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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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.

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

Respondents,

and

IDAHO GROUND WATER APPROPRIATORS, INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, and BINGHAM GROUND WATER DISTRICT,

Intervenors.

Case No. CV01-23-13238

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELF BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT NO. 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

SURFACE WATER COALITION'S RESPONSE BRIEF

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

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STATEMENT OF THE CASE

I. Nature of the Case.

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

II. Procedural History / Statement of Facts

The Court is well versed on the underlying history of the Coalition's delivery call and resulting appeals and decisions. *See generally, Memorandum Decision and Order on Petitions for Judicial Review* (Gooding County Dist. Ct., Fifth Jud. Dist., Consolidated Case No. CV-2010-382, Sept. 26, 2014) (hereinafter referred to as the "*382 Decision*"). R. 743. In addition to the Cities' procedural and factual background, the Coalition offers the following for the Court's review and consideration.

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

by IDWR today.[1] Both IGWA and the City of Pocatello requested hearings on the *Third Order*. However, at about that same time the Coalition and IGWA reached general settlement terms concerning mitigation that season and filed a joint motion with IDWR requesting withdrawal of the *Third Order* and the April order applying the first three steps.[2]

After execution and approval of the stipulated mitigation plan, the Coalition and IGWA further agreed to have IDWR reinstate the *Third Order* on March 9, 2016, and requested the agency to conjunctively administer ground water rights accordingly. The City of Pocatello requested a hearing on that order but also asked the Director to stay further action on its request.[3] Despite having an opportunity for an administrative hearing on its issues with the Director's methodology, the City chose to continue that indefinite stay.

Approximately one month later the Director issued the *Fourth Methodology Order* on April 19, 2016.[4] The City of Pocatello again requested a hearing and a stay (May 4, 2016).[5] Despite notice and the statutory right to a hearing, none of the other Cities that are parties to this appeal ever requested any administrative relief on any of the Department's first four methodology orders. The Director continued to apply the methodology from 2017-2022 since not all junior ground water rights were covered by approved mitigation plans. R. 52-53.

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

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

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

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

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

In the fall of 2022 IDWR convened a technical working group comprised of staff and consultants for the parties to evaluate potential updates to the methodology. Sukow, Tr. Vol. I, 53:11-15, Anders, Tr. Vol I, 170:5-6, 16-18. IDWR staff Matt Anders sent the first notice to the parties in early September. *See id.* 217:20-25.[6]

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

Matt Anders presented information and data related to the "baseline year" at the November 16, 2022, meeting. *See* R. 1176 (11/16/22 Anders PowerPoint). Jennifer Sukow presented the results of using a transient analysis for determining a projected curtailment date on November 28, 2022. *See* R. 1176 (11/28/22 Sukow PowerPoint), 1424. In other words, the Cities were put <u>on notice over six months</u> before issuance of the *Fifth Methodology Order* that the Director could incorporate these specific updates into the methodology.[7]

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

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

Ultimately, following the series of meetings and presentations, IDWR staff submitted a preliminary recommendation to the Director on December 23, 2022. R. 2866. Consultants for the parties then submitted their own comments by January 16, 2023. *See* R. 1300, 2867, 2879. IDWR reviewed and considered the parties' comments. Anders, Tr. Vol. I, 220:10-12.

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

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

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

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

R. 430.

The Director set a deadline to disclose witness and exhibit lists and any expert reports by May 30, 2023.[8] R. 126. The parties identified numerous witnesses and exhibits and disclosed expert reports prior to the hearing. R. 505-630, 792-861,1208-1231, 1511-1579, 1600-1632, 2112-2368. The Cities and other ground water users listed five different retained expert witnesses to testify at the administrative hearing. R. 524, 536, 546, 575. The Director then presided over a four-day hearing held June 6-9, 2023.[9] The parties had a full and fair opportunity to present testimony and exhibits, as well as cross-examine IDWR staff and all other witnesses. *See generally*, Tr. Vol. I-IV.

The parties also submitted post-hearing briefs at the request of the Director. R. 924-1103. Thereafter, the Director issued the final *Post-Hearing Order* and the *Sixth Methodology Order* on July 19, 2023. R. 1067, 1004. The *Sixth Order* essentially continues the same nine steps from the *Fourth Methodology Order* issued in 2016. Again, the basic framework and steps were previously litigated on judicial review before this Court. *See generally, 382 Decision* (R. 743).[10]

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

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

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

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

A. Baseline Year

The methodology's baseline year "is a year or average of years when irrigation demand represents conditions that predict need in the current year of irrigation at the start of the irrigation season." R. 1006. A baseline year "should represent a year(s) of above average diversions . . . and should also represent a year(s) of above average temperatures and reference ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors . . .[and] actual supply should be analyzed to assure that the BLY is not a year of limited supply." R. 1006-07. The criteria for selecting a baseline year have not changed since the Director issued the *Second* through *Fifth Orders*.[11]

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

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

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

B. Reasonable Carryover

The methodology for determining reasonable carryover did not change from the *Third* or *Fourth Orders* either. R. 1026-34. What changed was the Director's use of projected demand in his calculation with a projected demand (2018 BLY) instead of (06/08/12 BLY). R. 1028. The Director did make adjustments to certain Coalition members' "maximum projected carryover needs" as well. R. 1032-34. Although the reasonable carryover quantities changed in response to a change in the baseline year, the Director's evaluation of injury to carryover storage and the basic mechanics of Step 9 did not change.

C. Determination of Curtailment Date

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

A steady-state analysis evaluates the impact of curtailment on the aquifer and connected river reaches long-term (i.e. 50 years), whereas a transient analysis predicts the timing of changes that would occur during the irrigation season. R. 1035. The Director acknowledged that only "9% to 15% of the steady state response is predicted to accrue to the near Blackfoot to Minidoka reach between May 1 and September 30 of the same year." *See id.* In other words, if curtailment is based upon a steady-state analysis, it severely under-mitigates a predicted injury to the Coalition's senior water rights during the time of need, i.e. the current irrigation season. Consequently, the Director adopted a transient analysis as being "necessary to simulate the short-

term curtailments prescribed in the methodology."[12] R. 1036. Similar to the updated BLY, the potential use of a transient simulation was first disclosed in the fall of 2022. R. 1176 (11/28/22 Sukow PowerPoint). In other words, the parties and their consultants had well over five months to analyze the Director's use of ESPAM in this manner.[13]

The Director's updates were incorporated into both the *Fifth* and *Sixth Methodology Orders* issued in 2023. No junior ground water right of any petitioner city was curtailed in response to the issuance of these orders and the Cities continue to have in place an effectively operating mitigation plan. *Cities' Br.* at 48.

STANDARD OF REVIEW

When reviewing an agency action on a petition for judicial review, this court must affirm the agency unless it finds that the agency's findings, inferences, conclusions, or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence in the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 251, 257, 509 P.3d 1180, 1186 (2022) (quoting I.C. § 67-5279(3); *see also*, *South Valley Ground Water District et al. v. IDWR*, ___ P.3d ___, 2024 WL 136840 (Idaho Jan. 12, 2024). Furthermore, even if one of the conditions in section 67-5279(3)(a)-(e) is met, a reviewing court should still affirm the agency action "unless substantial rights of the appellant have been prejudiced." *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012) (quoting I.C. § 67-5279(4)).

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

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

Finally, the court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *See 3G AG LLC*, 170 Idaho at 257, 509 P.3d at 1186 (citing Idaho Code § 67-5279(1)); *South Valley*, 2024 WL 136840, at *5. So long as the agency's determinations are supported by substantial, competent evidence in the record, the factual determinations are binding on the court, even where there is conflicting evidence before the agency. *See In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 22, 467 P.3d 377, 386 (2020); *South Valley*, 2024 WL 136840, at *5, 20 ("We do not resolve factual issues like this on appeal. Our duty is to review the decision of the Director to determine whether substantial, competent evidence supports his decision").

ARGUMENT

The primary theme throughout the Cities' appeal is their disagreement with the Director's technical decisions and pre-hearing procedures. In several instances the Cities attempt to flip the established presumptions and burdens of proof from junior ground water users to either the Coalition or IDWR. Where the Director recognized that the Cities and other junior users carried the burden to prove defenses by "clear and convincing evidence," the Cities pay lip service to this standard that has been repeatedly affirmed by the Idaho Supreme Court.[14] Further, where the Supreme Court has recognized the Director's unique expertise in water distribution cases, the Cities ask this Court to "second-guess" that administration and his evaluation of complex technical information. *See In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) ("This Court has also recognized the need for the Director's specialized areas of water law"); *Keller v.*

[14] *See A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 516-525, 284 P.3d 225, 241-250 (2012) ("It is Idaho's longstanding rule that proof of 'no injury' by a junior appropriator in a water delivery call must be by clear and convincing evidence"); *A&B Irr. Dist. et al. v. Spackman*, 155 Idaho 640, 655, 315 P.3d 828, 843 (2013); *South Valley*, 2024 WL 136840, at *22 ("we hold that the clear and convincing evidence standard applies to the junior right holder's burden, whether in cases under the CM Rules or in cases brought by the Director under section 42-237a.g").

Magic Water Co., 92 Idaho 276, 282, 441 P.2d 725, 731 (1968) ("we ordinarily must vest the findings of the state engineer with the presumption of correctness").

Against that backdrop Idaho's APA provides the relevant standard of review. *See* I.C. § 67-5279(3). The legislature has provided specific direction for review of agency's technical factual findings. *See* I.C. § 67-5279(1) ("The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact"). The Idaho Supreme Court has also confirmed that the Department's "factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence." *A&B Irr. Dist. v. IDWR*, 153 Idaho at 506, 284 P.3d at 231.

The Cities' arguments on appeal do not satisfy the applicable standards. The Director did not abuse his discretion and the final orders are supported by substantial competent evidence. Since the Cities did not prove their defenses by "clear and convincing evidence," the Director properly relied upon the forecast supply criteria, the updated BLY and reasonable carryover, and transient use of ESPAM to identify a projected curtailment priority date. Moreover, where the Cities and other parties were put on notice about potential updates to the methodology order months in advance, the Director further allowed sufficient discovery and provided several weeks of pre-hearing process. Finally, the Director held a four-day hearing prior to issuing any curtailment order, which satisfied applicable due process considerations in the exigencies of an ongoing irrigation season. As described below, the Court should deny the Cities' petition for judicial review and affirm the Director's final orders.

I. The Cities' Misstate the Applicable Evidentiary Standard.

The Cities confuse the evidentiary standard at hearing compared to the standard on judicial review in furtherance of their challenges to the Director's *Sixth Order*. *See Cities' Br.* at 21-22. As opposed to the "clear and convincing" standard adopted by the Idaho Supreme Court, the Cities believe their challenges to parts of the Methodology Order need only satisfy a lesser "preponderance of the evidence" standard. *Id.* at 22. The Cities make this distinction on the mistaken claim that certain "metrics" of the Methodology Order are not elements of the Coalition's water rights. *See id.*

First, the Director does not administer to the quantity element of the Coalition's decreed natural flow and storage water rights. Instead, the Director identifies a total "reasonable in-season demand" volume as a substitute, and then he compares that demand to available water supplies for the year. The Director starts with a "baseline year" quantity at the beginning of the irrigation season and then adjusts that amount as the season progresses and climatic conditions change. The total volume diverted and put to beneficial use by the Coalition is the quantity that is used for administration of their decreed water rights as against junior priority ground water rights.

If the Cities believed this protocol was in error, they carried the burden to prove their defenses by the "clear and convincing evidence" standard at hearing. The Idaho Supreme Court was crystal clear on this point in *A&B Irr. Dist. v. Spackman*:

> With regard to the useage of the baseline in the management context, the Director is required to observe the well-established legal principles of Idaho's prior appropriation doctrine. Additionally, when utilizing the baseline in the administration context, the Director must abide by established evidentiary standards, presumptions, and burdens of proof.

155 Idaho at 650, 315 P.3d at 838 (2013).

> ". . . Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile[,] or to challenge, in some other constitutionally permissible way, the senior's call."
>
> *Id.* at 878, 154 P.3d at 449. Thus, any determination of a delivery call requires application of established evidentiary standards, legal presumptions and burdens of proof.

155 Idaho at 652, 315 P.3d at 840.

This Court confirmed the same evidentiary standard when the City of Pocatello and IGWA argued the Director should use an "average" year instead of the 2006/08 values that were at issue in the *382 Decision*:

> In that case, the district court held that if the Director determines to administer to less than the decreed quantity of water, such a determination must be supported by clear and convincing evidence. *Id.* at 38. The Director in issuing his *Methodology Order* was bound to follow this case law. As set forth above, using data associated with an average year in order to administer to less than the full decreed quantity of the Coalitions' water rights would not meet a clear and convincing standard.

R. 776.

Further, whereas the "baseline year" and other methodology steps have already been judicially confirmed, and that final decision on the merits was not appealed, the Cities cannot collaterally attack this metric here on judicial review. R. 748-90; *see Monitor Finance, L.C. v. Wildlife Ridge Estates, LLC*, 164 Idaho 555, 560, 433 P.3d 183, 188 (2019).[15] Although the Cities allege they met the "clear and convincing evidence" standard for their alleged defenses at hearing, the record reflects otherwise.

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[15] The methodology order steps, and their underlying technical framework were previously litigated in the *382 Decision* litigation. Consequently, the doctrine of *res judicata* bars the Cities' challenges to forecast supply, baseline year criteria, and project efficiency calculations since: 1) the original action ended in a final judgment on the merits; 2) the present claim involves the same parties (City of Pocatello, IDWR, SWC); and 3) the present claim arises out of the same transaction or series of transactions as the original action. *See Monitor Finance, L.C.*, 155 Idaho at 560, 433 P.3d at 188.

II. The April Forecast Supply is Supported by Substantial Evidence.

The Cities first attack the Director's April forecast supply criteria for the Twin Falls Canal Company (TFCC). *See Cities' Br.* at 23-26. The Cities believe using the Joint Forecast for the unregulated inflow at Heise (April – July), issued by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers, along with the Director's use of multi-linear regression equations comparing Snake River natural flow and Box Canyon flows to the natural flow diverted, was "clearly erroneous." *Id.* In support of their theory the Cities point to alleged "extraordinary snowpack and runoff associated" with tributaries in 2023, and the R-squared value of 0.72 for predicting TFCC's water supply. *Id.* at 23. Contrary to the Cities' argument, the Director's forecast supply is supported by substantial evidence in the record, and the Cities' effort to have this Court replace the Director's professional judgment on this technical decision should be rejected. *See South Valley*, 2024 WL 136840, at *5, 20.

The Director added the multi-linear regression equations with the Box Canyon flows to his forecast supply in the *Fourth Amended Methodology Order* following remand from the Court's *382 Decision*. R. 1395-96. Although the City of Pocatello requested a hearing on that order, it later voluntarily stayed that request, and no further challenge was pursued. No other city challenged the Director's use of those factors in the April forecast supply step.

The Cities' reference to 2023 watershed conditions in tributary basins below the Heise Gage is a "hindsight 20/20" argument. Just because certain areas below the Heise Gage had higher snowpacks in the spring of 2023, that does not justify abandoning the Director's forecast supply metric for TFCC that is used at the outset in April. Whereas higher runoff helped fill American Falls Reservoir and other natural flow rights to the Snake River above Blackfoot, that did not necessarily equate to TFCC receiving a higher natural flow supply throughout the irrigation season. Indeed, the use of Box Canyon flows better reflects the state of the Eastern

Snake Plain Aquifer (ESPA), a primary supply of reach gains that supply TFCC's natural flow once runoff ends. Sentinel well measurements in the spring of 2023 depicted near record lows, which supported a lower forecasted natural flow supply for TFCC. R. 392, 478-79. Moreover, the higher runoff just barely helped fill American Falls Reservoir and other natural flow water rights besides those held by TFCC, it was not water destined for TFCC's use alone. R. 471; Anders, Tr. Vol. I, 165:14 – 17; 168:21 – 169:2. Tony Olenichak, the Water District 01 Watermaster corroborated this fact at hearing. Olenichak, Tr. Vol. III, 234:19-24, 253:9 – 254:11.

Next, although the Joint Forecast volume was initially 112% of average in early April (R. 52), Reclamation revised that forecast downward by May 1st (R. 469) due to high spring temperatures and the lack of precipitation. R. 462-63. The Director further commented on this point in his *Order Denying Motion for Reconsideration of Denial of Continuance*:

> The Director disagrees that high snowpack means the SWC will not be injured. While there is a good snowpack in the hills above the ESPA, the snowpack is only part of the SWC's water supply, and recharge from the aquifer is at a record low. Additionally, southern Idaho is emerging from a two-year drought, and the existing storage supply going into this irrigation season is low. Forecasters are uncertain whether the storage supply system will fill this year. The Director agrees with the SWC that the "current snowpack does not tell the whole story" . . .

R. 429.

In other words, the isolated snowpack conditions in certain tributary basins did not tell the whole story at that time and is not a reason to claim the Director's forecast supply method was "clearly erroneous." Next, the Cities argue that the Director's use of TFCC's 0.72 R-squared value was "arbitrary and capricious" simply because other entities' values are higher (0.84 to 0.93). *See Cities' Br.* at 25. Although a higher R-squared value shows a better fit to the data analyzed, the Director's reliance upon TFCC's 0.72 value is reasonable and supported by

substantial evidence in the record.[16] While the Cities complain that IDWR could improve the accuracy of its forecast, and allege that the 2023 initial forecasts were "wildly inaccurate," they miss the point of the adjustable nature of the methodology as the irrigation season progresses. Indeed, the Supreme Court affirmed the fact the Director must adjust demands, up or down, depending upon climatic conditions that develop. *See A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841 ("and be promptly updated to take into account changing conditions"). Certainly forecasts are just that, an initial prediction. Whereas the Director continued to use the TFCC regression (which fits the data set over 70% of the time), that was supported by IDWR employee Matt Anders who testified IDWR still has confidence in its use. R. 1082; Anders, Tr. Vol. II, 224-25.[17]

Expert witnesses for the Coalition confirmed the continued use of this regression as well as "no significant degradations in predictive capability were identified." R. 1302. While forecasting techniques may improve in the future, the Cities have not shown the Director's use of the TFCC R-square value was "arbitrary and capricious," "clearly erroneous," or otherwise not supported by the record. Based on the administrative record there is no basis to grant the Cities' request to reject the Director's forecast supply method for TFCC.

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[16] Given the complexity of the Upper Snake system, an R-squared value of 0.72 is reasonable and reliable for an initial forecast supply that is adjusted as additional observation data becomes available. Literature in the field supports this number as well. For instance, Moriasi, et al., studied watershed and field scale models' statistical performance measures and reported "satisfactory" R-squared values for model flow predictions ranging from 0.5 to 0.8. *See* Moriasi, D.N. ,Gitau, M.W., Pai, N. (2015). *Hydrologic and Water Quality Models: Performance Measures and Evaluation Criteria. Transactions of the American Society of Agricultural and Biological Engineers,* Vol. 58(6), 1763-1785. Copy available at: https://web.ics.purdue.edu/~mgitau/pdf/Moriasi%20et%20al%202015.pdf

[17] Mr. Anders testified that it was staff's recommendation to continue to watch the R-squared value for TFCC over time as they have not found a predictor value that works better at this time. Anders, Tr. Vol. I, 189:11-20. While improvements may be forthcoming as that evaluation continues, that does not mean IDWR's present analysis is "arbitrary and capricious." Just the opposite, the record shows the Director's forecast supply methods are supported by substantial evidence in the record, including the testimony of staff and comments submitted by the SWC's expert witnesses. R. 1302. Moreover, the 0.72 value is significantly higher than an average value (0.50). *See e.g. Aries Communications Inc. & Subs. v. C.I.R.*, 2013 WL 1457751, at *11 (U.S. Tax Court 2013) (Court characterizing R-squared values ranging from 0.16 to 0.34 as "not very strong").

III. The Director's Use of 2018 as the BLY is Supported by Substantial Evidence.

The Cities next take issue with the Director's decision to update the "baseline year" (BLY) to 2018 based upon new available data compiled from 2016-2021. *Cities' Br.* at 26-28. The Cities decry the increased predicted needs at the outset of the irrigation season and claim using 2018 as the best fit for the methodology's criteria "goes beyond" what they believe is necessary. *Id.* at 28. Again, this is a technical decision committed to the Director's specialized expertise and professional judgment. *See Keller*, 92 Idaho at 282, 441 P.2d at 731; I.C. § 42-1701(2) (special technical qualifications for IDWR's Director). The Cities allege, without any supporting citation, that the use of 2018 overstated the predicted demand and forced un-named "junior users . . . to rush to acquire mitigation supplies that would not have been needed under an appropriately conservative BLY." *Id.* The Court should reject this hyperbole and instead evaluate the facts based upon the evidence in the record. As shown below, IDWR appropriately chose 2018 as the new BLY based upon the criteria previously approved by this Court.

First, the use of a BLY based upon IDWR's criteria as the predicted need at the start of an irrigation season, instead of the quantity of the Coalition members' decreed water rights, has been judicially confirmed. R. 771-73. In the *382 Decision* the Court rejected the City of Pocatello's and IGWA's challenge to the BLY procedure. The Court found that the Director's "use of a baseline analysis as the starting point in determining reasonable in-season demand is not contrary to law." R. 771, 774-76 ("The Court agrees that use of such data is necessary to protect senior rights if the Director is going to administer to an amount less than the full decreed quantity of the Coalition's rights"). The parties did not appeal that decision; hence it is binding precedent in the present case. *See Monitor Finance L.C.*, 164 Idaho at 560, 433 P.3d at 188.

Second, 2018 best fit the Department's criteria when the additional years of data were added to the evaluation. The Director explained the criteria of (1) climate; (2) available water

supply; and (3) current irrigation practices; and how the BLY must protect the seniors' forecasted needs with "above average diversions, above average temperatures, and below average precipitation." R. 1079-80. Based upon the data, the Director concluded 2018 was the best fit as it satisfied all criteria to sufficiently protect the senior appropriators. R. 1080-81. The Director's selection is supported by his staff's preliminary recommendation (R. 2866) and the opinion of the Coalition's expert witnesses as well. R. 1246-48, 1301.[18] This substantial competent evidence supports the Director's technical finding of fact. *See e.g. Rangen, Inc. v. IDWR*, 159 Idaho 798, 810-11, 367 P.3d 193, 205-06 (2016) ("Even if there is some evidence in the record supporting the conclusion that the USGS data is unreliable, Rangen has not established that is so unreliable as to preclude a reasonable mind from accepting it to support a conclusion").

The Cities dispute the Director's selection of 2018 (BLY) on the additional theory that the increased predicted RISD doesn't match up with improvements in the Coalition irrigation systems. *See Cities' Br.* at 26. Although TFCC has implemented various projects, including canal lining and automation, those improvements have been made to keep up with increased shareholder demands. TFCC's manager explained how increased forage production, longer irrigation seasons, reduced wastewater deliveries, and double cropping, have all placed increased demands on the company's water supply over time. R. 1184-86, 1199; *see also*, Sullivan, Tr. Vol. II, 233:1-9 (acknowledging warmer climatic conditions in recent years). Moreover, changing water use from crop irrigation to residential irrigation within subdivisions has placed greater demands on TFCC's system as well. R. 1203; Barlogi, Tr. Vol. II, 39-40, *see also*, Brockway, Tr.

[18] The Coalition's experts noted that IDWR could have used "a more conservative approach" by using "two standard deviations from the mean 3.559 maf, which would be in-line with standard engineering practices when a very high level of certainty is desired." R. 1248. Dr. Brockway characterized the use of 2018 as "reasonably conservative." Brockway, Tr. Vol. IV, 55:5-10. The use of one standard deviation from the mean was essentially the same volume as 2018. R. 1248. In sum, the Director's use of 2018 is supported by substantial evidence in the record.

Vol. IV, 42:11-25; 72:10-21 (unique demands of residential irrigation compared to agricultural use). Increased corn and alfalfa acreage on the TFCC project was further corroborated by the Coalition's expert report. R. 1243. While improvements in the canal system have attempted to keep up with increased demands, it shows that 2018 is a reasonable BLY according to the Director's criteria and updated data.

In sum, the Cities have failed to show that the Director's use of 2018 is "clearly erroneous" as it is supported by substantial competent evidence in the record and the criteria previously approved by this Court. *See South Valley*, 2024 WL 136840, at *5.

IV. The Cities' Claim Regarding "Overly Aggressive" Safety Factors Should be Denied.

The Cities next argue that the "cumulative bias" of the Department's forecast supply and use of the 2018 BLY unreasonably overestimates TFCC's demand shortfall. *See Cities' Br.* at 28-32. This hindsight approach based upon the Cities' "after-the-fact" review of 2023, fails to acknowledge the adjustable methodology over the course of the irrigation season to account for changing conditions, and the certainty needed to protect senior rights up front when juniors propose to pump out-of-priority.[19]

The Cities take issue with the Director's review of the April predicted demand shortfall by relying upon the outdated BLY (2006/2008/2012). *See Cities' Br.* at 29. However, the Cities cannot dispute the fact that using the prior BLY only protected seniors about half the time in the 2015-2022 timeframe. *Id.* The Cities claim this is justified because two years had "small margins" in their opinion. *Id.* n. 26. Apparently a small predicted injury can be disregarded under

[19] The Coalition objects to the Cities' request for the Court to review the Director's Step 9 Order issued on November 30, 2023. This "as applied" order is not part of the administrative record regarding the Cities' appeal of the Director's final orders issued on July 19, 2023. Although the nature of the methodology order reveals that RISD can adjust during the irrigation season depending upon conditions, the fact the April prediction did not match actual water diverted at the end of the year does equate to an erroneous agency decision. Again, this "hindsight 20/20" argument flat ignores the fact that junior groundwater users were allowed to pump the entire 2023 irrigation season even though TFCC's RISD changed as the season progressed.

the Cities' analysis. Again, this is easy for the Cities to argue as their junior use is protected by a 35-year mitigation plan and they have no fear of any shortage. *See Cities' Br.* at 48.

The Cities further complain that the 2023 April predicted shortfall of 75,200 acre-feet "had severe consequences for junior users" and that the Director should have improved "the accuracy of these predictions to avoid unwarranted hardship." *Cities Br.* at 31. Again, the Cities have no evidentiary support for their allegations. Contrary to this hyperbole, both the Cities and Ground Water Districts had approved mitigation plans in place for 2023 and were allowed to pump their junior water rights regardless of the forecasted injury. *See e.g. Cities' Br.* at 48 (acknowledging approved mitigation plan expiring no later than 2053). The Director eventually found no predicted demand shortfall in July 2023 and that any questions regarding IGWA's mitigation notice were "moot" as "groundwater users are no longer required to mitigate." R. 1103. Consequently, there was no "consequence" or "unwarranted hardship." The Cities' lack of evidence is no reason to conclude the Director's updated BLY and FS is "clearly erroneous."

Although the juniors bear the burden to ensure seniors are adequately protected in the event conditions turn hot and dry for the remainder of the irrigation season, that is an equitable protocol given they are allowed to pump out-of-priority from Day 1 of the irrigation season. Clearly this is a reason why juniors have secured approved mitigation plans to receive safe harbor from curtailment, particularly when demand shortfalls may increase as conditions worsen. In cases where the predicted shortfall is revised downward, juniors are still provided the benefit of their approved mitigation plan while the seniors' predicted injury is reduced or eliminated. The Director had aptly explained the reasoning behind this approach, consistent with Idaho's prior appropriation doctrine:

> 26. Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the Time of Need, the protection afforded to the senior water right holder is compromised. The risk of shortage is then impermissibly shouldered by the SWC. Members of the SWC should have certainty entering the irrigation season and at the midseason that mitigation water will be delivered or assigned at the Time of Need, or curtailment of junior water rights will be ordered.

R. 1041-42.

The Cities fail to appreciate they are permitted to pump out-of-priority to the full extent of their rights without risk of shortage, whereas the senior SWC members must rely upon the Director's predicted forecasts and shortfalls, that those predictions due in fact meet the present demands, and enforcement of mitigation plans. Using a conservative approach provides the requisite certainty required by Idaho law, while at the same time permitting juniors to divert out-of-priority. The Supreme Court recently acknowledged these respective burdens in conjunctive water right administration:

> Because water shortages are an ever-present concern, the Seniors claim the junior-priority groundwater pumpers had ample opportunity to prepare for curtailment even prior to the planting for the 2021 season. Furthermore, the risk of curtailment of a junior-priority groundwater right during a time of shortage is a risk that Idaho water users knowingly undertake and for which they should always plan, as senior surface water users must also do. We conclude that both Senior and Junior water users had significant private interests at stake, and that given the balance of risk among all water users, those with junior rights were the party fittingly most affected by a curtailment determination.

South Valley, 2024 WL 136840, at *24 (Idaho 2024).

Given the above, the Director's forecast supply and baseline year updates are supported by substantial evidence in the record, as well as the applicable standards and burdens adopted by the Idaho Supreme Court. Moreover, the Director's evaluation and use of these highly technical factors in administration is committed to his specialized expertise. *See In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) ("This Court has also recognized the need for the Director's

specialized areas of water law”). The Cities’ argument about “overly aggressive” safety factors should therefore be rejected.

V. The Cities Did Not Satisfy the “Clear and Convincing” Evidence Standard Regarding Their Irrigated Acres Defenses.

A. The Cities Failed to Show the Director Erred Concerning TFCC Acres.

The Cities first dispute the Director’s use of the total irrigated acreage submitted by TFCC pursuant to Step 1 of the Methodology Order. *See Cities’ Br.* at 33-35. The Cities revert back to IDWR’s erroneous use of data presented at the 2008 hearing that was accepted without adhering to the required “clear and convincing” evidence standard. Whereas IDWR corrected its mistake in 2015 and has been relying upon information submitted by TFCC since that time, the Cities failed to prove a different number by “clear and convincing” evidence at hearing. The Director’s number is supported by substantial competent evidence and should be upheld on judicial review. Again, even if the court finds disputed evidence in the record, the Director’s decision is afforded deference provided it is supported by substantial competent evidence.

The Cities fault the Director for not wholesale adopting the 2017 Irrigated Lands dataset used to calibrate ESPAM, information that was not developed for the purposes of the SWC delivery call. *See Cities’ Br.* at 34. Yet, IDWR staff testified the information did not satisfy the “clear and convincing” evidence standard, and the Coalition’s expert Dr. Brockway identified examples of irrigated fields that were completely omitted from that shapefile. R. 1233-34. Dr. Brockway also described other errors and problems relying upon that dataset for purposes of calculating irrigated acreage in 2023. R. 1233-34, Brockway, Tr. Vol IV, 40:13-15 (double-counting of acreage removed in 2017 shapefile). At hearing, Mr. Anders further confirmed that the model calibration information would show lands that may not be irrigated in one year but could be irrigated the next. Anders, Tr. Vol. II, 221:10-16. He also testified that he did not know

if the model calibration staff ever verified those numbers with the various canal companies and irrigation districts. *See id.*, 221:4-9. By contrast, TFCC's manager Jay Barlogi provided testimony to corroborate the Step 1 standard and his understanding that the irrigated area within the company had not varied by more than 5% each year. Barlogi, Tr. Vol. II, 53:24 – 54:10. Mr. Barlogi also explained that shares can be transferred within the project so lands that may not appeared irrigated in one year may be irrigated the next. *See id.*, 27:15 – 28:21, 82:19-22, *see also*, Brockway, Tr. Vol. IV, 137:18-20. The Coalition's expert Dave Shaw provided additional testimony that it was his opinion that the shapefile submitted by TFCC was the best information available for IDWR to use. Shaw, Tr. Vol. IV, 164:19 – 165:1. Mr. Shaw assisted in preparation of TFCC's information in response to Step 1. *See id.*, 148:17-23.

Reviewing the above information, the Director weighed the evidence applying the governing evidentiary standard and concluded the following in the *Post-Hearing Order*:

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

R. 1084-85.

The Director properly applied the governing evidentiary standard and burden of proof on this defense given the conflicting evidence in the record. Since the Cities did not establish a lesser number by "clear and convincing evidence," the Director did not err on this issue. Pursuant to Idaho's standard of review, the Director's decision should be upheld. *See Byrd*, 169 Idaho at 928, 505 P.3d at 714; *see also*, *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) ("the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record").

The Director had substantial competent evidence on this issue, confirmed by his staff and expert testimony from the Coalition's witnesses that supports the irrigated acreage used for TFCC in this proceeding. The Court should affirm the Director's decision accordingly.

B. The Cities Failed to Show the Director Erred Concerning Alleged Supplemental Groundwater Use within TFCC.

The Cities next turn to the previously rejected defense of "supplemental groundwater use" in an effort to claim the Director erred in the *Sixth Methodology Order*. First, the Cities argue that the Director erred by not finding the Coalition's water supplies could be met with "supplemental groundwater." *Cities' Br.* at 35-37. Again, the Cities erroneously believe it is <u>IDWR's</u> responsibility to investigate and prove the Cities' defense this this regard.

This is yet another example of the Cities attempting to shift the burden of proving their defense onto IDWR. The Cities claim IDWR has information available, but they did not provide any supporting factual information to prove the use of supplemental groundwater.[20] The Cities

[20] Ground water rights and their place of use is publicly available information on IDWR's "water right search" database on its website. *See* www.idwr.idaho.gov. TFCC's place of use is similarly publicly available, and TFCC has

specifically admitted he had not compiled any information on supplemental groundwater use. Sullivan, Tr. Vol. II, 238:23-25. Further, like IGWA, the Cities wrongly claim that the "groundwater fraction" in the ESPA Model should have been used for purposes of determining material injury. *See Cities' Br.* at 37. However, this argument was previously litigated and rejected in the appeal of the *Second Methodology Order*. In the *382 Decision* the Court rejected IDWR's prior attempt to use the "ground water fraction" without supporting factual information. R. 760-62 ("The record does not contain evidence that acres accounted for under the Coalition's senior surface water rights are being irrigated from a supplemental ground water source"). In other words, the model's "ground water fraction" standing alone is insufficient to change the calculated water needs of the Surface Water Coalition.

Dr. Brockway testified about the lack of supplemental ground water use on the TFCC project and the Cities did not rebut this finding with any specific evidence. Brockway, Tr. Vol. IV, 85:14-86:3; R. 1246. Further, the Director specifically found that the "record in this matter equally lacks sufficient evidence to justify a reduction of the total number of acres irrigated with surface water by SWC members." R. 1085. The Director did not use the "ground water fraction" in the methodology, and his decision is supported by the Court's prior decision on this issue and the evidence in the record.

In sum, the Cities have not shown that the Director erred in the *Sixth Methodology Order* by not reducing TFCC's water supply needs due to alleged supplemental groundwater use not disclosed in the record. *See North Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 526, 376

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reported its annual irrigated acreage pursuant to Step 1 of the methodology every year. The Cities failure to research and identify any relevant information on this point is not the Director's error. Further, as instructed by the Court in the *382 Decision*, "[i]f the supplemental ground water rights being used are themselves subject to curtailment under the senior call, (as suggested may be the case here by the Hearing Officer), that factor should also be accounted for by the Director." R. 760; *see also*, *South Valley*, 2024 WL 136840, at *20 ("The Districts' focus on alternate sources of water available to the Seniors does not diminish the substantial and competent evidence of injury that would be caused by junior groundwater users").

P.3d 722, 730 (2016) ("On the record before us, it does not appear that the Director's findings were clearly erroneous"). The Director's findings on this issue should be affirmed accordingly.

C. The Cities Did Not Prove the Director Curtailed to Benefit Coalition Enlargement Water Rights.

The Cities next take issue with A&B Irrigation District's irrigated acreage number used by IDWR for purposes of the methodology analyses. *See Cities' Br.* at 37-39. The Cities erroneously claim that "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." *Cities' Br.* at 38. First, the Director only predicted an initial demand shortfall for TFCC in the *April 2023 Order*. R. 50. Therefore, there was no "threat" of curtailment related to A&B's enlargement water rights (01-10225 and 01-10241).[21] Whereas IDWR can remove any acres associated with A&B's enlargement water rights going forward, it was harmless error for purposes of the *Sixth Methodology Order* and this present challenge, as IDWR did not curtail any junior ground water rights for purposes of predicted injury to A&B Irrigation District.

Despite information related to A&B, the Cities have not provided any evidentiary support to show IDWR is mistakenly including other Coalition members enlargement water rights in its irrigated acreage evaluations. R. 2907. Accordingly, the Court should reject the Cities' vague and unsupported claim that IDWR "may have included enlargement acres in other SWC members' numbers." *Cities' Br.* at 38.

VI. The Director's Finding that TFCC Canal Operations are Reasonable and Efficient is Supported by Substantial Competent Evidence.

The Cities next continue to argue that TFCC's canal operations are "unreasonable" despite substantial competent evidence in the record to the contrary. Turning to the Hearing

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[21] The Cities wrongly refer to one of A&B's groundwater rights (36-15127B) and its enlargement conditions. *See Cities' Br.* at 38, n. 42.

Officer's language in the *2008 Opinion* the Cities claim that "'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." *Cities' Br.* at 39 (emphasis added). Even if this standard applies, it is within the Director's discretion to evaluate if an irrigation entity must employ new technology or practices. Here, the Cities failed to demonstrate let alone prove that TFCC had failed to implement new "technology" or "management practices" that would render their current operations and management practices out-of-date compared to the rest of the southern Idaho irrigation community.[22]

Not only did the Cities fail to prove this claimed defense, but the evidence at hearing also demonstrated that TFCC continually improves its operations. TFCC's manager Jay Barlogi provided extensive direct testimony about the current canal operations and continued improvements that have been made over the past decade to the canal system. R. 1186-98. For example, the company annually maintains over 100 miles of main canal and over 1,000 miles of smaller canals and laterals, regularly removing sediment and aquatic weeds. R. 1187-88. TFCC employees perform regular mowing and spraying to ensure proper water delivery. R. 1189-90. The company has invested in gates and meters to automate over 60 sites to measure, regulate, and limit water flows within the system. R. 1192. Finally, the company annually replaces concrete structures, has lined portions of the High Line Canal to prevent losses, and has developed a large re-regulating reservoir (Kinyon Pond) near the end of the project to help with water delivery. R. 1193-1197. These improvements have been made to keep up with increased

[22] The Cities essentially argue that because on-farm sprinklers have increased, that reduces canal operation efficiency and therefore TFCC's use of water is per se unreasonable. *See Cities' Br.* at 40-41. Yet, changes to sprinkler irrigation does not tell the whole story of canal operations and increased demands on TFCC due to a number of factors (i.e. longer growing seasons, increased forage, reduced in project wastewater delivery, etc.). This was corroborated by testimony from Mr. Barlogi and Dr. Brockway. Barlogi, Tr. Vol. II, 105:2-6; Brockway, Vol. IV, 46-50. The Director properly considered all of this information and concluded that TFCC operates in a reasonable and efficient manner for a large surface water organization. R. 1088-89.

demand resulting from more forage crops (up to five cuttings of alfalfa), double cropping, longer growing seasons, reduced wastewater returns, and changed operating demands resulting from pressurized residential irrigation. R. 1184-1186; Barlogi, Tr. Vol. II, 32:15-21; 79:23 – 80:6, 96:19-20; 102:1-10; Brockway, Tr. Vol. IV, 42:11-25, 46-50, and 72:10-21.

Dave Shaw, an engineer with over 45-years' experience and expertise in water resources and management, corroborated the increased forage acreage, and further testified that TFCC was "well-managed" and "reasonable" compared to other water delivery organizations in Idaho. Shaw, Tr. Vol. IV, 145:5 – 146:21. Finally, when questioned about canal operations and per acre diversion volumes in Water District 01, Watermaster Tony Olenichak testified that quantities ranging from 1 af/a to 10 af/a were "reasonable" in his opinion. R. 1265-1276; Olenichak, Tr. Vol. III, 251:11 – 252:8. Dr. Brockway confirmed the watermaster's testimony and testified that TFCC's diversion rate per acre (5 to 6 afa) was "reasonable" for a large open canal system in southern Idaho.[23] Brockway, Tr. Vol. IV, 135:14-20. Dr. Brockway provided an extensive discussion about canal operations and the unique demands with operating such a system. Brockway, Tr. Vol. IV, 46-50. Mr. Olenichak further testified that large open canal systems like TFCC have different diversion needs than individual pumps. Olenichak, Tr. Vol. III, 247:11-14.

While the Cities would like to compare a canal company like TFCC to an individual groundwater user for purposes of delivery efficiency and what they believe is "reasonable" water use, the two types of water users are very different and are simply not operated the same.[24]

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[23] By comparison, TFCC's per acre diversion volume was listed as 5.3 af in that year (2011), a year when they diverted 1,060,300 acre-feet. R. 1271. Compare that to large open canal systems above American Falls that list per acre diversion rates ranging from 6.0 af to 16.6 af. R. 1267, 1270, 1273.

[24] The Cities erroneously rely upon an exhibit regarding return flows that included natural waterways and precipitation, not just irrigation returns. R. 1598; Sullivan, Vol. II, 241-42. The Director rejected that exhibit as only representing TFCC irrigation spills. R. 1089 ("The Cities' exhibit does not prove how much TFCC diverted from the Snake and later returned").

Operating and maintaining thousands of miles of canals, headgates, and structures cannot be compared to delivery of water from a single well and pump. Moreover, contrary to the Cities' claims about "unreasonable" water delivery operations, TFCC has been forced to reduce deliveries to its shareholders in recent years. R. 1481-82 (table showing half inch per share delivery); Barlogi, Tr. Vol. II, 30-31.

Considering the above information, the Director properly found that TFCC's operations were reasonable and efficient. R. 1088-89. The Director specifically recognized the complexity of operating surface water delivery systems that divert large flow rates and the unique demands placed upon such projects. R. 1089. The above information, coupled with the Hearing Officer's determinations from the first hearing, confirm that TFCC continues to operate a reasonably efficient canal system. The Director's findings on this issue are supported by substantial competent evidence and should be affirmed.

VII. The Director's Transient Use of ESPAM Should be Affirmed.

The Cities dispute the Director's transient use of ESPAM to determine a curtailment priority date on the basis that it "improperly 'commands large volumes of water' for nominal benefit to SWC." *Cities' Br.* at 44. The Cities further claim the Director failed to properly promote "the maximum beneficial use of the water resources of the states." *Id.* The Cities ask this Court to reject the Director's technical decision based on their interpretation of policy questions, not the model's validity or accuracy. Again, the Court should refrain from "second-guessing" the Director's professional judgment on this issue based upon mistaken legal arguments.

The Director's transient use of ESPAM is a technical decision that takes into account injury during the irrigation season and how that injury would be prevented in the absence of mitigation. In this case if TFCC's predicted injury of 75,200 acre-feet continued through the

2023 irrigation season, and ground water users did not mitigate through an approved plan, curtailment of junior rights using a steady state run of ESPAM would have only offset "9% to 15% of the predicted IDS" (i.e. 6,768 af to 11,280 af). R. 1091. In other words, TFCC would be forced to suffer a shortall in the magnitude of over 60,000 af. In contrast, the Director explained the transient use "will offset the *full* predicted IDS" and that the methodology order "should also employ curtailment and or mitigation that supplies replacement water at the time and place required by the senior-priority water right in a quantity sufficient to offset the shortfall resulting from ground water withdrawal and to assure protection of the senior-priority right." *Id.*

The Cities dispute the Director's technical modeling decision on the mistaken grounds of a "reasonable means of diversion" policy statement in the CM Rules. *Cities Br.* at 43. Relying upon the facts in *Rangen* limited to a single model cell and tunnel, the Cities argue that the Director should not implement a transient use of the model in this case. The Cities are mistaken both legally and factually. First, the reach of the Snake River that supplies the Coalition's water rights stretches over a hundred miles and covers numerous model cells (i.e. Near Blackfoot to Milner). Next, the general statement of policy in CM Rule 20.03 is a misstatement of the "reasonable means of diversion" issue set forth in *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912). Fortunately, the Idaho Supreme Court clarified any confusion on this issue in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809, 252 P.3d 71, 90 (2011) where the Court held: "The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights." The Cities have not shown any disrepair or issue with the Coalition's diversion works on the Snake River, hence any reliance upon CM 20.03 should be rejected.

Finally, the Cities believe the Director failed to "balance both the interests of the seniors and juniors" and that the transient use of ESPAM "offends the settled policy that promotes the maximum beneficial use of the water resources of the states." *Cities' Br.* at 44. The Cities do not dispute ESPAM or the Director's modeling results, they just believe potential curtailment would be "too much" in their opinion. Again, their argument belies Idaho's prior appropriation doctrine and the simple truth that juniors cannot injure seniors in times of shortage. *See e.g. South Valley*, 2024 WL 136840, at *23 ("This case exemplifies how difficult it can be to strike that balance when water is especially scarce, and why it is necessary to preserve the Director's discretion to perform that balancing subject to the limitations of Idaho law. We hold that the Director, mindful of those limitations, did not err when he concluded the balance here favored protecting senior appropriators' first rights to a drought-limited supply"). What the Cities' argument reveals is that securing approved mitigation plans, which protect seniors, while allowing juniors to still divert, is the most efficient way to address conjunctive administration issues across large aquifers like the ESPA. Although the Cities disagree with the reality of what is required by law if mitigation is not secured, the Director did not abuse his discretion or violate any law by the transient use of ESPAM to protect senior rights in the even mitigation was not provided.

The Court should reject the Cities' argument regarding the Director's transient use of ESPAM in the *Sixth Order* accordingly.

VIII. The Director's Pre-Hearing and Hearing Procedures Complied Due Process Requirements in the Context of the Facts of this Case.

The Cities' final issue concerns alleged due process violations with the hearing and discovery process. Despite being a party and having extensive knowledge and experience concerning the delivery call and its annual administration, as well as several months' notice on potential updates to the methodology order, the Cities argue they had "insufficient time to gather

and develop evidence" to support their arguments. *Cities' Br.* at 46. At the outset it must be remembered that the City of Pocatello filed original requests for hearing on the Director's *Third* and *Fourth Methodology Orders* years ago.[25] However, the City voluntarily stayed those proceedings and eventually abandoned pursuing its challenges altogether. The last petition the City of Pocatello filed was in the spring of 2016.[26] While the Cities had several years to gather information to support their theories and issues with the Director's methodology, they chose to refrain from taking further action or performing additional evaluations. As described below, the Director did not violate the Cities' right to due process and any complaints about timing should be denied in the context of this particular case.

First, the timing of scheduling a hearing and decisions related to authorized discovery are matters committed to the Director's discretion. The statute does not impose any particular timing requirements. *See* I.C. § 42-1701A(3). The Department's rules of procedure authorize but do not require various types of discovery. IDAPA 37.01.01.520 ("following kinds of discovery <u>may be</u> authorized by presiding officers") (emphasis added). The rules further commit the timing and schedule of discovery to the presiding officer's discretion. *See* IDAPA 37.01.01.521 ("officer may provide a schedule for discovery . . . but the order authorizing and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure"). Given the urgency of pending water right administration and the need to protect senior rights as required by law, the Director did not err in declining to extend discovery timelines or continue the hearing to December 2023 or January 2024 (R. 83), or October 2023 (R. 289) as requested by the Cities. R.

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

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

298, 425. Further, the Cities had been aware of potential updates to the methodology for several months.

In the fall of 2022, the Director convened the Technical Working Group that included the Cities' consultant Greg Sullivan, who had been working on the methodology since the original hearing back in 2008 and has been part of the modeling committee working on ESPAM "since its inception." R. 350; Sukow, Tr. Vol. I, 53:11-15, Anders, Tr. Vol I, 170:5-6, 16-18. IDWR staff Matt Anders sent the first notice to the parties in early September. *See id.* 217:20-25. Mr. Sullivan and counsel for the Cities all attended the various Department presentations on potential changes to the BLY, reasonable carryover, and the ESPAM transient analysis. R. 1176. The presentations were provided to the parties' consultants for review and analysis. *See id.*

Ultimately, following the series of meetings and presentations, IDWR staff submitted a preliminary recommendation to the Director on December 23, 2022. R. 2866. Consultants for the Coalition, IGWA, and the various Cities then submitted their own comments on or before January 16, 2023. *See* R. 1300, 2867, 2879. IDWR reviewed and considered the parties' comments. Anders, Tr. Vol. I, 220:10-12. The Cities had over six months to gather additional information and perform any analysis related to those issues.[27] Accordingly, any claim about not having sufficient time to complete additional work in the spring of 2023 should be rejected.

Next, the Cities dispute the Director's denial of a discovery order they requested <u>after</u> the Director issued his final *Sixth Methodology Order* in this proceeding. *Cities' Br.* at 46. Dissatisfied with the final order's result, the Cities attempted to "restart" the litigation and

[27] Further, while the Cities' consultant chose to continue on a foreign vacation prior to the hearing, he still had time to complete an expert report and testify in person at the hearing. *See generally*, R. 1511-79; Sullivan, Tr. Vol. II, 111-254. Although contested cases may interfere with travel schedules, the schedules of counsel and consultants cannot dictate or delay the Director's water right administration required by law.

hearing process on certain defenses they failed to prove at the June hearing.[28] R. 1130-31. The Coalition opposed this request and explained that the Cities had their hearing as provided by section 42-1701A(3). R. 1156-1161. The Cities then appealed the *Sixth Order* to this Court on August 16, 2023, and thereafter the Director denied the Cities' request to reopen discovery and set a second hearing. R. 1169 (August 23, 2023). The Director properly denied the Cities' request as section 42-1701A(3) does not provide for multiple hearings ("shall be entitled to a hearing").

Moreover, since the final agency action had been appealed to district court, the agency did not have jurisdiction or any authority to receive additional evidence absent further order by the court. *See* I.R.C.P. 84(l).

The Director's timing of holding a hearing within the spring and early summer did not deprive any party of due process.[29] Notably, all parties were subject to the same schedule. Moreover, although the Cities dispute the Director's recognition that water right administration matters must be addressed during the irrigation season, that factor has been repeatedly affirmed and emphasized by the Idaho Supreme Court. *See AFRD#2*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007) ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call"); *A&B Irr. Dist.*,155 Idaho at 653, 315 P.3d at 841 ("The Director may develop and implement a pre-season management plan . . . made available in

[29] The unique history of the Coalition's delivery call counters any claim that the Cities have been denied due process. It is undisputed that the Cities have been provided the opportunity for several hearings on the issues they allege in this matter. First, IDWR held a three-week hearing in 2008 on the initial orders. When the Director issued the first methodology order in early 2010 the parties were provided another opportunity for a hearing regarding the use of updated 2008 data. Finally, when the Director issued the *Fifth Order* and the *April As-Applied Order*, he held yet another hearing in June 2023. Importantly, neither of these orders substantially prejudiced the Cities' rights as they were covered by an approved mitigation plan. Stated another way, the notice of curtailment did not deprive the Cities of any property right in the spring of 2023. Moreover, the Director allowed for pre-hearing procedures and discovery, allowed expert reports and testimony, and held a hearing that lasted four days. There is no question the Cities had a full and fair opportunity to examine its witnesses, introduce exhibits, and cross-examine IDWR and other parties' witnesses.

advance of the applicable irrigation season, and be promptly updated to take into account changing conditions"); *South Valley*, 2024 WL 136840, at *25 ("Time was of the essence and in-season administration of these water rights was warranted – curtailing out-of-priority water use *after the irrigation season had passed* would have been too little, too late") (emphasis in original).

Further, when the Cities and IGWA attempted to stop the administrative hearing in June, this Court recognized the need for timely action in the context of in-season water right administration and the fact the methodology order had been updated before to incorporate new data and techniques. *See* Addendum A at 4, lns. 13-17 ("In any given year the reality is, there is a short time frame between when water supply determinations can be made and when water users' demands for irrigation water begin. Any process employed by the director must account for the exigencies of these time constraints"). The Coalition's senior water supply was at risk of the outcome of the hearing, the Cities by contrast were not at risk of curtailment. They were all covered by an approved mitigation plan and had safe harbor to pump their out-of-priority rights for the remainder of 2023, including the irrigation season. *Cities' Br.* at 48.

Although the Cities do not provide any legal authority or analysis in support of their due process argument, the facts of this case show the Director did not violate any such rights.[30] The Supreme Court's recent decision in *South Valley* is directly on point regarding this issue:

---

[30] The Cities erroneously attempt to wholesale incorporate portions of a brief from a separate case to support their due process argument in this appeal. *See Cities' Br.* at 45, n. 51 ("the Cities adopt and incorporate herein IGWA's Opening Brief, sections 1.3, 2, 3, 5 and 6") (referring to IGWA's opening brief filed in *IGWA v. IDWR*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-23-13173, Dec. 8, 2023). At most, the Court should only consider page 21 of that brief as the Cities' opening brief in this appeal is 49 pages. *See* I.R.C.P. 84(r); I.A.R. 34(b) ("No brief in excess of 50 pages . . . shall be filed without consent of the Supreme Court"). The Cities did not obtain permission to file an overlength brief therefore any attempted incorporation of IGWA's brief from the separate appeal should be rejected. *See e.g. State v. Abdullah*, 158 Idaho 386, 522, 384 P.3d 1, 137, n. 58 (2015) ("This Court declines to address these specific challenges, as this would allow Abdullah to subvert the page limit he has been allotted on appeal. I.A.R. 35(a)(6); *see also Norfleet v. Walker*, 684 F.3d 688, 690 (7th Cir. 2012) ('The incorporation of arguments by reference in an appellate brief is forbidden.'). Accordingly, only the arguments actually set forth in

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

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

Reviewing the above criteria, the Director granted the requests for hearing and provided a meaningful opportunity for the Cities to be heard approximately six weeks later after the notice was issued. R. 62. Similar to the facts in *South Valley* here the Director did not "curtail" any junior rights following issuance of the order, but instead "<u>opted for a pre-curtailment process</u> complete with advance notice, a full panoply of pre- and post-hearing procedures, and a [four]-day hearing." 2024 WL 136840, at 25 (emphasis added). Reviewing the interests at stake the Director provided adequate due process in this circumstance.

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

Abdullah's appellate brief are addressed herein"). The Cities should be held to the same standard as the appellant in *Abdullah*. Further, the Cities have waived specific arguments set forth in the IGWA Opening Brief. *See Estes v. Barry*, 132 Idaho 82, 87, 967 P.2d 284, 289 (1998) ("a party waives an issue cited on appeal if either authority or argument is lacking").

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

2024 WL 136840, at *24.

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

Next, the Cities' complaints about the hearing process are similar to those rejected in the *South Valley* case. *See* 2024 WL 136840, at *24-25. There the Court noted that "[d]ue process is not a concept rigidly applied to every adversarial confrontation, but instead is a flexible concept calling for such procedural protections as are warranted by the situation." *Id.* The Court noted that "[t]ime was of the essence and in-season administration of these water rights was warranted – curtailing out-of-priority water use *after the irrigation season had passed* would have been too little, too late." *Id.* at 25 (emphasis in original). The risk of any "erroneous deprivation of rights"

was properly weighed and balanced by the Director in delaying implementing any curtailment order until after the June 2023 hearing was held. R. 430 ("The Director will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed").

The Cities has several weeks to conduct pre-hearing discovery (R. 400), including deposing IDWR staff (R. 393, 435, 495) and TFCC's representative (R. 419, 452). The Cities' expert filed a report (R. 1511-1579), and they submitted evidence through numerous witnesses and exhibits at hearing. R. 1305-1599. This was in addition to the prior hearings (2008 and 2010) and IDWR's production of potential changes to the methodology provided months ago in the fall of 2022. R. 1176. Clearly, there was no "shortage of meaningful opportunities" for the Cities to be heard. *See e.g.*, 2024 WL 136840, at *25.

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

In sum, the Director did not violate the Cities' rights to due process by the pre-hearing procedures used in this case. The Director had a duty to administer water rights and delaying action until after the irrigation season would have been "too little, too late." The Court should deny the Cities' appeal of this issue accordingly.

IX. The Director's Orders Did Not Prejudice the Cities' Substantial Rights.

Even if the Court agrees with any of the Cities' arguments, in order to prevail on appeal, they must also demonstrate that their "substantial rights have been prejudiced." I.C. § 67-5279(4); *see also*, *Hungate v. Bonner County*, 166 Idaho 388, 394, 458 P.3d 966, 972 (2020) ("even when an agency blatantly contravenes its own ordinance, as the County did here, contestants like the Hungates must still establish prejudice to a *substantial right* to overcome the agency action"). As explained below, the Cities have not met this standard.

The Cities first argue their rights are prejudiced "because the Department erroneously administers ground water rights under the *Fifth Methodology Order*." *Cities' Br.* at 48. Although a water right, a real property right in Idaho (I.C. § 55-101), is a "substantial right" for purposes of an APA appeal, the Cities have failed to show how they will be prejudiced. The Cities admit they have "safe harbor from curtailment" pursuant to their approved mitigation plan. *Id.* While the methodology order may require administration of junior ground water rights not covered by an approved mitigation plan, that is not the case with the Cities. Stated another way, the Cities do not have "standing" to represent those unknown junior ground water users they are trying to protect. *See e.g., Tidwell v. Blaine County*, __ Idaho __, 537 P.3d 1212, 1224 (2023) ("Plaintiffs have put forth only generalized grievances, which any resident in the community could assert; therefore, we conclude such cannot alone confer standing").

Next, the Cities allege the Director's discovery procedures prejudiced their substantial right to due process. *Cities' Br.* at 49. Again, in light of the technical working group meetings the Cities were on notice for several months about specific updates to the methodology that could be made. R. 1176. While the Cities failed to undertake analysis and evaluation during that time, they cannot fault the Director for a six-week pre-hearing timeframe, particularly given the exigencies of the irrigation season and need for timely water right administration. The Cities had the same

rights as any other party during this process and were able to submit an expert report and cross-examine all witnesses at the hearing. Notably, the Director granted the Cities' and other parties' request for a hearing and held a four-day hearing pursuant to section 42-1701A(3). R. 62, 490. The Director specifically did not curtail any ground water rights prior to holding the hearing. The Director's procedures satisfied due process and did not prejudice the Cities as he acted within a reasonable timeframe given the exigencies of the irrigation season and need for timely water right administration. *See generally*, *South Valley*, 2024 WL 136840, at *23-26; *see also*, Addendum A.

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

CONCLUSION

The Director's technical decisions in this case are supported by substantial competent evidence in the record. Although the Cities dispute these findings, they failed to prove their defenses by "clear and convincing evidence" and have not met the applicable standard of review under Idaho's APA. The Director provided adequate due process, by both notifying the parties of potential updates back in the fall of 2022 and holding a four-day hearing receiving extensive testimony and evidence. The Cities have further failed to show prejudice to a substantial right, and they have an effectively operating mitigation plan in place and had no risk of curtailment. The Coalition respectfully requests the Court to affirm the final orders accordingly.

DATED this 16th February 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2024, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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Travis L. Thompson

Addendum
A

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

CASE NOS:

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

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

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

****

EXCERPT FROM HEARING ON ADMINISTRATIVE APPEALS

(COURT'S RULING)

JUNE 1, 2023

HONORABLE JUDGE ERIC J.WILDMAN PRESIDING

****

JACK L. FULLER, CSR
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1 **COURT'S RULING**

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

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

11 Under Idaho Code Section 7-302, a writ of mandate
12 may issue, quote, "to any inferior tribunal to compel the
13 performance of an act which the law especially enjoins as a duty
14 resulting from an office," end quote, or to compel the admissions
15 of a party to the use and enjoyment of a right or office to which
16 he is entitled and from which he is unlawfully precluded by such
17 inferior tribunal. The writ is only available in limited
18 circumstances where there is not a plain, speedy, and adequate
19 remedy in the ordinary course of law. That's Idaho Code Section
20 7-303.

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

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

1 and printed off every case where I have addressed mandamus with
2 respect to delivery calls -- that a writ of mandate is not
3 available to control discretionary acts of tribunals acting
4 within their jurisdiction.
5 A writ of prohibition is the counterpart to a writ
6 of mandate, Idaho Code Section 7-401. It arrests the proceedings
7 of a tribunal when it is in excess of the jurisdiction of the
8 tribunal. It may issue in all cases where there is not a plain,
9 speedy, and adequate remedy in the ordinary course of law. The
10 Court's decision whether to issue a writ is discretionary.
11 That's *Hepworth Holzer vs. Fourth Judicial District*, 169 Idaho
12 387, 2021.
13 Okay. With regard to the issues pertaining to the
14 legal propriety of the Fifth Amended Methodology Order and Final
15 Order regarding the April, 2023, forecast supply, the Court finds
16 the petitioners have a plain, speedy, and adequate remedy at law
17 through IDAPA in the form of judicial review. The Idaho Supreme
18 Court has made it clear, it was never that the intention of a
19 writ should take the place of an appeal. *Smith vs. Young*, 71
20 Idaho 31, 1950.
21 The Court, importantly, the Court also notes that
22 there is a hearing presently scheduled before the Department to
23 commence on June 6th on these orders. That administrative remedy
24 has not been exhausted at this time, and the director must first
25 be given the opportunity through that hearing to address issues

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

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

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

This analysis recognizes the failure of the

1 director to timely administer in priority can result to senior
2 rights in times of shortage. In conjunction, the Idaho Supreme
3 Court further determined that neither the Constitution nor the
4 statutes place any specific time frames on this process.
5 In this case the record reflects the Department
6 began notifying individuals in September, 2022, that it would be
7 reviewing data used in the Fourth Methodology Order. In November
8 and December, 2022, the Department conducted six meetings
9 regarding possible amendments to the Fourth Methodology Order
10 where staff presented new data and analyses with respect to
11 methodology. Later in December the Department released a
12 document setting forth preliminary recommendations for amendments
13 to the Fourth Methodology Order. The preliminary recommendations
14 stated that the Department will continue to evaluate the
15 integration of these recommendations and others into the
16 methodology. The recommendations also invited outside
17 consultants to submit written comments by January 16, 2023, which
18 some outside experts did by submitting preliminary comments.
19 On April 21st, 2023, the director issued the Fifth
20 Amended Methodology Order and Final Order regarding the April,
21 2023, forecast supply. In the final order regarding the April,
22 2023, forecast supply, the director predicted an in-season demand
23 shortfall to the Twin Falls Canal Company in the amount of
24 75,200-acre feed. The order gave affected juniors until May 5,
25 2023, to establish they can mitigate for their proportionate

1 share of the predicted demand shortfall. For those juniors who
2 could not, the order stated that the director would issue a
3 curtailment order.
4 The director did hold a hearing prior to issuing
5 the April 21st, 2023, orders. However, he has set a hearing --
6 and he has set a hearing to commence June 6th, 2023, on the
7 orders pursuant to Idaho Code Section 42-1701A(3). Idaho Code
8 Section 42-1701A(3) governs hearings before the director.
9 Subsection 3 applies where the director takes action without a
10 hearing. Normally a party has 15 days to request a hearing under
11 Subsection 3. However, because the director found time was of
12 the essence and because he anticipated multiple parties would
13 request a hearing, he took the proactive step of sua sponte
14 noticing up a hearing to save time. He also set a prehearing
15 conference for April 28th, 2023.
16 The director subsequently denied a request from
17 the petitioners to continue the June 6th hearing until December
18 or January. He also denied a request from the petitioners to
19 appoint an independent hearing officer.
20 On May 2nd, 2023, the director issued a scheduling
21 order, directing that discovery be completed by May 31st, 2023.
22 Then on May 5th, 2023, the director issued an order limiting
23 discovery to preclude questions regarding the director's
24 deliberative process.
25 Oh. I misread my notes here, and I want to go

1 back. When I said that the director held a hearing prior to
2 issuing the April 21st, 2023, order, I meant to say he did not
3 issue an -- he did not hold a hearing.
4 Okay. Again, on May 2nd, 2023, the director
5 issued a scheduling order, directing that discovery be completed
6 by May 31st, 2023. Then on May 5th, 2023, the director issued an
7 order limiting discovery to preclude questions regarding the
8 director's deliberative process on legal and policy
9 considerations.
10 Okay. So in evaluating the process in this case
11 against the director's duty to timely administer water rights in
12 priority, the Court finds it provides due process consistent with
13 the exigencies of the circumstances and the need to administer
14 water in priority to avoid injury to senior rights. In making
15 this finding, the Court is influenced by the fact that
16 administration in this case arises in the larger context of an
17 ongoing delivery call that has existed since 2005. The director
18 issued its first methodology order in 2010. Since then, the
19 methodology order has been modified and amended three times to
20 account for new data, modeling revisions, and climate trends. So
21 this is not a new issue. And the director gave heads-up that
22 amendments may be required again in 2023, starting in September
23 of 2022, when he notified individuals that the Department was
24 investigating integrating new data techniques into the
25 methodology order.

1 Again, he then conducted a series of meetings,
2 presenting new data and techniques, and issued a preliminary
3 recommendation setting forth proposed amendments and inviting
4 comment from outside experts. In effect, the parties were put on
5 notice starting in September of 2022 that amendments to the
6 methodology order were being considered. Based on prior actions
7 within the context of this ongoing delivery call, parties were
8 also well-aware of the exigent time constraints following demand
9 shortfall predictions.
10 In particular, in its memorandum decision issued
11 on April 11, 2011, in Gooding County Case CV-2010-382, the Court
12 addressed similar due process arguments concerning short time
13 frames for notice and discovery in the context of this very call.
14 The process provided then was found to provide due process.
15 In this instance the parties are being provided
16 with a hearing on the 2023 orders to commence on June 6th. They
17 were provided approximately six weeks actual notice for the
18 hearing. In addition, the director began making parties aware
19 that amendments to the methodology order were being considered
20 back in September of 2022. At the hearing on June 6th the
21 parties will be given the opportunity to present evidence and
22 arguments pertaining to the 2023 orders.
23 The Court finds this process provides due process
24 consistent with the exigencies of the circumstances and the
25 director's duty to timely administer water rights in priority.

1 And frankly, setting a hearing after the irrigation season as
2 requested is not a tangible alternative, given the director's
3 duty and the demand shortfall prediction for the 2023 irrigation
4 season.
5 With respect to the discovery limitations, the
6 Court finds the director does have the discretion to limit the
7 type and scope of discovery in an administrative hearing. We
8 talked about IDAPA 37.01.01.521. This discretion was also
9 recognized by the Idaho Supreme Court in *Musser* when it held that
10 while the director has a clear duty to administer water, the
11 details of how he chooses to do so are largely left to his
12 discretion.
13 For these reasons the Court, in an exercise of its
14 discretion, will deny petitioner's applications for writ of
15 mandate and writ of prohibition in Case CV01-23-8258.
16 That brings me to the Ground Water District's
17 petition and motions in CV01-23-8187. With respect to the
18 motions filed in that case, the Court finds it lacks jurisdiction
19 over the petition for judicial review filed in that proceeding
20 pursuant to Idaho Code Section 42-1701A and the doctrine of
21 exhaustion.
22 Subsection 3 of Idaho Code Section 42-1701A
23 provides that any aggrieved person, by any action of the
24 director, including any decision, determination order, or other
25 action, who has not previously been afforded an opportunity for a

1 hearing on the matter shall be entitled to a hearing before the
2 director to contest the action. It further provides that
3 judicial review of any final order of the director issued
4 following the hearing shall be had pursuant to Subsection 4 of
5 that section of the Code.
6 Here the director issued the 2023 orders without a
7 hearing. This is within the director's discretion, given that
8 the orders were issued under the umbrella of an active and
9 ongoing delivery call. Therefore, Subsection 3 of Idaho Code
10 Section 42-1701A controls. Until the director holds the hearing
11 on June 6th and issues a written decision, no person aggrieved by
12 the 2023 orders are entitled to judicial review under Idaho Code
13 Section 42-1701A(4). Likewise, under the doctrine of exhaustion,
14 the pursuit of statutory remedies is a condition precedent to
15 judicial review.
16 In this case the remedy provided in Idaho Code
17 Section 42-1701A(3) has not been exhausted. The Court must -- or
18 excuse me. The director must be given the opportunity to address
19 the issues raised by the petitioners pertaining to the 2023
20 orders.
21 The Court notes that it has come to the same
22 conclusion previously in several similar cases involving
23 premature petitions for judicial review, and I'll cite a few of
24 them. In preparation for this hearing, I went in and printed off
25 every one of them, and I have a stack of them here. But that

1 includes the Order Dismissing Petition for Judicial Review in Ada
2 County Case CV01-17-67, issued February 16, 2017; Order
3 Dismissing Petition for Judicial Review in Ada County Case
4 CV01-16-23173, also issued February 16, 2017; and an Order
5 Granting Motion to Dismiss in Jerome County Case CV27-22-945,
6 issued December of 2022. Therefore, based on the foregoing
7 reasons, the Court will grant the motion to dismiss.
8 With respect to McCain Foods' motion for stay,
9 CV -- and petition, CV01-23-8306, with respect to the motion for
10 stay filed in that case, the Court will deny the motion for the
11 same reason it denied the motion for stay and motion for
12 injunctive relief in CV01-23-8187. Namely, the director has
13 discretion to limit the type and scope of discovery in an
14 administrative hearing and that the Court lacks jurisdiction over
15 the petition for judicial review filed in this case due to the
16 pendency of a hearing. Therefore, the Court, in an exercise of
17 discretion, will deny the motion for stay and grant the motion to
18 dismiss.
19 And I'm going to add one final conclusion here.
20 You know, after reviewing the issues raised in these cases and
21 preparing for these hearings, as I had mentioned earlier, I went
22 back and reviewed the numerous opinions that have been addressed
23 by this Court where substantially the same if not the same issues
24 were raised in the context of conjunctive management delivery
25 calls, including this same delivery call brought by the Surface

1 Water Coalition. The issues are not new, and my reading of the
2 prior decisions explicitly sets forth and reiterates the
3 overriding principles that govern these types of matters. And
4 I'm aware in every single one of those, parties attempt to
5 distinguish that particular set of circumstances to justify the
6 requirement of exhausting administrative remedies.
7 But the issues raised -- and based on my review,
8 the issues raised today in these cases are no different. And
9 these include that the director's statutorily charged with
10 administering water in priority; time is of the essence in
11 responding to delivery calls; the director must act quickly to
12 avoid injury to senior rights; due process is required but must
13 account for the exigencies of the circumstances; the director has
14 discretion in limiting the scope and timing of the hearings; and
15 unless a statute or rule otherwise provides for a hearing, the
16 director may issue an order and conduct a hearing after issuance
17 of the order.
18 If a hearing has been requested or otherwise set,
19 administrative remedies have not been exhausted, thereby
20 depriving this Court of jurisdiction. The director must first
21 have the opportunity to rule on the issues raised by the order.
22 This process is set forth plainly in Idaho Code Section
23 42-1701A(3). Further, writs of mandate cannot issue for acts
24 that are discretionary with the director. Staying hearings and
25 holding them after the irrigation season where the director has

1 predicted material injury to seniors is unworkable as juniors
2 will be permitted to pump out of priority during the irrigation
3 season.
4 So that is my ruling. And anything else we need
5 to take up at this time?
6 MR. BAXTER: No, Your Honor. The only thing that
7 just briefly -- I think the parties -- do we want to stick around
8 for a minute?
9 (Discussion regarding parties conferring by Zoom
10 following the hearing)
11 THE COURT: Well, for the rest of -- everybody
12 else on the Zoom, if you're not -- those that aren't
13 participating in the discussion will be adjourned.
14 (Proceedings concluded)
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REPORTER'S CERTIFICATE

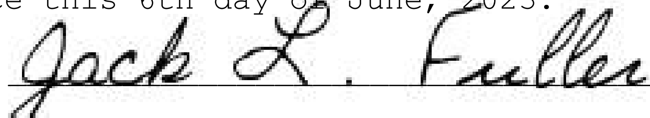
STATE OF IDAHO	)	
	)	CASE NOS. CV01-23-8258, CV01-23-8187,
COUNTY OF ADA	)	and CV01-23-8306

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

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

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

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



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