater than the predicted 2023 diversion shortage for the TFCC in 2023 of 75,200 acre-feet. In other words, if IDWR’s analysis to remove the non-irrigated acres in the TFCC service area is used in the 2023 Orders, there would be no predicted shortage to the TFCC in 2023.

### CONCLUSION

Idaho’s prior appropriation doctrine does not condone curtailment for acres that are not irrigated. Because the Director’s quantification of material injury was based on flawed data, material injury should not have been predicted. The prediction of material injury has forced the Groundwater Users to secure mitigation that they otherwise would not have been required to obtain. Based on the foregoing, the Groundwater Users request that the Director reconsider his finding of material injury to TFCC based on the fact that if he used the irrigated area that was discussed during the TWG, no injury would have been calculated.

Submitted this 5<sup>th</sup> day of May, 2023.

/s/ Sarah A. Klahn  
Sarah A. Klahn  
SOMACH SIMMONS & DUNN  
Attorneys for City of Pocatello

/s/ Candice M. McHugh  
Candice M. McHugh  
MCHUGH BROMLEY  
Attorneys for Coalition of Cities

/s/ Robert L. Harris  
Robert L. Harris  
HOLDEN KIDWELL HAHN & CRAPO  
Attorneys for City of Idaho Falls

/s/ Chris M. Bromley  
Chris M. Bromley  
MCHUGH BROMLEY  
Attorneys for Coalition of Cities

/s/ T.J. Budge  
Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON, PLLP  
*Attorneys for Idaho Ground Water  
Appropriators, Inc. (IGWA)*

/s/ Skyler C. Johns  
Skyler C. Johns  
OLSEN TAGGART PLLC  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

/s/ Dylan Anderson  
Dylan Anderson  
DYLAN ANDERSON LAW  
*Attorney for Bingham Groundwater District*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of May, 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

Idaho Dept. of Water Res.  
322 E. Front St.  
Boise, ID 83702  
[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)  
[gary.spackman@idwr.idaho.gov](mailto:gary.spackman@idwr.idaho.gov)  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)

Kathleen Marion Carr  
US Dept. Interior 960 Broadway Ste 400  
Boise, ID 83706  
[kathleenmarion.carr@sol.doi.gov](mailto:kathleenmarion.carr@sol.doi.gov)

John K. Simpson  
MARTEN LAW LLP  
P.O. Box 2139 Boise, ID 83701-2139  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)

David W. Gehlert  
Natural Resources Section Environment and  
Natural Resources Division U.S. Department  
of Justice  
999 18th St., South Terrace, Suite 370  
Denver, CO 80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

Travis L. Thompson  
MARTEN LAW LLP P.O. Box 63  
Twin Falls, ID 83303-0063  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)  
[jnielsen@martenlaw.com](mailto:jnielsen@martenlaw.com)

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248 Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

Sarah A Klahn  
Somach Simmons & Dunn  
1155 Canyon Blvd, Ste. 110 Boulder, CO  
80302 [sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[dthompson@somachlaw.com](mailto:dthompson@somachlaw.com)

Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON  
P.O. Box 1391 Pocatello, ID 83204-1391  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

Rich Diehl  
City of Pocatello  
P.O. Box 4169 Pocatello, ID 83205  
[rdiehl@pocatello.us](mailto:rdiehl@pocatello.us)

Candice McHugh  
Chris Bromley  
MCHUGH BROMLEY, PLLC  
380 South 4th Street, Suite 103 Boise, ID  
83702 [cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO,  
PLLC  
P.O. Box 50130 Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

Robert E. Williams  
WILLIAMS, MESERVY, & LOTHSPREICH,  
LLP P.O. Box 168 Jerome, ID 83338  
[rewilliams@wmlattys.com](mailto:rewilliams@wmlattys.com)

Skyler C. Johns  
Nathan M. Olsen Steven L. Taggart  
OLSEN TAGGART PLLC P.O. Box 3005  
Idaho Falls, ID 83403  
[sjohns@olsentaggart.com](mailto:sjohns@olsentaggart.com)  
[nolsen@olsentaggart.com](mailto:nolsen@olsentaggart.com)  
[staggart@olsentaggart.com](mailto:staggart@olsentaggart.com)

Randall D. Fife City  
Attorney, City of Idaho Falls  
P.O. Box 50220 Idaho Falls, ID 83405  
[rfife@idahofallsidaho.gov](mailto:rfife@idahofallsidaho.gov)

Corey Skinner  
IDWR—Southern Region  
1341 Fillmore St., Ste. 200 Twin Falls, ID  
83301-3033  
[corey.skinner@idwr.idaho.gov](mailto:corey.skinner@idwr.idaho.gov)

Tony Olenichak IDWR—Eastern Region  
900 N. Skyline Drive, Ste. A Idaho Falls, ID  
83402  
[Tony.Olenichak@idwr.idaho.gov](mailto:Tony.Olenichak@idwr.idaho.gov)

William A. Parsons  
PARSONS SMITH & STONE  
P.O. Box 910 Burley, ID 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

/s/ Chris M. Bromley  
Chris M. Bromley

# EXHIBIT A-7

Candice McHugh, ISB No. 5908  
McHugh Bromley, PLLC  
Attorneys at Law  
380 S. 4<sup>th</sup> St., Ste. 103  
Boise, ID 83702  
Telephone: (208) 287-0991  
Facsimile: (208) 287-0864  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

*Attorney for the Coalition of Cities, Amalgamated  
Sugar Company and McCain Foods USA, Inc.*

**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**

**DECLARATION OF CANDICE M.  
MCHUGH**

I, Candice McHugh hereby declare and state as follows:

1. I am over the age of 18 and state the following based upon my own personal knowledge.
2. I am one of two owners of McHugh Bromley, PLLC, the law firm that represents the cities that make up the Coalition of Cities as their interests relate to the on-going Surface Water Coalition (“SWC”) Delivery Call and mitigation thereof. McHugh Bromley, PLLC also represents Amalgamated Sugar Company (“Amalgamated”) and McCain Foods USA, Inc. (“McCain”) in this matter.
3. McHugh Bromley, PLLC has two attorneys, Candice McHugh and Chris Bromley. We have one part-time file clerk who works 4-5 hours per week on clerical duties only.
4. I serve as the primary attorney for Amalgamated and McCain.

5. My partner, Chris Bromley, is the primary attorney for Sun Valley Company who is a party to the Supreme Court appeal in *South Valley Ground Water District and Galena Ground Water District v. Idaho Dep't of Water Resources*, Supreme Court Docket No. 49632-2022 ("Supreme Court Matter"). Oral argument in that matter is set for June 5, 2023 with Mr. Bromley set for argument. Mr. Bromley will be preparing for argument during the week of May 29, 2023.
6. I have a previously scheduled out of state obligation in Boone, North Carolina, to assist my son who is a freshman football athlete in college from June 4-8, 2023, wherein I will be travelling by air virtually all day June 4 and all day June 8, 2023.
7. Because our law firm only has two attorneys, requiring Mr. Bromley, alone to prepare for the Supreme Court argument while also having to do the bulk of the preparation for the SWC hearing on behalf of the Coalition of Cities, Amalgamated, and McCain at the same time and then represent our firm's clients in 4 days of hearing is not practical and does not allow us to fully and fairly represent Coalition of Cities, Amalgamated, and McCain.
8. After repeated requests to postpone the hearing to other dates by the junior users, IGWA, GWDs, McCain, Amalgamated, and the Cities, the Director denied their requests.
9. The hearing as currently set will not allow me to assist or attend the hearing in any meaningful manner and prejudices the interest of McHugh Bromley, PLLC's clients.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Dated this 5th, day of May, 2023.

MCHUGH BROMLEY, PLLC



---

Candice M. McHugh  
Attorney for the Coalition of Cities



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of May, 2023, the above and foregoing, was served by email to the following:

Idaho Dept. of Water Res.  
[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)  
[gbaxter@idwr.idaho.gov](mailto:gbaxter@idwr.idaho.gov)

Kathleen Marion Carr  
US Dept. Interior 960 Broadway Ste 400  
Boise, ID 83706  
[kathleenmarion.carr@sol.doi.gov](mailto:kathleenmarion.carr@sol.doi.gov)

John K. Simpson  
MARTEN LAW LLP  
P.O. Box 2139 Boise, ID 83701-2139  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)

David W. Gehlert  
Natural Resources Section Environment and  
Natural Resources Division U.S. Department  
of Justice  
999 18th St., South Terrace, Suite 370  
Denver, CO 80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

Travis L. Thompson  
MARTEN LAW LLP P.O. Box 63  
Twin Falls, ID 83303-0063  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)  
[jnielsen@martenlaw.com](mailto:jnielsen@martenlaw.com)

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248 Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

Sarah A Klahn  
Somach Simmons & Dunn  
1155 Canyon Blvd, Ste. 110 Boulder, CO  
80302 [sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[dthompson@somachlaw.com](mailto:dthompson@somachlaw.com)

Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON  
P.O. Box 1391 Pocatello, ID 83204-1391  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

Rich Diehl  
City of Pocatello  
P.O. Box 4169 Pocatello, ID 83205  
[rdiehl@pocatello.us](mailto:rdiehl@pocatello.us)

Candice McHugh  
MCHUGH BROMLEY, PLLC  
380 South 4th Street, Suite 103 Boise, ID  
83702 [cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO,  
PLLC  
P.O. Box 50130 Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

Robert E. Williams  
WILLIAMS, MESERVY, & LOTHSPREICH,  
LLP P.O. Box 168 Jerome, ID 83338  
[rewilliams@wmlattys.com](mailto:rewilliams@wmlattys.com)

Skyler C. Johns  
Nathan M. Olsen Steven L. Taggart  
OLSEN TAGGART PLLC P.O. Box 3005  
Idaho Falls, ID 83403  
[sjohns@olsentaggart.com](mailto:sjohns@olsentaggart.com)  
[nolsen@olsentaggart.com](mailto:nolsen@olsentaggart.com)  
[staggart@olsentaggart.com](mailto:staggart@olsentaggart.com)

Randall D. Fife City  
Attorney, City of Idaho Falls  
P.O. Box 50220 Idaho Falls, ID 83405  
[rfife@idahofallsidaho.gov](mailto:rfife@idahofallsidaho.gov)

Corey Skinner  
IDWR—Southern Region  
1341 Fillmore St., Ste. 200 Twin Falls, ID  
83301-3033  
[corey.skinner@idwr.idaho.gov](mailto:corey.skinner@idwr.idaho.gov)

Tony Olenichak IDWR—Eastern Region  
900 N. Skyline Drive, Ste. A Idaho Falls, ID  
83402  
[Tony.Olenichak@idwr.idaho.gov](mailto:Tony.Olenichak@idwr.idaho.gov)

William A. Parsons  
PARSONS SMITH & STONE  
P.O. Box 910 Burley, ID 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

/s/ Candice M. McHugh  
Candice M. McHugh

# EXHIBIT A-8

**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

**ORDER DENYING THE CITIES’  
MOTION FOR APPOINTMENT  
OF INDEPENDENT HEARING  
OFFICER AND MOTION FOR  
CONTINUANCE AND LIMITING  
SCOPE OF DEPOSITIONS**

**BACKGROUND**

On April 21, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) as well as his *Final Order Regarding April 2023 Forecast Supply* (“As-Applied Order”). The Methodology Order revises the nine steps used to determine material injury to members of the Surface Water Coalition (“SWC”). The As-Applied Order predicts a shortfall for the 2023 irrigation season, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953.

Anticipating that one or more parties would request a hearing pursuant to Idaho Code § 42-1701A(3) in response to one or both of the orders, the Director also issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Notice of Hearing”) on April 21, 2023. The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing on the Methodology Order and As-Applied Order for June 6–10, 2023.

Immediately before the April 28, 2023 prehearing conference, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell (collectively the “Cities”) filed a *Motion for Appointment of Independent Hearing Officer* (“Motion to Appoint”) requesting that the Director appoint an independent hearing officer to preside over the hearing set for June 6–10, 2023. The Cities also filed a *Motion for Continuance*, asking the Director to continue the evidentiary hearing “until a date in December or January 2024 . . . .” Mot. for Continuance at 8.

The prehearing conference was held on April 28, 2023. During the prehearing conference, the Cities presented argument in support of their *Motion for Continuance*. The Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Groundwater District, and McCain Foods orally moved to join the Cities’ *Motion for Continuance*. The SWC opposed the Cities’ motion, arguing the hearing should remain as scheduled on June 6–10, 2023. The Director orally denied the Cities’ request to delay the hearing until December or January 2024

ORDER DENYING THE APPOINTMENT OF AN INDEPENDENT HEARING OFFICER  
AND MOTION FOR CONTINUANCE AND LIMITING SCOPE OF DEPOSITIONS —Page 1

but left open the possibility of moving the hearing dates to another week in June. This order memorializes the Director’s oral ruling.

## ANALYSIS

### A. Motion for Continuance.

The Cities request that the hearing, currently scheduled for June 6–10, 2023, be delayed approximately six months. Mot. for Continuance at 8. The Cities assert additional time is needed to conduct discovery, prepare witnesses, properly evaluate the updated Methodology Order and As-Applied Order, and because one of its attorneys (Ms. Candice McHugh) will be unable to appear in person June 6–10. *Id.* at 4–6. The Cities further assert the Director should grant its request because no exigency exists given the above-average snowfall this year. *Id.* at 6–8.

During the April 28, 2023 prehearing conference, the Director orally denied the Cities’ request to move the hearing to December or January 2024 but offered limited flexibility regarding the June hearing dates. The Director stated he was willing to move the hearing anytime within the first three weeks of June 2023 if all the parties agreed to move the hearing. In response to the Cities’ claims of being surprised by the changes, the Director observed that last fall the Department conducted multiple presentations regarding possible amendments to the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”). The Director also reminded the parties he had, multiple times, publicly expressed his intention to revisit the Fourth Methodology Order. In denying the Cities’ request, the Director emphasized his court-ordered obligation to timely predict water supplies and issue orders timely to ensure senior water right holders are protected. The Director reaffirms his denial of the Cities’ *Motion for Continuance* but remains willing to move the hearing within the first three weeks of June 2023 if the parties file a stipulated motion requesting a change.<sup>1</sup>

### B. Motion to Appoint an Independent Hearing Officer.

The Cities move the Director to appoint an independent hearing officer pursuant to Idaho Code § 42-1701A(2), which states in relevant part that “[t]he director, *in his discretion*, may direct that a hearing be conducted by a hearing officer appointed by the director.” (Emphasis added). Accordingly, the Director has the discretion to grant or deny the Cities’ request.

In support of the Motion, the Cities argue that “the only evidentiary hearing of any magnitude” in the SWC delivery call proceedings occurred in 2008 when former Idaho Supreme Court Chief Justice Gerald Schroeder was appointed to serve as a hearing officer. *Motion to Appoint* at 3–4. The Cities assert that the updated Methodology Order constitutes a “sea-change”

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<sup>1</sup> At the April 28, 2023 prehearing conference, Ms. McHugh asked that she be allowed to participate in the hearing remotely if the Director was going to keep the June hearing date. The Director granted Ms. McHugh’s request to appear at the hearing remotely in his *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (issued May 2, 2023).

and that “the Methodology Order fails to update data as to SWC irrigation efficiencies, irrigation practices, irrigated area, among other topics that will need to be addressed at an evidentiary hearing with a fully developed record.” *Id.* at 4. The Cities argue that it has been 15 years since “an evidentiary hearing of any consequence has taken place,” and recommend that an independent hearing officer be appointed to hold this upcoming evidentiary hearing. *Id.* at 5. The Cities suggest the Department has established a “practice” of appointing an independent hearing officer in the SWC delivery call and encourages the Director to continue with this “practice.” *Id.*

The Director declines to grant the Cities’ request to appoint an independent hearing officer. The Director has held many evidentiary hearings related to conjunctive administration of water rights. For example, the Director held a multi-day evidentiary hearing in the Rangen delivery call matter. *See Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 801, 367 P.3d 193, 196 (2016) (“IDWR Director Gary Spackman (‘Director’) presided over an evidentiary hearing.”). The Director held a multi-day evidentiary hearing in the Basin 37 administrative matter. *See Final Order, In re Basin 37 Administrative Proceeding*, No. AA-WRA-2021-001 (Idaho Dep’t of Water Res. June 28, 2021) (The Director presided over evidentiary hearing held June 7–12, 2021).

The Director has held evidentiary hearings related to mitigation plans in the SWC delivery call matter. *See Am. Final Order Re. Compliance with Approved Mitigation Plan, In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dep’t of Water Res. April 24, 2023). Significantly, the Director has held an evidentiary hearing on previous updates to the methodology order. *See Am. Final Order Re. Method. for Determ’g Material Injury to Reasonable In-Season Demand & Carryover.*

These examples are just a few of the many administrative hearings the Director has held. As these examples illustrate, there is no fixed practice of appointing a hearing officer in this or other contested administrative matters. The Director has presided over many evidentiary hearings related to significant water administration issues and is able to preside over the upcoming evidentiary hearing.

Furthermore, time is of the essence given that the As-Applied Order predicts a shortfall for the 2023 irrigation season resulting in mitigation requirements or curtailment for ground water rights junior to December 30, 1953. The urgency for water administration mandates a timely decision because “[w]hen a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011); *see also IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho).

The Director is thoroughly familiar with all aspects of the Methodology Order and the As-Applied Order and is the person in the best position to preside over this matter and consider the arguments raised by the parties. Appointing an independent hearing officer would unreasonably delay the proceedings and delay administration of hydraulically connected surface and ground water rights.

### C. Scope of Depositions of Department Employees

During the prehearing conference, the Director also identified Matthew Anders and Jennifer Sukow as the witnesses that will testify on behalf of the Department at the hearing to explain the facts and information the Department considered in updating the Methodology Order and As-Applied Order. Questions were raised regarding the appropriate scope of the depositions. As indicated at the prehearing, the deposition process is not an opportunity for parties to question Department employees about the Director's deliberative process related to legal and policy considerations. The Methodology Order clearly explains the Director's views regarding the legal and policy considerations on the issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling. Rule 521 of the Department's Rules of Procedure states: "The presiding officer may limit the type and scope of discovery." IDAPA 37.01.01.521. Accordingly, the Director will limit the scope of the depositions to preclude questions regarding the Director's deliberative process on legal and policy considerations.

### ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that the Coalition of Cities' *Motion for Continuance* is DENIED. The Director will consider moving the hearing to other dates within the first three weeks of June 2023 if the parties file a stipulated motion requesting the change.

IT IS FURTHER ORDERED that the Coalition of Cities' *Motion for Appointment of Independent Hearing Officer* is DENIED.

IT IS FURTHER ORDERED that the scope of any deposition of a Department employee will preclude questions regarding the Director's deliberative process on legal and policy considerations.

DATED this 5th day of May 2023.



Gary Spackman  
Director

## CERTIFICATE OF SERVICE

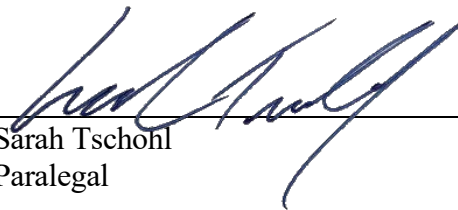
I HEREBY CERTIFY that on this 5th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson  MARTEN LAW LLP  P.O. Box 2139  Boise, ID 83701-2139  <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson  MARTEN LAW LLP  P.O. Box 63  Twin Falls, ID 83303-0063  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON  P.O. Box 1391  Pocatello, ID 83204-1391  <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn  Somach Simmons &amp; Dunn  1155 Canyon Blvd, Ste. 110  Boulder, CO 80302  <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>



<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83702  <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTHSPREICH, LLP  P.O. Box 168  Jerome, ID 83338  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405  <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Randall D. Fife  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405  <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Skyler C. Johns  Nathan M. Olsen  Steven L. Taggart  OLSEN TAGGART PLLC  P.O. Box 3005  Idaho Falls, ID 83403  <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a>  <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a>  <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Dylan Anderson  Dylan Anderson Law PLLC  P.O. Box 35  Rexburg, Idaho 83440  <a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
<p>Tony Olenichak  IDWR—Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402  <a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a>	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> Email

  
\_\_\_\_\_  
Sarah Tschohl  
Paralegal

# EXHIBIT A-9

**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

**NOTICE OF MATERIALS  
DEPARTMENT WITNESSES MAY  
RELY UPON AT HEARING AND  
INTENT TO TAKE OFFICIAL  
NOTICE**

On May 2, 2023, the Director issued a *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (“Scheduling Order”). In the Scheduling Order, the identified two Idaho Department of Water Resources (“Department”) employees who will testify at the hearing—Jennifer Sukow and Matthew Anders. The Director set a deadline of May 5, 2023, for the Department to provide the materials Ms. Sukow and Mr. Anders may rely upon at the hearing as well as a summary of topics Ms. Sukow and Mr. Anders may testify to. *Scheduling Order* at 2. The Department may augment its list of materials Ms. Sukow and Mr. Anders may rely upon at the hearing, if needed, by May 10, 2023. *Id.*

**A. Materials Ms. Sukow and Mr. Anders may rely upon during the June 6-10 hearing.**

The materials Ms. Sukow and Mr. Anders may rely upon at the hearing have been divided into four separate folders and are publicly available on the Department’s website<sup>1</sup> as a downloadable zipped file labeled “Materials Department Witnesses May Rely Upon at Hearing”.

- 1st Folder:** “2022 Technical Working Group (“TWG”)”. Presentations, agendas, data and communications related to the TWG meetings this fall.
- 2nd Folder:** “2023 5th Amended Methodology Order”. Data files and notes related to baseline year, irrigated acres, project efficiency, reasonable carryover.
- 3rd Folder:** “2023 April As-Applied Order”. Copies of all files in the April Background Information folder on IDWR’s website.
- 4th Folder:** “ESPAM Report”. ESPAM documentation reports from Jennifer Sukow.

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<sup>1</sup> The webpage for the above-captioned matter can be located at: <https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/>.

**B. Topics Ms. Sukow may testify about at the hearing:**

- Steady-state vs. transient modeling / simulations for the Eastern Snake Plain Aquifer Model (ESPAM).
- Calculation of curtailment priority dates for the SWC's delivery call.

**C. Topics Mr. Anders may testify about at the hearing:**

- Base Line Year (BLY)
- Forecast Supply
- SWC Irrigated Acres
- Crop Water Need
- Near Real Time Mapping Evapo Transpiration at high Resolution with Internalized Calibration (NRT METRIC)
- Project Efficiency
- Reasonable Carryover
- Twin Falls Canal Company's increase in diversions
- The 2023 Technical Working Group meetings

**D. Director's intent to take official notice.**

Department Rule of Procedure 602 states in pertinent part:

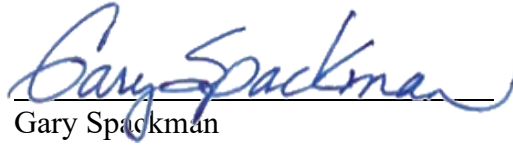
The [Director] may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency. The [Director] may ask agency staff to prepare reports or memoranda to be used in deciding a contested case, and all such reports and memoranda shall be officially noticed by the [Director]. The [Director] shall notify the parties of specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data. This notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest and rebut the facts or material officially noticed.

IDAPA 37.01.01.602.

The Director hereby notifies the parties that he intends to take official notice of the facts and data in the "2022 Technical Working Group ("TWG")" folder, "2023 5th Amended Methodology Order" folder, "2023 April as Applied Order folder", and "ESPAM Report" folder.

Concurrent with this notice, copies of those documents will be posted to the Department's docket for this proceeding. Pursuant to Rule of Procedure 602, any party may file a written objection "to contest and rebut the facts or material to be officially noticed" on or before June 4, 2023. IDAPA 37.01.01.602.

DATED this 5th day of May 2023.

A handwritten signature in blue ink that reads "Gary Spackman". The signature is written in a cursive style and is positioned above a horizontal line.

Gary Spackman  
Director

## CERTIFICATE OF SERVICE

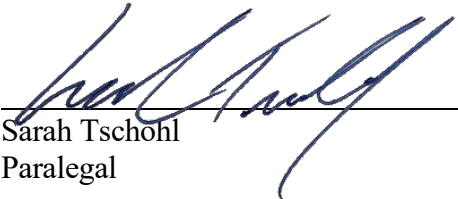
I HEREBY CERTIFY that on this 5th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson  MARTEN LAW LLP  P.O. Box 2139  Boise, ID 83701-2139  <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson  MARTEN LAW LLP  P.O. Box 63  Twin Falls, ID 83303-0063  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher  FLETCHER LAW OFFICE  P.O. Box 248  Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON  P.O. Box 1391  Pocatello, ID 83204-1391  <a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  999 18th St., South Terrace, Suite 370  Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn  Somach Simmons &amp; Dunn  1155 Canyon Blvd, Ste. 110  Boulder, CO 80302  <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>

<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83702  <a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTHSPREICH, LLP  P.O. Box 168  Jerome, ID 83338  <a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405  <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Randall D. Fife  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405  <a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Skyler C. Johns  Nathan M. Olsen  Steven L. Taggart  OLSEN TAGGART PLLC  P.O. Box 3005  Idaho Falls, ID 83403  <a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a>  <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a>  <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Dylan Anderson  Dylan Anderson Law PLLC  P.O. Box 35  Rexburg, Idaho 83440  <a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input checked="" type="checkbox"/> Email</p>
<p>Tony Olenichak  IDWR—Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402  <a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>	<p><input checked="" type="checkbox"/> Email</p>



<p>Corey Skinner  IDWR—Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033  <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email
<p>COURTESY COPY TO:  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"/> Email

  
\_\_\_\_\_  
Sarah Tschöhl  
Paralegal

# EXHIBIT A-10

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
(208) 232-6101  
tj@racineolson.com  
elisheva@racineolson.com

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

**STATE OF IDAHO**  
**DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

**Declaration of Jaxon Higgs**

I, Jaxon Higgs, declare the following:

1. I am over the age of 18 and competent to testify. If called upon to testify, I could testify to the following, all of which are within my own personal knowledge or based upon my professional judgment.

2. I am a licensed professional Geologist in the State of Idaho. I have a bachelor's degree in Geology from Brigham Young University Idaho and a master's degree in Hydrology from the University of Idaho.

3. I am the principal owner and operator of Water Well Consultants ("WWC"), an Idaho corporation with its principal address at 355 W. 500 S., Burley, Idaho 83318. WWC provides a variety of hydrogeologic services in southern Idaho related to aquifer management and water conservation. Contracted duties include, but are not limited to, monitoring of aquifer health, usage measurement and reporting, and management of aquifer recharge programs.

4. I am a consultant for Idaho Ground Water Appropriators, Inc. (“IGWA”). In that capacity I provide technical assistance on a variety of matters, including groundwater modelling and other issues related to the Surface Water Coalition (“SWC”) delivery call.

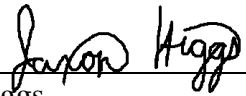
5. From November 16 to December 21, 2022, I participated in several Technical Working Group meetings with the Idaho Department of Water Resources (“Department”) staff via virtual meetings, to review the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”) and the Department staff’s findings. The information covered during these Technical Working Group meetings was complex and voluminous.

6. I have reviewed and consulted with IGWA concerning the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”) issued by the Director on April 21, 2023, and will be involved in reviewing the Fifth Methodology Order, analyzing data, and preparing expert reports.

7. My family has a long-standing road trip vacation to Mexico planned for May 27- June 10, 2023. Therefore, I am unable to participate in the hearing currently scheduled for June 6-10, 2023.


I declare under the penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of May, 2023.

By:  \_\_\_\_\_  
Jaxon Higgs

## CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of May, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
Thomas J. Budge

Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn Somach Simmons &amp; Dunn 2033 11th Street, Ste 5 Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP P.O. Box 168 Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Corey Skinner IDWR-Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak IDWR-Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p><i>COURTESY COPY TO:</i> William A. Parsons PARSONS SMITH &amp; STONE P.O. Box 910 Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>

# EXHIBIT A-11

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
(208) 232-6101 – phone  
(208) 232-6109 – fax  
tj@racineolson.com  
elisheva@racineolson.com

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

#### **Declaration of Sophia Sigstedt**

I, Sophia Sigstedt, declare the following:

1. I am over the age of 18 and competent to testify. If called upon to testify, I could testify to the following, all of which are within my own personal knowledge or based upon my professional judgment.

2. I am an American Institute of Hydrology Professionally Certified (No. 7015) Hydrogeologist with a specialization in groundwater. I have a master's degree in hydrology from the New Mexico Institute of Mining and Technology. My work includes hydrogeology, water resources engineering, and water resources planning and management. I have directed or contributed to several river-basin-scale water management studies that involved analysis of basin hydrology and water uses and the development of computer models to investigate implications of changes in hydrology, system operations, and water uses. My experience includes historical consumptive use analysis, evaluation of surface and ground water interactions, development of



protective terms and conditions for water users, settlement negotiations and expert witness testimony. I am employed by Lynker Technology, 5445 Conestoga Court, Suite 100, Boulder, Colorado.

3. For several years I have worked as a technical consultant for Idaho Ground Water Appropriators, Inc. (“IGWA”). In that capacity I participate on the Eastern Snake Plain Hydrologic Modeling Committee, the Big Lost Modeling Technical Advisory Committee, and the Swan Falls Technical Working Group, and have testified as an expert witness in cases before the Idaho Department of Water Resources (“IDWR” or “Department”). I further provide IGWA with technical assistance on a variety of matters, including the Surface Water Coalition (“SWC”) delivery call.

4. From November 16 to December 21, 2022, I participated in several virtual meetings held by Department staff regarding the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”) issued in the SWC delivery call case. Department staff had been reviewing the components of the methodology used to determine material injury to the SWC and related matters. The data shared during these meetings were highly technical, complex and voluminous.

5. On December 23, 2022, I received from Department staff a one-page summary of their “preliminary recommendations on potential technical changes to the methodology.” This document requested written comments be submitted by January 16, 2023.

6. I drafted and submitted to Department staff my preliminary comments to the preliminary recommendations, and comments addressing the other material covered during the November and December Technical Working Group meetings, on January 16, 2023.

7. On April 21, 2023, the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”). Based on my review of the Fifth Methodology Order, it does not appear that the Director took into consideration my written comments submitted on January 16, 2023.

8. Step 1 of the Fifth Methodology Order is the analysis of SWC’s total anticipated irrigated acres for the upcoming year. As with prior versions, the Fifth Methodology Order requires the SWC to annually submit either an electronic shapefile delineating total irrigated

acres within their delivery system, or confirm in writing that the acreage submitted previously has not varied by more than five percent. During the technical meetings, Department staff reported that they examined the number of acres irrigated within Twin Falls Canal Company (TFCC) as a check against the acres reported by TFCC. The Department found 179,456 irrigated acres, whereas TFCC reported 194,732 irrigated acres. This is a more than 9% difference, and it exceeds the 5% standard set in the Fifth Methodology Order. A proper evaluation of the Fifth Methodology Order requires consideration of the accuracy of SWC's reported irrigation acreage, which has not been addressed by the Department. In order to properly analyze Step 1 of the Fifth Methodology Order, I want to analyze the most up-to-date real-time METRIC data to audit the number of acres of acres actually irrigated within TFCC and other members of the SWC. The June 6, 2023, hearing date does not allow me sufficient time to perform this analysis.

9. Step 2 of the Fifth Methodology Order requires the Director to compare the April Forecast Supply (FS) to the Baseline Demand (BD) for each SWC entity to determine if an in-season demand shortfall (IDS) is predicted for the upcoming irrigation season. To calculate FS, the Fourth Methodology Order used the Heise natural flow data and in some cases Box Canyon spring discharge from years 1990-2022. IDWR staff reported in a presentation on November 17, 2022, that the  $R^2$  value for the TFCC FS model has degraded continually since the Fourth Methodology Order was issued, which creates significant problems with the reliability of the method used to predict FS. It is also significant that the  $R^2$  value for TFCC, which is often the only SWC entity with a predicted DS, is the lowest  $R^2$  value among the SWC members. In order to properly analyze Step 2 of the Fifth Methodology Order, I want to analyze previously tested FS predictors over the new period of record (POR) 1990-2022, as well as cast a new net of predictor variables that may have higher explanatory power than the current model. The June 6, 2023, hearing date does not allow me sufficient time to properly evaluate and analyze the data.

10. One of the most significant changes to the Fifth Methodology Order is the transition from a three-year composite Base Line Year (BLY) to a single-year BLY. The methodology uses the BLY to calculate Reasonable In-Season Demand (RISD) for each SWC entity in Steps 2, 6, 7 for Demand Shortfall and Step 9 Reasonable Carryover The Fourth Methodology Order used average diversion volumes in 2006, 2008, and 2012 as the BLY. The Fifth Methodology Order uses only 2018 diversions as the BLY. Average diversions in 2006/2008/2012 (06/08/12) ranked between 7th and 8th highest for diversions, or about the 55th percentile (based on a normal

distribution), for the period of record (POR) 2000-2015. For the POR 2000-2021 the diversion demand for 2018 ranks 3<sup>rd</sup>, or about the 90<sup>th</sup> percentile (based on a normal distribution) for the POR. When I compared the distribution of SWC total diversion demands for the POR 2000-2015 compared to 2000-2021, it is apparent that they are very similar with mean diversions of 3.16 million acre-feet and 3.2 million acre-feet, respectively. The standard deviation is also very similar for the POR 2000-2015 compared to 2000-2021 at 178,089 acre-feet and 178,587 acre-feet, respectively. Without evidence that the previous BLY created unmitigated shortages to the SWC, there is not an adequate technical basis to support 2018 as an appropriate BLY. In order to properly evaluate the Fifth Methodology Order, I would need to analyze if there are more appropriate BLY alternatives, and further evaluate the unique hydrologic circumstances in 2018 (i.e. precipitation and water operations) to better establish an appropriate BLY recommendation. I am unable to properly evaluate and analyze this data by the June 6, 2023, hearing date.

11. The RISD calculation applied in Steps 6 and 7 is a function of Crop Water Need (CWN) and Project Efficiency (PE). The inaccuracy of reported irrigated acres for TFCC of more than 15,000 acres will result in an inaccurate determination of CWN. I would want to further analyze and quantify the impact the error of including non-irrigated acres in the calculation of CWN has on the RISD calculation. The June 6, 2023, hearing date does not allow me to properly evaluate and analyze this data.

12. In the Fifth Methodology Order, the Director now finds that averaging over a rolling period of 15 years results in project efficiency that is more appropriate than the previous eight-year average. Project efficiency is a complex component of the Fifth Methodology Order to evaluate as it is a function of seepage or conveyance loss, on-farm application losses (deep percolation, field runoff), and system operational losses (return flows). Information reported by Department staff indicated that there is higher uncertainty in the April and October efficiency values which would result in errors in the determination of RISD. Data also showed the project efficiency among SWC entities are almost all flat or declining (6 out of 7 entities), which is contrary to what would be expected with technology advancements and constrained water supplies. Data presented to the TWG also included scatter plots by SWC entity comparing Annual Crop Water Need to Annual Diversions that show Crop Water Need is limited as a predictor given the low explanatory power indicated by the low  $R^2$  values in the analysis. I want

evaluate and analyze these apparent contradictions and uncertainties. The June 6, 2023 hearing date does not allow me to properly evaluate and analyze this data.

13. Step 3 of the Fifth Methodology Order uses the Eastern Snake Plain Aquifer Model (ESPAM) to predict the junior priority water rights that must be curtailed to produce the volume of water equal to the predicted April DS in the Blackfoot to Minidoka reach. In the Fifth Methodology Order, the Director now finds that transient simulations are necessary to evaluate the impacts of aquifer stresses. The November 28, 2022, presentation by IDWR staff showed a huge difference in resulting determination of the curtailment priority date if a steady state vs. transient model is applied. Under a transient model application, any DS above ~100,000 acre-feet would result in essentially aquifer-wide curtailment. IDWR staff have understood the difference between a transient model and steady state model at least since my involvement began in this case in 2015, so it is difficult to understand what caused the Director to make this change to methodology at this time, especially given the Department staff did not make a recommendation on this topic. During the technical presentations by IDWR staff in November/December 2022, IDWR staff were unable to explain why the change was being evaluated at this time. In order to properly evaluate this change to the methodology, I want to conduct a hindcast analysis using the transient application of ESPAM over all the preceding years to 2023 the Methodology Order has been applied. The June 6, 2023 hearing date does not allow me to properly evaluate and analyze this data.

14. I am unable to perform all of the work required to properly analyze the Fifth Methodology Order before the hearing scheduled for June 6-10, 2023. I estimated that I would need until October to complete this work.

15. I presently have a medical condition that leaves me unable to leave my home state of Colorado, until July 10, 2022. Therefore, I am not able to travel to Idaho for a hearing June 6-10, 2023. My condition further limits the amount of work I am able to perform during this time.

(Remainder of page intentionally left blank)


I declare under the penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of May, 2023.

  
\_\_\_\_\_  
Sophia C. Sigstedt

## CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of May, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
\_\_\_\_\_  
Thomas J. Budge

Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn Somach Simmons &amp; Dunn 2033 11th Street, Ste 5 Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP P.O. Box 168 Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Corey Skinner IDWR-Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak IDWR-Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p><i>COURTESY COPY TO:</i> William A. Parsons PARSONS SMITH &amp; STONE P.O. Box 910 Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>

# EXHIBIT A-12



Skyler C. Johns, ISB No. 11033  
Steven L. Taggart, ISB No. 8551  
Nathan M. Olsen, ISB No. 7373  
**OLSEN TAGGART PLLC**  
P. O. Box 3005  
Idaho Falls, ID 83403  
Telephone: (208) 552-6442  
Facsimile: (208) 524-6095  
Email: sjohns@olsentaggart.com  
staggart@olsentaggart.com  
nolsen@olsentaggart.com

*Attorneys for Bonneville-Jefferson Ground Water District*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

**DECLARATION OF BRYCE CONTOR  
IN SUPPORT OF MOTION FOR  
RECONSIDERATION OF DENIAL  
OF CONTINUANCE**

I, BRYCE CONTOR, under penalty of perjury, make this *Declaration in Support of Motion for Reconsideration of Denial of Continuance*.

1. I am over the age of eighteen (18) and competent to testify in this matter. I make this declaration based upon my own personal knowledge unless otherwise stated.

2. I am currently a senior hydrologist at Rocky Mountain Environmental Associates Inc. in Idaho Falls, Idaho (hereafter "Rocky Mountain"). I have an associate degree in farm crops management from Brigham Young University – Idaho, a Bachelor of Science degree in

agricultural economics from Bingham Young University – Provo, Utah, and a master’s degree in hydrology from the University of Idaho. I am published in the Journal of the American Water Resources Association, in Irrigation and Drainage and as a junior author in the American Journal of Agricultural Economics.

3. I began working in water resources in 1996, with Idaho Department of Water Resources (hereafter “IDWR”). I performed flow measurements, field examinations of beneficial use, GIS mapping of water-right places of use and points of diversion, and prepared water-right recommendations for the Snake River Basin Adjudication.

4. Beginning in 200, I left IDWR for the Idaho Water Resources Research Institute (within University of Idaho) where I worked on water budgets for aquifer modeling, groundwater/surface-water interaction, and some water economics work. In 2010, I transitioned gradually into the private sector, working part-time for the University and part-time for Rocky Mountain Environmental Associates.

5. Currently I work full time at Rocky Mountain after almost three years of limited involvement while working with the Henry’s Fork Foundation and Friends of the Teton River.

6. Bonneville-Jefferson Ground Water District (hereafter “Bonneville-Jefferson”) retained the services of Rocky Mountain to assist the district and its legal counsel with technical matters affecting the litigation in the above-captioned matter. I consult frequently with the district and its legal counsel, and I have personal knowledge of the matters involved in the above-captioned matter.

7. I understand that the Director of the Idaho Department of Water Resources (hereafter “Director”) changed the methodology used to calculate injury to the Surface Water Coalition (hereafter “SWC”) in his 5<sup>th</sup> Amended Methodology Order issued on April 21, 2023. I

also understand that the Director issues the April 2023 As-Applied Order on April 21, 2023, and that the new methodology used in the As-Applied Order calculated a material injury of 75,200-acre feet to SWC. I understand that the As-Applied order calculates a curtailment date of 1953 for groundwater users. I further understand that the Director intends to hold an evidentiary hearing on both these orders beginning on June 6, 2023.

8. In my professional opinion, I do not have time to perform an adequate technical review of the technical information requested from IDWR in this litigation in order to properly testify at hearing. The primary reason for this is that I was never invited to deliberations of the technical working group that advises on technical issues related to the SWC/IGWA Settlement Agreement. I have not received any work products or documentations of decisions or recommendations of that group. I presently do not have access to all the documents and data that I would need to do a defensible technical review of the 5th Methodology Order.

9. I understand that there will be depositions of IDWR personnel late in the middle of May 2023, and that documents and data will be requested. If all those documents and data are produced, the earliest I expect to receive them would be around Monday, May 22, 2023. Even assuming that I could continue technical work on the morning of June 6, that would only give 15 days. If there is a delay in providing the materials, the window would be even shorter.

10. As such, I will be unable to perform comprehensive review and consult with and prepare legal counsel for Bonneville-Jefferson prior to the scheduled hearing date. It is my opinion that I would need at least two months to adequately review and prepare myself and counsel for the hearing.

11. Further your declarant saith not.

DATED this the 5<sup>th</sup> day of May 2023.

/s/ Bryce Conton  
BRYCE CONTOR

## CERTIFICATE OF SERVICE

I hereby certify that on this the 5<sup>th</sup> day of May 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

*/s/ Skyler C. Johns*  
Skyler C. JOHNS

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
John K. Simpson Marten Law LLP P.O. Box 2139 Boise, Idaho 83701-2139 Travis L. Thompson Marten Law LLP 163 Second Ave. W. P.O. Box 63 Twin Falls, Idaho 83303-0063	<a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a>  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. DEPARTMENT OF JUSTICE 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US BUREAU OF RECLAMATION 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn  SOMACH SIMMONS &amp; DUNN  2033 11th Street, Ste 5  Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl  CITY OF POCATELLO  P.O. Box 4169  Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife  City Attorney  CITY OF IDAHO FALLS  P.O. Box 50220  Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>William A. Parsons  PARSONS SMITH &amp; STONE  P.O. Box 910  Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON, PLLP  201 E. Center St. / P.O. Box 1391  Pocatello, Idaho 83204</p>	<p><a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>
<p>Dylan Anderson  Dylan Anderson Law</p>	<p><a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>

# EXHIBIT A-13

Skyler C. Johns, ISB No. 11033  
Steven L. Taggart, ISB No. 8551  
Nathan M. Olsen, ISB No. 7373  
**OLSEN TAGGART PLLC**  
P. O. Box 3005  
Idaho Falls, ID 83403  
Telephone: (208) 552-6442  
Facsimile: (208) 524-6095  
Email: sjohns@olsentaggart.com  
staggart@olsentaggart.com  
nolsen@olsentaggart.com

*Attorneys for Bonneville-Jefferson Ground Water District*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

**DECLARATION OF SKYLER C.  
JOHNS IN SUPPORT OF MOTION  
FOR RECONSIDERATION OF  
DENIAL OF CONTINUANCE**

I, SKYLER C. JOHNS, under penalty of perjury, make this *Declaration in Support of Motion for Reconsideration of Denial of Continuance*.

1. I am over the age of eighteen (18) and competent to testify in this matter. I make this declaration based upon my own personal knowledge unless otherwise stated.

2. I am an attorney for the Bonneville-Jefferson Ground Water District (hereafter "Bonneville-Jefferson") in the above-captioned matter, and I have personal knowledge of the matters involved in these legal proceedings.



3. Bonneville-Jefferson has retained Rocky Mountain Environmental Associates, Inc. (hereafter “Rocky Mountain”), to review and advise me on technical matters involved in the above-captioned matter, including matters pertaining the Surface Water Coalition (hereafter “SWC”) water delivery call against the Idaho Ground Water Appropriators (hereafter “IGWA”).

4. On April 21, 2023, the Director of the Idaho Department of Water Resources (hereafter “Director”) changed the methodology used to calculate injury to the SWC in his 5<sup>th</sup> Amended Methodology Order. The Director also the April 2023 As-Applied Order on April 21, 2023, and the new methodology used in the As-Applied Order calculated a material injury of 75,200-acre feet to SWC.

5. Prior to issuing these orders, I never received formal notice from the Idaho Department of Water Resources (hereafter “IDWR”) that the Director would transition from Steady State to Transient State analysis as a tool to calculate material injury to SWC. To my knowledge, the Director never conducted a hearing prior to changing the methodology order. Neither myself, nor the experts who advise me from Rocky Mountain, were involved in any work group or discussions pertaining changes in the methodology order.

During the preliminary hearing held on April 28, 2023, I, on behalf of Bonneville-Jefferson, joined in support of the Motion to Continue filed by the Coalition of Cities to continue the evidentiary hearing set for June 6, 2023. I also expressed my concerns that Bonneville-Jefferson would not have sufficient time to obtain and review relevant information with its experts, and that would impair Bonneville-Jefferson’s ability to adequately review relevant information and develop evidence opposing the Orders before the scheduled hearing date. The Director, however, did not continue the hearing.

6. In my professional opinion, I do not have time to perform an adequate review of the

information requested from IDWR in this litigation in order to properly prepare for the June 6, 2023, hearing. I further do not have adequate time to consult with my experts from Rocky Mountain regarding their review of the information requested from IDWR, nor do I have adequate time to prepare them to testify at the June 6, 2023, hearing. This will impair my ability to develop evidence and legal arguments in opposition to the Orders if the hearing continues as scheduled.

7. As of the date of this declaration, I have not received any work products or documentations of decisions or recommendations from any technical working group as referenced by the Director during the April 28, 2023, preliminary hearing. I presently do not have access to all the documents and data that I would need to review and prepare a defensible legal argument to the 5th Methodology Order.

8. Given the time limitations specified by the Director in his Scheduling Order, I must prepare for depositions of IDWR staff without having access to any of the documents that were relied upon by IDWR. Depositions will occur on May 10 and 12, 2023. I will be unable to adequately prepare effective questions for the deponents as I likely will not have access to any relevant documents or other information prior to these depositions.

9. As such, I will be unable to perform comprehensive review and consult with and prepare legal counsel for Bonneville-Jefferson prior to the scheduled hearing date. It is my opinion that I would need at least 6 months to adequately review and prepare myself and counsel for the hearing.

10. Based upon my knowledge and experience, not granting additional time for Bonneville-Jefferson to obtain review and evidence and legal arguments will cause prejudice to my client's real property interests and rights to due process.

11. Further your declarant saith not.

DATED this 5<sup>th</sup> day of May 2023.

OLSEN TAGGART PLLC

/s/ *Skyler C. Johns*  
SKYLER C. JOHNS

## CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of May 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

*/s/ Skyler C. Johns*  
SKYLER C. JOHNS

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
John K. Simpson Marten Law LLP P.O. Box 2139 Boise, Idaho 83701-2139 Travis L. Thompson Marten Law LLP 163 Second Ave. W. P.O. Box 63 Twin Falls, Idaho 83303-0063	<a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a>  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. DEPARTMENT OF JUSTICE 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US BUREAU OF RECLAMATION 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn SOMACH SIMMONS &amp; DUNN 2033 11th Street, Ste 5 Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl CITY OF POCATELLO P.O. Box 4169 Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP P.O. Box 168 Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife City Attorney CITY OF IDAHO FALLS P.O. Box 50220 Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>William A. Parsons PARSONS SMITH &amp; STONE P.O. Box 910 Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>
<p>Thomas J. Budge Elisheva M. Patterson RACINE OLSON, PLLP 201 E. Center St. / P.O. Box 1391 Pocatello, Idaho 83204</p>	<p><a href="mailto:tj@racineolson.com">tj@racineolson.com</a> <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>
<p>Dylan Anderson Dylan Anderson Law</p>	<p><a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>

# EXHIBIT A-14

Skyler C. Johns, ISB No. 11033  
Steven L. Taggart, ISB No. 8551  
Nathan M. Olsen, ISB No. 7373  
**OLSEN TAGGART PLLC**  
P. O. Box 3005  
Idaho Falls, ID 83403  
Telephone: (208) 552-6442  
Facsimile: (208) 524-6095  
Email: sjohns@olsentaggart.com  
staggart@olsentaggart.com  
nolsen@olsentaggart.com

*Attorneys for Bonneville-Jefferson Ground Water District*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

**DECLARATION OF THANE KINDRED  
IN SUPPORT OF MOTION FOR  
RECONSIDERATION OF DENIAL  
OF CONTINUANCE**

I, THANE KINDRED, under penalty of perjury, make this *Declaration in Support of Motion for Reconsideration of Denial of Continuance*.

1. I am over the age of eighteen (18) and competent to testify in this matter. I make this declaration based upon my own personal knowledge unless otherwise stated.

2. I am currently a staff geologist at Rocky Mountain Environmental Associates Inc. in Idaho Falls, Idaho (hereafter "Rocky Mountain"). Before starting at Rocky Mountain as a staff geologist, I received my Bachelor of Science degree in geology from Brigham Young University in Provo, Utah, and my master's degree from Idaho State University in Pocatello, Idaho.

3. Bonneville-Jefferson Ground Water District (hereafter “Bonneville-Jefferson”) retained the services of Rocky Mountain to assist Bonneville-Jefferson and its legal counsel with technical matters affecting the litigation in the above-captioned matter. I consult frequently with the district and its legal counsel, and I have personal knowledge of the matters involved in the above-captioned matter.

4. I understand that the Director of the Idaho Department of Water Resources (hereafter “Director”) changed the methodology used to calculate injury to the Surface Water Coalition (hereafter “SWC”) in his 5<sup>th</sup> Amended Methodology Order issued on April 21, 2023. I also understand that the Director issues the April 2023 As-Applied Order on April 21, 2023, and that the new methodology used in the As-Applied Order calculated a material injury of 75,200-acre feet to SWC. I further understand that the Director intends to hold an evidentiary hearing on both these orders beginning on June 6, 2023.

5. In my professional opinion, I will not have time to fully understand the 5<sup>th</sup> Amended Methodology Order issued by the Director and perform a comprehensive technical review of it to be prepared for June 6th. I was not invited to any sort of Technical Working Group with IDWR concerning the Methodology Order. Similarly, I received no other indication (i.e., letter, email, etc.) that the Methodology Order would change prior to April 21 when it came out. As such, I do not currently have access to many of the documents and data that I would need to perform the analysis.

6. I understand that Depositions so far will be held in the middle of May 2023, but they will likely not produce documents until after the depositions occur, which only provides about two weeks for a technical review of all information before the date of the hearing.

7. As such, I will be unable to perform comprehensive review and consult with and



prepare legal counsel for Bonneville-Jefferson prior to the scheduled hearing date. It is my opinion that I would need at least two months to adequately review and prepare myself and counsel for the hearing.

8. Further your declarant saith not.

DATED this the 5<sup>th</sup> day of May 2023.

/s/ Thane Kindred  
THANE KINDRED

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 5<sup>th</sup> day of May 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

*/s/ Skyler C. Johns*  
SKYLER C. JOHNS

Gary Spackman, Director Garrick Baxter, Deputy Attorney General IDAHO DEPT. OF WATER RESOURCES P.O. Box 83720 Boise, Idaho 83720-0098	<a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a> <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a>
John K. Simpson Marten Law LLP P.O. Box 2139 Boise, Idaho 83701-2139 Travis L. Thompson Marten Law LLP 163 Second Ave. W. P.O. Box 63 Twin Falls, Idaho 83303-0063	<a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a>  <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a>  <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. DEPARTMENT OF JUSTICE 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US BUREAU OF RECLAMATION 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn  SOMACH SIMMONS &amp; DUNN  2033 11th Street, Ste 5  Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl  CITY OF POCATELLO  P.O. Box 4169  Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife  City Attorney  CITY OF IDAHO FALLS  P.O. Box 50220  Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>William A. Parsons  PARSONS SMITH &amp; STONE  P.O. Box 910  Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON, PLLP  201 E. Center St. / P.O. Box 1391  Pocatello, Idaho 83204</p>	<p><a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>
<p>Dylan Anderson  Dylan Anderson Law</p>	<p><a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>



# EXHIBIT A-15

Candice McHugh (ISB No. 5908)  
Chris Bromley ( ISB No. 6530)  
McHugh Bromley, PLLC  
Attorneys at Law  
380 S. 4<sup>th</sup> St., Ste. 103  
Boise, ID 83702  
Telephone: (208) 287-0991  
Facsimile: (208) 287-0864  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

*Attorney for the Coalition of Cities*

Sarah A. Klahn (ISB # 7928)  
Somach Simmons & Dunn 1155  
Canyon St., Suite 110 Boulder,  
CO 80302  
303-449-2834  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[mbricker@somachlaw.com](mailto:mbricker@somachlaw.com)

*ATTORNEYS FOR THE CITY OF  
POCATELLO*

Robert L. Harris (ISB No. 7018)  
HOLDEN, KIDWELL, HAHN &  
CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518  
Email: [rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)  
*Attorneys for the City of Idaho Falls*

## IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

**DECLARATION OF GREGORY K.  
SULLIVAN, P.E.**

I, Gregory K. Sullivan, P.E., being duly sworn do depose and state:

1. I make this affidavit based upon personal knowledge and expertise.
2. My professional resume is provided as **Attachment A** to this Declaration.

3. I have 37 years of experience in water resources engineering, water rights engineering, hydrologic analysis, groundwater and surface water modeling, conjunctive administration of groundwater and surface water, and other related disciplines.
4. I have worked on water resources, water rights, and conjunctive administration issues in the Snake River basin since the early 1990s.
5. My clients in the Snake River basin that are affected by the SWC Delivery Call include the City of Pocatello and the Coalition of Cities.
6. I have been a member of the Eastern Snake Plain Hydrologic Modeling Committee (“ESHMC”) since its inception along with other stakeholders in Snake River basin issues. The ESHMC has provided guidance and peer review in the development of the Eastern Snake Plain Aquifer groundwater model (“ESPAM”) since approximately 1999.
7. I have been involved in several water right delivery calls in the Snake River basin including the delivery calls by the Surface Water Coalition (“SWC”), the A&B Irrigation District, and the Rangen Fish Hatchery. My involvement has included preparation of expert reports and presentation of expert testimony at several administrative hearings.
8. My involvement in the SWC delivery calls began with the delivery call made in 2005. In response to that delivery call, I compiled extensive data and analyzed the operations of the SWC irrigation systems. This included several weeks in the field observing diversion and conveyance facilities, irrigated farms, and irrigation application methods. In addition, I was present at the depositions of managers and staff of each of the SWC members regarding irrigation system operations, system losses and efficiencies, record keeping, and other related matters. Based on this information, I prepared analyses of the historical irrigation operations of each SWC member over the period from 1990 – 2006. The results of my work were documented in several expert reports and presented at an IDWR hearing in February 2008.
9. Since the 2008 hearing regarding the SWC delivery call, I have reviewed the various amended methodology orders and the various as-applied orders concerning the SWC Methodology that have been issued over the years. In addition, I was involved in a May 2010 hearing on revisions to SWC Methodology proposed by IDWR based on experience in applying the methodology between 2005 and 2010, and based on recommendations from Hearing Officer Schroeder in his 2008 Order. Following the hearing, IDWR issued on June 23, 2010 the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Second Methodology Order”). The Second Methodology Order contains the framework that forms the basis for the current SWC Methodology procedures.
10. In early 2015, IDWR convened a technical working group (“TWG”) of experts to review proposed changes to the Second Methodology Order. I participated in the TWG on behalf of the City of Pocatello. Several meetings of the TWG were held to

solicit input from the TWG members regarding the SWC Methodology. Following the meetings, IDWR issued recommendations for changes in how the water supplies of the SWC members were forecast and how the crop mix of the SWC members was determined for purposes of estimating crop water need. Other proposed changes to the SWC Methodology were discussed but not implemented. These included determination of supplemental groundwater use by the SWC members, improvements in determination of the irrigated areas of the SWC members, and revisions to the Project Efficiencies used in determining the Reasonable In-Season Demand (“RISD”) of the SWC members. IDWR’s *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Third Methodology Order”) was issued on April 16, 2015, shortly after completion of the TWG meetings.

11. On April 16, 2016, IDWR issued the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”) that included some relatively minor revisions to the Third Methodology Order.
12. In late 2022, I actively participated in several meetings of another TWG that was convened by IDWR to consider potential changes to the Fourth Methodology Order. Given the approximate one-month period during which the TWG meetings took place, there was insufficient time to fully review and respond to the materials that IDWR distributed and the issues that were raised during the meetings. Nonetheless, I performed various preliminary analyses of the Baseline Year (“BLY”) and the SWC Project Efficiencies that are used in the SWC Methodology. Results from these analyses were presented to the TWG during the meetings and written materials and spreadsheets were submitted to TWG members on December 12 and December 21.
13. On December 23, 2022, IDWR issued a one-page *Summary of Recommended Technical Revisions to the 4th Amended Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover for the Surface Water Coalition* (“IDWR Recommendation”). The following is a summary of the proposed recommendations:
  - a. Update the BLY for Reasonable In-Season Demand and Reasonable Carryover from an average of diversions during 2006, 2008, 2012 to the diversions in 2018.
  - b. Update the Project Efficiencies to use average of the computed efficiencies for the SWC members during the previous 15 years instead of the previous 8 years.
14. The IDWR Recommendation document explicitly stated there were no recommendations regarding the following:
  - a. Use of near real-time METRIC for determining crop water need.
  - b. Use of transient modeling to determine curtailment priority dates.



15. On January 16, 2023, I submitted written comments on the IDWR Recommendation including:
  - a. Critique of the proposed changes to the BLY for projecting shortages to the SWC members.
  - b. Critique of the updated Project Efficiencies for computing in-season demand shortages.
  - c. Recommendation that the irrigated area data for the SWC members be updated to reflect the areas that are actually irrigated.
  - d. Recommendation that the crop water needs for the SWC members be adjusted for the supplemental groundwater use on the SWC irrigated lands.
16. There was no acknowledgement and no response from IDWR regarding my comments. Nor was there any further interaction between IDWR and the TWG after receipt of the IDWR Recommendation on December 23, 2022.
17. On April 21, 2023, IDWR issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”) and the *Final Order Regarding April 2023 Forecast Supply* (“April As-Applied Order”). There was no apparent consideration of my comments in either of these orders.
18. Also on April 21, 2023, IDWR issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery*. A hearing in the matter is scheduled for June 6-10, 2023.
19. On May 2, 2023, IDWR issued a *Schedule Order and Order Authorizing Remote Appearance at Hearing*. Among the scheduled events are the following:
  - a. May 5, 2023
    - i. Deadline for the Department to identify materials Ms. Sukow and Mr. Anders may rely upon at the hearing.
    - ii. Deadline for the Department to summarize topics Ms. Sukow and Mr. Anders will testify about at the hearing.
    - iii. Deadline for the parties to submit to the Department a written statement of proposed issues for the hearing.
  - b. May 10, 2023
    - i. Deadline for the Department to augment its above-mentioned list of materials Ms. Sukow and Mr. Anders may rely on at the hearing, if needed.
  - c. 7 Days Prior to Hearing Day 1
    - i. Deadline for the parties to complete all discovery.

- ii. Deadline for the parties to deliver copies of their expert reports to the other parties.
  - iii. Deadline for the parties to exchange and file with the Department their proposed lay and expert witness lists. The parties should include a general summary of each witness' anticipated testimony.
20. The proposed schedule leaves less than four weeks before the due date for expert reports and only one week to review the expert reports of others before the hearing. In addition, I, along with some of the other experts, are involved in the consolidated matters of the Big Wood River and Snake River Moratoria for which expert reports are due on June 9, 2023, in the middle of the proposed SWC Methodology hearing. Finally, I have previously scheduled a non-refundable trip to Europe departing on May 17 and returning on June 3, and so, as a practical matter, this leaves less than two weeks for me to complete my expert report.
21. The short time available before my expert report is due is far too little time for me to adequately analyze the Fifth Methodology Order, the April As-Applied Order, review the supporting materials that will be submitted by the IDWR witnesses, assist legal counsel with written discovery and depositions, compile additional data, perform field work, perform the necessary technical analyses, and document my work in an expert report.
22. It has been over 15 years since the 2008 hearing and Hearing Officer Schroeder's ruling that resulted in the Second Methodology Order issued in 2010. This was the last time that the SWC Methodology was significantly scrutinized. We now have 15 years of actual operating experience under the SWC Methodology Orders. Given the substantive changes to the SWC Methodology reflected in the Fifth Methodology Order, now is an appropriate time to fully review those changes, develop a comprehensive record of the 15 years of operating experience under the prior Methodology Orders, and to use this experience to propose and vet potential additional modifications to the SWC Methodology that will protect the SWC members from injury, ensure that the SWC members are operating with efficiently and without waste, protect groundwater users from excessive curtailment and mitigation obligations, and to maximize the beneficial use of the interconnected surface water and groundwater resources of the Snake River and the ESPA.
23. Given sufficient time, I would analyze information and data from the past 15 years of operations under the SWC Methodology Orders to assess changes in the irrigation operations of the SWC members, the improved and expanded availability of hydrologic and water use data, including remote-sensed data. In addition, interviews and/or depositions of IDWR staff and SWC managers and personnel will be necessary to provide context for the past 15 years of operating experience. Thorough review and analysis of this information and data will give me the knowledge that is necessary to recommend and support potential changes to the SWC Methodology.
24. The following is a preliminary high-level overview of the work that should be performed to analyze the operation of the SWC Methodology and the operations of the SWC members during the past 15 years:

- a. Compile, summarize, review, and analyze available hydrologic data and operational data related to the availability and use of water by the SWC members.
- b. Interview and/or depose managers and staff of the SWC members regarding their irrigation operations, data collection practices, and water use records.
- c. Perform site investigations of the SWC member facilities and service areas.
- d. Assess the operations of the SWC members to determine whether they are operating with reasonable efficiencies and without excessive waste consistent with industry standards.
- e. Review and analyze the elements of the SWC Methodology that involve determination of in-season demand shortfalls.
- f. Review and analyze the elements of the SWC Methodology that involve determination of material injury to reasonable carryover.
- g. Review and analyze the elements of the SWC Methodology that involve determination of the priority date for curtailment of junior ground water users in response to computed shortages to the in-season demands and reasonable carryover requirements of the SWC members. This includes the radical change in how the ESPAM is used to determine the curtailment date. Under the Fifth Methodology Order, IDWR is using transient runs of the ESPAM to determine the curtailment date rather than the steady-state runs that have been used in all prior methodology orders. This results in a substantially more senior curtailment date that affects many more groundwater users. The curtailment date in the April As-Applied Order is December 30, 1953, based on a projected combined shortage to the SWC members totaling 75,000 AF. Under the steady-state run procedure of the prior methodology order, the curtailment date would have been sometime in the mid-1980s for a 75,000 AF shortage.

25. I estimate that a minimum of 3 to 5 months will be necessary to adequately perform the work described above and to prepare an expert report to summarize the results of this work. In making this time estimate, I am considering the clear and convincing evidentiary standard that reportedly applies to changes in the SWC Methodology and the attendant need to fully develop the necessary evidence to support my opinions.

I hereby certify that the facts set forth above are true and correct to the best of my information and belief.

DATED this 7th day of May 2023.



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Gregory K. Sullivan, P.E.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 2023, a true and correct copy of the foregoing document was served via email to the following:

Idaho Dept. of Water Resources  
[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)

Kathleen Marion Carr  
US Dept. Interior  
960 Broadway Ste 400  
Boise, ID 83706  
[kathleenmarion.carr@sol.doi.gov](mailto:kathleenmarion.carr@sol.doi.gov)

John K. Simpson  
MARTEN LAW LLP  
P.O. Box 2139 Boise, ID 83701-2139  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)

David W. Gehlert  
Natural Resources Section Environment and  
Natural Resources Division U.S. Department  
of Justice  
999 18th St., South Terrace, Suite 370  
Denver, CO 80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

Travis L. Thompson  
MARTEN LAW LLP P.O. Box 63  
Twin Falls, ID 83303-0063  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)  
[jnielsen@martenlaw.com](mailto:jnielsen@martenlaw.com)

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road  
Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248  
Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON  
P.O. Box 1391  
Pocatello, ID 83204-1391  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

Candice McHugh  
Chris Bromley  
MCHUGH BROMLEY, PLLC  
380 South 4th Street, Suite 103  
Boise, ID 83702  
[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO,  
PLLC  
P.O. Box 50130  
Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

Robert E. Williams  
WILLIAMS, MESERVY, & LOTHSPREICH,  
LLP  
P.O. Box 168  
Jerome, ID 83338  
[rewilliams@wmlattys.com](mailto:rewilliams@wmlattys.com)

Dylan Anderson  
Dylan Anderson Law PLLC  
P.O. Box 35  
Rexburg, ID 83440  
[dylan@dylandandersonlaw.com](mailto:dylan@dylandandersonlaw.com)

Randall D. Fife  
City Attorney  
City of Idaho Falls  
P.O. Box 50320 IDWR—Eastern Region  
900 N. Fallsline Drive, Ste. A  
Idaho Falls, ID 83402  
[rfife@falls.idaho.gov](mailto:rfife@falls.idaho.gov)  
[Tony.Olenichak@idwr.idaho.gov](mailto:Tony.Olenichak@idwr.idaho.gov)

Skyler C. Johns  
Nathan M. Olsen  
Steven L. Taggart  
OLSEN TAGGART PLLC  
P.O. Box 3005  
Idaho Falls, ID 83403  
[sjohns@olsentaggart.com](mailto:sjohns@olsentaggart.com)  
[nolsen@olsentaggart.com](mailto:nolsen@olsentaggart.com)  
[staggart@olsentaggart.com](mailto:staggart@olsentaggart.com)

Corey Skinner  
IDWR—Southern Region  
1341 Fillmore St., Ste. 200  
Twin Falls, ID 83301-3033  
[corey.skinner@idwr.idaho.gov](mailto:corey.skinner@idwr.idaho.gov)

William A. Parsons  
PARSONS SMITH & STONE  
P.O. Box 910  
Burley, ID 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)



Sarah A. Klahn, ISB # 7928

# Attachment A

**Gregory K. Sullivan, P.E.**

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**President and Senior Water Resources Engineer**

**Education:** M.S., Civil Engineering, 1990, University of Colorado - Denver  
B.S., Civil Engineering, 1985, Colorado State University

**Professional Registration:** Professional Engineer in Colorado, Idaho, and New Mexico

**Professional Experience:**

**1990 - Present:** *Spronk Water Engineers, Inc., President and Senior Water Resources Engineer*

Mr. Sullivan has over thirty-five years of experience completing a wide variety of water resources engineering projects. Mr. Sullivan has extensive experience performing historical consumptive use analyses, stream depletions analyses, and reservoir operations studies. Mr. Sullivan serves as the primary consultant to numerous water providers for water supply planning and water rights engineering. In that role, he has been responsible for technical analyses in supporting applications for adjudication of water rights, changes of water rights, exchanges, augmentation plans, and other water right matters. He has led the development of complex surface water operations models that simulate municipal water demands and how those demands maybe met by available water supplies and water rights. Mr. Sullivan has served on the Eastern Snake Hydrologic Modeling Committee that guides the development and use of a regional ground water model of the Eastern Snake River Plain Aquifer since 1996. Mr. Sullivan has provided expert testimony in the U.S. Supreme Court, Colorado Water Courts, Snake River Basin Adjudication Court (Idaho), and in administrative hearings before the Idaho Department of Water Resources.

**Representative Projects:**

*Water Supply Modeling - Texas v. New Mexico and Colorado – Rio Grande Basin*

Mr. Sullivan is the lead modeling expert for the State of New Mexico in an active lawsuit filed by the State of Texas in the U.S. Supreme Court concerning alleged violations of the 1938 Rio Grande Compact. Mr. Sullivan is leading a multidisciplinary team of renowned experts from across the country that is analyzing and modeling the historical operation of the Rio Grande Project and the effects of alleged compact violations asserted in the

claims and counterclaims of the parties. The ongoing work includes compilation and analysis of historical data from before the time of the compact to the present, and development of farm budget models of large irrigation systems in New Mexico, Texas, and Mexico. In addition, Mr. Sullivan is coordinating development and use of a linked surface water (RiverWare) and ground water (MODFLOW) models of the Lower Rio Grande area from Elephant Butte Reservoir in New Mexico to Fort Quitman, Texas. The Integrated Lower Rio Grande Model simulates the essential hydrologic and institutional/management processes associated with irrigation and municipal water systems in the study area, including the allocation, operation, and accounting mechanisms of the Rio Grande Project.

**Water Supply Modeling - Kansas v. Colorado – Arkansas River Basin**

Mr. Sullivan was involved in the refinement and use of the H-I Model of the Arkansas River system in Colorado that was developed to support claims by the State of Kansas that Colorado was violating the terms of the 1948 Arkansas River Compact. The model simulates daily operation of irrigation water uses under approximately two dozen canal systems along the Arkansas River in Colorado between the City of Pueblo and the Colorado-Kansas from 1950 to the present. In addition, the model simulates the operation of sole-source and supplemental irrigation wells, and the impact of those wells on the flow of the Arkansas River. Mr. Sullivan provided expert testimony before a Special Master appointed by the U.S. Supreme Court regarding the use of the H-I Model to evaluate the effects on state line flows resulting from post-compact well development in Colorado.

**Injury Analysis - Kansas v. Colorado – Arkansas River Basin**

Mr. Sullivan developed a model that was used as part of an analysis to compute the economic impacts and monetary damages to Kansas resulting from the compact violations by Colorado that were determined in the Kansas v. Colorado lawsuit. The model was used to translate monthly depletions to usable stateline flows over a 45-year period into impacts to (a) surface water users in Kansas, (b) to supplemental pumping demands in Kansas and (c) to recharge of the regional ground water system. Mr. Sullivan testified before the Special Master regarding the model development, operation, and results.

***Analysis of Replacement Plans - Kansas v. Colorado – Arkansas River Basin***

To continue use of post-compact Arkansas River alluvial wells, the well owners in Colorado were required to develop Replacement Plans to offset the impacts of pumping on senior surface water rights in Colorado and on usable stateline flows to Kansas. Mr. Sullivan analyzed the adequacy of these replacement plans through preparation of historical use analyses, water budgets, and other analyses. In addition, Mr. Sullivan used the H-I Model to simulate the effectiveness of the replacement plans in meeting Colorado's delivery obligations under the Arkansas River Compact. Mr. Sullivan provided expert testimony before the Special Master concerning his analyses of the Colorado Replacement Plans.

***Change of Water Rights - City of Loveland, Colorado***

Mr. Sullivan was the principal investigator for ditch-wide historical use analyses of the major Big Thompson River irrigation ditches that serve lands in and around the City of Loveland. These analyses served as the basis for successful changes of water rights that were approved by the Division 1 Water Court to allow the City to divert its ditch shares at the City's municipal water intakes to help meet its water supply needs. He also guided development of detailed water rights accounting for the City to Mr. Sullivan provided expert testimony in support of the changes of water rights in a contested trial.

***Water Supply Yield Modeling - City of Loveland, Colorado***

Mr. Sullivan led the development of a model to simulate the daily water supply and demand of the City of Loveland over a study period from 1950 - 2017. The water supplies that are simulated in the model include the ditch shares that have been changed to municipal use, Colorado-Big Thompson Project units, Windy Gap Project units, and the operation of the City's Green Ridge Glade Reservoir. The model is used by the City to evaluate the firm yield of its water supply, and how that yield can be increased through acquisition of additional supplies, development of additional storage, changes in water supply operations and other actions.

***Water Supply Planning – ACWWA, Colorado***

Mr. Sullivan has provided water resources and water rights consulting for the Arapahoe County Water and Wastewater Authority for over 30 years. ACWWA serves lands in the Cherry Creek basin south of Denver through a



combination of shallow alluvial wells and deep nontributary Denver Basin wells. Water use from these sources is integrated and optimized through operation of a complex plan for augmentation that provides for replacement of out-of-priority depletions to Cherry Creek to protect downstream senior water users. Mr. Sullivan has performed numerous analyses to evaluate the yield of ACWWA's water supplies, including completion of a raw water master plan in 2018.

**Plan for Augmentation - Upper Cherry Creek Water Association, Colorado**

Mr. Sullivan was instrumental in the development of an umbrella plan for augmentation for five major water users in the Cherry Creek Basin upstream of Cherry Creek Reservoir. The members have pooled their augmentation sources to replace the combined out-of-priority depletions resulting from alluvial well pumping and out-of-priority storage in Cherry Creek Reservoir. The plan includes an innovative method of computing depletions that considers times when Cherry Creek is dry in the vicinity of the member wells.

**Cherry Creek Aquifer Modeling Project – Colorado**

Mr. Sullivan led the development of a basin-wide simulation model of the hydrology and water use in the Cherry Creek basin upstream of Cherry Creek Reservoir. The model simulates the water supplies and water rights of all municipal water providers in the study area and optimizes the alluvial pumping of the water users and the use of Denver Basin ground water replacement supplies. The model also simulates the operation of Cherry Creek Reservoir and Rueter-Hess Reservoir. The model is used by the study participants to evaluate changes in water supply operations and acquisition of new water supplies.

**Snake River Basin Adjudication - Idaho**

Mr. Sullivan assisted the City of Pocatello in filing claims to adjudicate water rights as part of the SRBA. This work included historical research of facilities and water uses to document historical flow rates, volumes, and priority dates to assign to the claimed water rights. Mr. Sullivan provided expert testimony before the SRBA Court to help defend the City's claims that were disputed by others.

**Snake River Delivery Calls - Idaho**

Mr. Sullivan has provided technical analysis and expert testimony to the City of Pocatello in their participation in complex litigation involving water right delivery calls by senior surface water users on the Snake River in Idaho. Pocatello's water supply is derived primarily from junior priority wells that are tributary to the Snake River, and its water supply is threatened by the delivery calls. Mr. Sullivan analyzed the historical operation of seven major irrigation districts that placed the delivery calls to assess the extent of their claimed irrigation water shortages. The irrigation districts serve a combined area of 560,000 acres with annual diversions averaging 3.2 million acre-feet per year. Mr. Sullivan provide expert testimony is several hearings before the hearing officers in Idaho Depart of Water Resources.

**ESPA Cities Mitigation Plan – Snake River Basin, Idaho**

Mr. provided technical expertise and analysis in development of a mitigation plan for Pocatello, Idaho Falls, and more than a dozen other cities to mitigate the impacts of municipal groundwater pumping from the Eastern Snake Plain Aquifer in Idaho. The plan relies largely on aquifer recharge to mitigate the impacts of aquifer depletions from pumping that is projected to increase from about 60,000 acre-feet per year to over 120,000 acre-feet per year over the next 50 years.

**Division 3 Rules Case - Rio Grande Basin, Colorado**

Mr. Sullivan represented a group of surface water right owners that opposed the enactment of administrative rules governing the withdrawal and use of ground water in the Rio Grande Basin in Colorado (Water Division 3). The primary basis for their opposition was that the rules did not provide for mitigation of impacts to a large spring that was the source of their surface water rights and which dried up in conjunction with the large-scale development of ground water irrigation in the area. Mr. Sullivan's work included analysis of the historical irrigation water use by his clients, review of hydrologic data and records, and review of a ground water modeling of the San Luis Valley performed by the State of Colorado. Mr. Sullivan provided expert testimony on behalf of his clients in a trial before the Division 3 Water Court.

**Ground Water Administrative Proceeding – Wood River Basin, Idaho**

Mr. Sullivan represents the Sun Valley Company and the Cities of Ketchum, Hailey, and Bellevue in an administrative proceeding in the Wood River Valley in Idaho. Holders of senior surface water rights are seeking curtailment of junior ground water rights based on allegations of injury being suffered by the seniors, and the Idaho Department of Water Resources is proposing to implement conjunctive administration of groundwater rights and surface water rights to address the injury claims. A groundwater model of the Wood River Valley developed by IDWR with input from stakeholders is being used in the dispute to assess impacts from pumping on surface water supplies. Mr. Sullivan provided expert testimony on behalf of SVC and the Cities in a contested administrative hearing before the IDWR Director. Mr. Sullivan is also a member of a technical working group that has been assembled to develop a groundwater management plan that is hoped to settle the ongoing dispute.

**1985 – 1990:**

**J. W. Patterson & Associates, Inc., Water Resources Engineer**

Performed water supply, hydraulic and hydrologic analyses for agricultural, industrial, commercial, and municipal developments. Managed yield and impact analyses of water rights adjudications, transfers, exchanges and plans for augmentation. Conducted ground water studies including aquifer testing, project dewatering and water well design and construction monitoring.

**Continuing Education:**

Applied Ground-Water Flow Modeling. International Ground Water Modeling Center, Colorado School of Mines, Golden, CO. March 1993.

Introduction to Simulation Training in RiverWare, Center for Advanced Decision Support for Water and Environmental Systems, University of Colorado, May 2016.

# EXHIBIT A-16

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
**MARTEN LAW LLP**  
163 Second Ave. West  
P.O. Box 63  
Twin Falls, Idaho 83303-0063  
Telephone: (208) 733-0700  
Email: [jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)

*Attorneys for A&B Irrigation District, Burley  
Irrigation District, Milner Irrigation District,  
North Side Canal Company, and Twin Falls  
Canal Company*

W. Kent Fletcher, ISB #2248  
**FLETCHER LAW OFFICE**  
P.O. Box 248  
Burley, Idaho 83318  
Telephone: (208) 678-3250  
Email: [wkf@pmt.org](mailto:wkf@pmt.org)

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

**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

**SURFACE WATER COALITION'S  
OPPOSITION TO GROUNDWATER  
USERS' MOTION FOR  
RECONSIDERATION OF ORDER  
DENYING MOTION FOR  
CONTINUANCE**

COME NOW, 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 ("Surface Water Coalition," "Coalition," or "SWC"), by and  
through counsel of record, and pursuant to the Department's Rules of Procedure (IDAPA  
37.01.01.220) hereby file the following response in opposition to the *Motion for Reconsideration*

*of Denial of Continuance (“Motion”)* filed jointly by the Coalition of Cities, Cities of Idaho Falls and Pocatello, the Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Ground Water District, and Bingham Ground Water District (hereinafter collectively referred to as “Groundwater Users”) on May 5, 2023. For the reasons set forth below, as well as those stated on the record at the April 28, 2023 pre-hearing conference, the Director should deny the motion for reconsideration.

### STANDARD OF REVIEW

The Director denied the Groundwater Users’ motion for a continuance. *See Order Denying the Appointment of an Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (May 5, 2023) (“*May 5 Order*”). The Groundwater Users now ask the Director to reconsider that decision pursuant to Department Rule of Procedure 711 (IDAPA 37.01.01.711). *See Motion* at 2-3. The Director’s review of the motion is governed by the same standard of review of the underlying motion. *See e.g. Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

The Department’s rules authorize a presiding officer to “continue proceedings for further hearing.” Rule 560. Although not stated, the decision to grant a motion for a continuance is presumably vested in the presiding officer’s discretion. Idaho case law provides that the “decision to grant a motion for a continuance rests within the sound discretion of the trial court.” *See State v. Labbee*, 2023 WL 1131212 at \*2 (Idaho Ct. App., Jan. 31, 2023). The Coalition submits that the Director properly exercised his discretion in denying the Groundwater Users’ motion given the unique circumstances of water right administration and the requirement to protect senior water rights during the irrigation season. The Director identified these reasons both at the pre-hearing conference and in his *May 5 Order*.

The Coalition offers the following points in support of the Director’s decision and in opposition to the Groundwater Users’ present request for reconsideration.

**I. IGWA Has No Authority and Has Not Proposed to Mitigate for Non-Member Junior Ground Water Right Holders.**

A fatal flaw in the Groundwater Users’ request for a continuance is their erroneous claim that “IGWA has enough the [sic] water to mitigate for its 2021 breach and for the predicted demand shortfall for the upcoming 2023 season.” *See* Motion at 6. The Groundwater Users also wrongly allege that the “other remaining junior users account a fractional percentage of the groundwater depletions which are allegedly causing injury” and “the Director should consider the junior water users ‘as a whole’ are complying with mitigation plans.” *Id.* at 7.

IGWA’s representative districts do not represent and have no authority to mitigate for any junior groundwater right holders who are not members of a groundwater district. *See* I.C. § 42-5224(6). This is also confirmed in IGWA’s *Notice of Ground Water District Mitigation* (“*Notice*”) wherein the districts represent they are only proposing to mitigate for their members.<sup>1</sup> *See Notice* at 2-3 (“These districts’ proportionate shares of the 63,645 acre-feet demand shortfall predicted in the April 2023 As-Applied Order are as follows . . .”). Stated another way, the *Notice* does not indicate that the districts will mitigate for the entire predicted demand shortfall of 75,200 acre-feet.

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<sup>1</sup> IGWA provided notice of mitigation for Bingham, Bonneville-Jefferson, and Jefferson Clark Ground Water Districts pursuant to its “storage water” mitigation plan (CM-MP-2009-007) and for Aberdeen-American Falls, Carey Valley, Henry’s Fork/Madison, Magic Valley and North Snake Ground Water Districts pursuant to the 2016 stipulated mitigation plan (CM-MP-2016-001). The Districts mistakenly believe they pick and choose which mitigation plans to follow. The Coalition reserves all rights with respect to IGWA’s *Notice* and any notion that the Districts are free to “mix and match” compliance with prior plans and orders. Further, contrary to the Groundwater Users’ claim, nothing in the 2023 *Notice* applies to the parties’ prior settlement concerning certain Districts’ 2021 breach of their mitigation plan. *See* 2021 Settlement at 2 (Sept. 7, 2022) (“Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved mitigation plan”) (emphasis added).

Nowhere in the *Notice* does IGWA claim to represent or mitigate for junior ground water rights represented in the difference between their proportionate share (63,645 af) and the predicted in-season demand shortfall (75,200 af), which is approximately 11,555 acre-feet (i.e. 15%).<sup>2</sup> The Groundwater Users' attempts to minimize this quantity or have it swept into considering junior users "as a whole" across the ESPA is contrary to law and the facts and should be rejected.

Whereas the Director has indicated he does not plan to issue a curtailment order until after the hearing in this matter, each day that passes is critical for purposes of water right administration during the 2023 irrigation season. Thus, any delay in the schedule would inevitably delay administration of any affected junior ground water rights not covered through an approved mitigation plan. Every day that passes furthers the potential that unmitigated pumping will continue to injure senior surface water rights without adequate mitigation as the irrigation season has already commenced throughout the various administrative basins across Eastern Snake Plain Aquifer ("ESPA").

Further exacerbating potential injury this year is a pending sentinel well index measurement for April 2023 that may be approaching the April 2015 level. The attached groundwater level data from one USGS monitoring well going back to early 1950s (2N35E35DCC1) shows a record low reading this spring. *See Ex. A.* The declining groundwater levels are likely reducing hydraulically connected reach gains in the Near Blackfoot to Minidoka reach of the Snake River this year, further reducing available water to the Coalition members. Contrary to the Groundwater Users' theory, just looking at the current snowpack does not tell the whole story on injury to the Coalition, the health and status of the ESPA, or trends in reach gains in the Snake River. *See Motion for Continuance* at 3, (Apr. 28, 2023).

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<sup>2</sup> This number includes the proportionate share assigned to A&B (458 acre-feet).



## **II. The Requested Continuance Does Not Account for Non-Compliant Ground Water Districts and Continuing Injury from Out-of-Priority Diversions.**

The Steering Committee for the SWC and IGWA held a meeting on April 12, 2023 concerning the Ground Water Districts' 2022 performance and their April 1<sup>st</sup> report. A joint letter was signed and submitted by counsel for IGWA and SWC to the Director stating that SWC asserts that in 2022 certain Districts breached the 2016 stipulated migration plan and order based upon information provided by IGWA. *See Travis L. Thompson April 13, 2023 Letter to Director Gary Spackman.* The Districts disagree that a breach occurred in 2022 and their counsel has indicated they intend to appeal the Director's *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (April 24, 2023) to district court.

At the April 28<sup>th</sup> pre-hearing conference the Director appeared to indicate that he would not address the alleged 2022 breach until after a hearing was held on the Fifth Methodology Order. Based upon IGWA's recent *Notice of Ground Water District Mitigation*, several Districts indicated they intend to mitigate pursuant to the 2016 Stipulated Plan and Order, while Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts apparently propose to mitigate pursuant to a prior "storage only" mitigation plan.<sup>3</sup> *See Notice* at 2-3. Despite receiving "safe harbor" from 2015-2022 and not securing sufficient storage to mitigate predicted in-season injuries in certain years pursuant to the Director's order, these districts now believe they are free to "pick and choose" which plan to follow. Through this filing it is apparent that these three Districts that are parties to the 2015 Settlement Agreement and 2016 Stipulated Mitigation Plan no longer believe they are bound by the Director's orders approving that plan and subsequent addendums.

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<sup>3</sup> The Coalition reserves the right to pursue all administrative and judicial remedies with respect to the Districts' breach of the 2015 Settlement Agreement, the 2016 Stipulated Mitigation Plan and final order approving the same.

Further, it is now known that Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts have each breached the 2016 Stipulated Mitigation Plan and Order again in 2022.<sup>4</sup> These Districts' continued non-compliance in 2022 will have impacts on the Coalition's water supply in 2023. To date, these districts have failed to present any viable proposals to cure the non-compliance despite receiving safe harbor from administration in 2022. The Director's 2016 Order approving the Stipulated Mitigation Plan requires the Ground Water Districts to take actions to restore groundwater levels on the ESPA and it is now obvious that the three named districts will not comply with that order again in 2023. *See Notice* at 2 ("The Districts identified in the following table will provide mitigation to the SWC under the Storage Water Plan").<sup>5</sup>

A delay in the hearing will presumably result in a delay of any required actions by the Districts that breached the 2016 Order in 2022 (according to the Director's indication at the April 28<sup>th</sup> pre-hearing conference), thus further depleting aquifer levels and the source of SWC's natural flow supplies. All the while, the three named Districts will no doubt claim "safe harbor" from administration and will pump their out-of-priority ground water rights unrestricted without taking actions to replenish the aquifer as they previously promised.

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<sup>4</sup> Counsel for IGWA has represented they intend to appeal the Director's recent *Amended Final Order Regarding Compliance with Approved Mitigation Plan* (April 24, 2023). Given this position and the parties' impasse at the April 12, 2023 Steering Committee meeting as documented in the April 13, 2023 letter, the Director should address the Districts' failure to undertake the required conservation obligations in 2022 pursuant to the Second Addendum process and his order approving the same. *See Second Addendum* at 3, section 2.c.iv; *Final Order Approving Amendmetn to Stipulated Mitigation Plan* (May 9, 2017). The fact Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts are representing they will not comply with that mitigation plan at the outset of 2023 is further reason for the Director to address this matter as soon as possible.

<sup>5</sup> The Districts continued non-performance under the 2016 Stipulated Mitigation Plan exacerbates declining reach gains which were specifically acknowledged in that agreement. To the contrary, the Storage Water Plan does not address the long-term obligations the Districts committed to in 2015.

The blatant repeated failure by Bingham, Bonneville-Jefferson, and Jefferson-Clark Ground Water Districts to comply with the Director's orders approving the 2016 Stipulated Plan is yet another reason to deny the Groundwater Users' motion to reconsider the denial of their motion for continuance of the hearing in this matter.

### **III. IDWR Has Held Conjunctive Administration Hearings Under Similar Schedules / Virtual Participation Accommodation.**

The bulk of the Groundwater Users' reason for asking for a continuance is the current schedules of certain consultants and counsel. *See Motion* at 3-5. Certainly participating in an administrative with numerous parties, counsel, and expert witnesses can be challenging. On April 21, 2023, cognizant of these challenges and proactively addressing likely petitions for hearing, the Director set a hearing for June 6-10, 2023. While individual schedules may need to be adjusted in order for a particular person to participate in this matter, all parties are subject to the same schedule and deadlines set by the Director, which gave the parties over six weeks to prepare for the hearing.<sup>6</sup> The Groundwater Users fail to recognize that the Surface Water Coalition and its consultants are all required to work within the same timeframe and will have to address their individual schedules as well.

Further, IDWR has previously scheduled and held hearings within similar timeframes, including in this very case. Accordingly, the Groundwater Users should not be surprised as to this type of scheduling in conjunctive administration matters occurring at the outset of an irrigation season.

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<sup>6</sup> The Coalition opposes the Groundwater Users' theory that this hearing could be moved and replace an already scheduled hearing in another contested case. *See Motion* at 8. The consolidated Big Wood River / Snake River Moratorium matter involves a host of other parties, counsel, consultants, and IDWR staff that are not involved in this case. Given the difficulty in scheduling in that matter with the number of counsel involved, the Director had to delay a proposed hearing timeframe from August to October. Further, the moratorium case hearing was set over a month ago and the parties are subject to pending deadlines in that case. *See Notice of Hearing* (March 31, 2023). The Groundwater Users do not speak for the others involved in that matter and have no basis to suggest changing that schedule in the context of a wholly separate case.

In 2010 the Director issued the first methodology order on April 7<sup>th</sup> and held a hearing on both the methodology and the first April As Applied order (dated April 29, 2010) on May 24-26, 2010 (i.e. roughly a similar six-week schedule). On appeal Judge Wildman found that the process employed by IDWR did not violate IGWA's or the City of Pocatello's rights to due process. *See Memorandum Decision* at 35-36, 47 (Gooding County Dist. Ct., Fifth Jud. Dist. CV-2010-382 et al., Sept. 26, 2014). Clearly, water right administration, and any necessary administrative procedures must occur in a timely fashion in order to be effective. The Groundwater Users' requested continuance is the type of situation Judge Wood warned against that would inevitably harm senior rights. *See Order on Plaintiffs' Motion for Summary Judgment* at 97 (*AFRD#2 et al. v. IDWR*, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2006-600, June 2, 2006) ("In practice, an untimely decision effectively becomes the decision; i.e. 'no decision is the decision.'")

In addition to the prior May hearings held in this case back in 2010, the Director recently initiated an administrative proceeding in Basin 37 in early May 2021 and then held a hearing in early June that year. Requests for continuance and injunctive relief were denied in that case, and the parties accommodated the schedule and presented evidence and exhibits during a five-day hearing held between June 8-12, 2021.

Although travel and participation by out-of-state consultants may pose further challenges in this case,<sup>7</sup> the Coalition would propose that consultants who cannot travel to Boise between June 6 and 10, be allowed to present testimony virtually (i.e. Zoom, Webex, etc.).<sup>8</sup> As virtual

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<sup>7</sup> The City of Pocatello's consultant, Greg Sullivan, has a scheduled trip to Europe but will be back before the hearing and does not claim he cannot attend in person. *See Dec. of Greg Sullivan* at 5, ¶ 20.

<sup>8</sup> The Director has already approved allowing Candice McHugh to participate remotely to accommodate her travel to a college football event. *See Scheduling Order* (May 2, 2023); *see Dec. of Candice McHugh* at 2; *see also, May 5 Order* at 2, n. 1. In light of that accommodation, certainly IGWA's consultant Ms. Sigstedt should be allowed to

hearings have been routinely used in prior administrative and court proceedings around the State of Idaho (particularly during the COVID-19 epidemic), the Department has the technology and capability of handling such requests. A virtual participation accommodation will address the concerns raised by IGWA and the Cities regarding their consultants that may be located out-of-state during that time, or unable to travel to Boise for medical reasons.

The Coalition would agree to work with the parties and their consultants to accommodate such participation during the hearing timeframe and would request the same consideration if needed.

### **III. Bonneville-Jefferson Ground Water District's Decision to Hire New Counsel and Consultants at this Stage Does Not Justify a Continuance.**

Finally, Bonneville-Jefferson Ground Water District makes a specific plea for continuance on the basis that the District recently hired new counsel and consultants. *See Motion* at 5-6. Although the District was previously represented by the law firm of Racine Olson and retained consultants Sophia Sigstedt and Jaxon Higgs, including through the technical working group process last fall and winter, the District has apparently substituted counsel and retained new consultants (Bryce Contor and Thane Kindred, Rocky Mountain Environmental Associates).<sup>9</sup>

While the District has the right to make such changes, those recent changes do not justify continuing a hearing that would inevitably delay conjunctive administration for the benefit of

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participate virtually given her medical restriction that requires her to stay in Colorado until mid-July. *See Dec. of Sophia Sigstedt* at 5. The Coalition would stipulate to Ms. Sigstedt's virtual participation.

<sup>9</sup> Mr. Johns has attended meetings for Bonneville-Jefferson in the past, including the summer of 2022, and recently participated in the hearing on the Director's September 8, 2022 Order held on February 8, 2023. Given that background certainly Mr. Johns has some familiarity with the SWC delivery call and prior orders regarding conjunctive administration. It is not known when Bonneville-Jefferson retained its new consultants.

their members.<sup>10</sup> Moreover, the timing of Bonneville's change is at their own risk given the Director's intention to make adjustments to the methodology order that have been known for months, including by their prior consultants that participated in the technical working group. Such a request for delay is particularly troublesome given Bonneville-Jefferson's repeated failures to comply with its mitigation plan in 2021 and 2022, and its notice that it will not comply with the 2016 Stipulated Plan in 2023. *See Notice* at 2. Moreover, the Director's methodology in this case has been in the public record at IDWR for well over a decade. It is presumed that Bonneville-Jefferson has been fully apprised of the various methodology orders issued between 2010-2016 through its prior counsel and consultants.<sup>11</sup>

In sum, there is no prejudice to Bonneville-Jefferson where it has been aptly represented on these issues by prior counsel and consultants for years, including through the technical working group initiated by IDWR last fall. Changing counsel and consultants is not a valid reason for the Director to reconsider the denial of the motion for continuance.

### **CONCLUSION**

In conclusion the Coalition submits the Director properly exercised his discretion in denying the Groundwater Users' motion for continuance. Time is of the essence for conjunctive administration this irrigation season, and given present aquifer levels and likely decreased reach gains this summer, any delay in the process stands to harm the Coalition's senior surface water rights. The Coalition therefore submits the Groundwater Users' motion for reconsideration should be denied.

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<sup>10</sup> None of the declarations of Bonneville-Jefferson's new counsel or consultants indicate they would not be available to participate at the June 6-10, 2023.

<sup>11</sup> The Technical Working Group presentations and comments were all provided to Bonneville-Jefferson's prior consultants (Ms. Sigstedt and Mr. Higgs) and counsel (Mr. Budge). Further, while the Coalition has similarly retained additional consultants that did not participate in the workgroup, they will likewise be subject to the same timeframe and deadlines to respond and participate in this case.

DATED this 8<sup>th</sup> day of May, 2023.

**MARTEN LAW LLP**



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Travis L. Thompson

*Attorneys for A&B Irrigation District,  
Burley Irrigation District, Milner Irrigation  
District, North Side Canal Company, and  
Twin Falls Canal Company*

**FLETCHER LAW OFFICE**



for

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W. Kent Fletcher

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

## CERTIFICATE OF SERVICE

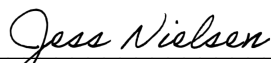
I hereby certify that on this 8<sup>th</sup> day of May, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p><a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p><a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p><a href="mailto:tj@racineolson.com">tj@racineolson.com</a> <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p>Sarah A. Klahn Somach Simmons &amp; Dunn 2033 11<sup>th</sup> St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p>David Gehlert ENRD – DOJ 999 18<sup>th</sup> St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p>William A. Parsons Parsons, Smith &amp; Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only</p> <p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4<sup>th</sup> Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>

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<p>Robert E. Williams Williams, Meservy &amp; Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p>Robert L. Harris Holden, Kidwell, Hahn &amp; Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only</p> <p><a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a></p>	<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only</p> <p><a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>	

  
 \_\_\_\_\_  
 Jessica Nielsen  
 Assistant for Travis L. Thompson

Exhibit

A

An official website of the United States government  
Here's how you know

MENU



IMPORTANT [Legacy real-time page](#)

7 days  30 days  1 year  
- using custom time span -

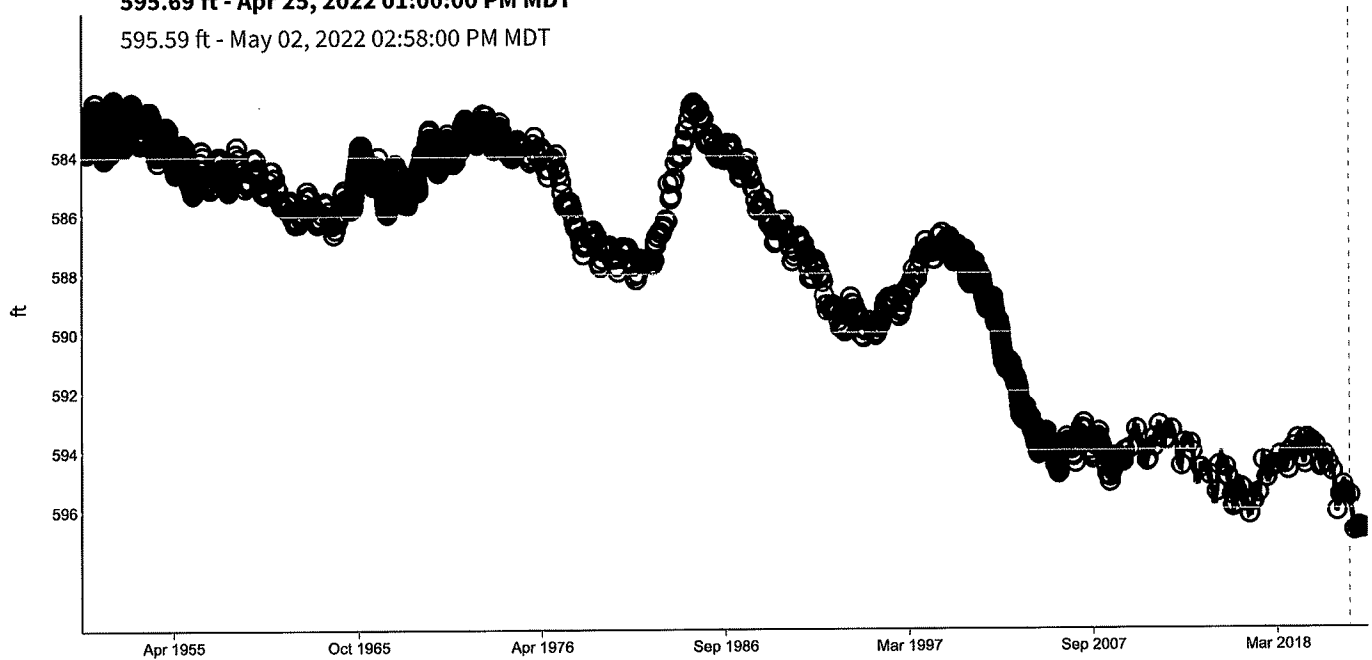
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January 1, 1950 - April 30, 2023

Depth to water level, ft below land surface

595.69 ft - Apr 25, 2022 01:00:00 PM MDT

595.59 ft - May 02, 2022 02:58:00 PM MDT



Show legend

	Value	Status
Latest May 08, 2023 07:00:00 AM MDT	596.93	Provisional
Selected Apr 25, 2022 01:00:00 PM MDT	595.69	Approved
Selected field visit Mav 02. 2022 02:58:00 PM MDT	595.59 ft	Approved

Questions or Comments

# EXHIBIT A-17

Sarah A. Klahn (ISB# 7928)  
SOMACH SIMMONS & DUNN  
*Attorneys for City of Pocatello*

Robert L. Harris (ISB# 7018)  
HOLDEN KIDWELL HAHN & CRAPO  
*Attorneys for City of Idaho Falls*

Candice M. McHugh (ISB# 5908)  
Chris M. Bromley, ISB # 6530  
MCHUGH BROMLEY, PLLC  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding, Hazelton,  
Heyburn, Jerome, Paul, Richfield, Rupert,  
Shoshone, and Wendell*

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB# 11746)  
RACINE OLSON, PLLP  
*Attorneys for Idaho Ground Water Approp-  
riators, Inc. (IGWA)*

Skyler C. Johns (ISB# 11033)  
Nathan M. Olsen (ISB# 7373)  
Steven L. Taggart (ISB# 8551)  
OLSEN TAGGART PLLC  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

Dylan Anderson (ISB# 9676)  
DYLAN ANDERSON LAW  
*Attorney for Bingham Groundwater District*

## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

### **I.R.C.P. 30(b)(6) NOTICE OF TAKING DEPOSITION DUCES TECUM OF IDWR**

To: Idaho Department of Water Resources and ITS counsel of record

PLEASE TAKE NOTICE that counsel for Idaho Ground Water Appropriators, Inc., Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and the Cities of Idaho Falls, Pocatello, Jerome, Burley, Bliss, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Paul, Richfield, Rupert, Shoshone, and Wendell will take the deposition of Idaho Department of Water Resources (“Department”) before M&M Court Reporting (“M&M”) in accordance with the *Order Authorizing Discovery* issued April 21, 2023, IDAPA 37.01.01.520.01.a and 37.01.01.520.02, and Idaho Rules of Civil Procedure 26, 30(a), 34 and 30(b)(6). The deposition will commence on a trailing docket immediately following the deposition of Matthew Anders scheduled to begin at

**9:00 a.m. on May 12, 2023**, and continuing from day to day thereafter until completion, at the office of the **Idaho Department of Water Resources, 322 E. Front Street, Boise, Idaho 83702**. The deponent must be present in person. The court reporter will participate in person. Attorney may participate in person or via the Zoom video platform, hosted by M&M. Participants will receive a Zoom link via email from M&M the day before the deposition.

The Department is required to designate one or more persons to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, regarding any information considered by Department staff and/or the Director in developing the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* issued April 21, 2023 (“Fifth Methodology Order”) and/or the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”) issued April 21, 2023, that is not included among the materials that Ms. Sukow and Mr. Anders may rely upon and the topics they may testify about pursuant to the *Notice of Materials Department Witnesses May Rely Upon at Hearing And Intent to Take Official Notice* issued May 5, 2023, including but not limited to the following:

1. The futile call doctrine pursuant to rules 10.08 and 20.04 of the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”).
2. The policy of full economic development of underground water resources pursuant to CM Rules 10.07 and 20.03.
3. The policy that an appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water pursuant to CM Rule 20.03.
4. The reasonableness of the diversion and use of water by the Surface Water Coalition pursuant to CM Rules 20.03, 20.05, 40.03, and 42.
5. The extent to which the water needs of the Surface Water Coalition could be met with their existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices pursuant to CM Rule 42.
6. The change from a steady-state to a transient-state application of the ESPA Model in the Fifth Methodology Order.
7. The Department’s review of comments submitted by outside consultants in response to the *Summary of Recommended Technical Revisions to the 4th Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover for the Surface Water Coalition* issued by Department staff dated December 23, 2023.

8. Any alleged non-compliance by groundwater users the so-called IGWA-Surface Water Coalition Settlement Agreement approved as a mitigation plan in IDWR Docket No. CM-MP-2016-001.
9. The documents identified below.

The deponent is required to bring with him or her true and correct copies of all documents reviewed by Department staff and/or the Director in connection with development of the Fifth Methodology Order or the As-Applied Order that relate, directly or indirectly, to the topics identified above, including but not limited to the following:

1. Documents relating to the implementation of a trim line or any other mechanism that could be used to implement the futile call doctrine, the policy of full economic development of underground water resources, and/or the policy that an appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water.
2. Letters, emails, text messages and other correspondence sent by Department personnel to any person not employed by the Department, or received by Department personnel from any person not employed by the Department, concerning the Fifth Methodology Order and/or the April 2023 As-Applied Order, or the development of such orders, prior to 6:45 p.m. mountain daylight time, April 21, 2023.
3. Documents showing the actual or estimated total number of water rights that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans; the total number of water rights by beneficial use (irrigation, municipal, industrial, commercial, etc.) that would be curtailed; and/or the total number of acres authorized for irrigation that would be curtailed.
4. Documents showing the actual or estimated total number of water rights that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.
5. Documents showing the number of water rights by beneficial use (irrigation, municipal, commercial, etc.) that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.
6. Documents showing the actual or estimated total number of acres authorized for irrigation that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.
7. Documents showing the actual or estimated total diversion rate (cubic feet per second) authorized for diversion under water rights that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.
8. Documents showing the actual or estimated total volume of water (acre-feet) authorized for diversion under water rights that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.

9. Documents relating to the extent, degree, or magnitude of beneficial use of water that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.
10. Documents relating to projected, estimated, or potential crop loss or any other impairment of beneficial use of water within Twin Falls Canal Company as a result of the 75,200 acre-foot Demand Shortfall predicted by the April 2023 As-Applied Order.
11. Documents comparing the adverse effects of curtailment under the Fifth Methodology Order and/or April 2023 As-Applied Order, in the absence of approved mitigation plan, on beneficial use of the ESPA versus the corresponding benefit to Twin Falls Canal Company.
12. Documents relating to the effect of the Fifth Methodology Order and/or the April 2023 As-Applied Order on ground water districts and/or their patrons who are not compliance with the so-called IGWA-Surface Water Coalition Settlement Agreement approved as a mitigation plan in IDWR Docket No. CM-MP-2016-001.

For purposes of this notice, the term “document” is to be interpreted as broadly as Idaho Rule of Civil Procedure 34 allows and includes all written or graphic matter, whether physical or electronic, however produced, including, but not limited to, letters, emails, text messages, notes, memoranda, meeting minutes, reports, directives, proposals, summaries, analyses, spreadsheets, internal communications, external communications, studies, surveys, working papers, and other physical or electronic data of any kind.

All parties and their counsel are invited to attend. The oral examination will continue from day to day until completed.

DATED this 8<sup>th</sup> day of May, 2023.

RACINE OLSON, PLLP

HOLDEN KIDWELL HAHN & CRAPO

By:   
Thomas J. Budge  
*Attorneys for IGWA*

By: /S/  
Robert L. Harris  
*Attorneys for City of Idaho Falls*

MCHUGH BROMLEY, PLLC

SOMACH SIMMONS & DUNN

By: /S/  
Candice M. McHugh  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding,*

By: /S/  
Sarah A. Klahn  
*Attorneys for City of Pocatello*



*Hazelton, Heyburn, Jerome, Paul, Rich-  
field, Rupert, Shoshone, and Wendell*

DYLAN ANDERSON LAW


OLSEN & TAGGART PLLC

By:                   /S/                    
Dylan Anderson  
*Attorney for Bingham Ground Water Dis-  
trict*

By:                   /S/                    
Skyler C. Johns  
*Attorneys for Bonneville-Jefferson  
Ground Water District*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of May, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
 \_\_\_\_\_  
 Thomas J. Budge

Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn Somach Simmons &amp; Dunn 2033 11th Street, Ste 5 Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP P.O. Box 168 Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Corey Skinner IDWR-Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak IDWR-Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p><i>COURTESY COPY TO:</i> William A. Parsons PARSONS SMITH &amp; STONE P.O. Box 910 Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>

# EXHIBIT A-18

Sarah A. Klahn (ISB# 7928)  
SOMACH SIMMONS & DUNN  
*Attorneys for City of Pocatello*

Robert L. Harris (ISB# 7018)  
HOLDEN KIDWELL HAHN & CRAPO  
*Attorneys for City of Idaho Falls*

Candice M. McHugh (ISB# 5908)  
Chris M. Bromley, ISB # 6530  
MCHUGH BROMLEY, PLLC  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding, Hazelton,  
Heyburn, Jerome, Paul, Richfield, Rupert,  
Shoshone, and Wendell*

Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB# 11746)  
RACINE OLSON, PLLP  
*Attorneys for Idaho Ground Water  
Appropriators, Inc. (IGWA)*

Skyler C. Johns (ISB# 11033)  
Nathan M. Olsen (ISB# 7373)  
Steven L. Taggart (ISB# 8551)  
OLSEN TAGGART PLLC  
*Attorneys for Bonneville-Jefferson Ground  
Water District*

Dylan Anderson (ISB# 9676)  
DYLAN ANDERSON LAW  
*Attorney for Bingham Groundwater District*

## STATE OF IDAHO

### DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY AND 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

**Groundwater Users' First Set of  
Request for Production to IDWR;  
Or, Alternatively, Request  
for Public Records**

#### **To: Idaho Department of Water Resources**

Idaho Ground Water Appropriators, Inc., Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and the Cities of Idaho Falls, Pocatello, Jerome, Burley, Bliss, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Paul, Richfield, Rupert, Shoshone, and Wendell; and Bingham Ground Water District and Bonneville-Jefferson Ground Water District (collectively, the "Groundwater Users"), hereby require you to produce the following documents pursuant to rules 520 and 521 of the Rules of Procedure of the Idaho Department of Water Resources (IDWR), Rules 26 and 34 of the Idaho Rules of Civil Procedure, and the *Order Authorizing Discovery* issued April 21, 2023, in this matter.

If the Department determines that the information requested below is not discoverable, the Department is requested to produce such documents pursuant to the Public Records Act, Chapter 1, Title 74, Idaho Code. If documents are produced under the Public Records Act, the Groundwater Users will promptly pay statutorily authorized fees upon request.

Given the compressed nature of the hearing schedule in this matter, the Groundwater Users respectfully request that such documents be produced as expeditiously as possible.

### INSTRUCTIONS

1. When answering these discovery requests, you are required to furnish all information and documents known or available upon reasonable inquiry to you.
2. These discovery requests are deemed continuing, and your answers are to be supplemented as additional information become available or known to you.
3. If any requested document was at one time in existence but is no longer in existence, please state: (a) the date it ceased to exist; (b) the circumstances under which it ceased to exist; (c) the identity of all persons having knowledge of the circumstances under which it ceased to exist; and (d) the identity of all persons having knowledge of its contents.
4. If any requested information is withheld due to a claim of privilege, please state: (a) the request to which it is responsive; (b) its title and general subject matter; (c) its date; (d) the names and titles of its authors or preparers; (e) the names and titles of the persons for whom it was prepared and all persons to whom it was sent or shown; (f) the privilege claimed; and (g) sufficient description to enable IGWA to assess the applicability of the privilege as required by I.R.C.P. 26(b)(5)(A).

### DEFINITIONS

1. April 2023 As-Applied Order means the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* issued April 21, 2023, in this matter.
2. Fifth Methodology Order means the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* issued in this matter on April 21, 2023
3. Fourth Methodology Order means the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* issued April 19, 2016, in this matter.
4. Department means the Idaho Department of Water Resources.
5. Document means any tangible or electronic record, including but not limited to letters, emails, agreements, memoranda, notes, reports, minutes, books, ledgers, invoices, receipts, surveys, photographs, maps, drawings, diagrams, recordings, computer files or other form of data compilation, including duplicates, copies, substitutes, facsimiles, and summaries thereof.
6. ESPA means the Eastern Snake Plain Aquifer.

7. Person means any person or legal entity and its agents or employees.
8. You and your means the Department and its employees, officers, and staff.

### **REQUESTS FOR PRODUCTION OF DOCUMENTS**

The Groundwater Users request that the following documents be provided in electronic format via email, thumb drive, or other digital medium. Alternatively, the documents shall be produced for inspection and copying at the office of the Department, 322 Front Street, Boise, Idaho.

**Request for Production 1:** Produce true and correct copies of all documents indicating when the Department first began considering a review and/or revision of the Fourth Methodology Order.

**Request for Production 2:** Produce true and correct copies of all documents indicated when the Department decided to proceed with a review and/or revision of the Fourth Methodology Order.

**Request for Production 3:** Produce true and correct copies of all documents relating to the Department's consideration of, in connection with the Fifth Methodology Order, the futile call doctrine, the policy of full economic development of underground water resources, the policy of reasonable use of water, or the policy of optimum development of water resources.

**Request for Production 4:** Produce true and correct copies of all documents relating to the Department's consideration of, in connection with the Fifth Methodology Order, the extent to which the water needs of the Surface Water Coalition or its members could be met with their existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices.

**Request for Production 5:** Produce true and correct copies of all documents generated, prepared, considered, discussed, utilized, reviewed, evaluated, analyzed, or relied upon by the Department in connection with development of the Fifth Methodology Order and/or the April 2023 As-Applied Order.

**Request for Production 6:** Produce true and correct copies of all letters, emails, text messages and other written correspondence sent by Department personnel to any person not employed by the Department, or received by Department personnel from any person not employed by the Department, prior to 6:45 p.m. mountain daylight time, April 21, 2023, concerning the Fifth Methodology Order, the April 2023 As-Applied Order, or the development, formulation, drafting, implication, application or effect of such orders.

**Request for Production 7:** Produce true and correct copies of all documents showing the actual or estimated total number of water rights that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.

**Request for Production 8:** Produce true and correct copies of all documents showing the number of water rights by beneficial use (irrigation, municipal, commercial, etc.) that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.

**Request for Production 9:** Produce true and correct copies of all documents showing the actual or estimated total number of acres authorized for irrigation that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.

**Request for Production 10:** Produce true and correct copies of all documents showing the actual or estimated total diversion rate (cubic feet per second) authorized for diversion under water rights that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.

**Request for Production 11:** Produce true and correct copies of all documents showing the actual or estimated total volume of water (acre-feet) authorized for diversion under water rights that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.

**Request for Production 12:** Produce true and correct copies of all documents relating to the extent, degree, or magnitude of beneficial use of water that would be curtailed under the April 2023 As-Applied Order in the absence of approved mitigation plans.

**Request for Production 13:** Produce true and correct copies of all documents relating to projected, estimated, or potential crop loss or any other impairment of beneficial use of water within Twin Falls Canal Company as a result of the 75,200 acre-feet Demand Shortfall predicted by the April 2023 As-Applied Order.

**Request for Production 14:** Produce true and correct copies of all documents comparing the adverse effects of curtailment under the Fifth Methodology Order and/or April 2023 As-Applied Order, in the absence of approved mitigation plan, on beneficial use of the ESPA versus the benefits of curtailment to Twin Falls Canal Company.

**Request for Production 15:** Produce true and correct copies of all documents that reference or reflect the Department's review or consideration, in connection with the Fifth Methodology Order and/or the As-Applied Order, of any alleged non-compliance with, or breach of, the so-called IGWA-Surface Water Coalition Settlement Agreement approved as a mitigation plan in IDWR Docket No. CM-MP-2016-001.

**Request for Production 16:** Produce true and correct copies of all documents showing the proportionate shares of the projected demand shortfall of 75,200 acre-feet set forth in the April 2023 As-Applied Order attributable to, respectively, North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Aberdeen-American Falls Area Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District, and all documents showing the calculation of their proportionate shares.

DATED this 8<sup>th</sup> day of May, 2023.



RACINE OLSON, PLLP

By: Thomas J. Budge  
Thomas J. Budge  
*Attorneys for IGWA*

HOLDEN KIDWELL HAHN & CRAPO

By: /S/  
Robert L. Harris  
*Attorneys for City of Idaho Falls*

MCHUGH BROMLEY, PLLC

By: /S/  
Candice M. McHugh  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding,  
Hazelton, Heyburn, Jerome, Paul,  
Richfield, Rupert, Shoshone, and Wendell*

SOMACH SIMMONS & DUNN

By: /S/  
Sarah A. Klahn  
*Attorneys for City of Pocatello*

DYLAN ANDERSON LAW

By: /S/  
Dylan Anderson  
*Attorney for Bingham Ground Water  
District*

OLSEN & TAGGART PLLC

By: /S/  
Skyler C. Johns  
*Attorneys for Bonneville-Jefferson  
Ground Water District*

## CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of May, 2023, I served the foregoing document on the persons below via email as indicated:

  
\_\_\_\_\_  
Thomas J. Budge

Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn Somach Simmons &amp; Dunn 2033 11th Street, Ste 5 Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP P.O. Box 168 Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Corey Skinner IDWR-Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak IDWR-Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p><i>COURTESY COPY TO:</i> William A. Parsons PARSONS SMITH &amp; STONE P.O. Box 910 Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>

# **EXHIBIT B**



**Governor Brad Little**

**Director Gary Spackman**

**Summary of Recommended Technical Revisions to the 4<sup>th</sup> Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover for the Surface Water Coalition**

12/23/2022

By: Kara Ferguson, Staff Hydrologist & Matt Anders, Hydrology Section Supervisor

In a status conference on August 5, 2022, the Director of the Idaho Department of Water Resources (IDWR) issued a directive to IDWR staff to convene a committee of experts to review and provide comments on potential technical changes to the "Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover" (Methodology) issued on April 19, 2016. IDWR staff created a technical working group composed of IDWR staff, experts representing the parties to the ongoing Surface Water Coalition (SWC) delivery call, and other interested parties. IDWR identified potential technical changes to the Methodology and presented them to the technical working group for discussion.

IDWR hosted six technical working group meetings between November 16 and December 14, 2022. Before each meeting, IDWR staff circulated PowerPoint presentations and agendas to the working group. The meetings were attended by interested members of the public and consultants and attorneys for parties to the SWC delivery call. Department staff and attorneys also participated. The meetings included presentations by IDWR staff and working group members, as well as open discussion on the topics presented. During the final meeting on December 14, 2022, IDWR staff stated that IDWR would provide a document summarizing staff's preliminary recommendations on potential technical changes to the Methodology.

Based on the information presented at the meetings and distributed to the technical working group, IDWR staff have the following preliminary technical recommendations:

- Update the Baseline Year (BLY) irrigation demand used to determine reasonable in-season demand from the current average of diversion demands for the 2006, 2008, and 2012 irrigation seasons to the diversion demand for the 2018 irrigation season.
- Update the BLY irrigation demand used to determine reasonable carryover for each SWC member from the current average of the diversion demands for the 2006, 2008, and 2012 irrigation seasons to the diversion demand for the 2018 irrigation season.
- Update the project efficiency value used to calculate monthly reasonable in-season demand from a rolling average of the previous eight years to a rolling average of the previous fifteen years.

At this time, staff do not have recommendations on utilizing near real time METRIC for determining crop water need, updating April and July regressions to improve their predictive power for natural flow supply, or using transient model simulation for determining curtailment priority dates. IDWR will continue to evaluate the integration of these and other techniques into the methodology.

IDWR requests written comments from the technical working group on the above recommendations or any other topic covered during the meetings. Please submit any comments no later than January 16, 2023, to [matthew.anders@idwr.idaho.gov](mailto:matthew.anders@idwr.idaho.gov).

# EXHIBIT C

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

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

v.

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

Respondents.

**Case No. CV27-22-00945**

IN THE MATTER OF THE DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS HELD BY  
AND 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

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

**AGENCY HEARING TRANSCRIPT ON APPEAL**

Judicial Review from the Idaho Department of Water Resources  
Director Gary Spackman Presiding

**LAWRENCE G. WASDEN**  
ATTORNEY GENERAL

**GARRICK L. BAXTER**  
Acting Chief of Natural Resources Division

**GARRICK L. BAXTER, ISB No. 6301**  
**MARK CECCHINI-BEAVER, ISB No. 9297**

Deputy Attorneys General  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, Idaho 83720-0098  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)  
[mark.cecchini-beaver@idwr.idaho.gov](mailto:mark.cecchini-beaver@idwr.idaho.gov)

Thomas J. Budge  
Elisheva M. Patterson  
**RACINE OLSON, PLLP**  
P.O. Box 1391  
Pocatello, ID 83204  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

*Attorneys for Petitioner*

*Attorneys for Respondents*

Candice McHugh  
Chris M Bromley  
**McHUGH BROMLEY, PLLC**  
380 S. 4th St., Ste. 103  
Boise, ID 83702  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)  
[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)

*Attorneys for Coalition of Cities*

John K. Simpson  
Travis L. Thompson  
Michael A. Short  
**BARKER ROSHOLT & SIMPSON LLP**  
P.O. Box 63  
Twin Falls, ID 83303  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlt@idahowaters.com](mailto:tlt@idahowaters.com)  
[mas@idahowaters.com](mailto:mas@idahowaters.com)

W. Kent Fletcher  
**FLETCHER LAW OFFICE**  
P.O. Box 248  
Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

*Attorneys for Surface Water Coalition*

Sarah A. Klahn  
**SOMACH SIMMONS & DUNN**  
1155 Canyon Blvd., Suite 110  
Boulder, CO 80302  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)

*Attorney for City of Pocatello*



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 ) Docket No.  
DISTRICT, MILNER IRRIGATION DISTRICT, ) CM-MP-2016-001  
MINIDOKA IRRIGATION DISTRICT, NORTH )  
SIDE CANAL COMPANY, AND TWIN FALLS )  
CANAL COMPANY )  
\_\_\_\_\_ )  
IN THE MATTER OF IGWA'S SETTLEMENT )  
AGREEMENT MITIGATION PLAN )  
\_\_\_\_\_ )

TRANSCRIPT OF RECORDED STATUS CONFERENCE HEARING

AUGUST 5, 2022

BEFORE DIRECTOR GARY SPACKMAN

TRANSCRIBED BY:

JEFF LAMAR, C.S.R. No. 640

Notary Public

1 cities even had people there at that time. So we'll  
2 take whoever wants to come in terms of that. We don't  
3 have a set list.

4 MS. KLAHN: Okay. Well, I just wanted to get on  
5 any mailing or e-mailing list so we could alert  
6 consultants to see if they could attend. We would  
7 probably send Heidi or Greg or something, so...

8 DIRECTOR SPACKMAN: Yeah, we don't want to  
9 exclude anybody in that process. And my reason for  
10 announcing it today is this particular group probably  
11 has more participants together right now than we might  
12 be able to gather together at some later date.

13 We'll send out notices. But I wanted  
14 everybody to know that the working group will reconvene  
15 over the next three months or so and look at the  
16 methodology order.

17 MS. KLAHN: Okay. Thank you.

18 DIRECTOR SPACKMAN: Yep.

19 MR. BUDGE: Director, this is TJ.

20 DIRECTOR SPACKMAN: Yes.

21 MR. BUDGE: It would be helpful if we had a more  
22 clear picture of the process the Department anticipated  
23 going through in terms of revising the methodology  
24 order. I haven't put much thought into this. But this  
25 was all created in the context of a contested and

1 litigated case. And so we've got principles of res  
2 judicata and due process that need to be taken into  
3 account in revising that.

4           And what I'm afraid is going to happen is  
5 this is going to turn into a re-litigation of the  
6 entire delivery call case, that once the Department  
7 opens the methodology order, the Coalition is going to  
8 make every, you know, argument it can to advance its  
9 position, whether that's related to the model or  
10 whatever, and the groundwater users are going to do the  
11 same.

12           We're going to want to perhaps, you know,  
13 challenge calculations of need and challenge the trim  
14 line and, you know, based on model changes and things  
15 of that nature. And I'm troubled by that. And that  
16 would be, you know, a tremendous expense to both  
17 parties, particularly considering that there's only a  
18 relative handful of groundwater users that are not  
19 currently covered under either IGWA's or the cities'  
20 mitigation plans.

21           And so I'm quite concerned about, you know,  
22 what this could turn into and the cost benefit  
23 involved. And also, as I mentioned, just issues of,  
24 you know, res judicata and due process. And so I think  
25 we really need to have a clear picture of what the

# EXHIBIT D

**From:** [TJ Budge](#)  
**To:** [Baxter, Garrick](#)  
**Subject:** RE: Methodology Order Technical Work Group  
**Date:** Saturday, October 1, 2022 7:10:00 PM  
**Attachments:** [image001.png](#)

---

Thanks Garrick, I appreciate this. Please know that I do not wish to make things difficult. I appreciate that the Department is inviting input on technical issues as it reconsiders the Methodology Order. It is important that the process comply with the APA, which as you know requires that decisions in contested cases be confined to the agency record. It would help me, and presumably others, to understand how the actions of the TWG fit within the APA, including how and when the Department envisions evidence being added to the agency record, action being taken on this new evidence, etc. I kindly ask that these issues be clarified up front so we avoid disputes down the road over compliance with the APA.

Thanks,

**T.J. Budge**

RACINE OLSON

201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204

Office: (208) 232-6101 | Direct: (208) 478-3467 | Cell: (208) 705-0826 | [racineolson.com](http://racineolson.com)

Assistant: Tessa Sparrow | Direct: (208) 478-3444 | [tessa@racineolson.com](mailto:tessa@racineolson.com)

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---

**From:** Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>  
**Sent:** Friday, September 30, 2022 3:52 PM  
**To:** TJ Budge <tj@racineolson.com>  
**Subject:** RE: Methodology Order Technical Work Group

TJ,

I've talked to the Department. The Department is willing to open the TWG to attorneys. The Department wants the attorneys for the parties to be aware of this so I will send an email to the group updating them that you will be attending and inviting them to attend too. Please be aware that the discussions will be confined to technical issues.

You asked about how the group will function. The Department is seeking feedback on certain technical aspects of the methodology order process, like base line year. The Department will ask the technical folks to review various options on these issues and provide feedback. If the Director chooses to modify the methodology order, the Director will issue an order amending the methodology order. Any order would be subject to a request for hearing and appeal.

The Director will set the topics he would like the TWG to provide feedback on, so no scoping meeting is necessary. The topics for discussion are still be considered by the Director and will be provided at a later date. Look for an email from Matt Anders with more info on topics and times.

Let me know if you have any additional questions.

Thanks,  
Garrick

---

**From:** TJ Budge <[tj@racineolson.com](mailto:tj@racineolson.com)>  
**Sent:** Thursday, September 29, 2022 11:53 AM  
**To:** Baxter, Garrick <[Garrick.Baxter@idwr.idaho.gov](mailto:Garrick.Baxter@idwr.idaho.gov)>  
**Subject:** RE: Methodology Order Technical Work Group

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Garrick,

Thanks for the update. As you know, the technical and legal aspects of the methodology order are intertwined. As such, I am not at this time comfortable being excluded from discussions to change the Methodology Order. I would also like to understand how this working group will function within the contested case structure of the Administrative Procedures Act. Additional information may give me the level of comfort needed to step back, but I'm not there yet.

Before any technical issues are discussed, I recommend that a scoping meeting be held to discuss which elements of the Methodology Order will be reconsidered, the process that will be followed, and how it fits within the contested case structure of the APA. Please advise if the Department will do this.

Thanks,

**T.J. Budge**

RACINE OLSON

201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204

Office: (208) 232-6101 | Direct: (208) 478-3467 | Cell: (208) 705-0826 | [racineolson.com](http://racineolson.com)

Assistant: Tessa Sparrow | Direct: (208) 478-3444 | [tessa@racineolson.com](mailto:tessa@racineolson.com)

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**From:** Baxter, Garrick <[Garrick.Baxter@idwr.idaho.gov](mailto:Garrick.Baxter@idwr.idaho.gov)>  
**Sent:** Thursday, September 29, 2022 10:18 AM  
**To:** TJ Budge <[tj@racineolson.com](mailto:tj@racineolson.com)>  
**Subject:** Methodology Order Technical Work Group

TJ,

Matt Anders (IDWR lead on the methodology technical work group) told me that you included your name on the list of folks seeking to participate in the methodology order technical working group. IDWR is not including attorneys in the technical work group. IDWR is keeping the meeting focused on technical issues and having attorneys participate can put a chill on the participation of the technical folks. Invitations should be going out shortly and IDWR will include Jaxon Higgs and Sophia Sigstedt. Let me know if you have any questions.

Thanks,  
Garrick



**Garrick Baxter | Deputy Attorney General**

Water Resources Section | Natural Resources Division

Office of the Attorney General | State of Idaho

O: 208-287-4811 | W: [ag.idaho.gov](http://ag.idaho.gov)

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# EXHIBIT E





IDAHO DEPARTMENT OF  
**WATER RESOURCES**

NEWS RELEASE - FOR IMMEDIATE RELEASE

Contact: Mathew Weaver, Deputy Director, Idaho Department of Water Resources, 208-287-4800

## **IDWR updates its method for determining injury in the Surface Water Coalition Delivery Call - with implications for junior ground water pumpers**

BOISE - (April 25, 2023) – On Friday, April 21, the Director of the Idaho Department of Water Resources (IDWR) issued a revised Methodology Order in the matter of the Surface Water Coalition’s long-standing delivery call.

The [Methodology Order](#) is the court-approved process IDWR uses to evaluate water supply conditions, aquifer conditions and irrigation demand. From that calculation, IDWR determines the impacts, or injury, caused by junior ground water users pumping from the Eastern Snake Plain Aquifer (ESPA).

Under Idaho water law, surface water users with senior water rights have priority over water users with junior rights on the Snake River and ESPA. The rule of law is “first in time, first in right.” On the Snake River, IDWR manages both surface and ground water resources together as one whole, or “conjunctively,” in calculating impacts each year.

“The Department must periodically update the numerous factors involved in our Methodology Order calculations to ensure it adequately protects the senior water users as outlined in Idaho law,” said Mat Weaver, IDWR Deputy Director.

IDWR is obligated to update the latest Methodology to incorporate new climate and hydrologic data and to ensure adequate protection for senior water users from injury. IDWR’s new Methodology revises important elements used to determine in-season and end-of-season injury volumes. It also revises the method used to calculate curtailment dates in a manner that could result in earlier curtailment dates.

Applying the new Methodology to April 2023 hydrologic conditions, the Department predicts pumping from junior ground water users in the ESPA will cause a 75,200 acre-foot shortfall to the senior priority surface water users’ water supplies during the irrigation season. Approximately 900 ground water rights junior to December 30, 1953, not protected by an approved mitigation plan, could be subject to curtailment as this irrigation season develops. The Department is working with the individual water right holders in these circumstances to make them aware of the latest information and how it impacts their water right.

Currently, there are seven approved mitigation plans for the ESPA surface water delivery call. The approved plans came from the Idaho Ground Water Appropriators, Inc. (IGWA), Southwest Irrigation District, Goose Creek Irrigation District, Coalition of Cities, the Water Mitigation Coalition and A&B Irrigation District. Because these entities have approved mitigation plans in place, they, and the water

users they serve, will not need to show how they can mitigate for projected water shortfalls if they continue to comply with their plans, the Director's order said.

Junior water users who do not have an approved mitigation plan in place may participate in an approved mitigation plan, such as the plan filed by IGWA, by contacting the Ground Water District (GWD) nearest to them and requesting to participate in the GWD for mitigation purposes. This will require acceptance by the GWD, the water user to pay assessments to the GWD, and to adhere to the district's ongoing mitigation practices.

The 75,200 acre-foot shortfall is based on the April 7 joint forecast of 3.7 million acre-feet of water flow at the Snake River Heise gage from April 1 through July 31. The forecast is calculated by the Bureau of Reclamation and U.S. Army Corps of Engineers, based on mountain snowpack and predicted streamflow runoff. The April 7 forecasted flow volume equates to 112% percent of average.

"By law, we have to keep people with senior water rights whole, and we want to make sure the junior ground water pumpers are aware that despite the settlement agreements between the Surface Water Coalition, IGWA, and the Coalition of Cities, if junior ground water pumpers are not participating in an approved mitigation plan, they could be subject to curtailment this year," Weaver said.

Much water litigation has resulted over conflicts between Snake River surface water users with senior water rights vs. ground water users with junior water rights in the ESPA. The litigation led to a water delivery call in 2005 by the Surface Water Coalition, which is a coalition of seven surface water irrigation entities that collectively irrigate more than 500,000 acres. Consequently, the Director of IDWR is required to issue an order at the beginning of the irrigation season, and then again in early July, determining any shortfall in water supply to the senior surface water right holders, and determining the obligations of junior ground water pumpers to curtail water use or mitigate for depletions to the holders of senior priority water rights.

### **Director to Hold a Contested Case Hearing**

Because of the scope of changes to the new Methodology used by IDWR in 2023, and the effect the changes will have on the magnitude and frequency of future injury determinations, the Director of IDWR has scheduled a contested case hearing for June 6-10, 2023. At the hearing, parties can argue if and how they believe the Director may have erred in making changes to the Methodology.

Following the hearing, the Director may issue a revised order depending on the arguments and evidence presented at the hearing.

Because of the pending hearing, the Director will delay issuing a curtailment notice to Snake River junior water users until after the hearing. This means junior ground water pumpers who do not have approved mitigation plans in place will have a reprieve from curtailment until late June. Junior water users should wait for specific notice and direction from IDWR as to how their individual water rights are affected by this decision, Weaver said. Junior water right users not in compliance and party to an approved mitigation plan should also be aware of the potential change to their water use given the As Applied order and plan accordingly.

**Why is there an injury determination, given the improved snowpack conditions in much of the state?**

“Even though this has been a remarkable winter and water year for many basins in Idaho, it has not been uniformly great everywhere,” Weaver said. “The Upper Snake Basin is the basin that supplies water to the reservoir system and the Snake River in the geographic region that’s the focus of the SWC Delivery Call.”

“Because of the past two years of drought, very low reservoir storage carryover from last year, uncertainty as to whether the reservoirs will fill, very low soil moisture conditions from last fall, and near-normal snowpack in Upper Snake basins, water supply conditions are still resulting in an injury determination at this time,” Weaver said.

In addition, injury predictions also factor in aquifer storage and discharge conditions. Although this has been a cool snowy year, the ESPA is approaching record low conditions in response to past ground water pumping and severe drought. As a result, aquifer flows into the Snake River are approaching record lows.

Two other important considerations are that 1) IDWR issued a moratorium on the issuance of new water rights in 2022 from King Hill upstream to the headwaters of the Snake River, finding that that surface water and the ESPA are fully appropriated, if not over-appropriated; 2) Water levels in the ESPA continue to decline.

Please see the Director’s [updated order](#) for more details.

#####

# EXHIBIT F

## DEPOSITION UNANSWERED QUESTIONS

### Baxter Instructing “Not to Answer”

Question	Sukow / Anders	Record
What other documents are responsive to Request No. 1, that show your involvement in the issuance of the Fifth Methodology Order outside of the technical working group documents that you’ve just described?	Sukow	Page 15, line 12-15
So I’m not asking for documents that you have between you and the Director. What about you and other staff?	Sukow	Page 16, line 5-7
So if the documents didn’t include the Director, I’m not understanding how those documents are part of the Director’s deliberative process. The Director didn’t look at them. How are they part of this process?	Sukow	Page 16, line 13-17
Did you prepare any analysis, memos, those kinds of things that you would have shared?	Sukow	Page 18, line 2-3
The question was identified to Ms. Sukow, what documents did you rely upon? She provided those documents that have been posted. And questions with regards to the memos, and other things that she prepared with regards to this matter, those go directly to the Director’s deliberative process.	Sukow	Page 19, line 1-6
Okay. We’ll move down to Question No. 2. Are you aware of any documents, whether or not they were authored by you, that reflect other Department employees input on the Department’s decision to move from the steady state to transit modeling in the Fifth Methodology Order that are not uploaded to the website?	Sukow	Page 21, line 11-16
It’s any and all documents reflecting your involvement in the issuance of the Fifth Amended Methodology Order. This is asking for any internal and external communications pertaining to that information?	Sukow	Page 25, line 11-14
If you could look at No. 11?	Sukow	Page 26, line 14
Were you part of the Director’s deliberative process to determine whether or not to move from steady state to transient state?	Sukow	Page 27, line 5-7
Would you look at Request No. 21?	Sukow	Page 34, line 11
When were you told that it was going to be amended?	Sukow	Page 39, line 12-13
Jennifer, was there a meeting to your knowledge within the Department to discuss whether or not to the amend the Fourth Methodology Order?	Sukow	Page 40, line 2-5
And who asked you those questions?	Sukow	Page 51, line 21
Were there any discussions about that?	Sukow	Page 75, line 6-7

Was there any discussion about whether or not using the transient model might impact analysis of futile call?	Sukow	Page 76, line 7-9
Do you know if anybody looked at this order and, for example, using the kind of information that is depicted on this graph, did any kind of reasonableness analysis and whether this made any sense?	Sukow	Page 76, line 18-22
What I'm asking is, when did you become aware that the Director was going to amend the Fourth Methodology Order, and then come up with a Fifth Methodology Order?	Sukow	Page 89, line 18-21
I'm going to ask you questions about these meetings on who was in the meeting. Was Mat Weaver in those meetings; do you know?	Sukow	Page 91, line 2-4
Was Shelley Keen in those meetings?	Sukow	Page 91, line 16-17
What about Tim Luke?	Sukow	Page 91, line 18-19
What about Brian Patton?	Sukow	Page 91, line 23
What about any meetings with the Idaho Water Resource Board?	Sukow	Page 92, line 1-2
Maybe one last try, and then maybe I'll move on. So, Jennifer, were you part of the Director's deliberative process?	Sukow	Page 94, line 22-24
Did you provide to Mat Weaver any documents relating to the Fifth Methodology Order or the April 2023 As-Applied Order that have not been uploaded to the Department's website?	Sukow	Page 97, line 21-24
Did you have any conversations with Matt Anders related to the Fifth Methodology Order or the April 2023 As-Applied Order?	Sukow	Page 99, line 4-6
And have you had conversations with Mat Weaver relating to the Fifth Methodology Order or the April 2023 As-Applied Order?	Sukow	Page 100, line 7-9
Jennifer, did you have any conversations with the Director about the Fifth Methodology Order or the April 2023 As-Applied Order?	Sukow	Page 101, line 4-6
And did you participate in any meetings involving Mat Weaver, or meetings with Mat Weaver or the Director involving the Fifth Methodology Order or the April 2023 As-Applied Order?	Sukow	Page 101, line 9-12
How were the comments that Sophia and Greg considered on January 16th, how are those considered in the Department?	Sukow	Page 105, line 12-14
Were you involved in any meetings with the other Department staff members, where the comments of Sophia or Greg Sullivan were reviewed?	Sukow	Page 106, line 11-13
Did you have discussions with any Department staff members about potential use of the trim line?	Sukow	Page 136, line 13-14
Paragraph 12, "All court filings that discuss, review, analyze, or identify areas of the methodology that require further technical analysis."	Anders	Page 26, line 8-10

Did you talk to the Director about the recommendations before you wrote them up?	Anders	Page 48, line 7-8
In your time working on the methodology orders, have you ever had a conversation with the Director about these kinds of policy issues where he challenged any of the technical conclusions on the basis of policy?	Anders	Page 66, line 20-24
Were concepts of reasonable use, futile call, or full economic development ever brought up during your work on the Fifth Methodology Order?	Anders	Page 177, line 16-18
Can you identify any findings in the Fifth Methodology Order that differ from the technical information that you provided to the Director or recommendations that you made?	Anders	Page 195, line 16-19
Can you provide examples of when and how that happened?	Anders	Page 203, line 7-8
So I'm not asking about specifics related to any discussions with the Director, but can you give a specific example of data you worked on and then reworked after talking to the Director?	Anders	Page 204, line 22-25
Prior to April 21st, when did the determination get made to use the model in a transient mode to determine the priority date?	Anders	Page 207, line 18-20
So who made the technical determination to use the model of the transient mode to determine curtailment date?	Anders	Page 209, line 13-15
Was that decision made in a meeting?	Anders	Page 210, line 5
And was Mat Weaver in that meeting?	Anders	Page 210, line 16
Were you in that meeting?	Anders	Page 211, line 9
Was Jennifer Sukow in that meeting?	Anders	Page 211, line 4-5
Were you in that meeting?	Anders	Page 211, line 9
Was Shelley Keen in the meeting?	Anders	Page 211, line 18-19
Was Brian Patton in the meeting?	Anders	Page 211, line 23-24
Moving on from whether there was a meeting or not that, apparently, may or may not have occurred, separate from any such meeting where the Director was involved, was there -- were you in any discussions with any other Department staff, excluding the Director, on changing the recommendation to go from using the model in a steady-state mode to a transient mode?	Anders	Page 212, line 3-10
Can the witness disclose whether or not a meeting occurred and not who's in the meeting?	Anders	Page 212, line 21-22

# EXHIBIT G



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

THE IDAHO PRESS CLUB, INC.,	)	Case No.: CV 01-19-16277
	)	
Petitioner,	)	DECISION AND ORDER
	)	
vs.	)	
	)	
	)	
ADA COUNTY,	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	

The Idaho Press Club, Inc. is an association of working journalists from many different Idaho news outlets which brought this action seeking public records requested by four of its members from Ada County. Each request sought public records. None of the requests were responded to within the time periods required by the Idaho Public Records Act. Two of the requests were responded to with extensive claims of privilege and contained pages and pages of blacked out, heavily redacted material provided several months after the requests were made. The third request generated public records with information redacted. No specific statutory grounds for denial were provided in the letter advising the requesters of the denials. The final request was not responded to at all. The petitioner filed a timely petition for review of the denial of the requests as required by I.C. § 74-115. Ada County moved to dismiss the petition on the grounds of insufficiency of process, improper service and failure to state a claim upon which

relief can be granted. Ada County also provided the unredacted records for *in camera* review by the Court and filed a response. Because there was a verified petition and both sides have submitted declarations, the Court is required to treat the motion to dismiss as one for summary judgment. I.R.C.P. 12(d). The Court will address both the Motion to Dismiss and the Petition to Compel. The Court has concluded its *in camera* review of all documents. For the reasons stated in this Decision, the Motion to Dismiss is denied and the Petition to Compel is granted.

## I.

### **The Framework of the Idaho Public Records Act**

The right of the public to know, in depth, how its public servants handle the public's business is embodied in the Idaho Public Records Act. It gives the public broad access to the public records of Idaho government at every level, in every form—from state, to county, to city, to every type of commission and board. Public records are presumed to be open at all reasonable times for inspection by the public. I.C. § 74-102(1). The public's business is open to the public's view upon request with some specific detailed exceptions. The Act sets tight time lines for response. It places the burden on the governmental body to prove that a requested record is exempt from disclosure because it falls under the Idaho Public Records Act's express statutory exemptions. A "public agency" which is government at every level—state, county, city, commission, board or committee, or commission must comply with the public's right of access. I.C. § 74-101(4)(7)(8)(11)(15). The public's right is broad as to who may make a request. "Every person" has right to examine and copy any public record of the state at a reasonable time and place subject to certain exceptions. I.C. § 74-102(1). "Person" is defined broadly:

“Person” means any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity.

I.C. § 74-101(9).

When a request is made, there are tight time requirements for response by the public agency. The request to view a public record must be granted or denied within three working days from its receipt. I.C. § 74-103. If the public agency needs more time to “locate or retrieve” the record, it is required to notify the person who requested the public record in writing that it will provide the record no later than ten working days after the request. *Id.* If an “electronic record requested” has to be “converted to another electronic format by the agency or a third party” and it cannot be done within the ten working days, then the public agency must work out a “mutually agreed upon” extension. *Id.* If there is no mutual agreement, if the requested records are not provided within the ten additional working days, the request is deemed denied. The public agency may grant part of the request and deny the rest provided it does so in writing. *Id.* “The notice of denial or partial denial also shall indicate the statutory authority for the denial and indicate clearly the person’s right to appeal the denial or partial denial and the time periods for doing so.” *Id.* When a request is denied or denied in part, the person who made the request is authorized to bring a proceeding in district court to make the record available for public inspection within 180 days. The deadline to file a petition runs from the date of mailing of the denial or partial denial. I.C. § 74-115.

The Idaho Public Records Act makes the first two hours of labor and 100 pages provided in response to a request free to the person requesting it. I.C. § 74-102(10)(a). Thereafter, the Act allows reasonable copying and labor costs, including certain attorney fee charges for redactions, provided that they are itemized. I.C. § 74-102(10)(e) and (g). The Act also allows for the waiver of all fees:

The public agency or independent public body corporate and politic shall not charge any cost or fee for copies or labor when the requester demonstrates that the requester's examination and/or copying of public records:

(i) Is likely to contribute significantly to the public's understanding of the operations or activities of the government;

(ii) Is not primarily in the individual interest of the requester including, but not limited to, the requester's interest in litigation in which the requester is or may become a party; and

(iii) Will not occur if fees are charged because the requester has insufficient financial resources to pay such fees.

I.C. § 74-102(10)(f). The district court also has a tight time line imposed on it by the Act. I.C. § 74-116(1).

## II.

### **Undisputed Facts**

1. The Idaho Press Club is an Idaho non-profit corporation which is a statewide association of working journalists from all types of media. It is a voluntary membership trade association with the mission of promoting "excellence in journalism, freedom of expression, and freedom of information." Petition, pg. 2.

2. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller are Idaho journalists who are members of the Idaho Press Club. They each made specific requests for public records which were denied in full or in part and are the subject of this action. Each of the journalists who made a request for records under the Idaho Public Records Act in this case is a member of

the Idaho Press Club.

3. Cynthia Sewell, a reporter for the Idaho Statesman requested the following on February 15, 2019 through the Ada County Public Records Request Portal on the Ada County website asking for: “Any correspondence or documents pertaining to the lease of or purchase of Les Bois race track.<sup>1</sup> This request includes Expo Idaho and Ada County Board of Commissioners documents. The time period of this request is July 1, 2018 to present.” Declaration of Judy Morris. Ada County’s website allows a person requesting public records to designate whether the request routes to the Ada County Commissioners’ Office, the Sheriff’s Office or the Ada County Clerk. Ada County asks for the name of the requester, email address, and a description of the request which is to be as specific as possible. *Id.* Ada County replied in writing on February 20, 2019 that the request would take longer than three working days as specified in I.C. § 74-103 and that they would need the ten working day extension allowed for by the same statutory provision. *Id.* Ada County then notified Cynthia Sewell on March 4, 2019 that ten days would not be enough time and sent an additional email on March 19, 2019 saying that due to “unforeseen circumstances” it would take still more time to respond to the request. *Id.* It did not detail the “unforeseen circumstances.” There was no “mutually agreed upon” extension.

4. No records were provided in response to the request by Cynthia Sewell for months following her request for public records.

5. On March 27, 2019, Cynthia Sewell sent an email pointing out the statutory deadlines, which had been substantially exceeded, and asking for the reasons for the delay. On April 3, 2019, an employee of Ada County sent an apologetic email to Cynthia Sewell, which read in pertinent part:

---

<sup>1</sup> The Les Bois Racetrack and surrounding acreage is a significant tract of publicly owned property in Ada County.

“Cynthia:

We are sorry this is taking longer than normal. We still believe that we are in compliance with Idaho Law, and hope to get the records to you soon.”

6. Also after the statutory deadline, a formal letter was sent from the Ada County Commissioner’s Office on April 5, 2019 addressing its lack of compliance with the public records request and citing an unspecified “technological glitch” which delayed processing the public records request. The letter said that there were over 2,000 emails and that Ada County expected to need “an additional 16.5 hours” to review the “compiled records” to see what was responsive to the public records request. In the April 5, 2019 letter, the commissioner’s representative said that they would charge \$50.00 per hour for I.T. personnel to search and retrieve the emails, and \$42.14 an hour for attorney time to review the located emails. The letter asked for \$695.31(16.5 hours x \$42.14) made payable to Ada County. The \$42.14 per hour charge reflects attorney review time, not I.T. time. Verified Petition, Exhibit B.

7. On April 8, 2019, Melissa Davlin, on behalf of the Idaho Press Club made this public records request to Ada County:

From: Melissa Davlin  
Sent: Monday, April 8, 2019 1:41 PM  
To: Judy Morris; BOCC  
Subject: [EXTERNAL] public records request

Dear Ms. Morris:

Pursuant to the state open records law Idaho Code Ann. Secs. 74-101 to 74-126 . I request access to and a copy of any and all written communications. including, but not limited to. e-mails and text messages, regarding the submission and pending fulfillment of Cynthia Sewell's Feb.15th public records request regarding Les Bois race track. This request includes any communications between you. the IT department, the commissioners’ office staff, and the county commissioners.

I agree to pay any reasonable copying and postage fees of not more than \$30. If the cost would be greater than this amount, please notify me before processing the request. Please provide a receipt indicating the charges for each document.

As provided by the open records law. I will expect your response within ten (10) business

days. See Idaho Code Ann. Sec. 74-1 03(1).

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

Thank you for your assistance.

Sincerely,

Melissa Davlin  
Idaho Press Club  
208-410-7239

Verified Petition, Exhibit H. Ada County responded to this public records request by stating that it had been forwarded to the Prosecuting Attorney's office. *Id.* On April 26, 2019, Ada County provided some documents and denied producing other documents broadly asserting "attorney work product and attorney-client communications." Most of the 172 pages provided were blacked out in their entirety. Ada County made a very vague reference to the heavy redactions as being due to "Idaho decisional law, rules, statutes (e.g. Idaho Code § 74-104(1)), and the Idaho State Bar's Rules of Professional Conduct...." Verified Petition, Exhibit I. Referring to the letter as a "Notice of Partial Denial," the letter advised the Idaho Press Club of the deadline of 180 days in which to file an action under the Idaho Public Records Act. *Id.*

8. A letter was sent on April 11, 2019 from Ada County to Cynthia Sewell, signed by each Ada County commissioner, which apologized for the delay in responding to the public records request and explained the general complexity of retrieving emails and referred to "some coincidental glitches including a technical issue which significantly delayed our I.T. department's ability to conduct the search and promptly respond to your request." This letter was much more informative. The letter recited the large number of emails sent by county and state employees which utilize the Ada County email system and then provided additional information about how the search was conducted and the search terms utilized. It stated that an attorney would need to review each "captured email and any attachments" to ensure that they are

public records and then to decide “whether it is exempt from disclosure, if it can be released in a redacted form, or if it can be released in its entirety.” It also recited that an attorney had reviewed the request. It discounted the earlier fee request by 25% because of the delay. The letter somewhat inconsistently references an attorney review having already been conducted and one that would be conducted once the fee was paid. The letter then advised Ms. Sewell that she had “180 calendar days from the mailing of the notice” to file a petition under the Idaho Public Records Act. The letter was cc’d to Melissa Davlin, Idaho Press Club. Verified Petition, Exhibit C.

9. Cynthia Sewell responded on July 23, 2019 by email asking for waiver of the fees under I.C. § 74-102(10)(f) and, if the waiver request was denied, for more specific detail on the basis for the rates being charged and the reason for the amount of time necessary to respond to the request. Verified Petition, Exhibit D.

10. On July 26, 2019, in a letter signed by each of the three county commissioners, Ada County advised that the commissioners had agreed to a one time waiver of the fees for the Cynthia Sewell public records request as a “good faith gesture.” The letter stated that an attorney would begin reviewing the emails. Verified Petition, Exhibit E.

11. Ada County’s communications manager indicated that documents responsive to the Sewell public records request would be provided but contained redactions which were due to “Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege Information.” Documents, a substantial portion of which were heavily blacked out, were provided. Verified Petition, Exhibit F. On August 26, 2019, 511 pages of documents were provided to Cynthia Sewell in response to her request for public records made on February 15, 2019. Many of the records are blacked out. Ada County said that the records which were



blacked out and not made available were due to: “Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege.” *Id.* There was no citation whatsoever to any specific statutory ground for any denial as required by I.C. § 74-103(4).

12. On July 11, 2019, Jennifer Swindell, a member of the Idaho Press Club and editor of the Idaho Education News, made a public records request for all public records requests made to Ada County in 2019. The request was limited to only the actual requests and the county’s responses, not the documents themselves. On July 25, 2019, Ada County produced the requests but blacked out the addresses, phone numbers and emails of all the people who had made public records requests on the basis that personal contact information was exempt from disclosure but it cited no authority for that proposition. Verified Petition, Exhibit J.

13. On August 1, 2019, Katy Moeller, a reporter for the Idaho Statesman and also a member of the Idaho Press Club, made a request by email to Patrick Orr, the Public Information Officer of the Ada County Sheriff’s Office, for a recording of 911 calls reporting injuries sustained in a scooter accident in Boise on July 26, 2019. Mr. Orr replied by email that if it was still under investigation, the request would be denied. If not, the same email advised that Ms. Moeller would need to get permission from the individuals who placed the 911 calls before the calls would be released but, if she got permission, he would “pull” them. Verified Petition, Exhibit K. This was a catch-22 since the names of the callers were unavailable. Although Mr. Orr does act as a media contact and provides information to reporters, he is not actually one of the two people in the Ada County Sheriff’s Office who handles formal public records requests. There is no record of a formal public records request for the 911 calls.

14. The Idaho Press Club is a voluntary membership trade association. Betsy Russell is the current President of the Idaho Press Club. Melissa Davlin is the Vice President and First

Amendment Committee Chairwoman of the Idaho Press Club. The Idaho Press Club has had to spend its funds on the costs and expenses of this case and divert them from other aspects of the Idaho Press Club's mission. Cynthia Sewell, Jennifer Swindell and Katy Moeller are also Idaho journalists and members of the Idaho Press Club.

15. A petition under the Idaho Public Records Act was filed on September 3, 2019 by the Idaho Press Club on behalf of itself and its members. The unredacted documents were provided to this Court prior to the hearing on October 2, 2019<sup>2</sup> which was the hearing required under I.C. § 74-116(1).

### III.

#### Ada County's Motion to Dismiss

##### A. Standards.

When a motion to dismiss is supported with factual allegations outside of the pleadings, the motion is treated as one for summary judgment. I.R.C.P. 12(d); *Paslay v. A & B Irrigation District* 162 Idaho 866, 868–69, 406 P.3d 878, 880–81 (2017). Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The moving party has the burden of establishing that there is no genuine issue of material fact. I.R.C.P. 56(c)(1); *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). A verified pleading is treated as an affidavit if it satisfies the requirement of I.R.C.P. 56(c)(4), that is: it is made on personal knowledge, sets forth facts admissible in evidence and is made by one who is competent to testify to those facts. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 918, 188

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<sup>2</sup> The hearing was initially set for September 25, 2019 as required by I.C. § 74-115 (1) but was continued to October 2, 2019 at the request of the parties.

P.3d 854, 860 (2008); *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct. App. 1984). Ada County has filed a number of declarations. The Idaho Press Club also filed a declaration. The verified petition from the individuals with personal knowledge about those facts and provides facts which are admissible in evidence.

Ada County contends that this action should be dismissed because of insufficiency of process or service of process and failure to state a claim upon which relief can be granted pursuant to I.R.C.P. 12(b)(4), (5) and (6). It challenges the designation of “Ada County” as the named defendant and its service. As far as its failure to state a claim argument, Ada County asserts that the Idaho Press Club lacks standing to bring this action on behalf of its members who made the requests which were denied or denied in part.

#### **B. Insufficiency of Process/Service of Process**

Ada County moves for dismissal under Rule 12(b)(4) and (5), insufficiency of process and insufficiency of service of process, because the Idaho Press Club failed to name the Ada County Board of Commissioners and the Ada County Sheriff’s Office as parties, instead only naming and serving Ada County as the defendant. The argument is without merit. The Act does not require that a sub-part of a public agency be named as the respondent. If a request is denied, then the “public agency” is the respondent. I.C. § 74-115 provides:

(1) The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of this chapter. The petition contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic. In cases in which the records requested are claimed as exempt pursuant to section 74-107(1) or (24), Idaho Code, the petitioner shall be required to name as a party and serve the person or entity that filed or provided such documents to the agency, and such person or entity shall have standing to oppose the request for disclosure and to support the decision of the agency to

deny the request. The time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing.

(emphasis added). A “[p]ublic agency” means any state or local agency as defined in this section.” I.C. § 74-101(11). A county is a local agency under the Idaho Public Records Act and therefore also a “public agency.” I.C. § 74-101(8) and (11). Exemptions pursuant to I.C. § 74-107 (1) and (24)<sup>3</sup>are not applicable in this situation, therefore it is unnecessary that the person or entity that provided such documents to the agency be named as a party and served. Ada County is properly named as the respondent.

### **C. Standing**

Melissa Davlin’s request was made on behalf of the Idaho Press Club. Each of the requesters of public records in this case is a member of the Idaho Press Club which is a voluntary membership organization of Idaho journalists. Under the Idaho Public Records Act, any “person” may seek to inspect a public record. “Person” is defined broadly as “any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity. I.C. § 74-101(9). An association whose members, as well as the association itself, which made a public records request is a proper party to bring an action under the Idaho Public Records Act when there is a denial. I.C. § 74-115. Every time “person” is referred to in the Act, it is necessary to circle back to the broad statutory definition of that word. Each of the reporters who made a request for a public record which was denied could have filed a separate action. If they had filed separate actions, the preferred course of action would have been to consolidate them into one proceeding since it is the most reasonable and efficient use of

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<sup>3</sup> 74-107(1) exempts certain trade secrets and 74-107(24) exempts certain records relating to property tax assessments.

judicial and party resources at both the trial and appellate level.

There are a cluster of doctrines designed to ensure that the disputes brought before the court system are thoroughly developed and advanced by those with a driving interest in the just resolution of a real dispute. The doctrine of standing is designed to insure that a person advancing a legal theory is so directly concerned about the issues involved in a particular case that they will develop the facts and the law as strenuously as possible. Courts are not designed to resolve academic debates or to serve as commentators or talk show hosts. Courts are designed to resolve real disputes between parties who have a direct stake in the outcome of the case. Real litigants involved in real disputes have every motive to flesh out the case factually and legally with the goal of arriving at the most just and reasonable resolution of a controversy. “The essence of the standing inquiry is whether the party seeking to invoke the court’s jurisdiction has ‘alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions.’” *Employers Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 779, 405 P.3d 33, 38 (2017) (internal citations omitted).

Each of the reporters who made a request which was denied had standing to bring a separate action. Melissa Davlin specifically made her request on behalf of the Idaho Press Club. The Idaho Press Club also has associational standing. In its Verified Petition, the Idaho Press Club describes itself as:

...an Idaho non-profit corporation serving as a statewide association of working journalists from all facets of the media. Its mission is to promote excellence in journalism, freedom of expression, and freedom of information. For decades it has fought for open records and all aspects of freedom of the press, in the courts, in the legislature and in the public arena. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller are all Idaho journalists and members of the Idaho Press Club. The Idaho Press Club brings this action on their behalf and on behalf of its other members.

The United States Supreme Court in *Hunt v. Washington Apple Advertising Com'n* 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) held that where a state agency also acted as a traditional trade association which promoted the Washington apple industry, it was entitled to standing in an action challenging another state's restrictions on advertising the source and grading of apples shipped to the other state. The *Hunt* Court held that an association had standing to bring a suit on behalf of its members if:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

*Id.*, 432 U.S. at 344, 97 S. Ct. at 2442. The three part test in *Hunt* was adopted in Idaho in *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006). In *Beach Lateral*, a case involving confirming a ditch easement, associational standing was found for injunctive relief but not for quieting title, as requested in the action, because it required the participation of the individual landowning members in the lawsuit.

In this case, each of members of the Idaho Press Club would have standing to sue in their own right. They are each members of the Idaho Press Club. The interests that the Idaho Press Club seeks to protect—freedom of expression and freedom of information are central to its purpose. The Idaho Press Club has a central interest in providing information to the general public about how elected officials and public employees handle public matters and perform their duties. The first and second prongs are present as Ada County concedes. The relief sought in this case is the compelling of public records. The Idaho Supreme Court in *Beach Lateral* provided the following guidance:

The question of associational standing often turns on the nature of the relief sought. When an association seeks some form of prospective relief, such as a declaration or an injunction, its benefits will likely be shared by the association's members without any

need for individualized findings of injury that would require the direct participation of its members as named parties. *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441, 53 L.Ed.2d at 394. “Indeed,” wrote the United States Supreme Court in *Hunt*, “in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.” *Id.* (quoting *Warth*, 422 U.S. at 515, 95 S.Ct. at 2213, 45 L.Ed.2d at 364).

142 Idaho 600, 603–04, 130 P.3d 1138, 1141–42. Generally, if an injunction is requested, then it serves the purpose of all the members equally and the third prong is met. The compelling of disclosure of public records which were the subject of a proper public record request is in the nature of injunctive relief. The relief sought in this case is the release of public records to the public. Since there is a presumption under the Idaho Public Records Act that all records maintained by a public agency are available to the public, Ada County bears the burden to show that an exemption applies. If Ada County does not, the public records are released. Because of the kind of relief sought, which is identical to injunctive relief, associational standing is proper. That being the case, it is unnecessary to address the Idaho Press Club’s argument regarding organizational standing.

The Idaho Press Club has a genuine stake in how the government responds to public records requests by its members. It has every motive to flesh out the case factually and legally. It has the personal stake in the outcome of the controversy and “the concrete adversariness which sharpens the presentation” upon which a court depends for the just resolution of disputes. The Idaho Press Club has standing to file this Petition.

#### **D. Relief under the Idaho Public Records Act and Declaratory Judgment**

The petition was brought under I.C. § 74-115 which allows the person whose request for the disclosure of public records to bring an action in district court in the county where the records are located. Nothing in the Idaho Public Records Act prohibits the joinder of similar claims. When it appears that a public record has been improperly withheld, the official who

withheld it must justify the non-disclosure. The Court can, as it has here, examine the records *in camera*, and order the disclosure of improperly withheld records. I.C. § 74-116. The process requires the court to scrutinize the reason for non-disclosure to determine if the public agency has the statutory authority for the denial. I.C. § 74-103(4). The statute creates a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute. The public agency bears the burden of proving that a document not disclosed fits within one of the “narrowly construed exemptions” *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002) citing *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). The Idaho Public Records Act requires the court to examine the requests, the basis for the denials and declare the rights of the parties. In every case involving the application of a statute, the court is declaring the rights of the parties.

The coupling of the statutorily authorized right to petition the courts when a record is claimed to be exempt with a request for declaratory relief does not warrant dismissal of the action even though it may be redundant. A declaratory judgment action is authorized:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

I.C. § 10-1201. The Declaratory Judgment Act is remedial and designed to “afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered. I.C. § 10-1212. The additional request for declaratory relief in addition to relief under I.C. § 74-115 and I.C. § 74-116 is not grounds for dismissal. In any event, this case already requires the Court to consider Ada County’s compliance with the statute and the rights of the parties directly involved in this case.



## CONCLUSION

The Idaho Press Club has standing to bring this petition since it reflects public records act requests made by its members. There is no basis to dismiss the Petition. The motion is denied.

### IV.

#### Idaho Press Club's Petition to Compel Disclosure

##### A. Introduction.

Whenever a public records request is expressly denied or deemed denied when it is not responded to within the timelines set forth by the Idaho Public Records Act, those requesting the records are authorized to file a petition in the district court of the county where the records are located to compel their production. I.C. § 74-115. The district court is then directed to set a hearing at the “earliest possible time” or not later than twenty-eight days from the filing of the petition. *Id.* The petition was timely filed. The issues which were asserted in the Motion to Dismiss are resolved. The Court has reviewed the records *in camera*.

Ada County failed to comply with the Idaho Public Records Act. Idaho law makes all public records available for public inspection at all reasonable times. I.C. § 74-102. The burden is on the public agency to justify any denial by pointing to the statutory authority for the denial. I.C. § 74-103(4). Any exemptions are narrowly construed. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002); *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). Ada County has the burden of establishing that any documents not disclosed fit within one of the “narrowly-construed exemptions.” *Id.*

Ada County did not timely respond to the requests. It did not follow the mandatory statutory timelines nor did it even seek a “mutually agreed upon” extension for any request.

When it did respond, it did not specify the specific statutory authority for any of its denials. Moreover, it has not met its burden in this Court of proving that the documents requested fit within one of the statutory exemptions. Ada County has not met its responsibilities under the Idaho Public Records Act. While it can be difficult to reply within the timelines established by the Legislature because of the number of public records being sought and the process needed to locate them, Ada County should have communicated with the requesters, been transparent about the challenges and worked on the statutorily required “mutual” extension. Ada County did not adequately detail its costs for production of the public records. Most seriously, the vague denials for: “Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege” do not satisfy Ada County’s burden under the Idaho Public Records Act.

1. **Timeliness.** None of the records requested in this case were timely supplied nor is there any evidence that there was ever any formal “mutually agreed upon extension” as specified by the Idaho Public Records Act. No record was supplied within three business days nor were any records provided within ten working days after Ada County’s written notice that three days was insufficient time. If there is not a mutually agreed upon extension, then the request is deemed denied and the person who made it may bring an action in district court. In this case, Cynthia Sewell, Melissa Davlin and Jennifer Swindell did receive heavily redacted documents as well as documents redacted in their entirety but substantially after the timelines required by the Idaho Public Records Act.

2. **Fees.** There is no charge for the first two hours of labor or for copying the first one hundred pages of public records. I.C. § 74-102(10).<sup>4</sup> Thereafter, a fee may be charged which does not exceed the actual cost to the public agency of the copy, or the cost of conversion of electronic

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<sup>4</sup> The Ada County website for public records request did not contain accurate information on costs since it neglected to advise that the first two hours of labor and first 100 pages copied were free.

records to another electronic form. I.C. § 74-102(10)(d). Reasonable labor costs, after the first two free hours, may be charged at the rate of the lowest paid administrative staff and if redactions are required, by the per hour rate of the lowest paid attorney within the public agency or the usual and customary rate of attorneys retained for that purpose if the public agency does not have an attorney on staff. Statements of fees are required to be itemized to show per page costs for copies and the hourly rate of employees and attorneys involved in responding to the request and the actual time spent on the records request. I.C. § 74-102(10)(g). Lump sum costs cannot be assigned to any public records request. *Id.*

Cynthia Sewell's public records request was made on February 15, 2019. The first response for the request for public records about the possible sale of the Les Bois racetrack came on April 3, 2019. By letter dated April 5, 2019, Ada County did provide the information that there were a number of emails to review and that the free two hours of labor provided by statute had been exhausted. In the letter, Ada County estimated that 16.5 additional hours of work would be required with charges for an unspecified number of hours for IT professionals at \$50.00 per hour and for lawyer assistance at \$42.14. There was no cost breakdown beyond the hourly charges and the overall estimate for time required for the work. Ada County asked for payment of \$695.31 before the documents would be handed over. The letter indicated that the attorneys had "reviewed the request and the files." Petition, Exhibit B. On April 11, 2019, Ada County sent another letter, this time reducing the fee to be charged to \$521.48. Petition, Exhibit C. The April 11<sup>th</sup> letter did provide more detailed information about the work required to answer the request although, oddly, in light of the April 5, 2019 letter it refers to "beginning the review" and "finishing the review" of the requested documents and that a lawyer would look at the documents but it would be on top of the lawyer's regular duties. The clear implication of the

letter is that holding one's breath for a response could be fatal. The letter ended with the advice on the appeal period if Ms. Sewell viewed it as a denial.

A public agency is entitled to charge a fee up front for responding to a public record request that exceeds the free labor and page amounts provided by law. I.C. § 74-102(10)(e) and (12). The Idaho Public Records Act expressly requires that the costs be itemized and bars lump sum costs. I.C. § 74-102(g). The lump sum figure provided in the April 5<sup>th</sup> and 11<sup>th</sup> does not meet the statutory requirements. Cynthia Sewell did not treat the letters as denials and did not file a petition to compel the response to the request. On July 23, 2019, she asked for a waiver or a more specific breakdown of the rates, time required, and which staff would be performing charged services. On July 26, 2019, Ada County waived all fees in a "one-time waiver."

The costs related to the Sewell request were not itemized as required by Idaho law. The costs bill did not contain the itemization of who would perform the work, what their rate was and how many hours the particular employee would be required to spend to do it. The Idaho Public Records Act does not have any statutory exemption for attorney review whenever the attorney gets around to it. The Idaho Public Records Act imposes tight deadlines. If the deadlines cannot be met, then there is supposed to be a mutually agreed upon timeline, not a unilateral one. However, since the fees were eventually waived, the cost issue on the Sewell request is moot.

**3. Procedure to make a Public Records Request.** A public agency may designate a custodian or custodians for agency's records. I.C. § 74-102(16). The custodian includes any public official who has authorized access to public records and their delegates or representatives. *Id.* The public agency may require that requests be made in writing, including by email. I.C. § 74-102(4). The Sewell, Davlin and Swindell requests were made in accordance with the procedure set out on the Ada County website. The request for the 911 calls on the scooter accident was

made to the public information officer, Patrick Orr, but was not made under the formal procedure set out by Ada County. Unless the procedure for a public records request established by a public agency is followed, a petition to compel the disclosure of public records is premature.

**4. Procedure for denial.** If a public record is not provided because there is a specific statutory basis for an exemption, the Idaho Public Records Act requires the public agency to specify the statutory basis. I.C. § 74-103(4) states: ...[T]he notice of denial or partial denial also shall indicate the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so." None of the denials or partial denials in this case indicated any statutory basis for the denial or partial denial.

**5. Non-statutory denials.**

**a. Privacy.** The Idaho Public Records Act has a number of specific statutory exemptions which address privacy concerns. For example, juvenile records are largely exempt, I.C. § 74-105(2). Records of the Idaho department of juvenile corrections "including records containing the names, addresses and written statements of victims and family members of juveniles, shall be exempt from public disclosure" pursuant to I.C. § 20-533A and I.C. § 74-105(3). Records collected as part of the presentence process are exempt from disclosure. I.C. § 74-105(4)(a)(iv). Many Department of Corrections records are exempt from disclosure. *Id.* Public employee personnel records are exempt from disclosure except for employment history, classification, pay grade, salary etc. I.C. § 74-106 (1). The home address and telephone number of current and retired public employees is exempt from disclosure without the employee's consent. I.C. § 74-106(1) and (2). Voter registration information which includes the voter's physical address, while generally available except for driver's license numbers and date of birth, can be withheld for crime victims or law enforcement officers. I.C. § 74-106 (25) and (30). Victims of stalkers or

domestic violence can have protection under the Idaho Public Records Act from disclosure of their home address. I.C. § 74-106(27) and I.C. § 19-5701 et. seq. Trade secrets and production records are exempt from disclosure along with archeological site locations, records of the books a patron has checked out of a library just to list a few. I.C. §§ 74-107, 108. While Ada County argues that privacy protections are important, it is abundantly clear that the Legislature is also aware of the need for privacy protection and has created specific statutory exemptions to maintain the privacy of many types of records. The concern that Ada County expresses that it might be subject to legal liability for disclosing private information is not persuasive since it has immunity under I.C. § 74-118. There is no basis for this Court to adopt the amorphous privacy exemption argued for by Ada County. The Idaho Public Records Act and the cases interpreting it have recognized that the Legislature has created specific exemptions which are to be narrowly construed. The broad “Privacy” basis for not providing public records information requested as argued by Ada County has no basis in any specific exemption or anywhere else in Idaho law. Ada County’s interpretation of I.C. § 74-104(1) which provides that: “[a]ny public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation” justifies its vague and unstructured right to exclude whatever information it deems as private is not supportable. First, if there is a specific state or federal law which precludes disclosure of a public record, then Ada County must cite to it. Secondly, such a broad, standard-less interpretation of I.C. § 74-104(1) would negate the entire Act. The policy of the Act is that records of the public’s business are open to examination by the public. No public agency has a right to create exemptions in addition to that already provided for by the Legislature. When the Legislature has chosen to create numerous specific statutory exemptions, it is a clear indication that they have created what they meant to create. *Bolger v.*

*Lance, supra.*; *Federated Publications, Inc. v. Boise City, supra.* Whether it would be a good idea to expand the law to include greater privacy protections is an argument which should be made to the Legislature.

Ada County's generic claim of "Privacy" without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." For that reason alone, all documents in response to each request which was denied because of "Privacy" must be provided. Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. The Idaho Public Records Act does not exempt the email or street addresses and names of people who submit public records requests, or ask for interviews with Ada County Commissioners or generally correspond with them. All information requested and gathered in response to Jennifer Swindell's public records request must be provided. All information redacted for "Privacy" alone must be provided to Cynthia Sewell and Melissa Davlin. Ada County's approach to this particular issue where it even deleted the reporter's own email address and emails asking about the status of their public records request because of "Privacy" is so lacking in good faith that it is striking. Whether those redactions were meant humorously, they are improper and not justified by any statutory exemption.

**b. Redactions for "Personnel".** Ada County's generic claim of "Personnel" as a basis for non-disclosure without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." I.C. § 74-106(1) does authorize the non-disclosure of the names of public employees or their positions. None of the personnel information involved "information

regarding sex, race, marital status, birth date, home address and telephone number, social security number, driver's license number, applications, testing and scoring materials, grievances, correspondence and performance evaluations." Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. While it cited a statutory exception which related to personnel and there are specific personnel information exclusions, none of them apply.

**c. Deliberative Process Privilege.** A considerable number of records were withheld because of Ada County's assertion of a "Deliberative Process Privilege." Nowhere in the Idaho Public Records Act is there a "Deliberative Process Privilege." The Idaho Public Records Act does protect some of the Legislature's own deliberative processes from public disclosure. Draft legislation and documents relating to it and research requests submitted to Idaho's legislative services office by a member of the Legislature are exempt from disclosure. I.C. § 74-109(1). However, there is no broad Idaho "Deliberative Process Privilege" even though the Legislature was presumably also aware of federal law which recognizes such a privilege. The federal Freedom of Information Act has had a specific exemption for the deliberative process privilege since its enactment in 1988. The purpose of the federal deliberative process privilege is to allow frank debate of options, "suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency" or represent views that are being tossed around but are not the final policy of a federal agency. See, *e.g.*, *Sierra Club, Inc. v. United States Fish & Wildlife Serv.*, 925 F.3d 1000, 1015 (9th Cir. 2019)(petition for writ of certiorari filed October 25, 2019). The deliberative process privilege has been the subject of considerable litigation. The federal FOIA also establishes a policy of open access to public records with exceptions narrowly construed. The debate in the federal cases over the tension



between FOIA's general principles mandating public access to information and the exclusion of records because of the application of the "deliberative process privilege" reflects considerable concern over the risk of the exception devouring the principle of public access. As Judge Winmill discussed in *Andrus v. United States Dep't of Energy*, 200 F. Supp. 3d 1093, 1105 (D. Idaho 2016), the purpose of the deliberative process privilege is to allow the exploration of possibilities, to engage in debate and explore ideas without fear, at the earliest stages of a policy discussion, that public scrutiny will dampen the discussion. Since the deliberative process privilege has been a part of the federal Freedom of Information Act since 1988, the Legislature's decision not to include it in the Idaho Public Records Act is significant. Had they wanted to include the privilege, they could have done so. Instead, they carved out a narrower exemption for drafts of proposed legislation and communication with the legislative services office. There is no deliberative process privilege in the Idaho Public Records Act. This Court declines the invitation to make one up. Idaho has opted for greater transparency. The decision to narrow the range of public records open to the public belongs to the Legislature.

**d. Attorney-Client Privilege.** The Idaho Public Records Act provides broad access to all public records. Because government at every level in 2019 maintains all sorts of records on many subjects, the Legislature carved out a number of specific areas where records that governmental entities maintain are not available to the general public. Those are the specific statutory exclusions which a governmental body is required to cite to justify non-disclosure.

The attorney-client privilege and the attorney work product privilege are not specifically protected in any statutory exclusion although they are long-standing privileges in Idaho law. They are referenced in the Idaho Public Records Act in two separate sections: I.C. § 74-105(18) and I.C. § 74-107(11). I.C. § 74-107(11) states that: "nothing in this subsection is intended to

limit the attorney-client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic” which seems to imply that the attorney-client privilege and attorney work product privilege do protect public records that fall within their proper focus.

The United States Supreme Court has described the attorney-client privilege as “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). The privilege protects “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *Id.* at 390, 101 S.Ct. at 683. The privilege exists to “to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Id.* at 389, 101 S.Ct. at 682.

In Idaho, the attorney-client privilege was first discussed in *Ex Parte Niday*, 15 Idaho 559, 98 P.845 (1908). The Supreme Court recognized that an attorney cannot, without the consent of his or her client, be examined as to any communication made by the client to the lawyer to obtain legal advice or to the lawyer’s legal advice to the client. Letters disclosed to a third party and not written with respect to the employment of the lawyer nor for the purpose of obtaining legal advice, were not privileged. The Court said:

The rule is intended to promote justice and protect persons who are obliged to disclose their private business affairs to an attorney in order to be advised of their legal rights and duties. It is defensive, and not offensive. It is intended as a shield, and not a sword. The communication must have been confidential and so understood and intended. *Weeks on Attorneys*, § 153; *Sharon v. Sharon*, 79 Cal. 678, 22 Pac. 26, 131; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; 10 Ency. of Ev. 270; *State v. Kidd*, 89 Iowa, 54, 56 N. W. 263.

*Id.*, 15 Idaho 559, 98 P. at 847–48. 2. An attorney cannot, without the consent of his or her

client, be examined as to any communication made by the client to the lawyer or to the lawyer's advice given in the course of the professional employment. I.C. § 9-203. Communications not solely between the attorney and client are not privileged. What matters as to whether a particular communication is privileged under the attorney-client privilege is to whom the statements are made, whether they were confidential and whether they involve the providing of legal advice. Communications by a client or the lawyer about non-legal matters do not fall within the scope of the privilege. See, generally, *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980); *T3 Enterprises, Inc. v. Safeguard Bus. Sys., Inc.*, 164 Idaho 738, 435 P.3d 518 (2019); 24 Federal Practice and Procedure § 5478 (Wright & Miller). The name of the attorney is not privileged. Wright & Miller have observed that lawyers employed by the public as public officers such as prosecutors owe their duty to the public at large and the "right of the public to know how the public business is conducted may override the policy the privilege is thought to serve." *Id.* at 6 citing *Coastal Corporation v. Duncan*, 86 F.R.D. 514 (D.C. Del. 1980).

The attorney-client privilege applies to confidential communications between the public attorney and the public agency client for the purpose of giving or receiving legal advice. Public agencies enter into contracts, assess their legal positions in connection with various types of litigation against the public agency and have the same need as private parties for frank disclosure of all of the relevant facts by the "client" in order to receive sound legal advice. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."

*Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980).

However, in light of the strong policy of Idaho law requiring public disclosure to the public of the records of the public's business, the attorney-client privilege and attorney work product

privilege should be narrowly construed in the context of public agencies. Moreover, where an attorney is just responding to a public records request and is acting in an administrative or clerical capacity and there is neither a confidential communication nor any provision of legal advice, the attorney-client privilege and attorney work product privilege do not come into play. The attorney-client privilege attaches only when the attorney acts in that capacity, not in some other role. See, *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995). Simply having an attorney act as the point person to gather a public records request does not convert everything he or she touches to a communication covered by the attorney-client privilege or to attorney work product. The privileges applies to confidential communications made for the purpose of seeking and providing legal advice, not to clerical or administrative functions performed by a public employee who is a lawyer.

**Sewell Request/ In-Camera Review.** Emails and correspondence from the Special Assistant to the Ada County Commissioners which refer to a prosecutor's name or general subject matter which the deputy prosecutor might be working on do not fall within attorney-client privilege. The fact that legal matters are referred to as being areas of interest or that there are funding needs does not fall within attorney-client privilege. Multiple copies provided to various public employees of Cynthia Sewell's public records request are in no way covered by the attorney-client privilege or work product privilege even though they may have been forwarded by someone working in the Ada County Prosecutor's legal department to another public employee. None of the emails and correspondence Bates stamped 000453-467 fall within any attorney-client privilege nor are they exempt under any other permissible basis. Drafts of letters from legal counsel to the Ada County Commissioners do fall within attorney-client/ attorney work product. Bates stamped documents 000468-000471 are exempt from disclosure. Bates stamped

document 000499 is not attorney-client or attorney work product and must be disclosed. Cover letter and draft legal documents fall within attorney client privilege thus Bates stamped documents 000543-000547 are not subject to disclosure. Legal documents disclosed to third parties lose the protection of the privilege. Bates stamped documents 000567-000572 must be disclosed. Bates stamped document 000619 is not covered by attorney client privilege or work product. Bates stamped document 000620-626 are copies of Cynthia Sewell's public records request and are not covered by the attorney client privilege. Bates stamped document 000627-000633 are not covered by the attorney client privilege or work product privilege. Except for the documents expressly found to be attorney-client or attorney work product, all other documents must be provided since there is no legal basis for their non-disclosure.

**Davlin Request/ In-Camera Review.** The Court has reviewed all documents in non-redacted form gathered in response to Melissa Davlin's request. Attorney names are not confidential. The body of Bates stamped documents 000023—000025; and 000035 are exempt from disclosure. Bates stamped documents 000043-48 do not fall within the attorney-client privilege and must be disclosed. It is absolutely remarkable that Ada County would claim a privilege for the name of an attorney and the stock confidentiality notice. Bates stamped document 000060 must be disclosed since it does not fall within the privilege. Bates stamped document 000062-67 falls within the attorney client privilege and will not be disclosed. Bates stamped document 000070-74 falls within the attorney client privilege and will not be disclosed. Correspondence about the retrieval efforts to respond to the public records request of Melissa Davlin are not confidential communications related to the provision of legal advice even though a lawyer may have corresponded with the IT expert. The search parameters are not in reference to the provision of legal advice but to the response to the public records requests and are not privileged.

## **Conclusion**

The Idaho Public Records Act mandates broad, timely access to the records of the public's business upon request. A public record can only be withheld if there is a clear and statutorily-grounded justification. I.C. § 74-101(13). The Idaho Press Club has associational standing to bring this petition on behalf of the members of the association who made requests which were denied. Ada County is the properly named party-defendant. There is no basis to dismiss this petition.

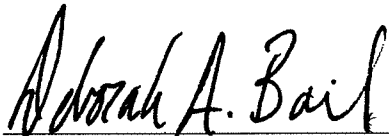
Ada County's approach to handling the Idaho Public Records Act requests in this case was troubling. The Act favors timeliness, narrow exclusions and openness; Ada County's approach emphasized delay, unsupportable interpretations of privilege and secrecy. Ada County not only did not follow the Idaho Public Records Act, it acted as though a different Act had been enacted—a reverse image of Idaho law. No public agency is free to create its own Public Records Act. Vague, over-reaching denials for “Personnel” or “Privacy” without citing the Act's specific personnel or privacy protections is not permissible. There is no “Deliberative Process” privilege in Idaho law. While the attorney-client privilege can be asserted for confidential communications between a lawyer and the client for the purpose of legal advice, delegating the administrative/clerical function of gathering public records to a lawyer does not make everything the lawyer touches or copies other employees subject to the protection of the privilege. Ada County's refusal to provide records was frivolous and it has frivolously pursued its positions in this case. See *Hymas v. Meridian Police Dep't*, 156 Idaho 739, 747, 330 P.3d 1097, 1105 (Ct. App. 2014). With the exception of a few records, no privilege applies.

The Idaho Legislature has determined that, in this State, government business must

largely be conducted in public view with quick access to public records. The Legislature did not choose to create any “deliberative process privilege” even though that has long been a component of the federal government’s Freedom of Information Act. With the exception of the request for the 911 call which needed the formal public records request which the Act allows public agencies to require, the Court finds that the evidence is overwhelming that public records were improperly and frivolously withheld. The Idaho Press Club is the prevailing party and is entitled to its attorney fees and costs. The Petition to Compel is granted. The documents must be supplied forthwith.

It is so ordered.

Dated this 12<sup>th</sup> day of December, 2019.

A handwritten signature in black ink that reads "Deborah A. Bail". The signature is written in a cursive style and is positioned above a horizontal line.

Deborah A. Bail  
District Judge

# EXHIBIT H



Thomas J. Budge (ISB# 7465)  
Elisheva M. Patterson (ISB#11746)  
RACINE OLSON, PLLP  
201 E. Center St. / P.O. Box 1391  
Pocatello, Idaho 83204  
(208) 232-6101 – phone  
(208) 232-6109 – fax  
tj@racineolson.com  
elisheva@racineolson.com

*Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)*

**STATE OF IDAHO**

**DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF  
A&B IRRIGATION DISTRICT, AMERI-  
CAN 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

**Notice of Ground Water District  
Mitigation**

Idaho Ground Water Appropriators, Inc. (“IGWA”), acting on behalf of North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District (collectively, the “Districts”), hereby provides notice that the Districts can mitigate for their proportionate share of the demand shortfall predicted in the Final Order Regarding April Forecast Supply (Methodology Steps 1-3) (“April 2023 As-Applied Order”) issued April 21, 2023, in this matter.

**Background**

The April 2023 As-Applied Order applies steps 1-3 of the Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover. It predicts that the Surface Water Coalition (“SWC”) will experience an in-season demand shortfall of 75,200 acre-feet in the absence of mitigation by junior-priority ground-water users. The order states: “On or before May 5, 2023, ground water users holding consumptive

water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan.” (April 2023 As-Applied Order, p. 6.) “IGWA’s proportionate share of the predicted DS of 75,200 acre-feet is 63,645 acre-feet.” *Id.* at 5, fn 5.

IGWA has three approved mitigation plans. Its “Storage Water Plan” authorizes the Districts to provide mitigation via the delivery of storage water to the SWC. (Order Approving Mitigation Plan, *In the Matter of the Idaho Ground Water Appropriators, Inc.’s Mitigation Plan in Response to the Surface Water Coalition’s Water Delivery Call*, IDWR Docket No. CM-MP-2009-007, June 3, 2010, p. 10.) Under this plan, “IGWA must provide proof of rental or an option to rent storage water and of a commitment of the storage water to the SWC within the deadlines provided by the Methodology Order and any order of the Director implementing the Methodology Order for a given year.” *Id.*

IGWA’s “Aquifer Enhancement Plan” authorizes the Districts to obtain mitigation credit for reach gains that accrue to the SWC as a result of (a) conversions of farmland from groundwater to surface water irrigation; (b) fallowing of groundwater-irrigated acres through the Conservation Reserve Enhancement Program (CREP), Agricultural Water Enhancement Program (AWEP), or other voluntary program; and (c) groundwater recharge.” (Order Approving Mitigation Plan, *In the Matter of the Idaho Ground Water Appropriators, Inc.’s Mitigation Plan for Conversions, Dry-Ups, and Recharge*, IDWR Docket No. CM-MP-2009-006, May 14, 2010, p. 1.) Under this plan, “[i]f mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide.” *Id.* at 2.

IGWA’s “Settlement Agreement Plan” authorizes the Districts to obtain mitigation protection by complying with a settlement agreement entered into between the Districts and the SWC in 2015. (Final Order Approving Stipulated Mitigation Plan, *In the Matter of IGWA’s Settlement Agreement Mitigation Plan*, IDWR Docket No. CM-MP-2016-001, May 2, 2016; Final Order Approving Amendment to Stipulated Mitigation Plan, *In the Matter of IGWA’s Settlement Agreement Mitigation Plan*, IDWR Docket No. CM-MP-2016-001, May 9, 2017.) Under this plan, the Districts are required to conserve 240,000 acre-feet of water and deliver 50,000 acre-feet of storage annually to the SWC as set forth in the Amended Final Order Regarding Compliance with Approved Plan issued April 24, 2023.

### **Notice of Mitigation**

The Districts identified in the following table will provide mitigation to the SWC under the Storage Water Plan. These districts’ proportionate shares of the 63,645 acre-feet demand shortfall predicted in the April 2023 As-Applied Order are as follows:

<b>District</b>	<b>Proportionate Share</b>
Bingham GWD	13,384
Bonneville-Jefferson GWD	8,469
Jefferson-Clark GWD	6,939
Total	28,792

Attached hereto as Appendix A are copies of storage water leases totaling 38,714 acre-feet, submitted on behalf of the above-identified Districts.

The Districts identified in the following table will provide mitigation under the Settlement Agreement Plan. These Districts' proportionate shares of the 240,000 acre-feet of conservation and the 50,000 acre-feet of storage obligations are as follows:

District	240,000 AF	50,000 AF
Aberdeen-American Falls GWD	39,395	8,705
Carey Valley GWD	821	173
Henry's Fork GWD + Madison GWD	6,299	0
Magic Valley GWD	37,931	8,000
North Snake GWD	29,765	6,410
Total	114,211	23,288

Each District's proportionate share of 240,000 is based on the Director's allocation set forth in the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* issued April 24, 2023, in this matter. Each District's proportionate share of 50,000 is based on the allocation IGWA has utilized since the Settlement Agreement Plan was implemented in 2016. The Settlement Agreement Plan does not require that storage water contracts be reported to the SWC or IDWR; it simply requires that storage be "delivered to SWC 21 days after the date of allocation." However, IGWA reports voluntarily that the above-identified Districts have storage leases in place for 23,288 acre-feet.

Dated this 5<sup>th</sup> day of May, 2023.

RACINE OLSON, PLLP

By:   
Thomas J. Budge  
Attorneys for IGWA

**APPENDIX A**

**Storage Leases**

Bingham Ground Water District  
Bonneville-Jefferson Ground Water District  
Jefferson-Clark Ground Water District

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Idaho Irrigation District (lessor) agrees to lease 6,678 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

Alan Melzer 5-1-23 Imeko Irrigation  
Lessor Signature Date Title, Canal Company  
District

[Signature] 5/5/23 BGWD  
Lessee Signature Date Canal Company or Diversion Name

=====  
(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Snake River Valley Irrigation District (lessor) agrees to lease 5,009 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

\_\_\_\_\_  
Lessor Signature      5-1-23      Date      Manager      SKUD      Title, Canal Company

\_\_\_\_\_  
Lessee Signature      5-1-23      Date      BGWD      Manager      Canal Company or Diversion Name

=====  
(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_



**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

New Sweden Irrigation District (lessor) agrees to lease 5,009 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

Kent Sapp 5-1-23 MANAGER NSID  
Lessor Signature Date Title, Canal Company

M. J. [Signature] 5/5/23 BGWD  
Lessee Signature Date Canal Company or Diversion Name

=====  
(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Enterprize Canal Company (lessor) agrees to lease 1,670 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

David K  
Lessor Signature

Enterprise Canal Company  
Title Canal Company

5/3/23  
Date

Lessee Signature

Date

Canal Company or Diversion Name

Mh

5/5/23

BGWD

=====

(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Sunnydell Irrigation District (lessor) agrees to lease 334 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

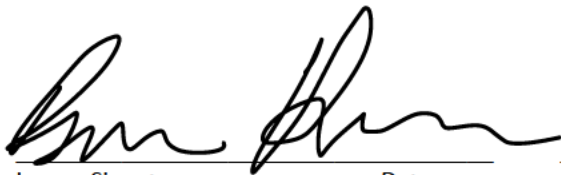
Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

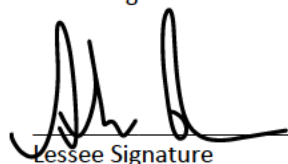


Lessor Signature

Date

V.P. Summydel Canal

Title, Canal Compan



Lessee Signature

5/5/23

Date

BGWD

Canal Company or Diversion Name

=====  
(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Aberdeen-Springfield Canal Co (lessor) agrees to lease 3,500 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

[Signature] 5/5/23  
Lessor Signature Date

General Manager  
Title, Canal Company

[Signature] 5/5/23  
Lessee Signature Date

BGWD  
Canal Company or Diversion Name

=====  
(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_



**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Blackfoot Irrigation Company (lessor) agrees to lease 500 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:


Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

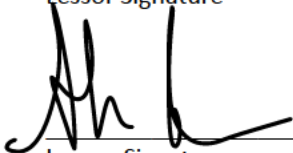


Lessor Signature

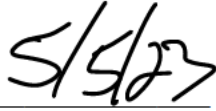
Date



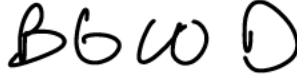
Title, Canal Company



Lessee Signature



Date



Canal Company or Diversion Name

=====

(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Corbett Slough Ditch Company (lessor) agrees to lease 750 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.



**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Parsons Ditch Company (lessor) agrees to lease 100 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

Lessor Signature

Date

Title, Canal Company



5/5/23

BGWD

Lessee Signature

Date

Canal Company or Diversion Name

=====

(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Peoples Canal & Irrigation Co (lessor) agrees to lease 2,514 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

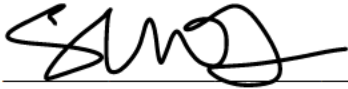
Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

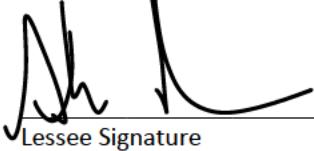


Lessor Signature

Date



Title, Canal Company



Lessee Signature

5/5/23

Date

BGWD

Canal Company or Diversion Name

=====

(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_



**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Riverside Canal Company (lessor) agrees to lease 50 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

76th Le...  
\_\_\_\_\_

Lessor Signature

Date

Title, Canal Company

ML  
\_\_\_\_\_

5/5/23

BGWD  
\_\_\_\_\_

Lessee Signature

Date

Canal Company or Diversion Name

=====

(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

The United Canal Company \_\_\_\_\_ (lessor) agrees to lease 400 acre-feet of storage to Bingham Ground Water District \_\_\_\_\_ (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

*[Handwritten Signature]*

Lessor Signature

Date

*[Handwritten Signature]*

Title, Canal Company

*[Handwritten Signature]*

Lessee Signature

5/5/23

Date

B G W D

Canal Company or Diversion Name

=====

(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Watson Canal Company (lessor) agrees to lease 50 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.

_____ Lessor Signature	_____ Date	_____ Title, Canal Company
<i>Am lc</i>	<i>5/5/23</i>	<i>BGWD</i>
_____ Lessee Signature	_____ Date	_____ Canal Company or Diversion Name

=====  
(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_

**WATER DISTRICT #1 RENTAL POOL - PRIVATE LEASE AGREEMENT**

Wearyrick Ditch Company (lessor) agrees to lease 150 acre-feet of storage to Bingham Ground Water District (lessee) for the 2023 irrigation season at a price of \$      according to the rules and regulations contained in the Water District #1 Rental Pool Procedures.

Description of Lease:

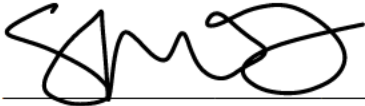
Name of River or Stream from which lease is diverted: Snake River  
Canal or Pump Name and location: TBD  
Place of Use description: TBD  
Water Right Appurtenant to Lands: TBD

An Idaho Water Resources Board surcharge (10% of the purchase price) plus a \$1.30 per acre-foot administrative fee must be received by Water District #1 prior to the approval of the storage lease).

If the reservoir storage system fails to fill in the season following the year leased, the lessor's storage allocation shall be reduced by the amount leased to offset any impacts to other spaceholders' storage accruals according to the approved Water District #1 Rental Pool Procedures pursuant to Idaho Code Section 42-1765. The lessor understands the net effect of this rule is to make an amount of the lessor's space (equal to the amount leased) last-to-fill in the reservoir system for the irrigation season following the lease.

If the lease is for irrigation purposes, the Applicant, by checking this box, certifies that the use of this leased storage water complies with the moratorium on new consumptive uses as outlined in Rental Pool Procedure 3.4. Failure to meet the conditions contained in Rental Pool Procedure 3.4 may be grounds for denying the application.

If the leased storage is diverted by a diversion outside the area regulated by Water District #1, the applicant, by signing this agreement agrees to report to the Watermaster of the water district containing the diversion, the daily amounts of leased storage diverted during the year. The Watermaster of that district, according to Rental Pool Procedure 4.3.108, must then report to the Water District #1 Watermaster the daily rental diverted by November 30<sup>th</sup>. Failure to report the daily rental diversion may result in the rental not being delivered in Water District #1's final rental delivery records.



Lessor Signature

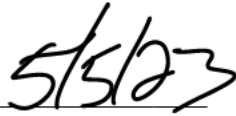
Date



Title, Canal Company



Lessee Signature



Date



Canal Company or Diversion Name

=====

(official use only)

Date Lease Accepted by Watermaster: \_\_\_\_\_

Watermaster Signature: \_\_\_\_\_



## STORAGE WATER LEASE

This Storage Water Lease ("Lease") is entered into between Enterprize Canal Co., whose mailing address is PO BOX 583, Ririe, ID 83443, ("Lessor"), and the Bonneville Jefferson Ground Water District whose mailing address is P.O. Box 51121, Idaho Falls, Idaho 83204.

### RECITALS

- A. Lessor has the right to use, lease, and assign storage water allocated and available to Lessor as a space holder in the Idaho Water District 1 reservoir system pursuant to Lessor's Storage Water Contracts with the United States Bureau of Reclamation ("Reclamation").
- B. BONNEVILLE JEFFERSON GROUND WATER DISTRICT desires to lease storage water to satisfy mitigation obligations determined by the Director of the Idaho Department of Water Resources ("Department") and related purposes, such as aquifer recharge and converting farmland from ground to surface water irrigation.
- C. Lessor desires to lease storage water to BONNEVILLE JEFFERSON GROUND WATER DISTRICT, and BONNEVILLE JEFFERSON GROUND WATER DISTRICT desires to lease storage water from Lessor, pursuant to the terms of this Lease.

### LEASE

1. **Storage Water Lease.** Lessor hereby leases to Bonneville Jefferson Ground Water District 4,000 acre feet of storage water for 2023 only, at which the Bonneville Jefferson Ground Water District is required to pay rent at a rate of \$ [REDACTED]
2. **Term.** The initial term of this Lease shall be for a period of one (1) year, commencing January 1, 2023, and ending December 31, 2023.
3. **Payment of Rent.** Bonneville Jefferson Ground Water District will pay the rent to Lessor in two equal installments. The first installment on or before May 1, of 2023, and the final installment on or before November 1, of 2023.
4. **Administrative Fees.** BONNEVILLE JEFFERSON GROUND WATER DISTRICT will pay all administrative fees imposed by Water District 1 and the Idaho Water Resource Board.
5. **Use of Leased Water.**
  - 5.1 The assignment, delivery, and use of leased storage water will be determined by BONNEVILLE JEFFERSON GROUND WATER DISTRICT and is subject to the final accounting for the year by the Watermaster of Water District 1

and any applicable Water District 1 Rental Pool Rules.

5.2 This Lease does not include any right to use storage water below Milner Dam.

5.3 The storage water available to Bonneville Jefferson Ground Water District under this Lease may be assigned and delivered by Bonneville Jefferson Ground Water District to any of its members or to any other person or entity for the authorized uses of recharge, mitigation, irrigation, or other lawful use at any time up to December 1 each year.

5.4 Any storage water not used or assigned by Bonneville Jefferson Ground Water District by December 1 shall remain in Lessor's Water District 1 storage account and then belong only to Lessor.

5.5 Lessor understands that any storage water leased may be subject to the Water District 1 Rental Pool Rules.

**6. Representations by Lessor.** Lessor covenants and represents that:

6.1 It will provide to Bonneville Jefferson Ground Water District all storage water leased under this Lease.

6.2 It is the true and lawful owner of the storage water and that nothing restricts or precludes Lessor from entering into this Lease.

**7. Breach.** If either party defaults in the performance of its obligations under this Lease, and such default is not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at its option, may elect to pursue remedies for breach of contract in district court.

**8. Assignment.** This Lease may not be assigned by Bonneville Jefferson Ground Water District without the express written consent of Lessor, but the storage water leased by Bonneville Jefferson Ground Water District under this Lease may be assigned or otherwise made available to any other person or entity.

**9. Dispute Resolution.** Any substantial dispute between the parties shall be resolved in accordance with the following provisions.

9.1 Good Faith Negotiation. Upon written notice from one party to the other, authorized representatives of the parties will attempt in good faith to resolve the dispute by negotiation.

9.2 Mediation. If the dispute cannot be resolved by good faith negotiation, either party may demand that the dispute be subjected to mediation

by a mediator designated by mutual Lease of the parties. The mediation will be held in Bonneville County, Idaho, unless the parties mutually agree to a different location. Mediator costs will be split equally between the parties.

9.3 Litigation. Litigation is allowed between the parties only: (i) if the dispute is not resolved by mediation, (ii) for the purpose of enforcing a settlement Lease entered into between the parties, or (iii) to seek temporary injunctive relief if a party deems such action necessary to avoid irreparable damage. The pursuit or granting of temporary injunctive relief does not excuse the parties from participating in good faith negotiation and mediation as set forth above. The prevailing party in any litigation is entitled to recover reasonable attorney fees and costs.

9.4 Governing Law, Jurisdiction, and Venue. This Lease will be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction, and agree that Bonneville County is the proper venue.

9.5 Exclusive Procedures. The procedures specified in this section 9 are the exclusive procedures for the resolution of disputes between the parties. All applicable statutes of limitation shall be tolled while the negotiation and mediation procedures specified in section 9.3 are pending.

**10. Notices.** All notices given pursuant to this Lease must be in writing and shall be sent in one of the following manners: (a) by certified mail, return receipt requested, postage prepaid; (b) by recognized overnight courier such as Federal Express; (c) by facsimile transmission; (d) by email if the receiving party acknowledges receipt of the emailed notice. Notices shall be deemed received on the earlier of actual receipt, three days after mailing for certified mail and regular mail, the next business day if given by fax, or the date the receiving party acknowledges receipt of email notice.

**ADDRESSES TO BE USED FOR NOTICES AND DELIVERY OF LEASE PAYMENTS SHALL BE AS FOLLOWS:**

Lessor: Enterprize Canal Co.  
PO BOX 583  
Ririe, ID 83443

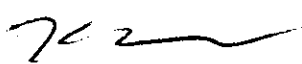
Lessee: Bonneville Jefferson Ground Water District  
PO Box 51121  
Idaho Falls, ID 83405

Either party may change its designated address by providing written notice of such change to the other party.

11. **Binding Effect.** This Lease shall be binding upon the respective heirs, successors, and assigns of the parties.

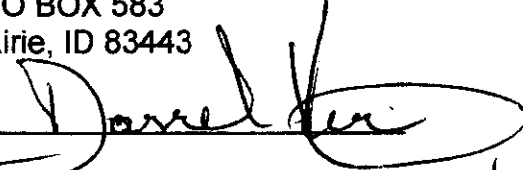
**LESSEE:**

Bonneville Jefferson Ground Water District  
PO Box 51121  
Idaho Falls, ID 83405

      4-21-23  
By: Kirt Schwieder      Date  
Title: Treasurer

**LESSOR:**

Enterprize Canal Co.  
PO BOX 583  
Ririe, ID 83443

      4/20/23  
By: Darrel Kerr      Date  
Title: Chairman

## STORAGE WATER LEASE

This Storage Water Lease ("Lease") is entered into between Idaho Irrigation District, whose address is 496 E 14th St, Idaho Falls, ID 83404, Idaho Falls, Idaho 83402 ("Lessor"), and the Bonneville Jefferson Ground Water District whose mailing address is P.O. Box 51121, Idaho Falls, Idaho 83204.

### RECITALS

- A. Lessor has the right to use, lease, and assign storage water allocated and available to Lessor as a space holder in the Idaho Water District 1 reservoir system pursuant to Lessor's Storage Water Contracts with the United States Bureau of Reclamation ("Reclamation").
- B. BONNEVILLE JEFFERSON GROUND WATER DISTRICT desires to lease storage water to satisfy mitigation obligations determined by the Director of the Idaho Department of Water Resources ("Department") and related purposes, such as aquifer recharge and converting farmland from ground to surface water irrigation.
- C. Lessor desires to lease storage water to BONNEVILLE JEFFERSON GROUND WATER DISTRICT, and BONNEVILLE JEFFERSON GROUND WATER DISTRICT desires to lease storage water from Lessor, pursuant to the terms of this Lease.

### LEASE

1. **Storage Water Lease.** Lessor hereby leases to Bonneville Jefferson Ground Water District 4,000 acre feet of storage water for 2023 only, at which the Bonneville Jefferson Ground Water District is required to pay rent at a rate of \$ [REDACTED]
2. **Term.** The initial term of this Lease shall be for a period of one (1) year, commencing January 1, 2023, and ending December 31, 2023.
3. **Payment of Rent.** Bonneville Jefferson Ground Water District will pay the rent to Lessor in two equal installments. The first installment on or before ~~May 1~~ <sup>JULY 15</sup>, of 2023, and the final installment on or before November 1, of 2023.
4. **Administrative Fees.** BONNEVILLE JEFFERSON GROUND WATER DISTRICT will pay all administrative fees imposed by Water District 1 and the Idaho Water Resource Board.
5. **Use of Leased Water.**
  - 5.1 The assignment, delivery, and use of leased storage water will be determined by BONNEVILLE JEFFERSON GROUND WATER DISTRICT and is subject to the final accounting for the year by the Watermaster of Water District 1

and any applicable Water District 1 Rental Pool Rules.

5.2 This Lease does not include any right to use storage water below Milner Dam.

5.3 The storage water available to Bonneville Jefferson Ground Water District under this Lease may be assigned and delivered by Bonneville Jefferson Ground Water District to any of its members or to any other person or entity for the authorized uses of recharge, mitigation, irrigation, or other lawful use at any time up to December 1 each year.

5.4 Any storage water not used or assigned by Bonneville Jefferson Ground Water District by December 1 shall remain in Lessor's Water District 1 storage account and then belong only to Lessor.

5.5 Lessor understands that any storage water leased may be subject to the Water District 1 Rental Pool Rules.

**6. Representations by Lessor.** Lessor covenants and represents that:

6.1 It will provide to Bonneville Jefferson Ground Water District all storage water leased under this Lease.

6.2 It is the true and lawful owner of the storage water and that nothing restricts or precludes Lessor from entering into this Lease.

7. **Breach.** If either party defaults in the performance of its obligations under this Lease, and such default is not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at its option, may elect to pursue remedies for breach of contract in district court.

8. **Assignment.** This Lease may not be assigned by Bonneville Jefferson Ground Water District without the express written consent of Lessor, but the storage water leased by Bonneville Jefferson Ground Water District under this Lease may be assigned or otherwise made available to any other person or entity.

9. **Dispute Resolution.** Any substantial dispute between the parties shall be resolved in accordance with the following provisions.

9.1 **Good Faith Negotiation.** Upon written notice from one party to the other, authorized representatives of the parties will attempt in good faith to resolve the dispute by negotiation.

9.2 **Mediation.** If the dispute cannot be resolved by good faith negotiation, either party may demand that the dispute be subjected to mediation

11. **Binding Effect.** This Lease shall be binding upon the respective heirs, successors, and assigns of the parties.

**LESSEE:**

Bonneville Jefferson Ground Water District  
PO Box 51121  
Idaho Falls, ID 83405



4-21-23

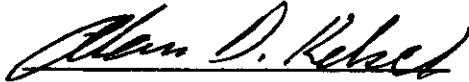
By: Kirt Schwieder

Title: Treasurer

Date

**LESSOR:**

Idaho Irrigation District  
496 E 14th St.  
Idaho Falls, ID 83404



4-18-2023

By: Alan Keisch

Date

Title: Chairman – Idaho Irrigation District

## **STORAGE WATER LEASE**

This Storage Water Lease ("Lease") is entered into between Snake River Valley Irrigation District, whose address is 816 N. 700 E., with a mailing address at PO BOX 70, Basalt, ID 83218, ("Lessor"), and the Bonneville Jefferson Ground Water District whose mailing address is P.O. Box 51121, Idaho Falls, Idaho 83204.

### **RECITALS**

- A. Lessor has the right to use, lease, and assign storage water allocated and available to Lessor as a space holder in the Idaho Water District 1 reservoir system pursuant to Lessor's Storage Water Contracts with the United States Bureau of Reclamation ("Reclamation").
- B. BONNEVILLE JEFFERSON GROUND WATER DISTRICT desires to lease storage water to satisfy mitigation obligations determined by the Director of the Idaho Department of Water Resources ("Department") and related purposes, such as aquifer recharge and converting farmland from ground to surface water irrigation.
- C. Lessor desires to lease storage water to BONNEVILLE JEFFERSON GROUND WATER DISTRICT, and BONNEVILLE JEFFERSON GROUND WATER DISTRICT desires to lease storage water from Lessor, pursuant to the terms of this Lease.

### **LEASE**

- 1. **Storage Water Lease.** Lessor hereby leases to Bonneville Jefferson Ground Water District 4,000 acre feet of storage water for 2023 only, at which the Bonneville Jefferson Ground Water District is required to pay rent at a rate of \$ [REDACTED]
- 2. **Term.** The initial term of this Lease shall be for a period of one (1) year, commencing January 1, 2023, and ending December 31, 2023.
- 3. **Payment of Rent.** Bonneville Jefferson Ground Water District will pay the rent to Lessor in two equal installments. The first installment on or before May 1, of 2023, and the final installment on or before November 1, of 2023.
- 4. **Administrative Fees.** BONNEVILLE JEFFERSON GROUND WATER DISTRICT will pay all administrative fees imposed by Water District 1 and the Idaho Water Resource Board.
- 5. **Use of Leased Water.**
  - 5.1 The assignment, delivery, and use of leased storage water will be determined by BONNEVILLE JEFFERSON GROUND WATER DISTRICT and is subject to the final accounting for the year by the Watermaster of Water District 1 and any applicable Water District 1 Rental Pool Rules.



5.2 This Lease does not include any right to use storage water below Milner Dam.

5.3 The storage water available to Bonneville Jefferson Ground Water District under this Lease may be assigned and delivered by Bonneville Jefferson Ground Water District to any of its members or to any other person or entity for the authorized uses of recharge, mitigation, irrigation, or other lawful use at any time up to December 1 each year.

5.4 Any storage water not used or assigned by Bonneville Jefferson Ground Water District by December 1 shall remain in Lessor's Water District 1 storage account and then belong only to Lessor.

5.5 Lessor understands that any storage water leased may be subject to the Water District 1 Rental Pool Rules.

**6. Representations by Lessor.** Lessor covenants and represents that:

6.1 It will provide to Bonneville Jefferson Ground Water District all storage water leased under this Lease.

6.2 It is the true and lawful owner of the storage water and that nothing restricts or precludes Lessor from entering into this Lease.

**7. Breach.** If either party defaults in the performance of its obligations under this Lease, and such default is not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at its option, may elect to pursue remedies for breach of contract in district court.

**8. Assignment.** This Lease may not be assigned by Bonneville Jefferson Ground Water District without the express written consent of Lessor, but the storage water leased by Bonneville Jefferson Ground Water District under this Lease may be assigned or otherwise made available to any other person or entity.

**9. Dispute Resolution.** Any substantial dispute between the parties shall be resolved in accordance with the following provisions.

9.1 **Good Faith Negotiation.** Upon written notice from one party to the other, authorized representatives of the parties will attempt in good faith to resolve the dispute by negotiation.

9.2 **Mediation.** If the dispute cannot be resolved by good faith negotiation, either party may demand that the dispute be subjected to mediation

by a mediator designated by mutual Lease of the parties. The mediation will be held in Bonneville County, Idaho, unless the parties mutually agree to a different location. Mediator costs will be split equally between the parties.

9.3 Litigation. Litigation is allowed between the parties only: (i) if the dispute is not resolved by mediation, (ii) for the purpose of enforcing a settlement Lease entered into between the parties, or (iii) to seek temporary injunctive relief if a party deems such action necessary to avoid irreparable damage. The pursuit or granting of temporary injunctive relief does not excuse the parties from participating in good faith negotiation and mediation as set forth above. The prevailing party in any litigation is entitled to recover reasonable attorney fees and costs.

9.4 Governing Law, Jurisdiction, and Venue. This Lease will be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction, and agree that Bonneville County is the proper venue.

9.5 Exclusive Procedures. The procedures specified in this section 9 are the exclusive procedures for the resolution of disputes between the parties. All applicable statutes of limitation shall be tolled while the negotiation and mediation procedures specified in section 9.3 are pending.

**10. Notices.** All notices given pursuant to this Lease must be in writing and shall be sent in one of the following manners: (a) by certified mail, return receipt requested, postage prepaid; (b) by recognized overnight courier such as Federal Express; (c) by facsimile transmission; (d) by email if the receiving party acknowledges receipt of the emailed notice. Notices shall be deemed received on the earlier of actual receipt, three days after mailing for certified mail and regular mail, the next business day if given by fax, or the date the receiving party acknowledges receipt of email notice.

**ADDRESSES TO BE USED FOR NOTICES AND DELIVERY OF LEASE PAYMENTS SHALL BE AS FOLLOWS:**

Lessor: Snake River Valley  
Irrigation District  
816 N. 700 E.  
PO Box 70  
Basalt, ID 83218

Lessee. Bonneville Jefferson Ground Water District:  
PO Box 51121  
Idaho Falls, ID 83405

Either party may change its designated address by providing written notice of such change to the other party.

successors, and assigns of the parties.

**LESSEE:**

Bonneville Jefferson Ground Water District  
PO Box 51121  
Idaho Falls, ID 83405

  
\_\_\_\_\_

4-21-23

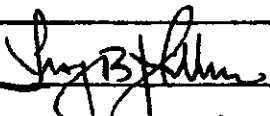
By: Kirt Schwieder

Title: Treasurer

Date

**LESSOR:**

Snake River Valley  
Irrigation District  
816 N. 700 E.  
PO Box 70  
Basalt, ID 83218

By:   
\_\_\_\_\_  
Title: President

4-20-23

Date

## CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of May, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

  
Thomas J. Budge

Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a>
John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion 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>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234	<a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>

<p>Sarah A Klahn  Somach Simmons &amp; Dunn  2033 11th Street, Ste 5  Boulder, Co 80302</p>	<p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a>  <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>
<p>Rich Diehl  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205</p>	<p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>
<p>Candice McHugh  Chris Bromley  MCHUGH BROMLEY, PLLC  380 South 4th Street, Suite 103  Boise, ID 83 702</p>	<p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a>  <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY, &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Robert L. Harris  HOLDEN, KIDWELL, HAHN &amp; CRAPO, PLLC  P.O. Box 50130  Idaho Falls, ID 83405</p>	<p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>
<p>Randall D. Fife  City Attorney, City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Corey Skinner  IDWR-Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak  IDWR-Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p><i>COURTESY COPY TO:</i>  William A. Parsons  PARSONS SMITH &amp; STONE  P.O. Box 910  Burley, ID 83318</p>	<p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>

## **ATTACHMENT 6**

*Exhibit 197 for reference with admitted Exhibit 829*

# Attachment 1

IGWA Proportionate Share Modeling  
May 2023 Curtailment

GWD	IDWR % of IGWA's proportionate share	IDWR Portion of April 2023 predicted demand shortfall		Transient May - Sept Impact <sup>1</sup>	May - Sept Curtailed Volume <sup>2</sup>	Ratio of Curtailed to Benefit	Jr. to 12/1953 <sup>3</sup>	District Total	% of Acres Curtailed	Baseline Volume <sup>4</sup>
	%	AF	%	AF	AF	AF	acres	acres	-	AF
American Falls Aberdeen	33.4%	21,214	28.2%	38,328	313,075	8:1	124,112	149,259	83%	283,815
Bingham	20.9%	13,384	17.8%	27,841	206,552	7:1	105,815	148,799	71%	277,011
Bonneville Jefferson	13.4%	8,469	11.3%	1,085	179,607	166:1	92,471	95,531	97%	158,133
Carey Valley	0.0%	5	0.0%	0.00	6,901	-	-	3,669	-	5,671
Henry's Fork	0.2%	90	0.1%	0.00	13,719	-	-	40,192	-	73,901
Jefferson Clark	10.8%	6,939	9.2%	69.9	247,765	3,547:1	111,792	174,039	64%	445,393
Madison	0.0%	4	0.0%	0.00	w/HF	w/HF	-	64,045	-	78,095
Magic Valley	16.1%	10,277	13.7%	23.1	227,879	9,856:1	99,110	137,466	72%	256,188
North Snake	5.1%	3,262	4.3%	0.06	217,151	3,619,180:1	88,320	101,358	87%	208,795
<b>Sub-Total</b>	<b>100.0%</b>	<b>63,645</b>	<b>84.6%</b>	<b>67,347</b>	<b>1,412,649</b>	<b>21:1</b>	<b>621,620</b>	<b>914,358</b>	<b>68%</b>	<b>1,787,002</b>
SWID	-	-	-	0.02	153,292	7,664,595:1	-	-	-	-
No District	-	-	-	7,373.6	31,498	4:1	-	-	-	-
<b>Grand Total</b>				<b>74,720.8</b>	<b>1,597,439</b>	<b>21:1</b>				

1. Impact broken down by geographic boundary. Some non-members are included in each district. For example, the A&B usage is included in Magic Valley and North Snake GWDs. See accompanying map. Acre-ft rounded to 2 decimal places.
2. Total volume split geographically as described in note 1 from IDWR model input files from Jr12301953 run. Some slight conversion and rounding errors.
3. Acres provided by each district except Carey, Henry's Fork, and Madison. Based on breakdown of combined acres to provide effective acres per water right.
4. Baseline volume taken from 2022 Settlement Report submitted by IGWA to IDWR and the Surface Water Coalition. Represents average usage from 2010-2014.