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

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

Docket No. CM-DC-2010-001

**SURFACE WATER COALITION'S  
POST-HEARING BRIEF**

COME NOW, 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 (“Surface Water Coalition” or “Coalition”), by and through counsel of  
record, and hereby submits its post-hearing brief in response to the Director’s instructions and  
request at the close of the administrative hearing held June 6-9, 2023.

The Director held an administrative hearing on the April 21, 2023 *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Fifth Order*”) (Ex. 300) and the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“*April As Applied Order*”) (Ex. 301) on June 6-9, 2023. Various parties had filed requests for hearing and identified statements of issue to be addressed. At the hearing, the Director heard testimony from various lay and expert witnesses and admitted additional exhibits to assist in the review.

At the close of the hearing the Director identified certain questions for the parties to address in post-hearing briefing including:

- 1) Who bears the burden regarding uncertainty in the information presented (i.e. IDWR, seniors, juniors)?
- 2) What have the courts told us and what are those standards?
- 3) What is the appropriate due process for this type of hearing?

The Director recognized that this proceeding involves an on-going delivery call and that material injury has already been determined. The Director noted that there is a presumption that a senior water right holder is entitled to water pursuant to its decree and that groundwater pumping in the ESPA depletes flows to the Snake River that supplies the Surface Water Coalition’s senior water rights. The Director further noted that the methodology order is the Department’s implementation of the conjunctive management rules (“CM Rules”) to evaluate water use by the senior and determine whether some adjustment is appropriate pursuant to the “clear and convincing evidence” standard. Finally, due process must take these factors into account. This post-hearing brief addresses those questions in context as well as the updates to the Fifth Order and additional evidence relevant to the April As Applied Order.

## I. Burden of Proof in Conjunctive Administration

The Idaho Supreme Court affirmed the burden of proof and evidentiary standard to apply in conjunctive administration cases in *A&B Irr. Dist. v. Spackman*, 153 Idaho 500, 284 P.3d 225 (2012). In that decision the Court held:

It is Idaho’s longstanding rule that proof of “no injury” by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administering agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

155 Idaho at 524, 284 P.3d at 224.

The Court also recited the district court’s reasoning behind this standard in water right administration which provides further insight into its basis:

The application of the clear and convincing standard of proof only makes sense from a common sense perspective. If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. In making a determination of whether or not to regulate juniors, the Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use. If the Director regulates juniors to satisfy the senior’s decreed quantity there is no risk of injury to the senior. However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director’s determination is incorrect. There is no remedy for the senior if the Director’s determination turns out to be in error and the senior comes up short of water during the irrigation season. **Any burden of this uncertainty should be borne by the junior** . . . [I]f the Director’s determination is only based on a finding “more probable than not.” The senior’s right is put at risk and the junior is essentially accorded the benefit of uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

155 Idaho at 517, 284 P.3d at 242 (emphasis added).

The above conclusions have guided conjunctive administration in Idaho for well over a decade now. The Director has expressly acknowledged the same in the Fifth Order. *See* Ex. 300 at 33, ¶ 11. The baseline year, its criteria, and subsequent adjustments to in-season demand, take

this standard into account. Therefore, in response to the Director’s question it is clear that Idaho courts have placed the burden of “uncertainty” squarely upon junior appropriators for purposes of water right administration. If the Director is unsure as to certain questions, and juniors are going to receive the benefit of out-of-priority diversions, then those juniors must prove defenses by the heightened standard to protect the seniors in times of shortage.

## **II. Director’s Updates to Methodology in the Fifth Methodology Order**

The Director first derived the framework for the methodology in the spring of 2010. The original methodology was challenged and litigated through judicial review. *See Memorandum Decision and Order on Petitions for Judicial Review*, Gooding County Dist. Ct., Fifth Jud. Dist., Consolidated Case No. CV-2010-382 (Sept. 26, 2014) (“2014 Order”).<sup>1</sup> No party appealed that decision to the Idaho Supreme Court. Since that decision the Director has issued additional updates to the methodology through amended orders. The Fifth Order incorporated new data (2015-2021) not available when the Fourth Order was issued in 2016, and identified the following updates in response.

### **A. Baseline Year**

The methodology’s baseline year “is a year or average of years when irrigation demand represents conditions that predict need in the current year of irrigation at the start of the irrigation season.” *Fifth Order* at 3, ¶ 7. A baseline year “should represent a year(s) of above average diversions . . . and should also represent a year(s) of above average temperatures and reference ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors . . . [and] actual supply should be analyzed to assure that the BLY is not a year of limited supply.” *Id.* at 3-4, ¶ 9. The criteria for selecting a baseline year

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<sup>1</sup> A full copy of the court’s decision is in the record attached as Ex. A to the SWC’s *Motion to Limit Scope of Hearing* (June 5, 2023).

has not changed since the Director issued the *Second, Third, and Fourth Orders*.<sup>2</sup> However, what has changed is the number of years the Director has available to analyze against that criteria. *See Fifth Order* at 11 (“the years 2000-2021 were considered for the BLY selection”).

As a result of the updated data, the Director found that “BLY 06/08/12 no longer satisfies the presumption criteria that total diversions in the BLY should exceed the average annual diversions.” *Id.* Consequently, the Director concluded that “total diversions for 2018 adequately protect senior water rights when predicting the demand shortfall at the start of the irrigation season and selects 2018 as the BLY.” *Id.* at 12, ¶ 27. IDWR staff recommended changing the baseline year to 2018 in its December 23, 2022 staff memorandum. Ex. 914. The Ground Water Users dispute the use of 2018 and the Director’s criteria for a baseline year in the methodology. Various positions were advanced advocating for an “average” year of diversions. *See generally*, Exs. 347A; 837A. The use of an “average” year was previously rejected by the District Court:

The Director did not err in his intentional adoption of a baseline year based on above average temperatures and evapotranspiration and below average precipitation. The Court agrees that use of such data is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition’s rights. The arguments set forth by the City of Pocatello and IGWA that the Director must use data associate with an average year fail to take into account the legal limitations placed on the Director in responding to a delivery call. . . . As set forth above, using data associated with an average year in order to administer to less than the full decreed quantity of the Coalitions’ water rights would not meet a clear and convincing evidenced standard. Therefore, the arguments set forth by IGWA and the City of Pocatello are unavailing.

2014 Order at 33-34.

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<sup>2</sup> The Director has updated the baseline year before. In 2016, the Director updated the baseline year from the 06/08 average used in the *Second Order* to a new average of 06/08/12 because at that time “the 06/08 diversions are no longer above average.” *See Fourth Order* at 11.

The use of 2018 as a baseline year is further supported by the data showing increased water demand in recent years. For example, since 2012 seven out of ten years have experienced below average growing season precipitation. *See Fifth Order* at 4. Over that same period nine out of ten years have experienced above average number of growing degree days. *See id.* at 7. Coupled with increases in higher consumptive use crops like corn and alfalfa, it is clear that the Coalition has witnessed increased water demands from their shareholders and landowners.<sup>3</sup> *See generally* Ex. 1 (pp. 4-9); Ex. 4 (pp. 7-11); *Barlogi Test*. Whereas junior groundwater users have the benefit of a firm water supply every year, it is appropriate to guard against dry and hot conditions for the senior by using the criteria selected by the Director. The 2018 baseline year is only one of two years that fit the methodology criteria and therefore it was appropriate for the Director to update the methodology. *See* Ex. 4 (p. 15).

**B. Transient Use of ESPAM**

The Eastern Snake Plain Aquifer Model (ESPAM) Version 2.2 has been adopted by the Eastern Snake Plain Hydrologic Modeling Committee (ESHMC) and has been used by IDWR in conjunctive administration, including in response to the Coalition's delivery call. *See* Ex. 3 (p. 3); *see also, Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011). Although certain consultants raised questions concerning ESPAM 2.2, the juniors did not carry their burden to show that the model is unreliable or cannot be used for conjunctive administration. *See e.g. Final Order* at 24-25 (Docket No. AA-WRA-2021-001) (June 28, 2021) (Director noting that junior ground water users carried the burden to prove by clear and convincing evidence that groundwater model could not be used for administration).

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<sup>3</sup> For purposes of the CWN crop mix calculator, IDWR should go back and adjust each year once that data becomes available to ensure the 3-year average is up to date. *See* Ex. 4 (pp. 8-9).

The Director identified how the ESPAM groundwater model has been and can be run to identify a curtailment date for junior groundwater rights causing material injury. *See Fifth Order* at 29-30. If a ground water right is not covered by an approved and effectively operating mitigation plan, then curtailment is the Director’s only remedy to prevent material injury to the senior right. *See* CM Rule 40.05.

A steady-state analysis analyzes the impact of curtailment on the aquifer and connected river reaches long-term (i.e. 50 years), whereas a transient analysis predicts the timing of changes that would occur during the irrigation season. *See id.* at 30. The Director acknowledged that only “9% to 15% of the steady state response is predicted to accrue to the near Blackfoot to Minidoka reach between May 1 and September 30 of the same year.” *See id.* In other words, if curtailment is based upon a steady-state analysis, it severely under-mitigates a predicted injury to the Coalition’s senior water rights. Consequently, the Director adopted a transient analysis as being “necessary to simulate the short-term curtailments prescribed in the methodology.”<sup>4</sup> *Id.* at 31.

The Director’s transient use of ESPAM 2.2 is appropriate for calculating the in-season reach gains to the Near Blackfoot to Minidoka reach that would result from the curtailment of groundwater pumping. *See* Ex. 3 (p. 3). No expert testified that a steady-state run would fully mitigate the forecasted demand shortfall. The Director’s transient use of the model to identify a curtailment date that would mitigate the in-season demand shortfall conforms to judicial precedent on this issue as well. *See Memorandum Decision and Order, Rangen, Inc. v. IDWR*, Twin Falls County Dist. Ct., Fifth Jud. Dist., Case No. CV-2014-4970 (June 1, 2015); *Memorandum Decision and Order, Rangen, Inc. v. IDWR*, Twin Falls County Dist. Ct., Fifth

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<sup>4</sup> Such a finding is consistent with the Director’s approval of mitigation plans where he allows the delivery of storage equal to the amount of an injury finding.

Jud. Dist., Case No. CV-2014-2446 (Dec. 3, 2014); *see also, Amended Final Order Regarding Compliance with Approved Mitigation Plan* at 17-19 (Docket No. CM-MP-2016-001, Apr. 24, 2023). Stated another way, if junior water users cannot mitigate the predicted in-season demand shortfall, Idaho law does not contemplate curtailment that would only supply between 9-15% of that shortfall during the irrigation season. In sum, the Director's transient use of the model is required by Idaho's prior appropriation doctrine and is supported by the record. If juniors desire to pump out-of-priority and cannot replace the predicted in-season shortfall as required, curtailment must be sufficient to mitigate that shortfall during the irrigation season. A steady-state use of the model does not identify the proper curtailment date for that purpose.

### **III. Twin Falls Canal Company Water Use / Irrigated Acres**

In his ruling following the 2008 hearing, the Hearing Officer (former Chief Justice Gerald Schroder) concluded:

The evidence does not show substandard facilities for diversion or conveyance. The members of the Surface Water Coalition have improved their conveyance practices since the time the water rights were licensed or decreed. . . .

There are various factors that might be considered that cause difference in the efficiency of diversion and conveyance within the irrigation districts. For example, the North Side Canal Company is very long, requiring more time for water to move from the initial diversion to the end of the system. There will be differences in the amount of evaporation and potentially of conveyance losses. Additionally, if the delivery of water at the beginning of the system is shut off, when the water is again turned on it takes considerable time for water to reach the far end of the system. Damage to the crops may occur during the delay. This simply says that there is no precise formula that can be applied from one SWC member to another. Differences exist. This does not mean that one district is using reasonable facilities and practices and another not. There is no evidence of decayed or damaged systems that are allowed to continue or practices that cause water to be wasted in transit. The evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency.

R. Vol. 37 at 7101-02.



This finding was echoed by the District Court on judicial review of the first methodology order:

Furthermore, both the Hearing Officer and the Director found, in considering the Rule 42 factors, that the Coalition members operate reasonable and efficient irrigation projects. The Director found that “as found by the hearing officer in his recommended order, members of the SWC operate reasonably and without waste,” and that he will not “impose greater project efficiencies upon members of the SWC than have been historically realized.”

2014 Order at 30-31.

The evidence at the June 6-9, 2023 hearing further showed that the Coalition members continue to operate reasonable and efficient irrigation projects. Specifically, TFCC’s manager Jay Barlogi provided testimony about the company’s water delivery operations as well as recent maintenance and conservation projects. *See generally*, Ex. 1 (pp. 3-23). Mr. Barlogi noted the increase in consumptive use crops across the project and how changes to sprinkler and residential use have created operational demands within the TFCC system. The company has implemented a number of projects to keep pace with operational demands and continues to look at ways to improve delivery and maintenance of the canal system. In other words, there was no evidence of “decayed or damaged” systems or water being wasted on the TFCC project.

That TFCC continues to put water to beneficial use and use water reasonably was confirmed by Mr. Barlogi as well. Mr. Barlogi described a general overview of operations for the irrigation season which is supported by the Director’s previous finding that although crop water needs may vary, water is still put to beneficial use at these times. *See* Ex. 1 (pp. 4-8); *see also Order on Reconsideration of Final Order et al.* at 4, ¶ 16 (June 16, 2010) (“Computing a seasonal Ep that is weighted to monthly CWN is misleading because the computation ignores or dampens the effects of beneficial diversions of water necessary to rear crops that lie beyond simply meeting the consumptive requirement of the plant (i.e. canal charging, availability of a

steady supply of water, chemigation, soil tillage, etc.)”). These beneficial uses were supported by the testimony of the Coalition’s experts in evaluating project efficiencies as well. *See* Ex. 4 (pp. 7-13).

Increased consumptive use crops (i.e. corn, alfalfa), as well as double-cropping, have an impact on water demands. *See* Ex. 1 (pp. 7-9); Ex. 4 (pp. 10-11). A review of Water District 01 delivery records confirms that TFCC operates within an accepted acre-feet per acre standard demonstrated by other large open canal systems within the district. *See* Ex. 8. Watermaster Tony Olenichak further testified that it was his opinion that TFCC operated and delivered water in a reasonable manner. *See generally, Olenichak Test.* This opinion was supported by other expert witnesses that testified at the hearing. *See Brockway Test., Shaw Test.* On the other hand, the ground water users did not prove by clear and convincing evidence that TFCC was not putting water that it diverts to beneficial use. Even the exhibit offered by the Cities’ consultant showed that measured returns in certain coulees across the TFCC project had remained stable (close to 50,000 acre-feet) and have even decreased over the last three years.<sup>5</sup> *See* Ex. 365.

There was considerable testimony concerning the number of irrigated acres within the TFCC project. The legal status of TFCC’s decreed place of use (including the number of authorized acres) and the presumption IDWR must apply is outlined in the Step 1 letter from counsel to Director Spackman dated March 29, 2013. *See* Ex. 938. TFCC submitted an irrigated area shapefile to IDWR in 2013 and since then has sent letters confirming that the acreage has not changed by more than 5% from the prior year.

IDWR staff Matt Anders testified that IDWR previously used 183,589 acres in its irrigated acreage calculations before 2015. *See Anders Test.* This may have been based upon an

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<sup>5</sup> The trend is similar for the “tributary gages” which include both natural streamflow and some irrigation return flows during the irrigation season. Certainly the type of water year will influence water availability and the amount of water identified in the flow measurements.

erroneous acceptance of a report presented at the 2008 hearing. *See* Ex. 938 (3/29/13 letter to Director Spackman noting the errors in the 2007 SPF report and fact that it was not adopted by the Hearing Officer). Further, IDWR did not have the benefit of the Court’s 2014 Order and confirmation about how the Department must apply the “clear and convincing evidence” standard in conjunctive administration, particularly in application of the methodology.

The Coalition’s expert report details issues with the 2017 irrigated lands dataset. *See* Ex. 4 (pp. 1-2). A review of that shapefile overlaid on 2021 aerial imagery shows lands that are irrigated have been removed and classified as “non-irrigated.” *See* Ex. 6. Whereas the status of certain lands can change from year to year, and water can be transferred within the TFCC project, identifying exact irrigated acreage in the current year can be a challenge, particularly on a project TFCC’s size. With the status of information that it had, IDWR properly relied upon its review of TFCC’s 2013 shapefile and the juniors did not carry their burden to show by clear and convincing evidence a different number was justified.

Regardless of the irrigated acreage number and its application in the CWN calculator, a reduction in acreage does not automatically reduce demand or beneficial use of TFCC’s water right. TFCC’s manager explained that increased consumptive use crops, longer growing seasons, and even double-cropping, have all contributed to increased demands. Ex. 1 (pp. 8-9). Further, conversion to sprinklers have reduced historical returns back to the canal system, reducing water available for reuse. *See id.* (pp. 24-25). Although fewer acres may be irrigated, that would only slightly reduce overall project efficiency and not mean that less water is required for successful canal operations. Ex. 4 (pp. 13-14).

#### **IV. AFRD#2 Baseline Year Diversion Volume**

On rebuttal testimony the last day of the hearing (June 9), Matt Anders clarified an error regarding AFRD#2's total diversion volume in 2018. Evaluation of certain recharge water showed that the total volume diverted by AFRD#2 for its irrigation purposes was understated. IDWR should correct the 2018 baseline year data for AFRD#2 accordingly.

#### **V. A&B Surface Water Delivery to Converted Lands / Proportionate Share in April As Applied Order**

The April As Applied Order identified A&B's proportionate share of the projected in-season demand shortfall to be 458 acre-feet. *See* Ex. 301 (p. 5, n. 5). This calculation was made using a steady-state run of ESPAM to apportion respective responsibility for the shortfall and mitigation obligation. *See Sukow Test.*

A&B Irrigation District now delivers surface water to 3,576 acres that were formerly solely irrigated with groundwater. *See* Ex. 2. While successful operation of its pipeline requires certain groundwater use for pressurization, the lands are primarily supplied by surface water. It appears that IDWR created the "proportionate share" table using a simulated curtailment of A&B's water rights junior to December 30, 1953. *See April Background Information* (excel spreadsheet).<sup>6</sup> The simulation used a crop irrigation requirement of 2.59 acre-feet per acre and assigns a value of 10,629 acre-feet to the 4,107.9 acres authorized under the District's junior priority water rights (36-15127A et al.). Since A&B has replaced groundwater with surface water delivery on certain lands, that should be taken into account when analyzing the proportionate share of any in-season demand shortfall predicted for the Surface Water Coalition. *See* Ex. 2. In other words, the District is not pumping 10,629 acre-feet for those lands every year as identified in IDWR's background information.

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<sup>6</sup> Available at: <https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/>

## **VI. Non-Participation in Water District 01 Rental Pool.**

The Fifth Order notes that “water supplied to private leases or to the rental pool by a SWC member will be included as part of the SWC supply for that member because non-inclusion would unjustifiably increase the shortfall obligation.” Ex. 300 at 13, ¶ 30. Questions arose in 2022 as to whether or not an injured Coalition member could receive an assignment of mitigation storage if that member was not a “participant” in the Water District 01 rental pool. *See SWC Request for Status Conference* at 3-5 (Apr. 27, 2022).

Tony Olenichak provided testimony at the hearing that a Coalition member could receive an assignment of storage water for mitigation purposes even if that member was not a participant in the rental pool. *See Olenichak Test.* The Director should clarify that fact going forward so that if a Coalition member decides to not participate in the rental pool in a given year, that would not preclude assignment of mitigation storage water if necessary, either as part of an approved mitigation plan or for delivery to mitigate injury.

## **VII. Due Process Concerns Addressed.**

Finally, in response to the Director’s note at the close of the hearing, while certain parties alleged concerns with the timing of the proceeding and schedules, all parties were subject to the same deadlines. Further, the unique issues related to timely water right administration in this case were explained as follows by the District Court:

That segues us into issues pertaining to due process. Petitioners raised due process concerns pertaining to the hearing process utilized by the director for the administrative hearing to commence June 6th. In evaluating the due process concerns raised by the petitioners, the Court must be cognizant of the director's duty to timely administer water rights in priority. The Idaho Supreme Court instructed in *Musser vs. Higginson* that the director's duty to administer water is clear and executive. Time is of the essence in water administration. In any given year the reality is, there is a short timeframe between when water supply determinations can be made and when water users' demands for irrigation water begin. Any process employed by the director must account for the exigencies of

these time constraints. These exigencies were recognized by the drafters of our Constitution as set forth in the Idaho Supreme Court and American Falls Reservoir District Number 2. The Court found the drafters intended that there be no unnecessary delay in the delivery of water pursuant to a valid water right and that a timely response is clearly required when a delivery call is made and water is necessary to respond to that call. That's AFRD Number 2, 143 Idaho at 874. This analysis recognizes the failure of the director to timely administer in priority can result to senior rights in times of shortage. In conjunction, the Idaho Supreme Court further determined that neither the Constitution nor the statutes place any specific time frames on this process.

In this case the record reflects the Department began notifying individuals in September, 2022, that it would be reviewing data used in the Fourth Methodology Order. In November and December, 2022, the Department conducted six meetings regarding possible amendments to the Fourth Methodology Order where staff presented new data and analyses with respect to methodology. Later in December the Department released a document setting forth preliminary recommendations for amendments to the Fourth Methodology Order. The preliminary recommendations stated that the Department will continue to evaluate the integration of these recommendations and others into the methodology. The recommendations also invited outside consultants to submit written comments by January 16, 2023, which some outside experts did by submitting preliminary comments.

On April 21st, 2023, the director issued the Fifth Amended Methodology Order and Final Order regarding the April, 2023, forecast supply. In the final order regarding the April, 2023, forecast supply, the director predicted an in-season demand shortfall to the Twin Falls Canal Company in the amount of 75,200-acre feed. The order gave affected juniors until May 5, 2023, to establish they can mitigate for their proportionate share of the predicted demand shortfall. For those juniors who could not, the order stated that the director would issue a curtailment order.

The director did not hold a hearing prior to issuing the April 21st, 2023, orders. However, he has set a hearing --and he has set a hearing to commence June 6th, 2023, on the orders pursuant to Idaho Code Section 42-1701A(3). Idaho Code Section 42-1701A(3) governs hearings before the director. Subsection 3 applies where the director takes action without a hearing. Normally a party has 15 days to request a hearing under Subsection 3. However, because the director found time was of the essence and because he anticipated multiple parties would request a hearing, he took the proactive step of sua sponte noticing up a hearing to save time. He also set a prehearing conference for April 28th, 2023. The director subsequently denied a request from the petitioners to continue the June 6th hearing until December or January. He also denied a request from the petitioners to appoint an independent hearing officer. On May 2nd, 2023, the director issued a scheduling order, directing that discovery be completed by May 31st, 2023. Then on May 5th, 2023, the director issued an order limiting discovery to preclude questions regarding the director's deliberative process. Okay. Again, on May 2nd, 2023, the director issued a scheduling order, directing that discovery be

completed by May 31st, 2023. Then on May 5th, 2023, the director issued an order limiting discovery to preclude questions regarding the director's deliberative process on legal and policy considerations. Okay. So in evaluating the process in this case against the director's duty to timely administer water rights in priority, the Court finds it provides due process consistent with the exigencies of the circumstances and the need to administer water in priority to avoid injury to senior rights.

In making this finding, the Court is influenced by the fact that administration in this case arises in the larger context of an ongoing delivery call that has existed since 2005. The director issued its first methodology order in 2010. Since then, the methodology order has been modified and amended three times to account for new data, modeling revisions, and climate trends. So this is not a new issue. And the director gave heads-up that amendments may be required again in 2023, starting in September of 2022, when he notified individuals that the Department was investigating integrating new data techniques into the methodology order. Again, he then conducted a series of meetings, presenting new data and techniques, and issued a preliminary recommendation setting forth proposed amendments and inviting comment from outside experts. In effect, the parties were put on notice starting in September of 2022 that amendments to the methodology order were being considered. Based on prior actions within the context of this ongoing delivery call, parties were also well-aware of the exigent time constraints following demand shortfall predictions. In particular, in its memorandum decision issued on April 11, 2011, in Gooding County Case CV-2010-382, the Court addressed similar due process arguments concerning short timeframes for notice and discovery in the context of this very call. The process provided then was found to provide due process. In this instance the parties are being provided with a hearing on the 2023 orders to commence on June 6th. They were provided approximately six weeks actual notice for the hearing.

In addition, the director began making parties aware that amendments to the methodology order were being considered back in September of 2022. At the hearing on June 6th the parties will be given the opportunity to present evidence and arguments pertaining to the 2023 orders. The Court finds this process provides due process consistent with the exigencies of the circumstances and the director's duty to timely administer water rights in priority. And frankly, setting a hearing after the irrigation season as requested is not a tangible alternative, given the director's duty and the demand shortfall prediction for the 2023 irrigation season.

Transcript, June 1<sup>st</sup> Hearing, *IGWA et al. v. IDWR*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-8187.

Based upon the above, the parties were provided the necessary due process in this proceeding, and any allegations of the Director violating constitutional rights are unfounded given the unique circumstances regarding conjunctive administration.

**CONCLUSION**

The Coalition submits the above post-hearing brief on the issues identified.

DATED this 16<sup>th</sup> day of June, 2023.

**MARTEN LAW LLP**

/s/ Travis L. Thompson  
Travis L. Thompson

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District, North Side Canal Company, and  
Twin Falls Canal Company*

**FLETCHER LAW OFFICE**

/s/ W. Kent Fletcher  
W. Kent Fletcher

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*



## CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of June, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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/s/ Jessica Nielsen

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