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Fourth Judicial District, Ada County
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW WEAVER in his capacity as the Director of the Idaho Department of Water Resources.

Respondents,

and

AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, CITY OF POCATELLO, CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, AND CITY OF WENDELL, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUNDWATER DISTRICT,

Intervenors.

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

Case No. CV01-23-13173

RESPONDENT IDWR'S BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Director, Presiding

RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources Division

GARRICK BAXTER, ISB No. 6301
KAYLEEN R. RICHTER, ISB No. 11258
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
kayleen.richter@idwr.idaho.gov

Attorneys for Respondents

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
201 E. Center St.
P.O. Box 1391
Pocatello, Idaho 83204
tj@racineolson.com
elisheva@racineolson.com

Attorneys for Petitioner

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

Attorneys for Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon Blvd., Suite 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com

Attorneys for City of Pocatello

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
jsimpson@martenlaw.com
tthompson@martenlaw.com

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

W.Kent Fletcher
FLETCHER LAW OFFICE
P.O. BOX 248
Burley, Idaho 83318
wkf@pmt.org

Attorney for American Falls Reservoir District #2 and Minidoka Irrigation District

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
P.O. Box 3005
Idaho Falls, ID 83403-3005
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com

Attorneys for Bonneville-Jefferson Ground Water District

Dylan Anderson
DYLAN ANDERSON LAW PLLC
P.O. Box 35
Rexburg, Idaho 83440
dylan@dylanandersonlaw.com

Attorney for Bingham Groundwater District

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is a judicial review proceeding that focuses on a final order issued by the Director of the Idaho Department of Water Resources ("Department"). The order updates the methodology used to determine material injury to members of the Surface Water Coalition[1] ("SWC") in the ongoing SWC Delivery Call. Idaho Ground Water Appropriators, Inc. ("IGWA"), challenge the updated methodology order, alleging that the Director's procedural process for issuing the order violated the Idaho Administrative Procedures Act ("APA") and IGWA's due process rights, and that the Director did not comply with the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CM Rules").

B. Statement of the Facts and Procedural Background.

i. History of the Methodology Order

The history of the methodology order begins in January of 2005, when the members of the SWC filed a delivery call against certain junior ground water rights located in the Eastern Snake Plain Aquifer ("ESPA"). On May 2, 2005, in response to the delivery call, then-Director Karl Dreher issued an order applying the CM Rules to the delivery call. The order determined that water shortages were reasonably likely in 2005 and would materially injure the holders of senior priority surface water rights. R. 1067.

In response to Director Dreher's order, on August 15, 2005, the SWC filed a declaratory judgment action in district court, challenging the constitutionality of the CM Rules. The SWC requested stays and continuances of the scheduled administrative hearing, and the district court

[1] The SWC is comprised 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.

heard the action for declaratory judgment. The district court issued its decision on summary judgment on June 2, 2006, finding that the CM Rules were facially unconstitutional. *Id*.

The Department and IGWA appealed the district court's decision to the Idaho Supreme Court. On appeal, the Court reversed the district court's decision and determined 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) [hereinafter *AFRD2*]. Significant to this case, the Court also outlined processes for the Director to constitutionally apply the CM Rules and assigned the burdens borne by the holders of senior surface water rights, junior ground water rights, and the Department.

After the *AFRD2* decision, then-Director David Tuthill issued an order appointing retired Idaho Supreme Court Chief Justice Gerald Schroeder to serve as the administrative hearing officer. The hearing began on January 18, 2008, and ended February 5, 2008. R. 1068.

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. *Id*. On September 5, 2008, Director Tuthill issued his *Final Order Regarding the Surface Water Coalition Delivery Call,* adopting most of the hearing officer's findings and recommendations. *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irr. Dist.*, 155 Idaho 640, 646, 315 P.3d 828, 834 (2013) [hereinafter *In re A & B*]. The order ruled on all issues raised at hearing, but the order did not provide the baseline methodology for predicting the water needs

of senior surface water users. The Director anticipated issuing a separate methodology order at a later date.[2] *Id*. at 155 Idaho at 654, 315 P.3d at 842.

Parties appealed Director Tuthill's order to district court and eventually to the Idaho Supreme Court, which determined the Director had constitutionally "applied" the CM Rules. *Id.* at 647, 315 P.3d at 835. The Court also held it was proper for the Director to use a baseline year to predict and quantify material injury. *Id.* at 652–53, 315 P.3d at 840. 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 Court 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.

ii. The First Methodology Order through the Fourth Amended Methodology Order

On April 7, 2010, while Director Tuthill's order was on appeal, then-Director Gary Spackman issued the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("First Methodology Order").[3] On June 16, 2010, after a hearing, the Director issued an *Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable*

[2] Parties challenged the Director's decision to bifurcate the two orders and on July 24, 2009, the Honorable John M. Melanson issued his order on judicial review, which found the Director's decision to bifurcate his order unlawful. Order on Pet. for Jud. Rev., at 32, *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irr. Dist,* No. CV-2008-551 (Gooding Cnty. Dist. Ct. Idaho July 24, 2009). As discussed below, the Director subsequently issued the *First Methodology Order* on April 7, 2010.

[3] 382 R. 32–74, *Idaho Ground Water Appropriators, Inc. v. Spackman*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho 2014). The Department requests the Court take judicial notice of the *First Methodology Order* as a court record pursuant to I.R.E. 201.

Carryover ("Amended Methodology Order").[4] On June 23, 2010, the Director issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Second Amended Methodology Order").[5] The Second Amended Methodology Order corrected an omission in the Amended Methodology Order. *Second Amended Methodology Order* at 2. Parties appealed the orders, along with several orders applying the methodology, to this Court. This Court stayed the appeal pending a decision by the Idaho Supreme Court in the appeal of Director Tuthill's September 5, 2008 order. R. 745.

This Court lifted the stay and on September 26, 2014, this Court issued its *Memorandum Decision and Order on Petitions for Judicial Review* ("2014 District Court Order"), wherein this Court squarely addressed the findings of fact shaping the methodology as well as the modifications to the methodology order. This Court largely upheld the factual basis underlying the Department's methodology and as-applied orders, but remanded certain portions for further consideration. R. 790. The ground water users initially noticed their intent to appeal the 2014 District Court Order, but later moved to withdraw, which the Idaho Supreme Court granted on January 23, 2015.

On April 17, 2015, the Director issued the *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Third Amended Methodology Order") to address the issues on remand from this Court. *See* R. 1381. On April 30, 2015, the City of Pocatello requested a hearing on the Third Methodology Order but requested the hearing be stayed for six months. *Id.* Concurrently, IGWA

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[4] 382 R. 507–46, *Idaho Ground Water Appropriators, Inc. v. Spackman*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho 2014). The Department requests the Court take judicial notice of the Amended Methodology Order as a court record pursuant to I.R.E. 201.

[5] 382 R. 564–604, *Idaho Ground Water Appropriators, Inc. v. Spackman*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho 2014). The Department requests the Court take judicial notice of the Second Amended Methodology Order as a court record pursuant to I.R.E. 201

filed a petition to reconsider and clarify the Third Methodology Order. *Id.* Prior to hearing, on May 8, 2015, the SWC and IGWA stipulated and jointly moved the Director to withdraw the Third Methodology Order. *Id.* The Director granted the motion that day and withdrew the Third Methodology Order. *Id.*

On March 9, 2016, the SWC and IGWA moved the Director to reinstate the Third Methodology Order and proceed with conjunctive administration for 2016 under the SWC Delivery Call. *See* R. 1381. On March 18, 2016, the City of Pocatello responded to the SWC-IGWA motion and did not object to reinstating the Third Methodology Order for the 2016 irrigation season. *Id.* On April 19, 2016, the Director granted the SWC-IGWA motion to reinstate the Third Methodology Order but explained that certain changes were necessary, and the order would be issued as the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fourth Methodology Order"). *See* R. 1382. The Director did not hold a hearing before issuing the Fourth Methodology Order.

iii. Review of the Fourth Amended Methodology Order

In 2020 and 2021, Matt Anders, Department Technical Services Bureau Chief, and his staff reviewed data sets supporting the Fourth Methodology Order. Tr. Vol. I, p. 169, L. 23 through p. 172, L. 2. The Department undertook this exercise because, as the methodology order acknowledges, the Director has an "ongoing duty" to "review and refine the process of predicting and evaluating material injury." R. 1004. In 2022, the Director decided that it was necessary to update the methodology order. On August 5, 2022, during a status conference in the SWC Delivery Call, the Director instructed Department staff to convene a committee to review and provide comments on potential technical changes to the Fourth Methodology Order. R. 2866.

Department staff assembled a technical working group composed of Department staff, experts representing the parties to the ongoing SWC Delivery Call, and other interested parties.[6] *Id.* The Department identified proposed changes to the methodology and presented them to the technical working group during six meetings between November 16 and December 14, 2022. *Id.* At the final meeting, Department staff stated that they would provide the technical working group with their preliminary recommendations on potential technical changes to the methodology. *Id.* On December 23, 2022, Department staff issued the *Summary of Recommended Technical Revisions to the 4th Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover for the Surface Water Coalition*. R. 2866.

In the preliminary recommendation summary, the Department requested that the technical working group submit written comments responding to the preliminary recommendations or any other topic covered during the meetings. *Id.* The Department received and considered comments from: (i) Heidi Netter and Greg Sullivan (Spronk Water Engineers, Inc.) on behalf of the Coalition of Cities and the City of Pocatello; (ii) Sophia Sigstedt (Lynker Technologies) on behalf of IGWA; and (iii) Dave Shaw (ERO Resources) and Dave Colvin (LRE Water) on behalf of the SWC. R. 1300–04; 2867–78; 2879–85.

[6] Two emails from expert witness Greg Sullivan (Spronk Water) addressed to the technical working group members suggest that the following people were involved with the technical working group: Matthew Anders (Department), Jaxon Higgs (Water Well Consultants), Sophia Sigstedt (Lynker Technologies), Dave Shaw (ERO Resources), Heidi Netter (Spronk Water), Kara Ferguson (Department), Dave Colvin (LRE Water), TJ Budge (Racine Olson, PLLP), Kent Fletcher (Fletcher Law Office), Travis Thompson (Marten Law LLP), Sarah Klahn (Somach Simmons & Dunn, P.C.), Chris Bromley (McHugh Bromley, PLLC), Candice McHugh (McHugh Bromley, PLLC), Matt Howard (USBR), Randy Brown (Southwest Irrigation District), Kresta Davis (Idaho Power), Dave Blew (Idaho Power), Brian Ragan (Department), Garrick Baxter (Department), John Simpson (Barker Rosholt & Simpson, LLP), Ethan Geisler (Department), Jennifer Sukow (Department), Mathew Weaver (Department), Mark Cecchini-Beaver (Department), Sean Vincent (Department), and Gary Spackman (Department). R. 2871–72.

iv. The Fifth Amended Methodology Order

In recognition of the Director's obligation to timely administer water, the deficiencies of the Fourth Methodology Order, and the concern that using the Fourth Methodology Order was no longer legally supportable, the Director determined it was necessary to update and implement the methodology urgently due to the upcoming season. R. 2, 35–36, 1421.[7]

Therefore, on April 21, 2023, the Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fifth Methodology Order") and the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ("April As-Applied Order").[8] R. 1–47, 48–61. In the Fifth Methodology Order the Director: (1) updated climate, hydrologic, and demand data used to determine material injury; (2) updated the baseline year; (3) updated reasonable carryover volumes for the SWC; and (4) changed how the Eastern Snake Plain Aquifer Model ("ESPAM 2.2") is deployed to calculate a priority curtailment date from steady state to transient analysis. R. 1–47, 1421.

The Director then took the proactive step of setting the Fifth Methodology Order and the April As-Applied Order for hearing, setting a prehearing conference, and authorizing discovery by issuing a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* ("Notice of Hearing"). R. 62. The Director explained that he anticipated parties would request a hearing on one or both orders and acknowledged that "time [wa]s of the essence

[7] For context, Exhibit 317 is a document the Department prepared on April 25, 2023, to answer the public's frequently asked questions about the updated methodology. R. 1421–23. The Cities' counsel downloaded and printed the document from the Department's website and marked it as Exhibit 5 during Jennifer Sukow's deposition. At hearing, the parties stipulated to its admission. Tr. Vol. IV, p. 13, L. 13–14.

[8] Given current forecasting techniques, the earliest the Director could predict material injury "with reasonable certainty" was soon after the United States Bureau of Reclamation ("USBR") and the United States Army Corps of Engineers ("USACE") issued the Joint Forecast within the first week of April. R. 18.

because the irrigation season ha[d] commenced for water users." *Id.* The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing for June 6–10, 2023. *Id.*

When the Director applied the amended methodology in the April As-Applied Order, the Director predicted an in-season demand shortfall of 75,200 acre-feet, which would result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953. R. 53. However, the Director did not require immediate curtailment. Instead, the Director notified water right holders of the possible curtailment and of the upcoming hearing so that "junior ground water users ha[d] the opportunity for a hearing before being curtailed. R. 104, 430.

Prior to the 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"), moved the Director to continue the evidentiary hearing from June 6–10 "until a date in December or January 2024." R. 87. During the prehearing conference, IGWA, Bonneville-Jefferson Ground Water District ("BJGWD"), and McCain Foods orally moved to join the Cities' Motion to Continue. R. 1070. The Director orally denied the Cities' motion. Following the prehearing conference, on May 2, 2023, the Director issued a *Scheduling Order and Order Authorizing Remote Appearance at Hearing* ("Scheduling Order"). R. 126–31.

On May 5, 2023, the Director memorialized his oral decision denying the motion to continue in an *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions*.[9] R. 298–304. That same

[9] In IGWA's petition for judicial review, IGWA refers to this order as the "Order Limiting Discovery." IGWA Pet. for Jud. Rev. 2.

day, the Director issued *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice*.[10] R. 305–10. Also on that day, the Cities, IGWA, BJGWD, and Bingham Groundwater District ("BGWD") (collectively the "Ground Water Users") moved the Director to reconsider his denial of a continuance. R. 323–30. The SWC responded in opposition on May 8, 2023. R. 400–06. The Director denied the Ground Water Users' motion to reconsider on May 19, 2023. R. 425–34.

Also on May 19, 2023, the Cities, BJGWD, BGWD, and McCain Foods filed a *Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus* initiating CV01-23-08258. Simultaneously, IGWA filed a *Petition for Judicial Review* and various motions, initiating CV01-23-08187. The Ground Water Users sought relief from this Court to stop or delay the administrative hearing in this matter set for June 6–10, 2023. On June 1, 2023, this Court heard the Ground Water Users' petitions and motions and orally dismissed the same. *Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res.*, No, CV01-23-08187 (Ada Cnty. Dist. Ct. Idaho June 1, 2023); *City of Pocatello v. Idaho Dep't of Water Res.*, No. CV01-23-08258 (Ada Cnty. Dist. Ct. Idaho June 1, 2023).

v. The Hearing on the Fifth Amended Methodology Order and the April As-Applied Order

The hearing on the Fifth Methodology Order and the April As-Applied Order proceeded as scheduled on June 6, 2023. The hearing lasted four days. The Ground Water Users and the SWC appeared represented by counsel. Thirteen witnesses testified, many of which were experts. The parties were provided with the opportunity to examine and cross-examine all witnesses including those appearing remotely. The parties offered and admitted sixty-five exhibits. At the conclusion of the hearing, the Director requested that the parties submit post-hearing briefs by

[10] IGWA refers to this notice as the "Order Limiting Evidence." IGWA Pet. for Jud. Rev. 2.

June 16, 2023. The parties all timely submitted post-hearing briefs. R. 924–41, 942–57, 958–79, 980–95, 996–1003.

Following receipt of the parties' post-hearing briefs, the Director considered the record presented and the parties' arguments in favor of and in opposition to the Fifth Methodology Order. As a result, on July 19, 2023, the Director issued the *Post-Hearing Order Regarding Fifth Amended Methodology Order* ("Post-Hearing Order") alongside the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Sixth Methodology Order") and the *Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* ("July As-Applied Order"). R. 1067–1100, 1004–53, 1054–66.

On August 16, 2023, IGWA timely filed this Petition for Judicial Review requesting judicial review of eight of the Director's orders: (1) Fifth Methodology Order; (2) April As-Applied Order; (3) Scheduling Order; (4) Order Limiting Discovery; (5) Order Limiting Evidence; (6) Post-Hearing Order; (7) Sixth Methodology Order; and (8) July As-Applied Order.

II. ISSUES PRESENTED ON APPEAL

Respondents' formulation of the issues presented is as follows:

1. Whether the Director was required to provide affected parties with notice and a hearing prior to issuing the Fifth Methodology Order.
2. Whether the Director abused his discretion by limiting the nature and scope of discovery.
3. Whether the Director abused his discretion when he took official notice of facts prior to the hearing on the Fifth Methodology Order.
4. Whether the Director violated the APA by denying the Cities' motion for an independent hearing officer.
5. Whether the Director abused his discretion by enforcing a condensed hearing schedule.

6. Whether the Fifth Methodology Order complies with both the first in time and beneficial use aspects of the prior appropriation doctrine.
7. Whether the Director's issuance of the Fifth Methodology Order prejudiced IGWA's substantial rights.
8. Whether IGWA is entitled to attorney fees.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). "The district court's review is limited to those issues raised before the administrative tribunal and those the tribunal lacked the authority to decide." *In re A & B*, 155 Idaho at 648, 315 P.3d at 836 (citing *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011)).

The court shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727,

963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

IGWA alleges that the Director made various procedural and substantive errors regarding the Fifth and Sixth Methodology Orders. This Court must reject IGWA's arguments and affirm the Director's orders because the Director did not err either procedurally or substantively.

A. The Director acted in accordance with Idaho law and within the bounds of his discretion when he issued the Fifth Methodology Order.

IGWA argues that the Director violated its due process rights by failing to comply with the Idaho Administrative Procedures Act ("APA") and the Department's Rules of Procedure "in developing and implementing the Fifth Methodology Order[.]" IGWA Opening *Br.* 17. IGWA's arguments fail because IGWA fundamentally misinterprets the APA and ignores Idaho Code § 42-1701A.

This case is about the Director's amendment to the methodology used to determine material injury in the SWC Delivery Call pursuant to the CM Rules. The Director uses the methodology both as "a predictive tool in preparing the Director's pre-season plan for allocation of water" and to determine material injury in the context of a delivery call. *In re A & B*, 155 Idaho at 650, 315 P.3d at 838. "This is a water management case wherein the management authority and discretion of the Director are at issue." *Id.* Such management and administration "must be conducted in accordance with the basic tenets of the prior appropriation doctrine." *Id.* "A water user has no property interest in being free from the State's regulation of water distribution in accordance with the prior appropriation doctrine[.]" *In re Idaho Dep't of Water Res. Am. Final Ord. Creating Water Dist. No. 170*, 148 Idaho 200, 213–14, 220 P.3d 318, 331–32

(2009). When the Director uses the methodology to determine material injury, the Director then has a legal responsibility to timely respond to injury incurred by senior water users. *AFRD2*, 143 Idaho at 874, 154 P.3d at 445.

Here, the Director determined that it was necessary to update the Fourth Methodology Order due to additional data, multiple years of experience with the methodology, and recent court decisions. R. 2. The Director notified interested parties of his intention to amend the methodology as early as August 2022, held a series of meetings to discuss the changes during which Department staff presented the new data and techniques, issued a preliminary recommendation outlining proposed amendments, and invited comments from outside experts. R. 2866.[11] The Director received and considered the comments prior to issuing the Fifth Methodology Order. R. 1300–04, 2867–78, 2879–85. After considering the updated data sets, the years of experience with the methodology, the Director's duties and responsibilities under Idaho law, and the technical expertise of the parties, the Director issued the Fifth Methodology Order concurrently with the April As-Applied Order. The Director's process for issuing the Fifth Methodology Order followed the same historic process the Department has always followed when taking action and when a hearing is requested on that action: the Director took action, gave an opportunity for a hearing, and when a hearing was requested, held the hearing pursuant to the APA and issued a final order pursuant to the APA.

[11] IGWA challenges the Director's "technical working group" as "fall[ing] far short of what due process and the APA require." IGWA Opening Br. 21. IGWA does not cite any authority on what "due process and the APA require" regarding the working group. IGWA incorrectly describes the Director's position. The Director's position is not that "he did not need to hold a hearing before issuing the Fifth Methodology Order because Department staff disclosed some of their technical analyses to outside consultants in November-December 2022[.]" *Id*.. The Director's position, as described in more detail below, is that the Director was not required to hold a hearing before the Director issued the Fifth Methodology Order.

i. The Director issued the Fifth Methodology Order in compliance with Idaho Code § 42-1701A and the APA.

IGWA argues the Director violated its due process rights by issuing the Fifth Methodology Order prior to holding a hearing. IGWA Opening Br. 18. IGWA's argument fails because it ignores the interplay between Idaho Code § 42-1701A and the APA. The APA "controls agency decision-making procedures only in the absence of more specific statutory requirements." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1994). The provisions of the APA govern contested cases "except as provided by other provisions of law." I.C. § 67-5240.[12] This is consistent with the basic tenet of statutory construction that "a more general statute should not be interpreted to encompass an area already covered by a special statute." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997).

Here, Idaho Code § 42-1701A specifically governs hearings before the Director. As the more specific statute, it is § 42-1701A that controls. Idaho Code § 42-1701A states in relevant part:

> [A]ny person aggrieved by any action of the director, including any decision, determination, order or other action… and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. …
>
> The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

I.C. § 42-1701A(3). To restate, under § 42-1701A any aggrieved party is entitled to a hearing *after* the Director acts. If a hearing is requested, only then is the Director required to hold a hearing in accordance with the APA. I.C. § 42-1701A(1). At the hearing, the hearing officer is

[12] "'Contested case' means a proceeding that results in the issuance of an order." I.C. § 67-5201(8). "'Provision of law' means all or part of the state or federal constitution, or of any state or federal: (a) Statute; or (b) Rule or decision of court." I.C. § 67-5201(22).

required to "make a complete record of the evidence presented and duly received at the hearing…" I.C. § 42-1701A(2). Thus, Idaho Code § 42-1701A governs how and when hearings before the Department are to be held, mandates that the hearing follow the APA, and mandates that the hearing officer make a complete record of the hearing. That is what happened in this case.

The Fifth Methodology Order is an "order or other action" under Idaho Code § 42-1701A. Here, the Director issued the Fifth Methodology Order and gave notice of the action to IGWA. R. 44. The notice provided IGWA the opportunity to request a hearing pursuant to Idaho Code § 42-1701A(3). R. 47. IGWA requested a hearing on the order.[13] R. 135. The Director then held a hearing pursuant to the provisions of the APA. This case is now before this Court because IGWA appealed the Director's decision pursuant to Idaho Code § 42-1701A(4) ("The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.").

This process did not violate the APA, as IGWA alleges, but rather it complied with Idaho Code § 42-1701A's statutory requirements. Here, because § 42-1701A is the more specific statute, it governs actions by the Director. The Director was only required to hold a hearing after IGWA and the other parties requested a hearing on the Fifth Methodology Order pursuant to § 42-1701A.

Further, IGWA's argument would result in an absurd outcome and would actually impair the review process. Had the Director held a hearing prior to issuing the Fifth Methodology

[13] Numerous other entities also requested a hearing on the order. R. 90, 94, 99, 139, 154, 159, 252, 263.

Order as IGWA suggests, the parties would not have had an "action" to contest.[14] The way the Director acted here (by first issuing the order and then holding a hearing on the order) gives the parties a specific action to review. If the Director were to hold the hearing before taking action, such a hearing would be based on speculation and would waste the parties' and the State's time and resources. Moreover, because the right to request a hearing under Idaho Code § 42-1701A(3) only applies to those "who ha[ve] not previously been afforded an opportunity for a hearing on the matter", had IGWA's suggested hearing occurred, the parties would likely be precluded from having a hearing on the order issued after the hearing—the order that would give the parties a non-speculative action to contest. Instead, and in compliance with the relevant and applicable statute, the Director issued the Fifth Methodology Order and then aggrieved parties received a hearing to contest the order. Therefore, the Director did not violate the APA by issuing the Fifth Methodology Order prior to holding a hearing.

IGWA also asserts that under the APA "[t]he only time a state agency can take action in a contested case, other than by stipulation of the parties, without first holding a hearing, is 'in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action.'" IGWA Opening Br. 18 (quoting I.C. § 67-5247(1)).[15] This

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[14] For example, consider the situation discussed in the third footnote of *In re Idaho Department of Water Resources Amended Final Order Creating Water District No. 170*:

> Thompson Creek also argues that by coming to the public hearing on November 11, 2005, with a proposal in place for WD170, including the structure of the proposed district, the Director was demonstrating that his mind was made up, and that this shows he was biased. On the contrary, I.C. § 42–604 requires the Director to present the public with a proposal. *Without a sufficiently detailed proposal in place, the public could not intelligently comment upon the proposed action and work with IDWR toward the most pragmatic solution*.

148 Idaho 200, 209 n.3, 220 P.3d 318, 327 n.3 (2009) (emphasis added).

[15] However, Idaho Code § 67-5247 does not *limit* the timing of an agency's actions, it *permits* an agency to act in an emergency if necessary. IGWA also asserts that Idaho Code § 67-5242 "requires state agencies, in the absence of an

argument ignores the interplay between Idaho Code § 42-1701A and the APA. As described above, the APA applies *after* the Director takes action as authorized under § 42-1701A.

IGWA's brief omits any analysis of the controlling interplay between the APA and Idaho Code § 42-1701A. Rather, IGWA seeks support for its position from case law. IGWA, citing the Idaho Supreme Court's decision in *AFRD2*, asserts that "[t]he Idaho Supreme Court has confirmed that in the context of conjunctive management of surface and ground water rights, if there is no emergency[,] a hearing must be held *before* an order is issued." IGWA Opening Br. 19. IGWA states that in *AFRD2*:

> [T]he Idaho Supreme Court reversed the district court decision which would have allowed the Director to make conjunctive management decisions first and hold hearings later. The Supreme Court explained that when it comes to conjunctive management, "[i]t is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts."

Id. A full examination of the case shows that IGWA misconstrues *AFRD2* and takes the quoted language out of context.

In *AFRD2*, American Falls challenged the constitutionality of the CM Rules. In response to American Falls' argument that the CM Rules were unconstitutional as applied to American Falls, the Supreme Court explained:

> The record simply does not support that assertion and, as indicated above, there is likewise no basis for a determination that the CM Rules are unconstitutional in this regard.
>
> Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether

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emergency, to hold a hearing *before* the agency decides the matter." IGWA Opening Br. 18 (emphasis in original). However, Idaho Code § 67-5242 contains no such requirement. Section 67-5242 does not address the timing of a hearing. Rather, § 67-5242 prescribes the contents of the hearing notice required in contested cases, describes who may preside over the hearing, outlines the presiding officer's duties at the hearing, and provides a procedure for default if a party fails to attend the contested case. I.C. § 67-5242.

> water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, *it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.*
>
> Absent additional evidence that the Director abused his discretion or that the delay in the hearing schedule was unreasonable despite the self-imposed extensions (both of which are appropriate to an "as applied" challenge on a fully developed administrative record), there is no basis for setting aside the CM Rules based upon the lack of specifically articulated time standards.

AFRD2, 143 Idaho at 875, 154 P.3d at 446 (emphasis added).

When the relevant section of *AFRD2* is reviewed in its entirety, one can appreciate that the quote on which IGWA relies is taken out of context. *AFRD2* does not stand for the proposition that the Director must hold a hearing before issuing an order.

IGWA also supports its claim that it was entitled to a hearing before the Director issued the Fifth Methodology Order by arguing that in *Clear Springs*, the "Court reprimanded the Director for issuing a curtailment order before a hearing, stating: 'the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.'" IGWA Opening Br. 19. Again, IGWA fails to provide the necessary context for its quotation.

In *Clear Springs*, the Director responded to a delivery call by issuing an order curtailing specific ground water users with water rights junior to those of the calling parties. 150 Idaho at 796, 252 P.3d at 77. Several entities, including the ground water users, requested a hearing. *Id*. The Director held a hearing and issued a post-hearing curtailment order. On appeal to the Idaho Supreme Court, the ground water users asked that the curtailment order be set aside because the Director did not grant them a hearing before the orders were issued. *Id*. at 814, 252 P.3d at 95. The Court rejected the argument that the Director can never curtail water users without first holding a hearing. The Supreme Court recognized that "due process does not necessarily require

a hearing before property is taken" and that "that there are circumstances that justify postponing notice and an opportunity for a hearing." *Id*. The Court discussed that "three requirements, if met, permit a prehearing seizure of property." *Id.* The Court explained:

> Whether or not curtailment of water use can be ordered without prior notice or an opportunity for a hearing depends upon whether the three requirements are met under the circumstances of a particular delivery call or curtailment. *See Nettleton v. Higginson*, 98 Idaho 87, 92, 558 P.2d 1048, 1053 (1977) ("We find the above three requirements to be met in the *present case* ...."). (Emphasis added.) In the instant case, the record does not show that there was a special need for very prompt action without notice and an opportunity for a hearing. The groundwater pumping did not cause a sudden loss of water discharge from the springs. The flow from the springs at issue had been gradually declining over a number of years. Curtailment would not quickly restore the spring flows. The Director found that "[t]he effects of curtailment may be years to be realized." Under these circumstances, *the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing.*
>
> However, that does not invalidate the curtailment orders that are the subject of this appeal. The Groundwater Users were given notice and a hearing before the Director issued his final order, and it is that order which is the subject of this appeal. That they may have initially been denied due process with respect to the curtailment orders issued in May and July 2005 does not invalidate the final order issued in July 2008 after the hearing.

Id. at 815–16, 252 P.3d at 96–97 (emphasis added). While IGWA is correct that the Court determined that the Director should have given the junior appropriators notice and a hearing prior to curtailing them, the error did not invalidate the post-hearing curtailment orders and the determination was limited to the circumstances of that delivery call.

In this case, when the Director issued the Fifth Methodology Order, he did not cause a prehearing seizure of property. The Fifth Methodology Order simply establishes the methods for determining material injury to members of the SWC. And in this case, IGWA requested and received a hearing. Thus, because the Fifth Methodology Order does not cause a prehearing seizure of property, IGWA's citations to *Clear Springs* do not hold up. And although the Director predicted an in-season demand shortfall of 75,200 acre-feet in the April As-Applied Order, the Director did not require immediate curtailment. R. 53. Instead, the Director notified water right

holders of the possible curtailment and of the upcoming hearing. R. 104. The Director also notified water right holders that "[a]fter the hearing the Director will decide whether to issue a curtailment order." R. 104. In the Director's *Order Denying Motion for Reconsideration of Denial of Continuance*, the Director reiterated: "The Director will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed." R. 430. After holding the hearing and revising the April Forecast Supply, the Director predicted no mid-season in-season demand shortfall and, therefore, did not issue a curtailment order. R. 1062.[16] In summary, the Director in this case did not act contrary to *Clear Springs*.

Finally, the parties contesting the Fifth Methodology Order moved this Court for relief prior to the June 6, 2023 hearing in *Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res.*, CV01-23-08187.[17] In that proceeding, the parties similarly argued the Director did not afford them with sufficient procedural due process when he issued the Fifth Methodology Order. At the hearing on June 1, 2023, the district court weighed the process the Director provided against the Director's duty to timely administer water rights in priority and concluded that the Director "provide[d] due process consistent with the exigencies of the circumstances and the director's duty to timely administer water rights in priority." R. 1095; Excerpt from Hr'g on

[16] Moreover, the premise that the Director cannot first issue an order identifying those who would be subject to curtailment is untenable. An order is defined as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." I.C. § 67-5201(15). Any document issued by the Director determining who is subject to curtailment is an order. How would water users know who would be subject to curtailment if the Director doesn't first issue an order explaining who is subject to curtailment and the reason for the curtailment? Once the curtailment order is issued, the water users subject to the order have notice of the order and can request a hearing. Whether the Director could require *immediate* curtailment would be subject to the three-part test established in *Clear Springs*.

[17] To the extent that it is necessary, the Department moves the Court to take judicial notice pursuant to I.R.E. 201 of the following court record in CV01-23-08187: June 1, 2023 hearing recording and/or court minutes, an excerpted transcript of which can be found attached as Exhibit B to the Declaration of Garrick L. Baxter in Support of Department's Motion for Attorney Fees, dated June 15, 2023.

Admin. Appeals (Court's Ruling) Tr., at 8–9, *Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res.*, No. CV01-23-08187 (Ada Cnty. Dist. Ct. Idaho June 1, 2023).[18]

Therefore, the Director issued the Fifth Methodology Order in compliance with Idaho Code § 42-1701A, which entitled IGWA to a hearing *after* the Director issued the order.[19]

ii. The hearing on the Fifth Methodology Order satisfied due process and the APA and IGWA was not prejudiced.

IGWA argues that the hearing on the Fifth Methodology Order was "anything but fair." IGWA Opening Br. 22. IGWA's contention is undermined by the record, which demonstrates IGWA received actual notice of the hearing and sufficient opportunity to be heard.

As stated above, the Director issued the Fifth Methodology Order in compliance with Idaho Code § 42-1701A(3). After the Director issued the order IGWA was entitled to a hearing on the order. A hearing contesting the action of the Director under subsection (3) "shall be held and conducted in accordance with the provisions of subsections (1) and (2)." I.C. § 42-1701A(3). Subsection (1) provides that hearings before the Director shall be conducted in accordance with the APA and the Department's Rules of Procedure. I.C. § 42-1701A(1). Subsection (2) permits the Director to appoint a hearing officer to conduct such a hearing and imparts the hearing officer with related duties. I.C. § 42-1701A(2). Under Idaho Code § 67-5242, the presiding officer is vested with responsibilities to promote the full adjudication of the merits at the hearing. *See* I.C.

[18] IGWA's argument here parallels arguments it has made in related cases, which have all been rejected by this Court. *See* Order Dismissing Pet. for Jud. Rev., at 2–4, *City of Pocatello v. Spackman*, No. CV01-17-00067 (Ada Cnty. Dist. Ct. Idaho, Feb. 16, 2017); Order Dismissing Pet. for Jud. Rev., at 2–3, *Sun Valley Co. v. Spackman*, No. CV01-16-23173 (Ada Cnty. Dist. Ct. Idaho Feb. 16, 2017); Order Granting Mot. to Dismiss, at 5–9, *Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022).

[19] IGWA also claims that the SWC Delivery Call is one contested case. IGWA is incorrect. The procedural history of the SWC Delivery Call is complicated. While the matters are administratively organized under one file number, CM-DC-2010-001, this does not render the delivery call *one contested case*. Instead, consistent with statute and the Department's Rules of Procedure, when someone requests a hearing pursuant to Idaho Code § 42-1701A, that creates a contested case as it creates a proceeding that will result in the issuance of an order. I.C. § 67-5201(8).

§ 67-5242(3). IGWA received actual notice of the hearing, sufficient opportunity to be heard, and a full adjudication of the merits of its challenge to the Fifth Methodology Order.

The Director issued the Fifth Methodology Order, the April As-Applied Order, and the Notice of Hearing on April 21, 2023. R. 1, 48, 62. The Director scheduled the hearing for approximately six weeks later, to begin on June 6, 2023. R. 62. In the six weeks between the issuance of the Fifth Methodology Order and the hearing, IGWA conducted discovery (*see e.g.,* R. 400–15), deposed two Department witnesses (R. 393–96, 435–36; *see e.g.,* Tr. Vol. I, p. 68, L. 2–5), deposed a representative of Twin Falls Canal Company (R. 452–56; *see e.g.,* Tr. Vol. II, p. 89, L. 6–15), solicited and received an expert witness report (R. 2112–625), and conducted several rounds of motion practice.

The hearing proceeded as scheduled from June 6–9, 2023. IGWA appeared at the hearing, represented by counsel, all four days. Tr. Vol. I, p. 3, L. 1–9; Vol. II, p. 4, L. 3–10; Vol. III, p. 4, L. 3–10; Vol. IV, p. 4, L. 3–10. At the hearing, thirteen witnesses testified and were subject to cross-examination. IGWA conducted the direct examination of three witnesses: Sophia Sigstedt, Richard Lynn Carlquist, and Anthony Olenichak. Tr. Vol. III, p. 11, L. 1 through p. 87, L. 14, pp. 122–132, pp. 228–237. IGWA cross-examined all witnesses except for Bryce Contor, Scott King, and Dean Delorey. IGWA presented both evidence and arguments at hearing and IGWA timely submitted a post-hearing brief. R. 958–76. As the record demonstrates, IGWA received notice of the hearing, participated in pre-hearing discovery and motion practice, received a full and robust opportunity to examine and cross-examine witnesses, and timely submitted its post-hearing argument to the Director. The hearing complied with all due process, APA, and Department requirements.

Nevertheless, IGWA asserts the hearing violated due process and alleges seven bullet points describing how the "process was prejudicial to junior water users[.]" IGWA Opening Br.

22. Two of IGWA's reasons are the unavailability of expert witnesses, three reasons concern lack of adequate time to develop expert opinions, and two reasons concern the Director's limitations on discovery. IGWA expands on its arguments regarding discovery issues and lack of adequate time to develop expert opinions later in its brief. *Id*. at 24–29. The Director responds to all of IGWA's arguments on these issues and IGWA's alleged prejudice together below. Again, the hearing on the Fifth Methodology Order satisfied due process and the APA and IGWA was not prejudiced.

a. IGWA was not unduly prejudiced by its expert witnesses' unavailability.

IGWA argues that the hearing was not fair and IGWA was prejudiced because expert witnesses Greg Sullivan and Jaxon Higgs were unavailable in some way regarding the hearing. The experts' partial unavailability did not prejudice IGWA.

First, IGWA claims it was prejudiced because Greg Sullivan was "unavailable to assist in developing strategy, preparing expert reports, preparing exhibits, and attending depositions." IGWA Opening Br. 22. However, IGWA did not identify Mr. Sullivan as a witness and Mr. Sullivan did not "represent" IGWA at the hearing. R. 536–38; Tr. Vol. II, p. 113, L. 25 through p. 114, L. 4. Rather, Mr. Sullivan authored a timely expert report on behalf of the Cities of Pocatello and Idaho Falls, and the Coalition of Cities and was identified as a witness by the same. R. 524, 1511–79. At the hearing, Mr. Sullivan testified regarding his expert opinions and was subject to full cross-examination. R. 1511–79; Tr. Vol II, p. 111, L. 18 through p. 255, L. 9. Indeed, IGWA cross-examined Mr. Sullivan. Tr. Vol. II, p. 247, L. 1 through p. 252, L. 1–9. Therefore, IGWA did not suffer prejudice by another party's witness' alleged inability to participate in hearing preparation.

Second, IGWA claims it was prejudiced because Jaxon Higgs was out of the country during the hearing. IGWA Opening Br. 22. When IGWA raised Mr. Higgs' unavailability to the

Director, the Director "recognize[d] that some flexibility with witnesses… [was] necessary" and authorized Mr. Higgs to participate in the hearing remotely. R. 427, 431. Mr. Higgs declined. Mr. Higgs did, however, consult with IGWA's other retained expert, Sophia Sigstedt. R. 2153–55 ("Jaxon Higgs provided the analysis but will be out of the country during the hearing and unable to testify. I reviewed the analysis and can testify to results shown in Table 3-1."). Ms. Sigstedt then testified to Mr. Higgs' analysis. Tr. Vol. III, p. 85, L. 1–4 ("The table is an analysis that was done by Jaxon Higgs, who couldn't be here to testify, so I went over the analysis with him, and I'm going to testify on it today."). The Director accommodated Mr. Higgs' unavailability by authorizing him to participate remotely, and IGWA adjusted for his absence in advance by introducing his analysis through another expert. Because IGWA adjusted for his absence and introduced his analysis through another expert, IGWA has failed to show it was prejudiced by Mr. Higgs' unavailability.

b. IGWA was not unduly prejudiced by the time allowed to develop expert opinions.

IGWA argues that the hearing was not fair and IGWA was prejudiced by not having sufficient time to develop expert opinions. IGWA Opening Br. 22, 27. IGWA claims that its expert, Ms. Sigstedt, did not have time to properly analyze the methodology, that it was unable to locate an expert to analyze the "project efficiency" component, and that it did not have adequate time to conduct inspections and analyses to develop expert opinions. *Id*., at 22, 27. Any prejudice IGWA suffered by the compressed hearing schedule was outweighed by the Director's duty to timely administer water rights in priority.

First, IGWA asserts it was prejudiced because Ms. Sigstedt "was unable to perform all of the work required to properly analyze the Fifth Methodology Order before the June hearing." *Id*.

at 22.[20] While the Director recognized the compressed hearing schedule was a potential burden on the parties, the Director noted it was "a burden being born by all parties, both the senior water users and the junior ground water users." R. 429. When scheduling the hearing, the Director had to weigh "the need of the senior water user to have timely administration" against "the ground water users desire to have more time to prepare for the hearing." *Id.* One factor the Director considered was the parties' technical experts' familiarity with the methodology order. *See id.* The Director observed that "the experts for IGWA and the Cities have represented those entities for many years. The experts have a familiarity with the methodology order." *Id.*

For example, Ms. Sigstedt has worked as a technical consultant for IGWA for "several years." R. 316. Ms. Sigstedt was also a member of both the 2015 and 2022 working groups that convened to review proposed revisions to the methodology. R. 2373. As a part of the 2022 working group, Ms. Sigstedt submitted comments on the December 23, 2022 IDWR Staff Recommendations on January 16, 2023. R. 2879.

Ms. Sigstedt's years-long familiarity with the methodology and her participation in the 2022 working group situated her differently than a newly retained expert approaching the methodology for the first time. Indeed, despite the time constraint, Ms. Sigstedt authored a timely expert report and an updated report for the hearing. R. 2112–368, 2369–625. While all the experts working on the compressed timetable would have likely appreciated more time to develop their opinions, the Director's responsibility to timely respond to injury incurred by senior water users without unnecessary delay predominated. R. 430; *see AFRD2*, 143 Idaho at 874, 154 P.3d at 445.

[20] IGWA also argues that it was prejudiced because Ms. Sigstedt "had a medical condition that prevented her from leaving her home state of Colorado" until after the hearing date. IGWA Opening Br. 22. However, to accommodate Ms. Sigstedt's medical condition, the Director authorized Ms. Sigstedt to participate in the hearing remotely. R. 427, 431. Ms. Sigstedt testified remotely at the start of the third day of the hearing. Tr. Vol III, p. 10, L. 9–11. Therefore, IGWA was not prejudiced by Ms. Sigstedt's inability to leave Colorado.

Second, IGWA argues that it was prejudiced because "IGWA was unable to locate a qualified engineering firm that had capacity to analyze the 'project efficiency' component of the Fifth Methodology Order by the June hearing." IGWA Opening Br. 22. In the August 5, 2022, status conference regarding this delivery call, the Director tasked Department staff with convening a technical working group to update the methodology order, putting IGWA on notice that technical updates to the methodology order were impending. R. 2866. In November 2022, Department staff presented the technical working group with possible changes to project efficiency, placing IGWA on notice that the Department was specifically considering updating project efficiency. *E.g.*, R. 2636, 2772.[21] As a result, IGWA's expert, Sophia Sigstedt, addressed project efficiency in her January 16, 2023 comments to staff's recommendation. R. 2883–85. However, Ms. Sigstedt's May 30, 2023 expert report omits a discussion of project efficiency and any explanation as to why the analysis is omitted. *See* R. 2112–368.

In a May 5, 2023 declaration in support of a motion to continue the hearing, Ms. Sigstedt expressed a desire to "evaluate and analyze [ ] apparent contradictions and uncertainties" with project efficiency but that "[t]he June 6, 2023 hearing date does not allow [her] to properly evaluate and analyze this data." R. 318–19. Ms. Sigstedt advised that she would need until October of 2023 to complete her work. R. 319. The Director addressed Ms. Sigstedt's request for a delay until October 2023 to conduct her analysis in his *Order Denying Motion for Reconsideration of Denial of Continuance*. R. 428. In denying the request, the Director concluded that the exigencies of timely administration prevailed over the desire for more hearing preparation time: "[t]o ensure timely administration for predicted material injury in this current irrigation season, the Director cannot agree to continue the hearing beyond June." R. 430–31.

[21] Department staff also identified updating the "project efficiency value" in its December 23, 2022 IDWR Staff Recommendations. R. 2866.

The Director urged repeatedly that time was of the essence given the April As-Applied Order predicted an in-season demand shortfall. *E.g.,* R. 300. "The urgency for water administration mandates a timely decision because '[w]hen a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action.'" R. 300.

IGWA never argued to the Director that Ms. Sigstedt could or would not analyze "project efficiency" in her expert report, that it had been necessary to locate an additional qualified expert to do so, that it been unable to locate such an expert, or that it would be prejudiced by not being able to do so. Therefore, IGWA was not prejudiced by failing to retain an expert to produce timely analysis of project efficiency.

Third, IGWA argues that "[t]he compressed schedule did not afford adequate time for affected water users to conduct inspections and analyses needed to formulate expert opinions and develop reports addressing the complex issues[.]" IGWA Opening Br. 22. In addition, IGWA claims that "it is a violation of fundamental fairness under due process" and Idaho Code § 67-5242(3)(a) "for the Director to implement a hearing schedule that precludes the parties from discovering relevant evidence" *Id*. at 28.

Specifically, IGWA argues:

> Recognizing that irrigated acres are an important consideration under the CM Rules, and that a field-level examination of irrigated acres would require coordination with [Twin Falls Canal Company] and take considerable time, IGWA and the Coalition of Cities filed a motion to continue the after-the-fact-hearing. Even though it was groundwater users had (sic) mitigated any potential injury to the SWC for 2023, the Director denied the motion. Then, after the hearing was held, the Director ruled that the groundwater users had failed to prove by clear and convincing evidence that TFCC was irrigating less than 194,732 acres, because they had not provide (sic) a field-level analysis of actual irrigated acres.

Id.[22]

[22] Later in its Opening Brief, IGWA alleges the Director erred substantively regarding TFCC's irrigated acres. IGWA Opening Br. 33. The Director addresses IGWA's procedural allegations in this section and responds to IGWA's substantive allegations in Section B.*ii*.

IGWA's recitation of the record is incomplete. On April 28, 2023, the Cities moved the Director to continue the hearing until December or January 2024 to allow time to conduct "necessary site investigations" to examine "[w]ater use, irrigation practices, and irrigated area[s]," which they claimed had "likely materially changed in the intervening fifteen (15) years" since the original delivery call administrative hearing. R. 84, 298. Later that day, the Director held the prehearing conference. At the prehearing conference, IGWA, BJGWD, and McCain Foods orally moved to join the Cities' motion to continue the hearing. R. 298. The Director orally denied the request to delay the hearing, which he memorialized in the Order Limiting Discovery. R. 299. The Director weighed the parties' arguments seeking more time against the Director's "obligation to timely predict water supplies and issue orders timely to ensure senior water right holders are protected." *Id.* The Director was skeptical of the "Cities' claims of being surprised by the changes" and responded by noting how the Director and the Department had advised the parties of the Director's "intention to revisit the Fourth Methodology Order." *Id.*

As detailed above, IGWA was on notice that the Director sought to make technical changes to the methodology order in August 2022—ten months prior to the hearing. IGWA's experts participated in the technical working group, which developed and narrowed the proposed updates to the methodology order. IGWA was on actual notice of the Fifth Methodology Order and the hearing in April 2023—six weeks prior to the hearing. The Department has used a methodology order since 2010 and has modified and amended the methodology several times to account for new data, modeling revisions, climate trends, and changes in law. While the timeline of the instant amendment was compressed, IGWA had time to investigate the irrigated acres over the past decade and had sufficient time to analyze the proposed changes to the Fourth Methodology Order. All parties were subject to the same timeline. The Director weighed IGWA's arguments in support of extended time against his duty to timely address injury and concluded

that the latter prevailed. The Director did not violate due process or the APA, and IGWA was not prejudiced by the compressed timeline.

Finally, IGWA was not precluded from undertaking a field-level examination of irrigated acres and supplemental ground water use and may do so at any time. "As more data is gathered and analyzed, the Director will continue to review and refine the process of predicting and evaluating material injury. The methodology will continue to be adjusted if the data supports a change." R. 1039–40.

c. IGWA was unduly not prejudiced by the Director's limitations on discovery.

IGWA argues that the hearing was not fair and IGWA was prejudiced by the Director's limitations on permissible discovery. IGWA Opening Br. 22, 24–27. Specifically, IGWA challenges the Director's denial of written interrogatories and requests for admissions,[23] and the limitations on the scope of the Department's witnesses' testimony. *Id*. at 22, 25. IGWA's arguments regarding discovery fail because the Director was well within his authority to limit the scope of discovery and IGWA has failed to preserve the issue for appeal.

"Unless otherwise provided by statute, rule, order or notice, the scope of discovery is governed by the Idaho Rules of Civil Procedure (see Idaho Rule of Civil Procedure 26)." IDAPA 37.01.01.520.02. In general, the scope of discovery under I.R.C.P. 26 is as follows: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" I.R.C.P. 26(b)(1)(A). It is also within the Director's discretion as the presiding officer to limit the type and scope of discovery in an administrative hearing. IDAPA 37.01.01.521. Additionally, "[t]he presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis

[23] IGWA states that "requests for production were not permitted." IGWA Opening Br. 22. However, the Director limited discovery by not authorizing the parties to engage in "interrogatories or requests for admissions." R. 127. The Director permitted the parties to request production of documents. *Id.*

of any evidentiary privilege provided by statute, rule or recognized in the courts of Idaho." IDAPA 37.01.01.600.

1. The Director acted within his discretion to limit written discovery and IGWA failed to preserve the issue by not objecting to the limitation before the Director.

In the Notice of Hearing, the Director authorized the parties to "immediately conduct and engage in discovery." R. 64. Following the prehearing conference, the Director issued a Scheduling Order. R. 126–28. In the Scheduling Order, the Director explained that during the prehearing conference, "[s]ome counsel expressed concern about having enough time to respond to discovery given the compressed period for the hearing. The Director agreed to limit the scope and timing of discovery to address the concerns…. Further, the Director and the parties discussed and agreed upon a discovery and hearing schedule." R. 126–27.

Therefore, within his discretion as the presiding officer, the Director limited written discovery to requests for production of documents, disallowing the parties from engaging in interrogatories or requests for admission. R. 127. IGWA did not object to the Director's exercise of his discretion to limit written discovery and IGWA agreed upon a discovery schedule. Because IGWA did not object to the limitation on written discovery, the Director did not have the opportunity to consider IGWA's argument. IGWA's argument should be rejected because the Director acted with his discretion as the presiding officer and IGWA did not preserve the issue by failing to object before the Director.

2. The Director acted within his discretion to limit the scope of the deposition testimony.

In the Scheduling Order, the Director also memorialized his oral identification of "two Department witnesses who [would] be made available to the parties for deposition and [would] testify at the hearing—Jennifer Sukow, Engineer, Technical 2, and Matthew Anders, Technical Services Bureau Chief." R. 126.

On May 4, 2023, Ground Water Users served a *Joint Notice of Deposition Duces Tecum of Jennifer Sukow, P.E., P.G. and a Joint Notice of Deposition Duces Tecum of Matthew Anders*, P.G. R. 164–70, 174–79.[24] The next day, the Director issued the *Order Limiting Discovery*. R. 298–301. The order provided in relevant part:

> As indicated at the prehearing, the deposition process is not an opportunity for parties to question Department employees about the Director's deliberative process related to legal and policy considerations. The Methodology Order clearly explains the Director's views regarding the legal and policy considerations on the issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling. Rule 521 of the Department's Rules of Procedure states: "The presiding officer may limit the type and scope of discovery." IDAPA 37.01.01.521. Accordingly, the Director will limit the scope of the depositions to preclude questions regarding the Director's deliberative process on legal and policy considerations.

R. 301.

IGWA now claims that "the Director implemented a scheme to block junior water users from discovering all of the information he considered in developing the Fifth Methodology Order." IGWA Opening Br. 25. Again, the methodology order "clearly explain[ed] the Director's views regarding the legal and policy considerations on the issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling." R. 301. To the extent that IGWA sought information beyond what the Director explained in the methodology order, such information was irrelevant and not discoverable. Further, Department employees are plainly not qualified to testify to the Director's legal and policy considerations. Rather, they are

[24] IGWA also served the Department with an I.R.C.P. 30(b)(6) deposition notice seeking to discover "any information considered by Department staff and/or the Director in developing the [Fifth Methodology Order]… that is not included among the materials that Ms. Sukow and Mr. Anders may rely upon and the topics they may testify about." R. 394. The information considered by the Director in developing the Fifth Methodology Order was included in the Fifth Methodology Order. The Department identified and made two Department employees available for deposition regarding the information they considered and analyzed in developing the Fifth Methodology Order. Any information considered by the Director that was not included in the Fifth Methodology Order or was not within the scope of the information Department employees could testify to was irrelevant. Therefore, IGWA's requested 30(b)(6) deposition would not have led to discoverable information and would have been unduly repetitious. The Director was within his discretion to decline to produce an additional Department witness.

qualified to testify to their technical findings and their analyses. *See* R. 306. Therefore, the Director properly excluded such information and limited the scope of discovery within the bounds of his discretion.

3. The Department did not err by enforcing the Director's Order Limiting Discovery.

IGWA argues that at the depositions of Ms. Sukow and Mr. Anders, "counsel for the Department instructed them not to answer almost 50 questions on the basis that they related to the Director's deliberative process." IGWA Opening Br. 25. IGWA supports this allegation by citing the two deposition notices. All IGWA's arguments regarding the deposition questioning of Ms. Sukow and Mr. Anders are irrelevant and are unsupported by the record as the deposition transcripts are not a part of the record. *Id*. at 25–26. In addition, IGWA did not raise any issues regarding the course of the depositions to the Director. To the extent that IGWA now argues that the Department's Counsel improperly interpreted the Order Limiting Discovery, IGWA likewise did not raise the issue with the Director. IGWA did not preserve any objection it had to the depositions of Ms. Sukow and Mr. Anders.

Finally, IGWA's allegations that the Director "implemented a scheme to block junior water users from discovering all of the information he considered," "hid[ ] information," and "employed a strategic approach to keep relevant information out of the agency record for review" are baseless. The Director properly exercised his discretion in limiting the manner and scope of discovery to expedite the discovery process considering the compressed hearing schedule and to exclude irrelevant evidence. IGWA was, therefore, not prejudiced by the Director's exercise of his discretion in limiting the type and scope of discovery.

iii. The Director did not rely on information outside the agency record to develop the Fifth Methodology Order.

IGWA alleges that the Director used "information outside the agency record" to develop the Fifth Methodology Order. IGWA Opening Br. 23. IGWA supports this allegation by citing a

portion of Matthew Anders' testimony at hearing, which describes how Department staff considered the written comments submitted to the technical working group and responded to them. *E.g.,* Tr. Vol I., p. 176, L. 11–13 ("After we got the comments, and after we were into the drafting, we started doing additional analyses looking at the reasonable carryover."). What IGWA claims is use of information outside of the agency record appears instead to be the Department meaningfully considering the comments received from the technical working group prior to issuing the updated methodology order.

IGWA also argues that "[w]e still don't know all the information the Director considered because he prohibited the parties from discovering relevant information related to legal and policy decisions that contributed to changes made in the Fifth Methodology Order." IGWA Opening Br. 23. Both what information is relevant and the scope of discovery are within the Director's discretion. The Fifth Methodology Order clearly explains the Director's views regarding the legal and policy considerations of revising the Methodology. The Director did not err.

iv. The Director did not violate the Department's Rules of Procedure when he took official notice of information after issuing the Fifth Methodology Order.

IGWA claims that the Director violated the Department's Rule of Procedure 602 by taking official notice of materials after issuing the Fifth Methodology Order. IGWA Opening Br. 23. IGWA's argument is premised upon the idea that the Director was required to hold a hearing before issuing the Fifth Methodology Order. *Id*. ("In keeping with the premise that hearing must be held before decisions…."). Because, as discussed above, the Director is *not* required to hold a hearing first, IGWA's argument regarding official notice is fundamentally flawed. The Director notified the parties of his intent to take official notice in the *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice* on May 5, 2023—one

month prior to the hearing. R. 305–07. Because the Director issued the notice prior to the hearing in this matter, the Director did not err.[25]

v. The Director did not violate the APA by denying the Coalition of Cities' motion for an independent hearing officer.

IGWA argues that the Director violated Idaho Code § 67-5252 by denying the Coalition of Cities' motion to appoint an independent hearing officer. IGWA Opening Br. 24. IGWA claims that § 67-5252 confers a "statutory right to disqualify the Director as the presiding officer." *Id.* IGWA's argument fails for three reasons.

First, IGWA did not move the Director to appoint an independent hearing officer, the Cities did. R. 73. IGWA did not raise any objection to the Director presiding over the matter and, therefore, it has waived its objection on judicial review.

Second, the Cities did not move the Director to appoint an independent hearing officer under Idaho Code § 67-5252, they moved pursuant to § 42-1701A(2) and IDAPA 37.01.01.410. R. 74. Section 42-1701A(2) states in relevant part that "[t]he director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director." I.C. § 42-1701A(2). Department Rule of Procedure 410 permits the Director to appoint an "independent contractor" as the hearing officer. IDAPA 37.01.01.410. The Cities argued that it was "IDWR's practice [ ] to appoint an independent hearing officer to preside over evidentiary hearings in the SWC delivery call." R. 77. The Cities concluded that they "agree[d] with past practice [and] respectfully move the Director to appoint an independent hearing officer." *Id.*

The Director recognized the matter as discretionary, thoroughly considered the Cities' arguments, and exercised his discretion by denying the Cities' motion. R. 299–300. The Director

[25] The notice also stated that "[p]ursuant to Rule of Procedure 602, any party may file a written objection 'to contest and rebut the facts or material to be officially noticed' on or before June 4, 2023." R. 307. IGWA did not file a written objection contesting the official notice and has waived any argument regarding this issue.

did not consider disqualification without cause under Idaho Code § 67-5252 because he was not asked to consider such disqualification.

Third, even if IGWA and the Cities had moved to disqualify the Director as the presiding officer without cause under Idaho Code § 67-5252, they still did not have a "statutory right to disqualify the Director as the presiding officer" without cause. IGWA Opening Br. 24. Department Rule of Procedure 411 states "[p]residing officers may be disqualified as provided in Section 67-5252, Idaho Code." IDAPA 37.01.01.411.[26] Section 67-5252(1) provides in relevant part, "*[e]xcept as provided in subsection (4)* of this section, any party shall have the right to one (1) disqualification without cause of any person serving or designated to serve as presiding officer[.]" I.C. § 67-5252(1) (emphasis added). Subsection (4) states "[w]hen disqualification of the agency head or a member of the agency head would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of section 74-404, Idaho Code." I.C. § 67-5252(4). Section 74-404 is a provision of the Ethics in Government Act that prohibits a public official from acting officially in any matter "where he has a conflict of interest and has failed to disclose such conflict." I.C. § 74-404.

While Idaho Code § 67-5252(4) contemplates the disqualification of an "agency head," it, unlike § 67-5252(1) does not explicitly state the grounds upon which the "agency head" may be disqualified; therefore, the circumstances under which an agency head may be disqualified are not explicitly defined in Idaho Code § 67-5252. However, the legislative history supports the conclusion that the legislature intended that the "agency head" cannot be disqualified without cause under subsection (1).

[26] Under the Department's Rules of Procedure, "Presiding Officer" is defined in part as "[o]ne (1) or more members of the Board, the Director, or duly appointed hearing officer presiding over a formal proceeding as authorized by statute or rule." IDAPA 37.01.01.002.15. The Rules of Procedure also define "Agency Head" as "[t]he Board or Director of the Department." IDAPA 37.01.01.002.03.

In conjunction with the promulgation of the Idaho Administrative Procedure Act, former Idaho Attorney General, Larry EchoHawk, published the IDAHO ADMINISTRATIVE PROCEDURE ACT WITH COMMENTS AND IDAHO ATTORNEY GENERAL'S MODEL RULES OF PRACTICE AND PROCEDURE, *EFFECTIVE JULY 1, 1993* ("IDAPA WITH COMMENTS AND MODEL RULES"). According to the IDAPA WITH COMMENTS AND MODEL RULES, the Idaho Administrative Procedure Act was drafted through a collective effort between the Attorney General's Office and an interim legislative committee. As indicated by its title, descriptive comments follow most sections of the publication. While the "comments were not officially adopted by the Idaho Legislature in connection with the passage of the A.P.A. … the comments were prepared for and available to the legislative interim committee that studied the draft of the A.P.A. prepared by the Attorney General's task force and were used by both that task force and the interim committee in their work." IDAPA WITH COMMENTS AND MODEL RULES.

The comments to § 67-5252 provide in relevant part: "Subsection (1) provides grounds for disqualifying a presiding officer other than an agency head…. Subsection (4) is concerned with the situation in which an agency head is subject to a petition for disqualification. The agency head is required to comply with Section 2 of the Ethics in Government Act, Idaho Code § 59-704." *Id.* at 36.[27]

When one considers the legislative history, one must conclude that the legislature intended that the Director should not be disqualified without cause. Therefore, IGWA's contention that Idaho Code § 67-5252(1) imparts a "statutory right to disqualify the Director"

[27] In 2015 the Idaho Legislature reorganized laws relating to government transparency by moving the Public Records Act, the Open Meetings Law, the Ethics in Government Act, and the Prohibitions Against Contracts With Officers statutes into a new title called "Transparent and Ethical Government." 2015 Idaho Sess. Laws, ch. 140, 344 (H.B. 90). As a result, Idaho Code § 59-704 was recodified as § 74-404.

without cause fails. Therefore, the Director did not violate § 67-5252 by denying the Cities' motion to appoint an independent hearing officer.

B. The Fifth Methodology Order accommodates both first in time and beneficial use aspects of the prior appropriation doctrine.

IGWA alleges that the Director "committed several substantive errors in developing and applying the Fifth Methodology Order, all of which relate to the principle of beneficial use." IGWA Opening Br. 29. To address IGWA's arguments, "it is necessary to reiterate the presumptions and evidentiary standards that apply to a delivery call." R. 773 (Mem. Decision & Order on Pets. for Jud. Rev., *Idaho Ground Water Appropriators, Inc. v. Spackman*, No. CV-2010-382 (Gooding Cnty. Dist. Ct. Idaho Sep. 26, 2014) [hereinafter 2014 District Court Order]).

> First, when a call is made "the presumption under Idaho law is that the senior is entitled to his decreed water right." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. Then, "[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." *A&B Irr., Dist.*, 153 Idaho at 524, 284 P.3d at 249. Finally, "[o]nce 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." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 (emphasis added).…
>
> [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.

Id. These presumptions and evidentiary standards are instructive on the issues IGWA now raises.

i. IGWA failed to provide sufficient evidence that the forecast supply calculation is flawed.

IGWA alleges that because the Fifth Methodology Order does not "adjust[ ] the Forecast Supply to account for inflows from other tributary basis" below the Heise Gage, the Director

failed to use the best science available to calculate SWC water needs in accordance with CM Rule 42.01.e. IGWA Opening Br. 32.

The methodology predicts material injury to reasonable in-season demand ("RISD") by taking the difference between RISD and the forecast supply ("FS"). R. 34. The Director calculates the initial forecast supply ("April FS") in Step 2 of the of the Fifth Methodology Order. R. 40.[28] In general, "[t]he April FS for each SWC entity is the sum of the forecasted natural flow supply and the forecasted storage allocation for each SWC entity. The forecasted natural flow supply will be computed with regression algorithms." *Id.* In finding of fact 49, the Fifth Methodology Order details how the Director determines the April FS for each SWC entity:

> Typically, within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. The joint forecast ("Joint Forecast") issued by the United States Bureau of Reclamation ("USBR") and the United States Army Corp of Engineers ("USACE") for the period April 1 through July 31 "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." … With data from 1990 through the irrigation year previous to the current year, a regression equation will be developed for each SWC member.…The regression equations will be used to predict the natural flow diverted for the upcoming irrigation season.… The forecasting techniques will be revised based on updated data and the forecasting techniques may be revised when improvements to the forecasting tools occur.

R. 18. To restate, the Director relies upon the USBR and USACE's Joint Forecast to calculate predictions of the upcoming season's supply for each SWC entity. "Currently, the USBR and USACE's Joint Forecast is an indispensable predictive tool at the Director's disposal for predicting material injury to RISD." R. 37. The Department does not prepare the Joint Forecast and does not oversee what is considered in its development or calculation. Tr. Vol I., p. 167, L. 2–11.

[28] The Director revisits the forecast supply in Steps 6 and 7 of the methodology, when the Director issues a revised forecast supply. R. 41–42 The revised "FS for each SWC entity is the sum of the year-to-date actual natural flow diversions, the forecasted natural flow supply for the remainder of the season, and the storage allocation for each member of the SWC." R. 42.

IGWA claims that "[t]o calculate the water supply, the Fifth Methodology Order uses Snake River flows on the South Fork at the Heise Gage, but does not account for inflows to the Snake River from several tributaries below Heise including the Portneuf River, Blackfoot River, Willow Creek, and Henry's Fork." IGWA Opening Br. 32. IGWA concludes that flooding in 2023 added more water to the Snake River than normal, was unaccounted for in the Fifth Methodology Order, and resulted in the Director predicting less water than was available to the SWC. *Id.* at 33.

IGWA supports its allegation by reference to the testimony of Department employee, Matthew Anders, and referencing the Idaho NRCS SNOTEL data. *Id.* at 32–33; R. 1599. Mr. Anders' testimony and the record do not support IGWA' s allegations. In addition, IGWA does not support its contention with affirmative evidence that had the Director accounted for "inflows to the Snake River from several tributaries below Heise" the forecast supply would have been more accurate.[29] The Joint Forecast "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques" and the Director properly relies on it as the best science available to develop the forecast supply.

ii. IGWA failed to provide sufficient evidence to reduce TFCC's predicted irrigated acres.

IGWA disputes the accuracy of TFCC's irrigated acre figure. IGWA argues that the Director abused his discretion by using outdated acreage data when the Department has newer and more accurate data. IGWA Opening Br. 36.

"The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination

[29] In the Post-Hearing Order, the Director addressed IGWA's forecast supply argument, specifically regarding TFCC: "[W]hile 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." R. 1082. The Director responded: "[t]he ground water users failed to offer sufficient evidence that TFCC's natural flow forecast is flawed… Accordingly, the Director concludes… TFCC's natural flow forecast is sufficiently accurate." *Id.*

of how much water is actually needed." *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. "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." R. 761. "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). "[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." R. 773.

CM Rule 42.01 states that, in determining whether a senior irrigator is using water efficiently yet still suffering injury, the Director may consider: "the rate of diversion compared to the acreage of land served" and "[t]he amount of water being diverted and used compared to the water rights." CM Rule 42.01.d, e.

The Director considers the SWC's irrigated acres in Step 1 of the Fifth Methodology Order. R. 39. Step 1 of the methodology requires members of the SWC to "submit electronic shape files to the Department delineating the total anticipated irrigated acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent." *Id.* Step 1 acknowledges that "[b]ecause the SWC members can best determine the irrigated acres within their service area, the SWC should be responsible for submitting the information to the Department." *Id.*

Here, TFCC's natural flow Snake River water rights authorize their shareholders to irrigate 196,162 acres. R. 10. However, it is undisputed that TFCC no longer irrigates 196,162 acres. R. 1083. A 2013 shapefile submitted by TFCC in compliance with Step 1 indicates that TFCC irrigates 194,732 acres. R. 1084. "TFCC concedes its members are currently irrigating no

more than 194,732 acres." *Id.* From 2014–2022, TFCC represented to the Director that "the number of acres TFCC irrigated has not varied by more than 5% from the previous (2013) shapefile numbers." *Id.* Therefore, "the Department used the 2013 shapefile to predict TFCC's irrigated acres for 2023." R. 10, 1084.

IGWA urges the Director to instead predict TFCC's irrigated acres by relying on a shapefile the Department's GIS staff created in 2017, which is commonly referred to as the "2017 irrigated lands dataset," or the METRIC data.[30] The irrigated lands datasets are "delineations of land use by IDWR's GIS staff, where they delineate land unit boundaries, and then classify them as either irrigated, non-irrigated, or semi-irrigated." Tr. Vol. I, p. 88, L. 19–22. The Department uses irrigated lands datasets in ESPAM model calibration. Tr. Vol. I, p. 68, L. 8–10. Model calibration employs hindcasts, not forecasts. R. 1084.

While the 2017 irrigated lands dataset is more recent than the 2013 shapefile, 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. For example, 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. Tr. Vol. II, p. 194, L. 19 through p. 195, L. 3.

In contrast, when TFCC's consultant, David Shaw, compiled the 2013 shapefile, he specifically excluded hardened acres and included acres that could have been irrigated in 2013 but were not. R. 1084; Tr. Vol. IV, p. 152, L. 5 through p. 153, L. 13. "Unlike the 2013 shapefile, the 2017 shapefile includes only acres that *were irrigated* in 2017 and excludes the acres that

[30] METRIC is an acronym for "Mapping EvapoTranspiration at high Resolution and Internalized Calibration." R. 2689. The Department considered using METRIC as a method to determine evapotranspiration ("ET") values. The "METRIC dataset" that IGWA refers to here is based on an IDWR irrigated lands dataset. Tr. Vol. I, p. 195, L. 18 through p. 196, L. 4.

were not irrigated in 2017 but *could be* irrigated in future years, e.g., 2023. The Department considers this distinction critical because, as Mr. Shaw explained in the SWC 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." R. 1234.

For the Director to reduce TFCC's predicted irrigated acres below 194,732, the junior ground water users bear the burden of proving the accuracy of the lesser number by clear and convincing evidence. The Ground Water Users did not establish an alternative number of acres irrigated by clear and convincing evidence. The Director did not abuse his discretion when relying on the best available information for determining TFCC's predicted irrigated acres.

iii. IGWA failed to provide sufficient evidence for the Department to accurately account for supplemental irrigation.

IGWA argues that the Director abused his discretion by "fail[ing] to evaluate whether the water needs of TFCC can be met with supplemental groundwater in accordance with CM Rule 42.01.h." IGWA Opening Br. 36. IGWA suggests that the Director should have required TFCC to disclose its surface water delivery data or "provide a report of supplemental groundwater use." *Id.* at 37.

When determining the total acreage irrigated with surface water by the SWC entities, the Department may consider supplemental ground water use. *See* R. 10, 40; *see also* CM Rule 42. 01.h. However, without sufficient information on supplemental ground water use, the Director is prohibited from reducing a water user's full decreed entitlement. R. 761 (2014 District Court Order 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…").

Step 1 of the Fifth Methodology Order states in relevant part:

> In determining the total irrigated acreage, the Department may account for supplemental ground water use. The Department currently does not have sufficient information to accurately determine the contribution of supplemental ground water to lands irrigated with surface water by the SWC. If and when reliable data is available to the Department, the methodology will be amended to account for the supplemental ground water use.

R. 40.

Again, it is the junior users' burden of proving by clear and convincing evidence that the 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. The burden of proof did not shift to either the Department or TFCC. The Director has the discretion, not the obligation, to consider the impact of supplemental ground water use. Therefore, the Director did not abuse his discretion when he declined to use insufficient information to determine the extent of supplemental irrigation on lands within the service areas of SWC entities.

iv. The Director did not err by not requiring senior appropriators to make system improvements prior to curtailing juniors causing material injury.

IGWA claims that the Director "violated Idaho law and abused discretion by failing to evaluate whether SWC water needs could be met without curtailment by making system improvements in accordance with CM Rules 40.03, 42.01.a, 42.01.g, and 42.01.h." IGWA Opening Br. 37. IGWA suggests that prior to curtailing junior users, the Director should "require TFCC or other members of the SWC to make any effort to meet their water needs with existing supplies." *Id*. at 39.

IGWA's contention that the Director "jumps immediately from a calculated water supply shortage to curtailment," is contrary to the very nature of the methodology order, which the Director employs to balance the first in time and beneficial use aspects of the prior appropriation

doctrine within the SWC Delivery Call. "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of direction by the Director." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451. Under the CM Rules, the Director has the discretion to consider "[t]he 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." IDAPA 37.03.11.042.01.g.

The Fifth Methodology Order repeatedly considers the reasonableness and efficiency of the seniors' water use. *See e.g.,* R. 33–34. However, while the Director has the discretion to consider the reasonableness and efficiency of the seniors' water use to determine whether seniors are suffering material injury, when the Director finds that junior-priority ground water pumping is causing a senior right holder material injury the Director's discretion is limited. CM Rule 40.01. "[W]hen the Director responds to a delivery call regarding diversions occurring within an area having a common ground water supply in an organized water district, the Director shall either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion." *In re A & B*, 155 at 654, 315 P.3d at 842 (citing IDAPA 37.03.11.040.01.a, b).

IGWA's assertion that the Director should have "require[ed] senior users to take reasonable actions to meet their water needs with available water supplies before seeking to curtail junior users" ignores the purpose of the methodology order, disregards the complexity of the calculations undertaken to determine material injury, and conflicts with the Director's obligation to regulate or require juniors to provide mitigation upon a finding of material injury. Therefore, the Director did not abuse his discretion.

v. IGWA did not provide sufficient evidence to support a futile call defense.

IGWA argues that the Director abused his discretion by not applying the futile call doctrine. IGWA Opening Br. 40. CM Rule 10.08 defines a "futile call" as: "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource." IDAPA 37.03.11.010.08.

"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." *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. Junior appropriators have the burden of proving by clear and convincing evidence that the delivery call is futile or otherwise unfounded. *In re A & B*, 155 Idaho at 653, 315 P.3d at 841.

In the Post-Hearing Order, the Director considered and rejected IGWA's arguments regarding the application of the futile call doctrine. R. 1092. IGWA has not proven by clear and convincing evidence that this delivery call is futile. Because IGWA failed to meet its burden, the Director did not err by refusing to apply the futile call doctrine.

vi. The Director acted within his discretion when he declined to implement a trim line.

IGWA argues that the Director "violated Idaho law and abused discretion by refusing to consider the public interest in achieving maximum beneficial use of Idaho's water resources[.]" IGWA Opening Br. 41. IGWA claims:

> Curtailment of hundreds of thousands of acres of groundwater irrigated farmland will do no more than increase TFCC's water supply by a few percentage points. If the principle of maximum beneficial use does not apply here, where the senior seeks to curtail 10 or 100 times more water than it needs for a full water supply, where TFCC will receive nearly full supply of water without curtailment, and where a shortfall can almost certainly be remedied through more efficient water conveyance and usage practices, then the principle might as well be written out of Idaho law.

Id. at 44.

Despite couching its argument in the suggestion that the Director order seniors to remedy a shortfall by using "more efficient water conveyance and usage practices," IGWA appears to be arguing that the Director should have implemented a trim line.[31] A trimline is an area designation that identifies "an area beyond which the impacts of pumping are de minimis to the reach of interest." Tr. Vol. I, p. 82, L. 18–20.

In the Rangen delivery call, the Director established a trim line when "the cumulative benefits of curtailment to a remote spring tributary to the Snake River were de minimus [sic]." R. 1092–93. The Idaho Supreme Court found that the Director had "discretion to implement the trim line based on the policy of beneficial use." *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 129, 369 P.3d 897, 907 (2016).

In the Post-Hearing Order, the Director noted that "[t]he 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." R. 1093. The Director analyzed the figures in Ms. Sigstedt's expert report and concluded that a trimline was not appropriate. *Id.*

It is within the Director's discretion to implement a trim line if the circumstances indicate a trim line is appropriate. The Director did not implement a trimline in the Fifth Methodology Order and ultimately concluded that a trimline was not appropriate. Therefore, the Director did not abuse his discretion or violate Idaho law when he did not implement a trim line.

[31] Consider that in IGWA's Post-Hearing Brief, IGWA suggested that the Director should amend the Fifth Methodology Order by "[i]mplement[ing] a trim line to prevent an unreasonable exercise of priority." R. 961. In support of this change, IGWA argued in Section 3 of its Post-Hearing Brief that "[t]he Fifth Methodology Order should be amended to apply CM Rule 20.03 and prevent the unreasonable exercise of priority by SWC entities." R. 974–75. IGWA's argument in Section 10 of its Opening Brief tracks its argument in Section 3 of its Post-Hearing Brief.

C. The Director did not prejudice IGWA's substantial rights and IGWA is not entitled to attorney fees.

i. The Director did not prejudice IGWA's substantial rights.

Even if the Court finds that the Director erred and met one of the conditions in Idaho Code § 67-5279(3), an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). IGWA argues that "the procedural errors described above violate the substantial rights of IGWA and its patrons because they deprived due process. The substantive errors described above violate the substantial rights of IGWA and its patrons because they generate larger and more frequent curtailments." IGWA Opening Br. 44.

IGWA's first argument is fatally circular. The Director provided IGWA the process it was due prior to issuing the Fifth Methodology Order, during the pre-hearing period, and at the hearing. IGWA had a full and fair opportunity to be heard on its issues with the Fifth Methodology Order. Therefore, the Director did not prejudice IGWA's substantial rights by "depriv[ing] due process."

IGWA's second argument is meritless. The reality of a delivery call is that it arises in times of water shortage.

> In times of water shortage, someone is not going to receive water. When a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action. "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder."

Clear Springs, 150 Idaho at 815, 252 P.3d at 96.

The Fifth and Sixth Methodology Order are supported by substantial evidence in the record. If the Director determines that the SWC will be materially injured because of a demand shortfall prediction, either in the preseason or the midseason, the demand shortfall represents a mitigation obligation that must be borne by junior ground water users.

Should the updated methodology generate larger and more frequent curtailments, such curtailments would be necessary to protect the rights of the seniors and to ensure their injury is remedied in the quantity, time, and place required. IGWA does not have a substantial right to divert water out of priority and cause material injury to the SWC. The Director did not prejudice IGWA's substantial rights.

ii. IGWA is not entitled to an award of attorney fees on judicial review.

IGWA seeks an award of attorney fees under two separate statutes. First, IGWA requests an award of attorney fees under 42 U.S.C. § 1983. IGWA Opening Br. 45. However, IGWA simply cites 42 U.S.C. § 1983 without even quoting the statute or providing any legal support or argument explaining how the Director may be found liable for attorney fees under this federal statute in a judicial review proceeding in state court. IGWA's failure to support the citation is fatal as a "party seeking fees must provide argument on the issue and not simply cite a statute." *Bracken v. City of Ketchum*, ___ Idaho __, __, 537 P.3d 44, 65 (2023).

Second, IGWA also seeks an award of attorney fees pursuant to Idaho Code § 12-117(1). IGWA Opening Br. 45. The Idaho Supreme Court has instructed that attorney fees under § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the Director's process provided due process consistent with the exigencies of the circumstances and the Director's duty to timely administer water rights in priority. IGWA is not entitled to an award of attorney fees under Idaho Code § 12-117.

V. CONCLUSION

The Director issued the Fifth Methodology Order in compliance with Idaho Code § 42-1701A(3).The Director provided all interested parties with actual notice of the order and the full and fair opportunity to be heard. The Director proceeded from the issuance of the order to

the hearing on a compressed schedule due to the urgency for water administration given the April As-Applied Order predicted an in-season demand shortfall and the concern that using the Fourth Methodology Order was no longer legally supportable. The Director did not abuse his discretion in issuing the Fifth Methodology Order, addressing pre-hearing matters, presiding over the hearing, or in the substantive updates to the methodology. The Director's decisions are supported by substantial and competent evidence in the record. The Director's actions did not prejudice IGWA's substantial rights and IGWA is not entitled to attorney fees. Accordingly, the Court should affirm the Director's actions regarding the Fifth Methodology Order and affirm the Sixth Methodology Order.

DATED this 19th day of January 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

KAYLEEN R. RICHTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of January 2024, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

Thomas J. Budge
Elisheva M. Patterson
RACINE OLSON, PLLP
tj@racineolson.com
elisheva@racineolson.com

Dylan Anderson
DYLAN ANDERSON LAW
dylan@dylanandersonlaw.com

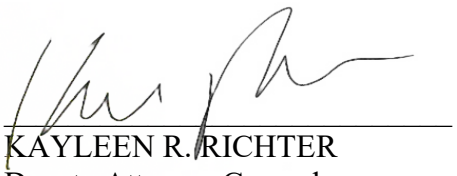
Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
johns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com
icourt@olsentaggart.com

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

W. Kent Fletcher
FLETCHER LAW OFFICE
wkf@pmt.org

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com

Sarah A. Klahn
Maximilian C. Bricker
sklahn@somachlaw.com
mbricker@somachlaw.com



KAYLEEN R. RICHTER
Deputy Attorney General