

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
tthompson@martenlaw.com

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER
APPROPRIATORS, INC. ET AL.,

Petitioners,

vs.

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

Respondents.

Case No. CV01-23-8187

**DECLARATION OF TRAVIS L.
THOMPSON IN SUPPORT OF
SURFACE WATER COALITION'S
RESPONSE IN OPPOSITION TO
GROUND WATER DISTRICTS'
MOTION FOR STAY & INJUNCTIVE
RELIEF / MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS**

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY AND FOR THE BENEFIT OF
A&B IRRIGATION DISTRICT,
AMERICAN FALLS RESERVOIR
DISTRICT NO. 2, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY, AND TWIN FALLS CANAL
COMPANY

I, Travis L. Thompson , declare as follows:

1. I am duly licensed to practice law in the State of Idaho and before this Court, and I am an attorney with the firm of Marten Law LLP. I am over the age of 18 and make this declaration based upon my personal knowledge. I am an attorney representing A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company in this matter.

2. Attached hereto as Exhibit A is a true and correct copy of the *Order Granting Motion to Dismiss* issued in Case No. CV27-22-945 on December 8, 2022.

3. Attached hereto as Exhibit B is a true and correct copy of the *Memorandum Decision* issued in Consolidated Case No. CV-2010-382 on September 26, 2014.

4. Attached hereto as Exhibit C is a true and correct copy an email from Matt Anders sent on September 6, 2022.

5. Attached hereto as Exhibit D is a true and correct copy of an email from Matt Anders sent on October 25, 2022.

6. Attached hereto as Exhibit E is a true and correct copy of the technical working group list attached to Mr. Anders' October 25, 2022 email.

7. Attached hereto as Exhibit F is a true and correct copy of the agendas for the technical working group meetings held in November and December, 2022.

8. Attached hereto as Exhibit G is a true and correct copy of a powerpoint presentation titled "Proposed Modification of the Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover: Baseline Year" (Matt Anders, November 16, 2022).

9. Attached hereto as Exhibit H is a true and correct copy of a powerpoint presentation titled “SWC methodology – calculation of priority dates for curtailment of junior groundwater users” (Jennifer Sukow, November 28, 2022). The presentation was emailed to all working group participants on November 19, 2022.

10. Attached hereto as Exhibit I is a true and correct copy of a memorandum titled “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” (Matt Anders, Kara Ferguson, December 23, 2022).

11. Attached hereto as Exhibit J is a true and correct copy of the comments submitted to IDWR on the Technical Working Group matters by Dave Shaw (ERO Resources) and Dave Colvin (LRE Water) and on behalf of the Surface Water Coalition.

12. Attached hereto as Exhibit K is a true and correct copy of the comments submitted to IDWR on the Technical Working Group subjects by Sophia Sigstedt (Lynker) on behalf of IGWA and its member ground water districts including Bingham Ground Water District and Bonneville-Jefferson Ground Water District.

13. Attached hereto as Exhibit L is a true and correct copy of the comments submitted to IDWR on the Technical Working Group subjects by Heidi Netter and Greg Sullivan (Spronk Water Engineers, Inc.) on behalf of the City of Pocatello and the Coalition of Cities.

14. Attached hereto as Exhibit M is a true and correct copy of the Surface Water Coalition’s *Petition Requesting Hearing* (CM-DC-2010-001) filed on May 5, 2023.

15. Attached hereto as Exhibit N is a true and correct copy of the *Motion to Re-Set Hearing* filed jointly by the Districts and other parties on May 22, 2023.

16. Attached hereto as Exhibit O is a true and correct copy of the *Surface Water Coalition's Opposition to Groundwater Users' Motion Re-Set Hearing Dates* filed on May 23, 2023.

17. Attached hereto as Exhibit P is a true and correct copy of the *Order Denying Motion for Reconsideration of Denial of Continuance* filed on May 19, 2023.

18. Attached hereto as Exhibit Q is a true and correct copy of the *Order Denying Motion to Re-Set Hearing* filed on May 26, 2023.

19. Attached hereto as Exhibit R is a true and correct copy of a May 22, 2023 email from Candice McHugh indicating that she did not want to take a Rule 30(b)(6) deposition of any other Surface Water Coalition matter.

20. Attached hereto as Exhibit S is a true and correct copy of the *Order Granting Requests for Hearing* filed on May 23, 2023.

21. Attached hereto as Exhibit T is a true and correct copy of the Director's *Final Order Approving Stipulated Mitigation Plan* (CM-MP-2019-001) (Apr. 9, 2019).

22. Attached hereto as Exhibit U is a true and correct copy of the *Declaration of David Colvin* filed in the underlying administrative proceeding. Exhibit A to Mr. Colvin's declaration includes information related to sentinel well index measurements for the spring of 2023.

23. Attached hereto as Exhibit V is a true and correct copy of the *Order Denying Application for Temporary Restraining Order* issued in *South Valley Ground Water Dist. et al. v. IDWR*, Blaine County Dist. Ct., Fourth Jud. Dist., Case No. CV07-21-243, May 21, 2021.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

RESPECTFULLY submitted this 30th day of May, 2022.

MARTEN LAW LLP

/s/ Travis L. Thompson
Travis L. Thompson

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

<p>Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail file@idwr.idaho.gov gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only mhoward@usbr.gov emcgarry@usbr.gov</p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva M. Patterson Racine Olson, PLLP P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Diane Thompson Somach Simmons & Dunn 2033 11th Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only rdiehl@pocatello.us</p>	<p>Robert E. Williams Williams, Meservy & Larsen LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com</p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave. W., Ste. 500 Twin Falls, ID 83301 *** service by electronic mail only corey.skinner@idwr.idaho.gov</p>
<p>Robert L. Harris Holden, Kidwell PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com</p>	<p>Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only rfife@idahofallsidaho.gov	<i>COURTESY COPY TO:</i> William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org	Skyler Johns Nathan Olsen Steven Taggart Olsen Taggart, PLLC P.O. Box 3005 Idaho Falls, ID 83404 *** service by electronic mail only sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com
Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, Idaho 83318 ***service by electronic mail only wkf@pmt.org	Dylan Anderson Dylan Anderson Law P.O. Box 35 Rexburg, Idaho 83440 ***service by electronic mail only dylan@dylanandersonlaw.com	

/s/ Travis L. Thompson
Travis L. Thompson

Exhibit A

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

IDAHO GROUNDWATER APPROPRIATORS, INC.,)	Case No. CV27-22-00945
)	
Petitioner,)	ORDER GRANTING MOTION
vs.)	TO DISMISS
)	
IDAHO DEPARTMENT OF WATER RESOURCES,)	
and GARY SPACKMAN in his capacity as the)	
Director of the Idaho Department of Water Resources,)	
)	
Respondents,)	
and)	
)	
A&B IRRIGATION DISTRICT, AMERICAN FALLS)	
RESERVOIR DISTRICT #2, BURLEY IRRIGATION)	
DISTRICT, MILNER IRRIGATION DISTRICT,)	
MINIDOKA IRRIGATION DISTRICT, NORTH SIDE)	
CANAL COMPANY, TWIN FALLS CANAL)	
COMPANY, CITY OF BLISS, CITY OF BURLEY,)	
CITY OF CAREY, CITY OF DECLO, CITY OF)	
DIETRICH, CITY OF GOODING, CITY OF)	
HAZELTON, CITY OF HEYBURN, CITY OF)	
JEROME, CITY OF PAUL, CITY OF RICHFIELD,)	
CITY OF RUPERT, CITY OF SHOSHONE, CITY)	
OF WENDELL, AND CITY OF POCA TELLO,)	
)	
Intervenors.)	
)	
<hr/>		
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)	
)	
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IN THE MATTER OF IGWA'S SETTLEMENT)	
AGREEMENT MITIGATION PLAN)	
)	
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I.

BACKGROUND

In 2005, members of the Surface Water Coalition initiated a delivery call before the Idaho Department of Water Resources.¹ The Coalition alleged their senior water rights are being injured due to junior ground water pumping on the Eastern Snake Plain Aquifer (“ESPA”). The Director initiated a contested case in response to the call. He ultimately found that water rights held by members of the Coalition are being materially injured by junior ground water pumping from the ESPA. The Coalition’s delivery call is ongoing.

In 2015, certain members of the Coalition and certain members of the Idaho Ground Water Appropriator’s Inc. (“IGWA”) entered into a settlement agreement in relation to the call, followed by an addendum to that agreement. Also in 2015, the A&B Irrigation District and certain members of IGWA entered into a separate settlement agreement. These agreements will be referred to collectively as the “2015 Agreements.”

On March 9, 2016, the Coalition and IGWA submitted a *Stipulated Mitigation Plan and Request for Order* to the Department. The parties jointly moved the Director to adopt the 2015 Agreements as an approved mitigation plan in response to the Coalition’s delivery call under CM Rule 43.² CM Rule 43 permits the Director to adopt a proposed mitigation plan to address material injury to senior water rights in response to a delivery call in lieu of curtailment of junior rights. IDAPA 37.03.11.043. The 2015 Agreements were attached as exhibits to the *Request for Order*. On May 2, 2016, the Director entered a *Final Order* adopting the 2015 Agreements as an approved mitigation plan in lieu of curtailment, with certain additional conditions.

On December 14, 2016, the Coalition and IGWA entered into an addendum to the 2015 Agreements. Thereafter, they submitted a *Stipulated Amended Mitigation Plan and Request for Order* to the Department. The parties jointly moved the Director to adopt an amendment to the approved mitigation plan reflecting the December 14, 2016, addendum. On May 9, 2017, the Director entered a *Final Order* adopting the requested amendment with respect to the approved mitigation plan, with certain additional conditions. The Court will refer to the Director’s 2017

¹ The term “Surface Water Coalition” refers collectively to 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.

² The term “CM Rule” refers to the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

Final Order as the “Approved Mitigation Plan.” The Approved Mitigation Plan requires IGWA to conserve a certain amount of groundwater through reduced diversions and/or managed aquifer recharge, among other things, in lieu of curtailment.

On July 21, 2022, the Coalition filed a *Notice* with the Department alleging that IGWA did not comply with the requirements of the Director’s Approved Mitigation Plan in 2021. It requested a status conference on the issue. A status conference was held on August 5, 2022. At the conference, the parties presented argument as to whether IGWA was in violation of the requirements of the Director’s Approved Mitigation Plan in 2021. Prior to any action by the Director, the Coalition and IGWA entered into a settlement agreement effective September 7, 2022. In the settlement agreement, the parties agreed to a remedy set forth therein to satisfy IGWA’s obligation under the approved Mitigation Plain for 2021 only. They further agreed to jointly submit the settlement agreement to the Director “as the remedy selected for the alleged shortfall in lieu of curtailment.”

Notwithstanding the agreement as to remedy, the parties still desired the Director to issue an order clarifying various provisions of the Approved Mitigation Plan. In the settlement agreement dated September 7, 2022, the parties agreed the Director “shall issue a final order regarding the interpretative issues raised by the SWC Notice.” *Settlement Agreement*, p.2. In particular, the parties desired the Director’s clarification as to (1) the amount of groundwater conservation for which IGWA is responsible under the Approved Mitigation Plan, and (2) whether averaging may be used to measure compliance with IGWA’s conversation obligation.

On September 8, 2022, the Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* (“*Final Order*”). The Director clarified that the Approved Mitigation Plan “obligates IGWA to reduce total ground water diversions, or conduct equivalent private recharge, by 240,000 acre-feet annually.” *Final Order*, p.9. He further clarified that IGWA may not use averaging to measure its compliance under the Approved Mitigation Plan. *Id.* at 11. Instead, he directed that “IGWA has an obligation to reduce total ground water diversion by 240,000 acre-feet every year.” *Id.* Based on this clarification, the Director found that certain IGWA members failed to comply with the requirements of the Approved Mitigation Plain in 2021. *Id.* at 13. Rather than curtail non-compliant junior water rights, the Director’s *Final Order* adopts the remedy agreed upon by the parties as the appropriate remedy for non-compliance in 2021.

On September 22, 2022, IGWA filed a *Petition for Reconsideration* of the Director's *Final Order* with the Department. It alternatively filed a *Request for Hearing* with the Department on that same date. The Director granted IGWA's request for a hearing on the *Final Order* under Idaho Code § 42-1701A(3) on October 13, 2022. As the Director granted IGWA's request for a hearing, he found IGWA's request for reconsideration to be moot. That said, he directed that "[t]he issues raised in the request for reconsideration can be raised at hearing or within briefing." *Order Granting Request for Hearing*, p.2.

On October 24, 2022, IGWA filed the instant *Petition for Judicial Review*. The *Petition* asserts the Director's *Final Order* is contrary to law and requests that it be set aside and remanded for further proceedings. At this time, the Director has not held the hearing requested by IGWA in the underlying administrative proceeding. That hearing is presently scheduled for February 2023.

On November 9, 2022, the Department filed a *Motion to Dismiss* the *Petition for Judicial Review* on the basis the Court lacks subject matter jurisdiction over the *Petition*. IGWA opposes the *Motion*. A hearing on the *Motion* was held before the Court on November 21, 2022. Prior to hearing, those parties identified as Intervenors in the caption were permitted to appear in this proceeding as Intervenors. The Coalition members joined in the Department's argument on the *Motion to Dismiss*. The Coalition of Cities and the City of Pocatello did not take a position on the *Motion to Dismiss*.³

II.

ANALYSIS

A. The Court lacks jurisdiction under the doctrine of exhaustion.

The issue is whether the Court has jurisdiction over IGWA's *Petition*. Under Idaho law, the pursuit of statutory remedies is a condition precedent to judicial review. *Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). The doctrine of exhaustion requires a case "run the full gamut of administrative proceedings before an application for judicial relief may be considered." *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). Important policy considerations underlie this requirement. It protects agency autonomy by

³ The term "Coalition of Cities" refers collectively to the Cities of Bliss, Buhl, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

allowing the agency to develop the record and mitigate or cure errors without judicial intervention. *See e.g., Park*, 143 Idaho at 578-579, 149 P.3d at 853-854. It also defers “to the administrative process established by the Legislature.” *Id.* Consistent with these principles, “courts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive.” *Id.*

In the underlying administration action, the parties requested that the Director provide clarification with respect to several provisions of the Approved Mitigation Plan. The Approved Mitigation Plan is a *Final Order* of the Director. The Director should be given the first opportunity to clarify the provisions of his *Order*. *See e.g., White v. Bannock County Commissioners*, 139 Idaho 396, 401-402, 80 P.3d 332, 337-338 (2003) (one policy consideration underlying the doctrine of exhaustion is “the sense of comity for the quasi-judicial functions of the administrative body”). Furthermore, it is the Director who is statutorily vested with the duty to distribute water. I.C. § 42-602. The legislature has vested this responsibility in the Director because he has the specialized knowledge and expertise in this area. The Director should be given the opportunity to apply his knowledge and expertise to any issues raised by IGWA regarding the alleged non-compliance with the Approved Mitigation Plan. If there are errors in the *Final Order* as asserted by IGWA, the Director should be given the opportunity to develop the evidentiary record and mitigate or cure those errors without judicial intervention. *Id.* Idaho Code § 42-1701A provides the mechanism through which the Director is given that opportunity in this case.

Idaho Code § 42-1701A governs hearings before the Director. Subsection (1) provides that when the Director is required to hold a hearing prior to taking an action, he must conduct it in accordance with the provisions of the IDAPA. Subsection (2) permits the Director to appoint a hearing officer to conduct such a hearing and make a complete record of the evidence presented. Subsection (3) governs the situation where the Director takes an action without a hearing. That section provides as follows:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any 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. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

I.C. § 42-1701A(3).

There is no specific statutory right to a pre-decision hearing regarding compliance with an approved mitigation plan. To the contrary, the CM Rules generally contemplate “immediate” action by the Director where a junior water user fails to operate in accordance with an approved mitigation plan. *Cf* CM Rule 40.05 (the Director “will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights” when a junior user fails to operate in accordance with an approved mitigation plan). The general tone of the CM Rules in this respect acknowledges the realities of water administration in times of shortage. As the Idaho Supreme Court has stated, “in times of shortage, someone is not going to receive water.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011). Therefore, “[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.” *Id.* The Court has acknowledged that “deprivation of water for the time it would take for a hearing may cause serious economic or other harm to the senior appropriator” and that “very prompt action may be necessary to prevent attempts at self help and possibly even violence.”⁴ *Id.* For these reasons, the Court has directed that situations may exist where “curtailment of water use can be ordered without prior notice or an opportunity for a hearing.” *Id.*

Since no pre-decision hearing is required by statute, IGWA is entitled to request a hearing before the Director to contest the *Final Order*.⁵ IGWA has requested such a hearing in

⁴ The rationales and comments set forth by the Court in *Clear Springs* are heightened when a junior user does not act in accordance with an approved mitigation plan. In such circumstances, the Director has already found material injury to a senior water right based on junior water use. But for the approval of a mitigation plan, the offending junior water user would already be curtailed to remedy the resulting injury to the senior. The junior’s continued out-of-priority water use is contingent upon compliance with the approved mitigation plan.

⁵ The Court notes that a pre-decision status conference was held in the underlying administrative proceeding. On judicial review, no party argues that IGWA was previously “afforded an opportunity for a hearing on the matter” for purposes of Idaho Code § 42-1701A(3) as a result of the status conference. The Court agrees. The status conference was not evidentiary hearing. It did not result in the development of a factual and evidentiary record. Therefore, there is no evidentiary record developed for the Court to review on judicial review.

this case, and the Director has granted IGWA's request. It is undisputed that the Director has not yet held the requested hearing in the underlying administrative proceeding. Therefore, the Court finds the administrative remedy available to IGWA under Idaho Code § 42-1701A(3) has not been exhausted.

IGWA argues that although no statute specifically requires a pre-determination hearing regarding compliance with an approved mitigation plan, the Idaho Administrative Procedure Act generally requires a hearing in this situation. In making its argument, IGWA relies upon Idaho Code §§ 67-5240 and 67-55424. The Idaho Administrative Procedure Act "controls agency decision-making procedures only in the absence of more specific statutory requirements." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1994). Indeed, Idaho Code § 67-5240 directs that its provisions apply "except as provided by other provisions of law." This directive is consistent with the basic tenant of statutory construction that "a more general statute should not be interpreted to encompass an area already covered by a special statute." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997). Here, Idaho Code § 42-1701A specifically governs hearings before the Director. As the more specific statute, it is Idaho Code § 42-1701A that governs.

As an exception to the exhaustion requirement, IGWA also asserts the Director exceeded his authority by clarifying the terms of the Approved Mitigation Plan after the parties resolved the dispute via settlement. This Court disagrees.

As an initial matter, IGWA waived this argument when as part of the November 2022 resolution, the parties agreed to have the Director issue an order clarifying disputed provision of the Approved Mitigation Plan.⁶ Notwithstanding, although based on a settlement agreement between the parties, the Approved Mitigation Plan - which adopts terms of the settlement agreement with certain additional conditions - is a final order of the Director issued in accordance with the CM Rules. *See e.g.*, IDAPA 37.03.11.043. The final order approves an on-going mitigation plan under the umbrella of an active delivery call. Contrary to IGWA's assertion, this is not a situation involving the Director interpreting an independent contract

⁶ In the Settlement Agreement dated September 7, 2022, the parties stipulated that "the Director shall incorporate the terms of section 1 above as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice." *Budge Declaration in Support of IGWA's Response to IDWR's Motion to Dismiss*, Ex M., p. 2 (Nov. 14, 2022) (emphasis added).

between the parties outside the scope of his authority. The Director clearly has authority to clarify his own final order.⁷ Despite the resolution for the 2021 irrigation season, it was not only appropriate but necessary for the Director to take such action due to the on-going nature of the Approved Mitigation Plan. Accordingly, the argument is without merit.

Since IGWA has an adequate administrative remedy available to it which has not been exhausted under Idaho Code § 42-1701A(3), its *Petition* must be dismissed. See e.g., *Regan*, 140 Idaho at 724, 100 P.3d at 618 (“if a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted”).

B. Due process does not require a pre-determination hearing in this case.

Notwithstanding the foregoing analysis, IGWA argues that due process required a hearing before the Director issued the *Final Order*. Under Idaho law, a water right is real property, and the owner of a water right must be afforded due process of law before the right can be taken by the State. I.C. § 55-101; *Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95. However, “due process does not necessarily require a hearing before property is taken.” *Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95. Circumstances that justify postponing notice and an opportunity for a hearing are as follows:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. Whether these factors have been met turn on the facts and circumstances of each case. *Id.*

Here, there has been no deprivation of a water right. Although the Director found that members of IGWA failed to comply with the requirements of the Approved Mitigation Plan in

⁷ IGWA argues that such contract disputes should be brought and resolved in district court in the same manner as any other contract dispute. This position is untenable for a variety of reasons. First, it is inconsistent with the Director’s responsibilities under the CM Rules pertaining to mitigation plans. Second, it would put a district judge in the position of having to clarify a final order of the Director – without providing the Director the opportunity to address his own order. Last, it would undermine the Director’s ability to timely respond to the exigencies of the circumstances while awaiting a determination. Ironically, IGWA attests to the urgent need for a determination as it requested an expedited schedule in this matter, citing this very concern. Addressing the matter in yet another forum frustrates any possibility of resolution in a time frame necessary to avoid potential implications relating to disputes over compliance with an approved mitigation plan.

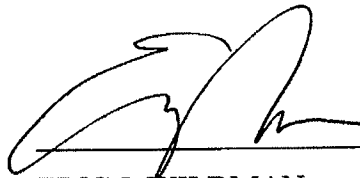
2021, he did not order curtailment of any junior water rights. Rather, he adopted the remedy agreed upon by the parties. That remedy is one to which IGWA has voluntarily agreed. As there has been no deprivation of a water right, the Court need not evaluate those factors set forth in *Clear Springs*. Rather, the Court finds IGWA will be afforded meaningful notice and an opportunity to be heard pursuant to the procedures set forth in Idaho Code § 42-1701A(3).

III.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Department's *Motion to Dismiss* is hereby granted.

Dated December 8, 2022



ERIC J. WILDMAN
District Judge



CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the foregoing document to:

<p>Garrick L Baxter Mark Cecchini-Beaver Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 mark.cecchini-beaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> By E-mail <input type="checkbox"/> By mail <input type="checkbox"/> By fax (number) <input type="checkbox"/> By overnight deliver / FedEx <input type="checkbox"/> By personal delivery</p>
<p>Thomas J Budge Elisheva M Patterson Racine Olson, PLLP 201 E Center St PO Box 1319 Pocatello, ID 83204 tj@racineolson.com elisheva@racineolson.com</p>	<p><input checked="" type="checkbox"/> By E-mail <input type="checkbox"/> By mail <input type="checkbox"/> By fax (number) <input type="checkbox"/> By overnight deliver / FedEx <input type="checkbox"/> By personal delivery</p>
<p>John K Simpson Travis L Thompson Michael A Short Barker Rosholt & Simpson, LLP PO Box 63 Twin Falls, ID 83303-0063 jks@idahowaters.com tlr@idahowaters.com mas@idahowaster.com</p>	<p><input checked="" type="checkbox"/> By E-mail <input type="checkbox"/> By mail <input type="checkbox"/> By fax (number) <input type="checkbox"/> By overnight deliver / FedEx <input type="checkbox"/> By personal delivery</p>
<p>W Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> By E-mail <input type="checkbox"/> By mail <input type="checkbox"/> By fax (number) <input type="checkbox"/> By overnight deliver / FedEx <input type="checkbox"/> By personal delivery</p>
<p>Sarah A Klahn Somach Simmons & Dunn 2033 11th Street, Ste 5 Boulder, CO 80302 sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p><input checked="" type="checkbox"/> By E-mail <input type="checkbox"/> By mail <input type="checkbox"/> By fax (number) <input type="checkbox"/> By overnight deliver / FedEx <input type="checkbox"/> By personal delivery</p>

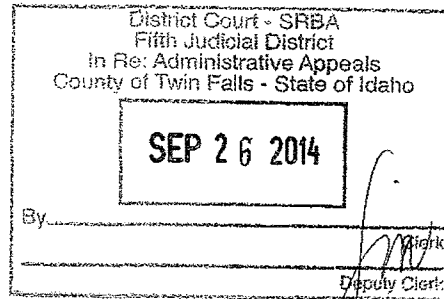
Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4 th Street, Ste 103 Boise, ID 83702 <u>cmchugh@mchughbromley.com</u> <u>cbromley@mchughbromley.com</u>	<input checked="" type="checkbox"/> By E-mail <input type="checkbox"/> By mail <input type="checkbox"/> By fax (number) <input type="checkbox"/> By overnight deliver / FedEx <input type="checkbox"/> By personal delivery
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DATED: 12/8/2022

Clerk of the Court

By Traci Brandebourg
Deputy Clerk

Exhibit B



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

IDAHO GROUND WATER
APPROPRIATORS, INC.,

Petitioner,

vs.

CITY OF POCA TELLO,

Petitioner,

vs.

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

Petitioners,

vs.

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

Respondents.

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF

) Case No.: CV-2010-382
)
) (consolidated Gooding County Cases
) CV-2010-382, CV-2010-383, CV-
) 2010-384, CV-2010-387, CV-2010-
) 388, Twin Falls County Cases CV-
) 2010-3403, CV-2010-5520, CV-2010-
) 5946, CV-2012-2096, CV-2013-2305,
) CV-2013-4417 and Lincoln County
) Case CV-2013-155)
)
)

**MEMORANDUM DECISION AND
ORDER ON PETITIONS FOR
JUDICIAL REVIEW**

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)
 _____)

Appearances:

Travis Thompson of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

W. Kent Fletcher of Fletcher Law Office, Burley, Idaho, attorney for American Falls Reservoir District #2 and Minidoka Irrigation District.

Randall Budge of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for the Idaho Ground Water Appropriators, Inc.

Mitra Pemberton of White & Jankowski, LLP, Denver, Colorado, attorneys for the City of Pocatello.

Michael Orr and Garrick Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This matter involves a dispute between senior surface water users and junior ground water users over the conjunctive administration of water in the Snake River Basin. The dispute arises in the context of a delivery call initiated by the A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, “Coalition” or “SWC”) against certain junior ground water rights located in the Eastern Snake Plain Aquifer (“ESPA”). At issue is the methodology utilized by the Director of the Idaho Department of Water Resources (“Department”) for determining material injury to reasonable in-

season demand and reasonable carryover to Coalition members, and his subsequent application of that methodology. The Coalition, Idaho Ground Water Appropriators, Inc. (“IGWA”) and the City of Pocatello seek judicial review of the Director’s methodology and his application of that methodology. Those parties ask this Court to set aside and remand various aspects of the Director’s final orders.

B. Course of proceedings and statement of facts.¹

1. This judicial review proceeding involves a number of *Petitions for Judicial Review*. They seek review of a series of final orders issued by the Director in relation to the Coalition’s delivery call. What follows is a recitation of those final orders, the resulting *Petitions for Judicial Review*, and the subsequent proceedings on those *Petitions* before this Court.

2. On June 23, 2010, the Director issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”). 382 R., pp.564-604. *Petitions* seeking judicial review of the *Methodology Order* were filed by the Coalition in Gooding County Case No. CV-2010-384, IGWA in Gooding County Case No. CV-2010-383, and the City of Pocatello in Gooding County Case No. CV-2010-388.

3. On June 24, 2010, the Director issued his *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* (“*As-Applied Order*”). 382 R., pp.605-625. *Petitions* seeking judicial review of the *As-Applied Order* were filed by the Coalition in Twin Falls County Case No. CV-2010-3403, IGWA in Gooding County Case No. CV-2010-382, and the City of Pocatello in Gooding County Case No. CV-2010-387.

4. The six *Petitions for Judicial Review* previously mentioned were reassigned to this Court.²

¹ **Footnote Re: Citations to Agency Record.** The agency record in this proceeding consists of two subparts: (1) the previously-compiled record for the judicial review proceeding under Gooding County Case No. CV-2008-551, and (2) the more recently compiled record for the judicial review petitions consolidated under Gooding County Case No. CV-2010-382. For clarity and convenience, citations of the former record will use form “551 R., p. ____,” while citations to the latter record will use the form “382 R., p. ____.”

² The reassignments were made pursuant to the Idaho Supreme Court’s *Administrative Order* dated December 9, 2009, issued *In the Matter of the Appointment of the SBRA District Court to Hear All Petitions for Judicial Review from the Department of Water Resources Involving Administration of Water Rights*.

5. On July 29, 2010, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the six *Petitions for Judicial Review* into Gooding County Case No. CV-2010-382 (“Consolidated 382 Case”).

6. On September 17, 2010, the Director issued his *Final Order Revising April 2010 Forecast Supply (Methodology Step 7)*. 382 R., pp.636-645. A *Petition* seeking judicial review of that *Final Order* was filed by the Coalition in Twin Falls County Case No. CV-2010-5520. The *Petition* was reassigned to this Court.

7. On November 30, 2010, the Director issued his *Final Order Establishing 2010 Reasonable Carryover (Methodology Step 9)*. 382 R., pp.684-692. A *Petition* seeking judicial review of that *Final Order* was filed by the Coalition in Twin Falls County Case No. CV-2010-5946. The *Petition* was reassigned to this Court.

8. On December 13, 2010, the Court issued an *Order* staying proceedings in the Consolidated 382 Case pending the Idaho Supreme Court’s issuance of its written decision in Idaho Supreme Court Docket No. 38193-2010. The stay was entered pursuant to the request and agreement of the parties.

9. On January 3, 2011, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the Coalition’s *Petitions* in Twin Falls County Case Nos. CV-2010-5520 and 2010-5946 into consolidated the Consolidated 382 Case.

10. On April 13, 2012, the Director issued his *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)*. 382 R., pp.728-742. On May 9, 2012, the Director issued his *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 1-8)*. 382 R., pp.753-757. A *Petition* seeking judicial review of that *Final Order* and *Order Denying Petition for Reconsideration* was filed by the Coalition in Twin Falls County Case No. CV-2012-2096. The *Petition* was reassigned to this Court.

11. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology 1-4)*. 382 R., pp.829-846. On May 22, 2013, the Director issued his *Order Denying Petition for Reconsideration; Denying Request for Hearing; Denying Motion to Authorize Discovery (Methodology Steps 1-4)*. 382 R., pp.888-893. A *Petition* seeking judicial review of that *Final Order* and *Order Denying Petition for Reconsideration* was filed by

the Coalition in Twin Falls County Case No. CV-2013-2305. The *Petition* was reassigned to this Court.

12. On June 17, 2013, the Director issued his *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)*. 382 R., pp.922-928. On July 18, 2013, the Director issued his *Order Denying AFRD2's Petition for Reconsideration of Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)*. 382 R., pp.937-943. A *Petition* seeking judicial review of that *Order* and *Order Denying Petition for Reconsideration* was filed by American Falls Reservoir District #2 in Lincoln County Case No. CV-2013-155. The *Petition* was reassigned to this Court.

13. On August 27, 2013, the Director issued his *Order Revising April 2013 Forecast Supply (Methodology 6-8)*. 382 R., pp.948-957. On September 27, 2013, the Director issued his *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 6-8)*. 382 R., pp.1037-1044. A *Petition* seeking judicial review of that *Order* and *Order Denying Petition for Reconsideration* was filed by the Coalition in Twin Falls County Case No. CV-2013-4417. The *Petition* was reassigned to this Court.

14. On November 12, 2013, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the Coalition's *Petitions* in Twin Falls County Case Nos., CV-2012-2096, CV-2013-2305, 2013-4417 and Lincoln County Case No. CV-2013-155 into the Consolidated 382 Case.

15. On December 17, 2013, the Idaho Supreme Court issued its written decision in Idaho Supreme Court Docket No. 38193-2010. Thereafter, the Court lifted the stay in the Consolidated 382 Case. The parties subsequently briefed the issues, and a hearing on the *Petitions* was held before this Court on August 13, 2014.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the Court in this matter was held on August 13, 2014. The parties did not request the opportunity to submit additional briefing nor does the Court require any. Therefore, this matter is deemed fully submitted for decision on the next business day or August 14, 2014.

III.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or,
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.³ *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

IV.

HISTORY AND PRIOR DETERMINATIONS

The *Petitions for Judicial Review* filed in this case arise in the context of an ongoing delivery call. Before the Court is the methodology established by the Director for determining

³ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

material injury to the Coalition's reasonable in-season demand and reasonable carryover caused by junior ground water rights, and his subsequent application of that methodology. Consideration of the issues requires a review of the prior administrative and judicial proceedings undertaken in relation to this call.

A. 2005 Delivery call.

The delivery call at issue here was filed by the Coalition in 2005. 551 R., pp.1-52. On May 2, 2005, the Director issued an *Amended Order* finding that junior ground water diversions from the ESPA were materially injuring the Coalition's natural flow and storage rights. 551 R., pp.1359-1424. The Director's *Amended Order* utilized a "minimum full supply" methodology in determining material injury. 551 R., pp.1382-1385. That methodology relied upon a baseline analysis to determine material injury based upon shortfalls to a chosen baseline quantum of the Coalition's in-season irrigation and reasonable carryover needs. *Id.*

Various parties sought an administrative hearing before the Department on the *Amended Order*. See e.g., 551 R., pp.1642-1657; 551 R., pp.1704-1724. However, that was put on hold while members of the Coalition filed a declaratory judgment action challenging the constitutionality of the Conjunctive Management Rules ("CM Rules").⁴ The declaratory judgment action culminated in the Idaho Supreme Court's written decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD#2*"), which upheld the CM Rules as facially constitutional. Thereafter, the Department proceeded with an administrative hearing on the *Amended Order*. The Director appointed the Honorable Gerald F. Schroeder as the presiding hearing officer ("Hearing Officer").

B. Director's 2008 Final Order.

The Hearing Officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* on April 29, 2008. 551 R., pp.7048-7118. The Hearing Officer's *Recommendation* analyzed the Director's use of a minimum full supply methodology in determining material injury to the Coalition. 551 R., pp.7086-7095. The Hearing Officer generally approved the Director's use of a minimum full supply methodology, including his use

⁴ The term "Conjunctive Management Rules" or "CM Rules" refers to the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

of a baseline as a starting point for the consideration of the call and in determining material injury. *Id.* But, the Hearing Officer noted that “[t]here have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained,” and that “there must be adjustments as conditions develop if any baseline supply concept is to be used.” 551 R., pp.7091 & 7093. Exceptions to the Hearing Officer’s *Recommendation* were subsequently filed with the Director by various parties. *See e.g.*, 551 R., pp.7126-7134; 551 R., pp.7141-7197.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call* (“2008 Final Order”). 551 R., pp.7381-7395. The 2008 Final Order adopted the findings of fact and conclusions of law of the Hearing Officer’s *Recommendation* except as specifically modified therein, including his recommendation that certain refinements be made to the minimum full supply methodology for determining material injury. 551 R., p.7387. Of significance to the instant proceeding, the Director abandoned the “minimum full supply” methodology in his 2008 Final Order in favor of a “reasonable in-season demand” methodology. 551 R., p.7386. Although the Director adopted the Hearing Officer’s recommendation that refinements be made, he did not address those refinements or the details of his new “reasonable in-season demand” methodology in his 2008 Final Order, stating:

Because of the need for ongoing administration, the Director will issue a separate final order . . . detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season.

551 R., p.7386. *Petitions* seeking judicial review of the Director’s 2008 Final Order were subsequently filed in Gooding County Case No. CV-2008-551.

C. District court decision in Gooding County Case No. CV-2008-551 and Director’s orders on remand.

The district court entered its *Order on Petition for Judicial Review* in Gooding County Case No. CV-2008-551 on July 24, 2009. 551 R., pp.10075-10108. The district court upheld the Director’s adoption of a baseline methodology for determining material injury. It held that “[t]he Director did not abuse discretion or act outside his authority in utilizing a ‘minimum full supply’ or ‘reasonable in-season demand’ baseline for determining material injury.” 551 R., p.10099. However, the court did find that the Director abused his discretion by waiting to issue a separate

final order detailing his approach for determining material injury to reasonable in-season demand and reasonable carryover. The case was therefore remanded to the Director. 551 R., pp.10106-10107. On remand, the Director complied with the district court's instruction. On June 23, 2010, the Director issued his *Methodology Order*, which by its terms provides the Director's methodology for determining material injury to reasonable in-season demand and reasonable carryover. 382 R., pp.564-604. Additionally, on June 24, 2010, the Director issued his *As-Applied Order*, wherein he applied his methodology to determine material injury to members of the Coalition in 2010. 382 R., pp.605-625. Both *Orders* are presently before the Court in this proceeding.

D. Idaho Supreme Court's decision in *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist.*

Meanwhile, the Coalition appealed the District Court's *Order on Petition for Judicial Review* in Gooding County Case No. CV-2008-551. On December 17, 2013, the Idaho Supreme Court issued its written decision in *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr., Dist.*, 155 Idaho 640, 315 P.3d 828 (2013) ("2013 SWC Case"). In that decision, the Court held that the Director may employ a baseline methodology for management of water resources, and as a starting point in administration proceedings for considering material injury. 2013 SWC Case, 155 Idaho at 650, 315 P.3d at 838. Although the Director's *Methodology Order* had been issued prior to the Supreme Court's consideration of the 2013 SWC Case, the Court in its opinion made clear that "since the district court did not review this final methodology order, the findings of fact that shape that methodology and any modifications to the methodology are not properly before this Court." 2013 SWC Case, 155 Idaho at 649, 315 P.3d at 837.

V.

METHODOLOGY ORDER ANALYSIS

The stated purpose of the Director's *Methodology Order* "is to provide the methodology by which the Director will determine material injury to [reasonable in-season demand] and reasonable carryover to members of the SWC." 382 R., p.591. Section II of the *Methodology Order* details the Director's approach for determining material injury to reasonable in-season

demand. 382 R., pp.565-585. Section III of the *Methodology Order* details the Director's approach for determining material injury to reasonable carryover. 382 R., pp.585-590. The *Methodology Order* then sets forth a ten step process to be undertaken annually for purposes of determining material injury. 382 R., pp.597-601. The Coalition, IGWA and the City of Pocatello seek judicial review of various aspects of the Director's methodology.

A. The *Methodology Order* fails to provide a proper remedy for material injury to reasonable in-season demand when taking into account changing conditions.

The Coalition argues that the signature flaw of the *Methodology Order* is its failure to properly remedy material injury to reasonable in-season demand based on changing conditions during the irrigation season. It asserts that if material injury to its reasonable in-season demand is greater than originally determined by the Director, the *Methodology Order*'s failure to remedy that injury through either curtailment or the requirement of a mitigation plan is contrary to Idaho law. For the reasons set forth below, this Court agrees.

i. Overview of the Director's methodology for determining material injury to reasonable in-season demand.

Reasonable in-season demand is defined under the *Methodology Order* as "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." 382 R., p.575. Under steps 1 and 2 of the *Methodology Order*, the Director calculates the crop water needs of the Coalition for that year.⁵ However, the Director's initial determination of reasonable in-season demand is not based on those calculations, but rather is based on a historic demand baseline analysis. The *Methodology Order* makes this clear, providing that reasonable in-season demand is initially "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 the climate and water supply between the BLY and actual conditions." 382 R., p.568. The *Methodology Order* uses the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. 382 R., p.574.

⁵ The term "crop water need" is defined in the *Methodology Order* as "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." 382 R., p.579.

Under step 3, the Director makes his initial determination of water supply. Step 3 occurs after the United States Bureau of Reclamation (“USBOR”) and the United States Corps of Engineers (“USACE”) issue their Joint Forecast predicting unregulated inflow volume at the Heise Gage. 382 R., p.598. The Joint Forecast is typically released within the first two weeks of April. *Id.* Thereafter, the Director issues an April Forecast Supply for the water year. *Id.* The Director also determines in step 3 whether a demand shortfall to any member of the Coalition will occur in the coming season. *Id.* Demand shortfall is the difference between reasonable in-season demand and the April Forecast Supply. *Id.* If reasonable in-season demand is greater than the April Forecast Supply, a demand shortfall exists. *Id.*

Under step 4, if the demand shortfall is greater than the reasonable carryover shortfall from the previous year,⁶ material injury exists or will exist, and junior users are required to establish their ability to mitigate that injury to avoid curtailment. 382 R., pp.598-599. To mitigate, junior users only need establish their ability to secure mitigation water to be provided to the Coalition at a later date, which the Director refers to as the “Time of Need.” The Director then makes adjustments to his calculations throughout the irrigation season as conditions develop. These adjustments are provided for in steps 6 and 7 of the *Methodology Order*, which provide that at various times throughout the irrigation season, the Director will recalculate reasonable in-season demand and adjust demand shortfall for each member of the Coalition. 382 R., pp.599-600. The Director’s recalculations are based on actual crop water need up to that point and a revised Forecast Supply, among other things. *Id.*

Step 8 addresses the obligations of junior water users after the Director makes his in-season recalculations and adjustments. These obligations generally trigger when Coalition members have exhausted their storage water rights to where all that remains in the reservoirs is an amount of water equal to their reasonable carryover. The Director refers to this as the “Time of Need.”⁷ Step 8 provides:

Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and the

⁶ Junior water users will have previously mitigated for any reasonable carryover shortfall from the previous year under step 9 of the *Methodology Order*. 382 R., pp.600-601.

⁷ The *Methodology Order* provides that “[t]he 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.” 382 R., p.584 fn.9.

[reasonable in-season demand] 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.**

382 R., p.600. While junior user's original mitigation obligation for material injury to reasonable in-season demand may be adjusted downward under the plain language of step 8, it may not be adjusted upward.

ii. Idaho law requires that out-of-priority diversions can only be permitted pursuant to a properly enacted mitigation plan.

The Coalition takes issue with step 8 of the *Methodology Order*. They assert that it unlawfully permits out-of-priority water use to occur without remedy of curtailment or a properly enacted mitigation plan. This Court agrees. In the *2013 SWC Case*, the Idaho Supreme Court held that the CM Rules "require that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan." *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. Further, that when the Director responds to a delivery call "the Director shall either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion." *Id.* at 654, 315 P.3d at 842. The Court's holding in this respect was based on the plain language of Rule 40 of the CM Rules, which provides that once the Director makes a determination of material injury, the Director shall:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . .; or
- b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.040.01.a, b.

This Court finds that step 8 of the *Methodology Order* is inconsistent with Rule 40 of the CM Rules and the precedent established in the *2013 SWC Case*. Step 8 effectively caps junior users' mitigation obligations for material injury to reasonable in-season demand to that amount determined in step 4. This determination is made in or around April. The cap remains in place even if changing conditions during the irrigation season establish that material injury to reasonable in-season demand is greater than originally determined. When that scenario arises,

step 8 provides that junior users are required to deliver to the Coalition the water they previously secured as mitigation under step 4. Even though that amount of water will be insufficient to remedy the full extent of material injury, the plain language of step 8 provides that “no additional water is required.” The result is that material injury to reasonable in-season demand is realized by the Coalition, out-of-priority junior water use occurs, and no remedy of curtailment or the requirement of a mitigation plan exists to address that injury. The endorsement of such unmitigated out-of-priority water use is contrary to Idaho’s doctrine of prior appropriation.

The Director justifies his decision as follows. First, he states that “the purpose of predicting need is to project an upper limit of material injury at the start of the season.” 382 R., p.569. He then provides:

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 **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.**

382 R., p.594 (emphasis added).

The justifications relied upon by the Director do not permit out-of-priority water use in contravention of CM Rule 40 and the *2013 SWC Case*. Neither Article XV, Section 3, nor Article XV, Section 7 of the Idaho Constitution permits such water use to occur under the circumstances presented. The Idaho Supreme Court has held that nothing in Article XV, § 7 “grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV, §3, which states, ‘Priority of appropriation shall give the better right as between those using the water [of any natural stream].’” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 807, 252 P.3d 71, 88 (2011). With respect to Idaho Code § 42-226, the Idaho Supreme Court has directed that it, and its reference to “full economic development,” has no application in delivery calls between senior surface water users and junior ground water users, such as the one at issue here. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 509,

284 P.3d 225, 234 (2012). The Court therefore finds that the legal justifications expressly relied upon by the Director do not support his determination to refrain from requiring further mitigation or curtailment from junior users if material injury to reasonable in-season demand is greater than originally determined in step 4 due to changing conditions.

iii. The Director's "total water supply" argument does not justify out-of-priority diversions without a properly enacted mitigation plan.

In briefing and at oral argument, counsel for the Department asserts another justification for step 8 of the *Methodology Order*. Counsel argues that under a "total water supply" theory, "the Director is not required to determine material injury to in-season demand and 'reasonable carryover' separately, nor is he required to order separate mitigation for each."⁸ Counsel suggests that if material injury to reasonable in-season demand is greater than originally determined under step 4, the Department need not curtail or require a mitigation plan to make up the difference. Rather, it can require Coalition members to exhaust their reasonable carryover to cure the material injury. Then, at a point later in the year, make a subsequent determination as to material injury to reasonable carryover and mitigation at that time. In so arguing, counsel refers to steps 9 and 10 of the *Methodology Order*, wherein the Director in or around November 30th determines material injury to reasonable carryover and establishes the mitigation obligations of the juniors. This Court rejects this argument.

As an initial matter, counsel's total water supply argument appears contrary to the plain language of the Director's *Methodology Order*. The *Methodology Order* itself contains separate and unique methodologies for determining material injury to reasonable in-season demand (Section II) and reasonable carryover (Section III).⁹ 382 R., pp.565 & 585. The methodologies described in Sections II and III of the *Methodology Order* establish that a determination of material injury will be conducted for both reasonable in-season demand and for reasonable carryover, and that such determinations will be conducted and mitigated separately. *Id.* For

⁸ The Court notes that this justification was not set forth by the Director in his *Methodology Order*. Notwithstanding, the Court will address the argument.

⁹ Section II of the *Methodology Order* is entitled "Methodology for Determining Material Injury to Reasonable In-Season Demand." 382 R., p.565. Section III of the *Methodology Order* is entitled "Methodology for Determining Material Injury to Reasonable Carryover." 382 R., p.585.

example, when detailing his methodology for determining material injury to reasonable in-season demand in Section II, the Director sets forth his calculation of demand shortfall and directs:

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 seasons and at the time of need.**

382 R., p.585 (emphasis added). The argument is also contrary to steps 3 and 4 of the *Methodology Order*, wherein the Director mitigates for material injury to reasonable in-season demand by requiring junior users to establish their ability to secure mitigation water or face curtailment. 382 R., pp.598-599.

More importantly, the total water supply argument is contrary to law. The concept of a “total water supply” arises out of Rule 42 of the CM Rules. The Rule permits the Director to consider the Coalition’s natural flow and storage rights in conjunction with one another when determining material injury. IDAPA 37.03.011.042.g. Indeed, the Director does so in his *Methodology Order* when determining material injury to reasonable in-season demand as well as in determining the Coalition’s “Time of Need.” However, problems arise when the Coalition is required to deplete its reasonable carryover, *in addition to its other storage water*, to address its material injury to reasonable in-season demand. Under Idaho law the holder of a surface water storage right is entitled to maintain a reasonable amount of carryover-over storage to assure water supplies for future dry years. IDAPA 37.03.011.042.g; *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451. Counsel’s argument fails to address what happens if the Coalition’s reasonable carryover is insufficient to address the full extent of material injury to reasonable in-season demand. Additionally, while the Coalition will have been required to deplete its reasonable carryover under counsel’s argument, out-of-priority water use will have occurred without curtailment or the enactment of a mitigation plan. If junior users are unable to secure all or part of their mitigation obligation in November due to cost, scarcity or unwillingness, the remedy of curtailment is lost, as the out-of-priority water use will have already occurred. In that scenario, there is no contingency to protect senior rights as required by the *2013 SWC Case*. Such a result is not contemplated by the CM Rules, and is in contravention of the plain language of CM Rule 40 and the Idaho Supreme Court’s precedent in the *2013 SWC Case*.

- iv. The Director may require use of reasonable carryover pursuant to a properly enacted mitigation plan that contains appropriate contingency provisions to protect senior rights.**

In conjunction with step 8, if the Director determines a greater volume of water is necessary than the previously determined to address material injury to reasonable in-season demand, the ability of junior users to secure additional in-season water during what is typically the most water intensive stage of the irrigation season is problematic. Further problematic is that curtailment at that stage would not only have a devastating impact on junior users but may not timely provide sufficient water to the Coalition. Accordingly, curtailment may still not prevent the Coalition from relying on its reasonable carryover to help get through the remainder of the irrigation season. Nonetheless, a viable mitigation plan is still possible.

In conjunction with a properly enacted and approved mitigation plan, the Director could require the Coalition to 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. This could be accomplished through an option or lease to provide water. The water would provide mitigation for any shortfalls to reasonable carryover determined to exist at the end of the season. If no shortfall is determined to exist due to changing conditions, then the option or lease need not be exercised. If a shortfall is determined to exist, then the option or lease is in place to be exercised in whole or in part as required to mitigate for any shortfall. The water would be secured but not have to be provided until such time as it can be determined whether or not the storage allocations will fill next season. This process eliminates the risk of the Director not being able to compel junior users to secure water at the end of the season in lieu of curtailment the following season. And, curtailment the following season may not provide sufficient water in storage to remedy the injury to storage, particularly if curtailment will also be required as a result of a demand shortfall to reasonable in-season demand the following season.

The process is consistent with the requirement set forth in the *2013 SWC Case* “that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan.” *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. It also eliminates the problem of securing water that will not be put to beneficial use because the water is being secured for the next season and

the amount secured can be adjusted down at the end of the instant season thereby leaving plenty of time for the unneeded water to be used elsewhere. Following any adjustment at the end of the instant season the amount of water that ultimately be secured would be the same as is currently required under Step 9.

B. The *Methodology Order*'s use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is supported by substantial evidence.

The Coalition argues that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is not supported by substantial evidence and must be set aside. 382 R., p.574. The Idaho Supreme Court has already approved the Director's employment of a baseline methodology as a starting point in administration proceedings and for determining material injury. *2013 SWC Case*, 155 Idaho at 648-653, 315 P.3d at 836-841. The Court finds that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year is supported by substantial evidence.

The *Methodology Order* explains that a baseline year is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. 382 R., p. 569. To capture current irrigation practices, the *Methodology Order* limits the identification of a baseline year to 1999 and beyond. *Id.* Additionally, the *Methodology Order* instructs as follows:

[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.

382 R., p.570. The Director found 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 Coalition."¹⁰ 382 R., p.574. In so holding, the Director made findings that 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. *Id.* These findings are supported by the record.

¹⁰ The Director determined that using values from a single year would not fit the selection criteria for all members of the Coalition. 382 R., p.574.

See 551 R., Ex. 8000, Vol. IV, Appdx. AS-1-8. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

Furthermore, the Court's holding regarding step 8 of the *Methodology Order* should alleviate the concerns raised by the Coalition on this issue. The baseline year should only be used as a starting point. As set forth above, it cannot result in the implementation of a cap on junior users' mitigation obligations. If changing conditions establish that material injury is greater than originally determined pursuant to the baseline analysis, then adjustments to the mitigation obligations of the juniors must be made when the Director undertakes his mid-season recalculations. The Coalition's concerns should be addressed since the mid-season adjustments include recalculating reasonable in-season demand for each member of the Coalition based on, among other things, actual crop water need to that point. 382 R., p.599.

C. The *Methodology Order*'s provision for the consideration of supplemental ground water does not violate Idaho law. However, the Director's finding regarding ground water fractions is not supported by substantial evidence and must be remanded.

Step 1 of the *Methodology Order* provides in part that "[i]n determining the total irrigated acreage [of Coalition members], the Department will account for supplemental ground water use." 382 R., p.597. The Coalition argues that the *Methodology Order*'s consideration of supplemental ground water use violates Idaho law and has no relevance to the administration of the Coalition's senior rights. This Court disagrees. The Idaho Supreme Court has directed that in responding to a delivery call, the Director has the authority "to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447. If it is established that acreage accounted for under the Coalition's senior surface water rights is being irrigated from a supplemental ground water source, that is a factor the Director has the authority to consider in the context of a delivery call. If the supplemental ground water rights being used are themselves subject to curtailment under the senior call, (as suggested may be the case here by the Hearing Officer¹¹), that factor should also be accounted for by the Director. However, the *Methodology Order*'s instruction that the Department will consider supplemental ground water use when determining the total irrigated

¹¹ 551 R., p.7507

acreage of Coalition members does not violate Idaho law. The Director's decision to include that instruction in the *Methodology Order* is affirmed.

That said, the Court finds that the Director's assignment of an entity wide split for each member of the Coalition of the ground water fraction to the surface water fraction is not supported by substantial evidence in the record. In the *Methodology Order*, the Director makes the following finding:

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.

382 R., p.576 fn.6. The Coalition argues that there is no factual support in the record justifying these ground water fractions, and that the Director's finding is arbitrary and capricious. The Department, IGWA and the City of Pocatello do not respond to the Coalition's argument in this respect.

A review of the record supports the Coalition's position. The record does not contain evidence that acres accounted for under the Coalition's senior surface water rights are being irrigated from a supplemental ground water source. Or that the ground water fractions utilized by the *Methodology Order* reflect such supplemental ground water use. If the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition's *Partial Decrees*, such a determination must be supported by clear and convincing evidence. See, e.g., *A&B Irr. Dist., v. Idaho Dept. of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (holding, "Once a decree is presented to an administering agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence"). Here, the parties fail to cite the Court to anything submitted before the Department in either written form or via oral testimony establishing the use of supplemental ground water by individual irrigators within the Coalition. That such was the case is illustrated by the Hearing Officer's limited findings on the issue. He found only that "an undetermined number of individual irrigators within SWC may hold supplemental ground water rights. . . ." and that "[i]t would seem that any

such ground water rights would be junior to the surface irrigations rights and subject to curtailment.” 551 R., p.7507 (emphasis added). The Director did not address the Hearing Officer’s findings in his *Methodology Order*, or include any further analysis on his findings. Rather, to support his ground water fraction finding, the Director cites to a document entitled *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017*, which is not in the record. Therefore, the Court finds the Director’s finding is not supported by substantial evidence in the record. The Director’s ground water fractions as set forth in the *Methodology Order* are hereby set aside and remanded for further proceedings as necessary.

D. The *Methodology Order*’s reliance upon the Joint Forecast, and its use of the Heise Gage, to determine the available water supply for the Twin Falls Canal Company is set aside and remanded for further proceedings as necessary.

The Coalition argues that the Director’s reliance upon the Joint Forecast, and its focus on the Heise Gage, to predict the available water supply for the Twin Falls Canal Company is arbitrary and capricious and not supported by substantial evidence. In response to this argument, the Department concedes the following in its briefing:

The Department recognizes that while the Joint Forecast is a “good indicator” for predicting the supplies of most Coalition members, it is “not the best evidence” for purposes of predicting TFCC’s supply. *SWC Methodology Brief* at 36. The Director has “previously expressed to TFCC that the Department is willing to work with the TFCC to improve the predictors for TFCC for future application in the *Methodology Order* and Department staff have even met with TFCC consultants on this issue.”

Corrected Br. of Respondents, p.37 fn.30 (July 30, 2014). As a result, the Coalition’s argument on this issue is unopposed. Therefore, the Director’s decision in this respect is set aside and remanded for further proceedings as necessary.

E. The Director in his discretion may use the U.S. Department of Agriculture’s National Agriculture Statistics Service data as a factor in determining crop water need, but should also take in account available data reflecting current cropping patterns.

Under steps 1 and 2 of the *Methodology Order*, the Director calculates the crop water needs of the Coalition for that year. In determining crop water need, the *Methodology Order* instructs that among other things the Director “will utilize crop distributions based on

distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS")." 382 R., p.580. The *Methodology Order* goes onto provide:

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.

Id. (emphasis added). The Coalition argues that the *Methodology Order's* designation of NASS data for 1990-2008 average crop distribution fails to capture current cropping patterns, resulting in under-determined crop water need. Specifically, that changes in cropping patterns have resulted in the planting of more water intensive crops such as corn and alfalfa in recent years which is not reflected in the 1990-2008 data.

The Court finds that the Director's decision to use NASS data as a factor in determining the Coalition's crop water need is a matter within his discretion. That said, while the Director may use historic cropping data as a starting point in determining crop water need, he should also take into account available data reflecting current cropping patterns. The *Methodology Order* provides that "the Department prefers to rely on data from the current season if and when it becomes usable." 382 R., p.580. Likewise, the Hearing Officer in addressing the issue of crop water need made the following recommendation which was adopted by the Director:

If there have been significant cropping changes resulting in either greater or less need for water, those factors should be factored. This is an area of caution. Cropping decisions are matter 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.

551 R., p.7099. Taking in account available data reflecting current cropping patterns also addresses the Coalition's concerns regarding the Director's decision to factor in only "harvested" area when considering historic NASS data. Since the *Methodology Order* already provides that the Director prefers to use data from the current seasons if and when it becomes usable, no remand is necessary on this issue.

F. The *Methodology Order*'s timing for initial determinations of water supply and material injury to reasonable in-season demand do not run afoul of Idaho law.

The Coalition takes issue with the timing of the Director's initial determinations of water supply and material injury to reasonable in-season demand under the *Methodology Order*. Under step 3 of the *Methodology Order*, the Director makes his initial determination of water supply through the issuance of his April Forecast Supply. 382 R., p.598. This occurs after the USBOR and USACE issue their Joint Forecast, which is typically released within the first two weeks of April. Then, the Director first determines whether a demand shortfall will occur for any member of the Coalition for the coming season. *Id.* If material injury exists or will exist, step 4 of the *Methodology Order* provides the juniors another fourteen days or until May 1st, whichever is later, to establish their ability to mitigate that material injury or face curtailment. *Id.* The Coalition asks this Court to set aside steps 3 and 4 of the *Methodology Order* and remand with instructions that the Director's initial determinations of water supply and material injury to reasonable in-season demand be made prior to the irrigation season (i.e., prior to March 15th).

The Coalition relies on the *2013 SWC Case* for the proposition that these initial determinations must occur prior to the irrigation season. In that case, the Court distinguished the two ways the Director may utilize a baseline methodology. *2013 SWC Case*, 155 Idaho at 650, 315 P.3d at 838. First, the Court directed that such a methodology may be used in a management context in preparing a pre-season management plan for the allocation of water resources. *Id.* Second, the Court directed that the Director may also use such a methodology in an administrative context "in determining material injury in the context of a water call." *Id.* The Court instructed that if the Director chooses to utilize a baseline methodology to "develop and implement a pre-season management plan for allocation of water resources," it must "be made available in advance of the applicable irrigation season" *Id.* at 653, 315 P.3d at 841. The irrigation season delineated on the Coalition's senior surface water rights begins March 15th.

The parties dispute whether the *Methodology Order* could be considered a pre-season management plan as contemplated in the *2013 SWC Case*. However, it is plain that the baseline methodology set forth in the *Methodology Order* is utilized by the Director in an administrative context in this case. Specifically, it is used as a starting point for consideration of the Coalition's call for administration, and as a starting point in determining the issue of material injury. The

procedural background of the *Methodology Order* makes clear that it was issued in response to the Coalition's 2005 call. In his 2008 *Final Order*, the Director explained he would be issuing a separate final order because of the need for ongoing administration. 551 R., p.7386. The stated purpose of the *Methodology Order* is "to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC." 382 R., p.565. Therefore, the Court finds that the *Methodology Order's* baseline methodology is used in an administrative context "in determining material injury in the context of a water call." 2013 SWC Case, 155 Idaho at 650, 315 P.3d at 838.

The Idaho Supreme Court has directed that "[w]hile there must be a timely response to a delivery call, neither the Constitution nor statutes place any specific timeframes on this process," and that it is "vastly more important that the Director have the necessary and pertinent information and the time to make a reasoned decision based on the available facts." *AFRD#2*, 143 Idaho at 875, 154 P.3d at 446. In this case, the Director found that it is necessary to wait until the Joint Forecast is issued to make the initial determinations at issue here. 382 R., p.572. He held that "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." 382 R., p.582. In so finding, the Director held that the Joint Forecast "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." 382 R., p.572. And, that it is "a good indicator of the total available irrigation water supply for a season." *Id.* The Director's holding is supported by the record. *See. e.g.*, 551 R., p.1379. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

G. The Director's use of the ESPA Model boundary to determine a curtailment priority date in steps 4 and 10 of the *Methodology Order* is set aside and remanded.

The Coalition argues that steps 4 and 10 of the *Methodology Order* unlawfully and arbitrarily reduce junior ground water acres subject to administration in the event of curtailment. Step 4 provides in part as follows:

If junior ground water users fail or refuse to 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. 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.

382 R., p.598-599.

The plain language of step 4 directs that the Director will use the ESPA Model to determine the curtailment priority date necessary to remedy material injury “within the model boundary of the ESPA.” *Id.* Step 4 then notes that under the CM Rules, the Director “can only curtail junior ground water rights within the area of common ground water supply.” *Id.* Thus, step 4 recognizes a conflict between the model boundary of the ESPA and the area of common ground water supply. The conflict arises from the fact that the ESPA Model boundary and the boundary of the area of common ground water supply – as it is defined by the CM Rules – are not consistent with one another. The ESPA Model boundary is larger, and contains ground water rights that are not within the area of common ground water supply. This fact is undisputed by the parties. It is the Coalition’s position that 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. And, that the Director’s practice in this respect results in unmitigated material injury contrary to law. This Court agrees.

When a senior water user seeks the conjunctive administration of ground water rights under the CM Rules, the senior user is seeking administration within the area of common ground water supply. The plain language of CM Rules make this clear. The Rules prescribe the procedures for responding to a delivery call made “in an area having a common ground water supply.”¹² IDAPA 37.03.11.001. Likewise, the Rules provide for administration when a delivery call is made by the holder of a senior-priority water right “alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights ... from

¹² An “area having a common ground water supply” is defined as:

A ground water source within which the diversion and use of ground water or changes in in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010.01

an area having a common water supply in an organized water district the petitioner is suffering material injury.” IDAPA 37.03.11.040.01 (emphasis added). As a result, the *Methodology Order*’s use of the ESPA Model to determine the curtailment priority date necessary to remedy material injury to the Coalition’s water rights “within the model boundary of the ESPA” is problematic. Absent further analysis, which the *Methodology Order* does not provide for, it will result in unmitigated material injury and out-of-priority water use to the detriment of the Coalition in the event of curtailment.

The Director’s application of step 4 in 2010 is illustrative. Under steps 3 and 4 of the *Methodology Order*, the Director determined a demand shortfall to reasonable in-season demand of 84,300 acre-feet to various Coalition members. 382 R., p.186. As permitted in step 4, the Director gave the junior users 14 days to mitigate by establishing their ability to secure 84,300 acre-feet of water. 382 R., p.188. In the event the juniors could not, the Director utilized the ESPA Model boundary to determine the curtailment priority date necessary to increase appropriate reach gains in the Snake River by 84,300 acre-feet. 382 R., p.187. This exercise resulted in a curtailment priority date of April 5, 1982. *Id.* However, the Director then provided that “[c]urtailing only those ground water rights located within the area of common ground water supply [junior to April 5, 1982] , IDAPA 37.03.11.050.01, will increase reach gains . . . by 77,985 acre-feet.” *Id.* The amount of 77,985 acre-feet would not have fully mitigated the material injury. Notwithstanding, the *Methodology Order* does not provide further analysis or a mechanism to adjust the curtailment priority date upward within the boundary of the area of common water supply to provide enough water to fully mitigate the injury.

Therefore, the Court finds that the *Methodology Order*’s use of the ESPA Model boundary to determine a curtailment priority date is arbitrary and contrary to the CM Rules. It includes ground water rights in the modeling that are not subject to curtailment under the plain language of the CM Rules to the detriment of the Coalition. The Court further finds that the use of the ESPA Model boundary results in out-of-priority water use contrary to law. The Director should either (1) use the boundary of the area of common water supply to determine a curtailment priority date, or (2) add further analysis to the *Methodology Order* to convert the curtailment priority date arrived at by using the ESPA Model boundary to a priority date which will provide the required amount of water to the Coalition when applied to the boundary of the

area of common water supply. The Director's decision in this respect is set aside and remanded for further proceedings as necessary.

H. The Coalition's argument that mitigation water for material injury to reasonable carryover must be provided up front has previously been addressed and will not be revisited.

With respect to the issue of mitigation of material injury to reasonable carryover, the Coalition argues that the *Methodology Order* is contrary to Idaho law in that it does not require the transfer of actual mitigation water to the Coalition's storage space up front to "carryover" for use in future years. This Coalition's argument in this respect has previously been addressed and rejected. In Gooding County Case No. CV-2008-551, the district court held that as long as assurances are in place, such as an option for water, that mitigation water could be acquired and transferred the following irrigation season, then junior users need not transfer that mitigation water up front to be carried over:

In this regard, although the Director adopted a "wait and see" approach, the Director did not require any protection to assure senior right holders that junior ground water users could secure replacement. ... *This does not mean that juniors must transfer replacement water in the season of injury*, however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example. Seniors can therefore plan for the future the same as if they have the water in their respective accounts and juniors may avoid the threat of curtailment.

Order on Petition for Judicial Review, Gooding County Case No. CV-2008-551, p.19 (July 24, 2009) (emphasis added). Given that the decision of the district court in this respect was not overturned by the Idaho Supreme Court in the *2013 SWC Case*, this Court sees no reason to revisit the issue. The Director's decision in this respect is affirmed:

I. The *Methodology Order's* process for determining reasonable carryover does not violate the CM Rules.

The CM Rules provide that in determining reasonable carryover, "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." IDAPA 37.03.11.042.g. The Coalition argues that the Director's *Methodology Order* fails to consider

these factors in its process for determining reasonable carryover, and asks this Court to set aside and remand the same. Section III of the *Methodology Order* sets forth the Director's methodology for determining material injury to reasonable carryover. 382 R., pp.585-590. A review of Section III reveals that the Director does consider and analyze, consistent with CM Rule 42.g, the projected water supply, average annual rate of fill and average annual carryover of the Coalition members. The *Methodology Order* first considers the projected water supply. 382 R., pp.585-586. It uses the values of Heise Gage natural flow data for the years 2002 and 2004 to establish a projected typical dry year supply as the projected water supply. 382 R., p.585. In so doing, the Director notes that "[t]he Heise natural flow, for the years 2002 and 2004, were well below the long term average" *Id.* The *Methodology Order* then considers and sets forth the annual percent fill of storage volume by Coalition members from 1995 to 2008. 382 R., pp.586-587. Last, the *Methodology Order* considers and sets forth actual average carryover of Coalition members from 1995-2008. 382 R., pp.587-588.

The CM Rules do not limit the Director's determination of reasonable carryover to consideration of the factors enumerated in CM Rule 42.g, but only require that the Director consider those enumerated factors. The Court finds based on a review of the *Methodology Order* that the Director's process for determination reasonable carryover does consider the enumerated factors. Therefore, the Court finds that the Director's process was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

J. Step 10 of the *Methodology Order* is set aside and remanded for further proceedings.

The Coalition argues that the transient modeling provision of step 10 of the *Methodology Order* is contrary to law. Step 10 provides in part as follows:

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. 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. 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.

382 R., p.601 (internal citations omitted). The Director justifies his determination in this respect as follows:

Because of the uncertainty associated with this prediction, and in the interest of balance 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.

382 R., pp.596-597. For reasons stated elsewhere in this decision (see Section V.A.ii above), the Court finds that the articles and code sections relied upon by the Director do not justify his decision. The Department acknowledges as much in its briefing, providing that "the Director did not have the benefit of the guidance in *Clear Springs* and the 2012 and 2013 *A&B* decisions when the *Methodology Order* was issued."¹³ *Corrected Brief of Respondents*, p.68. The Department thus suggests that "a remand to the Director with instructions to apply the Idaho Supreme Court's guidance is the appropriate remedy if this Court determines that the *Methodology Order* does not provide an adequate explanation of the basis for the transient modeling provision of Step 10." *Id.*

This Court agrees that the transient modeling provision of step 10 must be set aside and remanded for further proceedings. Counsel for the Department argues that the provision is supported by the CM Rules' provisions for phased-in curtailment. However, this justification was not contemplated or detailed by the Director in the *Methodology Order*. Rather, it is being raised for the first time on judicial review. The Court does question the viability of phased curtailment as a justification for the practice outlined in step 10. Reasonable carryover is surface water "which is retained or stored for future use in years of drought or low-water." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. As the *Methodology Order* is currently constituted, the out-of-priority use resulting in the material injury to the Coalition's reasonable carryover will have already occurred by the time the Director reaches step 10 of the *Methodology Order*. It is questionable whether after-the-fact phased curtailment, as contemplated by the CM Rules, would be consistent with Idaho law or satisfies the purpose of reasonable carryover. For the reasons set

¹³ Counsel refers to the Idaho Supreme Court's decisions in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012), and *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 315 P.3d 828 (2013), respectively.

forth in this section, the transient modeling provision of step 10 will be set aside and remanded for further proceedings as necessary.

K. The *Methodology Order*'s procedures for determining Coalition members' reasonable in-season demand are consistent with Idaho law.

The City of Pocatello and IGWA both argue that the Director's methodology for determining the Coalition's reasonable in-season demand, as set forth in the *Methodology Order*, are contrary to law. They assert several arguments in support of their position. Each will be addressed in turn.

i. The Director did not act contrary to law or abuse his discretion in considering the Coalition's historic use in determining reasonable in-season demand.

The primary argument asserted by IGWA and the City of Pocatello is that the *Methodology Order* unlawfully considers the Coalition's historic use in initially determining reasonable in-season demand. As discussed above, the Director uses a historic demand baseline analysis that utilizes the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. 382 R., p.574. However, the *Methodology Order* also provides that the initial reasonable in-season demand determination "will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions." 382 R., p.568. Further, that "[g]iven the climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences." 382 R., p.575. The Director's consideration of the Coalition's historic use in this context is not contrary to law. The Idaho Supreme Court has already affirmed "the Director's use of a *predicted baseline of a senior water right holders' needs* as a starting point in considering the material injury issue in a water call." *2013 SWC Case*, 155 Idaho at 656, 315 P.3d at 844 (emphasis added). Therefore, the Court finds that the *Methodology Order*'s use of a baseline analysis as the starting point in determining the Coalition's reasonable in-season demand is not contrary to law.

In conjunction with their argument, the City of Pocatello and IGWA assert that the *Methodology Order*'s process for determining reasonable in-season demand fails to consider

various contemporary factors. IGWA argues that it fails to consider acres that are no longer irrigated, crop needs, water diverted by the Coalition for use by others, and water leased by the Coalition to other water users. IGWA and the City of Pocatello additionally argue that it fails to consider certain factors listed in CMR Rule 42, including the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. This Court disagrees.

A review of the *Methodology Order* reveals that the Director's calculation of reasonable in-season demand provides for the consideration of all the factors raised by IGWA and the City of Pocatello. For instance, the Director's consideration of project efficiency and crop water need includes the following:

Monthly irrigation entity diversion ("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. . . . *Conversely, adjustments will be made to assure that water supplied to private leases or to the rental pool will not increase the shortfall obligation.*

382 R., p.578 (emphasis added). Therefore, the Court finds that the *Methodology Order* takes into consideration acres that are no longer irrigated, crop needs, water diverted by the Coalition for use by others, and water leased by the Coalition to other water users. Furthermore, both the Hearing Officer and the Director found, in considering the Rule 42 factors, that the Coalition members operate reasonable and efficient irrigation projects. The Director found that "as found by the hearing officer in his recommended order, members of the SWC operate reasonably and without waste," and that he will not "impose greater project efficiencies upon members of the SWC than have been historically realized." 382 R., p.551; 551 R., pp.7102-7104.

In conjunction with IGWA's and the City of Pocatello's argument in this respect, it is necessary to reiterate the presumptions and evidentiary standards that apply to a delivery call. *See e.g., 2013 SCW Case*, 155 Idaho at 650, 315 P.3d at 838 (providing, "when utilizing the baseline in the administration context, the Director must abide by established evidentiary standards, presumptions, and burdens of proof"). First, when a call is made "the presumption under Idaho law is that the senior is entitled to his decreed water right." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. Then, "[o]nce a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *A&B Irr., Dist.*, 153 Idaho at 524, 284 P.3d at 249. Finally, "[o]nce 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." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 (emphasis added).

These presumptions and evidentiary standards are instructive on this issue. The *Methodology Order* provides for the Director's consideration of the factors with which IGWA and the City of Pocatello are concerned. However, if the junior users believe for some reasons that the seniors will receive water they cannot beneficially use, it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence. For example, the juniors may assert that the Director in their opinion is considering some, but not *all* acres that are no longer irrigated by the seniors. Or it may be their opinion that the Director is considering some, but not *the full extent* of water diverted by the seniors for use by others. In that scenario, it is then their burden under the established evidentiary standards and burdens of proof get evidence supporting their position before the Director in an appropriate fashion.

- ii. **The Director did not abuse his discretion or act contrary to law in declining to adopt a water budget methodology to determine the Coalition's water needs.**

IGWA and the City of Pocatello argue that the Director's *Methodology Order* should have adopted a water budget methodology to determine the water needs of the Coalition. At the hearing before the Hearing Officer, the parties each proposed a water budget methodology for

determining the water needs of the Coalition. The Director declined to adopt any such methodology, favoring instead the use of a baseline demand analysis as the starting point in determining reasonable in-season demand. 382 R., pp.575-577. The Director's decision in this respect is supported by law, the record, and is within his discretion.

The Idaho Supreme Court has already affirmed "the Director's use of a predicted baseline of a senior water right holders' needs as a starting point in considering the material injury issue in a water call." 2013 SWC Case, 155 Idaho at 656, 315 P.3d at 844. Furthermore, the Director's reasoning for declining to adopt a water budget method is supported by the record. The record establishes that both the Hearing Officer and the Director questioned the validity of using a water budget methodology under the facts and circumstances presented, recognizing the wildly differing results reached by the surface water and ground water experts under such an approach. In addressing the issue, the Hearing Officer stated:

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. . . . The total under the SWC analysis is 3,274,948 acre-feet as compared to the Pocatello analysis of . . . 2,405,861[acre-feet].

551 R., p.7096. The Hearing Officer concluded that such results do "not promote much faith in the science of the water budget analysis," and declined to adopt any of the presented water budget approaches. 551 R., pp.7096-7097. The Director echoed these sentiments in his *Methodology Order* when making the determination to utilize a baseline methodology. 382 R., pp.576-577. As set forth in detail above, the Court finds that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is supported by substantial evidence. In reviewing the Director's assessment and rejection of the water budget methodology, this Court finds that the Director's decision was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

- iii. The *Methodology Order's* use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is not contrary to law.**

The City of Pocatello and IGWA allege that the *Methodology Order* impermissibly overestimates the reasonable in-season demand of the Coalition. They point to the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of a reasonable in-season demand determination. They assert that the Director's use of those values results in the selection of a baseline year of above average temperatures and evapotranspiration and below average precipitation, which in turn impermissibly results in overestimated reasonable in-season demand. It is their position that the Director must determine the needs of the Coalition based on historic use data associated with a year with average temperatures, evapotranspiration and precipitation. This Court disagrees.

The Director's adoption of a baseline year intentionally utilizes above average temperatures and evapotranspiration and below average precipitation. In selecting a baseline year, Director notes that "demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration ("ET"), and lower precipitation." 382 R., p.569. He then explains that it is necessary to select a baseline year of above average temperatures and evapotranspiration and below average precipitation in order to protect senior rights:

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 facts.

382 R., pp.569-570 (emphasis added). In his *Methodology Order*, the Director found 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." 382 R., p.574.

The Director did not err in his intentional adoption of a baseline year based on above average temperatures and evapotranspiration and below average precipitation. The Court agrees that use of such data is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition's rights. The arguments set forth by the City of Pocatello and IGWA that the Director must use data associated with an average year fail to take into account the legal limitations placed on the Director in responding to a

delivery call. The senior is entitled to a presumption under Idaho law that he is entitled to his decreed water right. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If the Director is going to administer to less than the full quantity of the decreed water right, his decision must be supported by clear and convincing evidence in order to adequately protect the senior right. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

If the Director determined the needs of the Coalition based on historic use data associated with an average year, any decision to administer to less than the full quantity of the Coalition's decreed rights based on that data would not adequately protect its senior rights. Using data associated with an average year by its very definition would result in an under-determination of the needs of the Coalition half of the time. The Director simply cannot rely upon such data if he is going to administer to less than the decreed quantity of the Coalitions' water rights as his analysis would not be supported by clear and convincing evidence.

The City of Pocatello and IGWA additionally argue that the Director's use of the values of 2006 and 2008 violates the law of case. Specifically, they argue that the use of such data violates the Hearing Officer's recommendation, which they interpret as requiring use of data associated with an average year. Whether this interpretation of the Hearing Officer's recommendation is accurate need not be addressed. What is important is that after the Hearing Officer issued his *Recommendation*, but before the Director issued his *Methodology Order*, case law developed instructing the Director concerning the significance of a decreed water right in a delivery call. *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. 2009-647 (May 4, 2010). In that case, the district court held that if the Director determines to administer to less than the decreed quantity of water, such a determination must be supported by clear and convincing evidence. *Id.* at 38. The Director in issuing his *Methodology Order* was bound to follow this case law.¹⁴ As set forth above, using data associated with an average year in order to administer to less than the full decreed quantity of the Coalitions' water rights would not meet a clear and convincing evidence standard. Therefore, the arguments set forth by IGWA and the City of Pocatello are unavailing.

¹⁴ The district court's decision in this regard was ultimately affirmed by the Idaho Supreme Court on appeal. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012).

L. The *Methodology Order*'s procedures for determining water supply are consistent with Idaho law.

IGWA and the City of Pocatello additionally argue that the Director wrongly underestimates the forecasted water supply in the *Methodology Order*. The *Methodology Order* explains that in determining water supply “[t]he 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.” 382 R., p.582. Further,

By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. . . . 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 the juniors to carry. Idaho Const. Art. XV, § 3, Idaho Code § 42-106.

382 R., p.594. IGWA and the City of Pocatello argue that the Director’s intentional underestimation of the forecasted water supply is an abuse of discretion and contrary to Idaho law. This Court disagrees for the reasons set forth in the preceding section regarding the Director’s use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. The analysis set forth in that preceding section is incorporated herein by reference. The Court finds that the Director did not abuse his discretion or act contrary to law in finding that the use of one standard error below the regression line is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition’s rights. The Court finds that the Director’s decision to utilize such a regression analysis was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

M. Neither the City of Pocatello nor IGWA were denied due process.

The City of Pocatello and IGWA argue that the Director denied them due process by declining to allow them to present evidence challenging the *Methodology Order* after his issuance of that *Order*. This Court disagrees. Idaho Code Section 42-1701A provides in part that “any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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.” In this case, the City of Pocatello and IGWA were previously afforded an opportunity for hearing. On January 16, 2008, a hearing was commenced before the Hearing Officer that resulted in the development and issuance of the *Methodology Order*. 551 R., p.7382. For approximately fourteen days, evidence and testimony was presented to the Hearing Officer by the parties, including IGWA and the City of Pocatello. Both IGWA and Pocatello had the opportunity at that hearing to present their theories and testimony on how material injury to the Coalition should be determined. Among other things, those parties had the opportunity to present their water budget analysis, which was rejected by the Hearing Officer and Director for reasons stated in the record. After considering the parties’ evidence and arguments, the Director adopted the methodology for determining material injury set forth in the *Methodology Order*. The question of whether the *Methodology Order*’s process for determining material injury is contrary to law, or inconsistent with the record, is a matter for judicial review. This Court has taken up those arguments in this decision. As a result, the IGWA and the City of Pocatello are not entitled to the relief they seek on this issue.

VI.

ANALYSIS OF METHODOLOGY AS APPLIED

The Director issued his *Methodology Order* in June 2010. Since that time, the Director has issued several final orders applying his methodology to subsequent water years. Those final orders have resulted in the filing of a number of *Petitions* seeking judicial review of the Director’s applications.

A. The Director’s application of the *Methodology Order* in 2013 failed to adjust the mitigation obligations of the juniors to take into account changing conditions.

The Coalition argues that the Director’s application of the *Methodology Order* in 2013 was contrary to law. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*. 382 R., pp.829-846. In that *Order*, the Director concluded that the Twin Falls Canal Company would experience material injury to reasonable in-season demand in the amount of 14,200 acre-feet. 382 R., p.831. He also determined that the rest of the Coalition members would experience no material injury to reasonable in-season

demand. *Id.* Consistent with step 4 of the *Methodology Order*, the Director gave IGWA fourteen days to secure 14,200 acre-feet of mitigation water to avoid curtailment. 382 R., p.835. IGWA filed its *Notice of Secured Water* with the Director on April 22, 2013. 382 R., pp.848-853.

After the Director undertook his in-season recalculations, he issued his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* on August 27, 2013. 382 R., pp.948-957. In that *Order*, the Director revised his original material injury determination based on changing conditions. He increased the material injury to reasonable in-season demand for the Twin Falls Canal Company from 14,200 acre-feet to 51,200 acre-feet. 382 R., p.953. He also increased the material injury to reasonable in-season demand for American Falls Reservoir District No. 2 from no material injury to 54,000 acre-feet of material injury. *Id.* Consistent with step 8 of the *Methodology Order*, the Director did not require the junior users to secure additional mitigation water to address the increased material injury, nor did he provide for curtailment. 382 R., p.954. Rather, the Director required the juniors to release the 14,200 acre-feet of mitigation water they had previously secured. *Id.* He then directed the Watermaster for Water District 01 to allocate 6,900 acre-feet to the Twin Falls Canal Company, and 7,300 acre-feet to American Falls Reservoir District No. 2 to address their respective material injuries. *Id.* As a result, the Twin Falls Canal Company did not get the amount of mitigation water that the Director ordered was to be secured for it under his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*.

The Coalition argues that the Director's refusal to adjust the juniors' mitigation obligation in 2013 is contrary to law. This Court agrees. In 2013, the Director did not provide a proper remedy for material injury to the reasonable in-season demand of the Twin Falls Canal Company or American Falls Reservoir District No. 2 when taking into account changing conditions. Namely, the Director improperly capped the mitigation obligations of junior users to that amount of material injury determined under step 4 (i.e., 14,200 acre-feet) even though changing conditions resulted in an increase of material injury to both the Twin Falls Canal Company and American Falls Reservoir District No. 2 (i.e., 51,200 acre-feet and 54,000 acre-feet, respectively). The analysis and justifications for the Court's finding in this respect are set forth above under Section V.A. of this decision. They will not be repeated here, but are incorporated by reference. The Court finds that the Director's failure to adjust the mitigation

obligations of the juniors to take into account changing conditions in 2013 resulted in prejudice to the Coalition's senior water rights and was contrary to law.

The Department argues that no further mitigation or curtailment was required in 2013 because "the April forecast and the in-season adjustments to it were predictions of material injury . . . not final determinations of actual material injury." Respondents' Br., pp.29-30. First, this argument is internally inconsistent with the *Methodology Order*, and the Director's application of the *Methodology Order* in 2013. In contravention of this argument, the *Methodology Order* itself provides for mitigation or curtailment if material injury to reasonable in-season demand is determined to exist in April. In fact, contrary to the Department's current argument, the Director required IGWA to secure mitigation water in 2013 following his initial April determination that the Twin Falls Canal Company would experience material injury to reasonable in-season demand in the amount of 14,200 acre-feet. 382 R., p.836. Second, the Department's argument is contrary to law. The Idaho Supreme Court has made clear that the burden of proof in a delivery call switches to the junior users once a determination has been made that material injury "is occurring *or will occur*." AFRD#2, 143 Idaho at 878, 154 P.3d at 449 (emphasis added). When the Director makes his April and mid-seasons calculations of material injury to reasonable in-season demand, he is making the determination under the plain language of the *Methodology Order* that material injury is or will occur. Therefore, the proper burdens of proof and evidentiary standards must be applied. The Director's *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* is set aside and remanded for further proceedings as necessary.

B. The Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination based on changing conditions. However, the Director failed to follow that timeframe in 2013.

The Coalition argues that in 2012 and 2013 the Director failed to timely make adjustments to his initial material injury determinations to take into account changing conditions. When and how often the Director adjusts his initial material injury determination to reasonable in-season demand based on changing conditions is a matter with which the Director exercises great discretion. The Director makes his initial material injury determination in or around April. The Director then makes adjustments to his initial determination throughout the irrigation season

as conditions develop, as provided for in steps 6 and 7 of the *Methodology Order*. These occur “approximately halfway through the irrigation season.” 382 R., p.599. The Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination. It would be unreasonable, for example, to require the Director to update his material injury determination to reasonable in-season demand on a daily or weekly basis as a result of changing conditions. If the Director determines that changing conditions require earlier, or more frequent adjustments, than that provided for in his *Methodology Order*, the Director may undertake such adjustments in his discretion.

The Coalition argues that in 2012 the Director failed to timely make adjustments to his initial material injury determination to reasonable in-season demand. It points to the fact that shortly after the USBOR and USACE issued their Joint Forecast on April 5, 2012, the USBOR and USACE issued a revised Joint Forecast on April 16, 2012 that reduced predicted water flows. The Director made his initial material injury determination based on the April 5, 2012, Joint Forecast, and then declined to update his initial material injury again in April following the issuance of the revised Joint Forecast. 382 R., p755. The Court finds that the Director did not abuse his discretion in this respect. As stated above, the Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination. When the Director makes his in-season adjustments pursuant to steps 6 and 7 of the *Methodology Order*, he issues a revised forecast supply. That revised forecast supply will take into account the changing water conditions that differ from his initial April Forecast Supply. The Director must then adjust the mitigation obligations of the junior users accordingly. It is noted that the Court’s holding regarding step 8 of the *Methodology Order* should alleviate the concerns raised by the Coalition on this issue, since the initial material injury determination will not result in a cap of the junior users’ mitigation obligations. The Court finds that the Director’s decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

With respect to 2013, the Court finds that the Director acted arbitrarily and capriciously by waiting until August 27 to apply step 6 of the *Methodology Order*. Step 6 provides that “approximately half way through the irrigation season” the Director will revise the April forecast and determine the “time of need” for purposes of providing mitigation. 382 R., p. 599. In 2013, the Director did not issue his *Order Revising April 2013 Forecast Supply (Methodology 6-8)*

until August 27, 2013. 382 R., pp.948-957. The Coalition argues the Director's delay in applying step 6 required its members to make water delivery decisions for the remainder of the irrigation season without the benefit of the revised forecast and any related mitigation obligation. The Coalition argues the Director acted arbitrarily and capriciously by delaying the application of step 6. This Court agrees.

The Director identifies the "irrigation season" as running from "the middle of March to the middle of November - an eight month span." 382 R., p. 1039. Therefore, mid-July is halfway through the irrigation season. The word "approximately" is defined as "almost correct or exact: close in value or amount but not precise." *See e.g.* www.merriam-webster.com/dictionary/approximately. Although step 6 provides for some flexibility by not requiring the revision to be made precisely halfway through the irrigation season, a delay of close to a month and half does not even fit under a generous interpretation of the word "approximately." In this regard, the Director acted arbitrarily and capriciously. The Director should apply his established procedure as written or further define and/or refine the procedure so that Coalition members relying on the procedure know when to anticipate its application and are able to plan accordingly.

C. The Director's calculation of crop water need of the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company in 2013, as set forth in his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* is set aside and remanded for further proceedings as necessary.

The Coalition asserts that the Director has erroneously refused to use certain irrigated acreage information provided by it when determining its crop water need under steps 1 and 2 of the *Methodology Order*. The Coalition's argument focuses primarily on the 2013 water year. Step 1 of the *Methodology Order* requires the Coalition "to 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%" on or before April 1. 382 R., p.597. Step 2 provides that starting at the beginning of April, the Department will calculate the cumulative crop water need volume for all land irrigated with surface water within the boundaries of each member of the SWC. *Id.* It further provides that volumetric values of crop water need will be calculated "using ET and precipitation values

from the USBR's AgriMet program, *irrigated acres provided by each entity*, and crop distributions based on NASS data." *Id.*

The record establishes that in March of 2013, the members of the Coalition provided the Director with shape files showing the acres being irrigated within the water delivery boundaries for the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company. 382 R., pp.821-828; *see also* 20130329 BID & TFCC Folder (in Bastes Stamped OCR Docs) (382 R., Disc 1). With respect to the A&B Irrigation District, Milner Irrigation District and North Side Canal Company, the Coalition informed the Director that the acres being irrigated within the water delivery boundaries for those entities was the same as the previous year. *Id.* Therefore, the Court finds that the Coalition timely complied with the *Methodology Order's* step 1 requirements. The Director also found that the Coalition complied with step 1 in 2013. 382 R., p.830.

The record further establishes that even though the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company timely complied with the step 1 requirements, the Director did not use the irrigated acreage data provided by those entities data to calculate their crop water needs in 2013. IDWR 8-27-13_August Background Data Folder, document entitled "DS RISD Calculator" (in Bastes Stamped OCR Docs) (382 R., Disc 1). Rather, the Director used irrigated acreage data for the Burley Irrigation District and Minidoka Irrigation District contained in a report prepared by SPF Water Engineering in 2005 (i.e., 551 Ex. 4300). *Id.* With respect to the Twin Falls Canal Company, the Director used irrigated acreage data contained in a report from 2007 (i.e., 551 Ex. 4310). *Id.* In doing so, the Director calculated the crop water needs of those entities based on less irrigated acres than that provided by those entities. *Id.* The Director provides no reasoning or rationale in his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* for deviating from step 2 of the *Methodology Order* in this respect. 382 R., pp.948-957. As set forth above, if the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition's *Partial Decrees*, such a determination must be supported by clear and convincing evidence. *See, e.g., A&B Irr. Dist., v. Idaho Dept. of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (holding, "Once a decree is presented to an administering agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence"). Since

the Director's decision to deviate from step 2 in this respect is not supported by reasoning it is hereby set aside and remanded for further proceedings as necessary.

D. The Coalition is not entitled to the relief it seeks on the issue of the Director's process for the use of storage water as mitigation.

The Coalition argues that the Director has failed to require that the use of storage water for mitigation be accomplished in accordance with the Water District 01 Rental Pool rules and procedures. Further, that the Director has provided no formal defined process for interaction between IDWR, Water District 01, and junior ground water users when addressing storage water leased, optioned, or otherwise contracted for mitigation purposes. The Coalition complains specifically of the mitigation water secured by IGWA in 2010 and 2013. With respect to storage water secured by IGWA under its 2010 mitigation plan, this Court has already held that mitigation plan, and its use of storage water located in the Upper Snake Reservoir System for mitigation, complied with the requirements of the CM Rules. *Memorandum Decision and Order on Petition for Judicial Review*, Twin Falls County Case No CV-2010-3075 (Jan. 25, 2011). This Court's holding in that case will not be revisited.¹⁵ With respect to the mitigation water secured by IGWA in 2013, the Court finds that the Director reviewed leases and contracts evidencing that IGWA had secured the required amount of mitigation water. 382 R., pp.881-887. Based on his review, the Director found that those leases and contracts would provide water to the Coalition at the Time of Need, and concluded that IGWA had satisfied its mitigation obligation. 382 R., p.884. The Court finds the Director's holding in this respect complied with the requirements of the CM Rules, as well as this Court's decision in Twin Falls County Case No. CV-2010-3075. In addition, the Court finds that the Coalition is not entitled to the relief it seeks on this issue, as it has failed to establish that its substantial rights have been prejudiced as a result of the mitigation water secured in 2010 and 2013. I.C. § 67-5279(4).

¹⁵ A final judgment was entered in Twin Falls County Case No CV-2010-3075 on January 21, 2011. No appeal was taken from that final judgment.

E. The Director's decision to deny the Coalition the opportunity for a hearing in 2012 and 2013 is in violation of Idaho Code § 42-1701A.

At the administrative level, the Coalition requested hearings before the Department with respect to several final orders issued in 2012 and 2013, wherein the Director applied his methodology to the facts and circumstances presented by those water years. Those final orders include the Director's (1) *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)* dated April 13, 2012, (2) *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)* dated April 17, 2013, and (3) *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* dated August 27, 2013. 382 R., pp.728-742; 382 R., pp.829-846; and 382 R., pp.948-957. The Coalition argued it was entitled to such hearings under Idaho Code § 42-1701A, asserting that no administrative hearing had previously been held on those matters. The Director denied the requests, finding that the Coalition had been afforded hearings on the issues raised. 382 R., p.757; 382 R., pp.890-891; and 382 R., p.1040. The Director held that hearings conducted in 2008 and 2010 constituted hearings previously afforded to the Coalition on the matters. *Id.* This Court holds that the Director's decision in this respect was made in violation of Idaho Code § 42-1701A.

Idaho Code § 42-1701A provides in part that "any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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." I.C. § 42-1701A. The plain language of the statute is mandatory. The Director does not specify the previous hearings in 2008 and 2010 on which he relies in denying the Coalition's requests for hearing. However, the Director likely refers to the hearing held before Hearing Officer commencing on January 18, 2008, and the hearing on the *Methodology Order* held on May 24, 2010. Those two hearings pertained specifically to the development and issuance of the *Methodology Order*. However, the Director thereafter issued a series of final orders, listed above, applying his methodology to the facts and circumstances arising in the 2012 and 2013 water years. The hearings conducted in 2008 and 2010 did not address his application of his methodology to the 2012 and 2013 water years. And, a review of the Coalition's *Requests for Hearing* establishes that the Coalition raised issues, and requested hearings on issues, not previously addressed in the 2008 and 2010 hearings.

The Coalition's *Request for Hearing on Order Revising April 2013 Forecast Supply (Steps 6-8)* is illustrative. 382 R., pp.969-979. The Coalition requested a hearing on the Director's issuance of his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* on August 27, 2013. It asserted that waiting until August 27 to issue a revised forecast was contrary to step 6 of the *Methodology Order*, which provides that "[a]pproximately halfway through the irrigation season" the Director will issue a revised forecast supply. 382 R., pp.970-971. The Coalition also requested a hearing on the Director's decision to apportion the 14,200 acre-feet of mitigation water secured by IGWA to give 7,300 acre-feet to American Falls Reservoir District No. 2 and 6,900 acre-feet to the Twin Falls Canal Company. 382 R., pp.971-972. It asserted that such an apportionment was in error, given that the entirety of the mitigation water was initially secured to address material injury to the Twin Falls Canal Company. *Id.* The record establishes that neither of these matters had been previously addressed in a prior administrative hearing. These arguments do not attack the *Methodology Order* itself, but rather challenge whether the Director complied with the terms of the *Methodology Order* in his application of his methodology to the 2013 water year. Therefore, the Director was statutorily required to afford the Coalition a hearing under the plain language of Idaho Code § 42-1701A.

Since the Director did not previously afford the Coalition a hearing on the issuance raised in the subject *Requests for Hearing*, the Director's decisions to deny the Coalition the opportunity for a hearing on those *Requests* were made in violation of Idaho Code § 42-1701A. The Court further finds that substantial rights of the Coalition members were prejudiced in the form of their statutory right to an administrative hearing. As a result, the Director's decisions in this respect are hereby set aside and remanded for further proceedings as necessary.

F. The City of Pocatello is not entitled to the relief it seeks with respect to the Director's *As-Applied Order*.

The City of Pocatello seeks judicial review of the Director's *As-Applied Order* on several grounds. It first argues that the *As-Applied Order*, wherein the Director applied steps 3 and 4 of the *Methodology Order* to the 2010 water year, is arbitrary and capricious. Specifically, that the *As-Applied Order* arbitrarily and capriciously based its initial material injury determination to the Coalition's reasonable in-season demand upon a historic demand baseline analysis and an intentional underestimation of water supply. This argument is not an attack on the *As-Applied*

Order, but rather another challenge to the Director's methodology for determining material injury to reasonable in-season demand as set forth in the *Methodology Order*. This Court addressed and rejected the City's argument in this respect above under Sections V.K. and V.L.

The City of Pocatello next argues that requiring junior users to secure mitigation water that is ultimately not required for beneficial use is contrary to Idaho law.¹⁶ Again, this is not a challenge to the *As-Applied Order*, but rather a challenge to steps 4 and 8 of the *Methodology Order*. If the Director determines that material injury to reasonable in-season demand exists or will exist under steps 3 and 4, then the junior users are required under step 4 to establish their ability to mitigate that injury to avoid curtailment. 382 R., pp.598-599. To avoid curtailment, junior users only need establish their ability to secure mitigation water to be provided to the Coalition at a later date (i.e., the "Time of Need"). Step 8 then provides that if the Director's in-season recalculations and adjustments establish that material injury to reasonable in-season demand is less than initially determined due to changing conditions, the juniors will not need to provide the full amount of water initially secured to the Coalition. 382 R., p.600. The City's argument that this result is contrary to law is unavailing, and fails to account for the burdens of proof and evidentiary standards established by Idaho law.

As stated in more detail above, when the Director makes his initial material injury determination to reasonable in-season demand in April, he is making the determination that material injury is occurring or will occur. Under the CM Rules and established Idaho law, the Director must curtail at that point, or allow out-of-priority water use pursuant to a properly enacted mitigation plan. *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. There is no presumption that administering to the full quantity of the Coalition's decreed water rights will result in waste. To the contrary, since the Coalition's water rights are decreed rights, Idaho law dictates that proper weight must be given to the decreed quantity of those rights. As a result, the presumption under Idaho law is that the Coalition members are entitled to their decreed quantities in times of shortage. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If junior users believe that administering to the full decreed amount of the Coalition's water rights will result in waste, they must come forth with clear and convincing evidence establishing that fact. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

¹⁶ As set forth in further detail below, the Director's *As-Applied Order* did not require or result in the City of Pocatello securing mitigation water in 2010 that was not ultimately required for beneficial use.

It is against these legal presumptions, burdens of proof, and evidentiary standards that the Director's *Methodology Order* must be analyzed. In the *Methodology Order*, the Director recognizes that "[i]f 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." 382 R., p.593. And, that:

By requiring that junior ground water users provide of 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.

Id. The Court finds that the Director's analysis in this respect protects senior rights in times of shortage by appropriately accounting for the legal presumptions, burdens of proof, and evidentiary standards required by Idaho law. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

The City of Pocatello next argues that in determining the reasonable in-season demand of the Coalition in his 2010 *As-Applied Order*, the Director failed to account for all water diverted by Coalition members for delivery to other entities (i.e., wheeled water). The *Methodology Order* provides that in calculating the Coalition's reasonable in-season demand, "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." 382 R., p.578. The City argues that the Director erroneously failed to subtract all wheeled water from the Coalition's reasonable in season demand calculations. This Court disagrees. The City relies on Exhibit 3000 from the hearing on the *As-Applied Order* in 2010. That exhibit provides that "Wheeled water transactions for A&B, AFRD2, Minidoka, and TFCC *may have occurred*, but values were less than 1% of total demand and therefore were not considered." 382 Ex. 3000, *Hearing on the As-Applied Order*. That exhibit only establishes that wheeled water transactions "may have occurred." The fact that such transaction may have occurred is not sufficient if the Director is going to use that data to administer to less than the full amount of the Coalition's decreed rights. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249 (holding, "Once a decree is presented to an administering agency or court, all changes to

that decree, permanent or temporary, must be supported by clear and convincing evidence”). The City points to no clear and convincing evidence in the record establishing that such transactions did occur. Therefore, the City is not entitled to the relief it seeks on this issue.

The City of Pocatello next argues that the Director improperly limited the scope of a hearing held on one of the Director’s orders applying his methodology to the 2010 water year. This Court disagrees. On April 29, 2010, the Director issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)*. 382 R., pp.185-198. Unlike the Coalition’s requests for hearings in 2012 and 2013, which were improperly denied, the Director acted consistent with Idaho Code § 42-1701A in 2010 by granting a hearing following the issuance of his April 29, 2010, *Order* when requested. The April 29, 2010, *Order* was limited to applying steps 3 and 4 of the *Methodology Order* to the 2010 water year. Therefore, the Director did not err in limiting the evidence presented at that hearing to information relevant to whether the Director’s application of steps 3 and 4 to the 2010 water year complied with the *Methodology Order*. 382 R., p.466. The Court finds, after a review of the record in this case, that the Director complied with the requirements of Idaho Code § 42-1701A, and that the City of Pocatello had a meaningful opportunity to be heard at that hearing, as Department staff familiar with the *Order* were present at that hearing to present evidence and testimony and to be subject to examination. Therefore, the City of Pocatello’s request for relief on this issue is denied.

Last, with respect to all of the issues raised by the City of Pocatello relating to the Director’s *As-Applied Order*, the Court finds that City of Pocatello has failed to establish that its substantial rights were prejudiced as a result of that *Order* under Idaho Code § 67-5279(4). The Director’s *As-Applied Order* required no action on the part of the City of Pocatello. The Director did not order the City of Pocatello to mitigate any material injury to the Coalition in 2010 in his *As-Applied Order*. Nor has the City of Pocatello established that it would have been in the curtailment zone in 2010 under the *As-Applied Order*. Only IGWA was required to show its ability to secure mitigation water under the Director’s *As-Applied Order* in 2010 in order to avoid curtailment. Therefore, since the City of Pocatello has failed to establish that its substantial rights were prejudiced as a result of the Director’s *As-Applied Order*, it is not entitled to the relief it seeks with respect to that *Order*. I.C. § 67-5279(4).

VII.

REMAINING *FINAL ORDERS*

The Coalition filed *Petitions* seeking judicial review of the Director's *Final Order Revising April 2010 Forecast Supply (Methodology Step 7)*, dated September 17, 2010, *Final Order Establishing 2010 Reasonable Carryover (Methodology Step 9)*, dated November 30, 2010, and *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)*, dated June 13, 2013. The Coalition provided no briefing or argument specific to these *Final Orders* on judicial review. However, through these *Final Orders* the Director applied his methodology as set forth in the *Methodology Order*. To the extent these *Final Orders* applied the *Methodology Order* in a manner inconsistent with this Court's analysis and holdings regarding the *Methodology Order* as set forth herein, they are set aside and remanded for further proceedings as necessary.

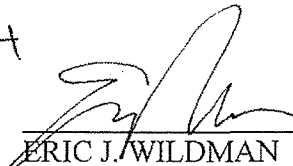
VIII.

CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the actions taken by Director in this matter are affirmed in part and set aside in part. The case is remanded for further proceedings as necessary consistent with this decision.

IT IS SO ORDERED.

Dated September 26, 2014



ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITIONS FOR JUDICIAL REVIEW was mailed on September 26, 2014, with sufficient first-class postage to the following:

CITY OF POCA TELLO

Represented by:

A. DEAN TRANMER

CITY OF POCA TELLO

PO BOX 4169

POCA TELLO, ID 83201

Phone: 208-234-6148

GARY SPACKMAN

Represented by:

GARRICK L BAXTER

DEPUTY ATTORNEY GENERAL

STATE OF IDAHO - IDWR

PO BOX 83720

BOISE, ID 83720-0098

Phone: 208-287-4800

A&B IRRIGATION DISTICT

BURLEY IRRIGATION DISTRICT

MILNER IRRIGATION DISTRICT

NORTH SIDE CANAL COMPANY

TWIN FALLS CANAL COMPANY

Represented by:

PAUL L ARRINGTON

195 RIVER VISTA PL STE 204

TWIN FALLS, ID 83301-3029

Phone: 208-733-0700

IDAHO GROUND WATERS

Represented by:

RANDALL C BUDGE

201 E CENTER ST STE A2

PO BOX 1391

POCA TELLO, ID 83204-1391

Phone: 208-232-6101

CITY OF POCA TELLO

Represented by:

SARAH A KLAHN

WHITE & JANKOWSKI LLP

KITTREDGE BUILDING

511 16TH ST STE 500

DENVER, CO 80202

Phone: 303-595-9441

A&B IRRIGATION DISTICT

BURLEY IRRIGATION DISTRICT

MILNER IRRIGATION DISTRICT

NORTH SIDE CANAL COMPANY

TWIN FALLS CANAL COMPANY

Represented by:

TRAVIS L THOMPSON

195 RIVER VISTA PL STE 204

TWIN FALLS, ID 83301-3029

Phone: 208-733-0700

AMERICAN FALLS RESERVOIR

MINIDOKA IRRIGATION DISTRICT

Represented by:

W KENT FLETCHER

1200 OVERLAND AVE

PO BOX 248

BURLEY, ID 83318-0248

Phone: 208-678-3250

DIRECTOR OF IDWR

PO BOX 83720

BOISE, ID 83720-0098

JULIE MURPHY

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/s/

Deputy Clerk



Exhibit C

Travis L. Thompson

From: John K. Simpson
Sent: Sunday, May 28, 2023 7:24 AM
To: Travis L. Thompson
Subject: FW: SWC TWG

From: Anders, Matthew <Matthew.Anders@idwr.idaho.gov>
Sent: Tuesday, September 6, 2022 11:20 AM
To: John Simpson <jks@idahowaters.com>; Travis Thompson <tlth@idahowaters.com>; Nicole L Swafford <nls@idahowaters.com>; Jessica Nielsen <jf@idahowaters.com>; wkf@pmt.org; randy@racineolson.com; TJ Budge <tj@racineolson.com>; kathleenmarion.carr@sol.doi.gov; Gehlert, David (ENRD) <David.Gehlert@usdoj.gov>; Matt Howard <MHoward@usbr.gov>; sklahn@somachlaw.com; dthompson@somachlaw.com; rdiehl@pocatello.us; Chris Bromley <cbromley@mchughbromley.com>; 'Candice McHugh' <cmchugh@mchughbromley.com>; rewilliams@wmlattys.com; rharris@holdenlegal.com; rfife@idahofallsidaho.gov; Olenichak, Tony <Tony.Olenichak@idwr.idaho.gov>; Skinner, Corey <Corey.Skinner@idwr.idaho.gov>; wparsons@pmt.org
Cc: Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>; Cecchini-Beaver, Mark <Mark.Cecchini-Beaver@idwr.idaho.gov>; Ferguson, Kara <Kara.Ferguson@idwr.idaho.gov>
Subject: SWC TWG

Hello,

As directed by Director Spackman during the Surface Water Coalition (SWC) delivery call status conference on August 5, 2022, IDWR is convening a technical working group (TWG) to review some of the methods in the "Fourth Amended Final Order Regarding Methodology For Determining Material Injury To Reasonable In-Season Demand and Reasonable Carryover" issued on April 16, 2016. I anticipate that the SWC TWG will meet on several occasions between now and December to review and discuss some specific calculation methods outlined in the order. If you want a representative of your organization to participate in the TWG meetings, please send me their name and contact information.

Thanks!

Matt

Matt Anders, PG
Hydrology Section Supervisor
Idaho Department of Water Resources
322 East Front St.
Boise, ID 83720

Ph: (208) 287-4932



Exhibit D

Travis Thompson

From: Anders, Matthew <Matthew.Anders@idwr.idaho.gov>
Sent: Tuesday, October 25, 2022 12:16 PM
To: Jaxon Higgs; ssigstedt@lynker.com; Dave Shaw; hwelsh@spronkwater.com; Greg Sullivan; Ferguson, Kara; dave.colvin@lrewater.com; TJ Budge; wkf@pmt.org; Travis Thompson; sklahn@somachlaw.com; Chris Bromley; 'Candice McHugh'; MHoward@usbr.gov; rbsnowmobiles@gmail.com; Kresta Davis (KDavis2@idahopower.com); Dave Blew (DBlew@Idahopower.com); Ragan, Brian; Baxter, Garrick; John Simpson; Heidi Netter
Subject: SWC TWG Prep
Attachments: Meeting Agenda 11-16-22.docx; Meeting Agenda 11-17-22.docx; 2022 SWC TWG participants_10-25-22.docx

Hello,

This morning I flooded your email inboxes with invitations to Surface Water Coalition Technical Work Group (TWG) meetings. It is difficult to find times when all of the technical participants are available to meet, so I scheduled several meetings before people's calendars fill up. I anticipate we will need to meet 5 times for presentations and discussions. I scheduled 3 additional meetings in case we need more time.

IDWR is planning to give presentations to the TWG on the following topics. There will be time for discussion after each presentation. We will also provide time for discussion of a topic at subsequent TWG meetings. For some of these topics, IDWR will propose a change to the Methodology. For others, IDWR will simply present the results of our internal analysis but not recommend changing the Methodology.

- Base Line Year
- Forecasting Natural Flow Supply
- Near-Real-Time METRIC for ET
- Project Efficiency
- ESPAM 2.2: Steady State vs. Transient

IDWR's goal for this TWG is to get verbal feedback at meetings, followed up by written feedback, on the technical merits of the topics presented. The TWG will not attempt to reach a consensus on which Methodology updates to pursue further. Written comments should focus on these general questions:

- Does the technique presented provide a better technical basis than the current technique for the analysis in question?
- Is there an alternative to the technique presented that would provide a better technical basis for the analysis in question?

Attached are the agendas for the first two TWG meetings. We will send out the PowerPoint presentations a few days before the meetings. I also attached the current version of the participant list.

Thanks!

Matt

Matt Anders, PG
Hydrology Section Supervisor
Idaho Department of Water Resources
322 East Front St.
Boise, ID 83720

Ph: (208) 287-4932



IDAHO DEPARTMENT OF
WATER RESOURCES

Exhibit E

Surface Water Coalition Technical Working Group Participants

10/25/22

Name	Organization	Representing	Email
Technical Participants			
Jaxon Higgs	Water Well Consultants	IGWA	jaxon@waterwellconsultants.com
Sophia Sigstedt	Lynker Technologies	IGWA	ssigstedt@lynker.com
Dave Colvin	LRE Water	SWC	dave.colvin@lrewater.com
Dave Shaw	ERO Resources	SWC	dshaw@eroreources.com
Heidi Welsh	Spronk Water Engineers	Pocatello	hwelsh@spronkwater.com hnetter@spronkwater.com
Greg Sullivan	Spronk Water Engineers	Pocatello	gsullivan@spronkwater.com
Kara Ferguson	IDWR	IDWR	Kara.Ferguson@idwr.idaho.gov
Matt Anders	IDWR	IDWR	Matthew.Anders@idwr.idaho.gov
Jennifer Sukow	IDWR	IDWR	Jennifer.Sukow@idwr.idaho.gov
Ethan Geisler	IDWR	IDWR	Ethan.Geisler@idwr.idaho.gov
Phil Blankenau	IDWR	IDWR	Philip.Blankenau@idwr.idaho.gov
Attorney Participants			
TJ Budge	Racine Olson	IGWA	tj@racineolson.com
Kent Fletcher	Fletcher Law	AFRD2 & Minidoka	wkf@pmt.org
John Simpson	Barker Rosholt & Simpson	A&B, Burley, Milner, NSCC, TFCC	jks@idahowaters.com
Travis Thompson	Barker Rosholt & Simpson	A&B, Burley, Milner, NSCC, TFCC	tlt@idahowaters.com
Sarah Klahn	Somach Simmons & Dunn	Pocatello	sklahn@somachlaw.com
Chris Bromley	McHugh Bromley	Coalition of Cities	cbromley@mchughbromley.com
Candice McHugh	McHugh Bromley	Coalition of Cities	cmchugh@mchughbromley.com
Matt Howard	USBR	USBR	MHoward@usbr.gov
Non-Active Participants			
Randy Brown	SWID	SWID	rbsnowmobiles@gmail.com
Kresta Davis	Idaho Power Company	IPCo	KDavis2@idahopower.com
David Blew	Idaho Power Company	IPCo	DBlew@idahopower.com
Brian Ragan	IDWR	IDWR	Brian.Ragan@idwr.idaho.gov

Exhibit F

Surface Water Coalition Methodology – TWG

AGENDA

November 16, 2022

Time	Topic	Presenter
1:00 – 1:05	Introductions	Anders
1:05 – 1:15	Goal of TWG	Anders
1:15 – 1:50	Overview of 4th Amended Methodology	Ferguson/Anders
1:50 – 2:00	Break	
2:00 – 3:00	Base Line Year	Anders

Surface Water Coalition Methodology – TWG

AGENDA

November 17, 2022

Time	Topic	Presenter
9:00 – 9:05	Introductions	Anders
9:05 – 9:20	Feedback on Base Line Year	Anders
9:20 – 10:00	Forecasting Natural Flow Supply	Ferguson
10:00 – 10:10	Break	
10:10 – 11:00	Near Real Time METRIC for ET	Geisler

Surface Water Coalition Methodology – TWG

AGENDA

December 1, 2022

Time	Topic	Presenter
1:00 – 1:05	Introductions	Anders
1:05 – 1:25	Review of IDWR SWC Website	Ferguson
1:25 – 1:45	Review of Demand Shortfall Calculator	Anders
1:45 – 1:50	Break	
2:00 – 3:00	Follow-up to Near Real Time METRIC for ET	Geisler/Anders

Surface Water Coalition Methodology – TWG

AGENDA

December 9, 2022

Time	Topic	Presenter
1:00 – 1:05	Introductions	Anders
1:05 – 1:25	Follow-up to Near Real Time METRIC for ET	Geisler
1:25 – 1:45	Follow-up to Near Real Time METRIC for ET	Sullivan
1:45 – 1:50	Break	
1:50 – 2:30	Reasonable Carryover	Anders

Surface Water Coalition Methodology – TWG

AGENDA

December 14, 2022

Time	Topic	Presenter
1:00 – 1:05	Introductions	Anders
1:05 – 1:45	Follow-up to Forecasting Natural Flow Supply	Ferguson
1:45 – 1:50	Break	
1:50 – 2:30	Follow-Up Questions to TWG Presentations	All
2:30 – 2:40	TWG Comments	Anders

Exhibit G



Proposed Modification of the Methodology For Determining Material Injury To Reasonable In-Season Demand and Reasonable Carryover: Baseline Year

Presented by: Matt Anders

Date: 11/16/2022

Elements of Shortfall Calculation – Baseline Year (BLY)

Milestone	Supply	Reasonable In-Season Demand (RISD)
April	<p>Forecast Natural Flow (Apr-Oct)</p> <ul style="list-style-type: none"> Regression Equations <p>Predicted Storage Allocation</p> <ul style="list-style-type: none"> Analogous Year or Years 	<p>Predicted Demand (Apr-Oct)</p> <ul style="list-style-type: none"> Historical Demand from Baseline Year (BLY)
July	<p>Actual Diverted Natural Flow (Apr-June)</p> <p>Forecast Natural Flow (July-Oct)</p> <ul style="list-style-type: none"> Regression Equations <p>Storage Allocation</p> <ul style="list-style-type: none"> Storage Report or Analogous Year 	<p>Crop Water Need (Apr-June)</p> <ul style="list-style-type: none"> ET Precipitation Project Efficiency <p>Predicted Demand (July-Oct)</p> <ul style="list-style-type: none"> Historical Demand from Baseline Year (BLY)

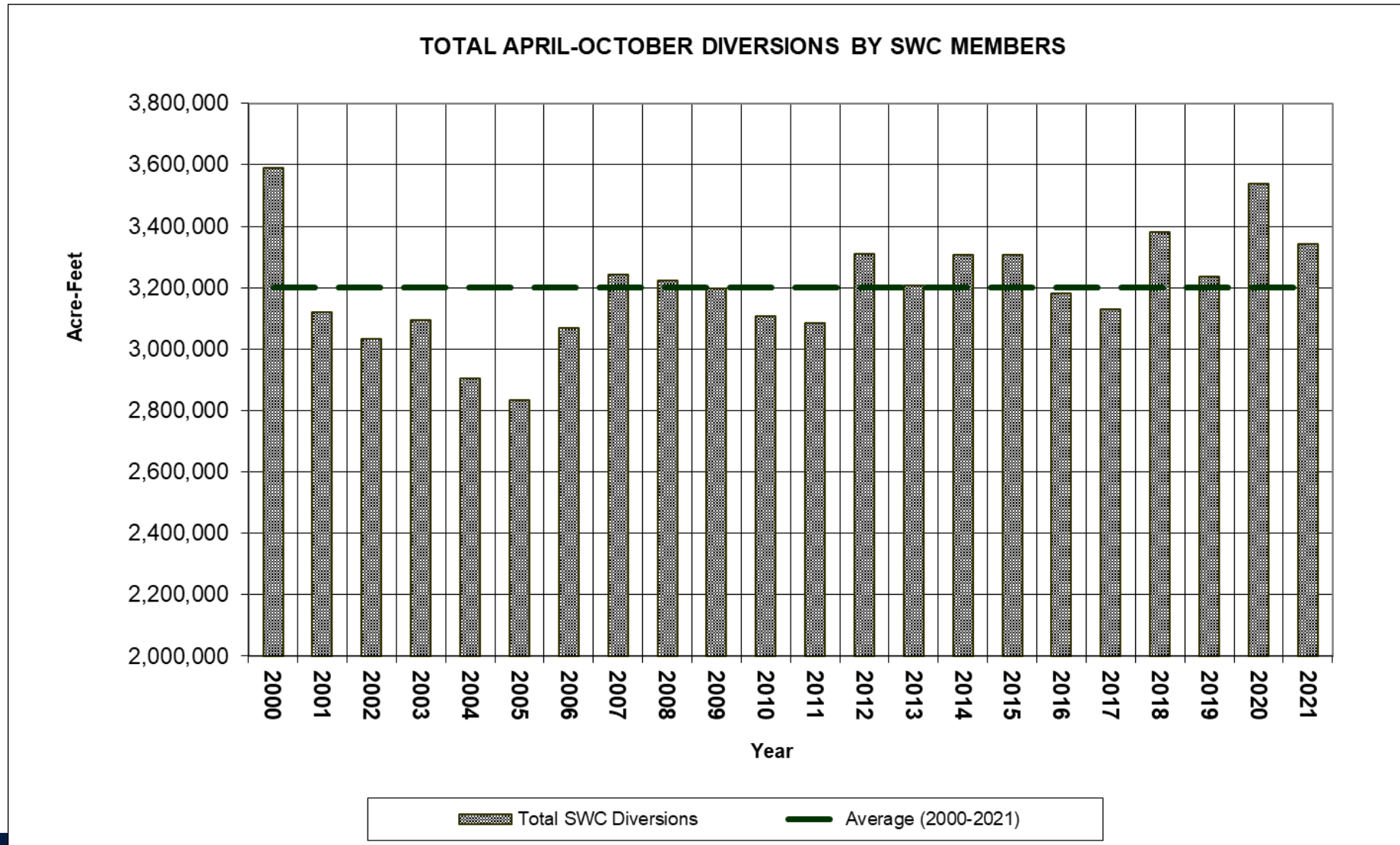
Elements of Shortfall Calculation – Baseline Year (BLY)

Milestone	Supply	Reasonable In-Season Demand (RISD)
Time of Need	Actual Diverted Natural Flow (Apr-Time of Need)	Crop Water Need (Apr-Time of Need) <ul style="list-style-type: none"> • ET • Precipitation • Project Efficiency
	Forecast Natural Flow (Time of Need-Oct) <ul style="list-style-type: none"> • Natural Flow from Comparable Year Storage Allocation <ul style="list-style-type: none"> • Storage Report 	Predicted Demand (Time of Need-Oct) <ul style="list-style-type: none"> • Historical Demand from Baseline Year (BLY)
November	Actual Diverted Natural Flow (Apr-Oct)	Crop Water Need (Apr-Oct) <ul style="list-style-type: none"> • ET • Precipitation • Project Efficiency
	Storage Allocation <ul style="list-style-type: none"> • Storage Report 	

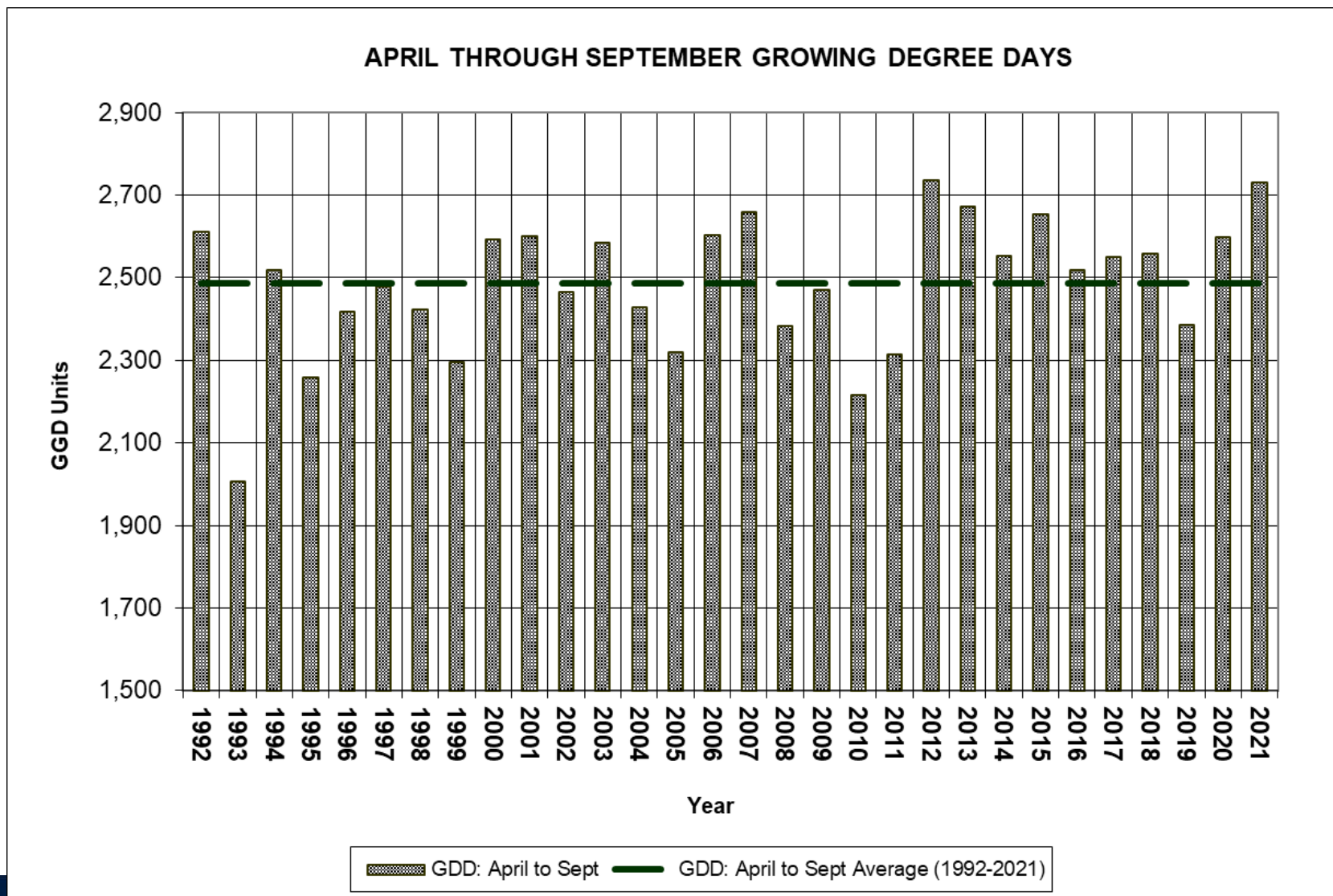
Methodology Reference

- Baseline Year (BLY) (Page 5 of Methodology)
 - Finding of Fact 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.
 - Finding of Fact 9: Intended to shift risk to junior water right holders.
- Used in methodology calculation to predict irrigation demand
 - April
 - July
 - Time of Need
- BLY Criteria
 - Above average
 - Diversions
 - Temperatures (Growing Degree Days)
 - ET
 - Below average precipitation
 - Not a year of limited supply

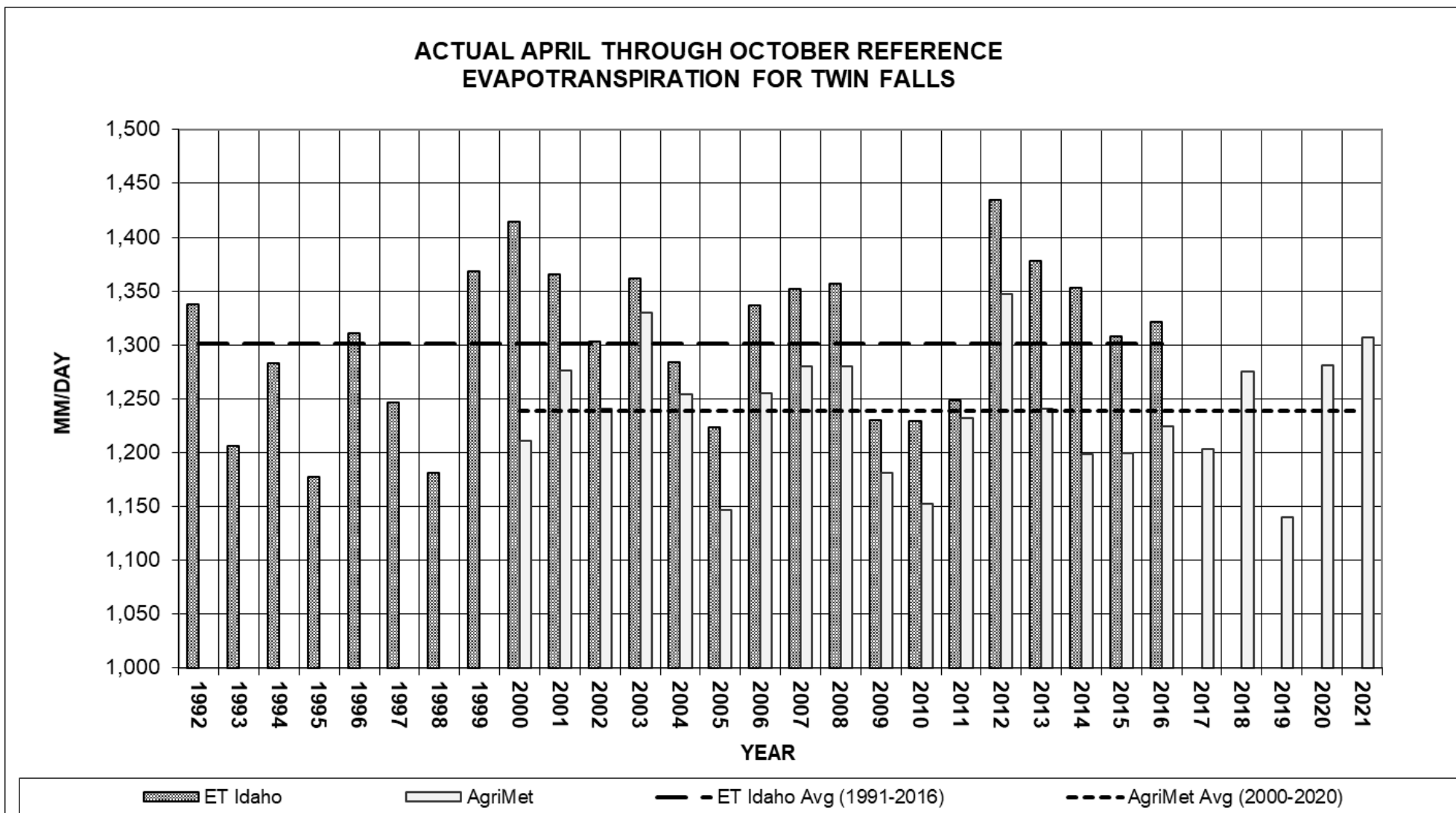
Diversions (Above Average)



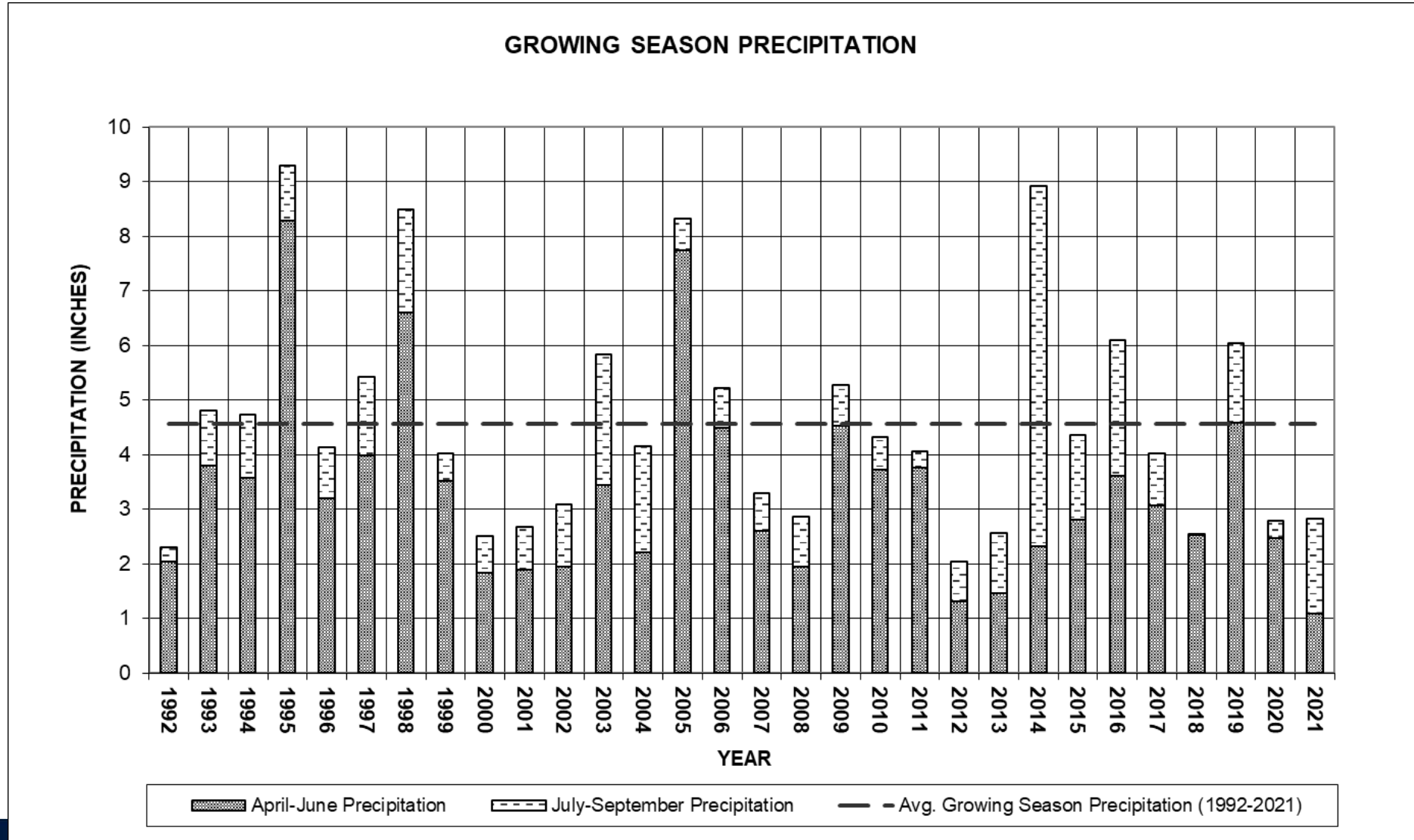
Growing Degree Days (Above Average)



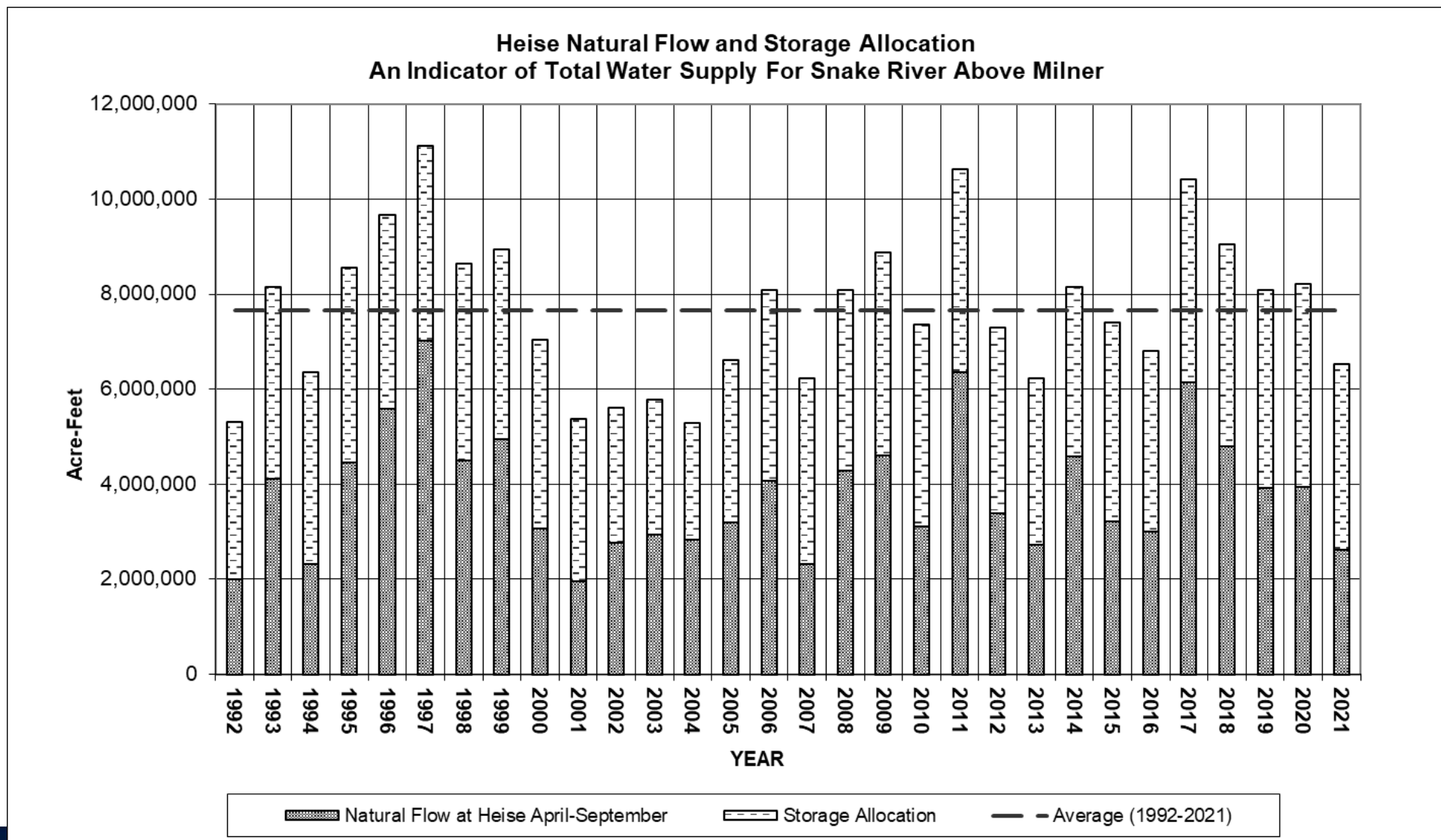
Reference ET (Above Average)



Precipitation (Below Average)



Supply Not Limited (Above Average)



BLY Criteria Data Ranges

- BLY Criteria
 - Above average
 - Diversions 2000-2021
 - Finding of Fact 8 (page 5) & Finding of Fact 20 (page 10):
To capture current irrigation practices...selection of a BLY should be limited to years subsequent to 1999.
 - Temperatures (Growing Degree Days) 1992-2021
 - ET 1992-2021
 - Below average precipitation 1992-2021
 - Not a year of limited supply 1992-2021

Diversions

	A&B (AF)	AFRD2 (AF)	BID (AF)	Milner (AF)	Minidoka (AF)	NSCC (AF)	TFCC (AF)	Total (AF)
BLY 06/08/12	59,993	427,672	251,531	47,135	369,492	978,888	1,060,011	3,194,722
Average 2000-2014	57,944	421,003	241,806	50,450	355,105	983,517	1,045,120	3,154,945
BLY % of Average 2000 -2014	103.5%	101.6%	104.0%	93.4%	104.1%	99.5%	101.4%	101.3%

BLY 06/08/12	59,993	427,672	251,531	47,135	369,492	978,888	1,060,011	3,194,722
Average 2000-2021	59,474	427,766	247,128	53,798	354,550	996,781	1,062,352	3,201,848
BLY % of Average 2000-2021	100.9%	100.0%	101.8%	87.6%	104.2%	98.2%	99.8%	99.8%

- Finding of Fact 25 (page 11): When compared to the average diversion from 2000-2014, the 06/08 diversions are no longer above average.
- 06/08/12 can no longer be the BLY because diversions are no longer above average.

BLY Selection Criteria

Year	Above Average Σ SWC Diversions (2000-2021)	Above Average GDD (1992-2021)	Above Average ET (1991-2021)	Below Average Precipitation (1992-2021)	Above Average Heise Runoff (1992-2021)	Supply Not Limited (Above Average) (1992-2021)	Notes
2000	x	x		x			
2001		x	x	x			
2002			x	x			
2003		x	x				
2004				x			
2005							
2006		x	x		x	x	Below average diversions
2007	x	x	x	x			Hot dry Spring, low carryover TFCC
2008	x		x	x	x	x	Below average GGD
2009	x				x	x	
2010				x			
2011				x	x	x	Very Wet
2012	x	x	x	x			Hot dry spring, lowest precipitation, highest ET, most GGD
2013	x	x	x	x			Wet Fall, AFRD2 and TFCC reduced deliveries in-season.
2014	x	x			x	x	Record August Rains
2015	x	x		x			
2016		x					
2017		x		x	x	x	
2018	x	x	x	x	x	x	
2019	x				x	x	
2020	x	x	x	x	x	x	Abnormally high diversions?
2021	x	x	x	x			

* To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999 (Page 5).

SWC Annual Diversions

Year	A&B (AF)	AFRD2 (AF)	BID (AF)	Milner (AF)	Minidoka (AF)	NSCC (AF)	TFCC (AF)	Total SWC Diversions (AF)
2000	62,623	512,980	268,653	66,583	400,544	1,119,218	1,160,451	3,591,053
2001	63,229	415,977	225,398	53,572	369,320	979,689	1,012,202	3,119,388
2002	59,354	400,654	229,261	60,327	349,680	926,219	1,009,092	3,034,586
2003	59,479	397,573	249,562	56,966	353,245	929,453	1,046,624	3,092,903
2004	49,708	299,371	254,082	35,674	340,958	924,324	1,001,779	2,905,896
2005	46,929	401,735	219,600	38,948	307,628	900,339	918,011	2,833,190
2006	57,493	410,376	247,849	41,672	352,269	963,208	995,822	3,068,689
2007	60,227	429,040	259,495	52,342	375,519	1,015,260	1,048,965	3,240,849
2008	59,493	421,083	254,105	50,994	373,499	967,543	1,094,941	3,221,658
2009	57,344	453,757	236,983	55,713	343,520	1,007,862	1,043,006	3,198,185
2010	53,528	431,376	231,542	45,471	319,837	995,820	1,029,645	3,107,219
2011	53,788	427,228	219,855	46,932	319,744	963,049	1,054,435	3,085,031
2012	63,550	454,143	248,557	49,038	387,998	1,018,145	1,089,269	3,310,699
2013	62,016	400,729	248,424	52,561	364,124	1,021,024	1,058,154	3,207,032
2014	60,392	459,017	233,728	49,961	368,685	1,021,605	1,114,409	3,307,796
2015	62,975	442,896	253,107	55,153	368,773	1,021,958	1,102,412	3,307,275
2016	60,409	438,224	250,702	56,550	349,779	978,658	1,045,567	3,179,888
2017	60,713	391,658	239,685	62,371	335,922	987,102	1,053,742	3,131,193
2018	64,192	456,319	263,954	68,429	362,970	1,037,970	1,127,305	3,381,139
2019	56,115	436,533	254,189	52,326	327,963	1,032,687	1,075,987	3,235,802
2020	65,828	493,153	282,949	67,227	373,531	1,048,708	1,206,401	3,537,797
2021	69,035	437,025	265,141	64,748	354,595	1,069,340	1,083,514	3,343,398
Average	59,474	427,766	247,128	53,798	354,550	996,781	1,062,352	3,201,848

SWC Annual Diversions – Ranked

Year	A&B Rank	AFRD2 Rank	BID Rank	Milner Rank	Minidoka Rank	NSCC Rank	TFCC Rank	Total SWC Diversions Rank
2000	7	1	2	3	1	1	2	1
2001	5	15	20	11	6	14	18	15
2002	15	19	19	6	15	20	19	20
2003	14	20	11	7	12	19	14	17
2004	21	22	8	22	17	21	20	21
2005	22	17	22	21	22	22	22	22
2006	16	16	14	20	13	17	21	19
2007	12	12	5	13	3	10	13	8
2008	13	14	7	15	5	16	6	10
2009	17	6	16	9	16	11	16	12
2010	20	11	18	19	20	12	17	16
2011	19	13	21	18	21	18	11	18
2012	4	5	12	17	2	9	7	5
2013	8	18	13	12	9	8	10	11
2014	11	3	17	16	8	7	4	6
2015	6	7	9	10	7	6	5	7
2016	10	8	10	8	14	15	15	13
2017	9	21	15	5	18	13	12	14
2018	3	4	4	1	10	4	3	3
2019	18	10	6	14	19	5	9	9
2020	2	2	1	2	4	3	1	2
2021	1	9	3	4	11	2	8	4

Diversions – BLY 2018

	A&B (AF)	AFRD2 (AF)	BID (AF)	Milner (AF)	Minidoka (AF)	NSCC (AF)	TFCC (AF)	Total (AF)
BLY 06/08/12	59,993	427,672	251,531	47,135	369,492	978,888	1,060,011	3,194,722
Average 2000-2021	59,474	427,766	247,128	53,798	354,550	996,781	1,062,352	3,201,848
BLY % of Average 2000-2021	100.9%	100.0%	101.8%	87.6%	104.2%	98.2%	99.8%	99.8%

Proposed BLY 2018	64,192	456,319	263,954	68,429	362,970	1,037,970	1,127,305	3,381,139
Average 2000-2021	59,474	427,766	247,128	53,798	354,550	996,781	1,062,352	3,201,848
BLY % of Average 2000-2021	107.9%	106.7%	106.8%	127.2%	102.4%	104.1%	106.1%	105.6%

2018 BLY Demand Shortfall Hindcast

Year	April BLY 06-08-12 (AF)	April BLY 2018 (AF)	July BLY 06-08-12 (AF)	July BLY 2018 (AF)	November Actual Demand Shortfall (AF)
2000	30,183	126,125	0	0	0
2001	179,947	334,970	160,472	200,546	243,565
2002	42,800	131,308	17,381	45,136	31,217
2003	10,124	93,902	43,808	80,241	0
2004	199,101	364,958	223,032	264,426	264,340
2005	114,916	228,241	0	0	0
2006	0	0	365,880	388,939	23,792
2007	56,914	152,855	201,036	253,185	289,065
2008	0	15,138	46,525	55,334	0
2009	0	34,109	0	0	0
2010	94,957	190,898	0	0	0
2011	0	0	0	0	0
2012	0	53,778	69,066	92,125	139,524
2013	28,802	110,912	114,058	154,132	22,588
2014	0	0	0	0	0
2015	88,959	184,901	107,418	138,684	92,246
2016	44,163	111,457	21,271	44,330	7,853
2017	0	65,382	0	0	0
2018	0	44,805	0	0	10,996
2019	20,943	88,237	0	0	0
2020	0	59,101	0	0	0
2021	40,491	126,102	162,873	194,139	190,816

Diversions - 2020

	A&B (AF)	AFRD2 (AF)	BID (AF)	Milner (AF)	Minidoka (AF)	NSCC (AF)	TFCC (AF)	Total (AF)
BLY 06/08/12	59,993	427,672	251,531	47,135	369,492	978,888	1,060,011	3,194,722
Average 2000-2021	59,474	427,766	247,128	53,798	354,550	996,781	1,062,352	3,201,848
BLY % of Average 2000-2021	100.9%	100.0%	101.8%	87.6%	104.2%	98.2%	99.8%	99.8%

Proposed BLY 2020	65,828	493,153	282,949	67,227	373,531	1,048,708	1,206,401	3,537,797
Average 2000-2021	59,474	427,766	247,128	53,798	354,550	996,781	1,062,352	3,201,848
BLY % of Average 2000-2021	110.7%	115.3%	114.5%	125.0%	105.4%	105.2%	113.6%	110.5%

2020 BLY Demand Shortfall Hindcast

Year	April BLY 06-08-12 (AF)	April BLY 2018 (AF)	July BLY 06-08-12 (AF)	July BLY 2018 (AF)	November Actual Demand Shortfall (AF)
2000	30,183	242,054	0	0	0
2001	179,947	461,638	160,472	264,889	243,565
2002	42,800	248,875	17,381	103,917	31,217
2003	10,124	210,787	43,808	134,310	0
2004	199,101	492,060	223,032	322,017	264,340
2005	114,916	348,648	0	17,037	0
2006	0	77,945	365,880	424,154	23,792
2007	56,914	268,785	201,036	328,560	289,065
2008	0	94,234	46,525	60,897	0
2009	0	113,204	0	0	0
2010	94,957	306,828	0	22,571	0
2011	0	58,274	0	0	0
2012	0	137,335	69,066	127,340	139,524
2013	28,802	226,842	114,058	218,476	22,588
2014	0	56,595	0	33,283	0
2015	88,959	300,829	107,418	197,465	92,246
2016	44,163	217,598	21,271	79,545	7,853
2017	0	144,478	0	0	0
2018	0	123,901	0	0	10,996
2019	20,943	187,289	0	0	0
2020	0	138,197	0	0	0
2021	40,491	242,032	162,873	252,919	190,816

Questions

(208) 287-4932

matthew.anders@idwr.idaho.gov

Exhibit H



SWC methodology – calculation of priority dates for curtailment of junior groundwater users

Presented to the SWC Methodology Technical Working Group

Jennifer Sukow, P.E., P.G.

November 28, 2022

Methodology reference



- Curtailment date calculation (Step 2) (Page 36 of Methodology)
 - The ESPA Model will be run to determine the curtailment date which will produce a volume of water equal to the DS in the near Blackfoot to Minidoka reach. The model simulation will be run at steady state within the area of common ground water supply as described by CM Rule 50.01.
- Curtailment date calculation (Step 6) (Page 38 of Methodology)
 - 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 pursuant to an approved mitigation plan or to conduct other approved mitigation activities 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.¹³ 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.

Methodology reference

- Curtailment for carryover shortfall (Step 9) (Page 39 of Methodology)
 - Fourteen (14) days following the issuance by the Department of reasonable carryover shortfall 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.

Presentation outline

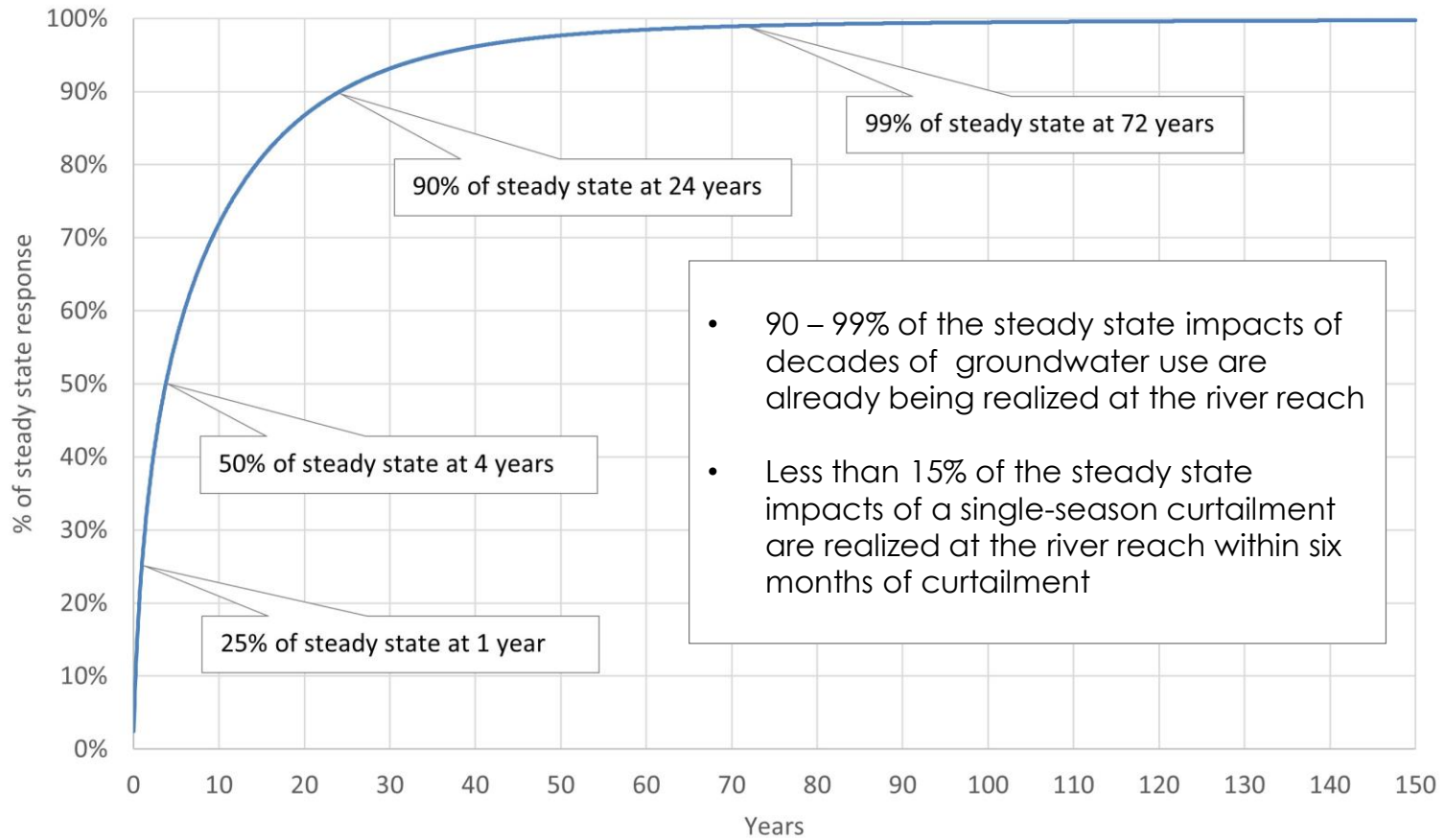
- ▶ Steady state vs. transient model simulations
- ▶ Transient model results for curtailment priority dates in 2022 orders
- ▶ Examples of transient model simulations for calculation of curtailment priority dates
 - ▶ Assumptions for transient model simulations
 - ▶ Comparison of priority dates and acres curtailed for various shortfall volumes
 - ▶ Transient analyses for water years 2021-2022

Steady state vs. transient model simulations

- ▶ Merriam-Webster definition of *steady state*
 - ▶ a state or condition of a system or process that does not change in time
- ▶ Steady state ESPAM simulation for calculation of curtailment priority date
 - ▶ Predicts long-term response to continuous curtailment of groundwater use at a constant rate for an infinite number of years
 - ▶ Result is a prediction of the long-term average annual impact of curtailment on the near Blackfoot to Minidoka reach
 - ▶ Curtailments ordered as prescribed in methodology order are not continuous or long-term
 - ▶ Groundwater use does not occur at a constant rate throughout the year

How long does it take to approach steady state conditions?

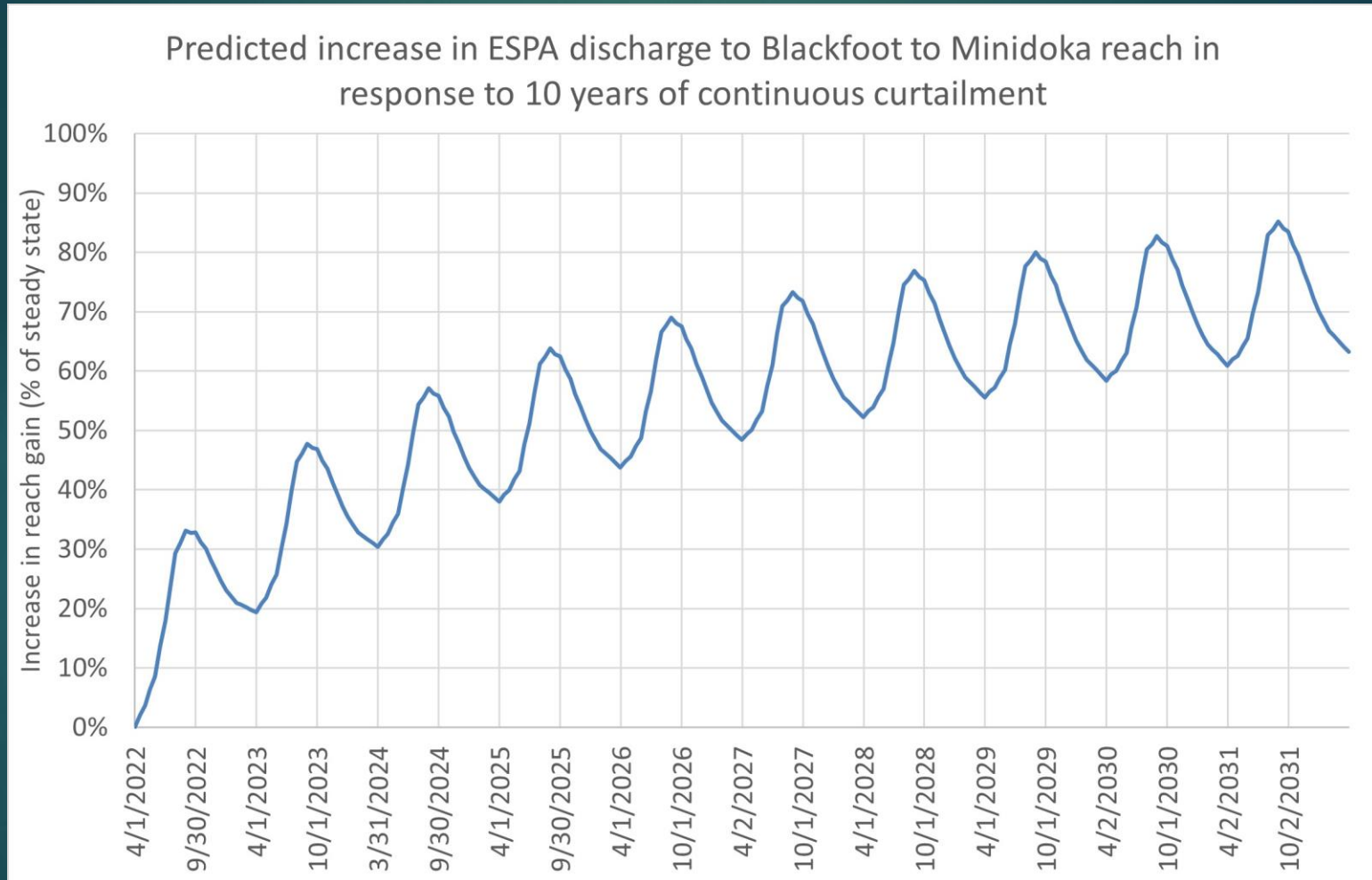
Time to reach steady state response to ACGW groundwater use (or curtailment) at near Blackfoot to Minidoka reach



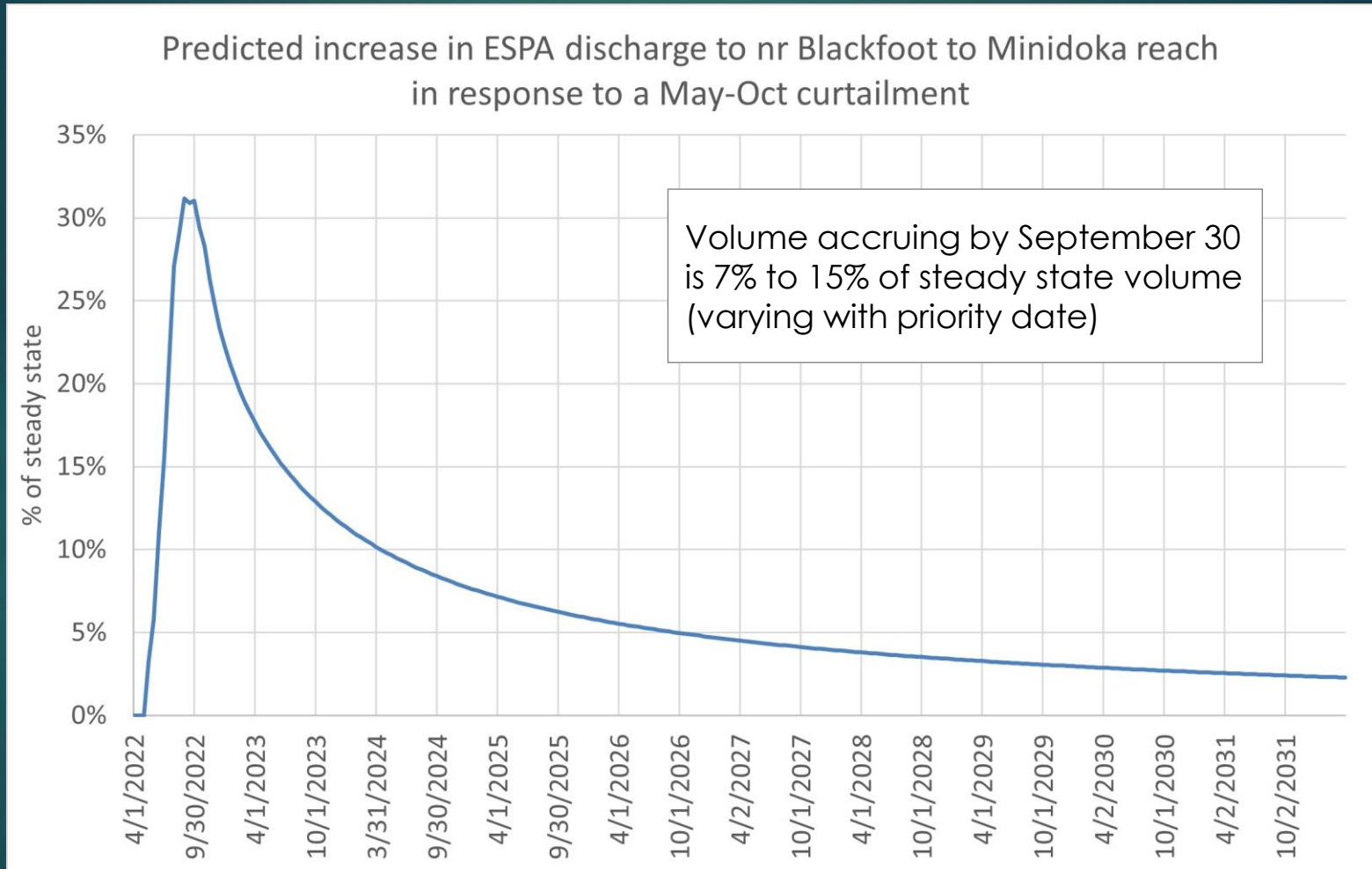
Steady state vs. transient model simulations

- ▶ Merriam-Webster definition of *transient*
 - ▶ passing especially quickly into and out of existence
- ▶ Transient ESPAM simulation for calculation of curtailment priority date
 - ▶ Predicts timing and magnitude of response to time-varying changes in aquifer stress resulting from short-term curtailment of groundwater use to address a predicted shortfall
 - ▶ Result is a prediction of the timing and magnitude of the response to time-varying curtailment of groundwater use

Steady state vs. transient model simulations



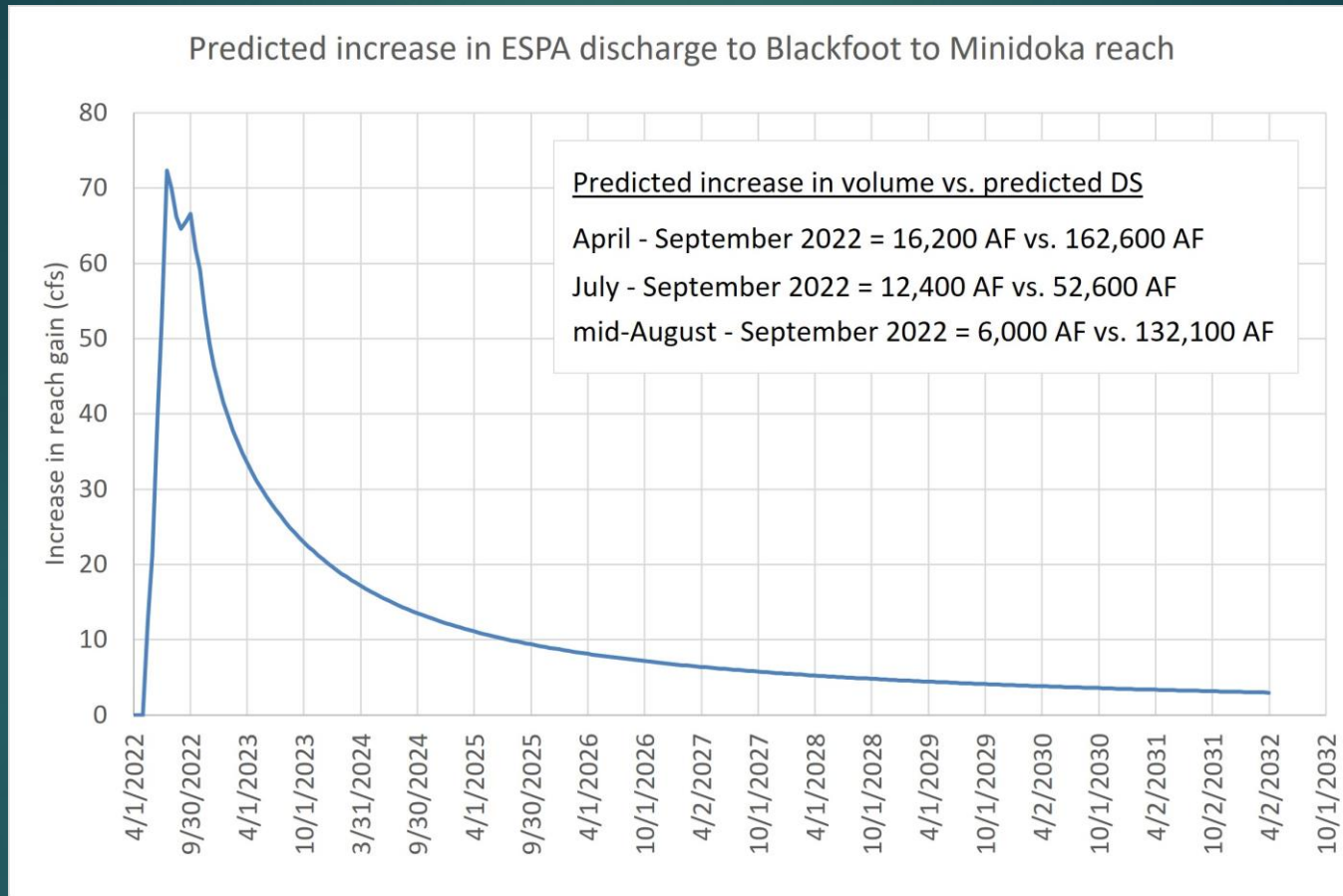
Steady state vs. transient model simulations



Transient simulation of curtailments ordered in 2022

- ▶ 2022 curtailments ordered
 - ▶ Curtailment priority dates were calculated based on steady state response at near Blackfoot to Minidoka
 - ▶ April 1 DS forecast of 162,600 AF → curtailment junior to December 25, 1979 beginning May
 - ▶ July 1 DS Forecast of 52,600 AF → curtailment reduced to junior to March 12, 1989 in July
 - ▶ Time of Need Forecast of 132,100 AF → curtailment increased to junior to March 25, 1981 in August
- ▶ Transient simulation of these curtailment dates was performed to compare volumes predicted to accrue to near Blackfoot to Minidoka during this season with the predicted DS volumes

Transient simulation of curtailments ordered in 2022

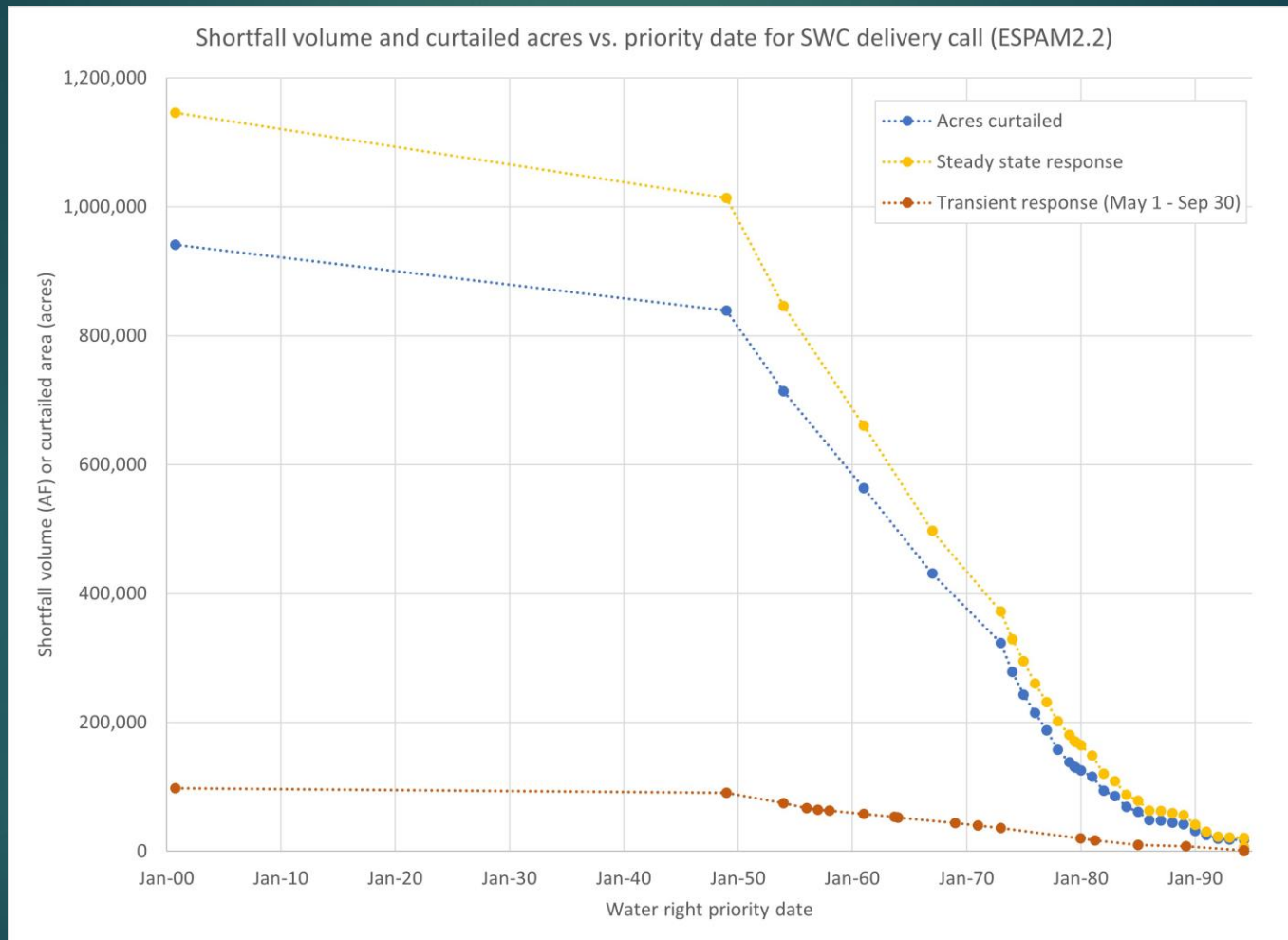


- Volume that would accrue from the ordered curtailments during the period of each shortfall is much less than the predicted shortfall
- Increases in reach gain would continue to accrue in future water years

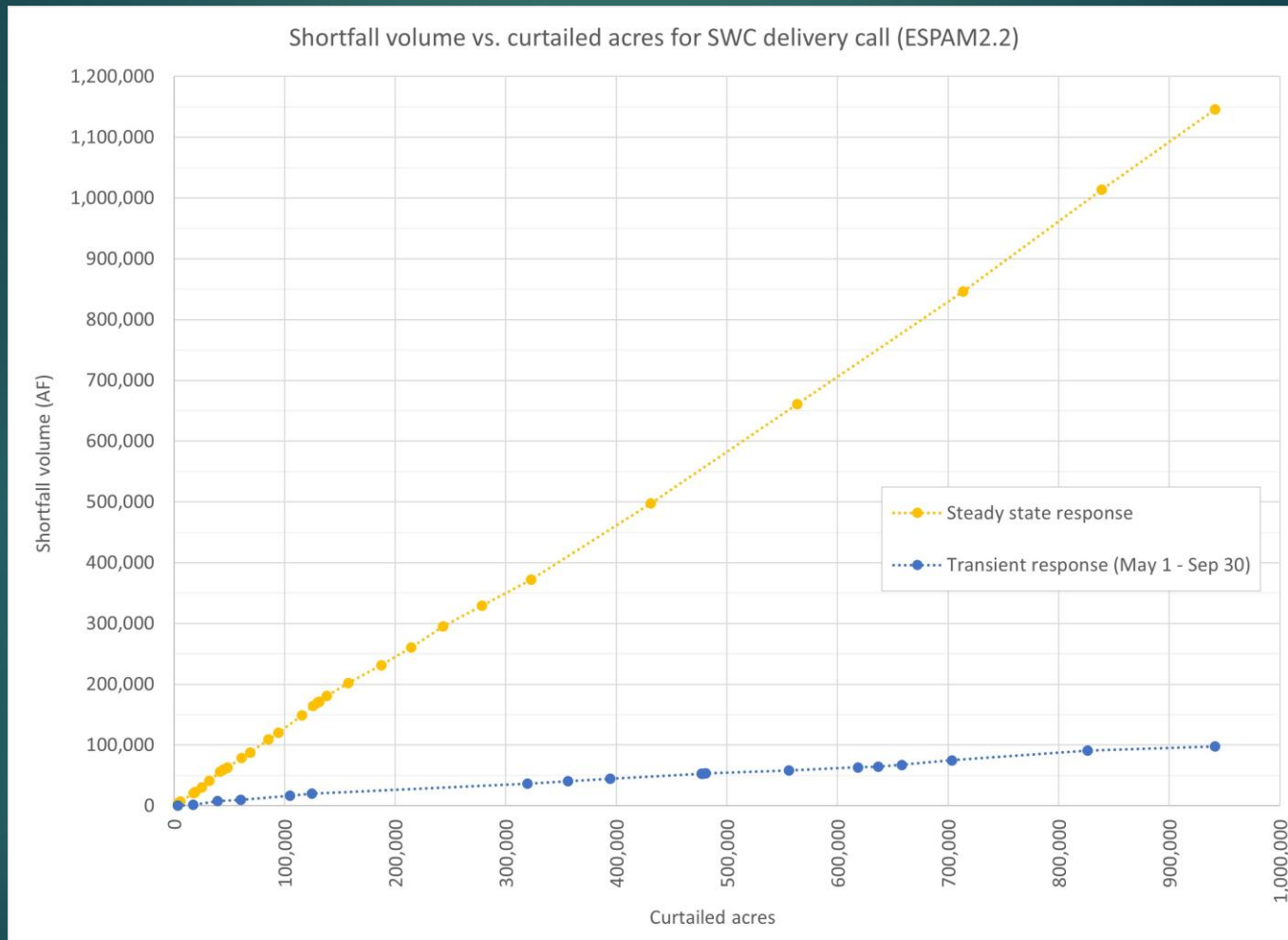
Assumptions for example transient model simulations

- ▶ Continue to use methods documented in “Curtailment Scenario” report (Sukow, 2021)
https://research.idwr.idaho.gov/files/projects/espam/browse/ESPAM22_Reports/Scenarios/CurtScen22_FinalwApp.pdf
 - ▶ Use average monthly ET and precipitation from WY2009-WY2018 instead of average annual values
- ▶ Analysis of municipal curtailment continues to use methods described in 2015 IDWR staff memo for Rangen delivery call (Sukow, 2015)
<https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2014-007/CM-MP-2014-007-20150123-Staff-Memo-Cities-2nd.pdf>
 - ▶ Five-year average pumping rates within ACGW are updated each year based on reported annual pumping volumes
- ▶ Curtailment for April forecast begins ~ May 1
- ▶ Curtailment priority date revision for July forecast goes into effect ~ July 16 if April DS > July DS
- ▶ Curtailment priority date revision for July forecast goes into effect ~ August 1 if April DS < July DS
- ▶ Curtailment priority date revision for Time of Need (mid-August) forecast goes into effect ~ September 1
- ▶ Target for transient calculation is a modeled benefit at near Blackfoot to Minidoka equal to DS volume accruing between DS forecast date and September 30
- ▶ Earliest curtailment priority date is junior to October 11, 1900 (TFCC and NSCC natural flow water rights)

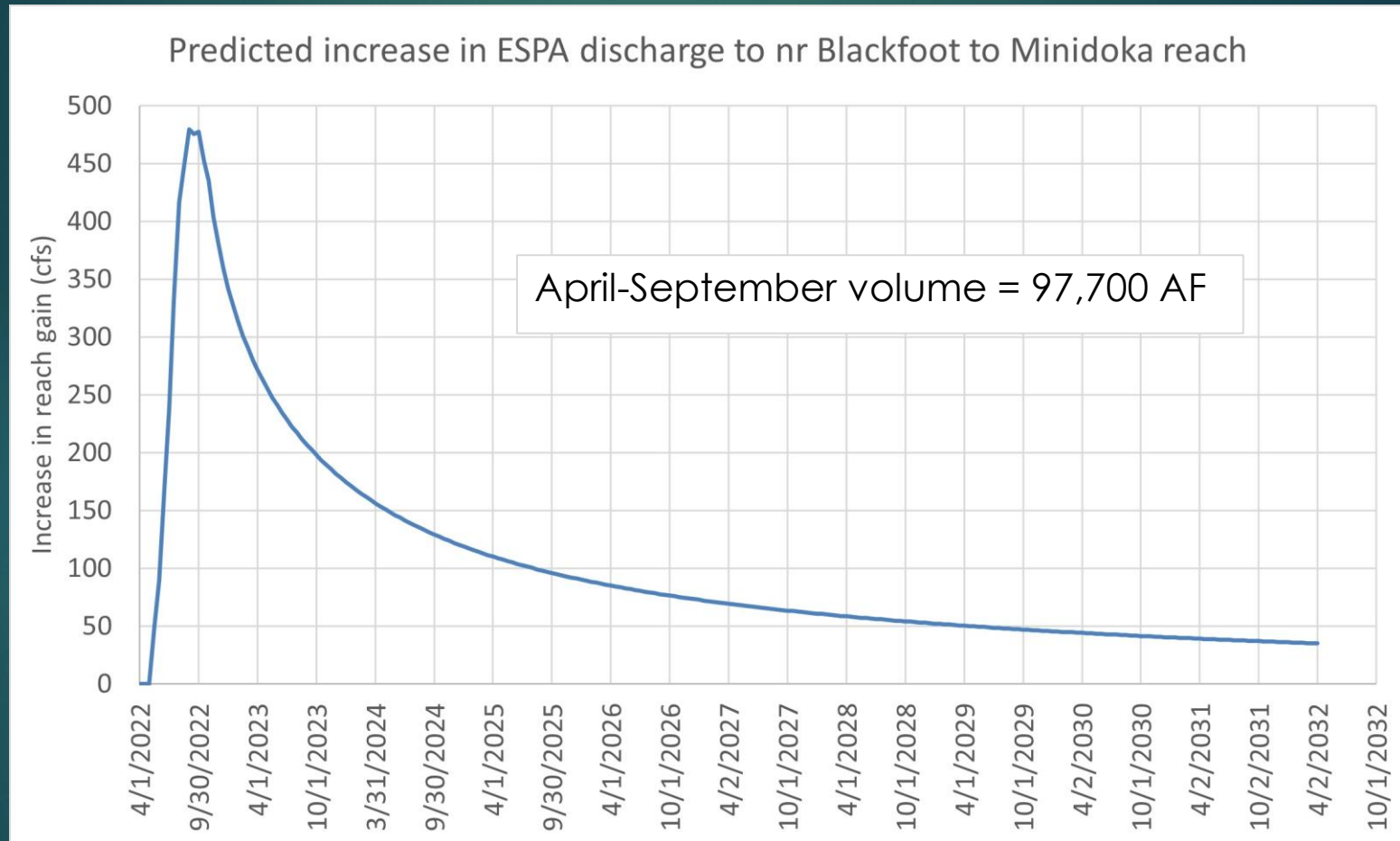
Comparison of priority dates calculated for April DS forecasts (May 1 curtailment)



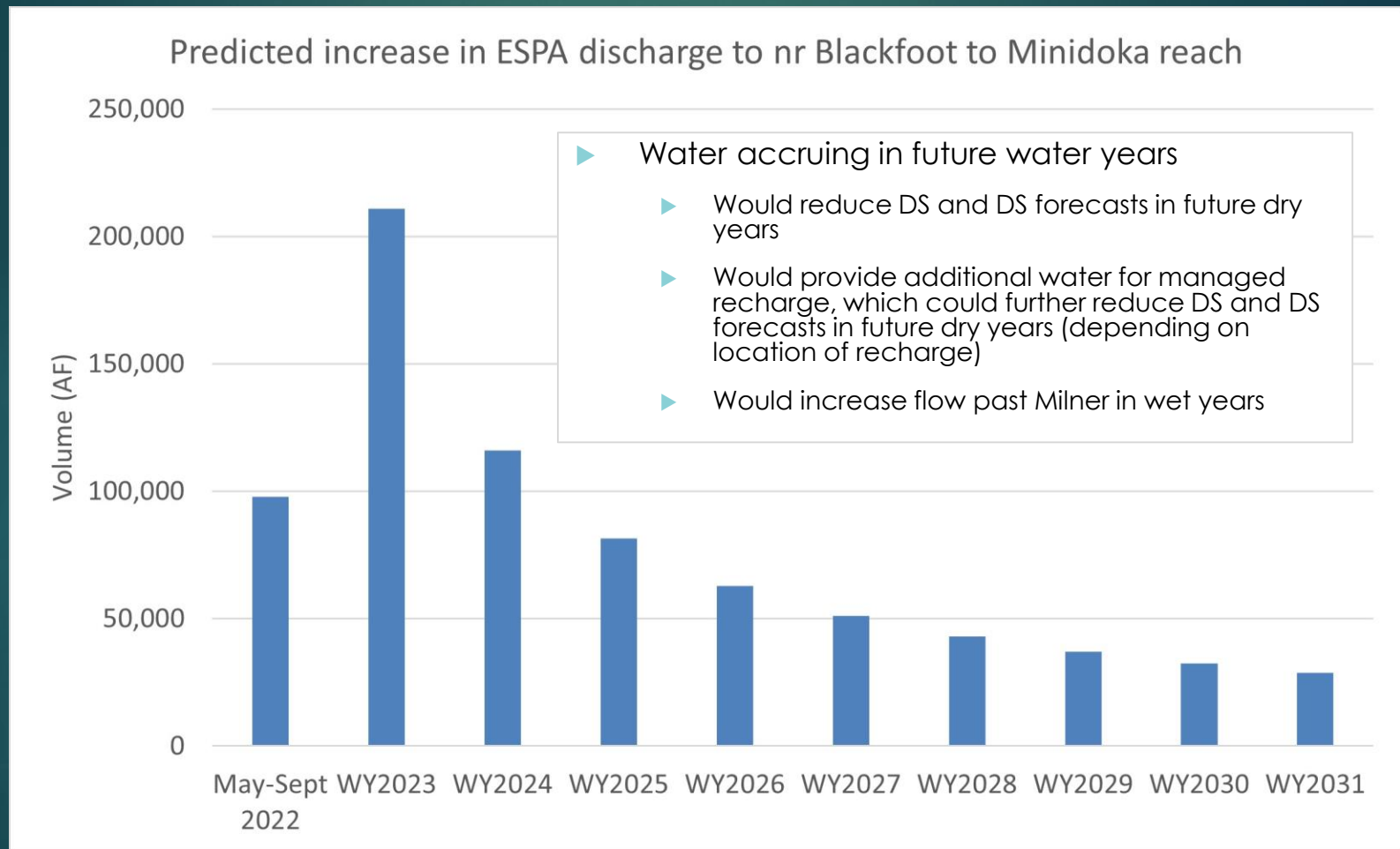
Comparison of priority dates calculated for April DS forecasts (May 1 curtailment)



Predicted response to May 1 curtailment of water rights junior to October 11, 1900



Predicted response to May 1 curtailment of water rights junior to October 11, 1900



Transient analyses for 2021 shortfall volumes

- ▶ April DS forecast = 40,500 AF
 - ▶ Curtail junior to **January 11, 1971** starting May 1
 - ▶ May 1 – Sep 30 predicted response = 40,500 AF
- ▶ July DS forecast = 170,000 AF
 - ▶ Increase curtailment to junior to **October 11, 1900** starting August 1
 - ▶ Jul 1 – Sep 30 predicted response = 44,400 AF
- ▶ Time of Need DS forecast = 142,700 AF
 - ▶ Maintain curtailment junior to **October 11, 1900**
 - ▶ Aug 16 – Sep 30 predicted response = 27,400 AF
- ▶ Carryover shortfall forecast = 64,600 AF
 - ▶ Curtail junior to **April 19, 1961** starting January 1
 - ▶ Jan 1 – Sep 30 predicted response = 64,700 AF

Transient analysis for 2021 carryover shortfall

- ▶ Calculation target is volume accruing between date of curtailment and September 30 of the next irrigation season
- ▶ Carryover shortfall forecast = 64,600 AF
 - ▶ Curtail junior to **April 19, 1961** starting January 1
 - ▶ Jan 1 – Sep 30 predicted response = 64,700 AF

Transient analyses for 2022 shortfall volumes

- ▶ April DS forecast = 162,600 AF
 - ▶ Curtail junior to **October 11, 1900** starting May 1
 - ▶ May 1 – Sep 30 predicted response = 97,700 AF
- ▶ July DS forecast = 52,600 AF
 - ▶ Decrease curtailment to junior to **March 13, 1981** starting July 16
 - ▶ Jul 1 – Sep 30 predicted response = 52,600 AF
- ▶ Time of Need DS forecast = 132,100 AF
 - ▶ Increase curtailment to junior to **October 11, 1900** starting September 1
 - ▶ Aug 16 – Sep 30 predicted response = 27,200 AF

Comparison of priority dates calculated using transient and steady state analyses

Forecast	Steady state date	Transient date	Steady state acres	Transient acres
April 1, 2021	1990	1/11/1971	~30,000	357,000
July 1, 2021	7/18/1979	10/11/1900	130,300	941,400
August 15, 2021	1981	10/11/1900	~110,000	941,400
Final net DS	1976	10/11/1900	~200,000	941,400
Carryover 2021	6/29/1985	4/19/1961	55,300	539,700
April 1, 2022	12/25/1979	10/11/1900	124,700	941,400
July 1, 2022	3/12/1989	3/31/1981	39,300	104,700
August 15, 2022	3/25/1981	10/11/1900	105,000	941,400

Range of priority dates using steady state simulations:
1976 – 1990 (30,000 to 200,000 acres)

Range of priority dates using transient simulations:
1900 – 1981 (105,000 to 940,000 acres)

Conclusions

- ▶ Steady state simulations are appropriate for evaluating the impact of aquifer stresses that have been applied for decades (i.e. groundwater pumping, continuous curtailment to same date every year)
- ▶ Transient simulations are appropriate to evaluate the impacts of aquifer stresses applied for short periods of time (i.e. short-term curtailments with varying priority dates)
- ▶ Steady state simulations of continuous curtailment do not simulate the short-term curtailments prescribed in the SWC methodology
- ▶ Transient simulations better simulate the short-term curtailments prescribed in the SWC methodology

Conclusions

- ▶ Short-term curtailments in response to in-season predictions of DS are inadequate to provide water during the time of need for several of the shortfall volumes predicted in 2021-2022
- ▶ Curtailments sufficient to provide water during the time of need would also provide water to reduce shortfalls in future dry years, but would result in additional flow past Milner in future wet years

Exhibit I



IDAHO DEPARTMENT OF
WATER RESOURCES

322 E Front Street, Suite 648, Boise ID 83702 • PO Box 83720, Boise ID 83720-0098
Phone: 208-287-4800 • Fax: 208-287-6700 • Email: idwrinfo@idwr.idaho.gov • Website: idwr.idaho.gov

Governor Brad Little

Director Gary Spackman

**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**

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.

Exhibit J

Memorandum

To: Matt Anders (Idaho Department of Water Resources)

From: Dave Shaw (ERO Resources), Dave Colvin (LRE Water)

Date: January 16, 2022

Subject: **SWC Response to IDWR Recommended SWC Methodology Updates**

Introduction

On December 23, 2022, Idaho Department of Water Resources (IDWR) staff issued a document summarizing their recommendations for updating the Surface Water Coalition (SWC) Methodology. IDWR presented considerations and potential updates in Technical Working Group (TWG) meetings convened during November and December 2022. The current Methodology was established in the April 19, 2016 IDWR Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover (Fourth Amended Final Order)¹.

The Methodology is intended to protect the maximum reasonable diversion of SWC senior water rights from the in-season impacts caused by junior groundwater pumping. Decades of groundwater pumping effects have reduced the Snake River flows and reduced the water supply for senior water rights creating continuing but variable impacts. This variability creates inherent limitations for the Methodology and has particular significance on the potential updates IDWR presented during TWG meetings.

In addition, the Methodology strives to use predictions and observations to predict reasonable in-season demands (RISD) for SWC entities. Many steps of the Methodology transition from predictive tools early in the season to measured field data later in the season when hydrologic observation data are available. Many of the data, methods, and analyses are insufficient to account for changes in farming practices forced upon SWC entities as a result of economic conditions and water supplies being unreliable throughout the season and year to year.

Despite these fundamental limitations, many aspects of the SWC Methodology represent the best available science for estimating forecasted supply (FS), RISD, and Demand Shortfall (DS). Additional comments on specific IDWR update recommendations are provided below.

¹ Fourth Amended Final Order <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20160419-Fourth-Amended-Final-Order-Regarding-Methodology-for-Determining-Material-Injury-to-Reasonable-In-Season-Demand-and-Reasonable-Carryover.pdf>

1. IDWR Recommended Methodology Updates

a. Baseline Year Update for In-Season Demand and Carryover

IDWR is recommending that the Baseline Year (BLY) be updated to 2018. The process for selecting the BLY is described in the Fourth Amended Final Order and identifies both 2018 and 2020 as candidate baseline years. Based on the additional years of data considered since the Methodology was developed, both 2018 and 2020 are superior to the current baseline years (2006, 2008, 2012) which are no longer acceptable candidates. IDWR's rationale for only selecting 2018 is that 2020 had relatively high late-season diversions for the Twin Falls Canal Company (TFCC). Estimates of late-season project efficiency are higher in 2020 than in 2018, indicating that the late-season TFCC diversions, although higher, are reasonable. Changes in late season demands are being driven by economic conditions and the dairy industry's need for feed that has resulted in double cropping and changes in harvest methods. Double cropping is sometimes triticale followed by field corn resulting in later season water demands to finish the corn. Other examples are alfalfa harvested as green chop instead of baled hay so the crop water requirement is continual instead of allowing time for the crop to dry in the field so it can be baled. In the past hay crops were often 3 cuttings per year but now are 5 or more cuttings that create additional crop water needs, particularly late irrigation season demands. Additionally, late season irrigation is sometimes required for cover crops or late season ground working in preparation of fall seeding that is likely not reflected by AgriMet Et data.

A review of CWN data for the period 2000 – 2022 shows an increase over time that has, in part, resulted in the need to select a new BLY for determining an adequate water supply for the SWC. If the current methodology is continued, a regular review of the BLY is recommended as provided in Step 9 of the Methodology Order. Along with changes in CWN, a review of NASS crop data layers (CDL) should be completed to verify the crop mix present on the land served by the SWC if the use of METRIC is not implemented.

The selection of a new BLY is expected to increase the total reasonable carryover quantities for most of the SWC members. Step 8 in the Methodology Order needs to be reviewed to be certain the new reasonable carryover quantities can actually be replaced by the junior ground water users if the SWC members' reasonable carryover is used to finish the season at the Time of Need.

b. Update Project Efficiency Values

Central to proper determination of project efficiency is an accurate determination of CWN. As climate conditions and cropping patterns change, the determination of CWN needs to

SWC Response to IDWR Recommended SWC Methodology Updates

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be kept current with conditions in the field. AgriMet is a significant resource so long as the results are adapted to current cropping patterns and field conditions.

Using a 15 year rolling average for current year reasonable project efficiency instead of the present 8 year rolling average does not appear to change the current year efficiencies significantly. As the available record of Project Efficiencies continues to grow, using the longer 15 year rolling average may have advantages, but may need to be reviewed again in the future.

2. IDWR TWG Topics Not Being Recommended for Methodology Updates

In their December 23, 2022 letter, IDWR staff identified issues that were discussed during the TWG meetings that are not being recommended as updates to the SWC Methodology.

a. Real-time METRIC data for determining crop water need

IDWR staff presented information about the potential benefits of utilizing real-time METRIC and PRISM data for determining crop water need (CWN). These data sources are spatially variable estimates of evapotranspiration (ET) and precipitation, respectively. They would likely better represent the variability of ET and precipitation across SWC entities compared to the current methods which are based on ET and precipitation data observed at two AgriMet stations.

It is our opinion that IDWR should continue to evaluate the benefits of incorporating real-time METRIC and PRISM data into estimating actual CWN. Other available data, including OpenET, should be considered as well.

b. April and July Natural Flow Regressions

During the TWG meetings, IDWR presented information about the performance of variables originally selected to support April and July FS predictions. Additional data from 2016-2021 were added to evaluate the performance of the predictor variables as measured by the correlation coefficient comparing predictions to actual natural flow. In summary, no significant degradations in predictive capability were identified, so there is no recommendation to change this aspect of the Methodology. Other candidate predictor variables should continue to be assessed and considered for incorporation should their performance prove better than the current inputs.

c. Transient ESPAM Modeling

During the November 28, 2022 TWG meeting, IDWR staff presented an analysis comparing steady state and transient uses of the Eastern Snake Plain Aquifer Model Version 2.2 (ESPAM) for determining curtailment dates under the Methodology. No TWG meeting attendees stated that they remembered the original rationale for steady-state modeling, including IDWR staff.

Steady-state modeling of groundwater curtailment predicts the maximum impacts that would occur over infinite time. There is no time variable result that relates to the irrigation season. In reality, the impacts of curtailment take time to propagate through the aquifer and occur over months, years, or decades depending on variables such as the distance of a well from the river, and the aquifer transmissivity between the two.

Transient and steady-state versions of ESPAM were created to support various administration and planning efforts by IDWR and Eastern Snake Plain Aquifer (ESPA) stakeholders interested in evaluating the interaction between surface water and groundwater. Steady-state versions of the model are used when results showing ultimate impacts without regard to time are desired. Transient ESPAM versions are used when results require time variable inputs (e.g. pumping limited to the irrigation season) or outputs (e.g. reach gain impacts during a single irrigation season).

Because the Methodology is intended to address in-season injury, transient modeling analysis is the only appropriate way to determine curtailment dates that would protect SWC water rights and supplies. IDWR presented the steady state versus transient differences between ESPAM predicted in-season impacts of curtailment as increases in near Blackfoot to Minidoka reach gains during the 2021 and 2022 seasons. IDWR showed that the transient ESPAM model predicts an October 11, 1900 curtailment date would result in 97,700 acre-foot (AF) impact in the April to September period. Steady-state modeling of the same curtailment date predicts approximately 1,100,000 AF of impact accruing instantaneously as reach gain increases. The steady-state result is clearly erroneous and overpredicts the in-season benefits of curtailment by more than an order of magnitude.

IDWR staff also presented the impact of curtailment in future years beyond the in-season benefits. Future years with relatively low natural flow would provide SWC benefits from the increased reach gains. Years with higher natural flows, when storage fills, would not directly benefit SWC as reach gain increases. IDWR speculated that these wet years would possibly result in increased flow past Milner or provide additional water for managed aquifer recharge. Utilizing the current recharge sites would not significantly

SWC Response to IDWR Recommended SWC Methodology Updates

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increase near Blackfoot to Minidoka reach gains and therefore would provide limited benefit to SWC water supplies.

IDWR's modeling analysis conclusions stated that "*Short-term curtailments in response to in-season predictions of DS [Demand Shortfall] are inadequate to provide water during the time of need for several of the shortfall volumes predicted in 2021-2022.*" This conclusion highlights the multi-year challenges that the Methodology is currently incapable of addressing.

Curtailment required by the Methodology is only applicable to junior groundwater users not covered in a settlement agreement or mitigation plan. The current agreements between SWC and ESPA groundwater users acknowledge the multi-year aspects of injury. IDWR's modeling results and the existing settlement agreements recognize the need for more effective protection of SWC's water supplies. Other Methodology steps are adjusted to create conservative results that protect senior surface water supplies, and the same approach should be taken with the modeling of curtailment dates.

Currently, the only aspect of the Methodology that has an impact year to year is the calculation of Reasonable Carryover. Although it is unlikely to be sufficient to protect SWC water supplies in all years, the Reasonable Carryover calculation could be increased to consider the inadequacies of curtailment for meeting in-season shortfalls. Ultimately, a comprehensive administration approach will need to fully address the multi-year nature of junior groundwater pumping on senior surface water supplies.

Exhibit K

MEMORANDUM

To: Matt Anders and Kara Ferguson, IDWR
From: Sophia C. Sigstedt, Lynker
Subject: Comments on 2022 IDWR Staff Recommendations
Date: January 16, 2023

This memorandum addresses my comments on the analyses presented to the 2022 Technical Working Group (TWG) related to revisions to the Methodology Order for determining injury to water rights held by members of the Surface Water Coalition. It serves as an addendum to Idaho Department of Water Resources (IDWR or Department) staff recommendations for the 2022 Methodology Update. IDWR staff and other members of the TWG presented analyses and recommendations regarding the following topics:

1. Baseline Year (BLY)
2. Forecasting Natural Flow Supply
3. Near-Real-Time METRIC for ET
4. Project Efficiency (PE)
5. ESPAM2.2 Steady State v. Transient

IDWR staff proposed changes related to BLY and PE, but only presented the results of internal analysis without recommending changes to the other topics investigated. TWG members were asked to consider whether the proposed recommendations provide a better technical basis than the current technique, or if there was an alternative with a better technical basis.

Sections 1-5 summarize my comments based on the proceedings for each TWG topic as listed above, respectively.

The topics identified above are not the only items in the Amended Methodology Order that should be considered regarding technical improvements. The comments in this memo are primarily in response to recommended changes made by IDWR staff in their memorandum dated December 23rd, 2022¹ and should not be considered a comprehensive summary of my opinions on all the technical aspects presented to the TWG or any other outstanding issues in the proceeding.

Section 1: Baseline Year Update

The IDWR staff recommended:

- Update the BLY irrigation demand used to determine Reasonable In-Season Demand (RISD) from the current average of diversion demands for the 2006, 2008, and 2012 (06/08/12) 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 diversion demands for the 06/08/12 irrigation seasons to the diversion demand for the 2018 irrigation season.

¹ 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 (IDWR, December 23rd 2022)

In my opinion the recommendation to replace average diversions for the 06/08/12 irrigation seasons with single-year diversions in 2018 as the BLY does not have an adequate technical basis, and alternatives should be considered due to the following:

1. IDWR should consider rank within the period-of-record (POR) and select an average of years closer to the rank of the 06/08/12 BLY selected in 2015. IDWR staff presented analysis to the TWG for individual years 2018 and 2020 for consideration as the updated BLY. Either of these individual years are inadequate to represent reasonably dry baseline conditions for SWC diversions.

When the average of diversion demands for the 06/08/12 irrigation seasons was selected as the BLY in 2015, the 06/08/12 average ranked between 7th and 8th highest for diversions, or about the 55th percentile (based on a normal distribution), for the POR 2000-2015 (**Figure 1**). IDWR staff presented analysis of Demand Shortfall calculations using 2018 and 2020 as an alternative BLY as they were both found to individually meet all the BLY criteria as shown in **Table 1**. For the POR 2000-2021 the diversion demand for 2018 and 2020 rank 3rd and 2nd, respectively, highest for diversions out of the 22 years, or about the 90th and 95th percentile (based on a normal distribution) for the POR (**Figure 2**).

In a hindcast analysis by IDWR staff, the higher rank in BLY SWC diversions appears to cause a huge shift in the type of water year (i.e. wet, average, dry, very dry) where Demand Shortfalls are calculated. The hindcast showed a Demand Shortfall much more frequently in average and even wet years in addition to every dry or very dry year. When you compare the distribution of SWC total diversion demands for the POR 2000-2015 compared to 2000-2021 in **Figures 1 and 2**, however, it is apparent that they are very similar with mean diversions of 3.16 maf and 3.2 maf, respectively. The standard deviation is also very similar for the POR 2000-2015 compared to 2000-2021 at 178,089 af and 178,587 af, respectively. The selection of the BLY is meant to be conservative as defined by the BLY criteria. The shift to SWC diversions of a much higher rank (compared to the previous BLY) like 2018 or 2020 translates to a much higher level of conservatism and is not technically justified given the similarity between mean diversions and the standard deviation for the 2000-2021 POR versus the 2000-2015 POR.

The Methodology Order states that the BLY can be a year or an average of years that meet the BLY criteria (**Table 1**). IDWR staff considered rank within the POR when they recommend keeping the 2002 and 2004 average Heise natural flows as the Supply in the Reasonable Carryover calculation from the 4th Amended Methodology Order for the 2022 update². The average of diversion demands for the 2006 and 2018 (06/18) irrigation seasons meet all the BLY criteria as shown in **Table 1** and is closer to the 55th percentile based on a normal distribution for diversions 2000-2021 similar to the rank of the BLY 06/08/12 (**Figures 1 and 2**) as applied in the 4th Amended Methodology Order. The BLY of 06/18 has a better technical basis than the proposed update to 2018 as the BLY.

Table 1. Baseline Year and Baseline Year Criteria

BLY Criteria	BLY Avg 06/18	BLY 2018	BLY 2020	Avg 2000-2021
Abv Avg SWC Diversions	3.22 maf	3.38 maf	3.53 maf	3.20 maf
Abv Avg GDD	2575 units	2550 units	2600 units	2495 units
Abv ET	1265 mm/d	1275 mm/d	1280 mm/d	1245 mm/d
Blw Avg Precipitation	3.9 in	2.6 in	2.7 in	4.5 in
Abv Avg SWC Supply	8.52 maf	9.00 maf	8.10 maf	7.70 maf

² Proposed Modification of the Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover: Reasonable Carryover (IDWR, presentation slide no. 4, December 9th, 2022)

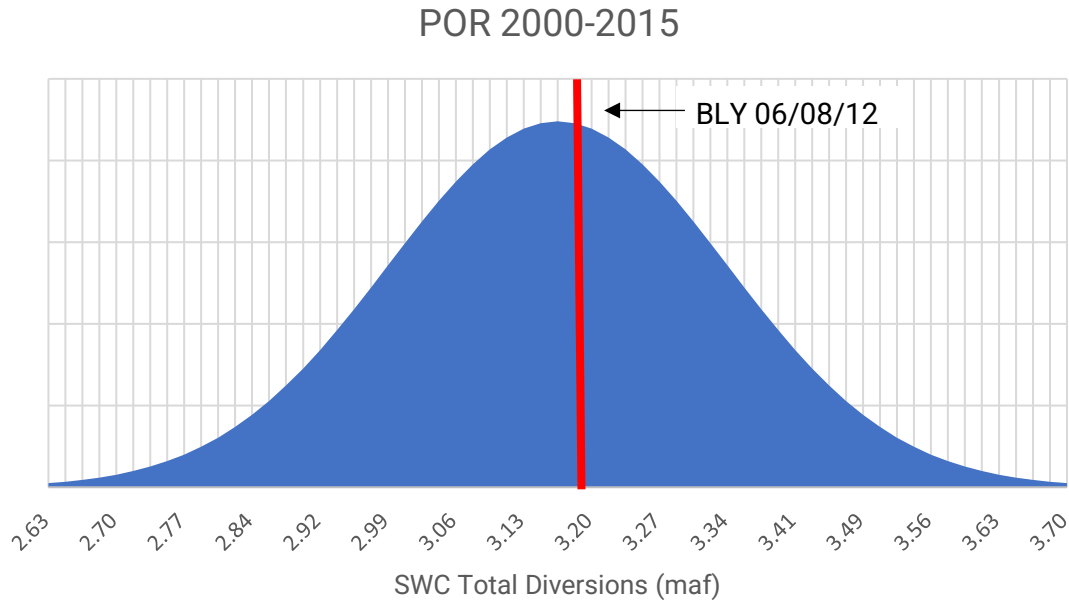


Figure 2. Normal distribution of SWC Total Diversion over the POR 2000-2015, the red line shows where the selected BLY 06/08/12 for the 4th Methodology Order falls within the normal distribution.

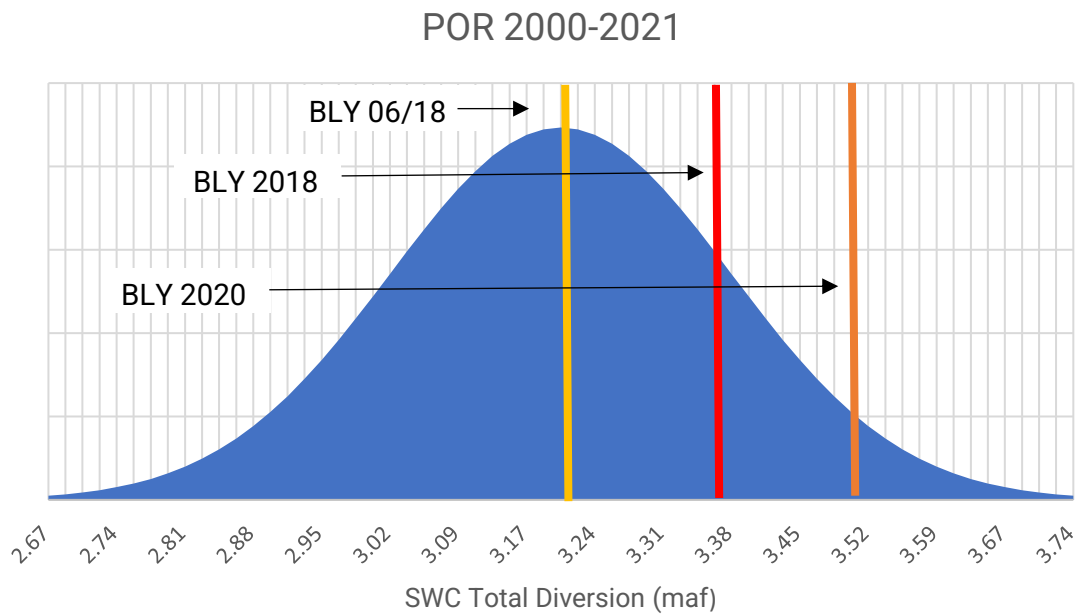


Figure 2. Normal distribution of SWC Total Diversion over the POR 2000-2021, the yellow line, red line, and orange line show where the proposed BLY 06/18, 2018 and 2020 falls within the normal distribution, respectively.

2. Another reason a better alternative would be to use diversion demands for the 06/18 irrigation seasons for the BLY is that there were unique hydrologic circumstances in 2018 that I don't believe represent the typical dry year. The 2017/2018 snowpack was very high and water year forecasts and early season streamflow led to positive water supply forecasts which resulted in a record amount of aquifer recharge in 2018. IDWR staff acknowledged the technical difficulties in sorting out surface water adjustments like recharge in applying the Methodology Order. The combination of large volumes of widely distributed canal recharge, often in relatively rarely used or new systems, may have exacerbated uncertainty in the adjustment. The positive water supply outlook may have also resulted in less stringent surface water administration and ultimately higher diversions than the crop water need alone would predict. Consequently, using gross diversions in 2018 as the BLY effectively overstates surface water irrigation demand. IDWR staff presentations and a review of Twin Falls Agrimet station data also showed the 2018 irrigation season is the only year in the 1992-2021 POR with a zero-precipitation total for July-September. The fact that almost any individual water year will have some unique circumstance is a good reason for continuing to define the BLY based on an average of years as the Methodology Order does currently.
3. An additional reason for using a specific percentile (or rank) within the POR when establishing a BLY, and for using an average of years, is that the process for selection of the BLY otherwise appears arbitrary and subjective. If IDWR staff are presented with multiple years within the POR that fit the criteria for a BLY, and there is no guidance or standard method for selecting a single BLY, the ultimate selection becomes purely subjective. Using an average of years that targets a prescribed rank is a more objective and technically defensible process.

Section 2: Forecasting Natural Flow Supply

IDWR staff did not make a recommendation on updating April and July regression models to improve their predictive power for natural flow supply. The staff did make presentations to the TWG on natural flow forecasting models that showed the Twin Fall Canal Company (TFCC) model is degrading in the R^2 value. This degradation is significant in that the R^2 values is an expression of the explanatory power of the forecast model. The TFCC natural flow forecast models also started with the lowest R^2 values based on the previously revised forecast. The technical information presented to the TWG indicated that a revised natural flow method for TFCC should be evaluated and a recommendation for an improved method should be made. However, given the extremely compressed timeframe for staff and TWG members to conduct a thorough evaluation I understand why a recommendation was not made at this point.

Lynker's technical memorandum included as addendum to IDWR staff recommendations in 2015³ laid out an alternative forecast model approach that I continue to think should be further investigated. The approach is creating a regression relationship or alternative model that forecasts the physical natural flow supply with subsequent allocation of that physical supply among the rights of the SWC. The technical basis for this suggestion is that water rights administration creates a non-continuous and non-normally distributed dependent variable in the regression analysis. This is likely the reason it is difficult to find a high performing regression model for TFCC.

The process for natural flow forecast model revision should also be standardized in-terms of defining how frequently a thorough re-evaluation of the predictors and models is done (i.e. 3-yrs, 5-yrs, if R^2 value drops below a threshold). This should include re-evaluating previously tested predictors over the new POR, as well as, casting a new net of total predictors for consideration by the TWG. While the TFCC model stands out in needing a refinement all of the models could be improved if sufficient time for the analysis were allowed. Several of the models utilize a depth to groundwater measurement as a predictor from a specific Sentinel Well flagged by a separate TWG (IGWA-SWC)⁴, as likely impacted by American Falls Reservoir level.

³ Recommended Revisions to the Surface Water Coalition Methodology (DWR, March 16th, 2015)

⁴ IGWA/SWC Steering Committee TM: 2021 Sentinel Well Recommendations (IGWA/SWC TWG, August 20th, 2021)

Section 3: Near-Real-Time METRIC for ET

The IDWR staff did not make a recommendation on utilizing near-real-time METRIC for determining Crop Water Need (CWN) in the RISD calculation. The application of METRIC in the determination of crop demands deals with a complex dataset that requires complex processing. Given the magnitude of the task to incorporate METRIC data I understand the staff not making a recommendation at this time. The IDWR staff should keep track of the calculation utilizing the METRIC data in parallel to the current CWN calculation method as way to continue to evaluate its use. The Department's Eastern Snake Plain Aquifer (ESPA) model already utilizes METRIC data for consumptive use calculations used for model input data. Given the complexity of the METRIC data I also recommend further investigation into the method behind the calibration and processing of the dataset to determine how and to what extent the METRIC data can be validated at the field-scale or if there are common misrepresentations that should be considered in the process of data quality assurance checks. This should be done in coordination with validation efforts by the Department on their ESPAM Metric calibration and processing.

The IDWR staff presentation regarding near-real-time METRIC application identified a significant shortcoming in the current method for calculating CWN as the fact that the most up-to-date crop data is from the previous year and that SWC irrigated acre datasets sometimes represent service areas, not the actual irrigated land⁵. Non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members⁶. The METRIC data could first be used to create a standard review process for the Methodology Order Step 1 submittal of irrigated acres by the SWC entities. IDWR staff should use a precise determination of irrigated acreage irrespective of whether it uses METRIC in the calculation of CWN. With IDWR staff only checking against the total acres for the decreed place of use, there is little to no incentive to keep the spatial data for the irrigated acres up to date. The METRIC data would be available for the current irrigation season and can be used to assess actual irrigated land. Some of the preliminary analysis by IDWR staff using METRIC data illustrated that through processing they were able to identify about 15,000 acres within the TFCC irrigated acres dataset that should not qualify as irrigated. The mischaracterized acres were all minor areal corrections but over a large service area such as TFCC added up to a significant amount of erroneous total acres. This just highlights the importance of spending the time to get an accurate picture of irrigated acres for an accurate RISD calculation. As previously noted in Lynker's 2015 comment letter the 5% change standard for SWC submittals should be reconsidered in light of large districts like TFCC where a 5% error in the irrigated acres can result in calculation of tens of thousands of acre-feet of erroneous mitigation obligation. Liz Cresto an IDWR staff member on the TWG in 2015 also made a similar recommendation in her comment letter attached to the staff memorandum.

Neither the 2015 nor the 2022 TWG has provided an opportunity to address concerns regarding supplemental groundwater use. This is a critical aspect of the RISD calculation and was one of the specific technical items cited for revision by the District Court. Analysis of supplemental groundwater use is likely critical to accurately applying METRIC in the RISD calculation.

Section 4: Project Efficiency

The IDWR staff recommended:

- 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.

⁵ Proposed Modification to Method for Determining Reasonable In-Season Demand for the Surface Water Coalition: Use of the Near Real Time Metric (IDWR, presentation slide no. 8, November 17th 2022)

⁶ Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover-pg 4

The technical basis for the IDWR staff recommendation was based on there being an extended POR available. TWG discussions and subsequent presentations identified other issues that should be considered in Methodology applications of project efficiency (PE) to RISD calculation.

1. There is higher uncertainty in the April and October project efficiency values. April and October represent months during the irrigation season when the method of calculating RISD strictly as a function CWN and PE is less reliable because CWN is often not the driving factor in diversions⁷.
2. 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 supplies⁸.

Change in Project Efficiency (2001-2021)

(percentage point change)

A&B	-4.6%
AFRD2	-3.6%
BID	-1.0%
Milner	-12.6%
Minidoka	+12.2%
NSCC	-3.0%
TFCC	+1.8%

3. Scatter plots by SWC entity comparing Annual Crop Water Need to Annual Diversions show Crop Water Need is limited as a predictor given the low explanatory power indicated by the low R^2 values in the analysis⁹.

Regarding the mid-season calculation of RISD, the sensitivity and appropriate use of CWN as a predictor for in-season demands for SWC entities should be evaluated. Technical analysis to the TWG showed that this is not a strong relationship¹⁰. This disconnect should be evaluated by the TWG so a recommendation can be made. The trends in declining PE are concerning in that they are contrary to our expectations given the direction technology advancements and constrained water supply. The declines in PE are significant in that any decline in PE will result in increased demands and subsequently increased calculated Demand Shortfalls. The IDWR staff presentation on PE illustrated how the very minor change in PE resulting from extending the POR for the average translated to tens of thousands of acre-feet differences in the Short Fall determination¹¹. Sullivan (e-mail to TWG 12/21/2022) found that when analyzing monthly PE the low PE in some months cause monthly demands calculated based on CWN/PE to be very sensitive to changes in CWN. I agree with Sullivan's recommendation that given the outside influences and uncertainty in some of the monthly PE values IDWR staff should consider using a seasonal PE value in computing monthly diversion demands. I also agree with Sullivan's recommendation that consideration should be given to PE values that better reflect reasonable and efficient operations of SWC members. Given the observed declining trends in PE and the historically wide range in operational PE by entity it is hard to know when SWC supplies are short under reasonable and efficient operations. This is consistent with Lynker's 2015 recommendation for an investigation into trends among entities related to PE factors.

⁷ Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover-pg 18

⁸ Greg Sullivan e-mail, Updated Comparison of Adjusted Diversion and Crop Water Needs for SWC Members, to TWG December 21, 2022

⁹ Analysis in Greg Sullivan datasheet "2022-12-21 SWC Diversions and CWN.xls"

¹⁰ Analysis in Greg Sullivan datasheet "2022-12-21 SWC Diversions and CWN.xls"

¹¹ Proposed Modification of the Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover: Project Efficiency (IDWR, presentation slide no. 15, November 28th, 2022)

Given the compressed timeframe around the 2022 TWG meeting there was not sufficient time for the TWG members to analyze or address these outstanding issues. Additional time should be set aside for the TWG to conduct an analysis and make a recommendation.

Section 5: Steady State v. Transient

The Department staff did not make a recommendation on using transient model simulation for determining curtailment priority dates in the Methodology. The IDWR staff presented to the TWG the following:

1. Technically the steady state application is not consistent with the variable curtailment dates and mitigation volumes under the Methodology.
2. Transient analysis shows that in-season shortfalls can generally not be met at Time of Need by in-season curtailment.
3. There is a huge difference in resulting determination of the curtailment priority date if a steady state v. transient model is applied.
4. Under a transient model application any Demand Shortfall above ~100K af would result in aquifer wide curtailment

It is not clear what additional analysis the Department staff need to conduct to make a recommendation on steady state v. transient model application. What is clear is that this represents a huge uncertainty to the water users and how they make planning and management decisions moving forward.

Exhibit L



TO: Kara Ferguson, Staff Hydrologist & Matt Anders, Hydrology Section Supervisor, Idaho Department of Water Resources

CC: Candice McHugh and Chris Bromley, McHugh Bromley, PLLC; Rob Harris, Holden, Kidwell, Hahn & Crapo, PLLC; and Sarah Klahn, Somach Simmons & Dunn, PC

FROM: Heidi Netter and Greg Sullivan, Spronk Water Engineers, Inc.

DATE: January 16, 2023

RE: Comments on behalf of the Coalition of Cities and the City of Pocatello on the Idaho Department of Resources 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, by Kara Ferguson and Matt Anders on December 23, 2022.

Under direction of the Director of the Idaho Department of Water Resources (“IDWR”), IDWR staff organized a technical working group (“TWG”) to 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 (“SWC Methodology”). The SWC Methodology was first ordered on April 7, 2010 and last amended on April 19, 2016. IDWR held numerous TWG meetings between November 16 – December 14, 2022 and Greg Sullivan and Heidi Netter of Spronk Water Engineers, Inc. (“SWE”) participated in all of them, along with representatives of the Coalition of Cities and the City of Pocatello (“Cities”).

On December 12 and 21, 2022, during the period of the TWG meetings, SWE submitted comments to the TWG via emails with attachments (see **Attachments 1 and 2**). These comments are made on behalf of the Cities to elaborate on the comments and materials previously provided.

IDWR Recommendations:

Following the conclusion of the TWG meetings, IDWR staff submitted a summary of three proposed changes to the SWC Methodology on December 23, 2022 that it recommends be implemented (“IDWR Recommendations”). The proposed changes consist of the following:

1. 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.
2. 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.

3. 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.

Comments on IDWR Recommendations:**Updated Baseline Year**

IWDR staff recommends that the BLY be changed to 2018 because the previous BLY that is based on an average of conditions during 2006, 2008, and 2012 ("06/08/12") no longer reflects conditions during year(s) with above average diversions. During the meeting on November 16, 2022, IDWR presented information showing that combined SWC member diversions during 06/08/12 that averaged a combined 3,194,722 acre-feet and were 99.8% of the 2001 – 2021 average. This information showed that the SWC member diversions were no longer above average, but instead were very slightly below average. The combined SWC diversions during the proposed new BLY of 2018 are 186,000 acre-feet greater than the combined average diversions the 06/08/12 BLY. The increased diversions for the proposed new BLY will translate into greater projected shortages to the SWC members under the SWC Methodology.

A review of the data suggests that the 06/08/12 average diversions are no longer above average because the diversions by several of the SWC members have increased since the SWC Methodology was last updated in 2016. IWDR did not provide any information or analysis to explain why the SWC diversions have increased.

The information previously submitted by SWE on December 12 and 21, 2002 indicates that the computed Project Efficiency ("PE") for most of the SWC members has decreased or remained flat since the methodology was last updated in 2016. This is surprising given the continued sprinkler conversions and general advances in irrigation practices and technology that have occurred in the irrigation industry over the past 20 years. Only Minidoka shows a trend of significantly increasing efficiency. In addition, the low PE values for most SWC members during September and October are concerning.

The 2010 Fourth Amended Methodology Order states that "[d]uring periods of drought when groundwater users are subject to curtailment, members of the SWC should exercise reasonable efficiencies to promote the optimum utilization of the State's water resources." (paragraph 15). Application of the current SWC Methodology results in an unreasonable positive feedback loop for determination of the BLY: the more the SWC members divert, the greater the BLY diversions must be in order to stay above average. IDWR (or the TWG) should conduct additional analysis to determine whether the additional diversions are needed to meet crop demands, an analysis that could take the form of a basin-wide crop survey or other type of analysis. In the meantime, it is unreasonable to change the BLY in the manner that will increase shortages to the SWC members and result in greater curtailment of juniors.

Updated Project Efficiencies

IDWR proposes to change computation of the monthly average PE values from the average for the most recent 8 years to the average of the most recent 15 years. IDWR did not explain why it is proposing this

change. Changing from an 8-year average to a 15-year average may lessen the effect of recent reductions in PE for certain SWC members. The 2010 Order entails a “reasonable test” be applied to SWC member efficiencies. Here no reasonableness test has been applied, and as discussed in detail in **Attachment 1**, flat or decreasing PE values for the SWC members are concerning given continued sprinkler conversions by the SWC members and the advances in irrigation practices that continue to occur in the industry.

Other Comments

1. Irrigated acres provided by SWC should be accompanied by shapefiles to show that the reported irrigated acres reasonably match the actual irrigated lands. This can be confirmed using aerial imagery, field verification, and/or remote sensing such as NDVI, METRIC ET, and CDL.
2. The SWC Methodology provides that the crop water needs of the SWC members may be adjusted for supplemental groundwater use on the irrigated lands. IDWR should require that information necessary for this adjustment be compiled and utilized to adjust the reasonable in-season demand of the SWC members.

Attachments

Attachment 1 - 12/12/2022 Email

From: Greg Sullivan <gsullivan@spronkwater.com>
Sent: Monday, December 12, 2022 9:48 AM
To: Anders, Matthew; Jaxon Higgs; ssigstedt@lynker.com; Dave Shaw; Heidi Netter; Ferguson, Kara; dave.colvin@lrewater.com; TJ Budge; wkf@pmt.org; Travis Thompson (tlr@idahowaters.com); sklaln@somachlaw.com; Chris Bromley; 'Candice McHugh'; MHoward@usbr.gov; rbsnowmobiles@gmail.com; Kresta Davis (KDavis2@idahopower.com); Dave Blew (DBlew@idahopower.com); Ragan, Brian; Baxter, Garrick; John Simpson - Barker Rosholt & Simpson LLP (jks@idahowaters.com); Heidi Netter; Geisler, Ethan; Sukow, Jennifer
Subject: Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>; Cecchini-Beaver, Mark <Mark.Cecchini-Beaver@idwr.idaho.gov>; Vincent, Sean <Sean.Vincent@idwr.idaho.gov>; Spackman, Gary <Gary.Spackman@idwr.idaho.gov>
Attachments: 2022-12-12 SWC Diversions and CWN.xlsx

Attached is a spreadsheet containing the graphs and tables of historical adjusted diversions and crop water needs for the SWC members that I presented to the SWC TWG on Friday, December 9. The underlying IDWR data on which the graphs and tables are based are also included.

As discussed during the meeting, the graphs and tables in the spreadsheet suggest that use of crop water need and project efficiency as a predictor of demand in the SWC Methodology should be revisited.

Let me know if you have any questions.

Thanks,

Greg

Gregory K. Sullivan, P.E.

Principal Water Resources Engineer

Spronk Water Engineers, Inc.

1000 Logan Street

Denver, CO 80203

303.884.9976 cell

gsullivan@spronkwater.com

Attachment 2 - 12/21/2022 Email

From: Greg Sullivan <gsullivan@spronkwater.com>
Sent: Wednesday, December 21, 2022 1:23 PM
To: Anders, Matthew; Jaxon Higgs; ssigstedt@lynker.com; Dave Shaw; Heidi Netter; Ferguson, Kara; dave.colvin@lrewater.com; TJ Budge; wkf@pmt.org; Travis Thompson (tlt@idahowaters.com); sklahn@somachlaw.com; Chris Bromley; 'Candice McHugh'; MHoward@usbr.gov; rbsnowmobiles@gmail.com; Kresta Davis (KDavis2@idahopower.com); Dave Blew (DBlew@idahopower.com); Ragan, Brian; Baxter, Garrick; John Simpson - Barker Rosholt & Simpson LLP (jks@idahowaters.com); Heidi Netter; Geisler, Ethan; Sukow, Jennifer
Subject: Updated Comparison of Adjusted Diversions and Crop Water Needs for SWC Members
Attachments: 2022-12-21 SWC Diversions and CWN.xlsx; 2022-12-21 SWC Diversions and CWN Charts.pdf

TWG Members:

Attached is updated version of the spreadsheet comparing the historical Adjusted Diversions and Crop Water Needs (CWN) for the SWC members during 2001 – 2021. The spreadsheet includes several additional charts described below. PDFs of the added charts are attached.

Annual Project Efficiency Time-Series (AnnChartsPE Tab)

Additional charts were added in columns S – AH showing the computed annual Project Efficiency (PE) for each SWC member during from 2001 – 2021. The input flags that can be used to exclude certain years from the analysis (set on the AB tab) also operate to limit the annual efficiency values that are plotted in the new graphs. The flag in the attached spreadsheet is currently set to exclude years with a Demand Shortfall (DS) [flag = 2]. The trendlines plotted on the graphs indicate generally flat or declining PE for 6 of the 7 SWC members. This is surprising given the continued sprinkler conversions and general advances in irrigation practices and technology that have occurred in the irrigation industry over the past 20 years. Only Minidoka shows a trend of significantly increasing efficiency. The following are the changes in PE from 2001 – 2021 indicated by the trendlines for each SWC member:

Change in Project Efficiency (2001-2021)

(percentage point change)

A&B	-4.6%
AFRD2	-3.6%
BID	-1.0%
Milner	-12.6%
Minidoka	+12.2%
NSCC	-3.0%
TFCC	+1.8%

Because the PE values used in the SWC Methodology are currently based on averages for the most recent 8 years, any declines in the computed PE values will translate into increased demands and increased shortages.

Annual Project Efficiency vs Annual Adjusted Diversions AND Annual Crop Water Need (AnnAll Tab)

Additional scatter diagrams were added in columns AG – BM to plot the Annual Project Efficiency (PE) vs the Annual Adjusted Diversions AND Annual Crop Water Need for the 2001 – 2021 period. Again, the flag in the attached spreadsheet is set to exclude years with computed Demand Shortfalls (DS). Also plotted on the Annual Adjusted Diversions scatter charts are the average PE (solid black line) and the average PE + 1 standard deviation (dotted black line).

Monthly vs. Annual Project Efficiencies (AnnAll Tab)

Charts were added in columns BO – CD that compare the monthly average PE, average annual PE, and average annual PE + 1 standard deviation for each SWC member. These charts illustrate the low PE values in some months that cause monthly demands computed based on CWN / PE to be very sensitive to changes in CWN.

Discussion

The current SWC Methodology uses Monthly CWN / Avg Monthly PE to compute the monthly Diversion Demand. The Avg Monthly PE values for many of the SWC members vary widely throughout the irrigation season, and are unreasonably low in some months, particularly in September and October. The low monthly PE values may be due in part because they do not reflect the portion of the diversions that may be stored in soil moisture for subsequent use. For example, consider a month with 100 AF diverted, 30 AF of CWN, and 20 AF accruing to soil moisture. Under the SWC methodology, the computed PE would be 30%, but the actual PE considering the water stored in soil moisture would be 50%.

Because of the wide variability in the computed monthly PE values, consideration should be given to using seasonal PE values rather than monthly PE values in computing the monthly Diversion Demands. This would help level out the wide swings in the monthly diversion demands that sometimes occur in application of the SWC Methodology when relatively low monthly PE values are divided into relatively high monthly CWN values. If seasonal PE values are utilized, the data for September and October should be reviewed and potentially excluded from calculation of the seasonal PE values since the efficiencies in those months are unreasonably low.

In addition, the current use of average PE values during the most recent 8 years in the Diversion Demand calculations should be reviewed. The 2010 Fourth Amended Methodology Order states that “[d]uring periods of drought when junior groundwater users are subject to curtailment, members of the SWC should exercise reasonable efficiencies to promote the optimum utilization of the State’s water resources.” (paragraph 15). The annual PE values shown in the above referenced graphs show significant year-to-year variations for each SWC member. Since the data in the charts have been filtered to exclude years with computed demand shortages, variations in the computed annual PE values indicate that each of the SWC members have operated at a range of efficiencies to meet crop water demands over the past 20 years. Given the level or declining trend in average efficiencies for most SWC members, the current methodology that uses average efficiencies for the most recent 8 years may discourage reasonable and efficient use by the SWC to the detriment of groundwater users and contrary to optimum utilization of the State’s water resources.

The following table compares the average annual PE values for 2014-2021 (most recent 8-year period) against alternate PE values computed from annual data and April – August data for 2001-2021. The alternate PE values are tabulated as averages and as averages plus 1 standard deviation. All values exclude years in which demand shortages were computed.

PE Summaries	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
2014-2021 Avg	58%	32%	41%	49%	52%	34%	38%
2001-2021 Avg	60%	34%	41%	56%	47%	34%	38%
2001-2021 Avg + 1 Std Dev	65%	36%	45%	65%	53%	37%	41%
2001-2021 (Apr-Aug) Avg	63%	36%	44%	58%	50%	37%	43%
2001-2021 (Apr-Aug) Avg + 1 Std Dev	68%	39%	48%	68%	55%	40%	46%

The above values are computed in columns CF – CU in the AnnAll tab in the attached spreadsheet. These values illustrate some different ways that annual and seasonal PE values can be computed from the historical data. If IDWR is going to continue computing Reasonable In Season Demand (RISD) based on CWN / PE, consideration should be given to using PE values that better reflect reasonable and efficient operations of the SWC members than do the historical averages that are currently used in the SWC Methodology. This would help ensure that curtailment and/or mitigation of impacts from junior groundwater use occurs when SWC supplies are short under reasonable and efficient operations.

Thanks,

Greg

Gregory K. Sullivan, P.E.

Principal Water Resources Engineer

Spronk Water Engineers, Inc.

1000 Logan Street

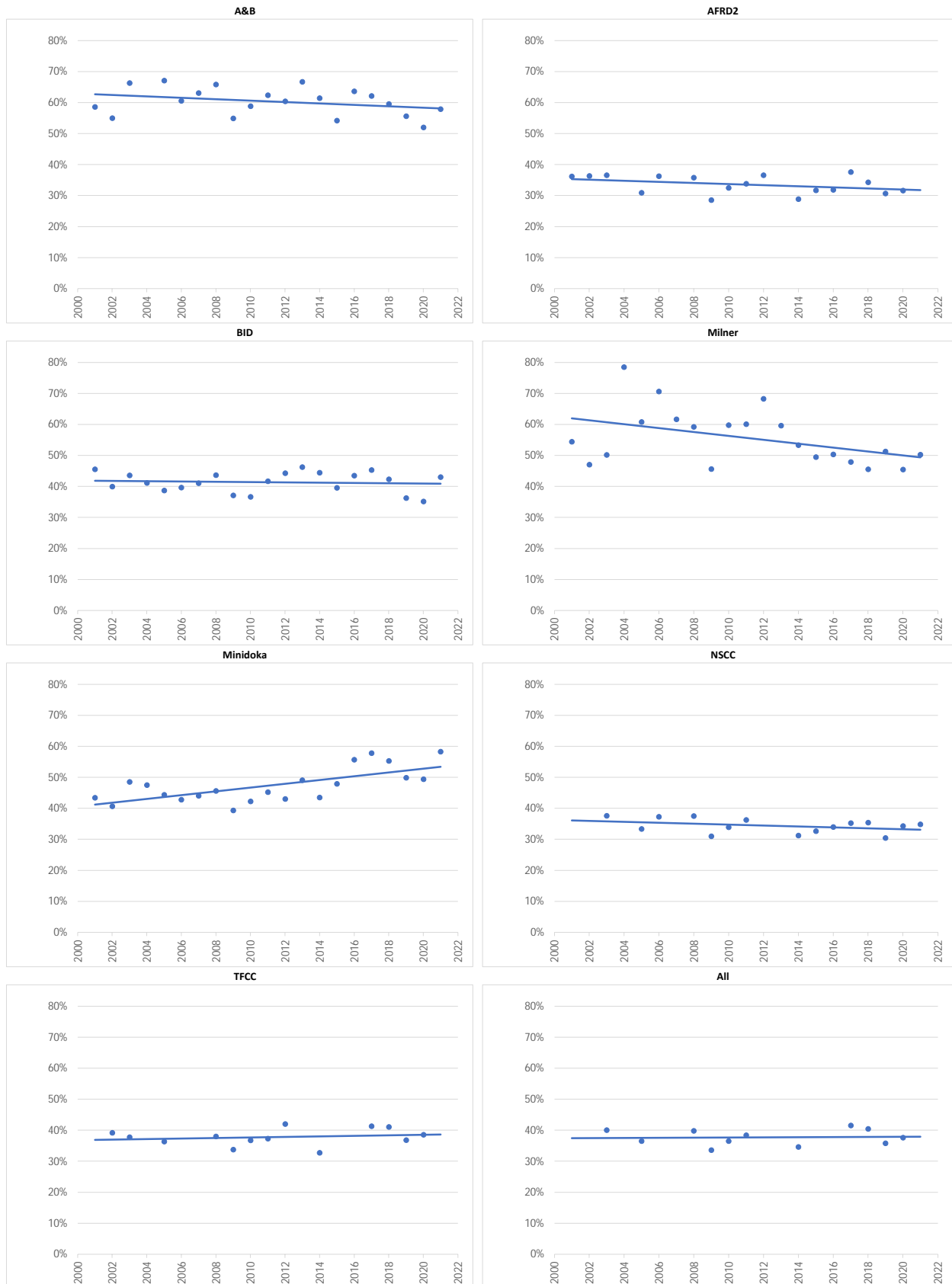
Denver, CO 80203

303.861.9700

303.884.9976 cell

gsullivan@spronkwater.com

Annual Project Efficiency
Surface Water Coalition Members
2001 - 2021 (AF)
Exclude Years with Demand Shortfall (DS)

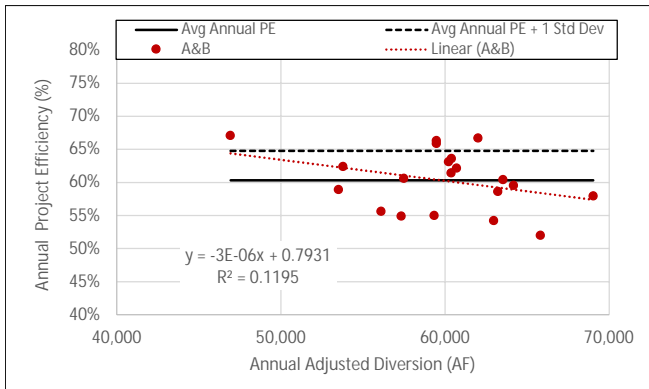


Annual Project Efficiency v. Annual Adjusted Diversions

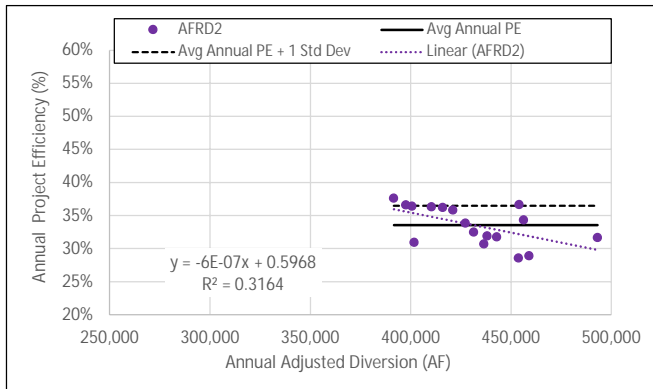
Surface Water Coalition Members

Exclude Years with Demand Shortfall (DS)

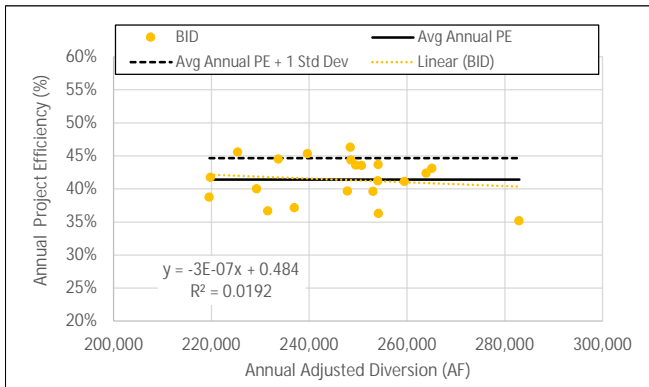
A&B



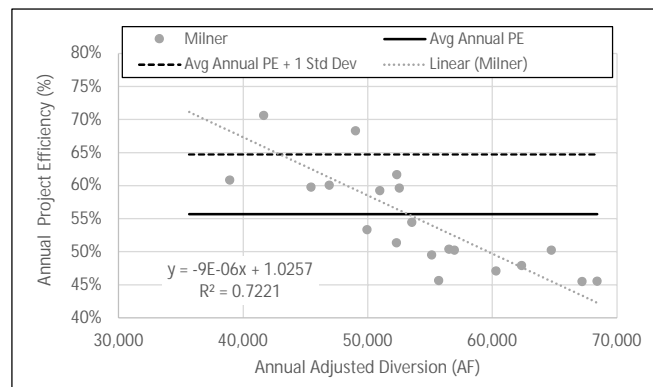
AFRD2



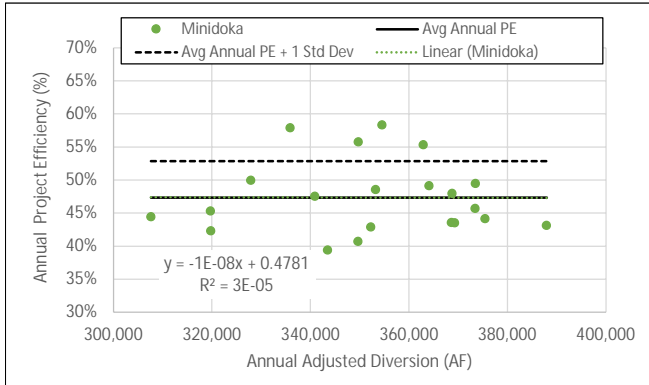
BID



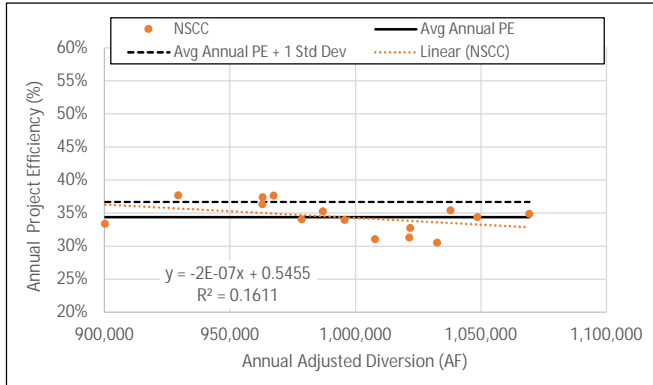
Milner



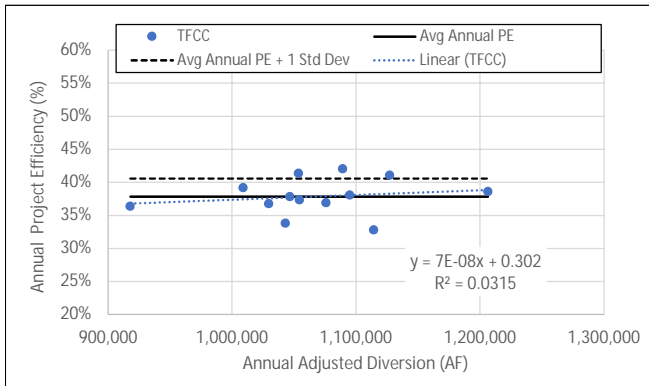
Minidoka



NSCC



TFCC



Notes:

Note different scales.

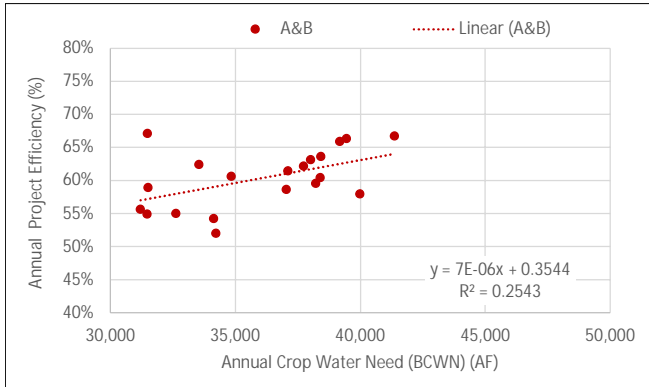
- (1) Annual Project Efficiency (PE) computed as Annual Crop Water Need (BCWN) divided by Annual Adjusted Diversion.
- (2) Annual Adjusted Diversions are historical reported diversions adjusted for to remove wheeled water, recharge, and mitigation (IDWR spreadsheet: DS RISD Calculator_2022_August 15.xlsx).
- (3) Annual Crop Water Need (BCWN) computed as crop weighted average crop irrigation requirement ("CIR") multiplied by District reported irrigated area.
- (4) Average Annual PE is the average of the 2001-2021 annual PE values.
- (5) Average Annual PE + 1 Std Dev is the average of the 2001-2021 annual PE Values plus 1 standard deviation.

Annual Project Efficiency v. Annual Crop Water Need (CWN)

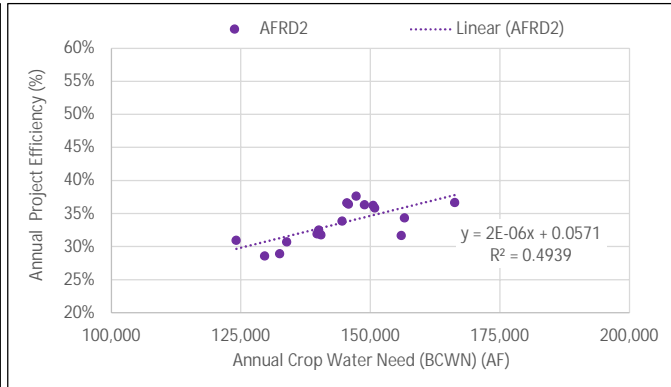
Surface Water Coalition Members

Exclude Years with Demand Shortfall (DS)

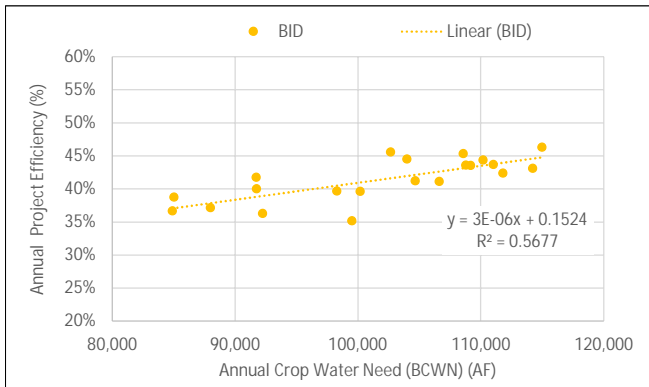
A&B



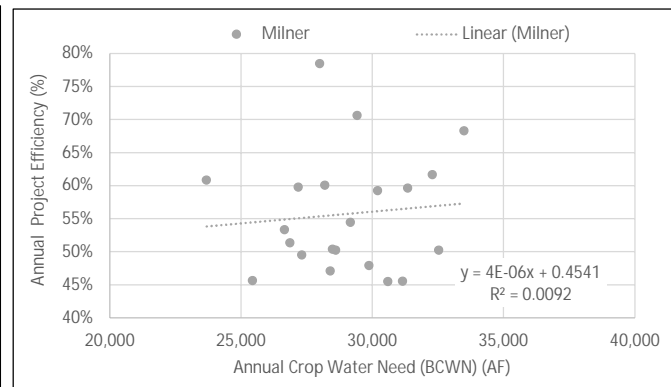
AFRD2



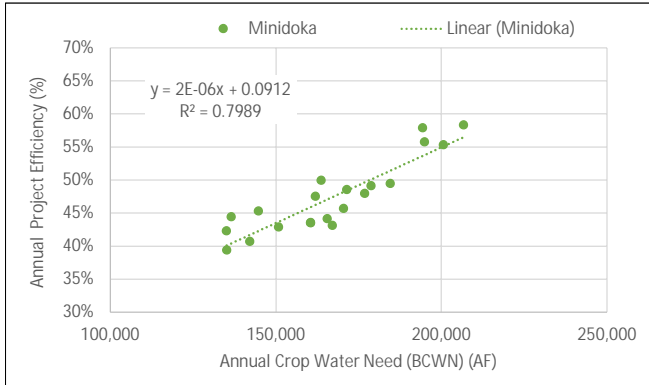
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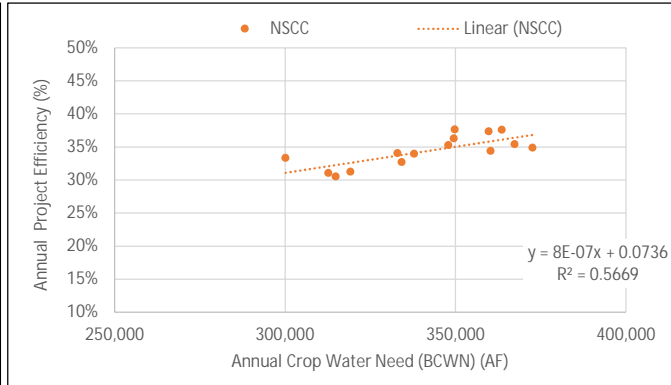
Milner



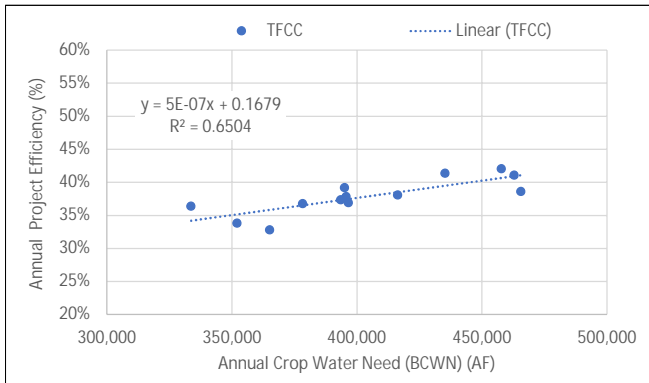
Minidoka



NSCC



TFCC



Notes:

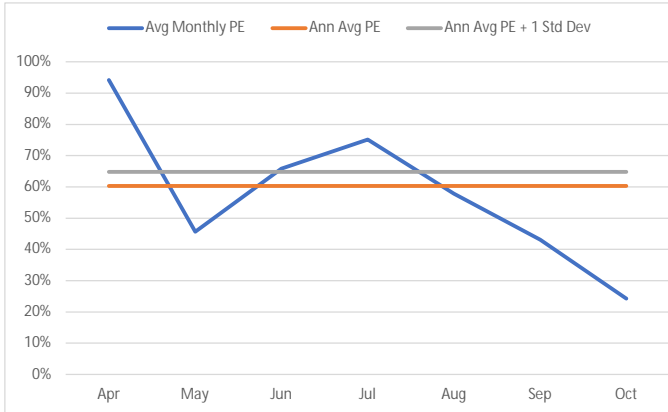
Note different scales.

- (1) Annual Project Efficiency (PE) computed as Annual Crop Water Need (BCWN) divided by Annual Adjusted Diversion.
- (2) Annual Adjusted Diversions are historical reported diversions adjusted for to remove wheeled water, recharge, and mitigation (IDWR spreadsheet: DS RISD Calculator_2022_August 15.xlsx).
- (3) Annual Crop Water Need (BCWN) computed as crop weighted average crop irrigation requirement ("CIR") multiplied by District reported irrigated area.

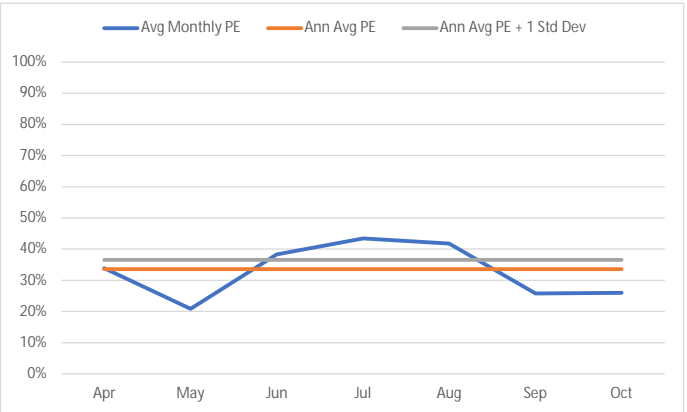
Annual Project Efficiency v. Monthly Project Efficiencies

Surface Water Coalition Members
Exclude Years with Demand Shortfall (DS)

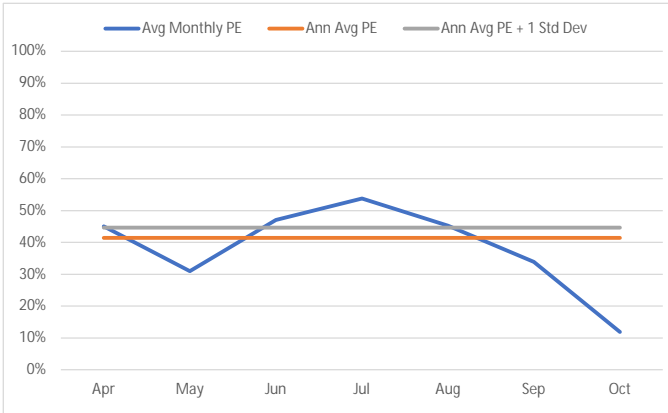
A&B



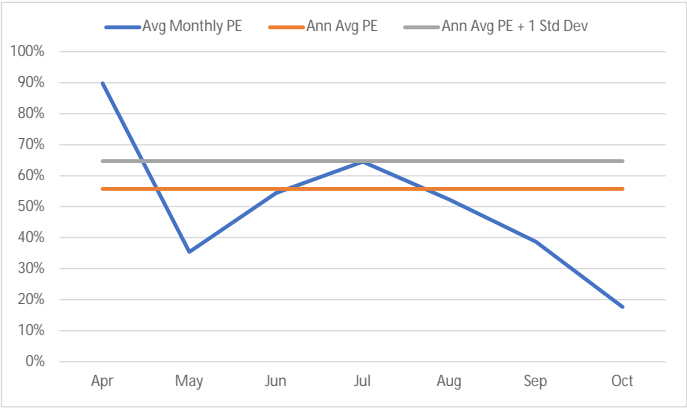
AFRD2



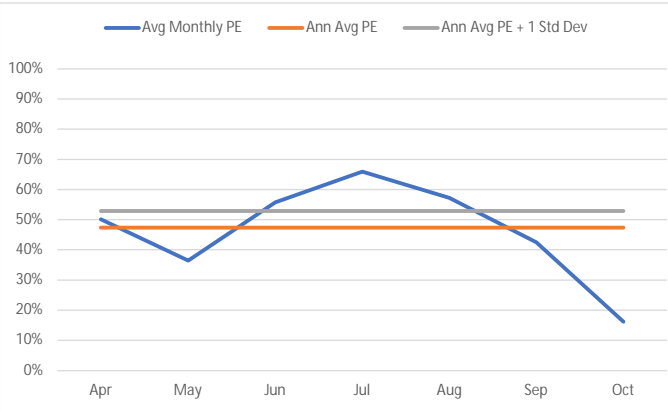
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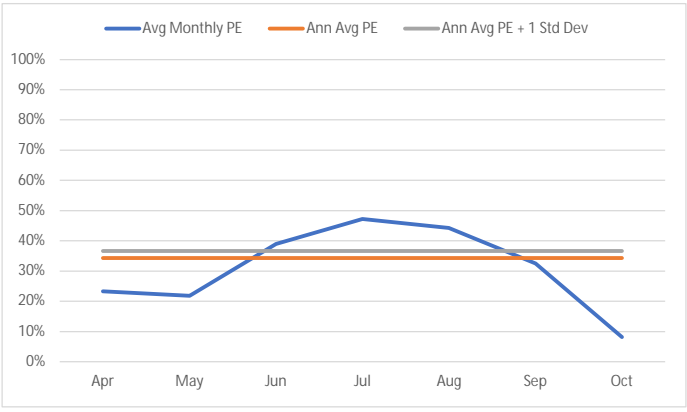
Milner



Minidoka



NSCC



TFCC

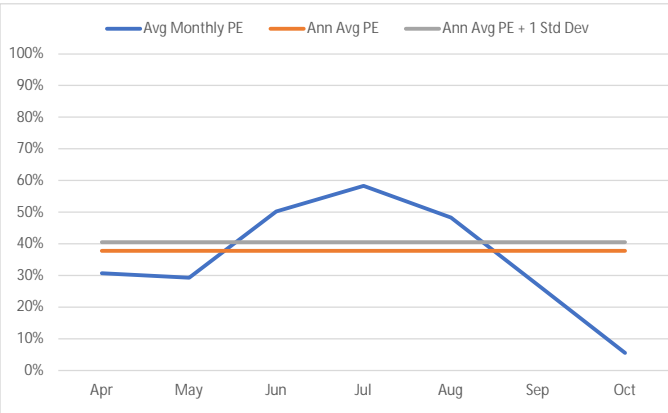


Exhibit M

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
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

*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
REQUEST FOR HEARING AND
STATEMENT OF ISSUES**

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" or "Coalition"), by and through
counsel of record, and hereby request a hearing in the above-referenced matter pursuant to I.C. §
42-1701A(3) and submit the following list of issues regarding the Director's *Fifth Amended*

Order Regarding Methodology et al. and the *Final Order Regarding April 2023 Forecast Supply* issued on April 21, 2023.

I. *Fifth Methodology Order*

The Coalition requests a hearing on the following issues:

- 1) Whether 2018 is the proper baseline year for each Coalition member pursuant to the criteria identified in the methodology order;
- 2) Whether the reasonable carryover amounts identified for each Coalition member are proper pursuant to the criteria identified in the methodology order;
- 3) Whether current year project efficiency is recalculated for each year after Cropland Data Layer (CDL) data for this year becomes available and prior to this current year's project efficiency being used in the 15-year rolling average;
- 4) Whether current year project efficiency is recalculated for each year after CDL updates become available and are included in the 15-year rolling average; and
- 5) Whether the Coalition members can receive assigned mitigation storage water if they do not participate in the Water District 01 rental pool.

II. *April As Applied Order*

The Coalition requests a hearing on the following issue:

- 1) Whether the order provides that IGWA has an option to comply with the mitigation plan approved in CM-MP-2016-001 to avoid curtailment by complying with the mitigation plan approved in CM-MP-2009-007 instead;

A&B Irrigation District requests a hearing on the following issues:

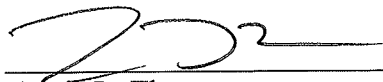
- 1) Whether the order's identified proportionate share (458 acre-feet) of the predicted injury (75,200 acre-feet) to TFCC is calculated correctly based upon A&B's actual diversion

and use of water rights that are subject to the identified curtailment date (junior to December 30, 1953); and

- 2) Whether the steady-state use of the ESPAM 2.2 in identifying A&B's proportionate share is consistent with the transient use of the model in identifying ground water rights subject to curtailment as outlined in the *Fifth Methodology Order*.


DATED this 5th day of May, 2023.

MARTEN LAW LLP


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


W. Kent Fletcher

*Attorneys for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

CERTIFICATE OF SERVICE

I hereby certify that on this 5th 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>gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov</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>Tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p>sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p>rdiehl@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p>wparsons@pmt.org</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>corey.skinner@idwr.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p>wkf@pmt.org</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>kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com	Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com	Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only rfife@idahofallsidaho.gov
Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com	Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only dylan@dylanandersonlaw.com	

Jessica Nielsen
Assistant for Travis L. Thompson

Exhibit N

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*

**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 TO RE-SET HEARING
DATES**

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”), Idaho Ground Water Appropriators (“IGWA”) by and through its attorney of record Thomas J. Budge,

Bingham Ground Water District by and through its attorney, Dylan Anderson and Bonneville-Jefferson Ground Water District, by and through its attorney Skyler Jones, (collectively the “Parties”) and request the hearing dates for the above captioned matter be moved to June 19-23, 2023..

As stated in his recent *Order Denying Motion for Reconsideration of Denial of Continuance*, (“Order Denying Reconsideration”) the Director states that “he is willing to work with the parties to move the hearing to anytime within the first three weeks of June 2023.” *Id.* at 6.¹ The Director stated that a hearing within the month of June will “ensure timely administration for predicted material injury in this current irrigation season.” *Id.* While the Parties to this Motion do not believe that moving the hearing dates back comport with the necessary due process this case requires and do not hereby waive any arguments relative to the process, the Parties believe that moving the hearing date back is needed and necessary for them to better prepare and accommodate their experts. The Parties conferred with counsel for the Surface Water Coalition but could not reach agreement on a continuance.

The bases for Parties’ request to re-set the hearing to June 19-23 are as follows:

1. IGWA’s expert, Jaxon Higgs will be available for hearing, whereas currently he will be out of the country. See previously filed Declaration of Higgs. Re-setting the dates will at least allow one of IGWA’s experts to attend the hearing in-person which is vital to effectively assist at hearing and evenings. Currently, none of IGWA’s experts can attend the hearing in person. *Id.* See too previously filed Declaration of Sigstedt.

2. The Cities’ expert, Greg Sullivan returns on June 2 from an overseas trip. By

¹ To be clear, counsel for IGWA and counsel for the Cities on multiple separate occasions tried to get the SWC to agree to move the hearing to a more reasonable time period but were met with either outright denials or other requests that impeded the ability to reach agreement among all the parties.

resetting the hearing to June 19, Mr. Sullivan will be available to assist the Cities with trial preparation. In addition, Mr. Sullivan's expert report would be due June 12 which gives him 10 days to finalize such report upon his return, whereas currently his report is due when he is out of the country. See previously filed Declaration of Sullivan.

3. The Cities' counsel, Candice McHugh will be available to both assist in witness preparation and to attend the hearing in person. See previously filed Declaration of McHugh.²

4. The Cities have filed a *Petition for Judicial Review and Motion for Stay Based on IDWR's Interference with Lawful Discovery and Complaint for Declaratory Relief and Writ of Prohibition and Petition for Writ of Mandamus*. Resetting the hearing to June 19 will allow due consideration of the pending Complaint and Writ Action.

5. IGWA and the GWDS have filed a *Petition for Judicial Review* and have also filed: Ground Water Districts' *Motion to Compel*, Ground Water Districts' *Motion for Order to Show Cause*, Ground Water Districts' *Motion for Stay*, Ground Water Districts' *Motion for Injunctive Relief*, Ground Water Districts' *Motion for Expedited Decision*. Moving the hearing dates back will allow due consideration of the various Motions.

CONCLUSION

Based on the foregoing, the Parties to this Motion request that the Director re-set the hearing dates as requested.

In addition, the Parties to this Motion recognize that the Surface Water Coalition has a right to respond to this motion but given the compressed hearing schedule, the Parties request

² The resetting will also facilitate Mr. Bromley's preparation for the Supreme Court argument on June 5 in the Basin 37 matter.

that the Director order them to respond by the end of business Wednesday, May 23, 2023, and issue an order on this Motion by Friday, May 26, 2023.

Submitted this 22nd day of May, 2023.

/s/ Sarah 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 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/ Thomas 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*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd 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.

file@idwr.idaho.gov

garrick.baxter@idwr.idaho.gov

John K. Simpson

MARTEN LAW LLP

P.O. Box 2139 Boise, ID 83701-2139

jsimpson@martenlaw.com

Travis L. Thompson

MARTEN LAW LLP P.O. Box 63

Twin Falls, ID 83303-0063

tthompson@martenlaw.com

jnielsen@martenlaw.com

W. Kent Fletcher

FLETCHER LAW OFFICE

P.O. Box 248 Burley, ID 83318

wkf@pmt.org

Thomas J. Budge

Elisheva M. Patterson

RACINE OLSON

P.O. Box 1391 Pocatello, ID 83204-1391

tj@racineolson.com

elisheva@racineolson.com

Candice McHugh

Chris Bromley

MCHUGH BROMLEY, PLLC

380 South 4th Street, Suite 103 Boise, ID

83702 cbromley@mchughbromley.com

cmchugh@mchughbromley.com

Kathleen Marion Carr

US Dept. Interior 960 Broadway Ste 400

Boise, ID 83706

kathleenmarion.carr@sol.doi.gov

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

Matt Howard

US Bureau of Reclamation

1150 N Curtis Road Boise, ID 83706-1234

mhoward@usbr.gov

Sarah A Klahn

Somach Simmons & Dunn

1155 Canyon Blvd, Ste. 110 Boulder, CO

80302 sklahn@somachlaw.com

dthompson@somachlaw.com

Rich Diehl

City of Pocatello

P.O. Box 4169 Pocatello, ID 83205

rdiehl@pocatello.us

Robert L. Harris

HOLDEN, KIDWELL, HAHN & CRAPO,
PLLC

P.O. Box 50130 Idaho Falls, ID 83405

rharris@holdenlegal.com

Robert E. Williams
WILLIAMS, MESERVY, & LOTHSPREICH,
LLP P.O. Box 168 Jerome, ID 83338
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
nolsen@olsentaggart.com
staggart@olsentaggart.com

Dylan Anderson
Dylan Anderson Law PLLC
P.O. Box 35
Rexburg, Idaho 83440
dylan@idylanandersonlaw.com

Corey Skinner
IDWR—Southern Region
1341 Fillmore St., Ste. 200 Twin Falls, ID
83301-3033
corey.skinner@idwr.idaho.gov

Randall D. Fife City
Attorney, City of Idaho Falls
P.O. Box 50220 Idaho Falls, ID 83405
rfife@idahofallsidaho.gov

William A. Parsons
PARSONS SMITH & STONE
P.O. Box 910 Burley, ID 83318
wparsons@pmt.org

/s/ Candice McHugh

Candice M. McHugh

Tony Olenichak IDWR—Eastern Region
900 N. Skyline Drive, Ste. A Idaho Falls, ID
83402
Tony.Olenichak@idwr.idaho.gov

Exhibit O

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
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

*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 TO RE-SET
HEARING DATES**

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 to Re-set Hearing*

Dates (“*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 22, 2023. This response is supported by the attached exhibits and the *Declaration of David Colvin* filed together herewith. For the reasons set forth below, the Director should deny the Groundwater Users’ motion, again.

BACKGROUND / APPLICABLE RULE

The Groundwater Users identify no basis or applicable rule for their present “motion.” Presumably it is a second motion for reconsideration of the Director’s denial of their original motion for continuance. As indicated in the *Order Denying Motion for Reconsideration of Denial of Continuance* (“*Reconsideration Order*”), the Director has discretion to “rescind, alter or amend any interlocutory order” pursuant to Rules 710 and 711. *See* IDAPA 37.01.01.560. For the reasons contained in that *Order* and as set forth below, the Director should again deny the present effort to delay the hearing in this case.

The Surface Water Coalition submits the Director properly exercised his discretion in denying the Groundwater Users’ repeated requests and that there is nothing in the present *Motion* that would warrant reconsidering the prior reasoning or decisions.

ARGUMENT

I. The Groundwater Users Offer No New Facts or Argument Warranting a Delay in this Hearing and Ultimately Conjunctive Administration of Junior Priority Ground Water Rights During the 2023 Irrigation Season.

The Groundwater Users offer no new facts that would justify any further delay in this case. Instead, they repeat the same claims the Director fully considered and addressed in the *Reconsideration Order*. *See generally*, *Motion* at 2-3. While the Director provided for remote

participation for consultants that cannot travel to Idaho or will be voluntarily out-of-state at that time, that accommodation is overlooked.¹ *See Order* at 7. The Groundwater Users are familiar with remote participation as evidenced by their counsel's participation in the depositions of IDWR staff last week as well as their consultants full participation in the Technical Work Group meetings hosted by the Department over a six-week period beginning in November of 2022. In fact, it was at those meetings where information was presented that ultimately resulted in the modifications to the Methodology in the *Fifth Order*.

The Groundwater Users ask the Director to move the hearing presently set for June 6-10 to June 19-23.² *Motion* at 2. However, even with this delay they “do not believe that moving the hearing dates back comport with necessary due process this case requires and do not hereby waive any arguments relative to the process.” *Id.* In other words, the Groundwater Users admittedly really don't believe moving the hearing two weeks matters or addresses the concerns alleged. Perhaps if the requested “re-set” acknowledged satisfaction of alleged due process concerns, the motion and its basis would look differently. However, they make no such claim. The reality is as pointed out in the Groundwater Users' briefing is that they want the delay, not to prepare for hearing, but to primarily provide more time for the processing of their district court filings.

¹ The Groundwater Users' request to move the hearing to June 19th would still require Ms. Sigstedt to participate remotely as she indicated she could not travel out-of-state until mid-July. *See Sigstedt Dec.* Accordingly, that is not a reason to reconsider the Director's order. Moreover, IGWA admits that “Jaxon Higgs will be available for hearing.” *Motion* at 2. Even though Mr. Higgs “will be out of the country,” the Director's remote accommodation addresses that concern. *See Order* at 7. Mr. Higgs does not indicate where he will be in Mexico but presumably he would be located in either the Mountain or Central time zone, i.e. a one hour difference from Boise, Idaho.

² The Coalition disputes the Groundwater Users' characterization of their discussions concerning moving the hearing date. *See Motion* at 2, n. 1. Each time the Groundwater Users' counsel requested moving the hearing, counsel for the Coalition advised of the problems with delaying administration to their clients' senior water rights and the fact that IGWA's *Notice of Mitigation* did not cover all affected junior ground water rights. As acknowledged by the Director, senior water right holders are entitled to timely administration and the schedules of counsel and consultants do not trump that statutory duty.

Since the denial of their original motion for reconsideration the Groundwater Users have filed three separate lawsuits against the Director and the Department in Ada County District Court. *See generally, IGWA et al. v. IDWR*, Case No. CV01-23-8187; *City of Pocatello et al. v. IDWR*, Case No. CV01-23-8258; *City of Pocatello et al. v. IDWR*, Case No. CV01-23-8306. In those actions the Groundwater Users seek among other relief, a stay, injunctive relief, and writs of mandamus and prohibition. Despite exercising their statutory rights and requesting an administrative hearing on the Director's *Fifth Order* pursuant to Idaho law, the Groundwater Users now ask the Director to delay that hearing in order to accommodate their lawsuits against the State of Idaho. *Motion* at 3 (“[r]esetting the hearing to June 19 will allow due consideration of the pending Complaint and Writ Action”). Stated another way, the Groundwater Users are not declaring the two-week delay would satisfy their due process claims, but instead are effectively asking the Director to voluntarily delay the administrative case proceeding so that the district court might enjoin it altogether. Whereas the State of Idaho and all parties involved will likely spend significant time and resources on these cases and the multitude of motions, it is likely such matters will be dismissed as a matter of law. *See e.g. Order Denying Application for Temporary Restraining Order (SVGWD v. IDWR*, Blaine County Dist. Ct., Fifth Jud. Dist., Case No. CV07-21-243, May 27, 2021); *Order Granting Motion to Dismiss (IGWA v. IDWR*, Jerome County Dist. Ct., Fifth Jud. Dist., Case No. CV27-22-945, Dec. 8, 2022) (“Since IGWA has an adequate administrative remedy available to it which has not been exhausted under Idaho Code § 42-1701A(3), its *Petition* must be dismissed”). The Director should see through the Groundwater Users’ requested “re-set” for what it is, a delay tactic that will cost all parties substantial resources and attorneys fees, and deny it accordingly.

Most importantly, as noted before, any delay in the hearing would effectively delay conjunctive administration during the 2023 irrigation season. *See generally, SWC Opposition to Groundwater Users' Motion for Reconsideration* (May 8, 2023). Whereas the Ground Water Districts' breach of the 2021 Stipulated Mitigation Plan took several months to address, it created great concern for potential curtailment at the end of the growing season. Any additional delay in this hearing has the potential to re-create that same situation, including for groundwater users that do not have an approved mitigation plan.

Indeed, the Director has stated that he “will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed.” *Order* at 6. This may include addressing the Ground Water Districts' 2022 breach of the Stipulated Mitigation Plan. Although over-pumping by certain Districts last year will have continuing impacts on the Snake River into this irrigation season, any delay in administration could reduce the effectiveness of any curtailment remedy if necessary.

For example, even if the Director issued a final order within a week of the close of the scheduled hearing, any actual curtailment could be delayed beyond that timeframe. For example, in 2022, after issuing the Steps 1-3 As Applied Order on April 20, 2022 forecasting a projected injury of 162,000 acre-feet, the Director stated that junior ground water users who did not establish their ability to mitigate by May 1, 2022 would be curtailed effective at 12:01 a.m. on May 20, 2022. *See Final Order Curtailing Ground Water Rights Junior to December 25, 1979* (CM-DC-2010-001; May 5, 2022). In other words, the actual curtailment was ordered to occur approximately two (2) weeks after the order was issued.³ If a similar schedule were to apply here, delaying the hearing to June 19-23 could foreseeably forestall any required curtailment to

³ The Director has ordered curtailment to occur sooner within the issuance of an order following hearing as evidenced in the Basin 37 administration case. *See Final Order* (Docket No. AA-WRA-2021-001, June 28, 2021).

the middle of July. This sort of delay in administration is unacceptable to the Coalition and their landowners and shareholders, particularly for entities like TFCC that typically rely solely on reach gains from ESPA aquifer discharges for the source of their natural flow water rights. Given the trends over the last several years, it is likely that natural flow declines will continue and would not satisfy increasing irrigation demands throughout the summer.

Further, the Director aptly highlighted the problems and issues with IGWA's *Notice of Mitigation*. See *Order* at 6. Again, 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 filing wherein the districts represent they are only proposing to mitigate for their members. 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.

Any delay in the schedule would inevitably delay administration of any affected junior ground water rights not covered through an approved any effectively operating mitigation plan. Every day that passes furthers the potential that unmitigated pumping will continue to injure the Coalition's senior surface water rights without adequate mitigation as the irrigation season has already commenced throughout the various administrative basins across the ESPA.

Further exacerbating potential injury this year is the deteriorating water supply evidenced by the U.S. Bureau of Reclamation's revised May 1st streamflow forecast and the recently released 2023 aquifer sentinel well index. See Ex. A; see also, Ex. A to *Dec. of David Colvin*. The reduced surface water supply forecast due to increased temperatures and lack of spring

precipitation, as well as declining groundwater levels are likely reducing hydraulically connected reach gains in the Near Blackfoot to Minidoka reach of the Snake River this year. Moreover, it is still uncertain at this time whether storage water supplies will completely fill. *See* Ex. B. Delaying administration under such worsening conditions is not warranted and is contrary to Idaho law.

The Coalition submits the Director properly found that after “considering the need of the senior water user to have timely administration versus the ground water users desire to have more time to prepare for hearing, the Director will adhere to the current schedule.” *Order* at 5 (emphasis added). The Coalition requests the Director to deny the Groundwater Users’ motion to re-set the hearing accordingly and confirm that the hearing is still scheduled for June 6-10, 2023 as previously ordered.

II. Coalition Consultant Conflict.

In addition to the reasons explained above, delaying the hearing until June 19th would create a conflict for one of the Coalition’s primary consultants, David Colvin, who will be out of the country and unavailable from June 8-21, 2023. *See Dec. of David Colvin*. Mr. Colvin has been assisting the Coalition for several years, including through the Technical Working Group process last fall and winter. Mr. Colvin is traveling to Vietnam, which would have an extreme time difference (13 hours ahead) making remote participation problematic. *See id.* Mr. Colvin has made travel arraignments and is planning on attending the hearing June 6-7. *See id.* Whereas moving the hearing would conflict with this schedule which has been set for weeks, the Coalition opposes the Groundwater Users’ *Motion* on this basis as well.

CONCLUSION

In conclusion, the Coalition submits the Director properly exercised his discretion in denying the Groundwater Users' motion for continuance the first two times. The administrative hearing requested by the Groundwater Users and the Coalition was set over four weeks ago on April 21st and is set to begin two weeks from today. Since the parties have already been preparing for the current schedule, including deadlines set for May 30th and the June 6-10 hearing, there is no new reason to delay that schedule, particularly when the Groundwater Users are seeking that delay to accommodate their lawsuits against the State.

Time is still 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 further harm the Coalition's senior surface water rights. The Coalition therefore submits the Groundwater Users' motion to re-set the hearing should be denied.

DATED this 23rd day of May, 2023.

MARTEN LAW LLP

/s/ Travis L. Thompson
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

/s/ W. Kent Fletcher
W. Kent Fletcher

*Attorneys for American Falls
Reservoir District #2 and Minidoka
Irrigation District*

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd 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>gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov</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>tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p>sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p>rdiehl@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p>wparsons@pmt.org</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>corey.skinner@idwr.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p>wkf@pmt.org</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>kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com	Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com	Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only rfife@idahofallsidaho.gov
Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com	Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only dylan@dylanandersonlaw.com	

/s/ Jessica Nielsen

Jessica Nielsen
Assistant for Travis L. Thompson

Exhibit A



— BUREAU OF —
RECLAMATION

Snake River Agency Meeting/Public Information Meeting May 18, 2023

Upper Snake Reservoir Operations

May 2023 Volume Runoff Forecasts

CURRENT MONTHLY FORECAST SUMMARY

MAY 1, 2023

FORECAST POINT	FORECAST PERIOD	1991-2020 AVERAGE (KAF)	FORECAST (KAF)	PERCENT NORMAL
*** HEISE	MAY~JUL	2898	3200	110%
JACKSON LAKE	MAY~JUL	701	734	105%
ISLAND PARK	MAY~JUL	158	180	114%
TETON	MAY~JUL	303	345	114%
*** RIRIE	MAY~JUN	35	100	289%
*** LITTLE WOOD	MAY~JUL	52	95	184%

* Coordinated with USACE

Mid-May Heise Forecast Reduced to 105% of Normal
due to dry conditions



Exhibit B

WATER REPORT – May 16, 2023

Total system natural flow continues to be sufficient to fill irrigation rights currently diverting water that are senior to the American Falls Reservoir 1921 priority storage right while continuing to accrue new storage into the 1917-priority Henrys Lake and 1913-priority Jackson Lake storage rights. It appears the American Falls storage right will reach 100% accrual near the end of this week, at which time the 1935-priority Island Park, 1936-priority Grassy Lake, 1939-priority Palisades, and perhaps the 1969-priority Ririe Reservoir space will begin accruing additional storage under their priorities.

All system natural flow is expected to be delivered to senior canal rights or stored to reservoir storage rights without spilling past Milner for at least the next few weeks. Whether the natural flow will be sufficient to fill the entire reservoir system and spill excess water past Milner probably won't be known for certain until mid-June.

CALENDAR

May 17th – Henrys Fork Watershed Council Meeting beginning at 9 AM at Fremont County Annex Building in St. Anthony or via Zoom link <https://us02web.zoom.us/j/88172196681>.

May 18th – Jackson Lake Operations Public Information Meeting beginning 3pm at Teton County Library in Jackson, Wyoming.

Exhibit P

**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 MOTION FOR
RECONSIDERATION OF DENIAL
OF CONTINUANCE**

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”) and 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 Continuance* requesting that the Director continue the June 6-10 evidentiary hearing “until a date in December or January 2024” Mot. for Continuance at 8.

During the April 28, 2023 prehearing conference, the Cities presented argument in support of their *Motion for Continuance*. The Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Groundwater District (“BJGD”), and McCain Foods orally moved to join the Cities’ *Motion for Continuance*. The Cities requested that the hearing be delayed approximately six months. *Id.* The Cities asserted that 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 asserted the Director should grant their

**ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF
CONTINUANCE—Page 1**

request because no exigency exists given the above-average snowfall this year. *Id.* at 6–8. 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. The Director stated he was, however, willing to move the hearing anytime within the first three weeks of June 2023 if all the parties agreed to move the hearing. 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.

On May 5, 2023, the Director issued an *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (“Order Denying Motion to Continue”). In the order, the Director memorialized his oral denial of the Motion for Continuance but advised that he was willing to move the hearing within the first three weeks of June 2023 if the parties filed a stipulated motion requesting the change. *Order Denying Motion to Continue* at 2. By separate order, the Director authorized Ms. McHugh to appear at the hearing remotely. Scheduling Order and Order Authorizing Remote Appearance at Hr’g at 3.

On May 5, 2023, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell along with IGWA, BJGD, and Bingham Groundwater District (collectively the “Groundwater Users”) filed a *Motion for Reconsideration of Denial of Continuance* (“Motion for Reconsideration”) asking the Director to reconsider his order denying the request to continue the hearing. In support of its Motion for Reconsideration, the Groundwater Users filed declarations from the following individuals: Candice McHugh, counsel for the Coalition of Cities, Amalgamated Sugar Company, and McCain Foods; Skyler Johns, Counsel for BJGD; Thane Kindred and Bryce Contor, experts for BJGD; and Sophia Sigstedt and Jaxon Higgs, experts for IGWA.

On May 8, 2023, the SWC filed *Surface Water Coalition’s Opposition to Groundwater Users’ Motion for Reconsideration of Order Denying Motion for Continuance* (“Objection”).

ANALYSIS

Rule 560 of the Department’s Rules of Procedure grants the presiding officer the discretion to continue a proceeding. IDAPA 37.01.01.560. Rules 710 and 711 advise that scheduling orders are interlocutory orders, and that the presiding officer has the discretion to “rescind, alter or amend any interlocutory order...”. IDAPA 37.01.01.710–711.

A. Unavailability of Counsel and Experts.

The Groundwater Users contend the June 6–10 hearing should be continued due to the unavailability of numerous witnesses and an attorney. *Motion for Reconsideration* at 3–5. The Groundwater Users further contend that a failure to continue the hearing will result in prejudice to the Groundwater Users. *Id.* at 5. To support their unavailability argument, the Groundwater Users submitted declarations from the following individuals:

Jaxon Higgs. Mr. Higgs is a hydrogeologist who provides technical analysis to IGWA. Decl. of Jaxon Higgs ¶¶ 3, 4. Mr. Higgs advises that he will be on a road trip vacation in Mexico from May 27–June 10 and will be unavailable to attend the hearing on June 6–10. *Id.* ¶ 7.

Sophia Sigstedt. Ms. Sigstedt is a hydrogeologist who provides technical analysis to IGWA. Decl. of Sophia Sigstedt ¶¶ 2, 3. Ms. Sigstedt advises she is dealing with a medical condition that prohibits her from leaving her home state of Colorado until July 10, 2023, and limits the amount of work she can perform during this time. *Id.* ¶ 15.

Candice McHugh. Ms. McHugh is an attorney representing the Coalition of Cities, Amalgamated Sugar, and McCain Foods. Decl. of Candice McHugh ¶ 2. Ms. McHugh advises that her partner Chris Bromley has an argument before the Idaho Supreme Court on June 5, and will need the week of May 29 to prepare for that argument. *Id.* Ms. McHugh advises that she will be out of state from June 4–8, and that she will be flying “virtually all day” on June 4 and June 8. *Id.* ¶ 6. Ms. McHugh contends that, given their schedules, she and Mr. Bromley will be unable to fully and fairly represent their clients if the hearing is held on June 6–10. Decl. of Candice McHugh ¶ 7.

In response, the SWC points out that the Department has already authorized Ms. McHugh to appear remotely to accommodate her travel, and that the SWC would stipulate to Ms. Sigstedt’s appearing remotely to accommodate her medical condition. *Objection* at 8–9 n.8.

The Director recognizes that some flexibility with witnesses and attorneys is necessary. Ms. McHugh has already been granted the ability to appear remotely. Mr. Bromley, Ms. McHugh’s law partner, will be available to attend on the one day that Ms. McHugh will be traveling and unavailable. Clients of the McHugh Bromley law firm will have representation during all days of the hearing. Regarding the participation by experts, the Director will authorize Ms. Sigstedt and Mr. Higgs to participate in the hearing remotely.

B. Insufficient time to prepare.

The Groundwater Users next assert that the June 6–10 hearing should be continued because they are without sufficient time to prepare, resulting in prejudice. *Motion for Reconsideration* at 5–6. To support this claim, the Groundwater Users submitted declarations from the following individuals:

Greg Sullivan. Mr. Sullivan is an expert for the Coalition of Cities and the City of Pocatello. Decl. of Greg Sullivan ¶¶ 3–5. Mr. Sullivan asserts he will be on a trip in Europe from May 17–June 3, leaving him an insufficient amount of time to prepare for a hearing. *Id.* ¶¶ 20–21.

Mr. Sullivan estimates he needs 3–5 months to prepare for the hearing. *Id.* ¶ 25.

Bryce Contor. Mr. Contor is a hydrologist who consults for BJGWD. Decl. of Bryce Contor ¶¶ 2, 6. Mr. Contor asserts he does not have time to perform an adequate technical review of the information prior to the hearing. *Id.* ¶¶ 8, 10.

Thane Kindred. Mr. Kindred is a geologist hired by BJGWD to provide technical advice and conduct a comprehensive review of the Methodology Order. Decl. of Thane Kindred ¶¶ 3, 5. Mr. Kindred advises he will not have sufficient time to conduct his review prior to the June 6–10 hearing. *Id.* ¶¶ 5, 7. Mr. Kindred further advises he does not have all the information he needs and will need at least two months to conduct his analysis. *Id.* ¶¶ 5, 7.

Sophia Sigstedt. Ms. Sigstedt is a hydrogeologist who provides technical analysis to IGWA. Decl. of Sophia Sigstedt ¶¶ 2, 3. Ms. Sigstedt advises she would like to analyze *inter alia* the number of acres irrigated by the Twin Falls Canal Company, the Forecast Supply Predictors from 1900–2022, and whether the data supports the Director’s decision to use 2018 as the Baseline Year. *Id.* ¶¶ 8–10. Ms. Sigstedt advises she lacks sufficient time to conduct her analysis prior to the hearing on June 6–10, and further advises she will need until October of 2023 to complete her work. *Id.* ¶ 14.

Skyler Johns. Mr. Johns is an attorney for BJGWD. Decl. of Skyler Johns ¶¶ 2. Mr. Johns asserts he did not receive “formal notice” from the Department that it would transition from steady-state to transient-state analysis. *Id.* ¶ 5. Mr. Johns advises that neither himself nor his experts were part of the technical working group. *Id.* Mr. Johns further advises that as of the date he signed his declaration (May 5, 2023), he did not have access to all the documents he needs to conduct a review and prepare his legal arguments. *Id.* ¶ 7. Mr. Johns contends he will need at least 6 months to prepare for the hearing, and that without such time his clients will be prejudiced. *Id.* ¶¶ 8–10.

Candice McHugh. Ms. McHugh is an attorney representing the Coalition of Cities, Amalgamated Sugar, and McCain Foods. Decl. of Candice McHugh ¶ 2. Ms. McHugh further advises that “[t]he 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, PLCC’s clients.” *Id.* ¶ 9.

The SWC responds that six weeks is plenty of time to prepare for a hearing, as evidenced by the fact that the First Methodology Order in this exact case was issued on April 7, 2010, with

an evidentiary hearing held on May 24, 2010. *Objection* at 7–8. The SWC further advises that this type of scheduling in a conjunctive management administration should surprise no one. *Id.*

While the Director recognizes that the current schedule may be a burden on the parties, it is a burden being born by all parties, both the senior water users and the junior ground water users. Plus, an accelerated schedule is not unheard of in water administrative proceedings. Furthermore, while Bonneville- Jefferson Groundwater District has decided to hire new counsel and hire its own new experts, this does not justify a continuance. BJGD has long been a party to this proceeding. The Director will not allow a junior ground water user that has long been a party to the proceeding to delay administration because new counsel and experts are hired.

The ground water users claim being surprised by changes to the Methodology Order. In the fall of 2022, 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 publicly expressed his intention to update the Fourth Methodology Order. The parties were notified that the Director was considering changes and the issues being considered by the Director. The Department distributed data, technical analysis, and recommendations to the parties’ technical experts. For some of the Department presentations, the experts submitted comments to the Department on the proposed changes. As the declarations show, the experts for IGWA and the Cities have represented those entities for many years. The experts have a familiarity with the methodology order. After considering the need of the senior water user to have timely administration versus the ground water users desire to have more time to prepare for hearing, the Director will adhere to the current schedule.

C. Current Conditions and Lack of prejudice to Groundwater Users.

In both their Motion for Continuance and Motion for Reconsideration, the Groundwater Users argue that there will be no prejudice to the senior surface water users this year because of high snowpack. The Director disagrees that high snowpack means the SWC will not be injured. While there is a good snowpack in the hills above the ESPA, snowpack is only part of the SWC’s water supply, and recharge from the aquifer is at a record low. Additionally, southern Idaho is emerging from a two-year drought, and the existing storage supply going into this irrigation season is low. Forecasters are uncertain whether the storage supply system will fill this year. The Director agrees with the SWC that the “current snowpack does not tell the whole story.” *Objection* at 9–10.

The Groundwater Users also contend that they have provided “sufficient mitigation this season so little to no injury will occur to the senior users.” *Motion for Reconsideration* at 3. Citing to IGWA’s *Notice of Ground Water District Mitigation* (“Notice of Mitigation”), the Groundwater Users argue that IGWA has “enough water to mitigate for its 2021 breach and for the predicted shortfall for the upcoming 2023 season.” *Id.* at 6. The Groundwater Users state, “[G]iven the fact that IGWA has enough water for this season to offset the entire injury forecasted to [Twin Falls Canal Company] ... the Director should consider that the junior water users ‘as a whole’ are complying with mitigation plans.” *Id.* at 7.

The problem with this argument is that IGWA's Notice of Mitigation does not say that it is agreeing to provide storage water "to offset the entire injury forecasted to [Twin Falls Canal Company]." IGWA's Notice of Mitigation states that it is acting on behalf of its member ground water districts and that IGWA is mitigating for its districts' "proportionate share" of the demand shortfall. *Notice of Mitigation* at 1–3.

But even more important, the Director is currently reviewing IGWA's Notice of Mitigation to determine whether the proposal would mitigate for the 2023 demand shortfall to the SWC. The Notice of Mitigation has several potential shortcomings: (1) Instead of relying on one single mitigation plan for all members, individual ground water districts are seeking to mitigate under different mitigation plans. This "hybridization" of mitigation plans presents serious questions about whether mixing of mitigation plans is allowable and whether there is compliance with a mitigation plan at all. (2) One of the mitigation plans, proposed in 2009 and approved in 2010, could be read to require IGWA, not individual ground water districts, to supply the entire demand shortfall to the SWC from rented storage water. The 2010 order approving the mitigation plan does not recognize a reduced mitigation obligation for IGWA based on IGWA's share of the mitigation obligation. Furthermore, the approved 2010 mitigation plan does not recognize an additional division of IGWA's obligation into fractional mitigation components for each of IGWA's members. (3) The ground water districts wanting to mitigate pursuant to the 2016 Stipulated Mitigation Plan have proportionately determined their individual obligations. But the mitigation plan does not recognize proportionate sharing of the storage water component. Further, the ground water districts are ignoring the additional requirement of an additional 30,000 acre-feet of storage to be rented for mitigation that was a component of an agreement to cure a breach of the 2016 Stipulated Mitigation Plan. (4) Jefferson-Clark Groundwater District is claiming to mitigate with storage water but none of the storage water agreements presented to the Director are in the name of Jefferson-Clark Groundwater District. (5) The Notice of Mitigation was filed by Thomas Budge on behalf of all IGWA members and purports to provide storage agreements for BJGWD and BGWD. Yet both BJWD and BGWD have recently hired independent counsel. It is unclear therefore whether IGWA's Notice of Mitigation would bind BJGWD and BGWD. Moreover, as the SWC observes, there are concerns about whether IGWA breached the 2016 Stipulated Mitigation Plan. In conclusion, it is far from clear that the IGWA's Notice of Mitigation complies with the requirements of an approved mitigation plan.

The Director has a responsibility to timely respond to injury incurred by senior water users and there should be no unnecessary delays in that process. *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.* The Department also agrees with the SWC that "[i]n practice, an untimely decision effectively becomes the decision; i.e. no decision is the decision." *Objection* at 3 (citing *Order on Plaintiffs' Motion for Summary Judgment* at 97 (*AFRD#2 et al. v. IDWR*, No. CV-2006-600 (Gooding County Dist. Ct. Idaho June 2, 2006))). The Director will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed. To ensure timely administration for predicted material injury in this current irrigation season, the Director cannot agree to continue the hearing beyond

June. The Director reiterates that he is willing to work with the parties to move the hearing to any time within the first three weeks of June 2023.¹

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that the Groundwater Users' *Motion for Reconsideration of Denial of Continuance* is DENIED.

IT IS FURTHER ORDERED that Sophia Sigstedt and Jaxon Higgs 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 Ms. Sigstedt and Mr. Higgs no later than May 30, 2023.

DATED this 19th day of May 2023.


Gary Spackman
Director

¹ The Groundwater Users allege that the Director has “delegated to the SWC the ability to veto a continuance to a reasonable hearing date.” *Motion for Reconsideration* at 7. This is inaccurate. Consistent with the obligation to timely respond, the Director settled on a hearing date that would provide the parties time to prepare for hearing but also allow for curtailment during this irrigation season if necessary. The Director has repeatedly expressed his willingness reset the hearing within the first three weeks of June.

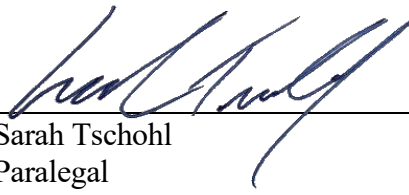
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Sarah A Klahn Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com dthompson@somachlaw.com	<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 rdiehl@pocatello.us</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 cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com</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 rfife@idahofallsidaho.gov</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 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com</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 dylan@dylanandersonlaw.com</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 Tony.Olenichak@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> Email</p>

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	<input checked="" type="checkbox"/> Email



Sarah Tschohl
Paralegal

Exhibit Q

**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 MOTION TO
RE-SET HEARING**

BACKGROUND

On May 22, 2023, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell (collectively the “Cities”), the Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Groundwater District (“BJGWD”), and Bingham Groundwater District (“BGWD”) (collectively “Groundwater Users”), filed a *Motion to Re-Set Hearing* (“Motion to Re-Set”), wherein the Groundwater Users requested that the hearing be re-set from June 6–10 to June 19–23. *Motion to Re-Set* at 2.

On May 23, 2023, the Surface Water Coalition (“SWC”) filed *Surface Water Coalition’s Opposition to Groundwater Users’ Motion to Re-Set Hearing Dates* (“Objection to Motion to Re-Set Hearing”).

ANALYSIS

Rule 560 of the Department’s Rules of Procedure grants the presiding officer the discretion to continue a proceeding. IDAPA 37.01.01.560. Rules 710 and 711 advise that scheduling orders are interlocutory orders, and that the presiding officer has the discretion to “rescind, alter or amend any interlocutory order...”. IDAPA 37.01.01.710–711.

The Groundwater Users contend that resetting the hearing for June 19–23 will allow IGWA’s expert Jaxon Higgs and counsel for the Cities Candice McHugh to attend the hearing in person. *Motion to Re-Set* at 2–3. The Groundwater Users further contend that resetting the hearing will allow the Cities’ expert Greg Sullivan and Ms. McHugh more time for preparation. *Id.* The Groundwater Users also point out that the Groundwater Users have filed various district court actions and associated motions and resetting the hearing date would allow “due consideration” to the various motions. *Id.* at 3.

The SWC opposes the motion, arguing the Groundwater Users “offer no new facts that would justify any further delay in this case. Instead, they repeat the same claims the Director fully considered and addressed” in his order responding to the Groundwater Users’ previous


request to move the hearing dates. *Objection to Motion to Re-Set Hearing* at 2. The SWC argues that “[w]hile the Director provided for remote participation for consultants that cannot travel to Idaho or will be voluntarily out-of-state at that time, that accommodation is overlooked.” *Id.* The SWC characterizes the Groundwater Users’ motion to reset as nothing more than a delay tactic to buy time for their various district court lawsuits. *Objection to Motion to Re-Set Hearing* at 3–4. The SWC argues that any delay in hearing will unreasonably delay water administration and that worsening water supply conditions justify moving forward promptly. *Id.* 5–7. The SWC also asserts its expert David Colvin will be traveling to Vietnam from June 8–21, and that Mr. Colvin has already made arrangements to appear in person at the hearing on June 6–7. *Id.* at 7; *see also* Colvin Decl. ¶¶ 4, 8.

Unfortunately, it appears that given the number of parties involved, there will not be a time later in June that will be free of conflicts. The Groundwater Users do not provide any new or additional information that would justify moving the hearing date. The Director has already authorized remote participation for the Groundwater Users’ experts and counsel. The Director previously stated that he would “consider moving the hearing to other dates within the first three weeks of June 2023 if the parties file[d] a stipulated motion requesting the change.” *Order Denying Second Motion to Continue* at 4. Because the parties failed to stipulate to resetting the hearing, the Director concludes it is best to keep the current hearing dates of June 6–10, 2023.

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that the Groundwater Users’ *Motion to Re-Set Hearing Dates* is DENIED.

DATED this 26th day of May 2023.



Gary Spackman
Director

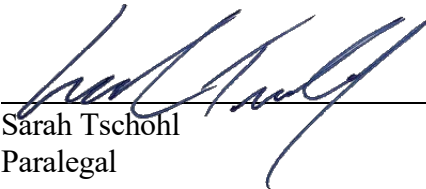
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Sarah A Klahn Maximilian C. Bricker Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email

Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Robert E. Williams WILLIAMS, MESERVY, & LOTHSPREICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov	<input checked="" type="checkbox"/> Email

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	<input checked="" type="checkbox"/> Email



Sarah Tschohl
Paralegal

Exhibit R

Travis L. Thompson

From: McHugh Bromley <cmchugh@mchughbromley.com>
Sent: Monday, May 22, 2023 8:58 AM
To: Travis L. Thompson
Subject: Re: TFCC Deposition Notice

Not right now...

Candice M. McHugh

On May 22, 2023, at 6:58 AM, Travis L. Thompson <tthompson@martenlaw.com> wrote:

Candice

Do you intend to depose any other 30(b)(6) reps for the other 6 SWC members?

Travis

Travis L. Thompson

Partner

D – 208.735.2227
M – 208.404.2840
E - tthompson@martenlaw.com

martenlaw.com
163 Second Ave. W.
Twin Falls, ID 83301

<image002.jpg>

From: C McHugh <cmchugh@mchughbromley.com>
Sent: Friday, May 19, 2023 4:27 PM
To: Travis L. Thompson <tthompson@martenlaw.com>
Cc: file@idwr.idaho.gov; Garrick Baxter <Garrick.Baxter@idwr.idaho.gov>; John K. Simpson <jsimpson@martenlaw.com>; kathleenmarion.carr@sol.doi.gov; David W. Gehlert <david.gehlert@usdoj.gov>; Jess Nielsen <jnielsen@martenlaw.com>; Kent Fletcher <wkf@pmt.org>; Matt Howard <mhoward@usbr.gov>; Sarah Klahn <sklahn@somachlaw.com>; Diane Thompson <dthompson@somachlaw.com>; Max C. Bricker <mbricker@somachlaw.com>; Ryan Mitchell <rmitchell@somachlaw.com>; TJ Budge <tj@racineolson.com>; Elisheva Patterson <elisheva@racineolson.com>; Rich Diehl <rdiehl@pocatello.us>; Chris Bromley <cbromley@mchughbromley.com>; Rob Harris <rharris@holdenlegal.com>; Rob Williams <rewilliams@wmlattys.com>; Skyler Johns <sjohns@olsentaggart.com>; Nathan Olsen <nolsen@olsentaggart.com>; Steven Taggart <staggart@olsentaggart.com>; Randall D. Fife <rfife@idahofallsidaho.gov>; Corey Skinner <corey.skinner@idwr.idaho.gov>; Tony Olenichak

Exhibit S

**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 GRANTING REQUESTS
FOR 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.

Anticipating that one or more parties would request a hearing 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 set the hearing for the Methodology Order and As-Applied Order for June 6–10, 2023, at the Department’s State Office, located at 322 E. Front Street, 6th Floor, Conference Rooms 602A–D, Boise, Idaho.

On April 28, 2023, the Department received the following filings:

- *The Coalition of Cities’ Request for Hearing*; ¹
- *McCain Foods USA, Inc.’s Request for Hearing and Objection*;
- *The Coalition of Cities’ Amended Request for Hearing*; and
- *Pocatello’s Request for Hearing*.

On May 2, 2023, the Department received IGWA’s *Petition for Reconsideration and Request for Hearing*.²

¹ For purposes of the request for hearing, 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.

² For purposes of the request for hearing, (“IGWA”) refers to the following ground water districts: North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Aberdeen-

On May 4, 2023, the Department received the following filings:

- *Amalgamated Sugar Company's Request for Hearing, Objection, Identification of Issues and Notice of Mitigation;*
- *City of Idaho Falls Challenge and Request for Hearing;*
- *Bonneville-Jefferson Ground Water District's Request for Hearing;* and
- *Bingham Ground Water District's Request for Hearing.*

On May 5, 2023, the Department received the *Surface Water Coalition's Request for Hearing and Statement of Issues.*

ANALYSIS AND CONCLUSIONS OF LAW

Idaho Code § 42-1701A(3) provides in relevant part:

Unless the right to a hearing before the director . . . is otherwise provided in by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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 parties have not previously been afforded an opportunity for hearing on the Methodology Order or the As-Applied Order and are entitled to a hearing pursuant to Idaho Code § 42-1701A(3). As described above, the Director has already set a hearing on the Methodology Order and the As-Applied Order for June 6–10, 2023. To resolve any question regarding the status of the pending requests for hearing, the Director will grant the requests and will hold the hearing as previously set in the Notice of Hearing.

ORDER

IT IS HEREBY ORDERED that the parties' requests for hearing are GRANTED. The hearing will be held as previously noticed in the *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery*: June 6–10, 2023, at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Rooms 602A–D, Boise, Idaho.

DATED this 23rd day of May 2023.


GARY SPACKMAN
Director

American Falls Area Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District.

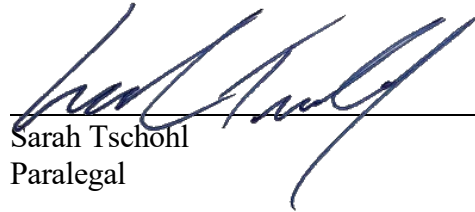
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Sarah A Klahn Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com dthompson@somachlaw.com	<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 rdiehl@pocatello.us</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 cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert E. Williams WILLIAMS, MESERVY, & LOTHSPEICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com</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 rfife@idahofallsidaho.gov</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 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com</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 dylan@dylanandersonlaw.com</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 Tony.Olenichak@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> Email</p>

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	<input checked="" type="checkbox"/> Email



Sarah Tschohl
Paralegal

Exhibit T

**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-MP-2019-001

**FINAL ORDER APPROVING
STIPULATED MITIGATION
PLAN**

IN THE MATTER OF THE JOINT MITIGATION
PLAN FILED BY THE COALITION OF CITIES,
THE CITY OF IDAHO FALLS, AND THE CITY
OF POCA TELLO IN RESPONSE TO THE
SURFACE WATER COALITION DELIVERY
CALL

The Director ("Director") of the Idaho Department of Water Resources ("Department") finds, concludes and orders as follows:

FINDINGS OF FACT

1. On February 25, 2019, the cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (collectively referred to herein as "Coalition of Cities"), submitted to the Department the *Coalition of Cities, City of Idaho Falls, and City of Pocatello Joint Mitigation Plan* ("Joint Mitigation Plan") with an attached Settlement Agreement between the Surface Water Coalition ("SWC"), Participating Members of Idaho Ground Water Appropriators, Inc. ("IGWA"), and Signatory Cities (collectively, "Joint Mitigation Plan").

2. The Coalition of Cities, Idaho Falls, and Pocatello (collectively hereinafter "Cities") have filed four mitigation plans under the Department's Rule 43, the Rules for Conjunctive Management of Surface and Ground Water Resources to satisfy their mitigation obligations in response to the SWC delivery call. *See* IDAPA 37.03.11.043. These are: CM-MP-2015-001, CM-MP-2015-004, CM-MP-2015-005, and CM-MP-2016-002. *See generally* Docket No. CM-DC-2010-001. The Joint Mitigation Plan supplants these previously filed plans.

3. The Cities assert the Joint Mitigation Plan “resolves the Cities’ collective mitigation obligation under the SWC delivery call.” Joint Mitigation Plan at 2. The Cities also assert that the SWC and IGWA “stipulate to the Joint Mitigation Plan with the Cities, agreeing that the Plan shall be deemed to fully mitigate all impacts caused by the Cities’ out-of-priority ground water pumping in CM-DC-2010-001 for the term of the mitigation plan.” *Id.* at 4-5. The term of the Joint Mitigation Plan “shall be until the average annual ESPA pumping of the cities referenced in the Agreement reaches 120,000 acre-feet per year as determined by a five-year rolling average, or December 31, 2053, whichever is earlier . . .” *Id.* at 4.

4. The terms of the Joint Mitigation Plan are attached as Exhibit 1: *Settlement Agreement Between the Surface Water Coalition, Participating Members of the Idaho Ground Water Appropriators, Inc., and Signatory Cities*. They include, in summary: (a) the Cities’ specific mitigation obligation(s) and options; (b) reporting and information sharing requirement(s); (c) agreement to withdraw opposition to creation of the ESPA Ground Water Management Area and potential incorporation of the Agreement into the ESPA ground water management plan; (d) a safe harbor from a delivery call by any participating city based on IGWA’s spring water rights; (e) approval by the Department; (e) effect on ground water district assessments; and (f) legislative approval and participating city support of state-sponsored managed aquifer recharge of the ESPA. *Id.* Exhibit 1 at 3-6.

5. The Department published notice of the Joint Mitigation Plan in the Idaho Mountain Express, Mountain Home News, and Power County Press on March 13 and 20, 2019; and the Times News, Post Register, Idaho State Journal, Lewiston Tribune, and Idaho Statesman on March 14 and 21, 2019. The notice stated any protest against approval of the Joint Mitigation Plan must be filed with the Department on or before April 1, 2019. No protest was filed in this matter.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602 authorizes the Director to supervise water distribution within water districts:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-1805(8) authorizes the Director to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

3. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution.

4. Pursuant to Chapter 52, Title 67, Idaho Code, and Sections 42-603 & 42-1805(8), Idaho Code, the Department promulgated the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), effective October 7, 1994. *See* IDAPA 37.03.11.000 *et seq.*

5. The CM Rules "prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001.

6. CM Rule 42.02 states: "The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan." IDAPA 37.03.11.042.02.

7. CM Rule 43.03 establishes factors the Director may consider "in determining whether a proposed mitigation plan will prevent injury to senior rights." IDAPA 37.03.11.043.03(a-o).

8. CM Rule 43.03(o) states: "Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions." IDAPA 37.03.11.043.03(o).

9. The Cities desire "to implement a long-term resolution to mitigation obligations under both the SWC Delivery Call and the ESPA-GWMA that allows for cities to continue to grow and develop and use additional water." Joint Mitigation Plan Exhibit 1 at 2. Therefore, the Cities, SWC, and IGWA stipulate and "[t]o the extent the Director finds the SWC to suffer material injury under the Methodology provided for in CM-DC-2010-001 . . . agree[] that the [Stipulated Mitigation Plan] shall be deemed to fully mitigate all impacts caused by the Cities' out-of-priority ground water pumping in CM-DC-2010-001 for the term of the mitigation plan." *Id.* at 4-5.

10. As discussed above, the Joint Mitigation Plan includes, in summary, (a) the Cities' specific mitigation obligation(s) and options; (b) reporting and information sharing requirement(s); (c) agreement to withdraw opposition to creation of the ESPA Ground Water Management Area and potential incorporation of the Agreement into the ESPA ground water management plan; (d) a safe harbor from a delivery call by any participating city based on IGWA's spring water rights; (e) approval by the Department; (e) effect on ground water district assessments; and (f) legislative approval and participating city support of state-sponsored managed aquifer recharge of the ESPA. *Id.* Exhibit 1 at 3-6.

11. The term of the Joint Mitigation Plan is until the average annual ESPA pumping of the Cities reaches 120,000 AF/year as determined by a five-year rolling average, or December 31, 2053, whichever is earlier.

12. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director approves the Mitigation Plan.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Stipulated Mitigation Plan submitted by the Cities, SWC, and IGWA is APPROVED with the following conditions:

a. All ongoing activities required pursuant to the Joint Mitigation Plan are the responsibility of the parties thereto.

b. Approval of the Joint Mitigation Plan does not constitute approval of the Joint Mitigation Plan as a ground water management plan. The Cities, SWC, and IGWA may submit the Joint Mitigation Plan to the Department for consideration at the time an ESPA-GWMA ground water management plan is considered.

DATED this 9th day of April 2019.



Gary Spackman
Director

Exhibit U

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
Facsimile: (208) 735-2444
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company*

**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 DAVID COLVIN

I, David Colvin, P.G., 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 licensed as a Professional Geologist in the State of Idaho (#PGL-1453). I have a Bachelor of Science degree in Geology from Syracuse University. I have a Master of

Science degree in Environmental Science and Engineering from the Colorado School of Mines.

3. I am a Principal Hydrogeologist and the Groundwater Team Leader for LRE Water, located at 1221 Auraria Pkwy, Denver, CO 80204. I provide groundwater resource management and planning services.
4. I have been a member of the Eastern Snake Hydrologic Modeling Committee since 2011.
5. I have been retained by the Surface Water Coalition to provide Eastern Snake Plain Aquifer water resources support, including a review of the annual well measurement data that is part of the sentinel well index. Attached hereto as Exhibit A is a true and correct copy of the index graph and table that includes the most recent data gathered in the spring of 2023.
6. In November and December of 2022, I participated in Technical Work Group meetings related to Idaho Department of Water Resources (IDWR) staff considerations for methodology updates related to the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*.
7. I have reviewed the IDWR staff recommendations and materials related to the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* and the *April As Applied Order*.
8. I have previously planned international travel to Vietnam from June 8 to June 21. The time difference between Boise, Idaho and Vietnam is 13 hours. I will be unable to attend

an administrative hearing concerning the above-referenced orders in person during this timeframe. I have made travel arrangements and am planning on attending the hearing on June 6 and 7, 2023.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Dated this 23rd day of May, 2023.

/s/ David Colvin

David Colvin

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd 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>gary.spackman@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov</p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p>mhoward@usbr.gov</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>tony.olenichak@idwr.idaho.gov</p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p>tj@racineolson.com elisheva@racineolson.com</p>	<p>Sarah A. Klahn Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p>sklahn@somachlaw.com dthompson@somachlaw.com</p>	<p>David Gehlert ENRD – DOJ 999 18th St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p>david.gehlert@usdoj.gov</p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p>rdiehl@pocatello.us</p>	<p>William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p>wparsons@pmt.org</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>corey.skinner@idwr.idaho.gov</p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p>wkf@pmt.org</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>kathleenmarion.carr@sol.doi.gov</p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4th Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p>cbromley@mchughbromley.com cmchugh@mchughbromley.com</p>

Robert E. Williams Williams, Meservy & Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only rewilliams@wmlattys.com	Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only rharris@holdenlegal.com	Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only rfife@idahofallsidaho.gov
Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only sjohns@olsentaggart.com staggart@olsentaggart.com nolsen@olsentaggart.com	Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only dylan@dylanandersonlaw.com	

Jessica Nielsen
Assistant for Travis L. Thompson

Exhibit A

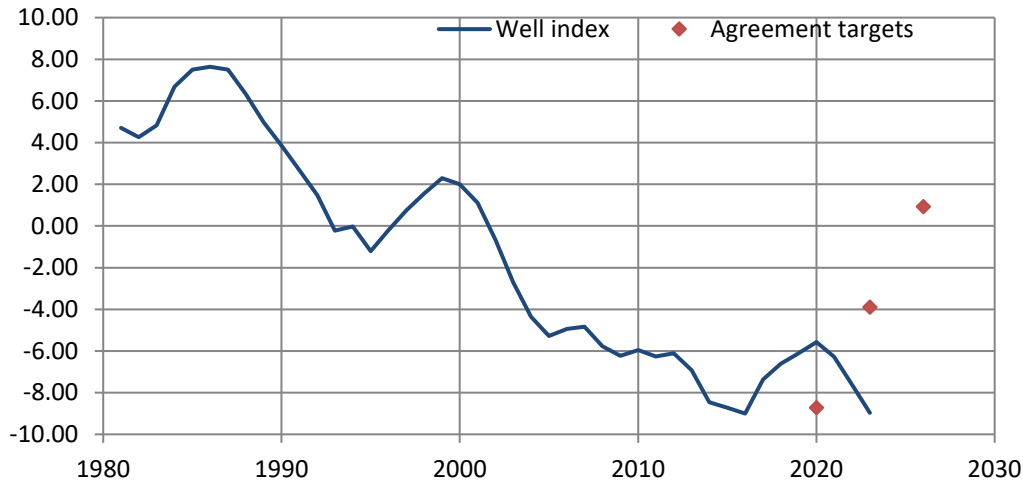
Groundwater Level Index Calculation Tool

Based on settlement agreement between Surface Water Coalition and IGWA, August 2015

Developed by Brockway Engineering and Lynker Technologies, August 2016 revision

Instructions:

1. Enter March-April groundwater levels on the Well Data tab.
2. Calculated index will display below.
3. Compare calculated index with specific targets in the agreement.



Year	Well Index	Agreement Targets
1981	4.71	
1982	4.26	
1983	4.83	
1984	6.68	
1985	7.51	
1986	7.64	
1987	7.51	
1988	6.32	
1989	4.98	
1990	3.86	
1991	2.68	
1992	1.48	
1993	-0.22	
1994	-0.03	
1995	-1.20	
1996	-0.21	
1997	0.75	
1998	1.56	
1999	2.29	
2000	2.00	

2001	1.11	
2002	-0.67	
2003	-2.70	
2004	-4.35	
2005	-5.28	
2006	-4.94	
2007	-4.84	
2008	-5.77	
2009	-6.23	
2010	-5.96	
2011	-6.26	
2012	-6.11	
2013	-6.92	
2014	-8.45	
2015	-8.73	
2016	-9.00	
2017	-7.37	
2018	-6.62	
2019	-6.11	
2020	-5.57	-8.72
2021	-6.28	
2022	-7.62	
2023	-8.97	-3.90
2024		
2025		
2026		0.93
2027		
2028		
2029		
2030		

Exhibit V

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

SOUTH VALLEY GROUND WATER)	Case No. CV07-21-243
DISTRICT and GALENA GROUND)	
WATER DISTRICT,)	ORDER DENYING
)	APPLICATION FOR
Petitioners,)	TEMPORARY RESTRAINING
)	ORDER
vs.)	
)	
)	
THE IDAHO DEPARTMENT OF WATER)	
RESOURCES and GARY SPACKMAN in his)	
official capacity as Director of the Idaho)	
Department of Water Resources,)	
)	
Respondents.)	
_____)	

I.

BACKGROUND

On May 4, 2021, the Director of the Idaho Department of Water Resources issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* in Docket No. AA-WRA-2021-001. The *Notice* provides the following background:

A drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 ("Model") show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season. Pursuant to Idaho Code § 42-237a.g., "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect ... the present or future use of any prior surface or ground water right." Based on the information from the Model, the Director of the Idaho Department of Water Resources ("Department") believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available

to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-140 1A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

Thompson Dec., Ex. I, p.1. Based on that background, the *Notice* directs the Director is initiating an administrative proceeding under Idaho Code § 42-237.a.g. The purpose of the proceeding is for the Director to decide whether the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue will affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. The *Notice* sets an administrative hearing before the Department on the matter for June 7-11, 2021.

The Director mailed a copy of the *Notice* to ground and surface water right holders within Water District 37 (Big and Little Wood River basin, including Silver Creek) and Water District 37B (Camas Creek basin). The *Notice* directs that those persons wishing to participate in the administrative proceeding must send written notice of their intent to participate to the Department by May 19, 2021. Various persons timely submitted written notice of their intent to participate.

On May 13, 2021, South Valley Ground Water District filed a *Motion to Dismiss* the administrative proceeding on the basis the Director exceeded his authority in initiating the same. Also on May 13, 2021, South Valley Ground Water District filed a *Motion* requesting that the Director appoint an independent hearing officer to preside over the administrative hearing.¹ A second *Motion to Dismiss* was filed by the Sun Valley Company on May 14, 2021. Additionally, various parties filed *Motions* requesting that the administrative hearing be continued or postponed to a later date.² Other parties filed joinders in support of the *Motions*. On May 22, 2021, the Director issued an *Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement*. The Director also issued an *Order Denying Motion to Appoint Independent Hearing Officer*. On May 22, 2021, South

¹ The *Motion* requesting appointment of an independent hearing officer was made in the alternative to South Valley Ground Water District's *Motion to Dismiss*.

² South Valley Ground Water District filed a *Motion for Continuance* on May 13, 2021. The City of Bellevue filed a *Motion to Postpone Hearing* as well as a *Motion for More Definite Statement* and *Motion for Clarification* on May 14, 2021.

Valley Ground Water District filed a *Motion* requesting that the Director designate his *Order Denying Motions to Dismiss* as a final order for purposes of immediate judicial review. The Director entered an *Order* denying the *Motion* on May 24, 2021.

This case was initiated on May 24, 2021, when the Petitioners filed a *Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Junction, or Alternatively, Writ of Prohibition* (“*Petition*”).³ Among other things, the *Petition* seeks the immediate entry of a temporary restraining order restraining the Respondents from proceeding with the administrative proceeding set to commence on June 7, 2021, and from issuing any curtailment order potentially resulting from that hearing. The Petitioners filed an *Application for Temporary Restraining Order* with a proposed *Order* along with the *Petition*. The *Application* is filed pursuant to Idaho Rule of Civil Procedure 65(b).

II. ANALYSIS

Idaho Rule of Civil Procedure 65(b) provides that the court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant or the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

I.R.C.P. 65(b).

In this case, the Court does not find that immediate and irreparable injury, loss, or damage will result to the Petitioners. The posture of the administrative proceeding at this time is such that the Director has not yet made any determination as to whether the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue will affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Nor has the Director issued any order of curtailment that would affect the water rights held by the Petitioners or their members. Until such a determination is made and/or curtailment ordered, any injury, loss, or damage to the Petitioners is speculative. At this point, the Director has simply

³ Although the *Petition* was filed in Blaine County, the case was reassigned by the clerk of the court to this Court.

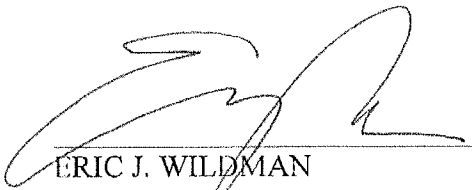
scheduled an administrative hearing pursuant to the duties and powers he purports to be statutorily granted to him under Idaho's Ground Water Act (specifically, Idaho Code § 42-237.a.g.) to examine these issues of water right administration.

The Court recognizes that those purported duties and powers are challenged in the Petitioners' *Petition*. However, the Court does not find that raising such issues on judicial review equates to immediate and irreparable injury, loss, or damage under the facts and circumstances presented here. In reaching its decision, the Court notes that a temporary restraining order is an extraordinary remedy, which is only to be used where the need for such relief is clear and plain. The Court does not find the need for such relief to be clear and plain, given the Director has not yet ruled on the issues of water right administration that are presently before him. Because the criteria for a temporary restraining order have not been met in this case, the Petitioners' *Application for Temporary Restraining Order* must be denied.

III. ORDER

Therefore, IT IS ORDERED that the Petitioners' *Application for Temporary Restraining Order* is hereby denied.

DATED May 27, 2021



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Albert P. Barker
Travis L. Thompson
Michael A. Short
BARKER ROSHOLT & SIMPSON
PO Box 2139
Boise ID 83701-2139
tlt@idahowaters.com
apb@idahowaters.com
mas@idahowaters.com
Attorneys for South Valley Ground Water District

☒ By E-mail ☐ By mail
☐ By fax (number)
☐ By overnight delivery / FedEx
☐ By personal delivery

James R Laski
Heather Elizabeth O'Leary
LAWSON LASKI CLARK, PLLC
PO Box 3310
Ketchum ID 83340
heo@lawsonlaski.com
efiling@lawsonlaski.com
Attorneys for Galena Ground Water District

☒ By E-mail ☐ By mail
☐ By fax (number)
☐ By overnight delivery / FedEx
☐ By personal delivery

Candice Michelle McHugh
McHUGH BROMLEY, PLLC
380 S 4th Street Ste 103
Boise ID 83702
cmchugh@mchughbromley.com
Attorney for City of Bellevue

☒ By E-mail ☐ By mail
☐ By fax (number)
☐ By overnight delivery / FedEx
☐ By personal delivery

Christopher Michael Bromley
McHUGH BROMLEY, PLLC
380 S 4th Street Ste 103
Boise ID 83702
cbromley@mchughbromley.com
Attorney for Sun Valley Company

☒ By E-mail ☐ By mail
☐ By fax (number)
☐ By overnight delivery / FedEx
☐ By personal delivery

The Idaho Department of Water Resources
PO Box 83720
Boise ID 83720-0093

☐ By E-mail ☒ By mail
☐ By fax (number)
☐ By overnight delivery / FedEx
☐ By personal delivery

Gary Spackman
Director – Idaho Department of Water Resources
PO Box 83720
Boise ID 83720-0093
gary.spackman@idwr.idaho.gov

☒ By E-mail ☐ By mail
☐ By fax (number)
☐ By overnight delivery / FedEx
☐ By personal delivery

JoLynn Drage
Clerk of the Court

Dated: 5/27/2021 10:09 AM

By *J. Schuie*
Deputy Clerk