

Randall C. Budge, ISB # 1949
Candice McHugh, ISB# 5908
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Facsimile: (208) 232-6109
rcb@racinelaw.net
cmm@racinelaw.net

Attorneys for IGWA

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE MITIGATION
COMPUTATIONS IN WATER DISTRICT 120
FOR THE SURFACE WATER COALITION

**SECOND QUESTIONS
OF IDAHO GROUND WATER
APPROPRIATORS, INC.
("IGWA")
(Numbers 34-48)**

TO: THE IDAHO DEPARTMENT OF WATER RESOURCES

COME NOW, Idaho Ground Water Appropriators, Inc. ("IGWA"), by and through their attorneys of record, pursuant to the Director's authorization and directive given at the May 4, a and June 1, 2009 workshops, and hereby submit the following questions to the Idaho Department of Water Resources ("Department"), and request that each question be answered as soon as practicable after the date of service. These questions are deemed continuing so as to require supplemental answers as additional information becomes known.

QUESTIONS

QUESTION 34: Hearing Officer Schroeder's *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, dated April 22, 2008 ("Hearing Officer's Opinion") at page 61, paragraph 9 states: "The Ground Water Users have no obligation to make up for

water that will not be applied to its licensed or adjudicated purpose, e.g., the sale of water for flow augmentation . . . (it would be different) if the requirement for augmentation were to arise from a mandate without compensation to the Surface Water Users. Were that the case, the Ground Water Users would be subject to contribution for their depletion of the river.” Further, Idaho Code § 42-1763B(4) states that flow augmentation is not a recognized beneficial use of water. Please describe how these findings are addressed in the mitigation computations.

QUESTION 35: In the Department’s Answers to IGWA’s Questions 2 and 21, the Department indicated that water leased, rented or sold by SWC entities would be accounted for in determining the amount of carryover storage. This response appears to contradict the Department’s Answer to Question 32 stating: “Mitigation obligations of Ground Water Users are not adjusted for any SWC unfilled reservoir space (if any) attributed to impacts from flow augmentation rentals.” Please explain this apparent contradiction.

QUESTION 36: The Hearing Officer’s Opinion at page 67, paragraph 4 states: “If crop needs are met by the combined use of natural flow and storage water and there is sufficient water for reasonable carryover, there is no material injury. This assumes that crop needs are fully met. Curtailment, however, only extends to providing the amount of water necessary to replace ground water depletions to reasonable carryover storage.” As this statement was made under the topic heading “Total Water Supply” and “Full Head Gate Delivery”, it seems to have more significance than just to carryover storage alone and seems to limit how much curtailment is allowed in general. Please explain how this statement is addressed in the mitigation computations and proposed protocol.

QUESTION 37: Will curtailment be limited to provide no more than the amount of depletions attributable to ground water pumping? How are shortages to RISD or carryover that are caused by factors other than ground water pumping (e.g., drought, changed irrigation practices) factored into the mitigation computation protocol?

QUESTION 38: Is there an assumption that all shortages to carryover storage are due to ground water depletion? Please explain.

QUESTION 39: CM Rule 43.01.b. states that “[c]onsideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.” Explain how your proposed protocol will account for these considerations.

QUESTION 40: Please answer the following questions and include explanation.

(a) It appears that the verification-period (post 1988) residuals for the carryover regression equations are not normally distributed, but are skewed in a direction that corresponds to over-prediction of reasonable carryover, sometimes by large amounts. According to Dr. Van Kirk, this reflects the influence of factors not considered in the regression equations. What evaluations has the Department done to evaluate what these factors might be and how the regression equations could be made to accommodate them?

(b) What units are used for each of the independent and dependent variables in the carryover regressions?

(c) Some of the carryover regression equations have the potential to predict unreasonable amounts of carryover. For example, the equation for AFRD#2 does not appear to permit the calculation (except fortuitously) of zero carryover, though zero carryover has occurred several times in the past. Also, the equation for AFRD#2, and possibly others, calculates reasonable carryover as a relative difference between large numbers; accordingly it may be highly sensitive to small errors in the values of independent variables. Has the Department carried out any analysis of the likely range of values that these carryover equations can predict, the degree to which predicted values may fail to recognize extenuating circumstances (e.g.,

reservoir storage restrictions, changes in water bank rules), and the sensitivity of predicted values to errors in the independent variables?

(d) If the carryover regression equations are not designed to force a zero intercept, doesn't this mean that in every year when the reservoirs do not fill, the equation will predict there is some carryover the calling party is "entitled" to?

QUESTION 41: Do the regression equations account for the effects of a series of years when the delivery of rented storage in past years will affect the current year fill, e.g., as occurred in the mid-1980s? Please explain.

QUESTION 42: Would you agree that the proposed protocol assumes that the SWC are all using water reasonably, but that an independent evaluation will be made under the CM Rules regarding material injury on any future delivery calls by other surface water users or if water use by the SWC changes that would reduce the amount of water that they need? If the answer is no, please explain.

QUESTION 43: The 1900 natural flow water rights of TFCC and NSCC equal 3400 cfs and are large enough to command the entirety of the reach gains below Blackfoot. Some users, e.g., AFRD#2, are highly dependent on storage rather than natural flow, due to their junior natural flow priorities. Irrigation season depletions from groundwater pumping cannot further reduce the natural flow availability to such users if they would have been out of priority for natural flow anyway. How does the proposed procedure avoid assigning replacement obligations for RISD shortages to such users?

QUESTION 44: Since some SWC entities rely almost exclusively upon natural flow (such as TFCC and NSCC) and other rely almost exclusively upon storage (such as AFRD#2) and the depletions from ground water pumping affect each supply for each entity differently, please explain how these differences will be addressed and accounted for in the proposed

mitigation computation protocol. How does the proposed protocol account for seasonal variability in water supply that is not caused by ground water pumping?

QUESTION 45: Referring to IDWR's answer to IGWA's Question 18, please explain:

(a) What is meant by "As before" in the last sentence that states: "As before, any volume of water less than the reasonable carryover deficit amount owed to the SWC must be provided immediately and any volume of water in excess of the reasonable carryover deficit may be provided to the SWC at the time of need."

(b) In this same last sentence quoted above, please explain when is "the time of need."

QUESTION 46: Will the computation of mitigation requirement be performed separately for each SWC entity? If the answer is no, please explain.

QUESTION 47: With respect to the storage water leased by ground water users for mitigation purposes to comply with early season estimates of shortage, please answer:

(a) Is it contemplated that the past practice will continue of allowing IGWA to notify the Watermaster of Water District 01 that the ground water users have the required amount of storage available for delivery when needed?

(b) If after the final accounting for Water District 01 is completed and the leased amount exceeds the amount delivered to SWC entities, will IGWA continue to be able to maintain control of all stored water it has purchased until it is delivered?

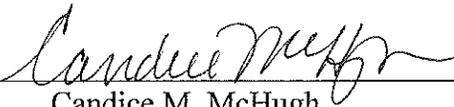
(c) If ground water users provide replacement water and the receiving entity ends the year with a greater-than-reasonable amount of carryover storage, will ground water users be able to retrieve the over-supply, re-book it to another entity that may have a carryover deficit, or otherwise obtain some credit or benefit for it? Please explain.

QUESTION 48: In 2008, the Director and the Hearing Officer approved the Ground Water District's replacement water plan that mitigated material injury predicted to TFCC by

underwriting TFCC's water supply. Under the new protocol, could such a plan be used as a Mitigation Plan under CM Rule 43? If the answer is yes, please explain any expected changes that would be required to such a plan. If the answer is no, please explain.

DATED this 9th day of June, 2009.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By  _____
Candice M. McHugh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2009, I caused to be served a true and correct copy of the foregoing as indicated below:

David R. Tuthill, Jr., Director (Original)
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
dave.tuthill@idwr.idaho.gov

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- Email

John K. Simpson
Travis Thompson
Barker Rosholt & Simpson
PO Box 485
Twin Falls, Idaho 83303-0485
jks@idahowaters.com
tlt@idahowaters.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- Email

Tom Arkoosh
Capitol Law Group
PO Box 2598
Boise, Idaho 83701
tarkoosh@capitolawgroup.net

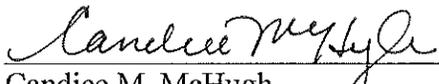
- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- Email

Sarah Klahn
White Jankowski
511 16th Street, Suite 500
Denver, Colorado 80202
sarahk@white-jankowski.com

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- Email

Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
wkf@pmt.org

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- Email


Candice M. McHugh