

Sarah A. Klahn (ISB# 7928)  
Maximilian C. Bricker (ISB #12283)  
SOMACH SIMMONS & DUNN, P.C.  
1155 Canyon St., Suite 110  
Boulder, CO 80302  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[mbricker@somachlaw.com](mailto:mbricker@somachlaw.com)  
*Attorneys for City of Pocatello*

Candice M. McHugh (ISB# 5908)  
Chris M. Bromley (ISB # 6530)  
MCHUGH BROMLEY, PLLC  
380 S. 4<sup>th</sup> St., Ste. 103  
Boise, ID 83702  
[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding, Hazelton,  
Heyburn, Jerome, Paul, Richfield, Rupert,  
Shoshone, and Wendell*

Robert L. Harris (ISB# 7018)  
HOLDEN KIDWELL HAHN & CRAPO,  
PLLC  
PO Box 50130  
Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)  
[efiling@holdenlegal.com](mailto:efiling@holdenlegal.com)  
*Attorneys for City of Idaho Falls*

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

CITY OF IDAHO FALLS, CITY OF  
POCATELLO, CITY OF BLISS, CITY OF  
BURLEY, CITY OF CAREY, CITY OF  
DECLO, CITY OF DIETRICH, CITY OF  
GOODING, CITY OF HAZELTON, CITY  
OF HEYBURN, CITY OF JEROME, CITY  
OF PAUL, CITY OF RICHFIELD, CITY OF  
RUPERT, CITY OF SHOSHONE, and CITY  
OF WENDELL

Petitioners,

vs.

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

Respondents.

**Case No. CV01-23-13238**

IDWR Docket No. CM-DC-2010-001

**CITIES' OPENING BRIEF ON  
JUDICIAL REVIEW,  
SWC POST-HEARING ORDER,  
FIFTH METHODOLOGY**

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

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Reasonable In-Season Demand	RISD	R. 0002
Demand Shortfall/ In-season Demand Shortfall	DS or IDS	R. 0002
Baseline Year	BLY	R. 0002
Forecast Supply	FS	R. 0002
Project Efficiency	Ep	R. 0012
Crop Water Need	CWN	R. 0013



Petitioners City of Idaho Falls, City of Pocatello, and the Coalition of Cities<sup>1</sup> (collectively, “Petitioners” or “Cities”), through their undersigned counsel, submit this opening brief pursuant to paragraph 9 of the Court’s *Procedural Order* dated August 17, 2023, the Court’s *Order Granting Unopposed Motion; Order Vacating and Resetting Hearing* dated November 17, 2023, Rule 84(p) of the Idaho Rules of Civil Procedure, and Rule 34 of the Idaho Appellate Rules.

## STATEMENT OF THE CASE

### A. Nature of the Case

This is a petition for judicial review of the findings, inferences, conclusions, or decisions made by the Director in the *Post-Hearing Order Regarding Fifth Amended Methodology Order* (Jul. 19, 2023) (“Post-Hearing Order”), after a three-day hearing on the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (Apr. 21, 2023) (“Fifth Methodology Order”).

### B. Procedural History

The *Fifth Methodology Order* is one in a series of final orders arising out of the ongoing Surface Water Coalition (“SWC”) Delivery Call, Docket No. CM-DC-2010-001, which was initiated by a January 14, 2005, letter from the SWC sent to the Director of Idaho Department of Water Resources (“Department” or “IDWR”). On May 2, 2005, the Director issued an *Amended Order* finding injury to certain SWC members’ natural flow and storage rights (“2005 Order”). Among the numerous procedural and substantive pre-hearing actions was the Supreme Court’s decision in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862 (2007)

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<sup>1</sup> The Coalition of Cities is composed of the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

(AFRD2), rejecting the SWC’s facial challenge to the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources, Idaho Admin. Code r. 37.01.11 (“CMR”), and defining the Department’s conjunctive management obligation to require delivery to seniors of the amount required for beneficial uses on acres that are actually irrigated—not necessarily the quantity or number of acres decreed.

On August 1, 2007, the Department appointed retired Idaho Supreme Court Justice Gerald Schroeder as hearing officer, with Justice Schroeder holding a hearing on the SWC’s delivery call request from January 16, 2008 to February 5, 2008. On April 29, 2008, Justice Schroeder issued an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (“2008 Opinion”). The *2008 Opinion* concluded that as the inputs to the Department’s determination of material injury changed, the Department had an obligation to revisit the delivery call analysis. *See, e.g., id.* at 51 (“The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.”).

On September 5, 2008, the Director adopted portions of the *2008 Opinion* in a *Final Order Regarding the Surface Water Coalition Delivery Call* (“2008 Order”), which was appealed. On remand from the appeals of the *2008 Order*, on April 7, 2010, the Director issued a *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”), based on the record developed at the January-February 2008 hearing, the *2008 Order*, and the rulings of the district court and Idaho Supreme Court on the various intervening appeals and petitions for judicial review. The *Methodology Order* refined the approach found in the Department’s *2005 Order* to determine

material injury, including starting from a forecast water supply and projecting shortages based on a baseline of the SWC's demands.

The Department has amended the *Methodology Order* on numerous occasions between 2010 and 2023, to wit: June 16, 2010 (“First Amended Methodology Order”); June 23, 2010 (“Second Methodology Order”); April 16, 2015 (“Third Methodology Order”); and April 19, 2016 (“Fourth Methodology Order”).<sup>2</sup> On April 21, 2023, the Director issued the *Fifth Methodology Order*, as well as the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“2023 Steps 1-3 Order”). R. 0001-47. The *Fifth Methodology Order* updated the nine steps the Department uses to determine material injury to SWC members. R. 0002. Despite nearly full reservoirs and abundant snowpack in the Upper Snake watershed in the spring of 2023, the *2023 Steps 1-3 Order* predicted a demand shortfall of 75,200 acre-feet for the 2023 irrigation season, which required appropriators with water rights junior to December 30, 1953, to mitigate or face curtailment. R. 0048-61.

Also on April 21, 2023, the Director issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery*, scheduling a prehearing conference for April 28, 2023, and an in-person evidentiary hearing on the *Fifth Methodology Order* and *2023 Steps 1-3 Order* for June 6-10. R. 0062-67. The Cities moved unsuccessfully to continue the evidentiary hearing—primarily on due process concerns—on multiple occasions. *See Motion for Continuance* (April 28, 2023) (R. 0080-89); *Motion for Reconsideration of Denial of Continuance* (May 5, 2023) (R. 0282-93); *Motion to Re-set Hearing Dates* (May 22, 2023) (R. 0446-51). *See Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (May 5, 2023) (R. 0299-

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<sup>2</sup> This brief refers to the assortment of orders, both past and future, as the “Methodology Orders.”

304) (reaffirming Director’s oral denial of the Cities’ *Motion for Continuance* at the April 28, 2023 prehearing conference); *Order Denying Motion for Reconsideration of Denial of Continuance* (May 19, 2023) (R. 0425-34); *Order Denying Motion to Re-set Hearing* (May 26, 2023) (R. 0500-04).

The Director held the evidentiary hearing from June 6-9, 2023. *See* R. 1067. The parties filed post-hearing briefs on or before June 16, 2023. *See* R. 0924-1003. On July 19, 2023, the Director issued a *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Sixth Methodology Order”), R. 1004-53; an *Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* (“2023 Steps 5-6 Order”), R. 1054-66; and the *Post-Hearing Order*, R. 1067-98.

On August 3, 2023, Petitioners filed a *Request for Hearing and Order Authorizing Discovery* based on the *Sixth Methodology Order*. R. 1130-34. On August 23, 2023, the Director issued an *Order Denying Request for Hearing and Motion to Authorize Discovery*. R. 1169-75. On September 5, 2023, Petitioners filed a *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery*.<sup>3</sup> On September 25, 2023, prior to Petitioners’ filing of a reply brief, the Director issued an *Order Denying Cities’ Motion for Clarification and Reconsideration*.<sup>4</sup>

On August 16, 2023, Petitioners filed a *Notice of Appeal and Petition for Judicial Review of Final Agency Action (Re: Post-Hearing Order Regarding Fifth Amended Methodology Order)*.

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<sup>3</sup> *See* Order Granting Motion to Augment Record; Order Augmenting Record, *City of Idaho Falls v. IDWR*, Case No. CV01-23-13238 (Nov. 15, 2023) (“Order Augmenting Record”) at 003-07. *See* App. A.

<sup>4</sup> *Id.* at 014-20.

### C. Statement of Facts

Given the scope of water rights subject to administration under the SWC Delivery Call, the Methodology Orders have become one of the most (if not *the* most) significant conjunctive management tools in Idaho, and the Department has long acknowledged its obligation to rely on reliable, robust, and up-to-date information to evaluate the various inputs to the Methodology Orders. Throughout the many years the Department has administered the “ongoing”<sup>5</sup> SWC Delivery Call, starting with the *2008 Opinion*, the Methodology Orders have been characterized as “dynamic document[s] that would be subject to change and would change with better information, better data, and better analysis.”<sup>6</sup>

It has been over 13 years since the *2010 Methodology* was initially issued, and the various Methodology Orders (First Amended, Second, Third, Fourth, Fifth, and Sixth) reflect the Department’s incorporation of updated data, information, and modeling, some of which could be described as “robust” or the “best available science.”<sup>7</sup> However, in some important instances the Department has also incorporated data and information that SWC itself provides to the Department without subjecting the SWC-provided information to meaningful scrutiny, and has preferentially adopted the SWC data rather than using other available and more reliable resources. *See* R. 0039-40 (describing process by which IDWR determines SWC’s irrigated acreage); R. 0048-49 (using irrigated acreage values simply “based on information submitted by

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<sup>5</sup> R. 0748.

<sup>6</sup> *See, e.g.*, Hr’g Tr. Vol. II, , 132:16-133:8; Hr’g Tr. Vol. IV, 201:3-15; R. 1297.

<sup>7</sup> R. 1660 (“Numerical models [such as ESPAM 2.1] are recognized by the U.S. Geological Survey as the most robust approach for predicting the effects of groundwater pumping on surface-water discharge”); R. 1210 (“ESPAM 2.2 is supported by the ESHMC and broader scientific community as representing the best available science for regional hydrologic analysis of the ESPA”); R. 1300 (“[M]any aspects of the SWC Methodology represent the best available science for estimating forecasted supply (FS), RISD [reasonable in-season demand], and Demand Shortfall (DS)”) (emphasis added).

the SWC . . .”). It has also adopted the SWC-provided information without providing Petitioners adequate discovery to collect alternative information to be offered at hearing. *Compare* R. 0064, 0127 (the Director provided Petitioners less than six (6) weeks to conduct discovery and prepare expert reports) *with* R. 0353-54 (Petitioners’ expert witness’ sworn statement that a *minimum* of three (3) to five (5) months is needed to perform necessary work).

The effect of this troubling reliance on uncorroborated data and information is that the *Fifth Methodology Order* grossly overpredicted SWC’s demand shortfall (i.e., material injury)<sup>8</sup> and ordered curtailment of far more acres than necessary to supply water that the SWC did not reasonably need.<sup>9</sup> A prominent example of the reliance on uncorroborated data is the Department’s use of SWC’s irrigated acreage numbers—acreage numbers derived from a 2013 shapefile created by Twin Falls Canal Company (“TFCC”)—that that are inconsistent with and much higher than both IDWR’s acreage numbers historically used in the Methodology Orders (based on evidence presented at hearing) and with IDWR’s own contemporaneously-developed acreage data.<sup>10</sup> The TFCC 2013 shapefile includes acres that the Department’s staff involved in developing the *Fifth Methodology Order* admitted, under oath, are “hardened” (and thus unable to be irrigated).<sup>11</sup> In the case of SWC’s project efficiencies, IDWR does not meaningfully assess whether those project efficiencies are reasonable by today’s standards,<sup>12</sup> presumably because the

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<sup>8</sup> Due to overpredicting demands and underpredicting supplies. *See infra*, at sections II-IV.

<sup>9</sup> Compounded by the Director’s adoption of the “transient” modeling method for purposes of curtailment. *See infra*, at section VII.

<sup>10</sup> Hr’g Tr. Vol. I, 132-37 (Department witness Matt Anders testified that the Department’s use of 194,732 acres (from the 2013 shapefile) for TFCC’s irrigated acreage was first incorporated into the *Fourth Methodology Order*, that prior *Methodology Orders* has used 183,589 acres, and that the Department did not disclose the change).

<sup>11</sup> Hr’g Tr. Vol. I, 132.

<sup>12</sup> Hr’g Tr. Vol. I, 130-132 (Mr. Anders testified that, while IDWR does examine “the reasonableness of the calculations” “on a technical level,” they do not assess whether the project efficiencies are “reasonable” in the legal sense).

Hearing Officer in 2008 found them to be reasonable.<sup>13</sup> The upshot is that IDWR blindly concludes that SWC’s submitted acreage data and the derived project efficiencies are accurate and/or reasonable, and then, in the context of discovery in advance of the 2023 hearing, stifled Petitioners’ attempts to investigate the validity of these conclusions. IDWR limited discovery on the *Fifth Methodology Order* because time was allegedly “of the essence.”<sup>14</sup> Yet when Petitioners challenged the *Sixth Methodology Order* a full eight months before the 2024 irrigation season, IDWR outright denied discovery.<sup>15</sup> This process has effectively precluded the Cities from successfully challenging the flaws in the *Fifth Methodology Order* and *Sixth Methodology Order* that were prescribed by the Director in 2023.<sup>16</sup>

### STANDARD OF REVIEW

Any party “aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court.” *Sagewillow, Inc. v. Idaho Dep’t of Water Res.*, 138 Idaho 831, 835 (2003) (citing Idaho Code (“I.C.”) § 67-5270(3)). Judicial review of a final decision or order of the Director is governed by the Idaho Administrative Procedure Act (“APA”). I.C. § 42-1701A(4). Under the APA, the Court shall “review an appeal from an agency decision based on the record created before the agency.” *Chisholm v. State Dep’t of Water Res.*, 142 Idaho 159, 162 (2005). District courts acting pursuant to the APA independently

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<sup>13</sup> See R. 0772 (“[b]oth the Hearing Officer and the Director found [in 2008], in considering the Rule 42 factors, that the Coalition members operate reasonable and efficient irrigation projects”).

<sup>14</sup> See, e.g., R. 0300.

<sup>15</sup> See R. 1130-34 (Requesting hearing and order authorizing discovery on the *Sixth Methodology Order*); R. 1169-75 (order denying discovery request); *Order Augmenting Record* at 003-07 (motion for clarification and reconsideration); *id.* at 014-020 (order denying clarification/reconsideration motion).

<sup>16</sup> For purposes of this brief, the content of the two Methodology Orders is identical, and they are used interchangeably, as the same flaws exist in both. See R. 1159-60 (stating that “the only change in the *Sixth Methodology Order*” was “limited corrections to the *Fifth Methodology Order*” “regarding AFRD2’s 2018 diversion volume”).

review the agency record on appeal. *Maclay v. Idaho Real Estate Comm'n*, 154 Idaho 540, 544 (2012).

Petitioners' substantial rights have been prejudiced by the Director's *Post-Hearing Order*. The *Post-Hearing Order*, and many of the Director's "findings, inferences, conclusions, or decisions" therein, are "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion," thus the *Post-Hearing Order* (and the accompanying *Sixth Methodology Order*) must "be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67-5279(3).

An agency action is arbitrary "if it was done in disregard of the facts and circumstances presented or without adequate determining principles," and capricious "if it was done without a rational basis." *In re Delivery Call of A&B Irrig. Dist.*, 153 Idaho 500, 511 (2012). Courts determine whether there was an abuse of discretion by analyzing whether the decisionmaker "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Chambers v. Idaho Bd. of Pharmacy & Agency*, 170 Idaho 701, 705 (2022).

"Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion . . . . It is more than a scintilla, but less than a preponderance." *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 507 (2014). Courts "will uphold an agency's findings if they are supported by substantial and competent evidence." *Id.* "The substantial and competent evidence standard is also equivalent to the 'clearly erroneous' standard



of I.R.C.P. 52(a).” *Higgins v. Larry Miller Subaru-Mitsubishi*, 145 Idaho 1, 4 (2007); *see also* *Nw. Farm Credit Servs. v. Lake Cascade Airpark, LLC*, 156 Idaho 758, 763 (2014) (“A finding is clearly erroneous if is not supported by substantial and competent evidence”).

The substantial evidence rule is said to be a middle position which precludes a *de novo* hearing but which nonetheless requires a serious review which goes beyond the mere ascertainment of procedural regularity.

Such a review requires more than a mere scintilla of evidence in support of the agency's determination . . . though something less than the weight of the evidence. Put simply . . . the substantial [competent] evidence rule requires a court to determine whether the agency's findings of fact are reasonable.

*Watson v. Joslin Millwork, Inc.*, 149 Idaho 850, 855 (2010) (quoting *Idaho State Insurance Fund v. Hunnicutt*, 110 Idaho 257, 260 (1985)). The evidence “need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.” *Nw. Farm Credit Servs.*, 156 Idaho at 764 (internal citation omitted).

### ISSUES ON APPEAL

1. Whether the Director's conclusion that “TFFC's 0.72 R-squared value is reasonable and the TFCC's natural flow forecast is sufficiently accurate,” R. 1082, and his failure to account for runoff in tributary basins, is supported by substantial evidence in the record as a whole, or is arbitrary, capricious, or an abuse of discretion.
2. Whether the Director's conclusions that “a safety factor of 4% is reasonable” and “2018 best satisfies the criteria for a baseline year,” R. 1082, is supported by substantial evidence in the record as a whole, or is arbitrary, capricious, or an abuse of discretion.

3. Whether the Director’s conclusion that “the Department’s safety factors do not aggressively overpredict demand shortfall,” R. 1083, is supported by substantial evidence in the record as a whole, or is arbitrary, capricious, or an abuse of discretion.
4. Whether the Director’s conclusion that “the [Cities’]<sup>17</sup> failed to satisfy their burden of proof” because they “did not establish an alternative number of acres irrigated by clear and convincing evidence,” R. 1085, is arbitrary, capricious, or an abuse of discretion because the Cities presented clear and convincing evidence that TFCC’s irrigated acreage is no more than 183,589 acres.
5. Whether the Director’s failure to ascertain and exclude “supplemental groundwater” acres, R. 1085-86, and “enlargement” acres, R. 2907, from SWC’s irrigated acreage violates his “ongoing obligation to use the best available science and information,” R. 0003, and his duty “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.
6. Whether the Director’s conclusion that “TFCC’s diversions and efficiency are reasonable,” R. 1089, and his failure to assess the reasonableness of all SWC

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<sup>17</sup> The bracketed use of the term “Cities” is necessary because unfortunately, in the *Post-Hearing Order*, the Director referred collectively to the Cities and the ground water districts (IGWA, Bonneville-Jefferson GWD, Bingham GWD) as the “ground water users”—even when rejecting evidence or argument made by only one or the other group of entities. The Cities and the ground water districts prosecuted separate appeals of the *Fifth Methodology Order* before the agency, and while they were aligned on the result, they did not agree on all issues. With that said, in certain instances the arguments and evidence presented at hearing by the Cities and ground water districts overlapped. For clarity, in this brief if a reference to the *Post-Hearing Order* refers to “Ground Water Users” on an issue upon which the Cities and ground water districts were not aligned (or did not even present evidence) we have noted that disconnect.

members' operations, is supported by substantial evidence on the record as a whole, or is arbitrary, capricious, or an abuse of discretion.

7. Whether the Director's conclusion that "curtailment dates . . . should be calculated by a transient model simulation," R. 1091, is in excess of the statutory authority of the agency, is supported by substantial evidence on the record as a whole, or is arbitrary, capricious, or an abuse of discretion.
8. Whether the Director's conclusion that "the [Cities'] due process rights were not violated," R. 1095, is in excess of the statutory authority of the agency, is supported by substantial evidence on the record as a whole, or is arbitrary, capricious, or an abuse of discretion.
9. Whether all of the foregoing conclusions by the Director were made upon unlawful procedure.

### **SUMMARY OF ARGUMENT**

The Director periodically updates the Methodology Orders with new information which should be the "best available science and information." However, the changes that the Director made—or in some instances, did *not* make—in 2023 render the *Sixth Methodology Order* less accurate at estimating SWC's material injury than the 2016 *Fourth Methodology Order*. There is no better example than the Director's prediction of material injury under the *Fifth Methodology Order* in April 2023, a year with abundant snowpack, which proved to be wildly inaccurate only a few months later.

There are three principal flaws in the *Sixth Methodology Order*: it grossly (1) over-predicts the SWC's material injury at the start of the irrigation season, (2) over-determines the

SWC's material injury at the end of the irrigation season, and (3) over-estimates the curtailment date necessary to redress the material injury during the irrigation season.

First, the Director's prediction of material injury (a/k/a "demand shortfall") in April is flawed because SWC's new "baseline year" for "reasonable in-season demand" is a year of *well* above-average diversions, and the "forecast supply" for TFCC is statistically inaccurate and fails to account for runoff in tributary basins below the Heise Gage. The result is a prediction of demand shortfall that is divorced from actual needs of the SWC. Second, the Director's determination of material injury in November is flawed because the Director uses overstated "irrigated acres" numbers and fails to deduct acreage associated with junior, enlargement surface water rights and/or acreage that is served by supplemental ground water rights; this issue is compounded by the Director assuming that SWC's "project efficiencies" are reasonable without any meaningful analysis, and the record does not support a conclusion that TFCC is reasonably efficient. Third, the Director's determination of curtailment dates is flawed because it improperly redresses SWC's material injury—the change to using transient modeling to determine curtailment dates grossly overstates which ground water rights are *causing*, and thus must face curtailment to remedy, the SWC's material injury; it also disregards the imbalance of curtailing 700,000 acres of junior farmland to produce 75,200 acre-feet to senior farmland.

Finally, Petitioners attempted to show the Director that the *Fifth Methodology Order* contained these glaring flaws at hearing in June 2023, but were unsuccessful, at least in part, due to having six weeks to prepare with discovery limitations. Thus, the Director's conclusions in the *Post-Hearing Order* are not only substantively erroneous but procedurally erroneous as well.

Accordingly, Petitioners request that the Court, consistent with the provisions of I.C. § 67-5279(3), set aside the *Post-Hearing Order* affirming the flaws in the *Fifth Methodology*

*Order*, and remand the *Sixth Methodology Order* for further proceedings consistent with the arguments in this brief to ensure that the Department’s administration of water rights under the Methodology Orders has a proper basis in fact and law.

## ARGUMENT

### I. Evidentiary Standard During the Agency Hearing versus Judicial Review

The District Court in *A&B Irrig. Dist. v. IDWR*<sup>18</sup> required the application of the “clear and convincing” standard in the event the Director determines to answer a delivery call by requiring delivery of less than the full decreed amount of a senior water right. *Memorandum Decision and Order on Petition for Judicial Review* at 24-38, Case No. 2009-000647 (Minidoka Cty. Dist., May 4, 2010). The Court’s rationale, subsequently upheld by the Idaho Supreme Court,<sup>19</sup> included the following:

Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right is decreed. Efficiencies, new technologies, and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres.

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Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use.

*Id.* at 30, 33. The Department—and this Court on judicial review—evaluates challenges to the Methodology Orders’ variations from decreed elements of the water right under the “clear and convincing standard.” R. 0761 (“If the Director is going to administer to less than the full amount of acres set forth on the face of the Coalition’s *Partial Decrees*, such a determination

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<sup>18</sup> 153 Idaho 500 (2012).

<sup>19</sup> *A&B Irrig. Dist. v. Spackman*, 155 Idaho 640, 655 (2013).

must be supported by clear and convincing evidence”); R. 1079 (“[a]ny diminishment of the decreed elements must be proven by clear and convincing evidence. *A&B Irrig. Dist.*, 153 Idaho at 524 . . .”).

But the Methodology Orders also incorporate metrics that are not elements of SWC’s water rights. For example, the “baseline year” is not an element of a water right,<sup>20</sup> hence challenges to this metric at hearing must meet the preponderance of the evidence standard, not the heightened standard of “clear and convincing.”<sup>21</sup> This is reflected in the Court’s review of challenges to these metrics: for example, this Court affirmed the Director’s decision to use an average of 2006 and 2008 values to establish a BLY on the basis of “substantial evidence” rather than the failure of the SWC to establish their position on the basis of “clear and convincing evidence.” R. 0759-60.

In this brief, the Cities will show that at hearing their evidence—whether through direct examination of their own witnesses or cross-examination of the Department and SWC’s witnesses—met the “clear and convincing” standard for *all* of the issues raised on appeal whether or not the issues related to elements of SWC’s decreed water rights. However, for those metrics in the Methodology Orders that are *not* elements on the face of SWC’s decrees, the Cities need only demonstrate that the Director’s determination for a particular metric is not supported by substantial evidence.

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<sup>20</sup> Neither is “reasonableness,” among other things. *AFRD2*, 143 Idaho at 877 (“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”).

<sup>21</sup> Other examples of non-decreed metrics include: “crop water need” (“CWN”), which relies on data generated by federal agencies regarding crop mix in particular counties; climate-related factors, such as reference evapotranspiration (“ET”) values; and Heise Gage and SWC diversion data.

## **II. The Director’s Conclusion that the Forecast of TFCC’s Supply is “Reasonable” and “Sufficiently Accurate” is Clearly Erroneous<sup>22</sup>**

There are two variables that the Department uses to predict SWC’s demand shortfall (“DS”) in April: the SWC’s forecast supply (“FS”) and the SWC’s reasonable in-season demand (“RISD”), which is initially represented by “the historic demands associated with a baseline year” (“BLY”). R. 0002.

To start, Petitioners challenged the reasonableness of Department’s input for the first variable, the FS for TFCC, under the *Fifth Methodology Order*. See, e.g., R. 2390-92; Hr’g Tr. Vol. III, 230-33. The FS “is comprised of natural flow and stored water.” R. 0018. The Department predicts natural flow supply upon receiving the “Joint Forecast” from the United States Bureau of Reclamation and United States Corps of Engineers in April, which “predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year.” *Id.* It uses the Joint Forecast to develop multi-linear regression equations “to predict the natural flow diverted for the upcoming irrigation season.” *Id.* The regression equations compare “the actual Snake River near Heise natural flow and the flows at Box Canyon to the natural flow diverted.” *Id.*

Using this process, the Department predicted TFCC’s total water supply to be 1,046,519 acre-feet in 2023 (R. 0050), grossly underestimating TFCC’s total water supply in light of the extraordinary snowpack and runoff associated with Snake River tributaries in 2023. See Hr’g Tr. Vol. I, 167-68. The evidence and testimony at hearing revealed that the Department’s forecast: (1) is far less accurate at predicting TFCC’s supplies (R-squared value of 0.72) than predicting any other SWC members’ supplies (R-squared values range from 0.84-0.93), R. 2655; and

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<sup>22</sup> The Table of Acronyms at the front of the brief can be used to navigate the thicket of acronyms in certain sections of this brief.

(2) fails to consider runoff in tributary streams that join the Snake River below the Heise Gage but above TFCC’s point of diversion. Hr’g Tr. Vol. I, 161-65; Hr’g Tr. Vol. III, 230-33.

Nevertheless, in the *Post-Hearing Order*, the Director concluded that “TFCC’s 0.72 R-squared value is reasonable and the TFCC’s natural flow forecast is sufficiently accurate.” R. 1082.

First, the Department’s reliance on the Joint Forecast to predict TFCC’s water supplies is arbitrary and capricious. The Joint Forecast relies solely on the Heise Gage, located near Palisades Reservoir (Hr’g Tr. Vol. I, 162), and thus excludes several tributaries to the Snake River below the Heise Gage that are a source of surface water to SWC members, who all divert below American Falls Reservoir. Hr’g Tr. Vol. III, 232-33. The Water District 01 Watermaster testified that in 2023 these basins experienced unusually high runoff and even higher snowpack totals than the basins above Palisades. Hr’g Tr. Vol. III, 233-34; *see also* R. 1599. Department witness Matt Anders testified that he was aware of the above-average snowpack totals in these basins but that there were no discussions within the Department to consider them when forecasting SWC’s supplies. Hr’g Tr. Vol. I, 161-65. The Department’s choice to disregard this information that could improve its water supply forecasting not only defies its duty to use the “best available science and information,” R. 0002, but resulted in the Department’s FS being wildly inaccurate, one of two reasons<sup>23</sup> why the Department walked back its initial DS prediction for TFCC. *Compare* R. 0050 (predicting an FS of 1,046,519 acre-feet and a 75,200 acre-feet DS) *with* R. 1060-61 (predicting an FS of 1,076,089 acre-feet and zero DS).<sup>24</sup>

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<sup>23</sup> The other reason being the Department’s prediction of TFCC’s RISD, by using a flawed BLY, was grossly overestimated. *See supra*, at section III.

<sup>24</sup> The Cities request that the Court take judicial notice of the *Final Order Establishing 2023 Reasonable Carryover (Methodology Step 9)* (Nov. 30, 2023) (“2023 Step 9 Order”) (attached as App. B), which demonstrates that TFCC’s total supplies in 2023 were 1,130,031 acre-feet (83,512 more than predicted in the FS—significantly more than the predicted DS of 75,200 acre-feet). <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM->



Second, the Department’s determination that TFCC’s 0.72 R-squared is “reasonable” was arbitrary and capricious. R-squared statistics “help users understand how much of the variability that regression equation is accounting for.” Hr’g Tr. Vol I, 187; *see also* Hr’g Tr. Vol. III, 49. While other SWC-member R-squared values have remained constant between 0.84 and 0.93 since 2014 (the first year the regression equations were used), TFCC’s value has declined from 0.86 to 0.72. R. 2655. Despite repeated recommendations (as far back as 2015, *see* R. 2882) from experts that the Department use an alternative forecasting approach and re-evaluate the forecasting if R-squared values drop below a threshold, R. 2391-92, the Department has made no changes and does not currently intend to change the way it forecasts TFCC’s water supplies. Hr’g Tr. Vol I, 188-91. The Department could improve the accuracy of its FS, thereby increasing the R-squared value, to account for tributary flows when predicting TFCC’s FS. From a practical perspective it isn’t clear why this wasn’t done: if there is no snow in the tributary basins, that will be reflected in the pre-season prediction; if there is snow, it will more accurately predict available supply. There is no risk to the seniors from creating a more accurate predictive tool for FS.

While “the Director purposely underestimates the water supply that is predicted”<sup>25</sup> because he believes that “this is an appropriate burden for junior appropriators to carry,” R. 0037, in 2023 the Director’s continued reliance on a forecast tool that fails to account for tributary basin flows is an abuse of discretion, especially considering precipitation data for those basins are readily available to the Department. *See* Hr’g Tr. Vol I, 163-165; Hr’g Tr. Vol. IV, 127.

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[DC-2010-001-20231130-Final-Order-Establishing-2023-Reasonable-Carryover-Methodology-Step-9.pdf](#) (last visited Dec. 19, 2023).

<sup>25</sup> This reference to underestimation refers to the Department’s “shifting the April Forecast Supply prediction curve down one standard error of estimate,” which is another safety factor *on top of* the discussed inaccuracies in the FS for TFCC.

Accordingly, the Court should reject as clearly erroneous the Director’s conclusion that an R-squared value of 0.72 is “reasonable” and the FS for TFCC is “sufficiently accurate,” R. 1082, and, on remand, require the Department to account for precipitation in tributary basins below the Heise Gage when predicting TFCC’s FS.

### **III. The Director’s Conclusion that 2018 is a “Reasonable” BLY is Clearly Erroneous**

Petitioners disputed the reasonableness of the Department’s input for the second variable in the SWC’s DS prediction, the BLY, challenging the Director’s switch from using an average of diversions in 2006, 2008, 2012 (“2006/2008/2012 BLY”) in the *Fourth Methodology Order* to using 2018 diversions as the BLY for RISD in the *Fifth Methodology Order*. *See, e.g.*, R. 1527-28 (pointing out that the Department increased SWC’s BLY demands without any “analyses to assess the reasonableness of the increased SWC member diversions since 2014 that prompted the need to change the BLY”). As shown in the figure below, the change from the 2006/2008/2012 BLY to the 2018 BLY increased the Department’s prediction for SWC’s RISD by 147,217 acre-feet. R. 0012 (difference between 3,341,939 acre-feet and 3,194,722 acre-feet). In particular, it increased TFCC’s and AFRD2’s—the only two SWC members who have ever experienced material injury under the Methodology Orders—BLY demands by 61,706 acre-feet and 26,218 acre-feet, respectively. R. 0012. This increase in predicted RISD occurred despite SWC witnesses’ testimony that they have continually improved the efficiencies of their systems with new and better technologies. *See, e.g.*, Hr’g Tr. Vol. II, 75.

Entity	2000-2021 Avg. Total Diversions (Acre-Feet)	06/08/12 Avg. Total Diversions (Acre-Feet)	06/08/12 % of Avg.	2018 Total Diversions (Acre-Feet)	2018 % of Avg.
A&B	59,474	59,993	101%	64,192	108%
AFRD2	427,978	427,672	100%	453,890	106%
BID	247,049	251,531	102%	262,211	106%
Milner	53,343	47,135	88%	58,417	110%
Minidoka	354,181	369,492	104%	354,851	100%
NSCC	996,267	978,888	98%	1,026,661	103%
TFCC	1,062,098	1,060,011	100%	1,121,717	106%
Total	3,200,389	3,194,722	100%	3,341,939	104%

Average SWC Diversions (acre-feet) for 2000-2021, 2006/2008/2012 BLY, and 2018 BLY.

(R. 0012.)

The Department defended the change by stating that 2018 “best satisfies” the Department’s own criteria for selecting a BLY, SWC’s 2018 diversions were 104% of average (from 2000-2021), and “a safety factor of 4% is reasonable.” R. 1082. For TFCC and AFRD2, however, the safety factor is 6%; for Milner and A&B Irrigation District (“A&B”), the safety factor is 10% and 8%, respectively. R. 0012 . TFCC’s 2018 diversions rank second in its annual diversions in the fifteen (15) year period from 2007-2021, and AFRD2’s rank fourth. R. 1578-79.

The 2006/2008/2012 BLY provided TFCC and AFRD2 safety factors of 1% and 2%, respectively. R. 1390. Safety factors of this magnitude are consistent with those associated with the 2006/2008 BLY that this Court approved in 2014—in that appeal, the City of Pocatello challenged the 2006/2008 BLY because it was inconsistent with the *2008 Opinion*, which approved of the use of historical average diversions; the Court rejected Pocatello’s arguments and affirmed the Director’s selection, holding that the use of an average BLY (i.e., a year(s) where diversions were 100% of average) unreasonably shifts the risk to seniors for purposes of pre-season predictions. R. 0774-76.

The Cities' argument here is that the Department's selection of 2018 as the new BLY *goes beyond* what is required to avoid shifting the risk to the seniors. This selection had significant repercussions in 2023 for junior ground water users—because the Department grossly over-predicted demand for the largest SWC member, numerous junior users were forced to rush to acquire mitigation supplies that would not have been needed under an appropriately conservative BLY. If a “a safety factor of 4% is reasonable” (R. 1082), then the Department must find a BLY that provides a 4% safety factor for all of the seniors. Accordingly, the Court should reject as clearly erroneous the Director's conclusion that its selection of the 2018 BLY was “reasonable,” and, on remand, require the Department to select a new BLY that is indeed reasonable, especially when predicting TFCC's and AFRD2's RISD.

**IV. The Department's Conclusion that Collectively the Safety Factors “do not aggressively overpredict demand shortfall” is Clearly Erroneous**

As discussed in the foregoing sections, the Department's FS for TFCC is flawed and underestimates supplies, and the Department's selection of the 2018 BLY is unreasonably conservative and overestimates RISD, resulting in DS predictions that far exceed volumes TFCC reasonably needs to satisfy its beneficial uses. While each error warrants a remand on its own, when taken together, the combination of the two (or, as the Department calls it, “cumulative bias,” R. 1083) illustrate the magnitude of the Department's inaccuracy when predicting TFCC's DS. As shown in the table below, the Department's predictions in April 2023 overstated DS by approximately 200,000 acre-feet.

<b>Order:</b>	<b>TFCC-FS (af)</b>	<b>TFCC- BLY/RISD (af)</b>	<b>TFCC- DS (af)</b>
<i>2023 Steps 1-3 Order</i> (R. 0050)	1,046,519	1,121,717	75,200
<i>2023 Steps 5-6 Order</i> (R. 1061)	1,076,089	996,214	0
<i>2023 Step 9 Order</i> <i>(attached as App. B)</i>	1,130,031	1,007,766	0
<b>Net changes over the course of 2023</b>	+83,512	-113,941	-200,000

While forecasts are inherently imperfect, the Department’s DS prediction under the *Fifth Methodology Order* reflects inaccuracies that amount to an abuse of discretion.

The *Post-Hearing Order* defends the Director’s conclusion that “the Department’s safety factors do not aggressively overpredict demands shortfall” by pointing out that the predicted DS in April was less than the actual DS in November four (4) times in the eight (8) year period between 2015-2022, so the *Fourth Methodology Order*’s “safety factors failed to protect seniors 50% of the time.” R. 1083 (citing Ex. 837A at 82 (R. 2450)). However, as shown in the figure below (R. 2450), two (2) of the four (4) years where the actual DS exceeded the predicted DS under the 2006/2008/2012 BLY only did so by a small margin<sup>26</sup>, and the other two (2) years were the severe drought years of 2021-2022.<sup>27</sup> R. 2450; *see also* R. 2730. It also reveals that there were two (2) years where predicted DS exceeded the actual DS by a magnitude of 20,000 acre-

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<sup>26</sup> “Small margin” means 11,000 acre-feet or less, which occurred in 2015 (difference between 88,959 and 92,246) and 2018. Further, the *Final Order Establishing 2018 Reasonable Carryover (Methodology Step 9)* (see App. B) reveals that there was zero DS in 2018, so the 10,996 acre-feet DS amount that is reflected in the far-right column appears to be erroneous.

<sup>27</sup> Further, the RISD value that is used in the November DS equation is calculated by dividing CWN by historical project efficiencies, R. 0017. As discussed in section V, *infra*, TFCC’s irrigated acreage numbers are overstated, and in section VI, *infra*, TFCC’s operations are not reasonably efficient; so, the DS values in the far-right column on R. 2450 are also overstated on those bases.

feet or more.<sup>28</sup> R. 2450. When looking at the second column from left rather the first (using the 2018 BLY instead of the 2006/2008/2012 BLY), actual DS exceeds the predicted DS just once (2021) in the eight (8) year period, and predicted DS exceeds actual DS seven (7) times. R. 2450.

Table 1 - Summary of Hindcast SWC Delivery Call Demand Shortfall Calculations 2000-2022

Year	April BLY 06-08-12 (AF)	April BLY 2018 (AF)	July BLY 06-08-12 (AF)	July BLY 2018 (AF)	November Actual Demand Shortfall (AF)
2000	30,183	126,125	0	0	0
2001	179,947	334,970	160,472	200,546	243,565
2002	42,800	131,308	17,381	45,136	31,217
2003	10,124	93,902	43,808	80,241	0
2004	199,101	364,958	223,032	264,426	264,340
2005	114,916	228,241	0	0	0
2006	0	0	365,880	388,939	23,792
2007	56,914	152,855	201,036	253,185	289,065
2008	0	15,138	46,525	55,334	0
2009	0	34,109	0	0	0
2010	94,957	190,898	0	0	0
2011	0	0	0	0	0
2012	0	53,778	69,066	92,125	139,524
2013	28,802	110,912	114,058	154,132	22,588
2014	0	0	0	0	0
2015	88,959	184,901	107,418	138,684	92,246
2016	44,163	111,457	21,271	44,330	7,853
2017	0	65,382	0	0	0
2018	0	44,805	0	0	10,996
2019	20,943	88,237	0	0	0
2020	0	59,101	0	0	0
2021	40,491	126,102	162,873	194,139	190,816
2022	162,613	313,446	52,771	84,036	276,551
Average:	48,474	123,071	68,939	86,750	69,241
Median:	28,802	110,912	21,271	45,136	7,853
75th Percentile:	72,937	168,878	110,738	146,408	115,885
80th Percentile:	92,558	188,499	141,906	178,136	170,299
85th Percentile:	108,928	217,038	162,153	198,624	227,740
86th Percentile:	113,319	225,254	162,681	200,033	239,345
87th Percentile:	121,594	240,170	168,216	207,915	246,474
88th Percentile:	132,087	258,915	176,612	219,496	251,044
89th Percentile:	142,580	277,660	185,008	231,077	255,615
90th Percentile:	153,074	296,405	193,403	242,657	260,185
95th Percentile:	178,214	332,818	220,832	263,302	275,330
Max:	199,101	364,958	365,880	388,939	289,065

Hindcasting and spreadsheet summary developed by IDWR (Matt Anders, Kara Furgason) as part of the Nov-Dec 2022 SWC Delivery Call TWG meetings.

<sup>28</sup> This occurred in 2016 (overprediction by roughly 36,000 acre-feet) and 2019 (overprediction by nearly 21,000 acre-feet).

(R. 2450.)

Using 2018 as the BLY results in predicted shortfalls (i.e., DS >0) *every* year in the 2015-2022 period, including two (2) years where using the 2006/2008/2012 BLY *correctly* predicted zero DS (2017, 2020). R. 2450. Thus, had the Director used the 2018 BLY in those years when predicting DS, junior users would have unnecessarily acquired mitigation supplies (or faced curtailment) as occurred in 2023. *Compare* R. 0050 *with* R. 1061. Finally, three (3) of the years where using the 2018 BLY causes the predicted DS to exceed the actual DS would have resulted in overpredictions between 88,000-103,000 acre-feet (2015, 2016, 2019).<sup>29</sup>

The Director’s predicted DS of 75,200 acre-feet for TFCC in April 2023, which was inaccurate by approximately 200,000 acre-feet,<sup>30</sup> had severe consequences for junior users—and more importantly from a legal perspective, is contrary to the Director’s obligation to “use the best available science and information” and take straightforward measures to improve the accuracy of these predictions to avoid unwarranted hardship. R. 0002. In ratcheting down the Methodology Orders’ provisions to avoid risk to seniors, the Department has created BLY demand and FS rubrics that stray from the delivery call principles affirmed by the Supreme Court both in *AFRD2*,<sup>31</sup> 143 Idaho at 880, and in *A&B Irrig. Dist. v. Spackman*, 155 Idaho at 649 (the “baseline estimate [is] to represent predicted in-season irrigation *needs* . . . .”) (emphasis added).

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<sup>29</sup> Which, under the transient model approach, would require curtailment of up to 941,400 acres of irrigated agriculture to supply those amounts to TFCC, because curtailing *all* rights junior to October 11, 1900 (TFCC’s natural flow right priority) is predicted to yield a maximum of 97,700 acre-feet of supply to SWC in an irrigation season. This means that virtually *all* ground water rights junior to TFCC’s right would have faced curtailment under such overpredictions. *See* R. 2750-71; *supra*, at section VII.

<sup>30</sup> *Compare 2023 Step 9 Order* at 3 with R. 0050.

<sup>31</sup> “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 . . . and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out.”

Accordingly, the Court should reject as clearly erroneous the Director’s conclusion that, cumulatively, “the Department’s safety factors do not aggressively overpredict demand shortfall,” R. 1083, and require on remand that the Director correct the flaws in the two DS prediction variables as requested in the sections above.

**V. The Director’s Quantification of SWC’s Irrigated Acreage is Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law**

Sections II-IV above covered the deficiencies in the *Fifth Methodology Order* regarding the Director’s prediction of DS that occurs in the April Steps 1-3 Orders. Sections V-VI will cover the deficiencies regarding the Director’s determination of DS that occurs in the November Step 9 Orders.<sup>32</sup>

After the irrigation season concludes, the Director determines the DS by subtracting SWC members’ calculated RISD from their actual supplies. *See* R. 0043, 1083, 2193.<sup>33</sup> RISD is calculated by first “multiplying crop specific [consumptive use] values,” (i.e., acre-feet per acre consumptive use requirements by crop) “by the total irrigated area of individual crop types, and summing for all crop types,” (i.e., total irrigated acres) which yield a total crop water need (“CWN,” in units of acre-feet; CWN is then divided by historical project efficiencies. *See* R. 0013-15, 1087. Under the *Fifth Methodology Order*, the Director’s determination of TFCC’s DS is inaccurate because (1) the irrigated acreage values are significantly overstated and include hardened acres, supplemental ground water acres, and enlargement acres; and (2) the project efficiency values are unreasonably low. *See, infra*, Section VI. Together, these flaws amplify the inaccuracy and render TFCC’s *reasonable* in-season demands to be *unreasonably* high.

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<sup>32</sup> It bears noting that the intermediate steps (Steps 5-8) utilize a hybrid formula, where the Department determines DS to-date while predicting DS for the remainder of the irrigation season. *See* R. 0039-43.

<sup>33</sup> *See also* 2023 Step 9 Order at 3.



**A. The Evidence at Hearing Clearly Demonstrated that TFCC's Irrigated Acreage Includes Hardened Acres**

The testimony and evidence at hearing showed there are no fewer than four data sources available to the Department showing TFCC's irrigated acreage is between 179,400-183,600 acres: (1) 2011 Irrigated Lands data (179,486 acres), R. 2813; (2) 2017 Irrigated Lands data (180,956 acres), R. 2813; (3) 2021 NRT Metric Processing data (179,456 acres), R. 2810; and (4) the 2007 SPF data (183,589 acres), R. 0364-66. Nonetheless, the Department used 194,732 acres as TFCC irrigated acreage number in the *Fifth Methodology Order*, based on a shapefile created by TFCC in 2013. R. 0010. This acreage value is over 11,000 acres *higher* than the acreage number used by the Department in the Methodology Orders from 2010 through 2014, R. 0364-65; it is also substantially higher than the acreage endorsed by the Hearing Officer in 2008 as a finding of fact. *2008 Opinion* at 53 ("IGWA has established that at least 6,600 acres claimed by TFCC in its district are not irrigated").<sup>34</sup>

According to the testimony of Matt Anders, the Department's technical services bureau chief who is the lead on updating the Methodology Orders, the Department began using 194,732 acres for TFCC in 2015.<sup>35</sup> Hr'g Tr. Vol. I, 133-34 (prior to 2015, the Department was using 183,589 acres for TFCC); *see also* R. 0365 (the amount seemingly changed based on letters from SWC counsel in 2014 and 2015 that asserted TFCC irrigates 194,778 acres).<sup>36</sup> Mr. Anders

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<sup>34</sup> Which means that, as of 2008, there was no more than 189,562 (196,162 minus 6,600) acres being irrigated. *See* R. 0012 (TFCC's decreed acreage amount is 196,162 acres).

<sup>35</sup> Neither the *Third Methodology Order*, issued in April 2015, nor the *Fourth Methodology Order*, issued in April 2016, identified the basis for increasing TFCC's irrigated acreage. *See* Hr'g Tr. Vol. I, 136-37; *compare* R. 0009-10 (table showing SWC irrigated acres is contained in ¶ 22 of the "irrigation practices" section) *with* R. 1388-89 (no such table in the "irrigation practices" section of the *Fourth Methodology Order*).

<sup>36</sup> Interestingly, one of the few changes between the *Fifth Methodology Order* and the *Sixth Methodology Order* was the removal of the first sentence in ¶ 21 of the *Fifth Methodology Order*, which stated "estimates of irrigated acres from the hearing show a trend of decreasing irrigated acreage." *Compare* R. 0009-10 *with* R. 1013-14.

testified that the TFCC 2013 shapefile showing 194,732 acres and used by the Department in the *Fifth Methodology Order* contains “hardened” (un-irrigable) acres. Hr’g Tr. Vol. I, 132, and that the Department’s 2017 data is a “more accurate representation of irrigated acres than the 2013 shapefile.” *Id.* at 194-95.

The evidence shows it is “highly probable” that TFCC’s irrigated acres is no more than 183,589 acres.<sup>37</sup> Nevertheless, the Director erroneously concluded “the ground water users failed to satisfy their burden of proof” because they “did not establish an alternative number of acres irrigated by clear and convincing evidence,” R. 1085, and again endorsed 194,732 as the irrigated acreage value for TFCC in the *Sixth Methodology Order*. R. 1014. The Director’s rationale that the TFCC 2013 shapefile is a better representation of “the number of acres TFCC may irrigate in 2023” than the “2017 shapefile” because the latter is but “a snapshot in time” and does not “predict *future* irrigated acres” is inadequate to support his finding—the exact same thing can be said about the TFCC 2013 shapefile acres. R. 1084. It is difficult to fathom what evidence Petitioners would have needed to present to clearly convince the Director that TFCC’s irrigated acreage value is no more than 183,589 acres.<sup>38</sup>

The *2008 Opinion* limited determination of the supply to be made available to the SWC in a delivery call based on irrigated acres. *2008 Opinion* at 53 (“Non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members”).<sup>39</sup> Petitioners acknowledge their burden to presenting clear and convincing evidence establishing that SWC members are not irrigating “the full amount of acres set forth on the face of the Coalition’s

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<sup>37</sup> This is the standard for clear and convincing evidence. *See* R. 1074 (citing *In re Doe*, 157 Idaho 694, 699, 339 P.3d 755, 760 (2014)).

<sup>38</sup> And in any event, as discussed *infra* at section IX, the Director’s discovery schedule was inadequate to allow for the type of analyses that would have allowed the Cities and IGWA to develop a (fifth) independent acreage analysis.

*Partial Decrees*” (R. 0783, 0787), but if that burden was not met at the June 2023 hearing, it was arguably met by IGWA’s evidence offered in 2008 and adopted by the Hearing Officer. The Cities are unaware of any proceeding in which the TFCC 2013 shapefile has been demonstrated to be more accurate than the 2008 value adopted by Justice Schroeder.

But leaving aside the evidentiary issues, the Director doesn’t act in a vacuum. “[T]he 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. It is undisputed that the Director’s use of 194,732 acres for TFCC’s irrigated acreage significantly overstates the number of acres *actually* being irrigated.<sup>40</sup> The use of this number is clearly erroneous and an abuse of discretion that violates the Director’s duty identified by the Supreme Court, as well as his duty to use the “best available science and information,” R. 0002, in order to avoid delivering water to the SWC that is not “attributable to the beneficial use of growing crops within the service area of the entity.” R. 0012. Accordingly, on remand, the Court should require the Department to issue an updated *Methodology Order* that uses the *best* available data for TFCC’s irrigated acres.

**B. The Evidence at Hearing Clearly Demonstrated that SWC’s Irrigated Acreage Includes Supplemental Ground Water Acres**

As part of the Department’s evaluation of material injury and reasonableness of diversions in a delivery call context, the CMRs provide several factors for consideration, including supplemental ground water use. CMR 42.01(g). The Department purports to consider supplemental ground water use as a factor under the *Fifth Methodology Order*. R. 0010.

Factually, the Director has already determined “[t]here are lands within the service areas of SWC

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<sup>40</sup> The Director’s use of 194,732 acres for TFCC’s irrigated acreage also does not account for acres being irrigated by supplemental ground water rights and enlargement acres, as discussed in the next sub-sections.

entities that are irrigated with supplemental groundwater[.]” *id.*, which is not disputed by SWC’s experts. R. 1246 (“Usage of private groundwater wells for supplemental purpose on surface water irrigated lands occurs within the Twin Falls Canal Company service area[.]”).<sup>41</sup> Despite the foregoing, the Director asserted in the *Sixth Methodology Order* that the Department’s current supplemental ground water information is not sufficient or reliable, and consequently, the Director has elected to ignore this factor entirely. R. 1045.

Evidence presented at the hearing demonstrates that there is information available to the Department through its Water Management Information System (“WMIS”) database and Geographic Information Shapefiles (“GIS”) regarding ground water right places of use and points of diversion. As acknowledged by Dr. Brockway, SWC’s expert, the WMIS database tracks ground water diversion either measured by flowmeters or calculated through power conversion calculations. Hr’g Tr. Vol. IV, 982:17-983:2. Dr. Brockway testified that he uses this data in conjunction with transfer applications (filed under I.C. § 42-222), and while not perfect, considers it to be a reliable source of information for historical ground water diversions in other Department contexts. *Id.* at 983:3-13. He further acknowledged that the ground water diversion information contained in the WMIS data is the “best available” and that information could then be matched to places of use and points of diversion for ground water rights that are contained within TFCC’s service area. *Id.* at 983:14-984:4.

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<sup>41</sup> The Department’s witness Matt Anders admitted the agency made no effort to evaluate supplemental ground water use during the Department’s technical review of the *Fourth Methodology Order*. Hr’g Tr. Vol. 1, 197. Certainly, if the available Department data on supplemental ground water use was deficient, one would expect the Department to have engaged in some effort to obtain data or refine existing data since the *Fourth Methodology Order* was issued seven (7) years ago in April of 2016. If the Department will not do the work on its own and denies Petitioners any meaningful opportunity to discover information in a timely manner, the agency’s inability to incorporate this type of information into the Methodology Order is self-fulfilling.

Additionally, in the absence of direct data, the Department utilizes estimates of ground water use on mixed-source ground in its ESPA model where both surface and ground water entitlements are authorized to be used. Hr’g Tr. Vol I, 69:21-70:6. Presumably, such estimates are informed by data from the WMIS database, but in any event, no matter how the Department calculates its estimates, there is no legal or factual reason why the Department could not similarly employ the same methodology to provide an estimate in its *Fifth Methodology Order* for supplemental ground water use.

Although the Director found that available supplemental ground water use data was not sufficient or reliable, the Department witnesses did not present any evidence or testimony as to the bases for this conclusion; similarly, the *Post-Hearing Order* is devoid of an explanation and does not explain why the unrefuted testimony in the record does not establish the reliability of available data for purposes of determining supplemental ground water use. The Department’s omission of a determination under the *Fifth Methodology Order* that would improve the accuracy of the material injury determination is contrary to the Department’s duty to use the “best available science and information.” R. 002. The Director could have considered supplemental ground water data in this matter and abused his discretion by refusing to do so, particularly when there is no dispute that supplemental ground water diversions are occurring. Thus, on remand, the Court should require the Department to issue an updated Methodology Order that ascertains the extent of supplemental ground water use within SWC’s service areas and reduce the predictions and determinations of SWC’s DS accordingly, consistent with CMR 42.01(g).

**C. The Evidence at Hearing Clearly Demonstrated that A&B’s Irrigated Acreage Includes Enlargement Acres**

Petitioners asserted at the hearing that the Department’s number in the *Fifth Methodology Order* for A&B’s irrigated acreage (15,924 acres) includes acres associated with A&B’s

enlargement water rights (1,175 acres) that bear junior priority dates (“enlargement acres”). Hr’g Tr. Vol. I, 203-05; *see also* R. 0010, 2907. As the Court is well aware, within the boundaries of the Snake River Basin Adjudication enlargement acres are administered with a priority date of April 12, 1994. *A&B Irrig. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 749 (2005); *see also e.g. A&B Irrig. Dist. Water Right No. 36-15127B*.<sup>42</sup> The curtailment date under the *2023 Steps 1-3 Order* was December 30, 1953, R. 0052-53, meaning the Department threatened curtailment against ground water rights with priority dates senior to April 12, 1994 for the benefit of A&B’s enlargement acres, not just its senior acres; this was erroneous.

Department witness Matt Anders testified that the Department has not investigated or discussed whether the irrigated acreage number used in the Methodology Orders should exclude enlargement acres. Hr’g Tr. Vol. I, 205. He also testified that he is not sure whether there are enlargement acres within the service areas of the other SWC members. Hr’g Tr. Vol. I, 215-16. This testimony notwithstanding, the Director continued to use 15,924 acres as A&B’s irrigated acreage in the *Sixth Methodology Order*. R. 1014.

The evidence and testimony at hearing demonstrate that the Director knowingly included enlargement acres in A&B’s irrigated acreage number in the *Sixth Methodology Order* and may have included enlargement acres in other SWC members’ numbers. While seemingly minor, this error is material because it contributes to the Department’s overestimation of the DS predictions and determinations for the SWC. Accordingly, on remand, the Court should require the Director

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<sup>42</sup> One condition states: “This right is based upon an enlargement of Right No. 36-2080 pursuant to Section 42-1426, Idaho Code. This right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right.”

to issue an updated Methodology Order that ascertains the irrigated acres associated with SWC members' senior water rights and use those numbers in future Methodology Orders.

**VI. The Director's Conclusion that TFCC's Operations are "Reasonable" is Clearly Erroneous**

Under CMR 42.01, the Department is required to consider SWC's allegations of injury in light of whether seniors are "using water efficiently and without waste." IDWR may properly evaluate SWC's "system, diversion and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion." *AFRD2*, 143 Idaho at 876-78.<sup>43</sup> Building on this *AFRD2* standard, the Hearing Officer concluded that "system efficiency" was the proper metric for Rule 42.01(g) analyses, and rejected "achievable farm efficiency," concluding that the standard was "reasonableness" of operations. *2008 Opinion* at 56. The Hearing Officer also concluded that SWC satisfied the 42.01(g) standard and was reasonably efficient but noted "[t]his is not a static system, and as improvements either in technology or management practices that fall within reasonable costs are identified, the Director may consider whether they have been implemented" in evaluating injury. *Id.* at 57 (emphasis added).

In 2014, this Court rejected a challenge to the *2010 Methodology Order* regarding the Department's conclusion that the SWC's operations were reasonably efficient, relying on the conclusions in the *2008 Opinion*. Fifteen years later, TFCC's project efficiency has declined, notwithstanding large increases in sprinkler-served acres and numerous "conveyance" efficiency projects, including canal lining. Hr'g Tr. Vol. II, 130-31, 194-97; R. 1559. Based on the testimony and evidence received at trial, the Director's conclusion that TFCC remains "reasonably efficient" is not supported by substantial evidence. If TFCC's operations are not

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<sup>43</sup> See also, *A&B Irrig. Dist. v. IDWR*, 153 Idaho at 513-15 (the senior is obligated "to take reasonable steps to maximize [ ] flexibility to move water within the system before it can seek curtailment..."); CMR 42.01(a)-(h).

“reasonably efficient,” then the Director’s reliance on its “project efficiency” in the RISD calculation for TFCC is without basis.

**A. How Project Efficiency is Used in the *Fifth Methodology Order***

To implement the Methodology, the Department employs “project efficiency” (the shorthand of which is Ep) as a metric in the calculation of RISD. *See* R. 0016 (stating that the calculated RISD is “the quotient of CWN and Ep”). Although called “project efficiency,” this is the same as the “system efficiency” concept approved of by the Hearing Officer. R. 0012-13. Monthly project efficiencies are then averaged over a fifteen (15) year period to “reduc[e] impacts of short-term trends.” R. 0013. In effect, as the Department has derived the metric, project efficiency is the ratio between CWN versus total diversions (i.e., the net amount consumed out of the gross amount diverted). By its terms, project efficiency assumes that SWC’s actual diversions were necessary to satisfy CWN (i.e., not wasteful). Hr’g Tr. Vol. IV, 996 (“the observed diversions are a given”).

The Department then determines SWC members’ RISD for a given year by dividing each member’s CWN by its historical project efficiencies. R. 0016-17. Thus, even if a SWC member’s operations have not been reasonably efficient in recent history, the Department still calculates *reasonable* in-season demand (RISD) without any correction for inefficient operations.

**B. The Director’s Conclusion that TFCC’s “diversions and efficiency are reasonable” is not Supported by Substantial Evidence; Further, the Evidence is “Clear and Convincing” that TFCC’s Diversions are Unreasonable.**

The Director concluded that “TFCC’s diversions and efficiency are reasonable” (R. 1089), relying on TFCC General Manager Jay Barlogi’s testimony that TFCC does not waste a significant amount of water to the Snake River, (*see* Hr’g Tr. Vol. II, 43), and SWC expert witness David Shaw’s conclusory opinion that TFCC’s “system and their plan for delivery is



reasonable.” Hr’g Tr. Vol. IV, 146. The conclusion overlooked much contradictory evidence and testimony and is not supported by substantial evidence.

First, Mr. Barlogi testified that the amount of sprinkler systems in the TFCC service area has never been higher. *See* Hr’g Tr. Vol. II, 130-31, 194-97. Despite the increased use of sprinklers, which increase efficiency of on-farm irrigation operations, *see* R. 1245,<sup>44</sup> TFCC’s efficiency has *declined* since 2006. *See* R. 1559; Hr’g Tr. Vol. II, 130-31,<sup>45</sup> 144-46.<sup>46</sup> Indeed, despite the increased number of sprinklers, Mr. Barlogi testified that TFCC diverts around 1,100,000 acre-feet annually, which it has consistently over the last thirty (30) years. Hr’g Tr. Vol. II, 71.

Dr. Brockway, SWC’s expert, testified that sprinkler conversions in TFCC have not led to higher overall project efficiencies due to “factors that are very difficult to put a number on.” *See* Hr’g Tr. Vol. IV, 116-17. Dr. Brockway agreed, however, that TFCC’s operational spill volumes have increased over time; *see id.* at 127-29. In fact, TFCC’s return flows, including operational spills, generally increased from 2009-2020. *See* R. 1598. As Petitioners’ expert witness Gregory Sullivan testified, the framework of the Methodology Orders inherently incentivizes SWC to maximize diversions, even if the diversions exceed what is needed to meet CWN, and rewards them for doing so (e.g., increases calculated RISD). Hr’g Tr. Vol. II, 142-44, 250-52. While a certain amount of operational spills (a/k/a wastewater or tailwater) is expected with large-scale

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<sup>44</sup> SWC’s expert witness associates flood (or gravity) irrigation with a 50% on-farm efficiency and sprinkler irrigation with an 80% on-farm efficiency.

<sup>45</sup> (“[T]he continued sprinkler conversions, these efficiency improvements . . . would suggest that, if anything, the diversions should have gone down . . . they should have been able to get by with less, but they’ve been diverting more”).

<sup>46</sup> (“[TFCC’s] actual efficiencies have gone down since 1990 to 2006. . . . That’s going the opposite direction from what I would expect given these continued conversions to sprinkler, canal lining, better irrigation system operation technology, and that sort of thing”).

conveyance systems, it is not expected that operational spills would increase in TFCC's on-demand system which has installed, *inter alia*, advancements in canal automation technology. *See Hr'g Tr. Vol. II, 75.*

The Director's "project efficiency" calculation requires a supportable finding that SWC members are all "reasonably efficient," and the conclusion that TFCC's operations are "reasonably efficient" is not supported by substantial evidence. While this Court declined to assess the reasonableness of the Director's conclusions regarding TFCC's efficiency of operation in 2014,<sup>47</sup> citing the Hearing Officer's 2008 findings, the Hearing Officer also determined that "this [the SWC's irrigation operations] is not a static system," and he called on the Director to consider whether SWC is not utilizing the "improvements either in technology or management practices that fall within reasonable costs . . . in making the decision of whether ground water pumpers should be curtailed."<sup>48</sup> Where, as here, the record does not contain substantial evidence related to the reasonableness of TFCC's operations, the Director's imposition of the "project efficiency" term in the RISD calculation is without basis and this portion of the order must be remanded for further proceedings on this point.<sup>49</sup>

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<sup>47</sup> R. 0771-72.

<sup>48</sup> *2008 Opinion* at 56-57.

<sup>49</sup> TFCC is not the only SWC member whose project efficiencies have declined and are now 35% or less—this concern also applies to AFRD2 and NSCC. *See* R. 1559 (comparing average project efficiencies from 1990-2006 with the project efficiency in the *Fifth Methodology Order*, which is based on average project efficiencies from 2007-2021). While Petitioners have focused on the reasonableness of TFCC's operations at hearing and in this brief, largely due to the consequences of TFCC's overpredicted DS in 2023, their request—that the Director perform a meaningful analysis to determine whether their project efficiencies are reasonable by today's standards, rather than assume it—equally applies to other SWC members whose project efficiencies have declined over time.

**VII. The Director’s Conclusion that “Curtailment dates . . . should be calculated by a transient model simulation . . .” is Clearly Erroneous and Causes IDWR to Curtail Ground Water Users that are not Causing the Material Injury to SWC.**

The *Fifth Methodology Order* applied “transient modeling to determine a curtailment priority date that would supply adequate water to the senior water right holders.” R. 0035. Petitioners challenged the validity of the Department’s reliance on transient modeling at hearing. See Hr’g Tr. Vol. II, 191, 209.<sup>50</sup> Nevertheless, the Director concluded that “curtailment dates, periodically determined at time of recalculating in-season demand shortfall (IDS), should be calculated by a transient model simulation that will return the full quantity of water to the senior priority rights at the time and place required, or the maximum quantity that can be returned by curtailing all junior water rights.” R. 1091.

The Idaho Supreme Court has stated “the policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho.” *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 160 Idaho 119, 131 (2016) (*Rangen*) (citing *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808 (2011)). The Court acknowledged that this policy “limits the prior appropriation doctrine by excluding from its purview water that is not being put to beneficial use.” *Rangen* at 131 (citing *AFRD2*, 143 Idaho at 876). The Court further tied the policy of maximum use to an acceptable “limit on the prior appropriation doctrine,” found in CMR 20.03, 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.” *Id.* (quoting IDAPA 37.03.11.020.03 (CMR 20.03)).

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<sup>50</sup> The predicted 75,200 acre-feet demand shortage “was caused by the wells junior to the mid-[19]80s, and, therefore, they should be the ones responsible for mitigating it because they caused the problem”); *see also* R. 1546-47 (“Curtailing or requiring mitigation from groundwater rights in 2023 with priority dates senior to the mid-1980s would injure those groundwater rights because pumping under these more senior groundwater rights did not create the shortage to the TFCC this year”).

In the conjunctive administration of ground water and surface water, the Court has recognized that “not all of the water collected due to the curtailment will accrue to the senior water right holder; some will remain in the aquifer, and some will flow to other tributary springs.” *Id.* at 132.

Here, curtailment based on transient modeling improperly “commands large volumes of water” for nominal to no benefit to SWC. Curtailment to achieve the predicted DS of 75,200 acre-feet during the 2023 irrigation season would have resulted in the idling of roughly 700,000 acres of ground water-irrigated farmland under the *Fifth Methodology Order*. In contrast, under the steady-state modeling approach utilized in all prior Methodology Orders, curtailment would have idled approximately 75,000 acres. Hr’g Tr. Vol. I, 55; R. 1436. Similarly, under a transient modeling approach, the maximum amount that would accrue to seniors from curtailment back to October 11, 1900 (effectively curtailing the entire ESPA) is 97,700 acre-feet of water (R. 2761, 2764)—nearly the amount predicted under the *2023 Steps 1-3 Order*. R. 0050. The change to the transient-state model does not properly balance both the interests of the seniors and the juniors, I.C. § 42-101 (the Director “shall equally guard all the various interests involved”), and offends the settled policy that promotes the maximum beneficial use of the water resources of the states.

As discussed in *Rangen*,, the Director has the statutory duty and authority to distribute water within water districts and adopt rules and regulations as necessary to carry out that duty.

160 Idaho at 255 (citing I.C. §§ 42-602, 42-603). The court went on to say:

Under CMR 40.01, when it is found that junior-priority ground water pumping is causing a senior right holder material injury, the Director must either: (1) curtail junior-priority ground water pumping to satisfy the senior's right, or (2) “[a]llow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.” IDAPA 37.03.11.040.01.

*Id.* at 256 (emphasis added). The Department’s use of transient modeling to determine the curtailment date to offset SWC’s predicted DS is over-inclusive and threatens curtailment against junior users that are not actually causing the demand shortfall (under the *2023 Steps 1-3 Order*, those with priority dates senior to the mid-1980s). R. 1546-47.

The Director’s conclusion in the *Post-Hearing Order* that “[c]urtailment dates . . . should be calculated by a transient model simulation,” R. 1091, is clearly erroneous and his application of transient modeling to determine curtailment dates in the *Fifth Methodology Order* is arbitrary, capricious, an abuse of discretion, and contrary to his duty under CMR 40.01, as recognized by *Rangen*, to only threaten curtailment against those ground water users who are causing the demand shortfall. Accordingly, on remand, the Court should set aside this conclusion and require the Director to issue an updated Methodology Order that determines curtailment dates pursuant to steady-state modeling.

**VIII. The Director’s Conclusion that “the [Cities’] due process rights were not violated” is Clearly Erroneous and in Excess of IDWR’s Statutory Authority.<sup>51</sup>**

The Director concluded that “the [Cities’] due process rights were not violated, which the District Court has already determined.” R. 1095. First, this conclusion is beyond the Director’s authority.<sup>52</sup> Accordingly, the Director’s conclusion should be set aside as being in excess of the Department’s statutory authority under I.C. § 67-5279(3)(b).

Further, the record as a whole reveals that, notwithstanding this Court’s oral ruling denying Petitioners’ petitions for writs of prohibition and mandamus on June 1, 2023, the

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<sup>51</sup> To avoid repetition, the Cities adopt and incorporate herein IGWA’s Opening Brief, sections 1.3, 2, 3, 5 and 6.

<sup>52</sup> See *City of Sandpoint v. Indep. Highway Dist.*, 161 Idaho 121, 125 (2016) (“An administrative agency is limited to the power and authority granted it by the legislature”) (internal citations omitted). Moreover, due process rights are constitutional questions, which are reserved for the courts, not administrative tribunals. See *Owsley v. Idaho Indus. Comm’n*, 141 Idaho 129, 134 (2005).

Department's discovery restrictions made it functionally impossible to develop evidence. The Cities' and IGWA's expert witnesses explained what they *would have done* had they been given sufficient time to prepare for the hearing. *See* R. 0353-54; Hr'g Tr. Vol. II, 121-23; Hr'g Tr. Vol. III, 14-15.<sup>53</sup> Further, the record reflects a pattern and practice of the Department to use "time is of the essence" and "urgency" (e.g., R. 0062, 300) as all-purpose excuses to foreclose any meaningful inquiry by junior users into the bases of the Methodology Orders and any meaningful analysis of the SWC's uses and practices. All of this amounts to a violation of the Cities' right to due process.

First, Petitioners were given insufficient time to gather and develop evidence to support their arguments prior to the June 6-9, 2023 hearing and then were told in the *Post-Hearing Order* that their evidence was inadequate—even though the junior users' experts had testified to the types of analyses they would have done had they a) had time; and b) been present in the United States.

Then, when the Cities requested permission to conduct discovery on issues disputed in the *Sixth Methodology Order*, they were told "no, you've already had your chance." The Director has not explained how the Cities can develop evidence on disputed issues involving information uniquely in the control of SWC.<sup>54</sup> For the Cities to conduct discovery independently without a Department order authorizing discovery is not only untenable, it is impossible.<sup>55</sup>

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<sup>53</sup> Even SWC expert witnesses wanted more time to prepare for the hearing. *See* Hr'g Tr. Vol. IV, 103 (Dr. Brockway answering "yes" to the question of "would you have liked to have more time to prepare [your report]?").

<sup>54</sup> The Cities do not concede that the evidence in the record is insufficient to grant the relief they seek in this appeal; to the extent the Court disagrees, however, the Cities highlight the pattern and practice of the Department playing administrative "gotcha" in its handling of discovery and scheduling issues that violates due process.

<sup>55</sup> The Department doubled-down on these positions when the Cities' requested a hearing and an order authorizing discovery on the *Sixth Methodology Order*. The Cities' requests came *after* the Director invited Petitioners to present evidence in the future, R. 1170 n.1, and *after* the Department had already determined that there was no

Further, setting a hearing on the *Fifth Methodology Order* after the irrigation season was a tangible alternative. In fact, the Cities, in their *Motion for Reconsideration of the Denial of Continuance* (May 5, 2023), told the Director that timely administration could still occur in 2023 under the *Fourth Methodology Order*, and even conceded that they would not object to the Director implementing the *Fifth Methodology Order* during the 2023 irrigation season if it meant that the hearing were continued to later in the calendar year. R. 0282-93.<sup>56</sup> Still, the Director refused to continue the hearing. R. 0425-34. Thus, time was not “of the essence”—there were multiple pathways for the Director to administer the SWC Delivery Call in 2023 and the Director’s “urgency” basis for denying the Cities the time and ability to gather and develop necessary evidence is a sham.

**IX. To the Extent that the Director’s Conclusions are not Found to be Clearly Erroneous, it is because the Cities were Deprived of Discovery.**

The Director’s orders limiting discovery on the *Fifth Methodology Order* and denying discovery on the *Sixth Methodology Order* resulted in a heightened evidentiary standard in these proceedings, and as discussed, have precluded Petitioners from gathering and developing the evidence apparently necessary to persuade the Director that the values he is using to predict and determine SWC’s demand shortfall are flawed. While Petitioners believe they satisfied their burdens of proof with the evidence that is in the record, to the extent the Court disagrees, it must recognize that Petitioners would have presented different or additional evidence before the Department had they been given sufficient time and been able to use the tools of discovery.

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shortage in 2023. See R. 1061-62 (no shortfall in 2023), 1130-1134 (Petitioners’ discovery request), 1169-1175 (Order denying discovery request).

<sup>56</sup> The lack of time to prepare for hearing was not the only concern for the ground water users; they were also dealing with the unavailability of key witnesses, both during discovery and at the hearing, due to international trips that had been previously scheduled. R. 0284-86.

Therefore, to the extent the Court determines that the Director's conclusions are supported by substantial evidence, are *not* an abuse of discretion, and are consistent with law, it should determine that the Director's conclusions are nonetheless made upon unlawful procedure due to the discovery limitations that were imposed, and remand the *Sixth Methodology Order* to the Department, ordering adequate period for discovery and an opportunity for the Cities to be heard on the issues in dispute.

**X. The Director's Orders and Erroneous Conclusions Prejudice Petitioners' Substantial Rights**

To prevail on appeal, parties must show that their substantial rights have been prejudiced. I.C. § 67-5279(4). The Director's *Post-Hearing Order* affirming the *Fifth Methodology Order* (and endorsing issuance of the virtually identical *Sixth Methodology Order*) prejudices Petitioners' substantial rights because the Department erroneously administers ground water rights under the *Fifth Methodology Order*.

As discussed in section VII, *supra*, in 2023, in accordance with the *Fifth Methodology Order*, the Director erroneously threatened curtailment against water rights junior to December 30, 1953. R. 0052-53. While Petitioners presently have safe harbor from curtailment under their approved mitigation plan, that protection is neither absolute (if they fail to satisfy their contractual obligations due to insufficient mitigation supplies) nor permanent (expires no later than 2053). *See Coalition of Cities, City of Idaho Falls, and City of Pocatello Joint Mitigation Plan*, Docket No. CM-MP-2019-001 (Feb. 25, 2019) at Ex. 1, p. 7. Thus, the Cities have a significant interest in ensuring that the applicable Methodology Order accurately predicts and determines the SWC's material injury (and curtailment date to offset the injury) so that ground water rights are not erroneously subject to curtailment.



In Idaho, water rights are real property rights. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797 (2011) (quoting *Olson v. Idaho Dep't of Water Res.*, 105 Idaho 98, 101 (1983); I.C. § 55-101). Because the *Sixth Methodology Order* inaccurately predicts and determines SWC's demand shortfall (and curtailment date to offset the injury), the Department's administration in accordance therewith erroneously infringes upon Petitioners' real property rights. Accordingly, the *Post-Hearing Order* prejudices Petitioners' substantial rights on that basis. Additionally, because the Director restricted Petitioners' ability to conduct discovery, thereby precluding Petitioners from presenting crucial evidence at the June 6-9, 2023 hearing, the Director also prejudiced Petitioners' substantial right to due process. *Eddins v. City of Lewiston*, 150 Idaho 30, 36 (2010).

### **CONCLUSION**

Petitioners request that the Court set aside the *Post-Hearing Order* on the primary issues of the Department over-predicting material injury, over-determining material injury, and over-estimating a curtailment date to remedy material injury, and remand as appropriate the *Sixth Methodology Order* to the Department for further proceedings to correct its flaws.

DATED this 21st day of December 2023.


**MCHUGH BROMLEY, PLLC**

By: /s/ Candice M. McHugh  
Candice M. McHugh (ISB #5908)  
Chris M. Bromley (ISB #6530)  
*Attorneys for the Cities of Bliss, Burley,  
Carey, Declo, Dietrich, Gooding,  
Hazelton, Heyburn, Jerome, Paul,  
Richfield, Rupert, Shoshone, and Wendell*

**HOLDEN KIDWELL HAHN & CRAPO,  
PLLC**

By: /s/ Robert L. Harris  
Robert L. Harris (ISB #7018)  
*Attorneys for City of Idaho Falls*

**SOMACH SIMMONS & DUNN, P.C.**

By:   
Sarah A. Klahn (ISB #7928)  
Maximilian C. Bricker (ISB #12283)  
*Attorneys for City of Pocatello*

## CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2023, I served the foregoing document on the persons below via email and iCourt unless otherwise indicated:

Clerk of the Court Jerome County District Court 233 West Main Street Jerome, ID 83338	iCourt
Director Gary Spackman Garrick Baxter Sarah Tschohl Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	<a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a>
John K. Simpson Travis L. Thompson MARTEN LAW LLP P.O. Box 2139 Boise, ID 83701-2139 P. O. Box 63 Twin Falls, ID 83303-0063	<a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318	<a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
Kathleen Marion Carr U.S. Dept. Interior 960 Broadway Ste 400 Boise, ID 83706	<a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a>
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202	<a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>

<p>Matt Howard  U.S. Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234</p>	<p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>
<p>Robert E. Williams  WILLIAMS, MESERVY &amp; LOTH SPEICH, LLP  P.O. Box 168  Jerome, ID 83338</p>	<p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>
<p>Randall D. Fife  City Attorney  City of Idaho Falls  P.O. Box 50220  Idaho Falls, ID 83405</p>	<p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Corey Skinner  IDWR-Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033</p>	<p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>Tony Olenichak  IDWR-Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402</p>	<p><a href="mailto:Tony.Olenichak@idwr.idaho.gov">Tony.Olenichak@idwr.idaho.gov</a></p>
<p>Thomas J. Budge  Elisheva M. Patterson  RACINE OLSON, PLLP  P.O. Box 1391  Pocatello, ID 83204-1391</p>	<p><a href="mailto:tj@racineolson.com">tj@racineolson.com</a>  <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>
<p>Skyler C. Johns  Nathan M. Olsen  Steven L. Taggart  OLSEN TAGGART PLLC  P.O. Box 3005  Idaho Falls, ID 83403</p>	<p><a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a>  <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a>  <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a></p>

Dylan Anderson Dylan Anderson Law P. O. Box 35 Rexburg, ID 83440	<a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a>
<i>COURTESY COPY TO:</i> William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318	<a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>



---

Maximilian C. Bricker, ISB #12283

**APPENDICES A & B**

**CITIES' BRIEF ON JUDICIAL REVIEW,  
SWC POST-HEARING ORDER, FIFTH  
METHODOLOGY**

**Case No. CV01-23-13238**

**APPENDIX A -1**

**Order Granting Motion to Augment Record; Order  
Augmenting Record, Case No. CV01-23-13238, Fourth  
Judicial District, Ada County, IDWR Docket  
No. CM-DC-2010-001 (Nov. 15, 2023)**





and BINGHAM GROUNDWATER )  
DISTRICT, )  
) )  
Intervenors. )  
\_\_\_\_\_ )  
) )  
IN THE MATTER OF THE DISTRIBUTION )  
OF WATER TO VARIOUS WATER )  
RIGHTS HELD BY AND FOR THE )  
BENEFIT OF A&B IRRIGATION )  
DISTRICT, AMERICAN FALLS )  
RESERVOIRS DISTRICT NO. 2, BURLEY )  
IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY, AND TWIN FALLS )  
CANAL COMPANY. )

On August 16, 2023, the Petitioners filed a *Petition* seeking judicial review of the Director’s *Post-Hearing Order Regarding Fifth Amended Methodology Order*. The administrative transcript and record were lodged with the Court on September 28, 2023. On October 19, 2023, the Petitioners filed a *Motion to Augment the Record*, followed by an *Amended Motion to Augment the Record* on October 20, 2023. The *Amended Motion* requests that the Court augment the agency record to include the following three documents pursuant to Idaho Rule of Civil Procedure 84(l):

1. Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery, filed in IDWR Docket No. CM-DC-2010-001 on September 5, 2023,
2. Surface Water Coalition’s Response to Cities’ Motion for Clarification and Reconsideration, filed in IDWR Docket No. CM-DC-2010-001 on September 19, 2023, and
3. Order Denying Cities’ Motion for Clarification and Reconsideration, filed in IDWR Docket No. CM-DC-2010-001 on September 25, 2023.

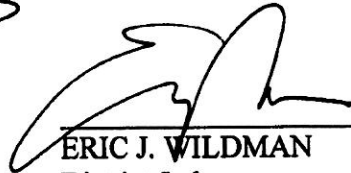
A hearing on the *Motion* was held before the Court on November 9, 2023. For reasons set forth on the record, the Court in an exercise of discretion determined to grant the *Amended Motion*.

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Petitioners' *Amended Motion to Augment the Record* is hereby granted.
2. The agency record is hereby augmented to include the three documents identified above as bates stamped and attached hereto.

IT IS SO ORDERED.

Dated: November 15, 2023



ERIC J. WILDMAN  
District Judge

## CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Sarah Klahn  
Maximilian Bricker  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[mbricker@somachlaw.com](mailto:mbricker@somachlaw.com) via Email

Candice McHugh  
Chris Bromley  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)  
[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com) via Email

Robert Harris  
[rharris@Holdenlegal.cm](mailto:rharris@Holdenlegal.cm)  
[efiling@holdenlegal.com](mailto:efiling@holdenlegal.com) via Email

Garrick Baxter  
Kayleen Richter  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)  
[kayleen.richter@idwr.idaho.gov](mailto:kayleen.richter@idwr.idaho.gov) via Email

Thomas Budge  
Elisheva Patterson  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com) via Email

John Simpson  
Travis Thompson  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com) via Email

W. Kent Fletcher  
[wkf@pmt.org](mailto:wkf@pmt.org) via Email

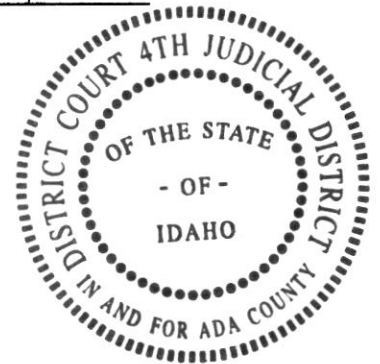
Skyler Johns via Email  
Nathan Olsen  
Steven Taggart  
[sjohns@olsentaggert.com](mailto:sjohns@olsentaggert.com)  
[nolsen@olsentaggert.com](mailto:nolsen@olsentaggert.com)  
[staggart@olsentaggert.com](mailto:staggart@olsentaggert.com)

Dylan Anderson via Email  
[dylan@dylanandersonlaw.com](mailto:dylan@dylanandersonlaw.com)

Date: 11/15/2023

Trent Triple  
Clerk of the Court

By Eric Rowell  
Deputy Clerk



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RECEIVED

Sep 05, 2023

DEPARTMENT OF  
WATER RESOURCES

Candice M. McHugh, ISB # 5908  
Chris M. Bromley, ISB # 6530  
MCHUGH BROMLEY, PLLC  
380 S. 4<sup>th</sup> St., Ste. 103  
Boise, ID 83702  
(208) 287-0991  
[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

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

Sarah A. Klahn, ISB # 7928  
Maximillian Bricker ISB #12283  
SOMACH SIMMONS & DUNN  
2033 11<sup>th</sup> St., Ste. 5  
Boulder, CO 80302  
(303) 449-2834  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
*Attorneys for City of Pocatello*

Robert L. Harris, ISB # 7018  
HOLDEN KIDWELL HAHN & CRAPO  
100 Riverwalk Dr., Ste. 200  
PO Box 50130  
Idaho Falls, ID 83405  
(208) 523-0620  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)  
*Attorneys for City of Idaho Falls*

**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

**MOTION FOR CLARIFICATION  
AND RECONSIDERATION OF  
DENIAL OF REQUEST FOR  
HEARING AND TO ENGAGE IN  
DISCOVERY**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton,  
Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by  
and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City  
of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of  
Pocatello, by and through its attorneys of record, Sarah A. Klahn and Maximilian C. Bricker

MOTION FOR CLARIFICATION AND RECONSIDERATION OF DENIAL OF REQUEST FOR  
HEARING AND TO ENGAGE IN DISCOVERY – p. 1

(collectively the “Cities”), pursuant to IDAPA 37.01.01.740.02.b and 770 of the Department’s rules of procedure and hereby file this *Motion for Reconsideration and Clarification* of the August 23, 2023, *Order Denying Request for Hearing and Motion Authorizing Discovery* (“Order Denying Hearing”) and move for reconsideration of the Director’s order denying the Parties’ request for a hearing on the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Sixth Methodology Order”).

### ARGUMENT

#### 1. The Cities seek clarification on the nature of the Sixth Methodology Order.

On July 19, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued, as relevant here, two orders: a *Post-Hearing Order Regarding Fifth Amended Methodology Order* (“Post-Hearing Order”) and the *Sixth Methodology Order*. Rather than amending 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”), which was subject to a hearing on June 6-9, 2023, the Director chose to issue a new final order.

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.

The Director denied the Parties’ request for a hearing on the *Sixth Methodology Order* because: “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).” However, no hearing has actually been held on the *Sixth Methodology Order*. Thus, the Parties request clarification of the nature and status of the *Sixth Methodology Order*—is it, in fact, merely an “amended” *Fifth Methodology Order* that is ripe for immediate appeal?

**2. Regardless of the answer to the clarification question above, the Parties seek reconsideration and clarification of the denial of the request to engage in discovery.**

The Director has stated on numerous occasions that the SWC Delivery Call is a continuing contested case, requiring the Department to periodically update the Methodology Order, which is a “living document.” Tr. Hearing Vol. I, 18:21. The Director has also acknowledged on numerous occasions that the Department would consider data or analyses brought forward by the Cities in updating or applying the Methodology Order—even the *Order Denying Hearing* asserted that the Director would welcome “new information [developed by the Cities that] the Director may consider in the future.” *Id.* at 2-3 n.1.<sup>1</sup> The Parties have been down this road before, as their April 28, 2023 *Motion for Continuance*, which requested adequate time to conduct investigations prior to a hearing on the *Fifth Methodology Order*, was denied on the ground that the Director had sufficiently notified the junior groundwater users that changes to the *Fourth Methodology Order* were impending (i.e., they had had plenty of “opportunities” to develop data and analyses). *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* at 2. To be adequately prepared for the hearing, however, the Cities needed authorization to access SWC’s lands, under IDAPA

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<sup>1</sup> For example, at the *Fifth Methodology Order* hearing, the Director said at one point: “there have been opportunities for people to gather data; there have been opportunities for folks to take on responsibility to prepare [analyses].” Tr. Hearing Vol. IV, 205:12-14.

37.01.01.520.01.e and I.R.C.P. Rule 34, to develop data associated with the nature and extent of irrigation on SWC lands; the Cities also needed adequate time to analyze the results of these inspections and investigations. The Cities did not have such authorization prior to April 21, 2023, so any “presentations” that the “Department conducted” in fall 2022 fell far short of what was reasonably needed to prepare for the hearing on the *Fifth Methodology Order*. *Id.*

The instant request to engage in discovery reflects the Cities’ efforts to take seriously the Director’s invitation to present “new information” to the Department update the Methodology Order with the best available science, and to be prepared to challenge the Department’s application of the *Sixth Methodology Order* in 2024 on the basis of erroneous or outdated inputs. Accordingly, the Cities request that the Director reconsider his denial of the Cities’ request to conduct discovery.

However, if this is indeed a continuing contested case, perhaps no new order authorizing such discovery is necessary. In that case, the Cities seek clarification as to whether it is entitled to proceed with serving requests on SWC members notwithstanding the *Order Denying Hearing* and whether the SWC members are obligated to comply.

Submitted this 6<sup>th</sup> day of September, 2023.

/s/ Sarah Klahn

---

Sarah A. Klahn  
Maximilian C. Bricker  
SOMACH SIMMONS & DUNN  
*Attorneys for City of Pocatello*

/s/ Candice M. McHugh

---

Candice M. McHugh  
Chris M. Bromley  
MCHUGH BROMLEY  
*Attorneys for Coalition of Cities*

/s/ Robert Harris

---

Robert L. Harris  
HOLDEN KIDWELL HAHN & CRAPO  
*Attorneys for City of Idaho Falls*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5th day of September, 2023, the above and foregoing, was filed and served via electronic service as set forth below:

Idaho Dept. of Water Res.

[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)

Travis L. Thompson  
MARTEN LAW LLP P.O. Box 63  
Twin Falls, ID 83303-0063  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)  
[jnielsen@martenlaw.com](mailto:jnielsen@martenlaw.com)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248 Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON  
P.O. Box 1391 Pocatello, ID 83204-1391  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC  
P.O. Box 50130 Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

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

Robert E. Williams  
WILLIAMS, MESERVY, & LOTHSPREICH, LLP  
P.O. Box 168 Jerome, ID 83338  
[rewilliams@wmlattys.com](mailto:rewilliams@wmlattys.com)

John K. Simpson  
MARTEN LAW LLP  
P.O. Box 2139 Boise, ID 83701-2139  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)

David W. Gehlert  
Natural Resources Section Environment and Natural  
Resources Division U.S. Department of Justice  
999 18th St., South Terrace, Suite 370 Denver, CO  
80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

Sarah A Klahn  
Maximilian C Bricker  
Somach Simmons & Dunn  
1155 Canyon Blvd, Ste. 110 Boulder, CO 80302  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[mbricker@somachlaw.com](mailto:mbricker@somachlaw.com)  
[dthompson@somachlaw.com](mailto:dthompson@somachlaw.com)

Rich Diehl  
City of Pocatello  
P.O. Box 4169 Pocatello, ID 83205  
[rdiehl@pocatello.us](mailto:rdiehl@pocatello.us)

Dylan Anderson  
Dylan Anderson Law PLLC  
P.O. Box 35  
Rexburg, Idaho 83440  
[dylan@dylanandersonlaw.com](mailto:dylan@dylanandersonlaw.com)

/s/ Candice McHugh  

---

  
Candice M. McHugh

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
**MARTEN LAW LLP**  
163 Second Ave. West  
P.O. Box 63  
Twin Falls, Idaho 83303-0063  
Telephone: (208) 733-0700  
Email: [jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)

W. Kent Fletcher, ISB #2248  
**FLETCHER LAW OFFICE**  
P.O. Box 248  
Burley, Idaho 83318  
Telephone: (208) 678-3250  
Email: [wkf@pmt.org](mailto:wkf@pmt.org)

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

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

**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

**SURFACE WATER COALITION'S  
RESPONSE TO CITIES' MOTION FOR  
CLARIFICATION AND  
RECONSIDERATION**

COME NOW, 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 ("Surface Water Coalition" or "Coalition"), by and through counsel of  
record, and hereby respond to the *Motion for Clarification and Reconsideration of Denial of*

*Request for Hearing and to Engage in Discovery* (“Motion”) filed on September 5, 2023.<sup>1</sup> The Coalition requests the Director to deny the Cities’ Motion for the reasons set forth below.

## **BACKGROUND**

The Sixth Methodology Order was issued as a “final” administrative order subject to reconsideration and/or appeal to district court. *See* I.C. §§ 67-5246; 67-5270 to 5272; *see also*, Explanatory Information to Accompany a Final Order (attached to the Director’s Sixth Methodology Order). The Cities filed a notice of appeal and petition for judicial review concerning the Director’s related *Post-Hearing Order*, another order issued as part of the matter resulting in the Sixth Methodology Order. *See City of Idaho Falls et al. v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13238 (appeal filed August 16, 2023). IGWA filed a notice of appeal and petition for judicial review of various orders as well, including specifically the Sixth Methodology Order. *See IGWA v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13173 (appeal filed August 16, 2023). The Coalition of Cities and the City of Pocatello filed notices of appearance in that case. The two appeals are pending in district court and it is anticipated the cases will be consolidated.

## **ARGUMENT**

### **I. The Director Properly Denied the Cities’ Request for Hearing.**

The Cities request clarification of the Director’s Sixth Methodology Order claiming “no hearing has actually been held on the *Sixth Methodology Order*.” Motion at 2-3. Yet, the Cities’ feigned ignorance about the order is merely form over substance. The Cities fully participated in the contested case and administrative hearing that resulted in the issuance of the Sixth Methodology Order. They cannot dispute this fact. There is no basis to hold a second hearing

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<sup>1</sup> The motion was filed the Coalition of Cities (cities of Bliss et al.), the City of Idaho Falls, and the City of Pocatello.

on the Sixth Methodology Order that fully addressed all of the information either presented at or before the administrative hearing. As such, the Director properly denied the requested hearing. *See Order Denying Request for Hearing and Motion Authorizing Discovery at 2-3.*

Moreover, the Cities have appealed the Director's *Post-Hearing Order* that addresses the issues raised on the Fifth Methodology Order, including the updated data the Director included in the Sixth Methodology Order. Although the Cities had a right to appeal the Sixth Methodology Order they failed to do so. Regardless, all of the Cities except Idaho Falls have appeared in IGWA's appeal of the Sixth Methodology Order.<sup>2</sup> Consequently, there is nothing to clarify and the petitions for judicial appeal will proceed pursuant to Idaho's civil rules.

## **II. The Director Properly Denied the Cities' Request for Discovery.**

The Cities have also requested the Director to reconsider the denial of their motion to authorize discovery. *See Motion at 2-3.* Since the request for hearing was denied, the request to authorize discovery was properly denied as well. The Cities misconstrue this matter as a "continuing contested case" with no end. *Motion at 2.* Although the Director's methodology regarding the SWC delivery call may be updated at some point in time, that does not mean the prior contested cases resulting in "final orders" that have been appealed or are currently on appeal to the District Court are continuing *ad infinitum* as the Cities suggest. To find otherwise would keep the parties in a perpetual state of discovery, motion practice, and litigation, without any culminating hearing or end.<sup>3</sup> Such a scenario has no basis in statute or rule and would be unduly burdensome and mire the parties in endless litigation expense.

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<sup>2</sup> Whether the City of Idaho Falls will file a notice of appearance is unknown. If the cases are ultimately consolidated it may not matter as all parties will be participating.

<sup>3</sup> It is curious why the Cities seem determined to re-litigate prior contested cases and outcomes in the face of their approved mitigation plan for the SWC delivery call and safe harbor from curtailment pursuant to the CM Rules. The request for discovery is unwarranted and would be overly burdensome in the context of what has already

Finally, the Cities' argument that they could not "adequately prepare" for the prior hearing is also erroneous and does not support their present reconsideration request. These arguments have been previously addressed by both the Director and the District Court. The Cities' continued efforts to "redo" prior contested cases is unwarranted and was properly denied by the Director. Since the final agency orders are presently on appeal to the district court, the agency should refrain from restarting contested cases as requested by the Cities.

**CONCLUSION**

The Cities have pointed to no new authority or information that would warrant reconsideration of the Director's August 23, 2023 order. The Coalition respectfully requests the Director to deny the Cities' Motion accordingly.

DATED this 19<sup>th</sup> day of September, 2023.

**MARTEN LAW LLP**



Travis L. Thompson

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

**FLETCHER LAW OFFICE**



for

W. Kent Fletcher

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

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preceded in this matter. The Department is right to deny such tactics that would result in wasted time and resources for the various canal companies and irrigation districts.

## CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of September, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

<p>Director Mat Weaver Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p><a href="mailto:mat.weaver@idwr.idaho.gov">mat.weaver@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p><a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p><a href="mailto:tj@racineolson.com">tj@racineolson.com</a> <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p>Sarah A. Klahn Max C. Bricker Diane Thompson Somach Simmons &amp; Dunn 2033 11<sup>th</sup> St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:mbricker@somachlaw.com">mbricker@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p>David Gehlert ENRD – DOJ 999 18<sup>th</sup> St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p>William A. Parsons Parsons, Smith &amp; Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only</p> <p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4<sup>th</sup> Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>



<p>Robert E. Williams Williams, Meservy &amp; Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p>Robert L. Harris Holden, Kidwell, Hahn &amp; Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only</p> <p><a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a></p>	<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only</p> <p><a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>	

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Jessica Nielsen  
*Assistant for Travis L. Thompson*

**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 CITIES'  
MOTION FOR CLARIFICATION  
AND RECONSIDERATION**

**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, Gary Spackman, the then-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. Request for Hearing and Discovery* at 2. The request also asks the Director for an order authorizing discovery, pursuant to IDAPA 37.01.01.521. *Id.* 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.

On August 25, 2023, Director Spackman issued an *Order Denying Request for Hearing and Motion Authorizing Discovery* (“*Order Denying Request for Hearing*”). After quoting Idaho Code § 42-1701(3), the Director concluded that “[t]he 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).” *Order Denying Request for Hearing* at 2.

On September 5, 2023, the City of Pocatello, the City of Idaho Falls, and Coalition of Cities (collectively “Cities”) filed a *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery* (“*Motion for Clarification and Reconsideration*”). The Cities “seek clarification on the nature of the Sixth Methodology Order.” *Motion for Clarification and Reconsideration* at 2. The Cities “request clarification on the nature and status of the Sixth Methodology Order – is it, in fact, merely an ‘amended’ Fifth Methodology Order that is ripe for immediate appeal?” *Id.* at 3. The Cities also ask that the Director also “reconsider his denial of the Cities’ request to conduct discovery.” *Id.* at 4.

On September 19, 2023, the SWC submitted *Surface Water Coalition's Response to Cities' Motion for Clarification and Reconsideration* (“*SWC's Response to Motion for Clarification*”). The SWC argues the Director correctly denied the Cities’ request for hearing and request for discovery and urges the Director to deny the latest request. *SWC's Response to Motion for Clarification* at 2–4.

## ANALYSIS AND CONCLUSIONS OF LAW

### A. Motion for Clarification and Reconsideration.

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

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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).

ORDER DENYING CITIES’ MOTION FOR CLARIFICATION AND  
RECONSIDERATION—Page 2

The Director denies the *Cities' Motion for Clarification and Reconsideration* because there is nothing unclear about the *Order Denying Request for Hearing*. As was stated in the *Order Denying Request for Hearing*, “[t]he 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).” *Order Denying Request for Hearing* at 2. The *Sixth Methodology Order* is an order issued after a hearing in response to the issues raised by the parties at hearing. The Cities ask whether “the *Sixth Methodology Order* – is it, in fact, merely an ‘amended’ Fifth Methodology Order.” *Motion for Clarification and Reconsideration* at 3. The title of the order does not matter. What matters is that the Cities have previously been afforded an opportunity for a hearing on the issues. Because the parties were recently afforded a hearing on the issues, the parties are not entitled to another hearing at this time. I.C. § 42-1701A(3).

**B. Motion to Authorize Discovery.**

Because the request for an order authorizing discovery was made as part of an improper request for hearing, the Director will not consider the request for discovery.

**ORDER**

IT IS HEREBY ORDERED that the *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery* is DENIED.

DATED this 25th day of September 2023.

  
\_\_\_\_\_  
MATHEW WEAVER  
Director

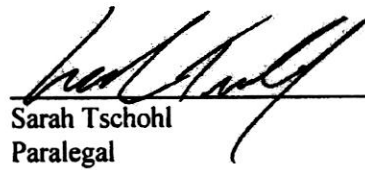
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25th day of September 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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

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

<p>COURTESY COPY TO: Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>	<p><input checked="" type="checkbox"/> Email</p>
<p>COURTESY COPY TO: William A. Parsons PARSONS SMITH &amp; STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<p><input checked="" type="checkbox"/> Email</p>

  
\_\_\_\_\_  
Sarah Tschohl  
Paralegal

## **EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION**

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

(Required by Rule of Procedure 740.02)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, 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 A -2**

**Motion for Clarification and Reconsideration of  
Denial of Request for Hearing and to Engage in  
Discovery, Case No. CV01-23-13238, Fourth Judicial  
District, Ada County, IDWR Docket  
No. CM-DC-2010-001 (Sep. 5, 2023)**

Sep 05, 2023

DEPARTMENT OF  
WATER RESOURCES

Candice M. McHugh, ISB # 5908  
 Chris M. Bromley, ISB # 6530  
 MCHUGH BROMLEY, PLLC  
 380 S. 4<sup>th</sup> St., Ste. 103  
 Boise, ID 83702  
 (208) 287-0991

[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

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

Sarah A. Klahn, ISB # 7928  
 Maximillian Bricker ISB #12283  
 SOMACH SIMMONS & DUNN  
 2033 11<sup>th</sup> St., Ste. 5  
 Boulder, CO 80302  
 (303) 449-2834

[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)

*Attorneys for City of Pocatello*

Robert L. Harris, ISB # 7018  
 HOLDEN KIDWELL HAHN & CRAPO  
 100 Riverwalk Dr., Ste. 200  
 PO Box 50130  
 Idaho Falls, ID 83405  
 (208) 523-0620

[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

*Attorneys for City of Idaho Falls*

**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

**MOTION FOR CLARIFICATION  
 AND RECONSIDERATION OF  
 DENIAL OF REQUEST FOR  
 HEARING AND TO ENGAGE IN  
 DISCOVERY**

COME NOW, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls, by and through its attorney of record, Robert L. Harris, and the City of Pocatello, by and through its attorneys of record, Sarah A. Klahn and Maximilian C. Bricker

(collectively the “Cities”), pursuant to IDAPA 37.01.01.740.02.b and 770 of the Department’s rules of procedure and hereby file this *Motion for Reconsideration and Clarification* of the August 23, 2023, *Order Denying Request for Hearing and Motion Authorizing Discovery* (“Order Denying Hearing”) and move for reconsideration of the Director’s order denying the Parties’ request for a hearing on the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Sixth Methodology Order”).

## ARGUMENT

### 1. The Cities seek clarification on the nature of the Sixth Methodology Order.

On July 19, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued, as relevant here, two orders: a *Post-Hearing Order Regarding Fifth Amended Methodology Order* (“Post-Hearing Order”) and the *Sixth Methodology Order*. Rather than amending 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”), which was subject to a hearing on June 6-9, 2023, the Director chose to issue a new final order.

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.

The Director denied the Parties’ request for a hearing on the *Sixth Methodology Order* because: “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).” However, no hearing has actually been held on the *Sixth Methodology Order*. Thus, the Parties request clarification of the nature and status of the *Sixth Methodology Order*—is it, in fact, merely an “amended” *Fifth Methodology Order* that is ripe for immediate appeal?

**2. Regardless of the answer to the clarification question above, the Parties seek reconsideration and clarification of the denial of the request to engage in discovery.**

The Director has stated on numerous occasions that the SWC Delivery Call is a continuing contested case, requiring the Department to periodically update the Methodology Order, which is a “living document.” Tr. Hearing Vol. I, 18:21. The Director has also acknowledged on numerous occasions that the Department would consider data or analyses brought forward by the Cities in updating or applying the Methodology Order—even the *Order Denying Hearing* asserted that the Director would welcome “new information [developed by the Cities that] the Director may consider in the future.” *Id.* at 2-3 n.1.<sup>1</sup> The Parties have been down this road before, as their April 28, 2023 *Motion for Continuance*, which requested adequate time to conduct investigations prior to a hearing on the *Fifth Methodology Order*, was denied on the ground that the Director had sufficiently notified the junior groundwater users that changes to the *Fourth Methodology Order* were impending (i.e., they had had plenty of “opportunities” to develop data and analyses). *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* at 2. To be adequately prepared for the hearing, however, the Cities needed authorization to access SWC’s lands, under IDAPA

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<sup>1</sup> For example, at the *Fifth Methodology Order* hearing, the Director said at one point: “there have been opportunities for people to gather data; there have been opportunities for folks to take on responsibility to prepare [analyses].” Tr. Hearing Vol. IV, 205:12-14.

37.01.01.520.01.e and I.R.C.P. Rule 34, to develop data associated with the nature and extent of irrigation on SWC lands; the Cities also needed adequate time to analyze the results of these inspections and investigations. The Cities did not have such authorization prior to April 21, 2023, so any “presentations” that the “Department conducted” in fall 2022 fell far short of what was reasonably needed to prepare for the hearing on the *Fifth Methodology Order*. *Id.*

The instant request to engage in discovery reflects the Cities’ efforts to take seriously the Director’s invitation to present “new information” to the Department update the Methodology Order with the best available science, and to be prepared to challenge the Department’s application of the *Sixth Methodology Order* in 2024 on the basis of erroneous or outdated inputs. Accordingly, the Cities request that the Director reconsider his denial of the Cities’ request to conduct discovery.

However, if this is indeed a continuing contested case, perhaps no new order authorizing such discovery is necessary. In that case, the Cities seek clarification as to whether it is entitled to proceed with serving requests on SWC members notwithstanding the *Order Denying Hearing* and whether the SWC members are obligated to comply.

Submitted this 6<sup>th</sup> day of September, 2023.

/s/ Sarah Klahn

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Sarah A. Klahn  
Maximilian C. Bricker  
SOMACH SIMMONS & DUNN  
*Attorneys for City of Pocatello*

/s/ Candice M. McHugh

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Candice M. McHugh  
Chris M. Bromley  
MCHUGH BROMLEY  
*Attorneys for Coalition of Cities*

/s/ Robert Harris

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Robert L. Harris  
HOLDEN KIDWELL HAHN & CRAPO  
*Attorneys for City of Idaho Falls*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2023, the above and foregoing, was filed and served via electronic service as set forth below:

Idaho Dept. of Water Res.

[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)

Travis L. Thompson  
MARTEN LAW LLP P.O. Box 63  
Twin Falls, ID 83303-0063  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)  
[jnielsen@martenlaw.com](mailto:jnielsen@martenlaw.com)

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248 Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

Thomas J. Budge  
Elisheva M. Patterson  
RACINE OLSON  
P.O. Box 1391 Pocatello, ID 83204-1391  
[tj@racineolson.com](mailto:tj@racineolson.com)  
[elisheva@racineolson.com](mailto:elisheva@racineolson.com)

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC  
P.O. Box 50130 Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

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

Robert E. Williams  
WILLIAMS, MESERVY, & LOTHSPREICH, LLP  
P.O. Box 168 Jerome, ID 83338  
[rewilliams@wmlattys.com](mailto:rewilliams@wmlattys.com)

John K. Simpson  
MARTEN LAW LLP  
P.O. Box 2139 Boise, ID 83701-2139  
[jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)

David W. Gehlert  
Natural Resources Section Environment and Natural  
Resources Division U.S. Department of Justice  
999 18th St., South Terrace, Suite 370 Denver, CO  
80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

Sarah A Klahn  
Maximilian C Bricker  
Somach Simmons & Dunn  
1155 Canyon Blvd, Ste. 110 Boulder, CO 80302  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[mbricker@somachlaw.com](mailto:mbricker@somachlaw.com)  
[dthompson@somachlaw.com](mailto:dthompson@somachlaw.com)

Rich Diehl  
City of Pocatello  
P.O. Box 4169 Pocatello, ID 83205  
[rdiehl@pocatello.us](mailto:rdiehl@pocatello.us)

Dylan Anderson  
Dylan Anderson Law PLLC  
P.O. Box 35  
Rexburg, Idaho 83440  
[dylan@dylanandersonlaw.com](mailto:dylan@dylanandersonlaw.com)

/s/ Candice McHugh

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Candice M. McHugh

**APPENDIX A -3**

**Surface Water Coalition's Response to Cities' Motion  
for Clarification and Reconsideration,  
Case No. CV01-23-13238, Fourth Judicial District,  
Ada County, IDWR Docket No. CM-DC-2010-001  
(Sep. 19, 2023)**

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
**MARTEN LAW LLP**  
163 Second Ave. West  
P.O. Box 63  
Twin Falls, Idaho 83303-0063  
Telephone: (208) 733-0700  
Email: [jsimpson@martenlaw.com](mailto:jsimpson@martenlaw.com)  
[tthompson@martenlaw.com](mailto:tthompson@martenlaw.com)

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

W. Kent Fletcher, ISB #2248  
**FLETCHER LAW OFFICE**  
P.O. Box 248  
Burley, Idaho 83318  
Telephone: (208) 678-3250  
Email: [wkf@pmt.org](mailto:wkf@pmt.org)

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

**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

**SURFACE WATER COALITION'S  
RESPONSE TO CITIES' MOTION FOR  
CLARIFICATION AND  
RECONSIDERATION**

COME NOW, 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 ("Surface Water Coalition" or "Coalition"), by and through counsel of  
record, and hereby respond to the *Motion for Clarification and Reconsideration of Denial of*



*Request for Hearing and to Engage in Discovery* (“Motion”) filed on September 5, 2023.<sup>1</sup> The Coalition requests the Director to deny the Cities’ Motion for the reasons set forth below.

## **BACKGROUND**

The Sixth Methodology Order was issued as a “final” administrative order subject to reconsideration and/or appeal to district court. *See* I.C. §§ 67-5246; 67-5270 to 5272; *see also*, Explanatory Information to Accompany a Final Order (attached to the Director’s Sixth Methodology Order). The Cities filed a notice of appeal and petition for judicial review concerning the Director’s related *Post-Hearing Order*, another order issued as part of the matter resulting in the Sixth Methodology Order. *See City of Idaho Falls et al. v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13238 (appeal filed August 16, 2023). IGWA filed a notice of appeal and petition for judicial review of various orders as well, including specifically the Sixth Methodology Order. *See IGWA v. IDWR*, Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV01-23-13173 (appeal filed August 16, 2023). The Coalition of Cities and the City of Pocatello filed notices of appearance in that case. The two appeals are pending in district court and it is anticipated the cases will be consolidated.

## **ARGUMENT**

### **I. The Director Properly Denied the Cities’ Request for Hearing.**

The Cities request clarification of the Director’s Sixth Methodology Order claiming “no hearing has actually been held on the *Sixth Methodology Order*.” Motion at 2-3. Yet, the Cities’ feigned ignorance about the order is merely form over substance. The Cities fully participated in the contested case and administrative hearing that resulted in the issuance of the Sixth Methodology Order. They cannot dispute this fact. There is no basis to hold a second hearing

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<sup>1</sup> The motion was filed the Coalition of Cities (cities of Bliss et al.), the City of Idaho Falls, and the City of Pocatello.

on the Sixth Methodology Order that fully addressed all of the information either presented at or before the administrative hearing. As such, the Director properly denied the requested hearing. *See Order Denying Request for Hearing and Motion Authorizing Discovery* at 2-3.

Moreover, the Cities have appealed the Director's *Post-Hearing Order* that addresses the issues raised on the Fifth Methodology Order, including the updated data the Director included in the Sixth Methodology Order. Although the Cities had a right to appeal the Sixth Methodology Order they failed to do so. Regardless, all of the Cities except Idaho Falls have appeared in IGWA's appeal of the Sixth Methodology Order.<sup>2</sup> Consequently, there is nothing to clarify and the petitions for judicial appeal will proceed pursuant to Idaho's civil rules.

## **II. The Director Properly Denied the Cities' Request for Discovery.**

The Cities have also requested the Director to reconsider the denial of their motion to authorize discovery. *See Motion* at 2-3. Since the request for hearing was denied, the request to authorize discovery was properly denied as well. The Cities misconstrue this matter as a "continuing contested case" with no end. *Motion* at 2. Although the Director's methodology regarding the SWC delivery call may be updated at some point in time, that does not mean the prior contested cases resulting in "final orders" that have been appealed or are currently on appeal to the District Court are continuing *ad infinitum* as the Cities suggest. To find otherwise would keep the parties in a perpetual state of discovery, motion practice, and litigation, without any culminating hearing or end.<sup>3</sup> Such a scenario has no basis in statute or rule and would be unduly burdensome and mire the parties in endless litigation expense.

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<sup>2</sup> Whether the City of Idaho Falls will file a notice of appearance is unknown. If the cases are ultimately consolidated it may not matter as all parties will be participating.

<sup>3</sup> It is curious why the Cities seem determined to re-litigate prior contested cases and outcomes in the face of their approved mitigation plan for the SWC delivery call and safe harbor from curtailment pursuant to the CM Rules. The request for discovery is unwarranted and would be overly burdensome in the context of what has already

Finally, the Cities’ argument that they could not “adequately prepare” for the prior hearing is also erroneous and does not support their present reconsideration request. These arguments have been previously addressed by both the Director and the District Court. The Cities’ continued efforts to “redo” prior contested cases is unwarranted and was properly denied by the Director. Since the final agency orders are presently on appeal to the district court, the agency should refrain from restarting contested cases as requested by the Cities.

**CONCLUSION**

The Cities have pointed to no new authority or information that would warrant reconsideration of the Director’s August 23, 2023 order. The Coalition respectfully requests the Director to deny the Cities’ Motion accordingly.

DATED this 19<sup>th</sup> day of September, 2023.

**MARTEN LAW LLP**



Travis L. Thompson

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

**FLETCHER LAW OFFICE**



for

W. Kent Fletcher

*Attorneys for American Falls  
Reservoir District #2 and Minidoka  
Irrigation District*

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preceded in this matter. The Department is right to deny such tactics that would result in wasted time and resources for the various canal companies and irrigation districts.

## CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of September, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

<p>Director Mat Weaver Garrick Baxter Sarah Tschohl State of Idaho Dept. of Water Resources 322 E Front St. Boise, ID 83720-0098 *** service by electronic mail</p> <p><a href="mailto:mat.weaver@idwr.idaho.gov">mat.weaver@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:sarah.tschohl@idwr.idaho.gov">sarah.tschohl@idwr.idaho.gov</a> <a href="mailto:file@idwr.idaho.gov">file@idwr.idaho.gov</a></p>	<p>Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise, ID 83706-1234 *** service by electronic mail only</p> <p><a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<p>Tony Olenichak IDWR – Eastern Region 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718 *** service by electronic mail only</p> <p><a href="mailto:tony.olenichak@idwr.idaho.gov">tony.olenichak@idwr.idaho.gov</a></p>
<p>T.J. Budge Elisheva Patterson Racine Olson P.O. Box 1391 Pocatello, ID 83204-1391 *** service by electronic mail only</p> <p><a href="mailto:tj@racineolson.com">tj@racineolson.com</a> <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a></p>	<p>Sarah A. Klahn Max C. Bricker Diane Thompson Somach Simmons &amp; Dunn 2033 11<sup>th</sup> St., Ste. 5 Boulder, CO 80302 *** service by electronic mail only</p> <p><a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:mbricker@somachlaw.com">mbricker@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a></p>	<p>David Gehlert ENRD – DOJ 999 18<sup>th</sup> St. South Terrace, Ste. 370 Denver, CO 80202 *** service by electronic mail only</p> <p><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>
<p>Rich Diehl City of Pocatello P.O. Box 4169 Pocatello, ID 83201 *** service by electronic mail only</p> <p><a href="mailto:rdiehl@pocatello.us">rdiehl@pocatello.us</a></p>	<p>William A. Parsons Parsons, Smith &amp; Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<p>Corey Skinner IDWR – Southern Region 650 Addison Ave W, Ste. 500 Twin Falls, ID 83301-5858 *** service by electronic mail only</p> <p><a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>
<p>W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, ID 83318 *** service by electronic mail only</p> <p><a href="mailto:wkf@pmt.org">wkf@pmt.org</a></p>	<p>Kathleen Carr U.S. Dept. Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway, Ste. 400 Boise, ID 83706 *** service by electronic mail only</p> <p><a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a></p>	<p>Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 South 4<sup>th</sup> Street, Ste. 103 Boise, ID 83702 *** service by electronic mail only</p> <p><a href="mailto:cbromley@mchughbromley.com">cbromley@mchughbromley.com</a> <a href="mailto:cmchugh@mchughbromley.com">cmchugh@mchughbromley.com</a></p>

<p>Robert E. Williams Williams, Meservy &amp; Lothspeich, LLP P.O. Box 168 Jerome, ID 83338 *** service by electronic mail only</p> <p><a href="mailto:rewilliams@wmlattys.com">rewilliams@wmlattys.com</a></p>	<p>Robert L. Harris Holden, Kidwell, Hahn &amp; Crapo, PLLC P.O. Box 50130 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p>	<p>Randall D. Fife City Attorney, City of Idaho Falls P.O. Box 50220 Idaho Falls, ID 83405 *** service by electronic mail only</p> <p><a href="mailto:rfife@idahofallsidaho.gov">rfife@idahofallsidaho.gov</a></p>
<p>Skyler Johns Steven Taggart Nathan Olsen Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403 *** service by electronic mail only</p> <p><a href="mailto:sjohns@olsentaggart.com">sjohns@olsentaggart.com</a> <a href="mailto:staggart@olsentaggart.com">staggart@olsentaggart.com</a> <a href="mailto:nolsen@olsentaggart.com">nolsen@olsentaggart.com</a></p>	<p>Dylan Anderson Dylan Anderson Law PLLC P.O. Box 35 Rexburg, ID 83440 *** service by electronic mail only</p> <p><a href="mailto:dylan@dylanandersonlaw.com">dylan@dylanandersonlaw.com</a></p>	

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Jessica Nielsen  
*Assistant for Travis L. Thompson*

**APPENDIX A -4**

**Order Denying Cities' Motion for Clarification and  
Reconsideration, Case No. CV01-23-13238, Fourth  
Judicial District, Ada County, IDWR Docket  
No. CM-DC-2010-001 (Sep. 25, 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 CITIES'  
MOTION FOR CLARIFICATION  
AND RECONSIDERATION**

**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, Gary Spackman, the then-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. Request for Hearing and Discovery* at 2. The request also asks the Director for an order authorizing discovery, pursuant to IDAPA 37.01.01.521. *Id.* 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.

On August 25, 2023, Director Spackman issued an *Order Denying Request for Hearing and Motion Authorizing Discovery* (“*Order Denying Request for Hearing*”). After quoting Idaho Code § 42-1701(3), the Director concluded that “[t]he 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).” *Order Denying Request for Hearing* at 2.

On September 5, 2023, the City of Pocatello, the City of Idaho Falls, and Coalition of Cities (collectively “Cities”) filed a *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery* (“*Motion for Clarification and Reconsideration*”). The Cities “seek clarification on the nature of the Sixth Methodology Order.” *Motion for Clarification and Reconsideration* at 2. The Cities “request clarification on the nature and status of the Sixth Methodology Order – is it, in fact, merely an ‘amended’ Fifth Methodology Order that is ripe for immediate appeal?” *Id.* at 3. The Cities also ask that the Director also “reconsider his denial of the Cities’ request to conduct discovery.” *Id.* at 4.

On September 19, 2023, the SWC submitted *Surface Water Coalition's Response to Cities' Motion for Clarification and Reconsideration* (“*SWC's Response to Motion for Clarification*”). The SWC argues the Director correctly denied the Cities’ request for hearing and request for discovery and urges the Director to deny the latest request. *SWC's Response to Motion for Clarification* at 2–4.

## ANALYSIS AND CONCLUSIONS OF LAW

### A. Motion for Clarification and Reconsideration.

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

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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 Director denies the *Cities' Motion for Clarification and Reconsideration* because there is nothing unclear about the *Order Denying Request for Hearing*. As was stated in the *Order Denying Request for Hearing*, “[t]he 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).” *Order Denying Request for Hearing* at 2. The *Sixth Methodology Order* is an order issued after a hearing in response to the issues raised by the parties at hearing. The Cities ask whether “the *Sixth Methodology Order* – is it, in fact, merely an ‘amended’ Fifth Methodology Order.” *Motion for Clarification and Reconsideration* at 3. The title of the order does not matter. What matters is that the Cities have previously been afforded an opportunity for a hearing on the issues. Because the parties were recently afforded a hearing on the issues, the parties are not entitled to another hearing at this time. I.C. § 42-1701A(3).

**B. Motion to Authorize Discovery.**

Because the request for an order authorizing discovery was made as part of an improper request for hearing, the Director will not consider the request for discovery.

**ORDER**

IT IS HEREBY ORDERED that the *Motion for Clarification and Reconsideration of Denial of Request for Hearing and to Engage in Discovery* is DENIED.

DATED this 25th day of September 2023.



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MATHEW WEAVER  
Director

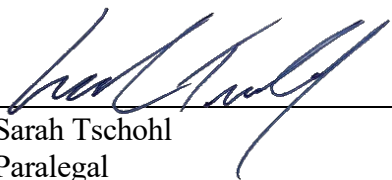
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September 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 <a href="mailto:jsimpson@martenlaw.com">jsimpson@martenlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Travis L. Thompson MARTEN LAW LLP P.O. Box 63 Twin Falls, ID 83303-0063 <a href="mailto:tthompson@martenlaw.com">tthompson@martenlaw.com</a> <a href="mailto:jnielsen@martenlaw.com">jnielsen@martenlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Thomas J. Budge Elisheva M. Patterson RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:tj@racineolson.com">tj@racineolson.com</a> <a href="mailto:elisheva@racineolson.com">elisheva@racineolson.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
Sarah A Klahn Maximilian C. Bricker Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 <a href="mailto:sklahn@somachlaw.com">sklahn@somachlaw.com</a> <a href="mailto:mbricker@somachlaw.com">mbricker@somachlaw.com</a> <a href="mailto:dthompson@somachlaw.com">dthompson@somachlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email

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

COURTESY COPY TO: Corey Skinner IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a>	<input checked="" type="checkbox"/> Email
COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a>	<input checked="" type="checkbox"/> Email

  
\_\_\_\_\_  
Sarah Tschohl  
Paralegal

## **EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION**

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

(Required by Rule of Procedure 740.02)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, 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 B-1**

**Final Order Establishing 2023 Reasonable  
Carryover (Methodology Step 9), IDWR Docket  
No. CM-DC-2010-001 (Nov. 30, 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

**FINAL ORDER  
ESTABLISHING 2023  
REASONABLE CARRYOVER**

***(METHODOLOGY STEP 9)***

**FINDINGS OF FACT**

1. On July 19, 2023, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued the *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”). The *Methodology Order* establishes nine steps for determining material injury to members of the Surface Water Coalition (“SWC”). This order applies step nine, the final step of the *Methodology Order*, for the 2023 water year.

2. The *Methodology Order* describes step 9 as follows:

Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual [crop water need] for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future [base line year], and for the refinement and continuing improvement of the method for future use.

On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on, but not limited to, the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and [reasonable in-season demand]. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover shortfall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights. A transient ESPAM simulation will be run to determine

the priority date of water rights that must be curtailed to produce the reasonable carryover shortfall volume by September 30 of the following year. Curtailment will be simulated within the area of common ground water supply, as described by CM Rule 50.01.

*Methodology Order* at 45.

3. The following table summarizes the 2023 irrigation season diversions, crop water need, and reasonable in-season demand (“RISD”) volumes for each SWC entity. RISD is calculated for each SWC entity using demand, crop water need, and project efficiency.

*Methodology Order* at 17. All values are reported in acre-feet (“AF”). These values are used to determine entity-specific season ending RISD values.

Entity	Demand <sup>1</sup>	Crop Water Need
A&B	62,080	28,401
AFRD2	433,151	135,217
BID	231,011	86,494
Milner	52,976	27,074
Minidoka	322,423	156,201
NSCC	985,149	313,401
TFCC	1,079,398	403,209

4. The following table summarizes the final calculated 2023 in-season demand shortfall values in AF, if any, for each member of the SWC. The values in this table are different from those in the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (April 21, 2023) (“*April Forecast Supply Order*”), *Order Revising April 2023 Forecast Supply and Amending Curtailment Order (Methodology Steps 5 & 6)* (July 19, 2023) (“*July Order*”) and the *Order Revising July 2023 Forecast Supply (Methodology Steps 7-8)* (August 31, 2023). The differences are due to changes in total supply and RISD that reflect diversion and ET data not available when the *April Forecast Supply Order* and *July Order* were issued. The second column of the summary table contains the total natural flow diversions from April 1 to October 31 for each SWC member.<sup>2</sup> The third column summarizes the natural flow adjustments, which include natural flow delivered for recharge<sup>3</sup> and natural flow delivered to SWID.<sup>4</sup> The fourth column contains the preliminary storage allocations reported from the August 1, 2023 Water

<sup>1</sup> The “Demand” for each SWC entity is equal to each entity’s 2023 April–October diversions.

<sup>2</sup> The natural flow diverted was calculated from the preliminary daily water right accounting records located here: <https://research.idwr.idaho.gov/apps/Hydrologic/Accounting/>.

<sup>3</sup> Natural flow recharge values represent accomplished recharge through the Idaho Water Resource Board’s recharge water rights as of October 31, 2023.

<sup>4</sup> See column titled “Natural Flow Adjustment” in “Attachment A” for further information regarding these adjustments.



District 01 storage report.<sup>5</sup> The fifth column summarizes storage adjustments due to the application of the Minidoka Credit.<sup>6</sup> The sixth column contains the total supply available to each SWC member and is calculated by summing columns two through five. The seventh column contains the calculated RISD. The demand shortfall in the last column is calculated by subtracting the RISD from the total supply. The demand shortfall is zero when the total supply exceeds the RISD. No members of the SWC have a demand shortfall for 2023.

Entity	Natural Flow Diverted through 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	In-Season Storage Adjustment	Total Supply	RISD	Demand Shortfall
A&B	15,628	-	132,888	-	148,516	46,854	0
AFRD2	155,354	(7,395)	382,422	1,000	531,380	378,375	0
BID	127,690	(3,714)	220,083	5,130	349,189	204,761	0
Milner	19,476	(3,011)	88,090	-	104,555	48,319	0
Minidoka	166,934	-	336,711	8,370	512,015	315,721	0
NSCC	508,227	(3,986)	834,525	(7,750)	1,331,016	831,620	0
TFCC	898,401	(181)	238,561	(6,750)	1,130,031	1,007,766	0

5. The following table summarizes the end of season reasonable carryover shortfall calculation for 2023. All values are reported in AF. The second column of the table contains the preliminary storage allocations reported from the August 1, 2023 Water District 01 storage report. The third column summarizes adjustments for storage water due to the application of the Minidoka Credit. The fourth column summarizes adjustments for water delivered through the SWC member’s canals for use by non-SWC members.<sup>7</sup> The fifth column contains the total storage water use reported from the October 31, 2023 Water District 01 water right accounting report.<sup>8</sup> The sixth column contains the actual carryover volumes as defined by the *Methodology Order* (*Methodology Order* at 45) and is calculated by subtracting the sum of columns four and five from the sum of columns two and three. The seventh column contains the reasonable carryover volumes established in the *Methodology Order*. *Methodology Order* at 31. The reasonable carryover shortfall in the last column is zero when the actual carryover is greater than the reasonable carryover, otherwise it is calculated as the difference between reasonable carryover and the actual carryover volume for each member of the SWC. No members of the SWC have a reasonable carryover shortfall for 2023.

<sup>5</sup> The preliminary storage allocations can be found on Water District 01’s website: <https://www.waterdistrict1.com/current-data/>.

<sup>6</sup> See column titled “In-Season Storage Adjustment” in “Attachment A.” The Minidoka Credit is a long existing exchange of stored water among AFRD2, BID, MID, NSCC, and TFCC that has been incorporated into an agreement of those entities and accepted by the SRBA district court.

<sup>7</sup> See column titled “Storage Use Adjustment” in “Attachment A” for further information regarding these adjustments.

<sup>8</sup> This water right accounting report was published to the Water District 01 webpage on November 17, 2023: <https://www.waterdistrict1.com/current-data/>.

	Preliminary Storage Allocation	In-Season Storage Allocation Adjustment	Storage Use Adjustment <sup>9</sup>	Storage Use	Actual Carryover	Reasonable Carryover	Reasonable Carryover Shortfall
A&B	132,888	-	-	46,452	86,436	22,700	0
AFRD2	382,422	1,000	(45,453)	331,435	97,230	16,700	0
BID	220,083	5,130	(11,500)	118,653	118,060	0	0
Milner	88,090	-	(2,100)	38,611	51,579	16,100	0
Minidoka	336,711	8,370	-	155,372	189,709	0	0
NSCC	834,525	(7,750)	(28,091)	508,999	345,867	113,300	0
TFCC	238,561	(6,750)	(5,366)	186,544	50,633	37,400	0

6. The above determinations are based on water diversion and storage data from Water District 01. Although these preliminary numbers are subject to revision by Water District 01 during its final accounting for 2023, revisions will not become available until after issuance of this order. For this reason, these estimates establish the final obligation of junior ground water users in supplying water to the SWC for reasonable carryover shortfall. The above determination of reasonable carryover shortfall is carried forward from the *Methodology Order* and considers the best available water diversion and storage data, comparative water years, and RISD. *Methodology Order* at 45.

## CONCLUSIONS OF LAW

1. The *Methodology Order* states that, on or before November 30, the Director will estimate the SWC’s reasonable carryover shortfall, if any, for 2023. *Methodology Order* at 45. If a reasonable carryover shortfall is established, junior-priority ground water users shall have fourteen days to demonstrate, to the satisfaction of the Director, “their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC.” *Id.*

2. The evidentiary standard to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012).

3. “Clear and convincing evidence refers to a degree of proof greater than a mere preponderance.” *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). “Clear and convincing evidence is generally understood to be ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) (citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006)); see also *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

<sup>9</sup> Storage Use Adjustment values include storage assignments reported on the Water District 01 Adjustment Worksheet as of November 22, 2023 (Attachment A). Personal communication with Water District 01 and water users indicates Water District 01 will finalize additional storage assignments this water year that will decrease the Storage Use Adjustment values and increase the Actual Carryover values of SWC entities.

4. Consistent with Finding of Fact 5, the Director concludes by clear and convincing evidence that no members of the SWC have a reasonable carryover shortfall for 2023.

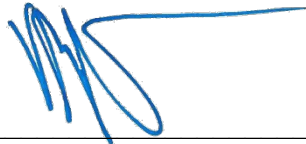
5. Because no members of the SWC have a reasonable carryover shortfall for 2023, junior ground water users do not need to establish “their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC.” *Methodology Order* at 45. Therefore, the Director will not “issue an order curtailing junior ground water rights.” *Id.*

### ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that no member of the SWC is owed reasonable carryover storage in 2023 for use in 2024.

IT IS FURTHER ORDERED that this final order concludes the application of the *Methodology Order* to the climatic, hydrologic, and agronomic facts of the 2023 irrigation season.

DATED this 30th day of November 2023.



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MATHEW WEAVER  
Director

## Attachment A 2023 SWC Adjustments

Entity	Adjustment Volume (AF)	Description	Natural Flow Adjustment	In-Season Storage Adjustment	Storage Use Adjustment
<b>A&amp;B</b>	-	-			
		<b>Total A&amp;B</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>AFRD2</b>	3,500.0	Minidoka Irrigation District (Northsnake GWD)			Yes
	41,742.8	IGWA/SWC/IWRB			Yes
	1,000.0	Minidoka Credit		Yes	
	(7,395.0)	IWRB Recharge	Yes		
		<b>Total AFRD</b>	<b>(7,395)</b>	<b>1,000</b>	<b>45,243</b>
<b>BID</b>	5,000.0	Falls Irrigation District (Southwest Irrigation District)			Yes
	1,500.0	City of Pocatello (Southwest Irrigation District)			Yes
	5,000.0	City of Pocatello (LCSC Enterprises)			Yes
	5,130.0	Minidoka Credit		Yes	
	(3,714.0)	SWID Natural Flow	Yes		
		<b>Total BID</b>	<b>(3,714)</b>	<b>5,130</b>	<b>11,500</b>
<b>Milner</b>	100.0	Scott Breeding			Yes
	2,000.0	Minidoka (Southwest Irrigation District)			Yes
	(3,011.0)	SWID Natural Flow	Yes		
		<b>Total Milner</b>	<b>(3,011)</b>	<b>0</b>	<b>2,100</b>
<b>MID</b>	(11,500.0)	Northside Canal (North Snake GWD)			
	(3,500.0)	AFRD2 (North Snake GWD)			
	(5,000.0)	SWID Pumps (SWID Pumps)			
	(1,500.0)	Northside Canal (Water Mitigation Coalition)			
	8,370.0	Minidoka Credit		Yes	
		<b>Total MID</b>	<b>0</b>	<b>8,370</b>	<b>0</b>
<b>NSCC</b>	100.0	Arthur Henry Farms			Yes
	11,500.0	Minidoka Irrigation District (Northsnake GWD)			Yes
	1,500.0	Minidoka Irrigation District (Magic Valley GWD)			Yes
	14,991.1	IGWA/SWC/IWRB			Yes
	(7,750.0)	Minidoka Credit		Yes	
	(3,986.0)	IWRB Recharge	Yes		
		<b>Total NSCC</b>	<b>(3,986)</b>	<b>(7,750)</b>	<b>28,091</b>
<b>TFCC</b>	5,000.0	City of Pocatello (Southwest Irrigation District)			Yes
	365.6	IGWA/SWC/IWRB			Yes
	(6,750.0)	Minidoka Credit		Yes	
	(181.0)	IWRB Recharge	Yes		
		<b>Total TFCC</b>	<b>(181)</b>	<b>(6,750)</b>	<b>5,366</b>

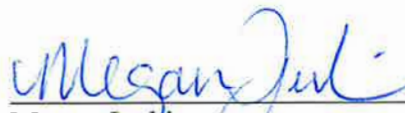
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30<sup>th</sup> day of November 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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

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

<p>COURTESY COPY TO:  Corey Skinner  IDWR—Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033  <a href="mailto:corey.skinner@idwr.idaho.gov">corey.skinner@idwr.idaho.gov</a></p>	<input checked="" type="checkbox"/> Email
<p>COURTESY COPY TO:  William A. Parsons  PARSONS SMITH &amp; STONE  P.O. Box 910  Burley, ID 83318  <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></p>	<input checked="" type="checkbox"/> Email

  
\_\_\_\_\_  
Megan Jenkins  
Manager Assistant II

## **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 B-2**

**Final Order Establishing 2018 Reasonable  
Carryover (Methodology Step 9), IDWR Docket  
No. CM-DC-2010-001 (Nov. 30, 2018)**

**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 )	Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>FINAL ORDER</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>ESTABLISHING 2018</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>REASONABLE CARRYOVER</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	
AND TWIN FALLS CANAL COMPANY )	<b>(METHODOLOGY STEP 9)</b>
_____ )	

**FINDINGS OF FACT**

1. On April 19, 2016, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order establishes nine steps for determining material injury to members of the Surface Water Coalition (“SWC”). This order applies step nine, the final step of the Methodology Order, for the 2018 water year.

2. The Methodology Order describes step 9 as follows:

Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual [crop water need] for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future BLY, and for the refinement and continuing improvement of the method for future use.

On or before November 30, the Department will issue estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on, but not limited to, the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and [reasonable in-season demand]. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the issuance by the Department of reasonable carryover shortfall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to supply a volume of storage water or to conduct other approved mitigation activities

that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

*Methodology Order* at 38-39.

3. The following table summarizes the 2018 irrigation season diversions, crop water need, and reasonable in-season demand (“RISD”) volumes for each SWC entity. RISD is calculated for each SWC entity using demand, crop water need, and project efficiency *Methodology Order* at 16. All values are reported in acre-feet (“AF”).

Entity	Demand <sup>1</sup>	Crop Water Need	RISD
A&B	64,192	38,220	62,661
AFRD2	456,319	156,633	439,226
BID	256,034	111,821	261,340
Milner	68,429	31,156	54,637
Minidoka	370,890	200,689	430,338
NSCC	1,037,970	367,342	1,023,441
TFCC	1,127,305	462,889	1,174,249

4. The following table summarizes the final calculated 2018 in-season demand shortfall values in AF, if any, for each member of the SWC. The values in this table are different from those in the *Final Order Regarding April 2018 Forecast Supply (Methodology Steps 1-3)* (April 17, 2018) (“April Forecast Supply Order”) and *Order Revising April 2018 Forecast Supply (Methodology Step 5 & 6)* (July 23, 2018) (“July Order”). The differences are due to changes in total supply and RISD that reflect diversion and ET data not available at the time the April Forecast Supply Order and July Order were issued. In the April Forecast Supply Order, the Director predicted no demand shortfall to members of the SWC. *April Forecast Supply Order* at 3. In the July Order, the Director continued to predict no demand shortfall. *July Order* at 8. The second column of the summary table contains the total natural flow diversions from April 1 to October 31 for each SWC member.<sup>2</sup> The third column summarizes the natural flow adjustments, which include natural flow delivered for recharge<sup>3</sup> and natural flow delivered to SWID.<sup>4</sup> The fourth column contains the preliminary storage allocations reported from the July 11, 2018,

<sup>1</sup> The “Demand” for each SWC entity is equal to each entity’s 2018 April – October diversions.

<sup>2</sup> The natural flow diverted was calculated from the preliminary daily water right accounting records located here: <http://www.idwr.idaho.gov/water-data/water-rights-accounting/research.html>.

<sup>3</sup> Natural flow recharge values represent accomplished recharge through the Idaho Water Resource Board’s recharge water rights as of October 31, 2018.

<sup>4</sup> See column titled “Natural Flow Adjustment” in “Attachment A” for further information regarding these adjustments.

Water District 01 storage report.<sup>5</sup> The fifth column summarizes storage adjustments due to application of the Minidoka Credit.<sup>6</sup> The sixth column contains the total supply available to each SWC member and is calculated by summing columns two through five. The seventh column contains the calculated RISD. The demand shortfall in the last column is calculated by subtracting the RISD from the total supply. The demand shortfall is zero when the total supply is greater than the RISD. No members of the SWC have a demand shortfall for 2018.

Entity	Natural Flow Diverted through 10/31	Natural Flow Adjustment	Preliminary Storage Allocation	In-Season Storage Adjustment	Total Supply	RISD	Demand Shortfall
A&B	25,064	-	134,983	-	160,047	62,661	0
AFRD2	257,879	(66,910)	387,120	1,000	579,089	439,226	0
BID	139,908	(3,714)	222,616	5,130	363,940	261,340	0
Milner	24,489	(3,011)	87,796	-	109,274	54,637	0
Minidoka	197,623	-	359,982	8,370	565,975	430,338	0
NSCC	555,645	-	844,619	(7,750)	1,392,514	1,023,441	0
TFCC	946,206	(923)	241,687	(6,750)	1,180,220	1,174,249	0

5. The following table summarizes the end of season reasonable carryover shortfall calculation for 2018. All values are reported in AF. The second column of the table contains the preliminary storage allocations reported from the July 11, 2018, Water District 01 storage report. The third column summarizes adjustments for storage water due to application of the Minidoka Credit. The fourth column summarizes adjustments for water delivered through the SWC member’s canals for use by non-SWC members.<sup>7</sup> The fifth column contains the total storage water use reported from the October 31, 2018, Water District 01 water right accounting report.<sup>8</sup> The sixth column contains the actual carryover volumes as defined by the Methodology Order (*Methodology Order* at 38) and is calculated by subtracting the sum of columns four and five from the sum of columns two and three. The seventh column contains the reasonable carryover volumes established in the Methodology Order. *Methodology Order* at 28. The reasonable carryover shortfall in the last column is zero when the actual carryover is greater than the reasonable carryover, otherwise it is calculated as the difference between reasonable carryover and the actual carryover volume for each member of the SWC. No members of the SWC have a reasonable carryover shortfall for 2018.

<sup>5</sup> The preliminary storage allocations can be found on Water District 01’s website located here: <http://www.waterdistrict1.com/WD01%20Storage%20Report.pdf>.

<sup>6</sup> See column titled “In-Season Storage Adjustment” in “Attachment A.” The Minidoka Credit is a long existing exchange of stored water among AFRD2, BID, MID, NSCC, and TFCC that has been incorporated into an agreement of those entities and accepted by the SRBA district court.

<sup>7</sup> See column titled “Storage Use Adjustment” in “Attachment A” for further information regarding these adjustments.

<sup>8</sup> This water right accounting report was published to the Water District 01 webpage on November 6, 2018: <http://www.waterdistrict1.com/SNKWRA.htm>.

	Preliminary Storage Allocation	In- Season Storage Allocation Adjustment	Storage Use Adjustment	Storage Use	Actual Carryover	Reasonable Carryover	Reasonable Carryover Shortfall
A&B	134,983	0	0	39,128	95,855	18,500	0
AFRD2	387,120	1,000	(14,500)	284,850	117,770	11,500	0
BID	222,616	5,130	(6,680)	122,807	111,619	0	0
Milner	87,796	0	(1,312)	45,252	43,856	4,800	0
Minidoka	359,982	8,370	(200)	173,467	195,084	0	0
NSCC	844,619	(7,750)	(9,100)	491,424	354,545	65,500	0
TFCC	241,687	(6,750)	(1,637)	183,659	52,915	25,200	0

6. The above determinations are based on water diversion and storage data from Water District 01. Although these preliminary numbers are subject to revision by Water District 01 during final accounting for 2018, revisions will not become available until after issuance of this order. For this reason, these estimates establish the final obligation of junior ground water users in supplying water to the SWC for reasonable carryover shortfall. The above determination of reasonable carryover shortfall is carried forward from the Methodology Order and takes into account the best available water diversion and storage data, comparative water years, and RISD. *Methodology Order* at 38-39.

### CONCLUSIONS OF LAW

1. The Methodology Order states that, on or before November 30, the Director will estimate the SWC's reasonable carryover shortfall, if any, for 2018. *Methodology Order* at 38-39. If a reasonable carryover shortfall is established, junior-priority ground water users shall have fourteen days to demonstrate, to the satisfaction of the Director, "their ability to provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC." *Id.* at 39.

2. The evidentiary standard to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012).

3. "Clear and convincing evidence refers to a degree of proof greater than a mere preponderance." *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). "Clear and convincing evidence is generally understood to be '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); see also *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

4. Consistent with Finding of Fact 5, the Director concludes by clear and convincing evidence that no members of the SWC have a reasonable carryover shortfall for 2018.

5. Because no members of the SWC have a reasonable carryover shortfall for 2018, junior ground water users do not need to establish “their ability to supply a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the SWC equal to the reasonable carryover shortfall for all injured members of the SWC.” *Methodology Order* at 39. The Director will not “issue an order curtailing junior ground water rights.” *Id.*

### ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that no member of the SWC is owed reasonable carryover storage in 2018 for use in 2019.

IT IS FURTHER ORDERED that this final order concludes application of the *Methodology Order* to the climatic, hydrologic, and agronomic facts of the 2018 irrigation season.

DATED this 30<sup>th</sup> day of November 2018. ~

  
\_\_\_\_\_  
GARY SPACKMAN  
Director

**Attachment A  
2018 SWC Adjustments**

	Adjustments	Description	Natural Flow Adjustment	In-Season Storage Adjustment	Storage Use Adjustment
<b>A&amp;B</b>	0	None			
		<b>Total A&amp;B</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>AFRD2</b>	2,000	Idaho Irrigation (IGWA)			Yes
	5,000	New Sweden			Yes
	5,000	Snake River Valley			Yes
	2,500	Minidoka Irrigation District			Yes
	(3,952)	Idaho Power			
	1,000	Minidoka Credit		Yes	
	(66,910)	IWRB Recharge	Yes		
		<b>Total AFRD</b>	<b>(66,910)</b>	<b>1,000</b>	<b>(14,500)</b>
<b>BID</b>	5,130	Minidoka Credit		Yes	
	(3,714)	SWID Natural Flow	Yes		
	(7,301)	Idaho Power			
	6,680	SWID (City of Pocatello)			Yes
		<b>Total BID</b>	<b>(3,714)</b>	<b>5,130</b>	<b>6,680</b>
<b>Milner</b>	1,112	Artesian			Yes
	(1,268)	Idaho Power			
	200	Scott Breeding			Yes
	(3,011)	SWID Natural Flow	Yes		
		<b>Total Milner</b>	<b>(3,011)</b>	<b>0</b>	<b>(1,312)</b>
<b>MID</b>	(200)	Wickel Farms			
	200	Wickel Farms			Yes
	(10,000)	Water Mitigation Coalition			
	8,370	Minidoka Credit		Yes	
	(9,277)	Idaho Power			
	(10,000)	North Snake GWD			
		<b>Total MID</b>	<b>0</b>	<b>8,370</b>	<b>(200)</b>
<b>NSCC</b>	100	Arther Henry Farms			Yes
	(7,750)	Minidoka Credit		Yes	
	1,500	Water Mitigation Coalition (Minidoka)			Yes
	0	IWRB Recharge	Yes		
	7,500	North Snake GWD			Yes
	(6,390)	Idaho Power			
		<b>Total NSCC</b>	<b>0</b>	<b>(7,750)</b>	<b>(9,100)</b>
<b>TFCC</b>	1,637	Artesian			Yes
	(6,750)	Minidoka Credit		Yes	
	(923)	IWRB Recharge	Yes		
	1,899	LCSC Enterprises			
	(2,130)	Idaho Power			
		<b>Total TFCC</b>	<b>(923)</b>	<b>(6,750)</b>	<b>(1,637)</b>

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30<sup>th</sup> day of November 2018, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson  
Travis L. Thompson  
BARKER ROSHOLT & SIMPSON, LLP  
P. O. Box 63  
Twin Falls, ID 83303-0063  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlr@idahowaters.com](mailto:tlr@idahowaters.com)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

W. Kent Fletcher  
FLETCHER LAW OFFICE  
P.O. Box 248  
Burley, ID 83318  
[wkf@pmt.org](mailto:wkf@pmt.org)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Randall C. Budge  
Thomas J. Budge  
RACINE OLSON  
P.O. Box 1391  
Pocatello, ID 83204-1391  
[rcb@racinelaw.net](mailto:rcb@racinelaw.net)  
[tjb@racinelaw.net](mailto:tjb@racinelaw.net)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Kathleen Marion Carr  
US Dept. Interior  
960 Broadway Ste 400  
Boise, ID 83706  
[kathleenmarion.carr@sol.doi.gov](mailto:kathleenmarion.carr@sol.doi.gov)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

David W. Gehlert  
Natural Resources Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
999 18<sup>th</sup> St., South Terrace, Suite 370  
Denver, CO 80202  
[david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Matt Howard  
US Bureau of Reclamation  
1150 N Curtis Road  
Boise, ID 83706-1234  
[mhoward@usbr.gov](mailto:mhoward@usbr.gov)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email



Sarah A. Klahn  
WHITE & JANKOWSKI  
511 16<sup>th</sup> St., Ste. 500  
Denver, CO 80202  
[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Kirk Bybee  
City of Pocatello  
P.O. Box 4169  
Pocatello, ID 83205  
[kibybee@pocatello.us](mailto:kibybee@pocatello.us)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Chris M. Bromley  
MCHUGH BROMLEY, PLLC  
380 South 4<sup>th</sup> Street, Suite 103  
Boise, ID 83702  
[cbromley@mchughbromley.com](mailto:cbromley@mchughbromley.com)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Robert E. Williams  
WILLIAMS, MESERVY, &  
LOTHSPEICH, LLP  
P.O. Box 168  
Jerome, ID 83338  
[rewilliams@cableone.net](mailto:rewilliams@cableone.net)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO,  
PLLC  
P.O. Box 50130  
Idaho Falls, ID 83405  
[rharris@holdenlegal.com](mailto:rharris@holdenlegal.com)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Randall D. Fife  
City Attorney, City of Idaho Falls  
P.O. Box 50220  
Idaho Falls, ID 83405  
[rfife@idahofallsidaho.gov](mailto:rfife@idahofallsidaho.gov)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Lyle Swank  
IDWR—Eastern Region  
900 N. Skyline Drive, Ste. A  
Idaho Falls, ID 83402  
[lyle.swank@idwr.idaho.gov](mailto:lyle.swank@idwr.idaho.gov)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Corey Skinner  
Nathan Erickson  
IDWR—Southern Region  
1341 Fillmore St., Ste. 200  
Twin Falls, ID 83301-3033  
[corey.skinner@idwr.idaho.gov](mailto:corey.skinner@idwr.idaho.gov)  
[nathan.erickson@idwr.idaho.gov](mailto:nathan.erickson@idwr.idaho.gov)


- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Cindy Yenter  
IDWR-Salmon Field Office  
102 S. Warpath  
Salmon ID 83467-4435  
[cindy.yenter@idwr.idaho.gov](mailto:cindy.yenter@idwr.idaho.gov)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

***COURTESY COPY TO:***  
William A. Parsons  
PARSONS SMITH & STONE  
P.O. Box 910  
Burley, ID 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

  
\_\_\_\_\_  
Kimberle English

## **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)

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### **REQUEST FOR HEARING**

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### **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.