

MAY 31 2024

TRENT TRIPPLE, Clerk
By ERIC ROWELL
DEPUTY

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

IDAHO GROUNDWATER)
APPROPRIATORS, INC.,)

Petitioner,)

vs.)

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

Respondents,)

and)

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

Intervenors.)

_____)

Case No. CV01-23-13173

**MEMORANDUM DECISION
AND ORDER**

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

I.

BACKGROUND

A. Delivery call.

The Surface Water Coalition is comprised of irrigators.¹ Each year, they use a combination of natural flow water from the Snake River and storage water held in reservoirs to water their fields. Their diversion of both sources of water is done pursuant to water rights. In 2005, members of the Coalition initiated a delivery call with the Director of the Idaho Department of Water Resources. The call seeks curtailment of junior priority ground water rights that divert from the Eastern Snake Plain Aquifer (“Aquifer”). It asserts surface and ground waters in the Snake River Basin are hydraulically connected. Further, that the Aquifer discharges to the Snake River via tributary springs and that junior ground water pumping on the Aquifer has decreased natural flows in the Snake River. The Coalition asserts injury to both its natural flow and storage water rights. The Director issued an order on May 2, 2005, finding that junior ground water diversions from the Aquifer were materially injuring the Coalition’s natural flow and storage rights. Since that time, the delivery call has been ongoing in nature. It has required yearly evaluation by the Director as to whether junior ground water pumping is causing material injury to the Coalition’s senior rights.

Beginning in 2010, the Director began using procedures set forth in his methodology order to conduct his yearly evaluation. The methodology order contains a series of steps to be

¹ The term “Surface Water Coalition” refers collectively to the 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. The term “Coalition” as used herein refers to the Surface Water Coalition.

undertaken annually through which the Director determines whether the Coalition's water rights are suffering material injury. If so, the Director will order the curtailment of junior rights unless he finds junior right holders can mitigate the material injury through an approved mitigation plan.

The First Methodology Order was issued on April 7, 2010, and was amended on June 16, 2010. The Second Methodology Order was issued on June 23, 2010. Various petitions seeking judicial review of that Order were filed with this Court in Gooding County Case No. CV-2010-382 ("382 Case"). The Court entered its decision on September 26, 2014, affirming the Second Methodology Order in part and setting it aside and remanding in part. Various parties appealed the Court's decision, but the notices of appeal were withdrawn before the Idaho Supreme Court undertook its review.

In response to the Court's decision in the 382 Case, the Director issued the Third Methodology Order on April 17, 2015. No appeal was taken from that Order. The Fourth Methodology Order was issued on April 19, 2016. In summary, it:

- (1) explained how the Director would determine material injury to storage and natural flow water rights of members of the Surface Water Coalition ("SWC");
- (2) established methods for quantifying material injury to SWC storage and natural flow water rights as predictive and actual demand shortfalls;
- (3) established methods for quantifying mitigation obligations by holders of junior priority ground water rights for shortfalls in predictive and actual SWC water demands; and
- (4) established a method for determining a priority date for curtailment if mitigation obligations are not satisfied.

R., 1. The Order recognized the methodology set forth therein may need to be adjusted from time to time:

Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director's predictions of material injury to RISD and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director's professional judgment as the manager of the State's water resources. Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. 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. No appeal was taken from the Fourth Methodology Order.

B. Fifth Methodology Order.

In August 2022, the Director issued a directive to Department staff to convene a committee of experts to review and provide comments on potential technical changes to the Fourth Methodology Order. R., 2866. The Department created a technical working group composed of Department staff, experts representing the parties to the Surface Water Coalition delivery call and other interested persons and entities. R., 2866. The technical work group held meetings on November 16, 17, 28 and December 1, 9, and 14, 2022. R., 1176. On December 23, 2022, the Department issued a summary of preliminary technical revisions to the Fourth Methodology Order:

Based on the information presented at the meetings and distributed to the technical working group, IDWR staff have the following preliminary technical recommendations:

- Update the Baseline Year (BLY) irrigation demand used to determine reasonable in-season demand from the current average of diversion demands for the 2006, 2008, and 2012 irrigation seasons to the diversion demand for the 2018 irrigation season.
- Update the BLY irrigation demand used to determine reasonable carryover for each SWC member from the current average of the diversion demands for the 2006, 2008, and 2012 irrigation seasons to the diversion demand for the 2018 irrigation season.
- Update the project efficiency value used to calculate monthly reasonable in-season demand from a rolling average of the previous eight years to a rolling average of the previous fifteen years.

At this time, staff do not have recommendations on utilizing near real time METRIC for determining crop water need, updating April and July regressions to improve their predictive power for natural flow supply, or using transient model simulation for determining curtailment priority dates. IDWR will continue to evaluate the integration of these and other techniques into the methodology.

R., 2866. The summary requested written comments on the recommendations be submitted to the Department by January 16, 2023. R., 2866. Various comments were submitted. R., 1300,

2867, & 2879. These included comments from Lynker Technologies on behalf of the Idaho Ground Water Appropriators, Inc. (“IGWA”) and Spronk Water Engineers, Inc. on behalf of the Coalition of Cities² and City of Pocatello. R., 1300, 2867, & 2879.

On April 21, 2023, the Director issued the Fifth Methodology Order. R., 1. The Fifth Methodology Order updated the baseline year used to determine reasonable in-season demand. R., 11-12. Previously this metric was determined from the average diversion demands for the 2005, 2008, and 2012 irrigation seasons. The Fifth Methodology Order replaced that with the diversion demand for the 2018 irrigation season.³ R., 11-12. It also switched to transient-state simulations of the Eastern Snake Plan Aquifer Model (“ESPAM”) when determining curtailment priority date. This replaced the steady-state simulations previously used.⁴ R., 29-31. The stated purpose of the Fifth Methodology Order is to update the methodology to use the best available science and information:

Many of the data sets the Department relied upon in the Fourth Methodology Order have been expanded and now include additional years. Furthermore, the Department now has multiple years of experience with the methodology to better understand the impact of applying steady-state modeling versus transient modeling to determine a curtailment priority date that would supply adequate water to the senior water right holders. The first version of the ESPA groundwater flow model was not calibrated at a time-scale that supported in-season transient modeling. In contrast, the current version was calibrated using monthly stress periods and half-month time steps, a refinement that facilitates in-season transient modeling for calculating the response to curtailment of groundwater use. The purpose of this *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”) is to update the Director’s methodology for determining material injury to storage and natural flow water rights either held by or committed to members of the SWC consistent with the Director’s ongoing obligation to use the best available science and information.

² The term “Coalition of Cities” refers collectively to the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

³ A baseline year is “a year or average of years when irrigation demand represents conditions that can predict need in the current year of irrigation at the start of the irrigation seasons.” R., 3. The purpose of predicting need is to estimate material injury. R., 3.

⁴ The ESPAM “simulates the effects of the reduction in aquifer stress and calculates predicted increases in aquifer discharge to the Snake River resulting from the curtailment of ground water pumping from the ESPA.” R., 29-30. ESPAM simulations can be either steady-state or transient. R., 30. Steady-state simulations predict long-term responses resulting from continuous curtailment of groundwater priorities used at a consistent rate over a long period of time. R., 31. Transient simulations predict responses resulting from the short-term curtailment of priorities. R., 31. Prior to 2010, ESPAM did not have the capability to run transient simulations.

R., 2. Ultimately, the Fifth Methodology Order sets forth nine steps to be undertaken annually to administer water rights under the ongoing Surface Water Coalition delivery call. R., 39-43.

C. 2023 As-Applied Order.

The Director issued his Final Order Regarding April 2023 Forecast Supply (“As-Applied Order”) contemporaneously with the Fifth Methodology Order. R., 48. The As-Applied Order applies the first three steps of the Fifth Methodology Order to 2023. R., 48. For 2023, the Director predicted an in-season demand shortfall to the Surface Water Coalition of 75,200 acre-feet. R., 53. The Director ran ESPAM 2.2 to predict the junior priority water rights within the area of common ground water supply that must be curtailed to produce the volume of water equal to the predicted demand shortfall. R., 51. He found ground water rights bearing priority dates later than December 30, 1953, must be curtailed to produce that volume of water. R., 51. However, the Director did not curtail any junior water rights at that time. R., 53. Rather, he allowed junior users the opportunity to show they could mitigate the material injury through an approved mitigation plan to avoid curtailment:

The Director predicts an in-season DS of 75,200 acre-feet. On or before May 5, 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan. If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS 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 (emphasis added).

D. Idaho Code § 42-1701A(3) hearing and Sixth Methodology Order.

The Director anticipated that various persons or entities would request a hearing in response to the Fifth Methodology Order and/or the As-Applied Order under Idaho Code § 42-1701A(3). R., 62. Finding time to be of the essence, the Director set an Idaho Code § 42-1701A(3) hearing on the Orders rather than wait for written notice of such a request. R., 62. The hearing was set for June 6-10, 2023. R., 62. He also set a prehearing conference and issued

an Order authorizing discovery. R., 63-64. The notices of hearing and prehearing conference, as well as the discovery order, were issued on April 21, 2023.⁵ R., 62-64.

On April 28, 2023, the Cities moved the Director to continue the hearing until “December 2023 or January 2024.”⁶ R., 80. The Cities also moved the Director to appoint an independent hearing officer to preside over the hearing. R., 70. The Director denied both requests via an order on May 5, 2023. R., 298. He also subsequently denied the Cities’ motion for reconsideration of his denial of the motion for continuance. R., 425.

Meanwhile, on May 19, 2023, the Cities and McCain Foods USA, Inc. filed a Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus before this Court in Ada County Case CV01-23-8258. The Complaint sought a writ restraining the Director from conducting the administrative hearing scheduled to commence on June 6, 2023. Also on May 19, 2023, IGWA, Bingham Ground Water District, and Bonneville-Jefferson Ground Water District filed a Petition for Judicial Review with this Court in Ada County Case CV01-23-8187. Along with the Petition, the petitioners filed a Motion for Stay, Motion to Compel, Motion for Injunctive Relief, Motion for Order to Show Cause, and Motion for Expedited Decision. Cumulatively, the Motions requested that the Court stay implementation of the Fifth Methodology Order and vacate and continue the administrative hearing set to commence on June 6, 2023. Following a hearing on June 1, 2023, the Court orally denied the relief requested in both cases.

The administrative hearing proceeded before the Director as scheduled. It commenced on June 6, 2023, and concluded on June 9, 2023. Following post-hearing briefing, the Director issued the Sixth Methodology Order on July 19, 2023. R., 1004. The stated purpose of the Sixth Methodology Order is to “correct data in the Fifth Methodology Order found to be in error during the June 6, Hearing.” R., 1005. It also edited “a few other non-substantive matters in the Fifth Methodology Order.” As with the Fifth Methodology Order, the Sixth sets forth nine steps to be undertaken annually to administer water right under the ongoing Surface Water Coalition delivery call. R., 1044-1048. The nine steps set forth in the Sixth Methodology Order are

⁵ Additionally, several parties subsequently filed petitions requesting an Idaho Code §42-1701A(3) hearing. R., 68, 90, 135, 263.

⁶ The term “the Cities” refers collectively to the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, Wendell, Pocatello, and Idaho Falls.

incorporated herein by reference. R., 39-43. Like the Fifth, the Sixth Methodology Order uses the diversion demand for the 2018 irrigation season as the baseline year for irrigation demand. R., 1016, 1039. It also uses transient-state simulations of the Eastern Snake Plan Aquifer Model (“ESPAM”) when determining curtailment priority date. R., 1036, 1041.

IGWA subsequently filed a Petition seeking judicial review of the following eight orders issued by the Director: (1) Fifth Methodology Order; (2) 2023 As-Applied Order; (3) Scheduling Order and Order Authorizing Remote Appearance at hearing; (4) Order Denying the Cities Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Deposition; (5) Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice; (6) Post-Hearing Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover; (7) Sixth Methodology Order; and (8) Order Revising April 23, Forecast Supply and Amending Curtailment Order. IGWA’s Petition asserts the Director’s orders are contrary to law and requests the Court set them aside and remand for further proceedings. The Court entered an Order permitting the Intervenors to participate in this proceeding. The parties submitted briefing on the issues raised on judicial review and a hearing on the Petition was held before the Court on April 4, 2024.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency’s

decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

A. The Director did not act contrary to law by holding a hearing after issuance of the Fifth Methodology Order.

IGWA asserts the Director was required to hold a hearing prior to his issuance of the Fifth Methodology Order under the Idaho Administrative Procedure Act ("IDAPA"). The provisions of IDAPA govern agency proceedings which may result in the issuance of an order "except as provided by other provisions of law." I.C. § 67-5240. This section makes clear IDAPA "controls agency decision-making procedures only in the absence of more specific statutory requirements." *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1994).

Here, a more specific statutory provision exists. Idaho Code § 42-1701A specifically governs hearings before the Director. Therefore, it controls. Subsection 3 of that provision provides:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

I.C. § 42-1701A(3).

The Director acted when he issued the Fifth Methodology Order. That action was done without a hearing, and Title 42 of the Idaho Code contains no statutory right to a pre-action hearing under these circumstances. Therefore, under Idaho Code § 42-1701A(3), any person aggrieved was entitled to a hearing before the Director to contest the action upon timely written notice. Rather than wait for written notice, the Director set an Idaho Code § 42-1701A(3) hearing on the Fifth Methodology Order when he issued it. R., 62. Although, the Court does note that the Coalition of Cities, the City of Pocatello, and McCain Foods USA, Inc. each did provide written notice requesting an Idaho Code § 42-1701A(3) hearing in this case. R., 68, 90, 94. A four-day hearing was subsequently held. Therefore, the Director did not act contrary to law by holding a hearing after issuance of the Fifth Methodology Order.

B. The proceeding before the Director satisfied due process.

i. IGWA's concerns.

IGWA raises due process concerns regarding the process utilized by the Director in issuing the Fifth Methodology Order. It asserts due process required a hearing prior to the issuance of the Fifth Methodology Order. Further, that the Idaho Code § 42-1701A(3) hearing held in June 2023 did not satisfy due process. IGWA raises the following due process concerns related to that hearing:

- Written interrogatories and requests for production were not permitted.

- 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

- 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.

- 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.

- 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.
- 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 in possession of relevant evidence, as explained below.

IGWA’s Opening Brief, p.22.

ii. What the methodology order is.

Prior to engaging in a due process analysis, it is necessary to establish what the methodology order is. The Surface Water Coalition call is described as an ongoing call. This is meant to denote that it does not present a one and done situation. Rather, the nature of the call is ongoing in that the underlying source problem of diminished ground water levels in the Aquifer, the culmination of which has occurred over a time span of decades, cannot be restored in a single year. The result is yearly reductions in the natural flow of the Snake River which may, in turn, result in material injury to surface water users.⁷

Diminished ground water levels present a long-term water supply problem that requires ongoing administration. This is evidenced by the fact the Director first found material injury to Coalition members resulting from ground water depletions in 2005. *Amended Order*, p.44 (May 2, 2005). Since that time, the reality of ground water depletions has not been resolved. The Idaho Supreme Court recognized that from “October 1980 through September 2008, average annual discharge from the ESPA exceeded average annual recharge by 270,000 acre feet, which resulted in declining aquifer water levels and declining discharge to the Snake River and tributary springs.” *Idaho Ground Water Assoc v. Idaho Dept. of Water Res.*, 160 Idaho 119, 122 369 P.3d 897, 900 (2016). Likewise, the record in this case shows that large scale ground water

⁷ “The amount of water that discharges from the aquifer to hydraulically connected surface water sources is largely dependent on ground water elevations and hydraulic conductance.” *Idaho Ground Water Assoc v. Idaho Dept. of Water Res.*, 160 Idaho 119, 122 369 P.3d 897, 900 (2016).

pumping has, over time, contributed to a long-term general decline trend in ground water levels throughout the ESPA from the 1950s through 2023. R., 478-479; 392.⁸

Understanding that the call is ongoing in nature, the methodology order provides water users direction as to how the Director will administer the call into the future. It does this by providing nine steps to be undertaken annually. Through these steps, the Director determines whether the Coalition's water rights are suffering material injury and whether that injury will be addressed via mitigation and/or curtailment.

Briefly stated, in April of each year, the Director predicts what material injury to Coalition members is anticipated for the upcoming irrigation season through a metric known as in-season demand shortfall. Also in April, he runs ESPAM to calculate the curtailment priority date predicted to produce a volume of water equal to the predicted in-season demand shortfall. Ground water users then have no shorter than fourteen (14) days within which to present mitigation plans showing they can mitigate forth their proportionate share of the predicted shortfall. Those who can mitigate may continue diverting ground water while those who cannot face curtailment. The Director then re-examines his initial prediction at least once halfway through the irrigation season to take into account changing conditions.

In this respect, the methodology order is a framework. It provides an identifiable and orderly structure through which both surface and ground water users may plan early in the year how best to proceed with the irrigation season. Contrast this with a curtail-now-hearing-later approach, wherein the Director curtails straight away once injury is occurring. *See e.g., South Valley Ground Water Dist. v. Idaho Dept. of Water Res.*, 2024 WL 136840, 32 (2024) (recognizing the propriety of a curtail-now-hearing-later approach in appropriate cases). Such an approach can result in abrupt late seasons curtailments, after economic investments for the year have been made, leaving little room for proactive planning by water users. The methodology order acts to promote concepts of optimum development and maximum use and benefit by

⁸ The surface flows on which senior rights rely depend on a combination of natural flow, discharges from the ESPA and storage. The significance of the impact of aquifer declines on senior rights depends in part on the quantity of storage rights held by the senior right holder. Seniors holding rights for greater quantities of storage are less reliant on aquifer discharges to satisfy their rights throughout the entirety of the irrigation season. Seniors with less storage are more dependent on natural flow rights and are more heavily reliant on aquifer discharges contributing to those rights after the spring runoff has subsided. As such, a year with above-average snowpack may have little benefit to those seniors lacking sufficient storage rights to store water from the additional snowpack.

providing a framework through which both surface and ground water users may, as early as is practicable, proactively plan for the upcoming irrigation season.⁹

But the methodology order is more than just a framework or a management tool.¹⁰ It is an administrative tool the Director uses annually to administer water under the ongoing call to provide water, if necessary, to injured surface water users at the time and place needed. In this respect, the methodology order acts to promote the concept of first in time first in right. It is in the methodology order that the Director determines the best available science and information to predict the effects of ground water pumping on Snake River flows. As years go by, the data sets relied upon by the Director for administration expand. This is self-evident. Additionally, the science available to the Director may improve. This is evidenced by the progression of ESPAM from its initial form to its current form. As data sets expand and as science improves, the methodology order may need to be adjusted to reflect the best available science and information. Therefore, the methodology order is an administrative tool utilized by the Director to administer water rights in priority under the Surface Water Coalition call through a predictive framework that balances concepts of first in time first in right with the optimum development and maximum use and benefit of the State's water resources.

iii. Due process.

Procedural due process “requires that there be some process to ensure that an individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” *South Valley Ground Water Dist. v. Idaho Dept. of Water Res.*, 2024 WL 136840, 30 (2024). Determining whether due process rights have been violated requires a two-step analysis. *Id.* First, the Court must “decide whether an individual’s threatened interest is a liberty or property interest under the Fourteenth Amendment.” *Id.* Second, the Court must “determine what process is due.” *Id.* As to the first step, there is no dispute water rights are property rights. I.C. §

⁹ The period of use for many irrigation water rights begins March 15. However, predicting the water supply at that early stage of the irrigation season presents practical difficulties as the United States Bureau of Reclamation and Army Corps of Engineers do not typically issue their joint forecast predicting unregulated inflow volume at the Heise Gage until the first two weeks of April.

¹⁰ In *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 815 P.3d 828 (2013), the Idaho Supreme Court distinguished between an administrative tool and a management tool. While the delineation between a management tool and an administrative tool can overlap, it’s clear that the methodology order is an administrative tool developed for the conjunctive administration of water pursuant to an on-going delivery call.

55-101. As to the second step, the Idaho Supreme Court recently provided guidance on what process is due in its decision in *South Valley*.

Like this case, *South Valley* involved the conjunctive administration of interconnected ground and surface water rights. There, the Director initiated a proceeding to determine whether the diversion of ground water in the Wood River Valley would injure senior surface water rights. *South Valley*, 2024 WL 136840 at 1. As is the case here, the Director utilized a truncated hearing process. The notice initiating the proceeding was issued on May 4, 2021. *Id.* at 4. It set a hearing for June 7-11, 2021. *Id.* The parties filed prehearing motions, “including two motions to dismiss the proceeding, a motion to appoint an independent hearing officer, motions to continue or postpone the hearing, and a motion to authorize discovery.” *Id.* at 5. The Director granted the motion to authorize discovery but denied the other motions. *Id.* After limited discovery, the Director held a six-day hearing from June 7–12, 2021. *Id.* The Director issued his final order on June 28, 2021, curtailing over 300 groundwater rights for the 2021 irrigation season. *Id.*

As is the case here, juniors in *South Valley* argued the truncated proceeding “violated any notion of fundamental fairness and failed to provide the ‘opportunity to be heard in a meaningful time and in a meaningful manner.’” *Id.* at 30. The Court disagreed. It found “the Director opted for a pre-curtailment process complete with advance notice, a full panoply of pre- and post-hearing procedures and a six-day hearing.” *Id.* at 32. The procedure provided was “necessarily expedited, but within reasonable limits in light of the imminent loss to senior right holders.” *Id.*

The Court finds the process provided by the Director to be in line with that provided in *South Valley*. The process utilized by the Director in issuing the Fifth and Sixth Methodology Orders is set forth in the Background section of this decision. It included advance notice beginning in August 2022 that changes to the Fourth Methodology may be necessary. R., 2866. This was followed by the convening of a technical working group which conducted multiple meetings throughout the fall of 2022 to review the issue. R., 1176. The Department then provided further notice by issuing a written summary of preliminary technical revisions and inviting written comments. R., 1300, 2867, & 2879. After comments were submitted and considered, the Director issued the Fifth Methodology Order on April 21, 2023. R., 1. The Director then provided notice to aggrieved persons of the opportunity to be heard on the Fifth Methodology Order through a five-day hearing scheduled approximately six weeks out from the

Order's issuance. R., 62. The hearing proceeded before the Director as scheduled. The Director provided time for limited discovery, admitted exhibits into evidence, took testimony, and allowed the parties to submit post-hearing briefing. The Director then issued his Sixth Methodology Order on July 19, 2023. The entirety of the process happened prior to any curtailment.

In evaluating the Director's process, the Court notes that both senior surface water users and junior ground water users had significant private interests at stake in this proceeding in the form of water rights. However, when material injury is predicted, "the risk of curtailment of a junior-priority groundwater right during a time of shortage is a risk that Idaho water users knowingly undertake. . . ." *South Valley*, 2024 WL 136840 at 31. In evaluating the risk of an erroneous deprivation of rights, the presumption "is that the senior is entitled to his decreed water right, whether that senior joined the proceeding or not." *Id.* at 32. Time is of the essence in water administration. The reality is there is a short timeframe between when water supply determinations can be made and when water users' demands for irrigation water begin. Any process employed by the Director must account for the exigencies of these time constraints as the Director has a duty to timely administer water in priority. *South Valley*, 2024 WL 136840 at 33. This is because the consequences of delaying administration in times of shortage is out-of-priority water use and "water in usable quantities for at least some of the senior surface water users would go undelivered." *Id.* The Idaho Supreme Court has directed that this is not a risk that should be foisted on senior water right holders "through additional, typical procedural avenues." *Id.* Last, as was recognized in *South Valley*, "the Director's obligation to administer water rights is an essential government function." *Id.* at 33. Weighing these factors together, the Court holds that the proceeding before the Director, which consisted of a pre-curtailment process complete with advance notice, a full panoply of pre- and post-hearing procedures and a five-day hearing, satisfied due process.

Continuing the hearing until after the irrigation season, as originally requested by the juniors, is not tenable given the Director's duty to timely administer water rights in priority. R., 80. "[C]urtailing out-of-priority water use *after the irrigation season had passed* would [be] too little, too late." *South Valley*, 2024 WL 136840 at 32. Notwithstanding, the juniors argue there was no pressing need to implement the Fifth Methodology Order in 2023 because the Fourth Methodology Order was in place and could have been used. The Court disagrees.

The methodology order is an administrative tool that is applied annually. The Director determined that the Fourth Methodology Order would not adequately protect senior water rights in 2023. In particular, he determined that application of steady state simulations to ESPAM as required by the Fourth Methodology Order would not provide senior users water in the quantity, time, and place necessary to address material injury from out-of-priority junior diversions in 2023. R., 29-31. Additionally, that the baseline year used in the Fourth Methodology Order would not protect senior rights in 2023. R., 11-12. Recognizing that the Fourth Methodology Order would not get senior water users the water they needed, the Director did not err in updating the methodology order in 2023 to be in compliance with the law and his obligation to timely administer water rights in priority.¹¹

C. The Director’s denial of the motion for an independent hearing officer is affirmed.

IGWA asserts Idaho Code § 67-5252(1) required the Director to disqualify himself as the presiding officer for the June 2023 hearing. This issue was not raised below. The record reflects the Coalition of Cities, the City of Idaho Falls, and the City of Pocatello filed a Motion for Appointment of Independent Hearing Officer on April 28, 2023. R., 73. That Motion requested that the Director appoint an independent hearing officer to conduct the June 6, 2023 hearing “pursuant to I.C. § 42-1701A(2) and IDAPA 37.01.01.410.”¹² R., 74. The Director considered and denied the Motion. R., 298. However, at no point did any party petition for the disqualification of the Director without cause under Idaho Code § 67-5252(1). That issue was not presented below and is being raised for the first time on appeal. Therefore, the Court does not consider it. *See e.g., Row v. State*, 135 Idaho 573, 580, 21 P.3d 895, 902 (2001) (“[t]he longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal”). It follows the Director’s denial of the Motion for Appointment of Independent Hearing Officer must be affirmed.

¹¹ To the extent climate variability becomes more pronounced over the course of an irrigation season water demand for the forthcoming season becomes more difficult to predict. Consequently, the utilization of smaller margins to avoid shortfalls to senior rights becomes less tenable. In the Court’s decision in the 382 Case, the Court explained that any administration to less than the full decreed quantity must be based on clear and convincing evidence. *Memorandum Decision*, Gooding County Case No. CV-2010-382, p.19 (September 26, 2014). The Court recognized that any shortfall due to underprediction would impermissibility injury senior rights. *Id.*

¹² Idaho Code § 42-1701A(2) provides that “[t]he director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director.” IDAPA 37.01.01.410 allows for the appointment of a hearing officer who may be an “employee of the agency or [an] independent contract.”

D. The Director's Scheduling Order and Order Limiting Discovery are affirmed.

At the prehearing conference for the June 2023 hearing, "some counsel expressed concern about having enough time to respond to discovery given the compressed period for the hearing." R., 126. The Director "agreed to limit the scope and timing of discovery to address these concerns." R., 126. In the Scheduling Order, the Director held:

IT IS HEREBY ORDERED that discovery will be limited as follows: (1) The parties shall not engage in interrogatories or requests for admissions; (2) The parties may request production of documents. The party upon whom a request for production of documents is served shall respond to the request within 10 days from the date the request is served.

R., 127.

The Director also identified two Department witnesses who would be made available to the parties for deposition and who would testify at the hearing. R., 126. These employees were Jennifer Sukow and Matthew Anders. R., 126. Questions were raised as to the appropriate scope of the depositions. R., 301. In response, the Director issued an Order Limiting Scope of Depositions directing "that the scope of any deposition of a Department employee will preclude questions regarding the Director's deliberative process on legal and policy considerations." R., 301. IGWA argues the Director acted contrary to law in limiting discovery in these respects.

The Idaho Code § 42-1701A(3) hearing was conducted in accordance with the provisions of IDAPA. I.C. § 42-1701A(1) & (3). IDAPA 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). Unless otherwise provided by statute, rule, order or notice, the scope of discovery is governed by the Idaho Rules of Civil Procedure." IDAPA 37.01.01.520.02. However, "[t]he presiding officer may limit the type and scope of discovery." IDAPA 37.01.01.521.

In a prior section, the Court found that the proceedings before the Director satisfied due process. The discovery limitations in the Director's Scheduling Order do not upset that analysis. As previously stated, any process employed by the Director must account for the exigencies associated with the timely administration of water within a given irrigation season. The Director's decision to limit written discovery and to shorten the timeframe in which to respond

was within his authority under Rule 521 and does not result in any due process violation. Such limitations simply reflect the time frames associated with priority administration.

Likewise, the Director did not violate due process by limiting the scope of the depositions of Department employees. The Director limited the depositions to “preclude questions regarding the Director’s deliberative process on legal and policy considerations.” R., 301. The Department employees made available to the parties for deposition are technical staff. They are qualified to testify as to technical matters concerning the changes to the Fourth Methodology Order. They are not qualified to testify as to the Director’s legal and policy determinations, as they do not make those determinations.

The Director set forth his determinations and reasoning for making changes to the Fourth Methodology Order, legal and otherwise, in the Fifth Methodology Order. For instance, the Director determined that the baseline year used in the Fourth Methodology Order “no longer satisfies the presumption criteria that total diversions in the BLY should exceed the average annual diversions.” R., 11. Rather, he found that year 2018 satisfies all the baseline year selection criteria and explained his reasoning in the Order. R., 11-12, 34. He also determined that the steady-state simulations of ESPAM previously used “will only offset 9% to 15% of the predicted [in-season demand shortfall],” while transient simulations “will offset the full predicted [in-season demand shortfall]”. R., 30, 35-36. The legal and policy reasoning behind his decisions in these respects are his own and are set forth in the Fifth Methodology Order. For these reasons, the Director’s Scheduling Order and Order Limiting Scope of Depositions must be affirmed.

E. The Director’s determination regarding the Twin Falls Canal Company’s irrigated acres is affirmed.

The Twin Falls Canal Company’s natural flow water rights authorize the irrigation of 196,162 acres. R., 17. Under the Fifth Methodology Order, the Director reduced the amount of irrigation acres attributed to the Twin Falls Canal Company for the 2023 irrigation season to 194,732. R., 10. IGWA asserts the Director erred in this respect and that further reductions were required. The law on this issue is clear. The presumption under Idaho law is that the senior is entitled to his decreed water right. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2006). “Once a decree is presented to an

administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.” *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012). If junior users believe that the seniors will receive water they cannot beneficially use, “it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence.” *Memorandum Decision and Order*, Gooding County Case No. CV-2010-382, p.31. (2014).

The Director considers the Surface Water Coalition’s irrigation acres in Step 1 of the methodology order. Step 1 requires Coalition members “to submit electronic shape files to the Department delineating the total anticipated irrigation acres for the upcoming year within their water delivery boundary or confirm in writing that the existing electronic shape file submitted by the SWC has not varied by more than five percent.” R., 39, 144. The Twin Falls Canal Company members submitted a 2013 shape file in compliance with Step 1 showing 194,732 irrigated acres. R., 1233; 1084. It represented its irrigated acres have not varied by more than five percent from the 2013 shape file numbers. R., 1084. Therefore, the Director used the 2013 shape file number to predict the Twin Falls Canal Company’s irrigated acres for 2023. R., 10, 1084.

IGWA argues the Director should have adopted a lesser number in what is referred to herein as the “2017 irrigated lands dataset.” However, the Director explained that the 2017 irrigated lands dataset was just a snapshot in time for purposes of ESPAM model calibration” which employs “hindcasts, not forecast”:

The purpose of the 2017 shapefile was to assist Department staff in determining TFCC’s irrigation demand in 2017 for use in model calibration. Hr’g Tr. vol. II, at 68, 140–41.

...

The 2017 shapefile is more recent than the 2013 shapefile, but it does not necessarily represent the number of acres TFCC may irrigate in 2023. The 2017 shapefile was a snapshot in time. It does not necessarily predict *future* irrigated acres. In compiling the 2017 shapefile, Department staff did not distinguish “hardened acres” —i.e., fields that have been permanently removed from irrigation—from fields that were not irrigated in 2017 but could be in future years. Hr’g Tr. vol. II, at 194–95.

The same is not true for the 2013 shapefile as explained by its author, a TFCC consultant named David Shaw. Mr. Shaw testified that when he compiled the 2013 shapefile, he specifically excluded hardened acres and included acres that could have been irrigated in 2013 but were not. Hr’g Tr. vol. IV, at 152–53. Unlike the

2013 shapefile, the 2017 shapefile includes only acres that *were irrigated* in 2017 and excludes the acres that *were not irrigated* in 2017 but *could be irrigated* in future years, e.g., 2023. This is a critical distinction because, as Mr. Shaw explains in the SWC’s expert report, TFCC “has no way of knowing whether land covered by shares will or will not be irrigated and must prepare to meet the share delivery obligation.” Ex. 4 ¶ 7, at 2.

Mr. Shaw also testified that in his opinion the 2013 shapefile currently represents the best available information for determining TFCC’s actual irrigated acreage. Hr’g Tr. vol. IV, at 164–65.

R., 1084. The Court finds the Director’s determination that the 2017 irrigated lands dataset employs “hindcasts, not forecast” is supported by substantial and competent evidence in the record. R., 1084. Additionally, IGWA did not establish a lesser number of Twin Falls Canal Company irrigated acres by clear and convincing evidence. This is its burden. In support of its argument, IGWA cites various transcripts, including the Anders Transcript, the Sukow Transcript, and the Barlogi Transcript which are not in the agency record and are therefore not before the Court.¹³ Therefore, the Director’s determination regarding the Twin Falls Canal Company’s irrigated acres must be affirmed.

F. The Director’s determination on the forecast supply calculation is affirmed.

IGWA asserts the Director acted contrary to law in using Snake River flows at the T Gage to forecast water supply. The methodology order predicts material injury to reasonable in-season demand by taking the difference between reasonable in-season demand and the forecast supply. Initial forecast supply is calculated in Step 2 of the methodology order. Typically, within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. The Director found that the joint forecast “is generally as accurate a forecast as is possible

¹³ IGWA additionally argues the Director erred by failing to give it adequate time to conduct a field-level examination of Coalition irrigated acres. The record reflects various junior ground water users filed a Motion for Continuance on April 28, 2023, requesting the June 2023 hearing be continued until “a date in December 2023 or January 2024” to allow time to conduct “necessary site investigations” to examine “[w]ater use, irrigation practices, and irrigated areas.” R., 80-89. As set forth herein, continuing the hearing until after the irrigation season is not tenable given the Director’s duty to timely administer water rights in priority. Furthermore, IGWA is not precluded from undertaking a field-level examination of irrigated acres in anticipation of any application of the methodology order. The methodology order is not new. The parties and their consultants are familiar with the methodology, having worked with it in the context of this call for over ten years.

using current data gathering and forecasting techniques.” R., 1022. The Court finds IGWA has failed to carry its burden of proving this finding is not supported by substantial evidence in the record. IGWA cites only the Anders Transcript in support of its argument. The Anders Transcript is not part of the agency record and is therefore not before the Court. Therefore, the Director’s determination on the forecast supply calculation must be affirmed.

G. The Director’s determination regarding supplemental groundwater is affirmed.

IGWA argues the Director abused his discretion by failing “to evaluate whether the water needs of TFCC can be met with supplemental groundwater in accordance with CM Rule 42.01.h.” IGWA Opening Br., 36. One of the factors the Director may consider when determining material injury includes “the 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. . . .” IDAPA 37.03.11.042.01.h. Under Step 1 of the methodology order, the Director may account for supplemental ground water use in determining the seniors’ total irrigated acreage.” R., 1045. In this case, the Director found that he “currently does not have sufficient information to accurately determine the contribution of supplemental ground water to lands irrigated with surface water by the [Coalition].” R., 1045. “If and when reliable data is available to the Department, the methodology will be amended to account for the supplemental ground water use.” R., 1045.

The presumption under Idaho law is that the senior is entitled to his decreed water right. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2006). “Once a decree is presented to an administrating agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.” *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012). If junior users believe senior acreage is irrigated with supplemental ground water and therefore the senior should receive less than his full decreed water right, “it is their burden under the established evidentiary standards and burdens of proof to prove that fact by clear and convincing evidence.” *Memorandum Decision and Order*, Gooding County Case No. CV-2010-382, p.31. (2014).

The ground water users here failed to provide clear and convincing evidence concerning the quantity of acres they allege Coalition members could irrigate with supplemental ground

water rights. IGWA asserts the Department has a database that assigns a ground water fraction to mixed-source lands and that this is the best science and data available to document supplemental ground water use. This database is not in the record before the Court. Moreover, in the 382 Case, the Court previously found that “the Director’s assignment of an entity wide split for each member of the Coalition of the ground water fraction to the surface water fraction is not supported by substantial evidence in the record.” 382 Case, p. 19. The Court found “the parties fail to cite the Court to anything submitted before the Department in either written form or via oral testimony establishing the use of supplemental ground water be individual irrigators within the Coalition.” *Id.* Such is the case here. IGWA cites the Anders Transcript and the Sukow Transcript in support of its argument. These transcripts are not part of the agency record and are therefore not before the Court. Therefore, the Director’s determination regarding supplemental groundwater must be affirmed.

H. The Director’s determination that Coalition members operate efficiently within the limits of their delivery system is affirmed.

IGWA argues the Director abused his discretion by failing to require Coalition members to make system improvements to meet their water needs without curtailment. This issue has been previously addressed in the context of this call. Former Idaho Supreme Court Justice Gerald Schroeder, acting in his capacity as an IDWR hearing officer, found that the facilities utilized by Coalition members are reasonable:

3. The existing facilities utilized by the Surface Water Coalition members are reasonable. The evidence does not show substandard facilities for diversion or conveyance. The members of the Surface Water Coalition have improved their conveyance practices since the time the water rights were licensed or decreed. All of the members have changed significant portions of their irrigation practices from gravity flow to sprinkler systems which generally deliver water to the crop more efficiently. Sprinkler practice is not perfect. Evidence from the Twin Falls Canal Company indicates that water from gravity flow that exceeds the need of the initial crop is captured and applied to other portions of the district by water paths that develop. The same process does not occur with sprinkler systems. Also, there are limitations with sprinklers on applying water into corner portions of property. Overall, however, the use of sprinklers is more efficient than gravity flow, and sprinklers are increasingly used by the members of SWC. Additionally, at least Twin Falls Canal Company and North Side Canal Company have gone extensively to the use of computer monitoring of water use to assure its proper application.

...

There is no evidence of decayed or damaged systems that are allowed to continue or practices that cause water to be wasted in transit. The evidence in this case indicates that each of the SWC members is operating with reasonable diversion and conveyance efficiency.

Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, p.54-55 (April 29, 2008).

The Director agreed and found that “members of the SWC operate reasonably and without waste.” *Order on Reconsideration of Final Order*, p.5 (June 16, 2010). In the 382 Case, this Court noted that the Director found that “members of the SWC operate reasonably and without waste,” and that he will not “impose greater project efficiencies upon members of the SWC than have been historically realized.” *Memorandum Decision and Order*, Gooding County Case No. CV-2010-382, p.31. (2014). The Court did not set aside and remand the Director on this issue and no appeal was pursued from the Court’s decision.

In this case, the Director found that “[t]estimony at the hearing established that the SWC entities operated efficiently within the limits of their delivery system,” and that the Twin Falls Canal Company’s “diversions and efficiency are reasonable.” R., 1089. The Director’s finding is supported by substantial evidence in the record. This includes the testimony of Twin Falls Canal Company general manager Jay Barlogi at the June 2023 hearing. Tr. Vol. II, p.75, 90-91, 94-96. It also includes the testimony of David Shaw, a Twin Falls Canal Company consultant, at the June 2023 hearing. Tr. Vol. IV, p.146. Since the Director’s finding is supported by substantial evidence in the record it must be affirmed.

I. IGWA’s argument that the Director violated IDAPA by using evidence not contained in the record is unavailing.

IGWA argues the Director violated IDAPA by using evidence not contained in the record when issuing the Fifth Methodology Order. IGWA supports its argument in this respect only with citation to the Anders Transcript. That transcript is not part of the agency record and is not before the Court. IGWA has failed to carry its burden on judicial review and its argument is unavailing.

J. The Director did not act contrary to law when he took official notice of information after issuing the Fifth Methodology Order.

IGWA argues the Director acted contrary to law by taking official notice of information after the Fifth Methodology Order was issued. Rule 602 of the Department's Rules of Procedure provides that the presiding officer may take official notice of certain information. IDAPA 37.01.01.602. It provides that notice of taking such official notice of information "should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed." *Id.* "Parties must be given an opportunity to contest and rebut the facts or material officially noticed." *Id.*

As set forth above, there is no requirement that the Director hold a hearing prior to issuing the Fifth Methodology Order. The Director issued that Order on April 21, 2023. R., 1. The Director notified the parties of his intent to take official notice of certain information on May 5, 2023. R., 305. This notice was given approximately one month prior to the June 2023 hearing. The parties that participated in the hearing were given the opportunity to contest and rebut the facts and/or materials officially noticed at that hearing. The Director then issued the Sixth Methodology Order. Therefore, the Court holds IGWA was given notice of the Director's intent to take official notice, the opportunity to contest the material officially noticed, and a hearing prior to the Director's issuance of the Sixth Methodology Order. Therefore, its argument that the Director acted contrary to law when he took official notice of information is unavailing.

K. The Director's determination that the delivery call is not futile is affirmed.

The Director determined the delivery call is not futile. R., 1092. IGWA asserts the Director violated Idaho law and abused his discretion by failing to apply the futile call doctrine to the delivery call. Rule 10.08 of the CM Rules defines a futile call as¹⁴:

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.

IDAPA 37.03.11.18.08. IGWA asserts the Department "regularly applies the [futile call] doctrine as between surface water users" and should likewise apply it to the Coalition's call in the same fashion. IGWA Opening Br., 40.

¹⁴ The term "CM Rules" refers to the Rules for Conjunctive Management of Surface and Ground Water Resources found at IDAPA 37.03.11.

IGWA's argument fails to recognize that the relationship of ground water to interconnected surface water differs from the relationship of surface water to surface water. The Idaho Supreme Court has previously acknowledged these differences, noting the unique challenges of applying the futile call doctrine in the context of conjunctive administration:

[C]urtailing ground water pumping does not provide the immediacy of delivery to the senior user that would be present in the curtailment of surface water. Surface water travels in a channel from one source that may be seen to a destination that can be seen. It can be routed to a particular point. Ground water does not fall into this model. Its route is determined by the contours of fractured basalt interspersed at times with soil of a different composition. Part of the water curtailed may travel one direction, part another. The effects of curtailment may be years to be realized. The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile. In effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 811-812, 252 P.3d 71, 92-93 (2010).

"The fact that curtailment will not produce sufficient water immediately to satisfy the senior right does not render [conjunctive management] calls futile." *Id.* To the contrary, "a reasonable time for the result of curtailment to be fully realized [in the context of conjunctive administration] may require years, not days or weeks." *Id.* In light of these differences, IGWA's attempt to compare the Department's futile call practices in surface water to surface water administration to this case is misplaced.

Consistent with the Idaho Supreme Court's analysis, the Director recognized that "[d]elay in the depletive effect of ground water pumping is not grounds for the Ground Water Users to be Excused from water administration under the CM Rules." R., 1092. He determined that "[a]voiding obligation because of delayed cumulative impact is contrary to the intent of the CM Rules," finding that:

If the Director were to determine that curtailment of some ground water rights would not immediately accrue water to the senior priority surface water rights, even though the cumulative impact is significant, and that the delivery call is futile because there is no immediate benefit for the surface water rights, the holders of junior priority ground water rights could recurrently avoid curtailment.

R., 1092.

The Idaho Supreme Court has instructed that “[o]nce the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call.” *American Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449. The junior bears the burden of proving futile call “by clear and convincing evidence.” *In Matter of Distribution of Water to Various Water Rights held by or for Benefit of A&B Irr. Dist.*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013). The Court finds IGWA did not produce clear and convincing evidence before the Department that the Coalition’s delivery call is futile, nor does it attempt to dispute the Court’s analysis in the *Clear Springs Foods, Inc.* decision. Therefore, the Director’s determination that the delivery call is not futile must be affirmed.

L. Substantial rights.

IGWA argues its substantial rights were prejudiced by the Director’s Orders. For the reasons set forth herein, IGWA has failed to establish the Director acted contrary to law. Therefore, IGWA has failed to show their substantial rights were prejudiced. It follows the Director’s Orders must be affirmed.

M. Attorney fees.

IGWA seeks an award of attorney fees under Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds “that the nonprevailing party acted without a reasonable basis in fact or law.” In this case, IGWA is not a prevailing party on appeal. Therefore, an award of attorney fees under Idaho Code § 12-117 is unwarranted. IGWA also seeks an award of attorney fees under 42 U.S.C. § 1983. This section allows courts to award the prevailing party attorney fees in actions seeking to enforce section 1983 claims. *Karr v. Bermeosolo*, 142 Idaho 444, 449, 129 P.3d 88, 93 (2005). IGWA is not the prevailing party. Also, the Court finds the proceeding before the Director satisfied due process. Therefore, an award of attorney fees under 42 U.S.C. § 1983 is unwarranted.

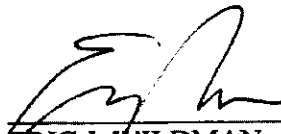
IV.
ORDER

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

1. The Fifth Methodology Order is affirmed.
2. The 2023 As-Applied Order is affirmed.
3. The Scheduling Order and Order Authorizing Remote Appearance at Hearing is affirmed.
4. The Order Denying the Cities Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Deposition is affirmed.
5. The Notice of Materials Department Witnesses May Rely Upon at Hearing and Intent to Take Official Notice is affirmed.
6. The Post-Hearing Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover is affirmed.
7. The Sixth Methodology Order is affirmed.
8. The Order Revising April 23, Forecast Supply and Amending Curtailment Order is affirmed.

IT IS SO ORDERED.

Dated May 31, 2024



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

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

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Date: 5/31/2024

Trent Tripple
Clerk of the Court

By Eric Rowell
Deputy Clerk

