

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

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

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

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

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

Petitioners,

vs.

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

Respondents.

and

IDAHO GROUND WATER
APPROPRIATORS, INC., A&B

Case No. CV01-23-13238

IDWR Docket No. CM-DC-2010-001

**CITIES' COMBINED
REPLY IN SUPPORT OF OPENING
BRIEF ON JUDICIAL REVIEW**

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.

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

Petitioners City of Idaho Falls, City of Pocatello, and the Coalition of Cities¹ (collectively, “Petitioners” or “Cities”), hereby submit this Combined Reply Brief, responding to the arguments within Idaho Department of Water Resources’ (IDWR) and the Surface Water Coalition’s (SWC) response briefs, in conformance with the *Order Granting Joint Motion; Order Vacating and Resetting Hearing* dated January 29, 2024. Any capitalized or abbreviated terms undefined here are defined in the *Cities’ Opening Brief on Judicial Review, SWC Post-Hearing Order, Fifth Methodology* (“Opening Brief”).

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

I. *Res Judicata* does not preclude the Cities from Bringing Their Challenges to the Fifth/Sixth Methodology Orders

The SWC argues that “the doctrine of *res judicata* bars the Cities’ challenges to forecast supply, baseline year criteria, and project efficiency calculations” because the “methodology order steps, and their underlying technical framework were previously litigated” before this Court in Case No. CV-2010-382. *SWC Response* at 12 n.15. The Cities are not challenging the Methodology Order *per se*—the Cities acknowledge that the Methodology Order provides the framework to administer the SWC delivery call. However, the revisions to the *Fourth Methodology Order* adopted by the Director in the *Fifth/Sixth Methodology Orders* were based on newly available information and data that had never been incorporated into a Methodology Order. These Methodology revisions have not previously been the subject of litigation. In other words, and by way of example, the Cities accept that the Director has the discretion to predict demand shortfall (DS) by subtracting the SWC’s baseline year (BLY) demands by forecast supply (FS); the Cities’ challenge on judicial review is to the Director’s selection of 2018 as the BLY for the SWC’s reasonable in-season demand (RISD) (and the decision to ignore available snowpack data in tributary watersheds when quantifying FS), which are live issues that the Court should evaluate as an abuse of that discretion, or an action that is arbitrary, capricious, and/or clearly erroneous.²

The Director himself has described the Methodology Order as a “dynamic document that would be subject to change and would change with better information, better data, and better analysis,” Tr., Vol. II, p. 133, LL. 3-7,³ and the Director has stated he has an “ongoing obligation to use the best available science and information,” R. 0002, so any challenges brought by the

² Cf. *Opening Brief* at 23-28.

³ See also *2008 Opinion* at 56 (the hearing officer that approved of establishing a Methodology to determine the SWC’s material injury stating that it “is not a static system”).

Cities to the Director's errors (whether it be the Director making a change or refusing to make a change to the Methodology), as reflected in the *Fifth/Sixth Methodology Orders*, are not barred by doctrines of preclusion. Rather, the Cities' proposals to improve the accuracy of the Methodology (e.g., by accounting for Portneuf River runoff when quantifying FS or using the most credible irrigated acreage data when quantifying RISD) should be *welcomed* by the Director.⁴

Further, the fact that the Director unilaterally changed aspects of the Methodology Order, such as switching from using steady-state modeling to transient modeling to determine curtailment dates, demonstrates that the Director himself intends to continue tinkering with the actual framework of the Methodology Order.

Thus, the Cities are not re-litigating issues that were decided previously by this Court in 2014 (the formulae to determine DS and corresponding curtailment dates), rather, they are challenging the decisions (changing certain inputs in the formulae but not changing others) that the Director made *in 2023*. Further, to the extent that the Cities' current arguments appear similar to previously decided issues (e.g., whether members of the SWC operate reasonably and without waste), the arguments today are not barred because there is a decade's worth of new facts and new technology that may change a prior finding. *See Erickson v. Amoth*, 105 Idaho

⁴ The Director has suggested that he welcomes the Cities to present "updated scientific information or data", but his actions in this matter, and IDWR's arguments in their brief are hardly "welcoming." *See* R. 1170-71, n.1 (the Director denying the Cities' request for hearing on the *Sixth Methodology Order* and request for authorization to conduct discovery to, *inter alia*, ascertain TFCC's actual irrigated acreage, but "emphasiz[ing] that this denial does not prevent the ground water users from presenting updated scientific information or data to the Director in the future.").

798, 801 (1983).⁵ So, just because a hearing officer or this Court may have found that the SWC members' project efficiencies were reasonable *then* does not mean that they are reasonable *now*.⁶

Accordingly, the Court should reject the SWC's argument that *res judicata* bars the Cities from bringing its challenges to the *Fifth/Sixth Methodology Orders*.

II. The SWC's and IDWR's Arguments regarding TFCC's FS Should be Rejected

The Cities' position is that the Director's initial DS prediction for TFCC under the *Sixth Methodology Order*, performed in a *Steps 1-3 Order* in April, is flawed for several reasons, including the fact that the FS prediction fails to account in any way for runoff from tributary basins below the Heise Gage.⁷ *Cf. Opening Brief* at 20, 24. The Director declined to consider such information, even though there is readily available and easily accessible information from Water District 01 (WD01) that would improve water supply forecasting. *See Tr.*, Vol. III, pp. 230-31. Ignoring snowpack data for tributary basins that join the Snake River below the Heise Gage as a factor in forecasting TFCC's supplies is arbitrary, capricious, and an abuse of discretion. As demonstrated here, the Director selectively applies the "best available science and information" standard for certain components of the Methodology while ignoring it for others.

IDWR's response to the Cities' position is that "the Cities overemphasize the impacts and predictive value of the high snowpack in 2023." *IDWR Response* at 13. Just like the Director, IDWR on appeal sidesteps this issue by asserting that "[t]he Director disagrees that high

⁵ "Generally, the doctrine of *res judicata* extends only to facts and conditions as they existed at the time the judgment was rendered and, ordinarily, *res judicata* does not apply where there are changed conditions and new facts which did not exist at the time of the prior judgment. The general view is that where, after the rendition of a judgment, subsequent events occur, creating a new legal situation or altering the legal rights or relations of the litigants, the judgment may thereby be precluded from operating as an estoppel." (Internal citations omitted.)

⁶ *See Tr.*, Vol. IV, p. 130, LL. 2-16 (Dr. Brockway, expert witness for the SWC, testifying that whether a canal system's operations are "reasonable" can change with time and changes in technology).

⁷ The tributary basins below the Heise Gage include the Henry's Fork, Teton, Willow, Blackfoot, and Portneuf River basins. R. 1599; *Tr.*, Vol. III, pp. 232-34.

snowpack means the SWC will not be injured” and, like the SWC, argues that ““the current snowpack does not tell the whole story.”” *Id.*

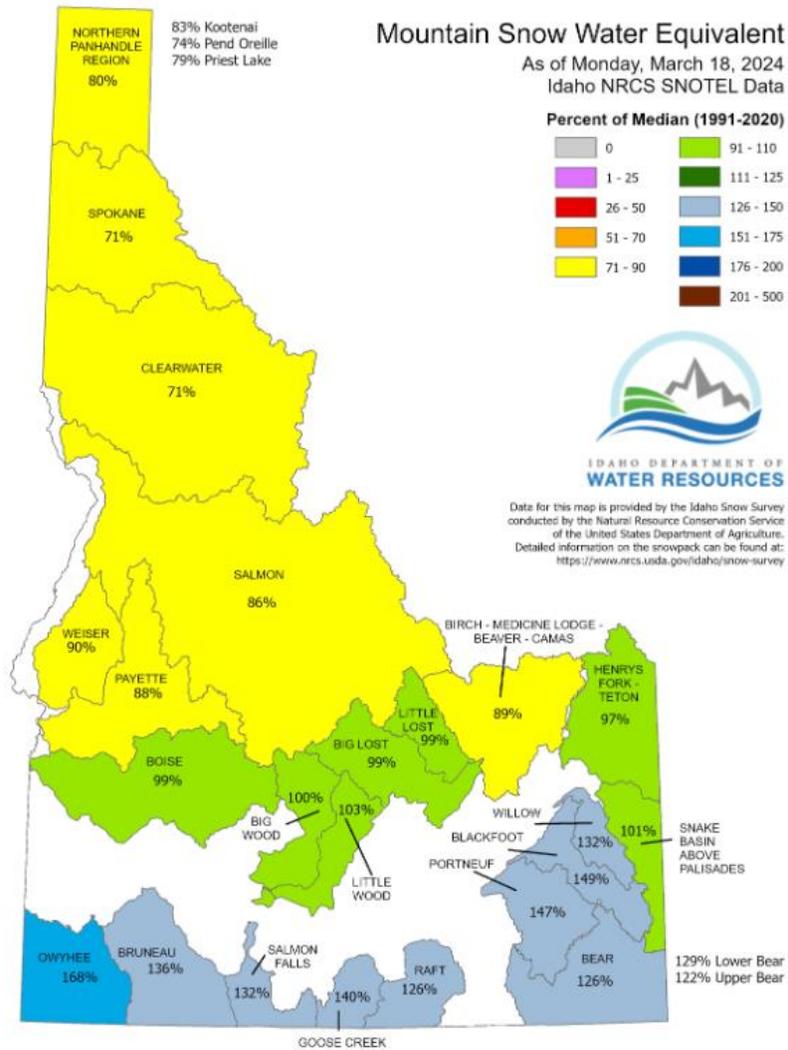
These responses mischaracterize the Cities’ position. The Cities have never asserted that high snowpack in watersheds below the Heise Gage should be the sole consideration for FS, nor does high snowpack in below-Heise tributaries mean that the SWC will or will not be injured. Rather, the Cities’ position is simply that the Director should consider anticipated runoff for these tributary basin *in addition to* the Heise Gage—i.e., make it a factor—in the FS analysis rather than ignore the tributary basin contributions to FS.⁸

Evidence and testimony presented at the hearing is clear that runoff from the tributary basins below Heise affects the SWC’s water supply because, as the WD01 watermaster testified, those flows enable greater storage of mainstem Snake River water in upstream reservoirs for later use by SWC members. *See* Tr., Vol. III, p. 234, LL. 17-24. In other words, high snowpack in basins below the Heise Gage has a material impact on the SWC’s (and other WD01 water users’) water supplies. The Director simply cannot ignore these data when predicting TFCC’s FS.

Further, 2023 is far from an anomaly. The high snowpack in 2023 for these below-Heise basins is repeating itself in 2024:⁹

⁸ The SWC engages in hyperbole like the Department, asserting that the high snowpack “does not justify abandoning the Director’s forecast supply metric for TFCC that is used at the outset in April.” *SWC Response* at 13 (emphasis added). The Cities have never advocated for abandoning use of the Heise Gage as a component of FS analysis. Sticking to only considering Heise Gage runoff predictions and Box Canyon flows when determining TFCC’s FS, however, is simply an indefensible position when the Director is duty-bound to use the best available science and information when amending the Methodology Order.

⁹ *See* <https://idwr.idaho.gov/water-data/water-supply/snow-water-equivalency/> (the Mountain Snow Water Equivalent Map as of March 18, 2024, which is a 2024 equivalent of Exhibit 366 (R. 1599)).



Perhaps sensing that there is no defense to ignoring accessible, material, “best science” information when the Director has an obligation to use the “best available science and information,” the Department directs fault to the Cities for not presenting “affirmative evidence that had the Director incorporated some unspecified quantification of the snowpack totals to forecast the SWC’s supply, the forecast supply would have been more accurate” and then concludes that “the Director’s reliance on the Joint Forecast is not an abuse of discretion, nor is it arbitrary and capricious.” *IDWR Response* at 13-14.

First, there is affirmative evidence in the record that had the Director considered below-Heise tributary snowpack when quantifying FS, it would have been more accurate, and that evidence is how grossly inaccurate the FS for TFCC proved to be. *See Opening Brief* at 24, n.24 (discussing the *2023 Step 9 Order*); *id.* at 29 (showing that the FS for TFCC was 1,046,519 acre-feet (“AF”) whereas TFCC’s actual supply was 1,130,031 AF, meaning the Director’s prediction was off by over 83,000 AF). While perfection is far from expected, the Director certainly ought to aspire for his FS predictions to be more accurate than that.

Second, IDWR’s response suggests that the Director does not know what to do with water supply information that is obtained or produced by his own agents, from the WD01 Watermaster to WD01 staff.¹⁰ The WD01 Watermaster testified about the high percentage above median values in the April 1st forecast for the below-Heise tributary basins. *See Tr.*, Vol. III, pp. 233-34.¹¹

WD01 collects substantial historical water supply information, which it often shares in its weekly (or in the winter, monthly) Water Reports. For example, here is data presented in the March 4, 2024 Report showing snowpack conditions that are similar to 2023:¹²

¹⁰ Idaho water districts, including WD01, are instrumentalities of the State of Idaho and are overseen and supervised by the Director. “Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators.” Idaho Code § 42-604; *see also Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969) (The watermaster is not the agent of the water company or water user, but is a ministerial officer.).

¹¹ “Q. [By Mr. Harris] So would you say this year that there was an unusually high amount of runoff from those drainages? A. [By Mr. Olenichak] Yes. The further south you go into the Portneuf, the Blackfoot, and Willow Creek drainages, they had a higher percentage above median values for the April 1st runoff forecast than those areas further upstream above Palisades.”

¹² The most recent WD01 Water Report is available at <https://www.waterdistrict1.com/reports-and-events/>.

	<u>MARCH 4, 2024</u>	<u>MARCH 4, 2023</u>
SWE: Snake River abv Palisades	99%	107%
PRECIP: Snake River abv Palisades	101%	100%
SWE: Henrys Fork/Teton Basins	97%	112%
PRECIP: Henrys Fork/Teton Basins	103%	107%
SWE: Willow/Blackfoot/Portneuf	141%	151%
PRECIP: Willow/Blackfoot/Portneuf	129%	135%
Total reservoir system contents	3,538,000 ac-ft (85%)	1,978,000 ac-ft (47%)
Jackson Reservoir contents	618,100 ac-ft (73%)	186,600 ac-ft (22%)
Snake River near Moran	280 cfs	350 cfs
Palisades Reservoir contents	1,072,000 ac-ft (89%)	366,900 ac-ft (31%)
Snake River near Irwin	880 cfs	1,110 cfs
Henrys Lake contents	84,330 ac-ft (94%)	81,400 ac-ft (90%)
Island Park Reservoir contents	122,400 ac-ft (91%)	110,500 ac-ft (82%)
Henrys Fork near Island Park	430 cfs	240 cfs
Grassy Lake contents	13,190 ac-ft (87%)	11,650 ac-ft (77%)
Ririe Reservoir contents	51,910 ac-ft (64%)	46,870 ac-ft (58%)
Snake River near Blackfoot	2,480 cfs	1,880 cfs
American Falls Reservoir contents	1,470,000 ac-ft (88%)	1,068,000 ac-ft (64%)
Snake River at Neeley	300 cfs	310 cfs
Lake Walcott contents	76,090 ac-ft (80%)	68,640 ac-ft (72%)
Lake Milner contents	30,270 ac-ft (82%)	29,160 ac-ft (79%)
Snake River at Milner	0 cfs	0 cfs

In addition to its duty to distribute and account for water, WD01 has historically and consistently collected data on snowpack levels, river flows, diversions, and other water supply information for each drainage that the Director could consult to improve the accuracy of his FS analysis. Indeed, the Director relies on WD01 data and information in other aspects of its Methodology Order, including selection of a baseline year, so there is no valid reason why he cannot similarly consider other relevant data when quantifying FS.

In sum, there is no dispute that the Director ignored material, readily available water supply information from tributary river basins below the Heise Gage when quantifying TFCC’s FS under the *Fifth Methodology Order* in April 2023. This is far different than the Cities quibbling about how the Director considered, analyzed, or utilized such data—the Director chose to ignore it entirely. The Director’s failure to do so is arbitrary, capricious, and an abuse of discretion.

Accordingly, the Court should reject the SWC’s and IDWR’s arguments on this issue and grant the Cities’ requested relief. *See Opening Brief* at 26.

III. The SWC's and IDWR's Defense of the Director's Selection of 2018 as the BLY Should be Rejected

Both the SWC and IDWR defend the Director's selection of 2018 as the new BLY because it was a "discretionary decision" that was appropriate because it fit within the Director's criteria for a BLY. *SWC Response* at 16-18; *IDWR Response* at 14-19. Their pitch is essentially that the old BLY (2006/2008/2012) under the *Fourth Methodology Order* no longer met the BLY criteria,¹³ so the Director had to pick a new BLY, and the Cities should be grateful that he chose 2018 rather than 2020. *See IDWR Response* at 15-18.

The Cities maintain that the Director's leap from a 1% safety factor¹⁴ to a 5% safety factor¹⁵ (a 500% increase) with respect to the BLY was unreasonable, and increased the SWC's RISD by over 150,000 AF. *See R. 1016*. As explained in the *Opening Brief* at 28, this increase in BLY had a significant impact on the Director's April 2023 DS prediction, which is perhaps the most prejudicial aspect of the Methodology to junior ground water users—if a *Steps 1-3 Order* grossly overpredicts DS, users that are not in a mitigation plan (or, increasingly, users who are not in compliance with a mitigation plan) are more likely to expend significant sums to acquire mitigation supplies only to find out months later (when the DS prediction/determination is updated in subsequent steps) that their efforts were all for naught.¹⁶

¹³ Note, however, that the Cities' expert, Gregory Sullivan, identified in his expert report that, had the Director included 2022 data when determining whether the 2006/2008/2012 diversions still met the BLY criteria, the old BLY would have still represented above average diversions (based on 2000-2022 data, rather than 2000-2021 data). *See R. 1527-28*.

¹⁴ *See R. 1390* (the *Fourth Methodology Order*, which shows that the 2006/2008/2012 BLY represented 101% of average diversions for the SWC).

¹⁵ And a 6% safety factor for AFRD#2 and TFCC, the only SWC members to ever experience a DS. *See Opening Brief* at 26-28; *see also R. 1016* (showing that the 2018 diversions were 105% of average).

¹⁶ This is precisely what happened in 2023. *See Opening Brief* at 28; *see also R. 0148-53* (McCain Foods USA, Inc. had to spend upwards of \$25,000 to join SWID's mitigation plan to obtain safe harbor from the threat of curtailment that did not materialize because the April DS prediction was wildly inaccurate).

Accordingly, the Cities request that the Court grant the relief requested regarding the Director's errors with the BLY. *See Opening Brief* at 28.

IV. The Director Must Correct the SWC's Irrigated Acreage Values

A. The SWC's and IDWR's Arguments Regarding TFCC's Irrigated Acreage Should be Rejected

Both the SWC and IDWR defend the Director's selected value for TFCC's irrigated acreage (194,732 acres) in the *Sixth Methodology Order*. *SWC Response* at 21-23; *IDWR Response* at 24-27. They insist that TFCC's alleged acreage value must be accurate because the SWC's expert testified that 194,732 acres *could be* irrigated in a given year, and while TFCC is unable to say exactly how many acres are irrigated in a given year, TFCC's manager testified that the company's total irrigated area does not vary from year to year. While the SWC's witnesses are confident that this acreage could be irrigated, when it comes to the amount of acres that *will be* or *are being* irrigated—nobody seems to know. *See SWC Response* at 22; *IDWR Response* at 24-25. But IDWR—and the SWC's witnesses—are using the wrong standard. The Director's obligation is to administer ground water rights for purposes of TFCC's acres that are being irrigated from its surface water rights. *Opening Brief* at 34 (“Non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members”) (citing *2008 Opinion* at 53).

1. SWC Employs the Wrong Standard

The SWC asserts that the Cities “revert back to IDWR's erroneous use of data presented at the 2008 hearing” and “fault the Director for not wholesale adopting the 2017 Irrigated Lands dataset used to calibrate ESPAM” *SWC Response* at 21. That is incorrect. The Cities have not argued that one particular acreage number is *the* correct number, rather, that “it is ‘highly probable’ that TFCC's irrigated acres is no more than 183,589 acres.” *Opening Brief* at 34. Five

irrigated acreage data sets were presented at hearing, four of which demonstrate it is more probable than not that a maximum of 183,589 acres are *being* irrigated at TFCC. Three of those datasets were prepared by the IDWR staff. The remaining dataset is based on correspondence from TFCC's lawyers, supported by the SWC's expert witness, which asserts that 194,732 acres *could be* irrigated.

2. IDWR Rejects its Own Datasets, Also in Reliance on the Wrong Standard.

IDWR takes a different approach, essentially adopting TFCC's argument that their data set is the most credible because IDWR's data sets fail to quantify the amount that *could be* irrigated in a given year. *IDWR Response* at 25. This argument fails, however, because the Director must only deliver water to the SWC that is "attributable to the beneficial use of growing crops within the service area of the entity," and no more. R. 0012.

IDWR also suggests the 2011 and 2017 data sets should be rejected because they are only a "snapshot in time of what was *actually irrigated*" in those years. *IDWR Response* at 27 (emphasis in original). Because the Director must estimate the SWC members' RISDs based on what *is* being irrigated rather than what *could be* irrigated, the data sets from 2011, 2017, and 2021 are all within 1,500 acres of each other (between 179,456 acres and 180,956 acres),¹⁷ and there is testimony indicating that TFCC's irrigated acreage remains consistent from year to year,¹⁸ it follows that the IDWR data sets provide the most credible amounts for how much TFCC's patrons are irrigating today.

¹⁷ See *Opening Brief* at 33.

¹⁸ See Tr., Vol. II, p. 78 (testimony from Mr. Barlogi, TFCC manager, that TFCC is not "planted wall to wall," that TFCC typically sees a "zero percent change" in irrigated acreage from year to year, and that TFCC can "ascertain when certain lands are not irrigated in a given year"); *id.* at 178 (testimony from Mr. Sullivan that "in all systems there's some lands that get fallowed for various reasons, but in my experience, while it's different lands that are going in and out of the fallowing, the overall amount of fallowing is roughly consistent from year to year.").

In sum, the Court should reject SWC's and IDWR's arguments that the Cities did not present clear and convincing evidence that TFCC irrigates no more than 183,589 acres, and grant the Cities' requested relief regarding the Director's errors on this issue. *See Opening Brief* at 35.

B. The SWC's and IDWR's Arguments Regarding Supplemental Ground Water Acres Should be Rejected

There is no dispute that inclusion of supplemental ground water use by SWC members increases their patrons' available water supplies, which *should* reduce the DS determination and curtailment date for junior ground water users under the *Sixth Methodology Order*. By ignoring supplemental ground water use in 2023, for example, the Director's analysis improperly overstates TFCC's RISD to the detriment of ground water users and the benefit of the SWC.

There is no dispute that the Department considers supplemental ground water use as a factor under the *Fifth Methodology Order*, R. 10, and the fact that "[t]here are lands within the service areas of SWC entities that are irrigated with supplemental ground water[.]" *id.*, is not disputed by the SWC's experts. *See* R. 1246 ("Usage of private ground water wells for supplemental purposes on surface water irrigated lands occurs within the Twin Falls Canal Company service area[.]"). It is also undisputed that there is water use and water rights information available to the Department for consideration. *See* Section II, *supra*.

Nevertheless, IDWR asserts that the Director can ignore supplemental ground water use in the *Sixth Methodology Order*, and justifies it as a matter of the Director's discretion. *IDWR Response* at 29. Further, IDWR characterizes the supplemental ground water use as follows: "The Director notes that the Cities have been on notice of the deficiencies in the current available supplemental ground water for the same amount of time as the Department." *Id.* at 28 n.23.

The SWC categorizes consideration of supplemental ground water use as a "defense" and that the Cities are attempting to "shift the burden of proving their defense onto IDWR." *SWC*

Response at 23. Where supplemental ground water use is part of the *Sixth Methodology Order* DS formula, this information is not properly categorized as a “defense” to anything—it should be part of the DS determination specifically described in the *Sixth Methodology Order* as part of the Director’s obligation to use the “best available science and information.” Further, as described above, the Director has misapplied the clear and convincing evidence standard rather than “best available science and information” standard and does so again here.

The responses from IDWR and SWC are antithetical to the Department’s self-stated duty to use the “best available science and information.” R. 002. It is improper for the Director to only direct Department resources at addressing components of the Methodology that benefit the SWC, such as changing the baseline year and switching to transient modeling, and direct no resources or effort at addressing components of the Methodology that counterbalance these changes, such as accounting for supplemental ground water use and runoff from tributary basins below the Heise Gage. These actions fit the definition of “arbitrary and capricious” because the Director entirely failed to consider important aspects of the problem:

The U.S. Supreme Court gave a useful description of the “arbitrary and capricious” standard in a leading case on federal administrative law:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Idaho Administrative Law: A Primer for Students and Practitioners, Richard Henry Seamon, 51 Idaho L. Rev. 421, 443-44 (2015) (emphasis added).

Despite diversion and other water right information being available to the Department and directly within its purview because of its statutory duties, both IDWR’s position and the

SWC's position is that the *Cities* should have crunched the numbers and presented the data in six short weeks while IDWR has had years to perform the requisite analysis. The Department admitted that it has made no effort to evaluate supplemental ground water use since the *Fourth Methodology Order* was issued over seven years ago. *See* Tr., Vol. 1, p. 197, LL. 9-12. There is no evidence in the record that it has made *any* effort to request information from SWC members regarding patrons or their ground water use to compare the information against ground water rights with places of use that overlap the service areas of the SWC members. In fact, this could be made a requirement of the SWC—the Department already relies on the SWC's legal counsel's assertions by correspondence to establish the annual acreage amounts for each entity; it ought to also require the SWC legal counsel to back out the supplemental ground water acres.¹⁹

It is arbitrary and capricious for the Director to categorize readily available information as “insufficient,” while at the same time make no effort to perform any actual analysis of such data or engage in any effort to gather additional information that could inform the supplemental ground water use analysis, particularly when the Director knows it will have an effect but chooses to do nothing about it: “If and when reliable data is available to the Department, the methodology will be amended to account for the supplemental ground water use.” R. 0040. On remand, the Court should require the Director to either use IDWR data to quantify supplemental ground water acres and update the Methodology Order accordingly, or direct the Department to seek this information from the SWC in its annual statement of irrigated acres.

¹⁹ Had the Director issued the *Fifth Methodology Order* in January of 2023, for example, there may have been adequate time for the *Cities* to seek discovery of this information (which would likely have been challenged by the SWC) to perform necessary analysis. However, because the *Fifth Methodology Order* was issued on April 21, 2023, there was simply insufficient time to gather and analyze this information, a violation of due process, as set forth below.

C. The Court Must Remand the *Sixth Methodology Order* to Correct the Erroneous Inclusion of A&B’s Enlargement Acres as the SWC and IDWR do not Dispute this Error

The Cities argued that the *Sixth Methodology Order* erroneously includes enlargement acres, with junior priority dates, in the irrigated acreage data for A&B Irrigation District. *Opening Brief* at 37-39. IDWR did not refute this argument, admitting that “the Department must further evaluate A&B’s irrigated acre figure” but asserting that “the juniors were not prejudiced” by this error in 2023. *IDWR Response* at 30. The SWC does not refute the Cities’ argument either, merely asserting that the inclusion of the enlargement acres was “harmless error.” *SWC Response* at 25.

Because there is no dispute that the *Sixth Methodology Order* erroneously includes enlargement acres for A&B, the Court must grant the Cities’ requested relief on this issue. *See Opening Brief* at 38-39.

V. TFCC is not Reasonably Efficient

The SWC cites to various operational changes that they say support the Director’s finding that TFCC’s canal system is “reasonably efficient.” *SWC Response* at 26-28. The Cities’ point is that it is peculiar that, despite these operational changes (canal lining, more efficient sprinkler irrigation, etc.), TFCC’s efficiency calculation used in the Methodology Order continues to go down. *See Opening Brief* at 39-42.²⁰ Even assuming TFCC has made all the changes they allege to have made, TFCC also admits that serving various subdivisions throughout its service area is a “challenge” to operating the canal system efficiently. R. 1180, 1202-03; Tr., Vol II, pp. 79-80.

²⁰ SWC asserts that “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.” *SWC Response* at 26 n.22. This is a gross mischaracterization. The Cities have never made this argument; rather, they would expect that TFCC’s overall project efficiency would increase as on-farm efficiencies have increased. TFCC’s project efficiencies, however, have actually declined, *see Opening Brief* at 41, thus the Cities’ argument is essentially that the only logical conclusion is that TFCC’s conveyance efficiencies must be unreasonably low due to, *inter alia*, excessive operational spills.

The proportion of TFCC's acres that are subdivisions versus (potentially) irrigated crop land is unknown because the Cities were denied an opportunity to develop that evidence and the Director failed to ask for that information.²¹ If the project efficiency calculations in the Methodology mean anything, then a decline in efficiency should be cause for the Director to seek more information or—at the very least—provide time for the Cities to develop the evidence in advance of a hearing.

Accordingly, the Cities request that the Court remand the *Sixth Methodology Order* to the Director with instructions to properly evaluate the reasonableness of TFCC's operations vis-à-vis the SWC Delivery Call.

VI. The SWC's and IDWR's Arguments Defending the Director's Use of Transient Modeling to Determine Curtailment Dates Should be Rejected

The SWC defends the Director's decision to use transient modeling simulations to determine the curtailment date necessary to offset the SWC's DS, essentially asserting that this is a "technical decision" that properly protects senior rights from injury. *SWC Response* at 28-30. The SWC points out that, assuming no junior ground water users were allowed to continue pumping under approved mitigation plans notwithstanding a curtailment order, "using a steady state run" to curtail such users would only supply the SWC with approximately 7,000 to 11,000 AF while curtailing under a transient run in 2023 would supply the SWC with the full 75,200 AF of predicted DS. *Id.* at 28-29. The SWC's arguments miss the point and should be rejected.

²¹ Similarly, the Cities had insufficient time to develop more robust evidence that TFCC's operational spills have increased in recent years, hence why Ex. 365 in the record does not distinguish operational spills from other categories of return flows. *See* R. 1598. The SWC asserts that the Cities "erroneously rely" on this exhibit, *SWC Response* at 27 n.24, but not so—the Cities recognize that additional data and analysis is required to determine whether TFCC's operations are reasonably efficient.

As Mr. Sullivan’s opinions describe,²² the ESPAM model has had the capability of running a monthly or half-monthly time step for purposes of transient modeling for over *ten years*. The Director has revised the Methodology Order at least three times during that time frame, yet it was not until the *Fifth Methodology Order* that the Department adopted transient modeling, purportedly out of a concern that SWC otherwise would not receive the predicted DS in the year of shortage. But, in 2023, transient modeling showed that curtailment back to December 30, 1953 would produce the 75,200 AF of predicted DS—at the expense of roughly 700,000 acres of ground water irrigation.²³

Further, in a year in which the predicted DS exceeds 100,000 AF (and using 2018 as the BLY means that in 12 out of 23 years of recent record there would have been over 100,000 AF of predicted DS²⁴) curtailment using transient modeling would not provide the predicted DS even if all ground water rights on the ESPA junior to October 11, 1900—effectively the *entire* ESPA, roughly 941,400 acres—were curtailed. That is because the largest accrual in flows predicted by curtailing under transient modeling is 97,900 AF.²⁵ *Cf. Opening Brief* at 31 n.29.

Using transient modeling to determine a curtailment date is not only inequitable and ultimately ineffective in most years, it is contrary to the Director’s statutory duty to balance the interests of senior and junior users and promote the maximum beneficial use of water connected with the ESPA. *See id.* at 43-45.

IDWR attacks the Cities’ position that transient modeling, supported by the written and oral testimony of Gregory K. Sullivan, results in the threat of curtailment against ground water

²² R. 1544; *see also* Tr., Vol I, pp. 45-48 (IDWR witness Jennifer Sukow explaining that the ESPAM model has been able to run transient simulations since roughly 2013).

²³ *Opening Brief* at 44; R. 1436-37.

²⁴ *Opening Brief* at 30, column entitled “April BLY 2018.”

²⁵ R. 2671, 2764.

users (including the Cities) that are not *causing* the SWC's predicted DS. *IDWR Response* at 36-38. IDWR frames this argument as "Mr. Sullivan's novel theory on causation,"²⁶ and argues that it is mistaken because *all* ground water users within the "ESPA ACGWS" junior to October 11, 1900 are affecting the SWC's DS. *Id.* at 37. IDWR also argues that the Cities' position should be rejected because Sullivan admitted that using steady state modeling would not fully offset the SWC's DS in 2023. *Id.* at 38. But, as described above, using transient modeling to structure curtailment is ineffective in achieving this end in most years, given the Department's adoption of 2018 as the BLY.

Further, the record shows that curtailing ground water users based on steady state modeling is consistent with the fact that the ESPA has been in a state of near- or quasi-equilibrium since roughly 1992, when the Director imposed a moratorium on new uses. *See R. 1429*²⁷; *R. 1543-47*²⁸; *R. 1759*²⁹; *Tr., Vol I*, pp. 111-12.³⁰ The SWC's expert agreed that it is the pumping from wells with priority dates *junior* to the mid-1980s that were depleting the near

²⁶ IDWR seems to imply that the *novelty* of the Cities' causation argument should be weighed against it as if it renders the argument meritless. It is novel, however, at least in part, because the *Fifth Methodology Order* was the first time that the Director began utilizing transient modeling to determine curtailment dates, so there was no reason for the Cities to raise it previously.

²⁷ IDWR presentation by Ms. Sukow stating that "90-99% of the steady state impacts of decades of ground water use are already being realized at the [near Blackfoot to Minidoka] reach."

²⁸ Ex. 347A, 6/5/2023 Updated Expert Report of Gregory K. Sullivan, P.E. on Behalf of the Cities of Pocatello, Idaho Falls, and the Coalition of Cities ("There has been a moratorium against new ground water development in the ESPA without mitigation since 1993. Therefore, all pre-moratorium wells have been pumping for at least 30 years, and most wells for much longer. As a result, the effects of the pumping by pre-moratorium wells on Snake River flows have reached near steady state. . . . [t]he process of determining curtailment dates based on steady-state runs should *continue* to be applied in the Upper Snake River Basin because it will properly assign the obligation for mitigating any computed shortages to the SWC members or the junior ground water users whose current and prior pumping is the cause of the shortage.") (Emphasis in original.)

²⁹ Ex. 505, Description of the IDWR/UI Snake River Plain Aquifer Model (SRPAM), 1999 ("Estimates from [a 1997 IDWR evaluation] represent a projection to near equilibrium conditions (e.g. negligible change in storage) with the level of irrigation development that existed in 1992 (Figure 7).")

³⁰ Q. [By Mr. Bricker] Okay. And you are aware as was asked of Ms. Sukow, that there has been a moratorium on new wells without mitigation since the early '90s; right? A. [By Mr. Colvin] Yes. . . . Q. Would you agree that 90 to 99 percent of pumping impacts on the ESPA have been realized at that particular river reach? A. Approximately, yes.

Blackfoot to Minidoka reach by 75,200 AF in 2023, *not* the wells with priority dates from December 30, 1953, to the mid-1980s. *See* Tr., Vol. I, pp. 111-14.³¹

In sum, the SWC’s and IDWR’s defense of the Director’s decision to switch from using steady state to transient modeling to determine curtailment dates are self-serving and unpersuasive. The record as a whole shows that using transient modeling still does not solve the problem that the SWC and IDWR assign to steady state modeling (it fails to fully offset SWC’s predicted DS if there were no continued pumping under approved mitigation plans) in most years, and using transient modeling results in a massive imbalance in the detriment to junior users compare to the benefit to senior users. Accordingly, the Court should grant the Cities’ requested relief on this issue. *See Opening Brief* at 45.

VII. The Department’s Handling of the *Fifth Methodology Order* Proceedings Violated Due Process

IDWR argues that the Cities “were on notice that the Director sought to make technical changes to the methodology order in August 2022 – ten months prior to the hearing.” *IDWR Response* at 42. The Cities were not “put on notice” about *what would be in the final order* yet the Department seems to suggest that the Cities should have engaged in some kind of evaluations/investigations/analyses in advance of knowing what was in the Fifth Methodology Order. Further, the Director’s announcement of his intention to revise the Methodology Order did not include designation of a contested case or authority to conduct discovery. Without an order to conduct discovery, it isn’t clear how the Cities can access data and information uniquely held by the SWC. How could the Cities know which technical areas to focus on for purposes of

³¹ Q. [By Mr. Bricker] So in other words, the current and prior pumping of wells junior to the mid-1980s is currently depleting the near Blackfoot to Minidoka reach by about 75,200 acre-feet given that slide; right? A. [By Mr. Colvin] That would be the impact on the reach gains there, so, yes. Q. Okay. So if the wells junior to the mid-1980s had not started pumping, there would be an additional 75,200 acre-feet in the river at that reach in 2023; right? A. If they had never started pumping, that would be about the increase in reach gains, yes.

discovery when they didn't have notice of which changes to the Methodology Order the Director would announce—until he announced them in mid-April?

IDWR further argues that since the Cities were able to participate and had “time to secure expert witnesses” and because “all parties were subject to the same timeline” that the Director did not violate the Cities’ due process rights. *Id.* at 42-43. However, IDWR’s claim that the Cities were able to fully participate in “pre-hearing discovery” and to receive a “full and robust opportunity to examine and cross-examine witnesses,” *id.* at 41 n.27, misses the point. Simply participating and being in the “same boat” as every other party does not provide due process. The process that is due must and should be meaningful, which requires enough time for the parties to fully probe the changes made in the *Fifth Methodology Order* and to develop evidence to meet the proper evidentiary standard. Simply, six weeks is not adequate. *Cf. Opening Brief* at 14, 20.

The Director could easily have issued the *Fifth Methodology Order* earlier, say in late February, six weeks after receiving all comments on the proposed changes (*see*, R. 1300-04, 2867-74).³² This timing would have given the parties notice of what was in the new Methodology Order, and thus given them sufficient time prior to the release of the *2023 Steps 1-3 Order* to react with meaningful pre-hearing discovery and motions. Yet, the Director instead took nearly twelve weeks to issue the *Fifth Methodology Order* after receiving comments from his staff and participants in the Technical Work Group. Entering the revised Methodology Order in February would likely even have been adequate on the issues that were a complete surprise: i.e., the switch to using transient modeling.

³² Or even earlier, since the Department’s staff submitted their recommendation on December 23, 2022 (*see* R. 2867), and he had known since at least August of 2022 that he was intending to revise the Order.

Alternatively, the Director could have issued the *Fifth Methodology Order* as a preliminary order, and continued to operate under the *Fourth Methodology Order*. This would have provided adequate time for a period of discovery in advance of the hearing, and afforded the parties an opportunity for a meaningful hearing process.

When you combine the compressed hearing schedule, the limitation on discovery, and the impossibility of the Cities being able to access and analyze information on actual SWC irrigated acreages, supplemental ground water and system efficiencies, the Cities' right to due process was violated. This is an admitted problem by IDWR—for example, after taking a swipe at the Cities for not using publicly available data to develop supplemental ground water acreage for purposes of the hearing (*IDWR Response* at 28 n.23), IDWR quotes Matt Anders saying that such data is inadequate, and that “clear and convincing” evidence would also require talking to individual water users to establish their supplemental ground water acres. *Id.* at 29. This is the same problem the Cities faced with irrigated acres; they did not have the time to develop evidence regarding TFCC's “hardened” acres—not only did the Director deny the Cities enough time to conduct discovery on these issues pre-hearing, he also denied the Cities' request for discovery associated with the *Sixth Methodology Order*. *Cf. Opening Brief* at 15 n.15.

There is a point where the interests of the junior ground water users must be protected and the Director did not do that here, contrary to the requirements of due process. And, without the Court providing its proper oversight as to such process, the Director will continue to ignore the juniors' rights to develop evidence to defend against the curtailment of their real property rights. Accordingly, the Cities request that the Court grant their requested relief regarding due process issues. *Id.* at 48.

VIII. The Director Prejudiced the Cities' Substantial Rights

Both the SWC and IDWR argue that the Director did not prejudice the Cities' substantial rights. *SWC Response* at 38-39; *IDWR Response* at 44-45. The SWC argues that the Cities lack "standing" to argue on behalf of "unknown junior ground water users they are trying to protect." *SWC Response* at 38. The Cities are doing no such thing—they are challenging the flawed changes to Methodology Order that the Director made in 2023 to ensure that *the Cities themselves* are not subject to erroneous administration when their mitigation plan expires or in the event they fail to comply with their existing mitigation plan (because of a lack of storage water to satisfy their obligations) and are subject to curtailment from the SWC delivery call. *Cf. Opening Brief* at 48-49.

IDWR argues that the Cities' argument fails because the Director's orders do not inaccurately predict and determine SWC's DS, *IDWR Response* at 45, even though the Cities demonstrated that the DS prediction in the *2023 Steps 1-3 Order* was off by a magnitude of roughly 200,000 AF for TFCC alone. *Opening Brief* at 28-29. While IDWR attempts to deflect by framing this error as "not meaningful," *IDWR Response* at 21 n.16, this gross over-prediction is one of the many flaws in the Methodology Order that the Cities seek for the Director to correct so that it is not erroneously subject to curtailment in the future.

CONCLUSION

The SWC's and IDWR's response briefs attempt to justify the Director's actions (or inactions) concerning the Methodology Order in 2023, but their justifications are just as erroneous as the Director's actions that resulted in flawed *Fifth/Sixth Methodology Orders*. The Cities therefore request that the Court reject their arguments and remand the *Sixth Methodology Order* to the Director for further proceedings to correct its flaws.

DATED this 22nd day of March, 2024.

MCHUGH BROMLEY, PLLC

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

**HOLDEN KIDWELL HAHN & CRAPO,
PLLC**

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

SOMACH SIMMONS & DUNN, P.C.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2024, I served the foregoing document on the persons below via iCourt unless otherwise indicated:

Clerk of the Court Jerome County District Court 233 West Main Street Jerome, ID 83338	iCourt
Director Mathew Weaver Garrick Baxter Sarah Tschohl Kayleen Richter Idaho Department of Water Resources 322 E Front St. Boise, ID 83720-0098	mathew.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov kayleen.richter@idwr.idaho.gov
John K. Simpson Travis L. Thompson Marten Law LLP P. O. Box 63 Twin Falls, ID 83303-0063	tthompson@martenlaw.com jsimpson@martenlaw.com jnielsen@martenlaw.com
Robert L. Harris Holden, Kidwell PLLC P.O. Box 50130 Idaho Falls, ID 83405	rharris@holdenlegal.com
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318	wkf@pmt.org
Thomas J. Budge Elisheva M. Patterson Racine Olson, PLLP P.O. Box 1391 Pocatello, ID 83204-1391	tj@racineolson.com elisheva@racineolson.com

<p>Skyler C. Johns Nathan M. Olsen Steven L. Taggart Olsen Taggart PLLC P.O. Box 3005 Idaho Falls, ID 83403</p>	<p>sjohns@olsentaggart.com nolsen@olsentaggart.com staggart@olsentaggart.com</p>
<p>Dylan Anderson Dylan Anderson Law P. O. Box 35 Rexburg, ID 83440</p>	<p>dylan@dylanandersonlaw.com</p>



Maximilian C. Bricker (ISB #12283)