5-11-2011

A & B Irrigation v. Spackman Clerk's Record v. 3 Dckt. 38191

38191 (Consolidated)

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

A&B IRRIGATION, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTHSIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,
Petitioners-Respondents,
And
IDAHO DAIRYMEN'S ASSOCIATION, INC.
Cross-Petitioner-Respondent,
v.
GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents-Respondents on Appeal,
And
IDAHO GROUND WATER APPROPRIATORS, INC.,
Intervenor-Appellant,
And
THE CITY OF POCATELLO,
Intervenor-Respondent.

and

LAW CLERK

Appealed from the District Court of the 5th *Judicial District for the State of Idaho, in and for* Gooding *County*

Hon. John Melanson *District Judge*

Randall Budge – Candice McHugh – RACINE OLSON

Sarah Klahn – WHITE JANKOWSKI – Dean Tranmer

Attorneys for Appellant

Garrick Baxter/Chris Bromley - IDAHO ATTORNEY GENERAL'S OFFICE

JohnSimpson/Travis Thompson/Paul Arrington – BARKER ROSHOLT SIMPSON

Attorney for Respondent

Filed this _____ *day of* _____, 19____

_____ *Clerk*

By _____ *Deputy*

CAXTON PRINTERS, CALDWELL, IDAHO

IN THE SUPREME COURT OF THE STATE OF IDAHO

****

IN THE MATTER OF THE 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, NORTSIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY,	Supreme Court No. # 38191-92-93-94-2010 Clerk's Certificate of Appeal
A&B IRRIGATION, AMERICAN FALLS RESERVOIR DISTRICT # 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTHSIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, Petitioners-Respondents, And IDAHO DAIRYMEN'S ASSOCIATION, INC. Cross-Petitioner-Respondent, v. GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents-Respondents on Appeal, And IDAHO GROUND WATER APPROPRIATORS, INC., Intervenor-Appellant, And THE CITY OF POCATELLO, Intervenor-Respondent.	

VOLUME 3

Appeal from the District Court of the 5th Judicial District of the State of Idaho, in and for the County of Gooding

****

HONORABLE JOHN MELANSON DISTRICT JUDGE

****

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CV 2008-0000551

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May 20, 2010	IDWR Response to IGWA and Pocatello Motion for Stay	876-884
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(a)

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9/11/2008	NCOC	CYNTHIA	New Case Filed - Other Claims	Barry Wood
	APER	CYNTHIA	Plaintiff: A & B Irrigation District Appearance John A Rosholt	Barry Wood
	APER	CYNTHIA	Plaintiff: American Falls Reservoir Appearance C. Tom Arkoosh	Barry Wood
	APER	CYNTHIA	Defendant: Tuthill, David Appearance Phillip J Rassier	Barry Wood
	APER	CYNTHIA	Defendant: Idaho Department Of Water Resources Appearance Phillip J Rassier	Barry Wood
		CYNTHIA	Filing: R2 Appeal or petiton for judical review, or cross-appeal or cross-petition, from Commission Board/ or body to the District Court Paid by: Arkoosh, C. Tom (attorney for American Falls Reservoir) Receipt number: 0003795 Dated: 9/11/2008 Amount: $88.00 (Check) For: A & B Irrigation District (plaintiff)	Barry Wood
	APER	CYNTHIA	Plaintiff: Burley Irrigation District, Appearance John A Rosholt	Barry Wood
	APER	CYNTHIA	Plaintiff: Milner Irrigation District, Appearance John A Rosholt	Barry Wood
	APER	CYNTHIA	Plaintiff: Minidoka Irrigation District, Appearance W Kent Fletcher	Barry Wood
	APER	CYNTHIA	Plaintiff: North Side Canal Company,ltd Appearance John A Rosholt	Barry Wood
	APER	CYNTHIA	Plaintiff: Twin Falls Canal Company, Appearance John A Rosholt	Barry Wood
9/12/2008	CHJG	CYNTHIA	Change Assigned Judge	John Melanson
	ORDR	CYNTHIA	Order of Reassignment	John Melanson
9/19/2008	NOAP	CYNTHIA	Notice Of Appearance	Barry Wood
9/25/2008	MISC	CYNTHIA	Petitioners Statement of Initial Issues	John Melanson
9/26/2008	NOTC	CYNTHIA	Notice of Petition for Reconsideration	John Melanson
	NOAP	CYNTHIA	Notice Of Appearance	John Melanson
9/30/2008		CYNTHIA	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than $300, Not more than $1000 Paid by: City Of Pocatello, (other party) Receipt number: 0004082 Dated: 10/1/2008 Amount: $58.00 (Check) For: City Of Pocatello, (other party)	John Melanson
10/1/2008	APER	CYNTHIA	Other party: City Of Pocatello, Appearance A. Dean Tranmer	John Melanson
10/2/2008	APER	CYNTHIA	Other party: Idaho Dairymen's Association, Inc Appearance Michael C Creamer	John Melanson

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Date	Code	User		Judge
10/2/2008		CYNTHIA	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than $300, Not more than $1000 Paid by: Creamer, Michael C (attorney for Idaho Dairymen's Association, Inc) Receipt number: 0004094 Dated: 10/2/2008 Amount: $58.00 (Check) For: Idaho Dairymen's Association, Inc (other party)	John Melanson
10/10/2008	ORDR	CYNTHIA	Order Staying Petition until Further order of the Court	John Melanson
10/15/2008	HRSC	CYNTHIA	Hearing Scheduled (Oral Argument on Appeal 02/10/2009 01:30 PM)	John Melanson
10/16/2008	NOTC	CYNTHIA	Notice of Agency Order Denying Petition for Reconsideration	John Melanson
10/17/2008	ORDR	CYNTHIA	Procedural Order Governing Judicial Review of Agency Decision by District Court	John Melanson
10/20/2008	CONT	CYNTHIA	Continued (Oral Argument on Appeal 03/31/2009 01:30 PM)	John Melanson
10/24/2008	ORDR	CYNTHIA	Order Setting Scheduling Conference	John Melanson
11/7/2008		AMYA	Filing: R2 Appeal or petiton for judical review, or cross-appeal or cross-petition, from Commission Board/ or body to the District Court Paid by: Capital Law Receipt number: 0004571 Dated: 11/7/2008 Amount: $88.00 (Check) For: A & B Irrigation District (plaintiff)	John Melanson
11/12/2008	APER	CYNTHIA	Plaintiff: United States Department Of Natural Resources Appearance David W Gehlert	John Melanson
11/21/2008	MISC	CYNTHIA	Petitioner's Statement of Issues (United States)	John Melanson
11/24/2008	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 11/24/2008 01:30 PM) scheduling conference	John Melanson
	CMIN	CYNTHIA	Court Minutes Hearing type: Hearing Scheduled Hearing date: 11/24/2008 Time: 1:30 pm Court reporter: Maureen Newton Audio tape number: DC 08-12	John Melanson
	CONT	CYNTHIA	Continued (Oral Argument on Appeal 05/26/2009 01:30 PM)	John Melanson
	HRHD	CYNTHIA	Hearing result for Hearing Scheduled held on 11/24/2008 01:30 PM: Hearing Held scheduling conference	John Melanson
11/26/2008		CYNTHIA	Notice Of Hearing	John Melanson
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1/21/2009	MISC	CYNTHIA	Coalitions Objection to Agency Record	John Melanson
1/22/2009	MISC	CYNTHIA	City of Pocatello's Objection to Agency Record	John Melanson
	MISC	CYNTHIA	IGWA's Objection to the Agency Record	John Melanson
1/23/2009	MOTN	CYNTHIA	Motionfor Extension of time to Lodge Transcript and Record with Clerk	John Melanson
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1/27/2009	ORDR	CYNTHIA	Second Amended Scheduling Order	John Melanson
2/6/2009	NOTC	CYNTHIA	Notice of Lodging of Agency Record with District Court	John Melanson
3/18/2009	MOTN	CYNTHIA	Petn Surface Water Coalitions Unoposed Motion to Reset Briefing Schedule	John Melanson
3/19/2009	ORDR	CYNTHIA	Third Amended Scheduling Order	John Melanson
4/3/2009	MISC	CYNTHIA	Petitioner US Opening Brief	John Melanson
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4/30/2009	MISC	CYNTHIA	Volume II begins	John Melanson
5/1/2009	MISC	CYNTHIA	IDWR Respondent's Brief	John Melanson
	MISC	CYNTHIA	Respondent Pocatello's Brief	John Melanson
5/4/2009	MISC	CYNTHIA	Ground Water Users Brief in Response	John Melanson
5/20/2009	MISC	CYNTHIA	Petitioner US Reply Brief	John Melanson
	MISC	CYNTHIA	Surface Water Coalitions Joint Reply Brief	John Melanson
5/21/2009	MISC	CYNTHIA	Volume III Begins	John Melanson
5/26/2009	HRHD	CYNTHIA	Hearing result for Oral Argument on Appeal held on 05/26/2009 01:30 PM: Hearing Held To be heard in Twin Falls- SRBA	John Melanson
7/24/2009	ORDR	CYNTHIA	Order on Petition for Judicial Review	John Melanson
	DPHR	CYNTHIA	Disposition With Hearing	John Melanson
8/14/2009	MISC	ROSA	Pocatello's Petition for Re-Hearing	John Melanson
	MISC	ROSA	Ground Water user's Petition for Re-Hearing	John Melanson
8/25/2009	ORDR	CYNTHIA	Scheduling Order on Petitions for Rehearing	John Melanson
10/9/2009	MISC	CYNTHIA	City of Pocatello's Opening Brief in Support of Petition for Rehearing	John Melanson
10/13/2009	MISC	CYNTHIA	Ground Water Users Opening Brief on Rehearing	John Melanson
10/23/2009	ORDR	CYNTHIA	Supreme Court Order Assigning Judge Melanson	John Melanson
11/6/2009	MISC	CYNTHIA	Surface Water Coalitions Response to IGWA's and City of Pocatello Petition for Rehearing	John Melanson
11/9/2009	MISC	CYNTHIA	IDWR Response Brief on Rehearing	John Melanson
11/30/2009	REPL	CYNTHIA	Ground Water Users Reply on Rehearing	John Melanson
	REPL	CYNTHIA	City of Pocatello's Reply Brief in Support of Petition for Rehearing	John Melanson
12/15/2009	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 02/02/2010 01:30 PM) TO BE HELD AT SRBA - TWIN FALLS (telephone okay)	John Melanson
	ORDR	CYNTHIA	Order Setting Oral Argument on Petition for Rehearing	John Melanson
1/25/2010	CONT	CYNTHIA	Continued (Hearing Scheduled 02/22/2010 01:30 PM) TO BE HELD AT SRBA - TWIN FALLS (telephone okay)	John Melanson

Date	Code	User		Judge
2/22/2010	HRHD	CYNTHIA	Hearing result for Hearing Scheduled held on 02/22/2010 01:30 PM: Hearing Held TO BE HELD AT SRBA - TWIN FALLS (telephone okay)	John Melanson
3/4/2010	ORDR	CYNTHIA	Order Staying Decision on Petition for rehearing Pending Issuance of Revised Final Order	John Melanson
3/11/2010	MISC	CYNTHIA	Surface Water Coalitions Objection to ORder staying decision	John Melanson
3/17/2010	MISC	CYNTHIA	Ground Water Users/Pocatello's Response to SWC Objection to Order Staying Decision	John Melanson
3/25/2010	ORDR	CYNTHIA	Order Overruling Objection to Order Staying Decision	John Melanson
3/29/2010	MOTN	CYNTHIA	Unopposed Motion for Extension of Time to File Order on Remand	John Melanson
4/19/2010	NOTC	CYNTHIA	Notice of Substitution of Counsel	John Melanson
	APER	CYNTHIA	Defendant: Tuthill, David Appearance Garrick Baxter	John Melanson
	APER	CYNTHIA	Defendant: Idaho Department Of Water Resources Appearance Garrick Baxter	John Melanson
5/13/2010	MOTN	CYNTHIA	City of Pocatello and Ground Water Users motion for Stay and to Augment Record	John Melanson
	MEMO	CYNTHIA	City of Pocatello and Ground Water Users Memorandum in Support of Motion for Stay...	John Melanson
5/18/2010	MISC	CYNTHIA	Volume IV Begins	John Melanson
5/19/2010	RESP	CYNTHIA	IDWR Response To IGWA and Pocatello Motion for Stay	John Melanson
	AFFD	CYNTHIA	Affidavit of Chris Bromley	John Melanson
5/27/2010	MOTN	CYNTHIA	Motion to Extend Deadline to Respond to Motion to Stay	John Melanson
5/28/2010	MISC	CYNTHIA	City of Pocatello and Ground Water Users Response to Motion to Extend Deadline	John Melanson
	ORDR	CYNTHIA	Order	John Melanson
6/3/2010	MISC	CYNTHIA	Surface Water Coalition's Response to IGWA/City of Pocatello Motion to Stay	John Melanson
6/8/2010	MISC	CYNTHIA	City of Pocatello and Ground Water Users Reply in Support of Motion to Stay and Augment...	John Melanson
	AFFD	CYNTHIA	Affidavit of Sarah Klahn	John Melanson
6/22/2010	MISC	CYNTHIA	Volume V Begins	John Melanson
6/23/2010	ORDR	CYNTHIA	Order Denying Motion for Stay and to Augment Record	John Melanson
7/23/2010	NOTC	CYNTHIA	Notice of Status Conference	John Melanson
	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 08/06/2010 10:00 AM) Video teleconference from Idaho Water Ctr - Boise	John Melanson

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Date	Code	User		Judge
8/6/2010	CMIN	CYNTHIA	Court Minutes - via video conferencing @ IDWR - Boise, Idaho Virginia Bailey - Reporter Julie Murphy - Clerk Status Conference 10:00 a.m.	John Melanson
	ADVS	CYNTHIA	Matter Taken Under Advisement	John Melanson
8/9/2010	HRHD	CYNTHIA	Hearing result for Hearing Scheduled held on 08/06/2010 10:00 AM: Hearing Held Video teleconference from Idaho Water Ctr - Boise	John Melanson
8/23/2010	ORDR	CYNTHIA	Order on Petitions for Rehearing	John Melanson
8/26/2010	MOTN	CYNTHIA	Motion to Clarify/Motion for Reconsideration	John Melanson
9/3/2010	MOTN	CYNTHIA	Surface Water Coalitions Motion for Clarification	John Melanson
9/9/2010	ORDR	CYNTHIA	Amended Order on Petitions for Rehearing	John Melanson
10/21/2010	APSC	CYNTHIA	Appealed To The Supreme Court (IDWR) Document sealed	John Melanson
	STAT	CYNTHIA	STATUS CHANGED: Inactive	John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Baxter, Garrick (attorney for Idaho Department Of Water Resources) Receipt number: 0003849 Dated: 10/21/2010 Amount: $.00 (Cash) For: Idaho Department Of Water Resources (defendant)	John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (Surface Water Coalition)	John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Arkoosh, C. Tom (attorney for American Falls Reservoir) Receipt number: 0003860 Dated: 10/21/2010 Amount: $101.00 (Check) For: A & B Irrigation District (plaintiff), American Falls Reservoir (plaintiff) and Burley Irrigation District, (plaintiff)	John Melanson
		CYNTHIA	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: A & B Irrigation District Receipt number: 0003861 Dated: 10/21/2010 Amount: $200.00 (Check)	John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: City of Pocatello Receipt number: 0003863 Dated: 10/21/2010 Amount: $.00 (Cash) For: City Of Pocatello, (other party)	John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (City of Pocatello)	John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (IGWA)	John Melanson
10/22/2010	APER	CYNTHIA	Other party: Idaho Ground Water Users, Appearance Randall C. Budge	John Melanson

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Date	Code	User		Judge
10/22/2010		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Budge, Randall C. (attorney for Idaho Ground Water Users,) Receipt number: 0003875 Dated: 10/22/2010 Amount: $101.00 (Check) For: Idaho Ground Water Users, (other party)	John Melanson
		CYNTHIA	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Racine Olson Receipt number: 0003876 Dated: 10/22/2010 Amount: $200.00 (Check)	John Melanson
11/4/2010	ORDR	CYNTHIA	Supreme Court Order Consolidating Appeals	John Melanson
11/22/2010	ORDR	CYNTHIA	OrderSuspending Appeal (Clerk of the Court)	John Melanson
11/24/2010	MISC	ROSA	Idaho Ground Water Appropriattors, Inc's and City of Pocatello's Request to Amend Caption	John Melanson
11/30/2010	JDMT	ROSA	Judgment Nunc Pro Tunc	John Melanson
	ORDR	ROSA	Order Amending Caption	John Melanson
	STAT	ROSA	STATUS CHANGED: Closed	John Melanson
12/2/2010	STAT	CYNTHIA	STATUS CHANGED: inactive	John Melanson
12/20/2010	MISC	JULIE	Idaho Ground Water's Amended Notice of Appeal	John Melanson
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12/23/2010	ORDR	CYNTHIA	Supreme Court ORder Adopting District Court Order (re: Caption)	John Melanson
1/27/2011	NOTC	CYNTHIA	IGWA Second Amended Notice of Appeal	John Melanson

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and **TWIN FALLS CANAL COMPANY,** Petitioners, vs. **DAVID R. TUTHILL, JR.**, in his capacity as Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,** Respondents.	**CASE NO. CV-2008-551**

SURFACE WATER COALITION'S JOINT REPLY BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

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,**	)	**CASE NO. CV-2008-551**
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INTRODUCTION

The Coalition hereby submits this *Joint Reply Brief* in support of its petition for judicial review. IDWR, IGWA, and Pocatello ("Respondents"), each filed a response brief in this matter on April 30, 2009. While some of the response briefs address the stated issues on appeal, much of the argument offered by IGWA and Pocatello addresses matters that are not before the Court. Any such non-responsive argument should be disregarded.

The Director's actions in this case constitute an unconstitutional application of the CM Rules. The Coalition's senior surface water rights have been materially injured by out-of-priority ground water diversions and the Director has failed to lawfully account for and protect the Coalition from that injury. Accordingly, the Court should grant the requested relief on appeal.

ARGUMENT

I. IGWA's Request for Attorneys Fees is Barred by Idaho Law.

IGWA's request for attorneys fees pursuant to Idaho Code § 12-121 and I.R.C.P. 54(e)(1), must be rejected. Rule 54(e)(1) states that the Court may award fees "when provided for by any statute or contract". However, the Idaho Supreme Court has made it clear that sections 12-121, "does not, however, provide authority for an award of attorney fees on appeals from administrative agency rulings". *Cheung v. Pena*, 143 Idaho 50, 137 P.3d 417, 423 (2006). IGWA's request cannot stand.

II. The Respondents' Arguments Do Not Justify the Director's Unconstitutional Application of the CM Rules to the Coalition's Senior Surface Water Rights.

In an effort to support the Director's unconstitutional application of the CM Rules in this case, Respondents mischaracterize the Coalition's argument. The Respondents fabricate

"strawmen" arguments.[1] Notably, the Respondents assert that the Coalition is claiming it is "entitled to full delivery of both their natural flow and storage water rights, regardless of whether the full amount of each right is required to produce a crop." *IDWR Br.* at 7; *IGWA Br.* at 19 (the Coalition "argues that the Director abused his discretion in determining for purposes of their delivery call that the SWC was entitled to an amount of water less than the full amount decreed in their water rights"); *Poc. Br.* at 14 ("SWC flatly asserts that the Director's obligation upon receiving its allegations of injury was to deliver the amount of water on the face of the SWC licenses and decrees"). The Respondents are wrong and the Court should not be distracted by this hyperbole.

Rather than seeking administration without regard for whether the resulting water can be put to beneficial use, the Coalition seeks lawful water delivery and administration of junior priority rights consistent with Idaho's constitution, statutes, and the CM Rules. So long as the Coalition members can beneficially use the amount of water stated on their decrees, they have a right to use that water prior to a junior ground water user taking that water. That is the law in Idaho.

Justice Schroeder plainly recognized this constitutional mandate and its application in conjunctive administration:

> However, to the extent water is available within the amount of the water right but is diminished by junior users, the presumption favors the senior users' rights to the water.

R. Vol. 37, p. 7078.

[1] In addition, IGWA and Pocatello argue several issues throughout their briefs as if they were "appellants" in this case. Rather than "respond" to the issues on appeal set forth in the SWC's *Joint Opening Brief*, IGWA and Pocatello argue matters that they did not appeal and hence are not at issue in this case. As such, these so-called "facts" and irrelevant arguments in support of theories should be ignored by the Court. *See IGWA Br.* at 4-15, 28-29, 38-39, 41-42; *Poc. Br.* at 3, 7-10, 15-16, 20, 23. The fact remains IGWA and Pocatello did not appeal the Director's *Final Order* in this case and any effort to re-litigate or re-argue their case now is barred.

The Director accepted this finding in the September 5, 2008 *Final Order*. R Vol. 39 at 7387. The Director erred, however, in ignoring the water right decrees, and creating a process whereby he determined the amount of water each Coalition entity had a right to use and then forced the Coalition to prove otherwise. This paradigm wholly ignores the presumptive effect of the decree and forces the Coalition members to "re-prove" their decrees. This "minimum full supply" concept fails as a matter of law. In *AFRD #2 v. IDWR*, 143 Idaho 862, 873 & 878 (2007), the Court stated:

> Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules.
>
> * * *
>
> The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed.

The proper presumption is that a senior is *entitled* to beneficially use his decreed water right. Indeed, a decree or license confirms the amount of water that can be beneficially used. *See Head v. Merrick*, 69 Idaho 106, 108 (1949); Idaho Code §§ 42-220 ("Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein"); 42-1420(1) ("The decree entered in a general stream adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system").

In order to apply the presumption correctly, the Director must begin with *and acknowledge* the senior's right to the decreed water rights. The senior does not have to "re-prove" his water right. Here, the Director overstepped his authority by disregarding the decrees and creating an initial assumption that the Coalition had no need for their decreed rights.

> In applying that methodology the Supreme Court anticipated that the Director would approach the resolution of the call ***applying the presumption favoring***

> ***the senior right holder***, once the threshold showing of material injury has been met by the senior right holder. ***It is not clear that the Director applied the burdens***.

R Vol. 37 at 7074 (emphasis added).

It is undisputed that the SWC has been materially injured by out-of-priority ground water diversions. Once material injury is established, the junior then carries the burden to show, by "clear and convincing evidence", to challenge that finding. *See Moe v. Harger*, 10 Idaho 302, 303-04 (1904); *Josslyn v. Daly*, 15 Idaho 137, 149 (1908); *see also AFRD #2* 143 Idaho at 878 ("Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call"). If the junior fails to carry this burden, as was the case in this proceeding,[2] then the Director must either: 1) curtail the junior right; or 2) allow the diversion to continue out-of-priority through an approved CM Rule 43 mitigation plan. *See* CM Rule 40.02(b) & (c). This is the result mandated by the plain language of the statutes and CM Rules. Lawful water right administration through a constitutional application of the CM Rules is all the Coalition seeks.

A. General Policy Arguments Do Not Excuse the Director's Failure to Properly Administer Water Rights Pursuant to the Plain Language of Idaho's Statutes and CM Rules.

Instead of following the criteria provided by Idaho's water distribution statutes (Idaho Code §§ 42-602, 607) and CM Rules (Rule 40, 43), IDWR argues the Director's actions were justified in the name of "optimum development of water resources", even claiming that Idaho's Ground Water Act limits senior surface water rights in conjunctive administration. *See IDWR*

[2] IGWA raised numerous defenses throughout the course of this proceeding, including theories that the Director failed to convene a "local ground water board", the Coalition was not entitled to an "enhanced water supply", the Coalition suffered "no injury", the call "interfered with the full economic development of the aquifer", and that the call was "futile" and would result in "waste". R Vol. 31 at 5926-30. Both the Hearing Officer and Director rejected these defenses. IGWA did not appeal the Director's rejection of its defenses.

Br. at 11-13. IGWA advocates that "it is the crop irrigation requirements that set the obligation of junior right holders to supply mitigation, not an authorized maximum quantity set out in the decree." *IGWA Br.* at 22.

Contrary to these claims, the Idaho Constitution and statutes addressing the Idaho Water Resource Board's formulation of a state water plan do not authorize "injury" in the name of "optimum development" of unappropriated water. *See* IDAHO CONST., art. XV, § 7 (Water Resource Board "shall have power to ***formulate and implement a state water plan*** for optimum development of water resources in the public interest") (emphasis added); Idaho Code § 42-1734A ("The board shall ... ***formulate, adopt and implement a comprehensive state water plan*** for conservation, development, management and optimum use ***of all unappropriated water resources*** and waterways of the state in the public interest") (emphasis added). Moreover, the *Ground Water Act* is simply inapplicable. *See* Idaho Code § 42-226; *Musser v. Higginson*, 125 Idaho 392, 396 (1994) ("we fail to see how I.C. § 42-226 in any way affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892") (emphasis added).[3] As such these arguments should be rejected.

B. By Not Recognizing the Coalition's Decreed Water Rights the Director Impermissibly Shifted the Burden to Senior Water Users in Administration.

Once the senior makes a *prima facie* showing of injury, the initial administrative target must be the water right not some artificial target created by the Director.

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[3] The senior water users in *Musser* held surface water rights with a priority date of April 1, 1892. *See* 125 Idaho at 392 ("The springs which supply the Mussers' water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer)."). *See also*, *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 91-00005, July 2, 2001) ("*BW5 Order*"):

> First, the groundwater management statutes do not apply to water rights prior to their enactment in 1951. *Musser*, 125 Idaho at 396, 871 P.2d at 813 (statutes do not affect rights to the use of groundwater acquired before enactment of the statute).

BW5 Order at 27

The following is not in dispute on appeal:

- Out-of-priority ground water pumping has materially injured the Coalition's use of their senior water rights. R Vol. 37 at 7073, 7076. As such, the Director must apply the presumption that the "senior water user is entitled to the amount of water set forth in a license or decree." *AFRD#2*, 143 Idaho at 878.
- In light of this material injury, the burden of proof shifts to the junior to show a defense to the senior's call. *See generally*, R Vol. 37 at 7072-75. The factors set forth in CM Rule 42.01 are in the nature of defenses to the claim of material injury. R Vol. 37 at 7078.[4]
- If material injury is determined, as was found in this case, the Director and the watermaster have a "clear legal duty" to regulate junior ground water rights and distribute water to the senior right.[5] *See* Idaho Code § 42-607; CM Rule 40.01.
- In order to be effective, the Director and watermaster must distribute water in a timely manner. *See AFRD #2*, 143 Idaho at 874 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call").

To date, the Director's method of responding to the Coalition's needs has violated these basic legal principles. Rather than following the law, the Director created a "target" quantity and then sought to adjust administration requirements up or down in response to the vicissitudes of the irrigation season. This "minimum full supply" process was questioned in the *Recommended*

[4] The factors in CM Rule 42.01 investigate the seniors' supply and actual demand, or need, in the time frame in question to assure that water provided by administration of junior rights will be applied to beneficial use and not wasted.

[5] Provided, a junior causing injury has the option to file and seek approval of a Rule 43 Mitigation Plan so that he could divert out-of-priority while fully mitigating the injured senior right. *See* CM Rules 40.01.b, 43.

Order. R.Vol.37 at 7086-9;[6] and then relabeled as "reasonable in-season demand" in the *Final Order*, R. Vol. 39 at 7386.

As the protocol morphs from "minimum full supply" to what the Director now coins as a "reasonable in-season demand", the senior water user immediately must engage to re-adjudicate its water right. R Vol. 39 at 7499; **Attachment A** (Director's 2009 *Draft Protocol*). As set forth in the example of the Director's *Draft Protocol for Determining Reasonable In-Season Demand and Reasonable Carryover*, the proposal is to identify a senior's "baseline demand" based upon diversions from 2006, identify a forecasted supply, and then re-evaluate conditions in July and again in September. Pursuant to this new regime, junior ground water users are only required "to provide evidence, to the satisfaction of the Director", that it can secure sufficient storage to mitigate the predicted "demand shortfall". While the shortfall to the "reasonable carryover deficit" is purportedly to be supplied "two weeks" after the date of storage allocation, the remainder is not required until sometime in September – the so-called "time of need".

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[6] At section XIII of his *Recommended Order* (R Vol. 37 at 7086-95), Justice Schroeder cataloged the deficiencies of the way the "minimum full supply" concept was applied in this case. He expressed concerns about basing the calculation on a single wet year, rather than several years and not being nimble in changing the baseline as conditions changed. In section XIX (R Vol. 37 at 7095-100), he made suggestions to correct these deficiencies. He cautions, however, that use of the protocol of a "minimum full supply" is not an avenue to modify licensed or decreed rights. R. Vol. 37 at 7092. The Hearing Officer further provided:

> **6. Use of the process of establishing a minimum full supply departs from the practice of recognizing a call at the level of the licenses or decrees, understanding that if less water is needed less will be delivered.** The history of surface to surface water administration has been that if a senior water user made a call within the licensed or decreed right the watermaster shut down delivery of water to a junior water user if necessary to deliver the licensed or decreed amount to the senior. ... SWC maintains the same process should be applicable in the ground water to surface water management. The logic of SWC in objecting to the Director's use of a minimum full supply is difficult to avoid. ...
>
> **7. Use of the minimum full supply analysis starts at a different point from recognizing the right of a senior right holder to receive the full amount of the licensed or decreed right, attempting to make an advance judgment of need.** Inherent in the application of the minimum full supply is the assumption that, if it accurately defines need, use of water above that amount would not be applied to a beneficial use and would constitute waste. This strains against the assumption that the senior users are entitled to the full extent of their rights licensed or decreed rights which at some point has been determined to be an amount they could beneficially use.

R Vol. 37 at 7090-91 (emphasis added).

Inevitably, the proposed process perpetuates the same errors found in the Director's prior scheme, water will not be delivered in a timely manner and ground water users will always be authorized to divert out-of-priority despite not having an approved Rule 43 mitigation plan in place. This process unconstitutionally infringes upon the priority doctrine by giving water to the juniors at the expense of the seniors. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982); *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away.").

Bear in mind that the commencement of the call is based on the manager's "judgment of need." CM Rule 40.03 provides:

> **03. Reasonable Exercise of Rights**. In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

Thus, if the water requested within the water right will be applied to a beneficial use without waste, it is "needed" and must be provided. The burden then shifts to the junior user to show, by "clear and convincing evidence," that it will not be applied to a beneficial use, or will otherwise be wasted.[7] That is the law and the Director is bound by that law.

C. The Director's System Results in Untimely and Unconstitutional Water Right Administration.

[7] The "need" element of the Director's newly created "reasonable in-season demand" protocol, however, is somewhat different. The inquiry is not whether the senior will apply the water to beneficial use without waste, but instead the inquiry has become does the Director, in the exercise of his discretion, believe the senior "needs" the water, or, more correctly stated, does the Director, in the exercise of his discretion, believe the senior "needs" its water right. By transmuting the question of need from whether the senior will apply the water to a beneficial use without waste into the different question of whether the Director believes under the circumstances the senior needs the water is a re-adjudication of the senior's water right prohibited by the *AFRD #2* Court. *See* 143 Idaho at 878.

Starting from a fabricated "baseline" – rather than the decreed quantity – will also prove incorrect because this paradigm will invariably result in retrospective administration, i.e., late mitigation water delivery, instead of prospective administration. Since a junior ground water user has no obligation to mitigate a "shortfall" to a senior's "reasonable in-season demand" until September, a time when the junior is likely harvesting or has already harvested his crop, the out-of-priority ground water diversion may be finished for the year and thus the Director has no credible method to regulate or curtail the junior in the event mitigation water is not provided as ordered.

As held by Judge Wood, the failure to provide for timely administration ***becomes the "decision"*** by burdening and diminishing the senior right:

> Second, in order to give any meaningful constitutional protections to a senior water right, a delivery call procedure must be completed consistent with the exigencies of a growing crop during an irrigation season. . . . Moreover, ***any delay occasioned by the process impermissibly shifts the burden to the senior right, thus diminishing the right.*** The concept of time being of the essence for a water supply for irrigation rights is one of the primary basis for the preference system in § 3 of Article XV of the Constitution.
>
> * * *
>
> In practice, ***an untimely decision effectively becomes the decision***, i.e. "no decision is the decision."

Order on Plaintiffs' Motion for Summary Judgment at 93, 97-98. **Attachment A** to *SWC Joint Opening Brief* (emphasis added).

The Director's actions to date all prevent timely administration to ensure the senior right is protected during the irrigation season. It is undisputed that no water has been provided to mitigate the Coalition's injuries ***during*** the irrigation season.[8]

Idaho law provides that water is not available to a junior groundwater user *if use of that water would affect the present or future use of any prior surface or ground water right. See*

[8] The Respondents do not even dispute the fact that no formal exchange was approved in 2005 and no water was actually delivered to the SWC during any irrigation season in which injury was found.

Idaho Code § 42-237a(g). Thus, once material injury has been shown, the offending junior that has no viable defense to the call *no longer has a source to service its water right, and must curtail.* The junior can continue to pump ***only*** if it has a Rule 43 mitigation plan in place.[9]

The CM Rules contemplate the adoption of long-term mitigation plans to prevent or compensate for material injury caused by junior ground water diversions.[10] CM Rule 10.15. Rule 43 provides for long-term mitigation plans, after providing a senior right holder with due process (notice and hearing). Thus far, few of the junior respondents to this call have submitted long-term mitigation plans, but have instead relied upon the Director's created "replacement water plans": short term, one time, immediate responses to the requirement that a senior's water be replaced so that the junior may pump out-of-priority. Justice Schroeder rejected "replacement water plans" because the Rules do not provide for them, and because they exclude the senior and deny him due process. The Director wrongly rejected Justice Schroeder and has re-instated the "replacement water plan" scheme in his *Final Order. See* Pat VI, *infra.*

Without long-term mitigation plans, in the year-to-year *ad hoc* administration in which we currently find the aquifer, the Director contemplates setting an initial "benchmark" or "baseline demand" after the April 1st Heise natural flow forecast – again in mid-summer after the

[9] In the *Recommended Order*, Justice Schroeder acceded to the use of a "minimum" benchmark at the commencement of administration to replace the actual water right – responding to the junior users concern that they may need to lease water during an irrigation season at great expense only to find that the senior water right holder would not apply the full amount of its right to beneficial use, thus causing the expense for no good purpose. This concern arises only because of the present refusal of the junior to look beyond instantaneous "replacement water plans" that allow no lead time for contemplation, planning, negotiation, or procurement. For instance, one could contemplate that a mitigation plan approved for a ten-year time frame would rely upon taking options to procure water if needed, but would allow the original right holder to use the water if not needed for mitigation. In this way, the junior would be paying only exactly the amount the market would require to allow him to continue to pump if his "number came up" to fulfill an injured senior water right, i.e., the option price.

[10] In order to have an effective long-term mitigation plan in place, the plan would necessarily need to supply mitigation water in an amount to compensate for the effect on the water right instead of just the "minimum full supply" or "reasonable in season demand" because of the impossibility of saying that in future years the senior will not apply its water right to a beneficial use without waste. These types of mitigation plans would put the entirety of the current conflict at rest.

runoff is complete – and finally sometime in September. This will occur without benefit of previous carryover storage.[11]

This entire unconstitutional retrospective, late delivery (or no delivery) paradigm can be avoided by requiring mitigation for the full amount of water that the Coalition will put to beneficial use, i.e. the water right; or, alternatively, curtailing out of priority depletions.

III. The Director Failed to Properly Account for Injury to the Coalition's Senior Natural Flow and Storage Water Rights.

IDWR creates a false comparison in support of the Director's "total water supply" analysis. *IDWR Br.* at 9-10. In arguing against the Director's duty to analyze injury to individual natural flow and storage water rights, IDWR asserts that the "SWC's decreed natural flow rights total approximately 6,804,325 acre-feet". *Id.* at 10. In calculating this number IDWR wrongly assumes that the Coalition's natural flow rights would be diverted at their decreed quantities every single day of the irrigation season.

The Coalition's natural flow rights are based upon decreed diversion rates and are administered by priority, hence junior rights are curtailed as dictated by the available water supply. As explained by Lyle Swank, the Water District 01 Watermaster:

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[11] In those years that ample water is available, administration will not matter except to the extent there should be assurance of reasonable carryover, which the Director currently will not do. In a year of shortage, or successive years of shortage, the following scenario is inevitable: Anticipating the need for its full water right, but facing predictions of water shortages, seniors will call for water to fulfill the right. The Director will set an initial benchmark that is less than the water right. The junior does not have a long-term mitigation plan to meet the water right, but offers a "replacement water plan" to meet the benchmark or "baseline", which the Director accepts and allows the junior to commence out of priority depletions of the aquifer, and consequently the reach gains to the Snake River relied upon by the senior. The senior diverts its water right, as it is entitled to do. The season is either normal, or hot, and shortages continue. The benchmark is either adjusted or not adjusted as the season progress. The difference between the amount of water that the junior is prepared to replace up to the benchmark, and the amount of water in the water right which the senior is entitled to apply to beneficial use and actually applying the beneficial use is not available in the "replacement water plan." At some point, to continue out-of-priority diversions, the junior must obtain new water during the season in a scarce market. The price will be concomitantly higher because of the scarcity, leaving the junior to decide whether to sacrifice his profit for mitigation water or quit pumping. The senior has no part in this process. Likely as not, without a prospective mitigation plan, both junior and senior will go without.

Q. [BY MR. SIMPSON] With respect to the entities identified on Exhibit 9701, how do you deliver water to these entities as part of your daily – daily work?

A. [BY MR. SWANK] Our daily water right accounting goes through the process of collecting data from multiple reservoir and river gauges, the diversion data; determines what the available natural flow is in different reaches of the river; computes what the amount of storage is in those different reaches; determines the amount of water diverted, how much was natural flow and how much was storage. That's gross simplification, but it hits the major steps.

Q. So in essence, you attempt to identify how much natural flow is available in the system in looking at the runoff, the natural flow in the river – looking at the Heise gauge, for example, and other pertinent river gauges – and then determine from a priority standpoint what priority's on and deliver water to those priorities?

A. Yes. That is part of the daily water – of the water right accounting process.

Tr. Vol. IV, p. 834, ln. 25 – p. 835, ln. 20; *see also Id.* at 838, lns. 3-6 (water is delivered "pursuant to the provisions of those previous decrees").

Mr. Swank further confirmed that administration of surface water rights in the water district considers the supply available to natural flow *and* storage water rights, not just some amalgamation of the two. Tr. Vol. IV, p. 858, lns. 3-21.

The Coalition's natural flow rights are not based upon volume, as implied by IDWR, and there is no basis to combine the Coalition's total supply for purposes of conjunctive administration. Moreover, each natural flow right is not diverted to its decreed rate of diversion every day of the irrigation season. Those natural flow water rights are curtailed by priority depending upon the water supply available in the river. IDWR's alleged "total authorized water supply" is misleading and ignores how the rights are actually diverted and administered by the Water District 01 Watermaster.

Contrary to IDWR's argument, the Director's examination of a "total water supply" does not "ensure the SWC's right to make beneficial use of the water was protected." *IDWR Br.* at 12. Instead, it deviates from what is required by law, which demands that the Director and watermaster analyze individual water rights and determine if a junior right interferes with that use. The "total water supply" concept is not applied in surface water right administration and it impermissibly allows the Director to authorize injury to the Coalition's rights by dictating that storage be exhausted to make up for injury to a natural flow right. The Hearing Officer acknowledged this:

> 3. **In analyzing a total water supply to determine if there is material injury each element of the water rights should be considered and proper recognition is given to the right to carryover storage – there may be material injury to the right of reasonable carryover if the provision of full headgate delivery exhausts what would otherwise be the reasonable carryover storage amount.** The first step in deciding if there is material injury should be to determine how much a surface water user's natural flow right has been diminished by junior ground water pumping. Evidence indicates that there has been a long term trend of declining natural flow water, causing the members of the SWC to begin the use of storage water earlier and to a greater extent. The diminution of natural flow results in a reduction of the storage water right by the amount of water withdrawn from storage to meet the need that could not be met by the natural flow right as a consequence of ground water pumping. All SWC members are entitled to reasonable carryover storage. If depletion of the storage right to make up the loss of natural flow reduces the amount of carryover storage below the level of reasonable carryover there is **material** injury and that amount must be made up through curtailment or replacement, or another form of mitigation.

R Vol. 37 at 7114 (emphasis in original).

Although the Coalition members rely upon storage water to varying degrees depending upon their natural flow rights (and administration of those rights vis-à-vis one another), their use of storage should not be dictated by the injury caused by junior ground water diversions.

A. IDWR Provides No Legal Authority to Justify the Director's Failure to Provide Water to Mitigate the Injury Suffered in 2005.

IDWR provides no response to the fact the Coalition received no water during the 2005 irrigation season. Importantly, IDWR provides no explanation or response to the fact that no exchange was approved to show that IGWA had water to provide during the 2005 irrigation season. Instead, IDWR argues that the Director's action in 2005, including a July 22, 2005 supplemental order on IGWA's "replacement water plan," was "accepted by the Hearing Officer". *IDWR Br.* at 34. Incredibly, IDWR ignores the Hearing Officer's finding on this point, which was accepted by the Director in his *Final Order*:

> **6. The process utilized in this case deviated from that anticipated by the Supreme Court.**
>
> * * *
>
> **2. A hindrance to reasonable carry-over storage constitutes material injury.**
>
> **3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights.**
>
> * * *
>
> **a. 1995 was a wetter than average year, diminishing the validity of use of that year to establish the base for a minimum full supply and underestimating the material injury likely to occur in 2005 and subsequent years**. . . . Basing the minimum full supply on a wet year makes it likely that material injury was underestimated in 2005 and subsequent year, unless an adjustment is made at the outset to account for the effects of a greater than average amount of precipitation through the year.
>
> * * *
>
> **6. The minimum full supply established in the May 2, 2005, Order is inadequate to predict the water needs of SWC on an annual basis.**
>
> * * *
>
> **2. Replacement water has not been provided in the season of need.**

R Vol. 37 at 7073, 7076, 7092, 7097, 7111-12 (bold in original).

In other words, the Hearing Officer concluded: 1) the process used by the Director in 2005 did not follow the *AFRD #2* Court's decision; 2) the Director's "minimum full supply"

"underestimated" the material injury to the SWC in 2005; and 3) the "replacement water plan" process did not follow the CM Rules and no water was provided to the Coalition in 2005. Clearly, the Hearing Officer did not "accept" the Director's actions in 2005, including the July 22, 2005 supplemental order approving IGWA's "replacement water plan".

IDWR claims that despite not providing any water during the 2005 irrigation season, the fact the Director allowed "IGWA to provide its replacement water to TFCC in 2006 provided TFCC with flexibility". *IDWR Br.* at 35. This "flexibility" argument does not address the fact that TFCC was injured in 2005 and was not provided any timely relief. IDWR cites no authority to support its theory. Clearly, the Director's actions in 2005 were erroneous.

B. The Director Failed to Perform Any Lawful Administration in 2006 and the Ad Hoc Rationale Offered in the Summer of 2007 Was Untimely.

IDWR claims the Director's actions were acceptable in 2006 since the Director determined at the end of June in that year "it was clear from the 2006 Join Forecast that members of the SWC would have a reasonable supply by which to irrigate and would not be materially injured". *IDWR Br.* at 37. The Director's 2006 *Third Supplemental Order* was predicated upon the same "minimum full supply" used in 2005, an amount which the Hearing Officer declared "underestimated" the material injury to the SWC members. The fact that Water District 01 does not finalize its accounting until the following spring, in order to account for gauge shifts and to receive final information from the USGS, does not excuse the failure to provide water to an injured senior right during the irrigation season. As such, IDWR's argument on this point is inapposite.

IDWR does not even attempt to support the Director's non-action during the rest of the 2006 irrigation season. Despite the Coalition's request for administration, the Director refused to regulate junior priority ground water rights pursuant to his statutory duty and instead waited until

May 2007 to find "no injury" occurred in 2006 based upon his "assumption" about how the SWC entities operated that year. *See SWC Opening Brief* at 17-18. This approach is unsupportable under the law and demonstrates yet again how the Director did not timely administer water rights in 2006.

C. IDWR Cannot Justify the Director's Failure to Provide Water to the Injured Coalition Members in 2007 Wherein the Director used the "Minimum Full Supply" as an Arbitrary "Cap" on Water Use.

Despite the express findings from the Hearing Officer that invalidated the Director's actions in 2007 (which the Director affirmed in the *Final Order*), IDWR curiously argues now that those actions were proper and "timely". *IDWR Br.* at 37-40. Justice Schroeder plainly found that the Director's use of a "minimum full supply" as a "cap" in 2007 resulted in a "re-adjudication" of the SWC's water rights:

> **g. Using the minimum full supply as a fixed amount in effect readjudicates a water right outside the processes of the SRBA.** Treating the minimum full supply as a cap reducing the right to mitigation in carryover storage has profound consequences. In practical effect it adjudicates a new amount of the water right outside the SRBA without a determination of specific factors warranting a reduction. . . . When treated as a fixed amount in 2007 it had great significance beyond its intended purpose.

R Vol. 37 at 7095.

Consequently, the Director's administration in 2007 did not follow the law, or even the Director's own prior orders. Despite the acknowledged failings in 2007, IDWR now misstates the facts and wrongly alleges that "IGWA was positioned during the season of need to mitigate TFCC's injury". *IDWR Br.* at 40. Yet, the record demonstrates that IGWA was not positioned to provide sufficient water during the irrigation season since they did not even enter into the lease for the water they proposed to provide until January 9, 2008. **Ex. 4603.**

Moreover, the Director's own *Seventh Supplemental Order* contradicts IDWR's argument, since it was clear that 93% of the water IGWA acquired in 2007 was provided for mitigation actions in Water District 130. *See* Ex. 4600 at 8 (only 5918 acre-feet of 65,145.8 acre-feet were available). IDWR fails to explain how 5,819 acre-feet available to IGWA as of December 27, 2007 was sufficient to mitigate the 17,345 acre-feet injury that the Director determined TFCC suffered during the 2007 irrigation season. Clearly it was not adequate, and IDWR cannot dispute the fact that absolutely no water was provided to TFCC during the irrigation season.[12] IDWR cannot credibly claim that the failure to administer junior priority ground water rights, or provide timely mitigation water to TFCC in 2007, was acceptable or "timely."

IGWA argues in support of the untimely administration in 2007 by alleging that "TFCC was free to divert as much water as it needed during the 2007 irrigation season, knowing that IGWA would transfer water into their storage account in the amount of the injury once the final accounting for 2007 was completed." *IGWA Br.* at 13. To the contrary, it was clear that IGWA did not have sufficient water for TFCC to divert and use and the Director took no action to order any water transferred to TFCC during the 2007 irrigation season.

In summary, IGWA's alleged after-the-fact transfer in January 2008 did not mitigate the injury inflicted upon TFCC's senior water rights that occurred during the 2007 irrigation season.

IV. Pocatello Mischaracterizes the Orders in This Case in an Effort to Claim the Director's Injury Determinations Have Been Accepted.

Pocatello, like IDWR, argues that the Hearing Officer accepted the Director's injury findings because the "Recommendations *did not* include a finding that the amounts of injury calculated through the Director's interim orders over the course of the proceedings were

[12] The "shell game" that IGWA attempted to play in 2007 was revealed by the above accounting, hence the reason that IGWA had to lease additional water from Pocatello in January 2008.

erroneous" and that "[t]he Hearing Officer affirmed the Director's determinations regarding injury for 2005-2007, based on evidence in the record." *Poc. Br.* at 7, 16. A plain reading of both Justice Schroeder's *Recommended Order* and the Director's *Final Order* demonstrates otherwise.

Pocatello simply ignores Justice Schroeder's decision relative to the "minimum full supply" and "reasonable carryover" calculations. The Hearing Officer did not approve the Director's injury calculations and instead found them to be "inadequate" and "underestimating the material injury" suffered by the SWC. R Vol. 37 at 7092, 7097.

Since Justice Schroeder concluded that the Director's "minimum full supply" "underestimated" the injury caused to the SWC water rights and was "inadequate" to protect those rights on an annual basis, it is undisputed that he found the Director's interim orders issued over the course of these proceedings were in error. Moreover, Pocatello's argument regarding the Director's actions and orders in 2007 finds no support in the Hearing Officer's decision, where he held the decisions resulted in a "re-adjudication" of the SWC's senior rights. R Vol. 37 at 7095. Therefore, Pocatello's claim and selected citations that the record actually supports the Director's injury findings is contrary to the Hearing Officer's decision on this issue (which was accepted by the Director in his *Final Order*).[13]

A. Pocatello's Reliance Upon General Policy Concepts is Misplaced and Does Not Excuse Injury to the Coalition's Senior Water Rights or the Director's Failure to Follow Idaho's Water Distribution Statutes and the CM Rules.

[13] Specifically, the Hearing Officer considered the information cited by Pocatello and, as identified above, plainly found that the Director's "injury" and "reasonable carryover" calculations were "inadequate" and constituted an unlawful "re-adjudication" in 2007. The Court should similarly reject Pocatello's theories here. After all, Pocatello did not appeal the Director's decision, hence it is not in a position to re-argue its dissatisfaction with the fact that the injury calculations were found to be erroneous.

In support of the Director's actions in this case Pocatello wrongly alleges that the Legislature enacted Idaho Code § 42-101 consistent with, or in reference to, Article XV, Section 5 of the Idaho Constitution.[14] *Poc. Br.* at 12. Pocatello misreads the constitutional provision since it only applies "among" irrigators within a specific project (i.e. "as among such persons"), not between the rights of unrelated water users not within an irrigation project. *See* IDAHO CONST., art. XV, § 5 (emphasis added).

Both Section 4 and Section 5 of Article XV plainly apply "among" those persons ***within*** water delivery organizations such as canal companies and irrigation districts where persons have settled the land with "the view of receiving water for agricultural purposes, under a sale, rental or distribution thereof."[15] *Id.*

Pocatello's citation to CM Rule 20's policy statement and the Director's use of the cited provision in his decision ignores the controlling condition that applies "as among such persons" within those irrigation projects and purports to expand the language and make it applicable to all other water rights, contrary to the constitution's plain language. *See Poc. Br.* at 13. Nothing implies that any "reasonable limitations" the Legislature might prescribe in that context applies to junior appropriators that are not part of the irrigation project. Moreover, the only statute that the Legislature has passed to address this provision is Idaho Code § 42-904, which essentially affirms that the prior appropriation doctrine applies as between different classes of users within an irrigation project.[16]

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[14] Judge Wood carefully reviewed and analyzed the Constitutional Convention, including the cited provision, which was approved by the *AFRD #2* Court. *See* Attachment A to *SWC Joint Opening Brief.*

[15] *See Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 604 (1904) (Sullivan, C.J., *dissenting*) ("The provisions of said section 5 contemplate that ditch owners must furnish water to the extent of their ability to all settlers under their ditches in the numerical order of their settlements or improvements, thus contemplating that the rental right to the use of such waters should be given to the settlers in accordance with the priority of their settlement or improvement, carrying out the theory that the first settler in time was first in right.").

[16] *See Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 543 (1963).

Contrary to Pocatello's argument and the reference in CM Rule 20, the Idaho Supreme Court has expressly recognized the limits of this section:

> The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from a natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used "under a sale, rental or distribution" ***and to point out the respective rights and priorities of the users of such waters.*** It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes. And so sec. 4 is dealing chiefly with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities ***as between water users and consumers who have settled under these ditches and canals*** and who expect to receive water under a "sale, rental or distribution thereof." The two sections must therefore be read and construed together.
>
> ...
>
> "Mr. Claggett: Mr. Chairman, both of these sections [4 and 5] apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental, or distribution.'

Mellen v. Great Western Sugar Beet Co., 21 Idaho 353, 359 & 361 (1912) (emphasis added).

Article XV, Section 5 therefore only applies as among users within an irrigation project and cannot be construed to imply some undefined "public interest" criteria that limits or precludes administration of other water rights. Neither the Director nor IDWR are authorized to expand its meaning and create a new "condition" between the Coalition's senior surface water rights and junior ground water right holders through some undefined "public interest" criteria. In Idaho, where a "constitutional provision is clear, the Court must follow the law as written and, thus, when the language is unambiguous, there is no occasion for rules of construction." *Hayes v. Kingston*, 140 Idaho 551, 553 (2004).

B. The Director's Actions are Not Consistent with the Statutory and Constitutional Framework.

Pocatello seeks to support the *Final Order* with a generic claim that the Director's factual determinations were consistent with the statutory and constitutional framework. *Poc. Br.* at 15. Rather than address the specific statutes and CM Rules that guide the Director's and watermaster's water right administration duties (Idaho Code §§ 42-602, 607, CM Rule 40), Pocatello alleges the Director acted properly in the name of "public interest" and "reasonable use". Coincidentally, Pocatello creates the same "strawman" as IGWA and IDWR by alleging the SWC's demand for all of the decreed quantities all of the time would have required vast curtailment inconsistent with "reasonable use" and the "public interest" and therefore cannot be accepted.

Pocatello twists the "public interest" and "reasonable use" concepts into a "catch-all" justification for the Director's actions. Pocatello's claim that the Director is authorized to injure a senior's water right in order to allow juniors to divert out-of-priority is rooted in a "common property" or "riparian doctrine" theory, which has been soundly rejected in Idaho since statehood. In explaining the prior appropriation doctrine in *Drake v. Earhart*, 2 Idaho 750, 755-56 (1890), the Idaho Supreme Court renounced the same theory being advanced by Pocatello, IGWA, and IDWR, and explained that a senior must beneficially use the water, not waste it, in order to have that water delivered. *See also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575 (1973) (confirming that Idaho does not follow a "riparian" approach).

The question in a delivery call turns on whether a senior appropriator can beneficially use, i.e. not waste, water. No Coalition member was found to have "wasted" water that is diverted and used within its decreed quantities. Further, Justice Schroeder and the Director both

concluded that the Coalition employed "reasonable" and efficient diversion and conveyance systems. R Vol. 37 at 7101-02; R Vol. 39 at 7382. These findings were not appealed.

The fact the Coalition's water rights have been decreed or licensed confirms that they can put the decreed quantities to beneficial use. Accordingly, since the junior water users failed to prove any defenses and did not show that the Coalition will not beneficially use the water called for, the Director cannot temper his administration or excuse some injury in the name of "public interest" or "reasonable use". Consequently, Pocatello's arguments are unpersuasive and should be rejected.

V. The Director's Failure to Provide for "Reasonable Carryover Storage" is an Unconstitutional Application of the CM Rules.

Former Director Dreher succinctly identified when carryover storage water should be provided to the Coalition members:

> Q. [BY MR. BROMLEY]: And for purposes of reasonable carryover, when, under your methods, were you envisioning that to be owed or due?
>
> A. [BY MR. DREHER]: Certainly, ***during the irrigation season prior to the subsequent year***. So in 2005 the amount for reasonable carryover would have been due during that irrigation season so that both sides, the ground water folks and the surface water folks, would know going into 2006 what they had.
>
> ***And at least my intent was that if the amount necessary to provide reasonable carryover was not provided in 2005, that there would be some level of curtailment in 2006. And I couldn't have made that determination unless the replacement water was provided up front.***

Tr. P. Vol. I at 103, lns. 11-25 (emphasis added). In other words, unless water is provided in-season "prior to the subsequent year" (i.e. in the season that the material injury determination is made), curtailment must follow.

Justice Schroeder echoed the former Director's intention in his *Recommended Order*, wherein upon a plain reading of the CM Rules, he found the Coalition had a right to "carryover" storage and to have that right protected from interference by out-of-priority ground water diversions. *See* R. Vol. 37 at 7076 & 7109.

The CM Rules and Idaho case law protect a senior's storage right, including the right to reasonable carryover storage. As former Director Dreher recognized, the Coalition members are each entitled to receive water ***in-season*** to compensate for the undisputed material injury caused by junior ground water diversions. If a junior could not provide water to mitigate the injury to the storage right "up front", former Director Dreher explained that the CM Rules required curtailment at that point. Tr. Vol I p. 101, lns. 3-8.

The CM Rules compel the Director's response to include an allowance for "reasonable carryover" for "***future*** years." *See* CM Rule 42.01(g) (emphasis added). Yet, the Director has now written this provision out of the CM Rules in his *Final Order* by refusing to require that water be provided "prior to the subsequent year" (i.e. for "*future* years"). Rather, the Director has unilaterally determined that carryover storage water need not be provided until sometime during the "subsequent year" – a theory supported by IGWA and Pocatello.[17]

The Director's carryover scheme demonstrates a fundamental misunderstanding about the importance of carryover storage and how it fits into the planning process for the Coalition for present and future water years. Rather than recognizing the need for carryover in-season, so that the Coalition managers can operate their projects accordingly and within their rights, the Respondents all disregard former Director Dreher's testimony and Justice Schroeder's findings,

[17] It is not surprising that the holders of junior water rights would support this scheme since, after nearly five years of "administration," no water has ever been provided *in-season* and no involuntary curtailment has occurred. By allowing the junior water rights to wait until the following season to provide carryover, the Director has provided those causing the material injury with a free pass to continue their depletions.

and instead cling to a few selected phrases from the *AFRD#2* decision[18] and accuse the Coalition of attempting to carryover their entire storage rights every year regardless of need. *See generally IDWR Br.* at 13-24; *IGWA Br.* at 34-40; *Poc. Br.* at 19-24. These misleading arguments cannot withstand scrutiny as each fails to acknowledge the plain language of the CM Rules and well-established precedent.

In reality, Coalition members rely upon their storage reserves both for meeting irrigation demand in the current irrigation season as well as making operating decisions to provide for carryover for the "subsequent year." *See* R. Vol. 34 at 6378 (carryover provides BID with "a sure knowledge [that] that much water will be there to use in the future year"); R. Vol. 32 at 6139 (AFRD#2 relies "on having a full storage right each year because the largest portion of our water right is storage"); R. Vol. 33 at 6324 (A&B "relies primarily on its storage carry over and projected run off forecasts for planning purposes"); R. Vol. 32 at 6129 ("carryover storage held by MID is a critical fact that is looked at early in our planning process for the coming irrigation season").

Coalition members "start planning for the ***next*** season's irrigation supplies based upon [] carryover." R. Vol. 33 at 6307 (emphasis added); *see also id.* at 6306 (NSCC tries to "carryover as much storage as possible"). Many Coalition members "cannot risk an inadequate carryover because [they do] not have senior natural flow rights to satisfy early season irrigation demands." *Id.* at 6307; R. Vol. 33 at 6248 ("with the increased uncertainty of Milner's 1916 and 1939

[18] IGWA spends much of its response arguing that carryover should not be provided. *IGWA Br.* at 34-40. Essentially, they assert that, by considering carryover to be "insurance" against future dry years, the Coalition members seek to "carryover water regardless of actual future need." *Id.* at 37. However, the *AFRD#2* Court specifically recognized that the CM Rule's allowance for reasonable carryover for "future years" was not facially unconstitutional. 143 Idaho at 880. IGWA's attempt to fashion a rule from the *AFRD#2* decision, therefore, is without merit – especially here, where IGWA did not file an appeal.

natural flow rights," Milner is "growing increasingly dependent on carryover storage to meet the needs of our water-users"); *see* R Vol. 37 at 7056-57, 7104-07.

SWC Managers carefully and frequently (i.e. daily) gauge their water users' demands with the quantity of water in the storage system and consequently plan their in-season deliveries based on the anticipated level of carryover for the "subsequent year." *See* R. Vol. 33 at 6307 (NSCC "self-mitigates by cutting deliveries to the Company's stockholders to provide carry-over water for the next"). As storage supplies decline during the season, Coalition members are forced to "self-mitigate" by reducing their shareholders' deliveries to ensure that there is some carryover for the next season. *Id.* In short, unless carryover storage is provided "prior to the subsequent year," the in-season material injury will be exacerbated due to the fact that the Coalition members rely upon that storage for purposes of their present year's water delivery operations.[19] As such, the Director's paper "promise" to provide carryover in the subsequent year must be rejected as it fails to protect the right to carryover storage and it impermissibly shifts the burden of water shortage to the senior right.[20]

IDWR does not dispute the need of the Managers to have their carryover storage for planning purposes. Nor does IDWR address former Director Dreher's recognition that carryover must be provided "prior to the subsequent season." *See* Tr. P. Vol. I at 103, lns. 11-25. Rather, IDWR spends much of its response addressing the apportionment of risk among water users and the use of the USBR and USACE Joint Forecast. *See IDWR Br.* at 15-24. First, IDWR contends that the Coalition is seeking to "eliminate risk" and force the junior water rights to carry the

[19] Accordingly, Pocatello's assertion that "injury occurs in the subsequent year if the amounts are not available for use," *Poc. Br.* at 20, is wrong.

[20] IGWA accuses the Coalition of "ignor[ing] historical fact" and seeking to "change the historical operation of WD01." *IGWA Br.* at 34. Yet, they fail to address the Coalition Managers' historical use of in-season carryover determinations (i.e. "prior to the subsequent year") to plan both present and future irrigation deliveries. IGWA's argument should be rejected accordingly.

entire risk of a fluctuating water supply – regardless of the cause of the fluctuation. *Id.* at 16. Pocatello joins in this distortion of the Coalition's argument. *See Poc. Br.* at 20 & 22-24. These arguments are wrong. Furthermore, they are misplaced here, where material injury is undisputed and the Coalition only seeks administration of junior water rights **in order to protect their senior rights, including storage rights and carryover**.

The Coalition does not seek to shift the risk associated with fluctuations in annual precipitation. All surface water users are subject to what nature provides. However, senior surface water users are not subject to interference with their rights caused by junior ground water diversions. The prior appropriation doctrine requires junior ground water users to bear the risk and responsibility for their depletions and injury to senior rights. *See* CM Rule 40.[21]

In addition to failing to understand the purpose of "carryover storage", IDWR attempts to hide behind the so-called "scientific approach in the February 14, 2005 order" – i.e. former Director Dreher's reliance on the USBR and USACE Joint Forecast to determine the needs of the Coalition members. *IDWR Br.* at 19. According to IDWR, former Director Dreher relied on the Joint Forecast because it "is generally as accurate a forecast as is possible." *Id.* Since the joint natural flow forecast does not come out until the "subsequent year," IDWR claims that reasonable carryover should not be determined until that time. *Id.* IDWR alleges that requiring carryover in-season would "ignore Director Dreher's scientific approach." *Id.* at 23.

IDWR cannot have it both ways. IDWR cannot rely upon former Director Dreher's so-called "scientific approach" and yet at the same time ignore the explanation that carryover must

[21] Pocatello also relies heavily on former Director Dreher's testimony regarding risk – asserting that requiring carryover be provided in-season is "unreasonably punitive." *Poc. Br.* at 19-20 & 22-24. Pocatello fails to discuss, however, Director Dreher's testimony that carryover must be provided "prior to the subsequent year" or that material injury is not disputed. When viewed in light of the evidence, Pocatello's risk argument, like the Director's, fails. Indeed, it would be "unreasonably punitive" to force the senior water right to bear the risk of injury caused by out-of-priority ground water diversions and then rely upon the next year's precipitation to make up for that injury.

be provided "prior to the subsequent year". *See* Tr. P. Vol. I at 103, lns. 11-25. In light of the former Director's testimony that carryover be provided "prior to the subsequent year," IDWR's present argument regarding the subsequent year's natural flow forecast is misleading, if not irrelevant. In fact, none of this testimony contradicts the fact that carryover water must be provided "prior to the subsequent year." *See* Tr. P. Vol. I at 103, lns. 11-25.

All Respondents argue that the Director must be able to provide carryover water during the "subsequent year" in order to avoid waste. *See IDWR Br.* at 19-21; *IGWA Br.* at 34-35 & 38-40; *Poc. Br.* at 20 & 23. Contrary to this argument, water provided to mitigate an injury to a senior's storage right and ensure "reasonable carryover" for the following year does not constitute "waste". In the event the reservoir system completely fills and water is released for flood control purposes the following year that does not excuse out-of-priority pumping the prior year. Moreover, the Respondents fail to acknowledge the fact that the reservoir system does not fill every year, and in years without adequate precipitation carryover storage is vital for the next year's water supply.

Finally, IDWR attempts to gloss over the arbitrariness of his "reasonable carryover" determinations, arguing that "nothing in the Final Order limits the right to hold carryover storage." *IDWR Br.* at 14. This argument is unpersuasive. Through the "reasonable carryover" determination, the Director has set a "baseline" or "floor" for material injury. According to the Director, unless the Coalition members drop below that floor, they are not materially injured. In other words, if BID has even ½ of an acre foot of carryover storage at the end of the season, the Director will consider BID to have *not* suffered material injury. R Vol. 8 at 1383 (setting "reasonable carryover for BID at 0 acre feet). This is the case regardless of the water year and BID's ability to deliver water to its landowners. Similarly, the Director's "reasonable carryover"

determination of 83,000 acre feet for NSCC was wholly inadequate in 2007, when NSCC used nearly all of its 350,000 acre-feet of carryover from 2007 and yet was still forced to reduce deliveries to its shareholders. R Vol. 33 at 6307-08. Similar problems exist for other Coalition members as a result of the Director's decision. *See* R. Vol. 33 at 6325 ("reasonable carryover" of 8,500 acre feet is wholly insufficient to provide A&B with an adequate supply of water); R. Vol. 32 at 6130 (MID "reasonable carryover" of 0 acre feet denies MID with the ability to plan for the future and forces MID to deplete its water resources before making a call); R. Vol. 34 at 6379 (BID's "reasonable carryover" of 0 acre feet places BID at "risk of being short every year in times of drought"); R. Vol. 33 at 6248 ("reasonable carryover" of 7,200 acre feet for Milner provides fails to provide "sufficient carryover to reduce the impacts of the ongoing drought").

Accordingly, the Director's decisions regarding reasonable carryover are arbitrary and capricious and should be rejected.

VI. The Respondents Fail to Provide Any Legal Support for the "Replacement Water Plan" Concept Created by the Director.

The Director's "replacement water plan" scheme does not comply with the CM Rules and is unconstitutional. The Hearing Officer found that the "replacement water plan" concept approved by the Director is in effect a mitigation plan that does not follow the procedural steps required to approve a mitigation plan. Furthermore, unless a mitigation plan is filed in accordance with the procedural steps of CM Rule 43, curtailment must follow, if there is a finding of material injury. See R. Vol. 37 at 7112. In spite of this, the Director found that it was:

> necessary that replacement water plans be an available administrative tool if junior water users are to be able to provide water to seniors, during the season in which it is needed, in the amount that would have accrued to the senior if curtailment were ordered – thereby making the senior whole during the pendency of the proceedings while not causing irreparable harm to the junior prior to a hearing. Replacement water plans serve a necessary role in the

> interim period after a delivery call is filed by a senior water user and before a record is developed upon which juniors can base a mitigation plan.

R. Vol. 39 at 7383.

The result of the Director's replacement plan procedure is that even though material injury exists, not one drop of replacement water has been provided in season since the beginning of this process in 2005. In responding to the position of the SWC and the Hearing Officer, the Respondents make the following arguments:

1. CM Rule 43 Mitigation Plan procedures are too cumbersome and take too long to prevent curtailment.

2. The result of following the procedure described in CM Rule 40 is too harsh since it could result in curtailment.

3. The Director has the authority to "pick and choose" which rules he desires to use and has the authority to create a unilateral procedure outside the scope of the rules.

4. IGWA argues that due process was fulfilled by the procedure utilized by the Director for a "hearing" that was conducted on June 22, 2007.

5. Pocatello argues that a Colorado case cited by the SWC, *Simpson v. Bijou Irrigation Co.* 69 P.3d 50 (2003) is not on point because the Director of IDWR has more authority than the State Engineer in Colorado.

These arguments cannot withstand scrutiny.

A. The CM Rules are Facially Constitutional and Describe the Procedures to be used by the Director.

When the SWC filed the action that lead to the decision in *AFRD #2*, the SWC argued, and the District Court found, that the CM Rules were facially unconstitutional. This argument was strongly opposed by IDWR, IGWA, and to the extent it was allowed to participate, Pocatello. The principal holding in *AFRD#2* was that the CM Rules are facially constitutional.

Now the same Respondents all argue that the rules do not need to be followed. They instead argue that the Director can "make up" additional rules and procedures. They argue that

CM Rule 5, which provides that nothing in the rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law, allows the Director to ignore the explicit procedure set forth in CM Rule 40, to extract references to "replacement water" out of CM Rule 43 (the Rule outlining the procedure for a mitigation plan), and then make up his own procedure on how he will apply the "replacement water" plan to the CM Rule 40 procedure and otherwise avoid administering water. Such actions are not supported by the CM Rules. *See* CM Rule 40 (if the Director find material injury he must either "regulate the diversion and use of water in accordance with the priorities ... or allow out-of-priority diversion of water ... pursuant to a mitigation plan"); CM Rule 40.01(c) (watermaster must determine whether an approved mitigation plan is in place and, if so, may allow out-of-priority diversions); CM Rule 40.04 (same); CM Rule 40.05 (any diversion in violation of the mitigation plan will result in the immediate termination of "the out-of-priority use of ground water rights ... to insure protection of senior priority water rights").

The Respondents rely heavily upon the provisions of CM Rule 5, yet each fails to provide any "Idaho Law" that would allow the Director to deviate from the express procedures set forth in the Conjunctive Management Rules. CM Rule 5 does not authorize the Director to go outside the express provisions of Idaho law and the CM Rules to create an alternative procedure, a procedure without criteria, timing, and due process wholly at the discretion of the Director.

B. Not only does the Director Ignore the Procedure set forth in CM Rule 40, the Director Ignores the Procedure set forth in CM Rule 43.

The Director cobbled together an alternative procedure by ignoring CM Rule 40 and the express procedure set forth in CM Rule 43. The phrase "replacement water" does not appear in CM Rule 40. As pointed out above, once a determination of material injury is made, CM Rule

40 requires the Director to regulate by priority or to allow out-of-priority diversion only pursuant to a Rule 43 mitigation plan that has been approved by the Director.

If one wants the benefit of diverting out-of-priority pursuant to a mitigation plan, CM Rule 43 clearly sets out the procedure to be followed. First, a plan must be submitted to the Director. CM Rule 43.01. Next, the Director provides notice and a hearing and determines whether the mitigation plan will provide water in the season of need. CM Rule 43.03(c).

The Respondents now argue that the Director has the right to pull the phrase "replacement water" out of CM Rule 43, ignore the provisions requiring notice and hearing before a plan is approved and unilaterally impose the requirements of a "replacement water plan". They have cited no authority that would allow the Director to create or implement such a procedure. The procedure utilized by the Director clearly violates the explicit procedures set forth in CM Rules 40 and 43.

C. AFRD#2 Did Not Uphold the Director's "Replacement Water Plan" Concept.

In its brief, IDWR misstates the position of the SWC, the Idaho Supreme Court in the *AFRD#2* decision, and the finding of the Hearing Officer in the *Recommended Order*. IDWR argues that the Coalition claims that "replacement water plans" are not permissible, that this argument was rejected in the *AFRD#2* decision and that the Hearing Officer rejected this argument. *IDWR Br.* at 25.

Contrary to IDWR's claims, the Coalition has never argued that mitigation is not permissible. Rather, the SWC has argued that any mitigation, be it labeled a "replacement water" , "mitigation", or "injury prevention" plan, must comply with CM Rules 40 and 43. The SWC has consistently argued that the Director does not have the right to create a unilateral

"replacement water plan" procedure that does not comply with those Rules or other provisions of Idaho law and the Idaho Constitution.

Since *AFRD#2* addressed the facial constitutionality of the CM Rules, the Idaho Supreme Court did not address or uphold the Director's "replacement water plan" procedure, since it is an "as applied" creature created by the Director outside of the express wording of the Rules. The *AFRD#2* Court decision did not state that the Director had the authority to ignore the provisions of CM Rules 40 and 43. Rather, in that case the Court recognized, when administering water, that the Idaho Constitution, statutes and case law become difficult and harsh in their application in times of drought. *See AFRD#2*, 143 at 869.

Contrary to IDWR's assertions, the Hearing Officer explicitly held that the "replacement water plans" approved by the Director were in effect "mitigation plans" and that the Director's application of the concept did not follow the procedural steps required to approve a Rule 43 mitigation plan. Furthermore, "If no plan is approved and there is finding of material injury, curtailment must follow." R Vol. 37 at 7112. That is law of prior appropriation in Idaho, and the Director is bound to follow it.

D. The Director's Creation of the "Replacement Water Plan" Scheme is Not Entitled to Deference.

In its brief, IDWR goes to great lengths to argue that the Director's unilateral implementation of a replacement water plan is entitled to deference, citing the decisions of the Idaho Supreme Court in *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849 (1991) and *Pearl v. Board of Professional Discipline of Idaho State Bd. Of Medicine*, 137 Idaho 107 (2002).

Initially, it is interesting to note that in the *Pearl* decision the Idaho Supreme Court found that the Board of Medicine's discipline of a doctor was improper and violated due process

because the Board failed to provide proper notice of alleged violations of standards of care to the doctor. It is also interesting to note that *Pearl* requires a more critical scrutiny of an agency's finding if the agency's findings disagree with those of a hearing panel:

> Where the agency's findings disagree with those of the hearing panel, this court will scrutinize the agency's findings more critically. As the Court of Appeals noted in *Woodfield*, there is authority for courts to impose on the agency an obligation of recent decision making that includes a duty to explain why the agency differed from the administrative law judge.

137 Idaho at 112 (citations omitted); *see also Northern Frontiers, Inc. v. State*, 129 Idaho 437, 440 (1996) ("[a]lthough the director may disagree with the recommended decision, the hearing officer's findings are entitled great weight"). Here, the Hearing Officer explicitly found that the Director should follow the procedural steps of CM Rule 43 when considering a mitigation plan. Since the CM Rules provide an express procedure, Justice Schroeder's decision should be entitled to "great weight" on this issue. Although the Director agreed that junior ground water users should file a Rule 43 mitigation plan, he nonetheless went on to state that he would continue to use "replacement water plans" outside of the procedural steps required by CM Rule 43. R. Vol. 39 at 7383. The Director's finding is not entitled to deference for several reasons.

When analyzing the four-prong *Pearl* test, the Director's actions do not pass the test:

1. Has IDWR been entrusted with the responsibility to administer the statute at issue?

   Answer: **Yes**, pursuant to rule, law and the Constitution.

2. Is the Director's statutory construction reasonable?

   Answer: **No**. The Director's statutory construction, particularly when interpreting CM Rules 40 and 43, is that he is entitled to ignore the procedural requirements of both Rules, unilaterally create a procedure for replacement water plans, and impose those requirements without hearing. This construction of the CM Rules is clearly contrary to the express provisions of the Rules and is not reasonable. In addition, as explained below, the Director's interpretation does not provide the SWC with meaningful due process.

3. Does the statutory language at issue address the precise issue?

Answer: **Yes**. The precise issue at hand – what should happen when a senior water user is suffering material injury – is explicitly addressed in CM Rule 40, and the requirements of a mitigation plan are specifically set out in CM Rule 43. The CM Rules speak to the use of "replacement water" only in the context of CM Rule 43, which requires notice and hearing prior to implementation of the plan. The Director's "replacement water plan" scheme is clearly outside of the scope of the Rules.

4. Are the rationales underlying the rule deference present?

Answer:

4.1. Is the Director's interpretation a practical interpretation? **No**. The Director is creating a new procedure and is refusing to implement clear and unambiguous procedures set forth in the CM Rules that apply to this case.

4.2. Has the legislature acquiesced to the Director's action? This question is not yet answered. This case and the other water call cases are all matters of first impression and are just now before the district court. They have yet to go before the Idaho Supreme Court. The only action that the legislature has taken is to pass the explicit rules that the Director is now ignoring.

4.3. Does the agency have expertise? **Yes.** IDWR has expertise in water management.

4.4. IDWR does not argue that repose applies to this case.

4.5. Was the interpretation of the Director contemporaneous with agency actions? Obviously, the Director's interpretation occurred at the time that he issued orders in this case. However, this rationale is self-fulfilling when dealing with a matter of first impression.

In *Farrell v. Whiteman*, 146 Idaho 604 (2009), the Supreme Court held that if the statutes speak clearly on the issues involved in the case, the test for deference is not met. In this matter, the statutes and rules speak clearly on the issues involved in this case, and the Director has ignored the express procedure set forth in the CM Rules. Since the Director is ignoring express provisions of the CM Rules, and since those Rules deal with the precise situation at hand, the Director's decisions are not entitled to "great weight" and should not be given deference.

E. The Director Has Failed to Follow the Law and Provide the SWC Due Process in Unilaterally Approving "Replacement Water Plans".

Throughout this proceeding, the SWC has argued that individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state. IDAHO CONST. art. 15, § 4; *Nettleton v. Higginson*, 98 Idaho 87 (1977). Before IDWR allows water to be taken from a materially injured senior water right holder, IDWR must afford the senior the right to an adversary hearing to be held at a "meaningful time and in a meaningful manner." See *Aberdeen–Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999).

The Respondents do not contest these notions. In fact, IDWR, citing *Hill v. Standard Mining Co.*, 12 Idaho 223, 229 (1906), argues that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his country. *IDWR Br.* at 31. However, it is apparent from the actions taken by the Director that IDWR is more concerned about providing protection to junior water users than it is providing timely delivery of water to senior water users.

IDWR argues that "replacement water plans" are akin to a court issuing a preliminary junction in a civil matter to preserve the status quo, pending final judgment. *IDWR Br.* at 30. However, IDWR fails to point out that, if issued without a hearing, a temporary restraining order is only good for fourteen (14) days, IRCP 65(b), and that a preliminary injunction is not entered without providing an opportunity for hearing. *See* IRCP 65. If a temporary injunction is issued without a hearing and without an opportunity for the defendant to present evidence and opposition thereto, it is issued without due process. *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389 (1965).

A case cited by IDWR, *Farm Service, Inc. v. U.S. Steel Corp.*, 90 Idaho 570 (1966), has nothing to do with water rights administration.[22] Rather, it deals with a civil action seeking an injunction dealing with the exclusive right to use the words "farm service" as a trade name within a specific trade area.[23]

Similar to other issues in this case, IGWA misstates the Coalition's argument by claiming that the Coalition asserts the ground water users have not provided any water. *See, e.g., IGWA Br.* at 28. IGWA is wrong. Rather, the Coalition has consistently alleged, and is fully supported by the record in stating, that no member of the SWC has received sufficient replacement or mitigation water in the irrigation season, during the time that injury is occurring. The Respondents point to no contrary evidence in the record. This fact is undisputed.

IGWA argues that the limited hearing conducted on June 22, 2007, provided the SWC with due process for this case. As stated above, due process requires that a party be provided the right to an adversary hearing at a meaningful time and in a meaningful manner.

The hearing held on June 22, 2007 was not a hearing that afforded the SWC due process. Rather, after IGWA submitted yet another "replacement water plan" in 2007, the Coalition filed an immediate protest and motion to dismiss. Similar to the protests lodged in 2005, the Director ignored the Coalition's filing and tentatively approved IGWA's plan without hearing. R Vol. 23 at 4300 ("IGWA should be able to fulfill the commitment it pledged in its 2007 Replacement

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[22] Even the Nevada case cited by IDWR, *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 492 P.2d 123 (Nev. 1972) has nothing to do with administrating water rights by a state agency. *Memory Gardens* is also a civil action seeking an injunction resulting from one party terminating a water supply to a pet cemetery. The case does not set forth the standard in Nevada for the issuance of an injunction nor does it provide any guidance on procedures that should be utilized by IDWR.

[23] Most importantly, the case specifically holds that a preliminary injunction can only be granted after a full hearing and a showing of a clear right thereto:

> The granting or refusal of a preliminary injunction is within the discretion of the trial court. Obviously that discretion must be exercised with caution. Such an injunction can be granted only after a full hearing and a showing of a clear right thereto.

Farm Service, Inc., 90 Idaho at 587 (emphasis added).

Water Plan"). The Director scheduled a limited hearing on June 22, 2007, which was opposed by IGWA and Pocatello. The Director issued an order refusing to vacate the hearing, but went on to hold that:

> a hearing on the 2007 replacement plan is appropriate in order to provide the Director with additional information on timely acquisitions of water and other interested parties the opportunity to cross examine any witnesses called by IGWA in support of its plan and raise arguments.

R. Vol. 23 at 4397.

The Director went on to order that the hearing would not include argument or presentation of evidence on any other orders issued by the Director or the Director's method and computation of material injury. *Id.* At the hearing the Director explained the hearing was limited in scope and the Coalition would not be provided an opportunity to contest the amount of the Director's calculated injury to their senior rights:

> MR. TUTHILL: . . . So the hearing this morning is to look at the adequacy of the plan and implementation of the plan and is not for the purpose of identifying the amounts that will be provided by the plan, not in replacement for the various members of the Surface Water Coalition. That issue which has been brought as objected to by the members of the Surface Water Coalition has been subsumed into the hearing that is to take place later this year.

R Vol. 34 at 6549.

In response, the managers of the SWC entities submitted affidavits setting forth serious concerns that they had about the critically low water conditions during 2007 including the fact that temperatures were forecasted to be higher than normal, precipitation was forecasted to be lower than normal, and that several of the entities would run short of water. *See* R. Vol. 24 at 4432, 4443, 4464, 4502, 4510, 4521, and 4529. The SWC also filed a request for an updated material injury determination for 2007 water right administration including a technical memorandum dealing with an updated 2007 SWC water supply estimate. R. Vol. 24 at 4422 &

4438. The Director refused to consider the affidavits and other information for the purposes of the hearing. R. Vol. 23 at 4719. The Director had already made his determination, without hearing, of the amount of injury and the amount of water that would be required for replacement water. *The only matter* reviewed by the Director at the hearing was whether IGWA had secured and pledged sufficient replacement water to mitigate the Director's unilateral calculation of predicted material injury for 2007. As discussed *infra*, the Director's "minimum full supply" calculations were inadequate to protect the Coalition's senior rights and when used as a "cap" on water use in 2007 the action constituted a "re-adjudication" of their water rights. R Vol. 37 at 7095, 7097.

The hearing conducted by the Director dealt with only a single issue of the "replacement water plan", the ability of the Ground Water Users to provide the replacement water ordered by the Director. The Director did not provide due process to the SWC. Its members were left without the right to address predicted injury and the other components of the Director's unilateral approval of the "replacement water plan" for the 2007 irrigation season. This did not provide the SWC with a hearing at a meaningful time and in a meaningful manner that complies with constitutional due process requirements. Moreover, at the time the hearing was held, midway through the irrigation season, ground water users had already been authorized to divert their full rights out-of-priority.

F. Pocatello Ignores the Primary Holding in the Colorado *Simpson* Decision.

In its brief, the SWC directed the Court to the Colorado Supreme Court decision in *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003), which held that the Colorado State Engineer's implementation of a replacement water plan was contrary to law. Pocatello argues

that the duties and discretion of the Colorado State Engineer are different than the Director of IDWR, and therefore the *Simpson* case can be distinguished.[24]

The primary holding of *Simpson* is not addressed by Pocatello. In *Simpson*, the court held that the State Engineer in Colorado had no legal or constitutional authority to deviate from the statutes, rules and constitution of the State of Colorado and use a procedure that did not comply with statutory and constitutional augmentation [i.e. mitigation]. *See Simpson*, 69 P.3d at 69. The same standard applies in Idaho. The Director of IDWR has no legal or constitutional authority to deviate from the statutes, rules and constitution of the State of Idaho and use a procedure that does not comply with statutory and constitutional mitigation.

VII. The Use of a 10% Trim Line was Arbitrary and Capricious.

The Director's application of a 10% trim line to discriminate against senior water rights was arbitrary and capricious. The Director cites to no law or facts to justify his decision to impose the 10% uncertainty against the materially injured senior water right and to the benefit of the junior water right causing that material injury. Rather, IDWR wanders through an argument about whether or not 10% is an appropriate margin of error.

The Director misses the point. The issue here is not whether the 10% is an appropriate margin of error. Rather, the issue is whether the Director acted arbitrarily and capriciously when he imposed that 10% margin of error to the sole detriment of the materially injured senior water right by exempting certain junior water rights that are causing the material injury from any administration or mitigation obligation. In addition, the Department's own expert testified that

[24] Although Pocatello attempts to argue that the authority of the Colorado State Engineer pertaining to replacement water plans is clearly limited, the statute in question is not so clear: "the state engineer and division engineers shall exercise *the broadest latitude possible* in the administration of waters under their jurisdiction to *encourage and develop augmentation plans* and voluntary exchanges of water and may make such rules and regulations and *shall take such other reasonable action* as may be necessary in order *to allow continuance of existing uses* and to assure maximum beneficial utilization of the waters of this state." Section 37-92-501.5, 10 C.R.S. (2002) (emphasis added by Court in decision, *Simpson*, 69 P.3d at 64.)

the "10% trim line" could actually underestimate the impact of junior ground water diversions on affected river reaches by 20%. *See* Attachment C (*Spring Users' Joint Reply* at 20).

Since all hydraulically connected ground water rights are deemed legally connected for purposes of administration, the Director had no basis to exclude a certain group, on that basis of alleged model uncertainty, particularly where those rights contribute to the declines in the river.

In addition, IDWR wrongly claims the Coalition has "waived" this issue on appeal. *IDWR Br.* at 41. The case cited by IDWR plainly supports the Coalition's right to raise this issue. In *Blaine County Title Associates v. One Hundred Bldg. Corp., Inc.*, 138 Idaho 517 (2002), the Supreme Court explained:

> However, this Court has held that an issue will be considered as long as argument is provided. . . . Additionally, the Trust has met this requirement through counsel's citation of authority in his Reply Brief.

138 Idaho at 520.

This legal issue was fully briefed before the Court in the Spring Users' appeal proceedings (*Clear Springs Foods, Inc. et al. v. Tuthill et al.*, Gooding County Dist. Ct., Case No. 08-444) and, as it did in its *Joint Opening Brief*, the Coalition adopts that briefing and argument for purposes of this appeal. Contrary to IDWR's claim, the Coalition did not "waive" this issue on appeal and has hereto attached parts of briefing submitted in the other appeal for convenience of the Court. *See* Attachments B & C.

VIII. The Director Has Violated Idaho Law By Not Issuing a Final Order to Provide for the Coalition's Right to Complete and Timely Judicial Review.

IDWR misreads Idaho's APA and claims that "there is nothing in Idaho Code §§ 67-5244 or 67-5246 that requires an agency head to issue a final order that decides every contested issue". *IDWR Br.* at 42. To the contrary, the statutes as well as IDWR's own procedural rules are clear and unambiguous; the Director is mandated to issue a final order following a hearing in a

contested case. First, Idaho's APA provides the following with respect to an agency head's review of a recommended order:

> (2) Unless otherwise required, the agency head shall either:
>
> (a) issue a final order in writing within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, . . .
>
> (b) remand the matter for additional hearings; or
>
> (c) hold additional hearings.

Idaho Code § 67-5244 (emphasis added). IDWR's procedural rules follow the statute, and echo the Director's duty to decide all matters in the event he issues a "final order":

> The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good chase shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

IDAPA 37.01.01.720.02.c. (emphasis added).

Director Tuthill did not find that "further factual development of the record" was necessary since he did not remand the matter or hold any additional hearings. Instead, Director Tuthill issued a *Final Order*, pursuant to Idaho Code § 67-5244(2)(a), on September 5, 2008. R Vol. 39 at 7381. Consequently, the Director had a duty to issue a final order on all issues presented. *See* Idaho Code § 67-5246(2) ("If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.") (emphasis added).

In this case the Director failed to issue a "final order" on all issues presented in the contested case. Instead, the Director stated an intent to issue a "separate, final order" and that "an opportunity for hearing will be provided on that order". R Vol. 39 at 7386. Although the parties participated in a 3-year contested case, which included an appeal to the Idaho Supreme

Court and an administrative hearing spanning 4 weeks, the Director is now attempting to force the parties engage in yet another proceeding without any legal basis, even thought the issues in the new proceeding were fully litigated in the administrative hearing. It is telling that IDWR can cite no statute, rule, or case that would authorize the Director's current process. Instead, IDWR argues that a determination of material injury "should be based on the best information available". *IDWR Br.* at 42. This does not excuse the Director from complying with Idaho's APA and IDWR's procedural rules. If the Director believed more information was necessary he could have remanded the matter or held additional hearings. Idaho Code § 67-5244(2). Since this did not happen it is clear that the Director believed he had all the necessary information and a full factual record with which to issue a final order on September 5, 2008. The Director cannot have it both ways now. By issuing a final order, the Director had a duty to decide all issues and provide for complete judicial review of that decision. That was not done in this case.

By forcing the parties to another contested case and administrative hearing, the Director is preventing the Coalition from obtaining timely judicial review required by law. Idaho's APA plainly states that a person "aggrieved by a final order in a contested case decided by an agency . . . is entitled to judicial review". Idaho Code § 67-5270(2). Whereas Idaho law provides for a party's right to judicial review when a "final order" is issued, the Director is preventing that from occurring by his unlawful "bifurcation" of the September 5, 2008 *Final Order*. The parties should not be relegated to administrative "purgatory" just because the Director failed to comply with the statute and issue a complete final order. Therefore, the Court should order the Director to issue a Final Order that encompasses all issues in dispute rather than allow another protracted administrative case which prejudices the Coalition's senior water rights.

CONCLUSION

> In times of scarcity, administration of water under Idaho's version of the prior appropriation doctrine is not a user friendly business. To the contrary, it is harsh – there are winners and there are losers. To the extent a person is applying water in accordance with his decreed water right and is not wasting water, he is, under the Idaho Constitution, allowed to be "the dog-in-the-manger." Rules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, they are essential to proper administration and to protect vested rights.

Order on Plaintiffs' Motion for Summary Judgment at 124.

Judge Wood accurately summed up what is required of the Director in water right administration and emphasized that conjunctive management rules are "essential to proper administration and to protect vested rights." *Id.* In this case the Director failed to properly apply the CM Rules to protect the Coalition's senior surface water rights. Instead, the Director deviated from the express procedures for regulating junior priority ground water rights and struck a new path not authorized by law. The Coalition's petition for judicial review should be granted accordingly.

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Respectfully submitted this 20th day of May, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2009, I served true and correct copies of the **SURFACE WATER COALITION'S JOINT REPLY BRIEF**, upon the following by the method indicated:

Deputy Clerk Gooding County District Court 624 Main St. P.O. Box 27 Gooding, ID 83330	____ U.S. Mail, Postage Prepaid __X__ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Courtesy Copy to Judge's Chambers: Snake River Basin Adjudication 253 3rd Ave. N. P.O. Box 2707 Twin Falls, ID 83303-2707	____ U.S. Mail, Postage Prepaid __X__ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
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By _____
Travis L. Thompson

Attachment
A

Draft Protocol for Determining Reasonable In-Season Demand and Reasonable Carryover

"Overview and Approach"

Dave Tuthill
Director, IDWR
May 4, 2009

Discussion Items

- Projected 2009 surface runoff computations, based on the April 1 forecast
- Draft Protocol for determining reasonable carryover and reasonable in-season demand

2009 Surface Water Coalition Supply Predictions Based on April 1, 2009 Forecast

	Projected 2009 Natural Flow (acre-feet)	2009 Storage (acre-feet)	Total 2009 Supply (acre-feet)
A & B Irrigation District	11,800	134,500	146,300
American Falls Res. Dist. #2	108,000	385,500	493,500
Burley Irrigation District	161,400	226,300	387,700
Milner Irrigation District	17,000	87,400	104,400
Minidoka Irrigation District	143,100	366,300	509,400
North Side Canal Company	510,100	832,500	1,342,600
Twin Falls Canal Company	863,900	233,700	1,097,600

Process to Develop the Protocol

■ Sharing of Draft Protocol	Today
■ Materials from Presentation	On Website
■ Receipt of Recommended Changes	By May 26
■ Issuance of Order	Early June

Summary History of this Matter

■ Surface Water Coalition Delivery Call	1/14/2005
■ Director's Order	5/2/2005
■ Hearing Commenced	1/16/2008
■ Hearing Officer's Opinion	4/29/2008
■ Hearing Officer's Responses to Objections	6/10/2008
■ Director's Final Order	9/5/2008

Today's Situation

- SWC Order Issued on September 5, 2008
- Order stated "Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing on the order will be provided." *Order at 6.*

Hearing Officer Determinations

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

Recommended Order at 53

Hearing Officer Determinations

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

Recommended Order at 53

Acreage Adjustments

Name	# Acres – Water Right (SRBA Recommended)	# Acres – Pres. Finding Surface Wtr. Irr.	Source – Water Right, Present Finding
A&B Irr. Dist.	82,610.1	76,904	1, 2
American Falls Res. Dist. #2	101,903	101,903+	1, 3
Burley Irr. Dist.	47,643	46,445	1, 4
Milner Irr. Dist.	13,335	7,741	1, 2
Minidoka Irr. Dist.	75,093	75,093+ (Preliminary)	1, 5
North Side Canal Co.	154,067	135,727	1, 2
Twin Falls Canal Co.	196,162	162,958	1, 2

Source Citations

1) Proof Report of Adjudication Recommendation for water rights 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-14 – Total acres for each company; http://www.idwr.idaho.gov/apps/ExtSearch/ SearchWRAJ.asp; Idaho Dept. of Water Resources.

2) Surface Water Irrigated Area (in Acres): Enclosure D. http://www.idwr.idaho.gov/Calls/Surface Water Coalition Call/Surface Water; Idaho Dept. of Water Resources.

3) Assessment of Lands Served: American Falls Reservoir District #2; Feb. 26, 2009; Table 5; Idaho Dept. Water Resources.

4) Assessment of Lands Served: Burley Irrigation District; Dec. 2008; Table 5; Idaho Dept. Water Resources.

5) Preliminary Findings: 60,194 acres reported in Enclosure D (see source citation 2) plus 14,979.22 acres additional acres identified by Minidoka Irr. Dist.

Hearing Officer Determinations

- There has been some confusion caused by the Director's perceived limitation on carryover storage. The Director did not rewrite the contracts the irrigation districts have with BOR or interfere with the right to carryover storage water when available. *The limitation only applies to an amount to be obtained from curtailment or mitigation water from ground water users.* If the irrigation district's needs for carryover can be met without curtailment, there will be zero carryover storage provided by curtailment or replacement. There is still a right to as much carryover as water supplies will provide within the limits of the contract.

Recommended Order at 58 (emphasis added).

Hearing Officer Determinations

- The climate is sometimes generous and sometimes stingy with precipitation, neither of which under the current state of science is predictable for anything more than relatively short terms. Anticipating more than the next season of need is closer to faith than science. Ordering curtailment to meet storage needs beyond the next year is almost certain to require ground water pumpers to give up valuable property rights or incur substantial financial obligations when no need would develop enough times to warrant such action.

  . . . .

  As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in AFRD#2.

  Recommended Order at 62-63 (emphasis added).

Guidance from Order

- As found by the Hearing Officer, the reservoir system fills two-thirds of the time, and storage water has been historically available for rental or lease even during times of drought. *Recommended Order* at 6, 15. To order reasonable carryover the year prior to the season of need would result in waste of the State's water resources. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 422, 319 P.2d 965, 968 (1957); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900). It is appropriate for the Director to notify the parties in the fall prior to the upcoming irrigation season of predicted carryover shortfalls for planning purposes. But it is not appropriate to require junior ground water users to provide predicted shortfalls until the spring when the water can be put to beneficial use during the season of need: "As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in *AFRD#2*." *Recommended Order* at 62-63. *Order at 11.*

Pieces of the Solution

■ Background	Dave Tuthill
■ Determining Average Irrigation Need	Steve Burrell
■ Reasonable In-Season Demand and Demand Shortfall	Mat Weaver
■ Adjustment of Supply	Liz Cresto
■ Reasonable Carryover	Steve Burrell
■ General Discussion	All

Summary

- We invite your active participation in the presentations
- We are seeking the best solution and are open to input
- Please provide any recommended changes by May 26th

Overview of Protocol for Determining *Reasonable In-Season Demand* & Predicting *Demand Shortfall*

Presented by Mat Weaver
Spring 2009

- **Reasonable In-Season Demand (RISD)**: the cumulative volume of water projected to be diverted by the *surface water user* for the entire irrigation season.
  - At the start of season it is always assumed to be equivalent to the Baseline Demand
  - In-season, it is calculated as the cumulative *actual crop water need* divided by the *project efficiency*, for the portion of the irrigation season that has already occurred, and the cumulative baseline demand for the remainder of the season.

- **Demand Shortfall**: the difference between the *RISD* and the *forecasted supply*.

Protocol: Step 1

- On April 1st the Bureau of Reclamation and Army Corps of Engineers publishes a joint forecast that predicts an unregulated flow volume at the Heise gage from April 1st to July 31st for the forthcoming water year.

RECLAMATION
Managing Water in the West

U.S. Department of the Interior
Bureau of Reclamation

Pacific Northwest Region
Water Supply Update
March 18, 2009

Late February and March finally brought a return to wetter conditions for the Pacific Northwest, after a very dry period extending back to the middle of January or longer. Snowpack percentages had dropped into the 60% to 70% range, but thanks to several significant storm cycles they have rebounded to the 80% to 90% range. Maximum snowpack for the season typically occurs around April 1; after that, spring rain (or lack of it) plays a large role in determining final water supplies. Thanks to good carryover storage from last year, water supplies will be adequate in 2009 even if runoff comes in below average. One area of exception is the Malheur basin in Eastern Oregon, which will have a very tight supply once again unless a wet spring occurs. No significant flood control operations are anticipated in the Region at this time. The forecast for the next 2 weeks calls for fairly benign spring like weather, with showers throughout the inland regions.

	Snowpack % of avg	Water Year Precipitation % of avg	Forecasted Spring Runoff % of avg	Reservoir Storage % full	Allocations
Yakima (WA)	81	90	81	77	n/a
Flathead/Hungry Horse (MT)	88	87	93	70	n/a
Crooked (OR)	90	89	61	68	n/a
Boise (ID)	83	90	70	60	n/a
Payette (ID)	84	86	79	65	n/a
Upper Snake (ID)	94	98	93	81	n/a
Columbia Basin (Columbia R at the Dalles)	89	89	80	n/a	n/a

Protocol: Step 2

- By April 10th, the Idaho Department of Water Resources (IDWR) will predict and publish a ***forecast supply*** for the water year and will compare the *forecast supply* to the ***baseline demand (RISD)*** to determine if a ***demand shortfall*** is anticipated for the upcoming irrigation season.
  - Separate *forecast supplies*, *baseline demands*, and *demand shortfalls* will be determined for each member of the Surface Water Coalition (SWC).

Protocol: Step 2

Relationships: Start of Irrigation Season

$$RISD = BD$$

$$CWN = BCWN$$

$$\text{Demand Shortfall} = BD - FS_{April}$$

Baseline Demand (BD): the sum of the historical volume of water diverted at the head gate and soil moisture adjustment factor for irrigation year 2006.

Baseline Crop Water Need (BCWN): the average of the total historic volume of *crop water need* for irrigation year 2006.

Crop Water Need (CWN): The volume of water required for optimal growth, by all crops supplied with surface water, by the surface water user; it is the product of the area of planted crops and evapotranspiration (ET) less effective precipitation and antecedent soil moisture.

Forecast Supply (FS): the combined volume of water available due to anticipated natural flows and total storage (predicted fill and carry over) at the head gate of the *surface water user*.

Protocol: Step 2

TFCC - Baseline Demand

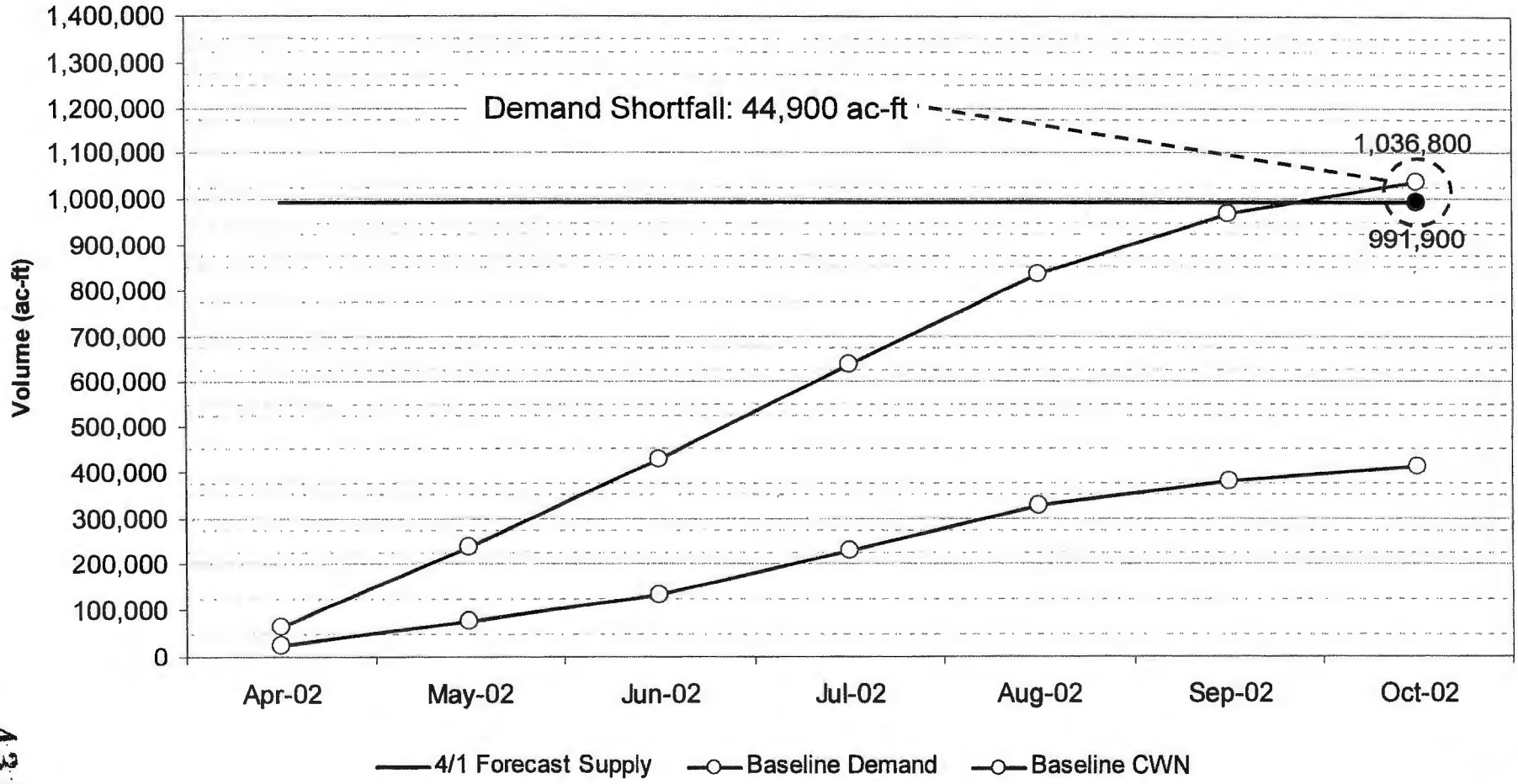
	'06 Monthly Soil Moisture Adjustment Vol. (ac-ft)	2006 Monthly Diversion (ac-ft)	Baseline Demand (ac-ft)
Apr.	33,000	33,060	66,100
May	8,000	164,045	172,000
Jun.	0	187,974	188,000
July	0	211,648	211,600
Aug.	0	198,506	198,500
Sept.	0	131,307	131,300
Oct.	0	69,283	69,300
	41,000	995,823	1,036,800

TFCC - Example Demand Shortfall - Start of Irr. Season

Natural Flow Supply:	778,900	ac-ft
+ Storage (predicted fill + carryover):	213,000	ac-ft
	991,900	ac-ft
April Forecast Supply:	991,900	ac-ft
- Baseline Demand:	1,036,800	ac-ft
	44,900	ac-ft
Demand Shortfall:	**44,900**	ac-ft

Protocol: Step 2

Fig. 1: 2002 TFCC - Start of Irrigation Season Summary



Example

- Twin Falls Canal Company
- 2002 Irrigation Season
- $ET = (ET_0 * K_c * A) - (EP * A)$
  - ET_0, Reference ET from ET_{IDAHO}
  - Kc, Crop Coefficient Based on METRIC Data
- Forecast Supply
  - Historic Natural Flows
  - Historic Storage Volumes

Protocol: Step 3

As needed the Idaho Ground Water Appropriators (IGWA) will provide and reserve water for the SWC to meet predicted shortages:

- If the *forecast supply* is less than *reasonable in-season demand*, then by definition a *demand shortfall* exists.
- IGWA has a responsibility to provide a volume of water to the SWC equal to the amount of the *demand shortfall*.
- Two weeks after the day of allocation, IGWA is required to provide evidence, to the satisfaction of the Director, establishing their ability to secure a volume of storage water equal to the entire amount of the predicted *demand shortfall*.
- At that time the portion of the *demand shortfall* equal to the *reasonable carryover deficit* shall be made available to the SWC.
- The remainder of the *demand shortfall* (*demand shortfall – reasonable carryover deficit*) shall be provided to the SWC at the "time of need" - typically in September.
- If IGWA can not meet these requirements by the established due date, IDWR will issue a curtailment order to IGWA for the remainder of the season.

Protocol: Step 4

- By April 1st Surface Water Users will provide electronic shape files to IDWR delineating the total irrigated acres within their water delivery boundary. If this information is not provided on time, IDWR will use its own methods to determine the total irrigated acres.

- Starting at the beginning of April, IDWR will calculate the cumulative *evapotranspiration* (ET) volume for all land irrigated with surface water within the boundaries of each *surface water user*.

  - Values of ET will be calculated from LANDSAT 5 imagery utilizing the Normalized Difference Vegetative Index (NDVI) approach for estimating ET.

  - Cumulative in-season ET values will be calculated for each *surface water user*, approximately once a month.

Protocol: Step 4

- **Contingency Plan A:** Alternative or replacement imagery is obtained by IDWR and utilized to complete the NDVI-ET approach.
  - LANDSAT 7
  - Other Sources
- **Contingency Plan B:** *Evapotranspiration* is estimated utilizing the ET_{Idaho} approach - a non-imagery based method. Values obtained from ET_{Idaho} will be coupled with crop acreages from the previous year to determine ET volumes for each *surface water user.*

Protocol: Step 5

- Approximately half way through the irrigation season IDWR will (1) evaluate the *actual crop water needs* of each *surface water* user up to that point in the irrigation season, and (2) publish a revised forecast supply. This information will be used to:
  - recalculate a ***reasonable in-season demand***
  - adjust the forecasted *crop water need*
  - adjust *demand shortfall.*

Protocol: Step 5

Relationships: During Irrigation Season

$$RISD = \sum_{i=1}^{n}\left(\frac{ACWN_i}{Ep_i}\right) + \sum_{i=1}^{7-n} BD_i$$

$$\text{Demand Shortfall} = \text{RISD}_{\text{july/sep}} - \text{FS}_{\text{july/sep}}$$

- **Project Efficiency, E_p:** the ratio of *baseline crop water need* to *baseline demand*.
- **Actual Crop Water Need (ACWN):** cumulative value of ET volume, for the portion of the irrigation season that has already occurred.

Protocol: Step 5

TFCC - Baseline Project Efficiency

	Baseline CWN (ac-ft)	Baseline Demand (ac-ft)	Baseline Project Efficiency
Apr.	25,792	66,100	0.39
May	52,363	172,000	0.30
Jun.	55,424	188,000	0.29
July	95,937	211,600	0.45
Aug.	98,188	198,500	0.49
Sept.	49,571	131,300	0.38
Oct.	32,701	69,300	0.47
	409,976	1,036,800	0.40

TFCC - Example Demand Shortfall - July of Irr. Season

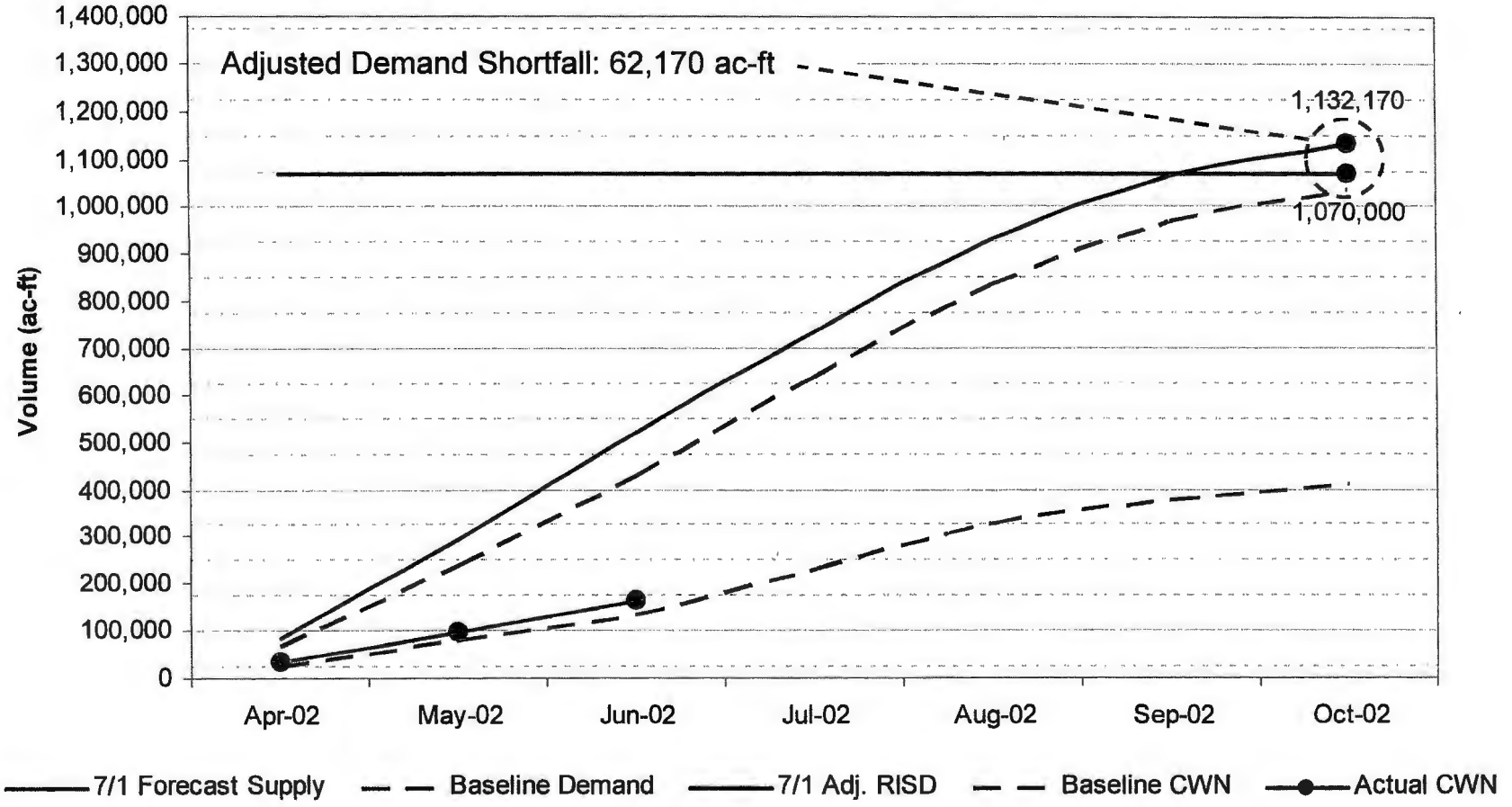
Natural Flow Supply:	X	ac-ft
+ Storage (predicted fill + carryover):	Y	ac-ft
	1,070,000	ac-ft
July Forecast Supply:	1,070,000	ac-ft
- RISD:	1,132,170	ac-ft
	62,170	ac-ft
Demand Shortfall:	**62,170**	ac-ft

TFCC - Mid-Season Calculation of RISD

	Monthly Baseline Demand (ac-ft)	Actual Monthly CWN (ac-ft)	Actual Cumulative CWN (ac-ft)	Project Efficiency	Monthly RISD (ac-ft)	Cumulative RISD (ac-ft)
Apr-02	66,100	31,910	31,910	0.39	81,781	81,781
May-02	172,000	64,144	96,054	0.30	210,698	292,478
Jun-02	188,000	67,509	163,563	0.29	228,992	521,470
Jul-02	211,600			0.45	211,600	733,070
Aug-02	198,500			0.49	198,500	931,570
Sep-02	131,300			0.38	131,300	1,062,870
Oct-02	69,300			0.47	69,300	1,132,170

Protocol: Step 5

Fig. 2: 2002 TFCC - July Adjustment of Reasonable In-Season Demand



Protocol: Step 6

- IGWA is required to provide additional evidence, to the satisfaction of the Director, establishing their ability to secure a volume of storage water equal to the revised amount of predicted *demand shortfall* less *reasonable carryover deficit*.

Protocol: Step 7

- Repeat Step 5 approximately three quarters of the way through the irrigation season.
  - *Forecast Supply*
  - *ACWN*
  - *RISD*
  - *Demand Shortfall*

Protocol: Step 7

TFCC - Baseline Project Efficiency

	Baseline CWN (ac-ft)	Baseline Demand (ac-ft)	Baseline Project Efficiency
Apr.	25,792	66,100	0.39
May	52,383	172,000	0.30
Jun.	55,424	188,000	0.29
July	95,937	211,600	0.45
Aug.	98,188	198,500	0.49
Sept.	48,571	131,300	0.38
Oct.	32,701	69,300	0.47
	409,976	1,036,800	0.40

TFCC - Example Demand Shortfall - Sep. of Irr. Season

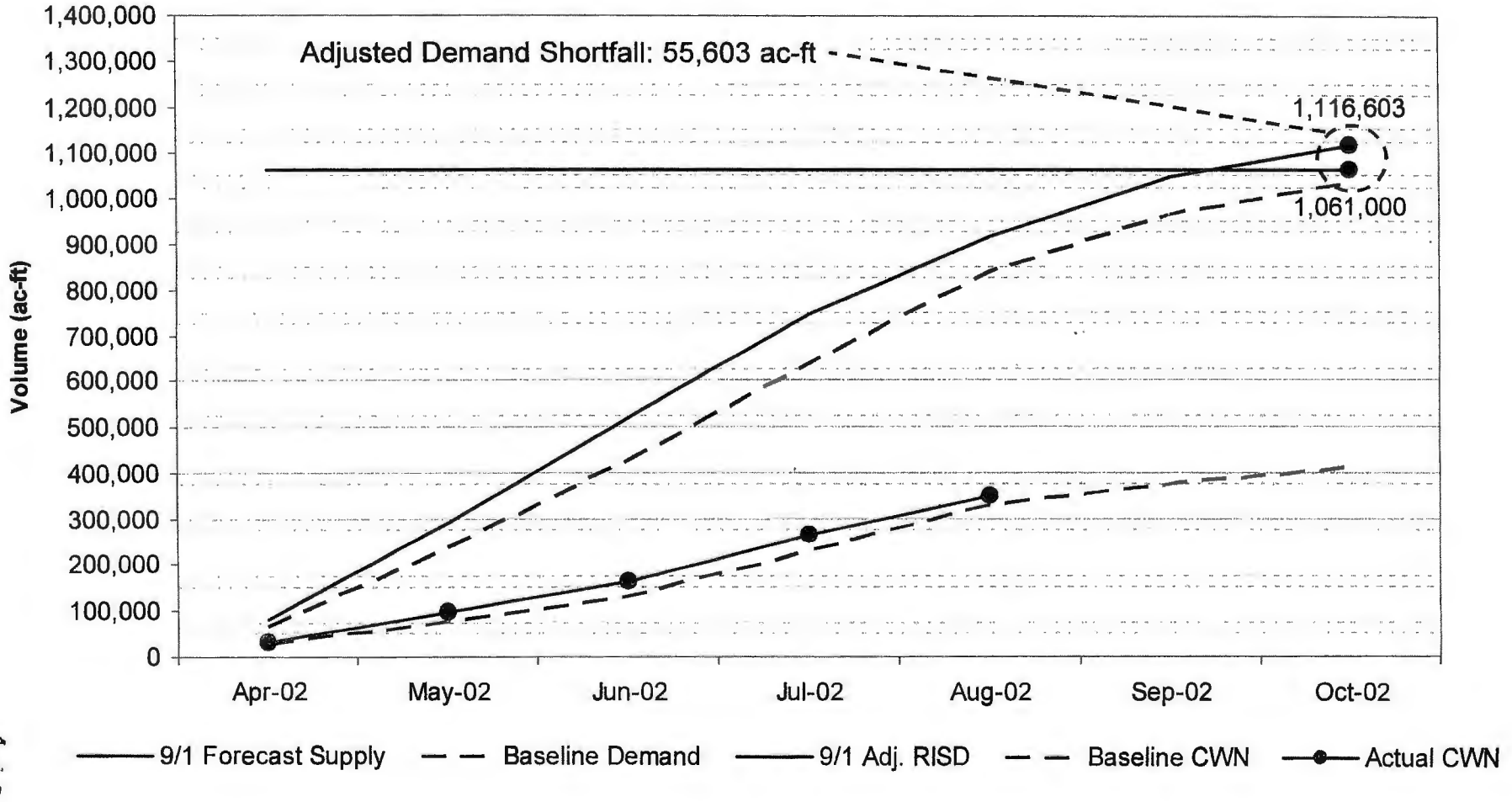
Natural Flow Supply:	X	ac-ft
+ Storage (predicted fill + carryover):	Y	ac-ft
	1,061,000	ac-ft
Sep. Forecast Supply:	1,061,000	ac-ft
- RISD:	1,116,603	ac-ft
	55,603	ac-ft
Demand Shortfall:	**55,603**	ac-ft

TFCC - 3/4-Season Calculation of RISD

	Monthly Baseline Demand (ac-ft)	Actual Monthly CWN (ac-ft)	Actual Cumulative CWN (ac-ft)	Project Efficiency	Monthly RISD (ac-ft)	Cumulative RISD (ac-ft)
Apr-02	66,100	31,910	31,910	0.39	81,781	81,781
May-02	172,000	64,144	96,054	0.30	210,688	292,478
Jun-02	188,000	67,509	163,563	0.29	228,892	521,470
Jul-02	211,600	100,338	263,901	0.45	221,306	742,777
Aug-02	198,500	85,687	349,588	0.49	173,227	916,003
Sep-02	131,300			0.38	131,300	1,047,303
Oct-02	69,300			0.47	69,300	1,116,603

Protocol: Step 7

Fig. 3: 2002 TFCC - September Adjustment of Reasonable In-Season Demand



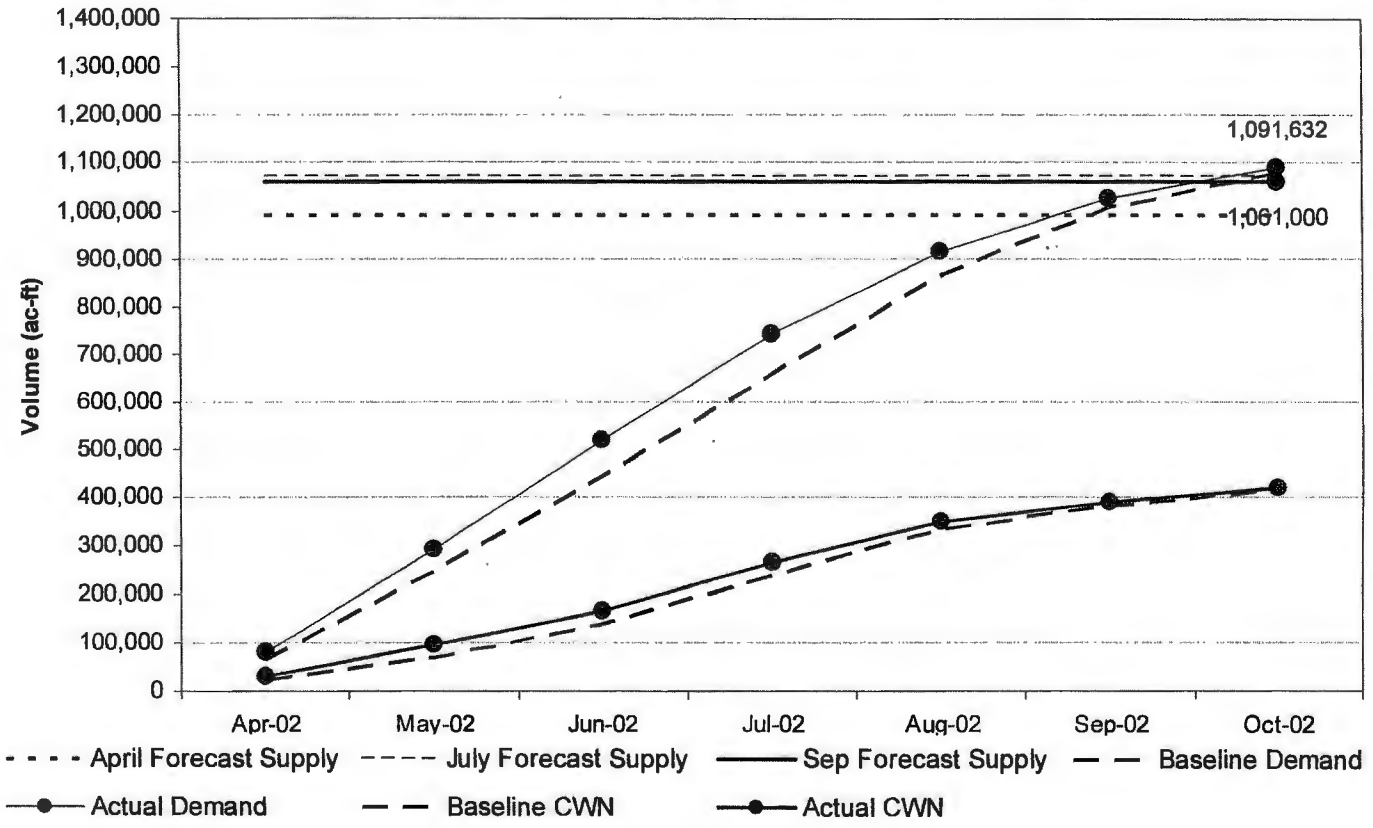
Protocol: Step 8

- For the final time, IGWA is required to provide evidence establishing their ability to secure a volume of storage water equal to the revised amount of predicted *demand shortfall* less *reasonable carryover deficit*.

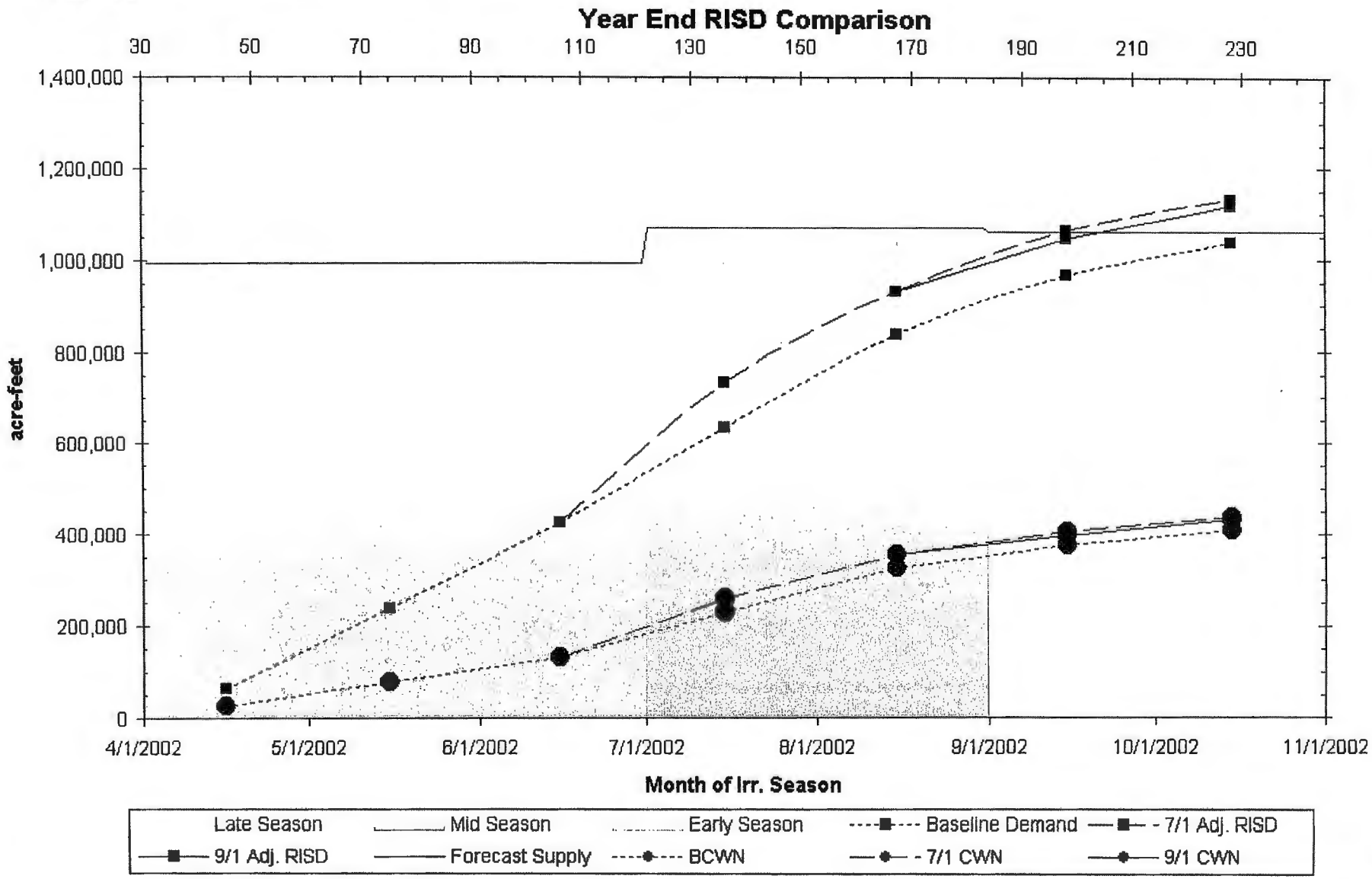
Protocol: Step 9

- At the end of the irrigation season IDWR will determine the total actual volumetric demand and total actual *crop water need* for the entire season.
- IDWR will evaluate whether predicted *shortfalls* were adequate and determine final injury, actual carryover, and reasonable carryover.

Fig. 4: 2002 TFCC - End of Irrigation Season Summary

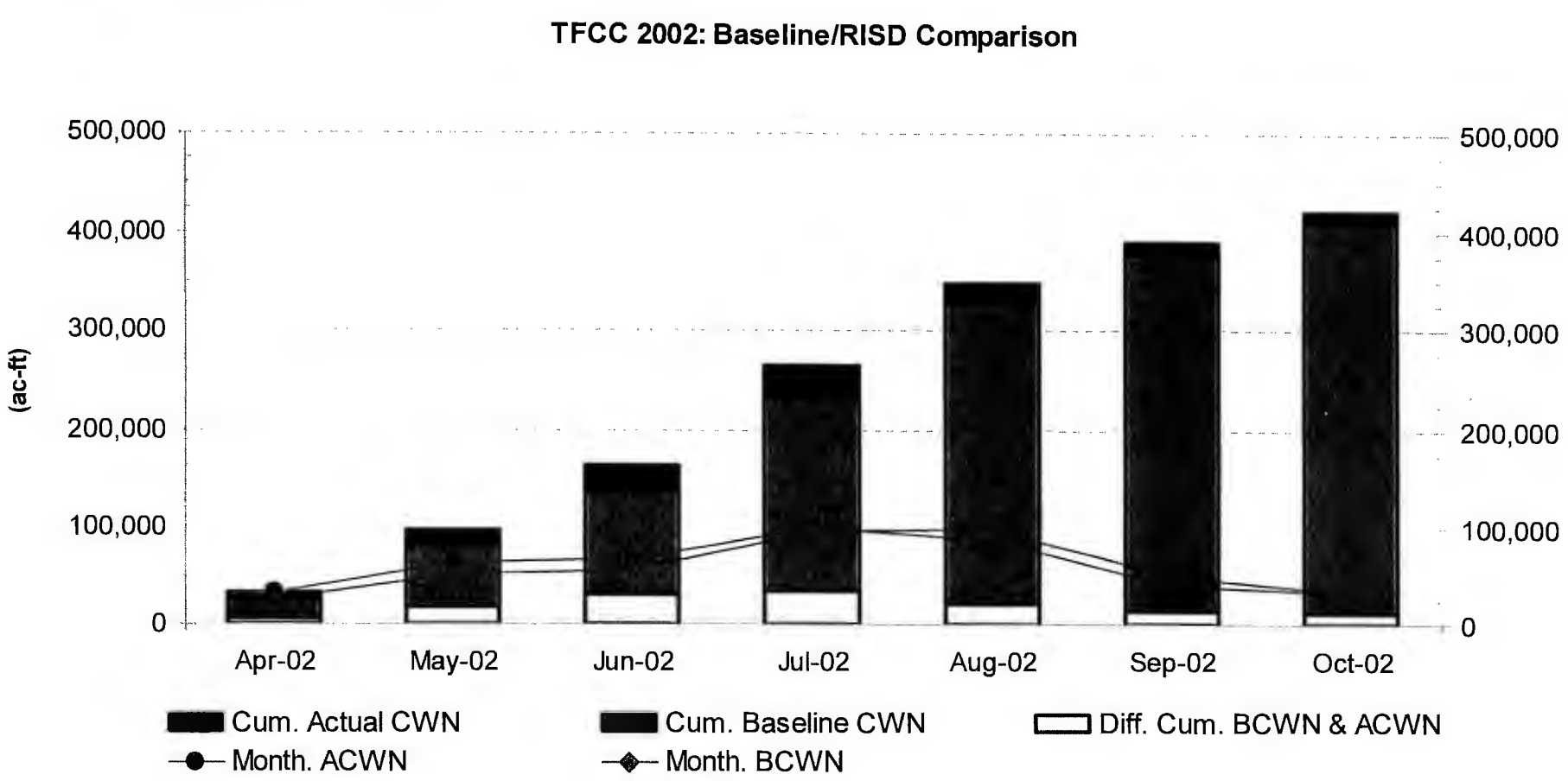


Protocol: Summary



The End

Additional Material



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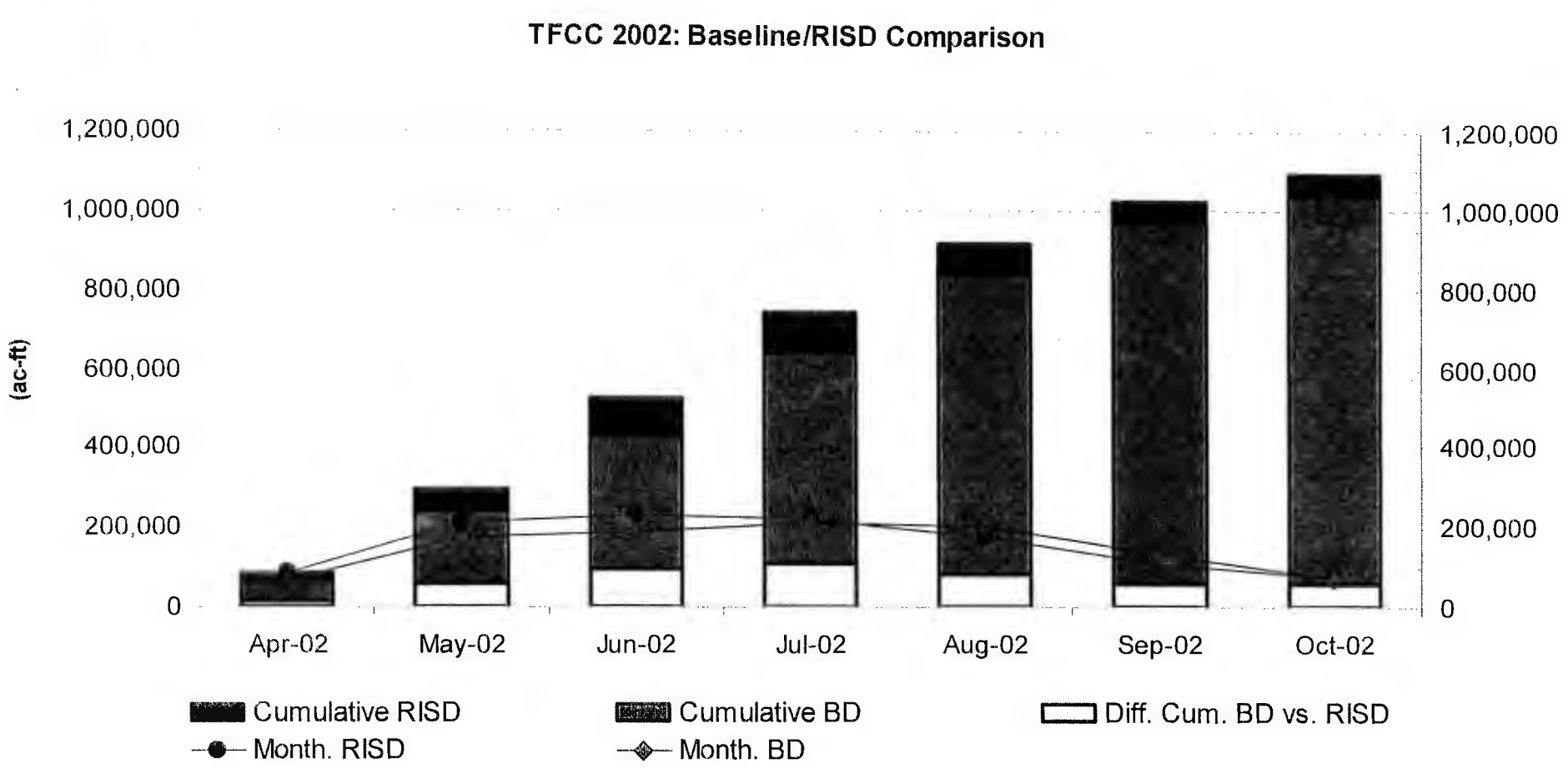

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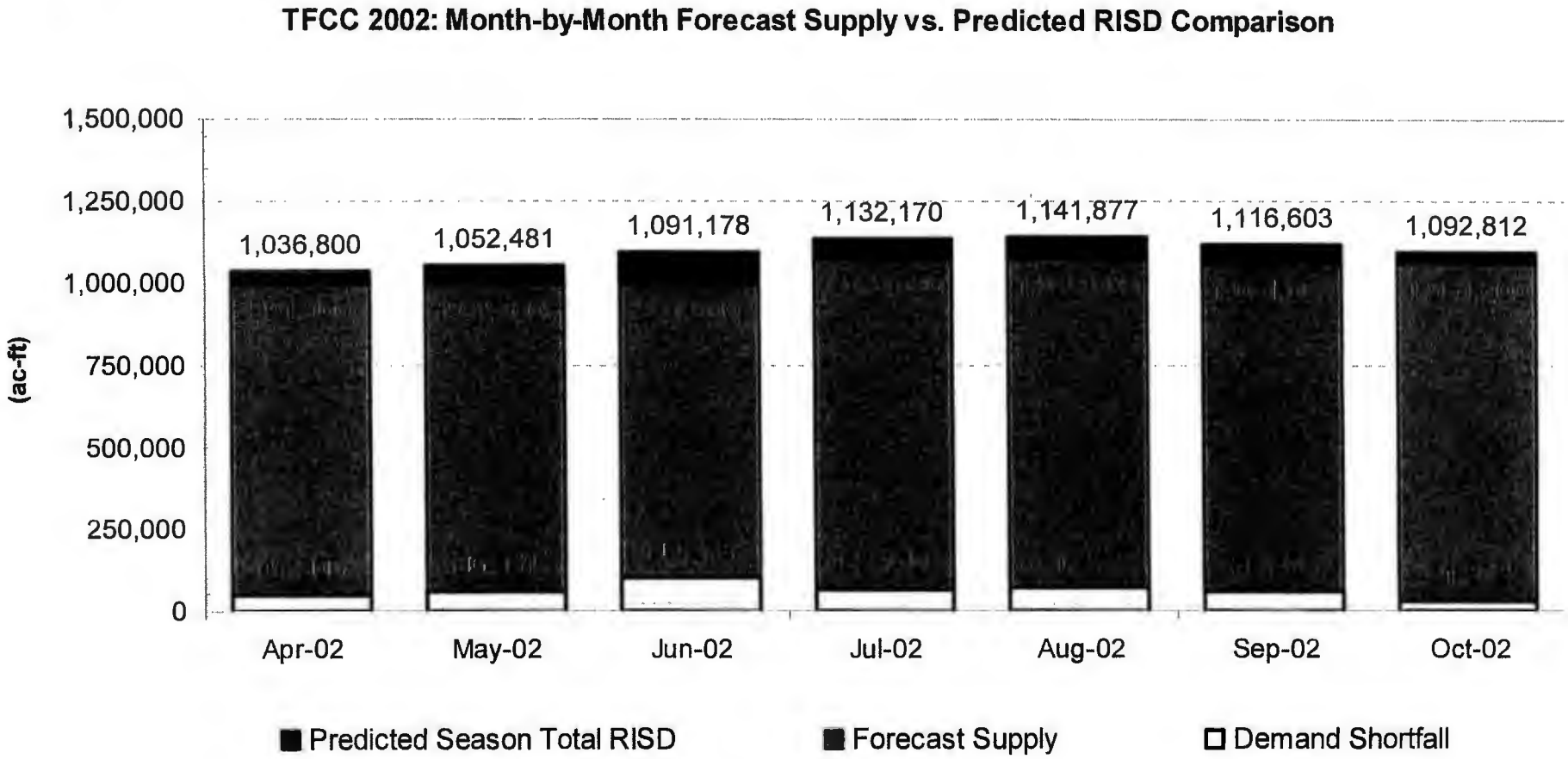


Determining Average Irrigation Need

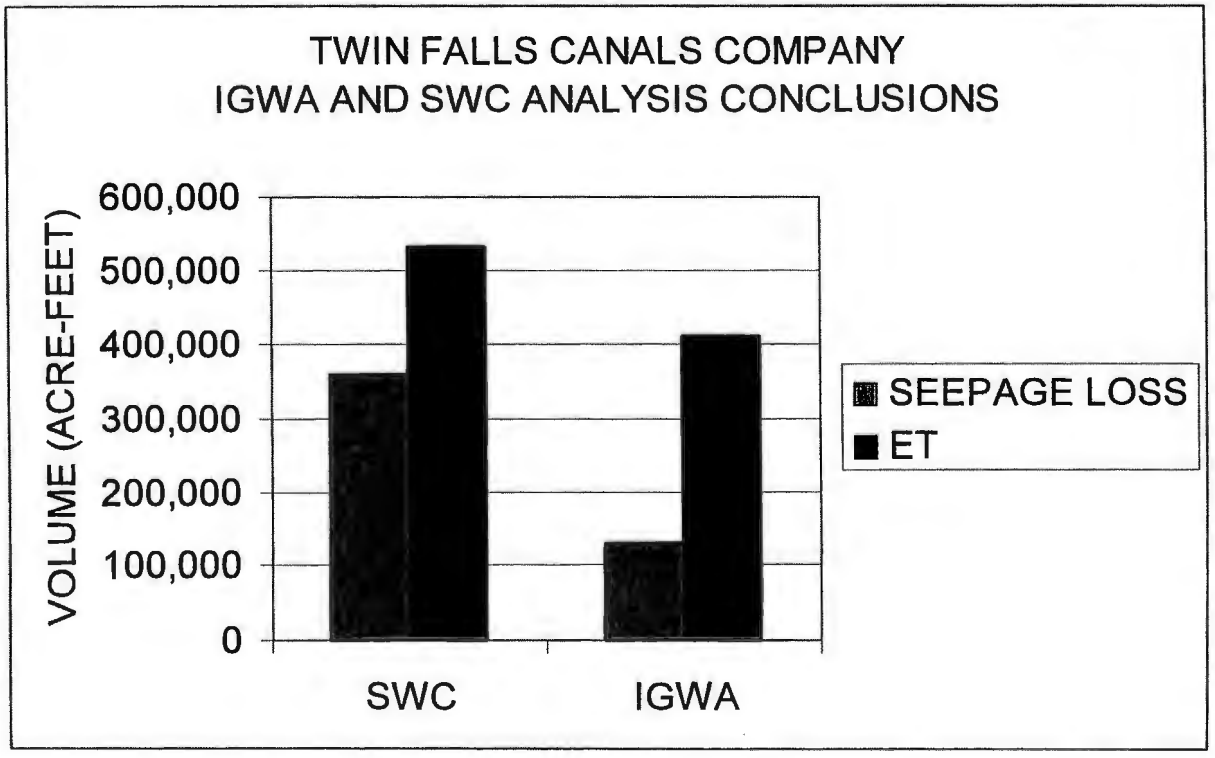
- Review Hearing Officer conclusions regarding supply needed to prevent material injury
- Selecting year to use as baseline supply
- Overview of adjustment technique to account for differing climatic conditions from baseline

Hearing Officer Conclusion

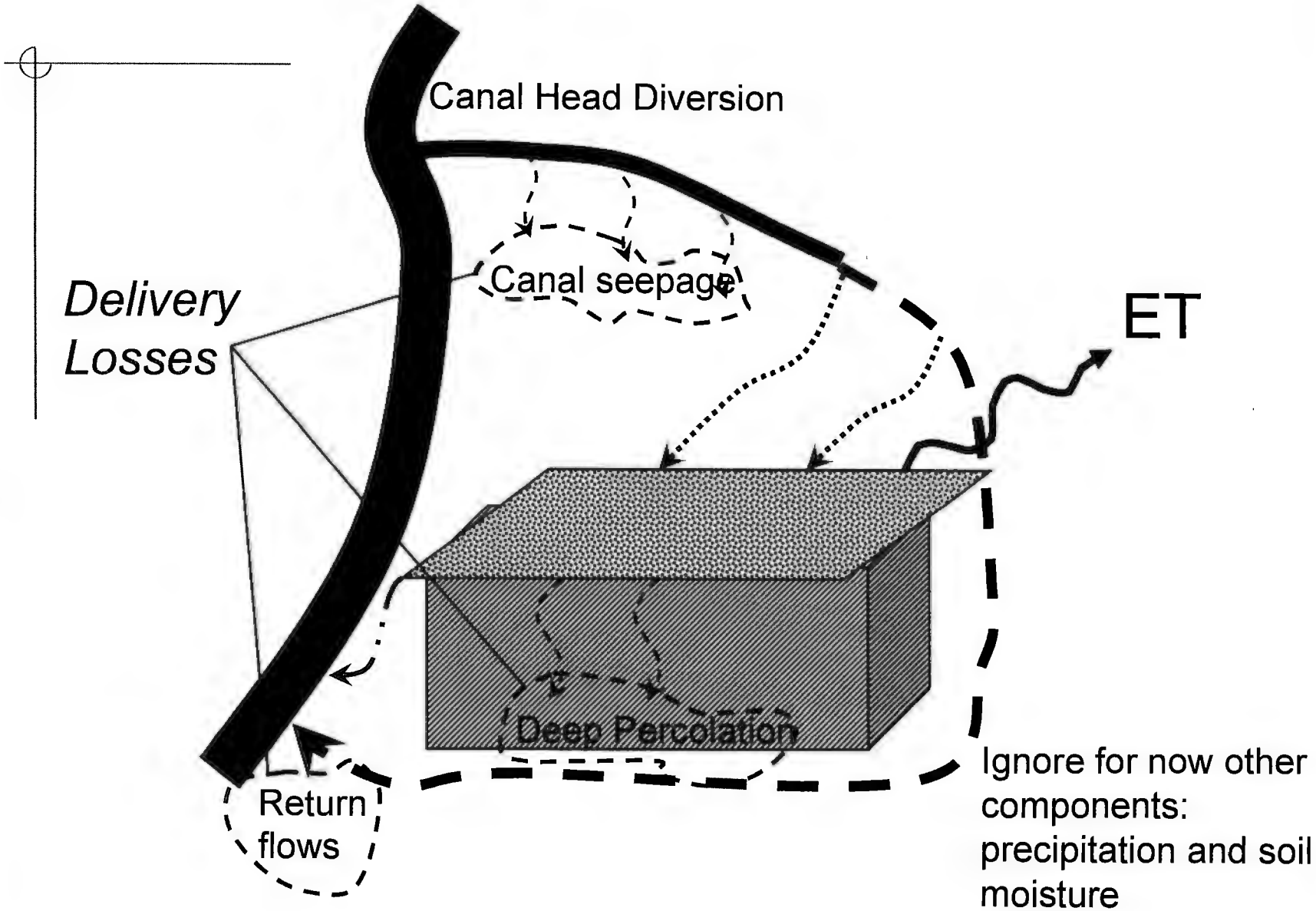
- The minimum full supply established in the May 2, 2005, Order is inadequate to predict the water needs of SWC on an annual basis. *Recommended Order at 50*
  - It is based on a decade old year that does not reflect current efficiencies such as the increased use of sprinkler irrigation and computer monitoring or changes in the amount of land irrigated. *Recommended Order at 49*
- ...it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff. *Recommended Order at 51*

Hearing Officer Conclusion

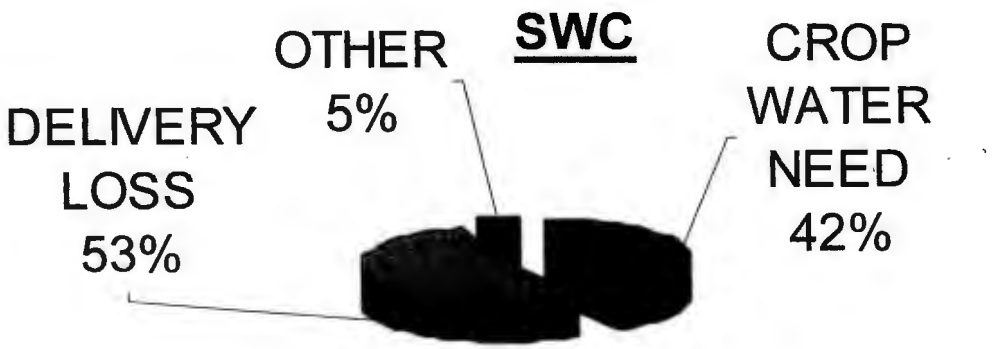
- The parties have attempted to establish water budgets that reflect the needs of SWC members using sophisticated analytical techniques, but the parties' analyses are too far apart to reconcile. *Recommended Order at 49*
- (…conclusions in SWC's expert testimony are closer to being acceptable…) *Recommended Order at 50*

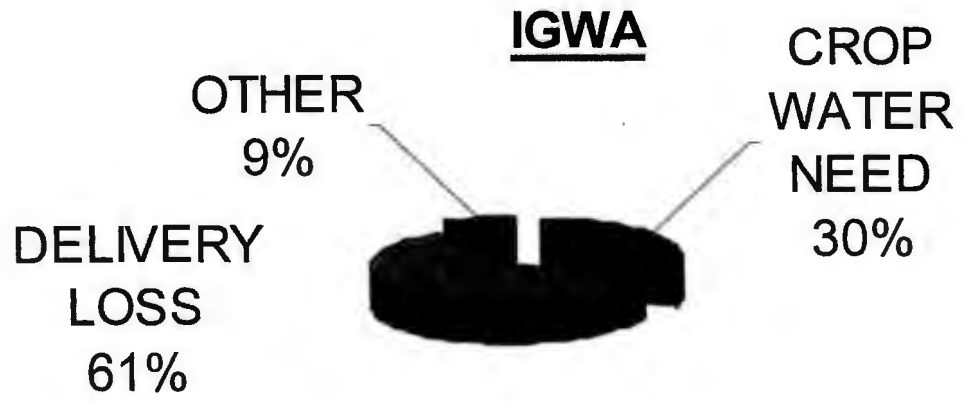


Water Budget Schematic

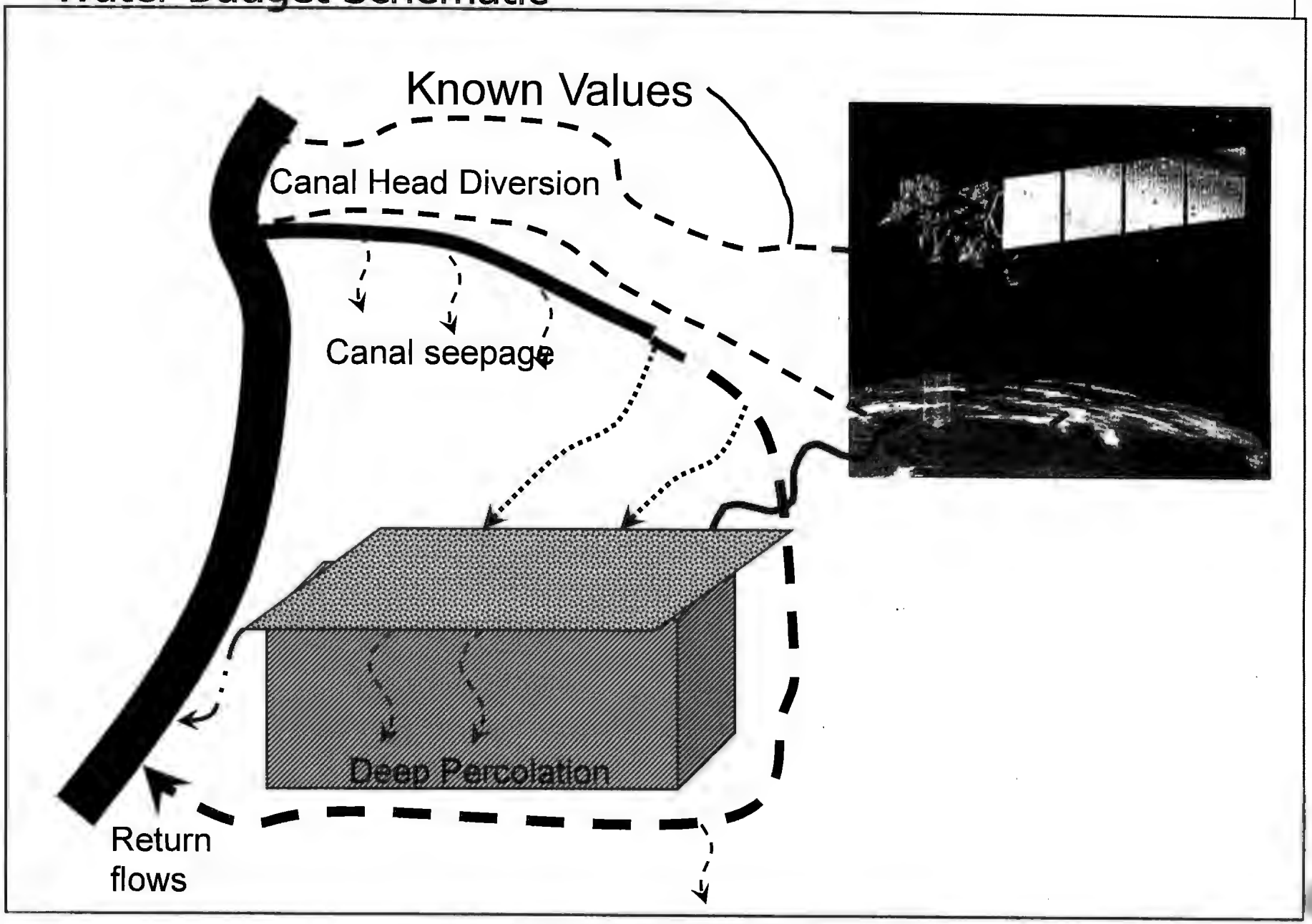


Water budget summary as percent of average diversion for Twin Falls Canal:

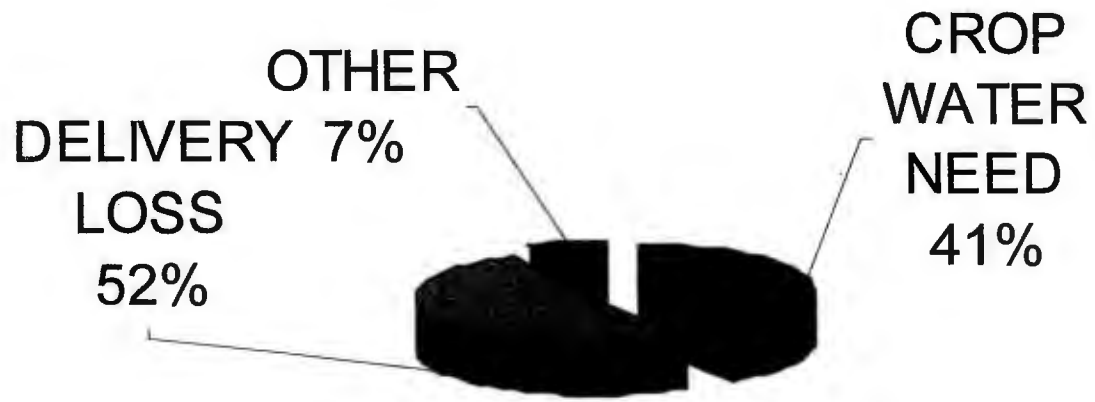




Water Budget Schematic



Water budget approach using satellite imagery based ET can be used to establishes apparent project efficiencies:



Apparent project efficiency = 41%

Apparent project efficiency can be used in adjustment process of average annual irrigation need

Development of an average annual irrigation need:

- "Predictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation season" *Recommended Order at 49*
  - Adjustment can be made using the measured in-season ET from satellite imagery and project efficiency

- Propose using 2006 irrigation diversions as the average annual irrigation need, or *baseline demand*:
  - Adjust for above normal winter/spring rains in 2006
  - Normal Heise gage runoff and adequate storage supply
  - ET values generated with Landsat data available

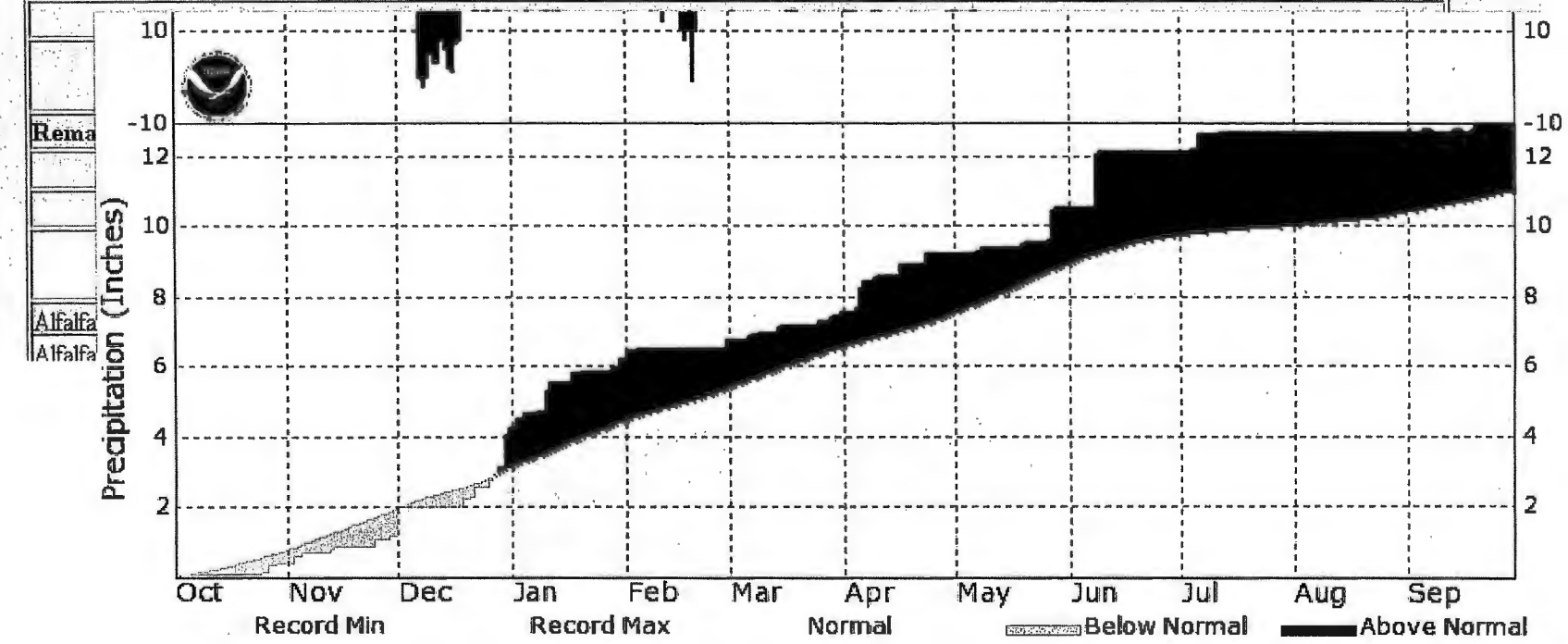
Correct 2006 diversion for soil moisture excess using ETIdaho data (in progress)

ET_{Idaho} --- Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho

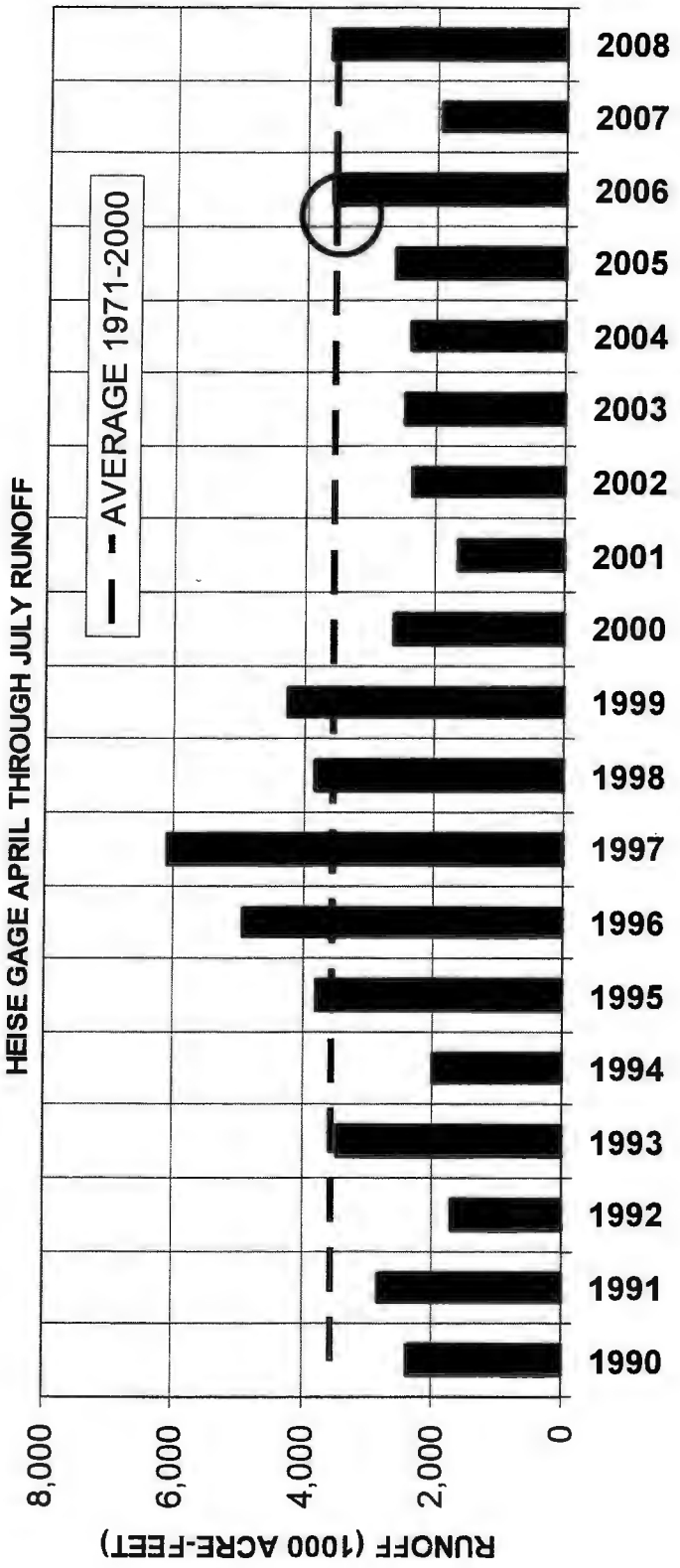
Please send suggestions for improving this site to robison at kimberly dot uidaho dot edu *Copyright 2007, University of Idaho.*

Twin Falls

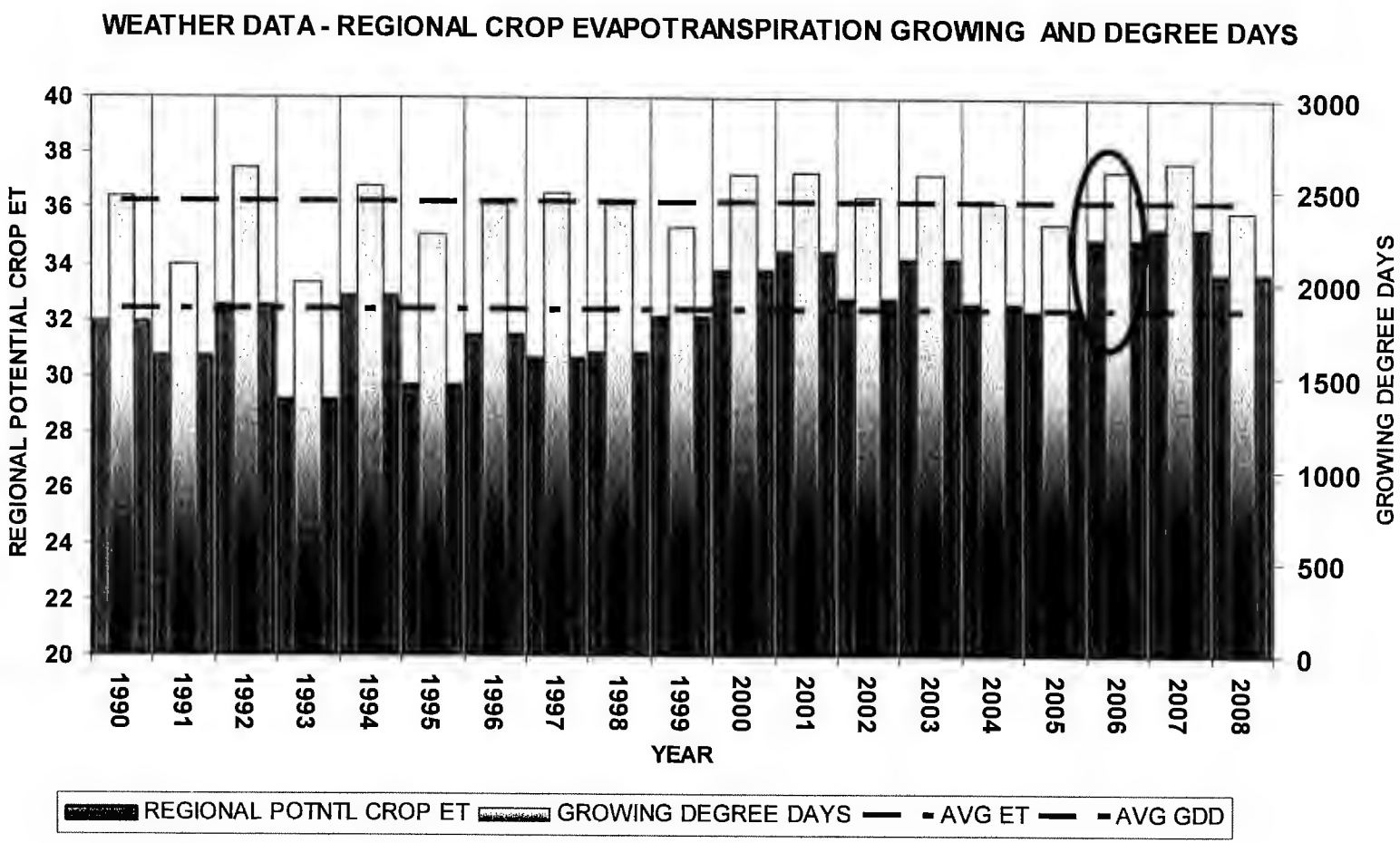
Station Type: AgriMet	Station Identifier: TWFI	County: Twin Falls
Latitude: 42° 33' North	Longitude: 114° 21' West	Elevation: 3920 feet
Start:	Stop:	Years with data:
Statisticial summaries based on 15 years between 1991 to 2005		



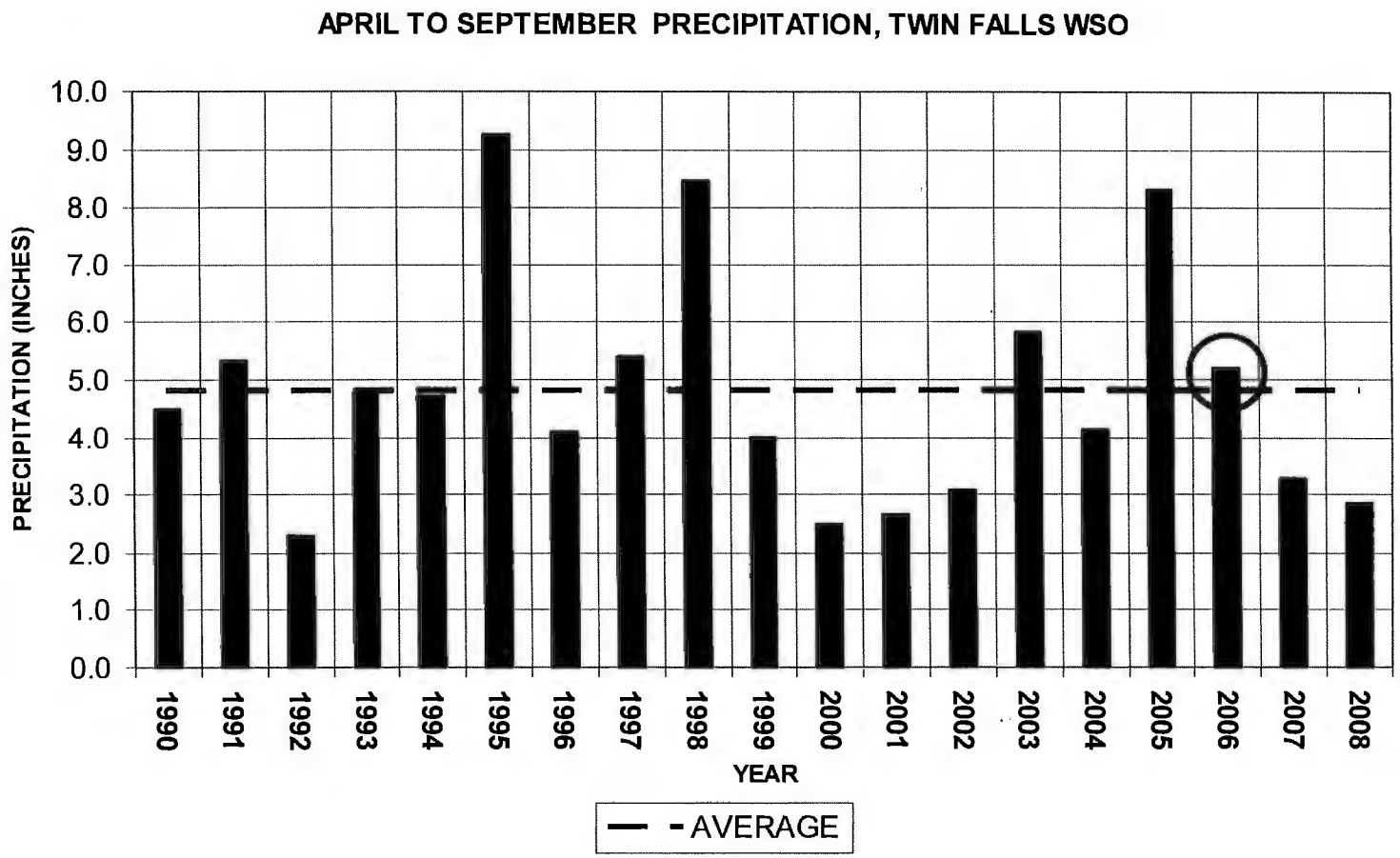
Heise gage runoff volume



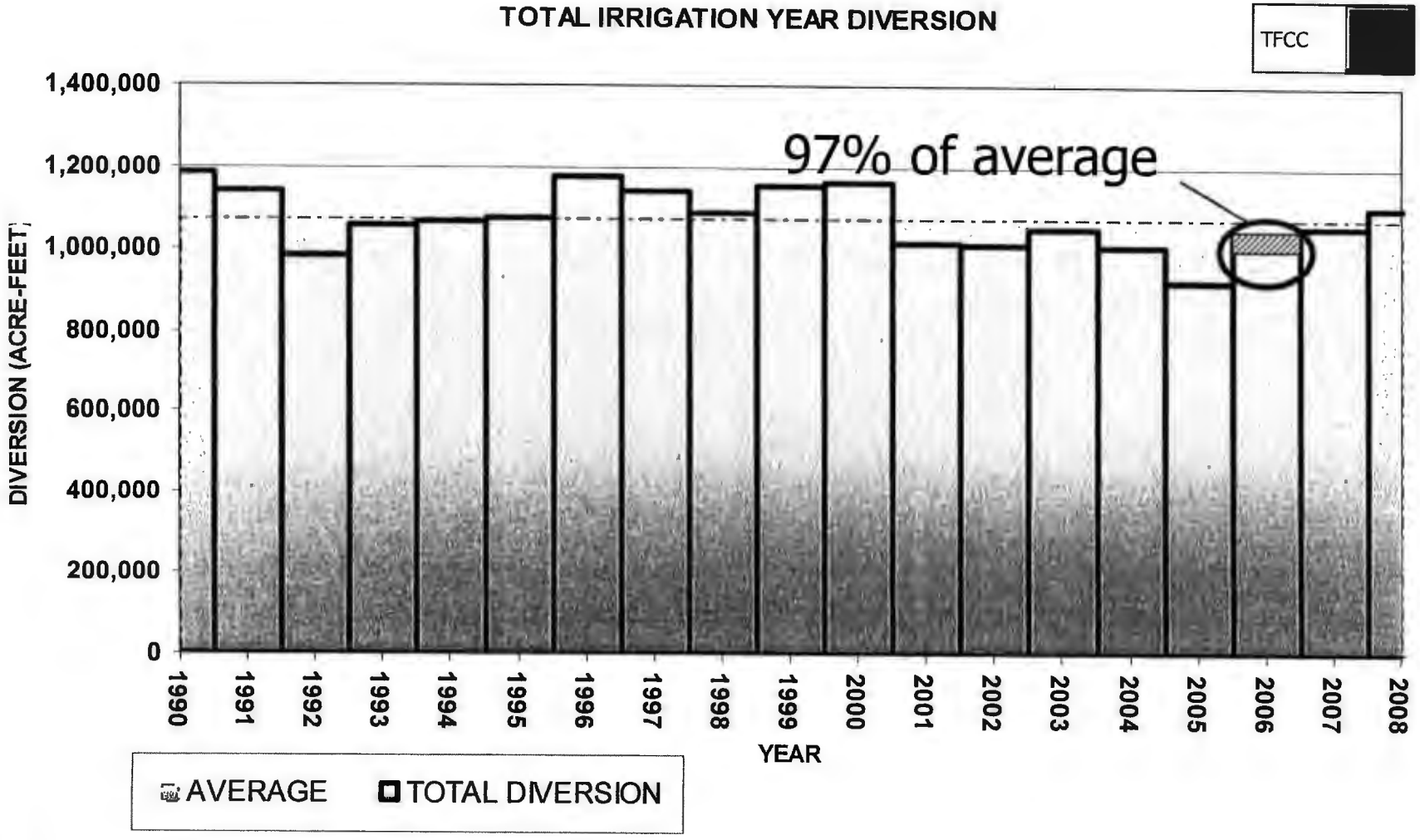
Regional weather data



Twin Falls growing season precipitation



Twin Falls Canal Company annual diversions



Summary of Baseline Demands for Surface Water Coalition members based on 2006 irrigation diversion with upward correction for average soil moisture

	2006 TOTAL DIVERSION (AF)	SOIL MOISTURE CORRECTION TO AVERAGE (AF)	2006 ADJUSTED DIVERSION (BASELINE DEMAND) (AF)
MINIDOKA NS	352,300	16,000	368,300
MINIDOKA SS (BID)	247,800	10,000	257,800
A & B ID	57,500	3,000	60,500
MILNER ID	55,500	3,000	58,500
RES. DIST #2	404,200	13,000	417,200
NS TWIN FALLS	968,600	32,000	1,000,600
TWIN FALLS SS	995,800	41,000	1,036,800
TOTAL			3,199,700

NOTE: PRELIMINARY, UNCHECKED DATA

Summary of Baseline Demands for Surface Water Coalition members, comparison to historic average diversions (cont.)

	BASELINE DEMAND (AF)	1990-2008 AVERAGE (AF)	BASELINE DEMAND AS % OF AVERAGE
MINIDOKA NS	368,300	358,800	103%
MINIDOKA SS (BID)	257,800	246,900	104%
A & B ID	60,500	56,100	108%
MILNER ID	58,500	57,800	101%
RES. DIST #2	417,200	428,500	97%
NS TWIN FALLS	1,000,600	1,030,400	97%
TWIN FALLS SS	1,036,800	1,072,700	97%
TOTAL	3,199,700	3,251,200	98%

NOTE: PRELIMINARY, UNCHECKED DATA

Hearing Officer Recommendation:

- The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol *Recommended Order at 51*

IDWR Proposed Protocol:

- Each SWC canal begins season with reasonable in-season demand equal to adjusted 2006 diversions, and called baseline demand (BD).

IDWR Proposed Protocol

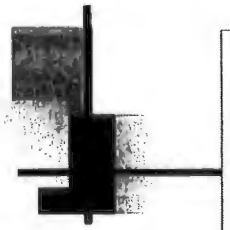
- Determine crop water needs (CWN) during season using Landsat generated ET:
  - CWN = (ET – PEFF) * Area
    where PEFF = effective precipitation
    Area = canal company total irrigated area

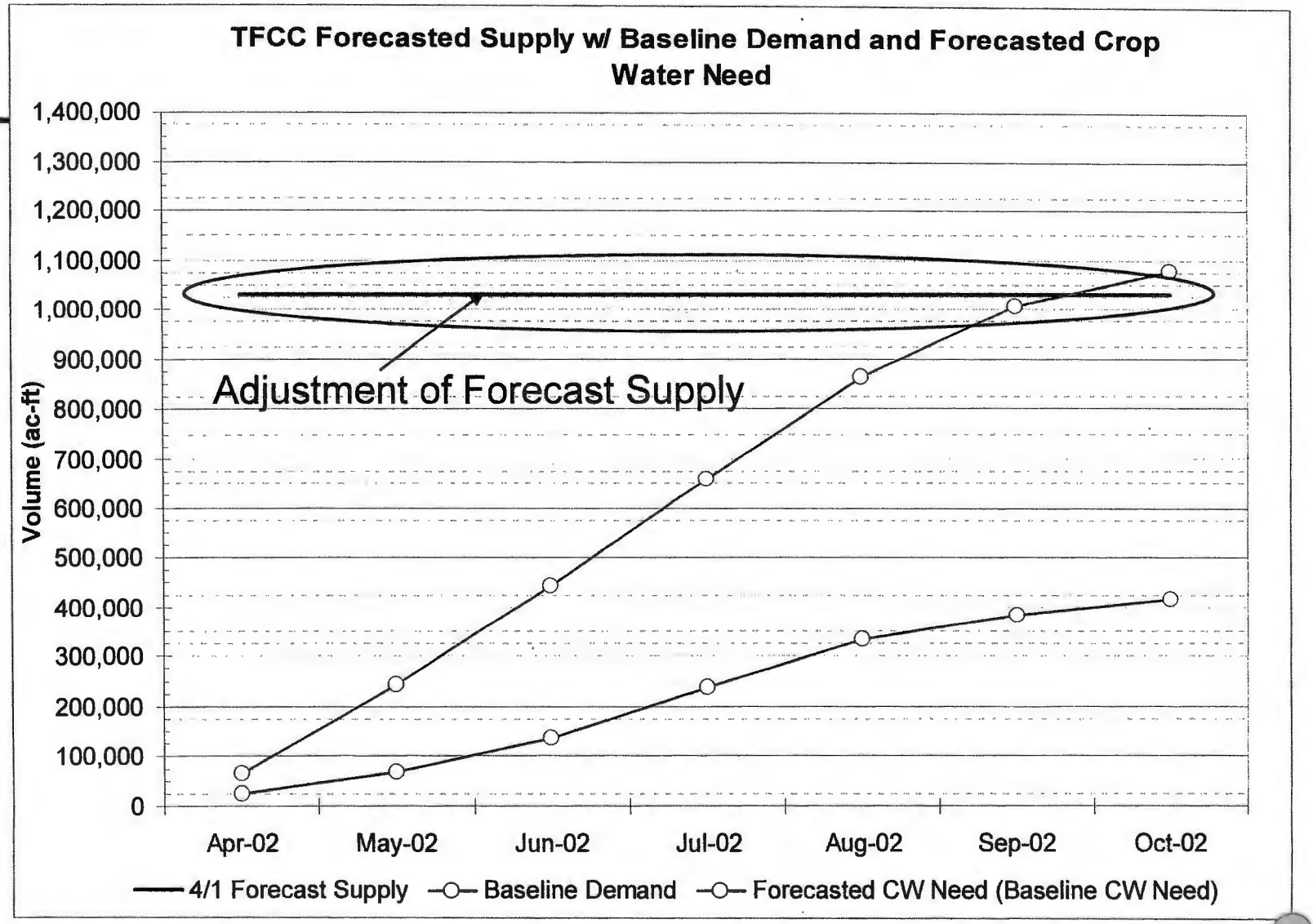
- Calculate revised reasonable in-season demand (RISD) as season progresses:
  - RISD = CWN Ep
    where Ep = project efficiency

SUMMARY

- Replace minimum full supply with the reasonable in-season demand, with baseline equal to 2006 SWC diversions, adjusted upward for beginning season soil moisture
- In-season adjustments made relative to 2006 crop water needs using Landsat generated ET and effective precipitation
- Baseline year for reasonable in-season demand will be amended in the future to reflect current average conditions

Adjustment of Forecast Supply



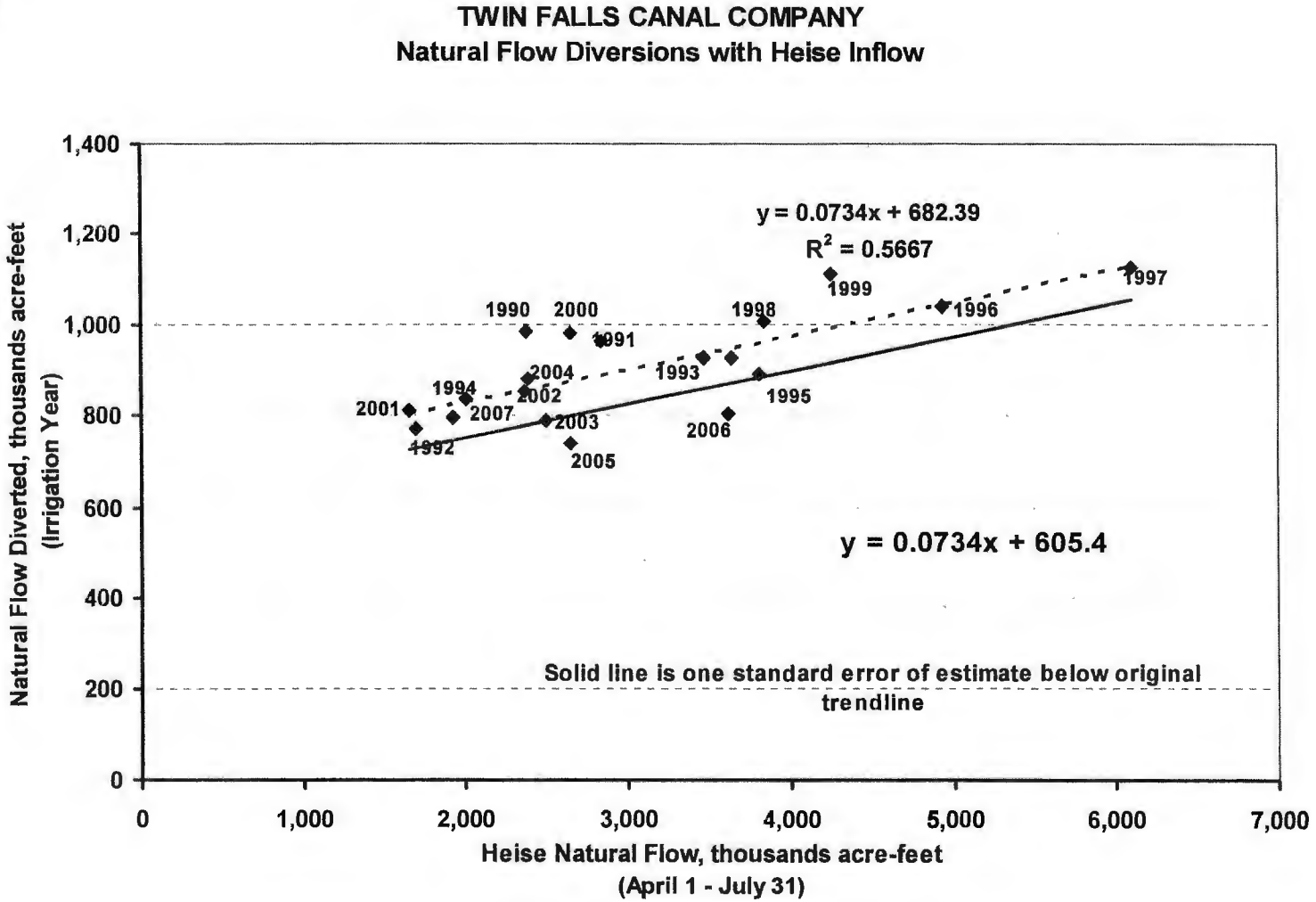


Timeline

- **April 1:** Use Heise Forecast
- **July:** Use actual accounting data and predict supply for remainder of season
- **September:** Use actual accounting data and predict supply for remainder of season

April 1

- Use Heise natural flow forecast to predict natural flow diversion



April 1

- Predict reservoir fill and storage allocation based on similar year.

July and September

- Have the storage allocation for each of the canals.
- Will know the natural flow diverted up to that point.
- Will find a year with similar reach gains to predict natural flow diversions for the remainder of the season.

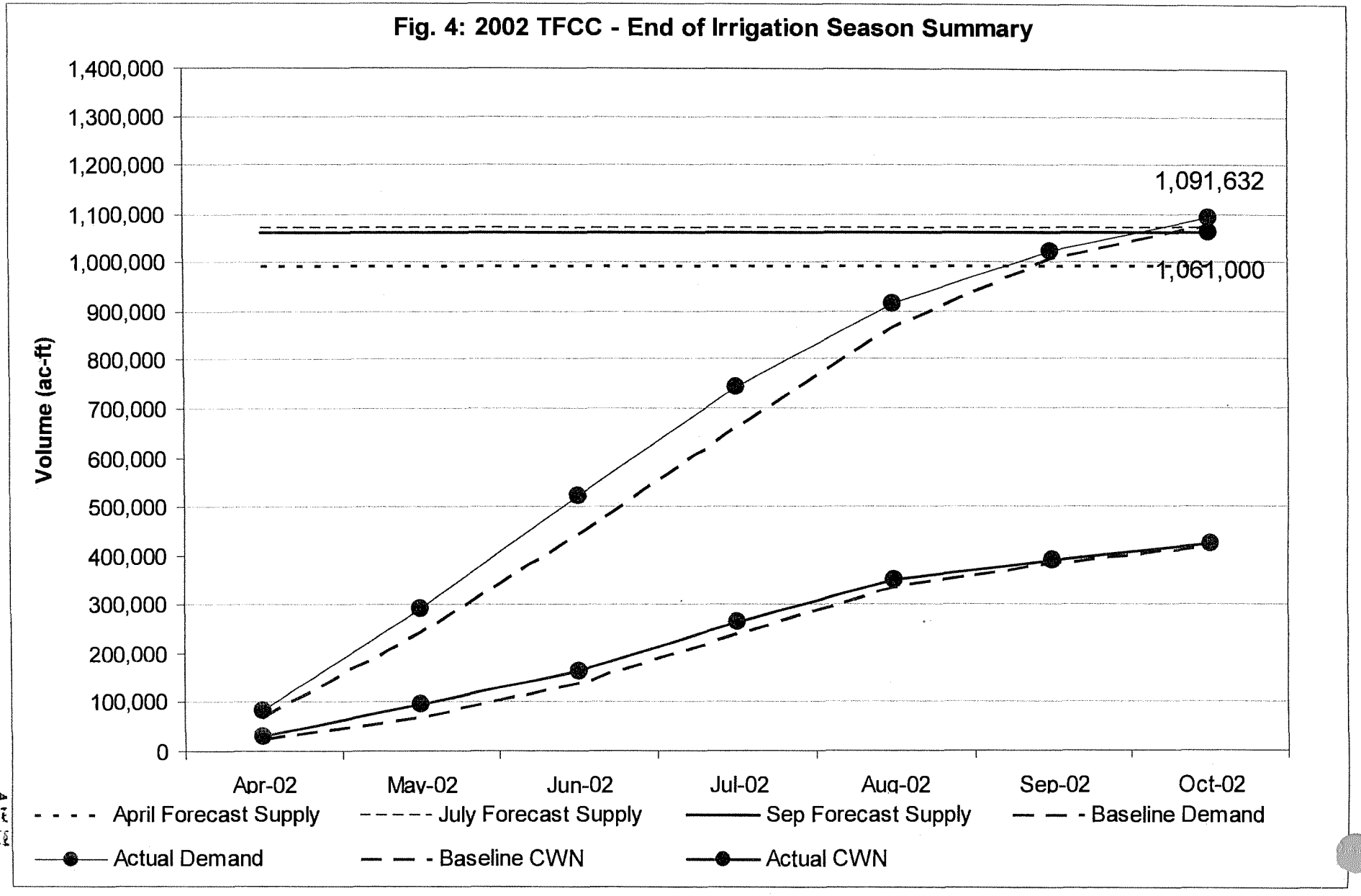
Reach Gains Blackfoot to Milner
Gain (cfs)
4,500
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
0
1-Jun
16-Jun
1-Jul
16-Jul
31-Jul
15-Aug
30-Aug
14-Sep
29-Sep
14-Oct
29-Oct
1997
1998
1999
2000
2001
2002

Reach Gains Blackfoot to Milner
Gain (cfs)
4,500
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
0
1-Jun
16-Jun
1-Jul
16-Jul
31-Jul
15-Aug
30-Aug
14-Sep
29-Sep
14-Oct
29-Oct
1997
1998
1999
2000
2001
2002

TFCC 2002 Example

	Natural Flow	Storage	Total Supply
4/1 Heise Forecast	**778,900 AF** Determined by Regression Analysis	**213,000 AF** Determined by predicting reservoir fill and storage allocation	**991,900 AF**
7/15 Update	**857,201 AF** ▪ 454,201 AF Natural Flow diverted up through 7/15 ▪ 403,000 AF Predicted Natural flow 7/16 to 10/31	**213,150 AF** Actual Storage Allocation	**1,070,351 AF**
9/1 Update	**848, 392 AF** ▪ 657,941 AF Natural Flow diverted up through 9/1 ▪ 190,451 AF Predicted Natural flow 9/2 to 10/31	**213,150 AF** Actual Storage Allocation	**1,061,542 AF**

2002 Example



REASONABLE CARRYOVER

CM 42.01 (g)

- In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. *Recommended Order at 51*

Hearing officer guidelines for calculations

- Use sufficient number of years to encompass wet and dry years
- Begin with year Palisades was fully operational
- Include years when the effect of groundwater pumping was minimal

Summarized from: *Recommended Order at 51*

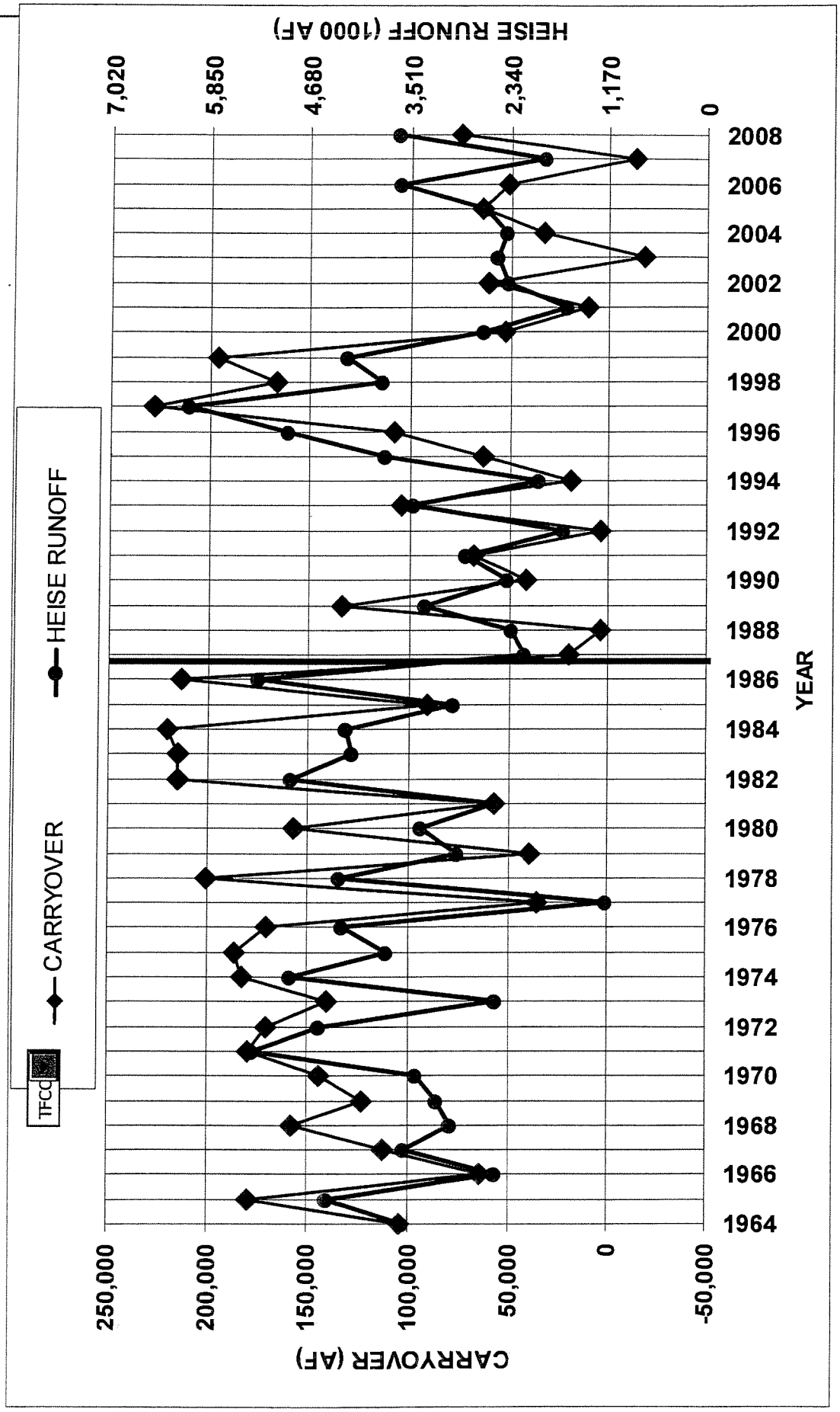
REASONABLE CARRYOVER

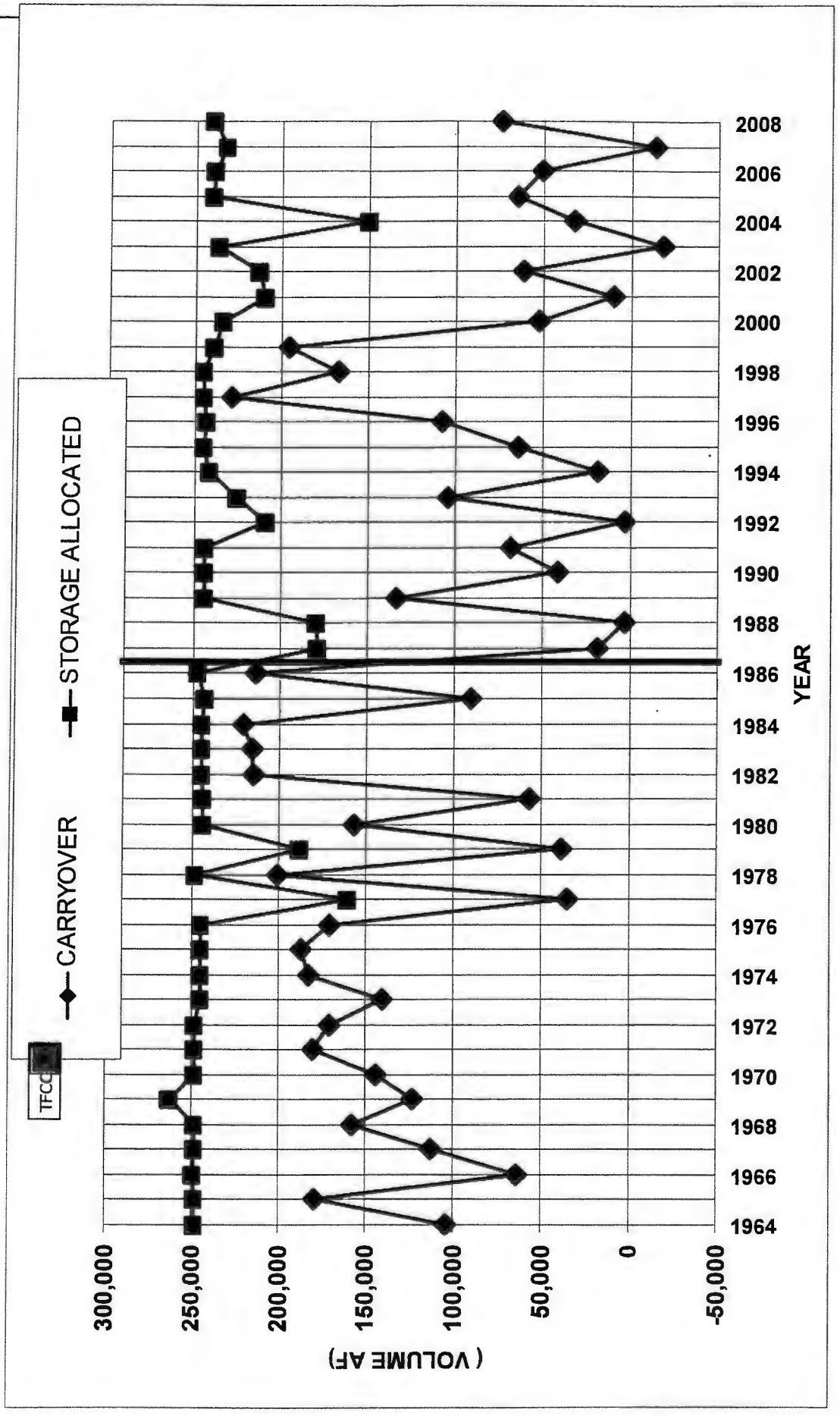
Proposed protocol for establishing basis of reasonable carryover

- Develop statistical model for each SWC canal of historic climate and water supply data with historic carryover
  - Irrigations years 1964 through 1986 can be used to establish historic carryover relation when ground water pumping effects were minimal and after Palisades was built.
- Use statistical model to estimate current carryover as if ground water pumping effects were absent
  - Substitute current climate and water supply data for historic values in model

REGIONAL CROP ET (IN)
27
32
37
2008
2006
2004
2002
2000
1998
1996
1994
1992
1990
1988
1986
1984
1982
1980
1978
1976
1974
1972
1970
1968
1966
1964
YEAR
CARRYOVER
REGIONAL CROP ET - TF WSO
TFCD
250,000
200,000
150,000
100,000
50,000
0
-50,000
CARRYOVER (AF)

DIVERSION (AF)
1,400,000
1,300,000
1,200,000
1,100,000
1,000,000
900,000
800,000
2008
2006
2004
2002
2000
1998
1996
1994
1992
1990
1988
1986
1984
1982
1980
1978
1976
1974
1972
1970
1968
1966
1964
YEAR
CARRYOVER
SEASON DIVERSION
TFCC
250,000
200,000
150,000
100,000
50,000
0
-50,000
CARRYOVER (AF)


HEISE RUNOFF (1000 AF)
7,020
5,850
4,680
3,510
2,340
1,170
0
2008
2006
2004
2002
2000
1998
1996
1994
1992
1990
1988
1986
1984
1982
1980
1978
1976
1974
1972
1970
1968
1966
1964
YEAR
CARRYOVER (AF)
250,000
200,000
150,000
100,000
50,000
0
-50,000
HEISE RUNOFF
CARRYOVER
TFCC


CARRYOVER
STORAGE ALLOCATED
TFCC
(VOLUME AF)
300,000
250,000
200,000
150,000
100,000
50,000
0
-50,000
YEAR
2008
2006
2004
2002
2000
1998
1996
1994
1992
1990
1988
1986
1984
1982
1980
1978
1976
1974
1972
1970
1968
1966
1964

PALMER INDEX
14
7
0
-7
-14
2008
2006
2004
2002
2000
1998
1996
1994
1992
1990
1988
1986
1984
1982
1980
1978
1976
1974
1972
1970
1968
1966
1964
YEAR
HEISE
PALMER DROUGHT INDEX
7,000
6,000
5,000
4,000
3,000
2,000
1,000
0
HEISE RUNOFF (1000 AF)

TWIN FALLS CANAL COMPANY STATISTICAL MODEL

CARRYOVER = 337,465 + 0.406 ALLOC + 26.1 HEISE100AF
+ 4,622 PDSI – 12,336 ETR

Where:

ALLOC = storage allocation for year in acre-feet,

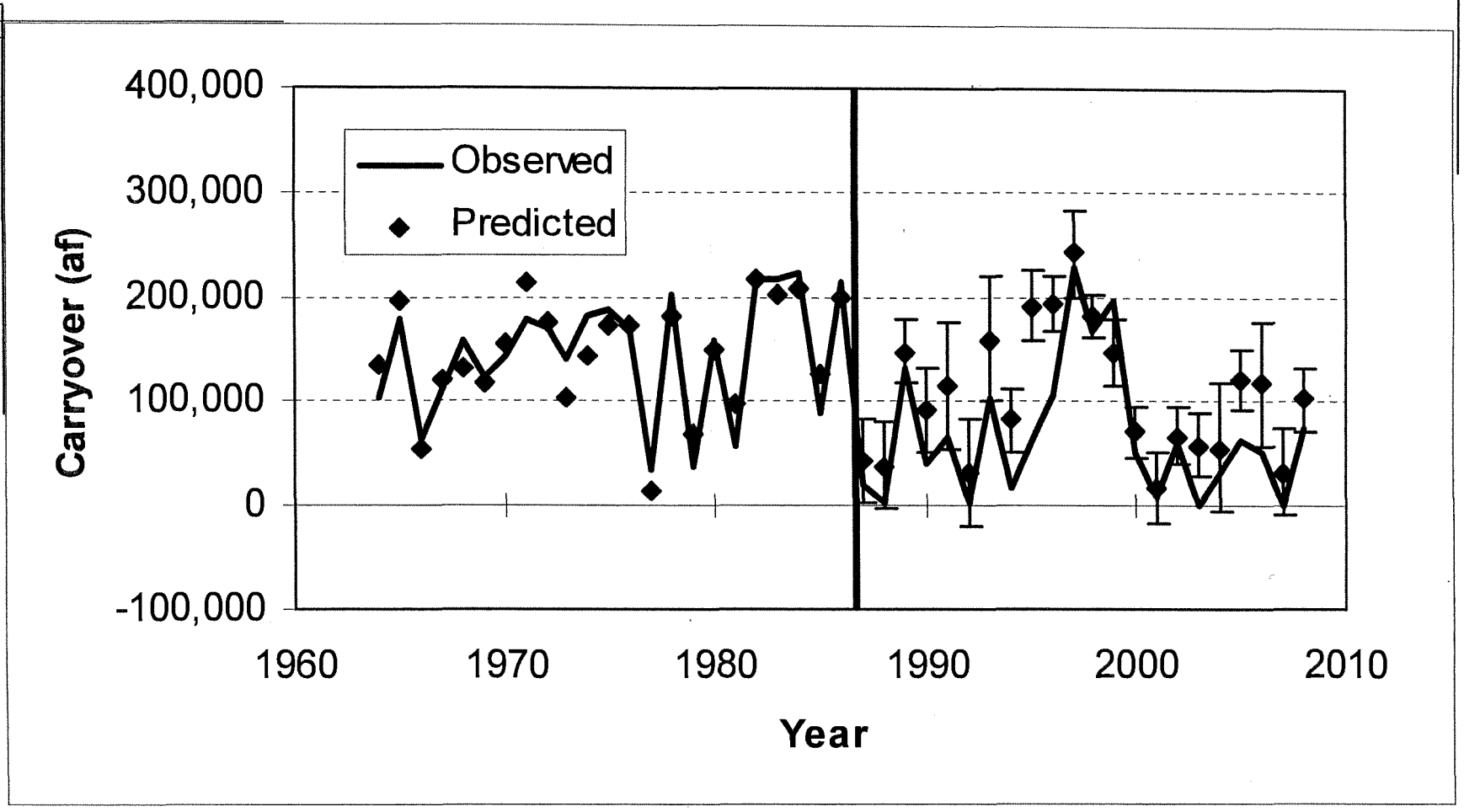
HEISE100AF = Heise April through July runoff volume in 100 acre-feet,

PDSI = September Palmer Drought Severity index, and

ETR = Seasonal potential crop evapotranspiration in inches, calculated with Twin Falls WSO temperature, NASS crop distribution for region, and average crop coefficient.

TWIN FALLS CANAL COMPANY STATISTICAL MODEL

R-Square = 81.1%



TWIN FALLS CANAL COMPANY 2002 example

2001 reasonable carryover calculated at end of season using these values from the 2001 season in equation:

Storage Allocation = 209,758 acre-feet
April – July Heise runoff = 1,659 acre-feet * 100
September PDSI = -5.05
ETR = 32.78 inches

CARRYOVER = 337,465 + 0.406 * 209,758 + 26.1* 1,659 + 4,622 *(-5.5) – 12,336 * 34.40

CARRYOVER = 18,000 acre-feet (rounding)

TWIN FALLS CANAL COMPANY 2002 example

2001 actual carryover: 10,000 acre-feet (rounding)

Difference between actual and calculated reasonable amounts:

18,000
- 10,000
8,000 (Reasonable Carryover Deficit)

If reservoir storage accounts do not fill in 2002 and the difference between baseline demand and forecasted supply exceeds the reasonable carryover deficit, then this amount, or portion thereof needed to meet a demand shortfall, is due two weeks after storage allocations are made by Water District 01.

TWIN FALLS CANAL COMPANY 2002 example

Twin Falls reservoir accounts did not fill in 2002;

Storage allocation: 210,000 acre-feet
TFCC net account total space: 240,000 acre-feet

A *demand shortfall* is also projected;

TFCC forecasted supply for 2002: 992,000 acre-feet
Reasonable in-season demand: 1,037,000 acre-feet

demand shortfall = 1,037,000 – 992,000 acre-feet
= 45,000 acre-feet

Total *reasonable carryover deficit* amount of 8,000 acre-feet due to Twin Falls by two weeks after day of allocation. Day of allocation in 2002 was approx. June 15

2002 SNAKE RIVER STORED WATER BY RESERVOIR

(ACRE-FEET)

RESERVOIR	SPACE	FILL	EVAPORATION	YIELD
JACKSON LAKE	847000.0	684506.6	13709.4	670797.2
PALISADES	845429.6	158943.9	3183.3	155760.6
PALISADES WWS	256708.7	256708.7	5141.4	251567.3
HENRYS LAKE	90000.0	32191.7	644.7	31547.0
ISLAND PARK	150204.0	63207.1	1265.9	61941.2
GRASSY LAKE	0.0	0.0	0.0	0.0
RIRIE	80500.0	0.0	0.0	0.0
AMERICAN FALLS	1614837.6	1612827.8	32301.9	1580525.9
LAKE WALCOTT	95200.0	95200.0	29348.1	65851.9
AMERICAN F LTF	57752.4	0.0	0.0	0.0
PALISADES LTF	97861.7	0.0	0.0	0.0
SUB TOTAL	4135494.0	2903585.8	85594.7	2817991.1
MILNER	37000.0	10129.7	0.0	10129.7
TOTAL	4172494.0	2913715.5	85594.7	2828120.8

PART 1

Questions/Discussion

Attachment B

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, AND 36-07148.	)	CASE NO. CV-2008-444
(Clear Springs Delivery Call)	)	
IN THE MATER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427.	)	
(Blue Lakes Delivery Call)	)	

PETITIONER CLEAR SPRINGS FOODS, INC.'S OPENING BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB 7198
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Attorneys for Idaho Department of Water Resources & David R. Tuthill, in his capacity as Director of the Idaho Department of Water Resources

(See Service Page for Remaining Counsel)

earlier question, the decrees are silent about the seasonal variability, as would be expected." Tr. P. at 1152, lns. 3-5. Apparently, the Director felt empowered by the fact that the decree did not contain any conditions on Clear Springs' quantity or season of use elements, and began taking liberties in administrating the rights. This violated long-standing Idaho law:

> A water right is tantamount to a real property right ... ***If the provisions define a water right, it is essential that the provisions are in the decree***, since the watermaster is to distribute water according to the adjudication or decree.

Nelson, 131 Idaho at 16 (emphasis added).

Clear Springs' water rights provide "year-round" diversion rates that, pursuant to the Idaho Constitution and water distribution statutes, are entitled to protection from interference by junior ground water rights. *See, supra.* The Director had no authority to "re-adjudicate" Clear Springs' decreed water rights through administration and include a "seasonal variation" condition to limit water delivery to Clear Springs' 1955 water right, especially since the evidence at hearing demonstrated that water right #36-4013A was injured by junior priority ground water rights, R. Vol. 16 at 3846-47. The Director's actions therefore exceeded his statutory authority and were arbitrary, capricious and in violation of the law.

II. The Director Erroneously Excluded Certain Hydraulically Connected Junior Priority Ground Water Rights From Administration Based Upon the "10% Trim Line", or Claimed Model Uncertainty.

A. The Use of a "10% Trim Line" was Arbitrary and Capricious.

It is undisputed that the ESPAM is the best available tool for addressing the interactions between ground and surface water on the Eastern Snake Plain. R. Vol. 16 at 3704. It is also undisputed that the Model contains imperfections, due to the uncertainties inherent in the multiple data inputs to the model. *Id.* at 3702-03. The Hearing Officer spoke of these imperfections:

> The former Director recognized that there had to be a margin of error in the application of the model and assigned a 10% error factor. This conclusion was based on ***the fact that the gauges used in water measurement have a plus or minus error factor of 10%. Some will be high; some will be low.***

Id. at 3703 (emphasis added). Stated differently, the impacts of junior ground water diversions on Clear Springs' senior water rights could be ***either*** higher or lower than that shown in the Model results.

In recognizing the inherent uncertainty with the model inputs, however, the Director used the uncertainty against Clear Springs, the senior water right holder, in favor of certain junior ground water right holders. This decision violated Idaho law and impermissibly shifted the burden of water shortage to Clear Springs, the senior water right holder. *See AFRD #2*, 143 Idaho at 874. The Director completely excluded hydraulically connected junior priority ground water rights from administration if their depletions to the particular spring reach were determined to be less than 10% of their total diversions. Amazingly, these junior ground water users were excluded from administration ***even though they were found to be contributing to the material injury suffered by Clear Springs' senior water rights.***

The Director's action flies in the face of the SRBA Court's "connected sources" general provision and the CMRs which do not excuse any class of junior water right holders in a connected source from administration. In addition, such a blanket exemption fails to account for the cumulative injury that those junior ground water rights have on the tributary springs. Using any model uncertainty against one water right for the benefit of another in administration is without a legal basis, particularly when the model input responsible for the "10%" number, the Snake River gage error, could be "high" or "low". Indeed, the Model could be *under-predicting* the depletion caused by junior ground water right holders. Exempting any junior water users

from administration, after it has been determined that they are materially injuring a senior water right, is arbitrary and capricious.

Clear Springs' expert, Dr. Charles Brockway, explained that using the 10% number as a standard confidence level, or "margin of error" for the Model was without scientific basis.

> A thorough evaluation of the confidence limits on model simulation results has not been performed. . . . This discharge record rating [10%] cannot imply that the difference between any two discharge measurements (reach gain) on the same river will have exactly the same accuracy as a single measurement. Similarly, when daily discharge measurements are aggregated to calculate monthly or longer period total or average flows, the confidence limts ± 10% on the calculated monthly flow are different than for a single measurement. The confidence levels for model output are influenced by the accuracy of individual data utilized in calibrating and developing the model as well as internal algorithm structures in the model code. For the above reasons, the assumption that the simulated output of the model is ± 10% is not justified. It is simply not possible to assign confidence limits to the model output without further extensive evaluation.

R. Supp. Vol. 7 at 4882.

The Hearing Officer recognized this fact and confirmed that "Development of the model has not proceeded to the point of establishing a margin of error". R. Vol. 16 at 3702. Although the Hearing Officer did not recommend setting aside the 10% used by the Director, he did explain that "Until a better factor is established, the Director in his best judgment may use 10%. The development of a more scientifically based error factor should be a priority in improvement of the model." *Id.* at 3702-03.

Until a scientifically based confidence limit is established for the Model, the Director's use of a "10%" margin of error to exclude certain junior water rights from administration, is arbitrary and not supported by substantial and competent evidence. Although a confidence level in the Model may be developed at some point in the future, the Director did not have a basis to

use the "10%" number to the detriment of a senior water right holder such as Clear Springs in this case.

B. Assuming the "10%" Model Uncertainty Was Appropriate, the Director Should Not Have Applied it to the Benefit or Detriment of Any Water Right Holder – Senior or Junior.

If the Director is to apply any margin of error for the Model he should apply it equally against (or in favor of) all water users in the ESPA. Any 10% trim line, as applied against a senior surface water right holder for the benefit of certain junior ground water right holders, is not proper and contrary to the law of prior appropriation in Idaho. *See Jenkins*, 103 Idaho at 388. In essence, it allows out-of-priority diversions by certain junior ground water right holders to continue, to the detriment of senior surface water right holders even though the ground water diversion depletes and injures the senior's water right. Such action unlawfully diminishes Clear Springs' priority.

The 10% trim line is based on one input into the Model calibration and ***has nothing to do with the elements of decreed junior ground water rights*** and whether or not those rights are subject to priority administration in connected water sources like the ESPA and the tributary springs. It does not describe wells used to measure ground water levels across the ESPA or gages used to measure spring discharges in the Thousand Springs reach. Rather, the model is used to determine the impacts of the curtailment of diversions on reach gains. R. Vol. 3 at 490, ¶ 12.

The Ground Water Model was calibrated according to recorded ground water levels, spring discharges, reach gains and losses to the Snake River, and other stream flow measurements for the period from 1980 to 2002. R. Vol. 16 at 491, ¶ 17. The stream gages on the Snake River have uncertainties up to 10%, *id.* – meaning that a stream gage could be

measuring an amount of water that is 10% lower ***or*** higher than the actual flow in the river at the time of the measurement.

Under the law of prior appropriation, a senior water right should be afforded the benefits of uncertainty in water right administration. At a minimum, the Director should not use any "margin of error" or "confidence level" for the benefit of either junior or senior water rights. In summary, it should not be applied as a penalty against senior water users exercising their legal right to water right administration in times of shortage.

C. The 10% Trim Line Violates the SRBA Court's "Connected Sources" General Provision.

Unless a water right contains a "separate source" provision on its decree, all water rights in Water District 130 are deemed legally connected for purposes of administration. *See* **Ex. 225.** Therefore water rights on all hydraulically connected water sources within the district must be administered by priority. The Director's actions in excluding certain junior priority ground water rights from any administration – even though they are materially injuring Clear Springs' senior water rights – is not supported by the law and violates the SRBA Court's connected sources provisions contained on those water rights' decrees. Accordingly, the Director's use of the "10% trim line" against Clear Springs' senior water right is arbitrary and should be set aside.

D. The Director's Use of a "10% Trim Line" Violates CMRs

In addition to violating Idaho's prior appropriation doctrine, the Director's use of a "10% trim line" to exclude from administration junior priority water rights that were causing injury also violated the Department's CMRs. As set forth in the Rules, the Director was obligated to administer <u>all</u> junior ground water rights causing injury "in accordance with the priorities of rights". Rule 40.01.a. The "10% trim line" allowed the Director to exclude a certain class of junior ground water rights from being subject to curtailment or ordered mitigation. For example,

although a ground water user with a 1965 priority right that had an 11% depletive effect on the spring reach was subject to administration, a ground water user with a 1990 priority right that had a 9% depletive effect on the spring reach was excluded. The Rules do not allow this unlawful result that ignores the law of prior appropriation. If a junior ground water right contributes to the injury of a senior surface water right, the Director has an obligation to regulate the use of water under that junior ground water right. The Director failed to implement the clear provisions of the Rules by using the "10% trim line" to excuse certain junior ground water rights from administration. Accordingly, the decision should be set aside.

III. The Director's Use of a Percentage of Reach Gains to the Snake River to Reduce the Quantity of Water Required as Mitigation in Lieu of Curtailment Was Erroneous.

In determining the amount of water that would arrive at Clear Springs' Snake River Farm as a result of curtailment, the Director relied on USGS measurements for the Buhl Gage to Thousand Springs reach. R. Vol. 3 at 491, ¶ 15. In doing so, the Director incorrectly concluded that the amount of water authorized under Clear Springs' water rights (a total of 117.67 cfs) accounted for 7 percent of the measured reach gains in that spring reach. *Id.*

The Director's decision is not supported by the evidence. That notwithstanding, the Hearing Officer determined that 6.9% should be used – based wholly on the testimony of Tim Luke, IDWR Water Distribution Section Manager. R. Vol. 16 at 3710. The Hearing Officer's decision was accepted in the *Final Order*. R. Vol. 16 at 3958, ¶ 5.

During the hearing, Dr. Allan Wylie, testified that he was not comfortable with the percentage estimates of flows that would return to the spring complex. Specifically, Dr. Wylie testified as follows:

Attachment C

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, AND 36-07148. (Clear Springs Delivery Call) IN THE MATER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427. (Blue Lakes Delivery Call)	)	CASE NO. CV-2008-444

SPRING USERS JOINT REPLY BRIEF

On Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, Presiding

John K. Simpson, ISB #4242
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(See Service Page for Remaining Counsel)

Despite the rising ground water levels into the 1950s and the highest average annual spring flows at that time in the Thousand Springs area, IDWR would have the Court believe this information "is simply not comparable to anything that might have occurred at Clear Springs' facility in the Buhl Gage to Thousand Springs reach during the time that water right no. 36-04013A was appropriated" in 1955. *IDWR Br.* at 46-47. IDWR asks the Court to ignore the evidence in the record, which shows that spring flows at Clear Springs' Snake River Farm facility were higher in 1955, and affirm the Director's conclusion based upon an "assumption" and a "lack of historical information". Nothing in Idaho law supports IDWR's arguments. The Idaho Supreme Court has instructed just the opposite in reviewing an agency decision that is not supported by the facts:

> In deciding whether the agency's findings of fact were reasonable, reviewing courts should not "read only one side of the case and, if they find any evidence there," sustain the administrative action and ignore the record to the contrary. ... [R]eviewing courts should evaluate whether "the evidence supporting that decision [under review] is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view."

Hunnicutt, supra at 260-61 (citing *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 481, 488 (1951).

When viewed in "the light that the record in its entirety furnishes," it is clear that the Director's "no-injury" finding is not supported by substantial evidence. The Director's finding is clearly erroneous and must be reversed.

B. There is No "Scientifically Certain" Standard for Water Right Administration in Idaho; as such, the Director Erred in Applying an Assumed 10% Model Uncertainty Against the Spring Users' Senior Surface Water Rights in Favor of Junior Ground Water Rights.

IDWR argues that the Director properly assigned a Model uncertainty and applied a "10% trim line" in response to the Spring Users' calls because such a finding resolves the alleged

"tension" between "strict priority administration" and "full economic development". *IDWR Br.* at 15. It asserts that the Director has the "discretion" to exclude some hydraulically connected junior ground water rights from administration because, in his opinion, "the best available science failed to show any measurable benefit" to the Spring Users. *Id.* at 14. IDWR further contends that, had he not used the 10% trim line, "it would have resulted in hundreds of thousands of acres curtailed with no reasonable degree of scientific certainty that such additional curtailment would provide any useable quantity of water" to the Spring Users. *Id.* at 23. Stated another way, IDWR claims the Director was not "scientifically certain" that administration of junior ground water rights outside the "10% trim line" would benefit the affected spring reaches, therefore administration was excused.

Idaho law, including the CM Rules, do not prescribe a "scientifically certain" standard in order to conjunctively administer surface and ground water rights.[4] Instead, in times of shortage, Chapter 6, Title 42, and the CM Rules require the Director and watermasters to distribute water to senior rights first and administer *all* water rights to the connected sources. Idaho Code §§ 42-602 & -607, CM Rule 40. When a senior surface water right is injured, the CM Rules specifically require the Director and watermasters to "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 water district.***" CM Rule 40.01(a) (emphasis added); *see also*, CM Rule 40.02 (Director "shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604.").

All water rights within Water District 130, not just some, are subject to conjunctive administration. If a ground water user on the ESPA in Water District 130 believed his water

[4] Despite rejecting IGWA's "reasonable certainty" arguments after hearing, IDWR now apparently adopts it for purposes of its "10% trim line" argument. *Compare* R Vol. 16 at 3703 to *IDWR Br.* at 23. IDWR's arguments contradict the Director's own findings on this issue.

right should be absolutely exempted from administration together with other surface water rights he had the opportunity to make the case for a "separate streams" provision for his water right in the SRBA. None of the affected ground water right holders in this matter made such a case, nor would they have been able to prove such a designation since all water in the ESPA is hydraulically connected to the Snake River and its tributary springs. Despite their failures in the SRBA, the Director essentially adopted a "separate streams" provision for certain ground water users in this case by a wholesale exemption from administration under the "10% trim line" theory. The CM Rules do not grant the Director with the discretion to make such a decision.

Furthermore, this decision was not supported by the facts or the law. First, the Director determined the Spring Users' calls were not "futile." As such, he had an obligation to administer *all* hydraulically connected junior priority ground water rights "within the water district". R. Vol. 16 at 3708-09. The fact that some ground water rights within the water district are located farther away from the springs than others does not change the undeniable fact that they are "hydraulically connected" to the Spring Users' senior rights and the fact they contribute to the material injury and are subject to administration. Hearing Officer Schroeder described the effects in his decision rejecting IGWA's "futile call" defense:

> What these facts establish is that in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may take years, not days or weeks. This is the reverse process of the depletion of the water flowing to the springs from the aquifer over a substantial number of years. The Director's orders of curtailment recognized that the Spring Users' calls were not futile, though remediation would take considerable time. The evidence supports that determination.

R. Vol. 16 at 3709.

Since the Director found the Spring Users' calls were not "futile", his duty was to administer *all* junior ground water rights within the water district. Nothing in the law allowed him to temper his duty through the use of a "10% trim line" that exempted some ground water users (found to be materially injuring the senior water right) but not others.

While IDWR argues that an undefined "scientifically certain" standard justified the Director's decision, it has no supporting evidence. Just the opposite, IDWR's own witness Dr. Allan Wylie testified that the potential impact of those wells outside the "10% trim line" *was not certain*, and that it could be understated by 20%:

> Q. [BY MR. BROMLEY] So if a water right was located within the 10 percent clip, could that possibly contribute as little as zero percent or as much as 19 percent to the particular reach at issue?
>
> A. [BY DR. WYLIE] If the – binder here was the 10 percent line, and the water right was on the greater than 10 percent side, right at 11 percent, then that water right could contribute, the best guess would be 11 percent. It ***could be*** as low as 1 percent or as high as 21 percent.

Tr. P. at 818, lns. 10-18 (emphasis added).[5]

The "10% trim line" only assumed facts about certain ground water rights located within Water District 130 and all ground water rights within Water District 120. Importantly, the Director had no "scientific certainty" or method to test whether those wells contributed 0% or 20% of the depletions from their diversions to the Spring Users' water rights. In the face of this

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[5] Dr. Wylie further recognized the acres outside the "10% trim line" did have a hydrologic effect on the spring flows supplying Spring Users' water rights and that the diversions could have more than a 10% impact:

> Q. [BY MR. SIMPSON] But it's equally likely that – that some of those areas outside of the 10 percent clip – clip line, could have a 10 percent impact on that reach?
>
> A. It's possible that areas outside the 10 percent clip line could have an impact, that's right.
>
> Q. Of at least 10 percent?
>
> A. Of at least 10 percent.

Tr. P. at 1106, lns. 13-19.

uncertainty the Director chose 0% and removed those wells outside the "10% trim line" from administration altogether.[6]

Although pumping from of over 600,000 acres of junior priority ground water development contributes both individually and collectively to the injuries suffered by Clear Springs and Blue Lakes, the Director used the "10% trim line" to sever those rights from water right administration. This decision is contrary to the law and is not supported by the evidence. Whereas the uncertainty could be "high" or "low", the Director erred on the side of the junior priority ground water user and exempted over 600,000 acres from administration, even though many of those ground water rights are junior to the ground water rights that are subject to administration (those located inside the trim line). This finding is clearly erroneous and should be set aside.

IDWR has no support for the Director's use of the "10% trim line". In its brief IDWR even goes so far as to contradict the Director's own determination regarding "futile call". IDWR alleges that the 10% gage uncertainty has a "history of use in surface-to-surface water administration" and that somehow supports the way the Director used it in this case. *IDWR Br.* at 16. The Director's cited testimony on this issue concerned a "futile call" order on the Big Lost River. *Id.* Contrary to IDWR's arguments, Hearing Officer Schroeder aptly explained that a "surface to surface" water right "futile call" analogy is not applicable in this case:

> The relationship of water in the aquifer to surface water differs from that of surface water to surface water in ways that affect interpretation of the futile

[6] Dr. Wylie explained that this decision had the effect of ignoring those hydraulically connected junior ground water rights' effects on the Spring Users' water rights and reducing the material injury finding:

> Q. [BY MR. SIMPSON] And so any of those rights outside the 10 percent clip line that are a portion of the 600,000 plus acres, then their impact on the Snake River Farms that would occur over time would not be considered under the curtailment order; would they not?
>
> A. They would not.

Tr. P. at 1102, lns. 7-12.

call rule. ... The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water.

R Vol. 16 at 3708-09.

The Director affirmed this decision in his final order. R. Vol. 16 at 3957. Therefore, IDWR's contradictory argument in its brief before the Court, that a "surface to surface" futile call scenario supports the "10% trim line" is clearly unfounded.

Next, IDWR argues that since mitigation actions outside the "10% trim line" were not accepted it was ok to exempt those wells outside the line. *IDWR Br.* at 16. This argument is of no merit. If a ground water right injures a senior surface water right it is subject to administration under Idaho law. If that ground water right can effectively mitigate for its depletions, regardless of where the mitigation occurs in the aquifer, the Director should consider it. The fact the Director drew an arbitrary line to exclude over 600,000 acres from administration is not justified just because he does not accept mitigation actions in that same area.

Finally, IDWR resorts to its "complexity" argument claiming that removing the "10% trim line" would result in "the ministerial administration of hydraulically connected ground and surface water sources without regard to the complexities associated with conjunctive administration". *IDWR Br.* at 17. The fact that the Director's and watermaster's duties to distribute water to water rights are "ministerial" as defined by the Idaho Supreme Court does not help IDWR's argument. *See Musser*, 125 Idaho at 395 ("We conclude that the director's duty to distribute water pursuant to this statute is a clear legal duty."); *Jones v. Big Lost Irr. Dist.*, 93 Idaho 227, 229 (1969) ("The duties of a water master are to determine decrees, ***regulate flow of streams and to transfer the water of decreed rights*** to the appropriate diversion points, I.C. § 42-607") (emphasis added); *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935) ("The defendant water master is only an administrative officer and has no interest in the subject

of the litigation – ***his only duty is to distribute the waters of his district in accordance with the respective rights of appropriators***") (emphasis added).

Nonetheless, conjunctive administration is not so "complex" that the Director can disregard the law to justify his decision. Moreover, factually, conjunctive administration is only a matter of location and timing regarding a ground water right's impact on a spring source. Those closer to the spring affect it more and sooner. Those farther away affect it less and over a longer time. The best available science (the ESPA Model) answers these questions for the Director. Despite the differences, the ground and surface water rights are all *legally connected*, both pursuant to the CM Rules definition of the ESPA as a "common ground water supply" and the SRBA Court's "connected sources" general provision. Removing the "10% trim line" ensures that all water rights are administered together on equal footing as required by the law.[7]

C. The Director's Use of a Percentage of Reach Gains to Limit Administration is Not Supported by the Record.

The Director's assigned percentage of reach gains to limit the extent of administration to satisfy Clear Springs' senior water rights is not supported by the law and it is not defendable by IDWR's own expert witness. Accordingly, the Director's decision to use that process was arbitrary and should be set aside.

IDWR argues that the Court should accept the Director's methodology and assignment of a 6.9% figure as a percentage of reach gains to Clear Springs on the basis that "no alternative science was presented at hearing." *IDWR Br.* at 22. To the contrary, IDWR's own expert, Dr.

[7] Although juniors retain the ability to prove any defenses to a call, removing the "10% trim line" will not cripple the Director for purposes of conjunctive administration. He would still retain all the tools to administer water consistent with the prior appropriation doctrine. As it stands now, as long as you pump on the other side of the "10% trim line" fence a water user has nothing to worry about. For those 600,000 plus acres that do impact the Spring Users' spring sources – this result is unlawful and not supported by the evidence. Since the Director exempted certain hydraulically connected ground water rights from administration based only upon a claimed model uncertainty, and that decision is not supported by substantial evidence, the "10% trim line" determination should be reversed and set aside.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

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

HONORABLE JOHN M. MELANSON	05/26/2009
Presiding Judge	1:30 p.m.
MAUREEN NEWTON	
Court Reporter	
JULIE MURPHY	
Deputy Clerk	Court Minutes
SRBA District Courtroom	Twin Falls, Idaho

This was the time and place set for **Case No. CV 2008-0000551**. Issues to be addressed are:

ORAL ARGUMENT ON PETITION FOR JUDICIAL REVIEW

Appearances: David Gehlert, Tom Arkoosh, Kent Fletcher, Paul Arrington, Phil Rassier, Chris Bromley, Sarah Klahn, Randy Budge, Candice McHugh, Travis Thompson, John Simpson, Clive Strong (phone)

TAPE	DESCRIPTION
1:37:39	COURT CONVENES
	Court summarizes
1:41:19	Mr. Budge addresses court re: attachment to brief and time limits of argument
1:42:21	Court comments re: attachment to brief
1:42:51	Mr. Simpson addresses court re: time limits
1:44:14	Mr. Simpson presents argument
2:07:40	Mr. Arkoosh presents argument
2:36:21	Mr. Thompson presents argument
3:03:08	Mr. Fletcher presents argument
3:09:20	Court interjects comments / Mr. Fletcher continues

3:24:01	Court comments / Mr. Fletcher responds
3:25	COURT IN RECESS
3:40:40	COURT RECONVENES
3:40:40	Mr. Gehlert presents argument
3:53:41	Court questions Mr. Gehlert / he responds
3:56:11	Mr. Budge presents argument
4:21:59	Court interjects / Mr. Budge responds and continues
4:46:38	Ms. Klahn presents argument
5:02:03	Mr. Bromley presents argument
5:11:45	Court interjects / Mr. Bromley responds and continues
5:28:40	COURT IN RECESS
5:41:13	COURT RECONVENES
5:41:54	Mr. Gehlert presents rebuttal
5:43:21	Mr. Arkoosh presents rebuttal
5:50:37	Mr. Thompson presents rebuttal
5:52:40	Mr. Fletcher presents rebuttal
5:57:46	MATTER SUBMITTED FOR DECISION – WILL TAKE UNDER ADVISEMENT – Court comments further
5:58:58	COURT ADJOURNS

ORIGINAL

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

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,

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,[1] and THE DEPARTMENT OF WATER RESOURCES,

Filed pursuant to I.R.C.P 5(e)(1) on July 24, 2009 at 3:05 P.M.
John Melanson, Dist. Judge

Case No. 2008-0000551

ORDER ON PETITION FOR JUDICIAL REVIEW

[1] Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

Respondents.

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

Ruling:

1) Director did not exceed authority by waiting until following season to adjust material injury to carry-over storage but exceeded his authority by not making process contingent on guarantee of replacement water in event of shortfall; 2) Director exceeded authority by categorically denying reasonable carry-over for multiple-years; 3) Director did not exceed authority or abuse discretion by combining natural flow and storage rights in making a material injury analysis or by using a "baseline" different from the decreed or licensed quantity, subject to certain conditions; 4) Director did not err or abuse discretion by using 10% trim-line in applying ground water model; 5) Director exceeded authority and abused discretion by not following procedural steps for mitigation plans as set forth in the Rules for Conjunctive Management; 6) Director exceeded his authority by determining that full headgate delivery for Twin Falls Canal Company as issue is currently pending in the SRBA; 7) Director exceeded authority by issuing separate "Final Orders"; 8) Based on foregoing actions, Director's actions did not constitute timely administration of junior rights to protect senior rights.

Appearances:

C. Thomas Arkoosh, of Capitol Law Group, PLLC, Gooding, Idaho, attorney for American Falls Reservoir District #2.

W. Kent Fletcher, of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

John A. Rosholt, John K. Simpson, and Travis L. 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.

Phillip J. Rassier, Chris M. Bromley, 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.

John C. Cruden, Acting Assistant Attorney General, and David Gehlert, of the United States Department of Justice, Denver, Colorado, attorneys for the United States Bureau of Reclamation.

Randall C. Budge, Candice M. McHugh, and Scott J. Smith, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators.

A. Dean Tranmer, of the City of Pocatello Attorney's Office, Pocatello, Idaho, attorney for the City of Pocatello.

Sarah A. Klahn of White and Jankowski, LLP, Denver, Colorado, attorney for the City of Pocatello.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

I.
STATEMENT OF THE CASE

A. Nature of the case

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR" or "Department") issued in response to a delivery call filed by Petitioner Surface Water Coalition ("SWC") on January 14, 2005. The delivery call was filed as a result of a reduction in reach gains and spring flows discharging from the Eastern Snake Plan Aquifer ("ESPA"). The SWC is made up of seven irrigation districts and canal companies below American Falls Reservoir that divert natural flow water from the Snake River and who hold storage water rights in various Bureau of Reclamation ("BOR") reservoirs. The members of SWC are: A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD #2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka

Irrigation District ("MID"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC"). The September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call ("Final Order")*, from which judicial review is sought, ordered curtailment of junior ground water rights or alternatively a replacement water plan in lieu of curtailment. Petitioners contend the Department erred in response to the delivery call and seek judicial review pursuant to the Idaho Administrative Procedures Act, Title 57, Chapter 52, Idaho Code.

B. Course of Proceedings

1. The Delivery Call

SWC delivered a letter to the Director of IDWR on January 14, 2005, requesting the Director to commence conjunctive administration of their water rights. Hearing Record (R.) Volume (Vol.) 1 at 1. SWC asserts in the letter that their senior water rights were being materially injured "[b]y reason of the diversion of junior ground water rights located within Water District No. 120 and elsewhere throughout the ESPA," including the American Falls Ground Water Management Area, and areas of the ESPA not within an organized water district or ground water management area. *Id.* at 4. Also on January 14, 2005, SWC filed a *Petition for Water Rights Administration and Designation of the Eastern Snake River Plain Aquifer as a Ground Water Management Area.* R. Vol. 1 at 53.

On February 14, 2005, Director Dreher issued an order ("*February 14, 2005 Order*") in response to SWC's requests. The Director found that because water districts were expected to be created in the ESPA by the irrigation season of 2006, there was no need for the creation of a ground water management area encompassing the entire ESPA. R. Vol. 2 at 214. The Director was unable to determine injury to the senior priority rights held by SWC until the commencement of the 2005 irrigation season and until the BOR and the United States Army Corps of Engineers released inflow forecasts. *Id.* at 226. The Director requested more information from SWC in order to make a determination of injury "as soon after April 1 [the start of the irrigation season] as practicable." *Id.* at 227, 230.

On May 2, 2005, Director Dreher issued an *Amended Order* ("*May 2, 2005 Amended Order*"). The Director found that junior ground water diversions from the ESPA were materially injuring senior SWC natural flow and storage rights. Vol. 8 at 1384-85, 1402. The amount of material injury to the seniors was determined to be 27,700 acre feet of water. *Id.* at 1402. Applying the amount of water used by SWC water users in 1995, the Director determined the "minimum full supply" needed for full deliveries, and then subtracted the predicted 2005 supply, in order to calculate a total shortage of 133,400 acre feet. *Id.* at 1384. Built into this calculation was the assumption that SWC members use all of their carryover storage from 2004. Further, the Director found that "[m]embers of the Surface Water Coalition are entitled to maintain a reasonable amount of carryover storage to minimize storages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rule (IDAPA 37.03.11.042.g)." *Id.* at 1385. The Director determined the amount of reasonable carryover due to SWC by averaging the amounts of carryover storage based on flow and storage accruals from 2002 and 2004. *Id.* Finally, the Director ordered that replacement water be provided over time to SWC and that the amount of replacement water for 2005 not be less than 27,700 acre feet. *Id.* at 1404. The Director determined that if all of the replacement water is not provided to the senior users as required, the amount remaining would be added to the ground water users' obligations for future years. However, the Director also ordered that the ground water users may be curtailed if at any time mitigation is not provided. *Id.*

Thereafter, the Director issued a series of supplemental orders, which reviewed IDWR action, made additional findings, and modified or revised previous findings. R. Vol. 37 at 7067-7071. For instance, on June 29, 2006, the Director entered his *Third Supplemental Order* ("*June 29, 2006 Supplemental Order*"), determining that the remainder of the replacement water that IGWA was to supply in 2005 was to be supplied at the beginning of the 2006 irrigation season, and not as 2005 carryover storage. R. Vol. 20 at 3756. Subsequent supplemental orders amended or approved replacement water plans for 2006, 2007, and 2008. R. Vol. 37 at 7068-7071, Vol. 38 at 7198.

2. IGWA

On February 3, 2004, IGWA filed two petitions to intervene in the request for administration in Water District 120 and the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area, and designation of the ESPA as a Ground Water Management Area. R. Vol. 2 at 197, 204. IGWA is a non-profit corporation that represents ground water users who pump water from the ESPA and irrigate over 700,000 acres of land from the aquifer. R. Vol. 37 at 7058. IGWA represents water users with ground water rights junior to SWC's rights, which are subject to curtailment under the Director's *Final Order*.

In a February 14, 2005 *Order*, the Director granted IGWA's petition to intervene in the matter of water right administration in Water District 120 and in the American Falls Ground Water Management Area.[2] *Id.* at 228.

IGWA has filed petitions for reconsideration of each of the *Director's Orders* and is a respondent in the petition for judicial review currently before this Court. ("IGWA or Ground Water Users").

3. The City of Pocatello

On April 26, 2005, the City of Pocatello filed a petition to intervene in the SWC delivery call. R. Vol. 7 at 1254. The City of Pocatello holds a ground water right that is junior to rights held by SWC and is subject to curtailment under the Director's *Final Order*. R. Vol. 37 at 7060.

On May 16, 2005, the City of Pocatello filed a petition for reconsideration of the Director's *May 2, 2005 Order*, and also filed petitions for reconsideration for later *Supplemental Orders*. R. Vol. 9 at 1669, Vol. 23 at 4376, Vol. 25 at 4745. The City of Pocatello is a respondent in the petition for judicial review currently before this Court.

[2] The Idaho Dairymen's Association, the City of Pocatello, the United States Bureau of Reclamation, and the State Agency Ground Water Users were also granted intervention in the proceedings before Director Dreher. *See* R. Vol. 39 at 7381.

4. Hearing on the SWC Delivery Call, Hearing Officer Schroeder's Recommended Order and the Director's Final Order

On August 1, 2007, Director David Tuthill issued an *Order Approving Stipulation and Rescheduled Hearing*, and an *Order Appointing Hearing Officer*, setting a hearing on the SWC delivery call and appointing Hon. Gerald F. Schroeder ("Hearing Officer") to preside over the hearing. R. Vol. 25 at 4770, 4775. The hearing began on January 18, 2008, and concluded on February 5, 2008. R. Vol. 37 at 7048. On April 29, 2008, the Hearing Officer entered his *Opinion Constituting Findings of fact, Conclusions of Law and Recommendation* ("*Recommended Order*"). *Id.*

In sum, the Hearing Officer concluded that: 1) the Director's assignment of a 10% uncertainty to the ESPA model and the use of a "trim-line" was reasonable, *Id.* at 7080; 2) the Director's consideration of the public interest criteria was proper, *Id.* at 7086; 3) the Director's application of a "minimum full supply" was reasonable when subject to adjustment as conditions change, but was unacceptable as a fixed amount, *Id.* at 7091, 7095, 7098-7099; 4) the existing facilities utilized by SWC were reasonable, *Id.* at 7101-7102; 5) the members of SWC were employing reasonable conservation practices, *Id.* at 7103-7104; 6) the Director's determination to provide carryover storage for one year (not multiple years) was reasonable, *Id.* at 7109; 7) the process utilized by the Director to determine a reasonable amount of carryover storage due to SWC was proper; 8) the Director's order of replacement water plans as a form of mitigation was proper, *Id.* at 7112-7113; and 9) replacement water must be approved in accordance with the procedures of the Conjunctive Management Rules, and provided at the time of material injury, *Id.* at 7112.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call.* R. Vol. 39 at 7381. The *Final Order* adopted the findings of fact and conclusions of law of the previous Director's orders issued in the delivery call, and the recommended orders of the Hearing Officer except as specifically modified. *Id.* at 7387. In particular, the Director held that 1) the Director properly exercised his discretion in authorizing replacement water as an interim measure for mitigation to senior water users before conducting a hearing to determine material injury, *Id.* at 7383, 7388; 2) it was appropriate to find that replacement water for predicted

shortages to reasonable carryover be provided in the season in which water can be put to beneficial use, not the season before, *Id.* at 7386, 7391; and 3) the term "reasonable in-season demand" will replace the use of the term "minimum full supply", *Id.* at 7386.

5. Petitions for Judicial Review

Petition for judicial review of the *Final Order* was timely filed by the SWC on September 11, 2008. On September 25, 2008, the United States Bureau of Reclamation filed a *Petition for Reconsideration* of the Director's *Final Order*. Thereafter, the Director issued an *Order Denying USBR Petition for Reconsideration and Pocatello's Response*. BOR then timely filed a petition for judicial review on November 7, 2008. This case was assigned to this Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication, on September 12, 2008.

C. Relevant Facts

1. The Water Rights at Issue

a) The A&B Irrigation District

A & B holds natural flow right number 01-00014 for 267 cfs with a priority date of April 1, 1939, and storage water rights in American Falls Reservoir for 46,826 acre feet with a priority date of March 30, 1921, and 90,800 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 137,626 acre feet. R. Vol. 37 at 7055.

b) The American Falls Reservoir District #2

AFRD #2 holds natural flow right number 01-006 for 1,700 cfs with a priority date of March 30, 1921, and storage water rights in American Falls Reservoir for 393,550 acre feet with a priority date of March 30, 1921. R. Vol. 37 at 7055.

c) The Burley Irrigation District

BID holds natural flow right number 01-00211B for 655.88 cfs with a priority date of March 26, 1903, and natural flow right number 01-00214B for 380 cfs with a priority date of August 6, 1908, and natural flow right number 01-00008 for 163.4 cfs with a priority date of April 1, 1939. BID also has a storage rights in Lake Walcott for 31,892 acre feet with a priority date of December 14, 1909; 2,672 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 155,395 acre feet in American Falls Reservoir with a priority date of March 30, 1921; 36,528 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 226,487 acre feet. R. Vol. 37 at 7055.

d) The Milner Irrigation District

Milner holds natural flow right number 01-00017 for 135 cfs with a priority date of November 14, 1916, and natural flow right 01-00009 for 121 cfs with a priority date of April 1, 1939, and natural flow right number 01-02050 for 37 cfs with a priority date of July 11, 1968. Milner has storage rights of 44,951 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 45,640 acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 90,591 acre feet. R. Vol. 37 at 7055.

e) The Minidoka Irrigation District

MID holds natural flow rights number 01-00211A for 1,070 cfs with a priority date of March 26, 1903, right number 01-00214A for 620 cfs with a priority date of August 6, 1908, and right number 01-00008 for 266.6 acre feet with a priority date of April 1, 1939. MID has storage rights of 127,040 acre feet in Jackson Lake with a priority date of August 23, 1906; 58,990 acre feet in Jackson Lake with a priority date of August 18, 1910, 63,308 acre feet in Lake Walcott with a priority date of December 14, 1909; 5,328 acre feet in Palisades Reservoir with a priority date of March 29, 1921; 82,216 acre feet in American Falls Reservoir with a priority date of March 30, 1921, and 29,672, acre feet in Palisades Reservoir with a priority date of July 28, 1939, for combined storage rights of 336,554 acre feet. R. Vol. 37 at 7056.

f) The North Side Canal Company

NSCC holds natural flow rights 01-00210 for 400 cfs with a priority date of October 11, 1900, right number 01-00212 for 2,250 cfs with a priority date of October 7, 1905; right number 01-00213 for 890 cfs with a priority date of June 16, 1908; right number 01-00005 for 300 cfs with a priority date of December 23, 1915; and right number 01-00016 for 1,260 cfs with a priority date of August 6, 1920. NSCC has storage rights for 312,007 acre feet in Jackson Lake with a priority date of May 24, 1913; 9,248 acre feet in American Falls Reservoir with a priority date of March 29, 1921; 116,600 acre feet in Palisades Reservoir with a priority date of March 29, 1921; and 422,043 acre feet in American Falls Reservoir with a priority date of March 30, 1921. R. Vol. 37 at 7056.

g) The Twin Falls Canal Company

TFCC holds natural flow rights 01-00209 for 3,000 cfs with a priority date of October 11, 1900, right number 01-00004 for 600 cfs with a priority date of December 22, 1915, and right 01-00010 for 180 cfs with a priority date of April 1, 1939. TFCC has storage rights of 97,183 acre feet in Jackson Lake with a priority date of May 24, 1913, and 147,582 acre feet in American Falls Reservoir with a priority date of March 29, 1921, for combined storage rights of 244,765 acre feet. Twin Falls Canal Company has claimed in the SRBA and the Director has recommended irrigation rights totaling 196,162 acres. TFCC delivers water to 202,690 shares. R. Vol. 37 at 7056.

2. Eastern Snake Plain Aquifer (ESPA)

The ESPA is an unconfined aquifer underlying a geographic area of approximately 10,800 square miles of southern and southeast Idaho. R. Vol. 37 at 7050. The ESPA connects with the Snake River and its tributaries along a number of reaches resulting in either gains or losses to the River depending on the level of the aquifer in relation to the River. *Id.* The ESPA consists primarily of fractured basalt ranging in a saturated thickness of several thousand feet in the central part of the Eastern Snake River

Plain, to a few hundred feet in the Thousand Springs area where the water is discharged through a complex of springs. Water flow through the ESPA is not uniform. Water travels through the system at rates ranging from 0.1 feet per day to 100,000 feet per day depending on subterranean geology, elevation and pressure differentials. *Id.* The ESPA receives approximately 7.5 million acre-feet per year from the following sources: irrigation related incidental recharge (3.4 million acre-feet), precipitation (2.2 million acre-feet) flow from tributary basins (0.9 million acre-feet) and losses from the Snake River and its tributaries (1.0 million acre-feet). R. Vol 2 at 198. On average between May 1980 and April 2002, the ESPA discharged approximately 7.5 million acre-feet on an annual basis through spring complexes located in the Thousand Springs area and near the American Falls Reservoir and through the discharge of approximately 2.0 million acre-feet per year through depletions from ground water withdrawals. *Id.* The ESPA is estimated to contain as much as one billion acre-feet of water. R. Vol. 37 at 7050.

The early 1950's marked the beginning of the use of deep well pumps on the ESPA. Spring flows then began to decline as a result of conversion from flood irrigation to sprinkler irrigation as well as depletions caused by ground water pumping. R. Vol. 37 at 7052. As a result, spring discharges and ESPA ground water levels have been declining in the last 50 years. A moratorium on new ground water permits was issued in 1992. R. Vol. 37 at 7058.

3. ESPA Model

A calibrated ground water model was used by the Director to predict the effects of curtailment of junior ground water rights. R. Vol. 2 at 199. The model has strengths and weaknesses. The model was designed to simulate gains and losses in various reaches of the Snake River including the reach from Shelley, Idaho to Minidoka Dam, which includes the American Falls Reservoir. *Id.* at 200. The model divides the ESPA into individual one mile by one mile cells. R. Vol. 37 at 7079. Despite the lack of homogeneity in the ESPA the model treats all cells as homogenous. The model was developed with input from a number of stakeholders with competing interests. *Id.*

4. The Bureau of Reclamation

The United States Bureau of Reclamation operates four main reservoir facilities on the Snake River: Jackson Lake Reservoir ("Jackson"), American Falls Reservoir ("American Falls"), Lake Walcott or Minidoka Dam ("Minidoka"), and Palisades Reservoir ("Palisades"). R. Vol. 37 at 7060-7061. This reservoir system was originally constructed with the intent to provide storage water to irrigators to insure against water shortages in times of drought. *Id.* More recently, the system also allows for flood control and hydropower production, while continuing to provide irrigation districts with the certainty that water will be available in future years. R. Vol. 37 at 7060-7061, 7107-7108. The BOR has contracts with members of SWC and the City of Pocatello for water held in storage in this reservoir system, including contracts for carryover water for irrigation. *Id.* at 7060-7061. *See also* United States' *Opening Brief*, at 3-4. As a result, the BOR has an interest in how the water rights at issue in this delivery call are administered. *See also U.S. V. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (holding legal title is held by the BOR with equitable title being held by landowners within the service area of SWC).

5. Interim Administration and Formation of Water District

On January 8, 2002, pursuant to I.C. § 42-1417, the SRBA District Court ordered Interim Administration of water rights located in all or portions of Basins 35, 36, 41 and 43, which included the water rights at issue in this matter. R. Vol. 2 at 200. On February 19, 2002, the Director of IDWR issued orders creating Water District Nos. 120 and 130. On November 19, 2002, the SRBA District Court ordered interim administration of a portion of Basin 37, which includes water rights at issue in this matter. *Id.* Thereafter, the Director issued an order revising the boundaries of Water District 130 to include this portion of Basin 37. *Id.* On October 29, 2003, the SRBA District Court issued an order authorizing Interim Administration of water rights located in portions of Basin 29, which includes water rights at issue here. *Id.* Again, the Director thereafter issued an order revising the boundary of Water District No. 120 to include this portion of Basin 29. *Id.* at

201. The water rights at issue in this case are included in Water District nos. 120 and 130, and such water districts have been created in order to provide for administration of water rights to protect prior surface and ground water rights. R. Vol. 37 at 7064. As a precondition for interim administration Idaho Code § 42-1417 requires that water rights either be reported in a director's report or partially decreed. I.C. § 42-1417 (a) and (b).

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held May 26, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or May 27, 2009.

III.
APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), 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 or appellant 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. Idaho Code § 67-5279(4); *Barron v. IDWR,* 135 Idaho 414, 18 P.3d 219, 222 (2001). 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] *Id.* The Petitioner (the party challenging the agency decision) 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).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of*

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[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).

Utah Hosp. v. Board of Comm'rs of Ada Co., 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

IV.
ISSUES PRESENTED FOR JUDICIAL REVIEW

A. Issues Raised by SWC

In its brief, SWC raised a number of issues. The Court has summarized these issues as follows:

1. Whether the Director failed to provide timely and lawful conjunctive administration of junior ground water rights?

2. Whether the Director gave proper weight and deference to the SWC's decreed senior water rights?

3. Whether the Director exceeded his statutory authority through the implementation of replacement water plans?

4. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary, capricious, and contrary to law?

5. Whether the Director's application of the Conjunctive Management Rules is consistent with Idaho law?

6. Whether the Director's use of a 10% "trim-line" resulting in the exclusion of certain junior priority ground water rights from administration was arbitrary, capricious, and contrary to law?

7. Whether the Director's determinations regarding carryover storage is arbitrary, capricious, and contrary to law?

B. Issues Raised by the Bureau of Reclamation

1. Whether the Director abused his discretion by failing to allow reasonable carryover storage for use in multiple years?

2. Whether the Director abused his discretion by failing to require mitigation of the material injury to reasonable carryover storage in the season the injury occurs?

V.
ANALYSIS AND DISCUSSION

A. The Director abused discretion by failing to require mitigation of material injury to reasonable carry-over storage in the season in which the injury occurs.

The SWC and BOR argue that Director Tuthill acted outside the scope of his authority and abused discretion by waiting until the following irrigation season before making a final determination of material injury to carry-over storage. Instead of making a final determination of injury, the Director adopted at "wait and see" approach to see if the storage reservoirs were predicted to fill the following year. The Director would not make a final determination until after the issuance of the "joint forecast" for the inflow for the Upper Snake River Basin which is issued annually after April 1st by the BOR and the United States Army Corps of Engineers. The Director reasoned as follows:

> The former Director [Dreher] found that shortfalls to reasonable carryover should be provided the season before the water can be put to beneficial use. as evidenced in 2006 and 2008, if the reservoir system mostly fills and had IGWA been required to provide reasonable carryover shortfalls to injured members of the SWC, the secured water would have been in excess of the amount needed for beneficial use by members of the SWC in the season of need.
>
> As found by the Hearing Officer, the reservoir system fills two-thirds of the time, and storage water has been historically available for rental or lease even during times of drought. *Recommended Order* at 6, 15. To order reasonable carryover the year prior to the season of need would result in waste of the State's water resources. *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 422, 319 P.2d 995, 968 (1957); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900). It is appropriate to notify the parties in the fall prior to the upcoming irrigation season of predicted carryover shortfalls for planning purposes. *But it is not appropriate to require junior ground water users to provide predicted shortfalls until the spring when the water can be put to beneficial use*

> *during the season of need*: 'As indicated, requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards applied in *AFRD#2*.'

Final Order, R. Vol. 39 at 7391 (emphasis added). The Director concluded that if the reservoirs filled in the following year any shortfall to carry-over storage from the preceding year would be cancelled. This Court concludes that this issue is addressed by the express language and framework of the CMR.

1. Surface Storage Rights Include Reasonable Carry-Over Storage.

The storage rights held by the BOR and SWC include the right to reasonable carry-over. CMR 042 expressly acknowledges material injury to carry-over storage.

> **Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:
>
> . . .
>
> g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage, 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.

CMR 042.01.g. In *American Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD #2*"), the Idaho Supreme Court upheld the constitutionality of the reasonable carry-over provisions of the CMR.

> Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out. *For*

> *purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task.* ***This Court upholds the reasonable carryover provisions in the CM Rules.***

AFRD #2 at 880, 154 P.3d at 451 (emphasis added). Clearly, based on the foregoing, absent conditions or other limitations included in the partial decree, a surface storage right includes with it the right to reasonable carry-over.

2. The Director's "wait and see" determination of material injury to carry-over storage is only authorized pursuant to a mitigation plan.

The CMR state that in determining a reasonable amount of carry-over storage "the Director shall consider the average annual rate of fill of storage reservoirs and the average carry-over for prior comparable water conditions and the projected water supply for the system." CMR 042.01.g. Of significance is that the "material injury" provisions of the CMR with respect to the reasonable carry-over provisions of storage water do not authorize a "wait and see" approach for purposes of determining material injury to carry-over storage. *See generally* CMR 042 ("Determining Material Injury and Reasonableness of Water Diversions"). Rather, a "wait and see" type approach is expressly authorized under the mitigation provisions of the CMR. CMR 043 provides:

> 03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan *will prevent injury to senior rights* include, but are not limited to, the following:
>
> c. ... A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply.

CMR 043.03.c. (emphasis added). However, the provision goes on to provide: "***The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable.***" *Id.* (emphasis added). This language is unambiguous.

A court must construe a statute as a whole and consider all of its sections together. *Davaz v. Priest River Glass Co., Inc.* 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). As such, the court must adopt a construction that will harmonize and reconcile all of the provisions of a statute. *State v. Horejs*, 143 Idaho 260, 266, 141 P.3d 1129, 1135 (Ct. App. 2006).

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 water. The Hearing Officer found that to date during extended drought periods there has always been water available somewhere at a price. Although the water may be expensive and/or difficult to obtain. R. Vol. 37 at 7053. While water may be available somewhere, the failure to require any protections for seniors is contrary to the express provisions and framework of the CMR. 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.[4] 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. The BOR and SWC argue that in the event the reservoirs do not fill in times of shortage, the risk of junior ground pumpers not being able to obtain replacement water to mitigate for injury to carry-over storage is unconstitutionally borne by the senior. This Court agrees.

Under the CMR the ordering of replacement water or other mitigation is in lieu of curtailment. CMR 040.01 provides in relevant part that "upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director through the water master, 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 in 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." CMR 040.01.a. and b. The Hearing Officer also acknowledged: "The theory underlying predicting material injury and allowing replacement water as mitigation instead of

[4] An option for water or some other mechanism for securing water pursuant to a long term mitigation plan where the cost would be less than actually transferring or leasing water.

requiring curtailment is that replacement water will be provided in time and in place in stages comparable to what would occur if curtailment were ordered." R. Vol. 37 at 7113. In the event replacement water could not be obtained in the following irrigation season or was determined too costly to obtain, ordering curtailment after the irrigation season has already begun or is about to begin presents new issues and problems. Both senior and juniors will have already planted crops. At that point curtailment may not timely remediate for the carry-over shortfall. The seniors are therefore forced to assume losses and adjust their cropping plans based on not having the anticipated quantity of carry-over storage. The Director is also faced with the issue as to whether or not to curtail junior ground water users based either on futile call as to the instant irrigation season or considerations regarding lessening the impact of economic injury. The Hearing Officer aptly pointed to this dilemma: "Curtailment of the ground water users may well not put water into the field of the senior surface water user in time to remediate the damage caused by a shortage, whereas the curtailment is devastating to the ground water user and damaging to the public interest which benefits from a prosperous economy." R. Vol. 37 at 7090. Ultimately, the prior appropriation doctrine is turned upside down. Therefore, unless assurances are in place that carry-over shortfalls will be replaced if the reservoirs do not fill, the risk of shortage ultimately falls on the senior. As such, the very purpose of the carry-over component of the storage right -- insurance against risk of future shortage -- is effectively defeated.

Accordingly, the Court concludes that the Director abused discretion in failing either to order curtailment in the season of injury or alternatively require a contingency provision to assure protection of senior right in the event the reservoirs do not fill.

3. The Director abused discretion by categorically denying reasonable carry-over for storage for more than one year.

The BOR and SWC argue that the Director acted outside of his authority and/or abused discretion by failing to require juniors to provide carry-over water for use beyond the one irrigation season. The Hearing Officer essentially recommended a categorical

rule with respect to carry-over storage beyond one irrigation season (as opposed to a case-by-case determination):

> The multiple functions of BOR and the desire of SWC for long term insurance against adverse weather conditions are legitimate and consistent with the language of CM Rule 42.01.g which refers to dry years. Nonetheless, attempting to curtail or to require replacement water sufficient to insure storage for periods of years rather than the forthcoming year presents too many problems and too great likelihood for the waste of water to be acceptable. Curtailing to hold water for longer than a year runs a serious risk of being classified as hoarding, warned against by the Supreme Court in AFRD #2. . . Ordering curtailment to meet storage needs beyond the next year is almost certain to require ground water pumpers to give up valuable property rights or incur substantial financial obligations when no need would develop enough times to warrant such action.

R. Vol. 37 at 7109. The Director adopted this reasoning in the *Final Order*. R. Vol. 39 at 7385. The problem with such a determination is that it is inconsistent with the plain language and framework of the CMR as well as the Idaho Supreme Court's ruling in AFRD #2. There is not a statute that specifically authorizes, defines or limits carry-over storage. However, carry-over storage is specifically included in the "**Determining Material Injury and Reasonableness of Water Diversions**" section of the CMR.[5] CMR 042.01.g provides "the holder of a surface storage right *shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years*. (emphasis added). IDWR argues in its brief that "[t]here appears to be a misconception in the opening briefs filed by the SWC and USBR that the Director has limited those entities' ability to hold carryover storage. Nothing in the Final Order limits the right to hold carryover storage. Rather, the issue is whether junior ground water users are subject to curtailment for the purpose of providing water to enhance carryover storage beyond one year." *Respondent's Brief* at 14. The problem with IDWR's argument is that the carry-over storage provisions are specifically included in the material injury section of the CMR as opposed to being just a provision that authorizes carry-over storage. Once material injury is established (absent defenses raised by juniors), then the Director must

either regulate the diversion and use of rights in accordance with priority or allow out-of –priority diversion pursuant to an approved mitigation plan. CMR 040. 01. a. and b. Accordingly, the CMR clearly contemplate that juniors can be curtailed to enhance carry-over storage beyond one year.

This exact provision withstood a facial constitutional challenge in *AFRD#2*. The Idaho Supreme Court rejected the argument that storage rights holders should be permitted to fill their entire storage right regardless of whether there was any indication that it was necessary to fulfill current or future needs. *Id.* at 880,154 P.3d at 451 (2007). The Supreme Court also rejected the argument of ground water users that the purpose of the reasonable carry-over provision is to meet actual needs as opposed to "routinely permitting water to be wasted through storage and non-use." The Court acknowledged that it is "permissible . . . to hold water over from one year to the next absent abuse." *Id.* at 880, 154 P.3d at 451 (citing *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 157 P.2d 76 (1945)). But "[t]o permit excessive carryover of stored water without regard to the need for it would in itself be unconstitutional." *Id.* Ultimately, the Court concluded that the CMR were facially constitutional in permitting some discretion in the Director to determine whether carryover water is reasonably necessary for future needs." *Id.*

Based upon this holding, this Court concludes that the Director exceeded his authority by concluding that permitting carry-over for more than just the next season is categorically unreasonable and results in the unconstitutional hording of water. Such a determination contravenes the express language and framework of the CMR. The Director, however, in the exercise of discretion, can significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances of a particular delivery call. Ultimately, the end result may well be the same. Finally, as discussed above, the securing of water through an option or similar method pursuant to or in conjunction with a long term mitigation plan would eliminate any concerns regarding hoarding water or other abuses.

[5] In referring to 'framework" the Court means that the reasonable carry-over provision is specifically located in the material injury and reasonableness of diversion section of the CMR.

B. The Director did not err in combining the natural flow rights and storage rights for purposes of determining material injury.

The SWC argues that the Director abused discretion and/or exceeded his authority by combining the supply of natural flow rights and storage rights for purposes of making a material injury determination. This Court disagrees. The irrigation water requirements of the members of the SWC are satisfied through a combination of decreed natural flow and storage rights. Storage is supplemental to natural flow to meet water requirements. However, the extent to which individual members of the SWC rely on storage to supplement natural flow in order to satisfy irrigation season demands varies. As a result of differing priority dates, some SWC members do not have sufficient natural flow rights to irrigate through an entire season and must rely heavily on storage rights to meet irrigation season demands. For others with earlier natural flow priority dates, less reliance on storage rights to meet seasonal demands is required. However, because one of the purposes of a storage right includes carry-over for future use, the combined full decreed quantities of natural flow and storage rights can exceed the quantity necessary to satisfy the water requirements for a single irrigation season. In the context of a material injury analysis, the issue is then at what point does material injury occur to a senior storage right such that curtailment of junior ground pumpers or mitigation in lieu of curtailment is required? Former Director Dreher discussed this issue in his testimony:

> Do you curtail junior priority ground water use to provide full reservoirs? Half-full reservoirs? At what point do you curtail junior-priority ground water use because of storage, the reduced storage supplies that are available to the senior right holders?

Tr. at 42-43.

Although the storage rights are decreed separately from the natural flow rights, the purpose of use of the storage rights is that the stored water will be released and used to supplement the natural flow rights for irrigating the same lands.[6] Therefore, it would be error for the Director not to consider natural flow and storage rights in conjunction with each other. This was confirmed by the Idaho Supreme Court in *AFRD#2,* where the

[6] The storage use is not an *in situ* use such as recreation, aesthetic etc.

Idaho Supreme Court specifically rejected the argument that senior surface storage right holders were entitled to seek curtailment up to the decreed quantity of the storage right regardless of whether there was any indication that it was necessary to fulfill current or future irrigation needs. The Court held that storage right holders were entitled to protection for reasonable carry-over:

> Clearly American Falls has decreed storage rights. Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute right without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or lost. Somewhere between the absolute right to use a decreed water right and the obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out. For purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task. This Court upholds the reasonable carry-over provisions.

AFRD#2 at 880, 154 P.2d at 451. The Director's actions must be evaluated against the back drop of this holding. Additionally, one of the factors the Director is to consider in determining material injury under CMR 042 is "the extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing water supplies . . . ." CMR 042.01.g. Accordingly, because:

1) a combination of both natural flow and storage rights are used for the purpose of meeting the same irrigation purpose of use; and

2) the decreed quantity of natural flow rights and the decreed quantity of storage rights can exceed irrigation demands for a single irrigation season; and

3) regulation of juniors for carry-over storage is limited to reasonable carry-over as opposed to the full quantity of the storage right; and

4) a material injury analysis requires that the Director consider the extent to which the requirements of a senior water right holder can be met with existing water supplies;

the Director's material injury determination necessarily requires evaluating natural flow and storage rights in conjunction with each other, as opposed to independently from each other. Accordingly, the Director did not abuse discretion or act outside his authority in considering natural flow rights and storage rights together for purposes of making a material injury determination.

1. The 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.

In determining material injury to senior rights the Director considered a "baseline" quantity independent of the decreed or licensed quantity. The baseline quantity represented the amount of water predicted from natural flow and storage needed to meet in-season irrigation requirements and reasonable-carryover. The Director then determined material injury based on shortfalls to the predicted baseline as opposed to the decreed or licensed quantities. Former Director Dreher labeled the baseline "minimum full supply." Director Tuthill in the *Final Order* replaced "minimum full supply" with the term "reasonable in-season demand." R. Vol. 39 at 7386. The SWC argues that the Director abused discretion and acted contrary to law by using a baseline quantity, as opposed to the decreed or licensed quantity. This Court disagrees.

On first impression it would appear that the use of such a baseline constitutes a re-adjudication of a decreed or licensed water right. As stated by the Hearing Officer "[t]he

logic of SWC in objecting to the Director's use of a minimum full supply is difficult to avoid." R. Vol.37 at 7090. However, on closer examination the use of baseline is a necessary result of the Director implementing the conditions imposed by the CMR with respect to regulating junior rights to protect senior storage rights. Put differently, senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR 042. Rule 042 of the CMR lists a number of factors the Director is to consider in determining material injury to senior rights. CMR 042.01 a-h. As this Court concluded previously, the total combined decreed quantity of the natural flow and storage rights can exceed the amount of water necessary to satisfy in-season demands plus reasonable carry-over. Simply put, pursuant to these factors a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right. Although the CMR do not expressly provide for the use of a "baseline" or other methodology, the Hearing Officer concluded that: "Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at base and works up according to need, the end result should be the same." R. Vol 37 at 7091. Ultimately the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable provided the baseline was adjustable to account for weather variations and that the process satisfied certain other enumerated conditions. R. Vol. 37 at 7086- 7100. This Court affirms the reasoning of the Hearing Officer on this issue.

C. The Director did not err in using the 10 % margin of error for the ESPA Model or in using as a "trim-line" for juniors located with the margin of error.

The Court addressed this issue at length in the *Order on Petition for Judicial Review* recently issued in Gooding County Case No. 2008-000444, which involves many of the same parties to this action. *See* Gooding County Case No. 2008-000444 ***Order on***

Petition for Judicial Review (June 19, 2009) at 25-28. The Court's analysis and holding in that decision is incorporated herein by reference.

D. The Director Abused Discretion by ordering a "replacement water plan" in lieu of following the procedures set forth in the CMR.

In response to the January 2005, request for administration filed by the SWC, the Ground Water Users filed an *Application for Approval of Mitigation Plan* pursuant to CMR 043. R. Vol. 1 at 126. A hearing was originally scheduled on the *Application* but was ultimately continued. R. Vol. 1 at 186; R. Vol. 2 at 454. On May 2, 2005, the Director issued an *Amended Order*, which made findings of fact and conclusions of law relative to material injury predictions and ultimately ordered replacement water as "mitigation" in lieu of curtailment. *See e.g. Amended Order*, R. Vol. 8 at 1403-1405 ¶¶ 1-14. The *Amended Order* also provided:

> As required herein, the North Snake, Magic valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices no later than 5:00 pm on April 29, 2005. Requests for extensions to file a plan for good cause will be considered on a case-by-case basis and granted or denied based on the merits of any such individual request for extension. The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension. A plan that is approved with conditions will be enforced by the Department and the water masters for Water Districts No. 120 and No. 130 through curtailment of the associated rights in the event the plan is not fully implemented.

Amended Order, R. Vol. 8 at 1405-05, ¶ 9. In response, the SWC filed a *Protest, Objection, and Motion to Dismiss 'Replacement Water Plans,'* on the grounds that the Director failed to follow the procedures set forth in the CMR. R. Vol. 8 at 1507.

> Conjunctive Management Rule 43 clearly sets forth the method for submitting mitigation plans, requires notice and hearing, requires that the

> plan be considered under the procedural provisions of Idaho Code § 42-222 in the same manner as applications to transfer water rights, and sets forth specific factors that may be considered by the Director of the Department in determining whether a proposed mitigation plan will prevent injury to senior rights.
>
> The department has no legal right or ability to unilaterally create new conjunctive management rules nor do those proposing mitigation have any legal authority to proceed other than set forth in the Conjunctive Management Rules. Should the Director or the Department desire to create new rules, the provisions of the Idaho Administrative procedure Act must be followed. See Idaho Code § 67-5201 *et seq*.

R. Vol. 8 at 1511. On May 6, 2005, without conducting a hearing, the Director issued an *Order Approving IGWA's Replacement Water Plan for 2005.* R. Vol. 12 at 2174. Thereafter the Director issued a series of supplemental orders amending the replacement water requirements.[7] A limited hearing was granted on IGWA's 2007 Replacement Plan. R. Vol. 23 at 4396. The hearing was limited as follows:

> The hearing on the 2007 Replacement Plan is limited in scope to presentation of information regarding the implementation of the Plan by IGWA to demonstrate that timely, in-season replacement water and reasonable carryover water can be provided to members of the Surface water Coalition.
>
> The hearing on IGWA's 2007 Replacement Plan will not include argument or presentation of evidence on any other orders issued by the Director, or the Director's method and computation of material injury.

Id. at 4397. Ultimately, a hearing was held before the Hearing Officer on January 16, 2008. The Hearing Officer determined that: "[t]he replacement water plan approved by

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[7] *Supplemental Order Amending Replacement Water Requirements* (July 22, 2005), R. Vol. 13 at 2424; *Second Supplemental Order Amending Replacement Water Requirements* (Dec. 27, 2005), R. Vol. 16 at 2994; *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* (June 29, 2006), R. Vol. 20 at 3735; *Fourth Supplemental Order Amending Replacement Water Requirements* (July 17, 2006), R. Vol. 21 at 3944; *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* (May 23, 2007), R. Vol. 23 at 4286; *Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan* (July 11, 2007), R. Vol. 25 at 4714; *Seventh Supplemental Order Amending Replacement Water Requirements* (December 20, 2007), Ex. 4600; *Eighth Supplemental Order Amending Replacement Water Requirements Final 2007 & Estimated 2008* (May 23, 2008), R. Vol. 38 at 7198.

the former Director in the May 2, 2005, Order and Supplemental Orders is in effect a mitigation plan. However, it does not appear that the procedural steps for approving a mitigation plan were followed." R. Vol. 37 at 7112.

This Court agrees. This is not a situation where the replacement water ordered is consistent with the timing and in the quantities authorized under the decreed or licensed rights, leaving no room for disagreement. Rather this is situation where the Director has extensively applied the provisions of the CMR for purposes of making a material injury analysis ultimately resulting in adjustments in the timing of delivery and in the quantities of water authorized under the decrees or licenses. The Court sees no distinction between the "replacement water plans" ordered in this case and a mitigation plan. Mitigation plans under the CMR are defined as:

> A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law.

CMR 010.15. governed by CMR 43:

> **043. MITIGATION PLANS (RULE 43).**
> **02.** Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222, which provides in relevant part:

> Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. *Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the*

> *receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.*

(emphasis added). The Director did not follow this process. IDWR argues that "[a]uthorizing replacement plans is akin to a court issuing a preliminary injunction in a civil matter to preserve the status quo, pending final judgment." While this may be true the Court is aware of no circumstance under the civil rules where a preliminary injunction is issued without the opportunity for a hearing. Next, the Director's preliminary relief extended over a period of multiple irrigation seasons in effect becoming an unauthorized substitute for a mitigation plan. Finally, Director concluded in his *Final Order*:

> Once a record is developed through the hearing process on the delivery call, a formal mitigation plan should be submitted by junior ground water users to mitigate material injury to the senior. Since a Rule 43 mitigation plan serves as a long term solution to material injury to senior water users, it is necessary for junior ground water users to have a proper record upon which to develop the plan because the amount of water sought by the senior in its delivery call may not be the amount attributable to junior ground water depletions.

R. Vol. 39 at 7384. However, the methodology employed by the Director in conjunction with the replacement plan can result in junior ground water users never being required to file a mitigation plan. For example, if and when the reservoirs ultimately fill and no future injury is predicted the filing of a mitigation plan is not required under the CMR. If the next time a shortfall occurs and the Director responds with the replacement plan process, the replacement plan has by default effectively circumvented and replaced the mitigation plan requirement. Thus, the process may never reach the point where a mitigation plan is filed.

While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users.

E. The Director exceeded his authority in determining that full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 of an inch instead of 3/4 of an inch per acre.

In response to information requests to SWC members made by former Director Dreher, Twin Falls Canal Company responded that 3/4 of an inch per acre constituted full headgate delivery. The Hearing Officer concluded:

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

R. Vol. 37 at 7100. Director Tuthill accepted the recommendation in his *Final Order*. R. Vol. 39 at 7392. TFCC's water right is still pending in the SRBA. The *Director's Report* recommended the water right at the delivery of 3/4 of an inch. Ex. 4001A. IGWA filed a SRBA *Standard Form 1 Objection* to the recommendation asserting *inter alia*, "The quantity should not exceed 5/8" per acre consistent with the rights of other surface water coalition rightholders." Ex. 9729. Proceedings on the *Objection* are currently pending in the SRBA. The Hearing Officer's recommendation appears to be based on a determination that TFCC's water right only entitles it to 5/8 of an inch per acre. The SRBA Court is vested with exclusive jurisdiction for determining the elements of a water right. Furthermore, the Director's determination is inconsistent with his recommendation for the claim in the SRBA. The SRBA Court ordered interim administration of the water rights at issue in this proceeding pursuant to Idaho Code § 42-1417. Idaho Code § 42-1417 provides: "The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code . . . in accordance with the director's report or as modified by the court's order . . . [or] . . . in accordance with applicable partial decree(s) for water rights acquired under state law. . . ." I.C. § 42-1417(1) (a) and (b). At this stage of the proceedings the *Director's Report* recommends 3/4 of an inch per acre. The Director can file an amended director's report in the SRBA, however, the

interim administration process is not a substitute for litigating the substantive elements of a water right. *See e.g. Walker v. Big Lost Irr. District*, 124 Idaho 78, 856 P.2d 868 (1993). The Director exceeded his authority in making this determination.

F. The Director abused his discretion by issuing two "*Final Orders*" in response to the Hearing Officer's *Recommended Order.*

In the September 5, 2008, *Final Order*, the Director stated his decision to issue an additional *Final Order* at a later date in response to the Hearing Officer's *Recommended Order*:

> 25. Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing on the order will be provided.

The SWC argues that the failure to address this issue in the *Final Order* was an abuse of discretion. This Court agrees.

In the *Recommended Order*, the Hearing Officer found that adjustments should be made to the methodologies for determining material injury and reasonable carryover for future years. R. Vol. 37 at 7090. The Director adopted this conclusion, but did not address a new method in his September 5, 2008 *Final Order*. R. Vol. 39 at 7382. The process for determining material injury and reasonable carryover is an integral part of the Hearing Officer's *Recommended Order*, and the issues raised in the delivery call. The Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*. Styling the *Final Order* as two orders issued months apart runs contrary to the Idaho Administrative Procedures Act and IDWR's Administrative Rules. *See* I.C. §§ 67-5244, 67-5246, 67-5248 and IDWR Administrative Rules 720 and 740. In addition, the issuance of separate "Final Orders" undermines the efficacy of the entire delivery call process, including the process of judicial review. Such a process requires certainty and definiteness as to the *Final Order* issued, so that any review of the *Final Order* can be complete and timely.[8]

[8] The Court notes that on June 30, 2009, the Director issued an *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover.* The *Order* is not part of the record in this matter.

G. Timeliness of the Director's Response to Delivery Calls.

The SWC also raises the issue that the Director failed to provide timely and lawful administration of junior priority rights to satisfy senior rights. This argument was addressed in the context of the Director's failure to provide mitigation in the season of injury and the Director's use of a replacement plan in lieu of following the procedural requirements for mitigation plans as set forth in the CMR.

VI.

CONCLUSION AND ORDER OF REMAND

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

IT IS SO ORDERED.

Dated: July 24, 2009

JOHN M. MELANSON
District Judge

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 24 of July, 2009, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petition for Judicial Review to the parties listed below via the U.S. Postal Service, postage prepaid:

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Dated: July 27, 2009

Cynthia R. Eagle-Ervin, Deputy Clerk

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

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

Petitioners,

vs.

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

Respondents.

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

Case No. CV-2008-0000551

POCATELLO'S PETITION FOR REHEARING

The City of Pocatello ("Pocatello"), by and through undersigned counsel, pursuant to Idaho Appellate Rule 42, respectfully petition the Court for rehearing on the following issue raised by the Court's July 24, 2009 "Order on Petition for Judicial Review":

1. **To clarify that because "replacement plans" are indistinguishable from mitigation plans, the hearing procedures followed in the future in this matter should be modified to include an opportunity for hearing on the replacement or mitigation water sought to be provided; however, a hearing on this topic cannot be held unless and until a hearing determines that the Department's initial injury determination was correct.**

In the July 24, 2009 Order the Court found that the Director abused his discretion by ordering replacement plans to mitigate injury to the Surface Water Coalition's ("SWC") water rights rather than requiring replacement by means of a mitigation plan approved following Conjunctive Management Rule ("CMR") 43 procedures. However, before a mitigation plan can be proposed, junior users must understand the nature and extent, if any, of the senior's injury.

Under Rule 40 and 42 of the CMR, the Idaho Department of Water Resources makes an initial determination of injury based on allegations of injury made by the senior. Idaho law is inconsistent with the concept of requiring juniors to merely respond with a mitigation plan under Rule 43; such an approach forecloses the determination of whether the Department correctly found injury in the first place. Only after a determination of the propriety of the Department's determination of injury is a hearing on a mitigation plan appropriate. In the SWC matter, a hearing has been held on the propriety of the injury determination; a complete hearing on the junior's mitigation plan has not been held. It would be useful for the Court to clarify this interplay and timing between the hearing on the Department's injury determination and a hearing on a junior's mitigation plan.

Within fourteen days Pocatello will provide a brief in support of its Petition for Rehearing.

In addition, Pocatello endorses and joins the Petition for Rehearing filed by the Idaho Ground Water Appropriators, August 13, 2009.

Respectfully submitted this 14th day of August, 2009.

CITY OF POCATELLO ATTORNEY'S OFFICE

By Sarah K fa
A. Dean Tranmer

WHITE & JANKOWSKI

By Sarah K
SARAH A KLAHN

Attorneys for City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2009, I caused to be served a true and correct copy of the foregoing **Pocatello's Petition for Rehearing** for **Case No. CV-2008-0000551** upon the following by the method indicated:

Sarah Klahn, White & Jankowski, LLP

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Courtesy Copy to: Judge John M. Melanson SRBA PO Box 2707 Twin Falls ID 83303-2707	___X__ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile – 208-736-2121 _____ Email
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Attorneys for Ground Water Districts and IGWA

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

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

Petitioners,

vs.

DAVID R. TUTHILL, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES

Respondents,

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

Case No.: CV-2008-551

GROUND WATER USERS' PETITION FOR REHEARING

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT, acting for and on behalf of their members (collectively, the "Ground Water Users"), through counsel, respectfully petition the Court for re-hearing pursuant to Idaho Appellate Rule 42 in response to the Court's *Order on Petition for Judicial Review* dated July 24, 2009 (the "*Order*"), on the following issues:

1. The Court should order the Director to immediately decide the issue and methodology for determining material injury and reasonable carryover for future years and incorporate that method into one Final Order as instructed by the Court on pp. 32-33 of the *Order*. Such order should require the Director to do this timely, by a date certain and based upon the evidence as established in the record and without further hearing.

On page 33 of the *Order* the Court remands the matter for further proceedings consistent with this decision. Among the issue for remand was the Court's conclusion that the Director abused his discretion by issuing two Final Orders in response to the Hearing Officer's Recommended Order, to wit:

> The process for determining material injury and reasonably carryover is an integral part of the Hearing Officers' Recommended Order, and the issues raised in the delivery all, The Director abused his discretion by not addressing and including all of the issues raised in this matter in one Final Order.

Id. at 32.

On remand, the Department should be directed to immediately "cure" the error by issuing one order for purposes of appeal and base it on the established record without further hearing. This is appropriate as a matter of judicial economy, because the parties have expended vast amounts of time and resources on this matter, including litigating the methodology related to material injury during a nearly three week hearing in January of 2008. If the Court fails to order

the Director immediately cure the error, all parties' efforts in the previous proceeding will have been wasted and may need to be duplicated should the Supreme Court remand the matter later on the same basis on the same issue. Therefore, the Ground Water Users request the Court instruct the Director as set forth above.

2. To clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decreed (or recommended) amount.

On page 26 of the *Order* the Court found that "[i]n times of shortage junior users will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR Rule 42" and that a "finding of material injury requires more than shortfalls to the decreed and license quantity of the senior right." These conclusions indicate that the decreed quantity is an authorized maximum and that the application of the factors in CMR Rule 42 may show that there is an amount of water that is less than the decreed or licensed quantity that a senior may be required to use in times of shortage. However, on pages 31 and 32 of the *Order*, the Court determines that the Director exceeded his authority in determining that the full head gate delivery for Twin Falls Canal Company is ⅝ of an inch instead of ¾ of an inch. Clearly, the Director was intending to find what Twin Falls Canal Company needed in times of shortage in a delivery call under the CM Rules which is entirely consistent with the Court's conclusion on p. 26 of the *Order*. For that purpose alone the ⅝ inch was determined by the Director as the proper amount for purposes of determining material injury to Twin Falls under the evidence as established in this case. The Director was not intending interfere with the SRBA Court's authority in determining the proper amount to ultimately be included in TFCC's partial decree. The Ground Water Users agree with the other statements made on p. 31 of the *Order*, that the SRBA District Court has exclusive jurisdiction to determine the elements of water rights

pending before it and do not believe the Director was intending to adjudicate Twin Fall Canal Company's water rights. These points need to be clarified and the apparent inconsistency of the Court's statements on pages 26 and 31 resolved.

3. To clarify whether junior ground water users are physically curtailed while the hearing process is proceeding under a proposed mitigation plan and before a final order has been entered?

The Court's finding on p. 29 of the *Order* states that:

> Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer . . ..

No where in this *Order* does the Court state when curtailment can actually be imposed. However, in the *Order on Petition for Judicial Review* in *Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444 (Fifth Jud. Dist. Gooding County) the Court found in that

> After the initial order is issued and pursuant to the constitutional requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before junior rights are curtailed and before the senior rights are injured further.

Id. at 49. The Court further stated that

> [A] more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury .. . and the mitigation plan at the same time.

This indicates that the curtailment order should not be enforced until a hearing process has been completed on a mitigation plan and a final order issued. Thus, the Court in this *Order* needs to confirm that the same process applies here, meaning that junior ground water users will be provided due process to protect their real property rights and that curtailment will not be enforced prior to completing the hearing process and issuance of a final order. If the seniors get the curtailment they want in advance, then it would only be to their benefit to string out the

hearing process. However, if curtailment only happens after a hearing and final order on the mitigation plan, both parties receive due process and there is incentive to complete the process timely by the parties and the Department. Now that the Court has invalidated the use of replacement water plans as an interim response to initial curtailment orders, clarification on when physical curtailment of junior ground water users can occur is needed.

The Ground Water Users will within fourteen days submit a brief in support of this Petition for Rehearing pursuant to Idaho Appellate Rule 42.

DATED this 13th day of August, 2009.

Randall C. Budge

RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August, 2009, the above and foregoing document was served in the following manner.

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Tom Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 2598 Boise, Idaho 83701-2598	[X] U.S. Mail/Postage Prepaid [ ] Facsimile 208-424-8873 [ ] Overnight Mail [ ] Hand Delivery [X] E-mail tarkoosh@capitollawgroup.net
Phillip J. Rassier Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098	[X] U.S. Mail/Postage Prepaid [ ] Facsimile 208-287-6700 [ ] Overnight Mail [ ] Hand Delivery [X] E-mail phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov
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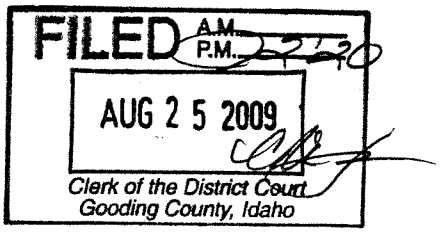
Randall C. Budge

RANDALL C. BUDGE

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



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

Petitioners,

vs.

GARY SPACKMAN, in his capacity as Interim 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 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

Case No. 2008-0000551

SCHEDULING ORDER ON PETITIONS FOR REHEARING

557(a)

This Court issued its ***Order on Petition for Judicial Review*** in this matter on July 24, 2009. On, August 14, 2009, the City of Pocatello filed a *Petition for Rehearing.* Also on August 14, 2009, the Ground Water Users also filed a *Petition for Rehearing.* Pursuant to Idaho Code § 67-5273, Idaho Rule of Civil Procedure 84(r) and Idaho Appellate Rule 34(c), IT IS HEREBY ORDERED that the following briefing schedule applies:

1. **September 4, 2009**: Deadline for cross-petitions.
2. **October 9, 2009:** Deadline for filing Petitioners' opening briefs.
3. **November 6, 2009:** Deadline for filing Respondent's brief.
4. **November 30, 2009:** Deadline for filing Petitioners' reply briefs.

The Court will set the date for **Oral Argument** after briefing has been filed.

IT IS SO ORDERED.

Dated Aug. 25, 2009

JOHN M. MELANSON
District Judge

557(b)

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 24 of July, 2009, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Scheduling Order on Petition for Rehearing to the parties listed below via the U.S. Postal Service, postage prepaid:

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Dated: August 25, 2009

Cynthia R. Eagle-Ervin, Deputy Clerk

Notice of Orders
Certificate of Mailing
IRCP 77(d)

557(c)