Docket No. 38191-2010, 38192-2010 and 38193-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION; and
Petitioners-Respondents on Appeal

IDAHO DAIRYMAN'S ASSOCIATION, INC.,
District Court Cross-Petitioner,

v.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES; and
Respondents-Respondents on Appeal

IDAHO GROUND WATER APPROPRIATORS, INC.; and
Intervenor-Respondent-Cross Appellant

THE CITY OF POCATELLO,
Intervenor-Respondent-Cross Appellant.

SURFACE WATER COALITION'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial district for Gooding County
Honorable John M. Melanson, District Judge, Presiding

ATTORNEYS FOR PETITIONERS-APPELLANTS

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls, ID 83303
(208) 733-0700 – Telephone
(208) 735-2444 – Facsimile
- Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP, PLLC
P.O. Box 32
Gooding, ID 83330
(208) 934-8872 – Telephone
(208) 934-8873 – Facsimile
- Attorneys for Am. Falls Reservoir District #2

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318
(208) 678-3250 – Telephone
(208) 878-2548 – Facsimile
- Attorneys for Minidoka Irrigation District

ATTORNEYS FOR RESPONDENTS-RESPONDENTS

Garrick Baxter
Chris M. Bromley
IDAHO DEPT. OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
(208) 287-4800 – Telephone
(208) 287-6700 – Facsimile
- Attorneys for Interim Director and Idaho Department of Water Resources

ATTORNEYS FOR INTERVENOR-RESPONDENT-CROSS APPELLANT

Randall C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE & BAILEY, CHTD
P.O. Box 1391
Pocatello, ID 83201
(208) 232-6101 – Telephone
(208) 232-6109 – Facsimile
- Attorneys for Idaho Groundwater Appropriators, Inc, et al.

A. Dean Tranmer
CITY OF POCATELLO
P.O. Box 4169
Pocatello, ID 83201
(208) 234-6149 – Telephone
(208) 234-6297 – Facsimile
- Attorneys for City of Pocatello

Sarah A. Klahn
Mitra M. Pemberton
WHITE & JANKOWSKI LLP
511 Sixteenth St., Suite 500
Denver, CO 80202
(303) 595-9441 – Telephone
(303) 825-5632 – Facsimile

(See Service Page for Remaining Counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

CONSTITUTIONAL & STATUTORY MATERIAL

RULES & REGULATIONS

OTHER CITATIONS

INTRODUCTION

The Surface Water Coalition's issues on appeal are straight forward. First, the Director erred in failing to apply the proper burdens and evidentiary standards when he devised the "minimum full supply" as the basis for conjunctive administration in 2005. The District Court erroneously approved the Director's "baseline" approach to administration, reasoning that it was acceptable to start at a "minimum" quantity provided it could be adjusted upward during the irrigation season. Contrary to this reasoning, Idaho law requires the agency to begin with the decreed water right as the foundation for administration. The Director's arbitrary framework did not comply with Idaho's constitution, water distribution statutes, and conjunctive management rules ("CM Rules"). *See SWC Opening Br.* at 19-23. The issue is not moot since the Court's decision on appeal will provide the requested relief and ensure lawful administration of the Coalition's senior water rights.

Next, the District Court properly found that the Director violated the Idaho APA in attempting to bifurcate the final agency order. Clerk's R. Vol. 3 at 542. However, the court erred in its remand order and failed to require the Department to issue a single order addressing all issues in the contested case, including the required framework for continued administration. Consequently, the parties are left with multiple agency orders subject to a variety of appeals in different forums. Unless corrected on this appeal, the parties and IDWR will have to piece together findings and conclusions from different orders to fully understand and resolve the required conjunctive administration. The Court should correct this error of law and require IDWR to issue a single comprehensive order to guide future administration.

Finally, the Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello") have cross-appealed the District Court's decision requiring the Director to apply the established burdens of proof and evidentiary standards in administration. The clear and convincing evidence standard is well established in Idaho water law and properly protects the important real property interests represented by a senior's decreed or licensed water right. Therefore, the Court should deny IGWA's and Pocatello's cross-appeals.

ARGUMENT

I. The Director's "Minimum Full Supply" or "Baseline" Approach is Properly Before the Court on Appeal.

IDWR asks this Court to refrain from addressing the merits of the Coalition's appeal arguing the "minimum full supply" issue is moot.[1] *See IDWR Respondents-Respondents on Appeal Brief* ("*IDWR Br.*") at 16. Yet, confusingly, at the same time IDWR admits that the Director's use of a "baseline" is properly before the Court. *Id.* at 17.

The Hearing Officer recommend approval of the flawed "baseline supply concept." R. Vol. 37 at 7093, 7095-7100. Reviewing the recommendation, the Director found the following in his *Final Order*:

> The Hearing Officer approved of the former Director's methodology of establishing a minimum full supply for members of the SWC from which to base his prediction of material injury. . . . Adjustments for climate variability are necessary in using the minimum full supply methodology. . . . The Director agrees that the term minimum full supply should be changed. In order to be more consistent with the CM Rules, the term that will replace minimum full supply is reasonable in-season demand.

[1] IGWA joins in this argument seeking to preclude a review on the merits. *See Groundwater Users' Opening Brief* ("*IGWA Br.*") at 36.

R. Vol. 39 at 7386.

Although the Director changed the name, he did not deny or abandon the "baseline" concept or methodology in the *Final Order*. Regardless of the term used to describe the Director's actions, the concept of unilaterally reducing the Coalition's decreed and licensed quantities without adhering to the proper burdens and standards established by Idaho law is a live controversy that is properly before this Court.[2]

The interpretation of the constitution, statutes, and IDWR's application of the CM Rules is a question of law over which this Court exercises free review. *Carrier v. Lake Pend Oreille School Dist.*, 142 Idaho 804, 807 (2006). Since the Court's decision will provide relief and ensure that IDWR's continued conjunctive administration of the Coalition's senior surface water rights complies with the law, the issue is not moot. *See Taylor v. Maile*, 146 Idaho 705, 710 (2006) (mootness does not apply when the appellant has a legal interest in the outcome and a favorable decision would result in relief). Moreover, since the Director's actions are susceptible to recurrence and likely to evade review, an exception exists even if the mootness doctrine applied. *State of Idaho, Child Support Services v. Smith*, 136 Idaho 775, 778 (Ct. App. 2001).[3]

In sum, the Coalition's challenge to the "minimum full supply" or "baseline" approach is not moot. IDWR admits the issue of a "baseline" supply for administration is properly on appeal. *IDWR Br.* at 17. Whether the Director's methodology is termed a "baseline" or

[2] The District Court erred in approving the continued use of a "baseline" or "minimum full supply" approach. Clerk's R. Vol. 3 at 535-36.

[3] In considering the "evasive of review" exception, the Court does not limit its consideration of the recurrence element to the individual challenger, but may look to others who are or will be in a similar position. *See Freeman v. Idaho Dept. of Correction*, 138 Idaho 872, 876 (Ct. App. 2003).

"minimum full supply" analysis, the decision to unilaterally reduce the Coalition's decreed quantities at the outset of administration is prohibited by law and subject to this Court's free review.

II. The Director Did Not Apply the Required Presumptions, Burdens of Proof, and Evidentiary Standards in Creating the "Minimum Full Supply" or "Baseline" Approach to Conjunctive Administration.

The Director failed to apply the proper burdens and evidentiary standards in creating a "minimum full supply" or "baseline" for administration. *SWC Opening Br.* at 13. That is the Coalition's issue on appeal. Admitting the Director's error, IDWR provides no valid response. Instead, IDWR mischaracterizes the issue, wrongly claiming that the Coalition demands "blind" administration of its full water rights "with no regard for beneficial use." *IDWR Br.* at 15, 18. Moreover, IDWR sets up a fictitious decreed quantity (9 million acre-feet) as the basis for its entire response.[4]

Ironically, IDWR recognizes and supports the proper burdens and standards for administration imposed by Idaho law. *IDWR Br.* at 34-35. This admission defeats the agency's effort to uphold the Director's "minimum full supply" or "baseline" approach to conjunctive administration. Since Idaho law precludes the Director from distributing less water to a senior's decreed right, unless that decision is supported by clear and convincing evidence, the Director's "minimum" total volume approach must be rejected.

[4] IDWR made the same argument to the District Court. Clerk's R. Vol. 2 at 192. Contrary to IDWR's insinuations, the Coalition's natural flow water rights are quantified by an instantaneous diversion rate (i.e. cubic foot per second "cfs"), not a total annual volume. R. Vol. 8 at 1370-72 (summary of Coalition's natural flow water rights and their elements). The Director has no authority to impose a unilateral volume limitation on the Coalition's natural flow rights.

It is undisputed that the Director failed to apply the proper standard when he devised the "minimum full supply" approach in the *2005 Order*. R. Vol. 8 at 1378-79, 1402 (no standard identified or applied in setting the 1995 total diversion as the "minimum full supply" volume). Instead, the Director disregarded the Coalition's water rights and started from a minimum "baseline" threshold. For example, the Director arbitrarily determined the following:

> A full supply of water for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company is not the maximum amount of combined natural flow and storage releases diverted that yielded full headgate deliveries, based on those entities' definition of full supply, ***but the minimum amount of combined natural flow and storage releases diverted recently that provided for full headgate deliveries***, recognizing that climatic growing conditions do affect the minimum amount of water needed and such effects can be significant.

R. Vol. 8 at 1379, ¶ 91 (emphasis added).

The Director's decision to default to the "minimum" amount he deemed necessary, without making any findings supported by clear and convincing evidence, violated the burdens and presumptions established by Idaho law. The Hearing Officer described the critical flaw in the Director's approach:

> **7. Use of a minimum full supply analysis starts at a different point from recognizing the right of a senior right holder to receive the full amount of the licensed or decreed right, attempting to make an advance judgment of need.** Inherent in the application of the minimum full supply is the assumption that, if it accurately defines need, the use of water above that amount would not be applied to a beneficial use and would constitute waste. This strains against the assumption that the senior users are entitled to the full extent of their rights licensed or decreed rights which at some point has been determined to be an amount they could beneficially use. . . .
>
> * * *

> Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at a base and works up according to need, the end result should be the same. . . .

R. Vol. 37 at 7091-92 (bold in original, underline added).[5]

The use of a minimum supply "assumption" does not simply "strain" against the presumptive weight of a senior's decreed water right; it violates the established burdens and standards required by Idaho law. Stated another way, it does matter where the agency starts for purposes of an injury determination in conjunctive administration.[6]

Contrary to the rationale adopted by the Hearing Officer and District Court, Idaho law expressly defines the starting point for the Director's injury analysis; it must begin with the elements of the senior's decreed water right. *See* IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602, 607; CM Rule 40. A decreed or licensed quantity represents an amount of water that seniors are presumed entitled to beneficially use. *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 877-78 (2007) ("*AFRD #2*"). Idaho law requires the Director to begin the injury analysis with the decreed quantity, not a "minimum" baseline.

[5] The District Court erroneously accepted the Hearing Officer's rationale and affirmed the Director's use of a "baseline" approach to administration. Clerk's R. Vol. 3 at 535-36.

[6] IGWA wrongly claims that the Director's starting point for administration can be adjusted upward if the senior needs more water. *IGWA Br.* at 26. The record in this case shows that the Director treated the "minimum full supply" as a cap in 2007, resulting in an unlawful re-adjudication. R. Vol. 37 at 7092, 7095. IDWR also misrepresents the Director's new approach on remand as providing for an "adjustable baseline volume." *IDWR Br.* at 11. The Director's Methodology Order does not authorize an adjustment to benefit the senior right. Like the re-adjudication that occurred in 2007, the Director's new methodology similarly caps the "reasonable in-season demand" as a fixed amount at the beginning of the irrigation season. Clerk's R. Vol. 5 at 829-30 ("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.") (emphasis added).

Although IDWR may distribute less water to a senior if the decreed quantity would be "wasted," that action must be supported by clear and convincing evidence. The District Court agreed on rehearing and specifically held the Director to this standard:

> [T]his Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence.

A&B Order at 37-38.[7]

The fact the Director started with a "minimum full supply," or "baseline" total volume is the critical error in his injury framework. Since the Director did not support his analysis with the necessary clear and convincing evidence, the methodology fails as a matter of law.

Contrary to IDWR's argument, the Coalition members have never claimed they have a right to more water than can be beneficially used on their irrigation projects.[8] To be clear, the Coalition acknowledges that beneficial use is the measure of a water right in Idaho. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 15 (2007); *AFRD #2*, 143 Idaho at 880. When IDWR issues a water right license, or a district court enters a water right decree, the water right holder is required to show that the quantity has been put to beneficial use. I.C. § 42-217 (requirement to submit proof of application to beneficial use); I.C. § 42-220 ("Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned

[7] The District Court adopted and incorporated pages 24-38 of Judge Wildman's *Memorandum Decision and Order on Petition for Judicial Review* (*A&B Irr. Dist. v. IDWR*, Minidoka County Dist. Ct. Fifth Jud. Dist., Case No. 2009-000647) ("*A&B Order*"). Clerk's R. Vol. 7 at 1247. Although the court only addressed the Director's failure to apply the proper standard in relation to TFCC's water right, the law applies equally to all Coalition members' water rights. The District Court failed to clarify this holding on rehearing. Clerk's R. Vol. 7 at 1251-52. Consequently, the Coalition appealed the court's decision.

[8] IGWA and Pocatello also wrongly allege that the Coalition seeks conjunctive administration with no regard for beneficial use of its members' water rights. *IGWA Br.* at 37; *The City of Pocatello's Intervenor-Respondent-Cross Appellant Brief* ("*Poc. Br.*") at 14-15.

therein."); *Head v. Merrick*, 69 Idaho 106, 108 (1949) ("a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed."). Once the right is established, the senior does not have to re-prove or re-adjudicate the decreed quantity for conjunctive administration. *AFRD #2*, 143 Idaho at 877-78.

In this case the Coalition's natural flow and storage water rights have all been previously licensed or decreed.[9] R. Vol. 8 at 1370-73 (identifying basis of right as "Decree" or "License"). The decrees constitute a judicial finding of beneficial use. *Crow v. Carlson*, 107 Idaho 461, 465 (1984) ("the [ ] decree is conclusive proof of diversion of the water, and of application of the water to beneficial use . . .") (emphasis added); *A&B Order* at 28-30. This Court, in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), recently confirmed:

> The amounts of the Spring Users' water rights had already been decreed based upon the amounts of water that they had diverted and applied to the beneficial use of fish propagation. ***Subject to the rights of senior appropriators, they are entitled to the full amount of water they have been decreed for that use.***

252 P.3d at 92 (emphasis added).

By the same token, there is no requirement, nor is it the common practice, that a water right holder uses the maximum decreed or licensed quantity every single day of the irrigation season. However, although irrigation requirements may change over the course of an entire

[9] The United States Bureau of Reclamation ("Reclamation") obtained licenses for the storage water rights. R. Vol. 8 at 1373; Tr. Vol. VI, p. 1185. Pursuant to Idaho law, the Coalition's landowners and shareholders hold a state law water right interest and beneficial title to the storage water rights. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115 (2007). The water rights were claimed and recommended in the SRBA.

season, a right holder is entitled to call upon and use his full decreed or licensed quantity, in priority, as needed. For example, Hearing Officer Schroeder described the dire conditions in 2007 and the Coalition's increased need for water on their respective irrigation projects:

> The snowpack runoff that occurred in April, May, and June was below the long term average for the district, resulting in less natural flow in the river. This led to a greater demand on storage water. The summer turned into a hot, dry period for humans, beasts, and particularly crops. The increased temperature and lower precipitation also led to a greater demand on storage water.

R. 7092-93.

The Coalition's managers specifically advised the Director of the extreme conditions in the early summer of 2007. R. Vol. 24 at 4432, 4443, 4464, 4502, 4510, 4521, and 4529. The Director ignored the actual water supply conditions and wrongly refused to consider the information from the managers. R. Vol. 37 at 7095. As a result, the "minimum full supply" served as an artificial cap for delivery and no mitigation water was provided when it was needed. The 2007 example demonstrates the inherent error in disregarding the decreed or licensed elements at the outset in administration.

The Director's "baseline" concept violates Idaho law by finding the Coalition is only entitled to enforce the priority of its water rights up to the amounts deemed necessary by the Director's sole calculations, ignoring the decreed quantity.[10] Clearly, the Director had no authority to disregard the decreed and licensed senior rights in this manner. The entire basis for the Director's administration misinterprets the presumptive effect of a decree.

[10] IDWR claims the Director "recognized" the Coalition's decreed rights, yet the testimony of former Director Dreher proves otherwise. The former Director gave no presumptive weight to the decrees for purposes of the injury analysis for both in-season irrigation use and carry-over storage requirements. Director Dreher admitted his legal error when he testified that a "water right is not a quantity entitlement." *IDWR Br.* at 18.

The District Court described the importance of a decree in conjunctive administration:

> In *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007), the Idaho Supreme Court held that the CMR incorporate the proper presumptions, burdens of proof, evidentiary standards, and time parameters of the prior appropriation doctrine established by Idaho law. The Court directed that the CMR could not "be read as containing a burden-shifting provision to make the petitioner reprove or re-adjudicate the right which he already has." *Id.* at 877-78, 154 P.3d at 448-49. It further directed that "the presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id.* at 878, 154 P.3d at 449.
>
> * * *
>
> This Court recognizes that there may be instances where a senior is not putting the full recommended or decreed quantity to beneficial use at the time of the delivery call. In such instances, the Director has the ability under the CMR (particularly CMR 42), to examine a number of factors to determine whether the delivery of the full recommended or decreed quantity of water to the senior user would result in the failure of the senior to put the full recommended or decreed quantity to beneficial use. Yet, in each of these instances, ***pursuant to the well-established burdens of proof and evidentiary standards, the Director shall not require the senior to re-prove his right***. *AFRD #2*, 143 Idaho at 877-78, 154 P.3d at 448-49. As explained by Judge Wildman in the *Memorandum Decision*, ***if the Director determines in the context of a delivery call proceeding that a decreed (or recommended) amount exceeds the amount being put to beneficial use by the senior at the time of the delivery call, that decision must be made based upon a standard of clear and convincing evidence***.

Clerk's R. Vol. 7 at 1248-49 (emphasis added).

The Coalition acknowledges that despite the entitlement and presumption afforded a decree, a water user has no right to "waste" water. *Martiny v. Wells*, 91 Idaho 215, 218-19 (1966). How IDWR evaluates material injury to a senior water right and determines "waste" is guided by the proper burdens and standards established by Idaho law. CM Rule 20.02; *AFRD #2*, 143 Idaho at 877-78.

If the Director determines that a senior would "waste" the quantity authorized in the decree, the Director's decision must be supported by clear and convincing evidence.[11] The Director must apply the proper burdens and standards and justify any decision to distribute less water with specific findings of fact.[12] This standard properly protects the senior in administration and provides the certainty required for all parties involved, including IDWR. *See e.g. State v. Nelson*, 131 Idaho 12, 16 (1998).

The Director did not find that the Coalition was wasting water. Rather, the Director failed to implement the proper burdens and standards in devising the Coalition's individual "minimum full supply" quantities. The process created a de-facto defense for junior priority ground water users and unlawfully shifted the burden back to the Coalition to re-prove the decreed quantities of their water rights. If the Director believed the Coalition would "waste" the decreed amounts of water, he needed to make that finding by clear and convincing evidence with supporting factual findings. Since the Director did not apply any burden or evidentiary standard as part of his methodology, nor did he find any waste, that decision violated Idaho law. R. Vol. 8 at 1378-79. This Court should reverse and remand the Director's *Final Order* accordingly.

A. IDWR's Misrepresented Total Water Supply / Decreed Quantity.

IDWR alleges 9 million acre-feet constitutes the total decreed water supply available to the Coalition, based upon a "calculated" volumetric total of all the natural flow rights combined with full storage allocations. *IDWR Br.* at 2. IDWR uses this calculation, or alleged "total

[11] The Director did not find any "waste" by the Coalition in this case. Just the opposite, the Hearing Officer found the Coalition's diversion and conveyance systems to be reasonable and efficient. R. Vol. 37 at 7101-02. The Director accepted these findings and they were not appealed by any party. R. Vol. 39 at 7382.
[12] *See also*, I.C. § 67-5248(1)(a).

decreed quantity," as the foundation for the majority of its response.[13] *Id.* at 17-24. While such a number may look attractive in an effort to make conjunctive administration appear unrealistic, the agency's calculation is fiction. Moreover, IDWR's attempts to refute this calculated "total water supply" completely miss the point of the Coalition's issue on appeal.

In a nutshell, holding up fully satisfied natural flow rights combined with full storage allocations as the demanded decreed quantity for a single irrigation season ignores the facts and actual administration of the Coalition's water rights. IDWR's misrepresentation is surprising since the agency is well acquainted with surface water right administration and Reclamation's reservoir operations in Water District 01. As detailed below, the alleged total decreed volume of 9 million acre-feet is nothing more than a "strawman" that creates a false basis for IDWR's arguments.

1. IDWR's Calculated Supply Ignores Actual Surface Water Administration and the Coalition's Irrigation Operations.

IDWR's calculated total natural flow supply (approximately 6.7 million acre-feet) relies upon the assumption that all of the Coalition's water rights would be fully satisfied every single day of the entire irrigation season (March 15 to November 15, or 246 days). *IDWR Br.* at 2, n. 2. This assumption has two critical flaws. First, it fails to account for daily surface water right administration in priority implemented by Water District 01. Second, it fails to account for the Coalition's actual operations on their irrigation projects.

[13] IGWA and Pocatello join in this calculated total volume theory as representing the "decreed" quantity requested by the Coalition. *IGWA Br.* at 31, 40; *Poc. Br.* at 22. Nothing in the record suggests the Coalition requests this amount of water for delivery in a single irrigation season. To the contrary, the Coalition understands administration since its junior natural flow water rights are annually curtailed as supplies drop on the Snake River.

The Coalition's natural flow water rights vary in priority between 1900 and 1939.[14] R. Vol. 8 at 1370-72. The natural flow rights are regulated daily by the Water District 01watermaster to satisfy senior rights.[15] At hearing, Watermaster Lyle Swank described the daily administration that occurs every year:

> Q. [BY MR. SIMPSON]: With respect to the entities identified on Exhibit 9701, how do you deliver water to these entities as part of your daily – daily work?
>
> A. [BY MR. SWANK]: Our daily water right accounting goes through the process of collecting data from multiple reservoir and river gauges, the diversion data; determines what the available natural flow is in different reaches of the river; computes what the amount of storage is in those different reaches; determines the amount of water diverted, how much was natural flow and how much was storage. That's a gross simplification, but it hits the major steps.
>
> Q. So in essence, you attempt to identify how much natural flow is available in the system in looking at the runoff, the natural flow in the river – looking at the Heise gauge, for example, and other pertinent river gauges – and then determine from a priority standpoint what priority's on and deliver water to those priorities?
>
> A. Yes. That is part of the daily water – or the water right accounting process.

Tr. Vol. IV, p. 834, ln. 25 – p. 835, ln. 20.

> Q. So if their water right, for example, is not in priority, then you would order that that diversion be curtailed?

[14] Contrary to IDWR's calculated estimate, the Coalition's natural flow rights are not based upon volume, or a total acre-feet per year quantity. R. Vol. 8 at 1370-72; Ex. 4001A.

[15] Pocatello misrepresents the daily administration within Water District 01 by alleging that it only occurs "after-the-fact" through a final accounting process. *Poc. Br.* at 4-5. Although the district completes an annual report every year, the final record accounting does not replace the actual daily administration that occurs during the irrigation season. *See* I.C. §§ 42-602, 607. Lyle Swank testified that Water District 01 runs a water right accounting report as part of the "normal course of business" during the irrigation sometimes "at least three times a week, and sometimes more frequently, during the irrigation season." Tr. Vol. IV, p. 828, lns. 2-12.

A. Or have them rent storage or some other means to prevent – well, to deliver that water, yes.

Q. And if storage water is available, they would continue to divert under the rental of that water, and if storage is not available, then their diversion would cease?

A. Yes.

Id., p. 859, lns. 9-19.

Q. So in essence, if that user's water right and their priority is on and they call for water, you deliver it to them?

A. Yes.

Id., p. 866, lns. 5-8.

When questioned by IGWA's counsel, Mr. Swank confirmed that all of the Coalition's post-1900 water rights are curtailed to satisfy the senior rights of TFCC and NSCC:

Q. [BY MR. BUDGE]: And of the Surface Water Coalition members, is it accurate to say that Twin Falls and North Side have the earliest priority rights with their early 1900 priority natural flow rights?

A. [BY MR. SWANK]: In the below American Falls reach, that's correct.

* * *

Q. So is it accurate to say that during the normal irrigation, that Twin Falls Canal and North Side Canal would utilize all of the natural flow available below American Falls?

A. Yes.

Tr. Vol. V, p. 996, lns. 25 – p. 997, ln. 15.[16]

[16] The Hearing Officer confirmed the actual surface water administration and how all the Coalition's rights junior to the 1900 rights held by TFCC and NSCC are curtailed every year. R. 7057.

Finally, Mr. Swank testified that if an entity did not have a water right in priority, or available storage, the diversion would be ordered curtailed.

> Q. [BY MR. FLETCHER]: Now, if you found out that Minidoka Irrigation District, for example, was not on natural flow, and was out of storage on September 15th, would you allow them to continue diverting water?
>
> A. [BY MR. SWANK]: Now, if they are out of natural flow, and don't have the storage for – you know, the watermaster doesn't have assurance that they will have whatever storage they need, then they will be shut off.
>
> Q. And how do you do that? I mean, you have to actually turn off some canal companies up river; isn't that true?
>
> A. Yes.

Tr. Vol. V, at p. 1045, ln. 19 – p. 1046, ln. 7.

Consistent with the watermaster's testimony, the Coalition managers further described the actual administration of their junior natural flow water rights on an annual basis. R. Vol. 32 at 6121, Vol. 33 at 6247, 6299, 6321, Vol. 34 at 6382-84. Accordingly, it is undisputed that not every Coalition natural flow right is diverted to its decreed rate of diversion every day of the irrigation season. The Coalition's natural flow water rights are curtailed by priority pursuant to surface water administration depending upon the water supply available in the river. I.C. § 42-607; CM Rule 40.02.a (watermaster regulates junior surface water rights "to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.").

Since the Coalition entities rely upon different natural flow and storage right combinations, each entity has to be evaluated on its own. Although TFCC may rely primarily

upon natural flow water rights, AFRD #2 relies primarily upon storage water. R. Vol. 37 at 7056-57. Whether out-of-priority juniors injure the senior water rights of any Coalition member depends upon the timing of their diversions and the effects, which can be long-term, on both natural flow and storage rights.[17] *See* CM Rule 20.04 (recognizing mitigation or curtailment may be required even though discontinuing junior ground water would not provide direct immediate relief).

In an effort to overinflate the reality of actual water distribution to the Coalition's natural flow rights, IDWR misses the crux of how the Director failed in his administration. IDWR's theoretical calculation of what the Coalition demands pursuant to its natural flow rights is not supported by any facts in the record, distorts the testimony of its employees, and ignores the actual annual surface water right administration. As such, IDWR's assumption that administration to the decreed quantities of the Coalition's natural flow rights requires delivery of 6.7 million acre-feet is flawed and should be rejected.

2. The Coalition's Use of Storage and Carry-Over for Present and Future Irrigation Needs.

Apart from failing to acknowledge the actual surface water right administration that occurs every year, IDWR also ignores the operation of the reservoirs and the multiple purposes that irrigation storage serves. Instead, IDWR wrongly argues that the Coalition is demanding administration to its full storage rights for use in a single irrigation season. *IDWR Br.* at 2 (identifying SWC's storage allocation as approximately 2.3 million acre-feet).

[17] Furthermore, the Director must consider each entity's reliance upon carry-over storage and the right to protect that storage for irrigation use in future dry years. CM Rule 42.01.g.

As a result of surface water administration and the required curtailment of junior natural flow rights, the Coalition members vary in their reliance upon storage water during the irrigation season. R. Vol. 37 at 7104. The Hearing Officer described the differences as follows:

> **9. The members of the SWC differ in their reliance on natural flow water and storage water.**
>
> **a. MID, BID, A&B, AFRD #2 and Milner rely primarily on water from their storage contracts with the BOR.** . . .
>
> **b. NSCC has a natural flow right of 400 cfs with a priority date of 1900.** This, along with TFCC which has a much larger natural flow right of the same date, commonly takes all of the natural flow downstream of Blackfoot. However, because of its limited amount of the natural flow right NSCC primarily relies on its extensive storage rights, cumulating to approximately 860,000 acre-feet.
>
> **c. TFCC has a natural flow right of 3,000 cfs with a priority date of 1900.** However, TFCC has a much smaller storage right, some 245,000 acre-feet. While NSCC is primarily dependent upon its storage rights to meet its needs, TFCC is primarily dependent upon its natural flow rights to meet its needs.

R. Vol. 37 at 7056-57 (emphasis in original).

Although the individual Coalition projects vary in their reliance upon storage water in a given irrigation, they all depend on carry-over storage to ensure water supplies in subsequent years. Every manager testified as to the important role carry-over storage plays in the careful planning and successful operation of their individual irrigation projects. R. Vol. 32 at 6129-31 (Billy Thompson, MID); at 6138-39 (Lynn Harmon, AFRD #2); Vol. 33 at 6248 (Walt Mullins, Milner); at 6306-08 (Ted Diehl, NSCC); at 6324 (Dan Temple, A&B); Vol. 34 at 6389 (Randy Bingham, BID); Tr. Vol. VIII, pp. 1607-09 (Vince Alberdi, TFCC).

Carry-over storage is critical to protect against future dry irrigation seasons. For example, dry conditions in 2007 forced NSCC to use all of the 350,000 acre-feet the company carried over from the 2006 irrigation season. R. Vol. 33 at 6305-06. Although TFCC carried over approximately 78,000 acre-feet in storage from 2006, the company was still forced to rent an additional 40,000 acre-feet from the Water District 01 rental pool to ensure a sufficient supply through the 2007 irrigation season as well. Tr. Vol. VIII, p. 1629-30.

Carrying storage water over for future dry years protects the Coalition's landowners and is a primary reason as to why the reservoirs were constructed in the first place. Providing sufficient carry-over storage is not unlawful "hoarding" since the water will be delivered to meet future irrigation beneficial uses. *Cf. AFRD #2*, 142 Idaho at 880. The Coalition does not store water to "lock it away" and not beneficially use it for irrigation purposes. Just the opposite, carry-over storage is the critical insurance policy that the farmers rely upon to guard against future dry years. Moreover, Coalition members paid for the development of additional storage to create a greater reliability of water supplies. R. Vol. 32 at 6119; Vol. 33 at 6300; Tr. Vol. VI, p. 1186 (describing spaceholder repayment contracts).

Notably, the Palisades project was specifically planned for the purpose of providing irrigation projects with a supplemental water supply in future dry years. R. Vol. 37 at 7061; Ex. 7008 at 15 ("the primary objective of the project is to provide holdover storage during years of average or above-average precipitation for release in ensuing dry years"); *see also* Tr. Vol. VI, p. 1209-10 ("Palisades was authorized and built to have carryover storage to get you through a period similar to the drought of the '30s.").

IDWR's theoretical example ignores the right to carry-over storage and the insurance that storage water provides to protect against future dry years. Contrary to IDWR's present argument, both the Hearing Officer and District Court found that proper administration prohibits junior ground water rights from injuring the Coalition's right to reasonable carry-over storage:

> **2. A hindrance to reasonable carry-over storage constitutes material injury.** . . .
>
> **3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights.** . . . Times of shortage call the CM Rules into play. The evidence in this case establishes that during recent periods of water shortage ground water pumping has affected the quantity and timing of water available to SWC members. Natural flow rights have been exhausted earlier and storage has been used earlier and more extensively, limiting the application of water during the irrigation season and diminishing the amount of carryover storage to which the surface water users are entitled.

R. Vol. 37 at 7076-77 (emphasis in original).

> **3. The Director abused discretion by categorically denying reasonable carry-over for storage for more than one year.**
> . . . The problem with IDWR's argument is that the carry-over storage provisions are specifically included in the material injury section of the CMR as opposed to being just a provision that authorizes carry-over storage. . . . Accordingly, the CMR clearly contemplate that juniors can be curtailed to enhance carry-over storage beyond one year.

Clerk's R. Vol. 3 at 530-32 (emphasis in original).

Accordingly, the facts in the record are that the Coalition relies upon storage for both current "in-season" and future irrigation uses. Although the Director examines the total water supply (natural flow + storage rights) in making an injury determination, he cannot ignore the Coalition's reasonable carry-over requirements. In other words, junior ground water rights

cannot take water that would be beneficially used by senior natural flow rights and the Director cannot force the Coalition to exhaust its storage water supplies in a single irrigation season. The Hearing Officer further described how the Director should implement administration when evaluating the Coalition's total water supply:

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

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

In an attempt to justify the Director's "baseline" approach, IDWR disregards the carry-over aspect of the Coalition's storage rights. Instead IDWR wrongly assumes that the Coalition demands a full storage allocation for use in a single irrigation season. Since this is not how the projects were developed or are actually operated, IDWR's example should be disregarded. Stated another way, IDWR cannot justify the Director's decision to reduce the Coalition's storage water amounts on the flawed theory that the full amount cannot be beneficially used in a

single irrigation season. Again, this argument ignores the right to carry-over and the reason why the storage projects were developed in the first place. *See AFRD #2*, 143 Idaho at 878; *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208 (1945) ("the very purpose of storage is to retain and hold for subsequent use . . .").

Finally, IDWR's calculated total volume example misses the point of the Coalition's issue on appeal. For the Director to find that the Coalition would "waste" its full storage allocation by not using it for both current irrigation needs and carry-over for future dry years, he must apply the proper burdens and evidentiary standards to distribute less water in conjunctive administration. The Director made no finding by clear and convincing evidence that the Coalition would waste its storage or not beneficially use the water for both current irrigation uses and carry-over needs to protect against future dry years.

Since the Director failed to apply the proper standards when he defined the Coalition's "baseline," which included an arbitrary carry-over storage amount, that action violated Idaho law.

B. IDWR's "Minimum Full Supply" or "Baseline" Approach is Not Entitled to Deference on Appeal.

Citing *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849 (1991), IDWR asserts that the use of a baseline in administration must be afforded deference because "the CM Rules do not, however, set forth a method to determine martial injury." *IDWR Br*. at 24-26. No deference is owed in this case for the following reasons.

First, there is no ambiguity that would require IDWR to "construe [the law] as a necessary precedent to administrative action." *IDWR Br*. at 25. Indeed, the law is clear. Any effort to deviate from the decreed elements of a water right (i.e. deliver less than the decreed diversion rate), must be based on clear and convincing evidence. *Infra*. The CM Rules incorporate this standard as a matter of law.[18] CM Rule 20.02; *AFRD #2*, 143 Idaho at 873-74.

Second, any "method to determine material injury" must be consistent with the law – i.e. it must recognize the binding nature of the water right decree. As such, administration must begin with the decree. Contrary to this rule, a minimum "baseline" approach establishes a starting point for administration without clear and convincing to support that determination. In this case, the baseline was less than the decreed diversion rates and established without specific clear and convincing evidentiary findings. R. Vol. 8 at 1378-79. Such an action is contrary to law and cannot be affirmed. *Cf.* I.C. § 67-5279 (agency actions cannot we upheld if they are "in violation of constitutional or statutory provisions" or are "made upon unlawful procedure").[19]

In sum, the law establishes that the water right decree is the starting point for the Director's material analysis – not an arbitrary "baseline." Any reduction to the decree without following the proper standards and supporting findings is contrary to the law and is not afforded agency deference. The Court should reject IDWR's argument accordingly.

[18] IDWR and the Director support the clear and convincing evidence standard before this Court. *IDWR Br*. at 34-35.
[19] Since the law is clear, IDWR cannot meet prong 2, 3 or 4 of the *Simplot* test.

C. IGWA's Arguments Do Not Justify the Director's Unlawful Actions.

Similar to IDWR, IGWA mischaracterizes the SWC's issue on appeal as seeking a system of administration with no regard for a senior's beneficial of water (i.e. "depletion equals injury"). *IGWA Br.* at 37. IGWA asserts that material injury only occurs if the senior is "unable to meet his irrigation needs," regardless of the decreed quantity a senior is entitled to use. *Id.*

Initially, it must be pointed out that IGWA did not appeal from the Director's determination that junior ground water users injured the Coalition's senior surface water rights.[20] R. Vol. 37 at 7073 ("The Surface Water Coalition made the showing that its members had licensed or decreed water rights and that material injury was occurring."). Even though the Coalition does not claim that any depletion to a senior's water supply automatically results in a material injury finding, the Director made the finding of injury in this case. Although IGWA, like IDWR, creates a "strawman" argument for purposes of its response to the Coalition's issue on appeal, the issue is the Director's application of the CM Rules, and whether he applied the proper burdens and standards in that administration.

If the Director determines that a senior cannot beneficially use (i.e. "waste) the decreed quantity, that decision must be supported by clear and convincing evidence. The Director cannot

[20] IGWA also misrepresents several undisputed facts in the record. For example, IGWA claims the Coalition has not been injured by junior ground water pumping. *IGWA Br.* at 16. The Hearing Officer and Director rejected IGWA's claim and found injury to the Coalition's senior water rights. R. Vol. 37 at 7073, 7076. IGWA also wrongly claims that essentially "all irrigation in southern Idaho is now done by sprinkler." *IGWA Br.* at 12. Information submitted to the Director shows a variety of furrow to sprinkler irrigation ratios, ranging from 20 to 75% furrow irrigation depending upon the particular Coalition project. R. Vol. 2 at 412-18. Finally, IGWA alleges there is no trend in reach gain declines in the American Falls reach of the Snake River. *IGWA Br.* at 13. The Hearing Officer specifically found otherwise. R. Vol. 37 at 7097, 7114 ("There has been a declining trend in reach gains for the irrigation season. . . . Evidence indicates that there has been a long term trend of declining natural flow water . . ."). Accordingly, the Court should disregard IGWA's mischaracterization of the facts in this case.

simply create a new "baseline," different than a senior's decreed quantity, without following the law. Unfortunately, that is exactly what happened in this case, and IGWA's arguments do not justify the Director's unlawful actions.

In addition, IGWA wrongly argues that TFCC's water right should be reduced to 5/8 miner's inch for administration, without any finding supported by clear and convincing evidence. *IGWA Br.* at 20-22. IGWA requested this relief on rehearing and the District Court properly rejected the claim, ordering the Director to apply the proper burdens and standards in evaluating TFCC's water right in administration. Clerk's Vol. 3 at 1246-49. The District Court's decision is supported by established Idaho law. *See* Response to IGWA/Pocatello Cross-Appeal, *infra* at 30-34. Moreover, TFCC's shareholders all testified that they require and can beneficially use 3/4 miner's inch for irrigation purposes.[21] R. Vol. 33 at 6269, 6337, 6357-58, 6362, Vol. 40 at 7543-44. Therefore, IGWA has no basis for this argument and it was properly rejected by the District Court. This Court should affirm accordingly.

D. Pocatello's Arguments Do Not Justify the Director's Actions Either.

Pocatello attempts to justify the Director's "minimum full supply" due to the "nature" of the Coalition's water rights. *Poc. Br.* at 13. Pocatello theorizes that, because the Coalition acquired storage rights, the Director can ignore the burdens and standards established by Idaho law and distribute less water to the Coalition. Pocatello misses the point. The question here is not whether the Director is authorized to distribute less water; it is whether he applied the law correctly in making that decision. Creating a new "minimum full supply" or "baseline" amount

[21] This quantity is 25% less than the standard irrigation duty of water provided by Idaho law. I.C. § 42-202(6) (i.e. 1 cfs for each 50 acres, or 0.02 cfs or 1 miner's inch per acre).

that is less than the Coalition's decreed water rights requires clear and convincing evidence. The Director did not apply the proper burdens and standards in his decision, therefore he violated Idaho law. The Director cannot hide behind agency discretion when misapplying the CM Rules.[22] *Fields v. State*, 149 Idaho 399, 400 (2010) ("This Court exercise free review over questions of law.").

Pocatello further misstates the law by arguing that the public trust doctrine and Article XV, section 5 of the Idaho Constitution limit the exercise of a senior's decreed water right in administration. *Poc. Br.* at 19. As to the public trust doctrine, Pocatello relies upon *Idaho Conservation League v. State*, 128 Idaho 155, 157 (1995). In response to this decision, the Idaho Legislature added chapter 12 to title 58, Idaho Code. *See* 1996 Sess. Laws, chp. 342, § 1, p. 1147. The legislation limited the application of the common law doctrine. The public trust doctrine does not apply to "the appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights as provided for in article XV of the constitution of the state of Idaho and title 42, Idaho Code, or any other procedure or law applicable to water rights in the state of Idaho." I.C. § 58-1203(2)(b) (emphasis added).

In addition, Pocatello's reliance upon Article XV, section 5 of the Idaho Constitution is not applicable to this case. The Court in *Clear Springs* held the following with respect to Sections 4 and 5:

[22] Contrary to Pocatello's claim, the Director did not administer the Coalition's water rights in accordance with Idaho law in this case. *Poc. Br.* at 20. The Director failed to apply the proper burdens and standards in creating the "minimum full supply" benchmark for administration. Consequently the Director misapplied the CM Rules and violated Idaho law in the process.

> First, neither section applies to the water user who has appropriated water directly from the water source . . . .
>
> Sections 4 and 5 were added to make it clear that water rights held by canal companies remained subject to state regulation and use by those who relied upon such water for agricultural purposes. . . . As we stated in *Mellen*:
>
> > The constitutional convention, accordingly, inserted sections 4 and 5, in article 15, of the Constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used "under a sale, rental or distribution," and to point out the respective rights and priorities of the users of such waters." . . .
>
> Finally, neither section governs conjunctive management. They only govern the distribution of certain surface waters.

252 P.3d at 86, 88 (emphasis added).

Section 5 does not apply in conjunctive administration and does not limit the Coalition's decreed surface water rights as against junior ground water rights. Accordingly, Pocatello's argument fails as a matter of law.

Next, Pocatello misapplies *AFRD #2* to support its argument. Pocatello denigrates the Coalition's real property right interests in their senior water rights, calling them merely a "paper right." *Poc. Br.* at 20. If a senior is not receiving the water he is entitled to beneficially use in administration when requested, i.e. the decreed quantity, and hydraulically-connected junior rights are taking water out-of-priority, the senior right is injured. R. Vol. 37 at 7073 ("The Surface Water Coalition made the showing that its members had licensed or decreed water rights and that material injury was occurring"). Moreover, it is the junior right holders that carry the

burden to prove, by clear and convincing evidence, any defenses to the senior's call. *AFRD #2*, 143 Idaho at 878-79, R. Vol. 37 at 7072-73. No defenses were proven in this case.

Finally, attempting to justify the administration that occurred in 2005 and 2007, Pocatello argues that the Director's actions provided "timely" relief to the Coalition. *Poc. Br.* at 24. Pocatello misconstrues the Coalition's point on appeal and reads certain statements in *AFRD #2* out-of-context. Although the Court in *AFRD #2* commented upon the initial response of the Director in 2005 and how it was appropriate as to the time of year, the Court did not review the "as-applied" facts including the Director's failure to provide "wet" mitigation water to the Coalition in 2005 or 2007. Moreover, the Court in *AFRD #2* agreed with the district court and confirmed that a "timely response is required when a delivery call is made and water is necessary to respond to that call." 143 Idaho at 874 (emphasis added).

It remains undisputed that the Coalition did not receive any mitigation water during the irrigation seasons when injury was found. Consequently, the Director's untimely actions resulted in an unconstitutional application of the CM Rules. In sum, Pocatello's arguments do not support the "minimum full supply" or "baseline" approach to administration. The Court should reject the arguments accordingly.

III. The District Court Erred in Instructing the Director to Bifurcate the Final Order.

IDWR claims "[T]he final order that governs conjunctive administration is the Methodology Order, which is on judicial review before Judge Wildman." *IDWR Br.* at 31. Similar to its "minimum full supply" response, IDWR mischaracterizes the state of proceedings before the Court and the resulting bifurcated agency orders.

The Director's September 5, 2008 *Final Order* addressed the Hearing Officer's comprehensive *Recommended Order* which followed a three-week administrative hearing. The Director accepted and incorporated the Hearing Officer's findings of fact and conclusions of law except as to the continued use of "replacement water plans" and the timing of providing reasonable carry-over storage. R. 7382-87. The Director also referenced the support for his "minimum full supply" methodology, but relabeled it "reasonable in-season demand" and attempted to defer deciding the merits of that issue to a future separate order. R. Vol. 39 at 7386. The Director's *Final Order* was appealed by the SWC and Reclamation, resulting in the District Court's decision on judicial review. Clerk's R. Vol. 3 at 511.

The District Court concluded that the Director violated Idaho's APA by not "addressing and including all of the issues raised" in the contested case in a single, final order. Clerk's R. Vol. 3 at 542. IDWR now apparently disavows the Director's acceptance of the Hearing Officer's numerous findings and conclusions claiming the *Final Order* does not have a part in future conjunctive administration. Instead, IDWR claims only the Methodology Order controls. *IDWR Br.* at 31.

To the contrary, much of the Director's *Final Order* was not even appealed. *See* Clerk's Vol. 1 at 1, 10-12 (SWC Notice of Appeal and Issues); at 24, 31-32 (Reclamation Notice of Appeal and Issues). For example, the Hearing Officer and Director:

1) Determined that the Eastern Snake Plain Aquifer Model constituted the best science available at the time (R. Vol. 37 at 7080);

2) Denied IGWA's defenses to the call and found material injury to the Coalition's senior surface water rights (R. Vol. 37 at 7076-77);

3) Found that the Coalition's diversion systems and conveyance practices were reasonable (R. Vol. 37 at 7101, 7103); and

4) Rejected Pocatello's "achievable farm efficiency" concept (R. Vol. 37 at 7103).

These are just a few of the issues the Hearing Officer made specific factual findings and conclusions on and that were accepted without modification by the Director's *Final Order*. R. Vol. 39 at 7382, 7387. IGWA and Pocatello did not appeal any part of the Director's *Final Order*. Accordingly, the Director's order on these issues constitutes a final decision on the merits that is not subject to collateral attack. *See Hansen v. Estate of Harvey*, 119 Idaho 333, 337-38 (1991); *Sagewillow Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 844 (2003). The Director reiterated this point in the Methodology Order, acknowledging that he "ruled on all issues raised at hearing" in the September 5, 2008 *Final Order*. Clerk's R. Vol. 5 at 800. Accordingly, IDWR cannot ignore the *Final Order* or claim that it is not relevant for purposes of future conjunctive administration. Contrary to IDWR's argument, the Methodology Order is not the sole agency decision to "govern" future conjunctive administration of the Coalition's water rights.

Since the District Court failed to properly remand the case for issuance of a single, final order, the parties are left with multiple decisions and multiple lawsuits. The Court should correct this error, order a proper remand and require the issuance of a single agency order to provide a complete document for future administration.

RESPONSE TO ISSUES RAISED BY IGWA AND POCATELLO

I. Idaho Law Requires Clear and Convincing Evidence to Reduce a Senior's Decreed Water Right in Administration.

The District Court held the Director erred by failing to apply the correct presumptions and burdens of proof in reducing TFCC's decreed water right. Clerk's R. Vol. 3 at 541-42; Vol. 7 at 1249. The court further held that in order to give proper presumptive weight to TFCC's senior right, any agency finding that the quantity decreed exceeds the amount being put to beneficial use must be supported by clear and convincing evidence. *Id.* Consequently, the court concluded that the Director abused his discretion and exceeded his authority in the *Final Order* and remanded the decision accordingly.[23] Clerk's R. Vol. 3 at 542.

IGWA and Pocatello (hereinafter "Ground Water Users") cross-appealed this issue. *See* Clerk's R. Vol. 7 at 1347, 1354c. In support, Pocatello incorporates and relies upon its argument submitted in the A&B appeal. *Poc. Br.*at 27. Similarly, IGWA essentially repeats its same argument from the A&B appeal as well. IGWA generally claims: 1) that no Idaho case addresses the issue; 2) the preponderance of the evidence standard applies to most civil and administrative cases and affords presumptive weight to decrees; and 3) that the adjudication of a water right is different from administration. *See generally, IGWA Br.* at 22-35. Rather than repeat the entire response to Pocatello's and IGWA's arguments in the A&B appeal, the Coalition adopts and incorporates by reference the response filed by the A&B Irrigation District

[23] Although the District Court refused to address the issue, the proper burdens and standards established by Idaho law apply equally to all Coalition members' senior water rights.

(*A&B Reply Brief* at pp. 25-39, filed September 16, 2011) (Supreme Court Docket No. 38403-2011).

In addition, like Judge Wildman in the A&B case, here the District Court properly followed established Idaho law, holding the agency's decision to distribute less water to TFCC's senior right to the heightened evidentiary standard. The District Court recognized this key holding in *AFRD #2* (Clerk's R. Vol. 7 at 1247, incorporating Judge Wildman's analysis by reference):

> On appeal, the Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards based on the application of principles unique to facial challenges. Integral to the Supreme Court's determination was the recognition that:
>
> > CM Rule 20.02 provides that '[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.' 'Idaho law' as defined by CM Rule 10.12 means '[T]he constitution, statutes, administrative rules and case law of Idaho.' Thus, the Rules incorporate by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules.'
>
> *Id.* at 873, 154 P.3d at 444. Accordingly, even though the CMR do not expressly address the burdens and presumptions the Director could still apply the CMR in a constitutional manner by including the constitutional burdens and presumptions. The Court then held that "**the Rules do not permit or direct the shifting of the burden of proof . . [r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules**." *Id.* at 874, 154 P.3d at 445 (emphasis added).

A&B Order at 27 (citing *AFRD #2*, 143 Idaho at 873-74) (emphasis in original).

The Supreme Court did not disturb the established burdens of proof and evidentiary standards for administration in *AFRD #2*. Indeed, the Court specifically noted that the CM

Rules, as written, "do not unconstitutionally force a senior water rights holder to re-adjudicate a right, nor do the Rules fail to give adequate consideration to a partial decree." *AFRD #2*,143 Idaho at 878.

Since the Court in *AFRD #2* expressly recognized that the burdens of proof and evidentiary standards that had been developed over the years were incorporated into the CM Rules, the entire foundation for the Ground Water Users' argument is flawed. The District Court properly interpreted *AFRD #2* and applied prior precedent in this case. Therefore, the Court should deny the Ground Water Users' cross-appeal.

Misreading binding precedent, IGWA further alleges that no Idaho case has addressed the required evidentiary standard to apply in the administration of water rights. *IGWA Br*. at 32-34. To the contrary, the standard has been specifically applied in the context of implementing (i.e administering) district court decrees in both surface and ground water right administration. *See Moe v. Harger*, 10 Idaho 302, 306 (1904) (affirming trial court's cross-injunctions restraining parties from interfering with each other's water rights established by the decree); *Silkey v. Tiegs*, 51 Idaho 344, 355 (1931) (referring enforcement of the decree and its "administrative" provisions to the state reclamation engineer, i.e. Director); *Silkey v. Tiegs*, 54 Idaho 126, 128-29 (1934) (affirming denial of appellants' requested relief since they did not prove by clear and convincing evidence that their increased groundwater diversions would not injure the senior appropriator).

Since the clear and convincing evidence standard applies in both surface and ground water administration contexts, it applies equally in conjunctive administration. Stated another

way, the law does not require a heightened standard in both surface to surface and groundwater to groundwater administration, and then allow a lesser standard when surface and ground water rights are administered together. Instead, the CM Rules incorporate the established burdens and standards, providing the required protection to senior surface and ground water rights in administration. CM Rules 10.12; 20.02. The Court should therefore reject IGWA's arguments.

Finally, IGWA's argument in favor of a lesser standard for administration fails to appreciate the critical personal interest and importance of water in an arid western state like Idaho. The Supreme Court has held that "[c]lear and convincing evidence is required by courts in fact-finding situations to protect important individual interests in civil cases." *Jenkins v. Idaho State Bar*, 120 Idaho 379, 383 (1991) (emphasis added); LEWIS, D. CRAIG, IDAHO TRIAL HANDBOOK § 10.13 (2d ed.) ("The [clear and convincing evidence] requirement may be imposed by statute or by courts when necessary to protect important individual interests.").

Water rights are real property right interests. *See* I.C. § 55-101; *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 (1983); *Clear Springs*, 252 P.3d at 78. This Court has specifically recognized the vital importance of our state's water resources. *Miles v. Idaho Power Company*, 116 Idaho 635-36 (1989) ("The water of this state is an important resource. Not only farmers, but industry and residential users depend upon it."); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904 (1990) ("Idaho's extensive agricultural economy would not exist but for the vast systems of irrigation canals and ditches which artificially deliver stored or naturally flowing water from Idaho's rivers and streams into abundant fields of growing crops. . . . This Court has long been cognizant of the crucial role which artificial water systems serve in this state.).

The fact that a water right represents a unique and important individual interest is further supported by the fact that clear and convincing evidence is required to prove abandonment, forfeiture, or adverse possession of a water right. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384 (1982); *Gilbert v. Smith*, 97 Idaho 735, 738 (1976).

In sum, the continued use and administration of a water right clearly falls within the "important individual interests" that requires the heightened protection established by prior case law. Notably, IDWR, the agency responsible for administering water rights, recognizes and supports the law in this regard. *IDWR Br.* at 34-35. The Ground Water Users' arguments present no valid reason to overturn the Court's precedent. Since the District Court properly followed the law, its decision on this issue should be affirmed. The Coalition respectfully requests the Court to deny the Ground Water Users' cross-appeals.

CONCLUSION

The Idaho Constitution, water distribution statutes, CM Rules, and well established precedent all protect a senior's right to beneficially use the quantity of water stated in a decree or license. Proper conjunctive administration requires the Director to apply the burdens and standards established by Idaho law.

Since the Director failed to apply the proper standards in creating the "minimum full supply" or "baseline" approach to administration, the Coalition respectfully requests the Court to set aside and remand the Director's decision on this issue. Finally, the Court should order a proper remand to ensure that continued conjunctive administration is lawfully guided by a single agency order.

Respectfully submitted this 28th day of October, 2011.

CAPITOL LAW GROUP PLLC

C. Thomas Arkoosh

Attorneys for American Falls Reservoir District #2

FLETCHER LAW OFFICE

W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of October, 2011, I served true and correct copies of the **SURFACE WATER COALITION'S REPLY BRIEF** upon the following by the method indicated:

Idaho Supreme Court Clerk of the Court P.O. Box 83720 451 W. State St. Boise, ID 83720	___ U.S. Mail, Postage Prepaid ✓ Hand Delivery ___ Overnight Mail ___ Facsimile ___ Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Facsimile ✓ Email
Randy Budge Candice M. McHugh T.J. Budge RACINE OLSON P.O. Box 1391 Pocatello, Idaho 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Facsimile ✓ Email
Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI, LLP 511 16th St., Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Facsimile ✓ Email
Dean Tranmer CITY OF POCATELLO P.O. Box 4169 Pocatello, Idaho 83205 dtranmer@pocatello.us	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Facsimile ✓ Email

Kathleen Marion Carr U.S. Department of the Interior P.O. Box 4169 Boise, Idaho 83706 kathleenmarion.carr@sol.doi.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
David W. Gehlert Natural Resources Section Environment & Natural Resources Division U.S. Department of Justice 1961 Stout ST. 8th Floor Denver, CO 80294 david.gehlert@usdoj.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Road Boise, Idaho 83706-1234 matt.howard@pn.usbr.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email
Mike Creamer Jeff Fereday GIVENS PURSLEY P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email

Travis L. Thompson