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DEPARTMENT OF
WATER RESOURCES

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND 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	Docket No. CM-DC-2010-001 **IGWA's Post-Hearing Brief**

Idaho Ground Water Appropriators, Inc., ("IGWA"), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, American Falls-Aberdeen Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District, submits this post-hearing brief pursuant to verbal instructions given by the Director at the conclusion of the hearing held June 6-9, 2022.

INTRODUCTION

Anytime the Department undertakes a review of the Methodology Order, the objective must be to improve its accuracy as a tool to administer surface and ground water resources in accordance with the Conjunctive Management Rules ("CM Rules"). In applying the CM Rules, the Idaho Supreme Court has instructed the Department to use the "best science available." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 813 (2011). Consequently, the Department has a duty to periodically review the Methodology Order, evaluate its performance, and make changes as appropriate to more accurately manage surface water and groundwater resources under the SWC delivery call in accordance with the CM Rules using the best science available.

The CM Rules were developed to bridge Idaho's different statutory schemes for managing surface water and groundwater. The prior appropriation doctrine applies in both contexts, but it applies differently due to their different hydrologic environments. River flows fluctuate considerably throughout each irrigation season and reset each winter from snowfall. By contrast, changes in aquifer levels occur slowly over multi-year periods. Surface water can be shepherded among water users through rivers, canals, and ditches in a matter of hours or days, whereas groundwater cannot. When a groundwater well is shut off, the effect emanates in all directions, it may take months or years for a senior-priority water user to realize additional water, and the senior may not need additional water when it finally arrives.

Given their different hydrologic properties, the Idaho Legislature adopted different schemes for applying the prior appropriation doctrine to surface water and groundwater. Surface water is distributed under Idaho Code § 42-607 by opening and closing headgates to shepherd the available supply to those entitled to receive it on any given day of the year. By contrast, aquifers are managed under the Ground Water Act based on "reasonable ground water pumping levels" designed to maximize beneficial use of the resources by allowing groundwater users to fully develop the resource so long as they do not overdraft the aquifer. Idaho Code § 42-226. If holders of groundwater rights overdraft the aquifer, priority determines which water rights must be curtailed to maintain a reasonable groundwater pumping level. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 802, 252 P.3d 71, 83 (2011) ("…with respect to ground water pumping, the prior appropriation doctrine was modified so that it only protects senior ground water appropriators in the maintenance of reasonable pumping levels in order to obtain full economic development of ground water resources.")

The CM Rules aim to bridge these different schemes. Under conjunctive management, delivery calls by senior surface water users are not controlled by the "reasonable pumping level" construct of the Ground Water Act, but nor are they entitled to curtail beneficial use of far more water than the senior needs, as stated in CM Rule 20.03: "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule." The Idaho Supreme Court has affirmed the balancing act required by the CM Rules: "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880 (2007) ("*AFRD2*").

What makes conjunctive management so problematic is the large amount of beneficial use of groundwater that must be curtailed to supply a relatively small amount of additional surface water to senior users. The prior appropriation doctrine was adopted not only because it protects the interests of prior appropriators, but also because it facilitates full development of the state's water resources. Misapplied conjunctive management can have the opposite effect by minimizing beneficial use of Idaho's water resources.

Courts have historically curbed the exercise of priority in circumstances where it would significantly impede full development of the state's water resources. In *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1917), a senior-priority water user was deprived of his ability to divert water from the Snake River because it would have prevented development of the Twin Falls Canal and the North Side Canal systems under junior-priority water rights. The court denied the senior's claim, holding that his appropriation "lacks one of the essential attributes of an appropriation—it is not reasonable." *Id*. at 118. The court explained:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water, in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres, at a loss of enough water to surface irrigate ten times as much by proper application.

Id. at 124-25. The doctrine of reasonable use is grounded in a long series of Idaho Supreme Court decisions. For instance, in *Poole v. Olaveson*, 82 Idaho 496, 502 (1960), the court held: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." Similarly, in *Farmer's Cooperative Ditch Co. v. Riverside Irrigation Distr.*, 16 Idaho 525, 525-36 (1909), the court held:

> Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water.

In keeping with the doctrine of reasonable use, the CM Rules do not allow seniors to simply call for their full decreed water right and then sit back while the Department curtails juniors. Rather, a conjunctive management call triggers analyses of how much water the senior reasonably needs to accomplish their beneficial use, whether the senior is using water efficiently, and reasonable use of the resource, among other things. In reviewing the Methodology Order, the Director must evaluate its performance against the objectives of the CM Rules and make changes using the best science available that will cause it to more accurately and effectively implement the CM Rules.

The last evidentiary hearing involving the Methodology Order occurred in 2008. The recent hearing reflects 15 years of experience along with new and better science and data. Some of the information presented at the hearing warrants immediate changes to the *Fifth Methodology Order*. Other information deserves further analysis by a technical working group charged with recommending improvements to be incorporated into the methodology at a future date. It is imperative that identified weaknesses in the methodology not go unaddressed simply because an improved process and better science is not ripe for immediate implementation.

LEGAL STANDARD

Implicit in the directive to use the best science available is an obligation to use the best data available. Yet, in some instances the *Fifth Methodology Order* does not use the best science or the best data due to a misperception by Department staff that it does not satisfy a clear and convincing standard of proof. In light of this, a review of applicable legal standards and burdens of proof is appropriate.

First, the Department has a statutory duty to equally guard the interests of both senior and junior water users when administering the State's water resources, as stated in the introductory sentence of Idaho's water code:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just

> apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. (Idaho Code § 42-101)

Second, the two bedrock components of the prior appropriation doctrine—priority and beneficial use—are co-equal. *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist., at al.*, 155 Idaho 640, 650 (2013) ("The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use"). Neither is superior to the other. There is no "clear and convincing" standard of proof favoring one over the other. The Department must give equal weight to both when administering the State's water resources.

Third, senior water users generally have a right to exercise priority and curtail junior water users, but "this is not an absolute rule without exception." *AFRD2*, 143 Idaho at 880. Seniors can only call for as much water as they need to accomplish their beneficial use when using water efficiently and without waste. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 524 (2012). A determination that the senior needs less than their full decreed rate of diversion requires clear and convincing evidence. 155 Idaho at 655.

Fourth, priority cannot be exercised in a manner that is unreasonable. The waters of Idaho are a state-owned resource, and the people of Idaho have an interest in seeing the state's water put to maximum beneficial use, as discussed above. The prior appropriation doctrine was adopted not only because it protects the interests of prior appropriators, but also because it facilitates the public's interest in achieving maximum utilization of the state's water resources. The doctrine of reasonable use guards this interest.

SUMMARY

Based on the evidence presented at the hearing, IGWA contends that the following changes to the *Fifth Methodology Order* should be implemented immediately:

- Use the best science available to determine actual irrigated acreage of SWC entities.
- Use the best science available to determine and account for supplemental groundwater use of SWC entities.
- Require SWC entities to annually submit an accurate GIS shapefile or other trustworthy analysis of actual irrigated acreage and supplemental groundwater use.
- Adjust the Baseline Year (BLY) to more accurately represent water demands of SWC entities without excessive material injury calculations.
- Apply the futile call doctrine to exclude from curtailment those groundwater rights for whom curtailment will provide no additional water to the SWC by the Time of Need.
- Implement a trim line to prevent an unreasonable exercise of priority.

In addition, the Director should reconvene a technical working group comprised of both Department staff and consultants for the parties, charged with further analyzing data and making recommendations to improve the methodology, including the following:

- Improve the end-of-season injury calculation to more accurately reflect actual injury.
- Develop a mechanism and process for Department staff and third party consultants to annually review the irrigated acreage and supplemental groundwater use information submitted by SWC entities.
- Develop a mechanism to account for project efficiencies based on real efficiency factors.
- Develop a mechanism to adjust the Forecast Supply (FS) formula to account for water accruing to the SWC from major tributaries to the Snake River below Heise, including the Henry's Fork, Willow Creek, Blackfoot River, Portneuf River, and Raft River basins.
- Develop an improved method of predicting FS for Twin Falls Canal Company.

ANALYSIS

Since the fundamental purpose of the Methodology Order is to calculate material injury, the principal goal of reviewing the Methodology Order must be to improve its accuracy in that regard. Any changes to the methodology should cause it to do a better job of calculating injury.

Evaluating the accuracy of the Methodology Order naturally requires a comparison of calculated injury with actual injury. Just because the Methodology Order calculates injury does not mean injury actually occurs, and vice versa.

Since Twin Falls Canal Company (TFCC) is usually the only SWC entity for which the Methodology Order predicts injury, TFCC must be the focal point of a comparison of calculated versus actual injury. As explained below, the *Fifth Methodology Order* significantly over-calculates injury for TFCC, in part due to errors and inaccuracies in the data used in the Methodology Order that can easily be remedied.

The *Fifth Methodology Order* should be revised to more accurately calculate injury. In addition, the change from a steady-state to a transient-state application of the ESPA Model (ESPAM) necessitates application of the futile call doctrine and the doctrine of reasonable use to protect the public interest in beneficial use of the ESPA in accordance with the CM Rules.

1. The *Fifth Methodology Order* should be revised to more accurately calculate injury.

As long as TFCC shareholders have enough water to grow the crops they desire to grow, they do not experience material injury. Undisputed evidence shows that TFCC has a very reliable supply of water, and that TFCC almost always delivers to its shareholders at least 5/8 inch per acre, which is enough to grow all crops customarily raised on the TFCC tract. Only in the most severe drought years is TFCC unable to deliver 5/8 inch.

By contrast, the *Fifth Methodology Order* calculates injury to TFCC almost every year. The injury calculations are so extreme that they bear little resemblance to reality. Therefore, revisions should be made to the *Fifth Methodology Order* to so that calculated injury more accurately reflects actual injury.

1.1 TFCC's annual water diversions have remained remarkably steady over the last half-century.

While the diversion of groundwater from the ESPA has contributed to declining reach gains to the Near Blackfoot to Neeley reach, diversions by TFCC have remained remarkably steady over the last half-century, as evident by TFCC's own diversion records. (Ex. 4, p. 7, Fig. 4.) Since 2010, TFCC diversions have actually trended upward. This demonstrates that declining reach gains have not generally diminished the water supply available to TFCC. This is because TFCC holds the most senior natural flow water right among all SWC entities. Declining reach gains have impacted the natural flow supplies of junior-priority SWC entities like Burley Irrigation District (BID) and Milner Irrigation District (MID) much more than TFCC; however, BID and MID hold large amounts of storage which has allowed them to absorb declining reach gains without experiencing material injury.

1.2 TFCC's longtime consultant and expert witness confirmed that TFCC has a reliable water supply.

TFCC's longtime consultant Dr. Charles Brockway, Jr. testified that TFCC is well known as having a reliable supply of water, owing to its most senior natural flow rights supplemented by storage water. As evidence of this, Dr. Brockway explained that there are relatively few supplemental groundwater wells within TFCC. If TFCC's water supply were unreliable, Dr. Brockway testified there would be many more supplemental groundwater wells.

1.3 TFCC shareholders can raise crops with 5/8 inch per acre without suffering material injury.

TFCC delivers water to shareholders on a per share basis, measured in miner's inches. The TFCC system was designed for one share per acre, but there are currently 10,000-20,000 more shares than irrigated acres, resulting in an average of around 1.1 shares per acre. The peak rate TFCC can deliver is 3/4 inch per share, but TFCC's base delivery is 5/8 inch per share. During severe drought TFCC has on occasion delivered 1/2 inch per share. (Ex. 332).

To be sure, it is easier to manage a canal with peak diversions. Peak diversions require little operational efficiency, whereas managing water more efficiently requires more care and attention. Consequently, TFCC, like all other canal companies, diverts its maximum authorized diversion rate when water is plentiful, even if its shareholders could grow their crops with less water when used efficiently. (Barlogi.)

When making a conjunctive management delivery call, however, senior users are not entitled to curtail juniors simply to enjoy the convenience of peak flows and easy operational management. Given the large amount of beneficial use of groundwater that must be curtailed to provide a comparatively small amount of additional to a senior surface user, the CM Rules require seniors use water efficiently before looking to curtail juniors. CM Rule 40.03 provides:

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

As explained below, the amount of water TFCC needs to raise crops without suffering material injury has not heretofore been determined. However, the record is clear and unequivocal that TFCC shareholders can raise crops on 5/8 inch per acre without suffering material injury.

(a) The amount of water TFCC needs to raise crops without suffering material injury has not been determined.

The Department's original material injury analysis considered, among other things, "average monthly headgate deliveries to the entity's members or shareholders (e.g., 5/8 inch)." *Order*, p. 31 (Feb. 14, 2005). Consequently, the original evidentiary hearing held in 2008 included evidence of the amount of water TFCC stockholders need to raise crops without suffering material injury. After considering the evidence, the hearing officer, former Idaho Supreme Court Justice Gerald Schroeder, made the following finding of fact:

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

Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, p. 53, 55. (April 29, 2008). On September 5, 2008, the Director issued the *Final Order Regarding the Surface Water Coalition Delivery Call* accepting the hearing officer's recommendation.

On appeal, the district court ruled that "senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR 042." *Order on Pet. For Jud. Rev.*, Gooding Cty. Case No. CV-2008-551, p. 26 (July 24, 2009). However, the court determined that the Director's finding that a "full headgate delivery" is 5/8 inch per acre exceeded his authority because TFCC's authorized diversion rate was to be decided in the SRBA. *Id*. at 31-32. On rehearing, the court clarified that while the SRBA court determines that maximum authorized rate of diversion under TFCC's water rights, the Department may determine under the CM Rules that TFCC needs less than its maximum rate to accomplish its beneficial use, but that such a determination must be supported by clear and convincing evidence. *Order on Pet. For Rehearing*, Gooding Cty. Case No. CV-2008-551, p. 7-8 (Aug. 23, 2010). Since the hearing officer did not indicate the evidentiary standard he applied to arrive at his 5/8 inch full headgate delivery finding, the district court remanded the matter to the Department to make that determination. *Id*.

The court's decision concerning the clear and convincing standard relied on a separate district court decision issued earlier that year in the A&B Irrigation District delivery call case. There, the court ruled that the decreed rate of diversion reflects a determination of beneficial use at the time of adjudication, but "there may be post-adjudication factors relevant to the determination of how much water is actually needed." *Memorandum Decision and Order on Pet. For Jud. Rev.*, Minidoka Case No. 2009-647, p. 30 (May 4, 2010). The court explained:

> The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and

> improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed. Year to year variations in water requirements also result from the types of crops that may be planted. The Idaho Legislature specifically acknowledged water users could reduce water requirements through the implementation of efficiencies and authorized the ability to expand irrigated acreage so long as the rate of diversion was not increased. See I.C. § 42-1426.

Id. at 30-31. The court noted also that "the rate of diversion for an irrigation water right sets a maximum rate of diversion to satisfy the peak water demand for the most water intensive crop grown in the region. In the event the senior is irrigating a less water intensive crop, the maximum rate of diversion may not be required." *Id*. at 30, fn. 11. The court then quoted a decision issued by the SRBA court stating:

> the quantity element of a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time … whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc.

Id. at 32.

Returning to the SWC case, after the district court issued its rehearing decision in August of 2010 remanding the 5/8 versus 3/4 inch issue, IDWR filed a motion for reconsideration stating: "As established in the Methodology Order, the Director is using 3/4 of an inch for TFCC diversions, instead of the stated 5/8 of an inch in his September 5, 2008 Final Order;" therefore, "the basis for the remand is moot." *Motion to Clarify / Motion for Reconsideration of Orders on Petitions for Rehearing*, Gooding County Case No. CV-2008-551, p. 3 (Aug. 26, 2010). Around that time, the Department had changed how it calculated material injury, switching from the "Minimum Full Supply" methodology to the "Reasonable In-Season Demand" methodology. The district court accepted the Department's representation. *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition's Motion for Clarification*, Gooding County Case No. CV-2008-551, p. 10 (Sep. 10, 2010). Accordingly, the Idaho Supreme Court did not address the issue on appeal, though it noted it in the procedural history. *In Matter of Distr. of Water to Various Water Rts. Held By or For Ben. of A & B Irr. Dist.*, 155 Idaho at 647 (2013).

The Methodology Order does not actually utilize a 3/4 inch headgate delivery, 5/8 inch delivery, or any other headgate delivery as part of its material injury determination for TFCC. Rather, it predicts material injury using a "Baseline Year" mechanism which is based on each SWC entity's gross diversion volume in a year or average of years with below-average precipitation, above-average ET, and unlimited water supply.

Since material injury under the Baseline Year mechanism is not tied to headgate deliveries, the parties ceased litigating whether TFCC shareholders can raise their crops with 5/8 inch per acre without suffering material injury. However, the parties foresaw that the issue would be

relevant in the future. Therefore, when TFCC's water rights were adjudicated in the SRBA, TFCC, IGWA, and Pocatello signed a stipulation in April of 2012 stating:

> a. Evidence relating to water use after November 19, 1987 was not at issue in the Adjudication. These water rights are decreed in the Snake River Basin Adjudication based on the extent of beneficial use that existed prior to or at the time of commencement of the Adjudication on November 19, 1987. The parties agree that issues related to conjunctive administration (including factors identified in IDAPA 37.03.11.42), as they exist after November 19, 1987, were not at issue in these subcases.
>
> b. The "diversion rate" element under each water right reflects the maximum authorized rate of diversion under each water right. However, the parties agree that crop water demand can vary over the course of an irrigation season, or from season to season, meaning the maximum authorized diversion rate may or may not be required over the entire course of a particular irrigation season.

Ex. 184, p. 2.[1]

IGWA is not presently raising the 5/8 inch headgate delivery as a means of changing or replacing the Baseline Year mechanism currently used in the Methodology Order to predict material injury. Rather, IGWA is raising it for the purpose of comparing how well the Methodology Order's material injury calculations correlates with actual injury. The Idaho Supreme Court has made clear that "evaluating whether a diversion is reasonable in the administrative context should not be deemed a re-adjudication." *AFRD2*, 143 Idaho at 878 (citing *Schodde*, 244 U.S. 107 (1912)).

(b) Clear and convincing evidence demonstrates that TFCC shareholders can raise crops on 5/8 inch per acre without suffering material injury.

The evidence is unequivocal that TFCC shareholders can fully irrigate their crops with 5/8 inch per acre without suffering material injury.

First, TFCC's shares of stock were issued on the basis that they provide a delivery rate of 5/8 inch per acre. When TFCC undertook to construct its canal system, it entered into a contract with the State Board of Land Commissioners stating that each share of stock provides a right to the delivery of 5/8 inch per acre when supplies permit: "The certificates of sale of water rights and the certificates of shares of stock of the Twin Falls Canal Company, Limited, shall each upon being issued to the purchaser or holder of land under the canal system, be made to indicate and define in the contract or certificate as the case may be, the amount of water, to-wit: One eightieth of a second foot allotted to each acre represented thereby." (Ex. 363, p. 7; Ex. 364)

Second, TFCC's internal policy documents clearly establish that 3/4 inch is the maximum capacity of the system and that 5/8 inch is the normal headgate delivery. TFCC's 1999 Management Plan states that "TFCC has always operated on the premise that the Company must deliver 5/8 m-in per acre constant flow so long as that supply is available." (Ex. 4166, p. 2.)[2]

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1 An SRBA Standard Form 5 (Stipulated Elements of a Water Right) incorporating this stipulation was filed with the SRBA Court on May 23, 2012, in Subcase Nos. 1-4, 1-10 and 1-209.

2 Ex. 4166 citation is found as a part of the final agency record on appeal in Gooding County Case No. CV-2008-551.

Likewise, TFCC's Operations Policy states: "The TFCC water right is 5/8ths of an inch per share. This includes an obligation to deliver 1/80th of a cubic foot per second for each share of stock when water is available." (Ex. 339, p. 2.); *State v. Twin Falls Canal Co*., 21 Idaho 410 (1911); *Twin Falls Land & Water C. v. Twin Falls Canal Co*., 79 F.2d 431 (9th Cir. 1935).

Third, TFCC leases storage to the Bureau of Reclamation for flow augmentation purposes on years when it delivers 5/8 inch per share. If TFCC shareholders suffer genuine injury with a 5/8 inch delivery, TFCC would not voluntarily lease storage to a third party.

Fourth, 5/8 inch per acre is ample to raise all crops grown by TFCC shareholders. TFCC's manager testified that shareholders typically take water continuously throughout the irrigation season beginning in April and ending in late September or October. Conservatively assuming a 5-month irrigation season and a delivery rate of 5/8 inch per acre, TFCC delivers 4.7 acre-feet per acre to the headgate of each shareholder. By comparison, the following table shows the volume of water needed to grow each crop customarily grown by TFCC shareholders, based on precipitation deficit data developed by the University of Idaho for the Twin Falls area.

Twin Falls 3SE (NWS – USC00109299)		
Precipitation Deficit Data		
Crop	Annual ET (a-f)	Growing Season ET (a-f)
Alfalfa - peak (no cutting effects)	3.8	3.84
Alfalfa - frequent cuttings	3.01	3.05
Sugar Beets	2.53	2.59
Field Corn - moderate season length	2.02	2.07
Silage Corn - truncated season	1.94	2
Sweet Corn - early plant	1.62	1.66
Sweet Corn - late plant	1.62	1.65
Potatoes - early harvest	1.55	1.6
Potatoes - late harvest	1.85	1.9
Grass Hay	2.97	3.07
Spring Grain - irrigated	1.8	1.93
Winter Grain - irrigated	1.99	1.92
Grass Pasture - high management	2.91	3.01
Grass Pasture - low management	2.32	2.41

All of this clearly demonstrates that TFCC shareholders can raise their crops on 5/8 inch without suffering material injury. The SWC offered no contradictory evidence.

1.4 The Methodology Order frequently calculates injury in years when TFCC delivers 5/8 inch or more per acre.

TFCC produced a chart showing the amount of water it has delivered to the headgates of its shareholders since 1990, showing at least 5/8 inch delivery throughout the entire irrigation season in all but five of the last 32 years. (Ex. 332.) By contrast, the Methodology Order frequently calculates material injury at the end of the irrigation during yeas when TFCC delivers

5/8 inch and even 3/4 inch per share for the duration of the irrigation season, as shown in the "November Actual Demand Shortfall" column of the following table which is a combination of the tables contained in Exhibit 837A at Attachment C and page 6 (Table 2-8):

Year	April BLY 06-08-12 (AF)	April BLY 2018 (AF)	July BLY 06-08-12 (AF)	July BLY 2018 (AF)	November Actual Demand Shortfall (AF)	TFFC inches per acre	Year
2000	30,183	126,125	0	0	0	3/4	2000
2001	179,947	334,970	160,472	200,546	243,565	***3/4, 5/8, 1/2***	***2001***
2002	42,800	131,308	17,381	45,136	31,217	5/8	2002
2003	10,124	93,902	43,808	80,241	0	5/8	2003
2004	199,101	364,958	223,032	264,426	264,340	***5/8, 1/2***	***2004***
2005	114,916	228,241	0	0	0	5/8	2005
2006	0	0	365,880	388,939	23,792	3/4	2006
2007	56,914	152,855	201,036	253,185	289,065	5/8	2007
2008	0	15,138	46,525	55,334	0	3/4	2008
2009	0	34,109	0	0	0	3/4	2009
2010	94,957	190,898	0	0	0	3/4	2010
2011	0	0	0	0	0	3/4	2011
2012	0	53,778	69,066	92,125	139,524	3/4, 5/8	2012
2013	28,802	110,912	114,058	154,132	22,588	3/4, 5/8	2013
2014	0	0	0	0	0	3/4, 5/8	2014
2015	88,959	184,901	107,418	138,684	92,246	3/4	2015
2016	44,163	111,457	21,271	44,330	7,853	3/4	2016
2017	0	65,382	0	0	0	3/4	2017
2018	0	44,805	0	0	10,996	3/4	2018
2019	20,943	88,237	0	0	0	3/4	2019
2020	0	59,101	0	0	0	3/4	2020
2021	40,491	126,102	162,873	194,139	190,816	***3/4, 5/8, 1/2***	***2021***
2022	162,613	313,446	52,771	84,036	276,551	***5/8, 1/2***	***2022***

No adjustments are made in the *Fifth Methodology Order* to improve the accuracy of the end-of-season material injury calculation. Evidence presented at the hearing shows the overcalculation is due in part to errors or inaccuracies in the data in the data used in the Methodology Order, as discussed below. Some of these errors can be corrected immediately to improve the accuracy the Methodology Order; others should be assigned to the technical working group for further analysis.

1.5 The *Fifth Methodology Order* generates extreme pre-season and mid-season injury predictions that bear little resemblance to reality.

Whereas the end-of-season calculation is intended to reflect actual injury, the Methodology Order intentionally overpredicts Demand Shortfall (DS) in April (Step 3) and July (Step 6) by using above-average water demand for the Baseline Year (BLY) and below-average water supply as the Forecast Supply (FS). These biases compound to aggressively over-predict DS. The *Fifth Methodology Order* takes the overprediction to new heights by adopting a new BLY that is much more aggressive than the BLY used in prior iterations of the Methodology Order.

In addition, errors and inaccuracies in the data used in the methodology cause it to overpredict DS even further. The result is a *Fifth Methodology Order* that generates extreme overpredictions of DS that bear little resemblance to reality. As shown in the above table, a hindcast of the *Fifth Methodology Order* applying it to the time period 2000-2022 shows it generating DS predictions in April (Step 3) and July (Step 6) in 20 out of 22 years, even though

TFCC rarely suffers injury in reality. In most of those years, the curtailment would shut off water to every groundwater right from the ESPA—farmers, cities, food processors, and others.

The above table demonstrates that the *Fifth Methodology Order* is far out of balance with the objectives of the CM Rules. This is reinforced by the fact that it generated a massive curtailment in 2023 despite snowpack being far above average and a reservoir system expected to fill or nearly fill. Nobody familiar with water supplies in the Upper Snake River Basin believes there is any legitimate risk of injury to TFCC this year.

1.6 Evidence presented at the hearing identified several solutions that will improve the accuracy of the *Fifth Methodology Order*.

Fortunately, there are solutions. The Methodology Order can become more accurate at predicting material injury by (i) adjusting the BLY to correlate with hydrologic conditions represented previously by the BLY, (ii) adjusting the FS to account for inflows from other tributary basins, (iii) developing an improved regression model to forecast water supply for TFCC, (iv) using actual irrigated acreage to calculate material injury, (v) accounting for supplemental groundwater use, and (vi) developing a method of calculating project efficiency based on real efficiency factors.

(a) Baseline Year (BLY).

The *First Methodology Order* utilized 2006 and an average of 2006 and 2008 ("06/08") as a BLY. 2006 BLY represented 97% of the 2000-2008 total SWC diversions, and the 06/08 BLY represented 100% of the average 2000-2008 total SWC diversions. Both 2006 and the 06/08 average were determined by the Department to be an appropriate BLY. (Ex. 837A, p. 13.)

The *Third Methodology Order* updated the BLY based on data from 2009-2014 data, with the Department selecting average diversions in 2006, 2008 and 2012 as the BLY, resulting in a BLY equivalent to 101% of average diversions from 2000-2014. *Id*. The *Fifth Methodology Order* adopts a single year of diversions in 2018 as the BLY, pushing the BLY to 104% of average diversions from 2000-2021. For TFCC, diversions for 2018 are 106% of the average 2000-2021 diversions.

The difference between 101% and 104% or 106% BLY is far more consequential than one might expect, adding 96,000 acre-feet of predicted DS in April. (Ex. 837A, p. 18.) This is a significant reason why the *Fifth Methodology Order* has become far less accurate at predicting injury than the *Fourth Methodology Order*.

2018 is a poor representation of above-average water demand of the SWC because it falls on the extreme end of the spectrum for precipitation. For years from 1992-2021, 2018 was the only irrigation season where there was zero precipitation from July to September.

It is also significant that the Methodology Order creates a "positive feedback loop" that incentivizes SWC entities to divert as much water as possible in order to elevate their average diversion volumes, which in turn generates a higher BLY, which in turn requires junior water users to provide more mitigation to the SWC to avoid curtailment. (Sullivan.) Not surprisingly, TFCC diversions have trended upward in recent years, forcing the BLY upward. *Id.*

The 2018 BLY is not the only option. As shown in Table 2-4 of Exhibit 837A, a BLY of 06/18 is more consistent with the average 2000-2021 BLY selection criteria values than a BLY of 2018 or 2020. (Ex. 837A, p. 19.) This change to the Methodology Order can be implemented immediately and will improve its accuracy in predicting material injury.

(b) Forecast Supply (FS).

The Methodology Order predicts water supply to the SWC based on flows at Heise Gauge on the South Fork of the Snake River near Ririe, without accounting for inflows from other major tributary basins such as the Henry's Fork, Willow Creek, Blackfoot River, Portneuf River, and Raft River. As of April 3, 2023, snow water equivalent in the Willow Creek basin was 178% of normal, the Blackfoot basin was 186% of normal, Henry's Fork Bains at 124% of normal, and the Portneuf basin 216% of normal, whereas the Upper Snake Basin above Palisades was at 120%. (Ex. 366.) In years like 2023 when the unaccounted-for tributaries have much higher snowpack than the headwaters of the South Fork, the Methodology Order significantly underpredicts actual water flows available to the SWC, which results in an overprediction of DS.

The Director should instruct the technical working group to evaluate incorporation of other major tributaries in the FS formula in order to improve the accuracy of the Methodology Order's DS calculations.

The Director should also instruct the technical working group to take action to improve the regression model used to forecast water supply to TFCC. The current model has a degrading R^2 value, decreasing from 0.86 in 2014 to 0.72 in 2022. R^2 values are a standard statistical tool used to quantify the predictive power of a model. (Sigstedt; Anders.) R^2 values range between one (1) and negative one (-1), with numbers approaching either representing better model predictions. *Id.* The decreasing R^2 value in the TFCC model means that the predictive power of the TFCC FS model is getting worse over time. *Id.* Given the continued, persistent decrease in R^2 values on the TFCC model, it is unlikely to improve in future years. (Sigstedt.)

The TFCC model has been a concern since at least 2015 when Sophia Sigstedt provided recommendations to the Department for improving the methodology's natural flow models. (Ex. 837A, p. 77). At that time, Ms. Sigstedt presented an alternative forecast model approach that should be investigated. *Id.* Department staff have been concerned with the TFCC forecast for several years, but no action has been taken to explore Ms. Sigstedt's proposal or otherwise improve the regression model for TFCC.

The *Fifth Methodology Order* states: "The forecasting techniques will be revised based on updated data and the forecasting techniques may be revised when improvements to the forecasting tools occurs." (Ex. 300, p. 18). Accordingly, the Director should task the technical working group with developing a more accurate and reliable forecast supply model for TFCC.

(c) Irrigated Acreage.

TFCC's water rights authorize the irrigation of 196,162 acres. However, this reflects irrigation as of the commencement of the SRBA on November 19, 1987. TFCC admits that fewer acres are irrigated today. Thus, the clear and convincing standard has been met that TFCC is not irrigated its full decreed acreage.

At the first evidentiary hearing held in 2008, a manual review of the TFCC project revealed a total of 183,589 irrigated acres. (Ex. 3007A[3]; Ex. 837A, p. 8.) From 2010-2014, the Department calculated material injury for TFCC based on this figure. (Sigstedt; Ex. 837A, p. 8.) Since 2015, the Department has assumed 194,732 irrigated acres based on a GIS shapefile that TFCC generated in-house with no collaboration with IDWR or the groundwater users directly

[3] Ex. 3007A was admitted to the agency record in this matter during the original 2008 delivery call and is contained in the final agency record on appeal in Gooding County Case No. CV-2008-551.

affected by the issue. (Sigstedt). The TFCC shapefile has never been subject to scrutiny in an evidentiary hearing. At the recent hearing, it was made clear that the 2013 shapefile was created with a broad brush that captured all land that could theoretically be irrigated, including many homes, farmsteads, subdivisions and other lands that are not in fact irrigated. Thus, the 2013 TFCC shapefile captures a gross acreage figure that is far greater than actual irrigated acreage within TFCC.

IDWR maintains Irrigated Lands data sets used in the ESPA Model to calculate irrigated acreage which were developed using a much more precise process. The 2011 Irrigated Lands data set calculated 179,486 irrigated acres for TFCC. (Ex. 928, at p. 19.) The 2017 Irrigated Lands data set calculated 180,956 acres. *Id*. The 2021 METRIC data used in ESPAM is also more precise than TFCC's shapefile and shows 179,486 irrigated acres. *Id.* at p. 16. The 2017 and 2021 data sets are more recent than the 2013 shapefile. Jennifer Sukow testified that these data sets represent the best science available to determine actual irrigated acreage, and this is the data used in ESPAM for purposes of calculating curtailment under the Methodology Order.

While the Irrigated Lands and METRIC datasets consistently calculate around 15,000 fewer irrigated acres than TFCC's 2013 shapefile, the acreage figures cited above (179,486 and 180,956) still overstate actual irrigated acreage because they encompass both irrigated land and semi-irrigated land (subdivisions, etc.).

Matt Anders testified that he declined to use the best science available and the best data available because he did not believe it satisfies the "clear and convincing" standard of proof. This is mistaken. Once a junior proves that a senior is not irrigating the full number of acres, the Department must use the best science available to determine actual irrigated acreage.

The SWC could not defend their 2013 shapefile as accurately representing actual irrigated acreage. Instead, TFCC's manager and its expert Dr. Brockway, Jr. argued that TFCC has a legal obligation to deliver water to all shares of stock in the company, and the Department should therefore assume that every acre with appurtenant shares is fully irrigated regardless of whether the land is actually irrigated. TFCC's position is untenable and contradictory to the fundamental premise of the CM Rules and the prior appropriation doctrine that a senior can only call for water that will in fact be applied to beneficial use.

Remarkably, TFCC has done nothing to accurately track irrigated acreage in its surface area. It does not maintain a map or record book of any type. TFCC annually reports irrigated acreage to IDWR under Step 1 of the Methodology Order, but there is no data or analysis to support it. Not because TFCC lacks the ability to maintain an accurate GIS shapefile or other database of actual irrigated acres. Other canal companies do this. Water users having water rights with a permissible place of use do this. But because it benefits TFCC to not maintain an accurate inventory of irrigated acreage.

Neither IGWA nor other groundwater users have access to TFCC's water delivery data, making it very difficult if not practically impossible for them to analyze actual irrigated acres. Instead, they must trust TFCC to provide an honest accounting of irrigated acreage.

To improve the accuracy and reliability of the Methodology Order, the Director should remove the 5% irrigated acreage threshold from the Methodology Order and require SWC entities to annually submit an accurate GIS shapefile or other reliably documentation of actual irrigated acreage. The Director should also direct the technical working group to develop a mechanism to review the annual submissions of SWC entities, as contemplated by the Department in 2015. (Ex. 837A, p. 56.)

Until that is done, the Director should use the most recent Irrigated Lands data set or

METRIC data set to determine actual irrigated acreage of SWC entities. This course of action is warranted under the clear and convincing standard of proof because the evidence is undisputed that (i) TFCC is not irrigating all of its decreed acres, (ii) TFCC's 2013 shapefile was relatively imprecise and captures many acres that are not actually irrigated, and (iii) the Irrigated Lands data set and the METRIC data set represent the best science available.

(d) Supplemental Groundwater Use.

In 2015, Department staff recommended that a procedure be developed for reviewing irrigated land data self-reported by SWC entities and accounting for supplemental groundwater use. (Ex. 837A, p. 9.) The recommendation notes that "There was insufficient time for the committee to evaluate [supplemental ground water use]" but that the Department committee recommended reviewing this issue. *Id*. at 56. Eight years later, the *Fifth Methodology Order* states: "At this time, the information submitted or available to the Department is insufficient to determine the extent of supplemental irrigation on lands within the service areas of SWC entities." (Ex. 300, p. 10). Matt Anders testified that they performed no additional analysis or review to address supplemental ground water use since 2015.

TFCC's manager and expert consultant Dr. Brockway, Jr. both testified that there is some supplemental groundwater use within TFCC. IGWA does not have the ability to accurately evaluate supplemental groundwater use for the same reason that it cannot accurately evaluate surface water irrigated acres—because TFCC holds the surface water delivery data. Unless the Department requires TFCC to disclose this data or provide a report of supplemental groundwater use, the Methodology Order will continue to assume there is no supplemental groundwater use and, as a result, overpredict DS.

The Department has a database used in the ESPA Model that assigns a groundwater fraction to mixed-source lands. (Sukow.) As of today, this is the best science and data available to document supplemental groundwater use. The Department should utilize this data when calculating material injury, and task the technical working group with developing a method to reliability track supplemental groundwater use.

(e) Project Efficiency.

CM Rule 42.01.d requires the Director, when determining material injury under the CM Rules, to consider "the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application."

Conveyance efficiency is based primarily on canal seepage and evaporation. The Methodology Order, however, does not evaluate such factors. Instead, it calculates efficiency simply as the product of crop water need divided by gross diversions. If CWN stays constant and diversions go up, the Methodology Order calculates lower efficiency, and vice version.

This approach is problematic because it makes no adjustment for real efficiency improvements. TFCC's manager testified that the company has made major efficiency improvements, including large lining projects. The Methodology Order makes no adjustment as a result of such improvements. Further of issue is the Department's use of total SWC diversions to calculate project efficiency. The *Fifth Methodology Order* states that Project Efficiency is CWN divided by Q_D. Q_D is defined as "irrigation entity diversion of water *specifically put to beneficial use for the growing of crops* within the irrigation entity." (Ex. 300, p. 13) (emphasis added). The

Department currently does not determine what portion of total SWC diversions are specifically put to beneficial use for the growing of crops. (Brockway).

The Director should direct the TWG to develop a mechanism to track real canal efficiency based on real efficiency factors.

2. The *Fifth Methodology Order* should be amended to apply the futile call doctrine.

One reason curtailment is so excessive under the *Fifth Methodology Order* is because it fails to apply the futile call doctrine, despite CM Rule 20.04 stating: "The principle of the futile call applies to the distribution of water under these rules." The CM Rules defined a "futile call" as "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource."

The futile call doctrine has a long history in Idaho. Since at least 1904 it has been applied to surface water administration. *Cartier v. Buck*, 9 Idaho 571, 75 P. 612, 613 (1904); *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904). In applying the futile call doctrine, courts have noted that futile call "is a well established part of the prior appropriation doctrine." Order on Pet. for Jud. Rev., at 21, *Clear Springs Foods, Inc. v. Spackman*, No. 2008-0000444 (Gooding Cnty. Dist. Ct. Idaho June 19, 2009) (citing *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976); *Martiny v. Wells*, 91 Idaho 215, 419 Idaho 470 (1966); *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921); *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904)).

At the hearing, testimony confirmed that IDWR continues to apply the doctrine as between surface water users. For example, Tony Olenichak testified that the doctrine is applied every year in the Teton Basin when the tributaries to the main stem of the Teton River lose their surface water connection. He explained that if shutting off diversions on a tributary stream does not cause surface water to reach the main stem within 5-7 days, the futile call doctrine takes effect and junior users are allowed to divert water out of priority.

Mr. Olenichak explained that the reason tributaries in the Teton Basin lose a surface water connection is because the surface flow in the tributary streams sinks into the ground through gravelly soils. Much if not all of this water flows underground in the shallow aquifer until it daylights via springs along the main stem of the Teton River. Nonetheless, the subsurface connection does not preclude application of the futile call doctrine.

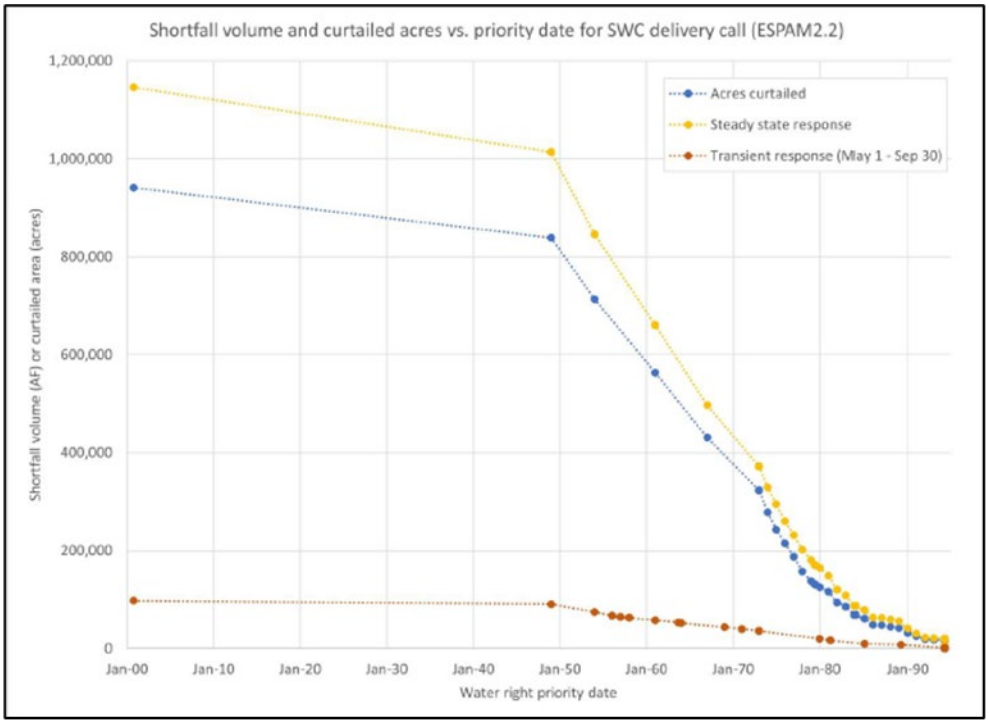
As a minimum, the futile call doctrine must be applied to the SWC delivery call to preclude curtailment of groundwater rights for whom curtailment would provide no additional water to the SWC by the Time of Need. However, the doctrine has historically not been so strict. By definition, it also includes circumstances where curtailment would be wasteful. Indeed, in surface water systems the doctrine takes effect even when the senior would receive a small amount of water via underground connectivity.

Undisputed evidence at the hearing shows that curtailment of groundwater pumping within Carey Valley Ground Water District , Madison Ground Water District, and Henry's Fork Ground Water District will provide zero additional water to the SWC at the Time of Need, and curtailment of groundwater pumping within North Snake Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, and Bonneville-Jefferson Ground Water District will provide essentially no additional water to the SWC when compared to the magnitude of curtailment within those districts. (Ex. 837A, p. 43.)

Based on undisputed evidence, the Director should immediately implement the futile call doctrine in an amended *Fifth Methodology Order*.

3. The *Fifth Methodology Order* should be amended to apply CM Rule 20.03 and prevent the unreasonable exercise of priority by SWC entities.

The change from a steady-state to transient-state model means that exponentially more acres of farmland will be curtailed for each acre-foot of Demand Shortfall calculated under the *Fifth Methodology Order*, as shown in Exhibit 905 cited below. This massive shift requires the Department to revisit the doctrine of reasonable use as set forth in CM Rule 20.03: "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule."



Comparison of priority dates calculated for April DS Forecasts (May 1 Curtailment), Ex. 90, p. 13.

Courts have historically curbed the exercise of priority in circumstances where it would significantly impede full development of the state's water resources. Ironically, the seminal case involved development of the Twin Falls and North Side canal systems. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1917). In *Schodde*, a senior-priority water user's ability to divert water from the Snake River was nullified by development of the Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) diversions. The senior sued, but the court denied their claim, holding that the senior's appropriation "lacks one of the essential attributes of an appropriation—it is not reasonable." *Id*. at 118. The court explained:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water, in the interest of agriculture and home building, it will not do to

> say that a stream may be dammed so as to cause subirrigation of a few acres, at a loss of enough water to surface irrigate ten times as much by proper application.

Id. at 124-25. Were it not for the sideboard of reasonableness imposed upon the exercise of priority, TFCC and NSCC would not exist. Now, however, the shoe is on the other foot. It is TFCC that desires to exercise priority in a manner that would eliminate ten times as much water as would accrue to TFCC from curtailment.

Moreover, this is not a situation where TFCC will go without water in the absence of curtailment. TFCC's water supply consists primarily of "base flow" from the Snake River. While reach gains from the ESPA have declined since 1980, the decline has had little if any impact on TFCC's water supply. TFCC's expert, Dr. Brockway, testified that diversions have remained steady over the last 46 years. Thus, the decline in reach gains does not appear to have affected TFCC's water supply. The decline presumably affected other SWC entities who have junior-priority natural flow rights but much higher storage reserves than TFCC which have enabled them to absorb declining reach gains without experiencing material injury.

In all but four of the last 46 years, TFCC's annual diversion volume has stayed within 75,000 acre-feet, or seven (7) percent, of average. Even in the most extreme drought year TFCC's diversion volume was within 151,000 acre-feet, or 14 percent, of average. (Ex. 4, p. 6-7). Thus, even on the occasion when the methodology order accurately predicts a DS, curtailment of hundreds of thousands of acres of groundwater irrigated farmland will do no more than increase TFCC's water supply by a few percentage points.

It strains credulity to think it reasonable to exercise priority in a manner that curtails ten or fifty times more water than TFCC would receive from curtailment, especially when TFCC will receive nearly full supply of water without curtailment, and when a shortfall can be remedied through more efficient water conveyance and usage practices.

4. Due Process and the Idaho Administrative Procedures Act.

IGWA maintains that Director violated due process and the Idaho Administrative Procedures Act by (i) failing to hold a hearing before issuing the *Fifth Methodology Order*, (ii) rushing into an after-the-fact hearing without providing adequate time for groundwater users to fully analyze and be prepared to fairly address all components of the *Fifth Methodology Order*, (iii) denying discovery of information relevant to the *Fifth Methodology Order*, (iv) denying the groundwater users subpoena of Mathew Weaver, and (v) refusing to allow an offer of proof of evidence that would have been submitted through Mr. Weaver. In support of this position, IGWA incorporates by reference *Ground Water Districts' Brief in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application for Order to Show Cause* filed May 19, 2023, in Ada County Case No. CV01-23-08187.

The methodology order defines a nine-step process of water rights administration under the SWC delivery call. While implementation of the process is inherently time-sensitive to account for contemporary water supply conditions, any review and amendment of the process is not time-sensitive. Development of the first methodology order was urgent because there was no prior method in place for administering water rights under the SWC call, but this is not true for subsequent changes to the methodology. The record is undisputed that the Department could have held a hearing *before* issuing the *Fifth Methodology Order*.

Failing to hold a hearing first skews the process because any significant changes made to the *Fifth Methodology Order* after-the-fact is evidence that the initial order was mistaken. This

naturally creates pressure on the Department not to make any significant changes after-the-fact, particularly where the decision has enormous consequences. It would be extremely difficult for any human to admit an error that wrongly exposed hundreds of thousands of acres of farmland to curtailment and forced junior-priority groundwater users to needlessly spend millions of dollars renting storage for mitigation.

When the decision is made before a hearing is held, the evidence presented after-the-fact can no longer be viewed by the decisionmaker in a neutral manner, at least subconsciously, but with a slant aimed to justify the original order. It is human nature.

The decision to not hold a hearing before issuing the *Fifth Methodology Order*, combined with the decision to keep certain types of information out of the record, has fostered distrust by those affected by the order and undermined the credibility of the Department. Whether or not the Department has something to hide, "the coverup is worse than the crime."

The best way to restore trust would be for the Department to vacate the *Fifth Methodology Order* and initiate a transparent, collaborative process for reviewing and analyzing the methodology, followed by a hearing before issuances of an amended methodology order. The evidence presented at the recent hearing provides a solid foundation for this type of process. In the meantime, the Department can proceed with water rights administration under the *Fourth Methodology Order*.

The second best way to restore trust would be to immediately change those components of the *Fifth Methodology Order* for which the evidence clearly warrants a change, as indicated above, and initiate a transparent, collaborative process for further analyzing those components which require further analysis.

CONCLUSION

For the foregoing reasons, IGWA respectfully requests that the Director amend the Fifth Methodology Order and issue instructions to the Department's technical working group as outlined above in the Summary section of this brief.

DATED this 16th day of June, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:

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