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DISTRICT COURT OF THE STATE OF IDAHO

FOURTH JUDICIAL DISTRICT

ADA COUNTY

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents,

and

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

Intervenors.

Case No. CV01-23-13173

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER

IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

IDAHO GROUND WATER APPROPRIATORS, INC.'S REPLY BRIEF

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

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Idaho Ground Water Appropriators, Inc. ("IGWA") submits this reply brief pursuant to the Court's *Order Vacating and Resetting Hearing* entered January 29, 2024. This brief replies to *Respondent IDWR's Brief* ("IDWR's Response") and *Surface Water Coalition's Response Brief* ("SWC's Response") filed January 19, 2024. Capitalized terms not defined in this brief have the definition set forth in IGWA's Opening Brief.

REPLY ARGUMENT

IGWA's Opening Brief identifies 13 issues on appeal, grouped by procedural errors, substantive errors, and ancillary matters. (IGWA's Opening Br., 14-15.). The Argument section of IGWA's Opening Brief addresses each issue in turn, with subsections that correspond to each issue. This brief follows the same organizational structure, except that it first addresses the threshold argument made by the SWC that the doctrines of *res judicata* and "law of the case" preclude junior-priority water users from challenging the Fifth Methodology Order at all.

As explained below, the response arguments made by IDWR and the SWC should not dissuade this court from correcting procedural and substantive errors made by the former Director of the Idaho Department of Water Resources in connection with issuing and applying the Fifth Methodology Order. As the Idaho Supreme Court has noted, even in matters that require the Director to exercise discretion, it "is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 880 (2007) ("*AFRD2*").

Threshold Issue

The SWC contends that IGWA "attempts to impermissibly re-litigate certain defenses through its 'substantive errors' portion of the opening brief" and "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." (SWC Resp., 24-25). They complain they are experiencing déjà vu, and ask the court to "deny IGWA's appeal and affirm the agency's final order" based on doctrines of *res judicata* and "law of the case" *Id*. at 10-11.

By asserting that any challenges to the Fifth Methodology Order are barred by *res judicata* and "law of the case" doctrines, the SWC effectively argues that the Director has no authority to change the methodology order at all. The courts have held otherwise, instructing the Director to periodically review the methodology to improve its accuracy and effectiveness based on the best available science. (R. 1-2, citing *In the Matter of Distrib. of Water to Various Water Rts. Held By or For Ben. of A&B Irr. Dist*., 155 Idaho 640, 645 (2013) ("*A&B Irrigation*".)

The Fourth Methodology Order states that "forecasting techniques will be revised based on updated data and the forecasting techniques may be revised when improvements to forecasting tools occur." (R. 1396.) It also acknowledges that not all of the material injury factors are evaluated and addressed in the Fourth Methodology Order, stating: "At this time, the information submitted or available to the Department to determine the extent of supplemental irrigation of lands within the service areas of SWC entities." (R. 1389.)

The feeling of familiarity, or déjà vu, should be expected any time the Director undertakes to review and improve the methodology based on newer and better data. That effort naturally requires analysis of the same topics that were addressed when the methodology was previously developed and revised—water demand calculations, water supply calculations, etc.

The only reason this case exists is because the Director changed the methodology based on data that did not exist when it was first developed and last amended. Doctrines of *res judicata* and "law of the case" do not preclude the Director from improving the methodology, nor do they preclude affected parties from opposing or advocating for particular changes. Moreover, Idaho courts have not previously reviewed the process the Director uses to change the methodology, which is an issue of first impression in this case.

The changes to the methodology that IGWA advocates for are driven by data that accrued since the methodology order was last updated. For instance, IGWA argues that the Director should (i) use the Irrigated Lands or METRIC data sets from 2017 and 2021, respectively, to define TFCC's current irrigated acreage; (ii) account for inflow from tributaries to the Snake River below Heise Gage in light of flooding in the Portneuf Basin in 2023; and (iii) examine opportunities for TFCC to operate more efficiently since the record shows TFCC has become considerably *less* efficient in recent years. None of this is barred by *res judicata* or "law of the case" doctrines because it is based on newer data, and it demonstrates shortcomings in the reliability and accuracy of the methodology order.

Ironically, the SWC takes no issue with the changes to the methodology that benefit the SWC. What the SWC actually requests is a double-standard that leaves the Director free to change the methodology in ways the SWC likes, but barred by *res judicata* and "law of the case" from making changes the SWC doesn't like. If the Director undertakes to improve the reliability and accuracy of the methodology based on the best available science and data, that analysis must include *all* aspects of the methodology, not just those that benefit the SWC.

Procedural Errors

1. The Director violated due process and the APA by changing the methodology without first providing notice and a hearing.

IGWA contends the Director violated due process and the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code ("APA") by changing the methodology without first holding a hearing. (IGWA's Open. Br., 17-23.)

Importantly, it is undisputed that there was no emergency that required the Director to change the methodology without first holding a hearing. The Director instructed IDWR staff as early as 2020 to begin evaluating potential changes to the Fourth Methodology Order, and he told the parties on August 5, 2022, that he intended to consider revising the Fourth Methodology Order. The Director had ample time to follow a normal hearing process and consider all relevant evidence before changing the methodology order. He simply chose not to.

Despite the lack of an emergency, IDWR argues that (i) due process and the APA do not require the Director to hold a hearing before changing the methodology order, (ii) Idaho Code § 42-1701A trumps due process and the APA and gives the Director *carte blanche* authority to issue orders without first holding a hearing, regardless of whether an emergency exists, and (iii) even if the Director violated due process and the APA, the judiciary should give him a free pass because junior water users were not "unduly prejudiced" by the Director's violations. The SWC makes similar arguments. Each of these defenses should be rejected, as explained below.

1.1 Due process does not condone after-the-fact hearings unless some exigency necessitates immediate government action before a hearing can be held.

IDWR argues that the Director did not violate due process because he held a hearing after issuance of the Fifth Methodology Order was issued, but before it took effect. (IDWR's Response, 19-21.) IDWR's argument should be rejected for three reasons.

First, the Director issued the Fifth Methodology Order on April 21, 2023, *after* the irrigation season had already begun. Given the exceptionally high snowpack in 2023, the Fourth Methodology Order would not have generated a curtailment order in 2023. The Director's decision to change the methodology after the irrigation season began violates the Idaho Supreme Court ruling in *A&B Irrigation* which allows the use of a baseline method to administer water under the SWC delivery call so long as it is "made available in advance of the applicable irrigation season." 155 Idaho at 653. This alone was a violation of due process.

Second, the Fifth Methodology Order did in fact take effect before the Director held the after-the-fact hearing June 6-9, 2023. The Fifth Methodology Order does not state that it will not take effect until after an after-the-fact hearing occurs.

On the same day the Director issued the Fifth Methodology Order, he issued the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ("April 2023 As-Applied Order") which applied the new methodology. (R. 48-61.) The April 2023 As-Applied Order states:

> On or before May 5, 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan. If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.

(R. 53, underline added.) The April 2023 As-Applied Order does not say that curtailment would be withheld until an after-the-fact hearing occurs. It states that the Director "will" order curtailment if mitigation is not provided by May 5, 2023.

Three days after the Director issued the Fifth Methodology Order and the April 2023 As-Applied Order, he issued an order declaring four ground water districts out of compliance with the IGWA-SWC Settlement Agreement, leaving them with no mitigation protection.[1] Shortly

[1] IGWA request that the Court take judicial notice of the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* issued on April 24, 2023, in IDWR Docket No. CM-MP-2016-001 (attached as Appendix A). chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20230424-Amended-Final-Order-Regarding-Compliance-with-Approved-Mitigation-Plan.pdf (last visited February 28, 2024).

thereafter, the Director issued an order ruling that compliance with the IGWA-SWC Settlement Agreement is an all-or-nothing affair—either all districts comply or none of them do. (R. 483-486.) This left all of the ground water districts without safe harbor under the IGWA-SWC Settlement Agreement, exposing them to curtailment under the April 2023 As-Applied Order.

The April 2023 As-Applied Order threatens curtailment of every groundwater right junior to December 30, 1953—approximately 75 percent of all groundwater rights from the ESPA, representing an estimated 1.7 million acre-feet of beneficial use. (Sukow, Tr. Vol. I, 55:1-56:2, 74:9-12 (testifying about R. 1436 (showing priority date of 1953 corresponding to 700,000 acres curtailed, and a priority date of 1900 corresponding to 940,000 acres curtailed.)) To avoid catastrophe, the ground water districts were forced to spend millions acquiring storage water to comply with IGWA's storage water mitigation plan and avoid curtailment in 2023. (R. 638.)

The Director did not indicate until May 23, 2023, in the *Order Determining Deficiency in IGWA's Notice of Secured Water*, that he would not proceed with curtailment until after the after-the-fact hearing. (R. 486.) By this time, IGWA's members had already signed storage contracts, most of them entered in haste at exorbitant prices, to satisfy their share of the 75,200 acre-feet mitigation obligation, as evidence by the contracts attached to *IGWA's Amended Notice of Mitigation*. (R. 636-708.)

Third, the after-the-fact hearing did not satisfy due process because it was not fundamentally fair. While due process does not impose a brightline rule as to when hearings must be held, the touchstone of the doctrine is that the decision-making process must be fair to those persons affected by the decision, as explained by the U.S. Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972):

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property.

The hearing requirement "is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Id*. at 90, fn 22. "An individual must have an opportunity to confront all the

evidence adduced against him, in particular that evidence with which the decisionmaker is familiar." *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982).

Pre-decision hearings are required when reasonably possible to ensure the decision is fair and unbiased, especially when the decision affects a person's livelihood. The U.S. Supreme Court has held that a pre-decision hearing is required "*before* [a property owner] is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id*. at 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original)). A pre-decision hearing is required before the government terminates welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

The ability to use a water right (a real property interest) is a significant property interest because it directly affects the survival of water users whose livelihood depends upon it, which is why the Idaho Supreme Court has held in *Clear Springs Foods, Inc. v. Spackman* that junior groundwater users were "denied due process" and the "the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing." 150 Idaho 790, 814-15 (2011).

IDWR argues that after-the-fact hearings are just as fair to junior water users as pre-decision hearings, but this is simply not reality. There is a huge difference between a decision that is based on a full evidentiary record, where the decision-maker has heard all relevant testimony and considered all relevant evidence before making the decision, and one that is not. When a hearing is held after-the-fact, affected parties are tasked with persuading the decision-maker to admit they got it wrong the first time. The deck is stacked against them. The pressure on the decision-maker to not deviate from the initial decision, especially when it carries major real-life consequences.

This case provides a perfect example of why due process requires a hearing first whenever possible. If, after holding the after-the-fact hearing, the Director had made a change to the methodology that reduced or eliminated the curtailment ordered under the April 2023 As-Applied Order, it would have armed junior groundwater users with black and white evidence that the Director violated due process by failing to hold a hearing first. To avoid that risk, the Director was highly motivated to not modify the Fifth Methodology Order. As expected, the

Director made no changes following the after-the-fact hearing, despite abundant evidence of ways to improve its reliability and accuracy.

If after-the-fact hearings were no different, due process would never require a pre-decision hearing. The truth is, after-the-fact hearings have actual and perceived shortcomings that erode public trust in the decision and the institution. Due process is concerned not only with actual fairness, but with the perception of fairness: "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

As explained in pages 17-18 of IGWA's Opening Brief, due process requires a pre-decision hearing in this case because there was no extraordinary situation that required postponing the hearing until after-the-fact. Two facts are particularly significant. First, the Fourth Methodology Order had been in place and functioning since 2016. (R. 1417.) No party had identified a major flaw in the Fourth Methodology Order that required immediate repair. Rather, the Director took up his review of the Fourth Methodology Order as a matter of course, to address new and better data that had developed. While the initial development of the methodology order was time sensitive, subsequent updates do not bear the same exigency. The Director initiated this process in 2020. There is no reason he could not have initiated a normal, deliberate hearing process, with adequate time to perform needed discovery, and then heard and considered all relevant evidence *before* changing the methodology.

Second, the methodology defines the *process* of water administration under the SWC delivery call. While seasonal water supply conditions affect the outcome of the Director's *application* of the methodology, they do not change the process itself. Changing the process of water administration is akin to lawmaking, and, in the absence of an emergency, should be done carefully, deliberately, and transparently, not behind closed doors.

As explained on pages 19-24 of IGWA's Opening Brief, the process employed by the Director to change the methodology left junior-priority groundwater users with the abiding belief that critical changes to the methodology were driven by bias, *ex parte* communications, animus toward certain ground water districts, and other interests of IDWR. This is precisely what due process is intended to protect against.

If courts regularly allowed government agencies to cure due process violations with after-the-fact hearings, the agencies would have little incentive to hold hearing first, public trust will erode, and, having lost trust in the institution, affected persons will be tempted to take matters

into their own hands. This is why, when an order is issued in violation of due process, courts are right to "vacate the Final Order … and hold a hew hearing that complies with due process." *Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F. Supp. 3d 1216, 1230 (D. Idaho 2018).

For the reasons set forth above and in IGWA's Opening Brief, this court should find that the Director violated due process, and restore trust in IDWR and the rule of law by setting aside the Fifth & Sixth Methodology Orders and instructing the Director to administer water under the Fourth Methodology Order until a hearing is held that complies with due process.

1.2 In the absence of an emergency declared in accordance with Idaho Code § 67-5247, the APA requires Idaho agencies to hold a hearing before issuing a final order in a contested case.

IDWR acknowledges that the Director is subject to the APA (IDWR's Resp., 11), but contends that the Director has discretion to ignore the APA in practice (*Id*. at 14).

As noted on pages 20 of IGWA's Opening Brief, the APA requires that findings of fact set forth in a final order issued in a contested case "be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." Idaho Code § 67-5248(2) (underline added). Idaho Code § 67-5249 defines "agency record" to include pleadings and evidence submitted at a hearing held in the contested case, including "the record prepared by the presiding officer under the provisions of section 67-5242, Idaho Code, together with any transcript of all or part of that record." Section 67-5242 is titled "Procedure at Hearing," and it requires the presiding officer to "afford all parties the opportunity to respond and present evidence and argument on all issues involved, except as restricted by a limited grant of intervention or by a prehearing order." Idaho Code § 67-5242(3)(b). Since the APA requires that final agency orders be based on the agency record, which is defined to include evidence submitted at a hearing, the hearing must necessarily be held before a final order is issued.

The APA prescribes one exception. Under Idaho Code § 67-5247, "An agency may act through an emergency proceeding in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action." (Underline added.) In such circumstances, "The agency shall issue an order, including a brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action,"

and "the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger." *Id*.

In this case, the Director did not issue an order explaining that he was acting under emergency proceedings pursuant to Idaho Code § 67-5247. Therefore, the APA required the Director to hold a hearing first, and base findings of fact in the Fifth Methodology Order on evidence presented at the hearing. He did not do that. He developed the Fifth Methodology Order behind closed doors, with no hearing, in violation of the APA.

Although the Director did not claim in 2023 that an emergency required immediate action, IDWR now argues for the first time that there was an emergency, stating that the Fifth Methodology Order was issued without a prior hearing "[i]n recognition of the Director's obligation to timely administer water, the deficiencies of the Fourth Methodology Order, and the concern that the Fourth Methodology Order was no longer legally supportable." (IDWR's Resp., 7.) This argument is belied by the facts of the case and the Director's actual conduct.

First, the Director could have timely administered water under the Fourth Methodology Order, as he had every year from 2016 through 2022.

Second, the Director did not claim that the Fourth Methodology Order was no longer legally supportable, and that immediate action was required to make it legally supportable. When he advised the parties in August of 2022 that he intended to revisit the Fourth Methodology Order, he did not say that he had found it to be legally unsupportable, nor had any party to the case asserted that it was legally unsupportable. The Director stated only he was updating the Fourth Methodology Order as part of his ongoing duty to use the best available science.

If the Director believed the Fourth Methodology Order was legally unsupportable, and that "immediate agency action" was needed to address an "immediate danger to the public health, safety, or welfare," he had a duty to issue an order under Idaho Code § 67-5247(2) containing a "reasoned statement to justify both the decision that an immediate danger exists." He did not do that.

This Court should reject IDWR's attempt to cover the Director's violation of the APA by claiming after-the-fact that an emergency required immediate action, and instead send the message that the Director is bound by the statutory obligations imposed by the APA.

1.3 Idaho Code § 42-1701A does not trump due process.

IDWR argues that "IGWA fundamentally misinterprets the APA and ignores Idaho Code § 42-1701A." (IDWR's Resp., 12.) According to IDWR, Idaho Code § 42-1701A trumps the APA because it "specifically governs hearings before the Director." (IDWR's Resp., 14.) IDWR takes the position that § 42-1701A and the APA are in conflict with each other, and "it is § 42-1701A that controls." *Id*. In effect, IDWR argues that § 42-1701A gives the Director *carte blanche* authority to issue orders in contested cases without first holding a hearing, even if there is no emergency and a hearing could easily be held beforehand. *Id*. at 12-14.

IDWR's argument should be rejected because Idaho Code § 42-1701A cannot be applied in a manner that violates the constitution. *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 241 (2009). Since due process requires that the Director hold a hearing before changing the methodology, Idaho Code § 42-1701A must be applied accordingly.

1.4 Idaho Code § 42-1701A can and should be interpreted and applied harmoniously with the APA to give effect to both.

IDWR's argument that Idaho Code § 42-1701A supersedes the APA should also be rejected. While Idaho Code § 42-1701A is indeed specific to IDWR, and while the APA may be abrogated by "other provisions of law" (Idaho Code § 67-5240), the plain language of the § 42-1701A does not exempt IDWR from complying with the APA. To the contrary, § 42-1701A expressly requires the Director to comply with the APA, stating: "All hearings required by law to be held before the Director of the department of water resources shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the Director." Idaho Code § 42-1701A(1). Had the legislature intended to exempt IDWR from the APA, it could have clearly stated so in Idaho Code § 42-1701A. It did the opposite by affirmatively requiring IDWR to comply with the APA.

IDWR argues that Idaho Code § 42-1701A(3) reflects the legislature's intention to exempt the Director from the APA, but subsection (3) contains no such language. In fact, subsection (3) does not define a hearing process at all. It simply requires the Director to provide an after-the-fact hearing <u>if</u> "the right to a hearing before the Director or the water resource board is otherwise provided by statute." Idaho Code § 42-1701A(3).

In addition, Idaho Code § 42-1701A should not be read as exempting IDWR from the APA because it is capable of being applied harmoniously with the APA: "the primary rule of

statutory construction [is] that statutes are to be interpreted, if possible, so as to give meaning to both and not to have one nullify the other." *State v. Burchard*, 123 Idaho 382, 385 (Ct. App. 1993) (quoting *Maxwell v. Cumberland Life Ins. Co*., 113 Idaho 808, 814, (1987)). Both Idaho Code § 42-1701A and the APA can be given effect by interpreting § 42-1701A to require an after-the-fact hearing only when a pre-hearing decision is not otherwise required by law.

Therefore, this court should conclude that Idaho Code § 42-1701A does not trump the APA, and the Director had a duty to comply with the APA in this case by providing a hearing before changing the methodology order.

1.5 IDWR's assertion that the Director is *required* to issue a decision before holding a hearing is incredulous.

IDWR remarkably argues that requiring government agencies to hold a hearing before issuing a decision in a contested case "would result in an absurd outcome and would actually impair the review process," because "the parties would not have had an 'action' to contest." (IDWR's Resp., 15-16.) According to IDWR, "[i]f the Director were to hold the hearing before taking action, such a hearing would be based on speculation and would waste the parties' and the State's time and resources." *Id*. at 16. IDWR's position is that state agencies should *never* have to hold a hearing before issuing a decision in a contested case.

If holding a pre-decision hearing—with a normal discovery process, a full evidentiary record, and thorough examination of all relevant evidence—would lead to a decision "based on speculation" that is a "waste of the parties' and the State's time and resources," is it any wonder that water users are disillusioned and disgruntled by the Director making a titanic decision *without* a normal discover process, *without* a full evidentiary record, and *without* a thorough examination of all relevance evidence?

The purpose of due process and the APA is to increase the likelihood that state agencies will make the correct decision, by requiring that they consider all relevant evidence before the decision is made. Therefore, this court should reject IDWR's argument that the Director is required to issue a decision before holding a hearing.

1.6 The after-the-fact hearing did not cure the Director's violations of due process and the APA.

IDWR argues that the Director satisfied due process and the APA by holding a few technical working group meetings in the Fall of 2022, and then giving an after-the-fact hearing.

(IDWR's Resp., 5-6.) It is IDWR's position that when the Idaho Supreme Court ruled in *Clear Springs Foods* that the Director violated due process and abused his discretion by issuing the curtailment orders without holding a prior hearing, the court tacitly approved the Director's conduct because the court "did not invalidate the post-hearing curtailment orders." (IDWR's Resp., 19.) The SWC makes the same argument. (SWC's Resp., 11-12.) The SWC also argues that the Idaho Supreme Court's recent decision in *South Valley Ground Water District vs. Idaho Dept. of Water Resources*, __ Idaho __, 2024 WL 136840 (2024), excuses the Director from ever having to hold a hearing before issuing a decision in a contested case. (SWC's Resp., 14-15.) It is the position of IDWR and the SWC that after-the-fact hearings always satisfy due process.

There is nothing in the *Clear Springs* decision that purports to excuse the Director from complying with due process and the APA. While the court let the curtailment orders stand, it stated unequivocally that the Director abused his discretion, sending a clear message that in the future, under similar circumstances, due process requires a hearing in advance. The Director apparently did not get the message.

The *South Valley* case is easily distinguishable. In that case, there was no methodology order in place, and the Director deemed it necessary to take immediate action to timely administer water rights. No such emergency existed in this case, as the Director had the ability to timely administer water rights under the Fourth Methodology Order, as he had from 2016-2022. Moreover, the *South Valley* decision limits its holding to the facts of that case, stating explicitly that it does not apply to conjunctive management of the ESPA. *Id*. at 24.

The process employed by the Director may have made sense to him, but it does not satisfy the requirements of due process or the APA, as discussed above. Therefore, this court should restore trust in IDWR and the rule of law by concluding that the after-the-fact hearing did not cure the Director's violations of due process and the APA, set aside the Fifth & Sixth Methodology Orders, and instruct the Director to administer water under the Fourth Methodology Order until a hearing is held that complies with due process.

1.7 The Director's violations of due process and the APA prejudiced the substantial rights of junior-priority water users.

IDWR argues that the Director's violation of due process and the APA should be pardoned on the basis that junior priority water users were not "unduly prejudiced." (IDWR's Resp., 23-36.) IDWR does not cite law for its "undue prejudice" argument, which is not a term

found in Idaho Code § 67-5279. Presumably IDWR is arguing that these the Director's errors did not violate substantial rights of groundwater users, as required by Idaho Code § 67-5279.

As noted on page 44 of IGWA's Opening Brief, the Director's errors violate substantial rights because they deprived junior water users of the use of real property. The Director's changes to the methodology order were by no means trivial. He made major changes to the Baseline Year and how the ESPA Model is deployed. In the spring of 2023, junior water users perceived essentially no risk of curtailment due to an exceptional snowpack, yet the new methodology generated a massive curtailment of approximately 75% of all groundwater rights from the ESPA. Junior water users were put to severe personal stress and millions of dollars of expense to avoid curtailment.

In addition, the after-the-fact hearing process was severely prejudicial to junior water users. Among other things, the Director denied the discovery of relevance information, provided inadequate time to develop key evidence, and blocked junior water users from presenting relevant evidence, as explained on pages 22-27 of IGWA's Opening Brief. These problems could have been avoided with a normal hearing schedule that afforded adequate discovery and a presentation of all relevant evidence *before* the Director changed the methodology.

Therefore, IGWA respectfully requests that the court reject IDWR's argument that the procedural and substantive errors of the Director should be pardoned on the basis that they did not "unduly prejudice" junior water users.

2. The Director violated the APA by failing to base the findings of fact in the Fifth Methodology Order exclusively on the evidence in the record of the contested case.

IGWA has argued that the Director violated the APA by developing the Fifth Methodology Order using information that is not part of the agency record, without taking official notice of all information he considered and relied upon. (IGWA's Open. Br., 23.) IDWR does not respond to this argument. Therefore, the Fifth Methodology Order should be set aside because it was not "based exclusively on evidence in the record of the contested case and on matters officially noticed in that proceeding," as required by Idaho Code § 67-5248(2).

3. The Director acted upon unlawful procedure or abused discretion by taking official notice of facts *after* the Fifth Methodology Order was issued.

IGWA has argued that the Director violated IDWR rules of procedure by taking official notice of information *after* the Fifth Methodology Order was issued. (IGWA's Open. Br., 23-24.)

IDWR argues that when the Director issues an order without first holding a hearing, he is not required to take official notice of information relied upon. (IDWR's Resp., 33.) IDWR does not cite any statute or rule to support its position, and its position is contrary to the plain language of Idaho Code § 67-5248 which provides that findings of fact "must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." Section 67-5248 does not create an exception for orders issued without a prior hearing.

4. The Director violated Idaho Code § 67-5252 by denying the cities' motion for an independent hearing officer.

IGWA has argued that the Director violated Idaho Code § 67-5252 by denying the motion for an independent hearing officer. (IGWA's Open. Br., 24). IDWR argues that the cities' motion for an independent hearing officer was made under Idaho Code § 42-1701A(2) and not Idaho Code § 67-5252. IGWA accepts IDWR's defense and hereby withdraws its claim that the Director violated Idaho Code § 67-5252.

5. The Director violated due process or abused discretion by blocking junior water users from discovering and examining witnesses about relevant information the Director considered in developing the Fifth Methodology Order.

IGWA has argued that the Director violated due process and the APA by blocking the parties from discovering and presenting relevant evidence. (IGWA's Open. Br., 24-27.) In defense, IDWR argues that "[b]oth what information is relevant and the scope of discovery are within the Director's discretion." (IDWR's Resp., 33.) IDWR also contends the Director is free to block discovery of relevant evidence related to "the Director's views regarding the legal and policy considerations," and that the Director was free to block discovery of relevant information on the basis that "the methodology order clearly explained the Director's views regarding the legal and policy considerations on issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling." *Id*. at 31-32. These arguments should be rejected.

As set forth below, whether evidence is relevant is an objective question, and the Director does not have discretion to exclude relevant evidence unless it is unduly repetitious or excludable on constitutional or statutory grounds, or on the basis of an evidentiary privilege. Therefore, the Director violated Idaho law by excluding evidence on the basis that it pertains to "legal and policy considerations." The Director also does not have authority to block discovery of relevant

information on the basis that the topic is addressed in the Fifth Methodology Order. Finally, the Director violated due process by barring junior groundwater users from making offers of proof.

5.1 Whether evidence is relevant is an objective question.

Evidence is relevant if "(a) it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." I.R.E. 401. This is an objective standard, not a discretionary standard. IDWR's mistaken view that the Director has discretion to decide what qualifies as relevant evidence should be corrected.

5.2 The Director does not have discretion to exclude relevant evidence.

As explained in pages 24-25 of IGWA's Opening Brief, the APA defines what types of evidence may be excluded. As the starting point, 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) (emphasis added). Evidence may be excluded only if it is "irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state." Idaho Code § 67-5251(1). These are objective standards, not discretionary standards. Therefore, IDWR's mistaken view that the Director has discretion to exclude relevant evidence, in the absence of finding such evidence unduly repetitions or excludable on constitutional or statutory grounds, should be corrected.

5.3 Idaho law does not allow the Director to exclude relevant evidence on the basis that it pertains to "legal or policy considerations."

The APA does not authorize agency hearing officers to exclude evidence on the basis that it pertains to "legal or policy considerations." *Id*. And, Idaho courts have already rejected the argument that state agencies enjoy a deliberative process privilege. Decision and Ord., *The Idaho Press Club, Inc. v. Ada Cnty*., CV01-19-16277 (Dec. 13, 2019).[2] Therefore, IDWR's mistaken argument that the Director is free to exclude relevant evidence because it pertains to legal and policy matters should be corrected.

[2] Attached hereto as Appendix B.

5.4 The Fifth Methodology Order does not provide an adequate explanation of the reasoning behind the change from a steady-state to transient-state.

IDWR asserts that the Director blocked discovery of relevant information because "the methodology order clearly explained the Director's views regarding the legal and policy considerations on issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling." (IDWR's Resp., 31.). This argument should be rejected for two reasons.

First, if the Director had nothing to hide, there was no reason to block discovery of relevant evidence.

Second, the Fifth Methodology Order provides only a scant explanation of the reasoning behind the Director's change from steady-state to transient-state modeling. It describes the difference between the two types of modeling (Fifth Methodology Order, p. 30-32), but the only explanation given for the change is that "[t]he Department now has multiple years of experience with the methodology to better understand the impact of applying steady-state modelling versus transient-state modelling to determine a curtailment priority date that would supply adequate water to the senior water right holders." *Id*. 35, ¶ 19. This explanation doesn't pass muster because the ESPA Model has been capable of transient-state modelling since at least 2013. (Sukow, Tr. Vol. I, 46:2-48:12.) In addition, IDWR staff did not recommend a change to steady-state modelling in the Recommendation they prepared dated December 23, 2022. (R. 2866.)

Something happened between December 23, 2023, to compel the change to transient-state modeling, but the record is devoid of explanation because the Director blocked the parties from discovering why. This not only prejudiced affected water users, it prevents the judiciary from properly reviewing the Director's decision.

5.5 The Director violated due process by barring junior groundwater users from making offers of proof.

Junior groundwater users believe the Director's change to transient-state modeling was motivated by bias, animus, and interests of IDWR that go beyond the technical aspects of the Fifth Methodology Order, but when legal counsel attempted to introduce evidence that effect the Director shut it down. (*See* IGWA's Open. Br., 26; Tr. Vol. IV, 1029:9-1033:5.)

Due process "entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). "This requirement applies not only to courts, but also to state

administrative agencies." *Stivers v. Pierce*, 71 F.3d 732 (9th Cir.1995). Under Idaho the law, "actual bias of a decision-maker is constitutionally unacceptable." *Bowler vs. Board of Trustees*, 101 Idaho 537, 543 (1980). The Director's refusal to allow junior water users to submit evidence and offer proof on matters he found offensive violated due process.

6. The Director acted upon unlawful procedure, violated due process and the APA, and abused discretion by failing to give junior water users adequate time to conduct a field examination of the number of acres actually irrigated and the use of supplemental groundwater by SWC members, and then ruling against them because they did not provide proof thereof at the hearing.

IGWA has argued that that the Director violated due process and the APA and abused his discretion by failing to give junior water users adequate time to conduct a field examination of the number of acres actually irrigated and the use of supplemental groundwater by SWC members, and then ruling against them because they did not provide proof thereof at the hearing. (IGWA's Open. Br., 27-28.) IDWR's only defense is that "[a]ny prejudice IGWA suffered by the compressed hearing schedule was outweighed by the Director's duty to timely administer water rights in priority." (IDWR's Resp., 24.) This defense should be rejected for three reasons.

First, evaluation of the number of acres actually irrigated by the SWC, and especially Twin Falls Canal Company ("TFCC"), is critical because it is a major driver of the Reasonable In-Season Demand component of the methodology. The CM Rules require the Director to consider "the amount of water being diverted and used compared to the water rights," CM Rule 42.01.e, and the Idaho Supreme Court has affirmed the "duty and authority" of the Director to "consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *AFRD2*, 143 Idaho at 876.

As explained in section 7.2 of this brief, every analysis of irrigated acres within TFCC shows approximately 14,000 fewer acres than TFCC reports as being irrigated. However, the Director refused to use any of those calculations, electing instead to take TFCC at its word that it is irrigating 14,000 acres more than every analysis shows.

The Director determined that all prior analyses of TFCC's irrigated acreage does not satisfy the "clear and convincing evidence" standard, and that only a field examination can satisfy that standard. IGWA contends that determination was in error, as discussed in section 7.2 of this brief. However, if it is upheld, then the Director had a duty to either have IDWR staff

conduct a field examination of TFCC's irrigated acreage or give junior water users adequate time to do so.

IDWR argues that "IGWA was not precluded from undertaking a field-level examination of irrigated acres and supplemental ground water use and may do so at any time," but this is not true. (IDWR's Resp., 29.) It is impossible for junior groundwater users to perform these analyses without cooperation from TFCC because only TFCC knows which lands it delivers water to. Since TFCC will not cooperate voluntarily, the only way junior water users can perform these analyses is through discovery, which requires an order from the Director authorizing discovery. Yet, the Director will not allow junior water users to discover such information unless there is an "active case." After the Director rejected its own digital datasets as satisfactory evidence of irrigated acreage, the Coalition of Cities filed a *Request for Hearing and Order Authorizing Discovery* to allow them to perform a field examination. The Director denied the request because "[t]he parties have previously been afforded an opportunity for hearing on the issues."[3]

The Director has created a catch-22 by refusing to authorize discovery in the absence of an "active case," while imposing a rushed hearing process within an active case that does not afford adequate time to perform such analyses.

The Director does not have a good excuse for not either instructing IDWR staff to conduct a field examination or giving junior users adequate time to do so. As discussed above, the Director could have easily administered water rights under the Fourth Methodology Order in 2023, as he had from 2016-2022, while having IDWR staff conduct a field examination or giving junior water users an opportunity to do so through discovery.

The Director's failure to do either has resulted in the methodology order assuming TFCC is irrigating some 14,000 more acres than are actually irrigated, and IDWR curtailing junior water rights to deliver water to TFCC that it does not need to raise crops.

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[3] IGWA request that the Court take judicial notice of the *Order Denying Request for Hearing and Motion Authorizing Discovery* issued on August 23, 2023, in IDWR Docket No. CM-DC-2010-001 (attached as App. C). chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20230823-Order-Denying-Request-for-Hearing-and-Motion-to-Authorize-Discovery.pdf (last visited February 28, 2024).

Substantive Errors

IGWA has argued that the Director committed several substantive errors in developing and applying the Fifth Methodology Order, all of which relate to the bedrock principle of beneficial use. (IGWA's Open. Br., 29.) The "Substantive Errors" section of IGWA's brief begins with a recitation of Idaho law concerning the beneficial use component of the prior appropriation doctrine. IDWR and the SWC argue that IGWA has misrepresented the prior appropriation doctrine and ignored the presumptions and evidentiary standards that apply to a delivery call. (IDWR's Resp., 37-46; SWC's Resp., 23-24.) IGWA will first reply to this argument before addressing the discrete errors cited in the "Substantive Errors" section of IGWA's Opening Brief.

IGWA's Opening Brief explains that the bedrock principle of beneficial use represents "[t]he policy of the law of this State to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502 (1960). This is sometimes referred to as the "maximum use doctrine," as described in *The Maximum Use Doctrine and It's Relevance to Water Rights Administration in the Lower Boise River Basin*. 47 Idaho L. Rev. 67, 68 (2010). For the sake of brevity, the term "maximum use doctrine" is used in this brief.

The SWC attempts to cast the maximum use doctrine as somehow incompatible with conjunctive management, accusing IGWA of attempting to "trump[] conjunctive administration" (SWC's Resp., 36) or "limit conjunctive administration in some manner" (SWC's Resp., 23). Not so. IGWA understands and accepts that conjunctive management is the law, and that junior priority water users bear risks derived from their junior priority dates. IGWA simply asks that fidelity be given to both the doctrine that "first in time is first in right" and the maximum use doctrine, as set forth on pages 29-30 of IGWA's Opening Brief.

IDWR and the SWC wrongly frame the priority doctrine and the maximum use doctrine as binary choices that cannot be mutually applied. (IDWR's Resp., SWC's Resp., 36.) While there is certainly tension between them, and while extreme circumstances the maximum use doctrine may compel denial of a senior's delivery call (as occurred in *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912)), most of the time the doctrines can be applied harmoniously to both protect the senior's water needs and maximize beneficial use of Idaho's water resources, as explained on pages 29-30 of IGWA's Opening Brief.

The primary reason the CM Rules were created is to provide a framework for applying *both* bedrock principles of prior appropriation doctrine. What makes conjunctive management so vexing, particularly with the ESPA, is the massive amount of groundwater use that must be curtailed to provide a comparatively small benefit to senior surface water users. To illustrate, the Director's application of the Fifth Methodology Order in April of 2023 ordered curtailment of all groundwater rights junior to December 30, 1953—representing approximately 1.7 million acre-feet of beneficial use—in an attempt to provide an additional 75,200 acre-feet to Twin Falls Canal Company ("TFCC"). (Anders, Tr. Vol. II, 452:20-24 ("the curtailment run that [Sukow] made to determine the 1953 curtailment date, she was curtailing, roughly, 700,000 acres of groundwater use and 1.7 million acre-feet of consumptive use.").) The additional 75,200 acre-feet represents about 7% of TFCC's total water supply. (Barlogi, Tr. Vol. II, 308:23-309:2; R. 1206.) (TFCC's manager testified at the hearing that TFCC typically diverts 1.1 million acre-feet). Thus, the Directed ordered complete curtailment of 1.7 million acre-feet of beneficial use in order to incrementally increase TFCC's water supply from 93% to 100%.

Curtailment is not the only means of meeting the irrigation needs of TFCC patrons. Those needs could almost certainly be met by having TFCC make reasonable operational changes or system improvements to deliver water more efficiently. It would have taken only a 7% improvement in operational efficiency to meet TFCC's irrigation demand without curtailing 1.7 million acre-feet of beneficial use. The most critical question this case presents is whether the maximum use doctrine as prescribed in the CM Rules requires the Director to exhaust reasonable alternatives before jumping to curtailment.

If conjunctive management meant nothing more than immediate curtailment of juniors any time the Director calculates a demand shortfall to a senior user, there would be no need for the CM Rules. The Rules were created primarily to create a water rights administration framework that avoids excessive curtailment by (i) preventing seniors from calling for more water than they actually need (this is captured in the Demand Shortfall calculation of the methodology order), (ii) requiring seniors to exhaust reasonable alternatives to curtailment before looking to curtail juniors (this is required by the CM Rules, but is not being implemented by the Director), and (iii) providing a defined process for juniors to develop mitigation plans to avoid curtailment if senior's are injured even after taking reasonable alternatives to curtailment. It is the second component that is not being given meaningful application by the Director, in the

ESPA and elsewhere. *The Maximum Use Doctrine and Its Relevance to Water Rights Administration in Idaho's Lower Boise River Basin*, 47 Idaho L. Rev. 67, 76-77 (2010).

The second component is embodied in the concept of "material injury" and the policy statements prescribed in the CM Rules. The CM Rules do not condone immediate curtailment any time a junior's diversion impacts a senior's water supply. There must be "material injury," defined as "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." CM Rule 10.14. This definition in incorporated into CM Rule 40.03 which states:

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

(Underline added.) CM Rule 20.03 states:

> **Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. 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. 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.

CM Rule 42 requires IDWR to do more than calculate demand shortfall. Once that determination is made, the Director must evaluate whether the senior is "using water efficiently," CM Rule 42.01, "[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices," CM Rule 42.01.g, and "[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells," CM Rule 42.01.h. If the senior's water needs

could be met by using water more efficiently, or by making reasonably system improvements, the injury is not "material" and curtailment is not justified.

The SWC argues that the principle of beneficial use requires nothing more than that seniors apply to beneficial use the water they divert. (SWC's Resp., 36-37.) While that is certainly one application of the doctrine, it is not the only application. Another application is that, when water supplies are scarce, seniors may be required to use water more efficiently in order to accommodate the public interest in maximizing beneficial use of the resource, as prescribed in CM Rules 42.01.g and 42.01.h. As explained on pages 40-41 of IGWA's Opening Brief, courts have applied the doctrine of beneficial use in this manner many times. *Sylte v. Idaho Dep't of Water Res.*, 165 Idaho 238, 245 (2019); *Gilbert v. Smith*, 97 Idaho 735, 739 (1976); *Clear Springs Foods, Inc. v. Spackman*, No. 2008-0000444 (Gooding Cnty. Dist. Ct., Idaho, June 19, 2009); *United States v. State* (In re SRBA Case No. 39576 Basin-Wide Issue No. 9), 131 Idaho 468, 472 (1998); *Baker v. Ora-Ida Foods, Inc*., 95 Idaho 575, 582 (1973); *Poole*, 82 Idaho at 502. As the Idaho Supreme Court stated in *AFRD2*, "[w]hile the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception." 143 Idaho at 880.

The Idaho Supreme Court upheld the Director's duty to apply CM Rules 42.01.g and 42.01.h in *A&B Irrigation*, 153 Idaho 500, where the Director required a senior water user to interconnect its wells in order use its existing water supplies more efficiently before looking to curtail junior users. In so doing, "[t]he Director did not impose a new condition, but rather he used his discretion to analyze A&B's delivery call using his statutory authority in the manner governed by the CM Rules." *Id*. at 516. "Idaho law does not explicitly state that interconnection is a condition of administration," the Court explained, "but the CM Rules allow the Director to consider reasonable diversion in his determinations." *Id*. at 516.

Therefore, this Court should reject the SWC's argument that the doctrine of beneficial use means nothing more than an evaluation of whether seniors are applying to beneficial use the water they divert, however inefficiently, and regardless of whether curtailment would be futile.

Meaningful application of the maximum use doctrine may, admittedly, impose a degree of inconvenience or expense on senior water users, yet within reason. For example, under the Ground Water Act, senior groundwater users may be forced at their own expense to deepen their wells or to interconnect wells to accommodate maximum beneficial use of Idaho's aquifers.

Idaho Code § 42-226; *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500 (2012); *Baker*, 95 Idaho at 584. As noted above, A&B Irrigation District was required to interconnect its well system before it was able to initiate a delivery call. This was despite the fact that A&B historically did not have an interconnected well system. 153 Idaho at 512. Despite this, the Hearing Officer found A&B "must take reasonable steps to divert some water throughout the project before junior members are impacted," which was upheld by the Court. *Id.* at 514, 525. By the same reasoning, senior surface waters user may be required to take reasonable actions to operate their canal systems more efficiently in order to accommodate maximum beneficial use of Idaho's aquifers. To be sure, management of a canal is easiest when there is more than enough water than is needed, whereas running a tight ship requires more effort. While senior users may find curtailment of juniors to be more convenient than operating their canal more efficiently, the public interest in maximizing beneficial use of Idaho's water resources may demand that seniors put forth a reasonable amount of effort to use water efficiently in lieu of curtailing other users, especially within the context of conjunctive management.

IGWA's frustration is not that the Director applied the priority doctrine, it is that he did not even attempt to apply the maximum use doctrine as prescribed by the CM Rules. The Director's analytical process is this:

1. Calculate demand shortfall.
2. If a demand shortfall exists, curtail junior water rights (in the absence of a mitigation plan under CM Rule 43).

A proper application of the CM Rules requires meaningful application of the beneficial use doctrine, as follows:

1. Calculate demand shortfall.
2. If a demand shortfall exists, evaluate whether the senior's water needs could be met without resorting to curtailment by "employing reasonable diversion and conveyance efficiency and conservation practices" (CM Rule 42.01.g) or "using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells" (CM Rule 42.01.h.)
3. To the extent a demand shortfall cannot be alleviated under step 2, evaluate whether curtailment should be limited by the futile call doctrine (CM Rules 10.08 and 20.04) or the rule that "[a]n 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" (CM Rule 20.03).

4. To the extent curtailment is not limited by steps 2 and 3, proceed with curtailment of junior-priority water use (in the absence of a mitigation plan under CM Rule 43).

(*See* IGWA's Opening Br., 37-44.)

The Director did not apply steps 2 and 3 because he mistakenly believes he is excused from doing so by "the presumptions and evidentiary standards that apply to a delivery call." (IDWR's Resp., 37.) This must be corrected. As explained below, the heightened clear and convening standard does not, or at least should not, apply to the Director's application of the maximum use doctrine pursuant to CM Rules 42.01.g or 42.01.h. Moreover, irrespective of what evidentiary standard applies, the Director has an affirmative duty to apply the CM Rules that implement the public interest in maximizing beneficial use of Idaho's water resources.

A. <u>The heightened clear and convincing standard does not apply to the Director's application of the maximum use doctrine pursuant to CM Rules 42.01.g and 42.01.h.</u>

The Idaho Supreme Court has clearly ruled that the clear and convincing standard of evidence applies to challenges to the decreed elements of the senior's water rights. As to the Director's duty to preserve the public interest in maximizing beneficial use in Idaho's water resources pursuant to CM Rules 42.01.g and 42.01.g, the preponderance of the evidence standard applies.

Early in the Snake River Basin Adjudication ("SRBA"), several conservation groups argued that the SRBA court should address the public trust doctrine, of which the maximum use doctrine is one component. *Idaho Cons. League, Inc. v. State*, 128 Idaho 155 (1995). They argued that "the public trust doctrine requires that the district court consider the public trust as an element of each water right subject to the adjudication." *Id*. at 156. Their appellate brief contained the following argument to the Idaho Supreme Court:

> It is fundamental to Idaho water law that no person has a right to own water, because water is owned by the State of Idaho as a public resource. See Idaho Const., Art. XV, § 1 ("The use of all waters . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law"); I.C. § 42-101 ("All the waters of the state when flowing in their natural channels ... are declared to be the property of the state"); I.C. § 42-226 ("all ground waters in this state are declared to be the property of the state");

> *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977) ("well-settled that the water itself is the property of the state, which has a duty to supervise the allotment of those waters with minimal waste"); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 p. 1073, 1076 (1915) ("The state is the sovereign owner of the right to appropriate and use all of the stream waters which are within the jurisdiction of the state. The state, by enactment of appropriate laws, permits private persons to use its right to appropriate and use the flow of stream water").
>
> It is equally fundamental that the State of Idaho may impose conditions, limitations or restrictions upon the exercise of water rights, in service of the public interest. *See* Idaho Const., Art. XV, §§ 1, 3, 5 (providing that state has powers to impose limitations and conditions): *Walker v. Big Lost Irrig, Dist.*, 124 Idaho 78, 856 P.2d 868, 870 (1993) ("The Idaho Constitution, art 15 § 1, gives the legislature broad authority to regulate and restrict the use of public waters in this state"). Among these are the familiar concepts of reasonable use and maximum utilization, which limit the exercise of any claimed water right. *E.g., Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627 (1973) (holding that Ground Water Act "is consistent with the constitutionally enunciated policy of optimum development of water resources in the public interest." and observing "when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare or all our citizens"); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) ("policy of the law of this State is to secure the maximum use and benefit, and the least wasteful use. of its water resources"); *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 258 P. 532 (1927) ("any property rights [in water] must be considered and construed with reference to the reasonableness of the use").
>
> Exercise of the state's power to limit, condition, or even deny the use of water, in service of the public good, has been repeatedly upheld: and in part reflects changing views about what constitutes appropriate water use. *See Schodde v. Twin Falls Land & Water Co*., 224 U.S. 107 (1912) (rejecting claim that senior, but inefficient, diverter could command entire flow of Snake River): *Nettleton, supra*, 558 P.2d at 1050-51 (affirming shut off of allegedly senior "constitutional" rights in favor of decreed and licensed rights, partly based on practical concerns over administration of the water system); *State Dept. of Parks v. Idaho Dept. of Water Resources*, 96 Idaho 440, 530 P.2d 924 (1974) (confirming instream flows as beneficial use). *and see id*. at 931 (Bakes, J., concurring) (definition of beneficial uses may change "because conditions might so change that these uses would be an unjustifiable use of water needed for other purposes. The notion of beneficiality of use must include a requirement of reasonableness").

(Appellant's Opening Brief, *In re SRBA - CASE NO. 39576, Idaho Conservation League, Inc., Idaho Rivers United, Inc., Idaho Wildlife Federation, Inc., and Northwest Resource Information Center, Inc., Petitioners/Appellants/Cross-Respondents, v. The State of Idaho, Rim View Trout*

Company, Nampa & Meridian Irrigation District, Grindstone Butte Mutual Canal Company, Hagerman Water Rights Users, Clear Springs Trout Company, and A&B Irrigation District,, 1994 WL 16179492, (Apr. 8, 1994) at 23–26.)[4]

The SRBA Court had declined to address the public trust in Idaho's water resources because it is not a defined element of individual water rights. The Idaho Supreme Court affirmed that decision, holding that "the public trust doctrine is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants." *Idaho Cons. League*, 128 Idaho at 157. However, the Court also held that (i) "[t]he proprietary rights to use water, which are the subject of the SRBA, are held subject to the public trust," (ii) "the public trust doctrine takes precedent even over vested water rights," and (iii) "water rights adjudicated in the SRBA, as with all water rights, are impressed with the public trust." *Id*. at 156.

In keeping with the aforementioned decision, the Idaho Supreme Court upheld the legality of CM Rules in *AFRD2*, 143 Idaho at 876-77, recognizing that "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." The Court specifically noted that "reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication." *Id*. In support of that ruling, the court cited *Schodde v. Twin Falls Land & Water Co*., which involved the denial of a senior's delivery call due to its unreasonable impairment of the public interest in maximizing beneficial use of Idaho's water resources.

A few years after the *AFRD2* decision, the Idaho Supreme Court addressed the evidentiary standards that apply to the CM Rules in *A&B Irrigation District vs. Idaho Department of Water Resources*, 153 Idaho 500 (2012) ("*A&B*"). The Court addressed two different applications of the CM Rules in that case: (i) the Director's determination that A&B's current irrigation requirement is 0.75 miner's inches per acre even though it's water rights are decreed for 0.88 miner's inches per acre (CM Rule 42.01.e: "The amount of water being diverted and used compared to the water rights"); and (ii) the Director's decision to require A&B to

[4] Attached hereto as Appendix D.

interconnect its well system—*i.e.* to improve its diversion and conveyance system to use water more efficiently—before looking to curtail junior rights (CM Rules 42.01.g and 42.01.h). As explained below, the Court applied the clear and convincing evidence standard to the first determination but not the second.

As to the first determination, the district court held that the burden of proof rests upon the junior, and the clear and convincing standard of evidence applies, to a junior's defense that "the diversions of the junior do not physically interfere with the right of the senior (i.e futile call) or that the senior is not injured because the senior is putting less than the decreed quantity of water to beneficial use or wasting water." (Mem. Decision and Order on Pet. for Jud. Rev., *A&B Irr. Dist. v. IDWR*, Minidoka Case No. 2009-647 (May 4, 2010), p. 34.) The court's rationale for the clear and convincing standard and the burden of proof being placed on the junior is that diversion rate is a decreed element of the senior's water right, and "[a] determination that a portion of a decreed water right is being wasted (or is not being put to beneficial use) is a diminishment of a property right." *Id*. Since the Director's decision did not cite the clear and convincing standard, the district court remanded the case "for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record." *Id*. at 49.

On appeal, the Idaho Supreme Court upheld the district court decision, using the same reasoning that a junior's defense that curtailment is futile or that the senior is not putting to beneficial use its full diversion rate diminishes the decreed elements of the senior's water rights. *A&B*, 153 Idaho at 516-524. The court concluded that "proof of 'no injury' by a junior appropriator in a water delivery call must be by clear and convincing evidence," but that conclusion is in reference to the ruling that "all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence." *Id*.

By contrast, the district court did not apply the clear and convincing evidence standard to the Director's decision to require A&B to improve its diversion and conveyance system pursuant to CM Rules 42.01.g and 42.01.h. (Mem. Dec. and Order on Pet. for Jud. Rev., *A&B Irr. Dist. v. IDWR*, Minidoka Case No. 2009-647 (May 4, 2010), p. 38-41.) A&B argued to the district court that "the Director erred by requiring that A&B take reasonable steps to interconnect individual wells or systems within the Unit prior to seeking regulation of junior pumpers," but the court disagreed, holding:

> the extent to which the Director may require A & B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

Id. at 39 (underline added). Even though the Director's decision did not cite the clear and convincing standard of proof, the district court did not remand the case to apply that standard, ruling instead that "[t]he decision of the Director to require A&B to take reasonable steps to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability is **affirmed**." *Id*. at 50 (emphasis in original.)

On appeal, the Idaho Supreme Court upheld the district court decision, holding that "the Director properly applied the CM Rules by finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed." *A&B*, 153 Idaho at 512. A&B argued to the Supreme Court that requiring it to improve its water distribution system was an unconstitutional application of the CM Rules because it undermined its SRBA decree. *Id.* at 515. The Cout disagreed, citing CM Rule 42.01.g and stating: "The Director did not impose a new condition, but rather he used his discretion to analyze A&B's delivery call using his statutory authority in the manner governed by the CM Rules." *Id*. at 515-16. The Court recognized that requiring A&B improve its water distribution system did not diminish the decreed elements of its water rights, and was a discretionary decision of the Director, concluding: "Given the language in the CM Rules, we find that the Director did not act arbitrarily or violate Idaho law when he found that A&B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed." *Id*. at 516.

The key difference between the first determination and the second is that the first determination diminishes decreed elements of the water right whereas the second addressed the public interest in maximizing beneficial use of Idaho's water resources, which is not a decreed element of a water right, as held in *Idaho Conservation League* and *AFRD2*.

Thus, under the *Idaho Conservation League*, *AFRD2* and *A&B* decisions, junior users bear the burden of proving by clear and convincing evidence that a senior user is not using their full decreed diversion rate, or that the junior's diversion does not physically interfere with senior's water supply. By contrast, the Director has a duty to use his best judgment to protect the public interest in the water resource. As stated in *AFRD2*, "[s]omewhere between the absolute

right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." 143 Idaho at 880.

B. The Director has an affirmative duty to apply the CM Rules that embody the maximum use doctrine.

IGWA's frustration is not just that the Director mistakenly imposed a heightened evidentiary standard to CM Rules 42.01.g and 42.01.h, it is that he did not apply them at all.

As noted above, after the Director calculates a demand shortfall, he has a duty, before jumping to curtailment, to evaluate (1) whether the senior's water needs could be met without curtailment by "employing reasonable diversion and conveyance efficiency and conservation practices" (CM Rule 42.01.g) or "using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells" (CM Rule 42.01.h.); and (2) whether curtailment should be limited by the futile call doctrine (CM Rule 10.08 and 20.04) or the that "[a]n 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" (CM Rule 20.03).

The Director has an affirmative duty to apply both the priority doctrine and the maximum use doctrine. As stated above, the "bedrock principles" of "first in time is first in right" and "maximum beneficial use" jointly define Idaho's prior appropriation doctrine, and one is not inferior to the other. Even if junior water users do not intervene and participate in a delivery call case, the Director must apply the CM Rules that incorporate the public interest in maximizing beneficial use of Idaho's water resources. Dereliction of this duty is contrary to the prior appropriation doctrine and the CM Rules.

7. The Director violated Idaho law and abused his discretion by failing to use the best science available to calculate SWC water needs in accordance with CM Rule 42.01.e.

IGWA has argued that the Director erred by failure to (a) improve the Forecast Supply calculation to account for all sources of water available to the SWC; (b) evaluate actual irrigated acreage of TFCC; and (c) evaluate supplemental groundwater use. IDWR's and the SWC's defenses are unavailing.

7.1 The Director erred by refusing to improve the Forecast Supply calculation to account for all sources of water available to the SWC.

IDWR argues that the testimony by Department staff member Matt Anders does not support IGWA's allegation that (i) the Forecast Supply does not account for tributary inflow to the Snake River below Heise (upstream of Idaho Falls on the South Fork of the Snake River), (ii) the Portneuf River, Blackfoot River, and Willow Creek basins, all of which are tributary to the Snake River below Heise, experienced record snowpack in 2023, with significant flooding in the Portneuf River basin, which was unaccounted for in the Forecast Supply calculation, and (iii) the excess inflow from these basins created a windfall to the SWC. (IGWA's Open. Br., 32-33.)

IDWR argues that "Mr. Anders' testimony and the record to not support IGWA's allegations," though IDWR offers no evidentiary citations to support this. (IDWR's Resp., 39.) IGWA's argument is supported by the testimony from Mr. Anders found on pages 162-165 of the hearing transcript, excerpts of which are attached hereto as Appendix D. Mr. Anders' testimony on this subject was unrebutted and is undisputed.

The SWC argues that the Director's failure to consider inflows from tributary basins "does not constitute a basis for changing the methodology [because] any temporary benefits from these 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 conditions.'" (SWC Resp., 28-29.) The problem with that argument is that the Director orders curtailment under Step 3, and the Director's failure to account for all sources of water results in larger curtailments than if the Director did account for all sources of water, at least in years when tributary inflow to the Snake River is above average.

The Director's refusal to account for all sources of water when calculating the water supply for the SWC is an abuse of discretion because there is no good reason not to. Therefore, IGWA respectfully asks the Court to set aside the Fifth & Sixth Methodology Orders and remand this case with an instruction to the Director to account for <u>all</u> sources of water available to the SWC.

7.2 The Director abused his discretion by refusing to use the best science available to determine the actual irrigated acres of TFCC.

IGWA has argued that the Director erred by refusing to use the best available data of the current irrigated acreage within TFCC. (IGWA's Open. Br., 33-36.) IDWR's defense is that the

best available data does not satisfy the "clear and convincing evidence" standard, and "Ground Water Users did not establish an alternative number of acres by clear and convincing evidence." (IDWR's Resp., 42.) The SWC makes a similar argument. (SWC Resp., 30-31.) The defenses made by IDWR and the SWC do not change the fact that the Director has misapplied the "clear and convincing evidence" standard to the facts of this case.

First, it should be noted that IDWR admits that "it is undisputed that TFCC no longer irrigates 196,162 acres" (the maximum number authorized by its SRBA decree). (IDWR Resp., 40.) This is not surprising, considering how much development has occurred in the Twin Falls and Kimberly areas since 1987 (the date by which water rights were defined in the SRBA). The Fifth Methodology Order acknowledges there is a "trend of decreasing irrigated acreage," and that "beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated." (R. 10.)

As a matter of Idaho law, the Director cannot curtail junior water rights to deliver water to land that TFCC or other SWC members are not actually irrigating. CM Rule 42.01.e requires the Director to consider "[t]he amount of water being diverted and used compared to the water rights," and the Idaho Supreme Court upheld the Director's "duty and authority" to "consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *AFRD2*, 143 Idaho at 876 (emphasis added).

In 2008, a manual review of the TFCC project revealed a total of 183,589 irrigated acres. (R. 2376.) The Director used this figure in the methodology order until 2015 when, at the request of TFCC, it was increased to 194,732 acres based on a GIS shapefile created by TFCC's consultant David Shaw using 2013 land use data (the "2013 GIS shapefile).

The 2013 GIS shapefile does not satisfy the "clear and convincing" standard because, as we discovered at the hearing, Mr. Shaw was tasked with analyzing the number of acres that *could* be irrigated, not the number *actually* irrigated. Mr. Shaw "specifically excluded hardened acres and included acres that could have been irrigated in 2013 but were not." (IDWR Resp., 41; underline added.) By evaluating the acres that *could* be irrigated, instead of the acres *actually* irrigated, Mr. Shaw created a shapefile that identifies significantly more acres than are actually irrigated. This causes the methodology order to calculate a water demand for TFCC that exceeds the true demand, which in turn causes larger curtailments than are justified to meet TFCC's true water needs.

Because the 2013 GIS shapefile does not even purport to represent the number of acres actually irrigated within TFCC, it does not satisfy the clear and convincing standard. The Director erred by replacing the acreage identified in the 2008 analysis, which does satisfy the clear and convincing standard, with the acreage figure from Mr. Shaw's 2013 GIS shapefile, which does not.

IDWR attempts to justify the Director's use of the number of acres that *could* be irrigated to calculate water demand, instead of the acreage *actually* irrigated, based on Mr. Shaw's testimony that TFCC "has no way of knowing whether land covered by shares will or will not be irrigated and be prepared to meet the share delivery obligation." *Id*. at 42. This statement is simply not true. Canal companies control the delivery of water to their stockholders, and they have the ability to track the number of acres that are actually irrigated. Moreover, modern technology enables IDWR to independently evaluate the number of acres actually irrigated, as explained in pages 33-34 of IGWA's Opening Brief.

IDWR also argues that "Ground Water Users did not establish an alternative number of acres irrigated by clear and convincing evidence." (IDWR's Resp., 42) This argument does not hold up against the facts in the agency record. There have been multiple analyses of the number of acres that are actually irrigated within TFCC, and they consistently show that TFCC actually irrigates around 180,000 acres per year—roughly 14,000 acres less than the 194,732 acres the Director assumes are being irrigated. In addition to the manual analysis in 2008, which calculated 183,589 irrigated acres (R. 2376), IDWR calculated 179,486 acres in 2011 (R. 2904), 180,956 acres in 2017 (*Id*.), and 179,456 acres in 2021 (R. 2901.) Thus, <u>every</u> analysis of the number of acres *actually* irrigated by TFCC shows approximately 180,000 acres.

While the 2008 analysis of irrigated acreage satisfies the clear and convincing standard, it does not represent the current best available data. The 2017 Irrigated Lands data set is more recent, and IDWR staff testified that it is "highly accurate" and represents the "best dataset." (Anders, Tr. Vol. I, 142:20-24; Sukow, Tr. Vol I., 68:2-69:20.) The 2017 Irrigated Lands data set should be used to define actual irrigated acreage within TFCC because it satisfies the clear and convincing standard, represents the best available science, and is the data set used in the current ESPA model.

IDWR does not dispute that the Irrigated Lands and METRIC data sets are highly accurate and satisfy the clear and convincing standard; rather, IDWR defends the Director's

disregard of those data sets because they are "a snapshot in time" and "[do] not necessarily predict future irrigated acres." (IDWR's Resp. 41.) This argument is contradicted by the fact that IDWR has accepted the 2013 shapefile and representative of actual irrigated acres for the last decade, despite the 2013 shapefile representing a snapshot in time.

Moreover, IDWR's suggestion that juniors be required prove the number of acres that will be irrigated within TFCC in future irrigation seasons could create an impossible standard for juniors to meet. Given the amount of time required for an outside consultant to conduct a manual review of TFCC's irrigated acres, and the fact that this would require cooperation from TFCC and its shareholders, which presumably would occur within the confines of discovery practice, it is impossible for juniors to determine in advance of the irrigation season which acres will be irrigated within TFCC. Only TFCC has the data and the relationships with stockholders to determine in advance of the irrigation season which acres will be irrigated. However, the Director has thus far declined to require that of TFCC, and TFCC has had no incentive to do it on its own (TFCC has benefitted from not tracking irrigated acres).

Until the Director requires TFCC to actually track irrigated acres and report the number of acres actually irrigated each season, the burden rests on junior groundwater users to calculate actual irrigated acres. The only practical analysis is a post-irrigation season audit, and every post-season audit has shown approximately 180,000 irrigated acres within TFCC.

The Director has the "duty and authority" to "consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *AFRD2*, 143 Idaho at 876. The Director cannot sidestep that analysis by imposing upon juniors an evidentiary burden that is impossible to meet. The Director must either (a) require TFCC to report in advance of the irrigation season the number of acres that will actually be irrigated that year (not the acres that *could* be irrigated), with supporting data, or (b) use the most recent post-irrigation season data of actual irrigated acres that satisfies the clear and convincing standard. In this case, that's either the 2017 Irrigated Lands data set or the 2021 METRIC data set.

Therefore, for the reasons set forth above and in pages 33-36 of IGWA's Opening Brief, this court should find that the Director erred by using evidence of the number of acres that *could* be irrigated over evidence of the number of acres that are *actually* irrigated within TFCC, and remand this case with instructions to the Director to calculate TFCC water demand based on the

number of acres *actually* irrigated as defined by the most recent data that satisfies the clear and convincing standard.

7.3 The Director erred by failing to evaluate the availability of supplemental groundwater to meet TFCC's water needs in accordance with CM Rule 42.01.h.

IGWA has argued that the Director erred by failing to evaluate whether the water needs of TFCC can be met with supplemental groundwater. (IGWA's Open. Br., 36-37.) IDWR's response is that the Director has no duty to evaluate supplemental groundwater availability due to the "clear and convincing" evidence standard. (IDWR's Resp., 42.) IDWR's argument mistakenly assumes that this determination is governed by the heightened clear and convincing standard.

As explained above, that standard applies to determinations that challenge the decreed elements of a water right. The analysis of supplemental groundwater does not come into play until *after* the Director has calculated the water needs of SWC entities. Once that is done, CM Rule 42.01.h requires the Director to evaluate "[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority." This determination is grounded in the public interest in maximizing beneficial use of Idaho's water resources, and, as such, is a discretionary matter that must be implemented based on the Director's best judgment.

The Director cannot refuse to apply CM Rule 42.01.h on the basis that a junior user has not forced him to. He has an affirmative duty to make that determination. Since he has failed to do so, the Fifth & Sixth Methodology Orders should be set aside, and the case should be remanded with an instruction to apply CM Rule 42.01.h.

8. The Director violated Idaho law and abused his discretion by failing to evaluate whether SWC water needs could be met with their existing water supplies by making operational changes or system improvements in accordance with CM Rules 40.03, 42.01.g, and 42.01.h.

IGWA has argued that the Director erred by failing to evaluate whether SWC water needs could be met by making reasonable operations changes or system improvements in accordance with CM Rules 43.03, 42.01.g, and 42.01.h. (IGWA's Opening Br., 37-39.) IDWR argues that

the Director did apply CM Rules 42.01.g and 42.01.h, stating that "[t]he Fifth Methodology Order repeatedly considers the reasonableness and the efficiency of the seniors' water use." (IDWR's Resp., 44.) In support of this statement, IDWR cites pages 33-34 of the Agency Record which consists of conclusions of law in the Fifth Methodology Order. *Id*. These pages of the Fifth Methodology Order do several court cases affirming the Director's obligation to consider the public interest in maximizing beneficial use of Idaho's water resources, along with the Director's duty to use his discretion to apply those laws. The problem is the Director does not apply them in practice. Paying lip service to the maximum use doctrine is not enough, he must actually apply it.

The Findings of Fact and the Order sections of the Fifth Methodology Order or the April 2023 As-Applied Order contain no applications of the maximum use doctrine. There is no analysis of whether the senior's water needs could be met without resorting to curtailment by "employing reasonable diversion and conveyance efficiency and conservation practices" (CM Rule 42.01.g) or "using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells" (CM Rule 42.01.h).

The SWC argues that "IGWA erroneously insinuates the Coalition is 'wasting' water and could meet their 'needs' with existing supplies." (SWC Resp., 32.) This is not true. IGWA does not contend that the SWC is wasting water. Water use efficiency is not a binary thing, it is a spectrum. The concept of "waste" is at the low end of spectrum. A water user is not so lackadaisical as to "waste" water may still improve the efficiency with which they divert, deliver, or use water. For example, a canal company that historically operated above the "waste" threshold by using ditch riders who periodically drive the canal bank and manually read diversions can become much more efficient by implementing telemetry, automation, and other modern technologies. IGWA's position is that the public interest in maximizing beneficial use of Idaho's resources imposes a duty upon Director to evaluate reasonable alternatives to meet the non-wasteful water needs of the senior user before jumping to curtailment. This analysis is particularly important here because, according to IDWR analyses, TFCC has become *less* efficient at using water in recent years. (Barlogi, Tr. Vol. II, 343:12-344:17 (project efficiency number for TFCC remained the same between the 2016 Fourth Methodology and 2023 Fifth Methodology, despite Barlogi testifying that TFCC's implemented projects have made them more efficient); Sullivan, Tr. Vol. III, 413:22-414:3.)

As explained above, the Director has violated Idaho law and the CM Rules by jumping immediately to curtailment after calculating a Demand Shortfall. Therefore, the Fifth & Sixth Methodology Orders should be set aside, and the case should be remanded with an instruction to apply all of the CM Rules via the following analytical framework:

1. Calculate demand shortfall.
2. If a demand shortfall exists, evaluate whether the senior's water needs could be met without resorting to curtailment by "employing reasonable diversion and conveyance efficiency and conservation practices" (CM Rule 42.01.g) or "using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells" (CM Rule 42.01.h.)
3. To the extent a demand shortfall cannot be alleviated under step 2, evaluate whether curtailment should be limited by the futile call doctrine (CM Rules 10.08 and 20.04) or the rule that "[a]n 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" (CM Rule 20.03).
4. To the extent curtailment is not limited by steps 2 and 3, proceed with curtailment of junior-priority water use (in the absence of a mitigation plan under CM Rule 43).

9. The Director violated Idaho law and abused his discretion by refusing to apply the futile call doctrine in accordance with CM Rules 10.07 and 20.04.

IGWA has argued that the Director violated Idaho law and abused his discretion by refusing to apply the futile call doctrine. (IGWA's Open. Br., 40-41.) IDWR and the SWC both contend that IGWA did not present evidence to support a finding of futile call. (IDWR's Resp., 45; SWC's Resp., 34.) This is a stunning assertion, as undisputed evidence shows that curtailment of groundwater use within Carey Valley Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District will provide zero additional water to the SWC at the Time of Need. This was demonstrated using the ESPA Model—the same model the Director used to determine which water rights must be curtailed to alleviate the predicted Demand Shortfall of 75,200 acre-feet, as shown in Table 3-1 of the expert report of Sophia Sigstedt:

GWD	IDWR % of IGWA's proportionate share	IDWR Portion of April 2023 predicted demand shortfall		Transient May - Sept Impact[1]	May - Sept Curtailed Volume[2]	Ratio of Curtailed to Benefit	Jr. to 12/1953[3]	District Total	% of Acres Curtailed	Baseline Volume[4]
	%	AF	%	AF	AF	AF	acres	acres	-	AF
American Falls Aberdeen	33.4%	21,214	28.2%	38,328	313,075	8:1	124,112	149,259	83%	283,815
Bingham	20.9%	13,384	17.8%	27,841	206,552	7:1	105,815	148,799	71%	277,011
Bonneville Jefferson	13.4%	8,469	11.3%	1,085	179,607	166:1	92,471	95,531	97%	158,133
Carey Valley	0.0%	5	0.0%	0.00	6,901	-	-	3,669	-	5,671
Henry's Fork	0.2%	90	0.1%	0.00	13,719	-	-	40,192	-	73,901
Jefferson Clark	10.8%	6,939	9.2%	69.9	247,765	3,547:1	111,792	174,039	64%	445,393
Madison	0.0%	4	0.0%	0.00	w/HF	w/HF	-	64,045	-	78,095
Magic Valley	16.1%	10,277	13.7%	23.1	227,879	9,856:1	99,110	137,466	72%	256,188
North Snake	5.1%	3,262	4.3%	0.06	217,151	3,619,180:1	88,320	101,358	87%	208,795
Sub-Total	100.0%	63,645	84.6%	67,347	1,412,649	21:1	621,620	914,358	68%	1,787,002

(R. 2411.)

The column labeled "Transient May-Sept Impact" shows how much water will accrue to the SWC by the Time of Need from curtailment of groundwater rights junior to December 30, 1953. The total reach gain shown in Table 3-1 (67,347 acre-feet) is less than the predicted Demand Shortfall (75,200 acre-feet) because Table 3-1 shows only the impact of curtailment within the ground water districts, which account for 84.6% of the total impact (cities and others are responsible for the remaining 15.4%). As the table shows, curtailment of water rights within Carey Valley Ground Water District, Henry's Fork Ground Water District, and Madison Ground Water District provides zero benefit to the SWC.

The SWC also argues that "IGWA wrongly attempts to superimpose the application of a surface water right administration futile call into this conjunctive administration proceeding." (SWC's Resp., 35.) IGWA's point is that IDWR is holding a double standard by regularly applying the futile call doctrine in surface water administration, yet refusing to apply it to conjunctive management.

The SWC also argues that the futile call doctrine can be disregarded because "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." (SWC's Resp., 35.) This argument does not square with the design of the Fifth Methodology Order, which imposes curtailment to offset predicted shortfalls to irrigation season demand and carryover storage, nor does it square with the Director's new use of transient-state modelling to define curtailment.

Despite the arguments made by IDWR and the SWC, undisputed evidence shows that curtailment within three groundwater districts will supply no additional water to the SWC. Curtailment of those water rights is, by definition, futile.

10. The Director violated Idaho law and abused discretion by refusing to protect the public interest in maximizing beneficial use of Idaho's water resources in accordance with CM Rules 10.07, 20.03, and 42.01.

IGWA has argued that the Director violated Idaho law and abused discretion by refusing to apply the doctrine of maximum use as set forth in CM Rule 20.03, which provides: "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." (IGWA's Open. Br., 41-44.)

In Table 3-1 shown above, the column titled "May-Sept Curtailed Volume" shows the acre-feet of beneficial use that are curtailed under a December 30, 1953, curtailment date. The column titled "Ratio of Curtailed to Benefit" shows the ration between the volume of beneficial use curtailed compared to the volume of benefit to the SWC. The data shown in Table 3-1 is undisputed, and it shows, for example, that the Director's application of the Fifth Methodology Order in the April 2023 As-Applied Order curtails 217,151 acre-feet of beneficial use within North Snake Ground Water District to provide 0.06 acre-feet of benefit to the SWC—a ratio of 3,619,180:1. Within Magic Valley Ground Water District, 227,879 acre-feet of beneficial use is curtailed to provide 23.1 acre-feet of benefit to the SWC—a ratio of 9,856:1.

As noted above, the Idaho Supreme Court has held,

> Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out.

AFRD2, 143 Idaho at 880.

IDWR does not argue that the data shown in Table 3-1 is inaccurate; it simply argues that it was not an abuse of discretion to curtail, with respect to North Snake Ground Water District, for instance, nearly 10,000 acre-feet of beneficial use to get 1 acre-foot of benefit to the SWC. The question squarely before this court is whether this was a reasonable exercise of the Director's discretion.

Ancillary Matters

11. The errors cited above prejudiced substantial rights of junior water users.

IDWR disputes IGWA's argument that the errors cited above violated substantial rights of junior water uses, arguing that the process the Director provided was fair, and that "[i]n times of shortage, someone is not going to receive water." (IDWR's Resp., 47.) The spring of 2023 was not a "time of shortage" by historic measures because the snowpack was far above average, with flooding in some tributary basins. Under prior versions of the methodology order, there would have been no curtailment in 2023, so curtailment was unforeseen and unplanned for.

The Director's violation of due process affected real property rights. It made sweeping changes to the methodology order that resulted in a massive curtailment in the spring of 2023. The Director then implemented the Fifth Methodology Order before holding a hearing, forcing junior groundwater users to expend millions of dollars renting storage water to avoid catastrophic curtailment—storage water the SWC did not actually need.

These facts clearly demonstrate prejudice to substantial rights.

12. The Director is liable for attorney fees under 42 U.S.C. § 1983 for the deprivation of the due process rights, or, alternatively, under Idaho Code § 42-117(1).

IDWR disputes IGWA's request for attorney fees under 42 U.S.C. § 1983 on the basis that IGWA was in fact provided due process. (IDWR's Resp., 48.) IGWA agrees that if there was no due process violation, then an award of fees is not warranted. On the other hand, if there was a due process violation then a fee award is appropriate.

IDWR also argues that IGWA's fee request should be denied due to an alleged "failure to support the citation," citing the recent Idaho Supreme Court decision in *Bracken v. City of Ketchum*, __ Idaho __, 537 P.3d 44, 65 (2023). *Id*. The *Bracken* decision, however, addressed an appellant's failure to provide "any legal analysis or argument." *Bracken*, 537 P.3d at 65. Here, IGWA provided a full page of legal argument and analysis.

Lastly, IDWR disputes IGWA's request for attorney fees under Idaho Code § 42-117(1) on the basis that "the Director's process provided due process consistent with the exigencies of the circumstances and the Director's duty to timely administer water rights in priority." (IDWR's Resp., 48.) Even if there were no due process violation, IDWR's defense does not address the

substantive errors in IGWA's appeal, including the Director's failure to apply the futile call doctrine without a reasonable basis in fact or law. (IGWA's Open. Br., 45.)

CONCLUSION

For the reasons set forth in IGWA's Opening Brief, as further explained above, IGWA respectfully requests that this Court set aside the Fifth & Sixth Methodology Orders and remand this case to the Director with instructions to (1) apply the Fourth Methodology Order until a proper evidentiary hearing is held that complies with due process and the APA, (2) use the best science available to calculate SWC water needs, (3) evaluate whether SWC water needs could be met without curtailment by making operational changes or system improvements, (4) apply the futile call doctrine, and (5) exercise discretion to protect the public interest in achieving maximum beneficial use of the state's water resources in accordance with CM Rules 20.03, 42.01.g, and 42.01.h.

RESPECTFULLY SUBMITTED this 1st day of March, 2024.

THOMAS J. BUDGE
Attorney for Petitioner-IGWA

APPENDIX A

Amended Final Order Regarding Compliance with Approved Mitigation Plan

IDWR Docket No. CM-MP-2016-001

(April 24, 2023)

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. CM-MP-2016-001 **AMENDED FINAL ORDER REGARDING COMPLIANCE WITH APPROVED MITIGATION PLAN**
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	

This order resolves a dispute over the requirements of an approved mitigation plan in the above-captioned matter. This order amends and replaces the *Final Order Regarding Compliance with Approved Mitigation Plan* issued on September 8, 2022. In this order, the Director concludes that the Idaho Ground Water Appropriators, Inc.'s approved mitigation plan unambiguously requires it to reduce its ground water diversions by 240,000 acre-feet ("ac-ft") each year—meaning that averaging is prohibited. The Director also concludes that the Idaho Ground Water Appropriators, Inc.'s mitigation plan unambiguously prohibits it from apportioning A&B Irrigation District or Southwest Irrigation District a percentage of its annual reduction obligation.[1]

BACKGROUND

A. The SWC-IGWA Agreement, Subsequent Amendments, and the Approved Mitigation Plan.

In 2015, the Surface Water Coalition ("SWC")[2] and certain members of the Idaho Ground Water Appropriators, Inc. ("IGWA")[3] entered into the *Settlement Agreement Entered*

[1] The parties also refer to the annual reduction obligation as a "conservation obligation" because the parties have agreed to count certain recharge activities towards IGWA's diversion reduction obligation. In this order, reduction obligation is synonymous with conservation obligation.

[2] The SWC is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

[3] For purposes of this order, references to IGWA include only the following eight ground water districts and one irrigation district, which are the signatories to the Mitigation Plan: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey Valley Ground Water District, Fremont Madison Irrigation District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc. ("SWC-IGWA Agreement").

In October of 2015, the SWC and IGWA entered into an *Addendum to Settlement Agreement* ("First Addendum"). Also, in October of 2015, the A&B Irrigation District ("A&B") and IGWA entered into a separate agreement ("A&B-IGWA Agreement").

On March 9, 2016, the SWC and IGWA submitted the *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order* ("Request for Order") to the Director of the Idaho Department of Water Resources ("Department"). Attached to the Request for Order as Exhibits B, C, and D were the SWC-IGWA Agreement, the First Addendum, and the A&B-IGWA Agreement. These documents were submitted as a stipulated mitigation plan in response to the SWC's delivery call (Docket No. CM-DC-2010-001). *Request for Order* at 3.

In the SWC-IGWA Agreement, the SWC and IGWA members agreed, among other things, that "[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually." *SWC-IGWA Agreement* § 3.a.i. The SWC and IGWA also stipulated "that the mitigation provided by participating IGWA members under the [2015] Agreements is, provided the [2015] Agreements are implemented, sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member." *Request for Order* ¶ 8. The SWC and IGWA agreed "[n]o ground water user participating in this [SWC-IGWA] Agreement will be subject to a delivery call by the SWC members as long as the provisions of the [SWC-IGWA] Agreement are being implemented." *SWC-IGWA Agreement* § 5.

On May 2, 2016, the Director issued the *Final Order Approving Stipulated Mitigation Plan* ("Order Approving Mitigation Plan"), which approved the parties' mitigation plan subject to conditions including the following: "a. All ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan."; and "b. The ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4.

On December 14, 2016, the SWC and IGWA entered into the *Second Addendum to Settlement Agreement* ("Second Addendum"). The *Second Addendum* amended the *SWC-IGWA Agreement* by providing additional details concerning the implementation of certain sections, most notably sections 3.a (Consumptive Use Volume Reduction); 3.e (Ground Water Level Goal and Benchmarks), 3.m (Steering Committee), and 4.a. (Adaptive Water Management). *Compare SWC-IGWA Agreement* §§ 3–4, *with Second Addendum* § 2. The *Second Addendum* also articulated the process by which the Steering Committee would address alleged breaches and further advised that if the parties couldn't agree whether a breach had occurred, the Director was tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

On February 7, 2017, the SWC and IGWA submitted the *Surface Water Coalition's and IGWA's Stipulated Amended Mitigation Plan and Request for Order* ("Second Request for

Order"). The SWC and IGWA requested that the Director issue an order approving the Second Addendum as an amendment to the mitigation plan. *Second Request for Order* ¶ 6.

On May 9, 2017, the Director issued the *Final Order Approving Amendment to Stipulated Mitigation Plan* ("Order Approving Amendment to Mitigation Plan"), approving the Second Addendum as an amendment to the parties' mitigation plan subject to the following conditions:

a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.

b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

Order Approving Amendment to Mitigation Plan at 5.

During the 2021 irrigation season, IGWA's obligations were set forth in six documents, collectively referred to herein as the "Mitigation Plan," which were admitted by stipulation at the hearing held February 8, 2023:

(1) the SWC-IGWA Agreement (Exhibit 1);

(2) the A&B-IGWA Agreement (Exhibit 4);

(3) the First Addendum (Exhibit 2);

(4) the Order Approving Mitigation Plan (Exhibit 36);

(5) the Second Addendum (Exhibit 3); and

(6) the Order Approving Amendment to Mitigation Plan (Exhibit 37).[4]

B. IGWA's 2021 breach of the Mitigation Plan.

On April 1, 2022, IGWA's counsel sent *IGWA's 2021 Performance Report* to representatives of the SWC and the Department.

On May 18, June 27, and July 13, 2022, the joint SWC/IGWA steering committee referenced in the SWC-IGWA Agreement, and the Second Addendum met to review technical information, including *IGWA's 2021 Performance Report.*

[4] Rule 43.02 of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) ("CM Rules") states that upon receiving a proposed mitigation plan the Director will "consider the plan under the procedural provisions of Section 42-222, Idaho Code . . . ." Idaho Code § 42-222 states that the Director shall "examine all the evidence and available information and shall approve the change in whole, or in part, or *upon conditions*, provided no other water rights are injured thereby. . . ." (emphasis added). Accordingly, the Director can approve a mitigation plan "upon conditions." The Director imposed conditions of approval in his Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan and those conditions became part of the Mitigation Plan.

On July 21, 2022, the SWC filed *Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference* ("Notice"). In the Notice, the SWC alleged IGWA's members failed to reduce total ground water diversions by 240,000 ac-ft in 2021 as mandated under the Mitigation Plan. *Notice* at 2–3. The SWC further advised that the allegations of noncompliance were reviewed by the steering committee as required by the Mitigation Plan, that the SWC and IGWA disagreed on whether there was a breach, and that the Steering Committee was at an impasse. *Id*. at 3–4.

On July 26, 2022, the Director granted the SWC's request for a status conference and scheduled the status conference for August 5, 2022.

On August 3, 2022, IGWA filed *IGWA's Response to Surface Water Coalition's Notice of Impasse* ("Response"). In the Response, IGWA argued there was no breach in 2021 because each IGWA member met its proportionate share of the 240,000 ac-ft. reduction obligation. *Response* at 4–5. This conclusion, however, was based on IGWA's contention that the annual reduction obligation was measured on a five-year rolling average and that A&B and Southwest Irrigation District ("Southwest") were each responsible for a portion of the 240,000 ac-ft. reduction. *Id*.

On August 4, 2022, the SWC filed the *Surface Water Coalition's Reply to IGWA's Response* ("Reply"). In the Reply, the SWC argued IGWA's arguments had "no support in the actual [SWC-IGWA] Agreement and should be rejected on their face." *Reply* at 2. The SWC argued that non-parties, such as A&B and Southwest, were not responsible for any portion of the 240,000 ac-ft. reduction, and that the 240,000 ac-ft. reduction obligation was an annual requirement—not based on a five-year rolling average. *Id*. at 3–5.

On August 5, 2022, the Director held a status conference and advised the parties that, in the event of a breach, section 2.c.iv of the *Second Addendum* required him to "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." The Director initiated a discussion with counsel for the parties regarding possible curative remedies should the Director find a breach. The only concrete proposal, suggested by an attorney for the SWC, was an increase in diversion reduction in 2022 equal to the 2021 deficiency.

On August 12, 2022, IGWA filed *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse* ("Supplemental Response"). In addition to expanding IGWA's five-year-rolling-average argument, the Supplemental Response raised two new procedural arguments. First, IGWA argued the Director should not act on the SWC's Notice until the SWC files a motion under the Department's rules of procedure. *Supplemental Response* at 2–3. Second, IGWA argued that, if the Director finds a breach of the Mitigation Plan, he must provide the breaching party with 90 days' notice and an opportunity to cure. *Id*. at 8–9.

C. Stipulated Remedy.

On September 7, 2022, the SWC and IGWA executed another settlement agreement ("Remedy Agreement"). The Remedy Agreement addressed the breach alleged in the SWC's notice and sought to ensure that "the Director d[id] not curtail certain IGWA members during the 2022 irrigation season." *Remedy Agreement* ¶ E. To accomplish this, the parties stipulated:

> **2021 Remedy.** As a compromise to resolve the parties' dispute over IGWA's compliance with the [SWC-IGWA] Agreement and Mitigation Plan in 2021, and not as an admission of liability, IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the [SWC-IGWA] Agreement and approved Mitigation Plan. IGWA agrees to take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River. For example, if by April 1, 2023, IGWA has secured contracts for only 25,000 acre-feet of storage water, IGWA will either (a) lease 5,000 acre-feet of storage from the SWC, or (b) undertake 5,000 acre-feet of diversion reductions. The remedy described in this section shall satisfy IGWA's obligation under the [SWC-IGWA] Agreement for 2021 only.

Id. § 1. The SWC and IGWA agreed to submit the Remedy Agreement to the Director "as a stipulated plan to remedy the alleged shortfall regarding IGWA's 2021 groundwater reduction obligation as set forth in the SWC Notice." *Id*. § 3. The Remedy Agreement contemplates that the Director will incorporate the terms of the 2021 remedy provision "as the remedy selected for the alleged shortfall in lieu of curtailment, and shall issue a final order regarding the interpretive issues raised by the SWC Notice." *Id*. Additionally, both parties waived their right to appeal the stipulated remedy. *Id*.

On September 8, 2022, the Director issued a *Final Order Regarding Compliance with Approved Mitigation Plan* ("Compliance Order"), wherein the Director concluded that certain IGWA members breached the Mitigation Plan during the 2021 irrigation season and approved the parties' Remedy Agreement as an appropriate contingency in lieu of curtailment for the breach. *Compliance Order* at 13–16.

D. Post Compliance Order Filings.

On September 22, 2022, IGWA timely filed a *Petition for Reconsideration and Request for Hearing* requesting that the Director amend the Compliance Order to "withdraw those parts . . . that adjudicate IGWA's contractual obligations under the [SWC-IGWA] Agreement . . ." or

in the alternative, set the matter for a merits hearing. *IGWA's Pet. for Reconsideration and Hearing* at 7.[5]

On October 13, 2022, the Director issued an order granting IGWA's request for a hearing. *Order Grant'g Req. for Hr'g; Notice of Prehr'g Conf.* at 1–2. The Director concluded IGWA's petition for reconsideration was moot since the Director was granting IGWA's request for a hearing. *Id*. at 2. The Director also set a prehearing conference for November 10, 2022. *Id*.

The prehearing conference was held as scheduled on November 10, 2022. On December 7, 2022, the Director issued an order scheduling a three-day hearing for February 8–10, 2023. *Order Authorizing Disc.; Notice of Hr'g* at 1–2.

On November 30, 2022, the Director issued the *Final Order Establishing 2022 Reasonable Carryover (Methodology Step 9)* ("2022 Step 9 Order") in the SWC delivery call matter (Docket No. CM-DC-2010-001). The 2022 Step 9 Order gave ground water users 14 days to establish their ability to mitigate for their proportionate share of the reasonable carryover shortfall. *2022 Step 9 Order* at 6. On December 14, 2022, the Director issued the *Final Order Curtailing Ground Water Rights Junior to May 31, 1989* ("2022 Curtailment Order"). The 2022 Curtailment Order curtailed ground water users junior to May 31, 1989, who failed to establish their ability to mitigate for their share of the reasonable carryover shortfall. *2022 Curtailment Order* at 3. This curtailment order remains in place today.

On December 21, 2022, the SWC filed a *Motion for Summary Judgment* and a *Memorandum in Support of Motion for Summary Judgment* ("SWC Memorandum"). The SWC argued an evidentiary hearing was unnecessary and further argued the Director should grant summary judgment because no material facts were in dispute. *SWC Memorandum* at 5. The SWC framed the issue solely as a contract interpretation inquiry. *Id.* at 10.

On January 4, 2023, IGWA filed its *Response in Opposition to SWC's Motion for Summary Judgment* ("Response to SWC Motion"). IGWA argued a hearing was required because the *SWC-IGWA Agreement* was ambiguous and that it was entitled to a hearing pursuant to Idaho Code § 42-1701(A)(3). *Response to SWC Motion* at 11.

Also on January 4, 2023, the Bonneville-Jefferson Ground Water District ("BJGWD") filed a *Petition to Intervene* ("BJGWD's Petition") and a *Response in Opposition to SWC's Motion for Summary Judgment* ("BJGWD's Response to SWC Motion"). BJGWD requested intervention "to preserve and not waive certain legal arguments and defenses not raised in IGWA's Response Brief." *BJGWD's Petition* at 1–2. More specifically, BJGWD sought intervention to raise a variety of breach of contract defenses, including unjust enrichment, legal impracticality, unclean hands, and lack of damages. *BJGWD's Response to SWC Motion* at 3–8.

[5] In addition to requesting a hearing with the Department, on October 24, 2022, IGWA also filed a *Petition for Judicial Review* on October 24, 2022. *See IGWA v. Idaho Dep't of Water Res*., No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho). The district court dismissed IGWA's petition for lack of jurisdiction on December 8, 2022.

On January 9, 2023, the SWC filed its *Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike Response.*

On January 11, 2023, the SWC filed its *Reply in Support of Summary Judgment Motion*.

On January 17, 2023, BJGWD filed its *Reply and Objection to SWC's Opposition to Bonneville-Jefferson Ground Water District's Motion to Intervene / Motion to Strike*.

On January 25, 2023, IGWA's counsel of record filed a *Notice of Conditional Withdrawal of Representation of Bonneville-Jefferson Ground Water District*.

On January 27, 2023, the Director issued an *Order Denying SWC's Motion for Summary Judgement & Conditionally Granting BJGWD's Petition to Intervene*.

E. Hearing on February 8, 2023.

The hearing IGWA requested began on February 8, 2023. The hearing was scheduled for three days but took only one. Thirty-nine common exhibits were admitted by stipulation (Exhibits 1–39).[6] IGWA introduced seven additional exhibits, marked as Exhibits 101, 107, 109, 114, 118, 119, and 120. The SWC introduced two exhibits, marked as Exhibits 200 and 201. IGWA called two witnesses, Jaxon Higgs and Timothy Deeg. Mr. Higgs is a professional geologist, has a master's degree in hydrology, and is a consultant for IGWA. Mr. Deeg was the Chairman of IGWA's Board for over twenty years. Mr. Deeg is also the Director of the Aberdeen-American Falls Groundwater District.

Neither the SWC nor BJGWD called any witnesses. At the conclusion of the hearing, BJGWD moved to adopt IGWA's arguments. All parties waived post-hearing briefing.

FINDINGS OF FACT

1. The SWC-IGWA Agreement mandates that "[t]otal ground water diversions shall be reduced by 240,000 ac-ft annually." *SWC-IGWA Agreement* § 3.a.i.

2. All members of the SWC except for A&B Irrigation District executed the SWC-IGWA Agreement. *A&B-IGWA Agreement* at 1.

3. The A&B-IGWA Agreement states in pertinent part that "A&B agrees to participate in the [SWC-IGWA] Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights." *A&B-IGWA Agreement* ¶ 2.

4. Southwest Irrigation District ("Southwest") did not sign the SWC-IGWA Agreement or any of the subsequent addendums. *SWC-IGWA Agreement* at 25.

[6] Among these were IGWA's 2021 Performance Report (Exhibit 20) and summation of IGWA's 2021 Report (Exhibit 27).

5. The Order Approving Mitigation Plan approved the SWC-IGWA Agreement as a mitigation plan subject to the following conditions:

a. All ongoing activities required pursuant to the Mitigation Plan *are the responsibility of the parties to the Mitigation Plan*.

b. The ground water level goal and benchmarks referenced in the Mitigation Plan *are applicable only to the parties to the Mitigation Plan*.

Order Approving Mitigation Plan at 4 (emphasis added).

6. No party sought judicial review of the Order Approving Mitigation Plan.

7. The Second Addendum articulates the process by which the Steering Committee is to address alleged breaches, and further states that, if the parties cannot agree whether a breach had occurred, the Director is tasked with resolving the dispute and fashioning a remedy. *Second Addendum* § 2.c.iii-iv.

8. Section 2.a.i. of the Second Addendum required IGWA to annually submit to the Steering Committee its diversion and recharge data from the previous irrigation season. IGWA submitted the data each year from 2016 through 2021. *Compare id.* § 2.a.i., *with* IGWA's Performance Reports [2016-2021], Exs. 15–20.

9. The Order Approving Amendment to Mitigation Plan approved the Second Addendum as an amendment to the parties' mitigation plan subject to the following conditions:

a. While the Department will exert its best efforts to support the activities of IGWA and the SWC, approval of the Second Addendum does not obligate the Department to undertake any particular action.

b. Approval of the Second Addendum does not limit the Director's enforcement discretion or otherwise commit the Director to a particular enforcement approach.

Order Approving Amendment to Mitigation Plan at 5.

10. The *Second Final Order* further states that "[t]he parties to the Mitigation Plan should be responsible for these activities and *the ground water level goal and benchmarks are only applicable to the parties to the Mitigation Plan as specified in the Mitigation Plan*." *Id*. at 4 (emphasis added).

11. No party sought judicial review of the Second Final Order.

12. On April 1, 2022, IGWA's sent its 2021 Performance Report to the SWC and the Department. IGWA's 2021 Performance Reports, Ex. 20.

13. A spreadsheet included in the 2021 Performance Report summarizes IGWA's, A&B's, and Southwest's mitigation efforts during 2020. 2020 Performance Summary Table, Ex. 26. IGWA's summary spreadsheet is reproduced as Table 1 below. Important to the Director's consideration here, IGWA apportioned A&B and Southwest a share of the 240,000 ac-ft reduction obligation.

Table 1:

2021 Performance Summary Table							
	Target Conservation	**Baseline**	**2021 Usage**	**Diversion Reduction**	**Accomplished Recharge**	**Total Conservation**	**2021 Mitigation Balance**
American Falls-Aberdeen	33,715	286,448	291,929	-5,481	20,050	14,569	-19,146
Bingham	35,015	277,011	302,020	-25,009	9,973	-15,036	-50,052
Bonneville-Jefferson	18,264	156,287	158,212	-1,925	5,080	3,155	-15,109
Carey	703	5,671	4,336	1,335	0	1,335	632
Jefferson-Clark	54,373	441,987	405,131	36,856	5,881	42,737	-11,636
Henry's Fork[1]	5,391	73,539	65,323	8,216	3,000	15,189	9,798
Madison[2]		81,423	77,449	3,973			
Magic Valley	32,462	256,270	231,474	24,795	10,546	35,341	2,879
North Snake[3]	25,474	208,970	194,778	14,192	11,301	25,494	20
A&B[4]	21,660	-	-	-	-	21,660	0
Southwest ID[4]	12,943	-	-	-	-	12,943	0
Total:	**240,000**	1,787,604	1,730,652	56,953	65,831	157,387	-82,613
Notes:							
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.							
(2) Madison baseline is preliminary estimate, see note on district breakdown.							
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.							
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.							

14. Table 2 illustrates IGWA's *2020 Performance Summary Table* with yellow highlighted columns added by the Director. The "Re-proportioning" column in Table 2 redistributes the 34,603 ac-ft IGWA assigned to A&B and Southwest. The yellow highlighted "Target Conservation" column evidences the reduction obligations of each IGWA member after the 34,603 ac-ft were reproportioned to IGWA members who were parties to the Mitigation Plan.

Table 2:

2021 Performance Summary Table											
	IGWA Proportioning	[IGWA] Target Conservation	Re-proportioning	Target Conservation	Baseline	2021 Usage	Diversion Reduction	Accomplished Recharge	Total Conservation	[IGWA] 2021 Mitigation Balance	2021 Mitigation Balance
American Falls-Aberdeen	14.0%	33,715	16.4%	39,395	286,448	291,929	-5,481	20,050	14,569	-19,146	-24,826
Bingham	14.6%	35,015	17.0%	40,914	277,011	302,020	-25,009	9,973	-15,036	-50,052	-55,951
Bonneville-Jefferson	7.6%	18,264	8.9%	21,341	156,287	158,212	-1,925	5,080	3,155	-15,109	-18,185
Carey	0.3%	703	0.3%	821	5,671	4,336	1,335	0	1,335	632	513
Jefferson-Clark	22.7%	54,373	26.5%	63,533	441,987	405,131	36,856	5,881	42,737	-11,636	-20,796
Henry's Fork[1]	2.2%	5,391	2.6%	6,299	73,539	65,323	8,216	3,000	15,189	9,798	8,890
Madison[2]					81,423	77,449	3,973				0
Magic Valley	13.5%	32,462	15.8%	37,931	256,270	231,474	24,795	10,546	35,341	2,879	-2,590
North Snake[3]	10.6%	25,474	12.4%	29,765	208,970	194,778	14,192	11,301	25,494	20	-4,272
A&B[4]	9.0%	21,660	--	--	-	-	-	-	21,660	0	--
Southwest ID[4]	5.4%	12,943	--	--	-	-	-	-	12,943	0	--
Total:	100%	**240,000**	100%	**240,000**	1,787,604	1,730,652	56,953	65,831	157,387	-82,613	-117,216
Notes:											
(1) Includes mitigation for Freemont-Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.											
(2) Madison baseline is preliminary estimate, see note on district breakdown.											
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.											
(4) A&B ID and Southwest ID Total Conservation is unknown and assumed to meet target.											

15. The spreadsheets summarizing IGWA's performance from 2016 to 2021 do not include diversion reduction data for A&B or Southwest. [2017-2022] Settlement Agreement Performance Report Spreadsheet, Exs. 22–27.

16. Despite the lack of diversion reduction data in its 2022 Performance Report, IGWA nevertheless assigned A&B a reduction target of 21,660 ac-ft and Southwest a reduction target of 12,943 ac-ft—a reduction of 14.4% or 34,603 ac-ft. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; *see also supra* Tables 1 & 2.

17. When A&B and Southwest are collectively apportioned 34,603 ac-ft of IGWA's conversation obligation, IGWA were 82,613 ac-ft short of its reduction obligation in 2021. 2022 Settlement Agreement Performance Report Spreadsheet, Ex. 27; *see also supra* Tables 1 & 2.

18. When A&B and Southwest are not apportioned 34,603 ac-ft, IGWA were 117,216 ac-ft short of its reduction obligation in 2021. *See supra* Table 2.

19. Based on the analysis in Table 2, American Falls-Aberdeen, Bingham, BJGWD, Jefferson-Clark, Magic Valley, and North Snake failed to satisfy their respective reduction requirements in 2021.

20. Seeking to avoid curtailment, IGWA and the SWC signed and submitted the Remedy Agreement, which requires IGWA to "provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year." *Remedy Agreement* at 2.

21. The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶3, at 2–3.

22. On February 8, 2023, a hearing was held during which IGWA called two witnesses: Jaxon Higgs, a professional geologist with a master's degree in hydrology and a IGWA consultant; and Timothy Deeg, who served as chairman of IGWA's Board for 22 years and is currently IGWA's Treasurer.

23. Mr. Higgs testified that in addition to IGWA, he also served as a consultant for Southwest.

24. Referencing the SWC-IGWA Agreement, Mr. Higgs admitted that while Southwest was listed as an IGWA member in a footnote, he was aware Southwest had never signed the SWC-IGWA Agreement. *See SWC-IGWA Agreement* at 22.

25. Mr. Higgs testified that Southwest did not sign the SWC-IGWA Agreement because it already had an interim agreement with the SWC and was waiting to finalize a long-term agreement with the SWC once the IGWA-SWC Agreement was finalized.

26. Mr. Higgs testified that Southwest has been performing under the separate agreement it entered with the SWC.

27. Mr. Deeg testified that he was involved in negotiating the SWC-IGWA Agreement but admitted that, with hindsight, the SWC-IGWA Agreement could have been written with greater specificity.

28. Mr. Higgs testified that he was not involved in negotiating the SWC-IGWA Agreement but did assist IGWA in implementing the SWC-IGWA Agreement.

29. Mr. Higgs testified that he began working with IGWA in the summer of 2015, and at that time, IGWA had not yet determined how the SWC-IGWA Agreement's reduction obligation would be apportioned.

30. Referencing IGWA's Exhibit 107, Mr. Higgs testified that he presented information to IGWA's Board in July of 2015 concerning how to apportion the reduction requirements among the various districts, and that during that presentation, he apportioned A&B and Southwest a percentage of the 240,000 ac-ft. *See* Ex. 107 at 10.

31. Mr. Higgs also testified that, in September of 2015, the Department presented information to various ground water districts, and at that time, IGWA had not yet determined how to apportion the 240,000 ac-ft reduction. *See* Ex. 109 ¶7, at 2.

32. Mr. Higgs testified that he chose to apportion A&B and Southwest a share of the 240,000 ac-ft. because they are ground water pumpers in the ESPA, and he assumed A&B and Southwest were required to contribute to the 240,000 ac-ft reduction obligation.

33. Mr. Higgs conceded, however, that there were other ESPA ground water users, for which he did not apportion a share of the 240,000 ac-ft reduction requirement.

34. Mr. Deeg also testified that it was his opinion the 240,000 would be apportioned among all ESPA groundwater users, not just IGWA members, and that the possibility some ground water users might not be included in the 240,000 ac-ft obligation was a real "sore spot" among some ground water districts.

35. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically articulate how the 240,000 ac-ft obligation would be apportioned.

36. Mr. Higgs further conceded that, while he was not tasked with interpreting the SWC-IGWA Agreement, the SWC-IGWA Agreement did not specifically state that IGWA would only be responsible for 205,000 ac-ft of reductions.

37. Mr. Higgs also admitted that the SWC-IGWA Agreement did not specifically authorize averaging.

38. Mr. Deeg likewise testified that the SWC-IGWA Agreement did not specify how the 240,000 ac-ft reduction obligation would be apportioned.

39. Mr. Deeg also testified that while his ground water district (Aberdeen-American Falls) allowed individual users to average their respective reduction requirements over a four-year period, the District itself did not average its yearly reduction obligation.

40. Mr. Higgs also conceded that, to his knowledge, the SWC had never agreed with IGWA's contention that A&B and Southwest were responsible for a portion of the 240,000 ac-ft reduction obligation.

41. Mr. Higgs admitted knowing that the SWC had repeatedly objected to IGWA's attempts to assign A&B and Southwest a portion of the 240,000 ac-ft reduction requirement. *See* April 14, 2017 Letter from SWC's Counsel to IGWA's counsel, Ex. 200; April 20, 2017 Letter from IGWA's Counsel to SWC's Counsel, Ex. 201.

42. Mr. Higgs also conceded he did not adjust his calculations concerning IGWA's reduction obligations after the Director issued the Order Approving Mitigation Plan; indeed, Mr. Higgs conceded he never read the Director's Order approving the Mitigation Plan.

43. Neither Mr. Higgs nor Mr. Deeg testified that the Order Approving Mitigation Plan or the Order Approving Amendment to Mitigation Plan were ambiguous or otherwise unclear concerning the apportionment of the 240,000 ac-ft reduction obligation.

ANALYSIS AND CONCLUSIONS OF LAW

A. The Mitigation Plan unambiguously requires IGWA to conserve 240,000 ac-ft each year—meaning averaging is prohibited.

The interpretation of a settlement agreement is "governed by the same rules and principles as are applicable to contracts generally." *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (internal quotation omitted). The interpretation of a contract starts with the language of the contract itself and requires viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co. v. Clear Springs Foods, In*c., 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). "The meaning of an unambiguous contract should be determined from the plain meaning of the words." *Id*. "Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact." *Porcello v. Est. of Porcello*, 167 Idaho 412, 421, 470 P.3d 1221, 1230 (2020) (internal citations and quotations omitted). "Only when the language is ambiguous, is the intention of the parties determined from surrounding facts and circumstances." *Clear Lakes Trout Co.,* 141 Idaho at 120.

Here, the *SWC-IGWA Agreement* states that the "[t]otal ground water diversion shall be reduced by 240,000 ac-ft *annually*." *SWC-IGWA Agreement* § 3.a.i. (Emphasis added). IGWA contends the term "annually" is ambiguous because it "does not prescribe how annual groundwater conservation will be measured[.]" *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 7. IGWA further contends that the 240,000 ac-ft conversation requirement is based on a multi-year rolling average. *Id.* at 7–10. Were IGWA's argument to prevail, IGWA's failure to conserve 240,000 ac-ft in one year would not necessarily constitute a breach of § 3.a.i. as the reduction obligation deficit could be recouped by reducing more than 240,000 ac-ft in other years. The Director rejects IGWA's arguments because they are contrary to the plain and unambiguous language of the Mitigation Plan.

First, the term "annually" is unambiguous. The adverb "annually" derives from the adjective "annual," which means "of or measured by a year" or "happening or appearing once a year; yearly." *Annual*, Webster's New World Dictionary (3d coll. Ed. 1994); *see also* Black's Law Dictionary 58 (6th ed. 1991) (The term annually means "[i]n annual order or succession; yearly, every year, year by year. At the end of each and every year during a period of time. Imposed once a year, computed by the year. Yearly or once a year, but does not in itself signify what time in a year."). Accordingly, the phrase "shall be reduced by 240,000 ac-ft annually" unambiguously requires IGWA to reduce ground water diversions by 240,000 ac-ft each and every year. *Clear Lakes*, 141 Idaho at 120, 106 P.3d at 446.

This understanding is reinforced by how the word "annually" is used in other provisions of the Mitigation Plan. For example, § 2.a.i of the Second Addendum requires IGWA to submit certain data to the Steering Committee "[p]rior to April 1 annually." IGWA has complied with this requirement each and every year. *See* IGWA's 2016-2021 Performance Reports & Summaries, Exs. 15–20, 22–27.

To support its averaging argument, IGWA points to § 3.e.iv of the SWC-IGWA Agreement which states: "When the *ground water level goal is achieved* for *a five year rolling*

average, ground water diversion reductions may be reduced or removed, so long as the ground water level goal is sustained." (emphasis added). The problem with IGWA's argument is that § 3.e.iv. simply states that a five-year rolling average will be used to determine whether IGWA has achieved the *ground water level goal* in § 3.e. Section 3.e.iv does not state or imply that IGWA's 240,000 ac-ft *annual reduction obligation* found in § 3.a can be averaged over multiple years. To the contrary, the fact that § 3.e.iv references a five-year rolling average actually cuts against IGWA's argument, as it demonstrates the parties knew how to draft a rolling-average provision had they intended § 3.a.i. to include one.

IGWA also argues its 240,000 ac-ft reduction should be averaged because IGWA used averaging to set its so-called "baseline." *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 7. Yet IGWA concedes its averaging process was not described or mandated in the SWC-IGWA Agreement. *Id.* at 9. The fact that IGWA chose to employ averaging when establishing a baseline so that it could apportion the 240,000 ac ft obligation among its members did not amend the SWC-IGWA Agreement's unambiguous requirement that IGWA conserve 240,000 ac ft *annually*.

IGWA also contends it should be allowed to employ averaging because it conserves more than 240,000 ac-ft during cool wet years, meaning it should be allowed to conserve less in hot and dry years. *Id.* at 8–9. The fact that IGWA may conserve more than 240,000 ac-ft in cool wet years does not change its unambiguous obligation to conserve 240,000 ac-ft *annually*. Nor has IGWA pointed to any language in the Mitigation Plan authorizing this type of surplus & deficit accounting.

In sum, averaging is not permitted because the SWC-IGWA Agreement unambiguously requires IGWA to conserve 240,000 ac-ft each and every year.

B. The Mitigation Plan unambiguously prohibits IGWA from apportioning A&B and Southwest a percentage of its annual reduction obligation.

IGWA next asserts that the 240,000 ac-ft. reduction requirement under § 3.a.i. is not IGWA's responsibility alone, but rather a shared responsibility amongst all groundwater users in the ESPA, including A&B and Southwest. *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 4–6. Were IGWA's argument to prevail, IGWA members who signed the Mitigation Plan would only be required to annually conserve 205,397 ac-ft—not 240,000 ac-ft— a reduction of 14.4% or 34,603 ac-ft. IGWA's 2021 Performance Summary, Ex. 27.

To buttress this position, IGWA points to § 3.ii of the SWC-IGWA Agreement, which reads: "Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity." *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 4–5. IGWA argues that because A&B and Southwest pump groundwater in the ESPA, they must share in the 240,000 ac-ft reduction obligation. *Id*.

IGWA's focus on § 3.ii of the SWC-IGWA Agreement is misguided. In construing a written instrument, the court must start with the language of the contract itself and requires

viewing the contract as a whole and in its entirety. *Clear Lakes Trout Co.*, 141 Idaho at 120. The court must "give meaning to all the provisions of the writing to the extent possible." *Magic Valley Radiology Assocs., P.A. v. Pro. Bus. Servs., Inc*., 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991). In this case, § 6 of the SWC-IGWA Agreement specifically states it does not cover non-participants: "Any ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration." *SWC-IGWA Agreement* § 6. Southwest never signed the SWC-IGWA Agreement, and A&B participated in the Mitigation Plan only as a member of the SWC: "A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement do not apply to A&B and its ground water rights." *A&B-IGWA Agreement* ¶ 2.

Additionally, § 2.d.i. of the Second Addendum states that "[t]he terms of the Settlement and the Director's Final Order approving the same as a mitigation plan" will control and satisfy any mitigation obligations. Both the Director's Order Approving Mitigation Plan and Order Approving Amendment to Mitigation Plan are unequivocal that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan," and that "[t]he ground water level goal and benchmarks referenced in the Mitigation Plan are applicable only to the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

In sum, the Mitigation Plan—when read as a whole and in its entirety —unambiguously excludes any ground water user that is not a party to the agreement from any obligation related to the annual 240,000 ac ft reduction target. The Mitigation Plan requires IGWA members alone to conserve 240,000 ac-ft each and every year. *Clear Lakes Trout Co*., 141 Idaho at 120.

C. IGWA's latent ambiguity argument also fails.

IGWA argues in the alternative that the SWC-IGWA Agreement is latently ambiguous concerning whether IGWA alone is responsible for reducing 240,000 ac-ft. *IGWA's Resp. in Opp. to SWC's Mot. for Summ. J.* at 6–10. More specifically, IGWA contends a latent ambiguity exists concerning the 240,000 ac-ft reduction obligation under § 3.ii because the SWC-IGWA Agreement failed to explain how each district's proportionate share of the 240,000 ac-ft reduction requirement would be calculated. *Id.* at 7.

"A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist." *Porcello v. Est. of Porcello*, 470 P.3d 1221, 167 Idaho 412, 424 (2020) (internal citation and quotations omitted). To determine whether a latent ambiguity exists, the written instrument must be examined along with "other writings incorporated into the instrument" to determine whether an ambiguity exists and the reasonableness of the alternative meanings suggested by the parties. *Sommer, LLC*, 511 P.3d at 845. A latent ambiguity must be tethered to language in the written instrument. *Porcello*, 167 Idaho at 424. Parole evidence may be considered to "determine whether *language within the instrument* is reasonably susceptible of more than one meaning." *Sommer*, 511 P.3d at 845 (emphasis in original).

The flaw in IGWA's argument is that not every phrase in a contract must be defined, nor is a contract rendered ambiguous by an undefined term. *Mut. Of Enumclaw v. Wilcox*, 123 Idaho 4, 8, 843 P.2d 154, 158 (1992). The SWC-IGWA Agreement is not ambiguous merely because it failed to articulate how IGWA must apportion the 240,000 ac-ft among its members. The absence of apportionment instructions does not substantiate IGWA's claim that it "reasonably accounted for diversions from A&B and Southwest in determining each of the signatory districts' proportionate groundwater conservation obligations." *IGWA's Resp. In Opp. to Summ. J.* at 7.

Section 6 of the SWC-IGWA Agreement expressly states that "[a]ny ground water user not participating in this Settlement Agreement or otherwise hav[ing] another approved mitigation plan will be subject to administration." *SWC-IGWA Agreement* § 6. IGWA's Agreement with A&B was likewise explicit that "A&B agrees to participate in the [SWC-IGWA] Settlement Agreement as a surface water right holder only. The obligations of Ground Water Districts set forth in Paragraphs 2-4 of the [IGWA-SWC] Settlement Agreement *do not apply to A&B* and its ground water rights." *A&B-IGWA Agreement* ¶ 2 (emphasis added). Additionally, the Director's orders approving the first and second mitigation plans clearly stated that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *Order Approving Amendment to Mitigation Plan* at 2.

IGWA offered neither evidence nor argument that the Mitigation Plan—when read as a whole and in its entirety—was ambiguous concerning IGWA's obligation to conserve 240,000 ac-ft. IGWA's own witnesses undermined IGWA's latent ambiguity argument. For example, Mr. Higgs testified that IGWA was aware that A&B and Southwest each agreed to separate settlements with the SWC. Mr. Higgs also testified that he did not adjust his calculations in 2016 after the Director issued his Order Approving Mitigation Plan, which was explicit that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibilities of the parties to the Mitigation Plan." *Order Approving Mitigation Plan* at 4; *see also* Higgs Test..

The plain reading of the six documents that make up the Mitigation Plan renders IGWA's latent ambiguity argument untenable.

D. Certain IGWA members breached the Mitigation Plan in 2021.

Based on the foregoing, each IGWA member participating in the Mitigation Plan is obligated to reduce total ground water diversion (or provide equivalent private recharge) by each member's proportionate share of 240,000 ac-ft. every year. *SWC-IGWA Agreement* § 3.a.

Based on Table 2 as shown in Finding of Fact 14 above, Madison Ground Water District, Fremont Madison Irrigation District, and Carey Ground Water District satisfied their proportionate 2021 mitigation obligations in 2021 and would not be subject to curtailment. *See SWC-IGWA Agreement* § 3.a.ii (Each member "shall be responsible for reducing their proportionate share … ."). Based on the analysis in Table 2, Table 3 below identifies the IGWA ground water districts that did not fulfill their proportionate share of the total annual ground water reduction and the volume of each district's deficiency.

Table 3:

Ground Water District	Deficiency (acre-feet)
American Falls-Aberdeen	24,826
Bingham	55,951
Bonneville-Jefferson	18,185
Jefferson-Clark	20,796
Magic Valley	2,590
North Snake	4,272
Total	**126,620**

E. The IGWA members in Table 3 are not covered by an effectively operating mitigation plan and IGWA must implement the 2021 remedy in the Remedy Agreement.

In a delivery call under the CM Rules, out-of-priority diversion of water by junior priority ground water users is allowable only "pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.b. Junior-priority ground water users "covered by an approved *and effectively operating* mitigation plan" are protected from curtailment under CM Rule 42. IDAPA 37.03.11.042.02 (emphasis added). In other words, only those junior ground water users who are in compliance with an approved mitigation plan are protected from a curtailment order.

The Director has approved several mitigation plans when the joint administration of ground water and surface water has been imminent. Some of these approved mitigation plans have been contested by holders of senior priority water rights. In this case, however, because of the stipulated Mitigation Plan, the Director allowed significant latitude to the agreeing parties in accepting the provisions of the Mitigation Plan. Nonetheless, the courts have defined the Director's responsibilities if the holders of junior priority water rights do not comply with the mitigation requirements.

In the *Rangen* case, Judge Eric Wildman addressed the Director's responsibility when a mitigation plan fails. Mem. Decision & Order*, Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015) [hereinafter "Rangen June 1, 2015 Decision"]. A mitigation plan that allows out-of-priority diversions must supply water to the holders of senior priority water rights during the time-of-need. The Court stated: "When the Director approves a mitigation plan, there should be certainty that the senior user's material injury will be mitigated throughout the duration of the plan's implementation. This is the price of allowing junior users to continue their offending out-of-priority water use." *Rangen June 1, 2015 Decision* at 8. Judge Wildman previously held in an earlier case that the compensation for underperformance of the requirements of the mitigation plan cannot be delayed. *See* Mem. Decision & Order at 10*, Rangen, Inc. v. Idaho Dep't of Water Res.*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014). Furthermore, without mitigation at the time-of-need, the holders of junior ground water rights could materially injure senior water rights by diverting out-of-priority with impunity.

Here, the Mitigation Plan obligates IGWA to reduce total diversions or recharge the equivalent of 240,000 ac-ft every year. Each IGWA member is annually responsible for their proportionate share of that total. But the Mitigation Plan is unique in that it contemplates delays in analyzing IGWA's mitigation efforts. These delays are inherent in the Steering Committee process the parties agreed to in the Second Addendum.

For example, section 2.a.i of the Second Addendum requires IGWA to submit, "[p]rior to April 1 annually," ground water diversion and recharge data (i.e., the types of data in the 2021 Performance Report) to the Steering Committee for the previous irrigation season. Further, the parties agreed to a process by which the Steering Committee evaluates IGWA's data from the previous irrigation season to assess whether a breach occurred in the previous season. *Second Addendum* § 2.c.i–.iv. Because IGWA is not obligated to submit its data to the Steering Committee until April 1 every year, the Steering Committee process necessarily begins well after the actions or inactions constituting a breach. Moreover, the process does not involve the Director until the Steering Committee finds a breach or, as here, reaches an impasse. *Id*. While the Director believes this process was developed and has been implemented by all parties in good faith, it nevertheless means that any breach will be addressed many months after it occurs.

A mitigation plan that depends on a prediction of compliance must include a contingency plan to mitigate if the predictive mitigation plan is not satisfied:

> If junior users wish to avoid curtailment by proposing a mitigation plan, the risk of that plan's failure has to rest with junior users. Junior users know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a,b. If they cannot, then the Director must address the resulting material injury by turning to the approved contingencies. If there is no alternative source of mitigation water designated as the contingency, then the Director must turn to the contingency of curtailment. Curtailment is an adequate contingency if timely effectuated. In this same vein, if curtailment is to be used to satisfy the contingency requirement, junior uses are on notice of this risk and should be conducting their operation so as to not lose sight of the possibility of curtailment.

Rangen June 1, 2015 Decision at 9.

In this case, certain holders of junior-priority water rights failed to satisfy their mitigation obligation in 2021. Out-of-priority diversions by the IGWA members in Table 3 above were not "pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01.b. The approved Mitigation Plan was not "effectively operating" with respect to those IGWA members in 2021. IDAPA 37.03.11.042.02. Consequently, the holders of senior water rights have been and are being materially injured by the failure of the juniors to fully mitigate during the 2021 irrigation season.

The CM Rules contemplate that out-of-priority diversions by junior-priority ground water users will be curtailed absent compliance with an approved mitigation plan. IDAPA

37.03.11.040.01. Nevertheless, curtailment may be avoided if an adequate, alternative source of mitigation water is designated as a contingency. *Rangen June 1, 2015 Decision* at 9. Therefore, the Director must determine if there is an adequate contingency for IGWA members' 2021 noncompliance with the Mitigation Plan.

The Mitigation Plan itself does not include a contingency in the event IGWA did not meet the 240,000 ac-ft reduction obligation, but the plan does contemplate the Director will "issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment." *Second Addendum* § 2.c.iv. The Director concludes the SWC and IGWA's Remedy Agreement provides a cure for the breach and constitutes an adequate contingency for IGWA members' noncompliance in 2021. Specifically, in section 1 of the Remedy Agreement, IGWA agrees to "collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year." Moreover, the Remedy Agreement details IGWA's options in the event it cannot lease the necessary water from non-SWC spaceholders:

> If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking consumptive use reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

Remedy Agreement § 1. The SWC and IGWA agree their stipulated 2021 remedy should be the "remedy selected for the alleged [2021] shortfall in lieu of curtailment." *Id*. § 3. The Director agrees. The parties' remedy constitutes an appropriate contingency for IGWA members' noncompliance of the Mitigation Plan in 2021. Therefore, in lieu of curtailment, the Director will order that IGWA must implement the 2021 remedy in section 1 of the Remedy Agreement.

The parties affirmatively waived their rights to appeal the stipulated remedy. *Remedy Agreement* ¶3, 2–3. Neither party challenged the remedy at hearing.

F. IGWA's procedural and evidentiary objections lack merit.

The primary issues discussed at hearing were the issues of averaging and whether A&B and Southwest were to be included in the reduction calculation. However, prior to the hearing, IGWA raised a handful of procedural and evidentiary objections in connection with this matter. The Director stands by the analysis in the Compliance Order and adopts, by reference, the discussion in Section 5 of the Compliance Order. *See IGWA v. Idaho Dep't of Water Res*., No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho).

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED:

1. To remedy noncompliance with the Mitigation Plan in 2021 only, IGWA must collectively supply to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the 2015 SWC-IGWA Agreement and approved Mitigation Plan. IGWA must take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA must make up the difference by either (a) leasing storage water from the SWC as described in section 2 of the Remedy Agreement, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River.

2. Except as necessary to implement paragraph 2 above, nothing in this order alters or amends the parties' Mitigation Plan or any condition in the Director's Order Approving Mitigation Plan or Order Approving Amendment to Mitigation Plan.

3. Failure to comply with the Mitigation Plan may result in curtailment.

DATED this 24th day of April 2023.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April 2023, the above and foregoing was served by the method indicated below and addressed to the following:

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Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

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

Section 67-5246 provides as follows:

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

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

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

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

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

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

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

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

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

PETITION FOR RECONSIDERATION

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

APPENDIX B

The Idaho Press Club, Inc. v. Ada County

Ada County Case No. CV01-19-16277

(Dec. 13, 2019)

Filed: 12/13/2019 14:39:11
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Villereal, Tara

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE IDAHO PRESS CLUB, INC., Petitioner, vs. ADA COUNTY, Respondent.	Case No.: CV 01-19-16277 DECISION AND ORDER

The Idaho Press Club, Inc. is an association of working journalists from many different Idaho news outlets which brought this action seeking public records requested by four of its members from Ada County. Each request sought public records. None of the requests were responded to within the time periods required by the Idaho Public Records Act. Two of the requests were responded to with extensive claims of privilege and contained pages and pages of blacked out, heavily redacted material provided several months after the requests were made. The third request generated public records with information redacted. No specific statutory grounds for denial were provided in the letter advising the requesters of the denials. The final request was not responded to at all. The petitioner filed a timely petition for review of the denial of the requests as required by I.C. § 74-115. Ada County moved to dismiss the petition on the grounds of insufficiency of process, improper service and failure to state a claim upon which

relief can be granted. Ada County also provided the unredacted records for *in camera* review by the Court and filed a response. Because there was a verified petition and both sides have submitted declarations, the Court is required to treat the motion to dismiss as one for summary judgment. I.R.C.P. 12(d). The Court will address both the Motion to Dismiss and the Petition to Compel. The Court has concluded its *in camera* review of all documents. For the reasons stated in this Decision, the Motion to Dismiss is denied and the Petition to Compel is granted.

I.

The Framework of the Idaho Public Records Act

The right of the public to know, in depth, how its public servants handle the public's business is embodied in the Idaho Public Records Act. It gives the public broad access to the public records of Idaho government at every level, in every form—from state, to county, to city, to every type of commission and board. Public records are presumed to be open at all reasonable times for inspection by the public. I.C. § 74-102(1). The public's business is open to the public's view upon request with some specific detailed exceptions. The Act sets tight time lines for response. It places the burden on the governmental body to prove that a requested record is exempt from disclosure because it falls under the Idaho Public Records Act's express statutory exemptions. A "public agency" which is government at every level—state, county, city, commission, board or committee, or commission must comply with the public's right of access. I.C. § 74-101(4)(7)(8)(11)(15). The public's right is broad as to who may make a request. "Every person" has right to examine and copy any public record of the state at a reasonable time and place subject to certain exceptions. I.C. § 74-102(1). "Person" is defined broadly:

> "Person" means any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity.

I.C. § 74-101(9).

When a request is made, there are tight time requirements for response by the public agency. The request to view a public record must be granted or denied within three working days from its receipt. I.C. § 74-103. If the public agency needs more time to "locate or retrieve" the record, it is required to notify the person who requested the public record in writing that it will provide the record no later than ten working days after the request. *Id.* If an "electronic record requested" has to be "converted to another electronic format by the agency or a third party" and it cannot be done within the ten working days, then the public agency must work out a "mutually agreed upon" extension. Id. If there is no mutual agreement, if the requested records are not provided within the ten additional working days, the request is deemed denied. The public agency may grant part of the request and deny the rest provided it does so in writing. *Id.* "The notice of denial or partial denial also shall indicate the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so." *Id.* When a request is denied or denied in part, the person who made the request is authorized to bring a proceeding in district court to make the record available for public inspection within 180 days. The deadline to file a petition runs from the date of mailing of the denial or partial denial. I.C. § 74-115.

The Idaho Public Records Act makes the first two hours of labor and 100 pages provided in response to a request free to the person requesting it. I.C. § 74-102(10)(a). Thereafter, the Act allows reasonable copying and labor costs, including certain attorney fee charges for redactions, provided that they are itemized. I.C. § 74-102(10)(e) and (g). The Act also allows for the waiver of all fees:

> The public agency or independent public body corporate and politic shall not charge any cost or fee for copies or labor when the requester demonstrates that the requester's examination and/or copying of public records:
>
> > (i) Is likely to contribute significantly to the public's understanding of the operations or activities of the government;
> >
> > (ii) Is not primarily in the individual interest of the requester including, but not limited to, the requester's interest in litigation in which the requester is or may become a party; and
> >
> > (iii) Will not occur if fees are charged because the requester has insufficient financial resources to pay such fees.

I.C. § 74-102(10)(f). The district court also has a tight time line imposed on it by the Act. I.C. § 74-116(1).

II.

Undisputed Facts

1. The Idaho Press Club is an Idaho non-profit corporation which is a statewide association of working journalists from all types of media. It is a voluntary membership trade association with the mission of promoting "excellence in journalism, freedom of expression, and freedom of information." Petition, pg. 2.

2. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller are Idaho journalists who are members of the Idaho Press Club. They each made specific requests for public records which were denied in full or in part and are the subject of this action. Each of the journalists who made a request for records under the Idaho Public Records Act in this case is a member of

the Idaho Press Club.

3. Cynthia Sewell, a reporter for the Idaho Statesman requested the following on February 15, 2019 through the Ada County Public Records Request Portal on the Ada County website asking for: "Any correspondence or documents pertaining to the lease of or purchase of Les Bois race track.[1] This request includes Expo Idaho and Ada County Board of Commissioners documents. The time period of this request is July 1, 2018 to present." Declaration of Judy Morris. Ada County's website allows a person requesting public records to designate whether the request routes to the Ada County Commissioners' Office, the Sheriff's Office or the Ada County Clerk. Ada County asks for the name of the requester, email address, and a description of the request which is to be as specific as possible. *Id.* Ada County replied in writing on February 20, 2019 that the request would take longer than three working days as specified in I.C. § 74-103 and that they would need the ten working day extension allowed for by the same statutory provision. *Id.* Ada County then notified Cynthia Sewell on March 4, 2019 that ten days would not be enough time and sent an additional email on March 19, 2019 saying that due to "unforeseen circumstances" it would take still more time to respond to the request. *Id.* It did not detail the "unforeseen circumstances." There was no "mutually agreed upon" extension.

4. No records were provided in response to the request by Cynthia Sewell for months following her request for public records.

5. On March 27, 2019, Cynthia Sewell sent an email pointing out the statutory deadlines, which had been substantially exceeded, and asking for the reasons for the delay. On April 3, 2019, an employee of Ada County sent an apologetic email to Cynthia Sewell, which read in pertinent part:

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[1] The Les Bois Racetrack and surrounding acreage is a significant tract of publicly owned property in Ada County.

"Cynthia:

We are sorry this is taking longer than normal. We still believe that we are in compliance with Idaho Law, and hope to get the records to you soon."

6. Also after the statutory deadline, a formal letter was sent from the Ada County Commissioner's Office on April 5, 2019 addressing its lack of compliance with the public records request and citing an unspecified "technological glitch" which delayed processing the public records request. The letter said that there were over 2,000 emails and that Ada County expected to need "an additional 16.5 hours" to review the "compiled records" to see what was responsive to the public records request. In the April 5, 2019 letter, the commissioner's representative said that they would charge $50.00 per hour for I.T. personnel to search and retrieve the emails, and $42.14 an hour for attorney time to review the located emails. The letter asked for $695.31(16.5 hours x $42.14) made payable to Ada County. The $42.14 per hour charge reflects attorney review time, not I.T. time. Verified Petition, Exhibit B.

7. On April 8, 2019, Melissa Davlin, on behalf of the Idaho Press Club made this public records request to Ada County:

> From: Melissa Davlin
> Sent: Monday, April 8, 2019 1:41 PM
> To: Judy Morris; BOCC
> Subject: [EXTERNAL] public records request
> Dear Ms. Morris:
> Pursuant to the state open records law Idaho Code Ann. Secs. 74-101 to 74-126 . I request access to and a copy of any and all written communications. including, but not limited to. e-mails and text messages, regarding the submission and pending fulfillment of Cynthia Sewell's Feb.15th public records request regarding Les Bois race track. This request includes any communications between you. the IT department, the commissioners' office staff, and the county commissioners.
>
> l agree to pay any reasonable copying and postage fees of not more than $30. If the cost would be greater than this amount, please notify me before processing the request. Please provide a receipt indicating the charges for each document.
> As provided by the open records law. I will expect your response within ten (10) business

days. See Idaho Code Ann. Sec. 74-1 03(1).
If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also. please provide all segregable portions of otherwise exempt material.
Thank you for your assistance.
Sincerely,
Melissa Davlin
Idaho Press Club
208-410-7239

Verified Petition, Exhibit H. Ada County responded to this public records request by stating that it had been forwarded to the Prosecuting Attorney's office. *Id.* On April 26, 2019, Ada County provided some documents and denied producing other documents broadly asserting "attorney work product and attorney-client communications." Most of the 172 pages provided were blacked out in their entirety. Ada County made a very vague reference to the heavy redactions as being due to "Idaho decisional law, rules, statutes (e.g. Idaho Code § 74-104(1)), and the Idaho State Bar's Rules of Professional Conduct...." Verified Petition, Exhibit I. Referring to the letter as a "Notice of Partial Denial," the letter advised the Idaho Press Club of the deadline of 180 days in which to file an action under the Idaho Public Records Act. *Id.*

8. A letter was sent on April 11, 2019 from Ada County to Cynthia Sewell, signed by each Ada County commissioner, which apologized for the delay in responding to the public records request and explained the general complexity of retrieving emails and referred to "some coincidental glitches including a technical issue which significantly delayed our I.T. department's ability to conduct the search and promptly respond to your request." This letter was much more informative. The letter recited the large number of emails sent by county and state employees which utilize the Ada County email system and then provided additional information about how the search was conducted and the search terms utilized. It stated that an attorney would need to review each "captured email and any attachments" to ensure that they are

public records and then to decide "whether it is exempt from disclosure, if it can be released in a redacted form, or if it can be released in its entirety." It also recited that an attorney had reviewed the request. It discounted the earlier fee request by 25% because of the delay. The letter somewhat inconsistently references an attorney review having already been conducted and one that would be conducted once the fee was paid. The letter then advised Ms. Sewell that she had "180 calendar days from the mailing of the notice" to file a petition under the Idaho Public Records Act. The letter was cc'd to Melissa Davlin, Idaho Press Club. Verified Petition, Exhibit C.

9. Cynthia Sewell responded on July 23, 2019 by email asking for waiver of the fees under I.C. § 74-102(10)(f) and, if the waiver request was denied, for more specific detail on the basis for the rates being charged and the reason for the amount of time necessary to respond to the request. Verified Petition, Exhibit D.

10. On July 26, 2019, in a letter signed by each of the three county commissioners, Ada County advised that the commissioners had agreed to a one time waiver of the fees for the Cynthia Sewell public records request as a "good faith gesture." The letter stated that an attorney would begin reviewing the emails. Verified Petition, Exhibit E.

11. Ada County's communications manager indicated that documents responsive to the Sewell public records request would be provided but contained redactions which were due to "Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege Information." Documents, a substantial portion of which were heavily blacked out, were provided. Verified Petition, Exhibit F. On August 26, 2019, 511 pages of documents were provided to Cynthia Sewell in response to her request for public records made on February 15, 2019. Many of the records are blacked out. Ada County said that the records which were

blacked out and not made available were due to: "Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege." *Id.* There was no citation whatsoever to any specific statutory ground for any denial as required by I.C. § 74-103(4).

12. On July 11, 2019, Jennifer Swindell, a member of the Idaho Press Club and editor of the Idaho Education News, made a public records request for all public records requests made to Ada County in 2019. The request was limited to only the actual requests and the county's responses, not the documents themselves. On July 25, 2019, Ada County produced the requests but blacked out the addresses, phone numbers and emails of all the people who had made public records requests on the basis that personal contact information was exempt from disclosure but it cited no authority for that proposition. Verified Petition, Exhibit J.

13. On August 1, 2019, Katy Moeller, a reporter for the Idaho Statesman and also a member of the Idaho Press Club, made a request by email to Patrick Orr, the Public Information Officer of the Ada County Sheriff's Office, for a recording of 911 calls reporting injuries sustained in a scooter accident in Boise on July 26, 2019. Mr. Orr replied by email that if it was still under investigation, the request would be denied. If not, the same email advised that Ms. Moeller would need to get permission from the individuals who placed the 911 calls before the calls would be released but, if she got permission, he would "pull" them. Verified Petition, Exhibit K. This was a catch-22 since the names of the callers were unavailable. Although Mr. Orr does act as a media contact and provides information to reporters, he is not actually one of the two people in the Ada County Sheriff's Office who handles formal public records requests. There is no record of a formal public records request for the 911 calls.

14. The Idaho Press Club is a voluntary membership trade association. Betsy Russell is the current President of the Idaho Press Club. Melissa Davlin is the Vice President and First

Amendment Committee Chairwoman of the Idaho Press Club. The Idaho Press Club has had to spend its funds on the costs and expenses of this case and divert them from other aspects of the Idaho Press Club's mission. Cynthia Sewell, Jennifer Swindell and Katy Moeller are also Idaho journalists and members of the Idaho Press Club.

15. A petition under the Idaho Public Records Act was filed on September 3, 2019 by the Idaho Press Club on behalf of itself and its members. The unredacted documents were provided to this Court prior to the hearing on October 2, 2019[2] which was the hearing required under I.C. § 74-116(1).

III.

Ada County's Motion to Dismiss

A. Standards.

When a motion to dismiss is supported with factual allegations outside of the pleadings, the motion is treated as one for summary judgment. I.R.C.P. 12(d); *Paslay v. A & B Irrigation District* 162 Idaho 866, 868–69, 406 P.3d 878, 880–81 (2017). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). The moving party has the burden of establishing that there is no genuine issue of material fact. I.R.C.P. 56(c)(1); *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). A verified pleading is treated as an affidavit if it satisfies the requirement of I.R.C.P. 56(c)(4), that is: it is made on personal knowledge, sets forth facts admissible in evidence and is made by one who is competent to testify to those facts. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 918, 188

[2] The hearing was initially set for September 25, 2019 as required by I.C. § 74-115 (1) but was continued to October 2, 2019 at the request of the parties.

P.3d 854, 860 (2008); *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct. App. 1984). Ada County has filed a number of declarations. The Idaho Press Club also filed a declaration. The verified petition from the individuals with personal knowledge about those facts and provides facts which are admissible in evidence.

Ada County contends that this action should be dismissed because of insufficiency of process or service of process and failure to state a claim upon which relief can be granted pursuant to I.R.C.P. 12(b)(4), (5) and (6). It challenges the designation of "Ada County" as the named defendant and its service. As far as its failure to state a claim argument, Ada County asserts that the Idaho Press Club lacks standing to bring this action on behalf of its members who made the requests which were denied or denied in part.

B. Insufficiency of Process/Service of Process

Ada County moves for dismissal under Rule 12(b)(4) and (5), insufficiency of process and insufficiency of service of process, because the Idaho Press Club failed to name the Ada County Board of Commissioners and the Ada County Sheriff's Office as parties, instead only naming and serving Ada County as the defendant. The argument is without merit. The Act does not require that a sub-part of a public agency be named as the respondent. If a request is denied, then the "public agency" is the respondent. I.C. § 74-115 provides:

> (1) The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of this chapter. The petition contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic. In cases in which the records requested are claimed as exempt pursuant to section 74-107(1) or (24), Idaho Code, the petitioner shall be required to name as a party and serve the person or entity that filed or provided such documents to the agency, and such person or entity shall have standing to oppose the request for disclosure and to support the decision of the agency to

> deny the request. The time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing.

(emphasis added). A "'[p]ublic agency' means any state or local agency as defined in this section." I.C. § 74-101(11). A county is a local agency under the Idaho Public Records Act and therefore also a "public agency." I.C. § 74-101(8) and (11). Exemptions pursuant to I.C. § 74-107 (1) and (24)[3]are not applicable in this situation, therefore it is unnecessary that the person or entity that provided such documents to the agency be named as a party and served. Ada County is properly named as the respondent.

C. Standing

Melissa Davlin's request was made on behalf of the Idaho Press Club. Each of the requesters of public records in this case is a member of the Idaho Press Club which is a voluntary membership organization of Idaho journalists. Under the Idaho Public Records Act, any "person" may seek to inspect a public record. "Person" is defined broadly as "any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity. I.C. § 74-101(9). An association whose members, as well as the association itself, which made a public records request is a proper party to bring an action under the Idaho Public Records Act when there is a denial. I.C. § 74-115. Every time "person" is referred to in the Act, it is necessary to circle back to the broad statutory definition of that word. Each of the reporters who made a request for a public record which was denied could have filed a separate action. If they had filed separate actions, the preferred course of action would have been to consolidate them into one proceeding since it is the most reasonable and efficient use of

[3] 74-107(1) exempts certain trade secrets and 74-107(24) exempts certain records relating to property tax assessments.

judicial and party resources at both the trial and appellate level.

There are a cluster of doctrines designed to ensure that the disputes brought before the court system are thoroughly developed and advanced by those with a driving interest in the just resolution of a real dispute. The doctrine of standing is designed to insure that a person advancing a legal theory is so directly concerned about the issues involved in a particular case that they will develop the facts and the law as strenuously as possible. Courts are not designed to resolve academic debates or to serve as commentators or talk show hosts. Courts are designed to resolve real disputes between parties who have a direct stake in the outcome of the case. Real litigants involved in real disputes have every motive to flesh out the case factually and legally with the goal of arriving at the most just and reasonable resolution of a controversy. "The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has 'alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions.'" *Employers Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 779, 405 P.3d 33, 38 (2017) (internal citations omitted).

Each of the reporters who made a request which was denied had standing to bring a separate action. Melissa Davlin specifically made her request on behalf of the Idaho Press Club. The Idaho Press Club also has associational standing. In its Verified Petition, the Idaho Press Club describes itself as:

> ...an Idaho non-profit corporation serving as a statewide association of working journalists from all facets of the media. Its mission is to promote excellence in journalism, freedom of expression, and freedom of information. For decades it has fought for open records and all aspects of freedom of the press, in the courts, in the legislature and in the public arena. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller are all Idaho journalists and members of the Idaho Press Club. The Idaho Press Club brings this action on their behalf and on behalf of its other members.

The United States Supreme Court in *Hunt v. Washington Apple Advertising Com'n* 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) held that where a state agency also acted as a traditional trade association which promoted the Washington apple industry, it was entitled to standing in an action challenging another state's restrictions on advertising the source and grading of apples shipped to the other state. The *Hunt* Court held that an association had standing to bring a suit on behalf of its members if:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Id., 432 U.S. at 344, 97 S. Ct. at 2442. The three part test in *Hunt* was adopted in Idaho in *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006). In *Beach Lateral*, a case involving confirming a ditch easement, associational standing was found for injunctive relief but not for quieting title, as requested in the action, because it required the participation of the individual landowning members in the lawsuit.

In this case, each of members of the Idaho Press Club would have standing to sue in their own right. They are each members of the Idaho Press Club. The interests that the Idaho Press Club seeks to protect—freedom of expression and freedom of information are central to its purpose. The Idaho Press Club has a central interest in providing information to the general public about how elected officials and public employees handle public matters and perform their duties. The first and second prongs are present as Ada County concedes. The relief sought in this case is the compelling of public records. The Idaho Supreme Court in *Beach Lateral* provided the following guidance:

> The question of associational standing often turns on the nature of the relief sought. When an association seeks some form of prospective relief, such as a declaration or an injunction, its benefits will likely be shared by the association's members without any

> need for individualized findings of injury that would require the direct participation of its members as named parties. *Hunt,* 432 U.S. at 343, 97 S.Ct. at 2441, 53 L.Ed.2d at 394. "Indeed," wrote the United States Supreme Court in *Hunt,* "in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Id.* (quoting *Warth,* 422 U.S. at 515, 95 S.Ct. at 2213, 45 L.Ed.2d at 364).

142 Idaho 600, 603–04, 130 P.3d 1138, 1141–42. Generally, if an injunction is requested, then it serves the purpose of all the members equally and the third prong is met. The compelling of disclosure of public records which were the subject of a proper public record request is in the nature of injunctive relief. The relief sought in this case is the release of public records to the public. Since there is a presumption under the Idaho Public Records Act that all records maintained by a public agency are available to the public, Ada County bears the burden to show that an exemption applies. If Ada County does not, the public records are released. Because of the kind of relief sought, which is identical to injunctive relief, associational standing is proper. That being the case, it is unnecessary to address the Idaho Press Club's argument regarding organizational standing.

The Idaho Press Club has a genuine stake in how the government responds to public records requests by its members. It has every motive to flesh out the case factually and legally. It has the personal stake in the outcome of the controversy and "the concrete adversariness which sharpens the presentation" upon which a court depends for the just resolution of disputes. The Idaho Press Club has standing to file this Petition.

D. Relief under the Idaho Public Records Act and Declaratory Judgment

The petition was brought under I.C. § 74-115 which allows the person whose request for the disclosure of public records to bring an action in district court in the county where the records are located. Nothing in the Idaho Public Records Act prohibits the joinder of similar claims. When it appears that a public record has been improperly withheld, the official who

withheld it must justify the non-disclosure. The Court can, as it has here, examine the records *in camera*, and order the disclosure of improperly withheld records. I.C. § 74-116. The process requires the court to scrutinize the reason for non-disclosure to determine if the public agency has the statutory authority for the denial. I.C. § 74-103(4). The statute creates a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute. The public agency bears the burden of proving that a document not disclosed fits within one of the "narrowly construed exemptions" *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002) citing *Federated Publications, Inc. v. Boise City,* 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). The Idaho Public Records Act requires the court to examine the requests, the basis for the denials and declare the rights of the parties. In every case involving the application of a statute, the court is declaring the rights of the parties.

The coupling of the statutorily authorized right to petition the courts when a record is claimed to be exempt with a request for declaratory relief does not warrant dismissal of the action even though it may be redundant. A declaratory judgment action is authorized:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

I.C. § 10-1201. The Declaratory Judgment Act is remedial and designed to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered. I.C. § 10-1212. The additional request for declaratory relief in addition to relief under I.C. § 74-115 and I.C. § 74-116 is not grounds for dismissal. In any event, this case already requires the Court to consider Ada County's compliance with the statute and the rights of the parties directly involved in this case.

CONCLUSION

The Idaho Press Club has standing to bring this petition since it reflects public records act requests made by its members. There is no basis to dismiss the Petition. The motion is denied.

IV.

Idaho Press Club's Petition to Compel Disclosure

A. Introduction.

Whenever a public records request is expressly denied or deemed denied when it is not responded to within the timelines set forth by the Idaho Public Records Act, those requesting the records are authorized to file a petition in the district court of the county where the records are located to compel their production. I.C. § 74-115. The district court is then directed to set a hearing at the "earliest possible time" or not later than twenty-eight days from the filing of the petition. *Id.* The petition was timely filed. The issues which were asserted in the Motion to Dismiss are resolved. The Court has reviewed the records *in camera.*

Ada County failed to comply with the Idaho Public Records Act. Idaho law makes all public records available for public inspection at all reasonable times. I.C. § 74-102. The burden is on the public agency to justify any denial by pointing to the statutory authority for the denial. I.C. § 74-103(4). Any exemptions are narrowly construed. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002); *Federated Publications, Inc. v. Boise City,* 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). Ada County has the burden of establishing that any documents not disclosed fit within one of the "narrowly-construed exemptions." *Id.*

Ada County did not timely respond to the requests. It did not follow the mandatory statutory timelines nor did it even seek a "mutually agreed upon" extension for any request.

When it did respond, it did not specify the specific statutory authority for any of its denials. Moreover, it has not met its burden in this Court of proving that the documents requested fit within one of the statutory exemptions. Ada County has not met its responsibilities under the Idaho Public Records Act. While it can be difficult to reply within the timelines established by the Legislature because of the number of public records being sought and the process needed to locate them, Ada County should have communicated with the requesters, been transparent about the challenges and worked on the statutorily required "mutual" exension. Ada County did not adequately detail its costs for production of the public records. Most seriously, the vague denials for: "Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege" do not satisfy Ada County's burden under the Idaho Public Records Act.

1. **Timeliness.** None of the records requested in this case were timely supplied nor is there any evidence that there was ever any formal "mutually agreed upon extension" as specified by the Idaho Public Records Act. No record was supplied within three business days nor were any records provided within ten working days after Ada County's written notice that three days was insufficient time. If there is not a mutually agreed upon extension, then the request is deemed denied and the person who made it may bring an action in district court. In this case, Cynthia Sewell, Melissa Davlin and Jennifer Swindell did receive heavily redacted documents as well as documents redacted in their entirety but substantially after the timelines required by the Idaho Public Records Act.

2. **Fees.** There is no charge for the first two hours of labor or for copying the first one hundred pages of public records. I.C. § 74-102(10).[4] Thereafter, a fee may be charged which does not exceed the actual cost to the public agency of the copy, or the cost of conversion of electronic

[4] The Ada County website for public records request did not contain accurate information on costs since it neglected to advise that the first two hours of labor and first 100 pages copied were free.

records to another electronic form. I.C. § 74-102(10)(d). Reasonable labor costs, after the first two free hours, may be charged at the rate of the lowest paid administrative staff and if redactions are required, by the per hour rate of the lowest paid attorney within the public agency or the usual and customary rate of attorneys retained for that purpose if the public agency does not have an attorney on staff. Statements of fees are required to be itemized to show per page costs for copies and the hourly rate of employees and attorneys involved in responding to the request and the actual time spent on the records request. I.C. § 74-102(10)(g). Lump sum costs cannot be assigned to any public records request. *Id.*

Cynthia Sewell's public records request was made on February 15, 2019. The first response for the request for public records about the possible sale of the Les Bois racetrack came on April 3, 2019. By letter dated April 5, 2019, Ada County did provide the information that there were a number of emails to review and that the free two hours of labor provided by statute had been exhausted. In the letter, Ada County estimated that 16.5 additional hours of work would be required with charges for an unspecified number of hours for IT professionals at $50.00 per hour and for lawyer assistance at $42.14. There was no cost breakdown beyond the hourly charges and the overall estimate for time required for the work. Ada County asked for payment of $695.31 before the documents would be handed over. The letter indicated that the attorneys had "reviewed the request and the files." Petition, Exhibit B. On April 11, 2019, Ada County sent another letter, this time reducing the fee to be charged to $521.48. Petition, Exhibit C. The April 11th letter did provide more detailed information about the work required to answer the request although, oddly, in light of the April 5, 2019 letter it refers to "beginning the review" and "finishing the review" of the requested documents and that a lawyer would look at the documents but it would be on top of the lawyer's regular duties. The clear implication of the

letter is that holding one's breath for a response could be fatal. The letter ended with the advice on the appeal period if Ms. Sewell viewed it as a denial.

A public agency is entitled to charge a fee up front for responding to a public record request that exceeds the free labor and page amounts provided by law. I.C. § 74-102(10)(e) and (12). The Idaho Public Records Act expressly requires that the costs be itemized and bars lump sum costs. I.C. § 74-102(g). The lump sum figure provided in the April 5th and 11th does not meet the statutory requirements. Cynthia Sewell did not treat the letters as denials and did not file a petition to compel the response to the request. On July 23, 2019, she asked for a waiver or a more specific breakdown of the rates, time required, and which staff would be performing charged services. On July 26, 2019, Ada County waived all fees in a "one-time waiver."

The costs related to the Sewell request were not itemized as required by Idaho law. The costs bill did not contain the itemization of who would perform the work, what their rate was and how many hours the particular employee would be required to spend to do it. The Idaho Public Records Act does not have any statutory exemption for attorney review whenever the attorney gets around to it. The Idaho Public Records Act imposes tight deadlines. If the deadlines cannot be met, then there is supposed to be a mutually agreed upon timeline, not a unilateral one. However, since the fees were eventually waived, the cost issue on the Sewell request is moot.

3. Procedure to make a Public Records Request. A public agency may designate a custodian or custodians for agency's records. I.C. § 74-102(16). The custodian includes any public official who has authorized access to public records and their delegates or representatives. *Id.* The public agency may require that requests be made in writing, including by email. I.C. § 74-102(4). The Sewell, Davlin and Swindell requests were made in accordance with the procedure set out on the Ada County website. The request for the 911 calls on the scooter accident was

made to the public information officer, Patrick Orr, but was not made under the formal procedure set out by Ada County. Unless the procedure for a public records request established by a public agency is followed, a petition to compel the disclosure of public records is premature.

4. Procedure for denial. If a public record is not provided because there is a specific statutory basis for an exemption, the Idaho Public Records Act requires the public agency to specify the statutory basis. I.C. § 74-103(4) states: ...[T]he notice of denial or partial denial also shall indicate the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so." None of the denials or partial denials in this case indicated any statutory basis for the denial or partial denial.

5. Non-statutory denials.

a. Privacy. The Idaho Public Records Act has a number of specific statutory exemptions which address privacy concerns. For example, juvenile records are largely exempt, I.C. § 74-105(2). Records of the Idaho department of juvenile corrections "including records containing the names, addresses and written statements of victims and family members of juveniles, shall be exempt from public disclosure" pursuant to I.C. § 20-533A and I.C. § 74-105(3). Records collected as part of the presentence process are exempt from disclosure. I.C. § 74-105(4)(a)(iv). Many Department of Corrections records are exempt from disclosure. *Id.* Public employee personnel records are exempt from disclosure except for employment history, classification, pay grade, salary etc. I.C. § 74-106 (1). The home address and telephone number of current and retired public employees is exempt from disclosure without the employee's consent. I.C. § 74-106(1) and (2). Voter registration information which includes the voter's physical address, while generally available except for driver's license numbers and date of birth, can be withheld for crime victims or law enforcement officers. I.C. § 74-106 (25) and (30). Victims of stalkers or

domestic violence can have protection under the Idaho Public Records Act from disclosure of their home address. I.C. § 74-106(27) and I.C. § 19-5701 et. seq. Trade secrets and production records are exempt from disclosure along with archeological site locations, records of the books a patron has checked out of a library just to list a few. I.C. §§ 74-107, 108. While Ada County argues that privacy protections are important, it is abundantly clear that the Legislature is also aware of the need for privacy protection and has created specific statutory exemptions to maintain the privacy of many types of records. The concern that Ada County expresses that it might be subject to legal liability for disclosing private information is not persuasive since it has immunity under I.C. § 74-118. There is no basis for this Court to adopt the amorphous privacy exemption argued for by Ada County. The Idaho Public Records Act and the cases interpreting it have recognized that the Legislature has created specific exemptions which are to be narrowly construed. The broad "Privacy" basis for not providing public records information requested as argued by Ada County has no basis in any specific exemption or anywhere else in Idaho law. Ada County's interpretation of I.C. § 74-104(1) which provides that: "[a]ny public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation" justifies its vague and unstructured right to exclude whatever information it deems as private is not supportable. First, if there is a specific state or federal law which precludes disclosure of a public record, then Ada County must cite to it. Secondly, such a broad, standard-less interpretation of I.C. § 74-104(1) would negate the entire Act. The policy of the Act is that records of the public's business are open to examination by the public. No public agency has a right to create exemptions in addition to that already provided for by the Legislature. When the Legislature has chosen to create numerous specific statutory exemptions, it is a clear indication that they have created what they meant to create. *Bolger v.*

Lance, supra.; *Federated Publications, Inc. v. Boise City,* supra. Whether it would be a good idea to expand the law to include greater privacy protections is an argument which should be made to the Legislature.

Ada County's generic claim of "Privacy" without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." For that reason alone, all documents in response to each request which was denied because of "Privacy" must be provided. Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. The Idaho Public Records Act does not exempt the email or street addresses and names of people who submit public records requests, or ask for interviews with Ada County Commissioners or generally correspond with them. All information requested and gathered in response to Jennifer Swindell's public records request must be provided. All information redacted for "Privacy" alone must be provided to Cynthia Sewell and Melissa Davlin. Ada County's approach to this particular issue where it even deleted the reporter's own email address and emails asking about the status of their public records request because of "Privacy" is so lacking in good faith that it is striking. Whether those redactions were meant humorously, they are improper and not justified by any statutory exemption.

b. Redactions for "Personnel". Ada County's generic claim of "Personnel" as a basis for non-disclosure without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." I.C. § 74-106(1) does authorize the non-disclosure of the names of public employees or their positions. None of the personnel information involved "information

regarding sex, race, marital status, birth date, home address and telephone number, social security number, driver's license number, applications, testing and scoring materials, grievances, correspondence and performance evaluations." Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. While it cited a statutory exception which related to personnel and there are specific personnel information exclusions, none of them apply.

c. Deliberative Process Privilege. A considerable number of records were withheld because of Ada County's assertion of a "Deliberative Process Privilege." Nowhere in the Idaho Public Records Act is there a "Deliberative Process Privilege." The Idaho Public Records Act does protect some of the Legislature's own deliberative processes from public disclosure. Draft legislation and documents relating to it and research requests submitted to Idaho's legislative services office by a member of the Legislature are exempt from disclosure. I.C. § 74-109(1). However, there is no broad Idaho "Deliberative Process Privilege" even though the Legislature was presumably also aware of federal law which recognizes such a privilege. The federal Freedom of Information Act has had a specific exemption for the deliberative process privilege since its enactment in 1988. The purpose of the federal deliberative process privilege is to allow frank debate of options, "suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency" or represent views that are being tossed around but are not the final policy of a federal agency. See, *e.g., Sierra Club, Inc. v. United States Fish & Wildlife Serv.*, 925 F.3d 1000, 1015 (9th Cir. 2019)(petition for writ of certiori filed October 25, 2019). The deliberative process privilege has been the subject of considerable litigation. The federal FOIA also establishes a policy of open access to public records with exceptions narrowly construed. The debate in the federal cases over the tension

between FOIA's general principles mandating public access to information and the exclusion of records because of the application of the "deliberative process privilege" reflects considerable concern over the risk of the exception devouring the principle of public access. As Judge Winmill discussed in *Andrus v. United States Dep't of Energy*, 200 F. Supp. 3d 1093, 1105 (D. Idaho 2016), the purpose of the deliberative process privilege is to allow the exploration of possibilities, to engage in debate and explore ideas without fear, at the earliest stages of a policy discussion, that public scrutiny will dampen the discussion. Since the deliberative process privilege has been a part of the federal Freedom of Information Act since 1988, the Legislature's decision not to include it in the Idaho Public Records Act is significant. Had they wanted to include the privilege, they could have done so. Instead, they carved out a narrower exemption for drafts of proposed legislation and communication with the legislative services office. There is no deliberative process privilege in the Idaho Public Records Act. This Court declines the invitation to make one up. Idaho has opted for greater transparency. The decision to narrow the range of public records open to the public belongs to the Legislature.

d. Attorney-Client Privilege. The Idaho Public Records Act provides broad access to all public records. Because government at every level in 2019 maintains all sorts of records on many subjects, the Legislature carved out a number of specific areas where records that governmental entities maintain are not available to the general public. Those are the specific statutory exclusions which a governmental body is required to cite to justify non-disclosure.

The attorney-client privilege and the attorney work product privilege are not specifically protected in any statutory exclusion although they are long-standing privileges in Idaho law. They are referenced in the Idaho Public Records Act in two separate sections: I.C. § 74-105(18) and I.C. § 74-107(11). I.C. § 74-107(11) states that: "nothing in this subsection is intended to

limit the attorney-client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic" which seems to imply that the attorney-client privilege and attorney work product privilege do protect public records that fall within their proper focus.

The United States Supreme Court has described the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). The privilege protects "not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390, 101 S.Ct. at 683. The privilege exists to "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389, 101 S.Ct. at 682.

In Idaho, the attorney-client privilege was first discussed in *Ex Parte Niday*, 15 Idaho 559, 98 P.845 (1908). The Supreme Court recognized that an attorney cannot, without the consent of his or her client, be examined as to any communication made by the client to the lawyer to obtain legal advice or to the lawyer's legal advice to the client. Letters disclosed to a third party and not written with respect to the employment of the lawyer nor for the purpose of obtaining legal advice, were not privileged. The Court said:

> The rule is intended to promote justice and protect persons who are obliged to disclose their private business affairs to an attorney in order to be advised of their legal rights and duties. It is defensive, and not offensive. It is intended as a shield, and not a sword. The communication must have been confidential and so understood and intended. Weeks on Attorneys, § 153; Sharon v. Sharon, 79 Cal. 678, 22 Pac. 26, 131; Hatton v. Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371; 10 Ency. of Ev. 270; State v. Kidd, 89 Iowa, 54, 56 N. W. 263.

Id., 15 Idaho 559, 98 P. at 847–48. 2. An attorney cannot, without the consent of his or her

client, be examined as to any communication made by the client to the lawyer or to the lawyer's advice given in the course of the professional employment. I.C. § 9-203. Communications not solely between the attorney and client are not privileged. What matters as to whether a particular communication is privileged under the attorney-client privilege is to whom the statements are made, whether they were confidential and whether they involve the providing of legal advice. Communications by a client or the lawyer about non-legal matters do not fall within the scope of the privilege. See, generally, *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980); *T3 Enterprises, Inc. v. Safeguard Bus. Sys., Inc.,* 164 Idaho 738, 435 P.3d 518 (2019); 24 Federal Practice and Procedure § 5478 (Wright & Miller). The name of the attorney is not privileged. Wright & Miller have observed that lawyers employed by the public as public officers such as prosecutors owe their duty to the public at large and the "right of the public to know how the public business is conducted may override the policy the privilege is thought to serve." *Id.* at 6 citing *Coastal Corporation v. Duncan*, 86 F.R.D. 514 (D.C. Del. 1980).

The attorney-client privilege applies to confidential communications between the public attorney and the public agency client for the purpose of giving or receiving legal advice. Public agencies enter into contracts, assess their legal positions in connection with various types of litigation against the public agency and have the same need as private parties for frank disclosure of all of the relevant facts by the "client" in order to receive sound legal advice. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980). However, in light of the strong policy of Idaho law requiring public disclosure to the public of the records of the public's business, the attorney-client privilege and attorney work product

privilege should be narrowly construed in the context of public agencies. Moreover, where an attorney is just responding to a public records request and is acting in an administrative or clerical capacity and there is neither a confidential communication nor any provision of legal advice, the attorney-client privilege and attorney work product privilege do not come into play. The attorney-client privilege attaches only when the attorney acts in that capacity, not in some other role. See, *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995). Simply having an attorney act as the point person to gather a public records request does not convert everything he or she touches to a communication covered by the attorney-client privilege or to attorney work product. The privileges applies to confidential communications made for the purpose of seeking and providing legal advice, not to clerical or administrative functions performed by a public employee who is a lawyer.

Sewell Request/ In-Camera Review. Emails and correspondence from the Special Assistant to the Ada County Commissioners which refer to a prosecutor's name or general subject matter which the deputy prosecutor might be working on do not fall within attorney-client privilege. The fact that legal matters are referred to as being areas of interest or that there are funding needs does not fall within attorney-client privilege. Multiple copies provided to various public employees of Cynthia Sewell's public records request are in no way covered by the attorney-client privilege or work product privilege even though they may have been forwarded by someone working in the Ada County Prosecutor's legal department to another public employee. None of the emails and correspondence Bates stamped 000453-467 fall within any attorney-client privilege nor are they exempt under any other permissible basis. Drafts of letters from legal counsel to the Ada County Commissioners do fall within attorney-client/ attorney work product. Bates stamped documents 000468-000471 are exempt from disclosure. Bates stamped

document 000499 is not attorney-client or attorney work product and must be disclosed. Cover letter and draft legal documents fall within attorney client privilege thus Bates stamped documents 000543-000547 are not subject to disclosure. Legal documents disclosed to third parties lose the protection of the privilege. Bates stamped documents 000567-000572 must be disclosed. Bates stamped document 000619 is not covered by attorney client privilege or work product. Bates stamped document 000620-626 are copies of Cynthia Sewell's public records request and are not covered by the attorney client privilege. Bates stamped document 000627-000633 are not covered by the attorney client privilege or work product privilege. Except for the documents expressly found to be attorney-client or attorney work product, all other documents must be provided since there is no legal basis for their non-disclosure.

Davlin Request/ In-Camera Review. The Court has reviewed all documents in non-redacted form gathered in response to Melissa Davlin's request. Attorney names are not confidential. The body of Bates stamped documents 000023—000025; and 000035 are exempt from disclosure. Bates stamped documents 000043-48 do not fall within the attorney-client privilege and must be disclosed. It is absolutely remarkable that Ada County would claim a privilege for the name of an attorney and the stock confidentiality notice. Bates stamped document 000060 must be disclosed since it does not fall within the privilege. Bates stamped document 000062-67 falls within the attorney client privilege and will not be disclosed. Bates stamped document 000070-74 falls within the attorney client privilege and will not be disclosed. Correspondence about the retrieval efforts to respond to the public records request of Melissa Davlin are not confidential communications related to the provision of legal advice even though a lawyer may have corresponded with the IT expert. The search parameters are not in reference to the provision of legal advice but to the response to the public records requests and are not privileged.

Conclusion

The Idaho Public Records Act mandates broad, timely access to the records of the public's business upon request. A public record can only be withheld if there is a clear and statutorily-grounded justification. I.C. § 74-101(13). The Idaho Press Club has associational standing to bring this petition on behalf of the members of the association who made requests which were denied. Ada County is the properly named party-defendant. There is no basis to dismiss this petition.

Ada County's approach to handling the Idaho Public Records Act requests in this case was troubling. The Act favors timeliness, narrow exclusions and openness; Ada County's approach emphasized delay, unsupportable interpretations of privilege and secrecy. Ada County not only did not follow the Idaho Public Records Act, it acted as though a different Act had been enacted—a reverse image of Idaho law. No public agency is free to create its own Public Records Act. Vague, over-reaching denials for "Personnel" or "Privacy" without citing the Act's specific personnel or privacy protections is not permissible. There is no "Deliberative Process" privilege in Idaho law. While the attorney-client privilege can be asserted for confidential communications between a lawyer and the client for the purpose of legal advice, delegating the administrative/clerical function of gathering public records to a lawyer does not make everything the lawyer touches or copies other employees subject to the protection of the privilege. Ada County's refusal to provide records was frivolous and it has frivolously pursued its positions in this case. See *Hymas v. Meridian Police Dep't*, 156 Idaho 739, 747, 330 P.3d 1097, 1105 (Ct. App. 2014). With the exception of a few records, no privilege applies.

The Idaho Legislature has determined that, in this State, government business must

largely be conducted in public view with quick access to public records. The Legislature did not choose to create any "deliberative process privilege" even though that has long been a component of the federal government's Freedom of Information Act. With the exception of the request for the 911 call which needed the formal public records request which the Act allows public agencies to require, the Court finds that the evidence is overwhelming that public records were improperly and frivolously withheld. The Idaho Press Club is the prevailing party and is entitled to its attorney fees and costs. The Petition to Compel is granted. The documents must be supplied forthwith.

It is so ordered.

Dated this 12th day of December, 2019.

Deborah A. Bail

Deborah A. Bail
District Judge

APPENDIX C

Order Denying Request for Hearing and Motion Authorizing Discovery

IDWR Docket No. CM-DC-2010-001

(August 23, 2023)

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. CM-DC-2010-001 **ORDER DENYING REQUEST FOR HEARING AND MOTION AUTHORIZING DISCOVERY**

BACKGROUND

On June 6–9, 2023 a hearing was held on the Department's April 21, 2023 *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fifth Methodology Order"). On July 19, 2023, the Director of the Idaho Department of Water Resources ("Department") issued his *Post-Hearing Order Regarding Fifth Amended Methodology Order* ("Post-Hearing Order") and *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Sixth Methodology Order"). The Sixth Methodology Order corrects data in the Department's Fifth Methodology Order found to be in error during the hearing held in this matter. The Sixth Methodology Order, like the Fifth Methodology Order, comprises nine steps to determine material injury to members of the Surface Water Coalition ("SWC").

On August 3, 2023, the Department received the *City of Pocatello's, City of Idaho Falls', and Coalition of Cities' Request for Hearing and Order Authorizing Discovery* ("Request for Hearing and Discovery"). The Request for Hearing and Discovery asks the Director to hold a status conference to schedule a four-day hearing, pursuant to Idaho Code § 42-1701(A)(3), on the Sixth Methodology Order and for an order authorizing discovery, pursuant to IDAPA 37.01.01.521. *Request for Hearing and Discovery* at 2–3. Four issues for hearing are identified in the Request for Hearing and Discovery:

> a) Whether the members of the Surface Water Coalition ("SWC") operate reasonably and without waste;
>
> b) Whether the irrigated acreage numbers for the SWC members in the Sixth Methodology Order are accurate;
>
> c) Whether the number of acres irrigated with supplemental groundwater rights within the service areas of the SWC members can be accurately determined; [and]

d) Whether the number of acres irrigated with enlargement rights within the service areas of the SWC members can be accurately determined[.]

Id. at 2.

On August 22, 2023, the Department received the *Surface Water Coalition's Response to Cities' Request for Hearing and Order Authorizing Discovery* ("SWC's Response"). The SWC's Response requests the Director "deny or limit the Cities' request for hearing and an order authorizing discovery . . . ." *SWC's Response* at 7.

ANALYSIS AND CONCLUSIONS OF LAW

A. Request for hearing.

Idaho Code § 42-1701A(3) states in relevant part:

> Unless the right to a hearing before the director . . . is otherwise provided in by statute, 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(3) (emphasis added). The parties have previously been afforded an opportunity for hearing on the issues identified related to the Sixth Methodology Order and are not entitled to a hearing pursuant to Idaho Code § 42-1701A(3).

Over the course of four days, the Director heard testimony regarding the Fifth Methodology Order, including testimony on the reasonableness of the SWC's efficiency and waste and the accuracy of the irrigated acreage numbers utilized. "Testimony at the hearing established that the SWC entities operated efficiently within the limits of their delivery system." *Post-Hearing Order* at 23. "The ground water users did not establish an alternative number of acres irrigated by clear and convincing evidence." *Id*. at 19. "The record in this matter . . . lacks sufficient evidence to justify a reduction of the total number of acres irrigated with surface water by SWC members." *Id*.

A hearing on the Fifth Methodology Order was held less than one month before the Request for Hearing and Discovery was filed. The Sixth Methodology Order was issued as a direct result of the hearing. While methodology orders in this matter are subject to review and revision as conditions and the best available science change, *see In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013), that review cannot reasonably be interpreted to equate to a right to a revolving door of administrative hearings. The Director therefore denies the request for hearing.[1]

[1] The Director emphasizes that this denial does not prevent the ground water users from presenting updated scientific information or data to the Director in the future. For example, if the ground water users prepare a new

B. Motion to Authorize Discovery.

The Request for Hearing and Discovery requests "an order authorizing discovery so that they can investigate SWC members' operations and obtain the information and data necessary to properly litigate the issues listed above." *Request for Hearing and Discovery* at 2–3. Because the Director is denying the request for hearing, the request to authorize discovery is moot. The Director therefore denies the request for discovery.

ORDER

IT IS HEREBY ORDERED that the *City of Pocatello's, City of Idaho Falls', and Coalition of Cities' Request for Hearing and Order Authorizing Discovery* is DENIED.

DATED this 23rd day of August 2023.

GARY SPACKMAN
Director

analysis of hardened acres within the boundary of a SWC member, this would be new information the Director may consider in the future.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	☒ U.S. Mail, postage prepaid ☒ Email
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Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

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

PETITION FOR RECONSIDERATION

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

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person 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. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

APPENDIX D

Appellant's Opening Brief

In re SRBA - CASE NO. 39576, Idaho Conservation League, Inc., Idaho Rivers United, Inc., Idaho Wildlife Federation, Inc., and Northwest Resource Information Center, Inc., Petitioners/Appellants/Cross-Respondents, v. The State of Idaho, Rim View Trout Company, Nampa & Meridian Irrigation District, Grindstone Butte Mutual Canal Company, Hagerman Water Rights Users, Clear Springs Trout Company, and A&B Irrigation District

1994 WL 16179492

(Apr. 8, 1994)

1994 WL 16179492 (Idaho) (Appellate Brief)
Supreme Court of Idaho.

In re SRBA - CASE NO. 39576,
Idaho Conservation League, Inc., Idaho Rivers United, Inc., Idaho Wildlife Federation, Inc., and Northwest Resource Information Center, Inc., Petitioners/Appellants/Cross-Respondents,
v.
The State of Idaho, Rim View Trout Company, Nampa & Meridian Irrigation District, Grindstone Butte Mutual Canal Company, Hagerman Water Rights Users, Clear Springs Trout Company, and A & B Irrigation District, Respondents,
and
Boise-Kuna Irrigation District, New York Irrigation District, Wilder Irrigation District, Big Bend Irrigation District, Idaho Power Company, Twin Falls Canal Company, North Side Canal Company, Pioneer Irrigation District, and Settlers Irrigation District, Respondents/Cross-Appellants.

No. 21144.
April 8, 1994.

Appeal from the District Court of the 5th Judicial District for Twin Falls County, Honorable Daniel C. Hurlbutt, Jr., Presiding.

Appellants' Opening Brief

Laurence (“Laird”) J. Lucas, residing at Boise ID. and Scott W. Reed, residing at Coeur d'Alene ID. for Appellants and Cross-Respondents Idaho Conservation League, Idaho Rivers United, Idaho Wildlife Federation, and Northwest Resource Information Center.

Clive J. Strong and David J. Barber, residing at Boise ID, for Respondent State of Idaho.

Don A. Olowinski and Richard B. Burleigh, residing at Boise ID, for Respondents and Cross-Appellants Boise-Kuna Irrigation District, New York Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District.

James C. Tucker and John K. Simpson, residing at Boise ID, for Respondents and Cross-Appellants Idaho Power Company, Twin Falls Canal Company, and Northside Canal Company.

Scott L. Campbell, Bobbi K. Dominick, and Harry M. Lane, residing at Boise ID. for Respondents and Cross-Appellants Pioneer Irrigation District and Settlers Irrigation District.

William F. Ringert, residing at Boise ID, for Respondents Rim View Trout Company, Nampa & Meridian Irrigation District, and Grindstone Butte Mutual Canal Company.

Patrick D. Brown, residing at Twin Falls ID, for Respondents Clear Springs Trout Company and Hagerman Water Rights Owners.

Roger D. Ling, residing at Rupert ID, for Respondent A & B Irrigation District.

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***ii TABLE OF CASES AND AUTHORITIES**

CASES

***1** *STATEMENT OF THE CASE*

1. Nature Of The Case

This appeal presents the narrow legal issue: Does the Snake River Basin Adjudication ("SRBA") court have the power, authority, or jurisdiction to consider the Public Trust Doctrine within the SRBA?

The SRBA court. Honorable Daniel C. Hurlbutt, Jr. presiding, concluded that since the legislature did not expressly authorize it to consider the public trust, the court lacks the jurisdiction to do so. Accordingly, Appellants Idaho Conservation League. Idaho Rivers United, Idaho Wildlife Federation, and Northwest Resource Information Center (jointly. "Conservation Groups"), were denied leave to intervene in the SRBA in order to raise objections based on the Public Trust Doctrine. They are appealing from that denial of intervention.

The prior decisions of this Court, including *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983), and *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), compel reversal. Authority to consider the Public Trust Doctrine does not depend on legislative permission, but arises instead from the judiciary's constitutional role as a coordinate department of government, which is vested with a sovereign fiduciary duty to protect the public trust. As stated in *Kootenai* and *Shokal*, "the public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources," and "final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary."

There can hardly be a more important application of those public trust responsibilities than the SRBA, a comprehensive proceeding in which the rights to use all waters of the Snake ***2** River Basin will be determined. However, no other party will raise public trust issues in the SRBA, unless the Conservation Groups are permitted to. Accordingly, the decision denying intervention to the Conservation Groups should be reversed.

2. Course Of Proceedings Below

On April 30, 1993, the Conservation Groups filed a Motion To Intervene in order to raise the Public Trust Doctrine in Basin 36, one of the "test basins" in the SRBA. R. Vol. I, pp. 9-11. The Motion To Intervene accompanied both general and specific Objections to water rights claimed in Basin 36, R. Vol. I, pp. 9-11, 23, 40-48, 229-230. [1] The Conservation Groups sought both intervention by right under Idaho Rule of Civil Procedure 24(a), or permissive intervention under Rule 24(b), to file these objections. R. Vol. I, pp. 9-11, 22-35. [2]

Notably, the Idaho Department of Water Resources ("IDWR"). through the Attorney General, did *not* oppose the Motion to Intervene. R. Vol. I, pp. 227-233. IDWR stated that it "does not admit that the Public Trust Doctrine applies in the adjudication of state acquired water rights in Idaho." but that it "supports early resolution of whether this doctrine imposes additional requirements on the Snake River Basin Adjudication." *Id.*, at pp. 232-232. However, numerous private water users -- Respondents here -- did oppose the motion, asserting various reasons why the Conservation Groups could not intervene in the adjudication and why the Public Trust Doctrine does not apply in the SRBA. *See* R. Vol. I, pp. 59-226.

***3** A hearing on the Motion to Intervene was conducted on June 15, 1993. R. Vol. I, pp. 236-242. After taking argument, the SRBA court orally denied the motion. R. Vol. I, p. 241; Tr., Vol. I, pp. 1-8. Thereafter, a written "Order Denying Motion for Leave to Intervene and To File Non-Conforming Objections" was entered on July 28, 1993 (hereafter, "July 28th Order"). R. Vol. I, pp. 289-292.

The Conservation Groups filed a Motion To Reconsider Denial Of Motion To Intervene, pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B), on July 19, 1993. R. Vol. I, pp. 243-286. Again, the State of Idaho (through IDWR) did not oppose the Motion To Reconsider. *See* R. Vol. II, pp. 294-370. Several private parties did submit briefs in opposition to the reconsideration motion. *Id.* Following a hearing conducted on August 24, 1993, the SRBA court took the matter under submission. R. Vol. II, pp. 371-76.

On January 14, 1994, the Court issued an "Order Granting, in Limited Part. Motion To Reconsider Order Denying Motion For Leave To Intervene" (hereafter. "January 14th Order"). R. Vol. II, pp. 377-386. The January 14th Order denied reconsideration of the SRBA court's prior ruling that the Conservation Groups would not be granted leave to intervene to raise the Public Trust Doctrine through objections in the SRBA. *Id.* The Conservation Groups timely filed a Notice of Appeal on February 25, 1994, R. Vol. II, pp. 482-486.

The January 14th Order did grant the Conservation Groups leave to intervene to raise statutory "local public interest" objections to a limited class of changed water rights claimed under the so-called "accomplished transfer" statute, I.C. § 42-1416A. and the "presumption statute." I.C. § 42-1416. R. Vol. II, pp. 377-386. That ruling is the subject of pending cross-appeals filed by several irrigation districts, canal companies, and others. R. Vol II, pp. 496- ***4** 510. Subsequent to the January 14th Order, however, the SRBA court entered an Order dated February 4, 1994, which declared the presumption and accomplished transfer statutes unconstitutional on due process grounds. R. Vol. II, pp. 462-481. [3] Thus, even the limited intervention granted to the Conservation Groups under those two statutes in the January 14th Order has now been completely negated.

3. Statement Of Facts

The Snake River Basin Adjudication was commenced in 1987 as a general water rights adjudication, pursuant to legislative authorization. *See generally* I.C. § 42-1401 *et seq.* The legislature directed that the SRBA be a comprehensive determination of all water uses in the Snake River Basin, in order to serve the public interest. The enabling statute, I.C. § 42-1406A. states:

Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of the surface and ground water from that system be determined. Therefore, the director shall petition the district court to commence an adjudication....

It is estimated that over 140,000 individual water rights will ultimately be adjudicated in the SRBA. accounting for about 87% of all surface and ground water in the State of Idaho. Krogh-Hampe. "Injury and Enlargement In Idaho Water Right Transfers." 27 *Idaho L. Rev.* 249 (1990-91). Surface waters affected include the Salmon, Clearwater, Payette. Weiser. Boise. Bruneau. Big and Little Wood. Big and Little Lost, Henry's Fork, South Snake, and mainstem Snake Rivers, as well as groundwater withdrawals from the Snake River Plain and other aquifers. *Id.*; *In re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78, 80-82 (1988). ***5** *cert. denied* 490 U.S. 1005.

The SRBA statutes provide that the director of IDWR ("director") is to take, investigate and recommend water rights claimed in the SRBA, and that recommended claims which are objected to will be resolved through the adjudication. I.C. §§ 42-1409 - 42-1412; *IDWR v. U.S.*, 122 Idaho 116, 832 P.2d 289, 291 (1992). *rev'd on other grounds*, 113 S.Ct. 1893 (1993). Pursuant to the statutes, the SRBA court has designated three "test basins" for initial recommendation of rights by the director -- Basin 34 (Reporting Area 1) in the Big Lost River area; Basin 57 (Reporting Area 2). in Owyhee County; and Basin 36 (Reporting Area 3). in the Hagerman Valley area north of the mid-Snake River.

The Conservation Groups are four nonprofit Idaho corporations dedicated to the preservation and wise management of Idaho's natural resources, including the state's fish, wildlife, and recreational treasures. R. Vol. I, pp. 9-11, 22-25, 28-30. They are statewide organizations working to protect the Snake River, its tributaries, and Idaho's ground water resources. *Id.* Idaho Conservation League has over 2,400 members, with over 2,200 residing in Idaho, *Id*. Idaho Rivers United has over 1000 individual members and 20 member groups in Idaho. *Id.* The Idaho Wildlife Federation has approximately 3,000 members in Idaho, while the Northwest Resource Information Center has been actively involved in Idaho water policy for many years. *Id.*

Members of the Conservation Groups fish, raft, swim, wade, photograph, study, and otherwise use and enjoy the waters that are the subject of the SRBA. R. Vol. I, pp. 9-11, 12-17 (Luntey and Pennington Affidavits), 22-25. In addition, members of the groups enjoy the quality of life and aesthetic benefits provided by intact ecosystems, clean water, and ***6** environmental health. *Id.* Recreational and aesthetic interests of the Conservation Groups' members will be affected by water rights determinations made during the SRBA. Specifically, member activities such as fishing in Billingsley Creek and the Middle Snake River, waterfowl hunting in the wetlands of Basin 36, and overall enjoyment of healthy riverine ecology are directly related to the amount and quality of water in Basin 36. *Id.*

The SRBA will permanently shape Idaho water use, and determine the quantity and quality of water in Idaho's streams, rivers, and lakes available to protect the health of Idaho's aquatic ecosystems, fish, wildlife. and recreation resources. Protecting those resources is central to the missions of the Conservation Groups, and is of vital and direct importance to their members. R. Vol. I, pp. 9-11, 12-17, 22-25, 28-30. Because of the SRBA's effect on the state's water resources, the Conservation Groups have sought to intervene in the SRBA. to promote public values such as navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality under the Public Trust Doctrine. R. Vol. 1. pp. 9-11, 12-17, 22-35, 40-48.

Those values will not be explicitly considered in any pan of the SRBA. unless the Conservation Groups are permitted to intervene to raise them. Importantly, the IDWR has expressly stated that the Public Trust Doctrine will *not* be taken into account or applied in recommending water rights claimed in the SRBA. *See* July 28th Order at 3 (R. Vol. I, p. 291): *see also* R. Vol. I, p. 240, L.

1-2330 -- 1-2340 (comments at hearing); R. Vol. 1, p. 231 (IDWR's Brief). No other party had even suggested that public trust concerns should be considered within the SRBA. until the Conservation Groups raised the issue.

In denying the Conservation Groups leave to intervene to raise the Public Trust Doctrine. ***7** the SRBA court made clear that its ruling was jurisdictional in nature. The SRBA court held that it lacks the power or authority to consider the Public Trust Doctrine at all. because the legislature has not expressly authorized it to do so. It also construed judicial review over the public trust to be appellate in nature only, which the court held was inapplicable in the SRBA. [4] The court's July 28th Order denying intervention stated:

Idaho Code § 42-1411 defines the elements of a water right which this court will confirm by order of decree. The public trust doctrine is not enumerated as an element of a water right. IDWR has stated that the public trust doctrine has not. and will not. be taken into consideration or applied in arriving at a recommendation of the elements of existing water rights, which are the subject matter of this action. Therefore, the public trust doctrine is not an element of those water rights over which this court has jurisdiction.

The objection and response process contemplated by I.C. § 42-1412 cannot be used by a party to collaterally attack IDWR agency determinations on the issuance of licenses or permits, nor can the adjudication be used to collaterally attack prior decrees. The SRBA is not a substitute for the normal appellate process which applies to those decisions.

In essence, this motion is for a writ of mandate requiring the Director to conduct investigations and make recommendations which would include the public trust doctrine as a judicially legislated element of a water right. The adjudication statutes do not so require and this court will not judicially legislate an element not specifically found in I.C. 42-1411.

July 28, 1993 Order at 3 (R. Vol. I, p. 291).

In the January 14th Order denying reconsideration of this ruling, the court reaffirmed its ***8** conclusion that it lacks jurisdiction over the Public Trust Doctrine, because the public trust is not an "element" of water rights and the court was not authorized by the legislature to consider public trust concerns. The order stated:

This court continues to adhere to its holding in the Order Denying Intervention that the "public trust doctrine" is *not* an enumerated element of a water right to be decreed in the SRBA .....

Reviewing the Conservation Groups' motion as it applies to claims and recommendations based on permits, licenses, constitutional appropriations and prior decreed rights requires reviewing this class of claims together. Unlike claims and recommendations based on I.C. § 42-1416 and I.C. § 42-1416A, there is no legislative requirement in the adjudication statutes (I.C. § 42-1401 *et seq.*) that the court apply the "local public interest" standard to this class of claims. In the Snake River Basin Adjudication, the legislature has only conferred jurisdiction on the court to review claims and recommendations for the purpose of entering decrees with respect to the statutory elements set forth in I.C. §42-1411. By its terms, I.C. § 42-1411 does not include the "local public interest" as an element of the right which must be reviewed by the court and included in a decree. That the "local public interest" standard is not included as an element in I.C. § 42-1411 is consistent with the very nature of the "local public interest" standard and "public trust doctrine" as it has evolved in Idaho.

... The Conservation Groups' *Motion to Reconsider* with respect to water rights claimed or recommended in the Snake River Basin Adjudication based on a permit, license, constitutional appropriation or prior decree is hereby *DENIED*.

January 14th Order at 4, 7-8 (emphasis in original) (R. Vol. II, pp. 380, 383-384).

The Conservation Groups now appeal the ruling that the SRBA court lacks jurisdiction to consider the Public Trust Doctrine, and the denial of intervention based on that ruling. Denial of intervention is a final order which is appealable. *Poage v. Cooperative Pub. Co.*, 57 Idaho 561, 66 P.2d 1119, 1123 (1937); *Walker Bank & Trust Co. v. Sieely*, 54 Idaho 591, 34 P.2d 56, 59(1934).

*9 *ISSUES PRESENTED ON APPEAL*

1. Does the SRBA court have the power or authority to consider the Public Trust Doctrine? Did the SRBA court err in concluding that it lacks jurisdiction over the Public Trust Doctrine?
2. Did the SRBA court err in denying the Conservation Groups leave to intervene to raise Public Trust Doctrine objections in the SRBA?

3. Are the Conservation Groups entitled to an award of attorney fees and costs below and on appeal under the private attorney general doctrine?

*10 *STANDARD OF REVIEW*

As noted, the SRBA court's denial of intervention to the Conservation Groups was based solely on legal and jurisdictional grounds, not on any factual determination. Accordingly, this Court exercises *de novo* or independent review. *See Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 828 P.2d 1299, 1300 (1992) ("the jurisdiction of a district court is a matter of law over which we exercise independent review"); *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 826 F.2d 1322, 1325 (1992) (ruling dismissing case is "question of law" over which the Court "exercises free review"). *See also Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326, 333 (1991) (intervention generally involves mixed questions of law and fact).

"This Court has consistently adhered to the view that the statutes providing for intervention should be given a liberal construction." *Herzog v. City of Pocatello*, 82 Idaho 505, 509, 356 P.2d 54, 55 (1960).[5] To be entitled to intervention as of right under I.R.C.P. 24(a). the Conservation Groups must demonstrate some protectable interest in the subject matter of the proceeding, which interest *may* be injured or impaired by the outcome, and which may not be adequately represented by the existing parties. I.R.C.P. 24(a)(2); *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257, 1259-61 (1974). For permissive intervention, the Conservation Groups need only allege questions of law or fact in common with the main action, resolution of which will not unduly delay or prejudice adjudication of the rights of the original parties. I.R.C.P. 24(b)(2); *Herzog*, 356 P.2d at 56 (1960).

*11 *ARGUMENT*

I. SUMMARY: THE SRBA COURT ERRED IN CONCLUDING THAT IT LACKS JURISDICTION TO CONSIDER THE PUBLIC TRUST DOCTRINE, THUS DENYING INTERVENTION TO THE CONSERVATION GROUPS

The legal error committed by the SRBA court occurred, first and foremost, because it apparently misunderstood the nature of judicial authority and responsibility under the Public Trust Doctrine. The court construed its jurisdiction as limited to decreeing the "elements" of water rights, which it said do not-include the Public Trust Doctrine. Because it concluded that the legislature did not expressly instruct it to do so, the court held that it lacks authority to consider the public trust at all within the SRBA.

As explained below, this determination was erroneous as a matter of law, for three fundamental reasons:

First, a court's power to apply the Public Trust Doctrine does not depend on legislative permission or direction. The Idaho Supreme Court's decisions in *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983), and *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), as well as the long line of cases on which those decisions rely, make

clear that the judiciary has independent responsibilities under the Public Trust Doctrine where public trust resources or values are at stake. This is so because the Public Trust Doctrine imposes a sovereign fiduciary obligation upon the courts, no less than the other coequal branches of government.

Second, as *Kootenai* and *Shokal* also establish, the Public Trust Doctrine imposes a continuing duty of supervision upon the State of Idaho in the use and allocation of its public waters. Because the SRBA will adjudicate a vast array of water rights, and will determine the ***12** nature and extent of water uses in the State of Idaho for generations to come, the Public Trust Doctrine necessarily must play a role in the adjudication.

Third, the SRBA court is no different from any other court in its obligation to fulfill these public trust responsibilities. While the SRBA court does have limited subject matter jurisdiction, the very nature of the task it has been given -- adjudication of virtually all water rights in Idaho -- necessarily embraces the public trust. Indeed, this Court's ruling in *Walker v. Big Lost Irrig. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993), as well as the relevant statutory language, confirm that the SRBA court has authority within its subject matter jurisdiction to resolve *all* matters affecting claimed water rights in the SRBA, including public trust objections.

Since the SRBA court denied intervention to the Conservation Groups solely on grounds that it lacks jurisdiction to consider the Public Trust Doctrine, the narrow issue presented is whether that threshold jurisdictional ruling was correct. If this Court determines, as it should, that the SRBA court erred in its jurisdictional determination, then the decision below should be reversed and the Conservation Groups should be granted intervention in order to raise public trust issues -- for if they are not allowed to do so, no other party will.

II. JUDICIAL AUTHORITY TO CONSIDER THE PUBLIC TRUST DOES NOT DEPEND ON LEGISLATIVE AUTHORIZATION

A. The Historical Development Of The Public Trust Doctrine Emphasizes The Independent Role Of The Courts In Fulfilling Trust Obligations

The extensive history of the Public Trust Doctrine in the United States underscores the independent role of the courts in fulfilling public trust responsibilities, without awaiting any legislative direction or permission.

Briefly stated, the Public Trust Doctrine embodies the fiduciary duty that the state, as ***13** sovereign, owes to its citizens to preserve and protect public trust resources. *See generally* 4 *Waters and Water Rights* (Robert E. Beck, editor-in-chief, 1991 ed.), chaps. 28-33;[6] Stevens. "The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right," 14 *U.C. Davis L. Rev.* 195-232 (1980). As this Court has observed:

[T]he public trust doctrine [is] an ancient common law doctrine providing for sovereign control of navigable waters.
Under the public trust doctrine, the state, acting on behalf of the people, has the right to regulate, control and utilize navigable waters for the protection of certain public uses, particularly navigation, commerce and fisheries.... More recent cases have held that the trust includes a broader range of public uses than were recognized in earlier cases: it is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, hunt and swim. The trust is a dynamic, rather than static, concept and seems destined to expand with development and recognition of new public uses.

Kootenai, 671 P.2d at 1088 (quoting law review article).

The origins of the Public Trust Doctrine are usually traced to Roman law: "By the law of nature these things are common to mankind -- the air. running water, the sea, and consequently the shores of the sea" *Institutes of Justinian*, 2.1.1.[7] The Roman principle was later recognized under Spanish. Portuguese, and other continental European laws; and from Spain found its way to Mexico. *See generally* 4 *Water and Water Rights*, *supra*, chap. 29. The principle also developed under English law as the

duty of the King to hold waterways in trust for his subjects, because the public interest in use of those waters for commerce, navigation, and ***14** fishing precluded allowing them to be controlled by private persons. *Id.* [8]

American cases recognizing public trust concepts date back virtually to the Revolution. *See*, *e.g.*, *Home v. Richards*, 8 Va. (4 Call.) 441 (1798) (bed of navigable river "is in the commonwealth and cannot be granted"); [9] *Arnold v. Mundy*, 6 N.J.L. 1 (1821) ("the sovereign power itself cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right"). Courts in at least thirty-eight states, through dozens of decisions, have acknowledged the applicability of the public trust in such contexts as tidal areas, submerged lands, and public waters. [10]

***15** The United States Supreme Court also has repeatedly upheld the applicability of the Public Trust Doctrine to navigable waterways and submerged lands, title to which passed to the states from the federal government upon entering the union. *E.g.*, *Martin v. Waddell*, 41 U.S. (16 Pet.) 345, 349-56 (1842) ("shores, and rivers, and bays, and arms of the sea, and the land under them ... [are] held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery"); *Shively v. Bowlby*, 152 U.S. 1, 11-50, 57-8 (1894) (extensively discussing English and various state laws, and observing: "lands under tide waters are ... of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people"); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (also extensively discussing caselaw, and holding that non-navigable tidal lands are state "public trust" lands).

In a landmark opinion issued over one hundred years ago. *Illinois Central Ruy v. Illinois*, 146 U.S. 387, 13 S.Ct. 110 (1892), the U.S. Supreme Court affirmed both the fiduciary nature of the public trust, and the independent power of courts to review the validity ot legislative action for adherence to public trust duties. There, the Illinois legislature had "sold" virtually the entire Chicago harborfront and adjoining submerged lands of Lake Michigan to a private railroad. A later legislature sought to rescind the sale, and the railroad sued to block it on contract grounds. The Supreme Court ruled against the railroad, holding that the legislature could not permanently divest title to the lands, and hence control over the waterway, because they were held in trust for the public and future generations:

***16** [T]he state holds title to the lands under the navigable waters of Lake Michigan ... and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use.... It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein....

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them ... than it can abdicate its police powers in the administration of government and the preservation of the peace....

So with trusts connected with public property, or property of a special character, like lands under navigable waters: they cannot be placed entirely beyond the direction and control of the state.

Illinois Central, 146 U.S. at 452.

Courts have increasingly recognized that the Public Trust Doctrine protects more than the traditional values of navigation, fishing and commerce. In *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971), for example, the California Supreme Court held that the doctrine includes "preservation of [tidal] lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *See also Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54-5 (N.J. 1972) (public trust "not limited to ancient prerogatives of navigation and fishing, but extends to recreational uses"). This Court's own decisions have described public trust values as including "property values, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality." *Shokal v. Dunn*, 707 P.2d 441, 447-48 n.2 (1985). *quoting Kootenai*, 105 Idaho at 632, 671 P.2d at 1095.

Probably the leading modern case on the Public Trust Doctrine is the "Mono Lake" decision from California. ***17** *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983). *cert. denied* 464 U.S. 977. The City of Los Angeles held 1940 water rights for virtually all the water in the streams flowing into Mono Lake, and by the 1970's exercise of those rights was causing marked deterioration of the lake's ecology. 658 P.2d at 711-12. Environmental groups sued for injunctive relief to halt the City's water diversions, on public trust grounds. *Id.* The district court -- much like the lower court here -- ruled that the public trust offered no basis for challenging the City's water rights, and that plaintiffs had failed to exhaust their administrative remedies. *Id.* A unanimous California Supreme Court reversed, holding that the Public Trust Doctrine could be invoked to protect the lake and its associated natural resources:

> [T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands. surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

658 P.2d at 724, The Mono Lake court rejected the argument that "vested" water rights are not subject to the public trust, because the state retains on-going control over public trust resources, and thus has a duty of continuing supervision over uses of those resources:

[P]arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust. . . . Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs....

It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested rights bar such reconsideration.

658 P.2d at 721, 729.

Notably, throughout its analysis of the public trust, and in sending the case back to the ***18** superior court to determine how the public interests in Mono Lake could be protected, the California Supreme Court did not seek or require legislative authority for its actions. *See* 658 P.2d at 717-24 & n. 14, 726-29 & n.27, 731-32.

Courts in other states have likewise emphasized the independent role of the courts in determining whether public trust values have been impaired under the Public Trust Doctrine. In *Arizona Center for Law v. Hassell*, 837 P.2d 158 (Az. App. 1992). the Arizona Court of Appeals held invalid legislation which would have divested the state of title to its streambeds. The court observed:

> Judicial review of public trust dispensations complements the concept of a public trust.... Just as private trustees are judicially accountable to the beneficiaries for disposition of the res. so the legislature and executive branches are judicially accountable for their disposition of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.

837 P.2d at 168-69 (citations omitted). *See also Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981) (court will subject legislative dispensations of state natural resource holdings to a "high and demanding" standard of review).

The Mono Lake case. *Illinois Central*, and the many other public trust cases from across the country emphasize the key point here -- courts do not await legislative approval before they apply the Public Trust Doctrine. Instead, because the public trust is a sovereign fiduciary obligation shared by all branches of government, courts are empowered to consider the public trust without requiring authorization from any other branch. The SRBA court erred in concluding otherwise.

***19 B. Idaho Law Also Firmly Establishes That Courts Must Independently Carry Out Public Trust Responsibilities**

The Idaho Supreme Court has repeatedly affirmed the applicability of the Public Trust Doctrine under Idaho law. both to public lands and waters. *See Kootenai Envir. Alliance v. Panhandle Yacht*, 105 Idaho 622, 671 P.2d 1085 (1983); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985); *Idaho Forest Industries v. Hayden Lake Watershed*, 112 Idaho 512, 733 P.2d 733 (1987). [11] In so doing, this Court has made plain its view that Idaho courts bear independent duties and responsibilities under the Public Trust Doctrine, without requiring legislative authorization.

Kootenai was a unanimous decision [12] in a case involving an easement granted by the Department of Lands to a private developer for a marina on Lake Coeur d'Alene. Although the Court ultimately upheld the Department's decision, it recognized the right of the Kootenai Environmental Alliance, as an affected representative of the public, to challenge the easement on public trust grounds. The plaintiff's public trust challenge was proper, the Court held, because the "State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public." and "that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use." *Id.*. 671 P.2d at 1088 (quoting *Illinois Central*).

The *Kootenai* opinion discussed at length the historical development of the Public Trust ***20** Doctrine, both in federal courts and in numerous states; and it adopted aspects of various decisions from Massachusetts, Wisconsin and California, while rejecting other parts. *See* 671 P.2d at 1087-94. The *Kootenai* decision affirms strongly, however, that the fundamental premises of the Public Trust Doctrine apply in Idaho. Referring to the U.S. Supreme Court's opinion in *Illinois Central*, *Kootenai* underscores that the state's responsibility to protect the public trust arises from its sovereign role as trustee on behalf of the people, a role which it may not abdicate:

> That decision [*Illinois Central*] established the principle that a state, as administrator of the trust in navigable waters on behalf of the-public, does not have the power to abdicate its role as trustee in favor of private parties....

Id.. at 1088. *Kootenai* is also unambiguous in holding that protection of the public trust, as a sovereign responsibility, is shared among all three branches of government - and that ultimately the *courts* must determine whether the other branches have fulfilled their public trust duties:

[P]ublic trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon. Moreover, decisions made by non-elected agencies rather than by the legislature itself will be subjected to closer scrutiny than will legislative decisionmaking....

Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will supplant its judgment for that of the legislature or agency. However, it does mean that this court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action. In making such a determination the court will examine, among other things, such factors as the degree of effect of the project on public trust uses, navigation, fishing, recreation, and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource ... and ***21** the degree to which broad public uses are set aside in favor of more limited or private ones.

Id., at 1091-93 (underscoring in original, bold added).

Kootenai concludes with the observation that "the public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources." *Id.*, at 1095. Thus, "mere compliance by [state agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine." *Id.*

Two years later, in *Shokal v. Dunn*, this Court approved what it termed the "comprehensive discussion" of the Public Trust Doctrine in *Kootenai*, *Shokal*, 707 P.2d at 447-48 n.2. [13] A water rights case, *Shokal* reiterated *Kootenai*' s holding concerning the power and duty of the courts to ensure that public trust values are properly considered before public trust resources are alienated or impaired:

Reviewing courts must "lake a 'close look' at the action [of the legislature or of agencies such as Water Resources] to determine if it complies with the public trust doctrine and will not act merely as a rubber stamp for agency or legislative action.... The public trust at all times forms the outer boundaries of permissible government action with respect to public trust resources."

Id. (quoting *Kootenai*, 671 P.2d at 1092, 1095) (brackets in original).

Shokal also addressed the statutory "local public interest" requirement for issuance of new water rights under I.C. § 42-203A. which it said is "related to the larger doctrine of the public trust." *Id. Shokal* held that the director of IDWR had been granted substantial discretion by the legislature to weigh and protect "local public interest" values in evaluating new water ***22** right applications under the statutory scheme. *Id.*, 707 P.2d at 448-52. Like the values protected by the Public Trust Doctrine, *Shokal* noted that "local public interest" concerns may include effects upon access to navigable waters, "assuring minimum streamflows." encouraging conservation, and protecting aesthetic or environmental qualities of particular areas, *Id.*, 707 P.2d at 449-50.

Another two years after *Shokal*, this Court again unanimously affirmed both the applicability of the Public Trust Doctrine under Idaho law, and the independent duties it imposes upon the courts. In *Idaho Forest Industries, Inc. v. Havden Lake Watershed Improv, Dist.*, 112 Idaho 512, 733 P.2d 733 (1987), a private company disputed an agency's plan to construct a public beach and other facilities upon lands that were periodically covered by the waters of Hayden Lake. 733 P.2d at 734-35. The state claimed the land was public trust land; the company claimed any public trust was lost years before upon construction of a dike preventing the lake from spreading over the land. *Id.* The Court remanded the issue for further factual findings on the historical status of the disputed property. In its discussion of the public trust, however, the Court observed:

> The public trust doctrine is based upon common law equitable principles. That is. the administration of land subject to the public trust is governed by the same principles applicable to the administration of trusts in general. All questions concerning public trust lands in this state are questions of state law.

733 P.2d at 738 (citations omitted).

Kootenai, *Shokal*, and *Hayden Lake* are unequivocal in establishing that Idaho courts bear fiduciary duties under the Public Trust Doctrine, and indeed that the ultimate responsibility lies with the judicial branch to determine whether the state has fulfilled its public trusi obligations ***23** in the alienation or impairment of public trust resources. These holdings, and the very theory underlying the Public Trust Doctrine as it has developed in Idaho and elsewhere, thus contradict the fundamental assumption of the SRBA court that it needs legislative permission before it may address public trust issues. Protecting the public trust is not something one branch does only after being delegated the task by another. Instead, all branches of government, including the courts, share this obligation in fulfilling their duties to the beneficiaries of the public trust -- the citizens of the State of Idaho. Therefore, the SRBA court erred in concluding that it cannot address the Public Trust Doctrine until expressly authorized by the legislature to do so.

III. BECAUSE THE PUBLIC TRUST DOCTRINE APPLIES TO DECISIONS ALLOCATING THE PUBLIC WATERS OF IDAHO, IT NECESSARILY HAS A ROLE WITHIN THE SRBA

The SRBA court also erred in denying intervention, on grounds that the adjudication will merely confirm existing water rights and thus the public trust has no role. *See* R. Vol. I, p. 291; R. Vol. II, p. 383. To the contrary, as explained below, since the Public Trust Doctrine imposes a continuing duty of supervision upon the state, and since the SRBA will have a dramatic impact on the allocation and use of the public waters of the state, public trust concerns must necessarily play a role in the SRBA.

A. The Public Trust Doctrine Applies To Water Rights Decisions

Although disputed by some parties in the proceedings below, there can be no serious question that water rights in Idaho, including water rights to be adjudicated in the SRBA, are subject to the Public Trust Doctrine, i.e., they are held subject to the power of the state to limit or condition use of the rights to prevent harm to the public trust.

Long-standing principles of law confirm this conclusion. It is fundamental to Idaho water ***24** law that no person has a right to *own* water, because water is owned by the State of Idaho as a public resource. *See* Idaho Const., Art. XV, § 1 ("The use of all waters . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law"); I.C. § 42-101 ("All the waters of the state when flowing in their natural channels ... are declared to be the property of the state"); I.C. § 42-226 ("all ground waters in this state are declared to be the property of the state"); *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977) ("well-settled that the water itself is the property of the state, which has a duty to supervise the allotment of those waters with minimal waste"); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 p. 1073, 1076 (1915) ("The state is the sovereign owner of the right to appropriate and use all of the stream waters which are within the jurisdiction of the state. The state, by enactment of appropriate laws, permits private persons to use its right to appropriate and use the flow of stream water").

It is equally fundamental that the State of Idaho may impose conditions, limitations or restrictions upon the exercise of water rights, in service of the public interest. *See* Idaho Const., Art. XV, §§ 1, 3, 5 (providing that state has powers to impose limitations and conditions): *Walker v. Big Lost Irrig, Dist.*, 124 Idaho 78, 856 P.2d 868, 870 (1993) ("The Idaho Constitution, art 15 § 1, gives the legislature broad authority to regulate and restrict the use of public waters in this state"). Among these are the familiar concepts of reasonable use and maximum utilization, which limit the exercise of any claimed water right. *E.g.*, *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627 (1973) (holding that Ground Water Act "is consistent with the constitutionally enunciated policy of optimum development of water resources in the public interest." and observing "when private property righis clash with the public interest ***25** regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare or all our citizens"); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) ("policy of the law of this State is to secure the maximum use and benefit, and the least wasteful

use. of its water resources"); *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 258 P. 532 (1927) ("any property rights [in water] must be considered and construed with reference to the reasonableness of the use").

Exercise of the state's power to limit, condition, or even deny the use of water, in service of the public good, has been repeatedly upheld: and in part reflects changing views about what constitutes appropriate water use. *See Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (rejecting claim that senior, but inefficient, diverter could command entire flow of Snake River): [14] *Neitleton*, *supra*, 558 P.2d at 1050-51 (affirming shut off of allegedly senior "constitutional" rights in favor of decreed and licensed rights, partly based on practical concerns over administration of the water system); *State Dept. of Parks v. Idaho Dept. of Water Resources*, 96 Idaho 440, 530 P.2d 924 (1974) (confirming instream flows as beneficial use). ***26** *and see id.* at 931 (Bakes, J., concurring) (definition of beneficial uses may change "because conditions might so change that these uses would be an unjustifiable use of water needed for other purposes. The notion of beneficiality of use must include a requirement of reasonableness").

In the SRBA itself, the State of Idaho has used its continuing power over the exercise of water rights to impose various conditions and restrictions upon the rights to be decreed. These include establishment, by statute, of a new "consumptive use" element, which did not exist when many of the rights claimed in the SRBA may have "vested." *See* I.C. § 42-1409(2)(j) & § 42-1411(2)(i) (requiring consumptive use element in description of water rights that are claimed and recommended in SRBA); I.C. § 42-1412(8) & (9) (requiring SRBA decrees to contain all elements of I.C. § 42-1411, including consumptive use). *See also* Krogh-Hampe. "The 1986 Water Rights Adjudication Statute," 23 *Idaho L. Rev.* 1, 17 (1986-87) (discussing recent development of consumptive use as new water right element).

Where the law provides that the State of Idaho owns the water and exercises continuing control over the use of water in service of the public good, it cannot be denied that public trust concepts have long been operative. This Court implicitly recognized as much back in 1915. *Callahan v. Price*, 26 Idaho 745, 146 P. 732, 754 (1915) (discussing *Illinois Central* and observing: "The Salmon river is a navigable stream, and is therefore a public highway belonging to the state ... and may be used and disposed of by the state subject only to the rights of the public in such waters and to the paramount power of Congress to control their navigation"). Idaho's federal court also, many years ago. explicitly acknowledged the existence of the public trust in which Idaho's waters are held. *See Twin Falls Land & Water Co. v. Twin Falls Canal* ***27** *Co.*, 7 F. Supp. 238 (D. Idaho 1933), *aff'd* 79 F.2d 431 (9th Cir. 1935). *cert. denied*, 296 U.S. 654 (1936):

> It is trite to observe that water is the lifeblood of the arid portion of the western states. So essential is it to existence that it is administered as a public trust. [In contracting with a private party] to perform the public function of reclaiming these arid lands for the future prosperity of the commonwealth as a whole ... the state did not depart thereby from the principle that the waters within its boundaries were a public trust to be used for the common good.

7 F. Supp. at 245.

If the applicability of the public trust to Idaho water rights was not already plain by the 1980's. the decisions of this Court over the last decade have made it clear. In adopting what it called the "California rule" from the Mono Lake case in 1983, the Court unambiguously stated:

> Under the California rule, statutes alienating public trust resources will be construed in light of the public trust doctrine. The public trust doctrine takes precedent even over vested water rights. Grants, even it" purporting to be in fee simple, are given subject to the trust and to action by the state necessary to fulfill its

> trust responsibilities.... Under the California rule herein adopted, the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust....

Kootenai, 671 P.2d at 1094.

Shokal also expressly confirms that the waters of the State of Idaho are a public trust resource: "The state holds all waters in trust for the benefit of the public, and 'does not have the power to abdicate its role as trustee in favor of private parties.' " *Shokai*, 707 P.2d at 447 n.2 (quoting *Kootenai*, 671 P.2d at 1088). Further, any grant to use the state's waters is "subject to the trust and to action by the State necessary to fulfill its trust responsibilities." *Id.*

The conclusion in *Kootenai* and *Shokal* that water rights in Idaho are held subject 10 the ***28** public trust does not mean, however, that the public trust has somehow displaced water rights under the prior appropriation system. Instead, as explained at length in the Mono Lake case, the two doctrines form one integrated body of water law. The California Supreme Court in Mono Lake rejected absolutist arguments on both sides -- that appropriate rights are completely exempt from the public trust, or conversely, that all established water rights must be limited as infringing upon public trust values. Instead, the court recognized the importance of both doctrines and harmonized them, holding that:

> The public trust doctrine and the appropriate water rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.

658 P.2d at 732. In language equally applicable to Idaho, the Mono Lake court also recognized the public importance of water rights in the arid west, which the court stressed the Public Trust Doctrine can and must accommodate:

> The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream. The state must have the power to grant non-vested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversions without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.

658 P.2d at 712.

In summary, the public trust remains as a continuing and potential "check" on the ***29** exercise of water rights, at least where specific harms to public trust values exist. The public trust can and will be balanced with the prior appropriation system. But the public trust cannot be *ignored* in decision-making over water rights, as the SRBA court has erroneously concluded it must do.

B. The Very Nature, Scope And Effect Of The SRBA Dictate That Public Trust Considerations Apply

If the Public Trust Doctrine applies at all in Idaho water law -- and it does -- then it must apply within the SRBA, because of the very nature, scope and effect of the adjudication.

The SRBA will comprehensively determine all rights to use virtually all waters in the State of Idaho. All three branches of government are involved in that process. The legislature has passed statutes which direct that the SRBA be undertaken, and which assign the executive and the judicial branches to carry out the tasks necessary to complete the adjudication. *See* I.C. §§ 42-1406A -- 42-1422. The executive branch, through the director of IDWR. is required to take, review and recommend all water right claims. *Id.* The SRBA Court has been authorized to adjudicate and finally decree all such claims. *Id.*

These actions, and the comprehensive decree that is finally issued, will result in a decision allocating the water resources of Idaho on an unprecedented scale, binding all users for generations to come. [15] The fact that individual and cumulative impacts will exist for the streams, rivers and aquifers that are adjudicated alone compels the conclusion that public trust analysis must apply. *See Kootenai*, 671 P.2d at 1092 (discussing importance of evaluating both ***30** individual and cumulative impacts on public trust resources). Further, the impacts will be felt not just upon those who have claimed appropriative rights, but upon all citizens of Idaho. After all, appropriative rights that are confirmed in the SRBA will thereby obtain a high level of security, and use of those appropriative rights will reduce the amount of remaining "unappropriated" waters in any particular stream or sub-basin -- waters which, as established above, are the public's waters.

Moreover, the SRBA will not merely "confirm" the elements of existing water rights. In addition to recommending and decreeing the tradional elements of water rights (i.e. amount, point of diversion, place and season of use, purpose of use. and priority, *see* I.C. § 42-1411(2)(a)-(h)). both the director and the SRBA court have substantial discretion to further define water rights and to impose conditions or limitations upon the exercise of water rights adjudicated in the SRBA. *See* I.C. § 42-1411(2)(j): § 42-1412(8) & (9). As explained in section IV, *infra*, the exercise of this discretion clearly calls for reference to public trust values in order to serve the public interest.

In addition, a wide variety of rights are claimed in the SRBA. ranging from recently licensed or permitted rights, to rights established years ago under prior court decrees, to so-called "constitutional" appropriations. Many of the rights claimed in the SRBA represent changed or expanded rights, which are effectively illegal under Idaho law since the claimants never obtained the mandatory approval from the IDWR. *See* I.C. §§ 42-1416(1), 42-1416(2) and 42-1416A; R. Vol. II, pp. 462-481. As this Court itself has noted, substantial distinctions exist between such varying types of claimed water rights, including the level of governmental review they have received. *See Nettleton*, *supra*, 98 Idaho at 90, 558 P.2d at 1051. Unless the ***31** SRBA court has the opportunity to consider public trust objections to particular rights, even flagrant violation of public values will be immunized through the adjudication of rights in the SRBA.

In short, where the government, acting as here through all three branches, engages in such a large-scale decision affecting public water resources, the Public Trust Doctrine imposes a fiduciary duty upon the state -- including the courts, as a co-equal branch -- to consider the impact upon public trust values. Put otherwise, the public trust forms the "outer boundary" limiting the government's freedom of action within the adjudication. *Kootenai*, 671 P.2d at 1095; *Shokal*, 707 P.2d 448 n.2. As the court charged with the task of effectuating the adjudication, the SRBA court thus bears the obligation to ensure that public trust values are appropriately considered, before entering a final decree. *Kootenai*, 671 P.2d at 1091-92.

In other states, and in contexts involving far less sweeping determinations about natural resource uses, courts have held that the Public Trust Doctrine must be considered in the course of allocating water resources. As stated by the California Supreme Court in the Mono Lake decision: "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Nat'l Audubon*, 658 P.2d at 728. Indeed, "[i]n exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." *Id.*

Similarly, the Hawaii Supreme Court has rejected the contention that a water rights adjudication may not consider the public interest. In *Robinson v. Ariyoshi*, 658 P.2d 287, 312 (Haw. 1982), the court noted that "underlying every private diversion and application there is, ***32** as there always has been, a superior public interest in this natural bounty." Construing its earlier decision in *McBryde Sugar Co. v. Robinson*, 504 P.2d 1300, 1339 (Haw. 1973), the court stated:

> [P]rior to *McBryde*, there existed no apparent common law restraint upon the right of private parties to drain rivers dry for whatever purposes they saw fit. Such a system may have been deemed both appropriate and beneficial in other historical contexts. But this is no longer the case. The reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization and flow of those waters. In *McBryde* we were called upon to assess a diversion of the waters of the Hanapepe river among the [adjoining] landowners. To have done so exclusively in accord with Appellees' reading of pre-existing caselaw would have been a gross oversimplification of the interests involved. For while there certainly exist relative usufructuary rights among landowners, these rights can no longer be treated as though they are absolute and exclusive interests in the waters of our state.

658 P.2d at 310-11.

The North Dakota Supreme Court likewise has emphasized the importance of public trust values in planning and allocating state water resources. In *United Plainsmen v. N.D. Water Cons. Comm.*, 247 N.W.2d 457, 463 (1976). that court held: "We think that the Public Trust Doctrine requires, at a minimum, evidence of some planning by appropriate state agencies and officers in the allocation of public water resources." It thus reversed the lower court's dismissal of a complaint seeking to challenge an energy project on public trust grounds.

No less than in other states, water is increasingly a scarce and precious resource in Idaho. Diverse and more numerous uses of water are being seen; and how one person uses water has direct impacts on other users. The public interest in decisions about the allocation of water resources has never been higher. As the singlemost important forum in which decisions will be ***33** made about water use in Idaho for generations to come, and in order for the State of Idaho to fulfill its fiduciary obligations to the citizens, the Public Trust Doctrine must play a role in the SRBA. The lower court thus erred in concluding that it cannot and will not consider the public trust within the adjudication.

IV. THE SRBA COURT IS NOT RESTRICTED IN ITS JUDICIAL AUTHORITY TO CONSIDER THE PUBLIC TRUST

The SRBA court erred not only in its perception of the nature of judicial authority under the Public Trust Doctrine generally, but also in concluding that its own jurisdiction is so limited that it cannot consider the public trust. It derived such limitations on its own power in two different ways. First, the court suggested that its role is statutorily confined to specific tasks. which do not include public trust review. Second, the court construed the Conservation Groups' objections as essentially seeking appellate or mandamus-type review of prior IDWR determinations, which the court said it lacked the power to conduct. *See* July 28, 1993 Order at 3 (R. Vol. I, p. 291): January 14th Order at 4, 7-8 (R. Vol. II, pp. 380, 383-384).

As explained below, both conceptions are mistaken. While the principal job of the SRBA court is to issue a decree establishing the elements of claimed water rights, the SRBA court has been given broad responsibility to resolve *all* issues affecting the adjudication of water rights claimed in the SRBA. That power necessarily entails the authority to hear and resolve public trust objections. The SRBA court thus erred in denying the Conservation Groups leave to intervene to raise such objections.

***34 A. The Court Has Statutory Authority To Address Public Trust Considerations**

In construing its power to decree the "elements" of water rights, the SRBA court ignored plain statutory language that affords it sufficient authority to consider public trust values, and to impose conditions or limitations on rights in order to preserve and protect those values.

That statutory authority is found in Idaho Code section 42-1412(8) & (9). First, section 42-1412 requires the court to include in its partial and final decrees "such other matters as are necessary to define the right." as recommended by the director under I.C. § 42-1411(2)(j). Second, section 42-1412 further provides that the court "*shall* also determine all other matters necessary for the efficient administration of the water rights." *See* I.C. § 42-1412(8) & (9) (emphasis added). These statutory provisions, which together explicitly authorize and require the SRBA court to decide all matters as may be necessary to define and to administer efficiently water rights across Idaho, cannot be ignored in construing the scope of the SRBA court's powers. [16] Indeed, it was precisely this statutory authority which authorized the development of the new "consumptive use" element that is now written into the SRBA water code. I.C. § 42-1411(2)(i). *See* Krogh-Hampe, *supra*, "The 1986 Water Rights Adjudication Statute." 23 *Idaho L. Rev.* at 17 & n.98.

Where the adjudication court is directed to exercise power over all matters necessary to "further define the right" and for the "efficient administration of the water rights." the consideration of public trust values can and must play a role. Indeed, the holdings of *Kootenai* and *Shokal* could hardly be clearer in dictating this conclusion: "The public trust doctrine *at all* ***35** *times* forms the outer boundaries of permissible government action with respect to public trust resources." *Kootenai*, 671 P.2d at 1095; *Shokal*, 707 P.2d at 447 n.2.

Thus, the Conservation Groups submit that the director must seek to protect public trust values to the maximum extent feasible when he recommends limitations or conditions to be imposed under I.C. 42-1411(2)(j). *See Nat'l Audubon*, *supra*, 658 P.2d at 712 (public trust resources are to be protected "whenever feasible"). Similarly, the SRBA court, in evaluating the director's recommendations and in determining "all other matters necessary for the efficient administration of the water rights" under I.C. § 42-1412(8) & (9). can and should explicitly consider public trust values. The imposition of conditions or restrictions on water rights in service of public interests has been repeatedly confirmed by the courts as a way of fulfilling public trust obligations. *See Shokal*, 707 P.2d at 449-51 & n.2 (approving conditions to protect public interests including "assuring minimum stream flows," "discouraging waste," and "encouraging conservation"); *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) (approving imposition of conditions to protect water level, temperature, quality and flow velocity in sculpin pool where appropriate to protect the public interest); *U.S. v. State Water Resources Control Board*, 182 Cal.App.3d 82, 227 Cal. Rptr. 161, 201 (1986) (following Mono Lake decision, state water board has power to impose conditions on water rights to protect public interests in fish and wildlife).

Thus, the SRBA court has authority under I.C. § 42-1412 to incorporate public trust values within the adjudication. It erred in ignoring this statutory authoritzation and concluding that it lacked such power.

***36 B. The SRBA Court Has Full Authority To Adjudicate The Subject Matter Before It, Including Public Trust Objections**

In addition to the foregoing statutory provisions, the SRBA court also has full authority to resolve public trust objections within the process of adjudicating water rights.

The SRBA court is a division of the 5th Judicial District Court (County of Twin Falls), which has been specially designated to conduct all SRBA proceedings. *See In Re Snake River Basin Adjudication*, 115 Idaho I, 764 P.2d 78 (1988) (upholding SRBA Court's designation of adjudication scope). As stated by this Court in *Walker v. Big Lost Irrig. Dist.*, 124 Idaho 78, 856 P.2d

868, 870-71 (1993). "[i]n essence, these actions created a division of the district courts (SRBA district court) with exclusive jurisdiction to determine all of the claims arising in SRBA. The SRBA district court is. in effect, a separate division of the district courts and exercises the unique jurisdiction given it by the legislature."

As a division of the district court, even though it has limited *subject matter* jurisdiction, the SRBA court has the same inherent and constitutional powers as other courts. *See* Idaho Const., Art. II. § I; [17] Art. V. § 13; [18] Art. V. § 20. [19] The SRBA court thus indisputably has, for example, the power to interpret the statutes before it, and to pass upon constitutional challenges to those laws. *See* ***37** *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757, 761-68 (1989): *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 308 P.2d 225, 228-30 (1957). As demonstrated by its recent decision invalidating the presumption and accomplished transfer statutes, the SRBA court recognizes that no action of the legislature is necessary to vest it with these powers. No action of the legislature can divest the court of such powers either. [20]

Just as it has the power to interpret the law, the SRBA court necessarily also has the power to consider and resolve objections based on the Public Trust Doctrine, *within the process* of adjudicating the elements of the water rights claimed in the SRBA. As explained above, the judiciary's obligation to determine whether other branches of government have fulfilled their public trust duties arises from the very nature of the public trust, as a fiduciary responsibility that rests equally on all three branches of the sovereign. Resolution of whether the state has fulfilled its public trust obligations in connection with the exercise of water rights claimed in the SRBA falls directly within the scope of the matters that have been assigned to the SRBA court.

Indeed, the *Walker* decision confirms that if any court has jurisdiction to consider the public trust in connection with existing water rights in Idaho, it must be the SRBA court. In *Walker*, the trial court granted a writ of mandamus, injunctive relief, and damages arising out of the Big Lost River Irrigation District's refusal, in 1990, to continue delivering water to a property owned by Walker outside the District's boundaries. After extensive proceedings, the trial court found for Walker on his claims that the District's history of delivering water to the out-of-boundary property since the 1940's constituted an implied contract for delivery, and that the District was precluded under the equitable doctrines of waiver, laches and estoppel from ***38** ceasing such deliveries. Although neither Walker nor the District contested the trial court's jurisdiction over the case. IDWR (as *amicus curiae*), argued on appeal thai the trial court lacked jurisdiction, because the legislature committed resolution of Walker's claims to the SRBA court. 856 P.2d at 869-70.

Agreeing with IDWR, this Court reversed, stating:
The trial court found that this case concerned [the District's] *delivery* of water and did not require adjudication of the parties' water rights.... We conclude that the merits of this case concern an adjudication of the right to the use of water which should be presented to the SRBA district court and that the trial court lacked jurisdiction to adjudicate these water rights....

Although the trial court applied the theories of estoppel, implied contract, laches and waiver instead of change in the place of use. expansion, and transfer, as are sometimes applied in water adjudications, this does not change the fact that this case is a private water adjudication. The trial court's application of these theories required it to make findings and assumptions concerning the underlying water rights.

Id., at 870-71.

Under *Walker*, then, all issues which may affect claimed rights to use water within the scope of the SRBA are to be determined by the SRBA court. If "findings and assumptions concerning underlying water rights" are involved in any particular dispute, the exclusive and proper forum for resolution is the SRBA court. *Id.* Since, as already demonstrated, the Public Trust Doctrine applies to and may limit or condition the exercise of water rights claimed in the SRBA, this holding of *Walker* compels the conclusion that the SRBA court has authority to adjudicate public trust objections.

In summary, the SRBA court erred in concluding that its powers are so limited that it cannot adjudicate objections based upon the Public Trust Doctrine.

***39 C. The Relief Sought Is Not Appellate Or Mandamus Review**

Finally, the relief sought by the Conservation Groups is not in the nature of a mandamus action, or appellate review of some alleged failure to act on the pan of the director, as the SRBA court has suggested.

Rather, the requested relief goes directly to the exercise of judicial powers by the SRBA court in its original jurisdiction. The SRBA, of course, is generally not an appellate proceeding involving judicial review of administrative action.[21] Instead, the adjudication is a proceeding much like any other litigation in district court -- initial pleadings have been filed by the director, opposing parties may submit opposition pleadings, and contested matters are to be resolved through normal litigation procedures. *See* I.C. §§ 42-1406A -- 42-1422. Rather than seeking appellate review, the Conservation Groups seek to become parties to the action through intervention, so that they may raise objections based on the Public Trust Doctrine for hearing and decision by the court.

The Conservation Groups have suggested that *one* way the Public Trust Doctrine might be implemented within the SRBA is to have the director explicitly include public trust review in his recommendations. *See* R. Vol. I, pp. 45-47. But whether that process, or some other, is utilized, the bottom-line claim presented by the Conservation Groups is that the *SRBA court*, in the exercise of its own fiduciary obligations, has the duty to ensure that public trust values have been satisfied before it enters the final SRBA decree. *See* R. Vol. II, pp. 246-280. This is no less than what is required under *Kootenai*, which emphasizes that "*final determination* of whether the alienation or impairment of a public trust resource violates the public trust doctrine ***40** *will be made by the judiciary*." 671 P.2d at 1091 (emphasis added).

The discussion of a district court's original versus appellate jurisdiction in *Sierra Lite Ins. Co. v. Granata*, 99 Idaho 624, 586 P.2d 1068 (1978), is instructive here. There, plaintiff Sierra Life was informed it would be subjected to a statutory examination by the Idaho Director of Insurance, which it sought to prevent by filing a complaint in district court. The agency claimed, and the district court agreed, that the court lacked subject matter jurisdiction to issue the declaratory and injunctive relief requested to stop the examination, because the action was essentially one for mandamus and the plaintiff had failed to exhaust administrative remedies. The Idaho Supreme Court reversed, finding that the essential relief sought was declaratory relief, rather than mandamus, which the district courts have original jurisdiction to grant:

The subject matter of the action involves alleged proposed unlawful action of the part of the Director which allegedly will cause Sierra irreparable harm. Resolution of the issues raised by the complaint requires construction of applicable statutes and determination of the legal effect of a prior administrative decision and order and a prior order of a court of a sister state.

... The claims presented by Sierra in the district court action involve issues which could be appropriately determined in a declaratory judgment action. District courts, of course, have jurisdiction to issue injunctions and entertain declaratory judgment actions.

Id., 586 P.2d at 1073.

As in *Sierra Life*, here the Conservation Groups are seeking judicial action, via construction of the state's legal obligations to protect public trust resources, which is solidly within the SRBA court's original jurisdiction. The lower court erred in denying them leave to raise these claims, on grounds that some form of appellate review was sought.

Note: Page 41 missing in original document

*42 *CONCLUSION*

In summary, it is an independent duty of the courts, as a separate and co-equal branch of government, to protect public trust resources. Because the Public Trust Doctrine "at all times forms the outer boundaries of permissible government action with respect to public trust resources," and because the courts bear, in the final analysis, the responsibility of ensuring that other branches of government fulfill their public trust obligations, the SRBA court indisputably has authority to consider the Public Trust Doctrine in connection with the SRBA. The SRBA court is not permitted to abdicate its role with respect to the public trust simply because there is no express legislative direction requiring it address the public trust in connection with its adjudication of water rights.

Further, the importance of the SRBA to water use in Idaho cannot be understated. It" the Public Trust Doctrine applies at all to decisions about Idaho's water and water rights -- and it does apply -- then it must play a role within the SRBA. It will not be considered at all. however, unless the Conservation Groups are granted intervention to raise public trust issues.

Accordingly, this Court should reverse the SRBA court's decision denying intervention to the Conservation Groups to file objections based on the Public Trust Doctrine.

Footnotes

1 Tbe Conservation Groups also filed a "Motion for Leave to File Non-Conforming Objection" alone with the general objection. R. Vol. I, pp. 36-39.

2 The Motion to Intervene was filed pursuant to an April 20, 1993 order by the SRBA court which denied, without prejudice, an earlier motion filed by the Conservation Groups to intervene generally in the SRBA. Although that April 20th order is not in the clerk's record. Respondent/Cross-Appellants Pioneer and Settlers Irrigation Districts moved on April 1, 1994 to have the order and associated pleadings included in a supplemental record. The Conservation Groups have asked that recent orders by the SRBA court denying intervention to file specific objections, as well as the objections. also be included in the supplemental record.

3 Further, the Idaho Legislature later passed H.B. 969, which repeals the the two statutes.

4 The SRBA court erroneously suggested that the Conservation Groups argued the Public Trust Doctrine is an "element" of water rights. *See* July 28th Order, at 2 (R. Vol. I, p. 290); January 14th Order, at 2-3 (R. Vol. II, pp. 378-379). That was not the Conservation Groups' argument below. *See* Memorandum in Support of Motion to Intervene (R. Vol. I, pp. 22-35); Conservation Groups' Memorandum of Points and Authorities in Support of Motion 10 Reconsider (R. Vol. I, pp. 246-280). Instead, as explained in this brief, the Conservation Groups have argued diat the Public Trust Doctrine is an independent responsibility which all branches of government must fulfill, including the courts.

5 Under the identical federal rule, federal courts have repeatedly held that intervention should be favored. *See Trbovich v. United Mine Workers*, 404 U.S. 523, 538 n. 10 (1972); *Cascade Natural Gas Com, v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967); *Blake v. Fallen*, 554 F.2d 947, 952-54 (9th Cir. 1977); *Sagehrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (intervention by conservation Groups appropriate based on "environmental, conservation and wildlife interests").

6 "At the core of the public trust doctrine is the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public." *Id.*, chap. 30 at p. 43.

7 Quoted in Stevens, *supra*, 14 *U.C. Davis L. Rev.* at 196-97.

8 Scholars have also found public trust concepts in widely differing cultures around the world. *E.g.* Wilkinson. "Headwaters of the Public Trust," 19 *Env'l Law* 425, 428-439 (1989) (discussing Asian. African and Native American analogues).

9 As cited in *Water and Water Rights*, *supra*, chap. 30 at p. 45-6 & n.155.

10 A partial listing includes the following: Alaska: *Owsichek v. State Guide Licensing Bd.*, 763 P.2d 488 (1988); Arizona: *Arizona Center for Law v. Hassell*, 837 P.2d 158 (1992): Arkansas: *Moose v. Southern Sand*, 167 S.W. 854 (1914); California: *National Auduhon Soe. v. Sup. Ct.*, 658 P.2d 709 (1983); Florida; *Coastal Petr. v. American Cyanamid*, 492 So.2d 339 (1986); Hawaii: *Robinson v. Ariyoshi*, 658 P.2d 287, 310-11 (1982); Idalin; *Kootenai v. Panhandle Yacht*, 671 P.2d 1085 (1983): Illinois: *People v. Kirk*, 45 N.E. 830(1896); Iowa: *State v. Sorenson*, 436 N.W.2d 358 (1989); Louisiana: *Save Ourselves Inc. v. Louisiana*, 452 So.2d 1152 (1984): Maine: *Opinion of the Justices*, 437 A.2d 597 (1981); Maryland: *Caine v. Cantrell*, 369 A.2d 56 (1977); Massachusetts: *Boston Waterfront Dev. v. Commonwealth*, 393 N.E.2d 356 (1979); Minnesota: *Lamprey v. Metcalf*, 53 N.W. 1139 (1893): Mississippi: *Trenting v. Bridge*, 199 So.2d 627 (1967); Missouri: *Elder v. Delcour*, 269 S.W.2d 17 (1954); Montana: *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (1984): Nevada: *State v. Bunkowski*, 503 P.2d 1231 (1972); New Hampshire: *New Hamp. Water Bd. v. Lebanon*, 233 A.2d 828 (1967); New Jersey: *Neptune City v. Ayon-by-the-Sea*, 294 A.2d 47 (1972): New Mexico: *State v. Red River Valley Co.*, 182 P.2d 421 (1945); New York: *Marha Sea Bay v. Clinton St. Realty*, 5 N.E.2d 824 (1936); North Carolina: *State v. Credle*, 369 S.E.2d 825 (1988); North Dakota: *United Plainsmen v. N.D. Water Cons. Comm.*, 247 n.W.2D 457 (1976); Ohio: *State v. Newport Concrete Co.*, 336 N.E. 2d 453 (1975): Oklahoma: *Curry v. Hill*, 460 P.2d 933 (1969); Oregon: *Morse v. Oregon Div. of State Lands*, 590 P.2d 709 (1979); Pennsylvania: *Payne v. Kassah*, 312 A.2d 86, 93 (1973); Rhode Island: *Hall v. Nascimento*, 594 A.2d 874 (1991): South Carolina: *Hobonny Club v. McEachern*, 252 S.E.2d 133 (1979); South Dakota: *Hillbrand v. Knapp*, 271 N.W. 821 (1937); Tennessee: *Miller v. State*, 137 S.W. 760 (1911); Utah: *Colman v. Utah State Land Bd.*, 795 P.2d 622 (1990); Vermont: *State v. Central Vermont Rwy*, 571 A.2d 1128 (1989); Virginia: *Darling. v. City of Newport News*, 96 S.E. 307 (1918); Washington: *Orion Corp. v. State*, 747 P.2d 1062 (1987): Wisconsin: *Just v. Marinette County*, 201 N.W.2d 761 (1927); Wyoming: *Dav v. Armstrong*, 362 P.2d 137 (1961).

11 *See also State ex rel. Haman v. Fox*, 100 Idaho 140, 594 P.2d 1093, 1101-02 (1979) (public trust recognized, but held inapplicable under facts of case, where only private property over high water mark at issued: *Southern Idaho F&G v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974) (affirming right of public to use navigable streams for recreation).

12 Chief Justice Donaldson and Justice Shepard concurred in the result. Justice Bistline filed a concurring opinion. 671 P.2d at 1096.

13 *Shokal* was unanimously decided, with Justices Bakes and Shepard concurring in the result. 707 P.2d at 452.

14 In *Schodde*, the U.S. Supreme Court was applying Idaho law. The dun's observations arc fully pertinent here:

> [T]he right of the first appropriator, exercised within reasonable limits, is respected and enforced ... [but] must be exercised with reference to the general condition of the country and the necessities of the people, and tun so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual....
>
> While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public.... It is easy to see that, if persons by appropriating the waters of the streams of the state become absolute owners without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state.

224 U.S. at 121, *quoting Basey v. Gallagher*, 20 Wall. 670 (1875), and *Fitzoatrick v. Montgomery*, 20 Mont. 181, 187.

15 The comprehensive scope and impact of the SRBA on Idaho's water resources may best be demonstrated by analogy to *Kootenai*. At issue here is not a decision about a single marina on Lake Coeur d'Alene, as in *Kootenai*, but a decision about all uses of the entire "lake". If the public trust doctrine applies to the single marina at issue in *Kootenai*, *a fortiori* it applies to a proceeding in which uses 10 the entire resource are at stake.

16 "[A] statute should he construed so thai effect is given to all its provisions, so that no pan thereof will he inoperative or superfluous, void or insignificant." *East Shoshone Hosp. Dist. v. Nonimi*, 109 Idaho 937, 712 P.2d 638, 642 (1985), *quoting Sutherland Statutory Construction*, sec. 4705 (3rd ed. 1943).

17 The "powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

18 "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the couns below the Supreme Court, so far as the same may be done without conflict with this Constitution..."

19 District courts have "original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

20 *E.g.*, *State v. McCoy.*, 94 Idaho 236, 486 P.2d 247, 248-52 (1971) (legislative effort to deprive courts of inherent power to suspend sentences held invalid); *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767, 774-75 (1960) (legislature cannot preclude courts from reviewing the constitutionality of legislative action, which is inherent role of judiciary).

21 This Court's recent decision in *Musser v. Higginson*, No. 20807, 1994 Opinion No. 23 (Feb. 28, 1994), of course, confirms that the SRBA court can appropriately grant a writ of mandate against the director.

End of Document

APPENDIX E

Matt Anders Testimony

Q. Okay. As I understand the [methodology] order when the Department or the Director looks at the forecast supply, he is looking at prediction of the unregulated inflow volume at the Heise gage as of April 1st; is that right?
A. Yes.
(Anders, Tr. Vol. I, 162:9-13.)

Q. Okay. And the Heise gage is generally located where on the Snake River; do you know?
A. It's located by Palisades . . . but between Palisades and Idaho Falls, generally speaking.
Q. So its predicting the inflow in the watershed above that gage; correct?
A. [] yes.
(*Id*. at 162:18-163:2.)

Q. [T]he Blackfoot River drainage . . . the Blackfoot River comes below where the Heise gage would be; would you agree with that?
A. I believe it comes in from the east.
Q. The same for Willow Creek [tributary basin]?
A. Yes, I believe my geography is right. They both come in from the east below Heise.
Q. Also the Portneuf River drainage; correct?
A. . . . It comes in from the southeast, but also – yes.
Q. And these are all tributary streams to the Snake River; correct?
A. I believe so, yes.
Q. And what is the source of water for the Twin Falls Canal Company; do you know?
A. The Snake River.
Q. [] And so these tributary basins come in above Twin Falls Canal Company's points of diversion, do you agree?
A. Yes.
(*Id*. at 163:11-164:8.)

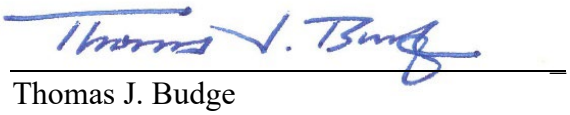
Q. And were you aware on the snow equivalency map for April 3rd, that the percentage snow pack in the Portneuf basin was 216 percent?
A. I knew it was very high. I didn't know the exact number.
Q. Did you know in the Blackfoot River drainage it was at 186 percent?
A. Again, I knew it was high, not the exact number.
Q. The same for Willow Creek at 178 percent?
A. Again, I knew it was high, but not the exact number.

Q. Was there ever any discussion within the Department to look at these other basins, in addition to the unregulated flow at Heise, [to] forecast as part of the water supply to the Surface Water Coalition?
A. We didn't have any discussions about adding them to our regressions or adding them [in] some way to the joint forecast, no.
Q. But you would agree, it would provide water to the water supply of the Twin Falls Canal Company, correct?
A. Among others. They can supply water to the reservoirs. They can supply water to anybody below [Heise] that's in priority.

(*Id*. at 164:17-165:16.)

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2024, I caused the foregoing document to be filed and served electronically via iCourt:



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