Thomas J. Budge (ISB# 7465)
Elisheva M. Patterson (ISB# 11746)
RACINE OLSON, PLLP
201 E. Center St. / P.O. Box 1391
Pocatello, Idaho 83204
(208) 232-6101 – phone
(208) 232-6109 – fax
tj@racineolson.com
elisheva@racineolson.com

Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

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

Case No. CV01-23-13173

IGWA'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

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

Idaho Ground Water Appropriators, Inc. (IGWA), acting for and on behalf of its members, submits this brief pursuant to I.R.C.P. 84(r) and I.A.R. 42(b) in support of IGWA's Petition for Rehearing filed June 21, 2024. Capitalized terms not defined in this brief have the meaning set forth in IGWA's Opening Brief filed December 8, 2023, or in this court's Memorandum Decision and Order issued May 31, 2024 ("Decision").

ARGUMENT

IGWA requests rehearing concerning the Court's assertions that: (1) the Coalition of Cities, City of Pocatello, and McCain Foods USA, Inc. were the only parties who requested an after-the-fact hearing in this matter, when IGWA also requested a hearing; (2) IGWA was not prejudiced by the Director's *Scheduling Order* and *Order Limiting Scope of Deposition* with regards to the Director's decision to switch from steady-state to transient state simulation of the ESPAM; and (3) IGWA did not cite to evidence in the agency record or transcript in support of its arguments in sections E, F, and G of the Decision.

1. The Decision should be corrected to acknowledge that IGWA submitted a request for hearing pursuant to Idaho Code § 42-1701A.

Section A of the Decision states that "the Coalition of Cities, the City of Pocatello, and McCain Foods USA, Inc. each did provide written notice requesting an Idaho Code § 42-1701A(3) hearing in this case," suggesting that no other party requested a hearing. IGWA also provided written notice requesting a hearing via *IGWA's Petition for Reconsideration and*

Request for Hearing filed May 2, 2023. (R. 135.) Therefore, IGWA respectfully requests that the Decision be amended to acknowledge IGWA's request for a hearing.

2. The Decision does not address IGWA's argument that the *Order Limiting Evidence* and *Order Limiting Discovery* violate due process.

IGWA has argued that the *Order Limiting Evidence* and the *Order Limiting Discovery* violate due process, are predicated upon unlawful procedure, and constitute an abuse of discretion. (IGWA's Open. Br., p. 24-27; IGWA's Reply Br., p. 14-16.) Specifically, IGWA has asserted that the Director's scheme to block the parties from discovering his rationale for the Director's change to transient-state modelling violated Idaho Code § 67-5242(3), IDAPA 37.01.600, and Idaho Supreme Court precedent. (IGWA's Open. Br., p. 24-17.) The Department argued in response that the Director has discretion to decide whether evidence is relevant, and he properly exercised his discretion in blocking the parties from discovering his rationale for switching to a transient-state model. (IDWR's Resp., p. 33.) The Department further argued that the Director is free to block parties from discovering relevant information "regarding legal and policy considerations." *Id*. at 31-32. IGWA vehemently disputes the Department's argument, arguing that the laws of Idaho and the United States Constitution entitle it to discover the Director's rationale for making a sweeping change to the methodology. (IGWA's Reply Br., p. 14-16.)

The Decision does not address IGWA's arguments, at least not with adequate particularity or rationale to enable IGWA to fairly challenge the Court's ruling on appeal.

The Decision affirms the Director's decision to switch to a transient-state application of ESPAM, stating that the "Director set forth his determinations and reasonings for making changes to the Fourth Methodology Order, legal and otherwise, in the Fifth Methodology Order," and that "steady-state simulations of the ESPAM previously used 'will only offset 9% to 15% of the predicted [in-season demand shortfall],' while transient simulations 'will offset the full predicted [in-season demand shortfall].'" (Decision, p. 18 (citing R. 30, 30-36). The problem is that the Director failed to explain why switching from a steady-state to transient-state application of ESPAM was necessitated <u>at this particular time</u>, when IDWR has had the ability to apply the Model in a transient-state for at least 10 years, and when the Department's "preliminary recommendations" did not preview this change to the methodology. (R. 2866.)

The Fifth Methodology Order gives nothing more than conclusory reason for switching to transient-state modelling, stating that the "Department now has multiple years of experience with the methodology to better understand the impact of applying steady-state modeling versus transient modelling to determine a curtailment priority date." (R. 35.) While this may be true, it does not explain the reason for making the change at this time, especially when it was not recommended by Department staff.

The Director's statements in the Fifth Methodology Order make it sound like a switch to transient mode is a new capability of the ESPAM—one the Department was unfamiliar with until the Fifth Methodology Order amendment. The truth is that the Department had this capability for 10 years. The Department's groundwater modeler, Jennifer Sukow, explained at the hearing that "the first version of the ESPA groundwater flow model was not calibrated at a time-scale that supported in-season transient state modeling, the current version was calibrated using monthly stress periods and half-month time steps, a refinement that facilitates in-season transient modeling for calculating the response to curtailment of groundwater use." (R. 35.) This is true as to the first version of ESPAM, but it is not true for version 2.1 which the Department has been using since 2013. Since then, Ms. Sukow acknowledged that Department has had the ability to run ESPAM in transient state for administration purposes, but chose not to. (Sukow, Tr. Vol. I, P. 46, L. 2 – P. 48, L. 23.) Thus, "new capability" is not the real reason for the Director's abrupt change to transient-state modelling after the 2023 irrigation season had already started.

The only other rationale offered by the Director is that decisions issued in the *Rangen* case in 2014 and 2015 justify the change to transient-state modelling. Of course, those decisions were issued many years ago even before the Fourth Methodology Order was issued in April 2016. Despite three years of experience using the transient-capable ESPAM 2.1, the Fourth Methodology Order utilized a steady-state application of ESPAM to determine an appropriate curtailment date. Thus, the Rangen decisions are not the real reason for the Director's abrupt change to transient-state modelling after the 2023 irrigation season had already started.

We are left with no cogent rationale for the Director's abrupt change to transient-state modelling. Junior-priority groundwater uses believe they know the real reason, but when they attempted to introduce evidence to that end, the Director barred them from that line of questioning, which itself is a violation of due process. (IGWA's Open. Br., p. 26.)

Since the Director failed to provide a valid reason for abruptly switching to transient-state modelling after the 2023 irrigation season had already started, and after Department's "preliminary recommendations" did not recommend that change, IGWA respectfully requests that the Court amend the Decision to explain why this is not a violation of Idaho law and an abuse of discretion as argued by IGWA.

3. The Decision mistakenly asserts that certain testimony cited by IGWA in support of its petition for judicial review is not part of the agency record.

The Court supports its conclusion of sections E, F, and G of the Decision be asserting that IGWA cited to testimony given by Anders, Sukow, and Barlogi which is not part of the agency record, and on that basis the Court affirmed the Director. These conclusions are mistaken since the transcripts cited by IGWA are in fact part of the agency record, as demonstrated below.

The Court presumably assumed that IGWA's citations are to deposition transcripts when they are actually citations to transcripts of the evidentiary hearing. IGWA respectfully request that the Court examine the hearing transcripts cited it IGWA's briefing and reconsider the Decision in light thereof.

Section E of the Decision addresses IGWA's arguments regarding the Director's error in determining the SWC's irrigated acres in the methodology, finding that "[i]n support of its argument, IGWA cites various transcripts, including the Anders Transcript, the Sukow Transcript, and the Barlogi Transcript which are not in the agency record and therefore are not before the Court." (Decision, p. 20.) IGWA's argument is set forth in section 7.2 of IGWA's Opening Brief, with citations to hearing transcripts of testimony given by Anders, Sukow, and Barlogi.

Section F of the Decision addresses IGWA's arguments regarding the forecast supply calculation, finding again that "IGWA has failed to carry its burden of proving [the finding that the joint forecast is 'generally as accurate a forecast as is possible using current data gathering and forecasting techniques'] is not supported by substantial evidence in the record. IGWA cites only the Anders Transcript in support of its argument. The Anders Transcript is not a part of the agency record and is therefore not before the Court. Therefore, the Director's determination on the forecast supply calculation must be affirmed." (Decision, p. 20-21.) IGWA's argument is set forth in section 7.1 of IGWA's Opening Brief, with citations to the hearing transcript of testimony given by Anders. Notably, the response brief filed by the Department did not take

issue with IGWA's citation to the Anders testimony. In addition, IGWA's Reply Brief states that "IGWA's argument is supported by the testimony from Mr. Anders found on pages 162-165 of the hearing transcripts, excerpts of which are attached hereto as Appendix D [for ease of reference]." (IGWA's Reply Br., p. 30.)

Section G of the Decision addresses IGWA's arguments concerning the supplemental groundwater fraction. Regarding these arguments the Court found that "IGWA cites the Anders Transcript and the Sukow Transcript in support of its argument. These transcripts are not a part of the agency record and are therefore not before the Court. Therefore, the Director's determination regarding supplemental groundwater must be affirmed." (Decision, p. 21.) The Court also found that the "database that assigns a ground water fraction to mixed-source lands and that this is the best science and data available to document supplemental ground water use" is not in the agency record, whereas it actually is. (R. 1176 electronic file > Materials Department Witnesses May Rely Upon at Hearing > 2023 5th Amended Methodology Order > Irrigated Acres > swc_irrigated_semi-irrigated_acres_2022). As discussed in Section 7.3 of IGWA's Opening Brief, Ms. Sukow testified at length about the Department's use of the mixed-source land dataset in ESPAM 2.2 at the agency hearing. IGWA cites to the agency record, not deposition transcript.

4. IGWA requests reconsideration and clarification of the Court's finding that IGWA did not produce clear and convincing evidence concerning the futile call doctrine.

IGWA argued on appeal that the Director violated Idaho law and abused discretion by refusing to apply the futile call doctrine in accordance with CM Rules 10.08 and 20.04. (IGWA's Open. Br., p. 40.) IGWA argued:

> Undisputed evidence at the hearing shows that curtailment of groundwater pumping within Carey Valley Ground Water District, Madison Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District will provide zero [sic] additional water to the SWC at the Time of Need, and curtailment of groundwater pumping within North Snake Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, and Bonneville-Jefferson Ground Water District will provide essentially no additional water to the SWC when compared to the magnitude of curtailment within those districts.

In support of this argument, IGWA cited the following table on page 2411 of the agency record:

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
SWID	-	-	-		0.02	153,292	7,664,595:1		-	-	-	-
No District	-	-	-		7,373.6	31,498	4:1		-	-	-	-
Grand Total					**74,720.8**	**1,597,439**	**21:1**					

The above table shows data generated by the Department's groundwater model used to determine which water rights would be curtailed under the Methodology Order. This data is undisputed.

The Court rejected IGWA's futile call argument on the basis that "IGWA did not produce clear and convincing evidence before the Department that the Coalition's delivery call is futile, nor does it attempt to dispute the Court's analysis in the *Clear Springs Foods, Inc.* decision." (Decision, p. 26.) The Court cited the part of the *Clear Springs Foods, Inc.* decision stating that "[t]he parameters of a futile call in surface to surface delivery do not fit in the administration of ground water," such that "[i]n effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated." (Decision, p. 25.) It appears to be the view of the Court that the *Clear Springs Foods, Inc*. decision stands for the proposition that a delivery call can never be deemed futile under conjunctive management.

IGWA requests reconsideration because the *Clear Springs Foods, Inc.* decision did not go so far. Conjunctive Management Rule 20.04 states unequivocally that "a call may be denied under the futile call doctrine," which Rule 10.08 defines as a call that "cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource."

The *Clear Springs Foods, Inc*. decision was based on the facts of that case, which are very different than the Surface Water Coalition delivery call case. In *Clear Springs Foods, Inc.*, the senior user relied upon constant, year-round spring flow to raise fish. Since flows from the spring

had declined, the Department determined that the senior would suffer constant, year-round injury unless the spring flows were restored. The Department did not develop a methodology order to calculate acute water needs because the shortage was constant. Even though curtailment of juniors would not produce immediate relief, curtailment was not deemed futile because even a delayed response would mitigate actual injury.

By contrast, injury to the Surface Water Coalition occurs intermittently, in fluctuating amounts, which is why IDWR developed the methodology order. IDWR shifted to the transient-state model in order to meet acute, intermittent water demands. In this context, the futile call doctrine is absolutely relevant, since curtailment of groundwater rights far away from the target springs will not satisfy a water supply shortage by the Surface Water Coalition within a reasonable time, and will in fact result in waste of the water resources.

Therefore, IGWA respectfully requests that the Court reconsider the Director's failure to apply the futile call doctrine based on undisputed evidence that shutting off many of the curtailed groundwater rights will not satisfy the predicted water shortage of the Surface Water Coalition within a reasonable time and/or will result in waste of the water resource.

5. The Decision does not address IGWA's argument concerning the public interest in maximum beneficial use of Idaho's water resources.

IGWA has argued that the Director "violated Idaho law and abused discretion by refusing to consider the public interest in achieving maximum beneficial use of Idaho's water resources in accordance with CM Rules 10.07, 20.03, and 42.01." (IGWA's Open. Br., p. 41-44.) The Decision does not address this argument. Therefore, IGWA respectfully requests that the Court provide its analysis of this issue in an amended decision.

CONCLUSION

In light of the foregoing, IGWA respectfully requests that the Court: acknowledge IGWA requested a hearing pursuant to Idaho Code § 42-1701A; address IGWA's arguments that the *Order Limiting Evidence* and *Order Limiting Discovery* violated due process, were predicated on unlawful procedure, and constituted an abuse of discretion in light of the failure of the Director to justify the timing of the change to transient state application of the methodology; reconsider IGWA's arguments addressed in sections E, F, and G of the Decision after considering the hearing testimony IGWA cited in its Opening and Reply Brief; reconsider the Director's failure

to apply the futile call doctrine; and address IGWA's argument concerning public interest in maximum beneficial use doctrine.

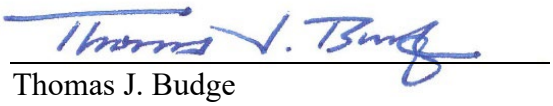
Respectfully submitted this 3rd day of July, 2024.

RACINE OLSON, PLLP

By: _____
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2024, I filed the foregoing document via iCourt and served it upon the persons below via email as indicated:



Thomas J. Budge

Clerk of the Court ADA COUNTY DISTRICT COURT	iCourt
Garrick L. Baxter Kayleen Richter Sarah Tschohl Deputy Attorney General Idaho Department of Water Resources garrick.baxter@idwr.idaho.gov Kayleen.richter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov	iCourt
Dylan Anderson DYLAN ANDERSON LAW PO Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com	iCourt
Skyler C. Johns Nathan M. Olsen Steven L. Taggart OLSEN TAGGART PLLC 1449 E 17th St, Ste A PO Box 3005 Idaho Falls, ID 83403 sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com icourt@olsentaggart.com mcastro@olsentaggart.com	iCourt

John K. Simpson Travis L. Thompson MARTEN LAW P. O. Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com jsimpson@martenlaw.com jnielsen@martenlaw.com	iCourt
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org brd@pmt.org	iCourt
Sarah A Klahn Maximilian Bricker SOMACH SIMMONS & DUNN 2033 11th Street, Ste 5 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com	iCourt
Candice McHugh Chris Bromley MCHUGH BROMLEY, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com	iCourt
Robert Harris HOLDEN KIDWELL HAHN & CRAPO, PLLC 1000 Riverway Drive, Suite 200 Idaho Falls, ID 83405 rharris@holdenlegal.com efiling@holdenlegal.com	iCourt