

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

**IDAHO GROUND WATER
APPROPRIATORS, INC.**

Petitioners,

vs.

CITY OF POCA TELLO,

Petitioners,

vs.

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

Petitioners,

vs.

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

Respondents.

Case No. CV-2010-382

(consolidated Gooding County
Cases CV-2010-382, CV-2010-383,
CV-2010-384, CV-2010-387,
CV-2010-388, Twin Falls
County Cases CV-2010-3403,
CV-2010-5520, CV-2010-5946, CV-
2012-2096, CV-2013-2305, CV-2013-
4417, and Lincoln County Case CV-
2013-155)

**SURFACE WATER COALITION'S JOINT OPENING BRIEF
(AS APPLIED APPEAL)**

On Appeal from the Idaho Department of Water Resources

Honorable Eric Wildman, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

Seven canal companies and irrigation districts (hereinafter collectively referred to as the “Surface Water Coalition” or “Coalition”)¹ filed a water right delivery call with the Idaho Department of Water Resources (“Department” or “IDWR”), in 2005. Through this process, the Director formulated a methodology for the conjunctive administration of junior ground water rights. That methodology established a ten (10) step program for determining whether there is material injury to senior surface water rights and, if so, the extent of administration to mitigate for that material injury. Appeals were filed as to the methodology, as well as to various orders applying that methodology (i.e. the “as applied orders”). This brief will address the Coalition’s appeal of the as applied orders.

The Director’s arbitrary and flawed application of the methodology has resulted in unmitigated and persistent injury to the Coalition’s senior water rights. Under the guise of “certainty to the water users,” the Director has rigidly refused to consider updated information about changing hydrologic and climatic conditions – particularly when that information shows that water supplies are becoming more strained. In addition, the Director has allowed injurious depletions to continue unmitigated – even after the Director determines that material injury is increasing throughout an irrigation season. Such administration plainly violates the Supreme Court’s recent decision in *A&B Irr. Dist. v. Spackman*, 315 P.3d 828, ___ Idaho ___ (2013) and is thoroughly addressed in the Coalition’s accompanying *Opening Brief (Methodology Appeal)*.

¹ The Coalition is comprised of A&B Irrigation District (“A&B”), American Falls Reservoir District #2 (“AFRD#2”), Burley Irrigation District (“BID”), Milner Irrigation District (“MID”), North Side Canal Company (“NSCC”), and Twin Falls Canal Company (“TFCC”). Each entity holds separate senior surface natural flow and storage water rights. R. 1370-74.

In addition to allowing unmitigated injury, the Director has consistently failed to make vital administrative decisions until far too late in the irrigation season. By the time the Director finally makes his decisions, the holders of the senior water rights have already been forced to curtail their diversions for the material injury they are suffering. This “after-the-fact” administration provides no relief to the injured senior water rights and only benefits junior ground water rights that have pumped their full rights for the year. Further, the Director’s process for delivering mitigation water is not defined and has failed to follow the Water District 01 rental pool rules. The failure to provide timely mitigation has unlawfully injured the Coalition members contrary to Idaho law.

Finally, the Director has steadfastly denied the Coalition’s requests for hearing on various as applied orders. As such, the Coalition’s efforts to provide updated and relevant hydrologic and climatic information to the Director has been rebuffed. The Director’s actions have denied the Coalition’s right to due process, contrary to the Idaho Constitution and relevant statutes. For the reasons set for the below, the Court should reverse and set aside the Director’s actions in the as applied orders and require IDWR to proceed with administration consistent with Idaho law.

II. Course of Proceedings

The Course of Proceedings is provided in the Coalition’s *Opening Brief (Methodology Appeal)* and is incorporated herein, with the following further information.

On July 29, 2009 the Honorable John M. Melanson issued an *Order on Petition for Judicial Review*, which, among other things, remanded the case to IDWR for further proceedings. [R. 10,075](#) & [10,107](#).² On remand, the Director issued the *Second Amended Final*

² All citations to the 2008 agency record, as lodged in Case No. CV-2008-551, will be designated “R.____.” All citations to the 2010 agency record, as lodged in Case No. CV-2010-382 will be designated “R. Vol. __ at ____.”

Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover (“Methodology Order”), on June 23, 2010. [R. Vol. 3 at 564](#).

Since 2010 the Director has issued several orders applying the “new” methodology. The Coalition has filed seven appeals as to these various orders:³

1. CV-2010-3403 (April 2010 Forecast Supply Order)
2. CV-2010-5520 (2010 Step 7 Order)
3. CV-2010-5946 (2010 Step 9 Order)
4. CV-2012-2096 (April 2012 Forecast Supply)
5. CV-2013-2305 (April 2013 Forecast Supply)
6. CV-2013-4417 (Revised April 2013 Forecast Supply)
7. CV-2013-155 (2013 Step 5 Order)⁴

III. Statement of Facts

The Director began applying the Methodology Order in April 2010. Since that time, the Director’s application of the Methodology Order has failed to remedy the material injury suffered by the Coalition. Below is a discussion of the Director’s application of specific steps in the Methodology Order in 2010, 2012 and 2013.

A. Methodology Step 1

The Methodology Order sets forth a straightforward requirement in Step 1. The Coalition members must provide electronic shape files delineating the total irrigated acres within their boundaries or confirm that the number has not varied from the previous year by more than five percent (5%). [R. Vol. 3 at 597](#). The Director then uses this information in calculating “Crop Water Need” in Step 2 and subsequent steps. *Id.* at 597-98.

³ The petitions for judicial review were stayed by stipulation of the parties until the Idaho Supreme Court issued its decision in *A&B v. Spackman*. Following the issuance of the opinion, this case resumed and the court set a briefing and oral argument schedule. See *Order Amending in Part Procedural Order Governing Judicial Review of Final Orders of Director of Idaho Department of Water Resources* (February 24, 2014); *Order Granting Joint Motion to Amend Oral Argument and Briefing Schedule* (May 8, 2014).

⁴ Appeal No. CV-2013-155 addresses the administration of water right 1-6, in the name of AFRD#2. The issue is currently pending before the Director pursuant to a hearing requested by the Coalition. [R. Vol. 5 at 809](#). The issue will be addressed, and an appropriate record will be developed, in those proceedings. As such, AFRD#2 voluntarily dismisses the appeal in CV-2013-155 for that reason.

Since 2010, the Director has refused to use the irrigated acreage information submitted by the Coalition members. In addition, the Director has ignored the number of irrigated acres partially decreed by the Snake River Basin Adjudication (“SRBA”) Court in 2012. Consequently, the Director has underestimated the Coalition’s in-season “Crop Water Need” requirements and the resulting material injury.

B. Methodology Steps 3 & 4:

The Methodology Order describes Steps 3 and 4 as follows:

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

5. Step 4: If the April DS is greater than the reasonable carryover shortfall from the previous year, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users fail or refuse to provide this information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users. Modeled curtailment shall be consistent with previous Department efforts. The ESPA Model will be run to determine the priority date necessary to produce the necessary volume within the model boundary of the ESPA. However, because the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01, junior ground water users will be required to meet the volumetric obligation within the area of common ground water supply, not the full model boundary.

[R. Vol. 3 at 598-99.](#)

Under these steps, the Director estimates the projected water supply and then anticipates what, if any, material injury will result to the Coalition's senior water rights.

1. Refusal to Adjust April Forecast Order and Mitigation Requirements.

In 2012, the Director issued the *Final Order Regarding April 2012 Forecast Supply* ("2012 Forecast Order"). *R. Vol. 4 at 728*. Relying upon the April 5, 2012 Joint Forecast from the U.S. Bureau of Reclamation and U.S. Army Corps of Engineers, the Director assumed the unregulated inflow of the Snake River at Heise would be 3,250,000 acre-feet (April through July). *Id. at 730*. According to the Director, this equates to "91% percent [sic] of average." *Id.* Based on this information, the Director concluded that no member of the Coalition would experience any "demand shortfall" or injury in the 2012 irrigation season. *Id.*

Shortly after the Joint Forecast was issued, water and climatic conditions changed for the worse. In particular, on April 16th Reclamation and the Corps issued a mid-month forecast, estimating unregulated inflow from April 16 through July. *R. Vol. 4 at 745-46 & 755*. This mid-month forecast reduced the forecasted inflow downward from 91% to only 85%. *Id.*

Consequently, the Coalition asked the Director to consider this information and how it would impact the Director's no material injury prediction. *Id. at 743*. The Director rejected the Coalition's request, concluding:

The Methodology Order requires the Director to use the actual Joint Forecast (April 1-July 31), not a mid-month forecast (April 16- July 31). *Methodology Order at 9*. Consistent with the Methodology Order and as stated in the April Forecast Order, the Department used the Joint Forecast, which was issued on April 5. The April Forecast Order was signed and served on April 13, 2012. The mid-month "joint forecast" referred to by the SWC is not the actual Joint Forecast. Moreover, the mid-month "joint forecast" was issued after the April Forecast Order, and was not available for the Director to consider.

Id. at 755.

Notwithstanding this conclusion, the Director purported to analyze the updated information, and again concluded that no member of the Coalition would suffer material injury. In short, the Director refused to allow for updated climate and water supply information to be presented for purposes of 2012 conjunctive administration.

Similar circumstances arose in 2013. On April 17, 2013, the Director issued the *Final Order Regarding April 2013 Forecast Supply* (“2013 Forecast Order”). [R. Vol. 5 at 829](#).

Applying Step 3, the Director stated:

On April 3, 2013, the Joint Forecast was announced, predicting an unregulated inflow of 2,650,000 acre-feet at the Snake River near Heise gage for the period of April through July. The Joint Forecast "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques."

Methodology Order at 9. The forecasted flow volume equates to 82% percent of average and is most similar to the flow volume experienced in 2010.

...

The Department predicts that Jackson, American Falls, Palisades winter water savings, and Lake Walcott will have 100% storage allocations. The 1939 Palisades Reservoir right is expected to fill 535,300 acre-feet, resulting in a 59% storage allocation. Reservoir evaporation is assumed to be 3%, which is similar to the total evaporation charges in both 2002 and 2004.

[Id. at 830-31](#). Based on this forecast, the Director determined that only TFCC would suffer a shortage (i.e. material injury) of 14,200 acre-feet. [Id. at 831](#).

However, like 2012, the 2013 water supply conditions quickly deteriorated. Based on these changes it became apparent that the Director did not rely on the best available hydrologic information. The Coalition explained this to the Director:

The Director’s reliance upon a 2002/2004 average of the SWC's reservoir rights’ fill after April 1st to predict storage allocations in 2013 is incorrect and not representative of actual hydrologic conditions that exist in the Upper Snake River Basin. Water District 01 released information yesterday showing that the American Falls 1921 storage right is still short of filling by 168,000 acre-feet. *See Ex. A (April 30, 2012 Weekly Report)*. This information also shows that early season storage use, both above and below American Falls Reservoir, “is not expected to be cancelled because excess water has not spilled past Milner

this year.” *Id.* Further, the Water District 01 report predicts that if “weather conditions are very dry, **it could result in very little new fill in the Palisades and Island Park storage rights.**” *Id.* (emphasis added). Accordingly, the Director’s predicted fill of 59% of the Palisades 1939 water right is erroneous and not based upon the best available hydrologic information.

In addition, the Director’s predicted natural flow supply available to the SWC is incorrect and not based upon the best available hydrologic information either. *See* Ex. A. Presently, only the October 7, 1905 water rights are projected to receive any natural flow below Blackfoot. While this priority will likely vary depending upon the runoff conditions that may occur, several SWC members have already begun to use storage water to meet their landowners’ and shareholders’ irrigation demands.

...

In sum, the Director’s over-prediction of total water supply results in an underestimated demand shortfall (TFCC- 14,200 acre-feet, AFRD #2- 14,605 acre-feet). The April Forecast Order should be reconsidered and revised to use the correct and most current and accurate information available to the Director. Stated another way, the Coalition requests the Director to reconsider the April Forecast Order since it does not allow for the adaptive management of the provision of water to the extent that the initial April forecast prediction proves incorrect, based upon the best available hydrologic information. At a minimum, the Director’s prediction of reservoir fill must be reconsidered in light of current available information provided by Water District 01.

R. Vol. 5 at 862-64 (emphasis in original).

Despite the changed conditions, the Director denied the Coalition’s request for reconsideration. In doing so, the Director concluded:

The Director rejects this argument for two reasons. First, the notion of continually updating the April Forecast Order is contrary to the very purpose for having an early forecast.

...

If the Director were to update the April Forecast Order every time new forecast information became available, there would never be a final decision upon which water users could plan for the upcoming irrigation season. The Director must determine the April forecast based upon the information available at the time the order is issued.

R. Vol. 5 at 889.

Notably, the Coalition’s concerns about the impacts resulting from the Director’s refusal to consider accurate and updated information became a reality in 2013. Hot and dry conditions persisted across southern Idaho. In his August 27, 2013 *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* (“2013 Revised Forecast Order”), the Director described the water supply conditions as follows:

9. The months of May and June were dry. According to the NRCS Snotel sites, the Upper Snake received 73% and 24% of average precipitation in May and June, respectively. The National Weather Service’s Twin Falls weather station reported 26% and 19% of normal precipitation in May and June, respectively. Twin Falls temperatures were near normal for April, were 1.6 degrees above normal for May, were 3.7 degrees above normal for June, and were 5.7 degrees above normal for July. Because of the hot, dry spring, water supply conditions were less than predicted. The actual Heise natural flow for April – July was 2,279,000 acre-feet, or 371,000 acre-feet less than the April 2013 Joint Forecast.

R. Vol. 5 at 950.

The resulting revised shortfall prediction revealed that the shortage to TFCC had increased from 14,200 acre-feet to 51,200 acre feet. *Id.* at 953. In addition, AFRD#2, which was not expected to have any material injury, now experienced a material injury of 54,000 acre-feet. *Id.* This increase from 14,200 acre-feet to a combined total of 105,200 acre-feet represents a 740% increase in material injury from what the Director predicted in early April. Despite this change and increased injury, the Director refused to require complete mitigation. As discussed below, the Coalition members would only receive a fraction of the actual material injury due to the Director’s refusal to adjust material injury determinations upward from the April Forecast orders.

2. Failure to Establish a Defined and Lawful Procedure for the Use of Storage Water as Mitigation.

Step 4 requires the holders of the junior water rights to secure sufficient water, as mitigation for material injury, in order to avoid curtailment. [R. Vol. 3 at 599](#). Rather than be curtailed, the owners of junior ground water rights have sought to mitigate the material injury through the lease of storage water from spaceholders in the Upper Snake River Reservoir system. *See, e.g., R. Vol. 2 at 354; at 374*. However, the Director has failed to mandate that the use of storage water comply with governing rules and procedures – which has resulted in further untimely administration and delivery of mitigation water when needed.

Water District 01 provides for the rental of storage water through a formal “rental pool” as well as through private leases under defined rules.⁵ The rules must be followed in order to effectuate such a lease. Yet, the Director has not required junior ground water users to follow these rules. Further, the Director has failed to order curtailment when they were not followed and delivery of mitigation water has been delayed.

For example, in 2010, the ground water users attempted to use storage water as mitigation for the material injury suffered by members of the Coalition. [R. Vol. 2 at 354; at 374](#) (providing copies of leases of storage water to be used for mitigation). In the *Final Order Regarding April 2010 Forecast Supply; Order on Reconsideration* (“2010 Forecast Order”), the Director recognized the use of storage for mitigation and ordered:

38. Junior ground water users must establish, to the satisfaction of the Director, their ability to secure 56,600 acre-feet. The Director will review the executed storage water leases and options to lease storage water and combine sufficient leases together to provide the 56,600 acre-feet obligation. These leases should be committed to the Watermaster of Water District 01 by instruction of the Director solely for the SWC mitigation.

⁵ The current rules and regulations can be viewed at <http://www.waterdistrict1.com/rental%20pool%20rules.pdf>. The local committee is authorized to adopt the rules through the Idaho Water Resource Board. *See* I.C. § 42-1765.

R. Vol. 4 at 612.

The 2010 Forecast Order plainly obligated the groundwater users to “commit” the leases to the Water District 01 Watermaster. *Id.* IGWA submitted information purporting to have leased 57,000 acre-feet of storage water for mitigation. R. Vol. 2 at 354; at 374. The Director subsequently found that there would be no material injury, and ordered that the leased water be “released.” R. Vol. 4 at 642 (“Because there will be no 2010 in-season shortfalls, the Director notifies the watermaster for Water District 01 to release IGWA’s 57,000 acre-feet of secured water”).

Notwithstanding this entire process, it became clear to the Coalition that the groundwater users never complied with the Water District 01 rental pool rules. In fact, weekly reports issued by Water District 01 at the time revealed that none of the storage water was ever submitted to the Watermaster as ordered. R. Vol. 4 at 652-53. Once again the Coalition explained these errors to the Director:

The above findings wrongly imply that IGWA secured 57,000 acre-feet that was then committed to the Watermaster of Water District 01 through the rental pool, and the rental fees were paid, both of which are required for private leases by the Water District I rental pool rules. The findings also wrongly imply that the water was in the control of the Watermaster and was available for assignment by the Watermaster to the SWC "solely" for use as mitigation water. No such assignment to the control of the Watermaster or payment of fees ever took place, therefore the Watermaster did not have control of the storage water for mitigation purposes during the 2010 irrigation season. In short, the Watermaster never had control over any mitigation water to “not deliver” or “release” as was directed by the Director’s orders.

In addition, the Director’s Step 7 Order lacks any information or accounting as to whether this “secured” storage water was actually used by any of the lessors during the 2010 irrigation season. Had “secured” water actually been used by a lessor, or committed to some other entity, it is obvious it would not have been available to deliver to SWC “solely” for mitigation as ordered. Since the water was never assigned pursuant to the rental pool rules, the Watermaster had no control over the “assigned” water. The factual inaccuracies stated in the Step 7 Order demonstrate a misunderstanding of the

procedural requirements of the rental pool rules and the inability of IDWR to control the delivery of mitigation water, control that is lawfully required and mandated by the Orders of the Director if a junior ground water user wants to divert out-of-priority following a finding of material injury.

Since the storage water was not committed to the control of the Watermaster, the water remained in the control of and was available for use by the lessor during the entire irrigation season.

Id. at 653-54.

The Director responded by concluding:

Neither the June 24 As-Applied Order nor the underlying Methodology Order required actual assignment to the Watermaster and the payment of fees to the rental pool. The director purposely wrote the June 24 As-Applied Order prohibiting the Watermaster from allowing the dedicated water to be used for any other purpose until released. The director is aware the storage water was not used for another purpose until released by the director's Final Forecast Order. IGWA complied with the requirement of the June 24 As-Applied Order.

R. Vol. 4 at 679.

The 2013 irrigation season presented a similar situation. As with 2010, the Director determined there would be material injury to certain members of the Coalition – in this case, TFCC in the amount of 14,200 acre-feet. *R. Vol. 5* at 829. On April 22, 2013, the groundwater users submitted their *Notice of Secured Water*, alleging to have secured water – in the form of storage leases – to mitigate for the material injury. *R. Vol. 5* at 848. However, the groundwater users did not submit copies of the leases to the Director. *Id.* at 854 (providing a “summary” of the leases).

Again, the groundwater users failed to follow procedures mandated by the Water District 01 rental pool rules for the lawful lease of storage water. The Coalition explained these errors to the Director. *R. Vol. 5* at 973-77. In particular, based on Water District 01 reports and accounting, it was obvious that the ground water users did not have the necessary mitigation required by the Director’s order. *Id.* Rather, as of June 25th, they “only had 10,500 acre-feet

remaining from its 2013 storage leases.” *Id.* at 974. Further, although the groundwater users alleged to have assigned storage water to TFCC for mitigation, Water District 01 records failed to show any such assignment. *Id.* at 976-77. This information demonstrated that the groundwater users did not have the requisite storage water available during the irrigation season, as required by the Methodology Order.

Importantly, much of this information was not available on April 22, 2013, when the *Notice* was filed by the ground water users. The error was only revealed as the irrigation season commenced and Water District 01 records showed that the proper procedures were not followed. However, notwithstanding this plain violation of the Methodology Order, the Director refused to address the Coalition’s concerns, concluding that the concerns should have been raised in April, 2013:

The SWC’s complaint about leases rests not with this order, but is focused on whether IGWA complied with the Director’s 2013 Forecast Supply Order when IGWA submitted IGWA’s *2013 Notice of Secured Water*. As this order did not establish the requirement for securing mitigation water, the SWC is not entitled to a hearing on that issue in the context of this order and the Director declines to address this issue in the context of this order.

R. Vol. 6 at 1040.⁶

⁶ The practice of playing “fast and loose” with the Water District 01 rental pool rules and procedures came to a head in the fall of 2013, where the Director’s complicity in the groundwater users’ failure to follow the procedures resulted in the failure to properly assign storage to the materially injured members of the Coalition. *See* http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/SWC_2013docs.htm (IDWR document repository for Coalition Call). In particular, the Director issued the *Final Order Establishing 2013 Reasonable Carryover (Methodology Step 9)* and the *Final Order Establishing 2013 Reasonable Carryover (Methodology Step 10)*. *Id.* Subsequently, the Director issued the *Order Determining Deficiency in IGWA’s Notice of Secure Water; Curtailing Ground Water Rights Junior to July 1, 1985*. http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/2014/01Jan/20140110_Order%20Determining%20Deficiency%20in%20IGWA's%20Notice.pdf. The Coalition requested administrative hearings on these Step 9 and 10 orders. The Director granted the Coalition’s requests and a hearing is pending before IDWR. Since the hearing has not been held the Coalition has not yet appealed the final order or sought consolidation with this appeal.

C. Methodology Steps 6-8:

The Methodology Order Describes Steps 6 through 8 as follows:

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

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

...

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

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

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

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

[R. Vol. 3 at 599-600.](#)

1. Reduction of Material Injury Determinations to Individual Coalition Members.

The 2013 Forecast Order anticipated that the only material injury suffered by any Coalition member would be TFCC – in the amount of 14,200 acre-feet. [R. Vol. 5 at 831](#). As explained above, the Coalition was concerned that the Director’s failure to consider the most current hydrologic and climatic information would result in underestimating the actual material injury. *See* [R. Vol. 5 at 862-64; at 889](#) (Director rejecting the Coalition’s petition).

The Coalition’s concerns turned into reality when, on August 27, 2013, the Director determined that “the actual Heise natural flow for April – July was 2,279,000 acre-feet, or 371,000 acre-feet less than the April 2013 Joint Forecast”, resulting in an increased shortfall prediction of 51,200 acre-feet for TFCC and 54,000 acre-feet for AFRD#2. [R. Vol. 5 at 950 & 953](#). Rather than adjust the mitigation requirements to reflect actual material injury, the Director actually reduced the mitigation owed to TFCC. According to the Director:

AFRD2 and TFCC are materially injured. Because the Time of Need is reasonably certain, the Director orders the Watermaster for Water District 01, upon issuance of this order, but no later than August 30, 2013, to assign the mitigation storage water secured by IGWA to the accounts of AFRD2 and TFCC. *The Watermaster for Water District 01 shall allocate 7,300 acre-feet to AFRD2, and 6,900 acre-feet to TFCC.*

[R. Vol. 5 at 955](#) (emphasis added).

The Coalition asked the Director to reconsider this reduction:

Next, despite the increased injury to TFCC in quantities over 300% than what was predicted in April, the Director arbitrarily cut the mitigation owed to TFCC in half, from 14,200 acre-feet to 6,900 acre-feet. Further, despite finding no injury to AFRD#2’s inseason demand in April, based upon erroneous stream flow forecasting, the Director increased the mitigation obligation owed by IGWA to 7,300 acre-feet. Overall, despite finding in-season injury to AFRD#2 and TFCC in the amount of 105,200 acre-feet, the Director concluded junior priority ground water users would only need to provide 14,200 acre-feet, or about 13% of the total in order to continue to pump their full junior rights. This implementation of the conjunctive

management rules and Methodology Order is unlawful. Further, the Director had no authority to reduce the mitigation obligation owed to TFCC and arbitrarily refused to follow the Methodology Order in an attempt to reallocate the mitigation water acquired by IGWA. Contrary to the Director's attempt, the Methodology Order requires an individual analysis for "each member of the SWC."

R. Vol. 5 at 971-72.

The Director rejected the Coalition's arguments, concluding that no individual member of the Coalition had any right to rely on the mitigation owed in the 2013 Forecast Order:

The SWC again mischaracterizes requirements of the Methodology Order. Nowhere in the Methodology Order, or in the 2013 Forecast Supply Order implementing the Methodology Order, does it provide that secured mitigation water acquired by IGWA in response to the 2013 Forecast Supply Order is obligated only to TFCC. In fact, by its plain language, ***the water is obligated to the SWC as a whole, not just one entity***. If the Director forecasts an in-season shortfall, the Methodology Order requires that IGWA secure the quantity of water necessary to meet the predicted in-season shortfall ***for the SWC***. *Methodology Order* at 35.

On April 17, 2013, the Director issued his 2013 Forecast Supply Order. The 2013 Forecast Supply Order predicted a 14,200 acre-foot in-season shortfall to TFCC and required IGWA to "secure and provide a volume of storage water or to conduct other approved mitigation activities that will provide water *to the SWC*." *2013 Forecast Supply Order* at 4 (emphasis added). ***The Methodology Order and the 2013 Forecast Supply Order, by their plain terms, obligate IGWA's secured mitigation water to the SWC as a whole, not to any one entity in the SWC***. The reason for this is because, as occurred in this year, a revised forecast may predict a shortfall for more than one member of the SWC. Alternatively, the revised prediction may conclude that a different member of the SWC is being injured than was originally predicted. If more than one member of the SWC is predicted to have a shortfall, it is appropriate to divide the secured water among the members of the SWC who are predicted to have a shortfall. Likewise, if a revised order predicts a shortfall for a different member of the SWC than was originally predicted, it is appropriate to provide the secured water to the entity now predicted to have a shortfall. In this circumstance, while the 2013 Forecast Supply Order originally predicted the shortfall for TFCC, the revised forecast in the Steps 6 - 8 Order predicts that AFRD2 will also have a shortfall. The Director's division of the secured water between TFCC and AFRD2 is not contrary to the Methodology Order.

R. Vol. 6 at 1039-40 (emphasis added).

2. The Director's Application of Steps 6-8 and the Determination of "Time of Need."

According to Step 6, "approximately halfway through the irrigation season," the Director is required to adjust the April forecast and determine the "time of need" for purposes of providing mitigation. [R. Vol. 3 at 599](#). The Director identifies the "irrigation season" as running from "the middle of March to the middle of November – an eight month span." [R. Vol. 6 at 1039](#).

As explained above, the 2013 irrigation season dramatically worsened following the 2013 Forecast Order, issued in April. *Supra*. Brian Olmstead, TFCC's manager, explained the difficulties of the water year:

6. At the date of final storage allocation in June, TFCC received a full storage allocation for its water rights in Jackson and American Falls Reservoirs, minus evaporation and storage assigned for the Minidoka Return Flow credit, decreed by the SRBA Court. The net storage allocation was 239,545.6 according to Water District 01's preliminary allocation dated June 10, 2013.

7. Natural flow in the Snake River deteriorated very quickly in 2013. There was no large runoff past Blackfoot and it was obvious to me in the spring and early summer that the available water supply would be less than what the Director predicted in his order. With this in mind TFCC began discussions with IGWA to ensure the full 14,200 acre-feet, if not more, would be provided in a timely manner during the irrigation season.

8. On about June 15th, natural flow in the Snake River began to recede rapidly, and TFCC began drawing heavily on storage. ***On June 17th, after consultation with the Board of Directors, TFCC cut water deliveries from 3/4" to 5/8" per share, even though our shareholders demand the full 3/4" for irrigation beneficial use.*** We were really hoping to hold 3/4" deliveries pursuant to our water rights for another couple weeks for farmers to get through the peak demand period in early July, but we simply couldn't wait any longer without risking severe shortages in late August as had happened in 2001 and 2004. As of July 18, TFCC had diverted and used approximately 64,000 acre-feet of storage and our natural flow was near record low at 1,000 to 1,200 cfs. Continuing this rate of storage use we would have run out of storage by mid-August thus causing extreme duress to the shareholders. Accordingly, the Board and I began to discuss cutting deliveries to 1/2" per

share, which results in very expensive repackaging of pivot systems, and even further deficit irrigation of all crops from that point forward.

9. Somewhat inexplicably, from about July 5th until the end of July, natural flow rebounded into the 2,000 cfs range and we began to think our supply would hold out without having a disastrous cut in deliveries to 1/2” per share. Also on July 16th, the Water District Report showed that 10,450 acre-feet was assigned by IGWA to the TFCC storage account. We finished July with 114,000 acre-feet of storage remaining. This amount was not sufficient for planning the rest of the irrigation season, but appeared to be an amount we could stretch to late September when our natural flow usually rebounds and keeps up with demand at that time.

10. Again inexplicably on about August 5th, natural flow gains crashed from the 2,000 cfs range to the 1,200 cfs range and with record heat across the project our shareholder irrigation demand was still extremely high. At that point we had 100,000 acre-feet of storage remaining (including the 10,450 from IGWA) so we were expecting to completely run out of storage by August 28th. I again called the Board in to assess the water supply conditions and recommended a cut to 1/2”. The company made preparations for such a reduction at that time. Without the 10,450 from IGWA in our storage account that cut would have been made and we would certainly have caused severe crop damage as temperatures were still near 100 degrees every day. Fortunately, on about August 13th, just when we had issued the 1/2” order to the ditchriders, the natural flow rebounded back towards the 2,000 cfs range, and we cancelled the cut.

11. Since about August 16th natural flows have appeared more reliable, and our crop demand has been slowly coming down so that I am now confident we will make it through the remainder of the season at 5/8” deliveries. ***However, due to the lack of available storage TFCC cannot deliver 3/4” even though we have shareholder demand for that quantity.***

R. Vol. 6 at 1002-03 (emphasis added). Notably, TFCC was forced to curtail its water deliveries due to the rapidly deteriorating water supply beginning on June 17th – just 3 months into the irrigation season.

Lynn Harmon, ARFD#2’s manager, also explained the difficulties that his water users faced with the deteriorating water supply:

7. When the 2013 irrigation season started, the Board of AFRD2 hoped to be able to deliver 5/8” to its water users during the season, which is needed by our water users to fully irrigate crops. Since, after the irrigation season began, the Director changed the amounts that would be supplied to AFRD2, it became apparent that AFRD2 could not rely upon the amounts that the Director ordered as mitigation. ***Flows in and into the Snake River deteriorated very quickly in 2013.*** There was no large runoff past Blackfoot and it was obvious to me in the spring and early summer that the available water supply would be less than what the Director predicted in his orders. After the issuance of his April 17, 2013 and June 17, 2013 Orders and because of the deteriorating water conditions, the Board of AFRD2 was very concerned about water supplies. ***On July 1, 2013, the Board made a determination to cut water deliveries to AFRD2 water users by 20% to 1/2” commencing July 15, 2013 for the rest of the season or until water supplies ran out. Since July 15, 2013, AFRD2 has been delivering 1/2” to its water users, which has stressed crops and reduced yields.*** Meanwhile, junior ground water users have irrigated without reduction.

R. Vol. 6 at 1007-08 (emphasis added). Notably, AFRD#2 was forced to curtail its deliveries due to depleted water conditions beginning July 15th – 4 months into the irrigation season.

For an irrigation season running from “the middle of March to the middle of November – an eight month span,” R. Vol. 6 at 1039, the halfway point would fall in the middle of July – i.e. July 14th. However, notwithstanding the rapidly deteriorating water conditions, the Director did not issue the *Order Revising April 2013 Forecast Supply* until August 27, 2013 – nearly 5 ½ months into the irrigation season. R. Vol. 5 at 948. By that time, both TFCC and AFRD#2 had been forced to curtail their deliveries to mitigate for the depleted water supplies for as much as 2 ½ months. *Supra*; see also R. Vol. 5 at 971 (“Instead of following the Methodology Order, the Director refused to complete the analysis until August 27th, well past the approximate ‘halfway’ point in the irrigation season. By that time water management decisions had already been made for purposes of water delivery through the end of the irrigation season”).

The Coalition's challenge to the Director's untimely determination, [R. Vol. 5 at 969](#), was rejected by the Director – who concluded that, notwithstanding the depleted water supply and the Coalition's forced curtailment, his order was timely:

Contrary to the SWC's suggestion, the Methodology Order does not require that the Director issue a revised forecast order exactly halfway through the irrigation season. The Methodology Order provides that the Director will issue a revised forecast order *approximately* halfway through the irrigation season. The irrigation season for the SWC members runs generally from the middle of March to the middle of November – an eight month span. The Steps 6-8 Order was issued on August 27, 2013, just over 5 months into the irrigation season. The use of the term *approximately* in Step 6 evidences the intent to provide flexibility regarding the specific date the revised order must be issued. The timing of the Steps 6-8 Order is consistent with the requirements of the Methodology Order as it was issued *approximately* halfway through the irrigation season.

[R. Vol. 6 at 1039](#).

D. Refusal to Grant a Hearing

The Director has issued multiple final as applied orders in this consolidated appeal. Each of those orders attempts to apply the Methodology Order steps to the specific factual circumstances of each individual water year. The Coalition filed petitions and requested hearings on at least 5 of those final orders. The Coalition exercised its statutory right to seek review of the Director's actions. *See* I.C. § 42-1701A(3). In each instance, the Director denied the Coalition's request for a hearing.

For example, in 2012, the Coalition requested a hearing to address the Director's refusal to consider the most current information relating to water supply conditions for 2012. [R. Vol. 6 at 743](#). The Director rejected the Coalition's request, stating:

Parties to this proceeding have previously been afforded hearings—once in 2008 and again in 2010. The Department applied the steps discussed in the Methodology Order, and did not deviate from those steps. Since the steps and processes used in this order did not change from those used in orders that were the subject of previous hearings, the SWC is not entitled to another hearing.

R. Vol. 4 at 757. The Director likewise denied the Coalition’s requests for a hearing relating to subsequent orders. R. Vol. 5 at 890-91; R. Vol. 6 at 1040-41. The Director’s actions in each instance denied the Coalition’s right to due process.

ISSUES PRESENTED

The Coalition has filed seven separate appeals of the Director’s as-applied orders. The issues raised by each appeal will be addressed collectively and are as follows:

- a. Whether the Director’s refusal to adjust the water supply forecast based on updated information violates Idaho law and the Conjunctive Management Rules?
- b. Whether the Director’s refusal to adjust material injury determinations based on updated water supply information violates Idaho Law and the Conjunctive Management Rules?
- c. Whether the Director’s reduction of mitigation obligations to individual members of the Coalition, even when the material injury to that individual members has increased, violates Idaho Law and the Conjunctive Management Rules?
- d. Whether the Director’s failure to use the irrigated acreage information supplied by the Coalition is arbitrary and capricious and contrary to the Methodology Order?
- e. Whether the Director’s refusal to define a process for the use of storage water as mitigation that would comply with Water District 01 policies and procedures violates Idaho Law and the Conjunctive Management Rules?
- f. Whether the Director’s application of the Methodology Order provides timely relief, as required by Idaho law and the Conjunctive Management Rules?
- g. Whether the Director’s refusal to provide a hearing on the final as applied orders violates Idaho law and the Conjunctive Management Rules?

STANDARD OF REVIEW

Any party “aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court.” *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter “based on the record created before the agency.” *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency’s decision. *Mercy Medical Center v. Ada County*, 146 Idaho 220, 226 (2008). The Court, however, is “free to correct errors of law.” *Id.*

An agency’s decision must be overturned if it (a) violates “constitutional or statutory provisions,” (b) “exceeds the agency’s statutory authority,” (c) “was made upon unlawful procedure,” (d) “is not supported by substantial evidence in the record as a whole” or (e) is “arbitrary, capricious or an abuse of discretion.” I.C. § 67-5279(3); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796 (2011).

An agency’s decision must be supported by “substantial evidence.” *Chisholm*, 142 Idaho at 164 (“Substantial evidence ... need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder”). This Court is not required to defer to an agency’s decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is “capricious” if it “was done without a rational basis.” *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is “arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *Id.*

Although the Court grants the Director discretion in his decision making, *supra*, the Director cannot use this discretion as a shield to hide behind a decision that is not supported by

the law or facts. Such decisions are “clearly erroneous” and must be reversed. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008) (“A decision is clearly erroneous when it is not supported by substantial and competent evidence”).

ARGUMENT

I. The Director Erred in Refusing to Make Adjustments Based on Actual Water Supply Conditions.

A. The Director’s Refusal to Adjust the April Forecast Order Injures the Coalition’s Senior Water Rights Contrary to Law.

It is necessary that the Director use the most reliable and current information when making his forecast for material injury in an upcoming irrigation season. In fact, the Methodology Order specifically provides that the Director would use “updated data, the best available science, analytical methods, and the Director's professional judgment.” [R. Vol. 3 at 568](#). Yet, the Director has refused to reconsider and/or adjust the April forecast based on actual water conditions. *See also, A&B Irr. Dist. v. Spackman*, 315 P.3d at 828 (2013). Rather, the Director continues to rely on outdated and invalid information to the Coalition’s detriment. The Director’s application of the Methodology Order illustrates the error of this type of immutable conjunctive administration.

As explained in the *Statement of Facts*, *supra* Part III.B, the Director’s 2012 Forecast Order relied on information that very quickly proved to be inaccurate. In particular, the April 5th Joint Forecast, which estimated a water supply of approximately 91% of average, was revised down to 85% of average on April 16, 2012. [R. Vol. 4 at 730 & 745-46](#). Yet, the Director refused to consider this updated and more accurate information. [Id. at 755](#).

The following irrigation season (2013), proved to be the year where the Director’s refusal to use updated and more accurate information significantly prejudiced the Coalition’s senior

water rights. In particular, relying on the April 3rd 2013 Joint Forecast, which predicted a flow volume of approximately 82% of average, [R. Vol. 5 at 830-31](#), the Director concluded that only TFCC would suffer a shortage (i.e. material injury) of 14,200 acre-feet, [id. at 831](#).

After receiving the 2013 Forecast Order, it quickly became apparent that the Director's forecast was woefully inadequate. The Coalition explained this to the Director:

Water District 01 released information yesterday showing that the American Falls 1921 storage right is still short of filling by 168,000 acre-feet. *See* Ex. A (April 30, 2012 Weekly Report). This information also shows that early season storage use, both above and below American Falls Reservoir, "is not expected to be cancelled because excess water has not spilled past Milner this year." *Id.* Further, the Water District 01 report predicts that if "weather conditions are very dry, it could result in very little new fill in the Palisades and Island Park storage rights." *Id.* (emphasis added). Accordingly, the Director's predicted fill of 59% of the Palisades 1939 water right is erroneous and not based upon the best available hydrologic information.

In addition, the Director's predicted natural flow supply available to the SWC is incorrect and not based upon the best available hydrologic information either. *See* Ex. A. Presently, only the October 7, 1905 water rights are projected to receive any natural flow below Blackfoot. While this priority will likely vary depending upon the runoff conditions that may occur, several SWC members have already begun to use storage water to meet their landowners' and shareholders' irrigation demands.

[R. Vol. 5 at 862-63](#) (emphasis in original). In the end, "the Director's over-prediction of total water supply results in an underestimated demand shortfall." [Id. at 864](#). Unfortunately, the Coalition's concerns about the 2013 water supply came true – as conditions made a dramatic turn for the worse. [R. Vol. 6 at 1002](#) ("Natural flow in the Snake River deteriorated very quickly in 2013"). By the middle of June, TFCC was forced to curtail deliveries to its shareholders. *Id.* By the middle of July, TFCC was forced to consider making even deeper cuts as its "natural flow was near record low." *Id.* AFRD#2 faced a similar fate when, by the middle of July, it was forced to curtail deliveries to its water users as well. [R. Vol. 6 at 1007-08](#) (cutting from 5/8" to 1/2" deliveries). These water delivery cuts "stressed crops and reduced yields." *Id.*

In the end, the Director’s 2013 Forecast Order underestimated the material injury that would be suffered by the Coalition members. Indeed, the 2013 Revised Forecast Order determined that the actual Snake River flows were “371,000 acre-feet less than the April 2013 Joint Forecast.” [R. Vol. 5 at 950](#). The resulting revised shortfall prediction revealed that the shortage to TFCC had increased from 14,200 acre-feet to 51,200 acre feet, and that AFRD#2, which had been predicted to have no material injury in April, had now experienced a material injury of 54,000 acre-feet. [Id. at 953](#). The failure to adjust the juniors’ mitigation obligation was unlawful and similar to the type of administration in 2007 that was struck down by the Hearing Officer. [R. 7095](#) (“Using the minimum full supply as a fixed amount in effect readjudicates a water right outside the processes of the SRBA. Treating the minimum full supply as a cap reducing the right to mitigation in carryover storage has profound consequences.”).

The importance of using correct information and getting the decision right cannot be understated. In particular, as discussed in the next section, the Methodology Order provides that the Director will not adjust the material injury determination upward based on actual water conditions. [R. Vol. 3 at 600](#) (“At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and the RISD volume calculated at the Time of Need. *If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required*”) (emphasis added).

Recognizing the need to get it right, the Coalition asked the Director to consider updated and accurate information in his early forecasts. [R. Vol. 5 at 862](#). However, the Director rejected the Coalition’s arguments, arguing that (i) “the notion of continually updating the April Forecast Order is contrary to the very purpose for having an early forecast,” and (ii) updating the forecast

based on new information would prevent a final decision from every being issued. [R. Vol. 5 at 889](#). Neither justification remedies the legal violations resulting from the Director’s refusal to adjust the predicted material injury. Moreover, the Director’s reason does not satisfy the Supreme Court’s ruling in *A&B v. Spackman* either.

First, the need for a “forecast” does not negate the need to rely on accurate, reliable and up-to-date hydrologic and climatic information. Although a forecast may provide a “starting point” for administration – it cannot be the ending point. Updated hydrologic and climatic information must be considered and used in administration. The Supreme Court recently confirmed this procedure. *A&B Irr. Dist.*, 315 P.3d at 841. The 2013 irrigation season provided a prime example of the need to consider updated information – as “natural flow in the Snake River deteriorated very quickly.” [R. Vol. 6 at 1002](#); *see also id.* (“On about June 15th, natural flow in the Snake River began to recede rapidly”). In fact, the initial forecast order was outdated in less than 2 weeks that year. [R. Vol. 5 at 829](#) (2013 Forecast Order issued April 17, 2013); [R. Vol. 5 at 867](#) (April 30, 2013 Water Report showing worsening water conditions).

In the end, the Coalition members suffered material injury that was 740% higher than anticipated by the Director’s April 2013 Forecast Order. Rather than make adjustments consistent with the deteriorating water supply and protect senior water rights, the Director turned a blind eye to the Coalition’s actual shortages and gave the ground water users a “free pass” as to 91,000 acre-feet of material injury resulting from their out-of-priority diversions. [R. Vol. 5 at 950](#) (requiring only 14,200 acre feet of mitigation for 105,200 acre feet of actual material injury). This type of administration plainly violates Idaho’s prior appropriation doctrine. *See* IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602, 607; CM Rule 40; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384 (1982); *Lockwood v. Freeman*, 15 Idaho 395 (1908).

The Director's second reason for refusing to consider updated information is equally unavailing. [R. Vol. 5 at 889](#) (“If the Director were to update the April Forecast Order every time new forecast information became available, there would never be a final decision upon which water users could plan for the upcoming irrigation season”). First, it should be noted that water users are planning “for the upcoming irrigation season” long before the middle of April. Indeed, the Director himself recognizes that the irrigation season begins in the middle of March. *Supra*. It is naive, therefore, to conclude that an irrigator is trying to “plan for the upcoming irrigation season” based on an order that is issued more than a month after the season begins.

That notwithstanding, relying on outdated and inaccurate information does not allow the water users to properly “plan for the upcoming irrigation season.” For example, in 2013, the April injury prediction of 14,200 acre-feet proved to be underestimated by 740%. [R. Vol. 5 at 950](#). Regardless, TFCC was advised in April that it would receive 14,200 acre feet of mitigation water for the material injury it was anticipated to suffer during the irrigation season – and planned accordingly. [R. Vol. 6 at 1001 at ¶ 4](#) (“I relied upon this representation and the Director’s order for purposes of my recommendations to the TFCC Board and the company’s water management decisions for the 2013 irrigation season”). However, the Director subsequently slashed that mitigation obligation in half and left TFCC with even less water than required by the April order. *Infra Statement of Facts Part III.C.1*.

The Director’s excuses for allowing this unmitigated injury do not withstand scrutiny. The application of the Methodology Orders has resulted in unmitigated material injury to the Coalition members. This is especially troublesome given the Director’s assurance that he would use “the best available science, analytical methods, and the Director's professional judgment.” [R. Vol. 3 at 568 \(emphasis added\)](#). The law demands that material injury be mitigated or that the

junior water rights causing the injury be curtailed. CM Rule 40.01. The Director's persistent reliance on outdated and invalid information and his refusal to adjust the demand shortfall throughout the irrigation season should be reversed and set aside.

B. The Director's Refusal to Adjust Material Injury Based on Actual Water Supply Conditions is Arbitrary and Capricious and Contrary to Law.

The Director's application of the Methodology Order has also resulted in increased and unmitigated material injury to Coalition members. The 2013 Forecast Order determined that TFCC would suffer 14,200 acre-feet in material injury – with no material injury to any other member of the Coalition. [R. Vol. 5 at 829](#). By June, it became exceedingly apparent that the Director's forecast was woefully inadequate, *see* [R. Vol. 6 at 1002-03](#) (TFCC manager discussing impacts); [R. Vol. 6 at 1007-08](#) (AFRD#2 manager discussing impacts), and by August that material injury had ballooned to 105,200 acre-feet (51,200 acre-feet for TFCC and 54,000 acre-feet for AFRD#2), [R. Vol. 5 at 953](#). However, the Director refused to adjust the material injury to reflect the actual water conditions – stating that the mitigation obligations would be capped at 14,200 acre-feet. [R. Vol. 5 at 950](#). As a result, the materially injured members of the Coalition were forced to curtail their deliveries due to the unmitigated material injury. [R. Vol. 6 at 1002-03](#) (TFCC manager discussing impacts); [R. Vol. 6 at 1007-08](#) (AFRD#2 manager discussing impacts).

Idaho's prior appropriation doctrine is crystal clear. "As between appropriators, the first in time is the first in right." I.C. § 42-106; *see also, e.g., Clear Springs Foods*, 150 Idaho at 800. The law requires that the Director oversee the distribution of water "according to the prior rights of each respectively." I.C. §§ 42-602 & -607; *see also* I.C. § 42-602 ("The director of the department of water resources shall distribute water in water district in accordance with the prior appropriation doctrine").

The Conjunctive Management Rules obligate the Director to administer when there is “material injury” – defined as “hindrance to or impact upon the exercise of a water right caused by the use of water by another person.” CM Rule 10.15. The Rules provide the Director with only two options when he determines there is material injury:

[U]pon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, *shall*:

a. ***Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users*** whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; *or*

b. ***Allow out-of-priority diversion*** of water by junior-priority ground water users ***pursuant to a mitigation plan that has been approved by the Director.***

CM Rule 40.01 (emphasis added).

The Director’s actions in 2013 violate the statutes and rules. As stated above, the material injury was initially determined to be 14,200 acre-feet. *Supra*. However, as water supplies quickly deteriorated, that material injury ballooned to 105,200 acre-feet. [R. Vol. 5 at 953](#). The law required the Director to either “regulate the diversion and use of water in accordance with the priorities of the rights” or “allow out-of-priority diversion ... pursuant to a mitigation plan.” CM Rule 40.01. Rather than comply with the mandates of the CM Rules, however, the Director capped the material injury at 14,200 acre-feet – allowing 91,000 acre-feet of material injury to go unmitigated to the detriment of the senior water users. [R. Vol. 5 at 954](#). Nothing in the statutes, case law or CM Rules provided the Director with the justification for overlooking 91,000 acre-feet of material injury and forcing the owners of the senior water rights to curtail their own deliveries. *See* [R. Vol. 6 at 1000 & 1006](#) (explaining curtailment by TFCC

and AFRD#2 as water supplies continued to diminish and the Director failed to require adequate mitigation).

The only justification provided by the Director for refusing to adjust material injury is provided in the Methodology Order, which states:

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

R. Vol. 3 at 594; *see* R. Vol. 5 at 954.

The Director's conclusion is based on a false premise. The very nature of a water supply in the arid West like Idaho is uncertainty unless one has the oldest right on the system. Only then does that right give one the first shot at the available water, not absolute certainty as the Director's methodology would give junior groundwater rights. Here, the Director in his reasoning is attempting to give the junior something that not even the most senior rights receive.

Moreover, the Director has determined that "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." R. Vol. 3 at 594 (emphasis added).

Yet, the 2013 Forecast Order was issued on April 17, 2013 – *more than a month after the*

irrigation season began. R. Vol. 6 at 1039 (holding that the irrigation season runs from “the middle of March to the middle of November – an eight month span”). In other words, by the time the Director issued the 2013 Forecast Order, the irrigation season had already begun – thereby preventing any water user from planning their season based on the Director’s material injury predictions.

Finally, the constitutional provisions or statutes relied upon by the Director all mandate priority administration to remedy material injury. *See* IDAHO CONST. art. XV, § 3 (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied ... ***Priority of appropriations shall give the better right as between those using the water.***”) (emphasis added); I.C. § 42-106 (“As between appropriators, ***the first in time is first in right***”) (emphasis added).⁷ The Director cannot justify ignoring the law’s mandates under the guise of providing certainty to a junior water user. Again, the prior appropriation doctrine does not guarantee water to a junior in the face of a short water supply, just the opposite it is the senior right that is protected.

The Director also relies on section 42-226 of the Groundwater Act – but that section does not apply to the Coalition’s surface water rights and does not limit the Coalition’s use of water or right to priority administration in any manner. *See Clear Spring Foods, Inc.*, 150 Idaho at 804 (“By its terms, section 42-226 only applies to appropriators of ground water”).

In the end, the Director’s failure to adjust for the actual material injury suffered by the Coalition members violates the statutes and regulations governing conjunctive administration. As such, the Director’s as applied orders should be reversed and set aside accordingly.

⁷ The Director also cited to IDAHO CONST. art. XV, § 7, which has nothing to do with priority administration – rather, it established the Idaho Water Resource Board and its responsibilities.

II. The Director’s Reduction of Mitigation Owed to Individual Coalition Members, Even When the Material Injury to that Member Increased, is Arbitrary and Capricious and Violates Idaho Law.

Not only did the Director refuse to adjust the mitigation obligations to reflect actual material injury, in 2013, he also cut the mitigation owed to certain Coalition members. In the 2013 April Forecast Order, the Director held that TFCC would be the only member of the Coalition to suffer material injury – in the amount of 14,200 acre-feet. [R. Vol. 5 at 829](#). However, as the water conditions worsened, the Director cut the mitigation obligations to TFCC by more than 50% (from 14,200 acre-feet to 6,900 acre feet):

2. The 14,200 acre-feet of mitigation storage water secured by IGWA shall be allocated by the Watermaster for Water District 01 as follows:

AFRD2	7,300 acre-feet
TFCC	6,900 acre-feet
...	

AFRD2 and TFCC are materially injured. Because the Time of Need is reasonably certain, the Director orders the Watermaster for Water District 01, upon issuance of this order, but no later than August 30, 2013, to assign the mitigation storage water secured by IGWA to the accounts of AFRD2 and TFCC. ***The Watermaster for Water District 01 shall allocate 7,300 acre-feet to AFRD2, and 6,900 acre-feet to TFCC.***

[R. Vol. 5 at 954 & 955](#) (emphasis added).

When challenged, the Director attempted to justify his actions by asserting that TFCC had no right to the 14,200 acre-feet *individually* because “the water is obligated to the SWC as a whole, not just one entity.”⁸ [R. Vol. 6 at 1039](#); *see Id.* (“The Methodology Order and the 2013 Forecast Supply Order, by their plain terms, obligate IGWA’s secured mitigation water to the SWC as a whole, not to any one entity in the SWC”). The Director’s analysis provides no legal support.

⁸ This statement is in direct conflict with the Director’s prior commitment that Coalition members would be able to plan their irrigation seasons based on the April forecast. [R. Vol. 5 at 889](#).

There are several reasons why this action by the Director violates Idaho law. However, perhaps the most glaring error is that it unlawfully shifted the risk of shortage onto the holders of the senior water right while juniors pump their full rights throughout 2013. The Methodology Order alleges to provide “certainty” in administration. *See R. Vol. 3 at 593* (“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”). Such “certainty” is necessary, according to the Methodology Order, in order to “ensure that the SWC does not carry the risk of shortage to their supply.” *Id. at 593*.

By cutting the mitigation owed to TFCC, however, the Director has eviscerated any “certainty” provided by the Methodology Order. In particular, TFCC planned its water 2013 deliveries based on the understanding that the groundwater users would provide 14,200 acre-feet. *R. Vol. 6 at 1001 at ¶ 4* (“I relied upon this representation and the Director’s order for purposes of my recommendations to the TFCC Board and the company’s water management decisions for the 2013 irrigation season”). Yet, after a summer of curtailed water deliveries, *id. at 1002, ¶¶ 7-8*, the Director cut the mitigation to be provided to TFCC by more than 50%, *R. Vol. 5 at 954*. In doing so, the Director has made clear that the only “certainty” he is concerned about is the “certainty” that the holders of the junior water rights will not have any more obligations than those identified in April – regardless of the actual water conditions and/or material injury. Such actions unlawfully forced TFCC to “carry the risk of shortage to [its] supply.” *R. Vol. 3 at 593*. Such a burden plainly violates Idaho’s prior appropriation doctrine. *E.g., IDAHO CONST. art. XV, § 3* (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied ... *Priority of appropriations shall give the better right as*

between those using the water.”) (emphasis added); I.C. § 42-106 (“As between appropriators, *the first in time is first in right*”) (emphasis added).

The Director appears to believe that his actions were appropriate because of the uncertainty in the water supply:

The reason for this is because, as occurred in this year, a revised forecast may predict a shortfall for more than one member of the SWC. Alternatively, the revised prediction may conclude that a different member of the SWC is being injured than was originally predicted.

R. Vol. 6 at 1039-40. This is the exact reason that the Director’s cap on material injury based on the initial forecast order is in error. Indeed, this justification from the Director speaks to the need to adjust the entire material injury obligation up to reflect actual conditions. It does not justify cutting the mitigation obligations by more than 50% (14,200 to 6,900 af) when actual material injury has increased by nearly 400% (14,200 to 51,200 af). *See supra*.

There is no legal basis for the Director’s actions. Rather, they depict the Director’s refusal to properly administer water right based on priority and actual water conditions. Such actions violate Idaho law and should be reversed and set aside.

III. The Director’s Failure to Use the Irrigated Acreage Information Supplied by the Coalition Members is an Arbitrary Application of Steps 1 and 2.

The Methodology Order sets forth a straightforward requirement in Step 1. The Coalition members must provide electronic shape files delineating the total irrigated acres within their boundaries or confirm that the number has not varied from the previous year by more than five percent (5%). R. Vol. 3 at 597. The Director then uses this information in calculating “Crop Water Need” in Step 2 and subsequent steps. *Id.* at 597-98.

Since 2010 the Director has refused to use the irrigated acreage information submitted by the Coalition members. Consequently, the Director has underestimated certain Coalition

members' in-season "Crop Water Need" requirements and the resulting material injury. The failure to properly implement conjunctive administration with the correct irrigated acreage has prejudiced the Coalition members' senior water rights.

The Director did not apply the Step 1 requirement in 2010 since the initial order was issued on April 7th, after the deadline imposed by the order. [R. Vol. 1 at 32](#). Accordingly, the Director did not provide the Coalition with timely notice to comply and submit information by the March 31st deadline. In 2011, counsel for the Coalition confirmed that the Director intended to use the same irrigated acreage in 2010, which was represented by IDWR counsel to be taken from the Department's water right recommendations in the SRBA.⁹

In 2012, AFRD #2 advised the Director that its irrigated acreage had not changed by more than 5% from 2011. [R. Vol. 4 at 725](#). Minidoka Irrigation District submitted acreage information by electronic mail. [R. Vol. 4 at 726-27](#); *see also 20120316 MID Folder* (in Bates Stamped OCR Docs) (Agency Record Disc 1). As for the rest of the Coalition members, counsel for IDWR again advised that it would be using the same information from 2011, which was represented to be taken from the Department's water right recommendations in the SRBA. [R. Vol. 4 at 745-47](#). The majority of the Coalition's water rights were then partially decreed by the SRBA Court later in 2012.¹⁰

In March 2013 the Coalition members either submitted irrigated acreage information to the Director or confirmed that the irrigated area had not varied by more than 5% from the prior year. *See* [R. Vol. 4 at 814, 821-28](#). Despite the Coalition's compliance with Step 1, the Director failed to follow his order and refused to use this information in calculating crop water need for

⁹ The Director found "no injury" based upon his initial water supply assessment in 2011, hence the Step 1 process regarding irrigated acreage was irrelevant from that point forward.

¹⁰ Like 2011, the Director found "no injury" based upon his initial water supply assessment hence the Step 1 process regarding irrigated acreage was irrelevant from that point forward.

certain Coalition members. For example, the table below shows the number of irrigated acres provided by the Coalition contrasted with the numbers used by the Director:

<u>Member:</u>	<u>Coalition Acres:</u>	<u>Director Acres:</u>	
AFRD#2	62,361	62,361	(Ex. 4001A)
A&B	15,924	15,924	(Ex. 4001A)
BID	46,083	44,715	(Ex. 4300)
Milner	13,335	13,335	(Ex. 4001A)
MID	74,112	70,144	(Ex. 4300)
NSCC	154,067	154,067	(Ex. 4001A)
TFCC	194,778	183,589	(Ex. 4310)

The irrigated acreage information for AFRD#2, A&B, Milner, and NSCC (Director’s Report SRBA) matches the partial decrees. *See* [Ex. 4001A](#). Accordingly, for those four Coalition members the Director followed the decreed water rights. However, for BID, MID, and TFCC, the Director ignored both the partial decrees and the information submitted by those entities and instead reverted to exhibits presented over 5 years prior at the 2008 Hearing ([Exs. 4300, 4310](#)). The Hearing Officer examined that information, as well as evidence submitted by the Coalition, and determined the following:

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.

[R. 7100](#).

BID claimed 47,818 acres, MID claimed 77,490 acres, and TFCC claimed 201,560.4 irrigated acres in the SRBA. [Ex. 4300 at 1](#). IGWA’s experts then referred to and relied upon an “agreed upon” number of irrigated acres, which did not represent IDWR’s final recommendation in the SRBA. [Ex. 4300 at 3](#). IDWR’s preliminary recommendations were not the final

recommendations included in the Director's Report filed with the SRBA Court. The Hearing Officer mistakenly referred to this number as the "claimed" acreage. However, even using this number, the Hearing Officer totals as referenced above are as follows: BID (47,622 – 2,907 = 44,715); MID (75,152 – 5,008 = 70,144); and TFCC (198,632 – 6,600 = 192,032).

Although the Director used the Hearing Officer's finding for BID and MID, he failed to use the same finding for TFCC. Instead, the Director referenced yet another IGWA report that was rebutted by the Coalition and rejected by the Hearing Officer. [Ex. 4310](#). Although IGWA alleged various areas within TFCC were "non-irrigated" based upon a review of 1987 and 2004 imagery and site visits to a few parcels, the Coalition's experts consulted TFCC personnel and performed extensive field verifications. [Ex. 8190 Table 1, pp. 3-4](#). Brockway Engineering showed that the lands identified by IGWA's consultant as "non-irrigated" was not accurate. The Hearing Officer accepted the Coalition's rebuttal evidence and concluded that "6,600 acres claimed by TFCC are not irrigated." [R. 7100](#). At a minimum, the Director was required to use the number of acres identified by the Hearing Officer, 192,032. Even this amount is less than the partial decree issued in 2012 (196,162) and less than the information supplied by TFCC in the spring of 2013 (194,778). The Director had no basis to ignore the most up to date information submitted by TFCC.

Since the Hearing Officer acknowledged that irrigated acres could be "added back," the Director had an obligation to follow his own order and use the information supplied by the Coalition in 2013. For BID, the Director refused to use the information showing 46,083 irrigated acres. [R. Vol. 4 at 825, 828](#). For MID, the Director similarly refused to use the information supplied showing 74,112 irrigated acres. [Id. at 821-823](#). Finally, for TFCC, the Director refused to use the information showing 194,778 irrigated acres. [Id. at 825, 828](#). The Director's error

resulted in miscalculations concerning the Coalition entities' "crop water needs" (Step 2) in each year after issuance of the Methodology Order, including 2013. The Director underestimated the Coalition's irrigation requirements which in turn reduced IGWA's mitigation obligation.

The Director's implementation of Step 1 in 2013 is therefore arbitrary and capricious and should be set aside.

IV. The Director's Refusal to Define a Process for the Use of Storage Water as Mitigation has Resulted in Untimely and Inadequate Mitigation.

Junior ground water users have repeatedly turned to storage water as a source of water for mitigation. However, the Director's orders have provided no formal requirement or defined process for interaction between IDWR, Water District 01, and junior ground water users supplying mitigation. Consequently, the Director's application of Steps 6 through 8 has resulted in arbitrary and untimely administration to the detriment of the Coalition's senior surface water rights. The lack of standards and identified process has led to confusion and further uncertainty, causing seniors to once again suffer the consequences of not having the water when needed.

Water District 01 has provided for the rental of storage and private leases through formal rules.¹¹ This rental pool program is operated through the Water District 01 Watermaster. Until rental applications are submitted to the Watermaster and reviewed by the Water District 01 rental pool committee, there is no rental. Furthermore, there are strict guidelines to follow in order to effectuate such a lease for the rental of storage water in a particular year. For example, leases may only be accomplished by a "spaceholder." Rental Pool Rules 5.2.101 & 5.2.102. Private leases of storage water must also include spaceholders and can only be transacted through the Water District 01 rental pool. Rental Pool Rule 6.1. Any lease must be on forms provided by the Watermaster and must be provided to the Watermaster. *Id.* Finally, to the extent

¹¹ The current rules and regulations can be viewed at <http://www.waterdistrict1.com/rental%20pool%20rules.pdf>.

spaceholders are impacted by the lease of storage water, the rules provide for mitigation for those impacts. Rental Pool Rule 7.0.

Notwithstanding these procedures, the Director has refused to require that the use of storage water for mitigation be accomplished in accordance with the Water District 01 Rental Pool rules and procedures. For example, in 2010, the ground water users rented storage water for mitigation. [R. Vol. 2 at 354; at 374](#) (providing copies of leases of storage water to be used for mitigation). In the 2010 Forecast Order, the Director obligated the groundwater users to “commit” the leases to the Watermaster for Water District 01. [R. Vol. 4 at 612](#). IGWA submitted information purporting to have leased 57,000 acre-feet of storage water for mitigation. [R. Vol. 2 at 354; at 374](#). Importantly, however, the groundwater users never complied with the Water District 01 regulations relating to the lease of storage water. *See* [R. Vol. 4 at 652-53](#) (Water District 01 weekly report showing that none of the storage water was ever submitted to the Watermaster).

By failing to follow the procedures, the ground water users never secured water as required by the Director’s orders. Since there was no assignment, the Watermaster never had control of the storage water for mitigation purposes during the 2010 irrigation season. The Director dismissed these concerns, concluding that nothing in the orders obligated the ground water users to comply with the Water District 01 rental pool procedures. [R. Vol. 4 at 679](#).

The 2013 irrigation season presented a similar situation.¹² On April 22, 2013, the groundwater users submitted their *Notice of Secured Water*, alleging to have secured water – in the form of storage leases – to mitigate for the material injury. [R. Vol. 5 at 848](#). However, the

¹² Additional violations of the rental pool rules occurred in the fall of 2013 and will be addressed in the pending hearing concerning the Coalition’s challenge to the Director’s Step 9 and 10 orders.

groundwater users did not submit copies of the leases to the Director. [R. Vol. V at 854](#) (providing a “summary” of the leases).

Again, the groundwater users failed to follow procedures mandated by Water District 01 for the lease of storage water. The Coalition explained these errors to the Director. [R. Vol. 5 at 973-77](#); *see also Id. at 974* (as of June 25, they “only had 10,500 acre-feet remaining from its 2013 storage leases”). Rather than address the Coalition’s concerns, the Director held that the Coalition’s arguments were untimely because they were not raised in relation to the 2013 April Forecast Order. [R. Vol. 6 at 1040](#). Yet, this information was not available until after the 2013 April Forecast Order was issued. The error was only revealed as the irrigation season commenced and Water District 01 records showed that the proper procedures were not followed.

Unless the Director mandates that the Water District 01 rules and procedures are strictly followed, there can be no certainty to the Coalition members when the ground water users attempt to use storage as mitigation. The Rules are established to ensure that the process is open and clear to all involved. To date, however, the ground water users have consistently refused to comply with those procedures and the Director has capitulated to these improper practices. Such actions are arbitrary and capricious and should be reversed and set aside.

V. The Director’s Application of the Methodology Order Fails to Provide Timely Administration in Violation of Idaho Law.

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.

R. Vol. 3 at 593 (emphasis added); *see also* A&B, 315 P.3d at 841 (“A determination of the call shall be made by the Director in a timely and expeditious manner”).

Through the Methodology Order, the Director claims to create a mechanism to provide water at the “time of need.”¹³ The Director is to “estimate the Time of Need date” “approximately halfway through the irrigation season.” R. Vol. 3 at 599. Importantly, unless the members of the Coalition have water when they need it, then the mitigation is insufficient – regardless of the “time of need.” Waiting until “approximately halfway through the irrigation season,” does not provide timely or adequate mitigation to materially injured senior water rights – particularly here, when the term “approximately” is used to mean whatever timeframe the Director chooses.

The 2013 irrigation season provides an example of the failings of the Director’s “time of need” analysis. In that season, the Director’s administration failed to provide any water to the Coalition members when they actually needed it. That season proved to be a very difficult one for the members of the Coalition. Brian Olmstead, TFCC’s manager, explained that:

7. Natural flow in the Snake River deteriorated very quickly in 2013.

...

8. On about June 15th, natural flow in the Snake River began to recede rapidly, and TFCC began drawing heavily on storage. ***On June 17th, after consultation with the Board of Directors, TFCC cut water deliveries from 3/4” to 5/8” per share, even though our shareholders demand the full 3/4” for irrigation beneficial use.*** ... As of July 18, TFCC had diverted and used approximately 64,000 acre-feet of storage and ***our natural flow was near record low*** at 1,000 to 1,200 cfs. ...

¹³ The “time of need” is defined as:

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

R. Vol. 3 at 584.

9. Somewhat inexplicably, from about July 5th until the end of July, natural flow rebounded into the 2,000 cfs range ...

10. Again inexplicably on about August 5th, natural flow gains crashed from the 2,000 cfs range to the 1,200 cfs range and with record heat across the project our shareholder irrigation demand was still extremely high. At that point we had 100,000 acre-feet of storage remaining (including the 10,450 from IGWA) so we were expecting to completely run out of storage by August 28th. ...

R. Vol. 6 at 1002-03 (emphasis added). Notably, TFCC began curtailing water deliveries on June 17th – just 3 months into the irrigation season.

AFRD#2 had a similarly difficult year:

7. When the 2013 irrigation season started, the Board of AFRD2 hoped to be able to deliver 5/8” to its water users during the season, which is needed by our water users to fully irrigate crops. Since, after the irrigation season began, the Director changed the amounts that would be supplied to AFRD2, it became apparent that AFRD2 could not rely upon the amounts that the Director ordered as mitigation. ***Flows in and into the Snake River deteriorated very quickly in 2013.*** There was no large runoff past Blackfoot and it was obvious to me in the spring and early summer that the available water supply would be less than what the Director predicted in his orders. After the issuance of his April 17, 2013 and June 17, 2013 Orders and because of the deteriorating water conditions, the Board of AFRD2 was very concerned about water supplies. ***On July 1, 2013, the Board made a determination to cut water deliveries to AFRD2 water users by 20% to 1/2” commencing July 15, 2013 for the rest of the season or until water supplies ran out. Since July 15, 2013, AFRD2 has been delivering 1/2” to its water users, which has stressed crops and reduced yields.*** Meanwhile, junior ground water users have irrigated without reduction.

R. Vol. 6 at 1007-08 (emphasis added). Notably, AFRD#2 curtailed water deliveries beginning on July 15th – 4 months into the irrigation season.

Notwithstanding the rapidly deteriorating water conditions, the Director did not issue the 2013 Revised Forecast Order until August 27, 2013 – nearly 5 ½ months into the irrigation season. R. Vol. 5 at 948. By that time, over 2/3 of the irrigation season had passed and, for as long as 2 ½ months, both TFCC and AFRD#2 had been forced to curtail their own deliveries for

the rapidly depleting water supplies. *Supra*; see also [R. Vol. 5 at 971](#) (“Instead of following the Methodology Order, the Director refused to complete the analysis until August 27th, well past the approximate ‘halfway’ point in the irrigation season”). Rather than provide water at the time it was needed by the Coalition (i.e. mid-June for TFCC and mid-July for AFRD#2), the Director took no action until the end of August. By that time, administration was of little benefit to the Coalition members who had made water management decisions for the remainder of the season. [R. Vol. 5 at 971](#) (“By that time water management decisions had already been made for purposes of water delivery through the end of the irrigation season”). Moreover, by that time junior groundwater users have already pumped their rights for most of the season as well.

The Coalition challenged the Director’s untimely response to deteriorating water supplies and failure to provide water to the Coalition members in their time of need. The Director casually dismissed the Coalition’s challenge by simply concluding that 5 ½ months is “*approximately* halfway through the irrigation season.” [R. Vol. 6 at 1039](#) (emphasis added). The Director is wrong. First, for an irrigation season that runs from “the middle of March to the middle of November – an eight month span,” [R. Vol. 6 at 1039](#), the halfway point is July 14th – not August 27th. This is simple math. The Director cannot justify the delay in addressing the impacts of the deteriorating water conditions on the Coalition members by grasping to the term “approximately.” The lack of a defined standard resulted in unmitigated injury to the senior to the benefit of junior groundwater users.

Second, by the time the Director finally decided to identify the “time of need,” TFCC and AFRD#2 had been curtailing deliveries for as much as 2 ½ months. *Supra*. Their “time of need” occurred in June and July – not August. Rather than act when TFCC and AFRD#2 actually needed water, the Director delayed administration until the end of August – when the water

management decisions for the rest of the season had already been made by the Coalition members. *R. Vol. 5 at 971*. The reduced water supplies caused by untimely administration “stressed crops and reduced yields.” *R. Vol. 6 at 1008*. The reduced water supplies caused by untimely administration further forced TFCC and AFRD#2 to use more of their storage supplies as a “record heat” caused “shareholder irrigation demand” to be “extremely high.” *R. Vol. 6 at 1003*. Yet, notwithstanding the need for water, the Director took no action.

The Director would have the water users believe that the term “approximately” provides the Director with “flexibility” sufficient to revise the forecast order at any time. *R. Vol. 6 at 1039*. According to the Director, the 2013 Revised Forecast Order was timely even though it was issued at the end of August. *Id.* This argument defies logic. The term “approximate” means “near or approaching a certain state,” “nearly exact,” “close together” or “very similar; nearly identical.”¹⁴ Contrary to the Director’s conclusion, two-thirds of a way through an irrigation season is not approximately halfway. Any water user would recognize this fact.

Rather than timely administer water, the Director’s delay forced the Coalition members to curtail their own deliveries for the material injury caused by out of priority diversions. Such actions fly in the face of the Director’s assurance that the methodology order would provide “certainty” to the water users. *Supra*. There is no certainty to a water user when the Director can take (or refuse to take) actions whenever he chooses. Such actions are arbitrary and capricious and should be reversed and set aside accordingly.

¹⁴ <http://dictionary.reference.com/browse/approximately?s=t> (viewed May 6, 2014).

VI. The Director's Refusal to Provide a Hearing on the Final Orders Violates Idaho Law and the Coalition's Right to Due Process.

Several as applied orders have been issued by the Director in this matter. Importantly, these orders all apply the Methodology Order to the specific factual circumstances of each individual irrigation season. The Coalition filed petitions requesting hearings on these orders and the ability to provide additional information for the Director's consideration. However, the Director routinely denied the Coalition's requests without any legal basis.

Idaho Code provides a right to a hearing on any "action" or "decision" made by the Director of IDWR.

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, *any person aggrieved by any action of the director, including any decision*, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, *who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. ...*

I.C. § 42-1701A(3) (emphasis added); *see also* IDAPA 37.01.01.740.02.b (same).

In compliance with the statute the Director did hold a hearing on the 2010 Forecast Order. [R. Vol. 1 at 324](#) ("The Director grants IGWA's request for reconsideration and will order a hearing"); *see also* [R. Vol. 1 at 188-89](#) (parties may request a hearing on 2010 Forecast Order).

In a total change of position, however, the Director refused to hold any hearings on any subsequent application of the Methodology Order. For example, in 2012, the Coalition requested a hearing on the 2012 Forecast Order, alleging, among other things, that the Director failed to follow the Methodology Order. [R. Vol. 4 at 743](#). The Director rejected the Coalition's request claiming that hearings in prior years were sufficient:

Parties to this proceeding have previously been afforded hearings—once in 2008 and again in 2010. The Department applied the steps discussed in the Methodology Order, and did not deviate from those steps. Since the steps and processes used in this order did not change from those used in orders that were the subject of previous hearings, the SWC is not entitled to another hearing.

R. Vol. 4 at 757. For the same reason, the Director denied the Coalition’s requests for a hearing relating to subsequent as-applied orders. R. Vol. 5 at 890-91; R. Vol. 6 at 1040-41. There is no legal basis for this shift in the Director’s decisions.

Importantly, the Methodology Order provides that the Director would use the best available science and information in administering the water supplies:

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

R. Vol. 3 at 568 (emphasis added).

Yet, the Coalition’s efforts to provide “updated data” and “the best available science” regarding hydrologic and climatic conditions were routinely rejected. *Supra*. For example, the Coalition attempted to show the Director in both 2012 and 2013 that the climate variations were such that the Joint April Forecast was not the most reliable, updated or best scientific information. *Supra*. The Director refused to allow discovery or hold any administrative hearings on his decisions. R. Vol. 4 at 753; Vol. 5 at 888.

The Director’s refusal to hold the requested hearings not only violates the plain terms of the Methodology Order and Idaho Code § 42-1701A(3), it also violates the Coalition’s right to due process protected by the Idaho Constitution. Individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state. IDAHO CONST. art. XV, § 4; *Nettleton v. Higginson*, 98 Idaho 87 (1977); *Clear Springs*

Foods, 150 Idaho at 814. In *Nettleton*, *supra*, the Supreme Court addressed the due process requirements that are imposed on IDWR in its administrative capacity:

The constitutional guarantee of procedural due process applies to governmental taking of legitimate property interests within the meaning of the Fifth and Fourteenth Amendments. It demands that if such a deprivation takes place, it must be accompanied by some type of notice and hearing. The United States Supreme Court ... held that in ‘extraordinary circumstances’ where some valid governmental interest justifies the postponement of notice and hearing, due process requires an adversary proceeding before a person can be deprived of his property interest.

98 Idaho at 90.

Before the Director can proceed to allow water to be taken away from senior water right holders through a “final” April forecast order, the agency must afford the senior the right to a hearing to be held at a “meaningful time and in a meaningful manner.” *See Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82 (1999); *Friends of Minidoka v. Jerome County*, 153 Idaho 298, 311 (2012).

To date, the Coalition has not been afforded any hearing on the Director’s application of the Methodology Order to the specific factual conditions of the individual irrigation seasons. As such, the Director cannot conclude that the Coalition has “previously been afforded hearings” on this information. Further, the 2008 and 2010 hearings did not address the unique factual circumstances or the Director’s application of the methodology in subsequent years. It is undisputed that the Director completely denied the Coalition’s right to an administrative hearing. Such actions plainly violated the Coalition’s right to due process and therefore should be reversed and set aside accordingly.

CONCLUSION

Rather than administer to the actual water conditions and the Coalition's water needs, the Director has forced the Coalition to curtail their own deliveries without any "certainty" that their material injury will be remedied. The application of the Methodology Order has resulted in untimely and unlawful administration that does not withstand judicial review. The Coalition respectfully requests the Court to reverse and set aside the as applied orders accordingly.

Respectfully submitted this 13th day of June, 2014.

BARKER ROSHOLT & SIMPSON LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of June, 2014, I served true and correct copies of the foregoing **SURFACE WATER COALITION’S OPENING BRIEF (AS APPLIED)** upon the following by the method indicated:

SRBA District Court
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