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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.

THE IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his capacity as 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, CITY OF WENDELL, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUND WATER DISTRICT,

Intervenors.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN

Case No. CV01-23-13173

FALLS RESERVOIR DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

SURFACE WATER COALITION'S RESPONSE BRIEF

Judicial Review from the Idaho Department of Water Resources
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Honorable Eric J. Wildman, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case.

This case concerns the Idaho Ground Water Appropriators, Inc.'s ("IGWA" or "Districts") petition for judicial review of certain orders issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") in the Surface Water Coalition's water right delivery call proceeding (CM-DC-2010-001). The Director updated the methodology for conjunctive administration in the spring of 2023, and affected parties were provided an opportunity for a hearing on those updates pursuant to Idaho Code § 42-1701A(3). Following the hearing, IGWA filed its present appeal challenging the Director's final *Post-Hearing Order* (R. 1067) and the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Sixth Methodology Order*" or "*Sixth Order*") (R. 1004).[1]

II. Procedural History / Statement of Facts.

The Court is well versed on the underlying history of the Coalition's delivery call and resulting appeals and decisions. *See generally, Memorandum Decision and Order on Petitions for Judicial Review* (Gooding County Dist. Ct., Fifth Jud. Dist., Consolidated Case No. CV-2010-382, Sept. 26, 2014) (hereinafter referred to as the "*382 Decision*").[2] A brief background is provided below to summarize the history of the Department's prior orders and IGWA's actions related thereto.

IDWR issued its first *Final Order Regarding Methodology for Determining Material Injury to Reasonable In Season Demand and Reasonable Carryover* ("*First Order*") on April 7,

[1] The Director issued the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* on April 21, 2023 (hereinafter "*Fifth Order*"). R. 43. That order was amended and superseded by the *Sixth Methodology Order* issued on July 19, 2023. R. 1004.

[2] A copy of the Court's prior decision is attached for convenience at Addendum A.

2010. That order, issued in response to the district court's initial remand,[3] set forth a ten (10) step process for annual conjunctive administration of the Coalition's delivery call. Following issuance of that order, the Director held another administrative hearing in response to petitions requesting the same on May 24-26, 2010.[4] Shortly after that hearing, the Director issued the *Second Amended Final Order Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Second Order*") on June 23, 2010.

Thereafter, twelve separate judicial review cases regarding the *Second Order* and various implementation orders were filed with district courts in Gooding, Lincoln, and Twin Falls Counties.[5] Those consolidated appeals culminated with the district court's *382 Decision* that comprehensively addressed the Director's methodology. *See* Addendum A. The fundamental concepts of the underlying methodology and IGWA's alleged defenses thereto have been fully adjudicated. Further, the parties' consultants have been familiar with the calculations and methods employed by the agency for over a decade. No party, including IGWA, appealed the Court's *382 Decision* and final judgment entered in that consolidated case.

Following the Court's review and ordered remand of the *Second Order*, the Director issued the *Third Methodology Order* on April 16, 2015. This order superseded the prior methodology orders and set out essentially the same nine-step process that is implemented by

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[3] *See generally, Order on Petition for Judicial Review* (Gooding County Dist. Ct., Fifth Jud. Dist, Case No. CV-2008-551, July 24, 2009).

[4] Documents and hearing audio found at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/. Similar to the timing of the facts in the current case, the Director held an administrative hearing on various petitions approximately six weeks from issuance of the initial methodology order. The Director recently used a similar timeframe in a conjunctive administration proceeding concerning water rights in Basin 37, where a notice of hearing was issued in early May and the hearing was held about six weeks later in early June. *See South Valley Ground Water District et al. v. IDWR*, __ P.3d__, 2024 WL 136840 (Idaho Jan. 12, 2024) ("*South Valley*").

[5] Documents filed in that case available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/swc/archived-matters/.

IDWR today.[6] Both IGWA and the City of Pocatello requested hearings on the *Third Order*. However, at about that same time the Coalition and IGWA reached general settlement terms concerning mitigation that season and filed a joint motion with IDWR requesting withdrawal of the *Third Order* and the April order applying the first three steps.[7] The City of Pocatello did not oppose that motion.

After execution and approval of the stipulated mitigation plan, the Coalition and IGWA further agreed to have IDWR reinstate the *Third Order* on March 9, 2016 and requested the agency to conjunctively administer ground water rights accordingly. The City of Pocatello requested a hearing on that order but also asked the Director to stay further action on its request.[8] Despite having an opportunity for an administrative hearing on its issues with the Director's methodology for several years, the City chose to continue that indefinite stay.

Approximately one month later the Director issued the *Fourth Methodology Order* on April 19, 2016.[9] The City of Pocatello again requested a hearing and a stay (May 4, 2016).[10] The Director continued to apply the methodology from 2017-2022 since not all junior ground water rights were covered by approved mitigation plans. R. 52-53.

In the fall of 2022 IDWR convened a technical working group comprised of staff and consultants for the parties to evaluate potential updates to the methodology. Sukow, Tr. Vol. I,

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[6] *See Third Methodology Order* at 32-36. Available at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20150417-Third-Amended-Final-Order-Regarding-Methodology.pdf

[7] *See generally, SWC and IGWA Stipulation and Joint Motion* (May 8, 2015). Available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

[8] Available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

[9] Available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

[10] Similar to its *Third Order* request, the City of Pocatello never asked the Director to lift the stay on its requested hearing on the *Fourth Methodology Order* which had been pending for several years.

53:11-15, Anders, Tr. Vol I, 170:5-6, 16-18. IDWR staff Matt Anders sent the first notice to the parties in early September. *See id.* 217:20-25.[11]

The working group participants included IDWR staff, as well as the parties' consultants and counsel, and other non-active participants. The working group held meetings at IDWR (with remote participation) on November 16, 17, 28 and December 1, 9, and 14, 2022. R. 1176. At each of these meetings Department staff received comments and feedback from the participants. R. 312 (Higgs participation); R. 316 (Sigstedt participation), Tr. Vol III, 13:19-24; R. 351 (Sullivan participation), Tr. Vol. II, 119:20-22; R. 473 (Colvin participation), Tr. Vol. I, 107:18-19.

Matt Anders presented information and data related to the "baseline year" at the November 16, 2022 meeting. *See* R. 1176 (11/16/22 Anders PowerPoint). Jennifer Sukow presented the results of using a transient analysis for determining a projected curtailment date on November 28, 2022. *See* R. 1176 (11/28/22 Sukow PowerPoint), 1424. In other words, the parties were put on notice over six months before issuance of the *Fifth Methodology Order* that these specific updates could be made to the methodology.[12]

Ultimately, following the series of meetings and presentations, IDWR staff submitted a preliminary recommendation to the Director on December 23, 2022. R. 2866. Consultants for the Coalition, IGWA, and the various Cities then submitted their own comments on or before

[11] Mr. Anders identified the topics and purpose of the TWG meetings in an October 25, 2022 email to counsel and all consultants. That email specifically listed potential updates to the "baseline year" and use of "ESPAM 2.2: Steady State vs. Transient." *See generally*, Ex. D to *Thompson Dec.* filed in *IGWA v. IDWR* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-8187); publicly available at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV01-23-08187/CV01-23-08187-20230530-Declaration-of-Travis-L.-Thompson-in-Support-of-Surface-Water-Coalitions-Response-in-Opposition.pdf

[12] Any allegations of insufficient time to analyze changes to the methodology are unfounded as the Director's *Fifth Order* was not the first time parties were presented with the updated baseline year and transient modeling analyses. R. 1176 (staff PowerPoints).

January 16, 2023. *See* R. 1300, 2867, 2879. IDWR reviewed and considered the comments submitted by the parties. Anders, Tr. Vol. I, 220:10-12.

On April 21, 2023 the Director issued the *Fifth Methodology Order* and the *Final Order Regarding April 2023 Forecast Supply* ("*April 2023 Order*") implementing steps 1-3 for the 2023 irrigation season. *See* R. 1, 48. The Director issued a notice that same day setting an administrative hearing to be held over six weeks later on June 6-10, 2023. *See* R. 62.

With these updates, several parties, including the Districts and the Coalition, all filed petitions requesting a hearing pursuant to section 42-1701A(3). R. 68, 90-103, 135-163, 263. The Districts and the Cities repeatedly requested the Director to stay or continue the scheduled hearing. R. 80, 282, 323, 446. The Coalition opposed these requests noting the fact that not all ground water rights were covered by an approved mitigation plan, potential worsening water supply conditions, and the need for timely water right administration during the irrigation season. R. 378, 457.

The Director considered the requests for delay and accommodated remote participation for certain individuals unable to travel to Boise, Idaho. *See* R. 425-431. However, the Director denied the repeated requests to delay the administrative hearing. R. 425, 500. Notably, the Director recognized the following:

> The Director has a responsibility to timely respond to injury incurred by senior water users and there should be no unnecessary delays in that process. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res*., 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). "Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call." Id. The Department also agrees with the SWC that "[i]n practice, an untimely decision effectively becomes the decision; i.e. no decision is the decision." *Objection* at 3 (citing *Order on Plaintiffs' Motion for Summary Judgment* at 97 (AFRD#2 et al. v. IDWR, No. CV-2006-600 (Gooding County Dist. Ct. Idaho June 2, 2006)).

R. 430.

The Director set a deadline to disclose witness and exhibit lists and any expert reports by May 30, 2023.[13] R. 126. The parties identified numerous witnesses and exhibits and disclosed expert reports prior to the hearing. R. 505-630, 792-861,1208-1231, 1511-1579, 1600-1632, 2112-2368. Notably, IGWA, the Cities, and individual ground water districts listed five different retained expert witnesses to testify at the administrative hearing. R. 524, 536, 546, 575. The Director presided over a four-day hearing held June 6-9, 2023.[14] The parties had a full and fair opportunity to present testimony and exhibits, as well as cross-examine IDWR staff and all other witnesses. *See generally*, Tr. Vol. I-IV.

The parties submitted post-hearing briefs at the request of the Director. R. 924-1103. Thereafter, the Director issued the final *Post-Hearing Order* and the *Sixth Methodology Order* on July 19, 2023. R. 1067, 1004. The *Sixth Order* essentially continues the same nine steps from the *Fourth Order* issued in 2016. Again, the basic framework and steps were previously litigated on judicial review before this Court. *See generally, 382 Decision.*[15]

The *Sixth Methodology Order* incorporates known additional data from 2015-2021 with the following updates to certain methodology steps:

a. Baseline Year

The methodology's baseline year "is a year or average of years when irrigation demand represents conditions that predict need in the current year of irrigation at the start of the irrigation

[13] The parties agreed to close discovery that day as well. The Cities and Districts propounded discovery and took the depositions of Jennifer Sukow, Matt Anders, and Jay Barlogi (Twin Falls Canal Company). R. 164-182, 400-406, 419-424, 435-445.

[14] The Director set the hearing date by notice on April 21st and granted the various requests for hearing that followed. R.62, 490.

[15] Documents filed in that case available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/swc/archived-matters/.

season." R. 1006. A baseline year "should represent a year(s) of above average diversions . . . and should also represent a year(s) of above average temperatures and reference ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors . . .[and] actual supply should be analyzed to assure that the BLY is not a year of limited supply." R. 1006-07. The criteria for selecting a baseline year have not changed since the Director issued the *Second* through *Fifth Orders*.[16]

However, what has changed is the number of years the Director had available to analyze against those criteria. R. 1015 ("the years 2000-2021 were considered for the BLY selection"). As a result of the updated data, the Director found that "BLY 06/08/12 no longer satisfies the presumption criteria that total diversions in the BLY should exceed the average annual diversions." R. 1015. Consequently, the Director concluded that "total diversions for 2018 adequately protect senior water rights when predicting the demand shortfall at the start of the irrigation season and selects 2018 as the BLY." R. 1016.

Notably, IDWR staff recommended changing the baseline year to 2018 in its December 23, 2022 staff memorandum. R. 2866. Whereas the data from 2018 was presented to the parties back in mid-November 2022, IGWA was on notice and had the ability to evaluate this data over the course of several months. R. 1176 (11/18/22 Anders PowerPoint).

b. Reasonable Carryover

The methodology for determining reasonable carryover did not change from the *Third* or *Fourth Orders* either. R. 1026-34. What changed was the Director's use of projected demand in his calculation with a projected demand (2018 BLY) instead of (06/08/12 BLY). R. 1028. The

[16] The Director previously updated the baseline year in this matter. In 2016, the Director updated the baseline year from the 06/08 average used in the *Second Order* to a new average of 06/08/12 because at that time he found "the 06/08 diversions are no longer above average." *See Fourth Order* at 11; available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/.

Director did make adjustments to certain Coalition members' "maximum projected carryover need" as well. R. 1032-34. Although the reasonable carryover quantities changed in response to a change in the baseline year, the Director's evaluation of injury to carryover storage and the basic mechanics of Step 9 did not change.

c. Determination of Curtailment Date

The Director identified how the ESPAM groundwater model has been and can be run to identify a curtailment date for junior groundwater rights causing material injury. R. 1034-36. Unless another procedure has been agreed to and approved, if a ground water right is not covered by an approved and effectively operating mitigation plan, then curtailment is the Director's only remedy to prevent material injury to the senior right.

A steady-state analysis evaluates the impact of curtailment on the aquifer and connected river reaches long-term (i.e. 50 years), whereas a transient analysis predicts the timing of changes that would occur during the irrigation season. R. 1035. The Director acknowledged that only "9% to 15% of the steady state response is predicted to accrue to the near Blackfoot to Minidoka reach between May 1 and September 30 of the same year." *See id.* In other words, if curtailment is based upon a steady-state analysis, it severely under-mitigates a predicted injury to the Coalition's senior water rights. Consequently, the Director adopted a transient analysis as being "necessary to simulate the short-term curtailments prescribed in the methodology."[17] R. 1036. The potential use of a transient simulation was first disclosed in the fall of 2022. R. 1176 (11/28/22 Sukow PowerPoint). In other words, the parties and their consultants had well over

[17] Such a finding is consistent with the Director's approval of mitigation plans where he allows the delivery of storage equal to the amount of an injury finding.

five months to analyze the Director's use of ESPAM in this manner.[18]

The Director's updates were incorporated into both the *Fifth* and *Sixth Methodology Orders* issued in 2023. No member of IGWA was curtailed in response to the issuance of these orders.

STANDARD OF REVIEW

When reviewing an agency action on a petition for judicial review, this court must affirm the agency unless it finds that 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 in the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 251, 257, 509 P.3d 1180, 1186 (2022) (quoting I.C. § 67-5279(3); *see also*, *South Valley*, 2024 WL 136840, at *5. Furthermore, even if one of the conditions in section 67-5279(3)(a)-(e) is met, a reviewing court should still affirm the agency action "unless substantial rights of the appellant have been prejudiced." *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012) (quoting I.C. § 67-5279(4)).

Finally, the court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *See 3G AG LLC*, 170 Idaho at 257, 509 P.3d at 1186 (citing Idaho Code § 67-5279(1)); *South Valley*, 2024 WL 136840, at *5. So long as the agency's determinations are supported by substantial, competent evidence in the record, the factual determinations are binding on the court, even where there is conflicting evidence before the agency. *See In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 22, 467 P.3d 377, 386 (2020);

[18] Ms. Sigstedt, IGWA's consultant, is very familiar with ESPAM as she has participated on IDWR's Eastern Snake Hydrologic Modeling Committee for years. R. 316. Mr. Sullivan, the Cities' consultant, has participated on the committee "since its inception." R. 350.

South Valley, 2024 WL 136840, at *5, 20 ("We do not resolve factual issues like this on appeal. Our duty is to review the decision of the Director to determine whether substantial, competent evidence supports his decision").

ARGUMENT

> **déjà vu**. noun. 1 a: the illusion of remembering scenes and events when experienced for the first time. b: a feeling that one has seen or heard something before. 2: something overly or unpleasantly familiar.

Webster's Dictionary (www.merriam-webster.com) (visited Jan. 8, 2024).

All counsel, parties, and this Court may be experiencing what Webster's aptly describes above, a keen sense of "déjà vu." The Surface Water Coalition's continued water right delivery call proceeding has been ongoing since 2005. Since that time the Department has held three administrative hearings, numerous petitions for judicial review have been filed, district courts have issued two memorandum decisions and final judgments, and the Idaho Supreme Court has issued two opinions. *See AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007); *A&B Irr. Dist. v. IDWR*, 155 Idaho 640, 315 P.3d 828 (2013).

Through it all, the Department has produced a comprehensive procedure or "methodology" for responding to the call on an annual basis. This basic framework was fully litigated in the *382 Decision*. *See* Addendum A. No party appealed the *382 Decision*, thus that ruling, or "law of the case," is a critical adjudication of the same claims raised in IGWA's present appeal.

When IDWR released the *Fourth Methodology Order* in the summer of 2016, only the City of Pocatello requested a hearing on that decision. Despite having an opportunity for an administrative hearing on its issues for several years, the City voluntarily chose to continue the indefinite stay before the agency. IGWA did not request a hearing on that decision and did not challenge the Director's methodology.

With additional years of data, the Director updated the inputs into the methodology in the spring of 2023. The parties were put on notice of these potential updates as early as the fall of 2022, and engaged in an open technical working group process for several months. With the issuance of the *Fifth Methodology Order* in mid-April, the Director provided yet another opportunity for hearing on his decision pursuant to section 42-1701A(3). Though the Department's updates largely addressed the addition of known data from the years 2015-2021, IGWA and other parties impermissibly attempted to restart the delivery call case as if the prior 18 years of litigation didn't happen.

Contrary to IGWA's efforts, the administrative hearing and this appeal do not provide groundwater users with the chance to relitigate defenses that have already been denied. Pursuant to well-established doctrines of *res judicata* and "law of the case," the Court can deny IGWA's appeal and affirm the agency's final order. In addition, IGWA has further failed to show that the Director erred in any of the ways set forth by the Idaho APA. *See* I.C. § 67-5279.

Finally, the Director's decisions are supported by substantial competent evidence and IGWA cannot show prejudice to any substantial right. For the reasons set forth below, the Court should deny IGWA's petition for judicial review and affirm IDWR's decisions in this case.

DUE PROCESS ISSUES

I. The Director's Fifth and Sixth Methodology Orders Satisfied Due Process and the Idaho Administrative Procedures Act.

a. The Administrative Hearing Was Timely Because it Occurred Before any Deprivation of Property Rights.

IGWA argues that the Director improperly failed to hold a hearing "*before* decid[ing] the matter," in contravention of Idaho Code § 67-5242. *IGWA Br*. at 17-18 (emphasis in original). This argument fails because the Director's *Fifth Order* did not fully decide the matter and the Idaho APA does not specify when a hearing must take place. Following issuance of the *Fifth*

Order, the Director granted requests for and held an evidentiary hearing which complied with all elements of section 67-5242, as explained below. After considering the evidence and testimony, including the parties' post-hearing briefing, the Director then issued the final *Sixth Methodology Order*. R. 1004. This order was issued after the hearing and was the dispositive order that IGWA claims actually impacted the property rights of its members.

Other junior groundwater users advanced this same argument a dozen years ago, and the Supreme Court rightly rejected it in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). In that case certain spring users filed delivery calls with IDWR in early 2005. Without holding a hearing, the Director issued orders requiring curtailment of specific junior groundwater rights, including those of the appellants. After several parties—including IGWA—moved to intervene, the Director held an evidentiary hearing regarding the delivery calls. 150 Idaho at 796, 252 P.3d at 77. Following the 12-day hearing, the hearing officer issued his findings of fact, conclusions of law, and recommendation. *See id.* In July 2008, the Director issued a final order "adopt[ing] the [2005] findings of fact and conclusions of law, the hearing officer's recommendations, and the curtailment orders," subject to certain modifications. *Id.*

The groundwater users in *Clear Springs* "ask[ed] that the curtailment orders be set aside for the failure to grant them a hearing before the orders were issued," arguing that "due process entitles property owners to an opportunity for a hearing before he is deprived of any significant property interest." *Id.* at 814 (cleaned up). The Supreme Court noted that the 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." *Id.* Thus, "[t]hat 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.*

The facts here are no different with respect to the Director honoring IGWA's due process rights. Moreover, the parties have been provided the opportunity for several hearings on the issues advanced by IGWA. First, IDWR held a three-week hearing in 2008 on the initial orders. When the Director issued the first methodology order in early 2010 the parties were provided another opportunity for a hearing regarding the use of updated 2008 data. Finally, when the Director issued the *Fifth Order* and the *April As-Applied Order*, he held yet another hearing in June 2023. Importantly, neither of these orders substantially prejudiced IGWA's rights as its members were covered by an approved mitigation plan. Stated another way, the notice of curtailment did not deprive IGWA's members of any property right in the spring of 2023. Moreover, the Director allowed for pre-hearing procedures and discovery, allowed expert reports and testimony, and held a hearing that lasted four days. There is no question IGWA had a full and fair opportunity to examine its witnesses, introduce exhibits, and cross-examine IDWR and other parties' witnesses.

Then, on July 19, 2023, the Director issued the *Sixth Order,* which modified the *Fifth Order* based on evidence presented at the hearing. Similar to the *Clear Springs* case, the Director's process of holding a hearing after an initial order but before a final order, where the hearing affected the final order, satisfies due process and is a remedy specifically provided by section 42-1701A(3). *See* 150 Idaho at 816, 252 P.3d at 97. The litigation history in this matter further belies IGWA's due process claims. Although IGWA attempted to stop the June hearing on due process grounds, the Court recognized the need for timely action in the unique context of the in-season water right administration and the fact the methodology order had been updated before to incorporate new data and techniques. *See* Addendum B.[19]

[19] Transcript of court's ruling in *IGWA v. IDWR*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-8187 (June 1, 2023).

Further, the Idaho Supreme Court's recent discussion of "due process" in conjunctive administration matters is instructive regarding the facts in this case. In *South Valley* the Court explained:

> Procedural due process requires that there be some process to ensure that an individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. . . . Determining whether an individual's due process rights have been violated requires this Court to engage in a two-step analysis. . . . For the first step, we must decide whether an individual's threatened interest is a liberty or property interest under the Fourteenth Amendment. *Id.* In the second step, we "determine[ ] what process is due." *Id.* Water rights are real property rights that require due process, so the first step is met. . . . On the contrary, "the determination of what process is required" for a particular curtailment "requires a balancing of both the nature of the governmental function involved and the private interests affected." . . . . Three factors guide this balancing test:
>
> > "(1) the importance of the private interest at stake; (2) the risk of an erroneous deprivation of rights given the processes at hand and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, 'including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'"

South Valley, 2024 WL 136840, at *23-24.

IGWA essentially claims the Director had no authority to issue the *Fifth Order* absent a hearing. IGWA's argument ignores section 42-1701A(3) and the Director's discretion and timeliness requirements for purposes of conjunctive administration. Applying the two-step analysis in *South Valley* there is no dispute that water rights are property rights. As to the second step, the Director did not "curtail" any junior rights following issuance of the order, but instead, similar to the facts in *South Valley*, "opted for a pre-curtailment process complete with advance notice, a full panoply of pre- and post-hearing procedures, and a [four]-day hearing." 2024 WL 136840, at 25 (emphasis added). Reviewing the private interests at stake, the risk of an erroneous deprivation of rights, and the government interest in timely administration of water rights, the Director satisfied due process.

First, IGWA's junior groundwater right interests did not outweigh the Coalition's senior surface water right interests as explained by the Supreme Court in *South Valley:*

> Furthermore, the risk of curtailment of a junior-priority groundwater right during a time of shortage is a risk that Idaho water users knowingly undertake and for which they should always plan, as senior surface water users must also do. We conclude that both Senior and Junior water users had significant private interests at stake, and that given the balance of risk among all water users, those with junior rights were the party fittingly most affected by a curtailment determination.

2024 WL 136840, at *24.

In this case the Director forecasted an initial injury to certain senior water rights in April and recognized his duty to act in a timely manner during the irrigation season. R. 430-31 ("To ensure timely administration for predicted material injury in this current irrigation season, the Director cannot agree to continue the hearing beyond June"). The Coalition opposed IGWA's repeated requests to delay the hearing and noted the predicted injury and potential worsening conditions that would only further injure senior rights. R. 378-87; 457-64 ("Further exacerbating potential injury this year is the deteriorating water supply evidenced by the U.S. Bureau of Reclamation's revised May 1st streamflow forecast and the recently released 2023 aquifer sentinel well index"); R. 467-79. Regardless of any snowpack conditions, groundwater levels had declined to near all-time lows in the spring of 2023 as well. R. 381, 392, 473, 478-79. Given the circumstances at the time, the junior groundwater right interests did not outweigh the interests of the senior surface rights and the need for timely water right administration.

Next, IGWA's complaints about the hearing process are similar to those rejected in the *South Valley* case. *See* 2024 WL 136840, at *24-25. There the Court noted that "[d]ue process is not a concept rigidly applied to every adversarial confrontation, but instead is a flexible concept calling for such procedural protections as are warranted by the situation." *Id.* The Court noted that "[t]ime was of the essence and in-season administration of these water rights was warranted

– curtailing out-of-priority water use *after the irrigation season had passed* would have been too little, too late." *Id.* at 25 (emphasis in original). The risk of any "erroneous deprivation of rights" was properly weighed and balanced by the Director in delaying implementing any curtailment order until after the June 2023 hearing was held. R. 430 ("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"). IGWA and the Cities conducted pre-hearing discovery (R. 400), including deposing IDWR staff (R. 393, 435, 495) and TFCC's representative (R. 419, 452), filed several expert reports (R. 1511-2579, 1600-1632, 2369-2625) and submitted evidence through numerous witnesses and exhibits at hearing. This was in addition to prior hearings and IDWR's production of potential changes to the methodology provided months ago in the fall of 2022. R. 1176. Clearly, there was no "shortage of meaningful opportunities" for IGWA to be heard. *See e.g.*, 2024 WL 136840, at *25.

Finally, there is no question that the Director had an "essential government function" to administer water rights during the 2023 irrigation season. R. 430; *see also*, *South Valley*, 2024 WL 136840, at *25-26. As found by the Supreme Court, "[t]hese powers and duties would be hollow if, in times of drought, in-season administration of interconnected surface and groundwater rights must wait for protracted litigation before any curtailment occurs. The irrigation season is too short for that – especially in times of extreme drought." *Id.* at *26. The Director acknowledged his duty to administer within the exigencies of the irrigation season and provided an expedited hearing schedule that was consistent with prior cases (i.e. 2010 SWC hearing; 2021 Basin 37 hearing).

The Court recognized the same in its ruling denying IGWA's attempt to stop the June hearing. *See* Addendum B at 4, lns. 13-17 ("In any given year the reality is, there is a short time

frame between when water supply determinations can be made and when water users' demands for irrigation water begin. Any process employed by the director must account for the exigencies of these time constraints"). Under these circumstances the Director acted within reasonable timeframes that did not violate IGWA's due process rights.

Moreover, IGWA's reliance upon the U.S. Supreme Court's opinion in *Fuentes v. Shevin*, 407 U.S. 67 (1972) is mistaken. IGWA acknowledges *Fuentes*' requirements that the hearing must take place "before [a property owner] is deprived of a significant property interest" and "at a meaningful time and in a meaningful manner." *IGWA Br.* at 17 (quoting *Fuentes*, 407 U.S. at 80, 82). Here, the Director gave himself opportunity to—and in fact, did—amend the *Fifth Order* into the (final) *Sixth Order* to reflect the evidence and arguments presented at the hearing. Thus, the "notice and a hearing … serve[d] its full purpose" because it was "granted at a time *when the deprivation can still be prevented*." *Fuentes*, 407 U.S. at 81 (emphasis added).[20] Thus, it is not the sequence of the hearings and the orders that matter, it is whether a deprivation order preceded a hearing. IGWA can point to no "deprivation" of any property interest because no curtailment order was implemented against its members prior to the hearing (who regardless had safe harbor pursuant to an approved mitigation plan). R. 430.

Similarly, IGWA contends that a "hearing 'must be provided at a time which allows the person to reasonably be prepared to address the issue.'" *IGWA Br.* at 18 (quoting *State v. Doe*, 147 Idaho 542, 546, 211 P.3d 787, 791 (Ct. App. 2009)). IGWA's omission of the beginning of the quote is telling; in explaining the adequacy of notice for a disposition hearing, the court of appeals said: "In addition, *notice* must be provided at a time which allows the person to

[20] It also bears pointing out that the Court invalidated as violations of due process two state statutes which did not provide for opportunity to be heard before a state "authorizes its agents to seize property in the possession of a person upon the application of another." 407 U.S. at 80. The Director did no such thing here.

reasonably be prepared to address the issue." *Doe*, 147 Idaho at 546, 211 P.3d at 791. IDWR provided IGWA with notice over six weeks before the hearing occurred and IGWA was aware of the potential updates to the methodology several months before during the technical working group process. R. 1176. Again, under these unique circumstances IGWA was provided with adequate notice and had a meaningful opportunity to be heard.

IGWA further argues 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.'" *See IGWA Br.* at 19 (citing *AFRD#2 v. IDWR*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007)). This quote is taken out of context—the Court was discussing the timeliness of responding to a delivery call and rejecting use of a bright-line rule in its resolution: "Given the complexity of the factual determinations that must be made in determining material injury, whether 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." *See AFRD#2*, 143 Idaho at 875, 154 P.3d at 446.

Furthermore, IGWA's argument that the Supreme Court "reprimanded the Director for issuing a curtailment order before holding a hearing" in *Clear Springs*, discussed above, is at best a red herring. It is true that the Court stated "the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing." However, like the facts here, junior groundwater rights were not actually curtailed with the issuance of the initial orders in the *Clear Springs* case.

Furthermore, the Court's note did not invalidate the curtailment orders that were the subject of that appeal because the 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." *See Clear Springs*, 150 Idaho at 815-17, 252 P.3d at 96-98 (emphasis added). A reprimand is one thing; remand or vacatur entirely different. Whereas the Director repeatedly noted groundwater rights would not be curtailed until after the June 2023 hearing was held, IGWA received the due process due in this unique circumstance of timely water right administration during the exigencies of an irrigation season.[21] R. 430.

b. The Director Did Not Err in Denying the Cities' Request for an Independent Hearing Officer.

IGWA claims the Director violated section 67-5252 by denying the Cities' motion for an independent hearing officer. *IGWA Br.* at 24. The Cities requested the Director to appoint an independent hearing officer pursuant to section 42-1701A(2). R. 73. The Director denied this request in his discretion explaining that time was of the essence and that he had unique familiarity with the matter. R. 300. IGWA does not argue the Director abused his discretion but instead turns to the Idaho APA "disqualification" statute in support.

First, the statute does not apply to the Cities' underlying motion. The Cities requested appointment of an independent hearing officer, they did not seek to "disqualify" Director Spackman from presiding. R. 73. IGWA misinterprets the Cities' motion and now for the first time on appeal relies upon a statute that was not at issue before the agency.

[21] IGWA's other due process issues also fail. IGWA lists a number of issues alleging the hearing "was anything but fair." *IGWA Br.* at 22-23. All parties were subject to schedule provided, and the Director made accommodations for remote participation by IGWA's consultants. R. 431 ("Sophia Sigstedt and Jaxon Higgs may appear virtually by video link on June 6-10, 2023"). Further, the parties' consultants were familiar with the updates to the methodology going back as far as the fall of 2022. The fact certain consultants opted to continue with planned vacations was their choice and not a reason to change the hearing date or prevent timely water right administration during the 2023 irrigation season. Delaying for that reason would have unduly prejudiced the Coalition's senior water rights.

Moreover, IGWA misreads the statute by omitting subsection (4) which provides:

> (4) Where 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).

The Director, as the Department's agency head, is responsible for issuing final orders in this proceeding. Since section 67-5252(1) addresses "disqualification" of a presiding officer, IGWA provides no explanation or argument alleging that Director Spackman had a "conflict of interest" as defined by section 74-403(4).

IGWA has failed to demonstrate any error by the Director and has failed to present any argument or authority in support of its new theory on appeal. The Court can deny this argument accordingly. *See* I.R.C.P. 84(r); I.A.R. 35(a)(6); *Minor Miracle Productions, LLC v. Starkey*, 152 Idaho 333, 337, 271 P.3d 1189, 1193 (2012) ("When an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court").

c. The Director's Development of and Reliance Upon the Agency Record Was Not Improper.

IGWA argues that the Director based his *Sixth Order* on an improper administrative record by blocking certain discovery prior to the hearing, preventing introduction of certain evidence at the hearing, and taking official notice of information after issuing the *Fifth Order* (but before issuing the final, *Sixth Order)*. The Coalition agrees that the APA requires "a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary," and "the opportunity to respond and present evidence and argument on all issues involved." Idaho Code § 67-5242(3). To that end, the Department's rules provide that "[e]vidence should be taken by the agency to assist the parties' development of a record, not

excluded to frustrate that development." IDAPA 37.01.01.600.

The scope of the record is not without bounds, however, and the rules of procedure give the Director (or other presiding officer) substantial discretion in key respects. Contrary to IGWA's assertion, the Director, "with or without objection, *may* exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute, rule or recognized in the courts of Idaho." IDAPA 37.01.01.600 (emphasis added); *see also* I.C. § 67-5251(1); *Chisholm v. Idaho Dept. of Water Res.*, 142 Idaho 159, 163, 125 P.3d 515, 519 (2005). Furthermore, "[a]ll other evidence *may* be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs." *Id.* (emphasis added). Finally, "[t]he agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence." *Id.* And with respect to discovery, the presiding officer "may … authorize[]" certain types of discovery and "may limit the type and scope of discovery." IDAPA 37.01.01.520, 37.01.01.521.[22]

The courts echo this deference to the agency. "A strong presumption of validity favors an agency's actions." *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2011). Courts "will only reverse a hearing officer's decision on the admissibility when there has been an abuse of discretion," though questions of relevancy are reviewed de novo. *See Chisholm*, 142 Idaho at 163, 125 P.3d at 519 (citations omitted). And of particular importance to the Director's actions here, the Director has a statutory duty to distribute water and "the details of

[22] IGWA cites *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 241, 207 P.3d 963, 971 (2009), and *State v. Perkins*, 135 Idaho 17, 22, 13 P.3d 344, 349 (Ct. App. 2000), for the proposition that Rule 521 "must be applied in a manner that is both constitutional and consistent with the APA." *IGWA Br.* at 28. These citations are puzzling. *Lochsa Falls* does not discuss discovery or the scope or content of APA hearings; rather, it stands for the propositions that the APA governs the issuance of an encroachment permit and that, because no administrative remedies were available to the appellant, the district court violated due process by dismissing the complaint for failure to exhaust administrative remedies. *Lochsa Falls*, 147 Idaho at 235-41, 207 P.3d at 966-971. Similarly, *Perkins* does not address administrative due process at all; the case concerns a sex offender registration requirement and record expungement request. *Perkins*, 135 Idaho at 18-22, 13 P.3d at 345-349.

the performance of the duty are left to the director's discretion." *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), abrogated on other grounds by *Rincover v. State, Dept. of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999).

In this matter the Director and the parties have been working with the general framework of the methodology for well over a decade. Updates have been made over time and the Director convened the technical working group to address additional updates in the fall of 2022. R. 1176. The need to perform timely administration and provide for a pre-curtailment hearing process of over six weeks is not unusual in conjunctive administration cases that take place during the irrigation season. *See e.g. South Valley*, 2024 WL 136840, at *25. The Director provided a fair process given the exigencies of water right administration and did not abuse his discretion in these unique circumstances.

IGWA also protests the timing of the Director's order taking notice of certain agency materials. The Department's procedural rule 602 allows the Director to take official notice of agency reports and memoranda "before the issuance of any order that is based in whole or in part on facts or material officially noticed," and grants parties "an opportunity to contest and rebut the facts or material officially noticed." IDAPA 37.01.01.602. On May 5, 2023, the Director issued the *Notice of Materials Department Witnesses May Rely Upon and Intent to Take Official Notice*, which made available approximately 45 documents that Department officials "may rely upon *at the June 6-10 hearing*" (emphasis added). The June hearing gave the parties the opportunity to contest or rebut the noticed material, and the parties did so. The *Sixth Order* followed the June hearing and was based in part on the noticed material provided by the Department. Thus, the procedure functioned exactly as intended here and is not a basis for reversal. The Director properly exercised his discretion, and the Court should affirm accordingly.

SUBSTANTIVE ISSUES

I. IGWA's Misreading of Idaho Law Should be Denied.

IGWA begins its alleged "substantive errors" discussion with a flawed interpretation of the Ground Water Act and its application for conjunctive administration. First, IGWA vaguely implies that section 42-226 can be applied to limit conjunctive administration in some manner. *See IGWA Br.* at 30 ("it allows junior users to draw down the water table so long as they do not withdraw more water than the aquifer can sustain long-term . . . If groundwater diversions exceed the maximum sustainable yield of the aquifer priority determines which water rights are curtailed to maintain sustainable groundwater levels"). As noted, the "reasonable groundwater pumping level" provision in the Act only applies only to "groundwater" rights, not surface water rights. *See Clear Springs*, 150 Idaho at 804, 252 P.3d at 85 ("There is nothing in statute addressing reasonable aquifer levels. It only mentions reasonable pumping levels. By its terms, section 42-226 only applies to appropriators of ground water. The Spring Users are not appropriators of ground water . . . They are appropriators of surface water flowing from springs") (emphasis added). Accordingly, IGWA's misinterpretation of the statute can be soundly rejected.

Next, IGWA wrongly claims that the concept of "beneficial use" is further defined or conditioned by certain definitions and general statements of purpose in the CM Rules. Again, the Idaho Supreme Court has rejected IGWA's interpretation and has identified the limited import of CM Rule 20. In *Clear Springs* the Court held:

> On its face, [CM Rule 20.03] does not state that priority of right as between a senior surface water user and junior ground water users is to be disregarded as long as the Aquifer is not being overdrawn by ground water users. Likewise, the authorities cited in the Rule do not so state.
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> * * *

> First, neither section (Art. XV § 4 and § 5) applies to the water user who has appropriated water directly from the water source. . . . Finally, neither section governs conjunctive management. . . . There is nothing in the wording of Article XV, § 7, that indicates that it grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV, § 3, which states, "Priority of appropriation shall give the better right as between those using the water" . . . The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

150 Idaho at 805-807, 252 P.3d at 86-88.

Accordingly, any claims of error related to the Director's application of the Ground Water Act or CM Rule 20 should be denied. Those provisions do not apply in the manner IGWA suggests and do not expose any errors in the Director's *Sixth Order* and the continued conjunctive water right administration in this case. Further, the following legal doctrines prohibit IGWA's attempts to re-challenge the methodology and the established burdens of proof and evidentiary standards adopted by the Idaho Supreme Court. *See A&B Irr. Dist.*, 155 Idaho at 655, 315 P.3d at 843.

II. Res Judicata and The Law of the Case Doctrines Preclude IGWA's Alleged Defenses.

IGWA attempts to impermissibly re-litigate certain defenses through its "substantive errors" portion of the opening brief. *See generally IGWA Br.* at 29-31, 36-44. These defenses, having been previously raised and litigated, are barred by both the *res judicata* and "law of the case" doctrines. In other words, IGWA cannot continue to regurgitate defenses that have already been denied by Idaho's judiciary. The Court should reject IGWA's arguments accordingly.

The doctrine of *res judicata* covers both claim preclusion and issue preclusion. *See Monitor Finance, L.C. v. Wildlife Ridge Estates, LLC*, 164 Idaho 555, 560, 433 P.3d 183, 188 (2019). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. *See id.*

The three criteria are: 1) the original action ended in a final judgment on the merits; 2) the present claim involves the same parties; and 3) the present claim arises out of the same transaction or series of transactions as the original action. *See id.* The doctrine exists "to prevent the resurrection of a lawsuit already laid to rest." *See Byrd v. Idaho State Bd. of Land Comm'rs*, 169 Idaho 922, 931, 505 P.3d 708, 717 (2022). Further, the doctrine applies to administrative proceedings as well. *See id.* All three of the criteria are met here and therefore the Court should apply *res judicata* to deny IGWA's present appeal of the agency's alleged "substantive errors."

First, the appeal concerns the same parties, the Coalition, IGWA, and IDWR. Next, the claims arise out of the same transaction, the underlying delivery call proceeding and the Director's methodology for administration. IGWA collaterally attacks the Director's methodology for forecasting water supply, use of irrigated acreage, accounting for supplemental groundwater use, and calculating project efficiency and system improvements. *See IGWA Br.* at 32-39. IGWA also alleges the Director wrongly refused to deny the call on theories of "futile call" and "maximum beneficial use." *See id.* at 39-44. All of these claimed errors and defenses were previously litigated and denied.[23] Moreover, any challenges to the methodology steps and underlying analysis were fully adjudicated in the *382 Decision*. Consequently, the final criteria of a final judgment on the merits is met, and the Court can deny IGWA's appeal of these issues accordingly. There simply is no legal basis to allow IGWA to continue to litigate defenses that have already been denied.

[23] IGWA originally moved for summary judgment on "futile call" and its "maximum use" theories. *See* Addendum C (*Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support*, Mar. 23, 2005). The Director denied IGWA's motion. *See* Addendum D (*Order on Petition to Intervene and Denying Motion for Summary Judgment et al.*, Apr. 6, 2005). IGWA did not appeal the Director's decision on these issues, and the resulting order on judicial review and the Supreme Court opinion constitute a final adjudication on the merits of IGWA's claimed defenses. *See Order on Petition for Judicial Review* (Gooding County Dist. Ct., Fifth Jud. Dist., Case No 2008-551); *A&B Irr. Dist. v. IDWR*, 155 Idaho 640, 315 P.3d 828 (2013).

In addition to *res judicata*, the "law of the case" doctrine precludes IGWA from re-raising previously denied defenses and alleged errors in the methodology. The doctrine of "law of the case" is well established in Idaho and provides that "upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress both in the trial court and upon subsequent appeal." *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000); *see also*, *South Valley*, 2024 WL 136840, at *15.

Idaho courts have applied the doctrine to preclude re-litigation of issues in cases that did not reach the Supreme Court during the first appeal. *See* 134 Idaho at 516, 5 P.3d at 977. Further, where a district court acts in an appellate capacity and there is no appeal to the Supreme Court, the rulings of the district court "become final rulings in the case, not subject to attack in this appeal, and which stated the law of the case that the magistrate–and even this appellate court–must follow in this appeal." *Id.*; *see also*, 2024 WL 136840, at *15 ("The doctrine prevents relitigating issues decided by a district court acting in its appellate capacity, even when an appeal was not taken to the Supreme Court"). The law of the case doctrine "prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal." *State v. Hawkins*, 155 Idaho 69, 72, 305 P.3d 513, 516 (2013).

IGWA's claimed defenses of "futile call" and "maximum beneficial use" have been denied and do not preclude the Director's continued conjunctive administration in this matter. IGWA did not appeal those prior denials[24] and the Idaho Supreme Court affirmed the Director's ability to employ an adjustable "methodology" for administration of the call pursuant to the "established evidentiary standards, presumptions, and burdens of proof." *See* 155 Idaho at 648-

[24] *See supra* at 25, n. 23.

53, 315 P.3d at 836-41. Any alleged errors with the methodology framework and analysis were similarly addressed in the *382 Decision*. Consequently, these decisions are "law of the case" and therefore preclude re-litigation IGWA's alleged "substantive errors" and defenses.

Further, whereas this Court previously reviewed the methodology framework and the analyses and calculations used by the Director, IGWA cannot now claim errors related to the "baseline year," "forecast supply," and "system efficiency" issues that were previously litigated. *See IGWA Br.* at 32. The Director has updated the data based upon additional years, and IGWA cannot collaterally attack the underlying technique and analysis now. In short, both the *res judicata* and "law of the case" doctrines bar IGWA's present arguments and the Court should deny its appeal accordingly.

III. Best Science Claims

IGWA casts an overly broad argument that the *Clear Springs* Court "has instructed the Director use the 'best science available'" in support of its claims related to the forecast supply, irrigated acres, and supplemental groundwater. IGWA distorts the Court's evaluation of ESPAM in that case as standing for a new standard that the Director somehow violated.[25] IGWA further alleges the Director abused his discretion by not accepting its proposed changes to technical matters in the methodology. *See IGWA Br.* at 32. IGWA's claim regarding its "more accurate methods" rings hollow, particularly in light of the standard of review under the Idaho APA.

On judicial review, courts cannot substitute their judgment for that of the agency as to the weight of the evidence on questions of fact. *See* I.C. § 67-5279(1); *Byrd v. Idaho State. Bd. of*

[25] The issue in *Clear Springs* concerned the Groundwater Users' claim that the Director failed to take into account a higher level of uncertainty in applying the model. *See* 150 Idaho at 812-15; 252 P.3d at 93-95. The Court found the Groundwater Users "failed to show that the Director abused his discretion in relying upon the model." *Id.* The case did not, as IGWA implies here, create a new standard of review different than what is provided by Idaho's APA. *See* I.C. § 67-5279.

Land Comm'rs, 169 Idaho 922, 928, 505 P.3d 708, 714 (2022). Even if there is conflicting evidence in the record, an agency's factual determinations are binding so long as they are supported by substantial and competent evidence in the record. *See In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 22, 467 P.3d 377, 386 (2020). Substantial evidence is less than a preponderance, but more than a scintilla. *See id.; see also Chisholm*, 142 Idaho at 164, 125 P.3d at 520. It is also "relevant evidence that a reasonable mind might accept to support a conclusion." *South Valley*, 2024 WL 136840, at *5.

The Director comprehensively addressed IGWA's alleged technical errors and underlying evidence supporting his decision on these issues in his *Post-Hearing Order*. R. 1077-1094. IGWA fails to show that the Director committed error or abused his discretion on technical questions related to the methodology. While IGWA lists a number of technical matters it disagrees with, it does not show the Director erred in rejecting IGWA's alleged "improvements." Further, as to the three issues IGWA specially addresses, the Director's decision is supported by prior decisions and substantial and competent evidence in the record.

a. Forecast Supply

IGWA first claims the forecast supply is in error based upon tributary flow conditions that existed below Heise in 2023. *See IGWA Br.* at 32-33. This argument challenges the calculations used in Step 2 of the methodology that has been in place since the *Second Order* was issued in 2010. The *Sixth Methodology Order* continued the use of the joint forecast for the Heise Gage from April 1 through July 31 for the computed regression algorithms for purposes of the April evaluation.[26] R. 1045. The fact that certain tributary basins had higher snowpacks in early 2023

[26] The use of the Heise Gage as a starting point in the forecast supply was affirmed by Hearing Officer Schroeder in his 2008 opinion: "Initial use of the Heise Gage unregulated flow is reasonable as a starting point in predicting the water supply, but as the year progresses and adjustments become necessary other sources utilized by the irrigation districts to monitor and predict their water supplies should be included." *2008 Opinion* at 53. IGWA never

does not constitute a basis for changing the methodology. Indeed, any temporary benefits from those basins to the Coalition's water supply are taken into account throughout the year (Steps 5-8) where the Director examines the total storage allocation as well as the "sum of the year-to-date actual natural flow diversions." R. 1046; Anders, Tr. Vol I, 168:21-169:2. Stated another way, IGWA fails to show any error in the Director's use of the initial forecast as the Coalition's total water supply is fully captured by the continued evaluation of actual storage and natural flow diversions as the irrigation season progresses.

In sum, the use of the April Joint Heise forecast has been affirmed and the Director's use of it is supported by substantial evidence in the record.

b. TFCC Irrigated Acres

TFCC has complied with Step 1 of the methodology every year since 2013, and consistent with the Supreme Court's decision in *A&B Irr. Dist. v. IDWR*, the Department has used the information provided by the company. R. 1491-1507; (Anders, Tr. Vol. I, 143:12-25). TFCC's manager confirmed that it his was testimony the total irrigated acreage had not varied by more than 5% over time. Barlogi, Tr. Vol. II, 86:17-20. On appeal IGWA claims the Director erred by not relying upon certain information related to other IDWR programs and projects. Notably, IGWA alleges that the 2017 Irrigated Lands data set and the 2021 METRIC dataset should have been applied to quantity TFCC's irrigated acreage instead of what TFCC supplied in response to Step 1 of the methodology.[27]

challenged that decision. Further, the use of the initial joint forecast was noted and confirmed by this Court. *See 382 Decision* at 11 (reference to what was "step 3" at the time). IGWA did not appeal that decision and final judgment either.

[27] IGWA mischaracterizes Mr. Barlogi's testimony in an effort to show error on the Director's part on this issue. In discussing water delivery to subdivisions Mr. Barlogi acknowledged the different total acreage, but explained how those areas result in a different demand upon TFCC operations and water delivery compared to cropland. R. 1203; Tr. Vol. II, 96:11-97:20.

The Director noted that the 2017 data set was used by IDWR for "model calibration" which employs "hindcasts, not forecasts." R. 1084. The information was not compiled for the purpose of the Coalition's delivery call and did not predict potential 2023 irrigated acres. Further, Dr. Brockway, an SWC expert, identified clear errors with the 2017 data where entire fields had been omitted from the total irrigated acreage. R. 1236. Dr. Brockway also described other errors and problems relying upon that dataset for purposes of calculating irrigated acreage in 2023. R. 1233-34.

With such conflicting evidence the Director rightly rejected IGWA's attempt to shift the burden to TFCC to "re-prove" what its shareholders would irrigate within its project during the 2023 irrigation season. In the *Post-Hearing Order* the Director found:

> The purpose of the 2017 shapefile was to assist Department staff in determining TFCC's irrigation demand in 2017 for use in model calibration. . . . The 2017 shapefile is more recent than the 2013 shapefile, but it does not necessarily represent the number of acres TFCC may irrigate in 2023. The 2017 shapefile was a snapshot in time. It does not necessarily predict *future* irrigated acres. . . .
>
> Mr. Shaw also testified that in his opinion the 2013 shapefile currently represents the best available information for determining TFCC's actual irrigated acreage. Hr'g Tr. vol. IV, at 164-6. Finally, the Director has letters from TFCC's counsel stating that from 2014-2022 the number of acres TFCC irrigated has not varied by more than 5% from the previous (2013) shapefile numbers. Ex. 337.
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> * * *
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> At the hearing and in their post-hearing briefing, the ground water users state that the burden is on TFCC or the Department to create a new shapefile that identifies the number of acres TFCC can irrigate in 2023. The ground water users are mistaken. To reduce TFCC's predicted irrigated acreage below 194,732 acres, the burden is on the junior ground water users to establish the accuracy of a lesser number (e.g., 180,956) by clear and convincing evidence. . . . The ground water users did not establish an alternative number of acres irrigated by clear and convincing evidence.

R. 1084-85.

The Director properly applied the governing evidentiary standard and burden of proof on this defense given the conflicting evidence in the record. Whereas IGWA did not establish a lesser number by "clear and convincing evidence," the Director did not err on this issue. Pursuant to Idaho's standard of review, the Director's decision should be upheld. *See Byrd*, 169 Idaho at 928, 505 P.3d at 714; *see also*, *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 ("the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record"). The Director had substantial competent evidence on this issue, confirmed by his staff and expert testimony from the Coalition's witnesses that supports the irrigated acreage used for TFCC in this proceeding. The Court should affirm the Director's decision accordingly.

c. Supplemental Groundwater Use

IGWA also falls back on previously rejected defenses in an effort to claim the Director erred in the *Sixth Methodology Order*. First, IGWA argues that the Director erred by not finding TFCC's water supply could be met with "supplemental groundwater." *IGWA Br.* at 36. IGWA makes this claim without any supporting factual information.[28] Instead, IGWA claims that the "groundwater fraction" in the ESPA Model is the best available science and that the Director should use this data for purposes of determining material injury. *See id.* at 37. However, this argument was previously litigated and rejected in litigation over the *Second Methodology Order*.

[28] Ground water rights and their place of use is publicly available information on IDWR's "water right search" database on its website. *See* www.idwr.idaho.gov. TFCC's place of use is similarly publicly available, and TFCC has reported its annual irrigated acreage pursuant to Step 1 of the methodology every year. IGWA's failure to research and identify any relevant information on this point is not the Director's error. Further, as instructed by the Court, "[i]f the supplemental ground water rights being used are themselves subject to curtailment under the senior call, (as suggested may be the case here by the Hearing Officer), that factor should also be accounted for by the Director." *382 Decision* at 18 (Addendum A); *see also*, *South Valley*, 2024 WL 136840, at *20 ("The Districts' focus on alternate sources of water available to the Seniors does not diminish the substantial and competent evidence of injury that would be caused by junior groundwater users").

The Court rejected IDWR's prior attempt to use the "ground water fraction" without supporting factual information. *See 382 Decision* at 18-20 ("The record does not contain evidence that acres accounted for under the Coalition's senior surface water rights are being irrigated from a supplemental ground water source"). In other words, the model's "ground water fraction" standing alone is insufficient to change the calculated water needs of the Surface Water Coalition. TFCC's expert Dr. Brockway testified about the lack of supplemental ground water use on his project and IGWA did not rebut this with any specific evidence. Brockway, Tr. Vol. IV, 85:14-86:3; R. 1246. Further, the Director specifically found that the "record in this matter equally lacks sufficient evidence to justify a reduction of the total number of acres irrigated with surface water by SWC members." R. 1085. The Director did not use the "ground water fraction" in the methodology, and his decision is supported by the Court's prior decision on this issue and the evidence in the record.

In sum, IGWA has not shown that the Director erred in the *Sixth Methodology Order* by not reducing TFCC's water supply needs due to alleged supplemental groundwater use not disclosed in the record. *See North Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 526, 376 P.3d 722, 730 (2016) ("On the record before us, it does not appear that the Director's findings were clearly erroneous"). The Director's findings on this issue should be affirmed accordingly.

IV. Water Delivery System Improvements

IGWA further attacks the Director's decision on the alleged basis that he failed to force the SWC to make "system improvements" to meet their water needs. *IGWA Br.* at 37. IGWA erroneously insinuates the Coalition is "wasting" water and could meet their "needs" with existing supplies through "operational changes and system improvements." *See id.* at 39. IGWA's alleged defense is soundly refuted by substantial and competent evidence in the record and has been repeatedly rejected in prior decisions in this matter.

First, this defense was previously addressed by the agency following the 2008 and 2010 hearings in this proceeding. In his 2008 opinion, Hearing Officer Schroeder found:

> **3. The existing facilities utilized by the Surface Water Coalition members are reasonable.** The evidence does not show substandard facilities for diversion and conveyance. The members of the Surface Water Coalition have improved their conveyance practices since the time the water rights were licensed or decreed. . . .
>
> **3. The members of the Surface Water Coalition are employing reasonable conservation practices.** There is evidence the members of the SWC monitor the use of water closely. It is very clear that during the drought period they did not apply the full extent of their water rights throughout the irrigation season. They withheld water and rationed it according to conditions. Had they not used the water reasonably they likely would have suffered catastrophic losses.

2008 Opinion at 54, 56 (emphasis in original).

Following the May 2010 hearing, the Director similarly found that "members of the SWC operate reasonably and without waste."[29] Reviewing the *Second Methodology Order* after the 2010 hearing, this Court also found the following:

> Therefore, the Court finds that the *Methodology Order* takes into consideration acres that are no longer irrigated, crop needs, water diverted by the Coalition for use by others, and water leased by the Coalition to other water users. Furthermore, both the Hearing Officer and the Director found, in considering the Rule 42 factors, that the Coalition members operate reasonable and efficient irrigation projects. The Director found that "as found by the hearing officer in his recommended order, members of the SWC operate reasonably and without waste," and that he will not "impose greater project efficiencies upon members of the SWC that have been historically realized."

382 Decision at 30; Addendum A.

Again, IGWA did not appeal these decisions rejecting the claimed defense of inefficient or wasteful water delivery systems. Those final orders and judgments are binding in the present matter. Moreover, with respect to the Twin Falls Canal Company, Mr. Barlogi (TFCC manager)

[29] *See Order on Reconsideration of Final Order et al.* at 5 (June 16, 2010). A copy of the order is available at: https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/

and Mr. Shaw (expert witness) provided additional evidence of continued system improvements and efficiency measures that the company has employed over time. R. 1192-1204; Barlogi, Tr. Vol. II, 17:1-21:17; Shaw, Tr. Vol. IV, 146:18-21.

The Director confirmed the above findings and concluded that the Coalition members continue to operate their water delivery systems reasonably and without waste:

> TFCC's general manager Jay Barlogi testified that his organization's diversions were reasonable and that TFCC worked hard to improve its efficiency, for example by annually cleaning its canals, lining canals, and replacing over 100 concrete structures per year. . . . Mr. Shaw testified that TFCC does a good job maintaining its infrastructure compared to other water delivery organizations, and that TFCC's delivery system is reasonable.
>
> * * *
>
> The SWC entities must be able to discharge some water out of its system to ensure delivery of water to its patrons and operate efficiently within the limits of the delivery system. Testimony at the hearing established that the SWC entities operated efficiently within the limits of their delivery system. *See* Hr'g Tr. vol. II, at 75, 90-91, 94-96, Hr'g Tr. vol IV, at 146.

R. 1088-89 (emphasis added).

Again, IGWA did not prove the defense of an unreasonable water delivery system with "clear and convincing evidence." Just the opposite, the Director's decision rejecting IGWA's defense is supported by substantial and competent evidence in the record and should be affirmed. *See e.g.,* I.C. § 67-5279(4); *South Valley*, 2024 WL 136840, at *5.

V. Futile Call

IGWA next claims the Director erred by not accepting its futile call defense to the SWC delivery call. *See IGWA Br.* at 40-41. IGWA failed to prove a futile call defense in this proceeding and has never appealed such decisions from the agency. *See generally*, Addendums C and D; *2008 Opinion*; *Final Order Regarding Surface Water Coalition Delivery Call* (Sept. 5, 2008); *Order on Petition for Judicial Review* (Gooding County Dist. Ct., Fifth Jud. Dist., Case

No. 2008-551, July 24, 2009); *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 315 P.3d 828 (2013); *382 Decision*. After nearly 20 years of conjunctive administration IGWA cannot now claim the Director has erred by refusing to apply a defense that has been rejected from the outset. Consequently, the "law of the case" and *res judicata* doctrines preclude IGWA from attempting to relitigate past failed defenses in this appeal.

Further, IGWA's hyper-temporal view of the futile call doctrine in the context of conjunctive administration across the ESPA is flawed. IGWA wrongly attempts to superimpose the application of a surface water right administration futile call into this conjunctive administration proceeding. *See IGWA Br.* at 40. Conjunctive administration of an area of common ground water supply like the ESPA is not the same as regulating surface water rights on the Teton River. *See id.* Indeed, the CM Rules acknowledge the fact that even if certain ground water use does not have an immediate impact on a surface water source, that use can still be administered:

> Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

CM Rule 20.04.

IGWA also ignores the fact that the continued impact of prior junior priority ground water use in various ground water districts (i.e. Carey Valley, Madison, Henry's Fork) is being realized on the Snake River today. Sukow, Tr. Vol. I, 79:1-9. Whereas the impact of historic ground water use in those areas is being realized now, those same juniors cannot escape conjunctive administration through misapplication of the futile call doctrine.

The Director's denial of IGWA's defense is supported by the record in this proceeding and should be affirmed.

VI. IGWA's "Public Interest" and "Maximum Beneficial Use" Should be Denied.

IGWA's final failed defense misapplies the Ground Water Act and a reasonable means of diversion case that has already been rejected by the Idaho Supreme Court. IGWA essentially argues that "full economic development" of the aquifer and "optimum development of water resources in the public interest" trumps conjunctive administration of junior priority ground water rights in the ESPA. *See IGWA Br.* at 41-42. The Supreme Court plainly rejected this argument in *Clear Springs*:

> The Groundwater Users' argument that full economic development means that priority of right is taken into consideration in managing the Aquifer only as necessary to prevent over-drafting of the Aquifer is not consistent with Idaho law. It would, in essence, preclude conjunctive management of the Aquifer. Conflicts between senior surface water users and junior ground water users would be ignored as long as withdrawals from the aquifer and recharge were in balance. . . . As we held in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), hydrologically connected surface and ground waters must be managed conjunctively.
>
> * * *
>
> The Idaho Water Resource Board and the Idaho legislature have the power to formulate and implement a state water plan for "optimum development of water resources in the public interest." Idaho Const. Art. XV, § 7. There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. Likewise, there is no material difference between "full economic development of water resources in the public interest." They are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest. . . . The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they managed conjunctively.

150 Idaho at 808; 252 P.2d at 89.

Furthermore, with respect to the issue of the water wheel means of diversion in *Schodde*, the Court explained:

> The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights. Thus, in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007), we cited *Schodde* for the proposition that "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication [of a water right]."

150 Idaho at 809; 252 P.2d at 90.

IGWA does not challenge the Coalition's "means of diversion" from the Snake River, nor the Director's findings that the Coalition members employ reasonable and efficient canal systems. R. 1088-89. Instead, IGWA turns back to the rejected argument that *Schodde* and "full economic development" preclude conjunctive administration where the impact on ground water user is too "large" in its opinion.[30] *See IGWA Br.* at 42. Where the Director's findings are supported by the substantial and competent evidence in the record, and this defense has been fully addressed before, the Court should affirm the Director accordingly.

VII. IGWA Has Failed to Show Prejudice to a Substantial Right.

In addition to showing that the Director committed error under the applicable standard of review (I.C. § 67-5279(3)), IGWA must also establish prejudice to a "substantial right" in order to succeed on appeal. *See* I.C. § 67-5279(4); *Hungate v. Bonner County*, 166 Idaho 388, 394, 458 P.3d 966, 972 (2020) ("even when an agency blatantly contravenes its own ordinance, as the County did here, contestants like the Hungates must still establish prejudice to a *substantial right* to overcome the agency action").

[30] IGWA's reliance upon *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016) is misplaced as the facts in that case are markedly different. Whereas the Rangen delivery call required analysis of water accruing to a single model cell, the SWC case concerns vast reaches of the Snake River (i.e. Near Blackfoot to Minidoka) stretching over a hundred miles. The Director's use of the Great Rift "trim line" in Rangen thus has no application in this proceeding.

IGWA generally alleges that the claimed due process and substantive errors "violate the substantial rights of IGWA and its patrons because they deprived due process" and "generate larger and more frequent curtailments." *IGWA Br.* at 44. Although a water right, a real property right in Idaho (I.C. § 55-101), is a "substantial right" for purposes of an APA appeal, IGWA has failed to show how any right of its members has been prejudiced. Notably, the Director granted IGWA's and other parties' request for a hearing and held a four-day hearing pursuant to section 42-1701A(3). R. 62, 490. The Director acted within a reasonable timeframe given the exigencies of the irrigation season and need for timely water right administration. *See generally*, Addendum B.

Although IGWA disagreed with the timing, the Director explained that would "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. Ultimately, no ground water user was curtailed during the 2023 irrigation season. Hence, no "property right"' or "substantial right" was prejudiced by the Director's orders. IGWA's claim that the alleged errors "generate larger and more frequent curtailments" is pure speculation at this point and does not prejudice any substantial right either. Moreover, IGWA's members have been covered by an approved mitigation plan since 2016 and no water right was curtailed in 2023. Unless IGWA is pre-determining its future non-compliance with an approved mitigation plan, then any feigned prejudice to a substantial right is not warranted.

Whereas the Director acted expeditiously in the context of the irrigation season and required conjunctive administration, IGWA was provided due process and has not shown any substantive error that violates any substantial right. Consequently, the Court can affirm the *Sixth Methodology Order* on this separate ground as well. *See* I.C. § 67-5279(4).

CONCLUSION

The Court is familiar with this case and the prior defenses that have been raised and repeatedly denied. IGWA's dues process claims are defeated by the particular facts in this case, where the overall methodology has been fully and fairly adjudicated. Further, the Director's updates to the methodology, which were disclosed to the parties back in the fall of 2022, should be affirmed as they are supported by substantial and competent evidence in the record. Moreover, IGWA's substantive errors should be denied based upon existing law and prior decisions in this proceeding. For the foregoing reasons the Coalition respectfully requests the Court to deny IGWA's petition for judicial review accordingly.

DATED this 19th January 2024.

MARTEN LAW LLP

Travis L. Thompson

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FLETCHER LAW OFFICE

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2024, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

Director Mat Weaver Garrick Baxter Kayleen Richter Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail file@idwr.idaho.gov mat.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov kayleen.richter@idwr.idaho.gov	T.J. Budge Elisheva M. Patterson Racine Olson, PLLP P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only tj@racineolson.com elisheva@racineolson.com	Sarah A. Klahn Maximilian C. Bricker Somach Simmons & Dunn 2033 11th Street, Ste. 5 Boulder, CO 80302 *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com
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Travis L. Thompson

Addendum A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

vs.

CITY OF POCATELLO,

Petitioner,

vs.

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

Petitioners,

vs.

GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE DEPARTMENT OF WATER RESOURCES,

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF

Case No.: CV-2010-382

(consolidated Gooding County Cases CV-2010-382, CV-2010-383, CV-2010-384, CV-2010-387, CV-2010-388, Twin Falls County Cases CV-2010-3403, CV-2010-5520, CV-2010-5946, CV-2012-2096, CV-2013-2305, CV-2013-4417 and Lincoln County Case CV-2013-155)

MEMORANDUM DECISION AND ORDER ON PETITIONS FOR JUDICIAL REVIEW

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

Appearances:

Travis Thompson of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

W. Kent Fletcher of Fletcher Law Office, Burley, Idaho, attorney for American Falls Reservoir District #2 and Minidoka Irrigation District.

Randall Budge of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for the Idaho Ground Water Appropriators, Inc.

Mitra Pemberton of White & Jankowski, LLP, Denver, Colorado, attorneys for the City of Pocatello.

Michael Orr and Garrick Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

I.

STATEMENT OF THE CASE

A. Nature of the Case.

This matter involves a dispute between senior surface water users and junior ground water users over the conjunctive administration of water in the Snake River Basin. The dispute arises in the context of a delivery call initiated by the A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, "Coalition" or "SWC") against certain junior ground water rights located in the Eastern Snake Plain Aquifer ("ESPA"). At issue is the methodology utilized by the Director of the Idaho Department of Water Resources ("Department") for determining material injury to reasonable in-

season demand and reasonable carryover to Coalition members, and his subsequent application of that methodology. The Coalition, Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello seek judicial review of the Director's methodology and his application of that methodology. Those parties ask this Court to set aside and remand various aspects of the Director's final orders.

B. Course of proceedings and statement of facts.[1]

1. This judicial review proceeding involves a number of *Petitions for Judicial Review*. They seek review of a series of final orders issued by the Director in relation to the Coalition's delivery call. What follows is a recitation of those final orders, the resulting *Petitions for Judicial Review*, and the subsequent proceedings on those *Petitions* before this Court.

2. 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* ("*Methodology Order*"). 382 R., pp.564-604. *Petitions* seeking judicial review of the *Methodology Order* were filed by the Coalition in Gooding County Case No. CV-2010-384, IGWA in Gooding County Case No. CV-2010-383, and the City of Pocatello in Gooding County Case No. CV-2010-388.

3. On June 24, 2010, the Director issued his *Final Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4); Order on Reconsideration* ("*As-Applied Order*"). 382 R., pp.605-625. *Petitions* seeking judicial review of the *As-Applied Order* were filed by the Coalition in Twin Falls County Case No. CV-2010-3403, IGWA in Gooding County Case No. CV-2010-382, and the City of Pocatello in Gooding County Case No. CV-2010-387.

4. The six *Petitions for Judicial Review* previously mentioned were reassigned to this Court.[2]

---

[1] **Footnote Re: Citations to Agency Record.** The agency record in this proceeding consists of two subparts: (1) the previously-compiled record for the judicial review proceeding under Gooding County Case No. CV-2008-551, and (2) the more recently compiled record for the judicial review petitions consolidated under Gooding County Case No. CV-2010-382. For clarity and convenience, citations of the former record will use form "551 R., p. ___," while citations to the latter record will use the form "382 R., p.___."

[2] The reassignments were made pursuant to the Idaho Supreme Court's *Administrative Order* dated December 9, 2009, issued *In the Matter of the Appointment of the SBRA District Court to Hear All Petitions for Judicial Review from the Department of Water Resources Involving Administration of Water Rights.*

5. On July 29, 2010, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the six *Petitions for Judicial Review* into Gooding County Case No. CV-2010-382 ("Consolidated 382 Case").

6. On September 17, 2010, the Director issued his *Final Order Revising April 2010 Forecast Supply (Methodology Step 7)*. 382 R., pp.636-645. A *Petition* seeking judicial review of that *Final Order* was filed by the Coalition in Twin Falls County Case No. CV-2010-5520. The *Petition* was reassigned to this Court.

7. On November 30, 2010, the Director issued his *Final Order Establishing 2010 Reasonable Carryover (Methodology Step 9)*. 382 R., pp.684-692. A *Petition* seeking judicial review of that *Final Order* was filed by the Coalition in Twin Falls County Case No. CV-2010-5946. The *Petition* was reassigned to this Court.

8. On December 13, 2010, the Court issued an *Order* staying proceedings in the Consolidated 382 Case pending the Idaho Supreme Court's issuance of its written decision in Idaho Supreme Court Docket No. 38193-2010. The stay was entered pursuant to the request and agreement of the parties.

9. On January 3, 2011, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the Coalition's *Petitions* in Twin Falls County Case Nos. CV-2010-5520 and 2010-5946 into consolidated the Consolidated 382 Case.

10. On April 13, 2012, the Director issued his *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)*. 382 R., pp.728-742. On May 9, 2012, the Director issued his *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 1-8)*. 382 R., pp.753-757. A *Petition* seeking judicial review of that *Final Order* and *Order Denying Petition for Reconsideration* was filed by the Coalition in Twin Falls County Case No. CV-2012-2096. The *Petition* was reassigned to this Court.

11. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology 1-4)*. 382 R., pp.829-846. On May 22, 2013, the Director issued his *Order Denying Petition for Reconsideration; Denying Request for Hearing; Denying Motion to Authorize Discovery (Methodology Steps 1-4)*. 382 R., pp.888-893. A *Petition* seeking judicial review of that *Final Order* and *Order Denying Petition for Reconsideration* was filed by

the Coalition in Twin Falls County Case No. CV-2013-2305. The *Petition* was reassigned to this Court.

12. On June 17, 2013, the Director issued his *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5).* 382 R., pp.922-928. On July 18, 2013, the Director issued his *Order Denying AFRD2's Petition for Reconsideration of Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5).* 382 R., pp.937-943. A *Petition* seeking judicial review of that *Order* and *Order Denying Petition for Reconsideration* was filed by American Falls Reservoir District #2 in Lincoln County Case No. CV-2013-155. The *Petition* was reassigned to this Court.

13. On August 27, 2013, the Director issued his *Order Revising April 2013 Forecast Supply (Methodology 6-8).* 382 R., pp.948-957. On September 27, 2013, the Director issued his *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 6-8).* 382 R., pp.1037-1044. A *Petition* seeking judicial review of that *Order* and *Order Denying Petition for Reconsideration* was filed by the Coalition in Twin Falls County Case No. CV-2013-4417. The *Petition* was reassigned to this Court.

14. On November 12, 2013, pursuant to the unopposed request of the parties, the Court entered an *Order* consolidating the Coalition's *Petitions* in Twin Falls County Case Nos., CV-2012-2096, CV-2013-2305, 2013-4417 and Lincoln County Case No. CV-2013-155 into the Consolidated 382 Case.

15. On December 17, 2013, the Idaho Supreme Court issued its written decision in Idaho Supreme Court Docket No. 38193-2010. Thereafter, the Court lifted the stay in the Consolidated 382 Case. The parties subsequently briefed the issues, and a hearing on the *Petitions* was held before this Court on August 13, 2014.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the Court in this matter was held on August 13, 2014. The parties did not request the opportunity to submit additional briefing nor does the Court require any. Therefore, this matter is deemed fully submitted for decision on the next business day or August 14, 2014.

III.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that 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.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[3] *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

IV.

HISTORY AND PRIOR DETERMINATIONS

The *Petitions for Judicial Review* filed in this case arise in the context of an ongoing delivery call. Before the Court is the methodology established by the Director for determining

[3] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

material injury to the Coalition's reasonable in-season demand and reasonable carryover caused by junior ground water rights, and his subsequent application of that methodology. Consideration of the issues requires a review of the prior administrative and judicial proceedings undertaken in relation to this call.

A. 2005 Delivery call.

The delivery call at issue here was filed by the Coalition in 2005. 551 R., pp.1-52. On May 2, 2005, the Director issued an *Amended Order* finding that junior ground water diversions from the ESPA were materially injuring the Coalition's natural flow and storage rights. 551 R., pp.1359-1424. The Director's *Amended Order* utilized a "minimum full supply" methodology in determining material injury. 551 R., pp.1382-1385. That methodology relied upon a baseline analysis to determine material injury based upon shortfalls to a chosen baseline quantum of the Coalition's in-season irrigation and reasonable carryover needs. *Id.*

Various parties sought an administrative hearing before the Department on the *Amended Order*. *See e.g.,* 551 R., pp.1642-1657; 551 R., pp.1704-1724. However, that was put on hold while members of the Coalition filed a declaratory judgment action challenging the constitutionality of the Conjunctive Management Rules ("CM Rules").[4] The declaratory judgment action culminated in the Idaho Supreme Court's written decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD#2*"), which upheld the CM Rules as facially constitutional. Thereafter, the Department proceeded with an administrative hearing on the *Amended Order*. The Director appointed the Honorable Gerald F. Schroeder as the presiding hearing officer ("Hearing Officer").

B. Director's *2008 Final Order.*

The Hearing Officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* on April 29, 2008. 551 R., pp.7048-7118. The Hearing Officer's *Recommendation* analyzed the Director's use of a minimum full supply methodology in determining material injury to the Coalition. 551 R., pp.7086-7095. The Hearing Officer generally approved the Director's use of a minimum full supply methodology, including his use

[4] The term "Conjunctive Management Rules" or "CM Rules" refers to the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

of a baseline as a starting point for the consideration of the call and in determining material injury. *Id.* But, the Hearing Officer noted that "[t]here have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained," and that "there must be adjustments as conditions develop if any baseline supply concept is to be used." 551 R., pp.7091 & 7093. Exceptions to the Hearing Officer's *Recommendation* were subsequently filed with the Director by various parties. *See e.g.,* 551 R., pp.7126-7134; 551 R., pp.7141-7197.

On September 5, 2008, the Director issued his *Final Order Regarding the Surface Water Coalition Delivery Call* ("*2008 Final Order*"). 551 R., pp.7381-7395. The *2008 Final Order* adopted the findings of fact and conclusions of law of the Hearing Officer's *Recommendation* except as specifically modified therein, including his recommendation that certain refinements be made to the minimum full supply methodology for determining material injury. 551 R., p.7387. Of significance to the instant proceeding, the Director abandoned the "minimum full supply" methodology in his *2008 Final Order* in favor of a "reasonable in-season demand" methodology. 551 R., p.7386. Although the Director adopted the Hearing Officer's recommendation that refinements be made, he did not address those refinements or the details of his new "reasonable in-season demand" methodology in his *2008 Final Order*, stating:

> Because of the need for ongoing administration, the Director will issue a separate final order . . . detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season.

551 R., p.7386. *Petitions* seeking judicial review of the Director's *2008 Final Order* were subsequently filed in Gooding County Case No. CV-2008-551.

C. District court decision in Gooding County Case No. CV-2008-551 and Director's orders on remand.

The district court entered its *Order on Petition for Judicial Review* in Gooding County Case No. CV-2008-551 on July 24, 2009. 551 R., pp.10075-10108. The district court upheld the Director's adoption of a baseline methodology for determining material injury. It held that "[t]he Director did not abuse discretion or act outside his authority in utilizing a 'minimum full supply' or 'reasonable in-season demand' baseline for determining material injury." 551 R., p.10099. However, the court did find that the Director abused his discretion by waiting to issue a separate

final order detailing his approach for determining material injury to reasonable in-season demand and reasonable carryover. The case was therefore remanded to the Director. 551 R., pp.10106-10107. On remand, the Director complied with the district court's instruction. On June 23, 2010, the Director issued his *Methodology Order*, which by its terms provides the Director's methodology for determining material injury to reasonable in-season demand and reasonable carryover. 382 R., pp.564-604. Additionally, on June 24, 2010, the Director issued his *As-Applied Order*, wherein he applied his methodology to determine material injury to members of the Coalition in 2010. 382 R., pp.605-625. Both *Orders* are presently before the Court in this proceeding.

D. Idaho Supreme Court's decision in *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist.*

Meanwhile, the Coalition appealed the District Court's *Order on Petition for Judicial Review* in Gooding County Case No. CV-2008-551. On December 17, 2013, the Idaho Supreme Court issued its written decision in *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr., Dist.,* 155 Idaho 640, 315 P.3d 828 (2013) ("*2013 SWC Case*"). In that decision, the Court held that the Director may employ a baseline methodology for management of water resources, and as a starting point in administration proceedings for considering material injury. *2013 SWC* Case, 155 Idaho at 650, 315 P.3d at 838. Although the Director's *Methodology Order* had been issued prior to the Supreme Court's consideration of the *2013 SWC Case*, the Court in its opinion made clear that "since the district court did not review this final methodology order, the findings of fact that shape that methodology and any modifications to the methodology are not properly before this Court." *2013 SWC Case*, 155 Idaho at 649, 315 P.3d at 837.

V.

METHODOLOGY ORDER ANALYSIS

The stated purpose of the Director's *Methodology Order* "is to provide the methodology by which the Director will determine material injury to [reasonable in-season demand] and reasonable carryover to members of the SWC." 382 R., p.591. Section II of the *Methodology Order* details the Director's approach for determining material injury to reasonable in-season

demand. 382 R., pp.565-585. Section III of the *Methodology Order* details the Director's approach for determining material injury to reasonable carryover. 382 R., pp.585-590. The *Methodology Order* then sets forth a ten step process to be undertaken annually for purposes of determining material injury. 382 R., pp.597-601. The Coalition, IGWA and the City of Pocatello seek judicial review of various aspects of the Director's methodology.

A. The *Methodology Order* fails to provide a proper remedy for material injury to reasonable in-season demand when taking into account changing conditions.

The Coalition argues that the signature flaw of the *Methodology Order* is its failure to properly remedy material injury to reasonable in-season demand based on changing conditions during the irrigation season. It asserts that if material injury to its reasonable in-season demand is greater than originally determined by the Director, the *Methodology Order's* failure to remedy that injury through either curtailment or the requirement of a mitigation plan is contrary to Idaho law. For the reasons set forth below, this Court agrees.

i. Overview of the Director's methodology for determining material injury to reasonable in-season demand.

Reasonable in-season demand is defined under the *Methodology Order* as "the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity." 382 R., p.575. Under steps 1 and 2 of the *Methodology Order,* the Director calculates the crop water needs of the Coalition for that year.[5] However, the Director's initial determination of reasonable in-season demand is not based on those calculations, but rather is based on a historic demand baseline analysis. The *Methodology Order* makes this clear, providing that reasonable in-season demand is initially "equal to the historic demands associated with a baseline year or years ("BLY") as selected by the Director, but will be corrected during the season to account for variations in the climate and water supply between the BLY and actual conditions." 382 R., p.568. The *Methodology Order* uses the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. 382 R., p.574.

[5] The term "crop water need" is defined in the *Methodology Order* as "the project wide volume of irrigation water required for crop growth, such that crop development is not limited by water availability, for all crops supplied with surface water by the surface water provider." 382 R., p.579.

Under step 3, the Director makes his initial determination of water supply. Step 3 occurs after the United States Bureau of Reclamation ("USBOR") and the United States Corps of Engineers ("USACE") issue their Joint Forecast predicting unregulated inflow volume at the Heise Gage. 382 R., p.598. The Joint Forecast is typically released within the first two weeks of April. *Id.* Thereafter, the Director issues an April Forecast Supply for the water year. *Id.* The Director also determines in step 3 whether a demand shortfall to any member of the Coalition will occur in the coming season. *Id.* Demand shortfall is the difference between reasonable in-season demand and the April Forecast Supply. *Id.* If reasonable in-season demand is greater that the April Forecast Supply, a demand shortfall exists. *Id.*

Under step 4, if the demand shortfall is greater than the reasonable carryover shortfall from the previous year,[6] material injury exists or will exist, and junior users are required to establish their ability to mitigate that injury to avoid curtailment. 382 R., pp.598-599. To mitigate, junior users only need establish their ability to secure mitigation water to be provided to the Coalition at a later date, which the Director refers to as the "Time of Need." The Director then makes adjustments to his calculations throughout the irrigation season as conditions develop. These adjustments are provided for in steps 6 and 7 of the *Methodology Order*, which provide that at various times throughout the irrigation season, the Director will recalculate reasonable in-season demand and adjust demand shortfall for each member of the Coalition. 382 R., pp.599-600. The Director's recalculations are based on actual crop water need up to that point and a revised Forecast Supply, among other things. *Id.*

Step 8 addresses the obligations of junior water users after the Director makes his in-season recalculations and adjustments. These obligations generally trigger when Coalition members have exhausted their storage water rights to where all that remains in the reservoirs is an amount of water equal to their reasonable carryover. The Director refers to this as the "Time of Need."[7] Step 8 provides:

> Step 8: At the Time of Need, junior ground water users are required to provide the lesser of the two volumes from Step 4 (May 1 secured water) and the

[6] Junior water users will have previously mitigated for any reasonable carryover shortfall from the previous year under step 9 of the *Methodology Order*. 382 R., pp.600-601.

[7] The *Methodology Order* provides that "[t]he calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover, or the difference between the 06/08 average demand and the 02/04 supply. The Time of Need will not be earlier than the Day of Allocation." 382 R., p.584 fn.9.

[reasonable in-season demand] volume calculated at the Time of Need. **If the calculations from steps 6 or 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.**

382 R., p.600. While junior user's original mitigation obligation for material injury to reasonable in-season demand may be adjusted downward under the plain language of step 8, it may not be adjusted upward.

ii. Idaho law requires that out-of-priority diversions can only be permitted pursuant to a properly enacted mitigation plan.

The Coalition takes issue with step 8 of the *Methodology Order*. They assert that it unlawfully permits out-of-priority water use to occur without remedy of curtailment or a properly enacted mitigation plan. This Court agrees. In the *2013 SWC Case*, the Idaho Supreme Court held that the CM Rules "require that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan." *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. Further, that when the Director responds to a delivery call "the Director shall either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion." *Id.* at 654, 315 P.3d at 842. The Court's holding in this respect was based on the plain language of Rule 40 of the CM Rules, which provides that once the Director makes a determination of material injury, the Director shall:

> a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . .; or
>
> b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.040.01.a, b.

This Court finds that step 8 of the *Methodology Order* is inconsistent with Rule 40 of the CM Rules and the precedent established in the *2013 SWC Case*. Step 8 effectively caps junior users' mitigation obligations for material injury to reasonable in-season demand to that amount determined in step 4. This determination is made in or around April. The cap remains in place even if changing conditions during the irrigation season establish that material injury to reasonable in-season demand is greater than originally determined. When that scenario arises,

step 8 provides that junior users are required to deliver to the Coalition the water they previously secured as mitigation under step 4. Even though that amount of water will be insufficient to remedy the full extent of material injury, the plain language of step 8 provides that "no additional water is required." The result is that material injury to reasonable in-season demand is realized by the Coalition, out-of-priority junior water use occurs, and no remedy of curtailment or the requirement of a mitigation plan exists to address that injury. The endorsement of such unmitigated out-of-priority water use is contrary to Idaho's doctrine of prior appropriation.

The Director justifies his decision as follows. First, he states that "the purpose of predicting need is to project an upper limit of material injury at the start of the season." 382 R., p.569. He then provides:

> Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water users will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need . . . . **If it is determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment. This determination is based upon the Director's discretion and his balancing of the principle of priority of right with the principles of optimum utilization and full economic development of the State's water resources. Idaho Const. Art XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226.**

382 R., p.594 (emphasis added).

The justifications relied upon by the Director do not permit out-of-priority water use in contravention of CM Rule 40 and the *2013 SWC Case*. Neither Article XV, Section 3, nor Article XV, Section 7 of the Idaho Constitution permits such water use to occur under the circumstances presented. The Idaho Supreme Court has held that nothing in Article XV, § 7 "grants the legislature or the Idaho Water Resource Board the authority to modify that portion of Article XV, §3, which states, 'Priority of appropriation shall give the better right as between those using the water [of any natural stream].'" *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 807, 252 P.3d 71, 88 (2011). With respect to Idaho Code § 42-226, the Idaho Supreme Court has directed that it, and its reference to "full economic development," has no application in delivery calls between senior surface water users and junior ground water users, such as the one at issue here. *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 509,

284 P.3d 225, 234 (2012). The Court therefore finds that the legal justifications expressly relied upon by the Director do not support his determination to refrain from requiring further mitigation or curtailment from junior users if material injury to reasonable in-season demand is greater than originally determined in step 4 due to changing conditions.

iii. The Director's "total water supply" argument does not justify out-of-priority diversions without a properly enacted mitigation plan.

In briefing and at oral argument, counsel for the Department asserts another justification for step 8 of the *Methodology Order*. Counsel argues that under a "total water supply" theory, "the Director is not required to determine material injury to in-season demand and 'reasonable carryover' separately, nor is he required to order separate mitigation for each."[8] Counsel suggests that if material injury to reasonable in-season demand is greater than originally determined under step 4, the Department need not curtail or require a mitigation plan to make up the difference. Rather, it can require Coalition members to exhaust their reasonable carryover to cure the material injury. Then, at a point later in the year, make a subsequent determination as to material injury to reasonable carryover and mitigation at that time. In so arguing, counsel refers to steps 9 and 10 of the *Methodology Order*, wherein the Director in or around November 30th determines material injury to reasonable carryover and establishes the mitigation obligations of the juniors. This Court rejects this argument.

As an initial matter, counsel's total water supply argument appears contrary to the plain language of the Director's *Methodology Order*. The *Methodology Order* itself contains separate and unique methodologies for determining material injury to reasonable in-season demand (Section II) and reasonable carryover (Section III).[9] 382 R., pp.565 & 585. The methodologies described in Sections II and III of the *Methodology Order* establish that a determination of material injury will be conducted for both reasonable in-season demand and for reasonable carryover, and that such determinations will be conducted and mitigated separately. *Id.* For

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[8] The Court notes that this justification was not set forth by the Director in his *Methodology Order*. Notwithstanding, the Court will address the argument.

[9] Section II of the *Methodology Order* is entitled "Methodology for Determining Material Injury to Reasonable In-Season Demand." 382 R, p.565. Section III of the *Methodology Order* is entitled "Methodology for Determining Material Injury to Reasonable Carryover." 382 R., p.585.

example, when detailing his methodology for determining material injury to reasonable in-season demand in Section II, the Director sets forth his calculation of demand shortfall and directs:

> The amount calculated represents the volume that junior ground water users will be required to have available for delivery to members of the SWC found to be materially injured by the Director. The amounts will be calculated in April, **and if necessary, at the middle of the seasons and at the time of need.**

382 R., p.585 (emphasis added). The argument is also contrary to steps 3 and 4 of the *Methodology Order*, wherein the Director mitigates for material injury to reasonable in-season demand by requiring junior users to establish their ability to secure mitigation water or face curtailment. 382 R., pp.598-599.

More importantly, the total water supply argument is contrary to law. The concept of a "total water supply" arises out of Rule 42 of the CM Rules. The Rule permits the Director to consider the Coalition's natural flow and storage rights in conjunction with one another when determining material injury. IDAPA 37.03.011.042.g. Indeed, the Director does so in his *Methodology Order* when determining material injury to reasonable in-season demand as well as in determining the Coalition's "Time of Need." However, problems arise when the Coalition is required to deplete its reasonable carryover, *in addition to its other storage water*, to address its material injury to reasonable in-season demand. Under Idaho law the holder of a surface water storage right is entitled to maintain a reasonable amount of carryover-over storage to assure water supplies for future dry years. IDAPA 37.03.011.042.g; *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451. Counsel's argument fails to address what happens if the Coalition's reasonable carryover is insufficient to address the full extent of material injury to reasonable in-season demand. Additionally, while the Coalition will have been required to deplete its reasonable carryover under counsel's argument, out-of-priority water use will have occurred without curtailment or the enactment of a mitigation plan. If junior users are unable to secure all or part of their mitigation obligation in November due to cost, scarcity or unwillingness, the remedy of curtailment is lost, as the out-of-priority water use will have already occurred. In that scenario, there is no contingency to protect senior rights as required by the *2013 SWC Case*. Such a result is not contemplated by the CM Rules, and is in contravention of the plain language of CM Rule 40 and the Idaho Supreme Court's precedent in the *2013 SWC Case*.

iv. The Director may require use of reasonable carryover pursuant to a properly enacted mitigation plan that contains appropriate contingency provisions to protect senior rights.

In conjunction with step 8, if the Director determines a greater volume of water is necessary than the previously determined to address material injury to reasonable in-season demand, the ability of junior users to secure additional in-season water during what is typically the most water intensive stage of the irrigation season is problematic. Further problematic is that curtailment at that stage would not only have a devastating impact on junior users but may not timely provide sufficient water to the Coalition. Accordingly, curtailment may still not prevent the Coalition from relying on its reasonable carryover to help get through the remainder of the irrigation season. Nonetheless, a viable mitigation plan is still possible.

In conjunction with a properly enacted and approved mitigation plan, the Director could require the Coalition to rely on its reasonable carryover provided that: 1) existing carryover storage allocations meet or exceed the additional shortfall to the revised reasonable in-season demand; and 2) junior users secure a commitment at that time for a volume of water equal to the shortfall to the revised reasonable in-season demand to be provided the following season if necessary. This could be accomplished through an option or lease to provide water. The water would provide mitigation for any shortfalls to reasonable carryover determined to exist at the end of the season. If no shortfall is determined to exist due to changing conditions, then the option or lease need not be exercised. If a shortfall is determined to exist, then the option or lease is in place to be exercised in whole or in part as required to mitigate for any shortfall. The water would be secured but not have to be provided until such time as it can be determined whether or not the storage allocations will fill next season. This process eliminates the risk of the Director not being able to compel junior users to secure water at the end of the season in lieu of curtailment the following season. And, curtailment the following season may not provide sufficient water in storage to remedy the injury to storage, particularly if curtailment will also be required as a result of a demand shortfall to reasonable in-season demand the following season.

The process is consistent with the requirement set forth in the *2013 SWC Case* "that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan." *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. It also eliminates the problem of securing water that will not be put to beneficial use because the water is being secured for the next season and

the amount secured can be adjusted down at the end of the instant season thereby leaving plenty of time for the unneeded water to be used elsewhere. Following any adjustment at the end of the instant season the amount of water that ultimately be secured would be the same as is currently required under Step 9.

B. The *Methodology Order's* use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is supported by substantial evidence.

The Coalition argues that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is not supported by substantial evidence and must be set aside. 382 R., p.574. The Idaho Supreme Court has already approved the Director's employment of a baseline methodology as a starting point in administration proceedings and for determining material injury. *2013 SWC Case*, 155 Idaho at 648-653, 315 P.3d at 836-841. The Court finds that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year is supported by substantial evidence.

The *Methodology Order* explains that a baseline year is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. 382 R., p. 569. To capture current irrigation practices, the *Methodology Order* limits the identification of a baseline year to 1999 and beyond. *Id.* Additionally, the *Methodology Order* instructs as follows:

> [A] BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

382 R., p.570. The Director found that "using the values of 2006 and 2008 (06/08) to arrive at an average BLY fits the selection criteria for all members of the Coalition."[10] 382 R., p.574. In so holding, the Director made findings that the 06/08 average has below average precipitation, near average ET, above average growing degree days, and represents years in which diversions were not limited by availability of water supply. *Id.* These findings are supported by the record.

[10] The Director determined that using values from a single year would not fit the selection criteria for all members of the Coalition. 382 R., p.574.

See 551 R., Ex. 8000, Vol. IV, Appdx. AS-1-8. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

Furthermore, the Court's holding regarding step 8 of the *Methodology Order* should alleviate the concerns raised by the Coalition on this issue. The baseline year should only be used as a starting point. As set forth above, it cannot result in the implementation of a cap on junior users' mitigation obligations. If changing conditions establish that material injury is greater than originally determined pursuant to the baseline analysis, then adjustments to the mitigation obligations of the juniors must be made when the Director undertakes his mid-season recalculations. The Coalition's concerns should be addressed since the mid-season adjustments include recalculating reasonable in-season demand for each member of the Coalition based on, among other things, actual crop water need to that point. 382 R., p.599.

C. The *Methodology Order's* provision for the consideration of supplemental ground water does not violate Idaho law. However, the Director's finding regarding ground water fractions is not supported by substantial evidence and must be remanded.

Step 1 of the *Methodology Order* provides in part that "[i]n determining the total irrigated acreage [of Coalition members], the Department will account for supplemental ground water use." 382 R., p.597. The Coalition argues that the *Methodology Order's* consideration of supplemental ground water use violates Idaho law and has no relevance to the administration of the Coalition's senior rights. This Court disagrees. The Idaho Supreme Court has directed that in responding to a delivery call, the Director has the authority "to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447. If it is established that acreage accounted for under the Coalition's senior surface water rights is being irrigated from a supplemental ground water source, that is a factor the Director has the authority to consider in the context of a delivery call. If the supplemental ground water rights being used are themselves subject to curtailment under the senior call, (as suggested may be the case here by the Hearing Officer[11]), that factor should also be accounted for by the Director. However, the *Methodology Order's* instruction that the Department will consider supplemental ground water use when determining the total irrigated

[11] 551 R., p.7507

acreage of Coalition members does not violate Idaho law. The Director's decision to include that instruction in the *Methodology Order* is affirmed.

That said, the Court finds that the Director's assignment of an entity wide split for each member of the Coalition of the ground water fraction to the surface water fraction is not supported by substantial evidence in the record. In the *Methodology Order*, the Director makes the following finding:

> All acres identified as receiving supplemental ground water within the boundaries of a single SWC entity will initially be evaluated by assigning an entity wide split of the ground water fraction to the surface water fraction as utilized in the development of the ESPA Model. *See Ex. 8000 Vol. II, Bibliography at II,* referencing *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017.* For each entity the ground water fraction to the surface water fraction is as follows: A&B 95:5; AFRD2 30:70; BID 30:70; Milner 50:50; Minidoka 30:70; NSCC 30:70; & TFCC 30:70. If these ratios change with a subsequent version of the ESPA Model, the Department will use the values assigned by the current version of the ESPA Model.

382 R., p.576 fn.6. The Coalition argues that there is no factual support in the record justifying these ground water fractions, and that the Director's finding is arbitrary and capricious. The Department, IGWA and the City of Pocatello do not respond to the Coalition's argument in this respect.

A review of the record supports the Coalition's position. The record does not contain evidence that acres accounted for under the Coalition's senior surface water rights are being irrigated from a supplemental ground water source. Or that the ground water fractions utilized by the *Methodology Order* reflect such supplemental ground water use. If the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition's *Partial Decrees*, such a determination must be supported by clear and convincing evidence. *See. e.g., A&B Irr. Dist., v. Idaho Dept. of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence"). Here, the parties fail to cite the Court to anything submitted before the Department in either written form or via oral testimony establishing the use of supplemental ground water by individual irrigators within the Coalition. That such was the case is illustrated by the Hearing Officer's limited findings on the issue. He found only that "an undetermined number of individual irrigators within SWC *may hold supplemental ground water rights. . . .*" and that "[i]t would seem that any

such ground water rights would be junior to the surface irrigations rights and subject to curtailment." 551 R., p.7507 (emphasis added). The Director did not address the Hearing Officer's findings in his *Methodology Order*, or include any further analysis on his findings. Rather, to support his ground water fraction finding, the Director cites to a document entitled *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017*, which is not in the record. Therefore, the Court finds the Director's finding is not supported by substantial evidence in the record. The Director's ground water fractions as set forth in the *Methodology Order* are hereby set aside and remanded for further proceedings as necessary.

D. The *Methodology Order's* reliance upon the Joint Forecast, and its use of the Heise Gage, to determine the available water supply for the Twin Falls Canal Company is set aside and remanded for further proceedings as necessary.

The Coalition argues that the Director's reliance upon the Joint Forecast, and its focus on the Heise Gage, to predict the available water supply for the Twin Falls Canal Company is arbitrary and capricious and not supported by substantial evidence. In response to this argument, the Department concedes the following in its briefing:

> The Department recognizes that while the Joint Forecast is a "good indicator" for predicting the supplies of most Coalition members, it is "not the best evidence" for purposes of predicting TFCC's supply. *SWC Methodology Brief* at 36. The Director has "previously expressed to TFCC that the Department is willing to work with the TFCC to improve the predictors for TFCC for future application in the Methodology Order and Department staff have even met with TFCC consultants on this issue."

Corrected Br. of Respondents, p.37 fn.30 (July 30, 2014). As a result, the Coalition's argument on this issue is unopposed. Therefore, the Director's decision in this respect is set aside and remanded for further proceedings as necessary.

E. The Director in his discretion may use the U.S. Department of Agriculture's National Agriculture Statistics Service data as a factor in determining crop water need, but should also take in account available data reflecting current cropping patterns.

Under steps 1 and 2 of the *Methodology Order,* the Director calculates the crop water needs of the Coalition for that year. In determining crop water need, the *Methodology Order* instructs that among other things the Director "will utilize crop distributions based on

distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS")." 382 R., p.580. The *Methodology Order* goes onto provide:

> NASS reports annual acres of planted and harvested crops by county. NASS also categorizes harvested crops by irrigation practice, i.e., irrigated, non irrigated, non irrigated following summer fallow, etc. *Crop distribution acreage will be obtained from NASS by averaging the "harvested" area for "irrigated" crops from 1990-2008.* Years in which harvested values were not reported will not be included in the average. In the future, the NASS data may not be the most accurate source of data. The Department prefers to rely on data from the current season if and when it becomes usable.

Id. (emphasis added). The Coalition argues that the *Methodology Order's* designation of NASS data for 1990-2008 average crop distribution fails to capture current cropping patterns, resulting in under-determined crop water need. Specifically, that changes in cropping patterns have resulted in the planting of more water intensive crops such as corn and alfalfa in recent years which is not reflected in the 1990-2008 data.

The Court finds that the Director's decision to use NASS data as a factor in determining the Coalition's crop water need is a matter within his discretion. That said, while the Director may use historic cropping data as a starting point in determining crop water need, he should also take into account available data reflecting current cropping patterns. The *Methodology Order* provides that "the Department prefers to rely on data from the current season if and when it becomes usable." 382 R., p.580. Likewise, the Hearing Officer in addressing the issue of crop water need made the following recommendation which was adopted by the Director:

> **If there have been significant cropping changes resulting in either greater or less need for water, those factors should be factored.** This is an area of caution. Cropping decisions are matter for the irrigators acting within their water rights. Those decisions should be driven by the market. The fact that a particular crop may take less water does not dictate that it be planted.

551 R., p.7099. Taking in account available data reflecting current cropping patterns also addresses the Coalition's concerns regarding the Director's decision to factor in only "harvested" area when considering historic NASS data. Since the *Methodology Order* already provides that the Director prefers to use data from the current seasons if and when it becomes usable, no remand is necessary on this issue.

F. The *Methodology Order's* timing for initial determinations of water supply and material injury to reasonable in-season demand do not run afoul of Idaho law.

The Coalition takes issue with the timing of the Director's initial determinations of water supply and material injury to reasonable in-season demand under the *Methodology Order*. Under step 3 of the *Methodology Order*, the Director makes his initial determination of water supply through the issuance of his April Forecast Supply. 382 R., p.598. This occurs after the USBOR and USACE issue their Joint Forecast, which is typically released within the first two weeks of April. Then, the Director first determines whether a demand shortfall will occur for any member of the Coalition for the coming season. *Id.* If material injury exists or will exist, step 4 of the *Methodology Order* provides the juniors another fourteen days or until May 1st, whichever is later, to establish their ability to mitigate that material injury or face curtailment. *Id.* The Coalition asks this Court to set aside steps 3 and 4 of the *Methodology Order* and remand with instructions that the Director's initial determinations of water supply and material injury to reasonable in-season demand be made prior to the irrigation season (i.e., prior to March 15th).

The Coalition relies on the *2013 SWC Case* for the proposition that these initial determinations must occur prior to the irrigation season. In that case, the Court distinguished the two ways the Director may utilize a baseline methodology. *2013 SWC Case*, 155 Idaho at 650, 315 P.3d at 838. First, the Court directed that such a methodology may be used in a management context in preparing a pre-season management plan for the allocation of water resources. *Id.* Second, the Court directed that the Director may also use such a methodology in an administrative context "in determining material injury in the context of a water call." *Id.* The Court instructed that if the Director chooses to utilize a baseline methodology to "develop and implement a pre-season management plan for allocation of water resources," it must "be made available in advance of the applicable irrigation season . . . ." *Id.* at 653, 315 P.3d at 841. The irrigation season delineated on the Coalition's senior surface water rights begins March 15th.

The parties dispute whether the *Methodology Order* could be considered a pre-season management plan as contemplated in the *2013 SWC Case*. However, it is plain that the baseline methodology set forth in the *Methodology Order* is utilized by the Director in an administrative context in this case. Specifically, it is used a starting point for consideration of the Coalition's call for administration, and as a starting point in determining the issue of material injury. The

procedural background of the *Methodology Order* makes clear that it was issued in response to the Coalition's 2005 call. In his 2008 *Final Order*, the Director explained he would be issuing a separate final order because of the need for ongoing administration. 551 R., p.7386. The stated purpose of the *Methodology Order* is "to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC." 382 R., p.565. Therefore, the Court finds that the *Methodology Order's* baseline methodology is used in an administrative context "in determining material injury in the context of a water call." *2013 SWC Case*, 155 Idaho at 650, 315 P.3d at 838.

The Idaho Supreme Court has directed that "[w]hile there must be a timely response to a delivery call, neither the Constitution nor statutes place any specific timeframes on this process," and that it is "vastly more important that the Director have the necessary and pertinent information and the time to make a reasoned decision based on the available facts." *AFRD#2*, 143 Idaho at 875, 154 P.3d at 446. In this case, the Director found that it is necessary to wait until the Joint Forecast is issued to make the initial determinations at issue here. 382 R., p.572. He held that "given current forecasting techniques, the earliest the Director can predict material injury to RISD 'with reasonable certainty' is soon after the Joint Forecast is issued." 382 R., p.582. In so finding, the Director held that the Joint Forecast "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." 382 R., p.572. And, that it is "a good indicator of the total available irrigation water supply for a season." *Id.* The Director's holding is supported by the record. *See. e.g.,* 551 R., p.1379. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

G. The Director's use of the ESPA Model boundary to determine a curtailment priority date in steps 4 and 10 of the *Methodology Order* is set aside and remanded.

The Coalition argues that steps 4 and 10 of the *Methodology Order* unlawfully and arbitrarily reduce junior ground water acres subject to administration in the event of curtailment. Step 4 provides in part as follows:

> If junior ground water users fail or refuse to provide this information by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users. Modeled curtailment shall be consistent with previous Department

> efforts. The ESPA Model will be run to determine the priority date necessary to produce the necessary volume within the model boundary of the ESPA. However, because the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01, junior ground water users will be required to meet the volumetric obligation within the area of common ground water supply, not the full model boundary.

382 R., p.598-599.

The plain language of step 4 directs that the Director will use the ESPA Model to determine the curtailment priority date necessary to remedy material injury "within the model boundary of the ESPA." *Id.* Step 4 then notes that under the CM Rules, the Director "can only curtail junior ground water rights within the area of common ground water supply." *Id.* Thus, step 4 recognizes a conflict between the model boundary of the ESPA and the area of common ground water supply. The conflict arises from the fact that the ESPA Model boundary and the boundary of the area of common ground water supply – as it is defined by the CM Rules – are not consistent with one another. The ESPA Model boundary is larger, and contains ground water rights that are not within the area of common ground water supply. This fact is undisputed by the parties. It is the Coalition's position that the *Methodology Order* wrongly uses the ESPA Model boundary, instead of the boundary of the area of common water supply, to determine a curtailment priority date. And, that the Director's practice in this respect results in unmitigated material injury contrary to law. This Court agrees.

When a senior water user seeks the conjunctive administration of ground water rights under the CM Rules, the senior user is seeking administration within the area of common ground water supply. The plain language of CM Rules make this clear. The Rules prescribe the procedures for responding to a delivery call made "in an area having a common ground water supply."[12] IDAPA 37.03.11.001. Likewise, the Rules provide for administration when a delivery call is made by the holder of a senior-priority water right "alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights ... from

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[12] An "area having a common ground water supply" is defined as:

> A ground water source within which the diversion and use of ground water or changes in in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010.01

an area having a common water supply in an organized water district the petitioner is suffering material injury." IDAPA 37.03.11.040.01 (emphasis added). As a result, the *Methodology Order's* use of the ESPA Model to determine the curtailment priority date necessary to remedy material injury to the Coalition's water rights "within the model boundary of the ESPA" is problematic. Absent further analysis, which the *Methodology Order* does not provide for, it will result in unmitigated material injury and out-of-priority water use to the detriment of the Coalition in the event of curtailment.

The Director's application of step 4 in 2010 is illustrative. Under steps 3 and 4 of the *Methodology Order*, the Director determined a demand shortfall to reasonable in-season demand of 84,300 acre-feet to various Coalition members. 382 R., p.186. As permitted in step 4, the Director gave the junior users 14 days to mitigate by establishing their ability to secure 84,300 acre-feet of water. 382 R., p.188. In the event the juniors could not, the Director utilized the ESPA Model boundary to determine the curtailment priority date necessary to increase appropriate reach gains in the Snake River by 84,300 acre-feet. 382 R., p.187. This exercise resulted in a curtailment priority date of April 5, 1982. *Id.* However, the Director then provided that "[c]urtailing only those ground water rights located within the area of common ground water supply [junior to April 5, 1982] , IDAPA 37.03.11.050.01, will increase reach gains . . . by 77,985 acre-feet." *Id.* The amount of 77,985 acre-feet would not have fully mitigated the material injury. Notwithstanding, the *Methodology Order* does not provide further analysis or a mechanism to adjust the curtailment priority date upward within the boundary of the area of common water supply to provide enough water to fully mitigate the injury.

Therefore, the Court finds that the *Methodology Order's* use of the ESPA Model boundary to determine a curtailment priority date is arbitrary and contrary to the CM Rules. It includes ground water rights in the modeling that are not subject to curtailment under the plain language of the CM Rules to the detriment of the Coalition. The Court further finds that the use of the ESPA Model boundary results in out-of-priority water use contrary to law. The Director should either (1) use the boundary of the area of common water supply to determine a curtailment priority date, or (2) add further analysis to the *Methodology Order* to convert the curtailment priority date arrived at by using the ESPA Model boundary to a priority date which will provide the required amount of water to the Coalition when applied to the boundary of the

area of common water supply. The Director's decision in this respect is set aside and remanded for further proceedings as necessary.

H. The Coalition's argument that mitigation water for material injury to reasonable carryover must be provided up front has previously been addressed and will not be revisited.

With respect to the issue of mitigation of material injury to reasonable carryover, the Coalition argues that the *Methodology Order* is contrary to Idaho law in that it does not require the transfer of actual mitigation water to the Coalition's storage space up front to "carryover" for use in future years. This Coalition's argument in this respect has previously been addressed and rejected. In Gooding County Case No. CV-2008-551, the district court held that as long as assurances are in place, such as an option for water, that mitigation water could be acquired and transferred the following irrigation season, then junior users need not transfer that mitigation water up front to be carried over:

> In this regard, although the Director adopted a "wait and see" approach, the Director did not require any protection to assure senior right holders that junior ground water users could secure replacement. ... *This does not mean that juniors must transfer replacement water in the season of injury,* however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example. Seniors can therefore plan for the future the same as if they have the water in their respective accounts and juniors may avoid the threat of curtailment.

Order on Petition for Judicial Review, Gooding County Case No. CV-2008-551, p.19 (July 24, 2009) (emphasis added). Given that the decision of the district court in this respect was not overturned by the Idaho Supreme Court in the *2013 SWC Case*, this Court sees no reason to revisit the issue. The Director's decision in this respect is affirmed.

I. The *Methodology Order's* process for determining reasonable carryover does not violate the CM Rules.

The CM Rules provide that in determining reasonable carryover, "the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system." IDAPA 37.03.11.042.g. The Coalition argues that the Director's *Methodology Order* fails to consider

these factors in its process for determining reasonable carryover, and asks this Court to set aside and remand the same. Section III of the *Methodology Order* sets forth the Director's methodology for determining material injury to reasonable carryover. 382 R., pp.585-590. A review of Section III reveals that the Director does consider and analyze, consistent with CM Rule 42.g, the projected water supply, average annual rate of fill and average annual carryover of the Coalition members. The *Methodology Order* first considers the projected water supply. 382 R., pp.585-586. It uses the values of Heise Gage natural flow data for the years 2002 and 2004 to establish a projected typical dry year supply as the projected water supply. 382 R., p.585. In so doing, the Director notes that "[t]he Heise natural flow, for the years 2002 and 2004, were well below the long term average . . . ." *Id.* The *Methodology Order* then considers and sets forth the annual percent fill of storage volume by Coalition members from 1995 to 2008. 382 R., pp.586-587. Last, the *Methodology Order* considers and sets forth actual average carryover of Coalition members from 1995-2008. 382 R., pp.587-588.

The CM Rules do not limit the Director's determination of reasonable carryover to consideration of the factors enumerated in CM Rule 42.g, but only require that the Director consider those enumerated factors. The Court finds based on a review of the *Methodology Order* that the Director's process for determination reasonable carryover does consider the enumerated factors. Therefore, the Court finds that the Director's process was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

J. Step 10 of the *Methodology Order* is set aside and remanded for further proceedings.

The Coalition argues that the transient modeling provision of step 10 of the *Methodology Order* is contrary to law. Step 10 provides in part as follows:

> As an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department's water rights data base and the ESPA Model. The modeling effort will determine total annual reach gain accruals due to curtailment over the period of the model exercise. In the year of injury, junior ground water users would then be obligated to provide the accrued volume of water associated with the first year of the model run. In each subsequent year, junior ground water users would be required to provide the respective volume of water associated with reach gain accruals for that respective year, until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided.

382 R., p.601 (internal citations omitted). The Director justifies his determination in this respect as follows:

> Because of the uncertainty associated with this prediction, and in the interest of balance priority of right with optimum utilization and full economic development of the State's water resources, Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226, the Director will use the ESPA Model to simulate transient curtailment of the projected reasonable carryover shortage.

382 R., pp.596-597. For reasons stated elsewhere in this decision (see Section V.A.ii above), the Court finds that the articles and code sections relied upon by the Director do not justify his decision. The Department acknowledges as much in its briefing, providing that "the Director did not have the benefit of the guidance in *Clear Springs* and the 2012 and 2013 *A&B* decisions when the *Methodology Order* was issued."[13] *Corrected Brief of Respondents*, p.68. The Department thus suggests that "a remand to the Director with instructions to apply the Idaho Supreme Court's guidance is the appropriate remedy if this Court determines that the *Methodology Order* does not provide an adequate explanation of the basis for the transient modeling provision of Step 10." *Id.*

This Court agrees that the transient modeling provision of step 10 must be set aside and remanded for further proceedings. Counsel for the Department argues that the provision is supported by the CM Rules' provisions for phased-in curtailment. However, this justification was not contemplated or detailed by the Director in the *Methodology Order*. Rather, it is being raised for the first time on judicial review. The Court does question the viability of phased curtailment as a justification for the practice outlined in step 10. Reasonable carryover is surface water "which is retained or stored for future use in years of drought or low-water." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. As the *Methodology Order* is currently constituted, the out-of-priority use resulting in the material injury to the Coalition's reasonable carryover will have already occurred by the time the Director reaches step 10 of the *Methodology Order*. It is questionable whether after-the-fact phased curtailment, as contemplated by the CM Rules, would be consistent with Idaho law or satisfies the purpose of reasonable carryover. For the reasons set

[13] Counsel refers to the Idaho Supreme Court's decisions in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012), and *In the Matter of Distribution of Waters to Various Water Rights Held by or for the Benefit of A&B Irr., Dist.*, 155 Idaho 640, 315 P.3d 828 (2013), respectively.

forth in this section, the transient modeling provision of step 10 will be set aside and remanded for further proceedings as necessary.

K. The *Methodology Order's* procedures for determining Coalition members' reasonable in-season demand are consistent with Idaho law.

The City of Pocatello and IGWA both argue that the Director's methodology for determining the Coalition's reasonable in-season demand, as set forth in the *Methodology Order*, are contrary to law. They assert several arguments in support of their position. Each will be addressed in turn.

i. The Director did not act contrary to law or abuse his discretion in considering the Coalition's historic use in determining reasonable in-season demand.

The primary argument asserted by IGWA and the City of Pocatello is that the *Methodology Order* unlawfully considers the Coalition's historic use in initially determining reasonable in-season demand. As discussed above, the Director uses a historic demand baseline analysis that utilizes the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. 382 R., p.574. However, the *Methodology Order* also provides that the initial reasonable in-season demand determination "will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions." 382 R., p.568. Further, that "[g]iven the climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences." 382 R., p.575. The Director's consideration of the Coalition's historic use in this context is not contrary to law. The Idaho Supreme Court has already affirmed "the Director's use of *a predicted baseline of a senior water right holders' needs* as a starting point in considering the material injury issue in a water call." *2013 SWC Case*, 155 Idaho at 656, 315 P.3d at 844 (emphasis added). Therefore, the Court finds that the *Methodology Order's* use of a baseline analysis as the starting point in determining the Coalition's reasonable in-season demand is not contrary to law.

In conjunction with their argument, the City of Pocatello and IGWA assert that the *Methodology Order's* process for determining reasonable in-season demand fails to consider

various contemporary factors. IGWA argues that it fails to consider acres that are no longer irrigated, crop needs, water diverted by the Coalition for use by others, and water leased by the Coalition to other water users. IGWA and the City of Pocatello additionally argue that it fails to consider certain factors listed in CMR Rule 42, including the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. This Court disagrees.

A review of the *Methodology Order* reveals that the Director's calculation of reasonable in-season demand provides for the consideration of all the factors raised by IGWA and the City of Pocatello. For instance, the Director's consideration of project efficiency and crop water need includes the following:

> Monthly irrigation entity diversion ("Q_D") will be obtained from Water District 01's diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. *Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity.* Examples of adjustments include the removal of diversions associated with in-season recharge *and diversion of irrigation water on the behalf of another irrigation entity.* Adjustments, as they become known to the Department, will be applied during the mid-season updates and in the reasonable carryover shortfall calculation. Examples of adjustments that can only be accounted for later in the season include SWC deliveries for flow augmentation, SWC Water placed in the rental pool, and SWC private leases. *Adjustments are unique to each irrigation season and will be evaluated each year. Any natural flow or storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume.* Water that is purchased or leased by a SWC member may become part of IGWA's shortfall obligation; to the extent that member has been found to have been materially injured. . . . *Conversely, adjustments will be made to assure that water supplied to private leases or to the rental pool will not increase the shortfall obligation.*

382 R., p.578 (emphasis added). Therefore, the Court finds that the *Methodology Order* takes into consideration acres that are no longer irrigated, crop needs, water diverted by the Coalition for use by others, and water leased by the Coalition to other water users. Furthermore, both the Hearing Officer and the Director found, in considering the Rule 42 factors, that the Coalition members operate reasonable and efficient irrigation projects. The Director found that "as found by the hearing officer in his recommended order, members of the SWC operate reasonably and without waste," and that he will not "impose greater project efficiencies upon members of the SWC than have been historically realized." 382 R., p.551; 551 R., pp.7102-7104.

In conjunction with IGWA's and the City of Pocatello's argument in this respect, it is necessary to reiterate the presumptions and evidentiary standards that apply to a delivery call. *See e.g., 2013 SCW Case*, 155 Idaho at 650, 315 P.3d at 838 (providing, "when utilizing the baseline in the administration context, the Director must abide by established evidentiary standards, presumptions, and burdens of proof"). 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).

These presumptions and evidentiary standards are instructive on this issue. The *Methodology Order* provides for the Director's consideration of the factors with which IGWA and the City of Pocatello are concerned. However, if 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 get evidence supporting their position before the Director in an appropriate fashion.

ii. The Director did not abuse his discretion or act contrary to law in declining to adopt a water budget methodology to determine the Coalition's water needs.

IGWA and the City of Pocatello argue that the Director's *Methodology Order* should have adopted a water budget methodology to determine the water needs of the Coalition. At the hearing before the Hearing Officer, the parties each proposed a water budget methodology for

determining the water needs of the Coalition. The Director declined to adopt any such methodology, favoring instead the use of a baseline demand analysis as the starting point in determining reasonable in-season demand. 382 R., pp.575-577. The Director's decision in this respect is supported by law, the record, and is within his discretion.

The Idaho Supreme Court has already affirmed "the Director's use of a predicted baseline of a senior water right holders' needs as a starting point in considering the material injury issue in a water call." *2013 SWC Case*, 155 Idaho at 656, 315 P.3d at 844. Furthermore, the Director's reasoning for declining to adopt a water budget method is supported by the record. The record establishes that both the Hearing Officer and the Director questioned the validity of using a water budget methodology under the facts and circumstances presented, recognizing the wildly differing results reached by the surface water and ground water experts under such an approach. In addressing the issue, the Hearing Officer stated:

> The irony in this case is that surface water and ground water expert testimony used much of the same information and in some respects the same approaches and came up with a difference of 869,000 acre-feet for an average diversion budget analysis of SWC districts for the period from 1990 through 2006. . . . The total under the SWC analysis is 3,274,948 acre-feet as compared to the Pocatello analysis of . . . 2,405,861 [acre-feet].

551 R., p.7096. The Hearing Officer concluded that such results do "not promote much faith in the science of the water budget analysis," and declined to adopt any of the presented water budget approaches. 551 R., pp.7096-7097. The Director echoed these sentiments in his *Methodology Order* when making the determination to utilize a baseline methodology. 382 R., pp.576-577. As set forth in detail above, the Court finds that the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is supported by substantial evidence. In reviewing the Director's assessment and rejection of the water budget methodology, this Court finds that the Director's decision was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

iii. The *Methodology Order's* use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination is not contrary to law.

The City of Pocatello and IGWA allege that the *Methodology Order* impermissibly overestimates the reasonable in-season demand of the Coalition. They point to the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of a reasonable in-season demand determination. They assert that the Director's use of those values results in the selection of a baseline year of above average temperatures and evapotranspiration and below average precipitation, which in turn impermissibly results in overestimated reasonable in-season demand. It is their position that the Director must determine the needs of the Coalition based on historic use data associated with a year with average temperatures, evapotranspiration and precipitation. This Court disagrees.

The Director's adoption of a baseline year intentionally utilizes above average temperatures and evapotranspiration and below average precipitation. In selecting a baseline year, Director notes that "demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration ("ET"), and lower precipitation." 382 R., p.569. He then explains that it is necessary to select a baseline year of above average temperatures and evapotranspiration and below average precipitation in order to protect senior rights:

> Equality in sharing the risk will not adequately protect the senior priority surface water right holder from injury. The incurrence of actual demand shortfalls by a senior surface water right holder resulting from pre-irrigation season predictions based on average data *unreasonably shifts the risk of shortage to the senior surface water right holder*. Therefore, a BLY should represent a year(s) of above average diversions, and should avoid years of below average diversions. An above average diversion year(s) selected as the BLY should also represent a year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other facts.

382 R., pp.569-570 (emphasis added). In his *Methodology Order*, the Director found that "using the values of 2006 and 2008 (06/08) to arrive at an average BLY fits the selection criteria for all members of the SWC." 382 R., p.574.

The Director did not err in his intentional adoption of a baseline year based on above average temperatures and evapotranspiration and below average precipitation. The Court agrees that use of such data is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition's rights. The arguments set forth by the City of Pocatello and IGWA that the Director must use data associated with an average year fail to take into account the legal limitations placed on the Director in responding to a

delivery call. The senior is entitled to a presumption under Idaho law that he is entitled to his decreed water right. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If the Director is going to administer to less than the full quantity of the decreed water right, his decision must be supported by clear and convincing evidence in order to adequately protect the senior right. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

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

The City of Pocatello and IGWA additionally argue that the Director's use of the values of 2006 and 2008 violates the law of case. Specifically, they argue that the use of such data violates the Hearing Officer's recommendation, which they interpret as requiring use of data associated with an average year. Whether this interpretation of the Hearing Officer's recommendation is accurate need not be addressed. What is important is that after the Hearing Officer issued his *Recommendation*, but before the Director issued his *Methodology Order*, case law developed instructing the Director concerning the significance of a decreed water right in a delivery call. *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. 2009-647 (May 4, 2010). In that case, the district court held that if the Director determines to administer to less than the decreed quantity of water, such a determination must be supported by clear and convincing evidence. *Id.* at 38. The Director in issuing his *Methodology Order* was bound to follow this case law.[14] As set forth above, using data associated with an average year in order to administer to less than the full decreed quantity of the Coalitions' water rights would not meet a clear and convincing evidence standard. Therefore, the arguments set forth by IGWA and the City of Pocatello are unavailing.

[14] The district court's decision in this regard was ultimately affirmed by the Idaho Supreme Court on appeal. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012).

L. The *Methodology Order's* procedures for determining water supply are consistent with Idaho law.

IGWA and the City of Pocatello additionally argue that the Director wrongly underestimates the forecasted water supply in the *Methodology Order*. The *Methodology Order* explains that in determining water supply "[t]he actual natural flow volume that will be used in the Director's Forecast Supply will be one standard error below the regression line, which underestimates the available supply." 382 R., p.582. Further,

> By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. . . . The Director's prediction of material injury to RISD is purposefully conservative. While it may ultimately be determined after final accounting that less water was owed than was provided, this is an appropriate burden for the juniors to carry. Idaho Const. Art. XV, § 3, Idaho Code § 42-106.

382 R., p.594. IGWA and the City of Pocatello argue that the Director's intentional underestimation of the forecasted water supply is an abuse of discretion and contrary to Idaho law. This Court disagrees for the reasons set forth in the preceding section regarding the Director's use of the values of 2006 and 2008 to arrive at an average baseline year for purposes of the initial reasonable in-season demand determination. The analysis set forth in that preceding section is incorporated herein by reference. The Court finds that the Director did not abuse his discretion or act contrary to law in finding that the use of one standard error below the regression line is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition's rights. The Court finds that the Director's decision to utilize such a regression analysis was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

M. Neither the City of Pocatello nor IGWA were denied due process.

The City of Pocatello and IGWA argue that the Director denied them due process by declining to allow them to present evidence challenging the *Methodology Order* after his issuance of that *Order*. This Court disagrees. Idaho Code Section 42-1701A provides in part that "any person aggrieved by any action of the director, including any decision, determination, order or other action . . . who is aggrieved by the action of the director, 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." In this case, the City of Pocatello and IGWA were previously afforded an opportunity for hearing. On January 16, 2008, a hearing was commenced before the Hearing Officer that resulted in the development and issuance of the *Methodology Order*. 551 R., p.7382. For approximately fourteen days, evidence and testimony was presented to the Hearing Officer by the parties, including IGWA and the City of Pocatello. Both IGWA and Pocatello had the opportunity at that hearing to present their theories and testimony on how material injury to the Coalition should be determined. Among other things, those parties had the opportunity to present their water budget analysis, which was rejected by the Hearing Officer and Director for reasons stated in the record. After considering the parties' evidence and arguments, the Director adopted the methodology for determining material injury set forth in the *Methodology Order*. The question of whether the *Methodology Order's* process for determining material injury is contrary to law, or inconsistent with the record, is a matter for judicial review. This Court has taken up those arguments in this decision. As a result, the IGWA and the City of Pocatello are not entitled to the relief they seek on this issue.

VI.
ANALYSIS OF METHODOLOGY AS APPLIED

The Director issued his *Methodology Order* in June 2010. Since that time, the Director has issued several final orders applying his methodology to subsequent water years. Those final orders have resulted in the filing of a number of *Petitions* seeking judicial review of the Director's applications.

A. The Director's application of the *Methodology Order* in 2013 failed to adjust the mitigation obligations of the juniors to take into account changing conditions.

The Coalition argues that the Director's application of the *Methodology Order* in 2013 was contrary to law. On April 17, 2013, the Director issued his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*. 382 R., pp.829-846. In that *Order*, the Director concluded that the Twin Falls Canal Company would experience material injury to reasonable in-season demand in the amount of 14,200 acre-feet. 382 R., p.831. He also determined that the rest of the Coalition members would experience no material injury to reasonable in-season

demand. *Id.* Consistent with step 4 of the *Methodology Order*, the Director gave IGWA fourteen days to secure 14,200 acre-feet of mitigation water to avoid curtailment. 382 R., p.835. IGWA filed its *Notice of Secured Water* with the Director on April 22, 2013. 382 R., pp.848-853.

After the Director undertook his in-season recalculations, he issued his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* on August 27, 2013. 382 R., pp.948-957. In that *Order*, the Director revised his original material injury determination based on changing conditions. He increased the material injury to reasonable in-season demand for the Twin Falls Canal Company from 14,200 acre-feet to 51,200 acre-feet. 382 R., p.953. He also increased the material injury to reasonable in-season demand for American Falls Reservoir District No. 2 from no material injury to 54,000 acre-feet of material injury. *Id.* Consistent with step 8 of the *Methodology Order*, the Director did not require the junior users to secure additional mitigation water to address the increased material injury, nor did he provide for curtailment. 382 R., p.954. Rather, the Director required the juniors to release the 14,200 acre-feet of mitigation water they had previously secured. *Id.* He then directed the Watermaster for Water District 01 to allocate 6,900 acre-feet to the Twin Falls Canal Company, and 7,300 acre-feet to American Falls Reservoir District No. 2 to address their respective material injuries. *Id.* As a result, the Twin Falls Canal Company did not get the amount of mitigation water that the Director ordered was to be secured for it under his *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)*.

The Coalition argues that the Director's refusal to adjust the juniors' mitigation obligation in 2013 is contrary to law. This Court agrees. In 2013, the Director did not provide a proper remedy for material injury to the reasonable in-season demand of the Twin Falls Canal Company or American Falls Reservoir District No. 2 when taking into account changing conditions. Namely, the Director improperly capped the mitigation obligations of junior users to that amount of material injury determined under step 4 (i.e., 14,200 acre-feet) even though changing conditions resulted in an increase of material injury to both the Twin Falls Canal Company and American Falls Reservoir District No. 2 (i.e., 51,200 acre-feet and 54,000 acre-feet, respectively). The analysis and justifications for the Court's finding in this respect are set forth above under Section V.A. of this decision. They will not be repeated here, but are incorporated by reference. The Court finds that the Director's failure to adjust the mitigation

obligations of the juniors to take into account changing conditions in 2013 resulted in prejudice to the Coalition's senior water rights and was contrary to law.

The Department argues that no further mitigation or curtailment was required in 2013 because "the April forecast and the in-season adjustments to it were predictions of material injury . . . not final determinations of actual material injury." Respondents' Br., pp.29-30. First, this argument is internally inconsistent with the *Methodology Order*, and the Director's application of the *Methodology Order* in 2013. In contravention of this argument, the *Methodology Order* itself provides for mitigation or curtailment if material injury to reasonable in-season demand is determined to exist in April. In fact, contrary to the Department's current argument, the Director required IGWA to secure mitigation water in 2013 following his initial April determination that the Twin Falls Canal Company would experience material injury to reasonable in-season demand in the amount of 14,200 acre-feet. 382 R., p.836. Second, the Department's argument is contrary to law. The Idaho Supreme Court has made clear that the burden of proof in a delivery call switches to the junior users once a determination has been made that material injury "is occurring *or will occur*." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 (emphasis added). When the Director makes his April and mid-seasons calculations of material injury to reasonable in-season demand, he is making the determination under the plain language of the *Methodology Order* that material injury is or will occur. Therefore, the proper burdens of proof and evidentiary standards must be applied. The Director's *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* is set aside and remanded for further proceedings as necessary.

B. The Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination based on changing conditions. However, the Director failed to follow that timeframe in 2013.

The Coalition argues that in 2012 and 2013 the Director failed to timely make adjustments to his initial material injury determinations to take into account changing conditions. When and how often the Director adjusts his initial material injury determination to reasonable in-season demand based on changing conditions is a matter with which the Director exercises great discretion. The Director makes his initial material injury determination in or around April. The Director then makes adjustments to his initial determination throughout the irrigation season

as conditions develop, as provided for in steps 6 and 7 of the *Methodology Order*. These occur "approximately halfway through the irrigation season." 382 R., p.599. The Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination. It would be unreasonable, for example, to require the Director to update his material injury determination to reasonable in-season demand on a daily or weekly basis as a result of changing conditions. If the Director determines that changing conditions require earlier, or more frequent adjustments, than that provided for in his *Methodology Order*, the Director may undertake such adjustments in his discretion.

The Coalition argues that in 2012 the Director failed to timely make adjustments to his initial material injury determination to reasonable in-season demand. It points to the fact that shortly after the USBOR and USACE issued their Joint Forecast on April 5, 2012, the USBOR and USACE issued a revised Joint Forecast on April 16, 2012 that reduced predicted water flows. The Director made his initial material injury determination based on the April 5, 2012, Joint Forecast, and then declined to update his initial material injury again in April following the issuance of the revised Joint Forecast. 382 R., p755. The Court finds that the Director did not abuse his discretion in this respect. As stated above, the Court finds that the *Methodology Order* provides a reasonable timeframe for the Director to make adjustments to his initial material injury determination. When the Director makes his in-season adjustments pursuant to steps 6 and 7 of the *Methodology Order*, he issues a revised forecast supply. That revised forecast supply will take into account the changing water conditions that differ from his initial April Forecast Supply. The Director must then adjust the mitigation obligations of the junior users accordingly. It is noted that the Court's holding regarding step 8 of the *Methodology Order* should alleviate the concerns raised by the Coalition on this issue, since the initial material injury determination will not result in a cap of the junior users' mitigation obligations. The Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

With respect to 2013, the Court finds that the Director acted arbitrarily and capriciously by waiting until August 27 to apply step 6 of the *Methodology Order*. Step 6 provides that "approximately half way through the irrigation season" the Director will revise the April forecast and determine the "time of need" for purposes of providing mitigation. 382 R., p. 599. In 2013, the Director did not issue his *Order Revising April 2013 Forecast Supply (Methodology 6-8)*

until August 27, 2013. 382 R., pp.948-957. The Coalition argues the Director's delay in applying step 6 required its members to make water delivery decisions for the remainder of the irrigation season without the benefit of the revised forecast and any related mitigation obligation. The Coalition argues the Director acted arbitrarily and capriciously by delaying the application of step 6. This Court agrees.

The Director identifies the "irrigation season" as running from "the middle of March to the middle of November - an eight month span." 382 R., p. 1039. Therefore, mid-July is halfway through the irrigation season. The word "approximately" is defined as "almost correct or exact: close in value or amount but not precise." *See e.g.* www. merriam-webster.com /dictionary/ approximately. Although step 6 provides for some flexibility by not requiring the revision to be made precisely halfway through the irrigation season, a delay of close to a month and half does not even fit under a generous interpretation of the word "approximately." In this regard, the Director acted arbitrarily and capriciously. The Director should apply his established procedure as written or further define and/or refine the procedure so that Coalition members relying on the procedure know when to anticipate its application and are able to plan accordingly.

C. The Director's calculation of crop water need of the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company in 2013, as set forth in his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* is set aside and remanded for further proceedings as necessary.

The Coalition asserts that the Director has erroneously refused to use certain irrigated acreage information provided by it when determining its crop water need under steps 1 and 2 of the *Methodology Order*. The Coalition's argument focuses primarily on the 2013 water year. Step 1 of the *Methodology Order* requires the Coalition "to provide electronic shape files to the Department delineating the total irrigated acres within their water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%" on or before April 1. 382 R., p.597. Step 2 provides that starting at the beginning of April, the Department will calculate the cumulative crop water need volume for all land irrigated with surface water within the boundaries of each member of the SWC. *Id.* It further provides that volumetric values of crop water need will be calculated "using ET and precipitation values

from the USBR's AgriMet program, *irrigated acres provided by each entity*, and crop distributions based on NASS data." *Id.*

The record establishes that in March of 2013, the members of the Coalition provided the Director with shape files showing the acres being irrigated within the water delivery boundaries for the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company. 382 R., pp.821-828; *see also* 20130329 BID & TFCC Folder (in Bastes Stamped OCR Docs) (382 R., Disc 1). With respect to the A&B Irrigation District, Milner Irrigation District and North Side Canal Company, the Coalition informed the Director that the acres being irrigated within the water delivery boundaries for those entities was the same as the previous year. *Id.* Therefore, the Court finds that the Coalition timely complied with the *Methodology Order's* step 1 requirements. The Director also found that the Coalition complied with step 1 in 2013. 382 R., p.830.

The record further establishes that even though the Minidoka Irrigation District, Burley Irrigation District, and the Twin Falls Canal Company timely complied with the step 1 requirements, the Director did not use the irrigated acreage data provided by those entities data to calculate their crop water needs in 2013. IDWR 8-27-13_August Background Data Folder, document entitled "DS RISD Calculator" (in Bastes Stamped OCR Docs) (382 R., Disc 1). Rather, the Director used irrigated acreage data for the Burley Irrigation District and Minidoka Irrigation District contained in a report prepared by SPF Water Engineering in 2005 (i.e., 551 Ex. 4300). *Id.* With respect to the Twin Falls Canal Company, the Director used irrigated acreage data contained in a report from 2007 (i.e., 551 Ex. 4310). *Id.* In doing so, the Director calculated the crop water needs of those entities based on less irrigated acres than that provided by those entities. *Id.* The Director provides no reasoning or rationale in his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* for deviating from step 2 of the *Methodology Order* in this respect. 382 R., pp.948-957. As set forth above, if the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition's *Partial Decrees*, such a determination must be supported by clear and convincing evidence. *See. e.g., A&B Irr. Dist., v. Idaho Dept. of Water Res.*, 153 Idaho 500, 524, 284 P.3d 225, 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence"). Since

the Director's decision to deviate from step 2 in this respect is not supported by reasoning it is hereby set aside and remanded for further proceedings as necessary.

D. The Coalition is not entitled to the relief it seeks on the issue of the Director's process for the use of storage water as mitigation.

The Coalition argues that the Director has failed to require that the use of storage water for mitigation be accomplished in accordance with the Water District 01 Rental Pool rules and procedures. Further, that the Director has provided no formal defined process for interaction between IDWR, Water District 01, and junior ground water users when addressing storage water leased, optioned, or otherwise contracted for mitigation purposes. The Coalition complains specifically of the mitigation water secured by IGWA in 2010 and 2013. With respect to storage water secured by IGWA under its 2010 mitigation plan, this Court has already held that mitigation plan, and its use of storage water located in the Upper Snake Reservoir System for mitigation, complied with the requirements of the CM Rules. *Memorandum Decision and Order on Petition for Judicial Review*, Twin Falls County Case No CV-2010-3075 (Jan. 25, 2011). This Court's holding in that case will not be revisited.[15] With respect to the mitigation water secured by IGWA in 2013, the Court finds that the Director reviewed leases and contracts evidencing that IGWA had secured the required amount of mitigation water. 382 R., pp.881-887. Based on his review, the Director found that those leases and contracts would provide water to the Coalition at the Time of Need, and concluded that IGWA had satisfied its mitigation obligation. 382 R., p.884. The Court finds the Director's holding in this respect complied with the requirements of the CM Rules, as well as this Court's decision in Twin Falls County Case No. CV-2010-3075. In addition, the Court finds that the Coalition is not entitled to the relief its seeks on this issue, as it has failed to establish that its substantial rights have been prejudiced as a result of the mitigation water secured in 2010 and 2013. I.C. § 67-5279(4).

[15] A final judgment was entered in Twin Falls County Case No CV-2010-3075 on January 21, 2011. No appeal was taken from that final judgment.

E. The Director's decision to deny the Coalition the opportunity for a hearing in 2012 and 2013 is in violation of Idaho Code § 42-1701A.

At the administrative level, the Coalition requested hearings before the Department with respect to several final orders issued in 2012 and 2013, wherein the Director applied his methodology to the facts and circumstances presented by those water years. Those final orders include the Director's (1) *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)* dated April 13, 2012, (2) *Final Order Regarding April 2013 Forecast Supply (Methodology Steps 1-4)* dated April 17, 2013, and (3) *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* dated August 27, 2013. 382 R., pp.728-742; 382 R., pp.829-846; and 382 R., pp.948-957. The Coalition argued it was entitled to such hearings under Idaho Code § 42-1701A, asserting that no administrative hearing had previously been held on those matters. The Director denied the requests, finding that the Coalition had been afforded hearings on the issues raised. 382 R., p.757; 382 R., pp.890-891; and 382 R., p.1040. The Director held that hearings conducted in 2008 and 2010 constituted hearings previously afforded to the Coalition on the matters. *Id.* This Court holds that the Director's decision in this respect was made in violation of Idaho Code § 42-1701A.

Idaho Code § 42-1701A provides in part that "any person aggrieved by any action of the director, including any decision, determination, order or other action . . . who is aggrieved by the action of the director, 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." I.C. § 42-1701A. The plain language of the statute is mandatory. The Director does not specify the previous hearings in 2008 and 2010 on which he relies in denying the Coalition's requests for hearing. However, the Director likely refers to the hearing held before Hearing Officer commencing on January 18, 2008, and the hearing on the *Methodology Order* held on May 24, 2010. Those two hearings pertained specifically to the development and issuance of the *Methodology Order*. However, the Director thereafter issued a series of final orders, listed above, applying his methodology to the facts and circumstances arising in the 2012 and 2013 water years. The hearings conducted in 2008 and 2010 did not address his application of his methodology to the 2012 and 2013 water years. And, a review of the Coalition's *Requests for Hearing* establishes that the Coalition raised issues, and requested hearings on issues, not previously addressed in the 2008 and 2010 hearings.

The Coalition's *Request for Hearing on Order Revising April 2013 Forecast Supply (Steps 6-8)* is illustrative. 382 R., pp.969-979. The Coalition requested a hearing on the Director's issuance of his *Order Revising April 2013 Forecast Supply (Methodology Steps 6-8)* on August 27, 2013. It asserted that waiting until August 27 to issue a revised forecast was contrary to step 6 of the *Methodology Order*, which provides that "[a]pproximately halfway through the irrigation season" the Director will issue a revised forecast supply. 382 R., pp.970-971. The Coalition also requested a hearing on the Director's decision to apportion the 14,200 acre-feet of mitigation water secured by IGWA to give 7,300 acre-feet to American Falls Reservoir District No. 2 and 6,900 acre-feet to the Twin Falls Canal Company. 382 R., pp.971-972. It asserted that such an apportionment was in error, given that the entirety of the mitigation water was initially secured to address material injury to the Twin Falls Canal Company. *Id.* The record establishes that neither of these matters had been previously addressed in a prior administrative hearing. These arguments do not attack the *Methodology Order* itself, but rather challenge whether the Director complied with the terms of the *Methodology Order* in his application of his methodology to the 2013 water year. Therefore, the Director was statutorily required to afford the Coalition a hearing under the plain language of Idaho Code § 42-1701A.

Since the Director did not previously afford the Coalition a hearing on the issuance raised in the subject *Requests for Hearing*, the Director's decisions to deny the Coalition the opportunity for a hearing on those *Requests* were made in violation of Idaho Code § 42-1701A. The Court further finds that substantial rights of the Coalition members were prejudiced in the form of their statutory right to an administrative hearing. As a result, the Director's decisions in this respect are hereby set aside and remanded for further proceedings as necessary.

F. The City of Pocatello is not entitled to the relief it seeks with respect to the Director's *As-Applied Order*.

The City of Pocatello seeks judicial review of the Director's *As-Applied Order* on several grounds. It first argues that the *As-Applied Order*, wherein the Director applied steps 3 and 4 of the *Methodology Order* to the 2010 water year, is arbitrary and capricious. Specifically, that the *As-Applied Order* arbitrarily and capriciously based its initial material injury determination to the Coalition's reasonable in-season demand upon a historic demand baseline analysis and an intentional underestimation of water supply. This argument is not an attack on the *As-Applied*

Order, but rather another challenge to the Director's methodology for determining material injury to reasonable in-season demand as set forth in the *Methodology Order*. This Court addressed and rejected the City's argument in this respect above under Sections V.K. and V.L.

The City of Pocatello next argues that requiring junior users to secure mitigation water that is ultimately not required for beneficial use is contrary to Idaho law.[16] Again, this is not a challenge to the *As-Applied Order*, but rather a challenge to steps 4 and 8 of the *Methodology Order*. If the Director determines that material injury to reasonable in-season demand exists or will exist under steps 3 and 4, then the junior users are required under step 4 to establish their ability to mitigate that injury to avoid curtailment. 382 R., pp.598-599. To avoid curtailment, junior users only need establish their ability to secure mitigation water to be provided to the Coalition at a later date (i.e., the "Time of Need"). Step 8 then provides that if the Director's in-season recalculations and adjustments establish that material injury to reasonable in-season demand is less than initially determined due to changing conditions, the juniors will not need to provide the full amount of water initially secured to the Coalition. 382 R., p.600. The City's argument that this result is contrary to law is unavailing, and fails to account for the burdens of proof and evidentiary standards established by Idaho law.

As stated in more detail above, when the Director makes his initial material injury determination to reasonable in-season demand in April, he is making the determination that material injury is occurring or will occur. Under the CM Rules and established Idaho law, the Director must curtail at that point, or allow out-of-priority water use pursuant to a properly enacted mitigation plan. *2013 SWC Case*, 155 Idaho at 653, 315 P.3d at 841. There is no presumption that administering to the full quantity of the Coalition's decreed water rights will result in waste. To the contrary, since the Coalition's water rights are decreed rights, Idaho law dictates that proper weight must be given to the decreed quantity of those rights. As a result, the presumption under Idaho law is that the Coalition members are entitled to their decreed quantities in times of shortage. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. If junior users believe that administering to the full decreed amount of the Coalition's water rights will result in waste, they must come forth with clear and convincing evidence establishing that fact. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249.

[16] As set forth in further detail below, the Director's *As-Applied Order* did not require or result in the City of Pocatello securing mitigation water in 2010 that was not ultimately required for beneficial use.

It is against these legal presumptions, burdens of proof, and evidentiary standards that the Director's *Methodology Order* must be analyzed. In the *Methodology Order*, the Director recognizes that "[i]f the Director predicts that the SWC will be materially injured, the consequence of that prediction is an obligation that must be borne by junior ground water users." 382 R., p.593. And, that:

> By requiring that junior ground water users provide of have options to acquire water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to provide mitigation water until the time of need, the Director ensures that junior ground water users provide only the amount of water necessary to satisfy the reasonable in-season demand.

Id. The Court finds that the Director's analysis in this respect protects senior rights in times of shortage by appropriately accounting for the legal presumptions, burdens of proof, and evidentiary standards required by Idaho law. Therefore, the Court finds that the Director's decision in this respect was reached through an exercise of reason, is within the limits of his discretion and must be affirmed.

The City of Pocatello next argues that in determining the reasonable in-season demand of the Coalition in his 2010 *As-Applied Order*, the Director failed to account for all water diverted by Coalition members for delivery to other entities (i.e., wheeled water). The *Methodology Order* provides that in calculating the Coalition's reasonable in-season demand, "any natural flow or storage water deliveries to entities other than the SWC for purposes unrelated to the original right will be adjusted so that the water is not included as a part of the SWC water supply or carryover volume." 382 R., p.578. The City argues that the Director erroneously failed to subtract all wheeled water from the Coalition's reasonable in season demand calculations. This Court disagrees. The City relies on Exhibit 3000 from the hearing on the *As-Applied Order* in 2010. That exhibit provides that "Wheeled water transactions for A&B, AFRD2, Minidoka, and TFCC *may have occurred*, but values were less than 1% of total demand and therefore were not considered." 382 Ex. 3000, *Hearing on the As-Applied Order*. That exhibit only establishes that wheeled water transactions "may have occurred." The fact that such transaction may have occurred is not is not sufficient if the Director is going to use that data to administer to less than the full amount of the Coalition's decreed rights. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249 (holding, "Once a decree is presented to an administrating agency or court, all changes to

that decree, permanent or temporary, must be supported by clear and convincing evidence"). The City points to no clear and convincing evidence in the record establishing that such transactions did occur. Therefore, the City is not entitled to the relief it seeks on this issue.

The City of Pocatello next argues that the Director improperly limited the scope of a hearing held on one of the Director's orders applying his methodology to the 2010 water year. This Court disagrees. On April 29, 2010, the Director issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)*. 382 R., pp.185-198. Unlike the Coalition's requests for hearings in 2012 and 2013, which were improperly denied, the Director acted consistent with Idaho Code § 42-1701A in 2010 by granting a hearing following the issuance of his April 29, 2010, *Order* when requested. The April 29, 2010, *Order* was limited to applying steps 3 and 4 of the *Methodology Order* to the 2010 water year. Therefore, the Director did not err in limiting the evidence presented at that hearing to information relevant to whether the Director's application of steps 3 and 4 to the 2010 water year complied with the *Methodology Order*. 382 R., p.466. The Court finds, after a review of the record in this case, that the Director complied with the requirements of Idaho Code § 42-1701A, and that the City of Pocatello had a meaningful opportunity to be heard at that hearing, as Department staff familiar with the *Order* were present at that hearing to present evidence and testimony and to be subject to examination. Therefore, the City of Pocatello's request for relief on this issue is denied.

Last, with respect to all of the issues raised by the City of Pocatello relating to the Director's *As-Applied Order*, the Court finds that City of Pocatello has failed to establish that its substantial rights were prejudiced as a result of that *Order* under Idaho Code § 67-5279(4). The Director's *As-Applied Order* required no action on the part of the City of Pocatello. The Director did not order the City of Pocatello to mitigate any material injury to the Coalition in 2010 in his *As-Applied Order*. Nor has the City of Pocatello established that it would have been in the curtailment zone in 2010 under the *As-Applied Order*. Only IGWA was required to show it ability to secure mitigation water under the Director's *As-Applied Order* in 2010 in order to avoid curtailment. Therefore, since the City of Pocatello has failed to establish that its substantial rights were prejudiced as a result of the Director's *As-Applied Order*, it is not entitled to the relief it seeks with respect to that *Order*. I.C. § 67-5279(4).

VII.

REMAINING *FINAL ORDERS*

The Coalition filed *Petitions* seeking judicial review of the Director's *Final Order Revising April 2010 Forecast Supply (Methodology Step 7)*, dated September 17, 2010, *Final Order Establishing 2010 Reasonable Carryover (Methodology Step 9)*, dated November 30, 2010, and *Order Releasing IGWA from 2012 Reasonable Carryover Shortfall Obligation (Methodology Step 5)*, dated June 13, 2013. The Coalition provided no briefing or argument specific to these *Final Orders* on judicial review. However, through these *Final Orders* the Director applied his methodology as set forth in the *Methodology Order*. To the extent these *Final Orders* applied the *Methodology Order* in a manner inconsistent with this Court's analysis and holdings regarding the *Methodology Order* as set forth herein, they are set aside and remanded for further proceedings as necessary.

VIII.

CONCLUSION AND ORDER OF REMAND

For the reasons set forth above, the actions taken by Director in this matter are affirmed in part and set aside in part. The case is remanded for further proceedings as necessary consistent with this decision.

IT IS SO ORDERED.

Dated September 26, 2014

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITIONS FOR JUDICIAL REVIEW was mailed on September 26, 2014, with sufficient first-class postage to the following:

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Addendum
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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

CASE NOS:

CV01-23-8258 - CITY OF POCATELLO vs. IDWR (Motion for Order to Show Cause)

CV01-23-8187 - IDAHO GROUND WATER ASSOCIATION vs. IDWR (Motion for Stay, Motion to Compel, Motion for Injunctive Relief, Motion for Expedited Decision, Motion for Order to Show Cause)

CV01-23-8306 - CITY OF POCATELLO vs. IDWR (Motion for Stay)

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EXCERPT FROM HEARING ON ADMINISTRATIVE APPEALS

(COURT'S RULING)

JUNE 1, 2023

HONORABLE JUDGE ERIC J.WILDMAN PRESIDING

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COURT'S RULING

THE COURT: Well, given the exigency of the circumstances and the time constraints and the fact that the parties have to know how they are going to be proceeding in the future, the Court does not have the luxury of taking the matter under advisement and, as such, will be ruling from the bench at this time.

So in -- with respect to Case Number CV01-23-8258, the Court, regarding the writ of prohibition and the writ of mandate, the Court will rule as follows:

Under Idaho Code Section 7-302, a writ of mandate may issue, quote, "to any inferior tribunal to compel the performance of an act which the law especially enjoins as a duty resulting from an office," end quote, or to compel the admissions of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal. The writ is only available in limited circumstances where there is not a plain, speedy, and adequate remedy in the ordinary course of law. That's Idaho Code Section 7-303.

A writ of mandamus is not a writ of right, and the Court's decision whether to issue a writ is discretionary. That's *Regan vs. Denney*, 165 Idaho 15, 2019 case.

Further, the Idaho Supreme Court has instructed and this Court has held on numerous occasions -- I went through

and printed off every case where I have addressed mandamus with respect to delivery calls -- that a writ of mandate is not available to control discretionary acts of tribunals acting within their jurisdiction.

A writ of prohibition is the counterpart to a writ of mandate, Idaho Code Section 7-401. It arrests the proceedings of a tribunal when it is in excess of the jurisdiction of the tribunal. It may issue in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. The Court's decision whether to issue a writ is discretionary. That's *Hepworth Holzer vs. Fourth Judicial District*, 169 Idaho 387, 2021.

Okay. With regard to the issues pertaining to the legal propriety of the Fifth Amended Methodology Order and Final Order regarding the April, 2023, forecast supply, the Court finds the petitioners have a plain, speedy, and adequate remedy at law through IDAPA in the form of judicial review. The Idaho Supreme Court has made it clear, it was never that the intention of a writ should take the place of an appeal. *Smith vs. Young*, 71 Idaho 31, 1950.

The Court, importantly, the Court also notes that there is a hearing presently scheduled before the Department to commence on June 6th on these orders. That administrative remedy has not been exhausted at this time, and the director must first be given the opportunity through that hearing to address issues

raised by petitioners pertaining to the legal propriety of the 2023 orders.

That segues us into issues pertaining to due process. Petitioners raised due process concerns pertaining to the hearing process utilized by the director for the administrative hearing to commence June 6th. In evaluating the due process concerns raised by the petitioners, the Court must be cognizant of the director's duty to timely administer water rights in priority.

The Idaho Supreme Court instructed in *Musser vs. Higginson* that the director's duty to administer water is clear and executive. Time is of the essence in water administration. In any given year the reality is, there is a short time frame between when water supply determinations can be made and when water users' demands for irrigation water begin. Any process employed by the director must account for the exigencies of these time constraints. These exigencies were recognized by the drafters of our Constitution as set forth in the Idaho Supreme Court and American Falls Reservoir District Number 2. The Court found the drafters intended that there be no unnecessary delay in the delivery of water pursuant to a valid water right and that a timely response is clearly required when a delivery call is made and water is necessary to respond to that call. That's AFRD Number 2, 143 Idaho at 874.

This analysis recognizes the failure of the

director to timely administer in priority can result to senior rights in times of shortage. In conjunction, the Idaho Supreme Court further determined that neither the Constitution nor the statutes place any specific time frames on this process.

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

On April 21st, 2023, the director issued the Fifth Amended Methodology Order and Final Order regarding the April, 2023, forecast supply. In the final order regarding the April, 2023, forecast supply, the director predicted an in-season demand shortfall to the Twin Falls Canal Company in the amount of 75,200-acre feed. The order gave affected juniors until May 5, 2023, to establish they can mitigate for their proportionate

share of the predicted demand shortfall. For those juniors who could not, the order stated that the director would issue a curtailment order.

The director did hold a hearing prior to issuing the April 21st, 2023, orders. However, he has set a hearing -- and he has set a hearing to commence June 6th, 2023, on the orders pursuant to Idaho Code Section 42-1701A(3). Idaho Code Section 42-1701A(3) governs hearings before the director. Subsection 3 applies where the director takes action without a hearing. Normally a party has 15 days to request a hearing under Subsection 3. However, because the director found time was of the essence and because he anticipated multiple parties would request a hearing, he took the proactive step of sua sponte noticing up a hearing to save time. He also set a prehearing conference for April 28th, 2023.

The director subsequently denied a request from the petitioners to continue the June 6th hearing until December or January. He also denied a request from the petitioners to appoint an independent hearing officer.

On May 2nd, 2023, the director issued a scheduling order, directing that discovery be completed by May 31st, 2023. Then on May 5th, 2023, the director issued an order limiting discovery to preclude questions regarding the director's deliberative process.

Oh. I misread my notes here, and I want to go

back. When I said that the director held a hearing prior to issuing the April 21st, 2023, order, I meant to say he did not issue an -- he did not hold a hearing.

Okay. Again, on May 2nd, 2023, the director issued a scheduling order, directing that discovery be completed by May 31st, 2023. Then on May 5th, 2023, the director issued an order limiting discovery to preclude questions regarding the director's deliberative process on legal and policy considerations.

Okay. So in evaluating the process in this case against the director's duty to timely administer water rights in priority, the Court finds it provides due process consistent with the exigencies of the circumstances and the need to administer water in priority to avoid injury to senior rights. In making this finding, the Court is influenced by the fact that administration in this case arises in the larger context of an ongoing delivery call that has existed since 2005. The director issued its first methodology order in 2010. Since then, the methodology order has been modified and amended three times to account for new data, modeling revisions, and climate trends. So this is not a new issue. And the director gave heads-up that amendments may be required again in 2023, starting in September of 2022, when he notified individuals that the Department was investigating integrating new data techniques into the methodology order.

Again, he then conducted a series of meetings, presenting new data and techniques, and issued a preliminary recommendation setting forth proposed amendments and inviting comment from outside experts. In effect, the parties were put on notice starting in September of 2022 that amendments to the methodology order were being considered. Based on prior actions within the context of this ongoing delivery call, parties were also well-aware of the exigent time constraints following demand shortfall predictions.

In particular, in its memorandum decision issued on April 11, 2011, in Gooding County Case CV-2010-382, the Court addressed similar due process arguments concerning short time frames for notice and discovery in the context of this very call. The process provided then was found to provide due process.

In this instance the parties are being provided with a hearing on the 2023 orders to commence on June 6th. They were provided approximately six weeks actual notice for the hearing. In addition, the director began making parties aware that amendments to the methodology order were being considered back in September of 2022. At the hearing on June 6th the parties will be given the opportunity to present evidence and arguments pertaining to the 2023 orders.

The Court finds this process provides due process consistent with the exigencies of the circumstances and the director's duty to timely administer water rights in priority.

And frankly, setting a hearing after the irrigation season as requested is not a tangible alternative, given the director's duty and the demand shortfall prediction for the 2023 irrigation season.

With respect to the discovery limitations, the Court finds the director does have the discretion to limit the type and scope of discovery in an administrative hearing. We talked about IDAPA 37.01.01.521. This discretion was also recognized by the Idaho Supreme Court in *Musser* when it held that while the director has a clear duty to administer water, the details of how he chooses to do so are largely left to his discretion.

For these reasons the Court, in an exercise of its discretion, will deny petitioner's applications for writ of mandate and writ of prohibition in Case CV01-23-8258.

That brings me to the Ground Water District's petition and motions in CV01-23-8187. With respect to the motions filed in that case, the Court finds it lacks jurisdiction over the petition for judicial review filed in that proceeding pursuant to Idaho Code Section 42-1701A and the doctrine of exhaustion.

Subsection 3 of Idaho Code Section 42-1701A provides that any aggrieved person, by any action of the director, including any decision, determination order, or other action, 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. It further provides that judicial review of any final order of the director issued following the hearing shall be had pursuant to Subsection 4 of that section of the Code.

Here the director issued the 2023 orders without a hearing. This is within the director's discretion, given that the orders were issued under the umbrella of an active and ongoing delivery call. Therefore, Subsection 3 of Idaho Code Section 42-1701A controls. Until the director holds the hearing on June 6th and issues a written decision, no person aggrieved by the 2023 orders are entitled to judicial review under Idaho Code Section 42-1701A(4). Likewise, under the doctrine of exhaustion, the pursuit of statutory remedies is a condition precedent to judicial review.

In this case the remedy provided in Idaho Code Section 42-1701A(3) has not been exhausted. The Court must -- or excuse me. The director must be given the opportunity to address the issues raised by the petitioners pertaining to the 2023 orders.

The Court notes that it has come to the same conclusion previously in several similar cases involving premature petitions for judicial review, and I'll cite a few of them. In preparation for this hearing, I went in and printed off every one of them, and I have a stack of them here. But that

includes the Order Dismissing Petition for Judicial Review in Ada County Case CV01-17-67, issued February 16, 2017; Order Dismissing Petition for Judicial Review in Ada County Case CV01-16-23173, also issued February 16, 2017; and an Order Granting Motion to Dismiss in Jerome County Case CV27-22-945, issued December of 2022. Therefore, based on the foregoing reasons, the Court will grant the motion to dismiss.

With respect to McCain Foods' motion for stay, CV -- and petition, CV01-23-8306, with respect to the motion for stay filed in that case, the Court will deny the motion for the same reason it denied the motion for stay and motion for injunctive relief in CV01-23-8187. Namely, the director has discretion to limit the type and scope of discovery in an administrative hearing and that the Court lacks jurisdiction over the petition for judicial review filed in this case due to the pendency of a hearing. Therefore, the Court, in an exercise of discretion, will deny the motion for stay and grant the motion to dismiss.

And I'm going to add one final conclusion here. You know, after reviewing the issues raised in these cases and preparing for these hearings, as I had mentioned earlier, I went back and reviewed the numerous opinions that have been addressed by this Court where substantially the same if not the same issues were raised in the context of conjunctive management delivery calls, including this same delivery call brought by the Surface

Water Coalition. The issues are not new, and my reading of the prior decisions explicitly sets forth and reiterates the overriding principles that govern these types of matters. And I'm aware in every single one of those, parties attempt to distinguish that particular set of circumstances to justify the requirement of exhausting administrative remedies.

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

If a hearing has been requested or otherwise set, administrative remedies have not been exhausted, thereby depriving this Court of jurisdiction. The director must first have the opportunity to rule on the issues raised by the order. This process is set forth plainly in Idaho Code Section 42-1701A(3). Further, writs of mandate cannot issue for acts that are discretionary with the director. Staying hearings and holding them after the irrigation season where the director has

predicted material injury to seniors is unworkable as juniors will be permitted to pump out of priority during the irrigation season.

So that is my ruling. And anything else we need to take up at this time?

MR. BAXTER: No, Your Honor. The only thing that just briefly -- I think the parties -- do we want to stick around for a minute?

(Discussion regarding parties conferring by Zoom following the hearing)

THE COURT: Well, for the rest of -- everybody else on the Zoom, if you're not -- those that aren't participating in the discussion will be adjourned.

(Proceedings concluded)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
)
COUNTY OF ADA)

CASE NOS. CV01-23-8258, CV01-23-8187, and CV01-23-8306

I, JACK L. FULLER, Certified Shorthand Reporter in and for the State of Idaho, do hereby certify:

That said proceedings were reported by me in machine shorthand at the time and place therein named and thereafter reduced to typewriting by me and that the foregoing transcript contains a verbatim record of said proceedings.

I further certify that I am not related to any of the parties nor do I have any interest, financial or otherwise, in the cause of action of which said proceedings were a part.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this 6th day of June, 2023.

Jack L. Fuller

Jack L. Fuller, Idaho CSR #762
CSR Expiration Date: 07-10-23

Addendum C

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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	**IDAHO GROUND WATER APPROPRIATORS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT**

Petitioners Surface Water Coalition ("Coalition") instituted this action with their January 14, 2005 letter to the Director of the Idaho Department of Water Resources ("Department") requesting water right administration in Water District 120 (the "Delivery Call"). Pursuant to Department Rule of Procedure 260 and Idaho Rule of Civil Procedure 56, Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, American Falls-Aberdeen Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, North Snake Ground Water District,

Bonneville-Jefferson Ground Water District, Southwest Irrigation District, and Madison Ground Water District ("Ground Water Users"), hereby moves the Director for an order granting summary judgment against the Coalition on their Delivery Call. The grounds for this motion are set forth in the following memorandum.

THE FACTS, IN BRIEF

Most of the facts underlying this case are well known to the Director, and many are set forth in the Director's February 14, 2005 Order in this matter ("Director's Order") or in other portions of the record (including, for example, admissions in the Delivery Call itself and in the Coalition's submission of information in response to Director's Order). Additional facts are set forth in the attached Affidavits of Dr. Charles M. Brendecke ("Brendecke Affidavit") and Mr. John Church ("Church Affidavit"), together with their respective exhibits. But the central, animating facts in this case are simple, and are the focus of this Memorandum: The Delivery Call seeks to dry up several hundred thousand acres of irrigated crop land in southern Idaho. Shutting off wells to do this would not likely produce meaningful supplies of water to the Coalition or significantly increase their irrigated acreage, would be devastating to Idaho's economy, and would not make full economic use of our ground water resources. In Dr. Brendecke's words:

> Because curtailing ground water use on the ESPA will have delayed effects on AFR reach gains, and because Coalition members historically have experienced water shortages only rarely and as a result of intermittent drought events, curtailing ground water diversions on a large or small-scale is not likely to produce meaningful supplies of water during the short-term period when it might be diverted to beneficial use by surface water users. During the long-term, most of the predicted increases in reach gains will be expressed during periods when Coalition members already will have a full supply and/or when the reservoir system will not be able to hold the additional water and it consequently will be spilled and provide no benefit to Coalition members.

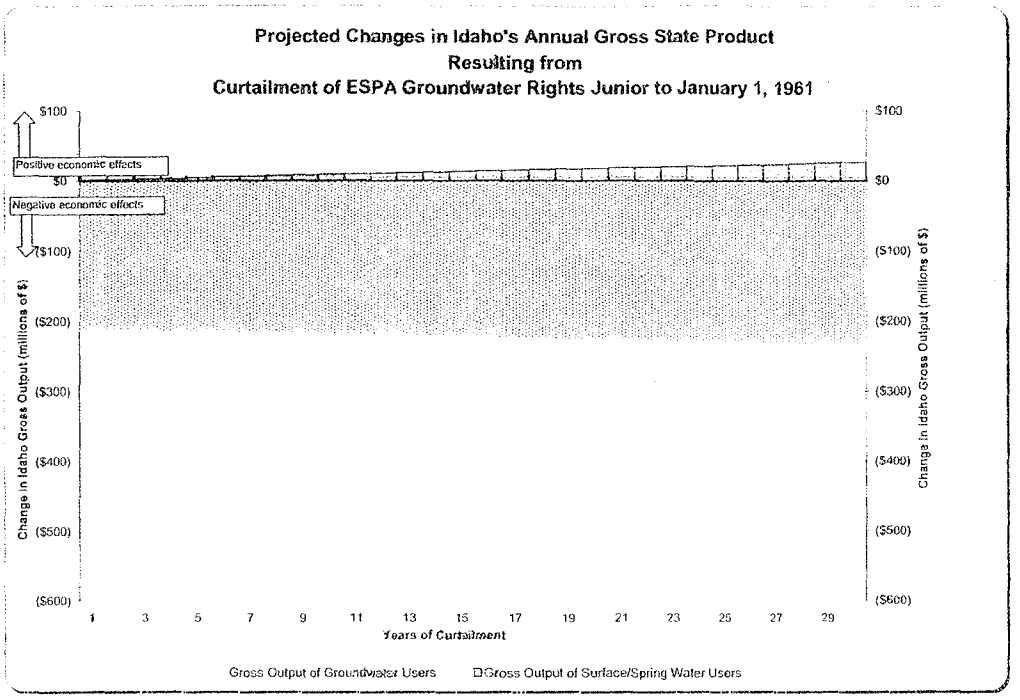
Brendecke Affidavit at 20. Dr. Brendecke also explains that "[a]ssuming the typical diversion by [Coalition] members of 6 acre-feet per acre, the dry-up of 1.1 million acres of ground water irrigated land would generate enough water to supply approximately 10,000 acres of [Coalition] land." *Id.* In other words, a curtailment along these lines would achieve an administration efficiency of 0.1%.

With regard to the proposal's effects on Idaho's economy and its relation to the "full economic development of underground water resources," Mr. Church says:

> [T]he concept of pursuing full economic development of Idaho's groundwater resources is wholly inconsistent with any alternative that regulates the use of the state's water resources to cause the state's economy to lose a present value of close to $8.1 billion in gross output during the next thirty years to gain a present value of $423.5 million. Whether or not, in the near-term, a curtailment of ESPA groundwater users would be considered a "futile call," it is quite evident that, in both the near and long terms, it would cause substantial, and likely permanent, harm to Idaho's economy that, in its first year alone, would overwhelm any possible long-term gain.

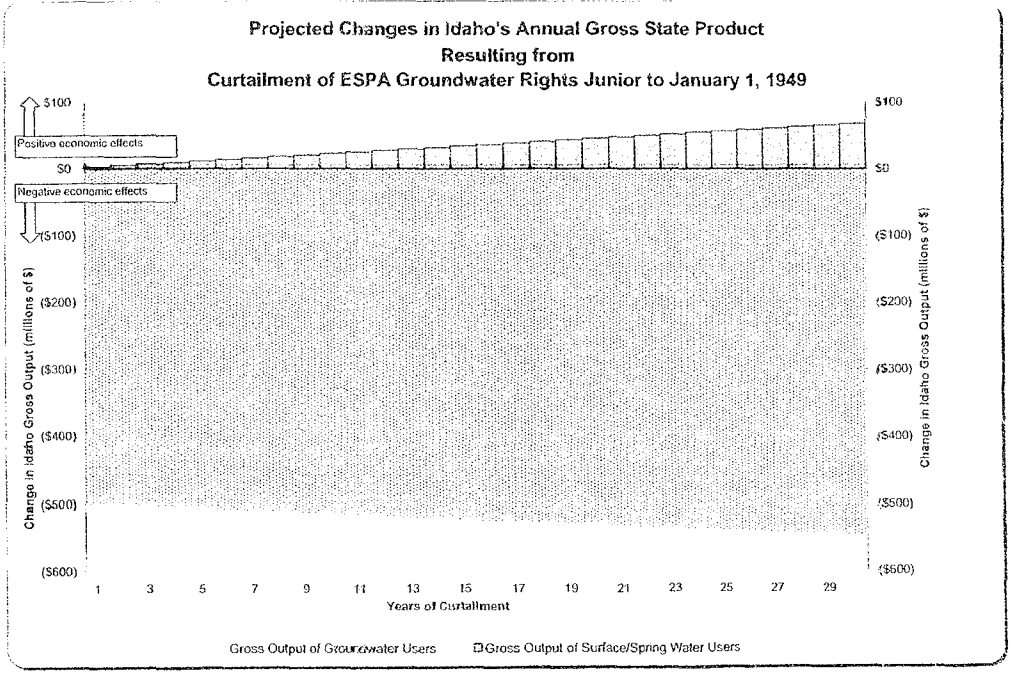
Church Affidavit at 14 (emphasis in original). The following are graphs, which Mr. Church adapted from a study recently commissioned by the Idaho Legislature, depicting the grossly disproportionate economic impacts—enormous, even devastating, costs to the state in return for paltry benefits—predicted to occur from the curtailment of ground water rights junior to 1961 and 1949, respectively.[1]

[1] These are discussed in detail in the Church Affidavit at 14, and shown in Appendix B to the affidavit.



Based on Snyder Report graphs, "Comparison of Gain and Loss Flows Over 10 Years," Snyder Report at 53.

John Church Affidavit Appendix B



Based on Snyder Report graphs, "Comparison of Gain and Loss Flows Over 10 Years," Snyder Report at 53.

John Church Affidavit Appendix B

ARGUMENT

I. Introduction.

This case presents Idaho with unprecedented questions of water law and economic policy that are vital to Idaho's future. And it is not a theoretical or distant future. The focal point for these critical questions is coming up immediately, this irrigation season, in a few weeks. A decision granting the Coalition's Delivery Call seeking to curtail all junior ground water rights in Water District 120 (or beyond)[2] would immediately idle, and probably permanently put out of business, several thousand farms in southern Idaho, beginning immediately. It would instantly change the face of our state and deal an almost unimaginable blow to Idaho's irrigated agriculture and the interconnected economies dependent upon it. In such a scenario, it is difficult to fathom when our state's agricultural economy would recover, if at all.

In policy terms, the answer to this question is self-evident: Idaho should not, with the stroke of a pen, shut off ground water deliveries to literally hundreds of thousands of acres of irrigated land, thus destroying the economic viability of thousands of farms depending on ground water and undercutting the economies of communities across the Snake Plain. Even more obvious, it would seem, is that Idaho should not implement such a shut-off because it would provide only a limited amount of water of questionable benefit this year—or next year, or the next—to surface water irrigators who have asserted pumping injures their water rights.

Fortunately, Idaho's water law does not look favorably on economic self-destruction. In resolving questions with such enormous economic and social dimensions, Idaho's foundational

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[2] The Delivery Call seeks curtailment of all junior ground water diversions within Water District 120,which contains the Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and portions of the Magic Valley Ground Water District. However, the Director has made it clear that if there is to be a delivery call honored, he will decide where it will extend. See Director's Order at 19-20. Accordingly, as vast as Water District 120 is (over 370,000 acres of ground water irrigated land), Water District 130 and other areas of the ESPA also are implicated.

laws have never separated rights and responsibilities under the state's water law from considerations of economic development, maximum use of water resources in the public interest, or the necessities of other water users. This may come as a surprise to some, who may believe that priority and a claimed diversion amount are all that is needed to curtail any junior they believe is causing impacts to a common water source.[3]

This memorandum explains how Idaho's Constitution, statutes, case law, and administrative rules all require consideration of these important factors. Idaho water law is not a cold, one-sided assessment of priority and injury as the Coalition would have it. At least during monumental conflicts like these, Idaho water law has imposed a balancing. And as a matter of law and the undisputed facts of this case, that balancing must result in a denial of the Delivery Call.

II. Summary judgment standards.

Under Idaho Rule of Civil Procedure 56(c), the Department must grant a summary judgment motion "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). As the party moving for summary judgment, IGWA, "initially carries the burden to establish there is no 'genuine issue of material fact' and that he or she is entitled to judgment as a matter of law.'" *Dunnick v. Elder,* 126 Idaho 308, 311, 882 P.2d 475, 478 (1994). However, because IGWA will not carry the burden of production or proof at trial, IGWA can meet this burden by establishing that the Coalition lacks evidence on an essential element of its case. *See id.* "Such an absence of

[3] We use "claimed diversion amount" here advisedly. Those Coalition members located in Water District 1 have not yet had their surface water rights reported or adjudicated in the Snake River Basin Adjudication. Therefore, no ESPA ground water user has yet had an opportunity to scrutinize these surface rights as to their quantity, place of use, or other elements which, once finally determined, would be relevant in any proceeding to determine the appropriateness or scope of any such Delivery Call.

evidence may be established either (1) by an affirmative showing with the moving party's own evidence or (2) by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Id.*

Once IGWA meets this burden, the burden shifts to the Coalition to respond with sufficient opposing evidence to show there is indeed a genuine issue for trial. *Id. See also Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001). If the Coalition does not come forward with admissible evidence sufficient to establish the existence of every single element of its case, then the Department must grant IGWA's summary judgment motion. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Sparks v. St. Luke's Regional Med. Center*, 115 Idaho 505, 509, 768 P.2d 768, 772 (1988) (citing *Celotex, v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986)).

III. The Coalition's Delivery Call, if granted, would violate the longstanding requirement of Idaho law to maximize the use of Idaho's water resources.

Idaho law requires the Department to evaluate a Delivery Call by balancing the "first in time" principle of prior appropriation against other longstanding principles of the prior appropriation doctrine. These include the full economic development of ground water resources, preservation of the state's agricultural base, the necessities of other water users, and the public interest, all in light of hydrological realities. The Idaho Constitution is the original source of this balancing requirement. Over the years, the Idaho Legislature, the Idaho Supreme Court and the Department all have secured its place in Idaho law.

A. Idaho's Constitution prescribes maximizing use of the resource by balancing public cost and benefit during times of water shortage.

The Delivery Call asks the Department to do nothing more than note that the Coalition's priorities are senior, take the Coalition's word that they are about to be injured by ground water

pumping, and then simply shut off the Ground Water Users' wells across a wide expanse. In lodging a Delivery Call premised on the fact of priority and the allegation of injury, the Coalition is asking the Department to ignore not only its own rules and Idaho statutes, but the Idaho Constitution itself.

Never in the many years of the surface water users' saber-rattling about the alleged effects of irrigation diversions from the Eastern Snake Plain Aquifer ("ESPA") have they ever attempted to explain how their desire for a "toggle-switch" shut-down of hundreds of thousands of acres of irrigated agriculture to deliver a paltry amount of water to the river squares with the Idaho Constitution. What the Constitution provides is a far cry from the concept of "priority, period," that the Coalition asks the Department to employ.

At least where irrigation entities are involved, in times of shortage the Idaho Constitution contemplates that the State will balance interests, give due regard to the "necessities" of junior-priority water users, and place "reasonable limitations" on senior-priority users, all to promote the greater economic interests of the State.

Our founding document states:

> The use of all waters now appropriated, or that may hereafter be appropriated for . . . distribution . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

Idaho Const. Art. XV, sec. 1 (emphasis added). The Coalition members are using the public's water, and the public, through the Legislature and the Department, has abiding interests, including economic interests, that must be considered.

To be sure, the Constitution sets up the familiar "first in time is first in right" principle. Idaho Const. Art. XV, sec. 3. However, as among those receiving the public's water for agricultural purposes under a distribution program—such as that occurring on the lands served

by every Coalition member---the Constitution qualifies this principle with the obligation that prior appropriators accept "reasonable limitations" in times of shortage.

> [P]riority in time shall give superiority of right to the use of such water . . .; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Idaho Const. Art. XV, sec. 5 (emphasis added). The Constitution also mandates that those using water in irrigation projects must comply "with such equitable terms and conditions as to the quantity used and time of use, as may be prescribed by law." Idaho Const. Art. XV, sec. 4 (emphasis added). The Idaho Constitution also establishes the Idaho Water Resource Board and empowers it to "formulate and implement a state water plan for optimum development of water resources in the public interest." Idaho Const. Art. XV, sec. 7 (emphasis added).[4] In contrast to all these directives, what the Coalition seeks with its Delivery Call is simple: impose no limitations on them at all, give no consideration to the necessities of anyone but them, and dismantle a large percentage of the water development in the state. It will not do for any water user to say that the rules of reasonable use, optimum development and reasonable limitations on the use of the public water resource apply to everyone's use but theirs.

While priority of right undeniably is a central factor in the allocation and administration of Idaho's water, it is not the only factor. Another requirement of equal importance—a

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[4] It is worth noting that nearby western states' constitutions do not contain these unique and detailed provisions and instead are silent on the matter or simply emphasize priority as the operative principle in water allocation. *See, e.g.,* Colorado Const. Art. XVI, Sec. 6; Wyoming Const. 97-8-003; Montana Const. Art. IX; and Utah Const., Art. XVII, sec. 1. The Idaho Constitution—with its provisions expressly authorizing the Legislature to subject one's priority to "reasonable limitations" so as to extend "due regard to . . . the necessities" of junior priority rights, with its language enunciating the need to provide for "optimum development" of our water resources, and with its declaration that water used under a distribution scheme is a "public use"—stands in stark contrast to the charters of these other western prior appropriation doctrine states. These provisions are in our Constitution for a reason, and this case presents the exact situation where they, and the statutes and rules enacted to implement them, should not be ignored.

requirement whose relevance is squarely apparent in this case—is the constitutional stipulation that "reasonable limitations" shall be placed on prior rights to accommodate the "necessities" of junior appropriators. Idaho Const. Art. XV, sec. 5.

While the goal of avoiding injury to senior rights is important, it is not spelled out in the Constitution; instead there is the concept of "optimum use," and the constitutional requirement that water rights used "for agricultural purposes" can be subjected to those "equitable terms and conditions as to the quantity used and time of use" that the Legislature finds appropriate from time to time.

In the simple case, on a stream or river where shutting a junior's headgate will deliver water to the senior immediately and in amounts equal (or nearly so) to the shut-off, the priority system typically can proceed without significant constraint from any constitutional principle other than priority. The action is neutral in terms of economic impact: either the junior gets a certain amount of water for beneficial use or the senior gets the same amount. In such a situation, it is proper that the senior should have it, and maximum use of the resource is preserved. This is one reason the state has supported the construction of large surface storage reservoirs—so that there is a supplemental supply to ease the impact of the "instant on/off" system of priorities that works on surface streams.

However, it is a far different story with regard to the vast ESPA and its complex relationship to the river. Here, a call seeking to improve river flows by enough to irrigate 1000 acres may require drying up 100,000 acres of land served by ground water. Here, little of the water use curtailed will be delivered to the seniors in the year the call is made. The balance will not be fully "delivered" for decades, during which the climatic conditions and water supply situation will have changed several times. Here the effect of curtailment very likely will put

many, or most, ground water users out of business, perhaps permanently. Such a proposal surely triggers the balancing factors set forth in our Constitution.

B. The Idaho Legislature has codified these Constitutional principles.

Idaho's Legislature has implemented the principles the constitution set forth. "It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state." Idaho Code § 42-234. The Legislature has been particularly explicit on this subject with regard to ground water rights, such as those the Coalition seeks to curtail. In Idaho's Ground Water Act, the Legislature confirmed that a weighing of the constitutionally-recognized factors in times of shortage, not rote priority, is the law in Idaho. The stated policy of this statute is that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources." Idaho Code § 42-226 (emphasis added.) The Idaho Supreme Court has noted that this statute is "consistent with the Idaho Constitution" because it seeks to promote "optimum development of water resources." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 (1973).

Brought down to the terms of this case, the statute means, as its constitutional heritage means, that the Coalition's priorities must be held in check so that they may be "reasonably" exercised, and so that the Department may assure that they do not block "full" economic development of the ground water resource. It would hardly serve either the Constitution or the Ground Water Act for the Department simply to eliminate the economic development that has occurred with ESPA ground water.

The Ground Water Act is not the only place that the Legislature has implemented Idaho's constitutional goals of optimum use and reasonable limitations on priority. The lawmakers have

enacted several other provisions mandating that considerations other than priority and injury be considered when it comes to the use of the public waters of the state.

For example, in evaluating water right transfers, the Legislature requires the Department to determine that the change will be "consistent with the conservation of water resources within the state of Idaho and is in the local public interest," and that "the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates." Idaho Code § 42-222(1).

This same statute expressly prohibits the director from approving "a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area." *Id.* (emphasis added). Where large acreages are implicated by the proposed transfer (i.e., more than 5,000), the Legislature has declared that both that body and the Department have a role in approving it, and that "[e]ach shall give due consideration to the local economic and ecological impact of the project or development so proposed." *Id.* (Emphasis added.)

The Legislature also has mandated specific adjudicatory procedures to apply when surface water users, like the Coalition here, make injury claims against ground water users. Idaho's Ground Water Act provides that if the holder of a surface water right asserts that his or her right "is being adversely affected by one or more user[s] of ground water rights of later priority" the surface water right holder may initiate an action at the Department seeking curtailment or other administration of the ground water rights. Idaho Code § 42-237b. Once the Director has received from the surface user written grounds the Director deems "sufficient" for initiating a proceeding to consider such administration, the statute requires the Director to set the matter "for hearing before a local ground water board." *Id.* The board may recognize the senior

surface water users call and curtail the junior ground water right only "if the use of the junior rights affects, contrary to the declared policy of this act, the use of the senior right." Idaho Code § 42-237c. The "declared policy" of the act is "full economic development of underground water resources," a goal that shall not be blocked by "reasonable exercise" of a prior right.

The State's policy, when it comes to using the public water resource, is not simply to tally relative priorities in a surface water-ground water dispute, accept the senior's allegation of injury, and then switch off ground water pumps.[5] The statute contemplates a process where local considerations, the hydrological and economic effects of curtailment, the legislative mandate of full economic development of ground water, and the principles enunciated by the Framers, all are taken fully into account.

IGWA contends that the Coalition's Delivery Call must be referred to a local ground water board, that the Coalition's statements in support of the call are insufficient under section 42-237b, and that this is an independent ground for summarily rejecting the Delivery Call.

C. Idaho's Supreme Court has ruled repeatedly that priority of right is not the only element to be considered during times of shortage and that maximum use and related concepts are critical elements.

In harmony with these constitutional and statutory mandates, Idaho's Supreme Court has confirmed that "maximum use" of the public's water, and its "optimum use," are overarching goals of state regulation. "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). *See also Reynolds Irr.Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880 (1950).

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[5] Chapter 6, Idaho Code, is designed to allow administration on surface streams, where instant curtailment leading to instant relief is possible. Idaho Code § 42-237b sets up a different, more appropriate procedure where ground water rights are concerned.

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

Van Camp v. Emery, 13 Idaho 202, 208, 89 P. 752, 754 (1907). One might also say that it will not do to demand that the ESPA be kept at an artificially high level—higher than when the Coalition's members obtained their surface water rights—so that the Coalition members may have their water rights improved beyond what they were when first appropriated.

In *State v. Hagerman Water Right Owners,* 130 Idaho 727, 735, (1997), quoting *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904 (1990),[6] the Idaho Court stated:

> The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it. Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of the limited resource. The policy of the law of the [s]tate is to secure the maximum use and benefit, and the least wasteful use, of its water resources.

Using language that was later to be echoed in Idaho's own constitution, the U.S. Supreme Court in *Basey v. Gallagher*, 87 U.S. 670, 683 (1874), ruled that the "right of the first appropriator" is to be "exercised within reasonable limits," and with reference to "the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

The Director's initial ruling in this very case recognizes these principles. Director's Order at 27-29. Here, the proposal is to curtail many times more acre-feet of ground water than could be delivered to or used by the Coalition's members, causing direct economic impact to the ground water-dependent economies while providing only transitory, eventual, and partial benefit

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[6] *Kunz* cites nine additional Idaho cases for this proposition. *Kunz v. Utah Power & Light Co.*, 117 Idaho at 904.

to the surface water users. The Coalition has not attempted to show how its Delivery Call can be sustained in light of this fact, or in light of the principles of law mandated by our court.

D. The Department's Conjunctive Management Rules require any Delivery Call to be considered in light of these same principles.

The Department's Conjunctive Management Rules embody the same principles—maximum use, balancing of priority against other factors—as articulated by the Framers, the Legislature, and the Idaho Supreme Court. The Department has expressly declared that:

> The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law.

IDAPA 37.03.11.020.03. Similar standards are set forth in other portions of the rules. *Id.* at 37.03.11.020.04 (futile calls will not be honored, or may be honored with conditions); 37.03.11.020.05 ("reasonableness of diversion and use of water" is a factor to be considered). These principles are not idle comments in the Rules; it is not by accident that the Department specifically refers to these same provisions of the Idaho Constitution. They are central to the consideration of the Coalition's Delivery Call.

The Rules also authorize the Director to consider, in evaluating whether "material injury" has occurred, the extent to which a senior's water requirements could be met by employing "reasonable diversion and conveyance efficiency and conservation practices" or "alternate reasonable means of diversion," including wells. IDAPA 37.03.11.042.01g and h. Again, the burden is on the Coalition to answer these concerns, and to come forward with a proof that they meet these standards.

These principles should require heightened scrutiny of any request, such as the Coalition's request here, to shut off over a million acre-feet of ground water pumping to deliver perhaps 5% of that amount to the seniors this irrigation season.[7]

The Department's Rules also recite a principle basic to authorities such as the United States Supreme Court's opinion, upholding the position of the predecessor to Coalition member Twin Falls Canal Company in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912): "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule." IDAPA 37.03.01.020.04. The Coalition's Delivery Call fails to address this factor. If granted, the Delivery Call also would violate it.

In sum, the wholesale shut-down of thousands of wells sought by the Coalition does not comport with the economic development, maximum use, and balancing principles contemplated by Idaho law.

The Coalition has made no attempt whatsoever to evaluate these hydrologic or economic factors, or to provide the Director with any facts that could support the radical and economically destructive ground water curtailment its members seek in this case.

IV. The Coalition has failed to meet its obligation to provide evidence of beneficial use and material injury.

As stated above, summary judgment is appropriate if the Coalition has failed to present evidence on at least one essential element of its case. *Dunnick v. Elder,* 126 Idaho 308, 311, 882 P.2d 475, 478 (1994). A review of the Coalition's evidence demonstrates that the Coalition has failed to present sufficient evidence on both beneficial use and material injury to prove those elements of its case.

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[7] See Brendecke Affidavit, attached.

The Department's Conjunctive Management Rules require that, before a delivery call will be honored, the Director first must "determin[e] the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made." IDAPA 37.03.11.020.05. To allow the Director to make this determination here, the Rules require the Coalition to provide the following information, among other required information, to support a call for water delivery: (1) "... the water diversion and delivery system being used by petitioner and the beneficial use being made of the water" and (2) "[a]ll information, measurements, data or study results available to the petitioner to support the claim of material injury." IDAPA 37.03.11.030.01 (a, c).

In addition to the Rules' requirements, the Director's February 14 Order in this case specifically directed the Coalition to supply certain information. Director's Order at 31. Although the Coalition was granted an extension to obtain and submit some of this information (the names, addresses and description of the water rights of the ground water users who are alleged to be causing material injury), the deadline has passed for the Coalition to make their record on the required items quoted above—namely, (1) documentation of their delivery system and beneficial use and (2) evidence showing material injury. March 7, 2005 letter from Travis Thompson to Director Dreher; *Order Denying Motion to Authorize Discovery; and Granting Additional Time to Serve Respondents* (March 9, 2005).

The limited information the Coalition has provided fails to satisfy both the minimum requirements of IDAPA 37.03.11.030.01 and the Director's Order. *Petitioners' Joint Response to Director's February 14, 2005 Request for Information* (March 15, 2005), as amended by March 18, 2005 letter from Travis Thompson to Director Dreher. First, the Coalition has not

provided sufficient information about its beneficial use of water. As explained in more detail below, with regard to the Coalition's lack of responsiveness to the Director's Order, the Coalition has not provided sufficient evidence showing the actual amounts of water beneficially used by each of its members' landowners and shareholders. Without this, how can the Director make a determination about material injury?

Second, and even more significantly, the Coalition has provided no information—beyond pointing out that river flows, and perhaps their diversions, have decreased in recent years (during a once-in-500-years drought)—to demonstrate how its members' landowners and shareholders are suffering material injury from ground water pumping. They have provided no evidence showing the extent of any shortage, how they have been affected by any such shortage, or what adjustments they have made to accommodate it. In this case, the Coalition has made sweeping allegations and called for thousands of acres of irrigated crop land to be dried up immediately, yet they have not made any effort to prove this central element of their case—material injury.

In addition, the Coalition provided either no information, or incomplete information, in response to the following specific requests in the Director's Order: (1) total diversions of ground water in acre feet per month by the Coalition members' landowners or shareholders, as to A&B Irrigation District, Minidoka Irrigation District, Burley Irrigation District, and Milner Irrigation District; (2) number of the Coalition members' landowners or shareholders holding individual ground water rights; (3) average monthly headgate deliveries in inches per acre to Coalition members' landowners or shareholders, as to A&B Irrigation District, Minidoka Irrigation District and Burley Irrigation District; (4) the total amount of reservoir storage in acre feet carried over to the subsequent year; (5) the quantity of water in acre feet the Coalition members' landowners or shareholders leased to other users through the water supply bank and the Water District 01

Rental Pool; (6) the quantity of water in acre feet the Coalition members' landowners or shareholders made available to other users through means other than the water supply bank and the Water District 01 Rental Pool; (7) the total number of acres irrigated by flood irrigation and the total number of acres irrigated by sprinkler irrigation, as to A&B Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company; and (8) the specific types of crops planted on irrigated acres served by the Coalition members' landowners or shareholders (without some indication of the number of acres on which each crop is grown, for each year for the last fifteen years, the meager information as provided is meaningless to support the Coalition's Delivery Call).[8]

The Coalition seems to be waiting for someone else to make their case, but that burden falls squarely on them. The Coalition's failure to provide evidence proving essential elements of their case warrants dismissal on summary judgment. The Ground Water Users and the State of Idaho should not be forced into the expense of full litigation when the Coalition has not brought forth evidence to support their claim.

V. The Surface Water Coalition's Delivery Call should not be granted because it would be futile.

The Department's Conjunctive Management Rules specify that a delivery call will be deemed "futile" and therefore denied if the call, "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. The Department already has refused, in response to delivery calls or proposed

[8] The Coalition itself agreed to provide any "further information concerning 'material injury'," beyond the wholly unsupported allegations in their Delivery Call. However, when requested (by the Director's Order) the Coalition again failed to provide the necessary information.

administration in water districts, to curtail juniors where it would be futile, including those situations where water could be delivered but to do so would be unreasonably wasteful.

In a 2004 case involving competing surface water rights on the Big Lost River, the Director concluded that a proposed delivery was futile and would not be attempted where channel and ditch losses between the junior diversions and the downstream seniors ranged from 75 percent to 90.2 percent. *In the Matter of Determining a Futile Call for the Delivery of Surface Water in Water District No. 34, Big Lost River* (July 30, 2004) (construing IDAPA 37.03.12.020.04, which prohibits "unreasonable waste").

In the present case, the Delivery Call asks the Department to curtail ground water use across a broad—and, as the Director's Order notes, as yet unspecified—expanse of the ESPA. The numbers implied in the Delivery Call certainly could involve drying up as many as 1.1 million acres of ground water irrigated land to "deliver" enough water to irrigate perhaps 10,000 acres of land. The Delivery Call requests an unreasonable waste of water and the antithesis of full economic development.

The Department's Rules indicate that, based on a finding that a call would be futile, the Department can either deny a curtailment or mitigation obligation outright or—provided the facts support it in light of the "full economic development" standard—require juniors to implement "mitigation" or "staged or phased curtailment." IDAPA 37.03.11.020.04 (emphasis added). The Director certainly has discretion in this regard. However, IGWA submits that, given the extreme imbalances involved and the certain harm to Idaho's economy that would result, it would be an abuse of discretion to require curtailment of any kind in this case.

Based on any one of the arguments raised in this memorandum and the facts set forth in the attached affidavits of H. J. Church and Charles M. Brendecke, the Coalition's Delivery Call should be dismissed on summary judgment.

RESPECTFULLY SUBMITTED this 23d day of March 2005.

GIVENS PURSLEY LLP

Jeffrey C. Fereday

Michael C. Creamer

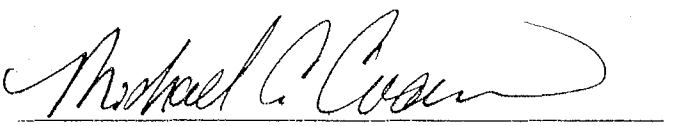
Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Mr. Karl J. Dreher Director Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	_____ U.S. Mail _____ Facsimile _____ Overnight Mail ✓ Hand Delivery
C. Tom Arkoosh, Esq. Arkoosh Law Offices, Chtd. 301 Main Street P.O Box 32 Gooding, ID 83330	✓ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
W. Kent Fletcher, Esq. Fletcher Law Office P.O. Box 248 Burley, ID 83318-0248	✓ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
Roger D. Ling, Esq. Ling, Robinson & Walker 615 H St. P.O. Box 396 Rupert, ID 83350-0396	✓ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
John A. Rosholt, Esq. John K. Simpson, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson 113 Main Avenue West, Ste. 303 Twin Falls, ID 83301-6167	✓ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
James C. Tucker, Esq. Idaho Power Company 1221 West Idaho P.O. Box 70 Boise, ID 83707	✓ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery

James S. Lochhead Adam T. Devoe Brownstein, Hyatt & Farber P.C. 410 17th St., 22nd Floor Denver, CO 80202	✓ U.S. Mail ____ Facsimile ____ Overnight Mail ____ Hand Delivery
Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 West Fort Street, MSC 020 Boise, ID 83724-0020	✓ U.S. Mail ____ Facsimile ____ Overnight Mail ____ Hand Delivery
E. Gail McGarry, P.E. Program Manager Water Rights & Acquisitions PN-3100 U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	✓ U.S. Mail ____ Facsimile ____ Overnight Mail ____ Hand Delivery
Scott L. Campbell, Esq. Moffatt Thomas Barrett Rock & Fields, Chtd. 101 S. Capitol Blvd., 10th Floor P.O. Box 829 Boise, ID 83701-0829	✓ U.S. Mail ____ Facsimile ____ Overnight Mail ____ Hand Delivery
Idaho Department of Water Resources Eastern Regional Office 900 North Skyline Dr. Idaho Falls, ID 83402-6105	✓ U.S. Mail ____ Facsimile ____ Overnight Mail ____ Hand Delivery
Idaho Department of Water Resources Southern Regional Office 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033	✓ U.S. Mail ____ Facsimile ____ Overnight Mail ____ Hand Delivery



Michael C. Creamer

Addendum D

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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	**ORDER ON PETITIONS TO INTERVENE AND DENYING MOTION FOR SUMMARY JUDGMENT; RENEWED REQUEST FOR INFORMATION; AND REQUEST FOR BRIEFS**

Background

On February 14, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued an Order in this matter and other related matters. The Order provided an initial response by the Director to the water delivery call made by letter on January 14, 2005, by the seven irrigation districts, reservoir district, and canal companies named in the above caption and referred to as the Surface Water Coalition ("Coalition"). The delivery call seeks the administration and curtailment of ground water rights within Water District No. 120 that are junior in priority to water rights held by or for the benefit of members of the Coalition. Among other actions, the Order designated the Coalition's delivery call as a contested case and granted the petition of the Idaho Ground Water Appropriators, Inc. ("IGWA") to intervene in the delivery call proceeding involving Water District No. 120.

In addition, the Order required each member of the Coalition to submit to the Director within thirty (30) days certain information called for in the Order. The Order states that the Director will consider the water delivery call as a call for administration and curtailment of junior priority ground water rights in Water Districts No. 120 and No. 130 that are alleged to, or may, be causing injury to the senior surface water rights of the members of the Coalition. The Order further states that the Director will make a determination of the extent of likely injury after April 1, 2005, when the U. S. Bureau of Reclamation and U. S. Army Corps of Engineers release their jointly prepared operating forecasts for inflow from the Upper Snake River Basin for the period April 1 through July 31, 2005. The forecasts are expected to be released on or about April 8, 2005. The Director expects to be able to issue an order addressing the extent of likely injury during the week of April 18, 2005.

4-6-05

Additional Petitions to Intervene

In addition to IGWA, other entities have filed timely petitions to intervene in this matter including the Idaho Dairymen's Association ("IDA"), the United States Bureau of Reclamation ("USBR"), and the Idaho Power Company ("Idaho Power"). IDAPA 37.03.01.353 provides as follows:

> If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

The IDA represents entities holding ground water rights that, based on the Coalition's water delivery call, are potentially subject to curtailment. Therefore, the IDA has a direct and substantial interest in the subject of the proceeding that may not be adequately represented by the present parties. Because the interests of the IDA will not unduly broaden the issues, the IDA is granted intervention.

The USBR is the legal owner of some of the water rights directly at issue in this proceeding as stated in Finding of Fact 54 of the Order of February 14, 2005. Therefore, the USBR has a direct and substantial interest in the subject of the proceeding that is not adequately represented by the present parties. Because the interests of the USBR will not unduly broaden the issues, the USBR is granted intervention.

Unlike the USBR, Idaho Power does not identify in its petition any water rights it holds that are the subject of this proceeding. Furthermore, unlike the IDA, Idaho Power does not state in its petition that it holds ground water rights that are potentially subject to the actions and relief requested. Therefore, Idaho Power has not demonstrated a direct and substantial interest in the subject of the proceeding and is denied intervention. Additionally, to the extent Idaho Power believes its water rights are being interfered with by the exercise of junior priority ground water rights, it has other adequate forms of relief available, such as the filing of a separate delivery call.

Motion for Summary Judgment

On March 23, 2005, IGWA filed *Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support*. IGWA also filed the *Affidavit of Dr. Charles M. Brendecke* ("Brendecke Affidavit") and the *Affidavit of Mr. John Church* ("Church Affidavit") in support of the summary judgment motion. The motion asks the Director to dismiss the Coalition's delivery call based upon the supporting affidavits and numerous factual and legal arguments. On March 28, 2005, the Coalition submitted a letter to the Director objecting to the filing of the summary judgment motion by IGWA. The Coalition argues that the motion for summary judgment is inappropriate at this informal stage of the proceeding and

should be stricken, or if not stricken the Director should inform the Coalition as to whether it is expected or required to respond to the motion pursuant to Rule 270 of the Department's Rules of Procedure.

The Order issued by the Director on February 14, 2005, designated this matter as a contested case and did not specify that the matter would proceed under the Informal Proceedings provided for by Rules 100 through 103 of the Department's Rules of Procedure. IDAPA 37.01.01.100 - 103. The Order did state, however, that the Director intended to make a determination of the extent of likely injury to the rights held by or for the benefit of members of the Coalition after April 1, 2005, which will be prior to any opportunity for a hearing in the contested case. Once the Director has issued a further order addressing the merits of the delivery call, the parties will have an opportunity to request a hearing and engage in the normal steps of a contested case provided for under the Department's Rules of Procedure. IGWA's *Motion for Summary Judgment* will, therefore, be denied without prejudice at this time, and the Coalition shall have no duty to respond. The Director has reviewed the *Motion for Summary Judgment* and the Brendecke Affidavit, but does not intend to rely upon the information contained therein in making a determination of the extent of likely injury to the members of the Coalition. The Director has not reviewed the Church Affidavit and does not intend to do so.

Renewed Request for Information

The Order of February 14, 2005, required that each member of the Surface Water Coalition file with the Director certain information called for under Conclusion of Law No. 38 of the Order for the past fifteen (15) irrigation seasons, 1990 to 2004, within thirty (30) days of the Order. The Coalition members filed information in response to this request on March 15 and 18, 2005.

The response filed by the Coalition members relied heavily on data obtained from the Department (total monthly diversions of natural flow and total monthly diversions of water released from reservoir storage), failed to identify members or shareholders holding individual ground water rights (alleging that such information is "irrelevant for purposes of the request for water right administration of Petitioners' surface water rights"), referred the Director to his own staff or the watermaster for Water District 01 (total amount of reservoir storage carried over to the subsequent year, quantity of water leased to other users through the water supply bank and the Water District 01 Rental Pool, and quantity of water made available to other users through means other than the water supply bank or the Water District 01 Rental Pool), provided data or estimates for the total number of acres irrigated by flood irrigation and the total number of acres irrigated by sprinkler irrigation for one year only (Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company), and a single list of crops for each member of the coalition (no acreage numbers and no history of crop rotation).

All of the information that was to have been provided pursuant to the Order of February 14, 2005, is relevant for the determination of the extent of material injury to surface water rights held by or for members of the Coalition. Ground water rights held by individual members of the entities comprising the Coalition (landowners in irrigation districts and shareholders in canal

companies) is especially relevant since such rights may have been established and used to supplement surface water supplies during times of shortage. If information about the ground water rights held by individuals within the Coalition members is not available, the Coalition may, as an alternative, supply documented information to the Director identifying the number and location of acres served by each Coalition member for which an inadequate water supply was available to irrigate or finish crops in specific years from any available water source.

The Coalition alleges that: "Since the Department 'maintains complete records for all claimed, permitted, licensed, and decreed water rights authorizing the diversion and use of ground water from the ESPA', the Department is capable of determining whether or not any landowners or shareholders of the respective Petitioner entity hold individual ground water rights." With the exception of the North Side Canal Company, the Department does not have records of the landowners and shareholders that receive water delivered by the member entities comprising the Coalition. Consequently, with the exception of the North Side Canal Company, the Department cannot determine whether landowners or shareholders of the respective member entity of the Surface Water Coalition hold individual ground water rights.

The Director hereby reiterates the request of the members of the Surface Water Coalition for submission of all information called for under Conclusion of Law No. 38 of the Order of February 14, 2005, to the extent that information has not been submitted to date. The failure to fully comply with this request will limit the Director's ability to fully address the relief requested by the Coalition.

Request for Briefs

In preparing the forthcoming order determining the extent of likely injury that will be experienced by the members of the Surface Water Coalition, the Director has identified a legal issue for which briefing by the parties is requested. The issue is whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party.

The Director requests that the parties review the cases of *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921); *Scott v. Nampa Meridian Irr. Dist.*, 55 Idaho 672, 45 P.2d 1062 (1934); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), and any other Idaho Supreme Court decisions that may be relevant to the issue raised. The Director requests that the parties provide simultaneous briefing on this issue to the Director within seven (7) days from the date of this order.

ORDER

Based upon and consistent with the foregoing,

IT IS HEREBY ORDERED as follows:

1. The Petitions to Intervene as parties in this matter filed by the Idaho Dairymen's Association and the United States Bureau of Reclamation are GRANTED, and the Petition to Intervene filed by the Idaho Power Company is DENIED.

2. The Motion for Summary Judgment filed by the Idaho Ground Water Appropriators is DENIED without prejudice.

3. The Director renews his request of the members of the Surface Water Coalition for submission of all information called for under Conclusion of Law No. 38 of the Order of February 14, 2005, to the extent that information has not already been submitted to the Director.

4. The parties are requested to provide simultaneous briefing to the Director within seven (7) days from the date of this order on whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party.

DATED this 6th day of April 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April 2005, the above and foregoing, was served on the following by facsimile and by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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