

5-11-2011

A & B Irrigation v. Spackman Clerk's Record v. 5 Dckt. 38191

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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)	<i>and</i>
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)	<i>and</i>
THE CITY OF POCATELLO, Intervenor-Respondent.)	

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

Attorney for Appellant

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

John Simpson/Travis Thompson/Paul Arrington – BARKER ROSHOLT SIMPSON

Attorney for Respondent

Filed this _____ day of _____, 19____

Clerk

By _____ Deputy

38191-1 20192
70173 ✓

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,)
NORTSIDE 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 POCA TELLO,)
Intervenor-Respondent.)

COPY

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 2008-000551

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	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: l2 - 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
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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
1/26/2009	MISC	CYNTHIA	US Unopposed Motion to Reset Briefing Schedule	John Melanson

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Date	Code	User		Judge
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 Unopposed 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
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	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
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7/24/2009	ORDR	CYNTHIA	Order on Petition for Judicial Review	John Melanson
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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
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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
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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

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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
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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

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.
	ADVS	CYNTHIA	Matter Taken Under Advisement
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
8/23/2010	ORDR	CYNTHIA	Order on Petitions for Rehearing
8/26/2010	MOTN	CYNTHIA	Motion to Clarify/Motion for Reconsideration
9/3/2010	MOTN	CYNTHIA	Surface Water Coalitions Motion for Clarification
9/9/2010	ORDR	CYNTHIA	Amended Order on Petitions for Rehearing
10/21/2010	APSC	CYNTHIA	Appealed To The Supreme Court (IDWR) Document sealed
	STAT	CYNTHIA	STATUS CHANGED: Inactive
		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)
	APSC	CYNTHIA	Appealed To The Supreme Court (Surface Water Coalition)
		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)
		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)
		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)
	APSC	CYNTHIA	Appealed To The Supreme Court (City of Pocatello)
	APSC	CYNTHIA	Appealed To The Supreme Court (IGWA)
10/22/2010	APER	CYNTHIA	Other party: Idaho Ground Water Users, Appearance Randall C. Budge

(2)

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)
		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)
11/4/2010	ORDR	CYNTHIA	Supreme Court Order Consolidating Appeals
11/22/2010	ORDR	CYNTHIA	Order Suspending Appeal (Clerk of the Court)
11/24/2010	MISC	ROSA	Idaho Ground Water Appropriators, Inc's and City of Pocatello's Request to Amend Caption
11/30/2010	JDMT	ROSA	Judgment Nunc Pro Tunc
	ORDR	ROSA	Order Amending Caption
	STAT	ROSA	STATUS CHANGED: Closed
12/2/2010	STAT	CYNTHIA	STATUS CHANGED: inactive
12/20/2010	MISC	JULIE	Idaho Ground Water's Amended Notice of Appeal
	MISC	CYNTHIA	City of Pocatello Amended Notice of Appeal
12/23/2010	ORDR	CYNTHIA	Supreme Court Order Adopting District Court Order (re: Caption)
1/27/2011	NOTC	CYNTHIA	IGWA Second Amended Notice of Appeal

DISTRICT COURT
GOODING CO. IDAHO
FILED

2010 MAY 19 PM 3:30

GOODING COUNTY CLERK
ROSA COTA

BY: _____
DEPUTY

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
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Attorneys for Respondents

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-2008-0000551

Petitioners,)

vs.)

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

**IDWR RESPONSE TO IGWA AND
POCATELLO MOTION FOR STAY
AND TO AUGMENT THE RECORD
WITH ADDITIONAL EVIDENCE**

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,)

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BURLEY IRRIGATION DISTRICT, MILNER)
 IRRIGATION DISTRICT, MINIDOKA IRRIGATION)
 DISTRICT, NORTH SIDE CANAL COMPANY,)
 AND TWIN FALLS CANAL COMPANY)

COME NOW Respondents, Gary Spackman in his capacity as Interim Director ("Director") of the Department of Water Resources and the Department of Water Resources ("Department") (collectively referred to herein as "Department"), and hereby file this response to the City of Pocatello ("Pocatello") and Idaho Ground Water Appropriators, Inc.'s ("IGWA") (collectively referred to herein as "Ground Water Users") May 12, 2010 *Motion for Stay and to Augment the Record with Additional Evidence* ("Motion") and accompanying memorandum ("Memorandum"). Because the Ground Water Users have failed to exhaust their administrative remedies before the Department, the Department respectfully requests this Court deny the GWU's attempt to derail the administrative process.

ARGUMENT

I. Following This Court's Order On Remand, The Director Has Established An Orderly Process For Administration Of Hydraulically Connected Surface and Ground Water Rights

On March 4, 2010, the Court issued its *Order Staying Decision on Petition for Judicial Review Pending Issuance of Revised Final Order* ("Remand Order"). The Remand Order was issued pursuant to Idaho Appellate Rule 13(b)(14) and tasked the Director to issue a final order determining material injury to reasonable in-season demand and reasonable carryover by March 31, 2010. On March 29, 2010, the Court extended the deadline to April 7, 2010. On April 7, 2010, the Director issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). Attachment A, Affidavit of Chris M. Bromley ("Bromley Affidavit"). "The purpose of this Final

Order is to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC." *Methodology Order* at 2. In the Methodology Order, the Director updated existing data in the record with 2008 data. *Id* at 7, fn. 4. The parties were made aware of the Director's decision to update existing data, were provided the opportunity for reconsideration on the Methodology Order, and have sought reconsideration of the Methodology Order. In accordance with Idaho Code § 67-5251(4), the Director has provided for a hearing to "contest and rebut" the 2008 data; the hearing is scheduled to commence May 24, 2010. *Notice of Hearing Regarding 2008 Data* (May 10, 2010). Attachment B, Bromley Affidavit.

Because of the need for on-going administration of hydraulically connected surface and ground water rights, the Director applied Steps 3 and 4 of the Methodology Order and, on April 29, 2010, issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* ("April Forecast Supply Order").¹ Attachment C, Bromley Affidavit. Following Steps 3 and 4 of the Methodology Order, the Director predicted a demand shortfall of 84,300 acre-feet to the Surface Water Coalition ("SWC"). *Id.* at 2. The Director provided for reconsideration and a hearing on whether the April Forecast Supply Order followed Steps 3 and 4 from the Methodology Order. *Id.* at 4. Petitions for reconsideration and requests for hearing regarding the April Forecast Supply Order have been filed. A hearing on the April Forecast Supply Order is scheduled to commence immediately following conclusion of the hearing on the Methodology Order. Following the hearing on the April Forecast Supply Order, the Director will hold a hearing on IGWA's mitigation plan for the SWC. On June 1, 2010, the Director will hold a hearing on his determination of credit for IGWA's conversion, CREP, and recharge activities.

¹ Referred to as the "As-Applied Order" by IGWA and Pocatello.

Order Approving Mitigation Credits Regarding SWC Delivery Call at 4 (May 17, 2010).

Attachment D, Bromley Affidavit. At the conclusion of these proceedings, the Director will issue orders on reconsideration, which will be subject to judicial review. Idaho Code § 42-1701(A)(4); § 67-5270.

II. Idaho Code § 67-5276 Does Not Provide The Ground Water Users With An Avenue To Seek Augmentation Of The Department's Administrative Record Before The Director's Orders Are Subject To Judicial Review

The Ground Water Users state that Idaho Code § 67-5276 authorizes "this Court to order IDWR to take additional evidence to augment the record in this matter." *Memorandum at 5.* Idaho Code § 67-5276 states as follows:

ADDITIONAL EVIDENCE. (1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

Emphasis added.

The Ground Water Users argue that the Court should force the Director to augment the record because a "hearing" has yet to occur before this Court. Certainly a hearing before the Court has not occurred because the matter is squarely before the Director.

In making their argument, the Ground Water Users first ignore the location in which - 5276 appears in Chapter 52, Title 67. Chapter 52, Title 67 contains the "Idaho Administrative Procedure Act" ("APA"). The APA follows a logical sequence. Regarding contested cases before an administrative agency, -5240 through -5255 addresses the procedures governing

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contested cases and declaratory rulings before the agency. In contrast, 5270 through -5279 provides the procedure upon which that review is governed following the issuance of a final order that is subject to “judicial review.” Idaho Code § 67-5270.

Idaho Code § 67-5276 is located squarely within the rules governing judicial review of final agency orders, not within the rules governing contested cases before an agency. The importance of the statute’s location in the APA is that until the Director has (1) completed hearings on reconsideration of the above-mentioned orders, Idaho Code § 67-5246; that (2) results in final orders that are subject to judicial review, Idaho Code § 67-5270; the Court cannot grant the Ground Water Users’ Motion because a hearing on judicial review is not ripe.

Second, the plain language of Idaho Code § 67-5276 makes it clear that the hearing that is referenced is a hearing on judicial review, not a hearing before an agency. Idaho Code § 67-5276(a) states that if “there were good reasons for failure to present it in the proceedings before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.” Emphasis added. Therefore, until an agency completes its hearing and until there are final orders that are ripe for judicial review, the Ground Water Users cannot invoke Idaho Code § 67-5276 to seek an order from this Court to augment the record.

The above interpretation of Idaho Code § 67-5276 is consistent with the articulated principle that parties must first exhaust their administrative remedies before seeking judicial review of agency actions.

A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies. I.C. § 67-5271(1). Until the full gamut of administrative proceedings has been conducted and all available administrative remedies been exhausted, judicial review should not be considered. *See Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972).

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Regan v. Kootenai County, 140 Idaho 721, 723-24, 100 P.3d 615, 617-18 (2004).

The Ground Water Users' request that the Court order the Department to augment the record is inconsistent with Idaho law and should be denied.

III. Idaho Code § 67-5276 Does Not Provide The Ground Water Users With An Avenue To Define The Scope Of Hearings Set By The Director

In their Motion, the Ground Water Users ask this Court to order the Director to "hold a hearing regarding the full scope of the issues related to the Methodology Order and As-Applied Order[]." *Memorandum* at 5 (emphasis added). Again, the Ground Water Users base this request on Idaho Code § 67-5276. As stated above in Part I, the Director has granted the parties' requests for hearing on the Methodology Order and the April Forecast Supply Order. What the Ground Water Users take exception with, however, is the Director's decision to define the scope of those hearings to issues that have already been subject to hearing. Idaho Code § 67-5276 does not provide an avenue to define the scope of the hearing, but allows for a court to remand a matter back to an agency. As explained in Part II, until the Director issues a final order that is subject to judicial review, the Court cannot entertain the Ground Water Users' Motion because they have failed to exhaust their administrative remedies. Idaho Code § 67-5271; *Regan* at 723-24, 100 P.3d at 617-18.

IV. The Ground Water Users Request For Judicial Review Of Certain Elements Of The Methodology Order Is Not Ripe For Review

The Ground Water Users allege that the Methodology Order is not grounded in the record and seek an order from the Court directing the Department to correct the alleged errors. *Memorandum* at 7-8. "At hearing in this matter, [the Ground Water Users] will present evidence regarding the factual problems with the new methodology, specifically the over-estimation of SWC crop water demands." *Id.* at 8.

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As stated earlier, IGWA, Pocatello, and the SWC have filed petitions for reconsideration regarding the Methodology Order. Starting on May 24, 2010, the Director will hold a hearing on the use of 2008 data in the Methodology Order. Upon completion of that hearing, the Director will issue an order regarding the petitions for reconsideration. Once the Director issues his order on reconsideration, the decision will be subject to judicial review; thereby providing the GWU with an opportunity to contest the Director's actions. The Ground Water Users' Motion for an advisory opinion from this Court on "SWC crop water demands"—a subject that was raised before Hearing Officer Gerald F. Schroeder—constitutes an end-run around established administrative procedures and must be denied. Idaho Code § 67-5271; *Regan* at 723-24, 100 P.3d at 617-18.

CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court deny the Ground Water Users' Motion for failure to exhaust administrative remedies.

DATED this 19th day of May, 2010.

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


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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 19th day of May, 2010.

Document Served: **IDWR Response to IGWA and Pocatello Motion for Stay and to Augment the Record with Additional Evidence**

Deputy Clerk Gooding County District Court 624 Main St. P.O. Box 27 Gooding, ID 83330 Facsimile: 208-934-5085	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Email
Judge Melanson (courtesy copy) Idaho Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 tarkoosh@capitollawgroup.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

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<p>Ronald Tenpas David W. Gehlert Natural Resources Section Environment & Natural Resources Division United States Department of Justice 1961 Stout St. 8th Floor Denver, CO 80294 David.Gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Sarah A. Klahn Mitra M. Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>



CHRIS M. BROMLEY
Deputy Attorney General

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DISTRICT COURT
GOODING CO. IDAHO
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2010 MAY 19 3:30 pm
~~MAY 17~~

GOODING COUNTY CLERK

BY: *[Signature]*
DEPUTY

LAWRENCE G. WASDEN
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Attorneys for Respondents

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-2008-0000551

Petitioners,)

vs.)

AFFIDAVIT OF
CHRIS M. BROMLEY

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,)

794

BURLEY IRRIGATION DISTRICT, MILNER)
 IRRIGATION DISTRICT, MINIDOKA IRRIGATION)
 DISTRICT, NORTH SIDE CANAL COMPANY,)
 AND TWIN FALLS CANAL COMPANY)

STATE OF IDAHO)
) ss.
 County of Ada)

CHRIS M. BROMLEY, being first duly sworn upon oath, deposes and says:

1. I am one of the Deputy Attorneys General of record for the Respondent, Idaho Department of Water Resources. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Attachment A** is a true and correct copy of the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*.

3. Attached hereto as **Attachment B** is a true and correct copy of the *Notice of Hearing Regarding 2008 Data*.

4. Attached hereto as **Attachment C** is a true and correct copy of the *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)*.

5. Attached hereto as **Attachment D** is a true and correct copy of the *Order Approving Mitigation Credits Regarding SWC Delivery Call*.

[The remainder if this page is intentionally left blank.]

Further your Affiant sayeth naught.

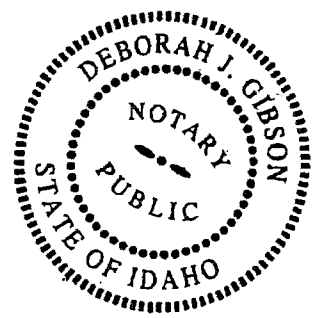
DATED this 19th day of May, 2010.

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

SUBSCRIBED AND SWORN TO BEFORE ME this 19th day of May, 2010.

Deborah J. Gibson
NOTARY PUBLIC for Idaho
Residing at: *Parma, Idaho*
My Commission Expires: *8/10/2015*

(seal)



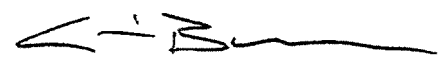
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 19th day of May, 2010.

Document Served: **Affidavit of Chris M. Bromley**

<p>Deputy Clerk Gooding County District Court 624 Main St. P.O. Box 27 Gooding, ID 83330 Facsimile: 208-934-5085</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>Judge Melanson (courtesy copy) Idaho Court of Appeals P.O. Box 83720 Boise, ID 83720-0101</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 tarkoosh@capitolawgroup.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>

<p>Ronald Tenpas David W. Gehlert Natural Resources Section Environment & Natural Resources Division United States Department of Justice 1961 Stout St. 8th Floor Denver, CO 80294 David.Gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>



CHRIS M. BROMLEY
Deputy Attorney General

ATTACHMENT A

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

IN THE MATTER OF DISTRIBUTION OF WATER)	
TO VARIOUS WATER RIGHTS HELD BY OR FOR)	FINAL ORDER REGARDING
THE BENEFIT OF A&B IRRIGATION DISTRICT,)	METHODOLOGY FOR
AMERICAN FALLS RESERVOIR DISTRICT #2,)	DETERMINING MATERIAL
BURLEY IRRIGATION DISTRICT, MILNER)	INJURY TO REASONABLE
IRRIGATION DISTRICT, MINIDOKA IRRIGATION)	IN-SEASON DEMAND AND
DISTRICT, NORTH SIDE CANAL COMPANY,)	REASONABLE CARRYOVER
AND TWIN FALLS CANAL COMPANY)	
_____)	

FINDINGS OF FACT

I. Procedural Background

1. On September 5, 2008, the Director of the Department of Water Resources (“Director” or “Department”) issued a final order in this matter (“2008 Final Order”), in which he ruled on all issues raised at hearing, with the exception of stating his methodology for determining material injury to the Surface Water Coalition’s (“SWC”) reasonable in-season demand (“RISD”) and reasonable carryover. R. Vol. 37 at 7386.¹

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

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

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

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

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

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

A. Background to Reasonable In-Season Demand

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

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

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

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

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

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

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

R. Vol. 37 at 7096.

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

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

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

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

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

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

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

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

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

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

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

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

² This recommendation was accepted by former Director Tuthill in his Final Order. R. Vol. 39 at 7392. In his July 24, 2009 *Order on Judicial Review*, Judge Melanson found that the Director exceeded his authority in making this determination. *Order on Judicial Review* at 31. The court based its decision on the filing of the *Director's Report* in the Snake River Basin Adjudication, which "recommend[ed] 3/4 of an inch per acre." *Id.* at 31. In its *Opening Brief on Rehearing*, IGWA asked the court to "clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decreed (or recommended amount)[.]" This issue has been stayed and held in abeyance until after the Director issues his final order regarding his methodology for determining material injury to RISD and reasonable carryover. *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 3.

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

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

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

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

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

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

C. Reasonable In-Season Demand

i. Considerations for the Selection of a Baseline Year

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

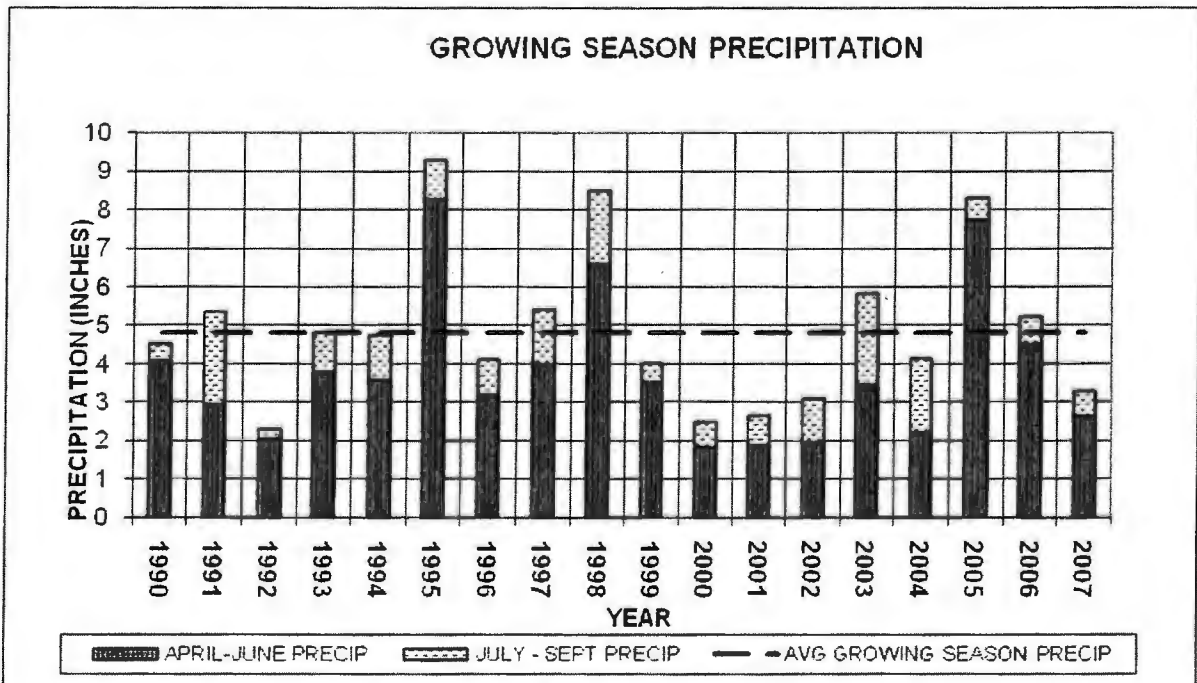
15. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098. To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

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

a. Climate

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

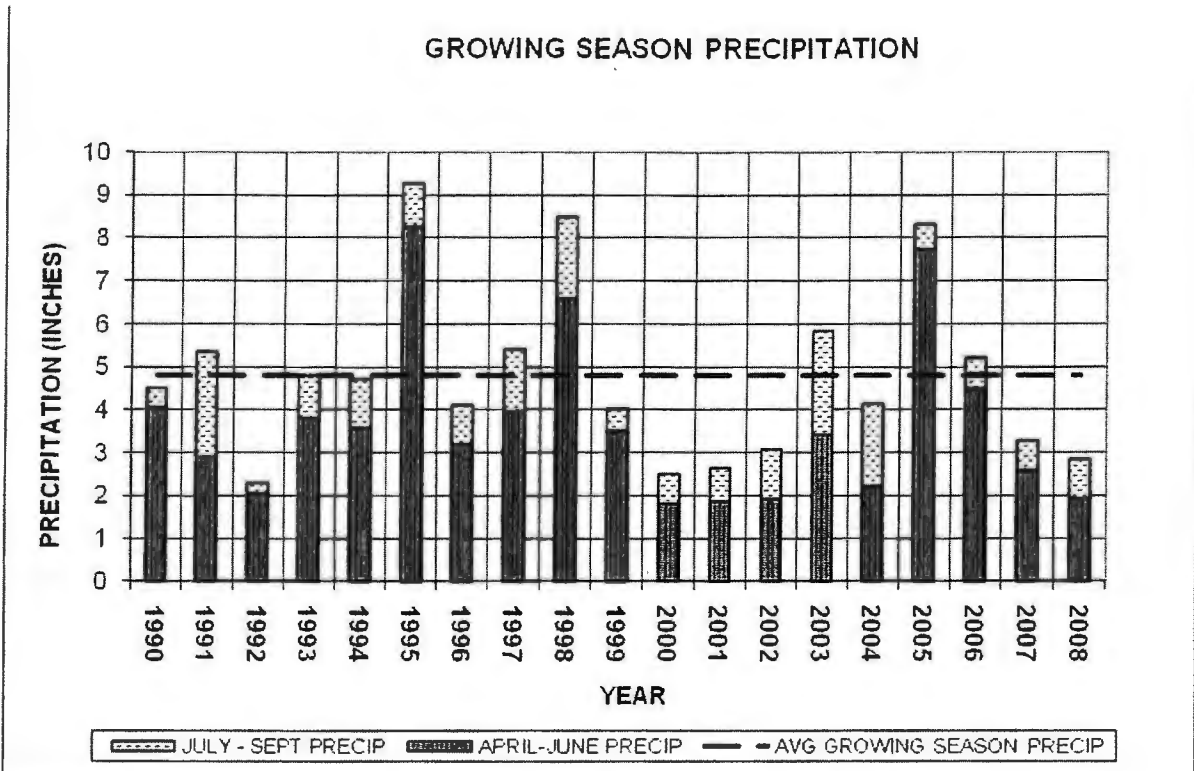
18. Precipitation. Water, in all phases, introduced to Idaho from the atmosphere is termed precipitation. During the growing season, precipitation has a substantial influence on crop water need both as a source of water to growing crops and as an influencing factor on ET. Ex. 3024 at 19. The figure below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



Growing Season Precipitation at Twin Falls Weather Station 1990-2007.³

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

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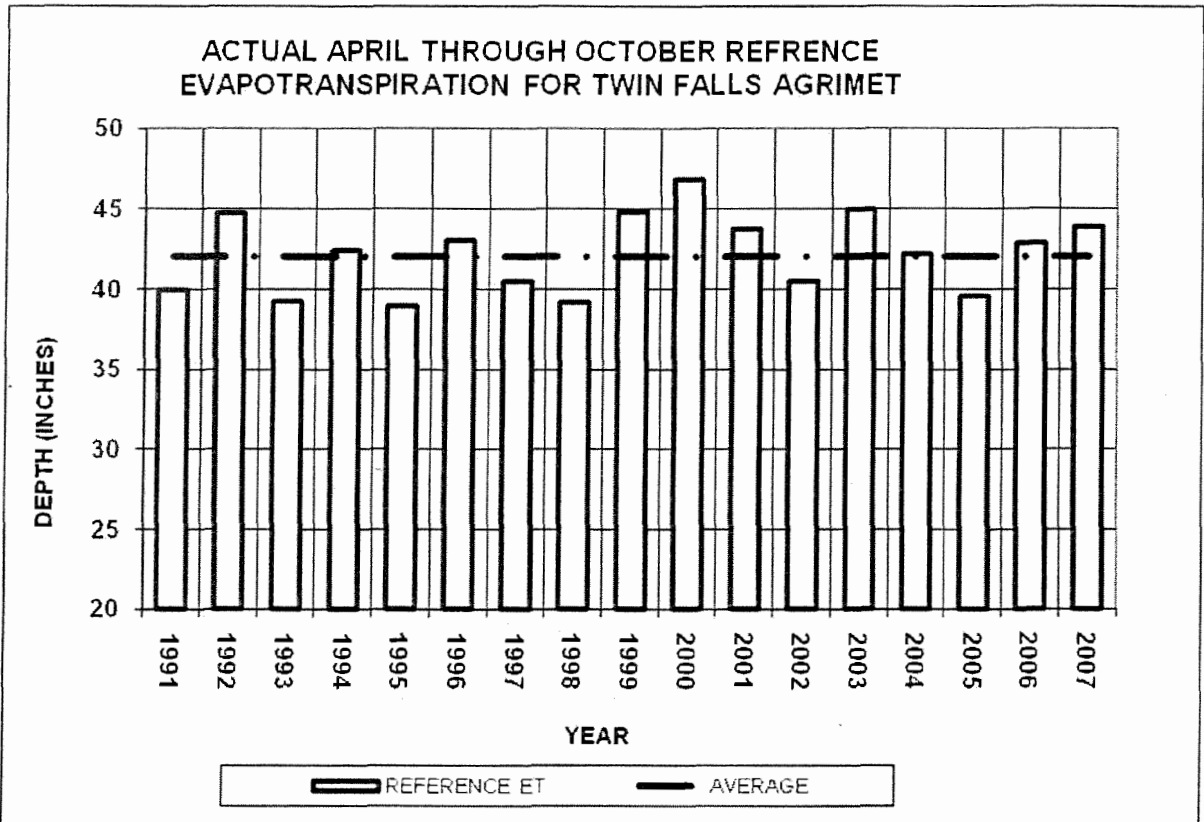
Growing Season Precipitation at Twin Falls Weather Station 1990–2008.⁴

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

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

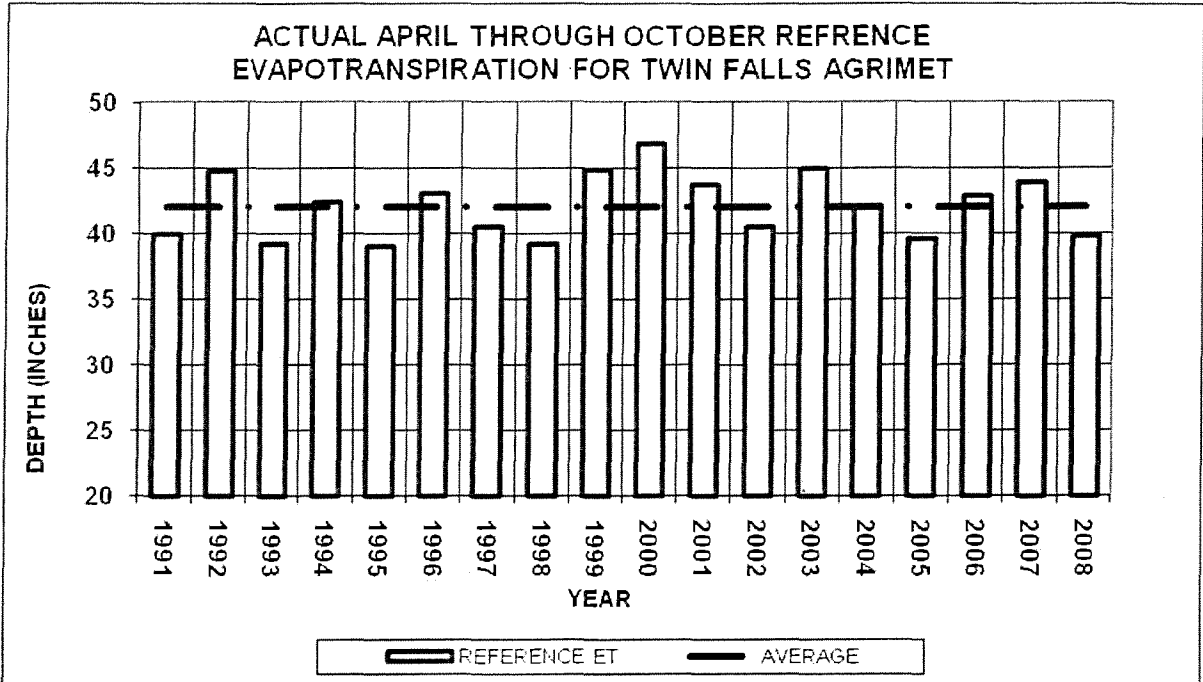
⁴ The record established at hearing was current through the year 2007. Since that time, Water District 01 has finalized its accounting for the 2008 irrigation season; thereby making the use of 2008 data appropriate. Water District 01 has not yet finalized its accounting for the 2009 irrigation season.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

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



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

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

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

Year	GDD: April- Sept	% of Average	Year	GDD: April- Sept	% of Average
1991	2,095.4	86%	2000	2,591.3	107%
1992	2,610.7	107%	2001	2,600.8	107%
1993	2,004.7	82%	2002	2,465.6	101%
1994	2,516.8	103%	2003	2,585.4	106%
1995	2,257.8	93%	2004	2,428.9	100%
1996	2,418.6	99%	2005	2,320.1	95%
1997	2,478.4	102%	2006	2,601.9	107%
1998	2,422.2	100%	2007	2,657.7	109%
1999	2,294.9	94%			
Average GDD:				2,432.4	

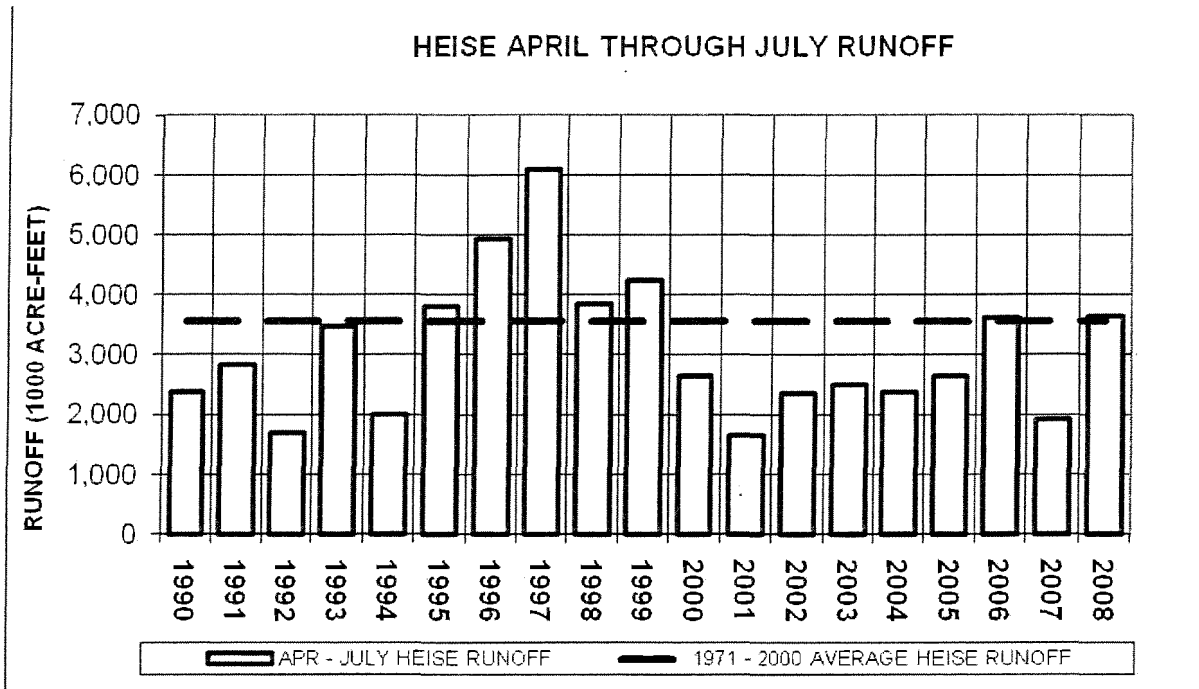
Growing Degree Days (“GDD”) for Twin Falls (Kimberly) AgriMet Site 1991-2007, Ex. 3024 at 10.

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

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

b. Available Water Supply

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



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

c. Irrigation Practices

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

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

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

ii. Selection of the Initial Baseline Year

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

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

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

28. With the exception of diversions for Milner, MID, and TFCC, 2006 is an appropriate BLY selection for a single year. The Director finds, however, that it would also be appropriate to use the values of 2006 and 2008 (06/08) to arrive at an average BLY that more strongly fits selection criteria for all members of the SWC.⁵ The 06/08 average has below average precipitation, near average ET, above average growing degree days, and were years in which diversions were not limited by availability of water supply. When compared to a period of record spanning from 1990-2008, the 06/08 diversions were above average; or average when considering a period of record from 2000-2008.⁶

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

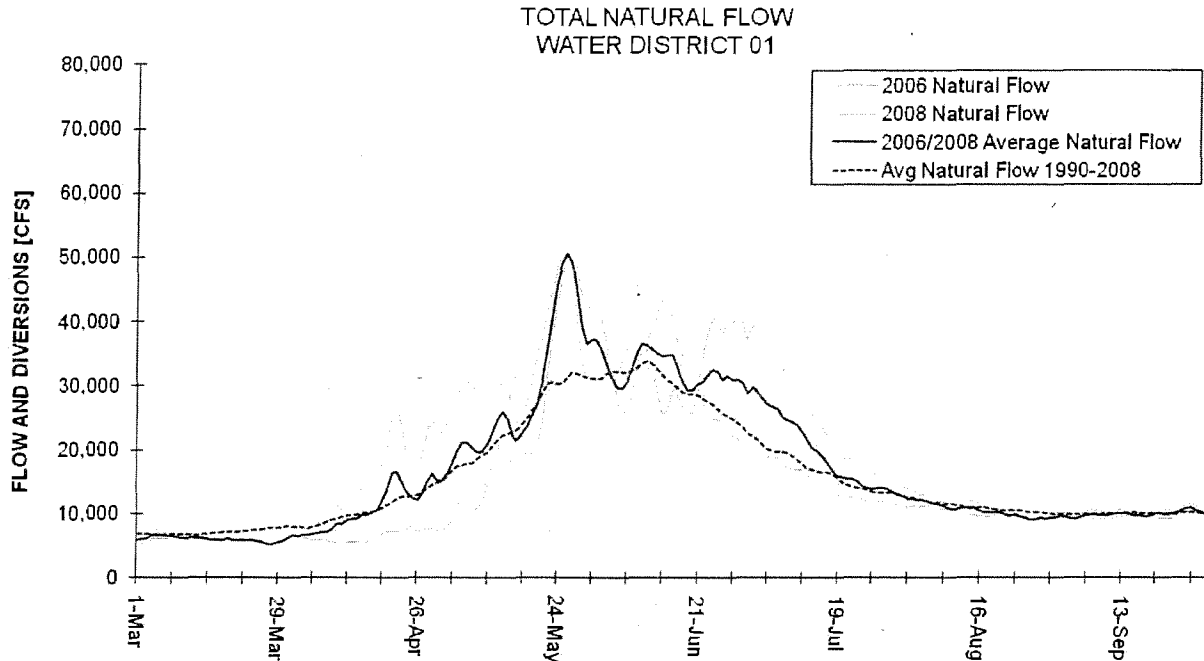
	2000-2008 Avg. Diversions	'06 Total Diversions	'06 % of Avg.	'06/'08 Avg. Total Diversions	'06/'08 % of Avg.
A&B	57,615	57,492	100%	58,492	102%
AFRD2	409,865	410,376	100%	415,730	101%
BID	245,295	247,849	101%	250,977	102%
Milner	50,786	41,671	82%	46,332	91%
Minidoka	358,018	352,269	98%	362,884	101%
NSCC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

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

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

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

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



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

D. Calculation of Reasonable In-Season Demand

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

i. Assessment of Water Balance Studies Presented at Hearing

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

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

Where:

- Q = irrigation entity diversion requirement,
- ET_c = consumptive use of each crop,
- F_c = fraction of area of each crop in irrigation entity,
- E_a = field application efficiency,
- W_e = estimated effective rainfall during growing season,
- A_{ID} = irrigated area in irrigation entity, and
- S_{loss} = seepage loss from canals.

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

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

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

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

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

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

R. Vol. 37 at 7096.

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

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

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

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

ii. Project Efficiency

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

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

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

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

Where:

E_p = project efficiency,

CWN = crop water need, and

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

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

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

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

SWC Member Average Monthly Project Efficiencies from 2001-2007.

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

SWC Member Average Monthly Project Efficiencies from 2001-2008.

iii. Crop Water Need

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

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

Where,

CWN = crop water need

ET_i = consumptive use of specific crop type,

W_e = estimated effective rainfall,

A_i = total irrigated area of specific crop type,

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

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

iv. Evapotranspiration

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

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

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

48. The utilization of AgriMet derived crop specific ET values necessitates crop distribution profiles similar to those described and presented at hearing. R. Vol. 2 at 420-26; Ex. 3007 at 21 & Table 4; and Ex. 3026. The methodology will utilize crop distributions based on distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS"). Ex. 1005 at 1.⁸ NASS reports annual acres of planted and harvested crops by county. NASS also categorizes harvested crops by irrigation practice, i.e. irrigated, non irrigated, non irrigated following summer fallow, etc. Crop distribution acreage will be obtained from NASS by averaging the "harvested" area for "irrigated" crops from 1990-2008. Years in which harvested values were not reported will not be included in the average. It is the Department's preference to rely on data from the current season if and when it becomes usable.

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

v. Effective Precipitation

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

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

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

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

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

vi. Summary of Reasonable In-Season Demand Calculation

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

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

Where:

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

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

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

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

D. Adjustment of Forecast Supply

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

i. April 1

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

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

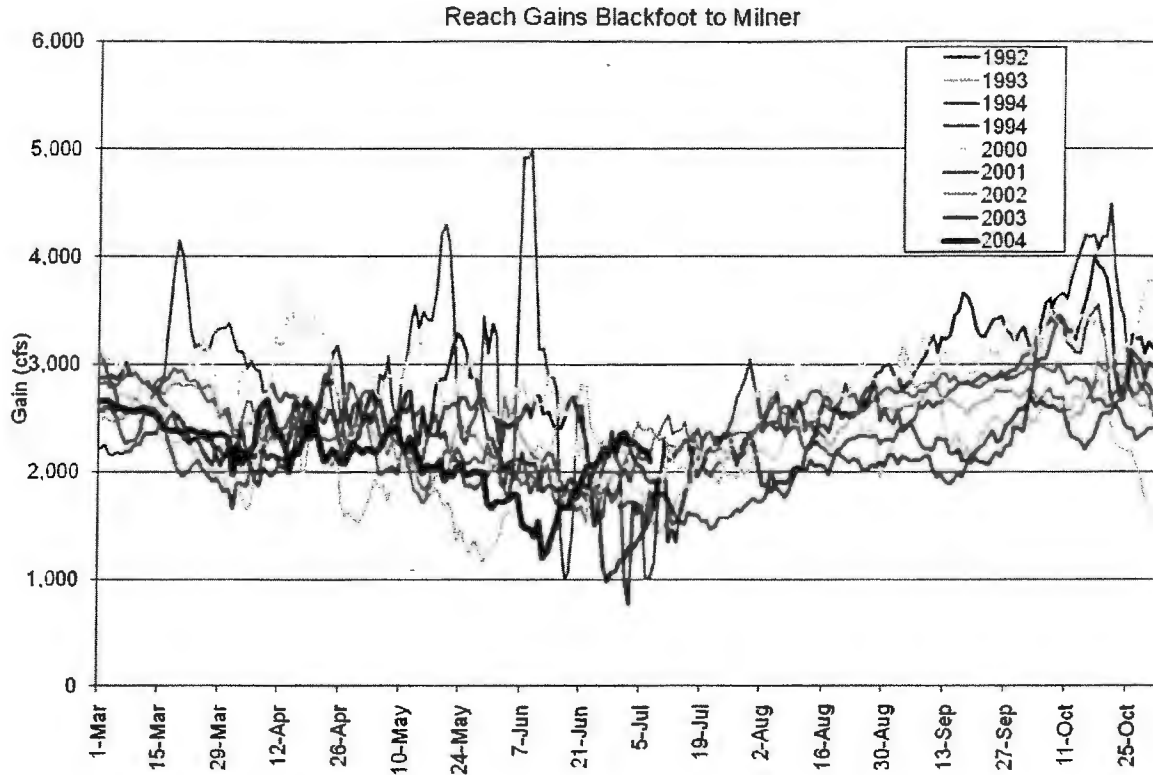
ii. Early to Mid-July

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

iii. Time of Need

61. The July procedure will be repeated shortly before the Time of Need⁹ with the updated water rights accounting data.

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



Example reach gain analysis for 2004.

E. Calculation of Demand Shortfall

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

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

Where:

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

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

III. Methodology For Determining Material Injury To Reasonable Carryover

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

A. Projected Water Supply

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

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

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

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

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

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

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

B. Average Annual Rate of Fill

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

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

Annual Percent Fill of Storage Volume by Entity (1995-2007).¹⁰

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

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

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

C. Average Annual Carryover

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

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

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

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

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

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

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

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

Total Reservoir Space¹¹ in Comparison to Demand.

D. Reasonable Carryover Shortfall

i. A&B

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

ii. AFRD2

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

iii. BID & Minidoka

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

iv. Milner

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

¹¹ *See* R. Vol. 8 at 1373-74.

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

v. NSCC

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

vi. TFCC

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. If, in the fall, the Director finds that a reasonable carryover shortfall exists, the Director will use the ESPA Model to determine the transient impacts of curtailment (year-to-year). The ESPA Model will be used to determine the yearly impacts of curtailment of junior ground water users, if curtailed from April 1 through March 31.¹³ It is this volume of water that junior ground water users must have optioned in the fall in order to start the subsequent irrigation season without an order of curtailment.

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

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

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

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

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

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

ORDER

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

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

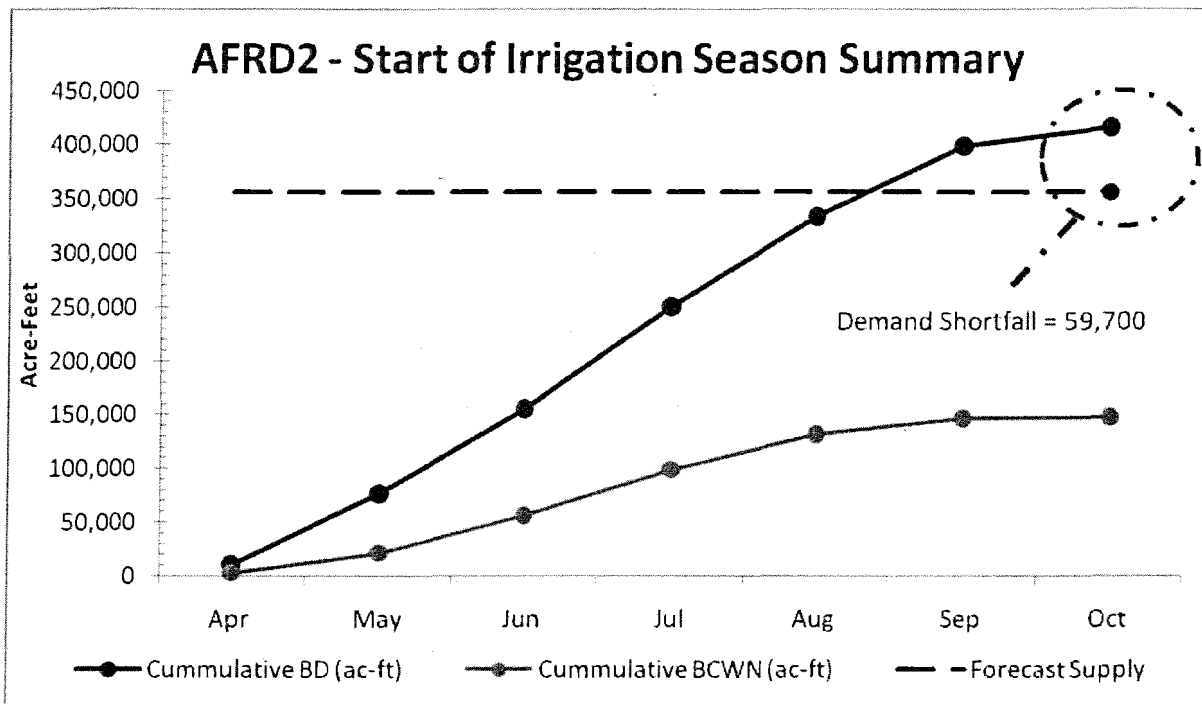
2. Beneficial use cannot occur on lands that are not described in the SWC's water rights. If, however, the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then an assessment must be made of the impact of this reduction in use of the water right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

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

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

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

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



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

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

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

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

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

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

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

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

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

11. Step 8: At the earliest forecasted Time of Need for any member of the SWC, junior ground water users are required to provide the lesser of the two volumes¹⁷ from Step 4 (May 1 secured water) and Step 7 (RISD volume calculated at the Time of Need). If the calculations from Step 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.

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

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

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

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

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

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

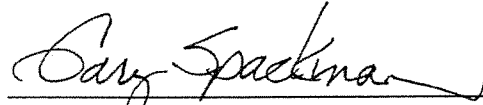
16. Included as an attachment to this order is an illustrative tabulated example, for each SWC entity, for three consecutive water years, illustrating the accounting that will be applied in determining reasonable carryover shortfalls, in-season demand shortfalls, water optioning, and water delivery requirements.

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

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28)

days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 7th day of April, 2010.



GARY SPACKMAN
Interim Director

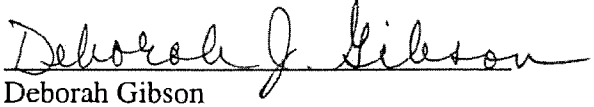
CERTIFICATE OF SERVICE

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

Honorable John M. Melanson Idaho Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 jks@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 tarkoosh@capitollawgroup.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 cmm@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 1961 Stout Street, 8th Floor Denver, CO 80294 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@pn.usbr.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Sarah A. Klahn WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>

Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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Deborah Gibson
Administrative Assistant to the Director

ATTACHMENT A

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

Illustrative Analysis of Three Consecutive Years of Shortfall Accounting.¹

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

Example Transient Analysis of Carryover Shortfall Volumes

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

Reasonable Carryover Shortfalls (Acre-Feet).

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

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

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

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

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

ATTACHMENT B

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

IN THE MATTER OF DISTRIBUTION OF WATER)
TO VARIOUS WATER RIGHTS HELD BY OR FOR)
THE BENEFIT OF A&B IRRIGATION DISTRICT,)
AMERICAN FALLS RESERVOIR DISTRICT #2,) **NOTICE OF HEARING**
BURLEY IRRIGATION DISTRICT, MILNER) **REGARDING 2008 DATA**
IRRIGATION DISTRICT, MINIDOKA IRRIGATION)
DISTRICT, NORTH SIDE CANAL COMPANY,)
AND TWIN FALLS CANAL COMPANY)
_____)

On April 7, 2010, the Director of the Department of Water Resources (“Director” or “Department”) issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The City of Pocatello (“Pocatello”), the Idaho Ground Water Appropriators, Inc. (“IGWA”), and the Surface Water Coalition filed petitions for reconsideration regarding the Methodology Order. One issue raised by IGWA and Pocatello was the Director’s use, in the Methodology Order, of information that is not contained in the record before the district court, namely 2008 data. On page 7, footnote 4, of the Methodology Order, the Director specifically directed the parties to the Director’s use of 2008 data.

Idaho Code § 67-5251(4) states as follows:

Official notice may be taken of:

- (a) any facts that could be judicially noticed in the courts of this state; and
- (b) generally recognized technical or scientific facts within the agency’s specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source thereof, including any staff memoranda and data. Notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed. When the presiding officer proposes to notice staff memoranda or reports, a responsible staff member shall be made available for cross-examination if any party so requests.

See also IDAPA 37.01.01.602.

On April 21, 2010, the Director provided the parties with background technical information regarding the Methodology Order. This information contained 2008 data. The 2008 data used by the Director in the Methodology Order was used in order to update data already contained in the record before the district court. The 2008 data is the type of data described in Idaho Code § 67-5251(4).

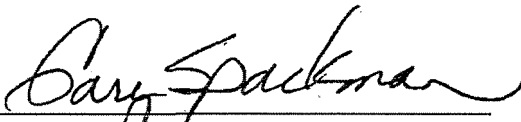
Based upon the concerns raised by the parties, the Director shall conduct a limited hearing to provide the parties the opportunity to contest or rebut the 2008 data.

ORDER

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

The Director shall conduct a limited hearing to provide the parties the opportunity to contest or rebut the 2008 data. The hearing shall commence on May 24, 2010, starting at 9:00 a.m., at the Department's State Office.

Dated this 10th day of May, 2010.



GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 jks@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 tarkoosh@capitollawgroup.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 cmm@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email

<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 1961 Stout Street, 8th Floor Denver, CO 80294 david.gehlert@usdoj.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@pn.usbr.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Sarah A. Klahn WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director

ATTACHMENT C

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

IN THE MATTER OF DISTRIBUTION OF WATER)
TO VARIOUS WATER RIGHTS HELD BY OR FOR) Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT,)
AMERICAN FALLS RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT, MILNER) **ORDER REGARDING APRIL**
IRRIGATION DISTRICT, MINIDOKA IRRIGATION) **2010 FORECAST SUPPLY**
DISTRICT, NORTH SIDE CANAL COMPANY,) **(Methodology Steps 3 & 4)**
AND TWIN FALLS CANAL COMPANY)
_____)

FINDINGS OF FACT

1. On April 7, 2010, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order established 10 steps for determining material injury to members of the Surface Water Coalition (“SWC”). This order will apply steps 3 and 4.

A. Step 3

2. Step 3 states that, within fourteen days of the issuance of the joint forecast (“Joint Forecast”) prepared by the United States Bureau of Reclamation and the United States Army Corps of Engineers, the Director shall “issue a Forecast Supply for the water year and will compare the forecast supply to the baseline demand (“BD”) to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season. A separate Forecast Supply and DS will be determined for each member of the SWC.” *Id.* at 34.

3. On April 8, 2010, the Joint Forecast was announced,¹ predicting an unregulated inflow of 1,940,000 acre-feet.²

¹ The Methodology Order was issued on April 7, 2010. Petitions for reconsideration were filed with the Department on April 21, 2010. Issuance of this order was delayed to allow the Director time to review the petitions for reconsideration.

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

4. Based upon the Joint Forecast, the Director predicts the following:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Total Supply	BLY 2006/2008	Shortfall
A&B	0	135,371	135,371	58,492	0
AFRD2	1,256	387,102	388,358	415,730	27,400 ³
BID	65,123	222,507	287,630	250,977	0
Milner	0	89,107	89,107	46,332	0
Minidoka	94,486	358,438	452,924	362,884	0
NSCC	233,145	843,169	1,076,314	965,536	0
TFCC	747,391	241,078	988,469	1,045,382	56,900
				Total	84,300

B. Step 4

5. Step 4 states as follows:

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

Id. at 34.⁴

6. As shown in the table above, it is predicted, at this time, that AFRD2 and TFCC will suffer a combined DS in the amount of 84,300 acre-feet (27,400 + 56,900). No later than May 13, 2010 (fourteen days from issuance of this order), junior ground water users must establish, to the satisfaction of the Director, their ability to secure 84,300 acre-feet.

³ In its *Corrected Petition for Reconsideration of Final Order Regarding Methodology Dated April 7, 2010*, the Idaho Ground Water Appropriators, Inc. ("IGWA") raised concerns regarding natural flow diversions by AFRD2 and the interim director's initial determination of material injury. IGWA did not explain why the interim director's determination of shortfall for AFRD2 was incorrect. The interim director reviewed the method of determining the shortfall, AFRD2's water rights, and the accounting of water deliveries to AFRD2. The interim director did not find compelling information to change the initial prediction of shortfall for AFRD2.

⁴ Steps 9 and 10 of the Methodology Order require the Director to predict reasonable carryover shortfalls to reservoir space held by member of the SWC in the fall before the subsequent irrigation season. *Methodology Order* at 36. Given when the Methodology Order was issued, junior ground water users were not under an obligation in the fall of 2009 to provide reasonable carryover shortfalls. At this time, it is forecasted that reservoir space held by members of the SWC will fill in 2010. In the fall of 2010, the Director will determine reasonable carryover shortfalls, if any, for members of the SWC. At that time, junior ground water users will be expected to comply with Steps 9 and 10, in whole or in part, or face curtailment, in whole or in part. *See id.* at 36.

7. If junior ground water users provide no water for purposes of mitigation, the Director will issue an order curtailing ground water rights junior to April 5, 1982, as simulated by the ESPA Model. Curtailment of ground water rights junior to April 5, 1982 will increase reach gains between the Near Blackfoot and Minidoka gages by a total amount of 84,361 acre-feet. Curtailing only those ground water rights located within the area of common ground water supply, IDAPA 37.03.11.050.01, will increase reach gains between the Near Blackfoot and Minidoka gages by 77,985 acre-feet. Curtailment of rights only within the area of common ground water supply will affect 73,782 acres. If junior ground water users secure a volume of water less than 84,300 acre-feet, the Director will redetermine the extent of curtailment, as simulated by the ESPA Model.

8. The 84,300 acre-feet of water required to mitigate material injury, shall be owed at the Time of Need, as established in Step 8 of the Methodology Order. At the Time of Need, the volume of water necessary to mitigate material injury to members of the SWC may be less but not greater than 84,300 acre-feet. *Id.* at 35.

CONCLUSIONS OF LAW

1. Based upon the Joint Forecast, the Director predicts, at this time, a demand shortfall will occur to AFRD2 and TFCC's Reasonable In-Season Demand ("RISD"); thereby resulting in material injury. IDAPA, 37.03.11.042. At this time, the predicted material injury to AFRD2 is 27,400 acre-feet. At this time, the predicted material injury is to TFCC 59,900 acre-feet. At this time, no other members of the SWC are predicted to suffer material injury during the 2010 irrigation season. The total predicted material injury to RISD for members of the SWC in the 2010 irrigation season shall be no greater than 84,300 acre-feet.

2. No later than May 13, 2010 (fourteen days from issuance of this order), junior ground water users must establish, to the satisfaction of the Director, that they have secured 84,300 acre-feet.

3. The predicted volume of water required to mitigate material injury shall be owed at the Time of Need, as established in Step 8 of the Methodology Order. The volume of water necessary to mitigate material injury at the Time of Need may be less, but not greater than 84,300 acre-feet.

4. If junior ground water users provide no water for purposes of mitigation, the Director shall issue an order curtailing ground water rights junior to April 5, 1982, which will increase reach gains between the Near Blackfoot and Minidoka gages by 84,361 acre-feet. Curtailing only those ground water rights located within the area of common ground water supply, IDAPA 37.03.11.050.01, will increase reach gains between the Near Blackfoot and Minidoka gages by 77,985 acre-feet. Curtailment of rights only within the area of common ground water supply will affect 73,782 acres. If junior ground water users secure a volume of water less than 84,300 acre-feet, the Director will redetermine the extent of curtailment, as simulated by the ESPA Model.

ORDER

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

The Director predicts, at this time, a demand shortfall of 27,400 acre-feet to AFRD2's reasonable in-season demand. The Director also predicts a demand shortfall, at this time, of 56,900 acre-feet to TFCC's reasonable in-season demand. At this time, no other members of the SWC are predicted to experience material injury during the 2010 irrigation season. The maximum, combined demand shortfall for members of the SWC during the 2010 irrigation season is 84,300 acre-feet.

No later than May 13, 2010 (fourteen days from issuance of this order), junior ground water users must establish, to the satisfaction of the Director, that they have secured 84,300 acre-feet of storage water to mitigate for the predicted material injury. If junior ground water users cannot establish, to the satisfaction of the Director, that they have secured the required volume of water, in whole or in part, the Director shall issue an order curtailing junior ground water users, in whole or in part, for the material injury caused to the injured members of the SWC.

IT IS FURTHER ORDERED that junior ground water users are not required to provide the secured volume of mitigation water until after the Director determines the SWC's Time of Need, as established in Step 8 of the Methodology Order. The volume of water required for mitigation at the Time of Need may be more or less for individual SWC members, but the combined volume will not be greater than 84,300 acre-feet.

IT IS FURTHER ORDERED that if junior ground water users provide no water for purposes of mitigation, the Director shall issue an order curtailing ground water rights junior to April 5, 1982. The curtailment shall affect 73,782 acres within the area of common ground water supply in Water District Nos. 34, 110, 120, 130, and 140, and will increase reach gains by 77,985 acre-feet. If junior ground water users secure a volume of water less than 84,300 acre-feet, the Director will redetermine the extent of curtailment, as simulated by the ESPA Model. Curtailment shall apply to consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

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

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a

written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

Dated this 29th day of April, 2010.



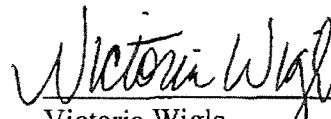
GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

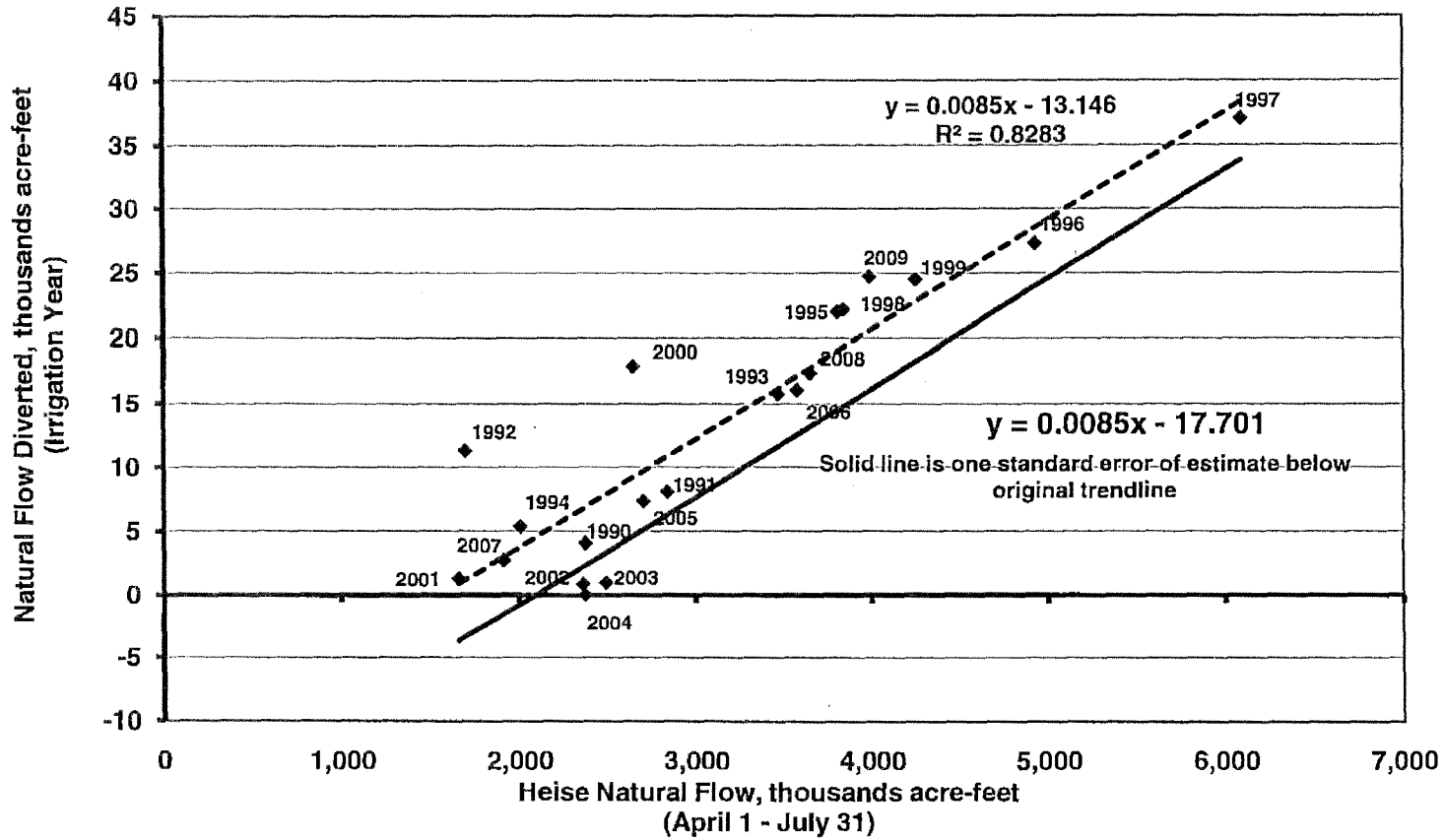
<p>John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 jks@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 tarkoosh@capitollawgroup.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 cmm@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email</p>

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<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@pn.usbr.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Sarah A. Klahn WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com icf@givenspursley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

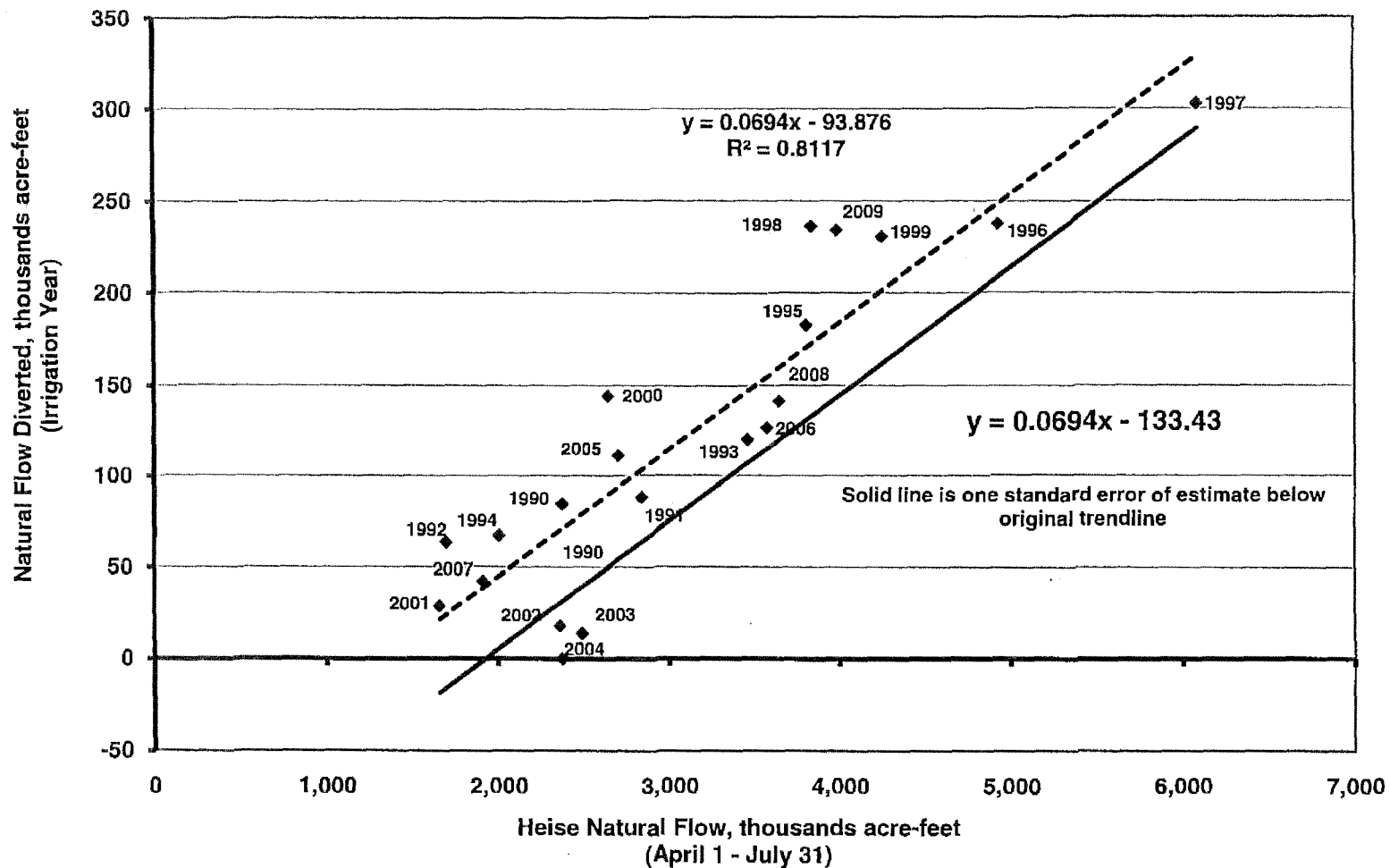


Victoria Wigle
Administrative Assistant to the Director

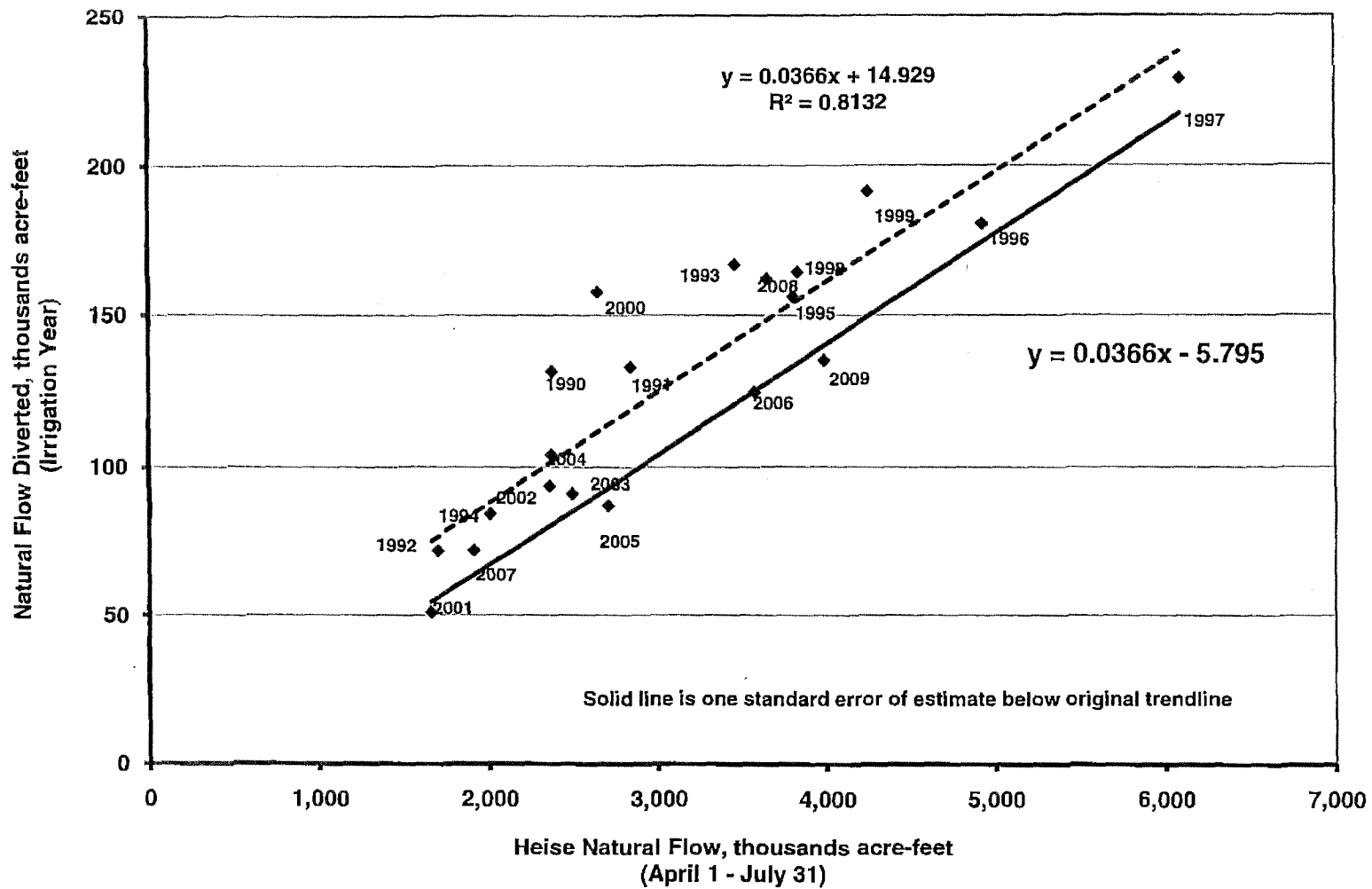
**A & B IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow**



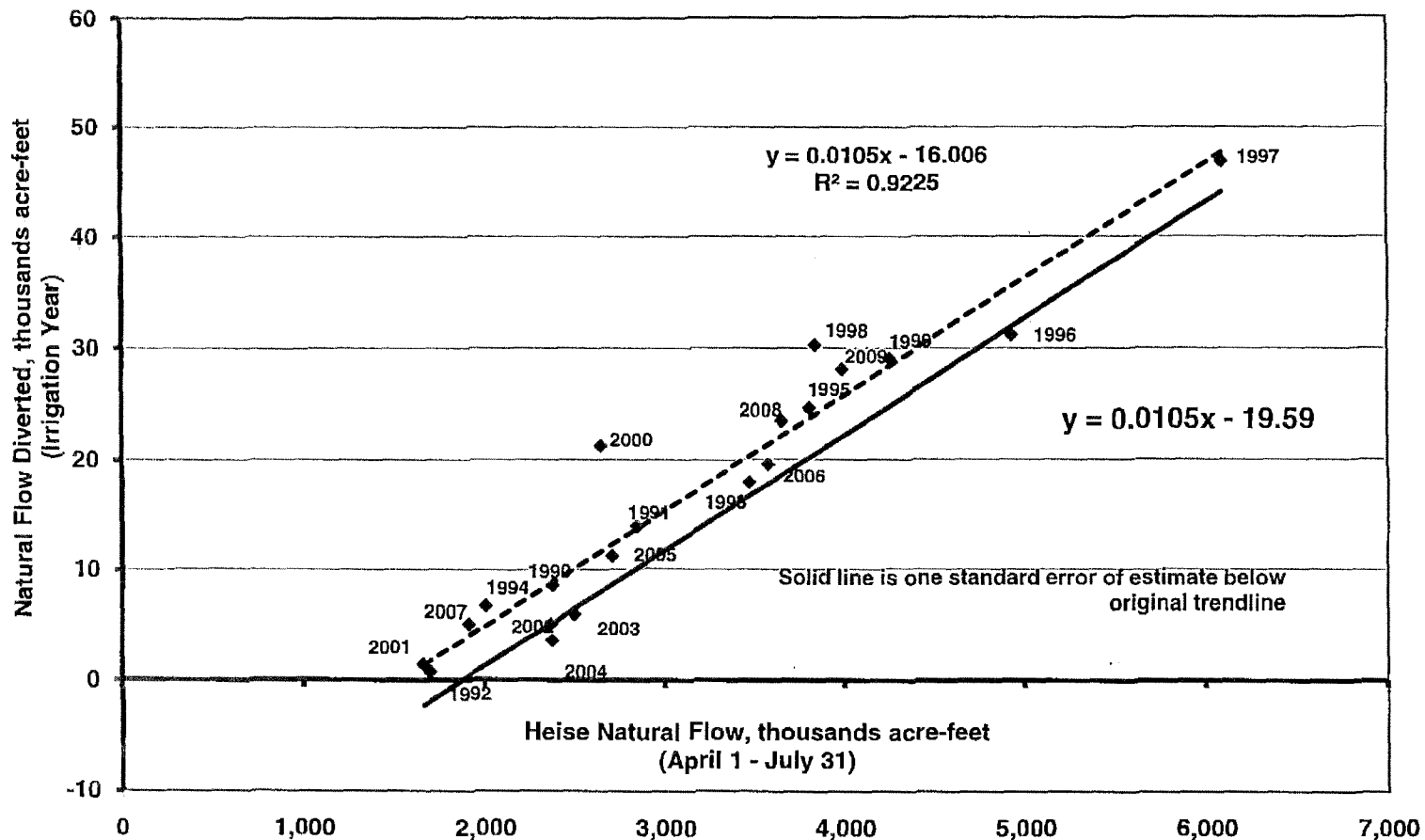
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Natural Flow Diversions with Heise Inflow



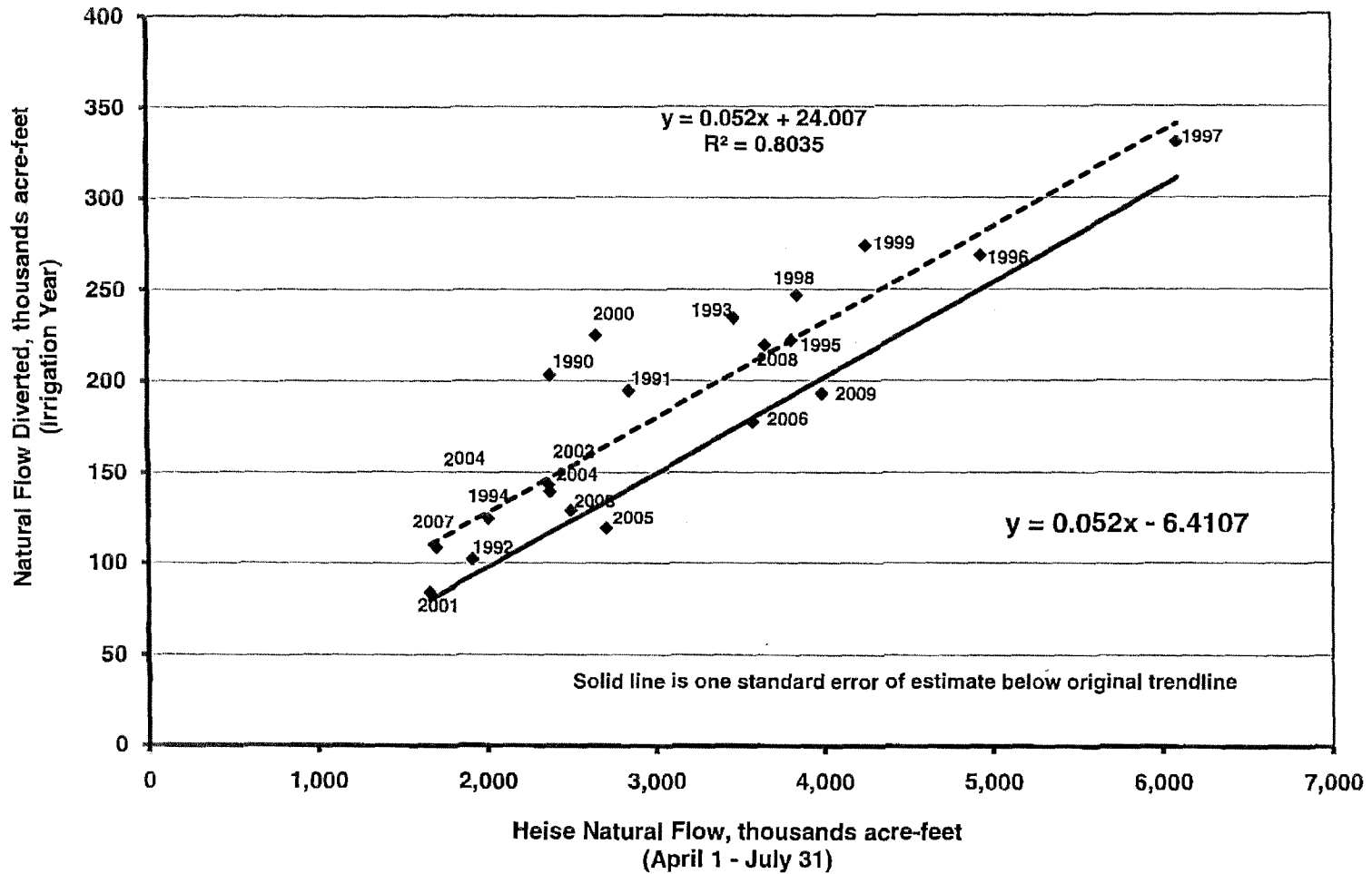
**BURLEY IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow**



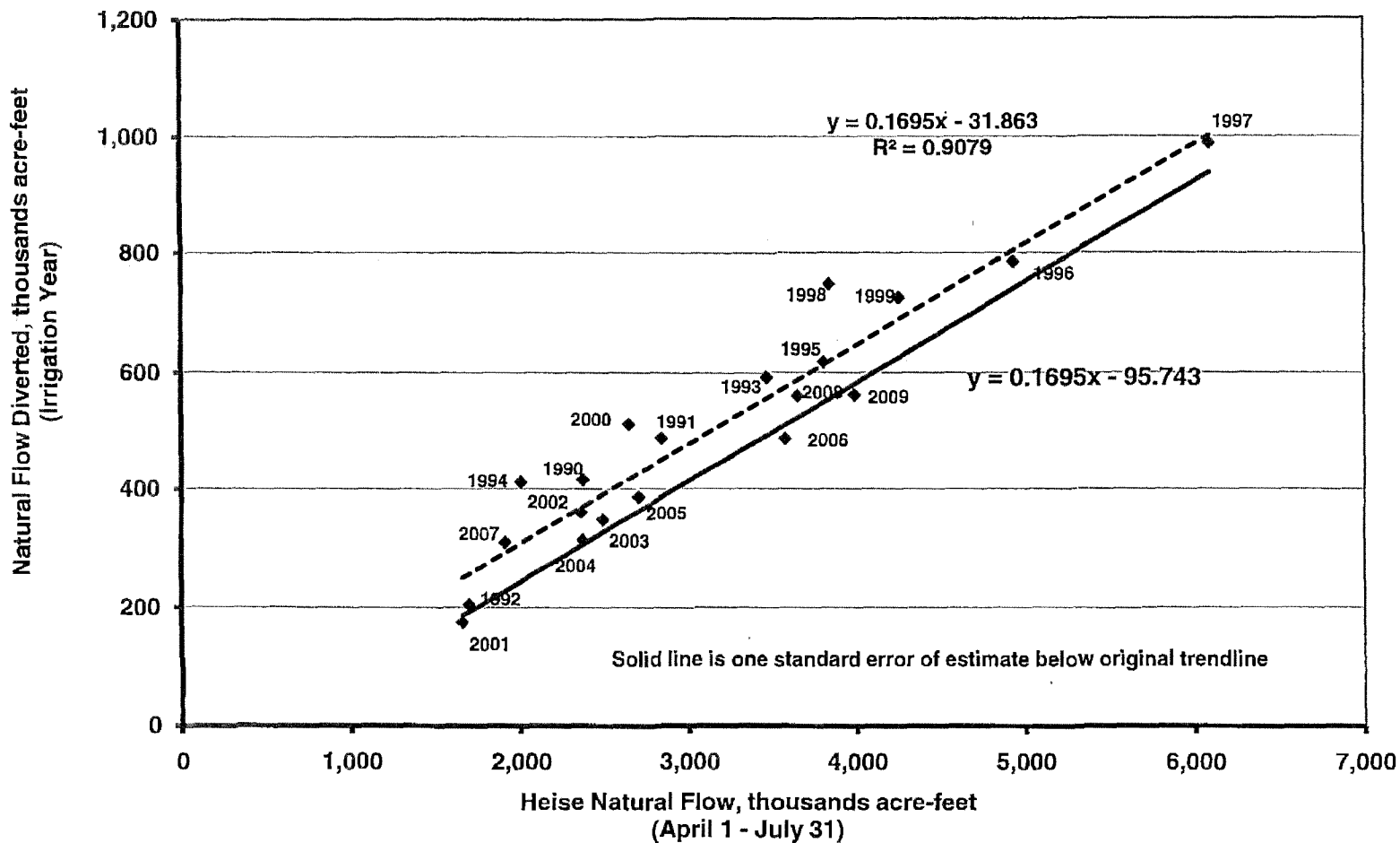
MILNER IRRIGATION DISTRICT
 Natural Flow Diversions with Heise Inflow



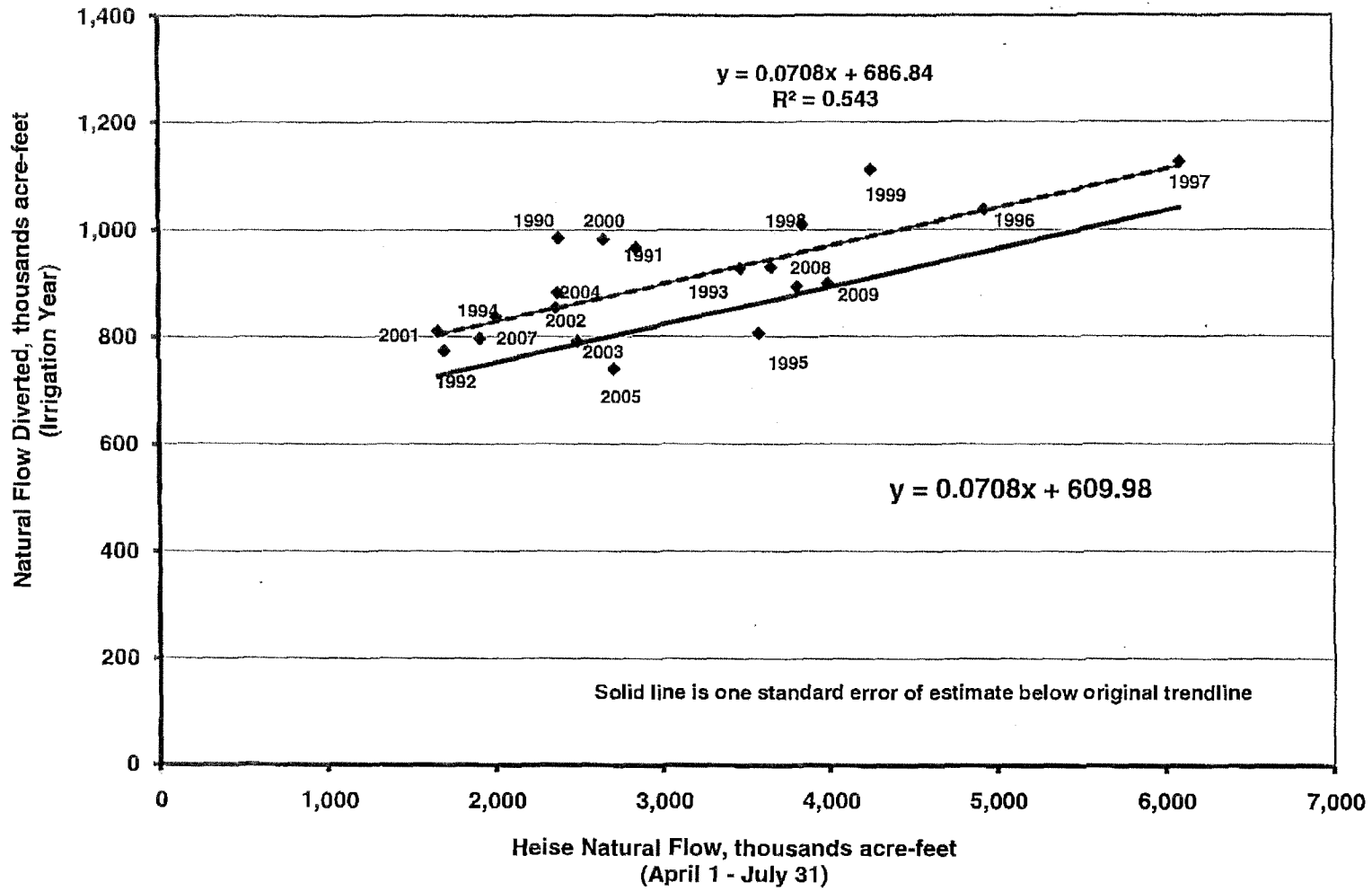
**MINIDOKA IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow**



NORTH SIDE CANAL COMPANY
 Natural Flow Diversions with Heise Inflow



TWIN FALLS CANAL COMPANY
Natural Flow Diversions with Heise Inflow



ATTACHMENT D

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

IN THE MATTER OF THE IDAHO GROUND WATER APPROPRIATORS, INC.'S MITIGATION PLAN FOR CONVERSIONS, DRY-UPS, AND RECHARGE) Docket No: CM-MP-2009-006))) ORDER APPROVING) MITIGATION CREDITS) REGARDING SWC) DELIVERY CALL)
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FINDINGS OF FACT

1. On October 6, 2009, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed with the Director of the Department of Water Resources ("Director" or "Department") a *Mitigation Plan for Conversions, Dry-Ups and Recharge* ("Plan") in accordance with the Conjunctive Management Rules ("CM Rules"). IDAPA 37.03.11.043. The Plan was filed broadly, "on behalf of [IGWA's] Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities" *Plan* at 1.

2. In accordance with CM Rule 43 and Idaho Code § 42-222, IGWA's Plan was published. The Plan was not protested. On May 14, 2010, the Director approved the Plan. *Order Approving Mitigation Plan*. In the Order Approving Mitigation Plan, the Director stated: "In the future, if mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide."

3. On May 12, 2010, the Department received *IGWA's Request for Mitigation Credit* ("Credit Request"). The Credit Request was filed in order to provide IGWA with mitigation credit for material injury that was predicted by the Director to occur to certain members of the SWC during the 2010 irrigation season. The Credit Request seeks approximately 15,306 acre-feet of mitigation credit for conversions, CREP, and recharge activities. According to the Request, these activities "enhance the water supply in the ESPA and to the Snake River" *Request* at 2.

4. Using the ESPA Model, the Director is able to simulate the benefits that will accrue to the Near Blackfoot and Minidoka gage during the 2010 irrigation season, in acre-feet, for certain mitigation activities:¹

W.D. 130 Conversions	CREP	2007 & 2009 Recharge	Total
220	5,390	97	5,707

5. Because water should be provided during the time in which it can be put to beneficial use, which for the SWC is the irrigation season (April through October), the Director calculates transient mitigation credit for these activities. Attached hereto as Attachment A are the ESPA Model runs.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602 states that, "The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine." The Idaho Supreme Court has recently stated, "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. CM Rule 20.03.

2. CM Rule 43.03 states as follows:

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

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

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

c. Whether the mitigation plan provides replacement water supplies or

¹ While IGWA has sought credit for certain activities undertaken by Southwest Irrigation District ("SWID"), IGWA has not stated that its Plan applies to SWID. Therefore, the Department will only review IGWA activities.

other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

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

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

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

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

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

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

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

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

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

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

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

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

3. The Credit Request requires the Director to utilize the ESPA Model to simulate the benefits that will accrue to the Near Blackfoot and Minidoka gage. CM Rule 43.03.e and .f. The ESPA Model represents the best available science for determining the effects of ground water diversions and surface water users on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There is currently no other technical basis as reliable as the simulations from the ESPA Model that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. The degree of uncertainty associated with application of the ESPA Model is 10 percent.

4. In order to ensure that mitigation credit is provided during the time of need, which for the SWC is the irrigation season (April through October), the Director calculates transient mitigation credit for the above-identified mitigation activities. Based upon ESPA Model simulations, the Director determines that, for the 2010 irrigation season, the benefit of these activities will increase gains in the Near Blackfoot and Minidoka gage by 5,707 acre-feet.

ORDER

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

IGWA's *Request for Mitigation Credit* is GRANTED for the 2010 irrigation season, in response to the SWC delivery call. The mitigation credit for the 2010 irrigation season is 5,707 acre-feet.

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

IT IS FURTHER ORDERED that, unless the parties specifically instruct the Director that a hearing is not necessary, a hearing shall occur on June 1, 2010. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an

appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 17th day of May, 2010.


GARY SPACKMAN
Interim Director

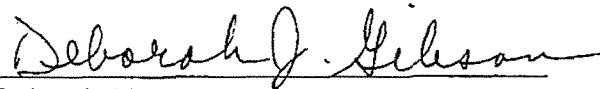
CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 17th day of May, 2010.

John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 jks@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 cmm@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email

<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 1961 Stout Street, 8th Floor Denver, CO 80294 david.gehlert@usdoj.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@pn.usbr.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Sarah A. Klahn Mitra Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

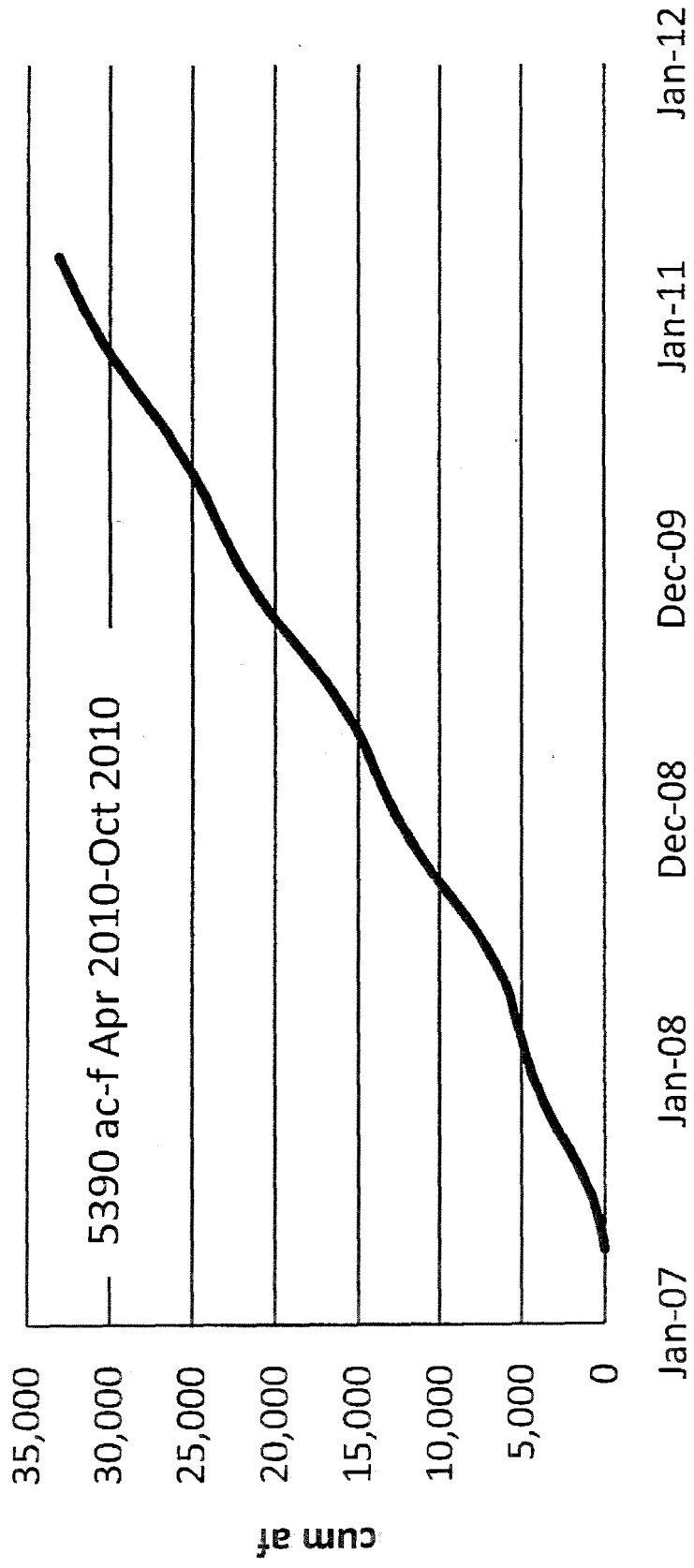
<p>Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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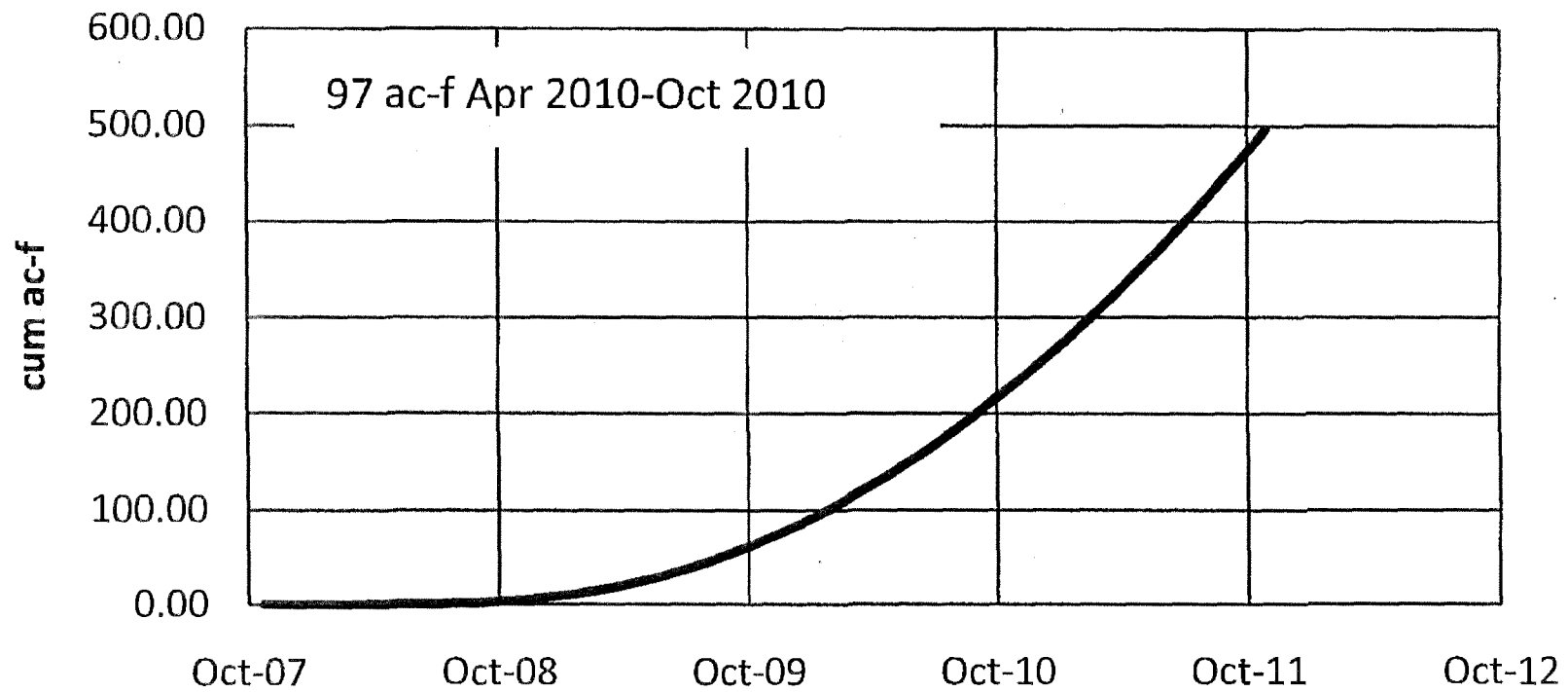
Deborah Gibson
Administrative Assistant, IDWR

ATTACHMENT A

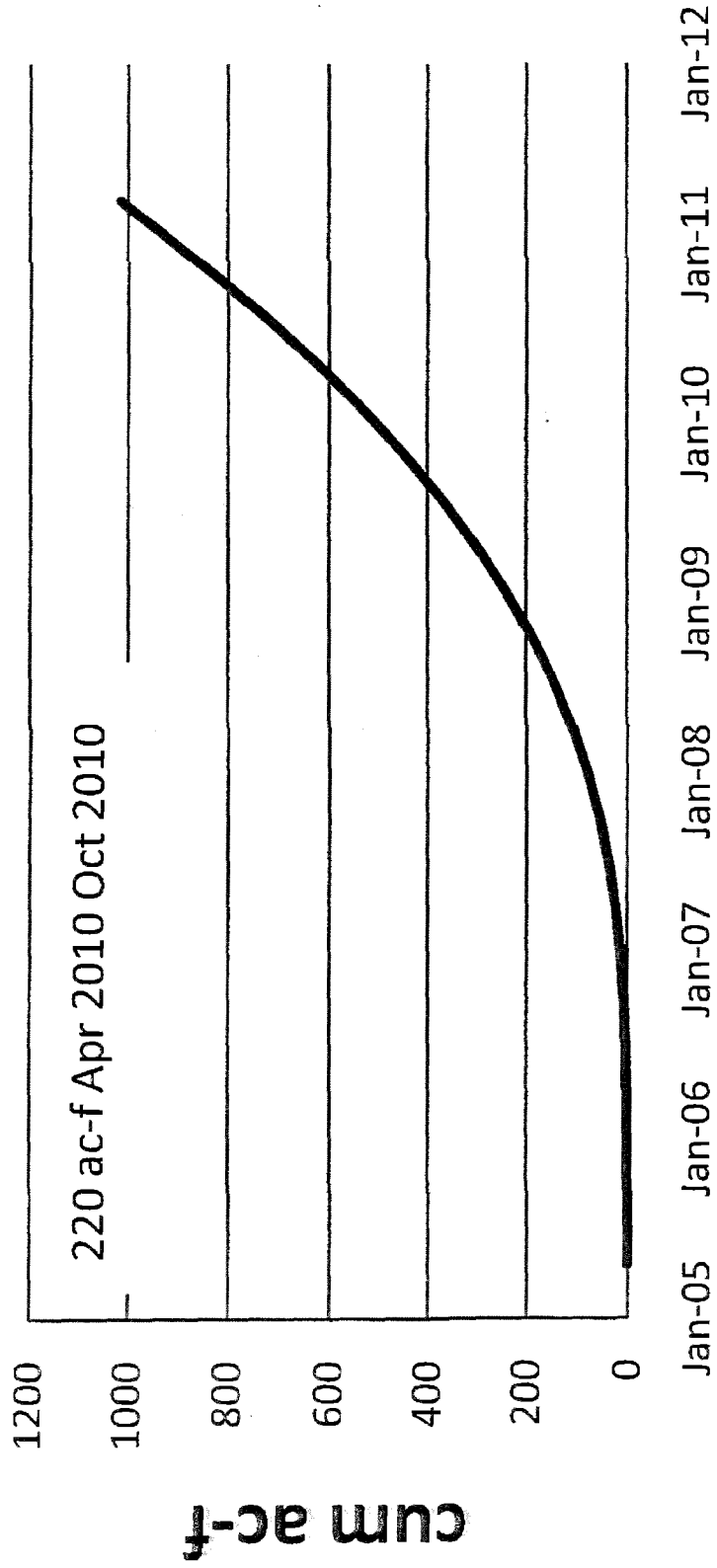
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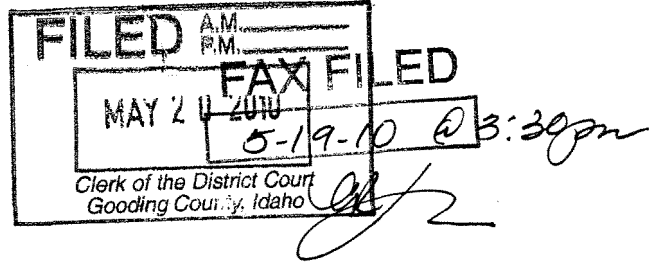


Recharge - nB_Min



Conversion - nB_Min





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Attorneys for Respondents

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-2008-0000551

Petitioners,)

vs.)

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

**IDWR RESPONSE TO IGWA AND
 POCATELLO MOTION FOR STAY
 AND TO AUGMENT THE RECORD
 WITH ADDITIONAL EVIDENCE**

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)

COME NOW Respondents, Gary Spackman in his capacity as Interim Director (“Director”) of the Department of Water Resources and the Department of Water Resources (“Department”) (collectively referred to herein as “Department”), and hereby file this response to the City of Pocatello (“Pocatello”) and Idaho Ground Water Appropriators, Inc.’s (“IGWA”) (collectively referred to herein as “Ground Water Users”) May 12, 2010 *Motion for Stay and to Augment the Record with Additional Evidence* (“Motion”) and accompanying memorandum (“Memorandum”). Because the Ground Water Users have failed to exhaust their administrative remedies before the Department, the Department respectfully requests this Court deny the GWU’s attempt to derail the administrative process.

ARGUMENT

I. Following This Court’s Order On Remand, The Director Has Established An Orderly Process For Administration Of Hydraulically Connected Surface and Ground Water Rights

On March 4, 2010, the Court issued its *Order Staying Decision on Petition for Judicial Review Pending Issuance of Revised Final Order* (“Remand Order”). The Remand Order was issued pursuant to Idaho Appellate Rule 13(b)(14) and tasked the Director to issue a final order determining material injury to reasonable in-season demand and reasonable carryover by March 31, 2010. On March 29, 2010, the Court extended the deadline to April 7, 2010. On April 7, 2010, the Director issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). Attachment A, Affidavit of Chris M. Bromley (“Bromley Affidavit”). “The purpose of this Final

Order is to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC." *Methodology Order* at 2. In the Methodology Order, the Director updated existing data in the record with 2008 data. *Id.* at 7, fn. 4. The parties were made aware of the Director's decision to update existing data, were provided the opportunity for reconsideration on the Methodology Order, and have sought reconsideration of the Methodology Order. In accordance with Idaho Code § 67-5251(4), the Director has provided for a hearing to "contest and rebut" the 2008 data; the hearing is scheduled to commence May 24, 2010. *Notice of Hearing Regarding 2008 Data* (May 10, 2010). Attachment B, Bromley Affidavit.

Because of the need for on-going administration of hydraulically connected surface and ground water rights, the Director applied Steps 3 and 4 of the Methodology Order and, on April 29, 2010, issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* ("April Forecast Supply Order").¹ Attachment C, Bromley Affidavit. Following Steps 3 and 4 of the Methodology Order, the Director predicted a demand shortfall of 84,300 acre-feet to the Surface Water Coalition ("SWC"). *Id.* at 2. The Director provided for reconsideration and a hearing on whether the April Forecast Supply Order followed Steps 3 and 4 from the Methodology Order. *Id.* at 4. Petitions for reconsideration and requests for hearing regarding the April Forecast Supply Order have been filed. A hearing on the April Forecast Supply Order is scheduled to commence immediately following conclusion of the hearing on the Methodology Order. Following the hearing on the April Forecast Supply Order, the Director will hold a hearing on IGWA's mitigation plan for the SWC. On June 1, 2010, the Director will hold a hearing on his determination of credit for IGWA's conversion, CREP, and recharge activities.

¹ Referred to as the "As-Applied Order" by IGWA and Pocatello.

Order Approving Mitigation Credits Regarding SWC Delivery Call at 4 (May 17, 2010).

Attachment D, Bromley Affidavit. At the conclusion of these proceedings, the Director will issue orders on reconsideration, which will be subject to judicial review. Idaho Code § 42-1701(A)(4); § 67-5270.

II. Idaho Code § 67-5276 Does Not Provide The Ground Water Users With An Avenue To Seek Augmentation Of The Department's Administrative Record Before The Director's Orders Are Subject To Judicial Review

The Ground Water Users state that Idaho Code § 67-5276 authorizes “this Court to order IDWR to take additional evidence to augment the record in this matter.” *Memorandum* at 5.

Idaho Code § 67-5276 states as follows:

ADDITIONAL EVIDENCE. (1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

Emphasis added.

The Ground Water Users argue that the Court should force the Director to augment the record because a “hearing” has yet to occur before this Court. Certainly a hearing before the Court has not occurred because the matter is squarely before the Director.

In making their argument, the Ground Water Users first ignore the location in which - 5276 appears in Chapter 52, Title 67. Chapter 52, Title 67 contains the “Idaho Administrative Procedure Act” (“APA”). The APA follows a logical sequence. Regarding contested cases before an administrative agency, -5240 through -5255 addresses the procedures governing

contested cases and declaratory rulings before the agency. In contrast, 5270 through -5279 provides the procedure upon which that review is governed following the issuance of a final order that is subject to “judicial review.” Idaho Code § 67-5270.

Idaho Code § 67-5276 is located squarely within the rules governing judicial review of final agency orders, not within the rules governing contested cases before an agency. The importance of the statute’s location in the APA is that until the Director has (1) completed hearings on reconsideration of the above-mentioned orders, Idaho Code § 67-5246; that (2) results in final orders that are subject to judicial review, Idaho Code § 67-5270; the Court cannot grant the Ground Water Users’ Motion because a hearing on judicial review is not ripe.

Second, the plain language of Idaho Code § 67-5276 makes it clear that the hearing that is referenced is a hearing on judicial review, not a hearing before an agency. Idaho Code § 67-5276(a) states that if “there were good reasons for failure to present it in the proceedings before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.” Emphasis added. Therefore, until an agency completes its hearing and until there are final orders that are ripe for judicial review, the Ground Water Users cannot invoke Idaho Code § 67-5276 to seek an order from this Court to augment the record.

The above interpretation of Idaho Code § 67-5276 is consistent with the articulated principle that parties must first exhaust their administrative remedies before seeking judicial review of agency actions.

A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies. I.C. § 67-5271(1). Until the full gamut of administrative proceedings has been conducted and all available administrative remedies been exhausted, judicial review should not be considered. *See Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972).

Regan v. Kootenai County, 140 Idaho 721, 723-24, 100 P.3d 615, 617-18 (2004).

The Ground Water Users' request that the Court order the Department to augment the record is inconsistent with Idaho law and should be denied.

III. Idaho Code § 67-5276 Does Not Provide The Ground Water Users With An Avenue To Define The Scope Of Hearings Set By The Director

In their Motion, the Ground Water Users ask this Court to order the Director to "hold a hearing regarding the full scope of the issues related to the Methodology Order and As-Applied Order[]." *Memorandum* at 5 (emphasis added). Again, the Ground Water Users base this request on Idaho Code § 67-5276. As stated above in Part I, the Director has granted the parties' requests for hearing on the Methodology Order and the April Forecast Supply Order. What the Ground Water Users take exception with, however, is the Director's decision to define the scope of those hearings to issues that have already been subject to hearing. Idaho Code § 67-5276 does not provide an avenue to define the scope of the hearing, but allows for a court to remand a matter back to an agency. As explained in Part II, until the Director issues a final order that is subject to judicial review, the Court cannot entertain the Ground Water Users' Motion because they have failed to exhaust their administrative remedies. Idaho Code § 67-5271; *Regan* at 723-24, 100 P.3d at 617-18.

IV. The Ground Water Users Request For Judicial Review Of Certain Elements Of The Methodology Order Is Not Ripe For Review

The Ground Water Users allege that the Methodology Order is not grounded in the record and seek an order from the Court directing the Department to correct the alleged errors. *Memorandum* at 7-8. "At hearing in this matter, [the Ground Water Users] will present evidence regarding the factual problems with the new methodology, specifically the over-estimation of SWC crop water demands." *Id.* at 8.

As stated earlier, IGWA, Pocatello, and the SWC have filed petitions for reconsideration regarding the Methodology Order. Starting on May 24, 2010, the Director will hold a hearing on the use of 2008 data in the Methodology Order. Upon completion of that hearing, the Director will issue an order regarding the petitions for reconsideration. Once the Director issues his order on reconsideration, the decision will be subject to judicial review; thereby providing the GWU with an opportunity to contest the Director's actions. The Ground Water Users' Motion for an advisory opinion from this Court on "SWC crop water demands"—a subject that was raised before Hearing Officer Gerald F. Schroeder—constitutes an end-run around established administrative procedures and must be denied. Idaho Code § 67-5271; *Regan* at 723-24, 100 P.3d at 617-18.

CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court deny the Ground Water Users' Motion for failure to exhaust administrative remedies.

DATED this 19th day of May, 2010.

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



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

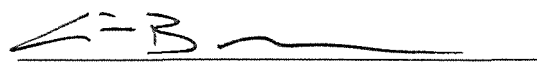
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 19th day of May, 2010.

Document Served: **IDWR Response to IGWA and Pocatello Motion for Stay and to Augment the Record with Additional Evidence**

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Judge Melanson (courtesy copy) Idaho Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
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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

Case No.: CV-2008-0000551

CITY OF POCATELLO'S AND
GROUND WATER USERS'
RESPONSE TO SWC'S MOTION TO
EXTEND DEADLINE TO RESPOND

Interim Director of the Idaho Department of
Water Resources,¹ 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

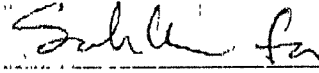
The City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, acting for and on behalf of their members ("Ground Water Users"), hereby submit this Response to SWC's Motion to Extend Deadline to Respond to City of Pocatello's & Ground Water Users' Motion for Stay and to Augment the Record with Additional Evidence ("Motion").

Pocatello and the Ground Water Users participated in all or part of the hearing referenced in SWC's Motion. Pocatello and the Ground Water Users consent to SWC's request for an extension until June 2, 2010, provided they are similarly provided an extension in filing any reply until June 7, 2010.

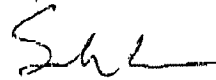
¹ Director David R. Tutill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

Respectfully submitted, this 28th day of May, 2010.

ATTORNEYS FOR CITY OF POCA TELLO

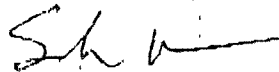


A. Dean Tranmer



Sarah A. Klahn


ATTORNEYS FOR GROUND WATER USERS



Candice M. McHugh

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's and Ground Water User's Response to SWC's Motion to Extend Deadline to Respond in Case No. CV-2008-0000551** upon the following by the method indicated:


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CITY OF POCATELLO'S AND GROUND WATER USERS' RESPONSE TO SWC'S MOTION TO EXTEND DEADLINE TO RESPOND

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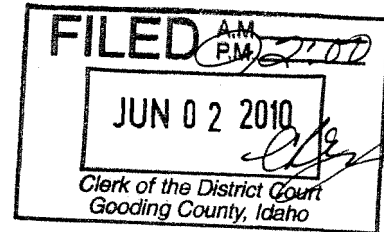
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Attorneys for Minidoka Irrigation District



**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.

)
) CASE NO. CV 2008-551
)
)
) **SURFACE WATER COALITION'S**
) **RESPONSE TO IGWA'S AND CITY**
) **OF POCATELLO'S MOTION FOR**
) **STAY AND TO AUGMENT THE**
) **RECORD WITH ADDITIONAL**
) **EVIDENCE**
)
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)

GARY SPACKMKAN, 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)
_____)

COME NOW, 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”) (collectively hereinafter referred to as the “Surface Water Coalition”, “Coalition”, or “SWC”), by and through their undersigned counsel, and hereby file this response to the motion for stay and to augment the record with additional evidence filed by IGWA and the City of Pocatello (“Pocatello”) (hereinafter collectively referred to as “Ground Water Users”) on May 12, 2010.

As explained in detail below, the relief sought by IGWA and Pocatello is not warranted and therefore the motions should be denied.

BACKGROUND

This case traces its history back to the Director’s Final Order issued on September 5, 2008. R. Vol. 39 at 7381. The Coalition and the United States Bureau of Reclamation (“Reclamation”) appealed the Director’s order to this Court. After objections to the initial

agency record were resolved, IDWR filed a final *Notice of Lodging of Agency Record with District Court* on February 6, 2009 pursuant to I.R.C.P. 84(k). After briefing and a hearing, this Court issued its *Order on Petition for Judicial Review* on July 24, 2009. The Court concluded the Director abused his discretion on various issues and remanded the case back to the agency for further proceedings consistent with the Court's decision. *Order* at 33.

Dissatisfied with the Court's decision IGWA and Pocatello each filed petitions for rehearing in August 2009. IDWR and the SWC filed responses to these petitions and a hearing was held before the Court on February 22, 2010. The Court then issued its *Order Staying Decision on Petition for Rehearing Pending Issuance of a Revised Final Order* on March 4, 2010 ("*Stay Order*"). The Court ordered IDWR to issue a new final order "determining material injury to reasonable in-season demand and reasonable carryover" and held in abeyance its final decision on the rehearing petitions. *Stay Order* at 3. The Court concluded that it would stay a decision on the rehearing petitions until IDWR issued its final order and "the time periods for filing a motion for reconsideration and petition for judicial review of the new order have expired." *Id.*

On April 7, 2010 the Director issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order*"). *See* Attach. A to *Bromley Aff.* The Coalition, IGWA, and Pocatello all filed petitions for reconsideration with the Director. Thereafter, the Director held a hearing on May 24, 2010 regarding the use of 2008 data in the Methodology Order. The 2008 data was not included in the agency record in this case. Presently, the parties are waiting for a decision from the Director on the petitions for reconsideration.

Once the Director issues an order on the petitions for reconsideration, the parties will then have 28 days to file a petition for judicial review with this Court. In addition, at that time the Court's ordered *Stay Order* will expire and it is presumed the Court will issue a decision on the petitions for rehearing that are still pending in this case.

STANDARD OF REVIEW

A decision to grant or deny a motion for augmentation of the record on appeal is reviewed under an abuse of discretion standard. *See Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 75-76 (2007). A decision within the discretion of the district court will not be disturbed on appeal if the court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it. *Id.* at 76.

With respect to the Ground Water Users' motion, the issue is whether they have met the criteria set forth in Idaho Code § 67-5276 to warrant the Court to take "additional evidence" to augment the administrative record in this case. As set forth below, the Ground Water Users have failed to meet the statutory standard and therefore the Court should deny the motion.

ARGUMENT

I. The Record in This Case is Established and There is No Basis to Create a New Administrative Proceeding to Delay Timely Judicial Review of the Director's Final Agency Action.

With the completion of the hearing held on May 24, 2010, the record in this case, which now includes 2008 data, is complete.¹ Since the data was not included in the original agency record established prior to the 2008 hearing in this case, the Director provided the parties with

¹ The SWC takes no position at this point as to whether IDWR's action in including the 2008 data in the agency record, and the method it did so, complied with Idaho law. The summary of how it was included by IDWR is provided for the Court's information.

the opportunity to contest or rebut the 2008 data that was used by the Director in the Methodology Order. IGWA and Pocatello participated in the May 24, 2010 hearing.

According to IDWR, the Director is in the process of issuing an order on the petitions for reconsideration filed on his April 7, 2010 Methodology Order. *IDWR Response* at 4. Once the order on reconsideration is issued, the parties will have the right to file petitions for judicial review with this Court. *See* I.C. § 67-5270. In the event the Director's final order does not comply with Idaho law and this Court's July 24, 2009 *Order on Petition for Judicial Review*, the parties will be able to seek the appropriate relief with this Court.

Contrary to the appeal process provided by Idaho's APA and the pending state of this case as ordered by the Court in the *Stay Order*, the Ground Water Users seek to delay timely judicial review of the Director's yet to be issued final decision by asking this Court to stay this case and "order" IDWR to hold a hearing "on all aspects of the Methodology Order and the As-Applied Order" under their theory that the Court should take some undefined "additional evidence". *Ground Water Users' Motion* at 3. The Ground Water Users' motion is not supported by the law or facts in this case and therefore should be denied.

First, as to the request for a hearing on the "As Applied Order" for 2010 administration, the Director held a hearing on that order on May 24th and 25th. IGWA and Pocatello participated in this hearing. The scope of the hearing considered whether the Director followed his Methodology Order in applying Steps 3 and 4 for purposes of the 2010 irrigation season. The case concerns ongoing conjunctive administration for this current irrigation season and has been submitted to the Director for a final order. The decision is pending. Accordingly, the Ground Water Users' request for the Court to order IDWR to hold a hearing on the "As Applied Order" is moot since a hearing has already occurred. Moreover, despite the prediction of material injury

to members of the SWC, and IGWA's failure to secure and provide the required mitigation by May 13, 2010, the Director nonetheless "stayed" the effect of his As Applied Order pending the hearing that was held on May 24th and 25th. See May 17, 2010 *Order Regarding IGWA Mitigation Obligation*.² If the Ground Water Users dispute the Director's As Applied Order, Idaho's APA provides them with a right to judicial review of that final order.³ See I.C. § 67-5270.

Next, there is no basis for the Court to "order" IDWR to hold a hearing on the "Methodology Order". The Director's Methodology Order, and any order on reconsideration to be issued, will be part of the final order based upon the agency record established in this case. See R. Vols. 1-39. The administrative proceeding underlying this case began in 2005 and culminated with a three-week long hearing held in January-February 2008. As this Court is well aware, the pleadings, testimony, expert reports, and evidence in this matter are voluminous. The administrative "hearing" the Ground Water Users presently request has already been held, at great expense and time spent by the parties. Although the Ground Water Users may dispute the result of that hearing, as well as the Court's July 24, 2009 *Order*, their remedy is an appeal of the Director's final order to this Court, not another 3-year administrative case that would only repeat the previous effort and effectively prevent timely judicial review of the agency's decision.

As a basis for their motion, the Ground Water Users rely upon the "additional evidence" section in Idaho's APA and claim the Court should "order" IDWR to hold an another administrative hearing in this case. The statute provides the following:

² Available at: <http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/default.htm#Admin>

³ IGWA recently filed for and was denied temporary injunctive relief regarding the Director's actions in implementing the As Applied Order for 2010. See *Order Denying Request for Temporary Restraining Order and Application for Stay*, (Jerome County Dist. Ct., Fifth Jud. Dist., Case No. CV-2010-510).

(1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

- (a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.
- (b) There were alleged irregularities in procedure before the agency, the court may take proof on the matter.

Idaho Code § 67-5276.

Contrary to the Ground Water Users' claim, they cannot meet the criteria set forth in Idaho Code § 67-5276.⁴ First, the "hearing" on the petitions for judicial review in this case was already held before the Court on May 26, 2009. Neither Pocatello nor IGWA filed a motion before the May 26, 2009 hearing seeking leave to present additional evidence. Accordingly, the motion is untimely. See I.R.C.P. 84(j); *Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487, 497 (2008) (request to augment the record after a decision on a petition for judicial review untimely and properly denied).

If the "hearing" the Ground Water Users reference is the hearing on a future petition for judicial review of the Director's final order after a decision on the pending petitions for reconsideration, the request is premature. As discussed above, if the parties dispute the Director's final order on reconsideration, an opportunity for appeal and judicial review is available under Idaho's APA. Regardless if the "hearing" contemplated by the statute is: 1) the hearing on oral argument already held in this case over a year ago, or 2) any future hearing on

⁴ The Ground Water Users do not allege "irregularities in procedure before the agency", nor do they offer any proof to the Court. I.C. § 67-5276(1)(b). Instead, they claim the Director's Methodology Order is not based on the record and exceeds the scope of agency discretion. Again, these claims represent grounds for appeal, not the basis for taking "additional evidence". As to the 2008 data, the Director held a hearing on that data on May 24, 2010.

any future petitions for judicial review, the Ground Water Users' request is not in accordance with the procedural timeframe specified by Idaho law. As such, the motion should be denied.

Next, even assuming the Court can consider the motion at this stage of the case, the Ground Water Users have failed to show that any "additional evidence" is material and that "there were good reasons for failure to present it in the proceeding before the agency. I.C. § 67-5276. It is telling the Ground Water Users present no new or "additional evidence" with their motion. Although they filed petitions for reconsideration before the agency and submitted "technical information" in support of those petitions, the information they rely upon is already part of the administrative record.⁵ Accordingly, there is no "new" or "additional" evidence for this Court to review that was not already presented and argued before IDWR at the administrative hearing in this case.

In addition, the Ground Water Users only allege they will present additional evidence "regarding the factual and technical problems" with the Director's Methodology Order. They admittedly fail to identify this "additional evidence" in their motion to the Court. *See Ground Water Users' Memo* at 6-8. As such their motion plainly fails to meet the statutory criteria set forth in Idaho Code § 67-5276. Instead, the Ground Water Users just disagree with the Director's methodology and claim that the result is an "over-estimation of SWC crops water demands". *Id.* If the Ground Water Users dispute the Director's final order, after a ruling on the pending petitions for reconsideration, their remedy is an appeal to this Court, not a new administrative proceeding that would only delay final resolution of this case. Alleging that the Director's decision is "arbitrary and capricious" or is not based upon the agency record at this

⁵ The Ground Water Users filed an April 29, 2010 Memorandum from Gregory K. Sullivan and a May 6, 2010 Affidavit of Charles M. Brendecke. The information relied upon in the Sullivan Memo and Brendecke Affidavit that relates to this case is already in the agency record, it is not "additional evidence" that they failed to present in the underlying hearing before IDWR held in January-February 2008. Information specific to 2010 administration is not relevant nor before the Court at this time.

point present reasons for appeal under Idaho Code § 67-5270. In sum, the Ground Water Users' claims do not represent "additional evidence" contemplated to be considered under Idaho Code § 67-5276.

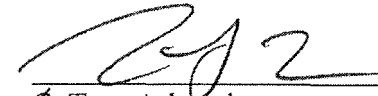
Since the Ground Water Users failed to object to the agency record previously filed with the Court on February 6, 2009, failed to file their motion prior to the hearing held on May 26, 2009, and have presented no meritorious basis for the Court to take "additional evidence" at this stage of the case, their motion fails. Since they have failed to meet the statutory criteria to augment the agency record, the Court should deny the Ground Water Users' motion. *See Crown Point Dev., Inc.*, 156 P.3d at 577 ("judicial review is confined to the agency record unless the party requesting the additional evidence complies with one of the two statutory exceptions.").

CONCLUSION

Similar to their petitions for rehearing, IGWA and Pocatello have failed to present sufficient legal or factual reasons to justify the relief they seek in this case. Although the Ground Waters apparently dispute the Director's methodology as set forth in April 7, 2010 Order, that decision is still pending on petitions for reconsideration before the Director. The remedy for this dispute, if it continues, is an appeal to this Court, not another protracted administrative case that would delay timely judicial review of the agency's action. Although the Ground Water Users would prefer to open up a new administrative case and continue to delay conjunctive administration of their out-of-priority ground water rights, it is clear they have no basis to meet the criteria set forth in Idaho Code § 67-5276. For these reasons the Coalition respectfully requests the Court deny the Ground Water Users' motion.

DATED this 2nd day of June, 2010.


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Tom Arkoosh

*Attorneys for American Falls Reservoir
District #2*

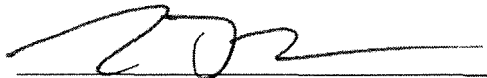
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June, 2010, I served true and correct copies of the *Surface Water Coalition's Response to IGWA's and City of Pocatello's Motion for Stay and to Augment the Record with Additional Evidence* upon the following by the method indicated:

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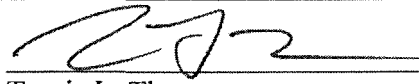
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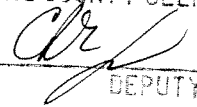
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ATTORNEYS FOR GROUND WATER
USERS

**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

Case No.: CV-2008-0000551

**CITY OF POCATELLO'S AND
GROUND WATER USERS'
REPLY IN SUPPORT OF MOTION FOR
STAY AND TO AUGMENT THE
RECORD WITH ADDITIONAL
EVIDENCE AND MOTION TO LATE
FILE REPLY**

CITY OF POCATELLO'S AND GROUND WATER USERS' REPLY IN SUPPORT OF MOTION FOR STAY
AND TO AUGMENT THE RECORD WITH ADDITIONAL EVIDENCE AND MOTION TO LATE FILE
REPLY

903

Interim Director of the Idaho Department of
Water Resources,¹ 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

The City of Pocatello (“Pocatello”) and the Idaho Ground Water Appropriators, acting for and on behalf of their members (“Ground Water Users”) submit this Reply in Support of their Motion to Stay and to Augment the Record with Additional Evidence (“Motion to Augment”). Pocatello and the Ground Water Users also respectfully request permission to late file this brief for the reasons described in the Motion appended to the end of this Reply.

Introduction

As a result of the limited remand granted to IDWR by this Court, the Department issued two orders regarding the SWC delivery call. The first was the April 7, 2009 “Methodology Order” and the second was the April 29, 2009 “As-Applied Order”, which purported to apply steps 3 and 4 from the Methodology Order to determine the mitigation amount owed by the Ground Water Users and set a curtailment date. *See* Attachments 1 and 2 to the Motion to Augment. As described in the Motion to Augment, the Methodology Order (and thus the As-Applied Order) is not consistent with the record below regarding the methodologies determined

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).

by the Hearing Officer, Director and this Court based on evidence taken at the 2008 Hearing in this matter.

Subsequent to the filing of the Motion to Augment, the Director held limited hearings on May 24 and 25, 2010 for the sole purpose of allowing inquiry into the reliance on 2008 data and whether the Department had complied with Steps 3 and 4 of the Methodology Order². The limitations on the scope of these hearings reflect a misperception on the part of the Department that the April 7th Methodology Order is consistent with the record below and the limited remand of the District Court.³ In the course of the hearings, the Director declined to consider evidence offered by Pocatello and the Ground Water Users that would have demonstrated the disconnect between the Methodology Order and the record below; further, the Director, in an abuse of discretion, refused to allow Pocatello and Ground Water Users to make offers of proof made on these subjects.

While the Department and the SWC responded to Pocatello and Ground Water Users' Motion to Augment, neither has provided any basis for the Methodology Order to be accepted into the record, or for the Court to find that the Methodology Order is consistent with the limited remand. Given the factual deficiencies in the record from the limited hearings held on May 24-25, and the abuse of discretion committed by the Department in exceeding the scope of the remand as well as the abuse of discretion regarding proceedings at the hearings on those dates, the Ground Water Users respectfully request that their Motion to Augment the record be granted.

² Enclosed with this Reply is an Affidavit of Sarah A. Klahn, attached to which are true and correct copies of the transcripts from the May 24th and 25th hearings in the Methodology Order and As Applied Order.

³ Despite the limited nature of the hearings, and the resulting violation of principles of due process, the evidence during the hearings demonstrated that the administrative steps outlined in the Department's Methodology Order have not been followed for purposes of issuing the 2010 curtailment order.

I. ALTHOUGH THE DEPARTMENT HELD HEARINGS ON MAY 24-25, 2010, THE SCOPE OF THE HEARINGS WAS INADEQUATE TO AUGMENT THE RECORD.

As described in the Motion to Augment, the Director noticed limited hearings for May 24-25 allowing evidence on the use of 2008 data in the Methodology Order and allowing inquiry into whether Steps 3 and 4 of the Methodology Order were followed. *See* Motion to Augment at 2-3 and Attachment 5.

At the May 24th hearing on the Methodology Order, the Director stated that despite the fact that the Methodology Order “may not be based on the methods that – methods that were proposed or the processes that were proposed by the parties in the [2008] hearing itself,” he saw any hearing on the Methodology beyond the department’s use of 2008 data as “beyond the scope of [Judge Melansen’s] directive to the Department.” Methodology Order Hearing Transcript, attached as Exhibit A to the Affidavit of Sarah A. Klahn, May 24, 2010, 22:17-23:7. The Director’s statement assumes, without allowing the parties to demonstrate otherwise, that the Methodology Order itself is consistent with the directive of Judge Melansen’s limited remand.

In the Methodology Order, the Department adopted methods (Steps 3 and 4) that purportedly allow for determination of shortage to the SWC. In the course of the Methodology Order hearing on May 24, Pocatello attempted to ask Department employees about the validation methods for the 2010 forecast shortfall, but the Director refused to allow that line of questioning because it went beyond “whether the 2008 date [sic] is accurate and reliable or not,”. *Id.* at 52:25-53:11. The Director also refused testimony regarding whether the 2008 data “needs to be adjusted somehow in the presentation of the raw data [because] I think that goes beyond what was intended to bring into the record with respect to the 2008 data.” *Id.* at 95:14-19. *See also id.* at 106:8-14.

A. Although Limited, Testimony at the May 24-25 Hearings Demonstrated the Department's Methodology Order is Arbitrary and Erroneous. A New Hearing Is Required.

Although the Department held two limited hearings on matters related to the Methodology, the scope of the hearings was inadequate to augment the record for the purposes of this motion. Pocatello and the Ground Water Users are not in a position to demonstrate the shortcomings of the hearing record, however, because the Director not only excluded testimony and cross-examination, he also excluded offers of proof. To wit:

I don't intend to allow offers of proof that will go on for hours, and enlarging the record in that manner. And I recognized that there is some risks in not allowing evidence into the record. That risk being that the matter could be remanded to the Department for the taking of additional evidence.

Id. at 24:2-8. Similarly, the Director refused the testimony of Greg Sullivan in the As Applied Hearing as beyond the scope of the Court's limited remand. Counsel for the City offered a written offer of proof to make a record on the matter and establish the substance of the testimony that was denied. The Director refused the offer of proof. As Applied Hearing Transcript, Vol. II, attached as Exhibit C to the Affidavit of Sarah A. Klahn, May 25, 2010, 202:15-203:16.

B. The Methodology Is Facially Inconsistent With the Prior Orders of the Hearing Officer, Director and Court in This Matter.

In its response, IDWR suggests that the Motion to Augment is an attempt to execute an "end-run around established administrative procedures by raising the concept of crop water needs in its motion". IDWR Response at 7. However, the "concept of crop water need" is the fundamental benchmark relied on by the Hearing Officer, Director and this Court in determining the appropriate framework methodology for purposes of the SWC Delivery Call. To wit:

[T]he Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted **water need** for projecting material injury.

Properly applied, the minimum full supply approach is an attempt to measure, for purposes of determining if there should be curtailment, **the amount of water senior surface water users need to raise crops of their choosing to maturity.**

2008 Opinion, R. p. 7098, ¶ XIV 7 (emphasis added).

There are scientific approaches well beyond what water was taken and used that the parties have utilized in order to establish **the amount of water SWC members actually need to meet full crop years [sic] over time.**

Id. at 7096, ¶ XIV 3 (emphasis added). The Director affirmed these findings in the September 5, 2008 *Final Order Regarding the Surface Water Coalition Delivery Call*; similarly, this Court affirmed the findings in its July 24, 2009 *Order on Petition for Judicial Review*. This is the standard upon which the Department's administration must be based; not historical diversions, as used by the Department in the Methodology Order.

C. Evidence at Hearing Establishes that the Department Did Not Even Rely on the Methodology Order in Determining Shortage and Curtailment.

At the limited hearings on May 24-25, testimony showed that the Department's administration is not based on the Methodology Order. However, due to the limited nature of those hearings the parties have still not been apprised of what exactly the Department is proposing with respect to administration of the SWC water rights. Such an approach to administration is not consistent with due process and requires more transparency on the part of IDWR. Although parties were not permitted to enquire into the substance of the Methodology Order at hearing, or determine exactly how IDWR proposes through that order to administer the SWC water rights in coming years, testimony and evidence demonstrated that the Methodology Order has not been followed by the Department in its 2010 administration.

For example, at hearing it was established that despite the Methodology Order's instruction to "remove any water diversions that can be identified to not directly support the beneficial use of crop development", Methodology Order at ¶43, the Department only adjusted

SWC demand for “wheeled water”⁴ diversions if those diversions were more than one percent of the diverting entities’ total demand. As Applied Hearing Transcript, Vol. I, attached as Exhibit B to the Affidavit of Sarah A. Klahn, May 24, 2010, 46:7-49:21. The Department witness admitted that there was not support for this one percent threshold in the Methodology Order. *Id.*

Further, Department employees admitted at hearing that their administration of the SWC call in 2010 was not based on the Methodology Order exclusively, but relied on memoranda prepared by staff that contained more detail than the administration rules explained in the Methodology Order. *See, e.g.*, As Applied Hearing Transcript, Vol. I, attached as Exhibit B to the Affidavit of Sarah A. Klahn, May 24, 2010, 78:1-5. Such an approach is contrary to the law: parties are “entitled to be fairly advised of what the Government proposes and to be heard upon its proposals” where the agency has undertaken a proceeding “aimed at the control of their activities.” *Gonzales v. United States*, 348 U.S. 407, 414, 75 S. Ct. 409, 413 n.5 (1955).⁵

CONCLUSION

Pocatello and the Ground Water Users respectfully request that the Court (1) order the Department to hold full and opening hearings on the Methodology and As Applied Orders

⁴ “Wheeled water” is defined as water diverted and carried in a canal by one entity on behalf of another entity. Methodology Order Hearing Transcript, attached as Exhibit A to the Affidavit of Sarah A. Klahn, May 24, 2010, 67:4-20. The removal of the “wheeled water” amounts from the SWC diversions is appropriate; removal of all but those that exceed 1% of diversions is not and has the result of increasing the Ground Water Users mitigation requirements by as much as 10,000 af.

⁵ Department employees admitted that the Methodology Order is vague on how it executes certain components of the methodology, such as forecast supply, and that the Methodology Order leaves open room for “another professional hydrologist or professional engineer [to] go about and develop their own methodology with the guidance to arrive at their own analog years, and arrive at their own allocation volumes,” and admitted that the Methodology Order doesn’t actually spell out how the Department will come up with predicted storage allocation. As Applied Hearing Transcript, Vol. I, attached as Exhibit B to the Affidavit of Sarah A. Klahn, May 24, 2010, 78:14-79:7. *See also Id.* at 147:13-23 (Department employee admitted that the staff memo is how storage is predicted and that it would be appropriate to include that information in the Department’s orders instead); *Id.* at 152:2-23 (Employee testifying that forecast base based on her own discretion and consideration of variable, that there is no set algorithm for calculating forecast supply.).

pursuant to Idaho Code section 67-5276, or (2) order the Department to rescind the Orders as outside the scope of the Court's limited remand, and stay the matter before the Court pending this year's administration.

MOTION TO FILE REPLY ONE DAY LATE (JUNE 8, 2010)

Movants request a one-day extension for physical filing of this Reply with Gooding County District Court. As reflected in the Affidavit of Sarah Klahn, June 7, 2010, Movants did not receive the Court's Order Granting Requests for Extension until Friday, June 4, 2010. On information and belief, as of June 4, 2010, Ground Water Users' counsel had not received the Order Granting Requests for Extension at all. Due to the late receipt of the Order, the Pocatello and the Ground Water Users were unable to physically file the Reply with Gooding County on Monday, June 7th. Pocatello and Ground Water Users will submit the Reply by overnight Federal Express, email it to opposing parties and the Department, as well as providing a courtesy copy to Judge Melanson in chambers at the Court of Appeals on Monday June 7, 2010. *See*, Affidavit of Sarah Klahn, June 7, 2010. No prejudice will accrue to any party for the submission of this Reply brief in the manner and timing described above, and Movants respectfully request that the reply brief be considered timely filed.

Respectfully submitted, this 7th day of June, 2010.

ATTORNEYS FOR CITY OF POCATELLO

ATTORNEYS FOR GROUND WATER
USERS



A. Dean Tranmer



Candice M. McHugh



Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's and Ground Water User's Reply in Support of Motion for Stay and to Augment the Record with Additional Evidence and Motion to Late File Reply** in Case No. CV-2008-0000551 upon the following by the method indicated:

Sarah Klahn

Sarah Klahn, White & Jankowski, LLP

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Courtesy Copy to: Judge John M. Melanson Idaho Court of Appeals PO Box 83720 Boise ID 83720-0101	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-334-2616 <input type="checkbox"/> Email
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John A. Rosholt John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt & Simpson 113 Main Ave West Ste 303 PO Box 485 Twin Falls ID 83303-0485 jar@idahowaters.com tlt@idahowaters.com jks@idahowaters.com pla@idahowaters.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-735-2444 <input checked="" type="checkbox"/> Email

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<p>Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey 201 E Center St PO Box 1391 Pocatello ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-232-6109 <input checked="" type="checkbox"/> Email</p>
<p>Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-234-6297 <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Carr US Dept Interior 960 Broadway Ste 400 Boise ID 83706 kmarioncarr@yahoo.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-334-1907 <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment & Natural Resources Division US Dept of Justice 1961 Stout St 8th Floor Denver CO 80294 david.gehlert@usdoj.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 303-844-1350 <input checked="" type="checkbox"/> Email</p>
<p>Michael Gilmore Attorney General's Office PO Box 83720 Boise ID 83720-0010 mike.gilmore@ag.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-334-2830 <input checked="" type="checkbox"/> Email</p>

<p>Michael C Creamer Jeffery C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 mcc@givenspursley.com jefffereday@givenspursley.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-388-1300 <input checked="" type="checkbox"/> Email</p>
<p>Roger D. Ling Attorney at Law PO Box 623 Rupert ID 83350 rld@idlawfirm.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-436-6804 <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise ID 83706-1234 mhoward@pn.usbr.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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DISTRICT COURT
GOODING CO. IDAHO
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BY:  DEPUTY

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ATTORNEYS FOR THE CITY OF POCATELLO

**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

Case No.: CV-2008-0000551

AFFIDAVIT OF SARAH A. KLAHN

Interim Director of the Idaho Department of Water Resources,¹ 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

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

SARAH A. KLAHN, being first duly sworn upon her oath, deposes and states that:


1. I am an attorney of record for the City of Pocatello in the captioned matter.
2. Attached is a true and correct copy of official transcripts from the following proceedings before the Idaho Department of Water Resources on May 24th and May 25, 2010:
 - a. The Hearing on the Methodology Order, May 24, 2010. Exhibit A.
 - b. The Hearing on the As Applied Order, May 24, 2010, Volume I. Exhibit B.
 - c. The Hearing on the As Applied Order, May 25, 2010, Volume II. Exhibit C.
3. Our office received the Court's June 1, 2010, Order Granting Requests for Extension on Friday, June 4, 2010 by United States Mail.

Further, AFFIANT SAYETH NAUGHT.

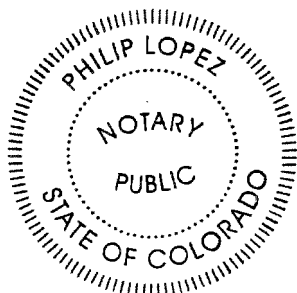
DATED this 7th day of June, 2010.

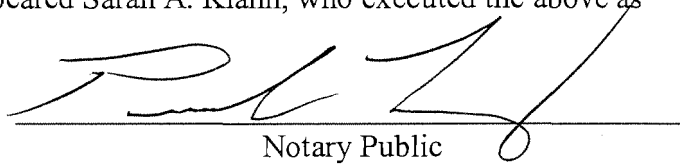
¹ Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By 
Sarah A. Klahn

BEFORE ME, the undersigned, a Notary Public, in and for said County and State on this 7th day of June, 2010, personally appeared Sarah A. Klahn, who executed the above as his/her free and voluntary act.

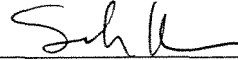



Notary Public
511 16th St. Suite 500
Denver, CO 80202

My Commission Expires: 7/23/2013

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2010, I caused to be served a true and correct copy of the foregoing **Affidavit of Sarah A. Klahn** in **Case No. CV-2008-0000551** upon the following by the method indicated:



Sarah Klahn, White & Jankowski, LLP

Gary Spackman, Interim Director State of Idaho, Dept of Water Resources 322 E Front St PO Box 83720 Boise ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-287-6700, Phone 208-287-4942 <input checked="" type="checkbox"/> Email
Cynthia R. Eagle-Ervin, Deputy Clerk Gooding County District Court 624 Main St Gooding ID 83330	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-934-4408, Phone 208-934-4861 <input type="checkbox"/> Email
Courtesy Copy to: Judge John M. Melanson Idaho Court of Appeals PO Box 83720 Boise ID 83720-0101	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-334-2616 <input type="checkbox"/> Email
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<p>Garrick L. Baxter Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-287-6700 <input checked="" type="checkbox"/> Email</p>
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<p>Kathleen Carr US Dept Interior 960 Broadway Ste 400 Boise ID 83706 kmarioncarr@yahoo.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-334-1907 <input checked="" type="checkbox"/> Email</p>
<p>David W. Gehlert Natural Resources Section Environment & Natural Resources Division US Dept of Justice 1961 Stout St 8th Floor Denver CO 80294 david.gehlert@usdoj.gov</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 303-844-1350 <input checked="" type="checkbox"/> Email</p>
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<p>Michael C Creamer Jeffery C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 mcc@givenspursley.com jeffereday@givenspursley.com</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-388-1300 <input checked="" type="checkbox"/> Email</p>

<p>Roger D. Ling Attorney at Law PO Box 623 Rupert ID 83350 <u>rdl@idlawfirm.com</u></p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile 208-436-6804 <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise ID 83706-1234 <u>mhoward@pn.usbr.gov</u></p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Lyle Swank IDWR – Eastern Region 900 N Skyline Dr Idaho Falls ID 83402-6105 <u>lyle.swank@idwr.idaho.gov</u></p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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EXHIBIT A

The Hearing on the Methodology Order Transcript
May 24, 2010

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

THE HEARING ON THE METHODOLOGY ORDER

May 24, 2010.

REPORTED BY:

COLLEEN P. KLINE, CSR No. 345

Notary Public

1 THE HEARING ON THE METHODOLOGY ORDER
 2 was taken BEFORE THE HEARING OFFICER GARY
 3 SPACKMAN, Director of the Idaho Department of
 4 Water Resources, at the offices of Idaho
 5 Department of Water Resources, located at 322 E.
 6 Front Street, Boise, Idaho, commencing at 9:00
 7 a.m., on May 24, 2010, before Colleen P. Kline,
 8 Certified Shorthand Reporter and Notary Public
 9 within and for the State of Idaho, in the
 10 above-entitled matter.

11 APPEARANCES:

12 For the City of Pocatello:
 13 White & Jankowski, LLP
 14 BY MS. SARAH A. KLAHN
 15 BY MS. MITRA PEMBERTON
 16 511 Sixteenth Street, Suite 500
 17 Denver, Colorado 80202
 18 For Idaho Ground Water Appropriators:
 19 Racine, Olson, Nye, Budge & Bailey
 20 BY MR. RANDALL C. BUDGE
 21 BY MS. CANDICE M. McHUGH
 22 101 South Capitol Boulevard, Suite 208
 23 Boise, Idaho 83702

1 APPEARANCES (Continued):
 2 For American Falls Reservoir District #2:
 3 Capitol Law Group, PLLC
 4 BY MR. C. TOM ARKOOSH
 5 P.O. Box 32
 6 Gooding, Idaho 83330

1 APPEARANCES (Continued):

2 For United States Bureau of Reclamation:
 3 Office of Attorney General
 4 Deputy Attorney General
 5 Natural Resources Division
 6 Chief Water Resources Section
 7 BY MR. CHRIS M. BROMLEY
 8 322 East Front Street
 9 P.O. Box 83720
 10 Boise, Idaho 83720-0098
 11 For A&B, Burley Irrigation District, Milner
 12 Irrigation District, Twin Falls Canal Company,
 13 and North Side Canal Company:
 14 Barker Rosholt & Simpson, LLP
 15 BY MR. TRAVIS THOMPSON
 16 BY MR. JOHN SIMPSON
 17 113 Main Avenue West, Suite 303
 18 Twin Falls, Idaho 83303-0485
 19 For Minidoka Irrigation District:
 20 Fletcher Law Office
 21 BY MR. KENT FLETCHER
 22 120 Overland Avenue
 23 P.O. Box 248
 24 Burley, Idaho 83318-0248

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14 EXHIBITS

15	DESCRIPTION	MARKED	ADMITTED
16	1	38	75
17	2	40	75
18	100	67	70

1 THE HEARING OFFICER: The time is right
 2 for us to begin the hearing in one of three
 3 hearings this morning.
 4 But before we do that, do the
 5 parties -- well, let's first of all, take a roll
 6 call.
 7 And maybe, I'll rely on you,
 8 Mr. Bromley, for this to some degree. Do we have
 9 the parties who are participants in these
 10 hearings today? I'm looking at a certificate of
 11 service, and maybe I should go through the
 12 parties, and have them introduce themselves for
 13 the record at this point. And then let's see
 14 what we have left.
 15 Mr. Bromley?
 16 MR. BROMLEY: Present.
 17 THE HEARING OFFICER: Why don't you
 18 just state your name, and who you are here
 19 representing.
 20 MR. BROMLEY: Chris M. Bromley on
 21 behalf of the Department of Water Resources.
 22 MR. THOMPSON: Travis Thompson, Barker,
 23 Rosholt, Simpson, for A & B, Burley, Milner
 24 Irrigation Districts, Twin Falls, North Side
 25 Canal Companies.

1 MR. SIMPSON: John Simpson assisting
 2 Mr. Thompson.
 3 MR. ARKOOSH: Tom Arkoosh, Capital Law
 4 Group, for American Falls Reservoir District #2.
 5 MR. FLETCHER: Kent Fletcher, Minidoka
 6 Irrigation District.
 7 MR. BUDGE: Randy Budge on behalf of
 8 the Idaho Ground Water Appropriators, Inc., and
 9 the Ground Water User members.
 10 MS. McHUGH: Candice McHugh assisting
 11 Mr. Budge.
 12 MS. KLAHN: Sarah Klahn on behalf of
 13 the City of Pocatello.
 14 MR. SULLIVAN: Greg Sullivan with
 15 Spronk.
 16 MS. PEMBERTON: Mitra Pemberton, the
 17 City of Pocatello.
 18 THE HEARING OFFICER: And there are
 19 some others who we have been mailing to,
 20 Mr. Bromley. And I notice that the U.S. Bureau
 21 of Reclamation or Department of Interior has at
 22 least been served, but is that just as a matter
 23 of courtesy?
 24 MR. BROMLEY: Your Honor, the Bureau of
 25 Reclamation was a party to this case when it was

1 initiated in 2005. They were also a party before
 2 the court. The Bureau of Reclamation has not
 3 participated in the depositions. I don't believe
 4 that the Bureau of Reclamation has filed a
 5 petition for reconsideration, but I could be
 6 mistaken.
 7 THE HEARING OFFICER: I don't recall if
 8 they did.
 9 MS. KLAHN: I believe, Your Honor, the
 10 Bureau of Reclamation submitted a pleading
 11 yesterday that they will not be participating in
 12 the hearings today. So I got an email from
 13 Kathleen's assistant yesterday. It was a
 14 pleading, though.
 15 MR. BROMLEY: Thanks, Ms. Klahn. I
 16 didn't see that.
 17 MS. McHUGH: It actually was filed late
 18 last week. It was served on me late last week by
 19 email.
 20 MR. BROMLEY: I didn't get it.
 21 THE HEARING OFFICER: I don't recall
 22 having seen a document.
 23 MR. FLETCHER: Yes, it states that they
 24 would not participate in the 2008 issue, or the
 25 As Applied Steps 3 and 4 issues. It does not

1 address the mitigation hearing.
 2 THE HEARING OFFICER: So when we reach
 3 that stage, we'll ask the question again about
 4 their participation.
 5 All right. Let me look down through
 6 the rest of the list. I also see that Mike
 7 Creamer and Jeff Fereday were served. And I
 8 think they were representing a group of producers
 9 as I recall; is that correct, or Dairymen?
 10 MR. BROMLEY: Idaho Dairymen's
 11 Association.
 12 THE HEARING OFFICER: Yes. And we
 13 haven't seen any activity from that group in this
 14 proceeding that I'm aware of.
 15 MR. BROMLEY: That's correct. And they
 16 haven't been active, Hearing Officer, for many
 17 years.
 18 THE HEARING OFFICER: Okay. All right.
 19 That completes the list. Thanks for your help
 20 and introductions this morning.
 21 Okay. I issued three orders on Friday,
 22 and I'm sorry for the timing. I thought it would
 23 be helpful to layout some at least boundaries for
 24 the parties to initiate a discussion this
 25 morning.

1 I intended by the orders to set some
 2 boundaries as to the scope of this hearing. I
 3 know there is disagreement regarding the scope of
 4 the hearing. And I received this morning a
 5 document from the Ground Water Users -- let me
 6 just refer to it -- and from the City of
 7 Pocatello.
 8 And the document is titled,
 9 "Pocatello's and Ground Water Users' Pre-Hearing
 10 Brief." And it takes issue with the limitations
 11 that were set forth in the orders that were
 12 issued.
 13 Do the parties want to discuss that
 14 particular subject at this point?
 15 THE HEARING OFFICER: Mr. Budge?
 16 Ms. McHugh?
 17 MS. KLAHN: Mr. Budge passed the buck
 18 to me this morning, Your Honor. And I'll just
 19 give it a quick summary, since it was filed this
 20 morning.
 21 Our concerns with the scope of the
 22 hearing, quite frankly, are that this
 23 arose -- the only reason we're here is because
 24 Judge Melanson issued a limited remand to the
 25 Department for the purpose of allowing the

1 planning to file. We will file a reply in that,
 2 obviously, and ask him to rule.
 3 So we don't even know yet whether Judge
 4 Melanson is favorably disposed to allow
 5 augmentation in the record. So again, we find
 6 ourselves between the rock and hard place of
 7 being at a hearing that may last for a couple of
 8 hours. Judge Melanson may say, yes, you need to
 9 augment the record. And you've done a little bit
 10 of it today, perhaps haven't gotten into it
 11 fully.
 12 And so we're concerned about that, the
 13 issue of agency discretion, and whether
 14 it's -- the order is consistent with the agency's
 15 discretion. And we're further interested
 16 in -- well, we're further concerned about issues
 17 of due process in that we need a meaningful
 18 opportunity to be heard.
 19 Certainly, this is a timely hearing in
 20 the sense that it's happening very quickly. But
 21 timely isn't the entire scope of what a reviewing
 22 corp would look at.
 23 And I would also mention that through
 24 the confusion at the Minidoka County District
 25 Court, I finally received a copy of the A & B

1 development of an order that was to be based on
 2 the record below, laying out the methodology for
 3 determining injury.
 4 It's our contention that the
 5 Methodology Order is not based on the record
 6 below. And our concern is that without the
 7 opportunity to put on evidence about that, the
 8 issue is mooted or waived as things go forward,
 9 we're limited to trying to show the District
 10 Court and the Supreme Court through exhaustive
 11 references to the record, the inconsistencies
 12 between the Methodology Order issued April 7th,
 13 and what was done at trial in this matter in
 14 2008.
 15 So we find ourselves between a rock and
 16 a hard place. Because the most efficient way to
 17 develop that theme, I think, is through
 18 testimony. And I believe IGWA -- that's why IGWA
 19 joined our brief. I think they agreed.
 20 We've also moved for the right to
 21 augment the record. We've made that motion to
 22 Judge Melanson. I apologize. I think it was the
 23 week before last that Mr. Bromley responded. I
 24 don't think the time is right for responses, but
 25 I don't know if our other opposing counsel is

1 order on Thursday. And that seems to throw a
 2 whole different monkey wrench into this
 3 particular -- if I can mix metaphors -- into this
 4 particular mess.
 5 And so the question arises of really
 6 what we can accomplish here today that's going to
 7 be useful moving forward. And that's the purpose
 8 of the brief. And that pretty much summarizes
 9 what's ended. I'll stand for any questions.
 10 THE HEARING OFFICER: Okay. Further
 11 argument, Mr. Budge, Ms. McHugh?
 12 MR. BUDGE: Yes, Your Honor, thanks.
 13 It seems to me like if we're going to proceed
 14 forward, we should address the Methodology Order,
 15 and the Applied Order as a single proceeding, so
 16 that we have a full record on appeal.
 17 It seems that the process has been laid
 18 out. And the limitation that the Director has
 19 put on the evidence in both proceedings, which is
 20 something I would like to address separately.
 21 But it seems like we have a disconnect
 22 between the two orders. And I guess I would
 23 liken it to constructing a car, but never going
 24 out and putting gas in it to see if it will run.
 25 Perhaps developing a computer, but not putting

1 any software in it and see if it gets any result.
 2 We have a history in this case of the
 3 Director developing methodologies based upon
 4 populating those methodologies and theories, if
 5 you will, with actual data and actual facts,
 6 which is what we did in a rather extensive
 7 record. Then we have a full record to take up on
 8 review. Not only do we have a method, but what
 9 was the result of that method going to be?
 10 And we all kind of remember the issue
 11 of the AFRD2 case, when the Supreme Court,
 12 understandably, had struggles in trying to
 13 determine the constitutionality of those rules on
 14 the face, without an opportunity to see how they
 15 are going to apply. They are going to get that
 16 opportunity now.
 17 But it would seem to me that there is a
 18 question on what -- and I can appreciate the
 19 Director's dilemma -- but there is a question on
 20 what did the district court want done, and how
 21 far are you to go in looking at the method, and
 22 then trying to see what the results of the method
 23 are when we apply it with some actual data for
 24 this particular year; particularly, since we have
 25 2008 data now into play, and we have a 2010 year?

1 And it would seem like rather than
 2 narrow and restrain the record, and give rise to
 3 due process arguments, give rise to potential
 4 remand again to Judge Melanson, who hadn't yet
 5 decided on this augmentation, why not error on
 6 the side of having an open process with a
 7 complete record? Then it can all go up to Judge
 8 Melanson, both issues pertaining to the
 9 Methodology Order, as well as the As Applied
 10 Order, and he can sort it out.
 11 So it would almost be no harm no foul
 12 to make a complete record, combine both
 13 proceedings, and both orders, and let it all go
 14 up. And then Judge Melanson can decide, yeah, I
 15 want to look at the whole thing. Go ahead and
 16 present your arguments, and we'll get one final
 17 decision, or you could decide, oh, you went
 18 farther, Director, than you needed to go. So I
 19 am going to narrow the scope down, and ignore all
 20 of this other stuff.
 21 And that's the main concern that we've
 22 got, is that we have an attempt to divorce and
 23 separate two orders that are inextricably tied
 24 together, married, if you will; one with the
 25 method, and one with the facts. And we have a

1 bunch of filings in here. When you look at the
 2 petitions for rehearing and some of the
 3 affidavits, it's not real easy to draw a bright
 4 line between what applies to the Methodology
 5 Order, and what applies to the other one.
 6 So that would be my suggestion on that
 7 point, that we not constrict the record, and that
 8 we combine both proceedings. And then come up
 9 with one record, and send it all back up to
 10 Melanson, and let him sort that issue out.
 11 If we don't do that, we're going to
 12 have a lot of wrangling today over what evidence
 13 should come into the record. And I think we will
 14 be forced to create our record anyway. If the
 15 objections are sustained, for example, that you
 16 are going beyond what the Hearing Officer
 17 intended should come in to analyze the 2008 data.
 18 I guess there is two ways to look at it.
 19 One way to view it is, you can only
 20 look at the data itself, and decide if the data
 21 is valid, if there is errors in it. Or you can
 22 go a broader interpretation of that order that
 23 says information that would contest or rebut the
 24 2008 data, would kind of seem to indicate that we
 25 have broader sideboards, that we should be able

1 to make arguments why we shouldn't use 2008 data
 2 at all. Whether it's better methods to look at
 3 going into the broader scope of the Methodology
 4 Order. I'm not sure what your ruling is going to
 5 be on it.
 6 But should you rule that we have a very
 7 narrow order, interpretation of your limiting
 8 order. We can only look at the data itself to
 9 see what's wrong with it. And then necessarily
 10 going through the course from both of us and make
 11 an offer of proof, go ahead and put on the
 12 testimony that we would hope to do anyway.
 13 So that when it goes up on appeal,
 14 we're able to then tell Judge Melanson, the
 15 Director erred by not giving us a full process
 16 here. Here's the evidence that we've put in
 17 under an offer of proof. And look at that, and
 18 determine whether there was an error or not.
 19 I'm just thinking we can avoid all of
 20 that, getting all the information in the record,
 21 combining the proceedings, putting on what we
 22 want to create our record. Let it all go up to
 23 Melanson, and he can then sort out what he wanted
 24 to do, or he didn't want to do.
 25 THE HEARING OFFICER: Okay. All right.

1 Thank you.
 2 Surface Water Coalition arguments,
 3 rebuttal arguments?
 4 MR. ARKOOSH: If -- we just got this
 5 brief this morning, and we do have some views
 6 that if we could have about three minutes to meet
 7 together, to see that our views are conforming
 8 and responsive to this brief, it would be helpful
 9 to us. We'll step out in the hall for a second.
 10 THE HEARING OFFICER: That's fine.
 11 Let's recess for five minutes.
 12 (A recess was had.)
 13 THE HEARING OFFICER: Okay. We've
 14 reconvened after a recess.
 15 The Surface Water Coalition, and their
 16 spokesperson, or someone who wishes to go first?
 17 Mr. Arkoosh?
 18 MR. ARKOOSH: Thank you, Mr. Director.
 19 Our overall conclusion is that the Director
 20 should proceed as you have ordered.
 21 We addressed this issue in front of
 22 Judge Melanson at the status conference when he
 23 remanded to create one order. And it was our
 24 conclusion, although we felt differently, that
 25 the Judge had sent this back to develop the

1 are things in Step 3 that are not going to be
 2 litigated this year that were set in the
 3 Methodology Order. But given the circumstance
 4 you found yourself in, I'm not really sure that
 5 any of that can be fixed.
 6 Now, if you overlay all of that with
 7 the A & B case, and the fact that there seems to
 8 be a change back to the initial position that one
 9 starts with the water right, and moves forward
 10 from that. The direction you had earlier on the
 11 Methodology Order may or may not be sustained in
 12 the ongoing appeal, when we match up the two
 13 bifurcated orders.
 14 So our interest is allow people a
 15 hearing on matters that weren't in the record
 16 that haven't been heard, which does not include
 17 the Methodology Order, and let's get this to the
 18 district court as quickly as we can, and find out
 19 what the real rules are.
 20 THE HEARING OFFICER: Others that might
 21 want to be speak?
 22 Mr. Fletcher?
 23 MR. FLETCHER: That was our consensus.
 24 THE HEARING OFFICER: Mr. Thompson?
 25 MR. THOMPSON: I have nothing.

1 methodology.
 2 And the AFRD case directs the
 3 Department how on a year-to-year basis, you deal
 4 with the new year. As best you can do, I think
 5 you have coalesced those two directions by
 6 creating a new case, allowing people input on
 7 matters that aren't in the record as applied.
 8 And underlying all of that, developing a
 9 methodology that wasn't done when this order was
 10 bifurcated, and sent in part up to the district
 11 court on appeal.
 12 Now, having said that, of course, that
 13 just applies to the other side. We certainly
 14 have a lot of issues in the Methodology Order, as
 15 you know. We think there has been quite a bit of
 16 breach in the membrane.
 17 There are some things that the
 18 Methodology Order said we would do, and it turns
 19 out that we are doing something else in the As
 20 Applied Order based upon the conditions of the
 21 year. We recognize that.
 22 We see things that were litigated in
 23 the Methodology Order that are for this year
 24 only, but otherwise in future years, would be
 25 adaptive. Step 3 is a perfect example. There

1 THE HEARING OFFICER: Okay.
 2 Mr. Simpson?
 3 MR. SIMPSON: No, sir.
 4 THE HEARING OFFICER: Okay. Thank you.
 5 I appreciate the arguments on both sides. And I
 6 think all of them are cogent arguments.
 7 And the concern I have with the
 8 broadening that you are suggesting, Mr. Budge,
 9 and Ms. Klahn, really goes back to my
 10 understanding of the limited remand from Judge
 11 Melanson.
 12 And as I understood that remand, the
 13 Department was to develop a methodology, and
 14 issue an order based on the record. And I
 15 understand there are arguments that perhaps in
 16 the order, the Methodology Order is not based on
 17 the record.
 18 Certainly in the development of that
 19 Methodology Order, and our looking at the
 20 information that was available to us, current
 21 information, we looked at 2008. The 2008 data
 22 was not available at the time that the original
 23 hearing was held. It was -- the hearing was held
 24 simultaneous with the gathering of that data or
 25 its development.

1 And the Department and the Director
2 feels a duty, based on the orders of the Court,
3 to use the best and most current information
4 available to it. So as we develop the
5 Methodology Order, we recognize that the 2008
6 data was not in the record.

7 And honestly, asked ourselves the
8 question, of whether it was even necessary to
9 hold a hearing to use that data, given that it
10 was -- it was dated, and simply is developed and
11 derived year by year. And the Court has an
12 expectation of the Department using the most
13 current information.

14 So the intent of the Department,
15 regardless of the arguments posed by Ms. Klahn
16 and Mr. Budge, was to issue an order based on the
17 record. It may not be based on the methods
18 that -- methods that were proposed or the
19 processes that were proposed by the parties in
20 the hearing itself. But the intent of the
21 Department was to issue the order based on the
22 record with the addition of the 2008 water data.

23 And I recognize, Mr. Budge, that there
24 is a possibility that Judge Melanson might say,
25 well, if you were holding a hearing, then perhaps

1 you should have expanded the hearing to include
2 lots and lots of other -- the exploration of lots
3 and lots of other subjects related to the
4 Methodology Order, and the taking of additional
5 evidence.

6 And I see that beyond the scope of his
7 directive to the Department. And I guess as the
8 Director, I will proceed cautiously, and try to
9 stay within what we were asked to do.

10 Frankly, I feel some discomfort holding
11 a hearing to even include the 2008 information,
12 but we wanted to give the parties an opportunity
13 to at least look at the data, to probe it, and to
14 determine whether it was accurate and reliable.

15 And so because that was the reason for
16 this hearing, I will limit the testimony very
17 narrowly to that subject. So the only questions
18 that will be asked -- the evidence will come in.
19 Mr. Bromley will present it. And then there will
20 be an opportunity for the parties to probe that
21 particular information, either with the
22 Department witness that presents it, or through
23 their own witnesses to question it's reliability,
24 and whether it can be used, and can be part of
25 the record. So that's the limited scope of the

1 hearing.

2 And just as a follow-up, Mr. Budge. I
3 don't intend to allow offers of proof that will
4 go on for hours, and enlarging the record in that
5 manner. And I recognize there is some risks in
6 not allowing evidence into the record. That risk
7 being that the matter could be remanded to the
8 Department for the taking of additional evidence.

9 But again, based on my understanding of
10 the nature of the remand from Judge Melanson, I
11 want to remain within that remand as much as I
12 can. Because I think his sending it back to the
13 Department was intended to allow the Department
14 to develop the order and the methodology as much
15 as possible within the information now contained
16 in the record.

17 I might also add that, Ms. Klahn,
18 Mr. Budge, the argument about whether an order is
19 based on the record or not based on the record,
20 is a classic subject for appeal anyway. And
21 certainly, any subjects or any portions of that
22 order that you feel are not within the record,
23 can be argued outside of an evidentiary hearing.
24 It certainly can be argued as part of the
25 petitions for reconsideration. It certainly can

1 be argued on appeal.

2 But the mere fact that the parties
3 raise the issue of whether an order is within the
4 record or outside the record, doesn't necessarily
5 give rise to the right for further evidentiary
6 hearings on that. And so I think for that
7 additional reason, I would not allow more
8 evidence to come in.

9 It is the Department's intention to
10 issue the Methodology Order as a final order, an
11 amended final order following this hearing in
12 considering the petitions for reconsideration,
13 based on the record with the inclusion of the
14 2008 data, unless the 2008 data is found to be
15 not accurate and unreliable.

16 Okay. Further questions?

17 MR. BUDGE: Your Honor, I have one
18 question that provides that -- from what I
19 understand your comment is then that, the
20 petitions for reconsideration and the issues
21 raised in those then will be decided, I suppose,
22 as questions of law as a part of the Methodology
23 Order without any more evidence?

24 THE HEARING OFFICER: That's correct.

25 MR. BUDGE: That's fine. I have two

1 issues relating to that. One, is so I suppose
2 then, the Hearing Officer is going to take a
3 rather narrow view of those orders that limit
4 what we can address.

5 And so on the order limiting the scope
6 for the Methodology Order, it says, limited to
7 information that would contest or rebut the 2008
8 data. You are interpreting that to mean, we can
9 only challenge and question the numbers
10 themselves, not go beyond that in whether the
11 data ought to be used at all, and whether other
12 methodologies should be considered?

13 THE HEARING OFFICER: That's correct.

14 MR. BUDGE: Okay. That gives rise to
15 one issue then --

16 THE HEARING OFFICER: Okay.

17 MR. BUDGE: -- relative to the 2008
18 data, which created somewhat of a problem to us.
19 And we've addressed it in our May 12th request
20 for supplemental information. And we had in
21 paragraph 3, specifically of that request, had
22 asked the Department to provide all of that 2008
23 data. And the problem was, is the Department's
24 spreadsheets, where the calculations were being
25 made, had screened out 2006 and 2008 data.

1 And the only other one is we had
2 affidavits filed in the As Applied proceeding of
3 Dr. Brendecke and Tim Deeg, that are addressing
4 issues that relate to both orders.

5 And the reason that it was done that
6 way is, because the As Applied Order relates to
7 Steps 3 and 4 of the Methodology Order. So there
8 is that prior connection to, and we would like to
9 have those affidavits made part of the record in
10 the methodology proceeding.

11 Even if the Director says, I won't
12 consider all or parts of them, because they are
13 beyond the scope, we would like to have them made
14 part of the record, which certainly will then
15 make it unnecessary for us to have to do an offer
16 of proof that goes into all that other stuff.

17 THE HEARING OFFICER: Mr. Arkoosh?

18 MR. ARKOOSH: Let me address that in
19 reverse order. And maybe I can -- by the time I
20 get to the first point, we'll have a little bit
21 more information on it.

22 The second point, the time to make the
23 offer of proof, that those affidavits be part of
24 the Methodology Order, is the time necessary to
25 state that. And we can probably -- I will take

1 Now, I don't know that there is any
2 errors with the number itself. But when the
3 hearing is going to be limited to the integrity,
4 if you will, of the 2006, 2008 data -- 2008, I
5 suppose, it's incumbent that we have an
6 opportunity to see that underlying data that the
7 Department was then using to make its calculation
8 in order to test the integrity or validity of
9 that data.

10 And that information was screened out,
11 and still has not been supplied to us, it puts us
12 in an even smaller box than we have been by way
13 of the order that's there. We're saying you can
14 only look at the data to see if it's good, or
15 valid, or has flaws. But we aren't going to let
16 you look at all of our calculations that were on
17 the spreadsheet, because that information is
18 blacked out.

19 So I guess how do we have due process,
20 and a full opportunity to scrutinize data when
21 the Department has not made all of that available
22 to look at to know there is a problem with it?
23 But certainly, cast doubt on the transparency and
24 integrity of the proceeding. That was the one
25 issue.

1 that as an offer of proof that --

2 I don't know how the Director will take
3 it. But again, we would object to it, because if
4 we can pack that record now, that's precisely
5 what we're not supposed to be doing. And then
6 however you want to handle that, you can make a
7 determination.

8 Regarding the first question of whether
9 the '08 data is in the spreadsheets, I think
10 Mr. Weaver can probably address that better than
11 anybody. But we understand that it is.

12 THE HEARING OFFICER: Well, I hate to
13 do it again. But, you know, it was my
14 understanding that the information was submitted.
15 Mr. Budge, this is the first I've heard, at
16 least, that there was some deficiency in that
17 submittal.

18 And I guess I would like to take
19 another recess, and have the folks get together,
20 and see what's out there and what's not. It
21 would have seemed to me that in that -- that
22 deficiency could have or should have been
23 identified to the Department before this hearing,
24 Mr. Budge.

25 MS. McHUGH: We did.

1 THE HEARING OFFICER: And that the
2 parties could have identified it prior to this
3 time. But nonetheless, I want all to have an
4 opportunity to look at it.

5 MR. BUDGE: If I could approach, I
6 think I can -- let me provide.

7 MR. BROMLEY: Mr. Budge, if we could go
8 off the record quickly?

9 THE HEARING OFFICER: Yes, we can --

10 MR. BROMLEY: We can clear this up
11 pretty easily.

12 THE HEARING OFFICER: Let's go off the
13 record.

14 (Discussion held off the record.)

15 THE HEARING OFFICER: Where are we at
16 in the discussion, Mr. Budge?

17 MR. BUDGE: Mr. Spackman, we were under
18 the impression in looking at the data, that the
19 calculations of reasonable in-season demand for
20 the base years of 2006, 2008 have not been
21 provided to us, because they were blacked out.
22 And Mr. Weaver explained during the break, that
23 that calculation is not made.

24 So we thought the calculation was made,
25 and not provided. But he described that all the

1 the Hearing Officer can subsequently determine, I
2 suppose, what aspects he considered to be beyond
3 the scope, and not considered. And that
4 similarly would be an offer of proof along the
5 same lines of the two affidavits we would like to
6 have in the record.

7 MR. THOMPSON: Well --

8 THE HEARING OFFICER: I don't know
9 that --

10 Go ahead. Who wants to speak?

11 MR. THOMPSON: Yes.

12 THE HEARING OFFICER: Mr. Thompson.

13 MR. THOMPSON: This is Travis Thompson.

14 Just a point on the affidavits and the
15 deposition, if there is anything that doesn't go
16 to the reliability or the accuracy of the 2008
17 data, it shouldn't be in the record of this
18 proceeding. And the As Applied Order is a
19 different proceeding.

20 What Mr. Budge has asked for, I think
21 is improper given the record in front of the
22 district court that's been set. The fact that
23 we're just going to supplement the '08 data to
24 include into it affidavits, depositions, that go
25 to anything but the '08 data, shouldn't go in

1 raw data was, in fact, provided, and the
2 Department didn't make the calculation.

3 So I think we can address the issue
4 with Mr. Weaver on cross-examination.

5 THE HEARING OFFICER: Okay. All right.
6 Very good. And with respect to your other
7 expressed concern regarding the affidavits that
8 were filed. I think I'll wait to rule on that
9 particular issue. And let's wait and see where
10 the evidence goes.

11 MR. BUDGE: Okay. That's fine.

12 THE HEARING OFFICER: If that's okay,
13 Mr. Budge?

14 MR. BUDGE: As long as we're at that
15 same issue. The similar issue would be the
16 affidavit of Mr. Weaver, himself. He was
17 deposed -- excuse me, not affidavit -- the
18 deposition of Mr. Weaver was taken for purposes
19 of both orders.

20 And I think there are going to be
21 matters in there that may not be relevant to one
22 or the other proceedings given the scope of the
23 orders that have been entered into each.

24 And we would also request that that
25 deposition be made part of the record. And then

1 that record.

2 THE HEARING OFFICER: Okay. Well,
3 let's talk about the depositions specifically. I
4 have never viewed depositions as being
5 appropriately brought into the record, unless the
6 parties all agreed that it would replace the
7 testimony of a party, or that, you know, it be
8 substituted as pre-filed written testimony.

9 And my understanding of a deposition,
10 Mr. Budge, is that it's part of discovery. And
11 the intention of it is to explore and find
12 relevant testimony, or questions that might lead
13 to relevant testimony. And consequently, I think
14 there is a lot that might be in the deposition
15 that's not relevant to the scope of this hearing
16 today.

17 So I'll deny the motion for receiving
18 the deposition into evidence. If there are
19 particular parts of that deposition, either for
20 the Methodology Order or the As Applied Order
21 that you want to explore with Mr. Weaver, he
22 probably doesn't like me, but he'll be on the
23 stand available for questioning.

24 The other issue, I guess I'll just
25 address, that's come up again, and I'm sorry. I

1 didn't address it as part of my initial response,
2 Mr. Budge.

3 But you had argued that the methodology
4 order in the As Applied Order ought to be merged
5 together and combined as a single unit, so that
6 there would be context in the review process.

7 And honestly, I think that contextual
8 assistance for a reviewing court would be very
9 valuable. Unfortunately, I don't think I'm in a
10 position right now to bring the two together,
11 because they are on separate tracks.

12 And Judge Melanson did not remand to
13 me, in his limited remand, for me to include the
14 2008 -- I'm sorry -- the 2010 application of the
15 Methodology Order. And I view each of those to
16 be separate in nature, because each year has to
17 be addressed separate.

18 Now, if there is a way for the parties
19 to -- and I think it is up to the parties and the
20 court to bring those together. There may be some
21 opportunity out there. And I think we discussed
22 the possibility of merging the two together. But
23 I think that's something that the parties need to
24 take up before the court, not before the
25 Department.

1 related to the information. Okay?

2 Other questions about procedure before
3 we forge ahead?

4 Okay. Mr. Weaver, if you'll come
5 forward, please.

6 MAT WEAVER,

7 first duly sworn to tell the truth relating to
8 said cause, testified as follows:

9 THE HEARING OFFICER: And remember your
10 first and last name, because you'll be asked.

11 Mr. Bromley?

12 MR. BROMLEY: Thank you, Hearing
13 Officer.

14 DIRECT EXAMINATION

15 QUESTIONS BY MR. BROMLEY:

16 Q. For the record, Chris Bromley on behalf
17 of the Department of Water Resources.

18 Mr. Weaver, would you please state and
19 spell your name for the record.

20 A. Mathew, M-a-t-h-e-w, Donald,
21 D-o-n-a-l-d, Weaver, W-e-a-v-e-r.

22 Q. And, Mr. Weaver, would you please
23 generally describe your educational experience?

24 A. I have a bachelor's of science in civil
25 engineering, and I'm currently pursuing a master

1 I don't see that I have the ability to
2 bring the two together right now. Because I
3 think it would unduly delay the Methodology
4 Order, and the opportunity for the Methodology
5 Order to go up.

6 The As Applied Order has not run its
7 course. I mean, there is an As Applied Order out
8 there. But certainly, it hasn't run the entire
9 irrigation season. So I think it's up to the
10 parties to determine whether in this entire
11 process and in the appellate process, whether it
12 would be advantageous, along with the court, to
13 put the two together.

14 Okay. Other issues people want to
15 raise?

16 Okay. As far as procedure, to bring
17 the 2008 data into the record, I've asked Chris
18 Bromley, Deputy Attorney General, to work with
19 Mat Weaver in presenting that information. And
20 then following the presentation of the data, then
21 I'll allow all the parties to question Mr. Weaver
22 on cross-examination.

23 And then following the presentation of
24 the data, then each of the parties will have the
25 opportunity to present their own testimony

1 of science in hydrologic sciences.

2 Q. And your bachelor of science, where did
3 you obtain that degree from?

4 A. Montana State University.

5 Q. And master's?

6 A. Boise State University.

7 Q. Mr. Weaver, could you please generally
8 describe your work background as it relates to
9 what you are doing today?

10 A. I graduated in 1997. And from 1997 to
11 2007, I practiced civil engineering in the states
12 of Texas and Idaho. And during that time, I
13 practiced on a variety of water engineering
14 projects. Following 2007, I was a research
15 assistant at Boise State University for a year.

16 And following that, I worked with the
17 Department as a -- I guess, you could say -- a
18 technical resource for the water allocations
19 Bureau.

20 Q. What's your position today?

21 A. Staff engineer.

22 Q. How long have you held that position?

23 A. Going on two-and-a-half years.

24 MR. BROMLEY: If I could approach?

25 THE HEARING OFFICER: Sure.

1 (Exhibit 1 marked.)

2 Q. (BY MR. BROMLEY) Okay. Mr. Weaver,
3 I'm handing you what I've marked as IDWR Exhibit
4 No. 1. Would you please identify Exhibit 1?

5 A. This is the Methodology Order. It was
6 developed over the course of the winter and the
7 spring, and released, I believe, on April 7th.

8 Q. Are you familiar with the Methodology
9 Order?

10 A. Yes, I am.

11 Q. Would you please turn to page 7 of the
12 Methodology Order?

13 A. (Witness complying.)

14 Q. And read Footnote 4?

15 A. "The record established at hearing was
16 current through the year 2007. Since that time,
17 Water District 01 has finalized its accounting
18 for the 2008 irrigation season; thereby making
19 the use of 2008 data appropriate. Water District
20 01 has not yet finalized its accounting for the
21 2009 water irrigation season. For purposes of
22 this order, the Director will specifically denote
23 instances in which he uses 2008 data."

24 Q. Mr. Weaver, I think you mentioned this
25 order was issued in April. I was curious if you

1 A. Yes, it's a place on-line where the
2 parties could go and download the information.

3 Q. Mr. Weaver, I'm going to hand you what
4 I will mark as IDWR Exhibit 2.

5 (Exhibit 2 marked.)

6 Q. (BY MR. BROMLEY) Would you please
7 identify that exhibit?

8 A. This exhibit is a CD that I prepared
9 that was available via the FTP server.

10 Q. And I think you said you prepared it?

11 A. Yes.

12 Q. So I assume then that you are familiar
13 with the data in Exhibit 2?

14 A. That's correct.

15 Q. To the best of your knowledge, does
16 Exhibit 2 consist of the data that was provided
17 to the parties that you've just mentioned via the
18 FTP server?

19 A. Yes, it does.

20 Q. To the best of your knowledge, does
21 Exhibit 2 contain the data relied upon by the
22 Department in the Methodology Order?

23 A. Yes, it does.

24 Q. Does Exhibit 2 contain the updated 2008
25 information?

1 are aware, as of today, if Water District 1 has
2 finalized its accounting data for 2009?

3 A. I'm not aware of that.

4 Q. Mr. Weaver, the Footnote 4 makes
5 reference to data that was updated. I was
6 wondering if you could generally describe the
7 type of data that was updated?

8 A. The data that was updated included:
9 Climate data, such as precipitation; temperature;
10 and growing degree days. It included
11 evapotranspiration data, and it included
12 diversion data.

13 Q. And is it your understanding that the
14 updates were made were to underlying data that
15 were already in the record?

16 A. Yeah, to amend existing data.

17 Q. To update it with the '08 data?

18 A. Yes.

19 Q. Are you aware, Mr. Weaver, if the
20 Department provided this information to the
21 parties?

22 A. Yes, we did. We provided it via FTP
23 server to the parties.

24 Q. And that's via the Department's
25 computer system; is that what the FTP server is?

1 A. Yes.

2 Q. Mr. Weaver, we had a discussion with
3 Mr. Budge prior to the beginning of your
4 testimony. Were you present for that discussion?

5 A. I was.

6 Q. Is it your understanding, again, that
7 all raw data for 2006, 2008, and all other years
8 that are on that disk, were provided to the
9 parties?

10 A. That's true, I believe that.

11 Q. Mr. Weaver, I have up here on the
12 screen -- and I will apologize to the parties,
13 the Department did not have an opportunity to
14 print this information on paper. The Department
15 would certainly print this information on paper
16 to make it part of the record that we need to
17 move forward.

18 But, Mr. Weaver, if you can please look
19 on the screen. These are the files that makeup
20 Exhibit 2; is that your understanding?

21 A. It is, yes.

22 Q. And "AgriMet ET Data," what is that?

23 A. That's the file that houses all the raw
24 data that was downloaded from the Bureau of
25 Reclamation's AgriMet site, I guess, which has ET

1 data for the Twin Falls and the Rupert AgriMet
2 stations.

3 Q. And the "Crop Area Data"?

4 A. That's the file that has all the raw
5 data from NASS, which I believe stands for the
6 Natural Agriculture Statistic Service. And that
7 data basically allowed us to come up with crop
8 distributions to understand what the specific
9 crop area acreages were for the different
10 counties.

11 Q. "DS & RISD Calculator"?

12 A. So that's the spreadsheet that brings
13 all of the raw data together in its finalized
14 form, and actually runs through the calculations
15 of reasonable in-season demand and demand
16 shortfall for a series of example years.

17 Q. And does this DS & RISD Calculator,
18 does it do calculations for 2006 and 2008?

19 A. It does not.

20 Q. And why is that, Mr. Weaver?

21 A. We just did not feel that it was
22 appropriate, or I don't -- I shouldn't say, we
23 didn't feel it was appropriate. We just didn't
24 consider the need to run reasonable in-season
25 demand calculations for the years that we

1 A. Certainly.

2 Q. "Heise Natural Flow 1990 to 2008"?

3 A. Yes, that's a pretty descriptive title
4 there. That's just the diversion -- or the -- it
5 is what it is, the Heise natural flow data from
6 1990 to 2008.

7 Q. The "Methodology Outline," that's a
8 Word document?

9 A. It is. That's a document that I
10 prepared, and Liz Cresto also assisted in, that
11 we gave to a number of other people on staff to
12 do a peer review of our methodology. And the
13 intent of that document was that it would be
14 detailed enough that they could go through, get
15 the same numbers that we got, make the same
16 calculations that we made, and arrive at the same
17 end result.

18 Q. "Reservoir Percent Fill"?

19 A. That's a document that summarizes the
20 percent of fill for each of the entities in each
21 of the reservoirs for specific water rights.

22 Q. "Shortfall Timeline"?

23 A. That's a spreadsheet that was used to
24 derive one of the attachments in the Methodology
25 Order.

1 selected as a baseline year. We never explored
2 it. We simply just did not address it.

3 Q. Is there a reason why it wouldn't have
4 been addressed?

5 A. Well, I think initially, when we had a
6 single baseline year, we felt that it would be
7 pretty heavily biased to run a reasonable
8 in-season demand calculation from the same year
9 for which you selected your baseline. Or when it
10 got expanded, to be an average of 2006 and 2008,
11 I just don't remember ever revisiting the matter.

12 Q. Biased how?

13 A. I never did explore it, and run the
14 calculations. So I can't say. It just seemed on
15 the surface, there wasn't much use in running the
16 calculations to determine what the historical
17 diversion would be, when you are relying on that
18 year for the diversion.

19 Q. But again, all of the raw data for 2006
20 and 2008 is included in the data submittal on the
21 FTP site, which is now in IDWR Exhibit 2?

22 A. That's correct.

23 Q. And would it be your understanding,
24 that anyone with your engineering background
25 would be able to make those calculations?

1 Q. "SWC Diversions '90 through '08"?

2 A. That's the diversion records from 1990
3 to 2008 for each one of the individual Surface
4 Water Coalition members.

5 Q. "SWC Carryover, 1990 through 2008"?

6 A. That's the calculated carryover volumes
7 for each of the Surface Water Coalition members
8 for each of those years.

9 Q. "Total NF Versus Total DIV"?

10 A. Off the top of my head, I can't
11 remember what that spreadsheet addresses.

12 Q. Should I open it up, maybe that will
13 refresh your memory?

14 A. Can you click on the first half?

15 Q. (Mr. Bromley complying.)

16 A. I think this is just -- I'm not
17 familiar with this spreadsheet. I have not used
18 it, and I did not prepare it. I think it's just
19 a summary of the total diversions for Water
20 District 01, so that you can look at -- well, you
21 can look at hydrographs like this, and pick
22 analog years for assisting and predicting the
23 forecast supply in-season.

24 Q. Do you know who would have prepared
25 this?

1 A. Liz Cresto.
 2 Q. So if there were any specific questions
 3 then --
 4 A. She would be the best person to answer
 5 them.
 6 Q. I understand.
 7 MR. BROMLEY: I have nothing further,
 8 Mr. Weaver.
 9 THE HEARING OFFICER: Okay. Thank you.
 10 We haven't established an order of
 11 cross-examination. But I guess based on the
 12 structure here, it seems to me that Ground Water
 13 Users, City of Pocatello ought to proceed first,
 14 and then the Surface Water Coalition. Is that an
 15 acceptable order? Mr. Budge, Ms. Klahn, members
 16 of the Surface Water Coalition?
 17 Okay. Who wants to lead out?
 18 MR. BUDGE: Ms. Klahn will proceed, and
 19 then Candice McHugh will follow-up for the Ground
 20 Water Users.
 21 THE HEARING OFFICER: Thank you.
 22 Ms. Klahn?
 23 MS. KLAHN: Thank you.
 24 ///
 25 ///

1 A. That's correct.
 2 Q. And did you actually obtain that
 3 Department data set for precipitation, for
 4 example, from the record of the Surface Water
 5 Coalition and add to that?
 6 A. I believe so.
 7 Q. Don't you know?
 8 A. Off the top of my head, I don't have
 9 instant recall of that. In some instances, we
 10 couldn't reproduce the data from the record that
 11 had been handed down to us by people prior. And
 12 so we went with the numbers that we could get
 13 from the sources that were identified.
 14 In some instances, we were able to
 15 completely reproduce what was in the record. So
 16 it was simply amending to that, the 2008 data. I
 17 don't remember specifically for what data what
 18 process was used.
 19 Q. Is it your testimony that the various
 20 categories of 2008 data that you used in this
 21 matter were the same categories of data that were
 22 in the record prior to your beginning on this
 23 project?
 24 A. Can you repeat that one more time,
 25 please?

1 CROSS-EXAMINATION
 2 QUESTIONS BY MS. KLAHN:
 3 Q. Good morning, Mat. I'm Sarah Klahn.
 4 I'm here for the City of Pocatello.
 5 I wanted to ask you a couple of
 6 questions about the information Mr. Bromley went
 7 over with you.
 8 Do you have Exhibit 1 there?
 9 A. Yes, I do.
 10 Q. And in the course of discussing Exhibit
 11 1, Mr. Bromley asked you if 2008 data were used
 12 in the development of that; is that right?
 13 A. That's correct.
 14 Q. And I believe you listed a number of
 15 different kinds of 2008 data that you used. Do
 16 you recall that?
 17 A. I do.
 18 Q. Could you list those again, because I
 19 don't have the transcript in front of me. And
 20 you said, diversions, ET, precipitation. What
 21 else?
 22 A. Temperature and growing days.
 23 Q. And it's your testimony that these
 24 could be described as updates to underlying data;
 25 is that correct?

1 MS. KLAHN: Colleen, could you read it
 2 back?
 3 (The reporter read back the requested
 4 testimony.)
 5 THE WITNESS: I believe that's the
 6 case.
 7 Q. (BY MS. KLAHN) So you can't sit here
 8 today, and tell us what data you had when you
 9 started this, that you added the 2008 data to?
 10 A. Well, I guess I can. We had, as an
 11 example, a data set of ET that we added to. We
 12 had a data set of diversions which we added to.
 13 But there is an example of where there were
 14 slight differences in some of the diversions that
 15 we could not reproduce.
 16 And so we went with data that we could
 17 get from the water right accounting data in place
 18 of numbers for, say, as an example, I believe one
 19 is the North Side, Gooding crosscut diversion.
 20 The data that was in the record had not been
 21 corrected by one-and-a-half percent to represent
 22 the distance from the actual diversion of the
 23 river and the measuring point. So I believe
 24 that's one example where we updated with data.
 25 Q. So that would be an example of a change

1 to the data you used that was not previously in
2 the record; is that correct?

3 A. Yes. So the data category was in error
4 ET, but we updated the value with numbers we
5 could get.

6 Q. I think you may have misspoken. Did
7 you mean diversions?

8 A. I'm sorry. Diversions.

9 MR. FLETCHER: Excuse me, one second.
10 I just need to clarify. I know this is confusing
11 the way it is --

12 I thought the scope of this hearing was
13 limited to whether or not the 2008 data he used
14 was accurate? And if we're getting into why did
15 you use 2008 data, or what aspects of the 2008
16 data you used, and those things, I think that's
17 reserved for the next -- the Steps 3 and 4, the
18 application of Steps 3 and 4 hearing.

19 I'm just trying to clarify what the
20 purpose of the hearing is. I thought it was just
21 simply, as you pointed out at the very beginning,
22 is the 2008 data that was used accurate.

23 THE HEARING OFFICER: Well, that --

24 MR. FLETCHER: And these lines of
25 inquiry, I think can be opened up later in the

1 analysis of the RISD -- I'm just going to use the
2 initials, because I never remember what they
3 stand for -- RISD plus DS for 2006 and 2008. Do
4 you recall that testimony?

5 A. I do.

6 Q. And in order to understand your
7 statement, I want to ask you a few foundational
8 questions related to your experience. What kind
9 of training do you have in statistics,
10 Mr. Weaver?

11 A. I've taken several statistic courses in
12 undergraduate and my graduate studies.

13 Q. Have you done any ground water
14 modeling, Mr. Weaver?

15 A. Not outside of school.

16 Q. In school you ran a model?

17 A. Yes.

18 Q. Which one?

19 A. MODFLOW.

20 Q. Are you familiar with the term
21 "verification" as it's used for modeling?

22 A. For validation?

23 Q. Yes.

24 A. Yes.

25 Q. And would you agree, that if you had an

1 subsequent hearings that were supposed to happen
2 this proceeding. But I don't think they are
3 appropriate in this hearing if we're just dealing
4 with 2008 data.

5 THE HEARING OFFICER: So your statement
6 is a re-characterization of the -- or an accurate
7 statement of what I said, Mr. Fletcher. I'm not
8 sure I understand what it is that Ms. Klahn is
9 exploring with Mr. Weaver right now. And I
10 suspect that at least to some degree, these
11 questions are preliminary.

12 So at least right now, I'll overrule
13 the objection, but -- and I'll watch the
14 questioning as it proceeds. Ms. Klahn,
15 Mr. Fletcher.

16 Go ahead, Ms. Klahn.

17 MS. KLAHN: Okay. Thank you.

18 Q. (BY MS. KLAHN) So you actually changed
19 some of the data prior to 2008, by adding back in
20 one-and-a-half percent to reflect the distance
21 from the river to the measuring point in the
22 crosscut; is that right?

23 A. That's right.

24 Q. Okay. Mr. Weaver, you've testified
25 about the -- you didn't see a need to do an

1 average of two years that you thought was
2 representative, it would be a good validation to
3 run that in the context of this RISD plus DS to
4 see whether it validated the selection of these
5 two years?

6 MR. THOMPSON: I'll object to that line
7 of questioning.

8 THE HEARING OFFICER: Sustained. I
9 think this goes beyond whether the 2008 date is
10 accurate and reliable or not, Ms. Klahn.
11 Sustained.

12 MR. ARKOOSH: For the record, while
13 we're interrupted, Mr. Hearing Officer, I move to
14 strike the two questions regarding the change in
15 historical data as beyond the scope as well. I
16 think the initial figure, which is preliminary,
17 but it turns out, it was the purpose of the
18 questions.

19 THE HEARING OFFICER: Well --

20 MS. KLAHN: Just for my purposes, are
21 those questions proper in the subsequent hearing,
22 either set of questions? I mean, we just had a
23 recess in order to discuss the RISD verification
24 issue. So I'm curious about whether we'll be
25 foreclosed from questioning the witness about

1 that at any point?

2 THE HEARING OFFICER: I think there
3 will be an opportunity, at least a broader
4 opportunity in the second, in the As Applied
5 hearing for exploration.

6 With respect to the motion to strike,
7 I'll overrule that motion. I guess one of the
8 issues that I want to try to address is whether
9 we're consistently staying within the record.

10 And consequently, I don't want to
11 expand the examination significantly in that
12 area. As I explained before, this is a matter
13 that can be argued by the parties. And I termed
14 it a classic subject for appeal. But
15 nonetheless, I want to stay within the record
16 that was available, plus adding in the 2008.

17 Ms. Klahn?

18 MS. KLAHN: Well, then let me ask a
19 preliminary question then, Your Honor, because I
20 am pretty sure that this will draw an objection
21 from my good friends across the room.

22 All of my cross-examination questions
23 have begun by establishing the foundation that
24 Mr. Bromley asked about a particular area.
25 However, Mr. Bromley's questions were not limited

1 from the record. Thank you.

2 MR. ARKOOSH: For the record,
3 Mr. Hearing Officer, either Exhibit 1, nor
4 Exhibit 2 were admitted yet.

5 THE HEARING OFFICER: I recognize that.
6 There has not been a motion.

7 CROSS-EXAMINATION
8 QUESTIONS BY MS. McHUGH:

9 Q. My name is Candice McHugh, and I
10 represent IGWA and the ground water users. I
11 just have a couple of questions just to make sure
12 that I was clear as to what information you
13 updated with 2008 data.

14 And Ms. Klahn got into, I think, you
15 said the climate data, and temperature, and
16 growing days; is that correct?

17 A. Yes.

18 Q. Evapotranspiration?

19 A. Yes.

20 Q. And diversions?

21 A. Yes.

22 Q. Did you also update the data on
23 reservoir evaporation?

24 A. I believe so, yes.

25 Q. And is that contained in one of those

1 to whether the 2008 data was accurate.

2 Mr. Bromley's examination could more
3 broadly be characterized as sort of an
4 introductory way of putting Mr. Weaver on for
5 purposes of both hearings.

6 And this is precisely the due process
7 objecting that we have, is this kind of slicing
8 and dicing of issues, so that things can't be
9 dealt with in a logical fashion.

10 I would like to ask Mr. Bromley about
11 the methodology outline, which is contained on
12 the screen that Mr. Bromley went through with
13 Mr. Weaver. I think I said Mr. Bromley. I meant
14 to say, I want to ask Mr. Weaver about it.

15 I would submit -- I would admit, the
16 methodology outline doesn't have anything to do
17 with veracity of the 2008 data.

18 THE HEARING OFFICER: Okay. Perhaps we
19 should remove it from the record, Ms. Klahn?

20 MS. KLAHN: Okay. I would suggest that
21 then. I think Mr. Bromley's examination was far
22 broader than the veracity of the 2008 data. And
23 with that, I will reserve the remainder of my
24 questions for the As Applied hearing.

25 THE HEARING OFFICER: Let's remove it

1 spreadsheets or --

2 A. I believe the reservoir percent fill
3 spreadsheet has that data.

4 Q. Did you update the data for diversions
5 for hydropower use for any of the Surface Water
6 Coalition entities?

7 MR. THOMPSON: I'll object to that
8 question. I don't think that data set was
9 involved in the hearing, the diversions made for
10 hydropower use. There is no call on the
11 hydropower right in this case.

12 THE HEARING OFFICER: Overruled. I'll
13 let him answer the question.

14 THE WITNESS: The raw diversion data
15 was adjusted. In one of the adjustments, we've
16 used to get at -- well, let me back up.

17 It was adjusted because we wanted to
18 get into volume of water that represented
19 exclusively water that was put towards the
20 development of crops. So we made two adjustments
21 to get at that. One of the adjustments was for
22 recharge. And the other one was for wheeled
23 water diverted on behalf of another entity. So
24 if -- what you said the hydropower diversions
25 cannot be characterized as either of those two,

1 then we didn't address it.
 2 Q. (BY MS. McHUGH) And where did you get
 3 the updated 2008 data to take out to adjust the
 4 raw data for recharge? Who gave you that
 5 information?

6 A. That's an answer that Ms. Cresto could
 7 best answer. I'm not sure.

8 Q. Okay. Are those adjustments reflected
 9 in any of those documents on the screen there?

10 A. They are.

11 Q. And which document?

12 A. The demand shortfall and reasonable
 13 in-season demand calculator document.

14 Q. And in those documents, do they
 15 actually specifically say what was taken out for
 16 the adjustments?

17 A. I believe they do, yes.

18 Q. For the wheeled water, who gave you the
 19 data for the 2008 water that was wheeled by the
 20 Surface Water Coalition?

21 A. I'm not sure.

22 Q. Do any of those documents up on the
 23 screen contain the 2008 water for the wheeled
 24 water for the Surface Water Coalition entities?

25 A. They do.

1 Q. And which one is that?

2 A. The one I just referenced, the demand
 3 shortfall and reasonable in-season demand
 4 calculator.

5 Q. But you are not sure where you got the
 6 data?

7 A. Well, I know that I got it from Liz.
 8 I'm not sure what the underlying source of that
 9 data was.

10 Q. Now, is this -- my understanding is
 11 that that is what is related to your adjustment
 12 for the one percent conveyance adjustment. Am I
 13 on the right track there?

14 A. No.

15 Q. Can you explain that then?

16 A. Explain what exactly?

17 Q. Ms. Klahn was asking you about the one
 18 percent adjustment that you made. Is that -- are
 19 you tracking?

20 A. I'm not. The one percent adjustment to
 21 what?

22 Q. Okay. Never mind. Okay.

23 When you made your adjustments for the
 24 recharge and wheeled water, how did you remove
 25 those amounts of water?

1 A. So we got the diversion data from the
 2 water rights accounting, and we came up with the
 3 volumes of water for each entity for each month
 4 that represented each of those two factors. And
 5 we subtracted the adjustments from the data for
 6 diversions from the water rights accounting to
 7 come up with the diversions that were used in the
 8 calculations. And that's summarized on a tab in
 9 the spreadsheet that I've been referring to DS &
 10 RISD Calculator.

11 Q. The information regarding the
 12 diversions from these Surface Water Coalition
 13 entities, was that taken from the water rights
 14 accounting data from the prior record, or was
 15 that updated information as well?

16 A. So specifically for 2008, the water
 17 rights accounting software had not been updated,
 18 and was not a part of the previous record. Does
 19 that answer your question?

20 Q. In part. And so then is your answer
 21 that you used the water rights accounting data
 22 that was already in the prior proceeding, and you
 23 just updated the 2008 data?

24 A. So we inherited a document that had the
 25 diversions for each of the entities that had been

1 constructed from the water rights accounting
 2 software. And I went through, and did my own
 3 downloading of that data, and compared entity by
 4 entity, month by month to the data that was in
 5 the record. And we found some discrepancies.

6 And those are the ones that I've
 7 alluded to, and we corrected those to where we
 8 discovered them. And I believe, it amounted to
 9 one-and-a-half percent on a certain diversion.

10 Now, on North Side it's not the total
 11 of one-and-a-half percent, because they have
 12 multiple diversions. I believe the other entity
 13 was AFRD2. So where that discrepancy existed, we
 14 identified it, and we went with the data that we
 15 felt comfortable -- which I believe does not
 16 exactly match the data that was presented to the
 17 Director -- or at the hearing.

18 Q. The inherited document that you just
 19 referred to, do you know whether it was part of
 20 the prior proceeding?

21 A. It was certainly used in prior orders.

22 Q. So is your answer, no?

23 A. I guess my answer is, I don't know.

24 Q. When you were updating the raw
 25 diversion data from the Surface Water Coalition

1 for 2008, did you make an adjustment for any
2 water that was released for flow augmentation?

3 A. I'm not sure what that term means,
4 "flow augmentation." Can you --

5 Q. Are you aware that water is released
6 from the Upper Snake River reservoirs for fish
7 flush or through the Bureau? Do you have any --

8 A. I am aware of that.

9 Q. Okay. And I'm referring to that flow
10 augmentation water.

11 A. Okay.

12 Q. Did you make any adjustments or
13 corrections to the 2008 data to adjust for that
14 for release of the flow augmentation water, if
15 any?

16 A. I'm not aware of how we adjusted that.

17 Q. Did you make any adjustments in the
18 2008 data for water that was leased by any of the
19 Surface Water Coalition entities to other users?

20 A. I'm not aware if we addressed that.

21 Q. I just want to clarify if I understand
22 how you removed the information. Did you remove
23 it on a monthly basis, or on an aggregate over
24 the season?

25 A. I don't recall off the top of my head.

1 And I don't honestly remember where that fell
2 out.

3 Q. (BY MS. McHUGH) Did you ask Twin Falls
4 Canal Company for that information?

5 A. Not that I'm aware of.

6 Q. Did you update the 2008 data or
7 information for the amount of acres that were
8 being irrigated within any of the Surface Water
9 Coalition entities' delivery boundaries?

10 A. So the total irrigated acre value that
11 was used in the calculations came directly out of
12 the hearing record.

13 Q. So you did not update it for 2008
14 information?

15 A. That's correct, not the irrigated area.

16 Q. Did you adjust the 2008 data to account
17 for what the Minidoka return flow credit was for
18 that year?

19 A. Not that I'm aware of.

20 Q. My recollection is that there were two
21 sets of irrigated acreage data in the record that
22 came out of the 2008 hearing. Do you know what
23 set of data you used to determine acreage?

24 A. I don't recall off the top of my head
25 what values we used. I believe it's well

1 We could open up the spreadsheet and determine
2 that. I thought it was monthly, but it's an easy
3 answer if we open up the document.

4 Q. I'm fine with it. You are wanting him
5 to open up the DS & RISD Calculator?

6 A. Yes.

7 (Mr. Bromley complying.)

8 THE WITNESS: In the second tab is
9 labeled "Demand." So it looks like it's monthly.

10 Q. (BY MS. McHUGH) Okay. In updating
11 your data, updating your information for the 2008
12 year, did you make any adjustments, or did you
13 review whether Twin Falls Canal Company delivered
14 five-eighths or three-quarters of an inch that
15 year?

16 MR. THOMPSON: I'll object.

17 THE WITNESS: I don't --

18 THE HEARING OFFICER: Just a minute.
19 Overruled.

20 Mr. Weaver, go ahead and answer the
21 question.

22 THE WITNESS: I don't recall that we
23 evaluated that year on that basis. We did have
24 some discussion of whether it was five-eighths of
25 an inch or three-quarters of an inch that year.

1 detailed and referenced in the documents that
2 were provided. As I recall, a number of them
3 were based off the Director's report. But some
4 of them had been modified based on findings in
5 the record. I don't have much more recollection
6 than that.

7 Q. Are you aware of the mitigation plan
8 submitted by the Southwest Irrigation District?

9 A. I guess I'm aware of it, yes.

10 Q. Okay. Are you aware of the sources of
11 water that are set forth in the Southwest
12 Irrigation District mitigation plan?

13 A. I'm not --

14 MR. THOMPSON: Objection to the
15 question. The Southwest Irrigation District is
16 not a part of this proceeding.

17 THE HEARING OFFICER: Explain the
18 relevance.

19 MS. McHUGH: I want to ask whether -- I
20 just want to lay a foundation on whether any
21 adjustments to the updated 2008 data was
22 considered at least through the water to the
23 Southwest Irrigation District. Because in
24 Southwest Irrigation District mitigation plan
25 sets for the Twin Falls Canal Company, Burley

1 Irrigation District as sources of leased water
2 for their plan. And I believe they leased water
3 in 2008. I'm just asking him if -- I'm just
4 laying that foundation.

5 MR. FLETCHER: That question has been
6 asked and answered, so I would object on those
7 grounds as well. And he has already answered
8 that there was no adjustment for leases according
9 to his testimony.

10 MR. THOMPSON: Yes, and I --

11 THE HEARING OFFICER: Well, and I guess
12 the other question I have, Ms. McHugh, is what
13 mitigation plan are you referring to?

14 MS. McHUGH: The Southwest Irrigation
15 District mitigation plan, and all I am aware of
16 actually, that was filed with the Blue Lakes
17 order.

18 THE HEARING OFFICER: So it wasn't
19 filed for this particular manner anyway; correct?

20 MS. McHUGH: Right. But it includes
21 the entities that are claiming shortage that
22 their leases. And I thought it might help
23 refresh his memory, if he didn't remember if
24 there was any adjustments to leases, since they
25 are specifically set out in that plan.

1 what's marked as Exhibit 100. This is the
2 document that we had passed out previously to all
3 the parties. I believe it's a partial printout
4 of this spreadsheet that is titled "DS & RISD
5 Calculator." Does that comport with
6 your -- would you agree with that?

7 A. I do, yes. It's one of the tasks.

8 Q. Okay. And this is just a follow-up on
9 some questions Ms. Klahn had asked. If you look
10 to the very back page of that.

11 A. (Witness complying.)

12 Q. I'll represent to you that this
13 spreadsheet has in it a file that says, "Read
14 Me." Do you recall that?

15 A. Yes.

16 Q. And this is the text that is associated
17 with the "Read Me" file. Does that look like
18 it's accurate?

19 A. I think so, yes.

20 MS. McHUGH: I would request Exhibit
21 100 be admitted with the back page, because I
22 believe the DS & RISD Calculator in the
23 spreadsheet itself, that the comment isn't
24 necessarily present unless you click on it. So I
25 wanted to have this admitted for that purpose.

1 THE HEARING OFFICER: Objection
2 sustained.

3 MS. McHUGH: Okay.

4 Q. (BY MS. McHUGH) I'm going to go back
5 to the adjustments that you stated you made for
6 the wheeled water that -- where the Surface Water
7 Coalition's entities were wheeling water for
8 another entity.

9 Are the adjustments you made for
10 wheeled water part of your application of Steps 3
11 and 4, or part of the Methodology Order?

12 A. Step 3 relies on our baseline year
13 diversion to calculate demand shortfall. And we
14 adjusted the diversions in our baseline year
15 based on wheeled water and in-season recharge.

16 Q. So in other words, the answer to my
17 question is: The adjustments that you made for
18 wheeled water are part of the application of
19 Steps 3 and 4; is that fair?

20 A. I think that's fair.

21 MS. McHUGH: May I approach the
22 witness?

23 THE HEARING OFFICER: Sure.
24 (Exhibit 100 marked.)

25 Q. (BY MS. McHUGH) I'm going to hand you

1 So that the comments are actually included.

2 THE HEARING OFFICER: Any objections?

3 MR. ARKOOSH: There was a previous
4 objection to comments on methodology that wasn't
5 data, which was sustained, actually removed from
6 the record. The objection was by, I think,
7 Pocatello. I don't recall.

8 MS. KLAHN: I haven't made any
9 objections.

10 MS. McHUGH: If you look at the
11 comment, this specifically refers to the 2006,
12 2008 data, and that the calculation for the
13 baseline years using the 2008, 2006 data average
14 wasn't done. This just gives context to the
15 questions that were asked. And I think it just
16 makes it so that the actual spreadsheet is
17 complete in the record.

18 MR. ARKOOSH: I don't object for that
19 purpose. As to the purpose so far as it reflects
20 on other years, I would object.

21 THE HEARING OFFICER: The document is
22 received into evidence.

23 (Exhibit 100 admitted into evidence.)

24 Q. (BY MS. McHUGH) Mr. Weaver, could you
25 look at Exhibit 1, which is the Methodology

1 Order?
 2 A. (Witness complying.)
 3 Q. And could you turn to the location in
 4 the Methodology Order where it says that
 5 adjustments, such as wheeled water, recharge
 6 water, that kind of thing, where that will be
 7 made, where that's called for?
 8 A. I'm on page 16, paragraph 43. It says,
 9 "Raw monthly diversion values will then be
 10 adjusted to remove any water diversions that
 11 could be identified not directly support the
 12 beneficial use of crop development within the
 13 irrigation entity. Examples of adjustments
 14 include the removal of diversions associated with
 15 in-season recharge, and diversion of irrigation
 16 water on behalf of another irrigation entity."
 17 Q. And the only adjustments or updates to
 18 the 2008 data that you made actually were
 19 adjusted to the two examples, but not to the
 20 other categories that I just questioned you
 21 about; correct?
 22 A. That's right.
 23 MS. McHUGH: I don't have anything
 24 further.
 25 THE HEARING OFFICER: Okay. Thank you,

1 have not yet been offered.
 2 MR. BROMLEY: Right. And now that
 3 we're done with questioning, I would move to
 4 admit Exhibit 1, which is the Methodology Order.
 5 And then as for Exhibit 2, we had a
 6 discussion about the Word document methodology
 7 outline, that that would be removed. And I do
 8 have questions about whether or not there is
 9 anything else that ought to then be removed from
 10 what we identified as Exhibit 2?
 11 THE HEARING OFFICER: Well --
 12 MR. BROMLEY: And maybe that's best
 13 done off the record, and we'll come back on
 14 before the other proceeding.
 15 THE HEARING OFFICER: Why don't we take
 16 a brief recess of about 10 minutes, and have a
 17 brief discussion with the parties, and then come
 18 back. And let's identify what needs to be
 19 removed, or should remain, or should not remain
 20 as part of Exhibit 2.
 21 We'll take ten minutes. Thanks.
 22 (Witness excused.)
 23 (A recess was had.)
 24 THE HEARING OFFICER: Let's go back on
 25 the record.

1 Ms. McHugh.
 2 Okay. Cross-examination, what order do
 3 we want to go in? Surface Water Coalition, any
 4 preference?
 5 MR. FLETCHER: I'm a little hesitant.
 6 The question I have deals with this baseline data
 7 that they keep asking about, which really has
 8 nothing to do with the 2008 issue. I guess I
 9 have a problem. So I don't have any questions.
 10 THE HEARING OFFICER: Okay,
 11 Mr. Arkoosh?
 12 MR. ARKOOSH: I have no
 13 cross-examination.
 14 THE HEARING OFFICER: Okay.
 15 MR. SIMPSON: Can we have just a
 16 moment?
 17 THE HEARING OFFICER: Yes.
 18 (Pause in the proceeding.)
 19 MR. SIMPSON: No questions.
 20 THE HEARING OFFICER: Okay.
 21 Mr. Bromley?
 22 MR. BROMLEY: I have nothing further,
 23 Your Honor.
 24 THE HEARING OFFICER: And I will remind
 25 you that the two documents that have been marked,

1 Mr. Bromley?
 2 MR. BROMLEY: Mr. Hearing Officer, it's
 3 my understanding based on the discussion that
 4 we've just had off the record, is what we will do
 5 with Exhibit 2, is we will remove the Word
 6 document methodology outline. And then all the
 7 other Excel documents will remain in the exhibit.
 8 The Department will prepare an amended
 9 Exhibit 2 for the record that has all the
 10 information, other than the methodology outline
 11 word documents.
 12 In talking with the parties, the
 13 parties are fine with the idea of simply having
 14 it as a disk as opposed to paper. The difficulty
 15 in printing these Excel spreadsheets would be
 16 getting the paper properly paginated, getting the
 17 data properly paginated, so it would be in a
 18 readable document. And the parties are okay with
 19 the idea of just having this simply as a disk.
 20 So the Department will prepare a disk
 21 that removes the methodology outline document,
 22 and that would then be Exhibit 2.
 23 THE HEARING OFFICER: So you are
 24 offering Exhibit 2 into evidence with the stated
 25 amendments?

1 MR. BROMLEY: Yes, sir.
 2 THE HEARING OFFICER: Okay. Any
 3 objection from the parties?
 4 MS. McHUGH: No objection.
 5 MS. KLAHN: No.
 6 THE HEARING OFFICER: Thanks to
 7 everyone for your help in working through the
 8 changes in Exhibit No. 2. That's received into
 9 evidence.
 10 (Exhibits 1 and 2 admitted into
 11 evidence.)
 12 THE HEARING OFFICER: And where do we
 13 want to go here now, Mr. Bromley, with respect
 14 to --
 15 MR. BROMLEY: Mr. Hearing Officer, it's
 16 my understanding that the Ground Water Users
 17 and/or the City of Pocatello have some interest
 18 in a few questions with Ms. Elizabeth Weaver.
 19 MS. McHUGH: Cresto, Elizabeth Cresto.
 20 MR. BROMLEY: I'm sorry. You guys
 21 aren't married now? I could have sworn you guys
 22 got married at some point. No.
 23 Liz Cresto, and I would just simply
 24 provide her background information, and to use
 25 Mr. Budge's phrase, tender her for

1 ELIZABETH CRESTO,
 2 first duly sworn to tell the truth relating to
 3 said cause, testified as follows:
 4 THE HEARING OFFICER: Ms. McHugh.
 5 DIRECT EXAMINATION
 6 QUESTIONS BY MS. McHUGH:
 7 Q. Good morning, Liz. My name is Candice
 8 McHugh. I represent the ground water districts.
 9 Is it all right if I call you Liz?
 10 A. Yes.
 11 Q. Could you briefly state what your
 12 background is and your position with the
 13 Department?
 14 THE HEARING OFFICER: Why don't we get
 15 her name for the record.
 16 THE WITNESS: My name is Elizabeth,
 17 E-l-i-z-a-b-e-t-h, Ann, A-n-n, Cresto,
 18 C-r-e-s-t-o.
 19 THE HEARING OFFICER: Okay. Thank you.
 20 Proceed, Ms. McHugh.
 21 Q. (BY MS. McHUGH) Could I get your
 22 general background, and your current position
 23 with the Department?
 24 A. I have a bachelor's of science degree
 25 from Virginia Tech University, and I have a

1 cross-examination.
 2 THE HEARING OFFICER: Do we want to do
 3 that right now then? So you've finished with
 4 your presentation of evidence?
 5 MR. BROMLEY: That's correct.
 6 THE HEARING OFFICER: Okay. So at this
 7 juncture then, I would turn to the Ground Water
 8 Users, City of Pocatello, and ask you to call
 9 your witnesses in the order that you choose to
 10 proceed.
 11 Ms. Klahn, do you want to follow, or,
 12 Mr. Budge, Ms. McHugh, in the same order that we
 13 had previously?
 14 MS. KLAHN: We can keep the same order.
 15 But the City of Pocatello does not have any
 16 witnesses to call for the 2008 hearing.
 17 THE HEARING OFFICER: All right. Thank
 18 you.
 19 Ms. McHugh?
 20 MS. McHUGH: Yes, and the Ground Water
 21 Users would call Liz Cresto.
 22 THE HEARING OFFICER: Okay.
 23 Ms. Cresto, if you would come forward, please.
 24 ///
 25 ///

1 master's of science in hydrology from the
 2 University of Arizona.
 3 I started working here soon after grad
 4 school in 2004. And I started as a hydrologist
 5 in the planning section. In 2005, I moved over
 6 into the hydrology section, and have been then
 7 working as a hydrologist. My primary focus has
 8 been on surface water, and on the water rights
 9 accounting programs.
 10 Q. And do you work with Mr. Weaver?
 11 A. Yes.
 12 Q. Do you supervise Mr. Weaver?
 13 A. No.
 14 Q. You are colleagues?
 15 A. Coworkers, yes.
 16 Q. Okay. Are you familiar with the
 17 information and data in the Excel spreadsheets on
 18 Exhibit 2?
 19 A. Yes.
 20 Q. Just a preliminary question that I
 21 wanted to ask you, and I may have misheard
 22 Mr. Weaver speak. But currently is the
 23 Department updating its Water District 1
 24 accounting software?
 25 A. They are, but it's not being used.

1 Q. It's not?

2 A. No.

3 Q. Were you part of the peer review
4 process that Mr. Weaver -- were you here for
5 Mr. Weaver's testimony?

6 A. Yes.

7 Q. Were you one of the people who was part
8 of the peer review process that he spoke to
9 earlier?

10 A. Yes.

11 Q. Now, I understand that the Department
12 used some updated 2008 data in the Methodology
13 Order?

14 A. Correct.

15 Q. As part of that, did you, or do you
16 know of anyone at the Department, that adjusted
17 the 2008 data that was used to take out reservoir
18 evaporation?

19 A. That's in the reservoir percent fill.

20 Q. Spreadsheet?

21 A. Spreadsheet.

22 Q. And if we were to open that reservoir
23 percent spreadsheet, would you be able to explain
24 to us how you took that evaporation out?

25 A. I think it comes straight from the

1 A. I think that's just the sum of the
2 evaporation taken out from each reservoir from
3 the storage reports, and it matches what's in the
4 storage report as to the total evaporation for
5 each year. So it's based on the entire Upper
6 Snake system, that number.

7 Q. Okay. I guess what I'm just trying to
8 understand for our purposes, is my understanding
9 is that the Department's position is that
10 evaporation from the storage reservoirs is taken
11 out, or that's the intention, to be taken out.
12 But we're having a tough time connecting how that
13 happened. So I'm trying to ask you --

14 A. Where that is.

15 Q. Where that is. How we could figure
16 that out.

17 A. You know, it would really be in
18 the -- I'm trying to think. Try going to the
19 calcs. Can you scroll the other direction?

20 I think it's in that yield, because
21 that's how much they were allocated each year.
22 So, you know, it's just taken straight from the
23 storage reports, how much that they have
24 available at the beginning of the season.

25 Q. So you --

1 storage reports.

2 Q. Okay. Could we open that spreadsheet?
3 (Mr. Bromley complying.)

4 Q. (BY MS. McHUGH) And this spreadsheet
5 is titled "Reservoir Percent Fill." And can you
6 tell me what data is in this spreadsheet?

7 A. Go to "P Avail," the one spreadsheet to
8 the left. So can you scroll all the way to the
9 left.

10 So this comes from the first page on
11 the storage report, and column A is actually the
12 year. I don't think the column is wide enough to
13 see it right there, but -- so it has each
14 reservoirs. So that's B through I is the fill.
15 The yield comes right out of that first page of
16 the storage report.

17 And then keep scrolling back over. And
18 then we have a percent available, and the total
19 evaporation summarized. So it comes straight
20 from the storage report.

21 Q. Okay. And just so I'm understanding
22 how the 2008 data was adjusted to take out
23 evaporation. Would you have taken out Column B,
24 which is titled "Total Evaporation," or can you
25 explain that?

1 A. And that's a function of how much
2 evaporation was taken out in the storage reports.

3 Q. So you didn't actually do a calculation
4 to take out evaporation? Your assumption was
5 that it was already taken out of the storage
6 reports?

7 A. Yes, it's already in the data in the
8 storage program. So that's -- you know, I don't
9 have to do a calculation, because Water District
10 01 does it through their accounting process. So
11 you just take that -- their data.

12 Q. And is that considered raw data, or is
13 that considered adjusted raw data?

14 A. I'm not sure.

15 Q. Okay.

16 A. I mean, it's the data source.

17 Q. So in order for to us figure out how
18 evaporation was taken out, it's not necessarily
19 accurate to look at the raw data? There is some
20 adjustments that you use based on the storage
21 report?

22 A. No, I would say, I used the storage
23 report values. That was my source, data source.

24 Q. Okay.

25 A. I did not contradict what they said

1 there.

2 Q. Okay. And can you tell me the
3 difference between the fill and yield? And I
4 think that was on the "P Avail" tab on the
5 bottom.

6 A. You want fill and yield. I'm trying to
7 not misspeak. Okay. I think the fill is the
8 total reservoir fill, and then the yield is less
9 evaporation.

10 Q. And who and where at District 1 makes
11 the calculation that would take out the
12 evaporation?

13 A. I'm assuming it would be Tony
14 Olenichak, and that was in the storage reports.

15 Q. And was Mr. Olenichak part of that peer
16 review within the Department?

17 A. He was definitely consulted, but I
18 don't think he was consulted on this matter.

19 MS. McHUGH: Okay. We can leave that
20 spreadsheet. The next document on Exhibit 2 I
21 would like to just ask her a couple of questions
22 on, was the crop data spreadsheet. I'm just
23 wanting to understand a couple numbers there.

24 If you could scroll over to the right,
25 Chris.

1 overruled right now. Let's see where the
2 question goes. I'm uncertain where we're headed.

3 Q. (BY MS. McHUGH) So it looks like this
4 information was possibly updated by a B. Kramber
5 on January 13th, 2010?

6 A. Correct.

7 Q. So is he the person that gets to tell
8 us what those acreage totals might mean?

9 A. I believe Mat Weaver worked closely
10 with Bill, and has a better knowledge of his
11 background of this data.

12 Q. Are you familiar with the water right
13 for Twin Falls Canal Company?

14 MR. THOMPSON: Objection; relevance in
15 this proceeding.

16 THE HEARING OFFICER: Yes. What's the
17 purpose of the inquiry, Ms. McHugh?

18 MS. McHUGH: Well, my understanding is
19 that the Department uses, or provided this
20 information for the record for the Methodology
21 Order that contains irrigated acres per
22 irrigation district or canal company. And I'm
23 trying to explore how it relates, if at all, to
24 the water right to each of the irrigation
25 districts to how it was updated or not, so we

1 (Mr. Bromley complying.)

2 Q. (BY MS. McHUGH) If you look at Table 2
3 there, Liz. Are you familiar with this
4 spreadsheet?

5 A. I am.

6 Q. It says, "Irrigation district breakdown
7 of surface water irrigated area per county." And
8 if you look at Twin Falls Canal Company, and you
9 scroll over. Underneath there, you see a number
10 of acres, and it says, "281,445 acres." What's
11 your understanding of what that number
12 represents?

13 A. I'm not really sure. I did not develop
14 this spreadsheet, and I'm not as familiar with
15 this set of data. I would have to refer back to
16 the title at the head of the table.

17 MS. McHUGH: And then if you make it a
18 little bit over to the left, Chris.

19 (Mr. Bromley complying.)

20 Q. (BY MS. McHUGH) Do you see the
21 footnote there? Does that help at all?

22 MR. ARKOOSH: Well, I would object on
23 lack of foundation. She's indicated she's not
24 the person who knows about this.

25 THE HEARING OFFICER: At least

1 could make that.

2 MR. THOMPSON: I believe Mr. Weaver
3 already testified to that question, Your Honor.

4 THE HEARING OFFICER: Okay. I'll
5 overrule. If there is some possibility of
6 relating the water rights to this particular
7 data, if that's for your inquiry, Ms. McHugh.
8 Overruled.

9 Ms. Cresto, do you recall the question?

10 THE WITNESS: Could you repeat it?

11 Q. (BY MS. McHUGH) Are you familiar with
12 the water right for Twin Falls Canal Company?

13 A. Yes.

14 Q. Do you know how many acres there are?

15 A. I'm not that familiar, so, no.

16 Q. All right. And do you know how this
17 data in this spreadsheet was used in the
18 Methodology Order, or was intended to be used?

19 A. It would be used as a part of the crop
20 water need. You need to know how many irrigated
21 acres. There are mid season updates of those.

22 MS. McHUGH: Okay. I don't have
23 anything further. Thank you.

24 THE HEARING OFFICER: Okay. Surface
25 Water Coalition questions for Ms. Cresto?

1 MR. ARKOOSH: No questions, I don't
 2 believe.
 3 THE HEARING OFFICER: Okay.
 4 Mr. Thompson?
 5 MR. THOMPSON: I don't think so.
 6 THE HEARING OFFICER: Okay. Thank you,
 7 Ms. Cresto.
 8 (Witness excused.)
 9 THE HEARING OFFICER: Okay. The next
 10 witness, the City of Pocatello or Ground Water
 11 Users?
 12 MR. BUDGE: We would call Dr. Brendecke
 13 to be sworn.
 14 Can we take a five minute break and
 15 proceed with this witness, please?
 16 THE HEARING OFFICER: Yes.
 17 (A recess was had.)
 18 THE HEARING OFFICER: We're recording
 19 again. And Dr. Brendecke has come forward. And
 20 if you raise your right hand, please.
 21 CHARLES BRENDECKE, Ph.D.,
 22 first duly sworn to tell the truth relating to
 23 said cause, testified as follows:
 24 THE HEARING OFFICER: Mr. Budge?
 25 DIRECT EXAMINATION

1 engineering from the University of Colorado, and
 2 a master's degree in civil engineering, master of
 3 science in civil engineering from Stanford
 4 University, and a Doctor of philosophy degree in
 5 civil engineering from Stanford University.
 6 Q. Dr. Brendecke, have you previously
 7 filed an affidavit with the Department in the
 8 matter of the Surface Water Coalition call that's
 9 sets forth in greater detail your professional
 10 experience?
 11 A. Yes, I did.
 12 Q. Have you had an opportunity to review
 13 the recent Methodology Order in this proceeding,
 14 Exhibit 1 --
 15 A. Yes.
 16 Q. -- as well as the subsequent As Applied
 17 Order?
 18 A. Yes, I did.
 19 Q. And did you participate in the
 20 preparation of the Ground Water Users' petition
 21 for reconsiderations, and the supplements and
 22 amendments to that document?
 23 A. Yes, I did.
 24 Q. Have you had an opportunity to examine
 25 the 2008 data, which is at issue in these

1 QUESTIONS BY MR. BUDGE:
 2 Q. Thank you. Dr. Brendecke, state your
 3 full name, and business address for the record.
 4 A. My name is Charles M. Brendecke,
 5 B-r-e-n-d-e-c-k-e. My business address is 1002
 6 Walnut Street, Suite 200, Boulder, Colorado
 7 80302.
 8 Q. And you are appearing as a witness on
 9 behalf of the Idaho Ground Water Appropriators
 10 and the Ground Water Districts?
 11 A. Yes, I am.
 12 Q. And you have also testified on their
 13 behalf in other proceedings before the
 14 Department, including the delivery calls of the
 15 Clear Springs, and Blue Lakes, and the Thousand
 16 Springs area, as well as in the Surface Water
 17 Coalition proceeding?
 18 A. Yes, I did.
 19 Q. And are you the lead technical
 20 consultant for IGWA and the Ground Water
 21 Districts?
 22 A. That's correct.
 23 Q. Would you just briefly summarize your
 24 educational background?
 25 A. I have a bachelor of science in civil

1 proceedings?
 2 A. Yes.
 3 Q. Do you have any comments or issues with
 4 respect to the use of the 2008 data?
 5 A. I have some concerns about adjustments
 6 that were made to the data in the calculations.
 7 Q. As far as the raw data itself, do you
 8 have any reason to question the raw data?
 9 A. I don't have reason to question the
 10 underlying raw data, no.
 11 Q. Do you have in front of you still
 12 Exhibit 1, which is the Methodology Order?
 13 A. I do.
 14 Q. Would you please turn to page 16,
 15 Finding of Fact 43?
 16 A. (Witness complying.)
 17 Q. In that particular finding, it starts
 18 out with the question that, monthly irrigation
 19 entity diversions would be obtained from Water
 20 District 01's diversion records.
 21 And it then goes on to say, "Raw
 22 monthly diversion values will then be adjusted to
 23 remove any water diversions that can be
 24 identified to not directly support the beneficial
 25 use of crop development within the irrigation

1 entity."
 2 What's your general understanding of
 3 the purpose of such an adjustment?
 4 MR. THOMPSON: I guess I'll object to
 5 the question. I think the scope of the hearing
 6 is whether the 2008 data was reliable or
 7 accurate, what the adjustments were made, and why
 8 they were made. And I think that goes beyond the
 9 scope of the testimony of the witness.
 10 THE HEARING OFFICER: Overruled at this
 11 point, because I think the question is
 12 preliminary. I want to know whether there were
 13 adjustments to the 2008 data. So I think that's
 14 possibly where the question is headed.
 15 Mr. Budge or Mr. Brendecke?
 16 Q. (BY MR. BUDGE) Would you like me to
 17 repeat that question?
 18 A. Yes.
 19 Q. The language here in Finding of Fact 43
 20 indicates that there will be some adjustments to
 21 the raw monthly diversion value. And it says,
 22 quote, "to remove any water diversions that can
 23 be identified to not directly support the
 24 beneficial use of crop development within the
 25 irrigation entity."

1 And I'm not asking you to give a legal
 2 interpretation of the order. Just what is your
 3 understanding of the nature and purpose of the
 4 adjustments that would have to be made to the raw
 5 diversion data?
 6 A. I believe the reason for making
 7 adjustments is so that the diversion that is used
 8 for determining shortages, the diversion, the
 9 baseline, for example, most accurately just
 10 reflects water that was diverted for crop needs
 11 and not for other purposes.
 12 Q. Were you present during the hearing
 13 earlier today when Mr. Mat Weaver testified
 14 regarding various adjustments that he did and did
 15 not make under this Finding of Fact 43?
 16 A. Yes.
 17 Q. And I wanted to ask you some questions
 18 regarding his testimony in those specific
 19 adjustments. First of all, if I correctly recall
 20 his testimony, he did not make any adjustments
 21 for hydropower production diversions that may
 22 have been made by a Surface Water Coalition
 23 entity. Do you recall that testimony?
 24 MR. ARKOOSH: For the record, is this
 25 limited -- may I inquire, Mr. Director, is this

1 limited to the '08 numbers, or is this as to the
 2 methodology in general?
 3 I'm going to object to the question as
 4 ambiguous. It could have relevance to the
 5 Methodology Order. It could be limited to the
 6 '08 hearing.
 7 MR. BUDGE: We're relating to
 8 adjustments to the 2008 data Mr. Weaver said he
 9 did and did not make. And I intend to ask this
 10 witness further about those same things he did,
 11 whether he agrees or disagrees.
 12 THE HEARING OFFICER: Overruled.
 13 Q. (BY MR. BUDGE) The question then is:
 14 Mr. Weaver had testified about the hydropower
 15 adjustments. In other words, he testified that
 16 if an entity, such as Twin Falls Canal Company
 17 were diverting water, for example, early in the
 18 irrigation season, or late in the irrigation
 19 season beyond what was needed to raise crops,
 20 that would require -- or would it require some
 21 type of an adjustment if we're going to comply
 22 with of Finding 43, that says, let's separate out
 23 water that goes for crop production and water for
 24 some other purpose?
 25 A. Yes, I believe it should.

1 MR. THOMPSON: Your Honor, I'll lodge
 2 an objection. Again, I think the question of
 3 whether this adjustment was or wasn't made, we
 4 don't need Dr. Brendecke to testify to that.
 5 Mr. Weaver already answered that question this
 6 morning. This is simply testimony in an attempt
 7 to get into evidence the facts of finding.
 8 THE HEARING OFFICER: Okay. Overruled.
 9 I'll allow some more preliminary examination
 10 exploration on this subject.
 11 MR. ARKOOSH: As long as you are
 12 interrupted, Mr. Director, I would object that
 13 we're not reflecting the record accurately. But
 14 that's for you to decide ultimately. But that
 15 would be my objection.
 16 THE HEARING OFFICER: Okay. Thanks.
 17 Overruled.
 18 Mr. Budge?
 19 Q. (BY MR. BUDGE) You can go ahead and
 20 answer the question, which is whether you believe
 21 the adjustments should be made for water diverted
 22 for hydropower purposes?
 23 MR. ARKOOSH: I'll object. I would
 24 lodge the same objection. That's not as of the
 25 '08 year. That's whether there should be

1 adjustments made.

2 MR. BUDGE: All of the questions are
3 made for purposes of the 2008 data. And I'll
4 include that in my question. If I don't, that's
5 what I would propose.

6 THE HEARING OFFICER: Thank you.
7 Proceed.

8 THE WITNESS: I believe that
9 adjustments should be made to remove diversions
10 that might have been made for hydropower
11 purposes, because they were not serving crop
12 needs.

13 Q. (BY MR. BUDGE) For purposes of the
14 2008 data, which you examined, do you believe
15 that adjustments should be made for water that
16 would be wasted or passed through the system in
17 excess of what would be necessary for crop
18 development within the individual entity?

19 A. I think that's what this finding calls
20 for. It calls for a determination of what's
21 being diverted for crop needs. If there is water
22 diverted that should be adjusted out.

23 Q. Was that an adjustment that was not
24 made?

25 A. It doesn't appear to have been -- or no

1 will, or the cat let out of the bag, when
2 Mr. Weaver was allowed to put in Exhibit 2 with
3 all of this data and information. And then he
4 proceeded to testify about some adjustments he
5 made, and some adjustments he didn't make. And
6 some he could explain how he made, and some he
7 could not.

8 So once the Department's own witness
9 testified without objection about adjustments
10 made or not made, it would seem that this
11 witness, our witness should be able to say, I
12 agree with an adjustment or disagree.

13 THE HEARING OFFICER: And if there are
14 adjustments that have been made to the 2008 data
15 beyond the raw data, then I think those areas of
16 examination exploration are legitimate,
17 acceptable.

18 MR. ARKOOSH: For the record,
19 Mr. Director, all of those questions were asked
20 by the other party. Now, we may not have
21 objected to it, but they are not developing a
22 record on the basis of what the adverse party
23 brought into this hearing.

24 They were allowed to probably go beyond
25 where they should have gone with the questions to

1 adjustments from Twin Falls or AFRD.

2 THE HEARING OFFICER: And, Mr. Budge,
3 if the nature of these questions is -- by
4 Mr. Brendecke -- if the questions are, and the
5 answers are, that there needs to be an adjustment
6 in the data? The data that was presented was raw
7 data, and did not intend, at least in my opinion,
8 to go beyond that raw data.

9 Now, if Mr. Weaver or Mr. Brendecke
10 wants to show that there were adjustments made in
11 that data that were incorrect, and that the data
12 is not reliable as raw data, then I think this
13 line of questioning is legitimate.

14 But if the questions are, and the
15 answers are intended to show that that data needs
16 to be adjusted somehow in the presentation of the
17 raw data, I think that goes beyond what was
18 intended to bring into the record with respect to
19 2008 data.

20 So if your questions continue along the
21 line that they presently are headed, I will start
22 to limit the scope of the questions.

23 MR. BUDGE: To that extent, we would
24 like to make an offer of proof on these. And the
25 difficulty is, is the door was opened, if you

1 Mr. Weaver. But that is not a foundation to
2 bootstrap it into more questions regarding
3 methodology to Dr. Brendecke.

4 MR. THOMPSON: Mr. Director, I guess
5 whether adjustments were made, why they were
6 made, why some weren't made, all go to
7 methodology, not to the reliability or accuracy
8 of the 2008 raw data.

9 THE HEARING OFFICER: Well,
10 Mr. Arkoosh, I appreciate your careful argument,
11 and yours as well, Mr. Thompson. But if there is
12 inaccuracy or unreliability in the 2008 data that
13 was presented, regardless of what source that
14 adjustment has been identified, or that
15 inaccuracy, then I will explore those particular
16 issues here in this hearing.

17 Okay. Mr. Budge, go forward. Thanks.

18 Q. (BY MR. BUDGE) Dr. Brendecke, were you
19 able to determine, in examining the diversion
20 data for 2008 for Twin Falls Canal Company,
21 whether that was determined based upon a delivery
22 rate of five-eighths inches per acre or
23 three-fourths inch per acre?

24 A. No.

25 Q. And do you think that information

1 should be disclosed and accounted for in the 2008
2 data?

3 MR. THOMPSON: The same objection, Your
4 Honor.

5 THE HEARING OFFICER: Sustained. It
6 doesn't go to the question of accuracy of the
7 data.

8 Q. (BY MR. BUDGE) Were you here during
9 the testimony of Mr. Weaver regarding the
10 evaporation adjustment, or I think that was maybe
11 Ms. Cresto?

12 A. Yes.

13 Q. In examining the 2008 data, were you
14 able to determine the manner in which the
15 adjustment for evaporation was calculated?

16 A. It appeared that the data was used from
17 the Water District 1 storage account report, net
18 of evaporation.

19 Q. What is the effect of the evaporation
20 adjustment?

21 MR. ARKOOSH: Objection. It does not
22 go to the accuracy or reliability of the
23 information.

24 THE HEARING OFFICER: That's a
25 preliminary question. Overruled.

1 MR. FLETCHER: Objection, Your Honor.
2 It's way beyond the scope of the 2008 data.

3 THE HEARING OFFICER: Sustained.

4 MR. BUDGE: Your Honor, I would like to
5 proceed at this point and make an offer of proof
6 on some other issues that based on the Court's
7 rulings and the limitation order, we haven't been
8 able to go into. And those will address the
9 issues that you sustained objection on, the use
10 of the --

11 MR. SIMPSON: I've got --

12 MR. BUDGE: Excuse me. If I can
13 finish, Counsel.

14 And that would include the issues of
15 the propriety of using the 2008 data, would show
16 that the use of the 2008 data, and averaging
17 method in the Methodology Order, in fact, results
18 in a reasonable in-season demand for the Surface
19 Water Coalition that is in excess of what they
20 requested in their experts' testimony in this
21 case previously if it were all accepted.

22 We have an exhibit to demonstrate that.
23 We also have an exhibit to demonstrate a
24 calculation of evaporation that we think should
25 be added back into the storage supply, that

1 Mr. Brendecke.

2 THE WITNESS: The effect of evaporation
3 adjustment is to reduce the amount of storage
4 available to space holders. And ultimately, then
5 reduces the supply that's used in the shortfall
6 calculation.

7 Q. (BY MR. BUDGE) And would that then in
8 turn -- as the 2008 data was then used to make
9 the calculation, does that in turn increase the
10 Mitigation Obligation of the Ground Water Users?

11 A. It would increase the mitigation.

12 Q. Would the effect of that make the
13 Ground Water Users responsible for evaporation on
14 the Surface Water Coalition reservoir storage?

15 MR. ARKOOSH: Same objection.

16 MR. FLETCHER: Also line of inquiry, it
17 has nothing to do with the data.

18 THE HEARING OFFICER: Sustained.

19 Q. (BY MR. BUDGE) Have you made an
20 attempt to compare the 2008 data as it was used
21 to determine the average headgate diversion with
22 the diversion requirement presented by the
23 Surface Water Coalition in the record in this
24 case?

25 MR. ARKOOSH: Objection.

1 consequently would reduce the Mitigation
2 Obligation of the Ground Water Users. And we
3 have further testimony on various problems with
4 the methodology that confuses 2008 data.

5 Now, it would probably take 20 minutes
6 or so for that offer of proof. That's why I
7 describe what it entails. And I appreciate your
8 earlier statement that we can't go on for hours.
9 But I think it would be of some importance to
10 establish the record.

11 THE HEARING OFFICER: Okay. Well,
12 Mr. Budge, I'm not going there. And I'm holding
13 firm to my previous ruling. So the scope of this
14 hearing was to determine whether -- the accuracy,
15 and the validity, and the reliability of the 2008
16 data that was being added to the record. And --

17 MR. BUDGE: If I could have just a
18 moment?

19 THE HEARING OFFICER: Okay.
20 (Discussion held off the record.)

21 Q. (BY MR. BUDGE) The Finding 43 that
22 requires an adjustment for water not used for
23 crop development -- I have a question that I want
24 to ask you.

25 Are you familiar with the mitigation

1 plan that was filed by Southwest Irrigation
2 District as a part of the Blue Lakes proceedings?

3 A. Generally.

4 Q. And do you recall the identified source
5 of water that Southwest Irrigation Company
6 indicated that it was utilizing for purposes of
7 the mitigation plan to Blue Lakes?

8 MR. THOMPSON: I'll lodge an objection
9 here; relevance. If Mr. Budge wants to litigate
10 the Southwest Irrigation District mitigation
11 plan --

12 MR. BUDGE: It's a foundation question.

13 MR. THOMPSON: It has nothing to do
14 with the 2008 raw data --

15 THE HEARING OFFICER: Overruled. But
16 you may only get one more question here,
17 Mr. Budge.

18 Q. (BY MR. BUDGE) And what was your
19 understanding of the source of the water that was
20 reflected in the Southwest Irrigation District
21 mitigation plan to Blue Lakes?

22 MR. ARKOOSH: I'm going to object to
23 foundation.

24 MR. FLETCHER: That's nothing to do
25 with the 2008 raw data that's been provided,

1 witness should be able to testify why it was
2 relevant in looking at the 2008 data under the
3 directive provided in 43, that we shouldn't make
4 any adjustment that doesn't result through
5 irrigation needs, and have testimony on whether
6 that adjustment is proper or not.

7 THE HEARING OFFICER: Okay. Mr. --

8 MR. THOMPSON: Can I ask one question
9 on what Southwest plan --

10 MR. BUDGE: And one other point, could
11 we maybe have one or two spokesmen. I can
12 appreciate a few objections, but we seem to be
13 getting three and four objections up and down and
14 up and down on the same issue. Maybe we could
15 have one spokesman from the coalition.

16 THE HEARING OFFICER: Well, I think
17 each of them independently represent a client,
18 and have the right, and should have the
19 opportunity to object.

20 Now, if I was listening to objections
21 from Mr. Simpson, Mr. Thompson, jointly then I
22 might quiet Mr. Simpson immediately.

23 MR. SIMPSON: Further?

24 THE HEARING OFFICER: And make him
25 remove his tie as well, but...

1 which I believe is the order of the scope of this
2 hearing.

3 MR. BUDGE: Can I be heard on this,
4 Your Honor?

5 THE HEARING OFFICER: Sure.

6 MR. BUDGE: We have 2008, we have a
7 mitigation plan from Southwest Irrigation
8 District that says their source of supply is Twin
9 Falls Canal Company. Now, if Twin Falls is
10 leasing water out to another entity for the
11 purposes of a mitigation plan, it's quite obvious
12 that an adjustment should be made. And we should
13 be able to ask this witness if he can identify if
14 an adjustment was made, and the propriety of such
15 an adjustment.

16 Under the very Finding 43 here that we
17 are talking about what adjustments should be made
18 to 2008 data. We have the Department's witnesses
19 say, here is some we made. Here is some we
20 didn't. Some involved data of the record, and
21 some involved data that we manipulated. So we've
22 established quite a record about making some
23 adjustments.

24 And conceptually, if an adjustment was
25 not made on something, it would seem that our

1 MR. THOMPSON: I just have a question
2 in aid of his objection.

3 THE HEARING OFFICER: Yes,
4 Mr. Thompson.

5 MR. THOMPSON: What mitigation plan are
6 you referring to of the Southwest Irrigation
7 District? What year in the file?

8 MR. BUDGE: What was filed?

9 MR. THOMPSON: What plan? What
10 mitigation plan? I don't know what you are
11 talking about.

12 MR. BUDGE: What was filed? This is
13 the Southwest Irrigation District plan for Blue
14 Lakes. It was filed. And they said the source
15 of the water is Twin Falls Canal Company. And I
16 called the attorney --

17 MR. THOMPSON: The plan filed in 2009,
18 you are offering for the purpose of 2008 data?

19 MR. BUDGE: Yes. I think the plan was
20 actually filed before that. But I have
21 a -- Counsel from Southwest Irrigation District
22 indicates that we have a lease agreement with
23 Twin Falls to lease water from the mitigation
24 plan. I don't know what it is, but...

25 THE HEARING OFFICER: Okay. Let me cut

1 off the argument between counsel.
 2 Mr. Budge, if Mr. Brendecke can
 3 identify adjustments that he or you would deem to
 4 be inappropriate that were made to the raw 2008
 5 data by Mr. Weaver, and those adjustments relate
 6 to Southwest Irrigation District plan, I'll let
 7 you proceed with the question.

8 If your line of questions for
 9 Mr. Brendecke is: We have raw data, but we think
 10 that raw data should be adjusted based on
 11 information that we have out there. I won't
 12 allow the question to go forward. Because that
 13 extends the analysis of the raw data that we're
 14 intending to get into the record.

15 MR. BUDGE: Well, the objections were
 16 coming before I ever got to that question.

17 THE HEARING OFFICER: Okay. So I'll
 18 allow you to go forward, but there is the
 19 limitation.

20 Q. (BY MR. BUDGE) Dr. Brendecke, are you
 21 aware whether or not the adjustments were made to
 22 the raw data for 2008 diversions based upon water
 23 leased by Twin Falls Canal Company to Southwest
 24 Irrigation District?

25 A. There doesn't appear to be any

1 purposes of the flow augmentation water leased by
 2 the Bureau of Reclamation?

3 A. It doesn't appear there were, no.

4 Q. Are you aware of whether there were any
 5 adjustments to the 2008 data for purposes of
 6 acres within the Surface Water Coalition entities
 7 that were hardened or non-irrigated?

8 A. It doesn't appear there were.

9 MR. BUDGE: No further questions.

10 THE HEARING OFFICER: Okay. Surface
 11 Water Coalition questions?

12 MR. FLETCHER: I don't have any
 13 questions.

14 THE HEARING OFFICER: Mr. Arkoosh,
 15 questions?

16 MR. ARKOOSH: No, I don't have any
 17 questions.

18 THE HEARING OFFICER: Thank you.
 19 Mr. Thompson?

20 MR. THOMPSON: I have no questions.

21 THE HEARING OFFICER: Okay. Thank you.
 22 (Mr. Brendecke excused.)

23 THE HEARING OFFICER: Other witnesses,
 24 Mr. Budge?

25 MR. BUDGE: No, Your Honor.

1 adjustment.

2 MR. FLETCHER: Your Honor, I'm going to
 3 object to that. There is an assumption for that
 4 question. There is no foundation for that
 5 question. There is nothing in the record to show
 6 that Twin Falls leased water to Southwest
 7 Irrigation District. So there is no foundation
 8 for the question. It's assuming facts not in
 9 evidence.

10 THE HEARING OFFICER: I agree. I agree
 11 with you, Mr. Fletcher. Nonetheless, the
 12 testimony of Dr. Brendecke establishes that there
 13 was no adjustment in the data, and that it is raw
 14 data. And his earlier testimony was that he saw
 15 no reason why the raw data wasn't acceptable. So
 16 I'll overrule the objection.

17 Mr. Budge, you know what the limitation
 18 is. And let's go forward.

19 Q. (BY MR. BUDGE) Are you aware whether
 20 there were any adjustments to the 2008 raw data
 21 for purposes of the mitigation return flow
 22 credit?

23 A. It doesn't appear there were.

24 Q. And were you aware of whether or not
 25 there were any adjustments to the 2008 data for

1 THE HEARING OFFICER: Okay. Does the
 2 Surface Water Coalition wish to call any
 3 witnesses?

4 MR. ARKOOSH: No, Your Honor, we don't.

5 THE HEARING OFFICER: Okay.

6 MR. BROMLEY: Hearing Officer, before
 7 we close the record in this proceeding, I do have
 8 an updated Exhibit 2 that does not have the
 9 methodology Word document. I would like to
 10 substitute for the Exhibit 2 that was previously
 11 offered.

12 THE HEARING OFFICER: Thank you,
 13 Mr. Bromley. It speaks to the efficiency of the
 14 Department that you can have that. I need to
 15 call attention to those efficiencies whenever I
 16 can.

17 All right. It seems to me --

18 MR. BROMLEY: Your Honor, just for
 19 purposes of the clarification of the record, the
 20 Exhibit 2 that I gave to the court reporter, it
 21 has a blue exhibit tag on the top that says "IDWR
 22 Exhibit 2," and it also has a mailing sticky on
 23 it that says, "Idaho Department of Water
 24 Resources Exhibit 2," just for purposes of
 25 clarification. Thank you.

1 THE HEARING OFFICER: Okay. All right.
2 Anything further in this particular matter? It's
3 a timely conclusion to the hearing for the
4 Methodology Order.

5 We'll come back about 1:00 and start
6 the hearing for the As Applied. I expect a more
7 lively presentation and discussion at that time.

8 (Hearing concluded at 12:00 p.m.)
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