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Fourth Judicial District, Ada County
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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

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

vs.

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

Respondents,

and

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

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

Case No. CV01-23-13173

NORTH SIDE CANAL COMPANY, AND
TWIN FALLS CANAL COMPANY

IDAHO GROUND WATER APPROPRIATORS, INC.'S OPENING BRIEF

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

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Idaho Ground Water Appropriators, Inc. ("IGWA"), acting for and on behalf of North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, American Falls-Aberdeen Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District, through counsel, submits this opening brief pursuant to paragraph 9 of the Court's *Procedural Order* dated August 16, 2023, the Court's *Order Granting Unopposed Motion and Order Vacating and Resetting Hearing* dated November 17, 2023, Rule 84(p) of the Idaho Rules of Civil Procedure, and Rule 34 of the Idaho Appellate Rules.

STATEMENT OF THE CASE

I. Nature of the case

This is a petition for judicial review of actions taken by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") in a contested case governed by the Idaho Administrative Procedures Act, Chapter 52, Title 67, Idaho Code ("APA"). The case involves the ongoing Surface Water Coalition[1] (SWC) delivery call. The Director adopted a new methodology that radically changes the way water rights are administered under the call. The process employed by the Director to develop the mew methodology violates due process and the APA. In addition, the Director failed to apply key provisions of the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CM Rules").

II. Procedural History

In January 2005, the SWC petitioned the Director to shut off groundwater diversions from the ESPA so more water will overflow from the ESPA into the Snake River in the American Falls area, upstream from SWC diversions at Minidoka Dam and Milner Dam. After a period of litigation over the constitutionality of the CM Rules, an evidentiary hearing was held in 2008 before former Idaho Supreme Court Chief Justice Gerald F. Schroeder who was appointed hearing officer. On the recommendation of Justice Schroeder, former IDWR Director David R. Tuthill, Jr. developed a formula known as the "methodology" to annually predict material injury to SWC members in accordance with the CM Rules. The methodology was subsequently revised

[1] The SWC consists of seven irrigation entities in the Magic Valley that divert water from the Snake River: 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.

in 2010 (Second Methodology Order), 2015 (Third Methodology Order), and 2016 (Fourth Methodology Order).

In the fall of 2020, IDWR staff members began reviewing and evaluating changes to the Fourth Methodology Order. (Anders, Tr. Vol. I, 170:2-3.) This continued through 2021. *Id*. at 170:4-18. On August 5, 2022, at a status conference involving the SWC delivery call, the Director verbally notified those present that he intended to review the Fourth Methodology Order and consider what changes might be made to improve its functionality. (R. 298; Anders, Tr. Vol. I, 172:7-16.) In September, a Department staff member, Matt Anders, sent an email notifying various individuals that Department staff had been reviewing data used in the Fourth Methodology Order and would be presenting their findings to outside consultants in coming months. (Anders, Tr. Vol. I, 217:4-218:3.) From November 16-December 21, 2022, Department staff held six virtual meetings where they shared new data they had reviewed and various analyses they had conducted. (R. 1176.) On December 23, 2022, Department staff issued a one-page document containing "preliminary recommendations" for changes to the methodology order. The preliminary recommendations address three components of the methodology. (R. 2866.) With respect to the rest, it states: "IDWR will continue to evaluate the integration of these and other techniques into the methodology." *Id*. The document invited outside consultants to submit written comments by January 16, 2023, roughly three weeks later. *Id.*

Outside consultants obviously could not thoroughly analyze in three weeks the complex and voluminous data that Department staff spent more than a year reviewing and analyzing, but since Department staff had presented a one-page summary of "preliminary recommendations," and since the APA required the Director to hold a hearing before amending the Fourth Methodology Order, IGWA's consultant prepared comments that were likewise preliminary in nature, expecting that a full evidentiary record would be developed in a hearing. (R. 316.) This expectation, however, was not realized.

Rather than hold a hearing, the Director worked behind closed doors from late December 2022 through April 2023 to develop the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fifth Methodology Order"), using information that is <u>not</u> in the agency record. The Director issued the Fifth Methodology Order on April 21, 2023. (R. 43.) The Fifth Methodology Order

makes some changes to the methodology that differ wildly from the preliminary recommendation of Department staff, while disregarding other changes recommended by Department staff.

On the same day the Director issued the Fifth Methodology Order, he applied it to the 2023 irrigation season via the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ("April As-Applied Order"). (R. 48-61.) Despite the exceptionally high snowpack in 2023, changes made to the Fifth Methodology Order caused the April As-Applied Order to predict a water supply shortage of 75,200 acre-feet to one member of the SWC: Twin Falls Canal Company ("TFCC"). (R. 50.) The April As-Applied Order requires curtailment of every groundwater right from the ESPA junior to December 30, 1953, stating: "If junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS [Demand Shortfall] of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user." (R. 53.)

Under the Fourth Methodology Order, a predicted demand shortfall of 75,200 acre-feet would have exposed approximately 75,000 acres to curtailment. (Sukow, Tr. Vol. I, 55:9-56:4.) Under the Fifth Methodology Order, it exposed approximately 700,000 acres to curtailment. *Id*. The Director's decision to change the methodology without a prior hearing, making it immediately effective after the 2023 farming season had already begun, induced chaos.

On the same day the Director issued the Fifth Methodology Order and the April As-Applied Order, he set a prehearing conference the following week, on April 28, 2023, and an after-the-fact hearing six weeks later on June 6-10, 2023. (R. 63, 126.) He knew affected water users would want a hearing, though he didn't bother to hold one before issuing the Fifth Methodology Order. It was more convenient, apparently, for the Director to change the methodology on his own, without the benefit of a full evidentiary record, and then let affected water users try and convince him after-the-fact that he got it wrong.

Affected water users filed pre-hearing motions for a continuance and the appointment of an independent hearing officer, but they were denied. (R. 298-304.) The Director set a hearing schedule that gave affected water users a few weeks to complete all discovery, prepare expert reports, file lay and expert witness lists with a summary of anticipated testimony, and file pre-marked exhibits with the Department. (R. 127.) In addition, the Director blocked written discovery and issues orders preventing junior water users from discovering information from the

Department pertaining to policy matters and the Director's deliberative process. (R. 127; 301; 305-06.) Junior water users were given all of five weeks to review, analyze, and contest what the Department spent some 10 months developing, while being denied access to some of the information the Director considered in developing the Fifth Methodology Order.

The after-the-fact hearing was held June 6-9, 2023. The Director issued a *Post-Hearing Order Regarding Amended Methodology Order* ("Post-Hearing Order") and a *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Sixth Methodology Order") on July 19, 2023. (R. 1067-1100; 1004-1053.) The Post-Hearing Order acknowledged one small data error in the Fifth Methodology Order, which was corrected in the Sixth Methodology Order. (R. 1086.) For all practical intents and purposes, the Sixth Methodology Order is identical to the Fifth Methodology Order.

While this brief at times refers to the Fifth Methodology or the Sixth Methodology Order separately, IGWA's position is that both orders must be set aside for the reasons set forth below, and that water rights administration should continue under the Fourth Methodology Order until the Department holds a hearing that affords due process and properly applies the CM Rules. This brief sometimes refers to the Fifth Methodology Order and the Sixth Methodology Order collectively as the Fifth & Sixth Methodology Orders.

III. Statement of Facts

The SWC consists of seven irrigation entities who filed a joint delivery call against groundwater users. The Director evaluates their water needs separately, however, and since the methodology order was first developed in 2010, only Twin Falls Canal Company (TFCC) and American Falls Reservoir District No. 9 (AFRD2) have been found to suffer a water supply shortage. When a water shortage is calculated, it usually affects only TFCC, as was the case in 2023. Therefore, the evidence presented at the after-the-fact hearing focused on the water supplies of TFCC to illustrate problems with the Fifth Methodology Order.

Over the last half century, the amount of water TFCC diverts has remained remarkably steady at around 1.1 million acre-feet annually, as shown in the following graphs:

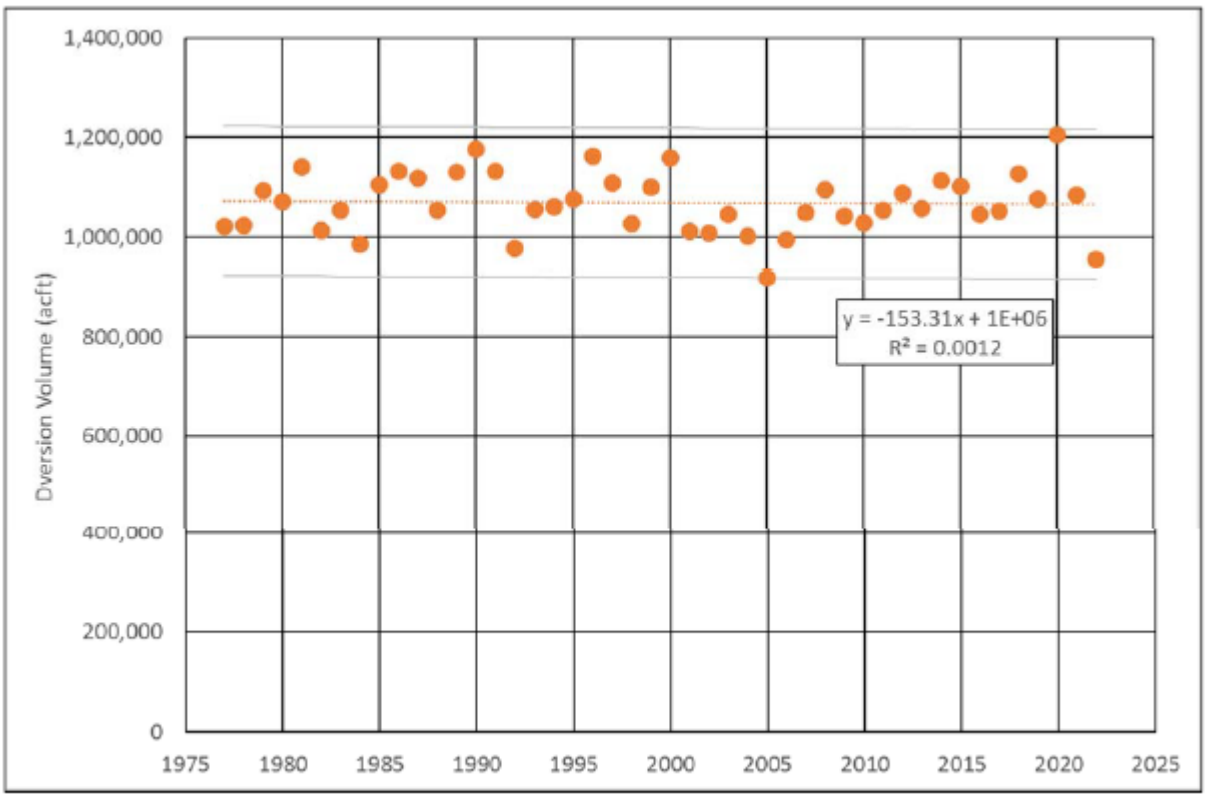
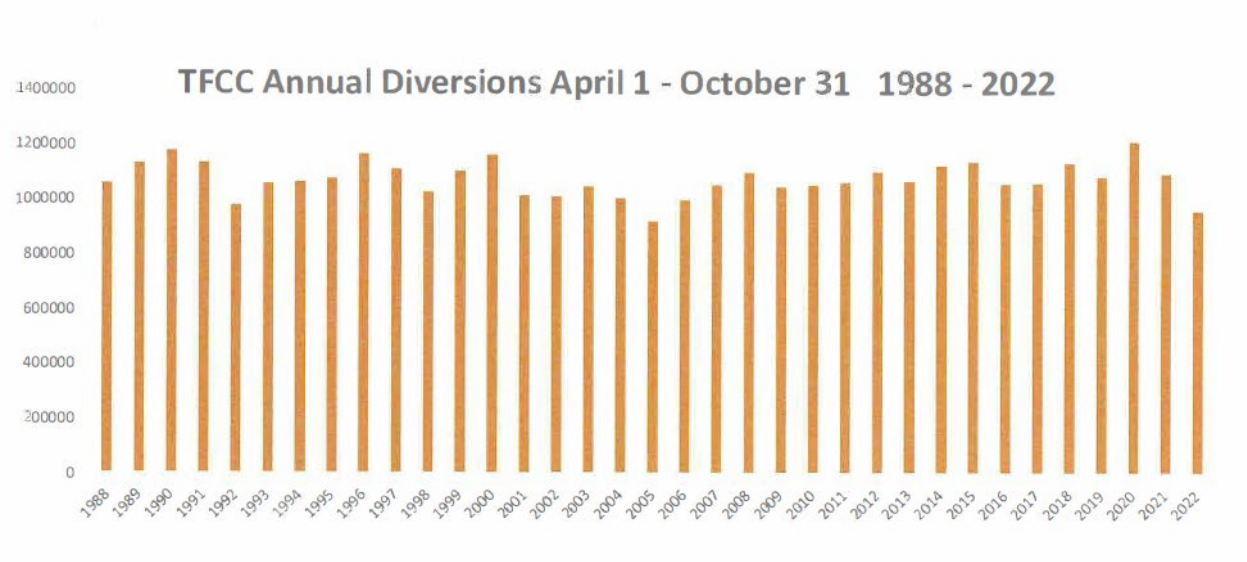


Figure 4. Adjusted annual TFCC diversion data from 1977 through 2022, presented in Table 1.

(R. 1239, Fig. 4.)



(R. 1206; Barolgi, Tr. Vol. II, 308:23-309:2.)

TFCC's longtime consultant, Dr. Charles Brockway, Jr., confirmed that TFCC has a reliable supply of water. (R. 1246.) Declining Snake River reach gains have not generally diminished the water supply available to TFCC because TFCC holds the most senior natural flow

water right downstream of American Falls Reservoir, supplemented by storage. Despite having the most senior natural flow rights, TFCC's storage supplies are modest compared to other SWC members. Ironically, the decline in aquifer storage and Snake River reach gains in the latter part of the twentieth century is due largely to the Winter Water Savings Program which effectively traded aquifer storage (and reach gains) for reservoir storage.

Changes made in the Fifth Methodology Order caused the April As-Applied Order to predict a water supply shortage (a/k/a "demand shortfall") of 75,200 acre-feet to TFCC, or approximately 6-7% of a full water supply. In an effort to increase overflow from the ESPA in the American Falls area by 75,200 acre-feet, the Director ordered curtailment of every groundwater right junior to December 30, 1953. (R. 52.) Absent mitigation, curtailment would have dried up an estimated 700,000 acres of farmland, eliminated beneficial use of roughly 1.6 million acre-feet of water, and left many cities and businesses without water, wreaking havoc on Idaho's economy, with no measurable increase in crop production by TFCC patrons. (R. 2762, 2763; Sukow, Tr. Vol. I, 55:22-56:2 (700,000 acres curtailed); R. 2411 (1,597,439 acre-feet curtailed).) Of the curtailed water use, less than 5% was predicted to accrue to TFCC during the 2023 irrigation season. (Sullivan, Tr. Vol. II, 453:15-21.)

Most of the curtailed groundwater rights are located far enough away from the Snake River that their curtailment would provide little if any additional water to the SWC. As shown in the following table, the April As-Applied Order curtails 20,620 acre-feet of groundwater use between Carey Valley Ground Water District, Henry's Fork Ground Water District, and Madison Ground Water District even though zero additional water would accrue to the SWC in 2023. It curtails an additional 872,402 acre-feet between Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District, compared to a benefit of only 1,178.06 acre-feet to the SWC. Of the total among of curtailed water use in these districts (893,022 acre-feet), only one-tenth of one percent would accrue to the SWC.

GWD	IDWR % of IGWA's proportionate share	IDWR Portion of April 2023 predicted demand shortfall			Transient May - Sept Impact[1]	May - Sept Curtailed Volume[2]	Ratio of Curtailed to Benefit		Jr. to 12/1953[3]	District Total	% of Acres Curtailed	Baseline Volume[4]
	%	AF	%		AF	AF	AF		acres	acres	-	AF
American Falls Aberdeen	33.4%	21,214	28.2%		38,328	313,075	8:1		124,112	149,259	83%	283,815
Bingham	20.9%	13,384	17.8%		27,841	206,552	7:1		105,815	148,799	71%	277,011
Bonneville Jefferson	13.4%	8,469	11.3%		1,085	179,607	166:1		92,471	95,531	97%	158,133
Carey Valley	0.0%	5	0.0%		0.00	6,901	-		-	3,669	-	5,671
Henry's Fork	0.2%	90	0.1%		0.00	13,719	-		-	40,192	-	73,901
Jefferson Clark	10.8%	6,939	9.2%		69.9	247,765	3,547:1		111,792	174,039	64%	445,393
Madison	0.0%	4	0.0%		0.00	w/HF	w/HF		-	64,045	-	78,095
Magic Valley	16.1%	10,277	13.7%		23.1	227,879	9,856:1		99,110	137,466	72%	256,188
North Snake	5.1%	3,262	4.3%		0.06	217,151	3,619,180:1		88,320	101,358	87%	208,795
Sub-Total	100.0%	63,645	84.6%		67,347	1,412,649	21:1		621,620	914,358	68%	1,787,002
SWID	-	-	-		0.02	153,292	7,664,595:1		-	-	-	-
No District	-	-	-		7,373.6	31,498	4:1		-	-	-	-
Grand Total					**74,720.8**	**1,597,439**	**21:1**					

1. Impact broken down by geographic boundary. Some non-members are included in each district. For example, the A&B usage is included in Magic Valley and North Snake GWDs. See accompanying map. Acre-ft rounded to 2 decimal places.
2. Total volume split geographically as described in note 1 from IDWR model input files from Jr12301953 run. Some slight conversion and rounding errors.
3. Acres provided by each district except Carey, Henry's Fork, and Madison. Based on breakdown of combined acres to provide effective acres per water right. 4. Baseline volume taken from 2022 Settlement Report submitted by IGWA to IDWR and the Surface Water Coalition. Represents average usage from 2010-2014.

(R. 2411, Tbl. 3-1.)

As mentioned above, the predicted demand shortfall of 75,200 acre-feet would have resulted in curtailment of water to approximately 75,000 acres of farmland under prior versions of the methodology order, compared to approximately 700,000 acres of farmland under the Fifth Methodology Order. (Sukow, Tr. Vol. I, 55:8-21; R. 1436.) This is the result of a sweeping change in how the ESPA Model is used in the methodology order. Prior methodology orders used a steady-state application of the Model. The Fifth Methodology Order switched to a transient-state application, causing exponentially larger curtailments in response to predicted water shortages. *Id.*

The Department has had the ability to run the Model at either steady-state or transient-state since at least 2013. (Sukow, Tr. Vol. I, 48:9-23.) The preliminary recommendation prepared by Department staff in December of 2022 did not recommend a change from to transient-state, yet that change was made in the Fifth Methodology Order, without explanation. And since the Director prevented the parties from discovering information related to the Director's policy decisions, or from calling Department witnesses to explain the basis for this change, we still don't fully know the reason for it.

Since the principal function of the methodology order is to calculate the amount of water SWC members need to meet irrigation demand, any update to the methodology order should cause it to become more accurate in that regard. At the after-the-fact hearing, outside consultants

identified several ways to improve the accuracy of the methodology order, as discussed below in section 7 this brief, but all were rejected by the Director.

The takeaway from all this is that the Methodology Order is not getting better at meeting the objectives of the CM Rules, it is getting worse. The Fifth Methodology Order will frequently cause complete curtailments of groundwater water use when the SWC is not actually short of water, and it is curtailing large number of groundwater rights even when it will provide no additional water to the SWC. (R. 2394, Tbl. 2-8.) This fundamental failing is lost amid all of the technicalities that caused the Director to change the methodology. It is a case of the proverbial failure to see the forest for the trees.

STANDARD OF REVIEW

Judicial review of the Fifth Methodology Order is governed by the APA. Under the APA, courts are to affirm agency action unless 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 on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right has been prejudiced. Idaho Code § 67-5279(4); *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417 (2001). If the Fifth Methodology Order is not affirmed, it shall be set aside in whole or in part and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

ISSUES ON APPEAL

Procedural errors

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

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

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

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

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

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

Substantive errors

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

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

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

10. Whether the Director violated Idaho law or abused discretion by refusing to consider the public interest in full development of Idaho's water resources in accordance with CM Rules 10.07, 20.03, and 42.01.

Ancillary matters

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

12. Whether the Director is liable for attorney fees under 42 U.S.C. § 1983 for the deprivation of the due process rights.

13. Whether the Director is liable for attorney fees under Idaho Code § 12-117(1) for failing to hold a hearing before issuing the Fifth Methodology Order, failing to apply the futile call doctrine, or committing other errors without a reasonable basis in fact and law.

SUMMARY OF THE ARGUMENT

The Fifth & Sixth Methodology Orders should be set aside for both procedural and substantive errors. Procedural errors include (a) failing to hold a hearing before changing the methodology order, (b) using evidence not contained in the agency record, (c) taking notice of facts *after* the Fifth Methodology Order was issued, (d) denying the motion for an independent hearing officer, (e) blocking junior water users parties from discovering relevant information the Director considered in developing the Fifth Methodology Order, and (f) failing to give junior water users adequate time to conduct a field examination of the number of acres currently irrigated by TFC, then ruling against them because they did not provide proof thereof at the after-the-fact hearing.

The Director also committed several substantive errors, likely due in part to his failure to hold a hearing before issuing the Fifth Methodology Order. Substantive errors include the Director's refusal to (a) use the best science available to calculate SWC water needs, (b) evaluate whether SWC water needs could be met without curtailment by making operational changes or system improvements, (c) apply the futile call doctrine, or (d) consider the public interest in achieving maximum beneficial use of the state's water resources.

Despite clear and undisputed evidence of changes that should be made to improve the accuracy of the Fifth Methodology Order, as well as the Director's failure to apply important CM Rules, the Director refused to make any changes. Of course, making a substantive change would signify that he got it wrong the first time—that he wrongly ordered curtailment. The Director effectively tied his own hands by changing the methodology order and implementing it immediately without first holding a hearing and developing a full evidentiary record.

If the court finds that the Director violated the due process rights of IGWA and its members, the court should award IGWA's attorney fees under 42 U.S.C. § 1983. The court should also award IGWA's attorney fees under Idaho Code § 12-117(1) for committing errors, including failure to apply the futile call doctrine or the principle of maximum beneficial use, without a reasonable basis in fact or law.

ARGUMENT

IV. Procedural Errors

The Director committed several procedural errors in developing and implementing the Fifth Methodology Order, all of which were designed to prejudice junior water users. They were not innocent mistakes either. They were deliberate. And they left junior water users with an abiding belief that adjudicatory proceedings by the Department are neither fair, just, nor unbiased. It is critical that the judiciary correct these errors to restore trust in the Department and the rule of law.

1. The Director violated due process and the APA by failing to hold a hearing before issuing the Fifth Methodology Order.

A fundamental right afforded by the United Stated Constitution is that "No state … shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Under Idaho law, "individual water rights are real property rights which must be afforded the protection of due process." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815-16 (2011).

Due process entitles a property owner to "an opportunity for a hearing before he is deprived of any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). The hearing "must be granted at a meaningful time and in a meaningful manner." *Id*. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). It must be held "*before* [a property owner] is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id*. at 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original)).

Not only must a hearing be held, but the decision-making process must be fair to those persons affected by the decision, as explained by the U.S. Supreme Court:

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

Id. at 80-81. The hearing requirement "is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Id*. at 90, fn 22. "An individual must have an opportunity to confront all the evidence adduced against him, in particular that evidence with which the decisionmaker is familiar." *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982). The hearing "must be provided at a time which allows the person to reasonably be prepared to address the issue." *State v. Doe*, 147 Idaho 542, 546 (Ct. App. 2009).

When a government agency fails to provide due process before issuing an order, the agency should be instructed "to vacate the Final Order … and hold a new hearing that complies with due process." *Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F. Supp. 3d 1216, 1230 (D. Idaho 2018).

To ensure that Idaho agencies afford due process in contested cases, the Idaho legislature enacted the APA which requires state agencies, in the absence of an emergency, to hold a hearing *before* the agency decides the matter. Idaho Code § 67-5242. The purpose of the hearing is "to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary." Idaho Code § 67-5242(3)(a). At the hearing, parties must be given "the opportunity to respond and present evidence and argument on all issues involved," Idaho Code § 67-5242(3)(b), and all findings of fact must be "based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding," Idaho Code § 67-5248(2).

The only time a state agency can take action in a contested case, other than by stipulation of the parties, without first holding a hearing, is "in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action." Idaho Code § 67-5247(1). When emergency action is taken, the order must include a "brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action." Idaho Code § 67-5247(2). In addition, the agency must "proceed as quickly as feasible to complete any proceedings that could be required." Idaho Code § 67-5247(4).

The Idaho Supreme Court has confirmed that in the context of conjunctive management of surface and ground water rights, if there is no emergency a hearing must be held *before* an order is issued. In *American Falls Reservoir District No. 2 vs. Idaho Department of Water Resources* ("*AFRD2*"), the Idaho Supreme Court reversed the district court decision which

would have allowed the Director to make conjunctive management decisions first and hold hearings later. The Supreme Court explained that when it comes to conjunctive management, "[i]t is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts." *AFRD2*, 143 Idaho 862, 875 (2006). In a subsequent case, the Court reprimanded the Director for issuing a curtailment order before holding a hearing, stating: "the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing." *Clear Springs Foods,* 150 Idaho at 815.

Pre-decision hearings are critical to ensure fair and unbiased decisions. There is a huge difference between a decision that is based on a full evidentiary record, where the decision-maker has heard all relevant testimony and considered all relevant evidence before making the decision, and one that is not. After-the-fact hearings are allowed only in emergencies because humans, by nature, do not like to admit mistakes. When a hearing is held after-the-fact, affected parties are tasked with persuading the decision-maker to admit they got it wrong the first time. The deck is stacked against them. The pressure on the decision-maker to not deviate from the initial decision is especially heavy when the decision carries major real-life consequences. To avoid this, due process and the APA require a hearing first, in the absence of an emergency, which did not happen here.

1.1 The Fifth Methodology Order was issued in a contested case, in the absence of an emergency.

The Fifth Methodology Order was issued in what is commonly known as the SWC delivery call case, IDWR Docket No. CM-DC-2010-001. This is a contested case under the APA that has been ongoing since 2005 when the SWC filed its delivery call (IDWR did not begin using docket numbers until 2010). Every iteration of the methodology order has been issued in this case.

The Fifth Methodology Order was not issued in an emergency. The Director told Department staff as early as 2020 that he wanted to review the Fourth Methodology Order and consider making changes. (Anders, Tr. Vol. I, 169:15-170:3.) Department staff began working on this in Fall of 2020, and their work continued through the Fall of 2022, culminating in a one-page letter to the Director dated December 23, 2022, outlining recommended changes to the Fourth Methodology Order. (R. 2866.)

The Director could easily have held a hearing in 2021 or 2022, or even early winter of 2023, ahead of the irrigation season as required by the Idaho Supreme Court ruling *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A&B Irr. Dist*., 155 Idaho 640, 653 (2013): "The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology [provided it] be made available in advance of the applicable irrigation season."). Normal discovery procedures could have been followed, Department staff could have submitted a technical report for review by affected parties, consultants for affected parties could have prepared expert reports, and testimony and exhibits could have been received and considered—all before the methodology order was changed.

If additional time was needed to fully examine the Fourth Methodology Order, additional time was available. The Fourth Methodology Order has been in place since 2016, and there is no reason it could not continue functioning in 2023. The Fourth Methodology Order does not have an end date or require review at prescribed intervals; it merely states: "As more data is gathered and analyzed, the Director will review and refine the process of predicting and evaluating material injury. The methodology will be adjusted if the data supports a change." (R. 1410.)

Ultimately, there was no "situation involving an immediate danger to the public health, safety, or welfare requiring immediate action" to amend the Fourth Methodology Order. Idaho Code § 67-5247(1). Indeed, the Fifth Methodology Order contains no such statement. Thus, the Fifth Methodology Order is, and must be considered, a non-emergency order.

1.2 The Fifth Methodology Order was issued in violation of due process and the APA.

Since there was no emergency, due process and the APA require the Director to hold a hearing prior to issuing the Fifth Methodology Order to assure that "there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary," Idaho Code § 67-5242(3)(a), the parties are given "the opportunity to respond and present evidence and argument on all issues involved," Idaho Code § 67-5242(3)(b), and all findings of fact are "based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding," Idaho Code § 67-5248(2). The Director had ample time to do this. He chose not to. In so doing, he violated due process and the APA.

1.3 The so-called "technical working group" cited by the Director does not satisfy due process or the APA.

The Director claimed he did not need to hold a hearing before issuing the Fifth Methodology Order because Department staff disclosed some of their technical analyses to outside consultants in November-December 2022, which the Director refers to as a "technical working group." The actions of Department staff fall far short of what due process and the APA require.

First, the term "working group" is a misnomer. The term suggests a collaborative process among Department staff and outside consultants; it was limited to Department staff working under the supervision of the Director. (Anders, Tr. Vol. I, 169:15-23.)

Second, outside consultants had no input as to what components of the Fourth Methodology Order would be analyzed and what types of studies would be performed; that was all directed behind the scenes by the Director, who personally reviewed and edited the presentations of Department staff to outside consultants. (Anders, Tr. Vol. I, 173:18-174:8; 176:11-24.)

Third, the "preliminary recommendations" of Department staff did not preview major changes that were made to the Fifth Methodology Order. Department staff published nothing more than a one-page document with conclusory recommendations. (R. 2866.) What's more, IGWA learned in depositions and at the hearing that while this document masquerades as a recommendation from Department staff to the Director, the Director actually reviewed and edited the content of the document before it was shared with consultants of the parties to the contested case. (Anders, Tr. Vol. I, 173:18-174:8.) It was, in effect, the Director's recommendation to himself.

Fourth, the preliminary recommendation document fails to provide any analysis of why certain critical components of the methodology were not modified. For example, the Fifth Methodology Order calculates water demand for TFCC based on the number of acres it reported to the Department as being irrigated in 2013, even though the Department's own subsequent investigation shows that there are more than 15,000 fewer acres that are actually irrigated. (Anders, Tr. Vol. I, 139:15-141:24; R. 1470.) Ordering curtailment to service non-irrigated acres is contrary to law: "[T]he Director has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court

were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority of water be extended only to those using the water." *In Matter of A&B*, 155 Idaho at 652 (emphasis added).

1.4 The after-the-fact hearing does not satisfy due process or the APA.

The Director attempted to cure his intentional violation of due process and the APA by holding an after-the-fact hearing. Yet, this was by no means healing.

First, as explained above, after-the-fact hearings are only allowed in emergency situations, which did not exist here.

Second, the rushed after-the-fact hearing was anything but fair. The process was prejudicial to junior water users for several reasons, including:

- Written interrogatories and requests for production were not permitted. (*Sched. Order and Order Auth. Remote Appear. At Hrg*., May 2, 2023, R. 127.)
- The compressed schedule did not afford adequate time for affected water users to conduct inspections and analyses needed to formulate expert opinions and develop reports addressing the complex issues such as (a) the seven years of additional, voluminous hydrologic and water use data used in the Fifth Methodology Order, (b) revised calculations employed in the Fifth Methodology Order, (c) the large discrepancy between Twin Falls Canal Company's (TFCC) actual irrigated acreage and the acreage used by the Director in the Fifth Methodology Order, (d) the use and availability of supplemental groundwater to TFCC, and (e) increasing diversions and decreasing project efficiency of TFCC in recent years. (R. 316-19; R. 83-84.)
- Greg Sullivan, the sole expert consultant for the Cities, was out of the country from May 17, 2023-June 3, 2023, leaving him unavailable to assist in developing strategy, preparing expert reports, preparing exhibits, and attending depositions. (R. 353.)
- Sophia Sigstedt, an expert consultant for IGWA, was unable to perform all of the work required to properly analyze the Fifth Methodology Order before the June hearing. In addition, she had a medical condition that prevented her from leaving her home state of Colorado until July 10, 2022. (R. 319.)
- Jaxon Higgs, expert consultant for IGWA, was unable to participate in the June hearing due to a previously planned out-of-country trip May 27-June 10, 2023. (R. 312.)
- IGWA was unable to locate a qualified engineering firm that had capacity to analyze the "project efficiency" component of the Fifth Methodology Order by the June hearing.
- The Director blocked the parties from discovering relevant evidence and from calling Department witnesses possession relevant evidence, as explained below.

Junior water users objected to the compressed hearing schedule and requested a continuance. (R. 80-89, 282-93, R.446-51.) The Director could have administered water rights in 2023 under the Fourth Methodology Order, as he had done from 2016-2022, to allow ample time to scrutinize the Fifth Methodology Order, but he refused, instead forcing the parties through a rushed after-the-fact hearing.

Based on the foregoing, this court should set aside the Fifth Methodology Order and the Sixth Methodology Order because they were issued in violation of due process and the APA, and instruct IDWR to "hold a new hearing that compliance with due process." *Citizens Allied*, 335 F. Supp. 3d at 1230.

2. The Director violated the APA by developing the Fifth Methodology Order using evidence not contained in the agency record.

The APA requires that orders issued in contested cases be "based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." Idaho Code § 67-5248(2). The Director did not do this. He instructed Department staff to perform various analyses internally, evaluated them internally, and worked internally to develop the Fifth Methodology Order with no oversight or input from the parties to the contested case. (Anders, Tr. Vol. I, 175:2-176:24.) We still don't know all the information the Director considered because he prohibited the parties from discovering relevant information related to legal and policy decisions that contributed to changes made in the Fifth Methodology Order, as explained below.

As a result of the Director's development of the Fifth Methodology Order using information outside the agency record, this court should set aside the Fifth & Sixth Methodology Orders because they were made upon unlawful procedure and in violation of the APA.

3. The Director violated Department rule of procedure by taking official notice of information *after* the Fifth Methodology Order was issued.

In keeping with the premise that hearings must be held before decisions, and that orders in contested cases must be based exclusively on the agency record, the Department's procedural rule 602 allows the Director to take official notice of agency reports and memoranda, provided that such notice "must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed," and "[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed." IDAPA 37.01.01.602.

After the Fifth Methodology Order was issued, the Director issued the *Notice of Materials Department Witnesses May Rely Upon and Intent to Take Official Notice*, which contains approximately 44 separate documents (PowerPoint presentations, emails, Excel files, and Word documents), which had been used to develop the Fifth Methodology Order. Since this occurred after the Fifth Methodology Order was issued, it was done in violation of rule 602. Therefore, this court should set aside the Fifth & Sixth Methodology Orders because they were made upon unlawful procedure.

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

Idaho Code § 67-5252(1) provides that "any party shall have the right to one (1) disqualification without cause of any person serving or designated to serve as the presiding officer." Shortly after the Fifth Methodology Order was issued, the Coalition of Cities filed a motion for appointment of an independent hearing officer, effectively disqualifying Director Spackman as the presiding officer. (R. 73-79.) The appointment of an independent hearing officer would not have removed Director Spackman from the proceeding entirely, because he would remain in position to review the recommended or preliminary order issued by the presiding officer, but it would have given the parties the benefit of an independent, unbiased finder of fact.

Despite the statutory right to disqualify the Director as the presiding officer, the Director denied the request. (R. 298-304.) Therefore, this court should set aside the Fifth & Sixth Methodology Orders because they were made upon unlawful procedure and in violation of Idaho Code § 67-5252(1).

5. The Director violated due process, acted upon unlawful procedure, and abused discretion by blocking the parties from discovering and presenting relevant evidence.

The APA requires "a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary," and "the opportunity to respond and present evidence and argument on all issues involved," Idaho Code § 67-5242(3) (emphasis added). Toward that end, Department rules of procedure provide that "[e]vidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." IDAPA 37.01.01.600. While the Director is not bound by the Idaho Rules of Evidence, he is not empowered to exclude relevant evidence; Department rules only allow "[t]he presiding officer

[to] exclude evidence that is irrelevant." *Id*. This is consistent with due process which, as noted above, provides that "[a]n individual must have an opportunity to confront all the evidence adduced against him." *Vanelli*, 667 F.2d at 780.

After scheduling the after-the-fact hearing, the Director implemented a scheme to block junior water users from discovering all of the information he considered in developing the Fifth Methodology Order. First, he issued the *Scheduling Order and Order Authorizing Remote Appearance at Hearing* on May 2, 2023, which (i) designates Matt Anders and Jennifer Sukow as the only Department staff members who would be permitted to testify at the hearing, and (ii) limits the topics and data they may discuss to certain technical matters. (R. 126-27.) Second, he issued the *Order Denying the Appointment of an Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* ("Order Limiting Discovery") on May 5, 2023, which limited Mr. Anders and Ms. Sukow's testimony to "facts and information the Department considered in updating the Methodology Order and As-Applied Order," and precludes water users from asking "questions regarding the Director's deliberative process on legal and policy considerations." (R. 301.) Finally, the Director issued the *Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice* ("Order Limiting Evidence") on May 5, 2023, limiting the materials Mr. Anders and Ms. Sukow may rely upon at the hearing and the topics they would be allowed to testify about. (R. 305-06.)

Based on these orders, at the depositions for Ms. Sukow and Mr. Anders held May 10 and 12, 2023, counsel for the Department instructed them to not answer almost 50 questions on the basis that they related to the Director's deliberative process. (R. 165; R. 175.) Among the questions they refused to answer are the following:

- What other documents are responsive to [Deposition Notice] Request No. 1, that show your involvement in the issuance of the Fifth Methodology Order outside of the technical working group documents that you've just described?
- Did you prepare any analysis, memos, those kinds of things that you would have shared?
- Are you aware of any documents, whether or not they were authored by you, that reflect other Department employees' input on the Department's decision to move from the steady state to transit modeling in the Fifth Methodology Order that are not uploaded to the website?
- Was there any discussion about whether or not using the transient model might impact analysis of futile call?

- Did you provide to Mat Weaver any documents relating to the Fifth Methodology Order or the April 2023 As-Applied Order that have not been uploaded to the Department's website?
- Did you participate in any meetings involving Mat Weaver, or meetings with Mat Weaver or the Director involving the Fifth Methodology Order or the April 2023 As-Applied Order?
- How were the comments that Sophia and Greg considered on January 16th, how are those considered in the Department?
- Did you have discussions with any Department staff members about potential use of a trim line?
- Were concepts of reasonable use, futile call, or full economic development ever brought up during your work on the Fifth Methodology Order?

As this list shows, many of the questions that Department staff refused to answer sought information the Director considered in developing the Fifth Methodology Order, not his deliberative process for evaluating information. The Director has no authority under Idaho law to block parties from discovery relevant information by claiming it relates to policy issues or his deliberative process.

Since the topics that Mr. Anders and Ms. Sukow were allowed to discuss do not encompass all of the information the Director considered in developing the Fifth Methodology Order, and do not address all of the issues involved in the Fifth Methodology Order, junior water users served upon the Department an I.R.C.P. 30(b)(6) deposition notice asking to depose Department personnel who can speak to information considered by the Director that goes beyond the topics and data that Mr. Anders and Ms. Sukow were permitted to address under the Order Limiting Evidence and the Order Limiting Discovery. (R. 393-97.) The Department refused to produce deponents in response to the I.R.C.P. 30(b)(6) based on the Director's Order Limiting Evidence and the Order Limiting Discovery.

Thus, the Order Limiting Evidence and the Order Limiting Discovery have been employed to hide information he considered in developing the Fifth Methodology Order.

At the after-the-fact hearing, junior water users attempted to submit emails into evidence that related to policy considerations that went into the Fifth Methodology Order, but the Director promptly shut down that line of questioning. (Tr. Vol. IV, 1029:9-1033:5.) Thus, the Director employed a strategic approach to keep relevant information out of the agency record for review.

The Director claimed authority to hide information by citing rule 521 of the Department's rules of procedure which authorizes the Director to "limit the type and scope of discovery." IDAPA 37.01.01.521. However, this rule must be applied in a manner that is both constitutional and consistent with the APA. *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 241 (2009); *State v. Perkins*, 135 Idaho 17, 22 (Ct. App. 2000). As mentioned above, the APA, due process, and the Department's rules of procedure allow the exclusion of evidence that is irrelevant only. Thus, the Director applied rule 521 in a manner that violates Idaho law.

Therefore, this court should set aside the Fifth & Sixth Methodology Orders because they were made upon unlawful procedure and violate due process and the APA as a result of the Director blocking the parties from discovering and presenting relevant information.

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

Under Idaho law, water users cannot divert more water than they need to accomplish their beneficial use. To do so would be a waste of water, and it is "against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state." *Stickney v. Hanrahan*, 7 Idaho 424, 435 (1900). Accordingly, the Idaho Supreme Court has ruled that:

> no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration.

Washington State Sugar Co. v. Goodrich, 27 Idaho 26 (1915) (internal citation omitted) (aff'd *In Matter of A&B*, 155 Idaho at 650).

A water right license or decree defines the maximum amount of water that may lawfully be diverted under the water right. It does not define the amount needed at a particular time to accomplish the designated beneficial use. *AFRD2*, 143 Idaho at 876-78. Therefore, in a water right delivery call, IDWR must evaluate how much water the senior currently needs. *Id*.

This is part of the material injury determination under the CM Rules. The CM Rules do not authorize the Director to curtail groundwater pumping simply because a senior user is not receiving water at the maximum rate authorized under their water rights. Rather, the senior must

be suffering "material injury" in accordance with CM Rule 42. Among the factors the Director is to consider under CM Rule 42 is "the amount of water being diverted and used compared to the water rights." CM Rule 42.01.e. This requires an evaluation of the number of acres actually being irrigated by the senior, among other factors.

Although the number of irrigated acres is a primary driver of SWC water need, the Director does not carefully examine the number of acres SWC members actually irrigate. Rather, he calculates SWC water demand based on the number of acres the SWC *reports* as being irrigated, without verifying the accuracy of the report, even when IDWR has information that the reported acreage over-states actual irrigated acreage.

To illustrate, TFCC's water rights authorize the irrigation of 196,162 acres. However, this reflects irrigation as of the commencement of the SRBA on November 19, 1987. At the first evidentiary hearing held on the SWC delivery call in 2008, a manual review of the TFCC project revealed a total of 183,589 irrigated acres. (R. 970; R. 2376.) From 2010-2014, the Department calculated material injury for TFCC using this figure. (R. 2376.) However, since 2015 the Department has assumed 194,732 irrigated acres because TFCC has reported that number of acres being irrigated. The Department has never scrutinized this figure, and we learned at the hearing that TFCC does not actually keep track of irrigated acres and cannot verify its irrigated acreage either. (Barlogi, Tr. Vol. II, 321:2-5.)

Recognizing that irrigated acres are an important consideration under the CM Rules, and that a field-level examination of irrigated acres would require coordination with TFCC and take considerable time, IGWA and the Coalition of Cities filed a motion to continue the after-the-fact hearing. (R. 80-89.) Even though it was groundwater users had mitigated any potential injury to the SWC for 2023, the Director denied the motion. (R. 299.) Then, after the hearing was held, the Director ruled that the groundwater users had failed to prove by clear and convincing evidence that TFCC was irrigating less than 194,732 acres, because they had not provide a field-level analysis of actual irrigated acres. (R. 1085.)

It is a violation of fundamental fairness under due process, as well as the requirement under the APA that "there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary," Idaho Code § 67-5242(3)(a), for the Director to implement a hearing schedule that precludes the parties from the discovering relevant evidence.

Therefore, the Fifth & Sixth Methodology Orders should be set aside because they were made upon unlawful procedure and violate due process and the APA.

Substantive Errors

The Director committed several substantive errors in developing and applying the Fifth Methodology Order, all of which relate to the principle of beneficial use. Idaho's prior appropriation doctrine consists of two foundational principles—priority and beneficial use. Priority is the principle that "first in time is first in right." Idaho Code § 42-106. Beneficial use represents "[t]he policy of the law of this State to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502 (1960). These are the "bedrock principles" of the prior appropriation doctrine. *Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res*., 160 Idaho 119, 132 (2016).

The principle of beneficial use exists because Idaho's water is owned by the State "for the purpose of ensuring that it is used for the public benefit." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287 (1997). The interest of the public at large is to see the state's water resources put to maximum beneficial use. This is reflected in the Idaho Constitution which calls for "optimum development of water resources in the public interest." Idaho Const. Art. 15 § 7. It is also reflected in the policy of "full economic development" set forth in Idaho Code § 42-226. "The entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Nettleton*, 98 Idaho at 91.

Priority and beneficial use are sometimes cast as competing principles that must be balanced, but they are not inherently opposed. The principle of priority can be, and historically has been, applied in a manner that maximizes beneficial use of Idaho's water resources.

To illustrate, surface water exists above ground and flows through defined channels—lakes, rivers, canals, ditches. When the surface water supply is inadequate to fill all water rights, the legislature has directed IDWR to apply the prior appropriation doctrine in accordance with Idaho Code § 42-607 by opening and closing headgates to shepherd water from one point of diversion to another based on priority. Application of the prior appropriation doctrine in this manner has maximized development of Idaho's surface water resources.

To maximize beneficial use of groundwater, the Legislature adopted a different framework. Unlike surface water, groundwater exists below ground in undefined spaces.

Groundwater cannot be directed from one water user to another through rivers, canals, and ditches. When groundwater is pumped from a well there is a drawdown of the aquifer around the well. When pumping ceases, the water table around the well rebounds. IDWR cannot shut off a well and direct that water to another well or a particular spring through a defined channel. If Idaho were to apply the prior appropriation doctrine to groundwater by shutting of junior rights any time the groundwater table drops, no matter how small the impact, it would *minimize* beneficial use of Idaho's aquifers by allowing senior users to insist that the groundwater table be kept at peak elevation.

Recognizing that groundwater behaves differently than surface water, the Legislature enacted the Ground Water Act in 1951 to ensure that priority is applied in a manner that maximizes beneficial use of Idaho's aquifers, as stated in Idaho Code 42-226:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

To achieve maximum beneficial use, the Ground Water Act implemented a management framework based on the elevation of the aquifer groundwater table. The Act does not allow holders of senior water rights to insist that the water table be kept at peak elevation. Rather, it allows junior users to draw down the water table so long as they do not withdraw more water than the aquifer can sustain long-term. *Clear Springs Foods*, 150 Idaho at 802 ("… with respect to ground water pumping, the prior appropriation doctrine was modified so that it only protects senior ground water appropriators in the maintenance of reasonable pumping levels in order to obtain full economic development of ground water resources."); Idaho Code §§ 42-233a, 42-233b, 42-237a.g. If groundwater diversions exceed the maximum sustainable yield of the aquifer, priority determines which water rights are curtailed to maintain sustainable groundwater levels. Application of the prior appropriation doctrine in this manner maximizes beneficial use of Idaho's aquifers.

The CM Rules were created to ensure that the prior appropriation doctrine is also applied to conjunctive management in a manner that maximizes beneficial use of Idaho's water

resources. CM Rule 20 sets forth the purposes of the CM Rules. The principle of beneficial use is explicitly incorporated as follows:

> **03. Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.
>
> **05. Exercise of Water Rights.** These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made.
>
> **08. Reasonably Anticipated Average Rate of Future Natural Recharge.** These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge.

These concepts add an element of reasonableness to water right administration decisions by the Department. The Idaho Supreme Court has affirmed the Director's duty to do this, holding that first in time is first and right "is not an absolute rule without exception." *AFRD2*, 143 Idaho at 880.

The public interest in maximizing beneficial use of Idaho's water resources has various applications under the CM Rules, but the Director refused to apply any of them. As explained below, the Director violated Idaho law and abused discretion by (a) failing to use the best science available to calculate SWC water needs, (b) refusing to require senior water users to pursue alternatives to curtailment, (c) refusing to apply the futile call doctrine, and (d) refusing to consider whether curtailment unreasonably impedes the public interest in maximum beneficial use of Idaho's water resources.

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

In applying the CM Rules, the Idaho Supreme Court has instructed the Director to use the "best science available." *Clear Springs Foods*, 150 Idaho at 813.

At the after-the-fact hearing, expert witnesses demonstrated several ways of improving the water supply and water demand calculations in the Fifth Methodology Order, including (a) adjusting the Baseline Year to correlate with hydrologic conditions represented previously by the Baseline Year (R. 2386-88, 2442-45, 969); (b) adjusting the Forecast Supply to account for inflows from other tributary basins (Anders, Tr. Vol. I, 162:9-164:8; R.970); (c) developing an improved regression model to forecast water supply for TFCC (R. 2391-92, R. 2245, 970); (d) using actual irrigated acreage to calculate material injury (R. 2394-95, 970-71); (e) accounting for supplemental groundwater use (R. 972); and (f) developing a method of calculating project efficiency based on real efficiency factors (R. 969-73). The Director refused to accept any of them. He elected to stick by his *less accurate* method of calculating water needs when more accurate methods are available. This effect is excessive curtailment of beneficial use. This is an abuse of discretion as it is contrary to the principle of beneficial use and the Idaho Supreme Court's instruction to use the best science available.

Three of the Director's decisions to use the best science available deserve special mention: (a) his refusal to improve the Forecast Supply calculation to account for all sources of water available to the SWC; (b) his refusal to evaluate actual irrigated acreage of TFCC; and (c) his refusal to evaluate supplemental groundwater use.

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

A key component of the methodology order is the prediction of water supply, referred to in the Fifth Methodology Order as the "Forecast Supply." To calculate the water supply, the Fifth Methodology Order uses Snake River flows on the South Fork at the Heise Gage, but does not account for inflows to the Snake River from several tributaries below Heise including the Portneuf River, Blackfoot River, Willow Creek, and Henry's Fork. (Anders, Tr. Vol. I, 162:9-164:8.) Failure to account for inflows from the Portneuf River, Blackfoot River, and Willow Creek tributaries was especially significant in 2023 because these basins experienced record snowpack. As of April 3, 2023, Willow Springs basin snowpack was 178% of median, the

Blackfoot basin at 186%, and the Portneuf basin at 216% of median snowpack, according to the Idaho NRCS Snotel data. (R. 1599). The Portneuf River experienced significant flooding in 2023, adding much more water to the Snake River than normal, but this was unaccounted for in the Fifth Methodology Order, resulting in the Director predicting less water than was truly available to the SWC. (Anders, Tr. Vol. I, 167:19-168:11.)

7.2 The Director refused to use the best science available to determine the current irrigated acres of TFCC.

As mentioned above, the expedited after-the-fact hearing did not afford adequate time for junior water users to a field level examination of irrigated acres as supplemental groundwater use. Therefore, junior users relied on the Department's "Irrigated Lands" and "METRIC" datasets to demonstrate the number of acres currently irrigated by TFCC. These datasets show that TFCC actually irrigates approximately 15,000 fewer acres than TFCC reports to IDWR as being irrigated. (R. 2381.) The Irrigated Lands and METRIC datasets actually overstate irrigated acreage because they do not remove hardened acres within subdivisions and other developments that are partially irrigated. (Anders, Tr. Vol. I, 140:1:21; Sukow, Tr. Vol., 68:6-13. Still, IDWR staff agreed that these datasets are the best science available and are used in the ESPA Model which is used in the Fifth Methodology Order. (R. 1084-85.)

TFCC's manager admitted at the hearing that TFCC does not irrigate as many acres as it was decree based on practices in 1987. (Barlogi, Tr. Vol. II, 303:23-304:10; R. 1084.) TFCC's expert Charles Brockway Jr. acknowledged this. (R. 1233.) Thus, the clear and convincing standard has been met that TFCC is not irrigating its full decreed acreage. Once this occurs, the Director has a duty to evaluate the number of acres actually currently irrigated.

At the first evidentiary hearing held on the SWC delivery call in 2008, a manual review of the TFCC project revealed a total of 183,589 irrigated acres. (2376.) From 2010-2014, the Department calculated material injury for TFCC based on this figure. *Id*. Since 2015, the Department has assumed 194,732 irrigated acres based on a GIS shapefile that TFCC generated in-house with no collaboration with IDWR or the groundwater users directly affected by the issue. (Shaw, Tr. Vol. IV, 1018:5-14). The TFCC shapefile has never been subject to scrutiny in an evidentiary hearing. At the recent hearing, it was made clear that the 2013 shapefile was created with a broad brush that captured all land that could theoretically be irrigated, including many homes, farmsteads, subdivisions and other lands that are not in fact irrigated. (Shaw, Tr.

Vol. IV, 1015:15-1016:6; R. 1237.) Even more surprising, TFCC general manager Jay Barlogi testified that he did not know how many acres TFCC irrigated. (Barlogi, Tr. Vol. II, 321:2-5.). TFCC does not keep track of how many acres its users have fallowed under CRP and CREP programs, nor how many acres have been hardened by development. (*Id.* at 317:21-318:5; 320:5-19.) Thus, the 2013 TFCC shapefile captures a gross acreage figure that is far greater than actual irrigated acreage within TFCC.

IDWR maintains Irrigated Lands data sets used in the ESPA Model to define irrigated acreage. (Anders, Tr. Vol. I, 142:20-24). At the hearing Mr. Anders was asked:

> Q. Would you agree the Department's hand digitized maps that are created using the irrigated lands dataset process are highly accurate?
>
> A. I think they are highly accurate for the year that they are created for."

Id.

The 2011 Irrigated Lands data set calculated 179,486 irrigated acres for TFCC. (R. 2904.) The 2017 Irrigated Lands data set calculated 180,956 acres. *Id*. The 2021 METRIC data used in ESPAM is also more precise than TFCC's shapefile and shows 179,486 irrigated acres. (R. 2901.) The 2017 and 2021 data sets are more recent than the 2013 shapefile. Ms. Sukow testified that these data sets represent the best science available to determine actual irrigated acreage, and this is the data used in ESPAM for purposes of calculating curtailment under the fifth Methodology Order. (Sukow, Tr. Vol. I, 68:2-69:20.) These datasets consistently show 15,000 fewer irrigated acres than TFCC reports as being irrigated.

Despite being the best science available, Department staff did not use the irrigated acreage figures from Irrigated Lands or METRIC datasets to calculate water demand for TFCC. Matt Anders testified that he declined to use the best science available because he did not believe it satisfies the "clear and convincing" standard of proof. (Anders, Tr. Vol. I, 143:12-25.) This is mistaken. Once a junior proves that a senior is not irrigating the full number of acres, the Department must use the best science available to determine actual irrigated acreage.

The SWC could not verify or defend the 194,732 acre figure that they have been reporting to the Director since 2013. Instead, TFCC's manager and its expert Dr. Brockway, Jr. argued that TFCC has a legal obligation to deliver water to all shares of stock in the company, and the Department should therefore assume that every acre with appurtenant shares is fully irrigated regardless of whether the land is actually irrigated. (R. 1233, ¶ 4; Brockway, Tr. Vol.

IV, 905:11-16.) TFCC's manager asserted that "these subdivisions are entitled to the same share delivery as the agricultural field was prior to development. So the canal company has to be prepared to meet the same demand, even though the area being developed and the actual irrigated acreage is going down." (Barlogi, Tr. Vol. II, 309:20-310:1.) On cross-examination he did not retreat from the position that IDWR should assume that TFCC is irrigating land that is covered in concrete and asphalt:

> Q. So if the irrigated acre [of the subdivision] is half – lets start it this way, if a 40-acre field is taking 5.8 acre-feet of water, the subdivision has contracted that space by half due to hardening of acres, only half of those acres are receiving the same volume of water, which would be 11.86 acre-feet; correct?
>
> A. Yes.

(Barlogi, Tr. Vol. II, 309:20-310:1.) This is directly contrary to the Fifth Methodology finding of fact number 28, which states that "Reasonable in-season demand (RISD) is the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity." (R. 12, ¶ 28 (emphasis added).) And finding of fact number 30, which acknowledges that raw SWC diversions values "will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity." (R. 13, ¶ 30; emphasis added.)

Remarkably, TFCC has done nothing to accurately track irrigated acreage in its surface area. (Barlogi, Tr. Vol. II, 321:2-5.) It does not maintain a map or record book of any type. (Barlogi, Tr. Vol. II, 350:23-951:9; 352:3-7.) TFCC annually reports irrigated acreage to IDWR under Step 1 of the Methodology Order, but there is no data or analysis to support it. *Id*. at 352:3-7. Not because TFCC lacks the ability to maintain an accurate accounting of actual irrigated acres, as other canal companies do, but because it benefits TFCC to not maintain an accurate inventory of irrigated acreage. (Barlogi, Tr. Vol. II, 352:24-353:18.) Because TFCC keeps no record of irrigated acreage, Mr. Barlogi testified that there is "zero percent change in TFCC's irrigated acreage" despite acknowledging the urban development of farmland as the City of Twin Falls grows. (Tr. Vol. II, 346:3-6.) TFCC's position is incredulous, but the Director accepts it.

Importantly, neither IGWA nor other groundwater users have access to TFCC's water delivery data, making it practically impossible for them to analyze actual irrigated acres without the cooperation of TFCC. Thus, TFCC holds all the cards—only they know which fields they

deliver water to, yet they don't keep track of irrigated acreage, because the Director has not required them to verify the number of acres they report as being irrigated.

Evidence presented at the hearing demonstrated that the Director could significantly improve the accuracy and reliability of the methodology order by requiring SWC entities to annually submit an accurate GIS shapefile or other reliable documentation of actual irrigated acreage, to be reviewed by Department staff, as contemplated in by the Department in 2015. (R. 2424.) The Director could also use the most recent Irrigated Lands dataset METRIC dataset to determine actual irrigated acreage of SWC entities, as discussed above.

Since (i) TFCC's 2013 shapefile was relatively imprecise and captures many acres that were not actually irrigated at that time; (ii) the Director has not verified the 194,732 acre figure that TFCC reports, (iii) TFCC does not actually keep track of irrigated acreage and cannot verify that figure, and (iiv) the Director did not give junior water users to opportunity to conduct a field level examination of irrigated acres, the best science available are the Irrigated Lands and METRIC datasets—the same datasets the Department uses in the ESPA Model, which is used in the Fifth Methodology Order. The Director abused his discretion by using outdated acreage data when the Department has newer and more accurate data.

7.3 The Director failed to evaluate whether the water needs of TFCC can be met with supplemental groundwater in accordance with CM Rule 42.01.h.

In evaluating SWC water need, CM Rule 42.01.h instructs the Director to consider "[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells." Many farmers in Magic Valley have groundwater wells with supplemental groundwater rights they can use when surface water supplies are not available. CM Rule 42.01.h requires the Director to consider this when evaluating material injury.

In 2015, Department staff recommended that a procedure be developed for reviewing irrigated land data self-reported by SWC entities and accounting for supplemental groundwater use. (R. 2377.) The recommendation notes: "There was insufficient time for the committee to evaluate [supplemental ground water use]" but that the Department committee recommended reviewing this issue. (R. 2424.) Eight years later, the Fifth Methodology Order states: "At this time, the information submitted or available to the Department is insufficient to determine the

extent of supplemental irrigation on lands within the service areas of SWC entities." (R. 1314). Matt Anders testified that they performed no additional analysis or review to address supplemental ground water use. (Anders, Tr. Vol. I, 197:1-12.)

TFCC's manager and expert consultant Dr. Brockway, Jr. both testified that there is some supplemental groundwater use within TFCC. IGWA does not have the ability to accurately evaluate supplemental groundwater use for the same reason that it cannot accurately evaluate surface water irrigated acres—because TFCC holds the surface water delivery data. Unless the Department requires TFCC to disclose this data or provide a report of supplemental groundwater use, the methodology order will continue to assume there is no supplemental groundwater use and, as a result, overpredict the amount of water actually needed by the SWC. (Anders, Tr. Vol. I, 197:13-198:18; Brockway, Tr. Vol. IV, 944:4-945:24.)

The Department has a database used in the ESPA Model that assigns a groundwater fraction to mixed-source lands. (Sukow, Tr. Vol. I, 69:21-70:6.) As of today, this is the best science and data available to document supplemental groundwater use. The Director must utilize this data when calculating material injury, until better science becomes available.

Since undisputed evidence shows that TFCC patrons have supplemental groundwater rights that can be used to meet their water needs, the Director abused discretion by refusing to take this into account.

8. The Director violated Idaho law and abused discretion by failing to evaluate whether SWC water needs could be met without curtailment by making system improvements in accordance with CM Rules 40.03, 42.01.a, 42.01.g, and 42.01.h.

Given that large disparity between the amount of groundwater use must be curtailed to provide a comparatively small benefit to senior surface users, the CM Rules require senior water users to make all reasonable efforts to meet their water needs with their existing supplies before looking to curtail junior water users. CM Rule 40.03 states:

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

CM Rule 42.01 similarly provides that the determination of material injury includes consideration of whether the senior user is "using water efficiently and without waste," and then lists several factors the Director may consider in making that determination, including "[t]he amount of water available in the source from which the water right is diverted" (CM Rule 42.01.a), "[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices" (CM Rule 42.01.g), and "[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells" (CM Rule 42.01.h).

The requirement that senior water users take reasonable measures to meet their water needs with existing water supplies before looking to curtail juniors is grounded in the public interest in achieving maximum beneficial use of Idaho's water resources. The first section of Idaho's water code reads:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.

Idaho Code § 42-101. More than a century ago, the Idaho Supreme Court affirmed the obligation to use water efficiently:

> A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.

Washington State Sugar Co., 27 Idaho 26 (internal citation omitted). This concept has been reaffirmed many times since. Recently, in a case involving conjunctive management of the ESPA, the Court held that "[j]ust apportionment to, and economical use by, those who have appropriated water for a beneficial use furthers the important governmental interest of securing the maximum use and benefit of Idaho's scarce water resources." *Clear Springs Foods*, 150 Idaho at 815.

When the SWC challenged the constitutionality of the CM Rules in the *AFRD2* case, they argued that it undermined their decreed water rights for the Director to evaluate, in response to a delivery call, their current water needs and whether those needs can be met with available water supplies before seeking to curtail junior users. *AFRD2*, 143 Idaho at 876-78. The Idaho Supreme Court disagreed, holding instead that "water rights adjudications neither address, nor answer, the questions presented in delivery calls," that there "may be some post-adjudication factors which are relevant to the determination of how much water is actually needed," and that IDWR may properly evaluate the senior user's "system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion." *AFRD2*, 143 Idaho at 876-878. The Court subsequently upheld the obligation of a senior user "to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from junior users." *In Matter of A&B*, 153 Idaho at 513-515.

Requiring senior users to take reasonable actions to meet their water needs with available water supplies before seeking to curtail junior users will often avoid the need for curtailment, thereby securing maximum use of Idaho's water resources. However, the Director refused to require TFCC or other members of the SWC to make any effort to meet their water needs with existing supplies. The Director could have required them to submit information containing the number of acres currently irrigated, all sources of water available to meet their demand, the amount of water that discharges out the end of their canal system, and a description of operational changes and system improvements that could be made to meet their water needs with existing water supplies, then evaluate whether reasonable measures are available to meet water needs with existing supplies. However, the Director refuses to do so. Instead, the Director jumps immediately from a calculated water supply shortage to curtailment.

As a result, Idaho is not maximizing beneficial use of its resources. Rather than find a way to meet TFCC's water demands with 93% of a full supply, the Department has deemed it more prudent to impose mass curtailment and the economic and social devastation that would result.

The Director's failure to require the SWC to take reasonable actions to meet their water needs with available water supplies before seeking to curtail junior users is an abuse of discretion.

9. The Director violated Idaho law and abused discretion by refusing to apply the futile call doctrine in accordance with CM Rules 10.08 and 20.04.

One reason curtailment is so excessive under the Fifth Methodology Order is because the Director refused to apply the futile call doctrine. The principle of beneficial use precludes IDWR from curtailing a junior user if it will not result in additional water reaching the senior when the senior needs it, because it would be a "futile call." The Idaho Supreme Court has explained:

> if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Sylte v. Idaho Dep't of Water Res., 165 Idaho 238, 245 (2019) (quoting *Gilbert v. Smith*, 97 Idaho 735, 739 (1976)). This court has held that the futile call doctrine is "a well established part of the prior appropriation doctrine." Order on Pet. for Jud. Rev. at 21, *Clear Springs Foods, Inc. v. Spackman*, No. 2008-0000444 (Gooding Cnty. Dist. Ct., Idaho, June 19, 2009).

The futile call doctrine is incorporated explicitly into the CM Rules, which define a "futile call" as "[a] delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource." CM Rule 10.07. CM Rule 20.04 states: "The principle of the futile call applies to the distribution of water under these rules," and "a call may be denied under the futile call doctrine."

At the after-the-fact hearing, testimony confirmed that IDWR regularly applies the doctrine as between surface water users. IDWR watermaster Tony Olenichak testified that the doctrine is applied every year in Water District 1 when the tributaries to the main stem of the Teton River lose their surface water connection. (Tr. Vol. III, 799:3-800:4.) He explained that if shutting off diversions on a tributary stream does not cause surface water to reach the main stem within 3-5 days, the futile call doctrine takes effect and junior users are allowed to divert water out of priority. (Tr. Vol. III, 801:6-15.) Mr. Olenichak explained that the reason tributaries in the Teton Basin lose a surface water connection is because the surface flow in the tributary streams sinks into the ground through gravelly soils. This water flows underground in the shallow aquifer

until it daylights via springs along the main stem of the Teton River. (Tr. Vol. III, 801-18-802:9.) Despite the subsurface connection, IDWR deems curtailment futile. (R. 1092.)

As a minimum, the futile call doctrine must be applied to the SWC delivery call to preclude curtailment of groundwater rights for whom curtailment would provide no additional water to the SWC by the Time of Need. However, the doctrine has historically not been so strict. By definition, it also includes circumstances where curtailment would be wasteful.

Undisputed evidence at the hearing shows that curtailment of groundwater pumping within Carey Valley Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District will provide zero no additional water to the SWC at the Time of Need, and curtailment of groundwater pumping within North Snake Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, and Bonneville-Jefferson Ground Water District will provide essentially no additional water to the SWC when compared to the magnitude of curtailment within those districts. (R. 2411.)

Notwithstanding, the Director refused to apply the futile call doctrine, giving no explanation why. While conjunctive management certainly requires some exercise of discretion by the Director, that discretion is not so broad as to allow the Director to utterly ignore established Idaho law and his own rules. Therefore, the Fifth & Sixth Methodology Orders should be set aside as a result of the Director's failure to apply the futile call doctrine.

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

The Idaho Supreme Court has ruled that "water rights must be exercised with some regard to the public and necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *AFRD2*, 143 Idaho at 880 (internal quotes omitted). This concept was first applied in 1907 when a senior user sought to control an entire stream even though he beneficially used only a portion of it. *Van Camp v. Emery*, 13 Idaho 202 (1907). The Idaho Supreme Court refused to allow priority to be exercised in that manner, explaining:

> In this arid country where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home-building, it will not do to say that a stream may be dammed so as to cause sub-irrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper application.

Id. at 208.

It was again applied in 1910 to accommodate development of the Twin Falls Canal and the Northside Canal. In that case, *Schodde v. Twin Falls Land & Water Company*, a senior user had constructed 11 water wheels to divert water from the Snake River to irrigate 430 acres—a large investment in those days. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912). Twin Falls Land & Water Company sought to construct the Twin Falls Canal and the North Side Canal to bring irrigation water to more than a hundred thousand acres in the Magic Valley, but this would require damming the Snake River which would render the senior's water wheels inoperable and eliminate the senior's ability to divert water. Despite the injury to the senior user, the court allowed development of the junior rights because preserving the senior's use would unreasonably impede full development of Idaho's water resources. The court reasoned:

> Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land 100 inches, can he then object to those above him and appropriating the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation.

Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 119 (1912).

The *Schodde* decision underpins the Ground Water Act and its policy of "full economic development of underground water resources," discussed above. Idaho Code § 42-226. The Act was once challenged on the basis it violated the prior appropriation doctrine, but the Idaho Supreme Court upheld the Act, finding it to be "consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Baker v. Ore-Ida Foods, Inc*, 95 Idaho 575, 584 (1973).

What makes conjunctive management so vexing is the large amount of beneficial use of groundwater that must be curtailed to supply a relatively small amount of additional surface water to senior users. This is much different than surface water administration where the senior water user receives all of the water that would have otherwise been diverted by the junior. The principle of maximum beneficial use starkly germane to conjunctive management.

The CM Rules explicitly incorporate the principle of maximum beneficial use, stating: "An appropriator is not entitled to command the entirety of large volumes of water in a surface

or ground water source to support his appropriation contrary to the public policy of reasonable use of water." CM Rule 20.03. This rule was tested when the SWC challenged the constitutionality of the CM Rules, but it was upheld, with the Idaho Supreme Court explaining that "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication," *AFRD2*, 143 Idaho at 877, and "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *Id.* at 880. As stated by former Idaho Supreme Court Justice Gerald Schroeder: "The Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens." Opinion Constituting Finds of Fact, Conclusions of Law and Recommendations, at 39, *A & B Irr. Dist. v. Idaho Dep't of Water Res*., No. 2008-0000551 (Gooding Ctny. Dist. Ct., Idaho, Oct. 10, 2008).

As recent as 2016, the Idaho Supreme Court upheld the Director's authority to decline curtailment "based on the policy of beneficial use." *Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 129 (2016). In that decision, the court explained that (i) "the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy of Idaho," (ii) "The policy of beneficial use serv[es] as a limit on the prior appropriation doctrine," (iii) "Idaho law contemplates a balance between the 'bedrock principles' of priority of right and beneficial use," and (iv) the director of IDWR must "determine in a delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller." *Id*. at 131-132.

Ironically, were it not for the ruling in *Schodde* that a senior cannot exercise priority in a way that blocks full development of Idaho's water resources, TFCC and NSCC would not exist. Now that the shoe is on the other foot, they have persuaded the Director to curtail groundwater rights, even if it would provide them with no additional water.

There is one important distinction between the circumstances in *Schodde* and the circumstances here. In *Schodde*, the senior was completely deprived of his water right by the junior diversions of TFCC and NSCC. By contrast, the development of more than a million acres

of farmland with groundwater has had a comparatively small impact on TFCC's water supplies. As explained above, TFCC's diversions have remained steady over the last half century. In all but four of the last 46 years, TFCC's annual diversion volume has stayed within 75,000 acre-feet, or seven percent, of average. Even in the most extreme drought year, TFCC's diversion volume was within 14 percent, of average. (R. 1238-39.) Curtailment of hundreds of thousands of acres of groundwater irrigated farmland will do no more than increase TFCC's water supply by a few percentage points.

If the principle of maximum beneficial use does not apply here, where the senior seeks to curtail 10 or 100 times more water than it needs for a full water supply, where TFCC will receive nearly full supply of water without curtailment, and where a shortfall can almost certainly be remedied through more efficient water conveyance and usage practices, then the principle might as well be written out of Idaho law.

As with the futile call doctrine, the Director simply refused to apply the principle of maximum beneficial use. His failure was an abuse of discretion.

Ancillary Matters

If the court finds that the Director erred in one or more ways described above, the court should find that such error(s) violated the substantial rights of junior water users, and award IGWA's attorney fees, as described below.

11. The errors cited above violate substantial rights of junior-priority water users.

Water rights are real property rights. *Clear Springs Foods*, 150 Idaho at 797 (quoting *Olson v. Idaho Dep't of Water Res.*, 105 Idaho 98, 101; Idaho Code § 55-101). Real property rights are, as a matter of law, substantial rights. *Id*. The procedural errors described above violate the substantial rights of IGWA and its patrons because they deprived due process. The substantive errors described above violate the substantial rights of IGWA and its patrons because they generate larger and more frequent curtailments.

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

The impact of the due process violations consciously perpetrated by the Director cannot be understated. It did more than violate IGWA's substantial rights, it undermined the institutional trust that all junior water users once placed in the Department of Water Resources.

A message must be sent demonstrating that transparent, fair treatment is the hallmark of our institutions, accordingly, IGWA request this Court grant attorneys' fees pursuant to 42 U.S.C. § 1983 if the Director was found to have deprived IGWA of its rights and privileges under the Idaho Constitution and law. Alternatively, the Director is liable for attorneys fees pursuant to Idaho Code § 42-117(1) for failing to hold a hearing before issuing the Fifth Methodology Order, issuing the Fifth Methodology Order in the absence of an emergency and after the applicable irrigation season had begun, for failing to apply the futile call doctrine subjecting almost every ground water right subject to curtailment in half the years, and finally for implementing the Fifth Methodology Order without a reasonable basis in fact or law. The Director is liable for attorney fees under Idaho Code § 42-117(1) for failing to hold a hearing before issuing the Fifth Methodology Order, and failing to apply the futile call doctrine, without a reasonable basis in fact or law.

CONCLUSION

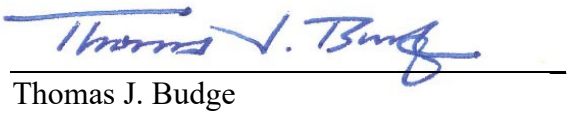
For the reasons set forth above, IGWA respectfully requests that this Court set aside the Fifth & Sixth Methodology Orders and remand this case to the Director with instructions to (1) apply the Fourth Methodology Order until a proper evidentiary hearing is held that complies with due process and the APA, and (2) use the best science available in the methodology order.

RESPECTFULLY SUBMITTED this 8th day of December, 2023.

THOMAS J. BUDGE
Attorney for Petitioner-IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2023, I filed the foregoing document and served it upon the persons below via iCourt:



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