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 **POST-HEARING ORDER REGARDING FIFTH AMENDED METHODOLOGY ORDER**

On April 21, 2023, the Director of the Idaho Department of Water Resources ("Department") issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fifth Methodology Order") as well as the *Final Order Regarding April 2023 Forecast Supply* ("2023 As-Applied Order"). A hearing on these orders was held June 6–9, 2023. In this *Post-Hearing Order Regarding Fifth Amended Methodology Order*, the Director affirms the Fifth Methodology Order with a few modifications. Because there are some modifications, the Director simultaneously issues with this order a *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*.

BACKGROUND

A. General History of the Surface Water Coalition Delivery Call

In January of 2005, various holders of senior priority surface water rights authorizing diversion of water from the Snake River and tributary springs filed or joined in a delivery call against holders of junior priority ground water rights pursuant to the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). In response to the delivery call, on May 2, 2005, then-Director Karl Dreher issued an order, which determined that water shortages were reasonably likely in 2005 and would materially injure the holders of senior priority surface water rights. Am. Order at 44, *In re Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist., Am. Falls Reservoir Dist. No. 2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., & Twin Falls Canal Co.* (Idaho Dep't of Water Res. May 2, 2005).

In response to Director Dreher's order, on August 15, 2005, the holders of senior surface water rights filed a declaratory judgment action in district court, challenging, among other subjects, the constitutionality of the CM Rules. The holders of senior surface water rights requested stays and continuances in a scheduled administrative hearing, and the action for declaratory judgment was heard by the district court. The district court issued its decision on summary judgment on June 2, 2006, finding that the CM Rules were facially unconstitutional.

Order on Pls.' Mot. for Summ. J., at 105, *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, No. CV-2005-600 (Gooding Cnty. Dist. Ct. Idaho June 2, 2006).

The decision by the district court was appealed to the Idaho Supreme Court. On appeal, the Idaho Supreme Court issued an opinion determining that the CM Rules were facially constitutional. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 882–83, 154 P.3d 433, 453–54 (2007).

The Idaho Supreme Court outlined processes for the Director to constitutionally apply the CM Rules and also assigned the burdens borne by the holders of senior surface water rights, junior ground water rights, and the Department. In outlining the acceptable "as-applied" processes, the Idaho Supreme Court stated:

> The [CM] Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has . . . . [T]he burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right . . . .

Am. Falls Reservoir Dist. No. 2, 143 Idaho at 877–78, 154 P.3d at 448–49.

Despite the presumption, the Court stated:

> [T]here certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The [CM] Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The [CM] Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.,* 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

Id. at 878, 154 P.3d at 449.

After the Idaho Supreme Court's decision in *American Falls Reservoir District No. 2*, then-Director David Tuthill issued an Order appointing retired Idaho Supreme Court Chief Justice Gerald Schroeder to serve as a hearing officer for the administrative hearing. The hearing began on January 18, 2008, and ended February 5, 2008.

On April 29, 2008, Hearing Officer Schroeder issued his decision which recommended among other things that the Director establish a baseline for predicting the water needs of senior surface water users, which was necessary for projecting material injury. *Opinion Constituting*

Findings of Fact, Conclusions of Law and Recommendations at 51. On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call,* adopting most of the hearing officer's findings and recommendations.

The order was appealed to district court and eventually appealed to the Idaho Supreme Court, which determined the Director had constitutionally "applied" the CM Rules. *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irr. Dist.,* 155 Idaho 640, 647, 315 P.3d 828, 835 (2013). The Court also held it was proper for the Director to use a baseline year to predict and quantify material injury, and that the initial determination of material injury must depend on "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts others." *Id.* at 652–53, 315 P.3d at 840 (internal citations and quotations omitted). Finally, the Court affirmed the district court's determination that the clear and convincing evidence standard is to be applied in determining material injury when a decreed senior priority water right is being evaluated for reduction. *Id*.

The Idaho Supreme was clear, however, that because the district court had not reviewed the findings of fact that shaped the methodology nor any modifications to the methodology order, those issues were not properly before the Court. *Id.* at 649, 315 P.3d at 837.

On September 26, 2014, the district court issued its *Memorandum Decision and Order on Petitions for Judicial Review*, wherein Judge Wildman squarely addressed the findings of fact shaping the methodology as well as the modifications to the methodology order. Mem. Decision & Order on Pets. for Judicial Review, *Idaho Ground Water Appropriators, Inc. v. Spackman*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho Sep. 26, 2014) [hereinafter 2014 District Court Order]. Judge Wildman largely upheld the factual basis underlying the Department's methodology and as-applied orders, but remanded certain portions for further consideration. The groundwater users initially noticed their intent to appeal the 2014 District Court Order, but later filed a motion to withdraw, which the Idaho Supreme Court granted on January 23, 2015. Judge Wildman's 2014 District Court Order will be addressed in detail throughout this order.

B. History of the Fifth Methodology Order

The Director issued the Fifth Methodology Order as well as the 2023 As-Applied Order on April 21, 2023. The Fifth Methodology Order revised the nine steps used to determine material injury to members of the SWC. The 2023 As-Applied Order predicted a shortfall for the 2023 irrigation season, which required appropriators with water rights junior to December 30, 1953, to mitigate or curtail.

Anticipating that one or more parties would request a hearing pursuant to Idaho Code § 42-1701A(3) in response to one or both orders, the Director issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* ("Notice of Hearing") on April 21, 2023. The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing on the Fifth Methodology Order and 2023 As-Applied Order for June 6–10, 2023.

Immediately before the April 28, 2023 prehearing conference, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell (collectively the "Cities") filed a *Motion for Continuance* ("Motion to Continue") requesting that the Director continue the June 6–10 evidentiary hearing "until a date in December or January 2024 . . . ." *Motion to Continue* at 8.

During the April 28, 2023 prehearing conference, the Cities presented argument in support of their Motion to Continue. The Idaho Ground Water Appropriators, Inc. ("IGWA"), Bonneville-Jefferson Groundwater District ("BJGWD"), and McCain Foods orally moved to join the Cities' Motion to Continue. The Cities requested that the hearing, currently scheduled for June 6–10, 2023, be delayed approximately six months. *Motion to Continue* at 8. The Cities asserted additional time was needed to conduct discovery, prepare witnesses, properly evaluate the updated Fifth Methodology Order and 2023 As-Applied Order, and because one of its attorneys (Ms. Candice McHugh) would be unable to appear in person June 6–10. *Id*. at 4–6. The Cities further asserted the Director should grant its request because no exigency exists given the above-average snowfall this year. *Id*. at 6–8. The SWC opposed the Cities' motion, arguing the hearing should remain as scheduled on June 6–10, 2023.

The Director orally denied the Cities' request to continue the hearing until December or January 2024. The Director stated he was, however, willing to hold the hearing anytime within the first three weeks of June 2023 so long as all parties agreed to the modified dates. In denying the Cities' requested continuance, the Director emphasized his court-ordered obligation to timely predict water supplies and issue orders to ensure senior water right holders are protected.

On May 5, 2023, the Director issued an *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* ("Order Denying Motion to Continue & Limiting Scope of Depositions"). In the order, the Director memorialized his oral denial of the Motion to Continue, but reiterated he was willing to move the hearing within the first three weeks of June 2023, so long as the parties filed a stipulated motion requesting the change. *Order Denying Motion to Continue & Limiting Scope of Depositions* at 2. The Director also ordered that the depositions of Department staff be limited "to preclude questions regarding the Director's deliberative process on legal and policy considerations" pursuant to IDAPA 37.01.01.521. *Id*. at 3. By separate order, the Director authorized Ms. McHugh to appear at the hearing remotely. Scheduling Order & Order Authorizing Remote Appearance at Hr'g at 3.

On May 5, 2023, the Cities, along with IGWA, BJGD, and Bingham Groundwater District (collectively the "Groundwater Users") filed a *Motion for Reconsideration of Denial of Continuance* ("Motion to Reconsider") requesting that the Director reconsider his order denying the Groundwater Users' request to continue the hearing. The Groundwater Users further argued that the June 6–10 hearing should be continued due to the unavailability of numerous witnesses and an attorney. *Motion to Reconsider* at 3–5. The Groundwater Users also claimed that a failure to continue the hearing would result in prejudice to the Groundwater Users. *Id.* at 5.

On May 8, 2023, the SWC filed *Surface Water Coalition's Opposition to Groundwater Users' Motion for Reconsideration of Order Denying Motion for Continuance* ("Objection to

Motion to Reconsider"). The SWC pointed out that the Department has already authorized Ms. McHugh to appear remotely to accommodate her travel, and that the SWC would stipulate to IGWA's expert witnesses, Sophia Sigstedt's, appearing remotely to accommodate her medical condition. *Objection to Motion to Reconsider* at 8–9 n.8. The SWC further argued that 6 weeks was plenty of time to prepare for a hearing, as evidenced by the fact that the First Methodology Order in this exact case was issued on April 7, 2010, with an evidentiary hearing held approximately six weeks later on May 24, 2010. *Id.* at 7–8. The SWC further argued that this type of scheduling in a conjunctive management administration should surprise no one. *Id*. Most importantly, the SWC argued they would be prejudiced were the hearing to be continued. *Id.* at 10.

On May 19, 2023, the Director issued his *Order Denying Motion for Reconsideration of Denial of Continuance* ("Order Denying Motion to Reconsider"). In denying the Groundwater Users motion, the Director expressed that, like the SWC, he was skeptical of the Groundwater Users contention that they had secured sufficient mitigation to ensure seniors would not be injured. *Order Denying Motion to Reconsider* at 5–6. The Director further emphasized his legal responsibility to timely respond to injury incurred by senior water users. *Id.* at 6 (citing *Am. Falls Reservoir Dist. No. 2,* 143 Idaho at 874, 154 P.3d at 445).

Also on May 19, 2023, the Cities, BJGWD, Bingham Groundwater District ("BGWD"), and McCain Foods filed in district court a *Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus* ("Complaint & Petition") as well as a motion for order to show cause. On the same day, IGWA filed in district court a petition for judicial review along with a variety of motions including a motion to stay, a motion for injunctive relief, motion to compel, motion for order to show cause, and a motion for expedited decision. The purpose of the Groundwater Users' various petitions and motions was the same; they were an attempt to persuade the district court to step in and stop the administrative hearing set for June 6–10, 2023.

On June 1, 2023, the district court held a 3.5-hour hearing on the Ground Water Users' various petitions and motions. At the conclusion of the hearing the court ruled from the bench and orally dismissed the Cities writ applications and IGWA's petition for judicial review, and also denied the various other motions filed by the Groundwater Users.[1] The court reiterated that the Groundwater Users grievances have already been addressed in numerous previous cases:

> And I'm going to add one final conclusion here. You know, after reviewing the issues raised in these cases and preparing for these hearings, as I had mentioned earlier, I went back and reviewed the numerous opinions that have been addressed by this Court where substantially the same if not the same issues were raised in the context of conjunctive management delivery calls, including this same delivery call brought by the Surface Water Coalition. The issues are not new, and my reading of the prior decisions explicitly sets forth and reiterates the overriding principles that govern these types of matters. And I'm aware in every single one of those, parties attempt to distinguish that particular set of circumstances to justify the requirement

[1] On June 7, 2023, the Cities filed a motion to voluntarily dismiss their remaining complaint for declaratory relief, which the district court granted on June 14, 2023.

> of exhausting administrative remedies. But the issues raised -- and based on my review, the issues raised today in these cases are no different. And these include that the director's statutorily charged with administering water in priority; time is of the essence in responding to delivery calls; the director must act quickly to avoid injury to senior rights; due process is required but must account for the exigencies of the circumstances; the director has discretion in limiting the scope and timing of the hearings; and unless a statute or rule otherwise provides for a hearing, the director may issue an order and conduct a hearing after issuance of the order.

Excerpt from Hr'g on Admin. Appeals (Court's Ruling) Tr., at 11–12, *City of Pocatello v. Idaho Dep't of Water Res.*, No. CV01-23-08258 (Ada Cnty. Dist. Ct. Idaho June 1, 2023).

The previously scheduled administrative hearing began on June 6, 2023. The hearing was scheduled for five days but was completed in four. Prior to the hearing, the Department posted to its publicly available website the materials Department staff might rely upon at the hearing. The Director took official notice of the documents as authorized under the Department's Procedural Rule 602 (IDAPA 37.01.01.602). At the conclusion of the hearing, the Director requested that the parties submit post-hearing briefing by June 16, 2023. The parties submitted post-hearing briefs.

APPLICABLE LAW

1. "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

2. The conjunctive management rules "give the Director the tools by which to determine 'how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts . . . other sources.'" *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).

3. CM Rule 42.01 lists factors the Director may consider when determining whether senior irrigation water right holders are suffering material injury and using water efficiently and without waste:

> a. The amount of water available in the source from which the water right is diverted.
>
> b. The effort or expense of the holder of the water right to divert water from the source.
>
> c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to . . . a senior-priority surface . . . water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

d. If for irrigation, 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.

e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

IDAPA 37.03.11.042.01

4. The Rule 42.01 factors are not comprehensive. The following are additional factors the Director has considered:

- Statistical Certainty for Predicting Water Supply (Regression r^2 values)
- Field Headgate Deliveries (3/4 inch/acre vs. 5/8 inch/acre)
- Model Uncertainty
- Futile Call
- Trim Line

5. CM Rule 43.03.c outlines a variety of factors the Director may consider in determining whether a proposed mitigation plan will prevent injury to senior rights:

Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi season accounting of ground water withdrawals and provide for replacement water

> to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable.

IDAPA 37.03.11.043.03.c.

6. "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *A & B Irr. Dist. v. Idaho Dep't of Water Res*., 153 Idaho 500, 524, 284 P.3d 225, 249 (2012).

7. "If the Director is going to administer to less than the full amount of acres set forth on the face of the [SWC's] Partial Decrees, such a determination must be supported by clear and convincing evidence." *2014 District Court Order* at 19.

8. Clear and convincing evidence is evidence indicating that the thing to be proved is "highly probable or reasonably certain*." In re Doe*, 157 Idaho 694, 699, 339 P.3d 755, 760 (2014).

9. "It seems self–evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should . . . produce clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion. The burden is on him to show such facts." *Josslyn v. Daly*, 15 Idaho 137, 149, 96 P. 568, 571–72 (1908) (internal citations and quotations omitted).

10. The Idaho Supreme Court has expressly admonished that, if the Director is going to administer to less than the full amount of the decree, the burden of any uncertainty must be borne by junior water users:

> 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.
> . . . .
>
> 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 administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

A & B Irr. Dist., 153 Idaho at 524, 284 P.3d at 249 (internal citations and quotations omitted).

11. In responding to a delivery call under the CM Rules, the Director "may employ a baseline methodology as a starting point for considering material injury," provided the baseline methodology otherwise comports with the prior appropriation doctrine as established by Idaho law. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841; *see also 2014 District Court Order* at 17.

12. In his 2014 District Court Order, Judge Wildman stated:

> 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 [SWC's] rights. The arguments set forth by the City of Pocatello and IGWA that the Director must use data associated with an average year fail to take into account the legal limitations placed on the Director in responding to a delivery call . . . .
> . . . .
>
> If the Director determined the needs of the [SWC] based on historic use data associated with an average year, any decision to administer to less than the full quantity of the [SWC's] decreed rights based on that data would not adequately protect its senior rights. Using data associated with an average year by its very definition would result in an under-determination of the needs of the [SWC] half of the time. The Director simply cannot rely upon such data if he is going to administer to less than the decreed quantity of the [SWC's] water rights as his analysis would not be supported by clear and convincing evidence.
> . . . .
>
> As set forth above, using data associated with an average year in order to administer to less than the full decreed quantity of the [SWC's] 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 District Court Order at 34.

13. Throughout the 2014 District Court Order, Judge Wildman analyzed and applied the Rule 42.01 factors referenced above and reiterated that the proper evidentiary standard is clear and convincing evidence and that the junior ground water users bear the burden of proof.

a. Reduction of Decreed Place of Use: (See Rule 42.01.d.)

Regarding a reduction of the decreed place of use (Rule 42.01.d), Judge Wildman stated:

> If the Director is going to administer to less than the full amount of acres set forth on the face of the [SWC's] *Partial Decrees,* such a determination must be supported by clear and convincing evidence. *See. e.g., A&B Irr. Dist., v. Idaho Dept. of Water Res.,* l53 Idaho 500, 524,284 P.3d 225, 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence").

2014 District Court Order at 19.

b. Efficiency and Waste of Water (see Rule 42.01 preface and Rule 42.01.f–g):

Regarding efficiency and the waste of water (Rule 42.01 preface and Rule 42.01.f–g), Judge Wildman stated:

> [I]f the junior users believe for some reasons that the seniors will receive water they cannot beneficially use, it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence. For example, the juniors may assert that the Director in their opinion is considering some, but not *all* acres that are no longer irrigated by the seniors. Or it may be their opinion that the Director is considering some, but not *the full extent* of water diverted by the seniors for use by others. In that scenario, it is then their burden under the established evidentiary standards and burdens of proof [to] get evidence supporting their position before the Director in an appropriate fashion.
> . . . .
>
> If junior users believe that administering to the full decreed amount of the [SWC's] water rights will result in waste, they must come forth with clear and convincing evidence establishing that fact. *A&B lrr. Dist.,* 153 Idaho at 524, 284 P.3d at 249.

2014 District Court Order at 31, 45 (emphasis in original).

c. Transactions of Surface Water that Could Diminish Senior Water Right Entitlement (see Rule 42.01.e):

Regarding transactions of surface water that could diminish senior water right entitlements (Rule 42.01.e), Judge Wildman stated:

> The fact that such transaction may have occurred is not . . . sufficient if the Director is going to use that data to administer to less than the full amount of the Coalition's decreed rights. *A&B Irr. Dist.,* 153 Idaho at 524, 284 P.3d at 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence").

2014 District Court Order at 46–47.

d. Acres irrigated with supplemental ground water rights:

When determining total irrigated acreage, the Department may consider supplemental groundwater use. *Fifth Methodology Order* ¶ 23, at 10, ¶ 1, at 40.

Regarding supplemental acres, Judge Wildman stated:

> If it is established that acreage accounted for under the Coalition's senior surface water rights is being irrigated from a supplemental ground water source, that is a factor the Director has the authority to consider in the context of a delivery call. If the supplemental ground water rights being used are themselves subject to curtailment under the senior call, (as suggested may be the case here by the Hearing Officer), that factor should also be accounted for by the Director.

2014 District Court Order at 18 (internal citations and quotations omitted).

ANALYSIS

A. Hydrologic connectivity.

1. Groundwater in the ESPA is hydrologically connected to the Snake River

Rule 42.01.c authorizes the Director to determine whether pumping by junior ground water appropriators is affecting downstream senior surface water users. IDAPA 37.03.11.042.01.c; *see also Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449. The conjunctive management rules "give the Director the tools by which to determine 'how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts others.'" *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449 (quoting *A & B Irrigation Dist*., 131 Idaho at 422, 958 P.2d at 579).

The evaluation of the hydraulic relationship between ground water and surface water, and whether, because of an established relationship, pumping from ground water will deplete the source of water upon which the holders of senior priority surface water rights depend is not a proposed change to the decree. *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 877, 154 P.3d at 448.

The hydraulic relationship between ground water and surface water has been established in previous proceedings in this matter by expert testimony. "The surface and ground waters in the Snake River Basin are hydraulically connected, such that ground water pumping can decrease the natural flows in the Snake River and its tributaries." *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist*., 155 Idaho at 643, 315 P.3d at 831. "[G]eneral interconnection of all water in the Snake River system is well settled . . . unless the

party claiming otherwise proves by a preponderance of the evidence that the water is from a separate source." *A & B Irr. Dist.*, 131 Idaho at 421–22, 958 P.2d at 578–79. A general provision was added to each water basin in the ESPA, advising that all water rights in the Snake River Basin are connected sources to the Snake River and shall be administered conjunctively unless otherwise specifically provided.[2]

2. Quantifying Depletion

Quantifying the magnitude of the depletion caused by ground water pumping is not a change to the decree. *A & B Irr. Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). These hydraulic relationships must be established by the preponderance of evidence, as a prerequisite, if possible, to any attempt to adjust the elements of a decreed water right.

The magnitude of the depletion on the Near Blackfoot to Minidoka Reach has previously been quantified by various ground water models for the Eastern Snake Plain Aquifer, although the magnitude of depletion on the reach has fluctuated for each new version of the ground water model. Differences in the predictions result from differences in the methods and time periods used to quantify irrigated acres, evapotranspiration, and consumptive use of ground water, along with improvements in the model representation of the near Blackfoot to Minidoka reach and changes in calibrated model parameters. Off. Noticed Doc. CurtScen22_FinalwApp, at 8, 17.[3] In ESPAM versions 1.1, 2.1, and 2.2, predictions of the depletion to the near Blackfoot to Minidoka reach caused by ground water pumping within the model boundary have ranged from approximately 860,000 to 1.2 million acre-feet per year. The predicted depletions to the near Blackfoot to Minidoka reach ranged from 42% to 46% of the modeled volume of ground water use. All three versions of the model have quantified a significant depletion to the near Blackfoot to Minidoka reach resulting from ground water pumping. Off. Noticed Doc. CurtScen22_FinalwApp, at B-2; Off. Noticed Doc. iwdl-200601, at 22.[4]

In 2022, ESPAM 2.2 predicted that the long-term junior ground water pumping within the ESPA area of common ground water supply depletes reach gains in the near Blackfoot to Minidoka reach by approximately 1.1 million acre-feet per year. Ex. 318, at 13, 21.

3. Quantifying Material Injury

Predicting and documenting whether the depletion caused by groundwater pumping is reducing the delivery of senior surface water rights is difficult because the seniors' Snake River

---

[2] *See* SRBA General Provisions for Basins 01, 21, 22, 23, 24, 25, 27, 29, 31, 35, 36, 41, 43, 45, and 47, access at: https://idwr.idaho.gov/water-rights/adjudication/srba/documents/ (last visited June 29, 2023).

[3] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathway: ESPAM Report\ESPAM22_Reports\Scenarios\ CurtScen22_FinalwApp.

[4] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathways: ESPAM Report\ESPAM22_Reports\Scenarios\ CurtScen22_FinalwApp; ESPAM Report\ESPAM_Legacy_Reports\ iwdl-200601.

water supply relies on both ground water inflow (aquifer discharge entering the Snake River), as well as surface water inflow (snowpack runoff into the Snake River). Predictions of material injury must therefore include a combination of surface water runoff forecasts and surrogate ground water data for estimating ground water inflow to the Snake River.

Because of the variability in Snake River runoff and aquifer levels, the evaluation of whether ground water pumping depletions reduce the delivery and beneficial use of senior water right entitlements must be completed annually. As a result, the methodology order must simultaneously analyze the annual hydrologic data to: (1) determine whether reduced aquifer discharge to the Snake River caused by ground water pumping will result in a demand shortfall for senior water rights given the forecasted snowmelt runoff; and (2) evaluate possible reductions of senior water right elements under the clear and convincing evidence standard. Because these evaluations are concurrent in the methodology order, the Director employs safety factors when considering data that might adjust elements of the decreed senior water rights. As addressed in more detail below, these safety factors are necessary to ensure any adjustment to senior decreed water rights satisfy the requirement for clear and convincing evidence.

B. Challenges to the Fifth Methodology's Order's Method for Calculating Shortfall

Once the prerequisite hydrologic relationships have been established, the presumption is that the holder of the senior priority water right is entitled to delivery and beneficial use of the decreed water right elements, and any diminishment of the decreed elements must be proven by clear and convincing evidence. *A & B Irr. Dist*., 153 Idaho at 524, 284 P.3d at 249 (Holding that "[o]nce a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence."). "If the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition's Partial Decrees, such a determination must be supported by clear and convincing evidence . . . ." *2014 District Court Order*, at 19. "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." *A & B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

1. Baseline Year

A baseline year is a year or average of years when irrigation demand represents conditions that can predict need in the current year. The predicted irrigation demands of the current irrigation season are derived from the baseline year and are compared to estimated water supplies to predict material injury to senior appropriators. *Fifth Methodology Order* ¶ 7, at 3. The Idaho Supreme Court has affirmed that data from a baseline year can be used to determine reasonable in-season demand and predict material injury. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist*., 155 Idaho at 653, 315 P.3d at 841.

The baseline year is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) current irrigation practices. *Fifth Methodology Order* ¶ 8, at 3. A baseline year is selected from recent year(s) to ensure the baseline year accurately represents current irrigation practices, recent climate conditions, and a year when the senior water rights received a full supply of waters. *Fifth Methodology Order* ¶ 19, at 9, ¶ 24,

at 11. Because the baseline year data is used to *predict* reasonable in-season demand for senior appropriators, safety factors must be employed to ensure the senior water rights will be satisfied. *See 2014 District Court Order*, at 34. Safety factors include selecting a baseline year(s) with above average diversions, above average temperatures, and below average precipitation. *Fifth Methodology Order* ¶ 9, at 3. These safety factors protect the senior water rights from an underprediction of water need because, under Idaho law, a senior appropriator is presumed entitled to his or her fully decreed water right. *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 877–78, 154 P.3d at 448–49.

In previous methodology orders, no single year during the period from 2000–2014 satisfied all necessary criteria for selecting a baseline year. Off. Noticed Doc.BLYReview_2022_used for TWG_used for order, "Summary" tab.[5] For instance, one year might have been hotter than normal, resulting in greater than average evapotranspiration, but the rainfall might have been higher than normal too, disqualifying the single year. To ensure that all factors were satisfied, the Director combined several years to create an adequate safety factor to ensure senior priority surface water rights were protected.

For example, in the Fourth Methodology Order, the Department's baseline year averaged the SWC diversion volumes for 2006, 2008, and 2012 ("BLY 6/08/12"). *Fifth Methodology Order* ¶ 26, at 11. When averaged, 2006, 2008, and 2012 resulted in a baseline year diversion volume slightly above average (101%). *Fourth Methodology Order* ¶ 27, at 12. The Fourth Methodology Order averaged SWC diversion volumes for three years because no single year met all necessary criteria. *Fourth Methodology Order* ¶ 27, at 12.

For the Fifth Amended Methodology Order, the Director reviewed data from the recent years of 2014–2021. *Fifth Methodology Order* ¶ 26, at 11. Unlike in the Fourth Methodology Order, there were two years, 2018 and 2020, that satisfied all necessary criteria for a baseline year. *Compare Fourth Methodology Order* ¶ 27, at 12 *with Fifth Methodology Order* ¶ 27, at 12; *see also* Off. Noticed Doc. BLY_SWC_TWG_11-16-22, at 12.[6]

After thoroughly reviewing the data, the Director concludes that 2018 best satisfies the criteria for a baseline year. In 2018 the SWC's diversion volume was above average at 104%, ranking fourth in total diversions (from 2000–2021). *Fifth Methodology Order* ¶ 27, at 12; *see also* Off. Noticed Doc. BLYReview_2022_used for TWG_used for order, "Summary" tab.[7] A safety factor of 4% is reasonable. Additionally, 2018 had below average precipitation with above average temperatures and associated growing degree days. Year 2018 therefore satisfies all

[5] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathway: 2023 5th Amended Methodology Order\BLY\BLYReview_2022_used for TWG_used for order.

[6] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathway: 2022 Technical Working Group (TWG)\Meeting 11-16-22 Methodology Overview & BLY\BYL_SWC_TWG_11-16-22.

[7] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathway: 2023 5th Amended Methodology Order\BLY\BLYReview_2022_used for TWG_used for order.

criteria for a baseline year and sufficiently protects senior appropriators. *Fifth Methodology Order* ¶ 27, at 12.

The Ground Water Users propose averaging 2006 and 2018, which produces a diversion volume that is 101%, or just 1% above average, a percentage closer to that used in previous methodology orders. Ex. 837A, at 18; *see also Fourth Methodology Order* ¶ 27, at 12. The purpose of selecting a baseline year with diversions above average is to protect the senior surface water rights, not to select a number closest to the average diversion volume. Historical data illustrates the risk to senior appropriators when the Department selects a BLY with diversion volumes only slightly above average. The data shows that averaging SWC diversion volumes from 2006/2008/2012 for the baseline year resulted in shortfalls in four out of eight years from 2015 to 2022. Ex. 837A, at 82; see also *Fourth Methodology Order* ¶ 27, at 12.

As Judge Wildman previously advised:

> 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 associated with an average year fail to take into account the legal limitations placed on the Director in responding to a delivery call. . . .
>
> If the Director determined the needs of the Coalition based on historic use data associated with an average year, any decision to administer to less than the full quantity of the Coalition's decreed rights based on that data would not adequately protect its senior rights. Using data associated with an average year by its very definition would result in an under-determination of the needs of the Coalition half of the time. The Director simply cannot rely upon such data if he is going to administer to less than the decreed quantity of the Coalitions' water rights as his analysis would not be supported by clear and convincing evidence.

2014 District Court Order, at 33–34.

The Ground Water Users further contend selecting 2018 as the baseline year was improper "because it falls on the extreme end of the spectrum for precipitation" given that, "from 1992-2021, 2018 was the only irrigation season where there was zero precipitation from July to September." IGWA's Post-Hr'g Br., at 12.

It is true that 2018 was an outlier for lack of precipitation from July–September, and in this regard 2020 would have been a better choice. Off. Noticed Doc. BLY_SWC_TWG_11-16-

22, at 8.[8] The Director did not select 2020 as the baseline year, given the SWC's abnormally high diversion volumes of 110.5% of average. *Id*. at 17.

In sum, after thoroughly reviewing the data, the Director concludes that a safety factor of 4% is reasonable. Year 2018 best satisfies the criteria for a baseline year and sufficiently protects senior appropriators.

2. The R-Squared Value for TFCC's Natural Flow Forecast

The predictive power for accuracy of the TFCC's natural flow multi-linear model can be evaluated by the "R-squared" value on a regression line. Hr'g Tr. vol. III, at 49; Hr'g Tr. vol. I, at 186–87. The R-squared value is a statistical measurement of how closely data points fit on a regression line. Hr'g Tr. vol. I, at 186–87. R-squared values are decimal numbers that range from zero to one. The higher the decimal value, the closer the data are to the regression line, and the greater the percent of variability in the data is explained by the model. Hr'g Tr. vol. I, at 187.

The R-squared value for the TFCC's April predicted natural flow model is 0.72. Ex. 901, at 9. Department employee Matt Anders testified that this R-squared value has declined in recent years, but that the Department is still confident the regression equation is accurately predicting TFCC's natural flow. Hr'g Tr. vol. I, at 224–25.

The ground water users challenge the accuracy of TFCC's natural flow prediction and imply that TFCC's 0.72 R-squared is evidence that the Department's TFCC natural flow forecast is unreliable. Hr'g Tr. vol. I, at 162-65; Hr'g Tr. vol. III, at 49–51, 187–89, 230–33; *see also* Ex. 837A at 23. While not entirely clear, the ground water users appear to believe that the Heise Gage is a poor predictor of TFCC's surface water supply given the number of tributaries that enter the Snake downstream from the Heise Gage. Hr'g Tr. vol. I, at 162-65; Hr'g Tr. vol. III, at 49–51, 187–89, 230–33.

The ground water users also appear to challenge the Department's use of ground-water-derived spring flow from Box Canyon Springs, which the ground water users appear to believe has no correlation with reach gains from the near Blackfoot to Minidoka stretch. Hr'g Tr. vol. I, at 162-65; Hr'g Tr. vol. III, at 49–51, 187–89, 230–33; *see also* Ex. 837A at 23.

The ground water users failed to offer sufficient evidence that TFCC's natural flow forecast is flawed or that TFFC's 0.72 R-squared value is unreasonable. Accordingly, the Director concludes TFFC's 0.72 R-squared value is reasonable and the TFCC's natural flow forecast is sufficiently accurate.

[8] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathway: 2022 Technical Working Group (TWG)\Meeting 11-16-22 Methodology Overview & BLY\BYL_SWC_TWG_11-16-22.

3. Cumulative Bias

In its April shortfall calculation, the Department employs two bias or safety factors to protect senior water right holders. First, the 2018 BLY diversion volumes must be above average; and second, the forecasted natural flow supply is reduced by one standard deviation. In its July shortfall calculation, the Department employs one bias factor; the diversion volumes for July–October are above average.

The ground water users contend "[t]hese 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." IGWA's Post-Hr'g Br. at 11.

The Director disagrees that the new BLY "aggressively" over-predicts demand shortfall and is "much more aggressive than the BLY used in prior iterations . . . ." As discussed in the baseline year section above, historical data indicates that the Fourth Methodology Order, which averaged diversions for 2006/2008/2012, was not biased enough to protect senior water right holders. In four out of eight years from 2015 to 2022, the April demand shortfall was *less* than the actual demand shortfall in November. Ex. 837A, at 82; see also *Fourth Methodology Order* ¶ 27, at 12. In other words, under the Fourth Methodology Order the safety factors failed to protect seniors 50% of the time.

The 2018 BLY is not anticipated to result in extreme over predictions of the SWC's demand shortfall as alleged by the ground water users. Historical data indicates that if the 2018 BLY had been used from 2015–2022, in one of eight years the April demand shortfall would have been less than the actual demand shortfall in November and in two of eight years, the July demand shortfall would have been less than the actual demand shortfall in November. *Id.*

The Director concludes that the Department's safety factors do not aggressively overpredict demand shortfall.

4. Reduction of TFCC's Decreed Place of Use

CM Rules 42.01.d–e state that, in determining whether a senior irrigator is using water efficiently yet still suffering injury, the Director may consider:

d. [T]he rate of diversion compared to the acreage of land served . . . .

e. The amount of water being diverted and used compared to the water rights.

Collectively, TFCC's natural flow Snake River water rights authorize their shareholders to irrigate 196,162 acres. Ex. 184, at 9, 13, 18; *see also* Hr'g Tr. vol. II, at 81. This 196,162-acre figure represents the number of acres TFCC irrigated in 1987 when the Snake River Basin Adjudication was commenced. Ex. 184, at 2; *see also* Hr'g Tr. vol. II, at 82. It is undisputed TFCC no longer irrigates 196,162 acres, as acreage has been removed from irrigation for various reasons. Hr'g Tr. vol. II, at 82.

TFCC concedes its members are currently irrigating no more than 194,732 acres. Ex. 4, at 1. The 194,732 irrigated acre figure is derived from a 2013 shapefile created by TFCC. *Id*. The Department used the 2013 shapefile to predict TFCC's irrigated acres for 2023. *Fifth Methodology Order* ¶ 22, at 10; *see also 2023 As-Applied Order* ¶ 3, at 1, ¶ 6, at 2; Ex. 337.

Using aerial imagery and Landsat photography from 2017, the Department's GIS staff created what has been commonly referred to as the "2017 irrigated lands dataset" (hereinafter "2017 shapefile"). Hr'g Tr. vol. II, at 68. The 2017 shapefile classified irrigated fields into three categories, irrigated, semi-irrigated, and non-irrigated. *Id.* at 68–69. The shapefile indicated that, in 2017, TFCC members irrigated 180,956 acres. Ex. 4, at 3. The purpose of the 2017 shapefile was to assist Department staff in determining TFCC's irrigation demand in 2017 for use in model calibration. Hr'g Tr. vol. II, at 68, 140–41.

The ground water users argue that, in predicting TFCC's 2023 irrigated acreage, the Director should rely on the Department's 2017 shapefile—not the 2013 shapefile created by TFCC. IGWA's Post-Hr'g Br., at 13–14. The Director disagrees.

The 2017 shapefile is more recent than the 2013 shapefile, but it does not necessarily represent the number of acres TFCC may irrigate in 2023. The 2017 shapefile was a snapshot in time. It does not necessarily predict *future* irrigated acres. In compiling the 2017 shapefile, Department staff did not distinguish "hardened acres" —i.e., fields that have been permanently removed from irrigation—from fields that were not irrigated in 2017 but could be in future years. Hr'g Tr. vol. II, at 194–95.

The same is not true for the 2013 shapefile as explained by its author, a TFCC consultant named David Shaw. Mr. Shaw testified that when he compiled the 2013 shapefile, he specifically excluded hardened acres and included acres that could have been irrigated in 2013 but were not. Hr'g Tr. vol. IV, at 152–53. Unlike the 2013 shapefile, the 2017 shapefile includes only acres that *were irrigated* in 2017 and excludes the acres that *were not irrigated* in 2017 but *could be* irrigated in future years, e.g., 2023. This is a critical distinction because, as Mr. Shaw explains in the SWC's expert report, TFCC "has no way of knowing whether land covered by shares will or will not be irrigated and must prepare to meet the share delivery obligation." Ex. 4 ¶ 7, at 2.

Mr. Shaw also testified that in his opinion the 2013 shapefile currently represents the best available information for determining TFCC's actual irrigated acreage. Hr'g Tr. vol. IV, at 164–65. Finally, the Director has letters from TFCC's counsel stating that from 2014–2022 the number of acres TFCC irrigated has not varied by more than 5% from the previous (2013) shapefile numbers. Ex. 337.

The Ground Water Users also contend that "Jennifer Sukow testified that [the 2017 lands] data set[] represent[s] the best science available to determine actual irrigated acreage . . . ." IGWA's Post-Hr'g Br. at 14. The ground water users are mistaken. During the hearing, Ms. Sukow testified that the 2017 irrigated lands data set was the best data for *model calibration*. Hr'g Tr. vol. I, at 69. Model calibration employs hindcasts, not forecasts. As noted above, the

2017 shapefile was created to assist Department staff in determining historic irrigation demand within the ESPAM boundary during 2017 for use in model calibration. *Id.* at 68, 140–41.

At the hearing and in their post-hearing briefing, the ground water users state that the burden is on TFCC or the Department to create a new shapefile that identifies the number of acres TFCC can irrigate in 2023. The ground water users are mistaken. To reduce TFCC's predicted irrigated acreage below 194,732 acres, the burden is on the junior ground water users to establish the accuracy of a lesser number (e.g., 180,956) by clear and convincing evidence. "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *A & B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249. The ground water users did not establish an alternative number of acres irrigated by clear and convincing evidence. In short, the ground water users failed to satisfy their burden of proof.

5. Supplemental acres

When determining the total acreage irrigated with surface water by SWC entities, the Department may consider supplemental ground water use. *Fifth Methodology Order* ¶ 23, at 10, ¶ 1, at 40. If acreage is irrigated with ground water instead of surface water, less surface water is needed for irrigation, and any surface water demand shortfall should decrease. In the Fifth Methodology Order, the Department determined that it was without sufficient information to determine the extent of supplemental irrigation on lands within the service areas of the SWC entities. *See Id.* Without sufficient information on supplemental ground water use, the Director is prohibited from reducing a water user's full decreed entitlement. *2014 District Court Order*, at 19 (Holding that the Director was prohibited from administering less than the seniors full decree given that "the record d[id] not contain evidence that acres accounted for . . . [we]re being irrigated from a supplemental ground water source . . . ."). The record in this matter equally lacks sufficient evidence to justify a reduction of the total number of acres irrigated with surface water by SWC members.

IGWA argues that at least some TFCC members have supplemental rights. IGWA's Post-Hr'g Br., at 15. The Department agrees that TFCC's manager and expert Chuck Brockway testified that some TFCC members have supplemental water rights, but he also opined the number is very low. Hr'g Tr. vol. IV, at 52–53.

In his 2014 District Court Order, Judge Wildman noted that:

> [T]he parties fail to cite the Court anything submitted before the Department in either written form or via oral testimony establishing the use of supplemental ground water by individual irrigators within the Coalition.

2014 District Court Order at 19.

The Ground Water Users bear the burden of proving by clear and convincing evidence that SWC acreage was irrigated with supplemental ground water. The Ground Water Users failed to proffer sufficient evidence concerning the quantity of acres TFCC members could

irrigate with supplemental ground water rights. Assertions that IDWR records should identify overlapping ground water rights or that ground water pumping information is best known by the SWC does not change the standard of proof and does not shift the burden of proof borne by the ground water users.

6. The Department's adjustments for "wheeled water"

At times canal companies transport water for third parties through their respective water delivery systems. This transported water, which does not go to meet the canal company member's water supply, is often called "wheeled water." When calculating reasonable in-season demand, it is important to remove wheeled water from SWC diversions. For example, suppose the SWC diverted 3,500,000 acre-feet on a particular year, but 200,000 of those acre-feet was wheeled water. It is necessary to remove the 200,000 acre-feet of wheeled water when calculating SWC's demand, lest it appear SWC members were diverting and using 3,500,000 acre-feet, rather than 3,300,000.

IGWA's expert Sophia Sigstedt advised that her calculations revealed, in determining SWC's 2018 diversion, that IDWR failed to account for approximately 5,000 acre-feet of water wheeled by AFRD2. Ex. 837A, at 20. According to Ms. Sigstedt, IDWR failed to properly subtract all AFRD2's wheeled water in 2018, resulting in a diversion that was 5,000 ac. ft. too high. *Id.* at 16.

On rebuttal, Matt Anders testified that AFRD2's diversion was inaccurately calculated, and the inaccuracy resulted in AFRD2's diversion being 5,000 ac. ft. *too low*. Hr'g Tr. vol. IV, at 173–74. In other words, the miscalculation benefited the Groundwater Users and harmed the SWC, not the other way around.

In sum, there is no evidence that storage water wheeled by the SWC was incorrectly added to the SWC's 2018 surface water demand.

7. 5/8 inch per acre vs. 3/4 inch per acre

At hearing and in its summary brief, IGWA argues that "TFCC shareholders can raise crops on 5/8 inch per acre [headgate delivery] without suffering material injury." IGWA Post Hearing Brief, at 7, 9, 10. However, TFCC's seasonal headgate delivery rate is not the basis for evaluating injury in the current methodology. As IGWA acknowledges, "the Methodology Order does not actually utilize a 3/4-inch headgate delivery, 5/8-inch headgate delivery, or any other headgate delivery as part of its material injury determination for TFCC." *Id.* at 8.

Rather, as IGWA correctly states, the Methodology predicts injury using a baseline year. The baseline year is selected by analyzing climate, available water supply, and current irrigation practices from a single year or average of years. *Fifth Methodology Order* ¶ 8, at 3. The Idaho Supreme Court has affirmed that data from a baseline year can be used to determine reasonable in-season demand and predict material injury. *In re Distribution of Water to Various Water Rights Held by or for the Ben. of A&B Irr. Dist*., 155 Idaho at 653, 315 P.3d at 841.

Undaunted, IGWA compares baseline year injury determinations to historical TFCC seasonal headgate delivery rates and concludes, "a hindcast of the Fifth Methodology Order applying it to the time period 2000-2022 shows it generating DS predictions . . ., even though TFCC rarely suffers injury in reality." IGWA's Post-Hr'g Br. at 11–12. IGWA presumably determined there was no "injury in reality" because the Methodology predicted a demand shortfall in years when TFCC received a seasonal or partial season 3/4-inch headgate delivery. IGWA's argument is unpersuasive because, by its own admission, it is relying on a determination of injury that is not a component of this or past methodologies.

C. Efficiency & Waste

CM Rule 42.01.d and g advise that two of the factors the Director may consider in determining whether senior irrigation water right holders are using water efficiently and without waste, while still suffering material injury, are:

> d. [T]he 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[;] [and]
>
> . . . .
>
> g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practice . . . .

In substance, 42.01.d and g authorize the Director to consider whether senior appropriators are wasting water via various unreasonable or inefficient practices.

Project efficiency for each surface water delivery system is unique, depending on numerous factors, including but not limited to: (1) length of delivery system; (2) geological materials through which the system delivers water; (3) nature of structures that deliver water; and (4) method of application of irrigation water. *Fifth Methodology Order* ¶¶ 29–30, at 12–13. In the *Fifth Methodology Order*, the Director calculated recent historical project efficiency (as compared to general "project efficiency") for each SWC member for the 15-year period from 2008 through 2022. *Fifth Methodology Order* ¶ 32, at 14.

The crop water need ("CWN") for each SWC entity for the upcoming season is calculated by averaging each entity's crop mix for the previous three previous years. Off. Noticed Doc. NRT METRIC_SWC_TWG_11-17-22, at 6.[9] Averaging crop mix for the preceding three years is necessary to reflect possible changes in irrigation demands caused by variability in annual crop mix. The SWC's projected reasonable in-season demand ("RISD") for the upcoming season is calculated by dividing each entity's CWN by its recent historical project efficiency.

[9] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathway: 2022 Technical Working Group (TWG)\Meeting 11-17-22 Forecast Supply & NRT METRIC\NRT METRIC_SWC_TWG_11-17-22.

The Ground Water Users contend the Director's efficiency analysis is inadequate because it fails to adjust for on-the-ground efficiency projects, e.g., canal lining. IGWA's Post-Hr'g Br., at 15. The Ground Water Users argue the Director should require the SWC to satisfy a higher efficiency standard than the recent historical project efficiencies.

The Ground Water Users also criticize the calculation of recent project efficiencies as being circular. Cities' Closing Br., at 7; *see also* IGWA's Post-Hr'g Br., at 15. In effect, the ground water users argue that if the SWC's irrigated acreage number is reduced, but the amount of water delivered doesn't change, the only result will be a reduced efficiency value. IGWA's Post-Hr'g Br., at 15. While the mathematical argument is correct, the purpose of the argument is unclear. It appears the purpose may be to establish that the calculated efficiency numbers are valueless.

To remedy the perceived efficiency calculation errors, the Ground Water Users contend the Department should jettison its historical efficiency analysis and instead judge SWC members efficiencies by comparing them to industry standards. Cities' Closing Br., at 7. The Director disagrees.

The Cities' expert, Greg Sullivan, conceded that the Court has previously rejected the industry standard approach for which the ground water users currently advocate. Hr'g Tr. vol. II, at 201. The Court has already determined that the methodology order's approach to calculating the efficiencies of SWC members is acceptable. *2014 District Court Order*, at 30–31. Mr. Sullivan further admitted that there were no per acre industry standard diversion rates for large open canal systems—as each entity would be different—and that he used the term "industry standard" to mean reasonableness of TFCC's operation compared to its irrigation efficiencies. Hr'g Tr., vol. II, at 225, 237.

Calculating efficiency for large open canal systems is extremely difficult. Hr'g Tr. vol. IV, at 146. TFCC's operation is enormous, with over 1,000 miles of canal, over 4,000 headgates, and over 10,000 concrete structures. Hr'g Tr. vol. II, at 16–18. Evaluating the efficiency of each mile of canal or headgate is a large undertaking. The Ground Water Users, the parties that bear the burden of proof, have not evaluated the SWC's canal and lateral efficiencies.

The Ground Water Users also contend the Director should instruct the Technical Working Group to "develop a mechanism to track real canal efficiency based on real efficiency factors." IGWA's Post-Hr'g Br., at 16. The Ground Water users' proposal attempts to misdirect the burden of proof. "[I]f the junior users believe for some reasons that the seniors will receive water they cannot beneficially use, it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence." *2014 District Court Order*, at 31.

TFCC's general manager Jay Barlogi testified that his organization's diversions were reasonable and that TFCC worked hard to improve its efficiency, for example by annually cleaning its canals, lining canals, and replacing over 100 concrete structures per year. Hr'g Tr. vol. II, at 18–20. Mr. Shaw testified that TFCC does a good job maintaining its infrastructure compared to other water delivery organizations, and that TFCC's delivery system is reasonable. Hr'g Tr. vol. IV, at 146.

Lastly, the Ground Water Users imply TFCC is wasting significant quantities of water as evidenced by TFCC's return flows. Hr'g Tr. vol. II, at 191–196. For example, the Cities offered into evidence a document that purports to show TFCC's return flows from 2009–2022. Ex. 365.

Exhibit 365 does not distinguish between natural flow in tributary creeks (e.g., Rock Creek) from water TFCC diverted from the Snake and later returned to the Snake. This matters because measured flows can include irrigation returns as well as water from tributaries. Hr'g Tr. vol. II, at 241. The Cities' exhibit does not prove how much water TFCC diverted from the Snake and later returned.

Return flow data are difficult to obtain. Mr. Anders testified that the Department monitors some of TFCC's return flow, but does not monitor some of the smaller return flows. Hr'g Tr. vol. I, at 128. TFCC's general manager Jay Barlogi testified that he did not believe TFCC was returning a significant amount of water. Hr'g Tr. vol. II, at 43.

The SWC's surface water delivery systems were designed to divert large flow rates delivered to many farmers through long and complex networks of canals and laterals. At the beginning of the irrigation season, these networks must fill over the course of several days. The time needed to fill the canals has a relationship to the time necessary to respond to changes in delivery or emergency. If a large rainstorm reduces the demand for delivery of irrigation water in the canals and laterals, and many users along the delivery system reduce deliveries, the canal company cannot immediately reduce the water being delivered in its system at the diversion from the Snake River. Furthermore, the SWC entity also cannot immediately refill the canals and laterals when the rain stops and the crops demand an immediate water supply. Finally, an emergency on a canal or lateral, like a bank failure, might require that water in the delivery system be discharged from the canals to relieve the system of excess water.

The SWC entities must be able to discharge some water out of its system to ensure delivery of water to its patrons and to operate efficiently within the limits of the delivery system. Testimony at the hearing established that the SWC entities operated efficiently within the limits of their delivery system. *See* Hr'g Tr. vol. II, at 75, 90–91, 94–96; Hr'g Tr. vol. IV, at 146.

The Director concludes TFCC's diversions and efficiency are reasonable.

D. Curtailment

1. Transient vs. Steady-State Modeling

In previous years, the Director used steady-state modeling when determining the curtailment priority date.

In surface water administration, uses by holders of junior priority surface water rights are curtailed until the senior surface water rights are fully satisfied, absent a futile call and if the senior surface water users need the water to accomplish a beneficial use. Under surface water administration, junior surface water rights are generally curtailed unless the senior receives water in the quantity and at the time and place required.

As previously stated in *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449, "[t]he presumption under Idaho law is that the senior is entitled to his decreed water right . . . ." Entitlement to the decreed water right includes receiving water in the quantity and at the time and place required. The Director has a responsibility to respond timely to injury incurred by senior water users; there should be no unnecessary delays in that process. *Id.* "Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call." *Id.* This is common sense because "[i]n practice, an untimely decision effectively becomes the decision; i.e. 'no decision is the decision.'" Order on Pls.' Mot. for Summ. J., at 97, *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, No. CV-2005-600 (Gooding Cnty. Dist. Ct. Idaho June 2, 2006)

Rule 43 of the CM Rules mandates that when the Director evaluates a mitigation plan, the mitigation plan must ensure that water is delivered to holders of senior priority surface water rights in both the quantity and at the time and place required by the senior. In considering a proposed mitigation plan pursuant to Rule 43.03, the Director must evaluate:

> b. Whether the mitigation plan will provide replacement water, *at the time and place required by the senior-priority water right*, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source *at such time and place as necessary* to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
>
> c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right *when needed during a time of shortage* even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

IDAPA 37.03.11.043.03.b–c (emphasis added). In other words, there is an assumption that senior water right holders calling for delivery of water under the CM Rules will receive, by curtailment or by mitigation, "replacement water, at the time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal . . . ." The plan must "assure protection of the senior-priority right in the event the mitigation water source becomes unavailable."

The Director has an obligation to address a mitigation deficiency in the year it occurs. Mem. Decision & Order on Pet. for Jud. Rev., at 10, *Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014); Mem. Decision & Order, at 8–9, *Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015).

Curtailment to a priority date calculated by the steady state analysis method used in the Fourth Methodology Order will only offset 9% to 15% of the predicted IDS. In contrast, curtailment to a priority date calculated with a transient simulation of a single season curtailment will offset the *full* predicted IDS unless the shortfall exceeds the accruals to the near Blackfoot to Minidoka reach by the end of the irrigation season with curtailment of all junior ground water rights. This methodology order depends on an annual evaluation of material injury and should also employ curtailment and or mitigation that supplies replacement water at the time and place required by the senior-priority water right in a quantity sufficient to offset the shortfall resulting from ground water withdrawal and to assure protection of the senior-priority right. Curtailment dates, periodically determined at time of recalculating in season demand shortfall (IDS), should be calculated by a transient model simulation that will return the full quantity of water to the senior priority rights at the time and place required, or the maximum quantity that can be returned by curtailing all junior water rights.

The Ground Water Users argue the Director should have determined a priority date for curtailment by steady state modeling of a continuous curtailment that would eventually deliver a volume of water to satisfy the demand shortfall of SWC entities, and require continuous mitigation from holders of ground water rights junior to the calculated priority date. Curtailment would be the threat to ensure the holders of junior ground water rights comply with the mitigation plan. This proposal, while lofty in its equitable ambition, does not follow the legal progression of water administration. In a delivery call proceeding in Idaho, the Director does not impose mitigation plans upon the holders of junior priority water rights. Mitigation plans are proposed by holders of junior priority ground water rights and may be approved by the Director to allow for out-of-priority pumping. Curtailment, or the threat of curtailment, is the tool employed by the Director to force the development of a mitigation plan. Only a threat of continuous curtailment of ground water rights bearing priority dates junior to some unknown priority date would prevent shortfalls to calling parties.

This argument fails because of extreme fluctuations in the Snake River flows caused by fluctuating flows from snowmelt, there are years when there is plentiful surface water for beneficial use and there is no material injury to the calling parties. Water may be flowing past Milner Dam, down the Snake River, and out of the State of Idaho. If there were a curtailment, these facts could be viewed as a waste of water, the antithesis of optimizing the beneficial use of the water of the State of Idaho.

Furthermore, when there is a demand shortfall, the magnitude of the shortfall varies. Choosing a single priority date for continuous curtailment to match one year's shortfall would be inaccurate.

As stated by the CM Rules and by the Courts, out of priority diversion is only allowed by an approved mitigation plan. Junior water right holders can develop or adhere to an approved mitigation plan to avoid curtailment in years of demand shortfalls and allow for out of priority diversions.

2. Futile Call

CM Rule 42.01.c alludes to delayed depletions caused by ground water pumping that affect the "quantity and timing" of water availability to the senior surface water rights. The Director must consider whether "the holders of [senior priority] water rights are suffering material injury" even though the full depletion is not immediate and may be delayed for multiple years:

> Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to . . . a senior-priority surface . . . water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

CM Rule 42.01.c.

Delay in the depletive effect of ground water pumping is not grounds for the Ground Water Users to be excused from water administration under the CM Rules. If there is a significant depletion to the senior water rights, even if the impact is spread over multiple years, junior Ground Water Users are subject to water administration.

In support of this conclusion, CM Rule 43.03.c outlines a variety of factors the Director may consider in determining whether a proposed mitigation plan will prevent injury to senior rights including:

> Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable.

If the Director were to determine that curtailment of some ground water rights would not immediately accrue water to the senior priority surface water rights, even though the cumulative impact is significant, and that the delivery call is futile because there is no immediate benefit for the surface water rights, the holders of junior priority ground water rights could recurringly avoid curtailment. Avoiding obligation because of delayed cumulative impact is contrary to the intent of the CM Rules. The Director concludes the delivery call is not futile.

3. Trim line

Establishing a trim line is a close relative to determining a futile call. In the Rangen delivery call, the Director previously established a trim line when the cumulative benefits

of curtailment to a remote spring tributary to the Snake River were de minimus. On appeal, the Idaho Supreme Court stated:

> In light of this challenging balancing requirement, it is necessary that the Director have some discretion to determine in a delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller. As discussed, Idaho law contemplates a balance between the "bedrock principles" of priority of right and beneficial use. *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013). The Director is authorized to undertake this balancing act, subject, as he acknowledged here, to the limitations of Idaho law.

Idaho Ground Water Assoc. v. Idaho Dep't of Water Res., 160 Idaho 119, 132, 369 P.3d 897, 910 (2016).

The spatial distribution of long-term impacts of Ground Water Users on aquifer discharge to the near Blackfoot to Minidoka reach is documented in the record. In Ms. Sigstedt's expert report, Figure 3-6 shows the steady state response function, which is the long-term impact of pumping on the near Blackfoot to Minidoka reach as a percentage of the volume of ground water used. Ex. 837 at 38. Figure 3-6 shows that Ground Water Users on both sides of the Great Rift (the boundary applied to the Rangen delivery call trim line) have significant long-term impacts on aquifer discharge to the nB-Min reach. As a result, the Director concludes that a trimline is not appropriate.

4. Model Uncertainty

Prior to the issuance of the Fifth Methodology Order and 2023 April As-Applied Order, three versions of ESPAM (1.1, 2.1, and 2.2) quantified depletions to surface water supply caused by junior ground water pumping or calculated priority dates for curtailment for this delivery call. These three model versions have also quantified depletions to surface water supply caused by ground water pumping in support of water right administration, including the approval or denial of water right transfer applications. In transfer evaluations, the current and previous versions of ESPAM have calculated the transient impacts of ground water pumping on Snake River reach gains, similar to the transient calculation of curtailment benefit implemented in the Fifth Methodology Order and 2023 April As-Applied Order. Ex. 3, at 7.

The current version, ESPAM version 2.2 was completed in May 2021 and superseded ESPAM version 2.1 as the best available scientific tool for these purposes. Improved representation of ground water and surface water interaction in the near Blackfoot to Neeley reach was identified as one of the priorities for development of ESPAM version 2.2 and significant improvements to the Department's monitoring network and the ESPAM model were implemented with the guidance of the Eastern Snake Hydrologic Modeling Committee to achieve this objective. Off. Noticed Doc. ModelCalibration22_Final, at 1, 3; Off. Noticed Doc.

CurtScen22_FinalwApp, at 10.[10] A predictive uncertainty analysis of ESPAM version 2.2 was performed and presented to the Eastern Snake Hydrologic Modeling Committee in conjunction with the release of the new version. Off. Noticed Doc. E22PredUnc_Final.[11]

While the predictive uncertainty analysis did not specifically quantify the uncertainty of the model predictions applied in the 2023 April As-Applied Order, it does provide a general understanding of the contribution of model calibration to predictive uncertainty for steady-state and transient model scenarios. *Id.* at 41. Model uncertainty is not so significant to suggest that a transient simulation of a single season curtailment will not provide a more accurate estimate of the increase in reach gains expected to occur during the current irrigation season than a steady-state simulation of a continuous curtailment. In other words, there is no evidence that model uncertainty is so significant that a curtailment date calculated using a steady-state simulation, which results in a predicted in-season accrual of approximately 10% of the IDS, could possibly result in an actual in-season accrual approaching 100% of the IDS.

Further, any administrative allowance for uncertainty in the prediction of the volume of water obtained by applying a given curtailment date would be applied to reduce the risk to the senior water user and would result in applying an earlier curtailment date. Because of the safety factor already applied in the calculation of the shortfall, the Director does not find that an additional safety factor needs to be applied to calculation of the priority date. Further, the senior water users did not request that the Director add an additional safety factor to account for ESPAM predictive uncertainty.

E. Due process

The Ground Water Users contend the Department violated their due process rights and the Idaho Administrative Procedures Act by issuing the methodology order before holding a hearing, and by failing to provide the Ground Water Users sufficient time to prepare for the hearing. IGWA's Post-Hr'g Br., at 18. The Ground Water Users are mistaken.

Idaho Code § 42-1701A governs hearings before the Director, and provides among other things that:

> Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any . . . approval . . . or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded

[10] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathways: ESPAM Report\ESPAM22_Reports\ ModelCalibrationRpt \ ModelCalibration22_Final; ESPAM Report\ESPAM22_Reports\Scenarios\ CurtScen22_FinalwApp.

[11] Available for download at https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/, "Materials Department Witnesses May Rely Upon at Hearing—May 5, 2023". Downloaded folder pathway: ESPAM Report\ESPAM22_Reports\ESPAM22_Reports\UncertaintyRpt\ E22PredUnc_Final.

an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

The Methodology Order constitutes an "order" under § 42-1701A(3), meaning there is no statutory right to a pre-decision hearing concerning an amendment to the Methodology Order. The Idaho Supreme Court has already held that "[t]he Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology . . . [and is] made available in advance of the applicable irrigation season . . . ." *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist*., 155 Idaho at 653, 315 P.3d at 841.

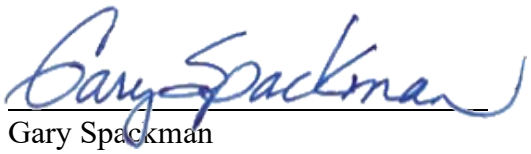
The Idaho Supreme Court has also clearly expressed that the Director has a legal responsibility to *timely* respond to injury incurred by senior water users. Am. Falls Reservoir Dist. No. 2, 143 Idaho at 874, 154 P.3d at 445. The District Court has already ruled in this matter that the process the Department afforded "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 . . . ." Excerpt from Hr'g on Admin. Appeals (Court's Ruling) Tr., at 8–9, *City of Pocatello v. Idaho Dep't of Water Res.*, No. CV01-23-08258 (Ada Cnty. Dist. Ct. Idaho June 1, 2023).

In sum, the Ground Water Users' due process rights were not violated, which the District Court has already determined.

ORDER

IT IS HEREBY ORDERED that the Director affirms the Fifth Methodology Order with a few modifications. Because there are some modifications, the Director will simultaneously issue with this order a *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*.

DATED this 19th day of July 2023.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	☒ U.S. Mail, postage prepaid ☒ Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jnielsen@martenlaw.com	☒ U.S. Mail, postage prepaid ☒ Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	☒ U.S. Mail, postage prepaid ☒ Email
Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com elisheva@racineolson.com	☒ U.S. Mail, postage prepaid ☒ Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov	☒ U.S. Mail, postage prepaid ☒ Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov	☒ U.S. Mail, postage prepaid ☒ Email
Sarah A Klahn Maximilian C. Bricker Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com dthompson@somachlaw.com	☒ U.S. Mail, postage prepaid ☒ Email

Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us	☒ U.S. Mail, postage prepaid ☒ Email
Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com	☒ U.S. Mail, postage prepaid ☒ Email
Robert E. Williams WILLIAMS, MESERVY, & LOTHSPEICH, LLP P.O. Box 168 Jerome, ID 83338 rewilliams@wmlattys.com	☒ U.S. Mail, postage prepaid ☒ Email
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	☒ U.S. Mail, postage prepaid ☒ Email
Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 rfife@idahofallsidaho.gov	☒ U.S. Mail, postage prepaid ☒ Email
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC P.O. Box 3005 Idaho Falls, ID 83403 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com	☒ U.S. Mail, postage prepaid ☒ Email
Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com	☒ U.S. Mail, postage prepaid ☒ Email
Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov	☒ Email

Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov	☒ Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	☒ Email

Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.